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Suter v. Artist M. and Statutory Remedies under Section 1983: Alteration without Justification

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NOTES

Suter v. Artist M. and Statutory Remedies Under Section 1983: Alteration Without Justification

> *[S]peak what you think today in words as hard as cannon balls, and tomorrow speak what tomorrow thinks in hard words again, though it contradict everything you said today.*[1]

When someone acting "under color" of state law violates an individual's rights under the Federal "Constitution and laws," 42 U.S.C. § 1983[2] provides the wronged individual with a private right of action against the guilty party.[3] Commonly known as § 1983, Congress enacted this legislation in the 1870s as part of its Reconstruction legislation.[4] The Supreme Court has stated that Congress's intent in passing § 1983 was to override "invidious" state legislation against individual rights, to offer a remedy where state laws were inadequate to protect those rights, and to provide a cause of action "where the state remedy, although adequate in theory, was not available in practice."[5] In 1980, the Court held that § 1983 could support a private cause of action for violations by state officials of rights protected by federal statutes as well as the Constitu-

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1. RALPH W. EMERSON, SELF-RELIANCE 33 (Gene Dekovic ed., 1975).

2. 42 U.S.C. § 1983 (1988). In pertinent part, § 1983 provides:

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

Id. (emphasis added). What is now § 1983 was enacted as § 1 of the Civil Rights Act of 1871, Ch. 22, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. § 1983 (1988)) (also known as the Ku Klux Klan Act).

3. 42 U.S.C. § 1983.

4. *See* Maine v. Thiboutot, 448 U.S. 1, 14 (1980) (Powell, J., dissenting). Section one of the Civil Rights Act of 1871 read as § 1983 does now, except that the phrase "and laws" was not included. *See id.* at 15 (Powell, J., dissenting). Congress added the phrase "and laws" in 1874. *See id.* (Powell, J., dissenting).

5. Monroe v. Pape, 365 U.S. 167, 173-74 (1961), *overruled in part on other grounds by* Monell v. Department of Social Servs., 436 U.S. 658, 663 (1978). The *Monroe* Court cited legislative history demonstrating that § 1983's predecessor was intended to address the constitutional problem of states' denying "equal protection of the law" to African Americans. *Id.* at 173-75. While addressing equal protection violations was a critical factor in Congress's enactment of the provision that evolved into § 1983, the Supreme Court nonetheless has refused to restrict § 1983's applicability to violations of civil rights protected by the Constitution. *Thiboutot*, 448 U.S. at 6-7; *see infra* note 76 and accompanying text.

tion.[6] Since that time, the Court has struggled to determine which federal statutes private parties may enforce under § 1983.[7]

In a 1990 case, the Supreme Court consolidated into a multi-faceted test the factors it had traditionally considered to determine when a federal statute is enforceable under § 1983.[8] The Court recently departed from this test for judging a federal statute's enforceability in *Suter v. Artist M.*,[9] which illustrates a fundamental change in the Court's § 1983 analysis.[10] At issue in *Artist M.* was a provision of the Adoption Assistance and Child Welfare Act of 1980 (AACWA, or "the Act").[11] The Court held that private parties cannot enforce the "reasonable efforts" clause of the AACWA[12] under § 1983.[13]

Artist M.'s practical impact on the foster care system will not be

6. *Thiboutot*, 448 U.S. at 4; for further discussion of *Thiboutot*, see *infra* notes 71-77 and accompanying text. Prior to *Thiboutot*, § 1983 served only as a remedy for denials of constitutional rights; while the *Thiboutot* majority cited several cases supporting the proposition that § 1983 should be available to remedy violations of federal statutes by state officials, *see Thiboutot*, 448 U.S. at 4-5, *Thiboutot* was the first case to state this proposition as a matter of law.

7. The Court has addressed § 1983's application to several federal statutes. *See, e.g.*, *infra* note 78 (Developmentally Disabled Assistance and Bill of Rights Act), notes 83-84 (Clean Water Act and Marine Protection, Research, and Sanctuaries Act), note 87 (Education of the Handicapped Act), note 89 (Brooke Amendment to Housing Act), note 96 (National Labor Relations Act), and notes 105-09 (Medicaid Act) and accompanying text.

8. Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498, 509 (1990). According to *Wilder*, if a federal statute was intended to benefit the plaintiffs who brought suit (the first prong of the test), then the statute creates enforceable rights under § 1983 so long as it reflects a binding obligation—rather than a mere legislative preference (the second prong)—and it is not too "vague" or "amorphous" for the judiciary to enforce (the third prong). *Id.* at 509. While the Court had recognized the relevance of these three factors in Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 106 (1989), the Court did not refer the factors in a discernable "test" until *Wilder*. 496 U.S. at 509; *see infra* notes 113-20 and accompanying text (discussion the test enunciated in *Wilder*), notes 96, 98 (further discussing *Golden State*).

9. 112 S. Ct. 1360 (1992).

10. *See infra* notes 56, 152-54, 180-93, 195-216 and accompanying text.

11. 42 U.S.C. §§ 620-628, 670-679a (1988). The AACWA was Congress's attempt to address the deficiencies of the American foster care system, including foster care agencies' demonstrable ineffectiveness in preventing the fragmentation of families. Alice C. Shotton, *Making Reasonable Efforts in Child Abuse and Neglect Cases: Ten Years Later*, 26 CAL. W. L. REV. 223, 223-24 (1989); *see infra* notes 29-34 and accompanying text. The Act offers states federal reimbursement for foster care and adoption services that comply with certain conditions, one of which is the submission of a plan demonstrating that the implementing agency makes "reasonable efforts" to avoid removing children from their homes and to facilitate reuniting families after necessary removals. 42 U.S.C. §§ 670, 671(a)(15). See *infra* text accompanying note 35 for the specific language of the reasonable-efforts requirement. The reasonable-efforts provision is one of 17 requirements for a state's plan; others include the development of case plans for children (number 16) and the reporting of suspected physical or mental abuse of a child (number 9). 42 U.S.C. § 671(a).

12. 42 U.S.C. § 671(a)(15).

13. *Artist M.*, 112 S. Ct. at 1370.

negligible, since the decision eradicates any deterrence private plaintiff suits might have had on agencies administering poor foster care services.[14] That consideration notwithstanding, the most far-reaching impact *Artist M.* will have is on § 1983 jurisprudence.[15] The Supreme Court's denial of a private remedy under § 1983 is not extraordinary in itself; after all, the Court has denied private plaintiffs remedies under § 1983 for violations of federal statutes before.[16] The Court's analysis and reasoning in *Artist M.*, however, is unusual.[17] The *Artist M.* Court ignored its traditional method for analyzing whether a federal statute creates rights enforceable under § 1983.[18] Most important, the Court ignored its general presumption in favor of finding a statute enforceable pursuant to § 1983; under the traditional inquiry, the plaintiff has a private right of action under § 1983 unless the defendant demonstrates that Congress did not intend a private remedy through § 1983 for violation of the federal statute in question.[19] The *Artist M.* Court effectively shifted the burden of production regarding legislative intent from the defendant to the plaintiff,[20] thereby making it far more difficult for a private plaintiff to demonstrate that a federal statute is enforceable under § 1983.[21] As Justice Blackmun noted in his dissent, the *Artist M.* majority arguably "changed the rules of the game" without acknowledging, much less justifying, that change.[22]

This Note outlines the purpose and language of the reasonable-efforts provision of the AACWA.[23] Next, the Note briefly explains the *Artist M.* Court's resolution of the § 1983 question and describes the dissenting Justices' arguments.[24] The Note traces the basic analytical framework developed by the Court (before *Artist M.*) with regard to

14. *See infra* notes 149, 222-25 and accompanying text.

15. *See infra* notes 152-57, 195-216 and accompanying text.

16. *See infra* notes 84-88 and accompanying text.

17. *See infra* notes 152-93 and accompanying text.

18. *See infra* notes 56, 154-57 and accompanying text.

19. Section 1983 arguably creates a presumption that federal statutory rights are enforceable through private action unless Congress specifically has foreclosed enforcement under § 1983 within the statute at issue. Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498, 508-09 n.9 (1990); *see infra* note 191 and accompanying text.

20. *See infra* notes 186-93 and accompanying text.

21. *See infra* note 193 and accompanying text.

22. *Artist M.*, 112 S. Ct. at 1377 (Blackmun, J., dissenting).

23. *See infra* notes 29-35 and accompanying text. This Note focuses on the *Artist M.* Court's ruling on the § 1983 question. *Artist M.* also addressed the enforceability of the reasonable-efforts clause under an "implied remedy" theory. *See infra* notes 59-60, 100, 186-93 and accompanying text for discussion of the implied remedy issue. Although the Court's resolution of the implied remedy theory in *Artist M.* is worthy topic for further study, it is not the focal point of this Note.

24. *See infra* notes 36-69 and accompanying text.

§ 1983,[25] and then analyzes the *Artist M.* opinion in light of prior § 1983 jurisprudence.[26] The Note concludes that the *Artist M.* decision does not embody sound legal principles grounded in ample precedent so much as it represents the Court's desire to protect state autonomy and restrict the use of § 1983.[27] Finally, this Note predicts how lower courts may react to *Artist M.*'s novel approach to applying § 1983 to federal statutes.[28]

The statutory provision that served as a catalyst for altering § 1983 jurisprudence in *Artist M.* represents Congress's attempt to address a severe social problem. During the five years preceding the passage of the AACWA, members of Congress heard testimony about how neglected and abused children were treated by the foster care system.[29] The legislators learned that children in foster care were becoming "more and more disturbed" as they moved from one foster home to the next, unable to return to their natural families or to move into adoptive ones.[30] Faced with the magnitude of this problem and encouraged by the success of experimental programs that were managing to keep "crisis-ridden families" together,[31] Congress passed the AACWA in 1980 in an attempt to "lessen the emphasis on foster care placement and to encourage greater efforts to find permanent homes for children either by making it possible for them to return to their own families or by placing them in adoptive homes."[32] Congress hoped to encourage a higher quality of care for children in dysfunctional families by offering federal reimbursement to foster

25. *See infra* notes 70-150 and accompanying text.

26. *See infra* notes 152-93 and accompanying text. This Note also examines the state courts' general confusion over how to define "reasonable efforts" and how and when to evaluate an agency's efforts. *See infra* notes 134-50 and accompanying text.

27. *See infra* notes 129-33, 194-216 and accompanying text.

28. *See infra* notes 217-24 and accompanying text.

29. Shotton, *supra* note 11, at 224. The foster care crisis has hardly abated. Almost 500,000 children lived in foster homes in 1991, an increase of more than 50% since 1982; some predict that that number will rise to over one million by the year 2000. Pat Wingert & Eloise Salholz, *Irreconcilable Differences*, NEWSWEEK, Sept. 21, 1992, at 84-85. The recent "Gregory K" case, in which a 12 year-old boy successfully sued his natural mother for divorce after years of "bouncing" between her homes and those of foster families, has drawn national attention to the foster care system's failure to prevent the unnecessary removal of children from their homes or facilitate the successful reunion of those families forced to resort to temporary foster care. *Id.* at 84.

30. Shotton, *supra* note 11, at 224.

31. *Id.* (citing EDNA MCCONNELL CLARK FOUND., KEEPING FAMILIES TOGETHER: THE CASE FOR FAMILY PRESERVATION 8-13 (1985)). One of the more prominent programs demonstrating this success was Homebuilders, a Washington state program providing "intensive [family] services" that consisted of 24-hour staff availability and at-home services, rather than requiring the family to come to the agency's office. *Id.*

32. S. REP. NO. 336, 96th Cong., 2d Sess. (1979), *reprinted in* 1980 U.S.C.C.A.N. 1448, 1450.

care agencies that focused their services on several purposes,[33] some of which included helping families identify and resolve their problems—rather than separating children from their parents unnecessarily—and returning children to their natural homes whenever possible.[34]

Section 671(a) of the AACWA outlines requirements of state foster care and adoption assistance plans, including the requirement at issue in *Artist M.*:

> In order for a State to be eligible for payments under this part, it shall *have a plan* approved by the Secretary [of Health and Human Resources] which—
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> . . . .
>
> (3) provides that the plan shall be *in effect* in all political subdivisions of the State, and, if administered by them, be *mandatory* upon them; . . .
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> . . . .
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> [and] (15) effective October 1, 1983, provides that, in each case, *reasonable efforts* will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home.[35]

The conflict over the reasonable-efforts provision which culminated in the *Artist M.* decision began in Illinois. The Illinois Department of Children and Family Services (DCFS) receives and investigates reports of neglected or abused children.[36] When its investigations indicate that administrative and judicial action is necessary to protect the child's welfare, DCFS files petitions in its juvenile court.[37] In some cases, the juvenile court awards temporary child custody to DCFS; in other cases, a child's parents retain custody under protective order.[38] Like all states, Illinois may obtain federal reimbursement under the AACWA for a percentage of its foster care services.[39] To receive and retain these federal funds, the state must present a plan for approval by the Secretary of Health and Human Services.[40] This plan must meet several qualifications, one of which is that the plan contain a reasonable-efforts require-

33. 42 U.S.C. § 625(a) (1988).

34. *Id.* § 625(a)(1)(C), (D).

35. *Id.* § 671(a)(3), (15) (emphasis added).

36. Artist M. v. Johnson, 917 F.2d 980, 982-83 (7th Cir. 1990), *rev'd sub nom.* Suter v. Artist M., 112 S. Ct. 1360 (1992).

37. *Id.* The "juvenile court" is the Juvenile Division of the Circuit Court of Cook County, Illinois. *Id.* at 983.

38. *Id.* at 982-83.

39. *See* 42 U.S.C. §§ 672-674, 675(4)(A).

40. *Id.* §§ 670, 671.

ment governing state foster care agencies.[41]

The *Artist M.* plaintiffs, wards of the Illinois juvenile court,[42] filed a class action against the director and guardianship administrator of DCFS.[43] The plaintiffs alleged that the agency had failed to assign workers to their cases promptly enough and had neglected to reassign cases promptly when caseworkers left the agency.[44] According to the complaint, DCFS violated the plaintiffs' rights under the AACWA by failing to make reasonable efforts to avoid the removal of children from their homes and to reunite families after these removals.[45] The plaintiffs sued under § 1983, which serves as a private remedy for violations of a federal statute if the statute meets certain criteria.[46]

Granting the plaintiffs a preliminary injunction, the trial court ordered DCFS to assign caseworkers to all cases no longer than three working days after either (1) the juvenile court case was first heard, or (2) an assigned caseworker relinquished any aspect of the case.[47] The Seventh Circuit Court of Appeals affirmed the injunctive order,[48] resting its decision on the Supreme Court's most recent articulation of the test for

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41. *Id.* § 671(a)(15). The plan must require agencies administering foster care services to avoid removing children from the home and to return children to their homes after necessary separations. *Id.*; see *supra* text accompanying note 35 for the full text of the reasonable-efforts provision.

42. *Artist M.*, 917 F.2d at 983. The plaintiff class raising the § 1983 claim was made up of "[c]hildren who are or will be the subjects of neglect, dependency or abuse petitions . . . who are or will be in the custody of [DCFS] or in a home under DCFS supervision [by Court order] . . . and who are now or will be without a DCFS caseworker for a significant period of time." *Artist M.*, 112 S. Ct. at 1364 n.4 (quoting Artist M. v. Johnson, 726 F. Supp. 690, 691 (N.D. Ill. 1989), *aff'd*, 917 F.2d 980 (7th Cir. 1990), *rev'd sub nom.* Suter v. Artist M., 112 S. Ct. 1360 (1992)).

43. In the original action, the director was Gordon Johnson and the guardianship administrator was Gary Morgan. *Artist M.*, 917 F.2d at 982. When the case reached the Supreme Court, Sue Suter had taken over as director of DCFS, *Artist M.*, 112 S. Ct. at 1364; hence, the case name changed between the Court of Appeals and the Supreme Court decisions.

44. *Artist M.*, 917 F.2d at 983.

45. *Id.*; 42 U.S.C. § 671(a)(15) (1988).

46. Maine v. Thiboutot, 448 U.S. 1, 4-6 (1980). To be enforceable under § 1983, a federal statute must create enforceable rights in the plaintiffs; furthermore, suit under § 1983 to enforce the statutory right must not have been precluded expressly by Congress. Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498, 508 (1990). According to *Wilder*'s three-prong test, when a statute was intended to benefit the putative plaintiffs, it creates enforceable rights unless it fails to create a "binding obligation" (i.e., it reflects a mere "congressional preference") or it is so "vague and amorphous" that it cannot be competently enforced by the judiciary. *Id.* at 509. See *infra* notes 113-20 and accompanying text for a detailed discussion of these criteria for determining if § 1983 applies.

47. *Artist M.*, 917 F.2d at 984. The injunction was later amended to include a monitoring mechanism, requiring the DCFS to report weekly on its compliance with the first injunctive order. *Id.*

48. *Id.* at 992.

determining whether a federal statute is enforceable under § 1983.[49] The court held that because the AACWA was clearly "intended to benefit" the plaintiffs in this action, and since the right asserted by the plaintiffs was not too "vague and amorphous" for courts to enforce, the Act's reasonable-efforts provision created an enforceable right.[50] The Seventh Circuit also agreed that the defendants in *Artist M.* had not met the burden imposed on them by § 1983 to demonstrate that Congress, in enacting the AACWA, intended to preclude enforcement of the reasonable-efforts clause through § 1983.[51]

The Supreme Court granted certiorari[52] and reversed.[53] Chief Justice Rehnquist, writing for the majority,[54] reiterated the rule that an action under § 1983 is not available if the statute does not confer enforceable rights or if Congress has precluded the applicability of § 1983 in the statute.[55] The Chief Justice did not, however, recognize the Court's recent articulation of the test for determining whether a federal statutory provision has created enforceable rights under § 1983.[56]

In analyzing § 1983's enforceability, Chief Justice Rehnquist cited *Pennhurst State School & Hospital v. Halderman*[57] for the principle that when Congress wants to place conditions on federal grants, "it must do

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49. The case referred to is *Wilder*, 496 U.S. 498. In *Wilder*, the Supreme Court addressed the applicability of § 1983 to the Boren Amendment to the Medicaid Act. See *supra* note 8 for a brief description of the *Wilder* test. See *infra* notes 104-28 for a thorough discussion of the *Wilder* case.

50. *Artist M.*, 917 F.2d at 986-87. The court of appeals also explained that because the reasonable-efforts clause was tied explicitly to funding under the Act, the provision created an obligation binding on the states; this provided further evidence that the reasonable-efforts clause created an enforceable right in the plaintiffs. *Id.* at 987. This and the other two factors of the enforceable right inquiry under § 1983 are discussed at length later in this Note. *See infra* notes 96, 115, 161 and accompanying text (intent to benefit putative plaintiff), notes 116-17, 163-71 and accompanying text (binding obligation versus mere congressional preference), and notes 97-98, 118-20, 172-76 and accompanying text (not too vague or amorphous to enforce).

51. *Artist M.*, 917 F.2d at 987, 988-89. According to the preclusion exception, § 1983 is not available to plaintiffs when Congress intended to foreclose enforcement of a federal statute under § 1983. *Artist M.*, 112 S. Ct. at 1366. The preclusion exception to § 1983's applicability is discussed in greater detail *infra* notes 79-95 and accompanying text.

52. 111 S. Ct. 2008 (1991).

53. *Artist M.*, 112 S. Ct. at 1370.

54. Justices White, O'Connor, Scalia, Souter, and Thomas joined the Chief Justice's opinion. *Id.* at 1363.

55. *Id.* at 1366. The Court originally developed this rule in Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 19 (1981). See *infra* notes 79-86 and accompanying text for discussion of the *Sea Clammers* case.

56. *Artist M.*, 112 S. Ct. at 1366 (statement of the relevant § 1983 case law).

57. 451 U.S. 1 (1981). See *infra* note 78 for a discussion of the *Pennhurst* case.

so unambiguously."[58] Relying on this language and explaining that the plaintiff has the burden to prove congressional intent to create an enforceable right,[59] the majority concluded that the reasonable-efforts clause of the AACWA conferred no enforceable right on beneficiaries of the Act; the Act's language and legislative history did not reveal unambiguously Congress's intent to provide a private remedy for enforcing that clause.[60] The Court further stated that rather than providing a specific statutory definition of what constitutes reasonable efforts, Congress gave the states ample discretion under the AACWA to make this determination themselves.[61] Finally, since the AACWA provides other enforcement mechanisms whenever a foster care agency has failed to make reasonable efforts,[62] Chief Justice Rehnquist noted that the Court's de-

58. *Artist M.*, 112 S. Ct. at 1366 (quoting *Pennhurst*, 451 U.S. at 17 (citations omitted)). *Pennhurst* was not a § 1983 case, so Chief Justice Rehnquist's reliance on its language, rather than on *Wilder*'s language about § 1983, is somewhat questionable.

59. *Id.* at 1370. The Court cited Cort v. Ash, 422 U.S. 66 (1975), the case setting out the test for determining whether a federal statute contains an implied remedy. Under *Cort*, a private remedy may be implied from a federal statute when (1) the plaintiff is a member of the class of persons the statute was intended to benefit, (2) there is either explicit or implicit legislative intent to create a private remedy, (3) the court's implication of a private remedy is consistent with "the underlying purposes of the legislative scheme," and (4) the private action is not one "traditionally relegated to state law," in which case implying a federal remedy is inappropriate. *Id.* at 78.

Traditionally, the Court has considered the question of whether a private remedy may be implied from a federal statute completely separate and distinct from the question of whether a private remedy exists under § 1983 for violation of a federal statute. Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498, 508-09 n.9 (1990). *But see infra* notes 186-93 and accompanying text (not viewing the two inquiries as distinct).

60. *Artist M.*, 112 S. Ct. at 1367-70. Specifically, the Court found that Congress, by not enacting a statutory definition of "reasonable efforts," gave states the discretion to define the term and comply with the requirement. *Id.* at 1368. The Court cited Senate and House committee reports reflecting Congress's confidence in the states' abilities to "discharge their duties" under the AACWA and to determine what services are appropriate in a given situation. *Id.* at 1369-70 n.15. The Court also noted that Congress had enacted other enforcement mechanisms for the reasonable-efforts clause, *id.* at 1368, and had imposed "precise requirements on the States" in other parts of the AACWA. *Id.* at 1369 n.12. Since the reasonable-efforts clause was not worded like these other precise requirements, the Court concluded that Congress had not intended for it to create enforceable rights under § 1983. *Id.* Finally, in further support of its holding, the Court cited a lack of specificity in the regulations relevant to the reasonable-efforts provision. *Id.* at 1369 n.14.

61. *Id.* at 1369. Chief Justice Rehnquist emphasized that the states had no notice that they had to do anything more than submit a plan to the Secretary of Health and Human Resources outlining how they would make the requisite reasonable efforts. Due to this lack of legislative notice that the reasonable-efforts clause may impose substantive, binding obligations on the states, only the existence of a plan—and not actual compliance with it—was required for a state to receive funding under the AACWA. *Id.* On this basis, the *Artist M.* Court held that the reasonable-efforts clause created no enforceable rights and, consequently, could not support a private action under § 1983. *Id.* at 1370. For further discussion of the "plan is enough" argument, see *infra* notes 121-23 and accompanying text.

62. These other "enforcement mechanisms" consist of (1) the power of the Secretary of

nial of an enforceable private right under § 1983 hardly makes the Act a "dead letter."[63]

In a stinging and thorough dissent joined by Justice Stevens, Justice Blackmun argued that the *Artist M.* majority had disregarded precedent without cause or explanation.[64] He asserted that the majority's decision clearly conflicted with its previous case law because the reasonable-efforts provision was "functionally identical" to a statute held enforceable under § 1983 only two years before the *Artist M.* ruling.[65] Justice Blackmun outlined the prior § 1983 jurisprudence and argued that the majority's analysis differed substantially from that employed in its most recent § 1983 case addressing a federal statute's enforceability.[66] He concluded that the reasonable-efforts provision created an enforceable right because it met the elements of the traditional enforceable rights test.[67] According to the Court's established § 1983 analysis, Justice Blackmun insisted, defendants who sought to defeat a § 1983 action bore the difficult burden of demonstrating congressional intent to foreclose such a remedy for violations of a federal statute.[68] The *Artist M.* majority, argued Justice Blackmun, effectively shifted that burden onto plaintiffs, requiring them to prove that Congress had conferred on them the right to enforce the statute under § 1983.[69]

Health and Human Services to reduce or deny federal funding when states are not complying with the Act's requirements, 42 U.S.C. § 671(b) (1988), and (2) the requirement of a "judicial determination" (typically by a juvenile court) that reasonable efforts were made to keep the child in the home. *Id.* § 672(a)(1).

63. *Artist M.*, 112 S. Ct. at 1369.

64. *Id.* at 1371 (Blackmun, J., dissenting).

65. *Id.* (Blackmun, J., dissenting) (citing Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498 (1990)). Justice Blackmun was referring to the reasonable-rates provision of the Boren Amendment to the Medicaid Act that the Court enforced under § 1983 in *Wilder*. *Id.* (Blackmun, J., dissenting). The Boren Amendment required states to set reasonable rates of reimbursement to health care providers of Medicaid related services. *Wilder*, 496 U.S. at 501-02.

66. *Artist M.*, 112 S. Ct. at 1375-77 (Blackmun, J., dissenting).

67. *Id.* at 1373-74 (Blackmun, J., dissenting).

68. *Id.* at 1376 (Blackmun, J., dissenting). Language in the Court's previous opinions indicates that there is a presumption in favor of finding an implied cause of action in federal statutes via § 1983. *Wilder*, 496 U.S. 498, 508-09 n.9 (explaining that there is a "general rule" in favor of finding federal statutes enforceable under § 1983).

69. *Artist M.*, 112 S. Ct. at 1376 (Blackmun, J., dissenting). Traditionally, plaintiffs were not required to meet this heavy burden with regard to legislative intent because Congress, in enacting § 1983, already had expressed its intent to provide remedies for federal statutory violations made under color of state law. *See infra* note 191 and accompanying text. To Justice Blackmun's credit, there is ample evidence in the *Artist M.* opinion that Chief Justice Rehnquist believed the burden of proof with regard to legislative intent in § 1983 actions is on the plaintiffs. *See Artist M.*, 112 S. Ct. at 1370 (The reasonable-efforts provision is not enforceable under § 1983 because its "language does not unambiguously *confer* an enforceable right upon the Act's beneficiaries.") (emphasis added).

According to § 1983, whenever a state actor deprives a person of "rights, privileges, or immunities secured by the Constitution and laws," the wronged person may bring a private action, at law or in equity, in federal court.[70] In *Maine v. Thiboutot*,[71] the Supreme Court interpreted the "and laws" phrase in § 1983 to apply to federal statutes.[72] Citing previous cases indicating the Court's opinion that § 1983 applied to violations of federal statutes as well as violations of constitutional rights,[73] the Court held that the Civil Rights Attorney's Fees Awards Act of 1976[74] could be enforced through private suits brought under § 1983.[75] The Court refused to restrict § 1983's applicability to civil rights statutes or to cases arising under the Equal Protection Clause of the Fourteenth Amendment; instead, the Court rested its broad holding on the "plain language" of § 1983.[76] *Thiboutot* thus opened the door to private actions in favor of all plaintiffs who could demonstrate that a given statute had created a right or privilege that they were being denied.[77]

After *Thiboutot*, the Supreme Court addressed § 1983's applicability to several federal statutes.[78] *Middlesex County Sewerage Authority v. Na-*

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70. 42 U.S.C. § 1983 (1988).

71. 448 U.S. 1 (1980).

72. *Id.* at 4-5.

73. *Id.* at 4-6.

74. 42 U.S.C. § 1988 (1988).

75. *Thiboutot*, 448 U.S. at 3-4, 11. Thiboutot was a recipient of Aid to Families with Dependent Children (AFDC). *Id.* at 3. He was notified that in computing his benefits for three children from a previous marriage (all of whom he now supported), the Maine Department of Human Services would no longer consider the money he spent to support his other five children (from his current marriage). *Id.* Thiboutot challenged the state's interpretation of a provision of the Social Security Act that supported this action by Maine's Department of Human Services; after exhausting his remedies under state administrative law, he requested state judicial review. *Id.* In an amended complaint, Thiboutot alleged a cause of action under § 1983 for himself and "others similarly situated." *Id.*

The Supreme Court of Maine upheld Thiboutot's claim and granted him and the other complainants attorney's fees pursuant to 42 U.S.C. § 1988 (1988). *Id.* The Supreme Court granted certiorari, *Thiboutot*, 444 U.S. 1042 (1980), and affirmed, *Thiboutot*, 448 U.S. at 4.

76. *Thiboutot*, 448 U.S. at 6-7. The defendants in *Thiboutot* argued that § 1983 should only apply to civil rights laws and claims under the Equal Protection Clause because that was Congress's intent in passing the original statute. *Id.* The Court acknowledged that one of the principal purposes of adding the phrase "and laws" to § 1983's predecessor was to "ensure that federal legislation providing specifically for equality of rights would be brought within the ambit of the civil action authorized by that statute." *Id.* at 7 (quoting Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 637 (1979) (Powell, J., concurring)). The Court concluded, however, that this was not Congress's only purpose in amending the language of § 1983. *Id.*

77. *See id.* at 5.

78. Many of the statutes examined by the Court were enacted, like the AACWA, pursuant to Congress's spending power. *Artist M.*, 112 S. Ct. at 1366; *see* U.S. CONST. art. I, § 8, cl. 1 ("Congress shall have the Power To . . . provide for the . . . general Welfare of the United States."). The Court's first application of the *Thiboutot* rule was the 1981 case of Pennhurst

tional Sea Clammers Ass'n[79] was the Court's first clear articulation of the *Thiboutot* rule. In *Sea Clammers*, the Court noted that it had "recognized two exceptions to the application of [section] 1983 to statutory violations . . . (i) whether Congress had foreclosed private enforcement of that statute in the enactment itself [the so-called preclusion exception], and (ii) whether the statute at issue . . . was the kind that created enforceable 'rights' under [section] 1983."[80] Justice Powell, writing for the majority, explained that Congress need not expressly preclude a § 1983 action for the first exception to apply.[81] Whenever the remedies provided under a statute are comprehensive enough, they will "suffice to demonstrate congressional intent" to preclude § 1983 private actions.[82] The *Sea Clammers* Court found that the Federal Water Pollution Control

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State School & Hospital v. Halderman, 451 U.S. 1 (1981). *See Artist M.*, 112 S. Ct. at 1366. The *Pennhurst* Court held that § 6010 of the Developmentally Disabled Assistance and Bill of Rights Act of 1975, 42 U.S.C. §§ 6000-6081 (1976) (presently codified at 42 U.S.C. §§ 6000-6083 (1988)), which granted mentally retarded persons "a right to appropriate treatment, services, and habilitation" in "the setting that is least restrictive of . . . personal liberty," *Id.* § 6010(1)-(2), did not create an implied cause of action in favor of mentally retarded persons. *Pennhurst*, 451 U.S. at 18-23. Writing for the majority in *Pennhurst*, then-Justice Rehnquist rejected the implied remedy claim because Congress intended § 6010 "to be hortatory, not mandatory." *Id.* at 24.

Because the Court found no enforceable rights in favor of the *Pennhurst* claimants under § 6010, it did not actually "reach the question whether there is a private cause of action . . . to enforce those rights" under § 1983. *Id.* at 28 n.21. *Pennhurst* has often been quoted, nonetheless, for its passages relating to § 1983, and the Court has incorporated *Pennhurst*'s commentary on § 1983 into its case law. Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 19 (1981). The *Pennhurst* Court noted that § 1983 does not provide a private remedy for violation of a federal statute when the statute does not create a "right secured" by federal law, *Pennhurst*, 451 U.S. at 28, or when the statute " 'provides an exclusive remedy for violations of its terms.' " *Id.* (quoting *Thiboutot*, 448 U.S. at 22 n.11 (Powell, J., dissenting)). The latter exception to § 1983's applicability (the so-called "preclusion exception") would prove crucial to the Court's later analyses, including the reasoning of *Artist M.* Ironically, this important requirement of § 1983 analysis began as a recognition, in dictum, of a dissenting justice's opinion.

79. 453 U.S. 1 (1981).

80. *Id.* at 19 (citing *Pennhurst*, 451 U.S. at 28). The Court addressed the § 1983 issue—even though neither of the parties to *Sea Clammers* had raised it—because the *Sea Clammers* litigation started "long before" the Court's decision in *Thiboutot*. *Id.* *Thiboutot* was decided in June, 1980, seven months before oral arguments in *Sea Clammers*, so the Court could have required the parties to amend their complaints and answers to address the § 1983 question. Consequently, one wonders if the *Sea Clammers* Court addressed § 1983 out of its concern for the parties' claims or, rather, because of a desire to narrow and clarify *Thiboutot*.

81. *Id.* at 20-21.

82. *Id.* at 20. Justice Powell explained, "[W]hen '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.' " *Id.* (quoting Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 673 n.2 (1979) (Stewart, J., dissenting)) (emphasis added).

Act Amendments of 1972 (FWPCA or Clean Water Act)[83] and the Marine Protection, Research, and Sanctuaries Act of 1972 (MPRSA)[84] contain comprehensive remedial schemes; as a result, these statutes were not enforceable under § 1983.[85] "It is hard to believe," wrote Justice Powell, "that Congress intended to preserve the [section] 1983 right of action when it created so many specific statutory remedies, including the two citizen-suit provisions."[86]

The Supreme Court later affirmed the relevance of the preclusion exception in a case in which allowing the § 1983 suit would have "render[ed] superfluous" the statute's detailed procedural protections.[87] In an oft-quoted passage from that case, however, the Court expressed its hesitancy to apply the preclusion exception and reiterated the strong showing defendants must make to support it:

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83. 33 U.S.C. §§ 1251-1376 (1976) (codified at 33 U.S.C. §§ 1251-1387 (1988)).

84. *Id.* §§ 1401-1445.

85. *Sea Clammers*, 453 U.S. at 19-20.

86. *Id.* at 20. Justice Stevens disagreed with the Court's approach and conclusions in *Sea Clammers*. He argued that when one acting under color of state law denies a plaintiff's statutory rights, courts must presume that § 1983 "provides an express remedy" for the violation "unless Congress has *expressly* withdrawn that remedy." *Id.* at 26 (Stevens, J., dissenting) (emphasis added). In Justice Stevens' opinion, the legislative history demonstrated no clear congressional intent to preclude § 1983; in fact, he argued that the statutes demonstrated Congress's desire to preserve outside remedies. *Id.* at 29 (Stevens, J., dissenting). To support this assertion, Justice Stevens quoted specific provisions of the Clean Water Act, 33 U.S.C. § 1365(e) (1976) (" 'Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute . . . to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency)' "), and a provision of MPRSA, 33 U.S.C. § 1415(g)(5) (1976) (" 'The injunctive relief provided by this subsection shall not restrict any right which any person (or class of persons) may have under any statute . . . to seek enforcement of any standard or limitation or to seek any other relief (including relief against the Administrator, the Secretary, or a State agency)' "). *Sea Clammers*, 453 U.S. at 29 (Stevens, J., dissenting).

87. Smith v. Robinson, 468 U.S. 992, 1011-12 (1984). In *Smith*, the plaintiffs based their § 1983 claim on alleged violations of Constitutional protections, and not on violations of the Education of the Handicapped Act (EHA), 20 U.S.C. § 1400-1461 (1982) (presently codified at §§ 1400-1485 (1988 & Supp. II), because, as the Supreme Court noted, "Courts generally agree that the EHA may not be claimed as the basis for a § 1983 action." *Smith*, 468 U.S. at 1008 n.11 (citing, *e.g.*, Department of Educ., Hawaii v. Katherine D., 727 F.2d 809, 820 (9th Cir. 1983), *cert. denied*, 471 U.S. 1117 (1985); Quackenbush v. Johnson City Sch. Dist., 716 F.2d 141, 149 (2d Cir. 1983), *cert. denied*, 465 U.S. 1071 (1984); Anderson v. Thompson, 658 F.2d 1205, 1215 (7th Cir. 1981)). The *Smith* Court held that a handicapped child does not have a right to bring a § 1983 action demanding a "free appropriate public education" under the Constitution's Equal Protection Clause because Congress wanted the EHA to be the exclusive remedy for this problem. *Id.* at 1009. The Court reached this conclusion because the EHA was a "carefully tailored" and "comprehensive scheme," *id.*, for remedying violations of the child's right to a "free appropriate public education." *Id.* at 1009-13. The *Smith* Court emphasized that Congress felt the needs of handicapped children were best accommodated by allowing parents and local education agencies to work together to formulate an individualized plan for each handicapped child's education. *Id.*

> We do not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy for a substantial equal protection claim. Since 1871, when it was passed by Congress, § 1983 has stood as an independent safeguard against deprivations of federal constitutional and statutory rights. Nevertheless, § 1983 is a statutory remedy and Congress retains the authority to *repeal* it or *replace* it with an alternative remedy. The crucial consideration is what Congress intended.[88]

The Supreme Court clarified the defendant's burden to prove the preclusion exception in *Wright v. City of Roanoke Redevelopment & Housing Authority*.[89] In that case, the Supreme Court explained that under its prior case law,[90] the preclusion exception prevents enforcement under § 1983 when "the *state actor demonstrates* by express provision or other specific evidence from the statute itself that Congress intended to foreclose such private enforcement."[91] Under *Wright*, the preclusion exception does not apply when a statute and its legislative history are "devoid of any express indication that exclusive enforcement authority was vested" in a particular enforcing body,[92] particularly when there is some indication that Congress anticipated private actions under the statute.[93] The Court distinguished the statutory provision at issue in *Wright*, under which the plaintiffs' only remedies were "local grievance procedures," from previous cases like *Sea Clammers*, where the relevant statute contained a comprehensive enforcement scheme.[94] The Court further illu-

88. *Smith*, 468 U.S. at 1012 (citations omitted) (emphasis added).

89. 479 U.S. 418, 423-24 (1987). The complainants in *Wright* were tenants of low-income housing projects owned by a public housing authority, which were established by the U.S. Housing Act of 1937, 42 U.S.C. § 1401-1436 (1970) (presently codified at §§ 1401-1440 (1988)). *Wright*, 479 U.S. at 419-20. The 1969 Brooke Amendment to the Housing Act, Pub. L. No. 91-152, § 213, 83 Stat. 389 (1969), imposed a rent ceiling on public housing projects and, as later amended in 1981, Pub. L. No. 97-35, § 322, 95 Stat. 400 (1981), provided that low-income families should pay a percentage of their incomes as rent. *Wright*, 479 U.S. at 420. Relying on the fact that the Department of Housing and Urban Development (HUD) had "consistently considered 'rent' to include a reasonable amount for the use of utilities," and that HUD had expressed this view in its regulations, *id.* at 420-21 & n.3 (citing 24 C.F.R. § 865.470 (1983) (applicable regulation), 47 Fed. Reg. 35,249-35,250 (1982) (HUD's proposed rule stating its general practice), and 49 Fed. Reg. 31,399 (1984) (actual amendment of the regulation)), the tenants brought suit under § 1983 and the Brooke Amendment, alleging that respondent had overcharged them for utilities. *Wright*, 479 U.S. at 421-22. The Supreme Court ruled in favor of the tenants. *Id.* at 424.

90. *Wright*, 479 U.S. at 423 (citing *Smith*, 468 U.S. at 1012-13, Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 19-21 (1981), and Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 28 (1981)).

91. *Wright*, 479 U.S. at 423 (emphasis added).

92. *Id.* at 424.

93. *Id.* In *Wright*, Congress had indicated no intent to make HUD the exclusive enforcer of the Brooke Amendment. *Id.* at 424-25.

94. *Id.* at 427; *see supra* notes 83-86 and accompanying text (discussing statutes litigated

minated the preclusion exception issue by addressing the relevance of private state judicial remedies, holding that the plaintiffs' right to sue in state court was "hardly a reason" for barring a § 1983 action, which involves a "federal remedy for the enforcement of federal rights."[95]

Wright also clarified when a federal statute creates an enforceable right by introducing a critical new consideration. The Court held that when Congress intended that a statute benefit the class of plaintiffs bringing the § 1983 suit—the putative plaintiffs—that factor weighs in favor of finding an enforceable right.[96] Finally, the *Wright* Court addressed the common contention of § 1983 defendants that the statute at issue is "too vague and amorphous" to confer an enforceable right and therefore is "beyond the competence of the judiciary" to enforce.[97] In *Wright*, the Court rejected that argument because the regulations defining the relevant provisions of the statute were sufficiently particular and specific to counter any vagueness claim.[98]

In her dissent to the *Wright* decision, Justice O'Connor argued that the Brooke Amendment created no enforceable right in the tenants under § 1983.[99] She insisted that courts should look carefully at legislative intent to determine if an enforceable right was created under § 1983, just as courts rely on legislative intent when determining if a statute itself con-

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in *Sea Clammers* which contained citizen suit provisions); *see also supra* note 87 (discussing statute litigated in *Smith* that was intended to be exclusive remedy).

95. *Wright*, 479 U.S. at 429.

96. *Id.* at 430-32. Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103 (1989), echoed the principle that Congress's intent to benefit the "putative plaintiff" was an important factor in determining if an enforceable right had been created. *Id.* at 106. In *Golden State*, the Court held that even though the National Labor Relations Board (NLRB) enjoys a comprehensive "exclusive jurisdiction" to prevent and remedy unfair labor practices by employers and unions, § 1983 still creates an enforceable right under the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151-169 (1982) (presently codified at 29 U.S.C. §§ 151-917 (1988)), for parties to a collective bargaining agreement to use "economic weapons" (i.e., strikes) without state or federal governmental interference. *Golden State*, 493 U.S. at 108-09, 111.

97. *Wright*, 479 U.S. at 431-32.

98. *Id.* at 432. The *Golden State* Court agreed that a statute creates no enforceable right under § 1983 when that right is so amorphous that it defies judicial enforcement. *Golden State*, 493 U.S. at 106 (citing *Wright*, 479 U.S. at 431-32).

99. *Wright*, 479 U.S. at 432-41 (O'Connor, J., dissenting). Justice O'Connor found that neither the "language," nor the "legislative history," nor the "administrative interpretation" of the Amendment indicated Congress's intent to create an enforceable right to reasonable utilities. *Id.* at 437 (O'Connor, J., dissenting). She expressed her concern about over-applying § 1983:

> [L]urking behind the Court's analysis may be the view that, once it has been found that a statute creates some enforceable right, *any* regulation adopted within the purview of the statute creates rights enforceable in federal courts, regardless of whether Congress or the promulgating agency ever contemplated such a result.

Id. at 438 (O'Connor, J., dissenting) (emphasis in original).

tains a implied remedy.[100] Justice O'Connor treated legislative intent as an essential element of the complainant's case for a § 1983 suit,[101] and was willing to rely on state courts to provide remedies for activities that, in her opinion, did not rise to the level of federally enforceable rights.[102] Her approach foreshadowed the critical turning point in § 1983 analysis that *Artist M.* represents.[103]

The Supreme Court's most recent and detailed statement on how § 1983 should be applied to federal statutes came in *Wilder v. Virginia Hospital Ass'n.*[104] *Wilder* involved several provisions of the amended Medicaid Act,[105] under which a state may obtain funding from the federal government to help cover its reimbursements to those health care providers serving needy persons.[106] To qualify for these federal monies, a state must submit to the Secretary of Health and Human Services[107] a comprehensive plan outlining the state's Medicaid program.[108] The Boren Amendment to the Medicaid Act provided that the state's plan must include an explanation of the state's reimbursement scheme for providers

100. *Id.* at 432-33 (O'Connor, J., dissenting). The implied remedy test is the four-prong inquiry from Cort v. Ash, 422 U.S. 66, 78 (1975). *See supra* note 59 (discussing of the four-prong test). The second prong of the test is whether Congress demonstrated an intent to make the particular statute privately enforceable. *Cort*, 422 U.S. at 78. Interestingly, to support her proposed § 1983 analysis in *Wright*, Justice O'Connor relied on quotations from cases that did not address the question of whether a federal statute creates an enforceable right under § 1983. She cited conclusions from the *Sea Clammers* decision, where the Court was looking at whether legislative intent *precluded* the § 1983 remedy—not whether it created a right. *Wright*, 479 U.S. at 433 (O'Connor, J., dissenting) (quoting Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 13 (1981), for the statement that " 'the key to the inquiry is the intent of the Legislature' "). Justice O'Connor also cited a portion of the *Pennhurst* opinion addressing whether the statute at issue contained an implied remedy—not whether § 1983 applied. *Id.* (O'Connor, J., dissenting) (citing Pennhurst State School & Hospital v. Halderman, 451 U.S. 1, 18 (1981), for the principle that the statute must be cast in mandatory, not "precatory" terms).

101. *See Wright*, 479 U.S. at 433-40 (O'Connor, J., dissenting).

102. *See id.* at 440-49 (O'Connor, J., dissenting) ("In my view, petitioners do have a remedy in seeking to secure utilities from respondent: they may sue on their leases.").

103. See *infra* notes 163-71, 177-93 and accompanying text for a discussion of Chief Justice Rehnquist's vision of § 1983 as evidenced in *Artist M.* In *Wright*, this type of approach was overruled by a narrow majority: Justice White authored the majority opinion, which was joined by Justices Brennan, Marshall, Blackmun, and Stevens. *Wright*, 479 U.S. at 419. Chief Justice Rehnquist, Justice Powell, and Justice Scalia joined Justice O'Connor's dissent in *Wright*. *Id.* at 432 (O'Connor, J., dissenting).

104. 496 U.S. 498 (1990).

105. 42 U.S.C. §§ 1396-1396s (1982) (presently codified at 42 U.S.C. §§ 1396-1387f (1988)).

106. *Wilder*, 496 U.S. at 502.

107. 42 U.S.C. §§ 1396, 1396a(a).

108. *Wilder*, 496 U.S. at 502 (citing 42 C.F.R. § 430.10 (1989)).

and must establish "reasonable and adequate" rates of reimbursement.[109]

In *Wilder*, a nonprofit association of private and public hospitals brought suit against the governor of Virginia under § 1983.[110] The plaintiffs alleged that the state's Medicaid reimbursement plan violated the Boren Amendment because its rates were not "reasonable and adequate" to meet the Amendment's express goals.[111] The Supreme Court agreed. Writing for the Court, Justice Brennan began by reciting the two previously recognized exceptions that would bar enforceability of a federal statute under § 1983: the statute's failure to create an enforceable right and the congressional preclusion exception.[112] Justice Brennan then consolidated the Court's prior § 1983 case law regarding enforceable rights into a three-part test:[113] if the putative plaintiff is an intended beneficiary of the statute, then the statute creates enforceable rights so long as it imposes a binding obligation (not a mere congressional preference) and it is not too ambiguous or vague to be competently enforced by the judiciary.[114]

Applying the first prong of this test, the Court decided the Boren Amendment clearly was intended to benefit hospitals seeking reimbursement at reasonable rates—the putative plaintiffs in *Wilder*.[115] Next, the Court found that the Boren Amendment created a binding obligation because federal funding under the Medicaid Act was tied explicitly to the state's compliance with its provisions.[116] The Amendment represented more than a mere congressional preference because, unlike the statute and regulations in *Pennhurst*, the Amendment and its accompanying regulations explicitly conditioned federal funding on compliance with the

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109. *Id.* at 501-02 (citing 42 U.S.C. § 1396a(a)(13)(A) (Supp. 1982)). States must utilize rates determined in accordance with the methods and standards developed by the State

> which the State finds, and makes assurances satisfactory to the Secretary, are *reasonable and adequate* to meet the costs which must be incurred by efficiently and economically operated facilities in order to provide care and services in conformity with State and Federal laws, regulations, and quality and safety standards and *to assure* that individuals eligible for medical assistance have *reasonable access* . . . to inpatient hospital services of *adequate quality*.

Id. at 503 (emphasis changed). The Medicaid Act does not define the terms "reasonable and adequate" rates, "reasonable access," or "adequate quality," and the Secretary of Health and Human Services has chosen not to adopt a nationally binding definition of the terms; the Secretary believes the states should have the freedom to define those terms. *Id.* at 507.

110. *Id.* at 501-03.

111. *Id.* at 503.

112. *Id.* at 508; *see supra* notes 55, 80 and accompanying text.

113. *Wilder*, 496 U.S. at 509.

114. *Id.*

115. *Id.* at 510. "The provision establishes a system for reimbursement of providers and is phrased in terms benefitting health care providers." *Id.*

116. *Id.* at 512.

"reasonable and adequate" rates requirement, thus demonstrating Congress's intent that this statute be mandatory.[117] Finally, applying the third prong of the enforceable rights test, the Court held that the reasonable-rates requirement was not too vague and amorphous to be enforced judicially because the statute provided an objective method for evaluating reasonableness.[118] Although Congress intended to give each state considerable discretion in choosing a rate calculation method,[119] the *Wilder* Court insisted that "there certainly are *some* rates . . . that no State could ever find to be reasonable and adequate under the Act."[120]

One important issue in *Wilder* was precisely *what* right was enforceable under § 1983. The Court rejected the state's argument that its only obligation under the Boren Amendment was a procedural one—simply to "make findings" that its rates were reasonable and to assure the Secretary of that fact.[121] The Court refused to interpret the Boren Amendment in a manner that would "render it a dead letter"[122] and cited extensive legislative history to buttress its holding that the right enforceable under § 1983 was substantive, not merely procedural.[123]

The Court's analysis of the preclusion exception—which bars enforcement of a federal statute under § 1983—was somewhat more refined than in past cases. Justice Brennan explained that to prove Congress intended to foreclose § 1983 suits for statutory violations, the defendant must point to either an express reference in the statute or "other specific evidence from the statute itself."[124] He noted that when there is no express foreclosure, the Court has found implied foreclosure only when the statute's remedial scheme was so comprehensive it demonstrated Con-

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117. *Id.* at 510-12.

118. *Id.* at 519.

119. *Id.* at 515, 519.

120. *Id.* at 520.

121. *Id.* at 514.

122. *Id.*

123. *Id.* at 515-19. Chief Justice Rehnquist dissented in *Wilder*, and Justices O'Connor, Scalia, and Kennedy joined in his dissent. *Id.* at 524 (Rehnquist, C.J., dissenting). The dissent contended that the language of the Boren Amendment indicated no intent to create a substantive right enforceable under § 1983. *Id.* at 527-28 (Rehnquist, C.J., dissenting). According to Chief Justice Rehnquist, the statute conferred only a procedural right: that states be required to set rates according to the mandatory process. *Id.* (Rehnquist, C.J., dissenting). The Chief Justice also argued that the Boren Amendment and Medicaid Act did not expressly focus on the plaintiffs (Medicaid services providers) as its beneficiaries. *Id.* (Rehnquist, C.J., dissenting).

A critical aspect of Chief Justice Rehnquist's dissent in *Wilder* is his argument that the inquiry under § 1983 and under the implied statutory remedy theory are not distinguishable. *See infra* notes 186-93 and accompanying text.

124. *Wilder*, 496 U.S. at 520-21 (quoting Wright v. Roanoke Redevelopment & Hous. Auth., 479 U.S. 418, 423 (1987)).

gress's preclusionary intent.[125] As Justice Brennan pointed out, the Court had found such a scheme in only two cases, both of which involved statutes with substantial administrative or judicial remedies;[126] in each of these cases there was also some provision for "private judicial or administrative enforcement."[127] The Medicaid Act's remedial provisions—which permit the Secretary of Health and Human Services to diminish a state's funding when its plan does not comply with the Medicaid Act—did not, in the Court's opinion, constitute a scheme that was "sufficiently comprehensive" to demonstrate congressional intent to foreclose a § 1983 action.[128]

As *Wilder* and *Wright* demonstrate, the Court has hardly reached a consensus on the proper approach to examining federal statutory remedies under § 1983. Both of these cases involved five-to-four decisions in which a narrow majority articulated a multi-faceted test for § 1983 and held that a statute requiring "reasonableness" created an enforceable statutory right under § 1983.[129] Furthermore, in both cases the dissenters insisted that to gain a remedy for the violation of a federal statute through § 1983 plaintiffs must demonstrate that the statute clearly was intended by Congress to confer on individuals a privately enforceable right.[130]

Virtually all of the Justices have been highly consistent in their stances on § 1983's application to federal statutes.[131] As a result of the

125. *Id.* at 521.

126. *Id.* See *supra* notes 79-86 and accompanying text for a discussion of Middlesex County Sewerage Authority v. National Sea Clammers Ass'n, 453 U.S. 1 (1981), and *supra* note 87 for a discussion of Smith v. Robinson, 468 U.S. 992 (1984).

127. *Wilder*, 496 U.S. at 521. The *Sea Clammers* statutes contained two citizen suit provisions. *Id.* The *Smith* statute included "local administrative review" that "culminated in a right to judicial review." *Id.*

128. *Id.* at 521-22. The defendants in *Wilder* contended that because Congress gave the Secretary of Health and Human Resources the power to reduce or withhold a state's funding if that state does not impose reasonable rates, Congress intended to foreclose the remedy for unreasonable rates under § 1983. *Id.* at 514. With regard to the creation of enforceable rights, Justice Brennan turned that argument on its head; the Court found that the Secretary's control over funding "support[ed] the conclusion that the provision does create enforceable rights," since it put the States "on notice" that the reasonable rates requirement "is not a mere formality." *Id.* The *Artist M.* Court contradicted this line of reasoning. *See infra* notes 180-85 and accompanying text.

129. *See supra* notes 89-98, 104-112 and accompanying text.

130. *See supra* notes 99-103, 123 and accompanying text.

131. In cases where the Court held that a federal statute was enforceable under § 1983, Justices Brennan, Blackmun, Marshall, Stevens, and White always joined the majority, while Chief Justice Rehnquist and Justices Powell, O'Connor, Kennedy, and Scalia (with one exception—Justice Scalia joined the majority in finding a National Labor Relations Act provision enforceable under § 1983 in Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 104 (1989)) always dissented. *See Wilder*, 496 U.S. at 501, 524; Golden State Transit Corp. v.

fairly settled positions of most of the Justices, personnel changes in the Court had a critical impact on the resolution of *Artist M.* By the time the Court decided *Artist M.*, Justices Brennan and Marshall—two of the key proponents of the traditional approach to § 1983—had been replaced by Justices Souter and Thomas. Thus, with a split in the lower courts over § 1983's applicability to the reasonable-efforts requirement of the AACWA,[132] and with the heavy reliance by those courts on case law now supported by only a minority of the Court,[133] the stage was set for a change in § 1983 analysis.

It is no wonder that before *Artist M.* the federal courts had inconsistently[134] interpreted § 1983's applicability to the reasonable-efforts clause of the AACWA. The provision has been the subject of much confusion

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City of Los Angeles, 493 U.S. 103, 104, 113 (1989); Wright v. Roanoke Redevelopment & Hous. Auth., 479 U.S. 418, 419, 432 (1987); Maine v. Thiboutot, 448 U.S. 1, 9-11 (1980). Similarly, whenever the Court did not find a statute (or, in the case of Smith v. Robinson, 468 U.S. 992 (1984), a constitutional provision) enforceable under § 1983, the majority always included Chief Justice Rehnquist and Justices Powell, O'Connor, Scalia, and Kennedy, while Justices Brennan, Blackmun, Marshall, and Stevens almost always dissented. *See Smith*, 468 U.S. at 994, 1021; Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 4-5, 22 (1981). There are a few exceptions. In *Sea Clammers*, Justices Brennan and Marshall joined the majority in finding the two environmental statutes unenforceable under § 1983. *Id.* at 22. Also, Justice Blackmun wrote the majority opinion in *Smith* holding the Education of the Handicapped Act unenforceable under § 1983. *Smith*, 468 U.S. at 994.

132. 42 U.S.C. § 671(a)(15) (1988). Several courts have addressed the enforceability of § 671(a) of the AACWA under § 1983. *See* L.J. *ex rel.* Darr v. Massinga, 838 F.2d 118, 123 (4th Cir. 1988) (substantive requirements listed in § 671(a) enforceable under § 1983, including case plan requirement), *cert. denied*, 488 U.S. 1018 (1989), *abrogated in part by* Suter v. Artist M., 112 S. Ct. 1360 (1992); Norman v. Johnson, 739 F. Supp. 1182, 1187 (N.D. Ill. 1990) (reasonable-efforts clause enforceable under § 1983), *abrogated by* Suter v. Artist M., 112 S. Ct. 1360 (1992). *But see* B.H. v. Johnson, 715 F. Supp. 1387, 1401 (N.D. Ill. 1989) (reasonable-efforts clause not enforceable under § 1983). Other courts have addressed the enforceability of the AACWA in general (or the Social Security Act, of which the AACWA is a subsection). *See* Del A. v. Edwards, 855 F.2d 1148, 1149, 1152 (5th Cir. 1988) (holding that children have enforceable right to development of case plan, review of plan, timely hearing, and development of information systems under the Act and § 1983); Harpole v. Arkansas Dep't of Human Servs., 820 F.2d 923, 928 (8th Cir. 1987) (holding that the Social Security Act creates no enforceable rights for abused children's grandparents); Taylor v. Ledbetter, 818 F.2d 791, 800 (11th Cir. 1987) (finding no merit in Social Security Act claims), *cert. denied*, 489 U.S. 1065 (1989); Lynch v. Dukakis, 719 F.2d 504, 512 (1st Cir. 1983) (holding the case plan requirement enforceable under § 1983), *abrogated in part by* Suter v. Artist M., 112 S. Ct. 1360 (1992); La Shawn v. Dixon, 762 F. Supp. 959, 989 (D.D.C. 1991) (holding that the AACWA creates enforceable rights), *abrogated in part by* Suter v. Artist M., 112 S. Ct. 1360 (1992); Aristotle P. v. Johnson, 721 F. Supp. 1002, 1012 (N.D. Ill. 1989) (finding the rights granted by Act too amorphous to be enforceable under § 1983).

133. The lower courts often relied on *Wilder*'s enforceable right test. *See, e.g.*, Winston v. Children & Youth Servs., 948 F.2d 1380, 1387-88 (3d Cir. 1991) (finding reasonable-efforts clause enforceable under § 1983 by following *Wilder* and the Seventh Circuit's reasoning in *Artist M.*), *abrogated by* Suter v. Artist M., 112 S. Ct. 1360 (1992), *cert. denied*, 112 S. Ct. 2303 (1992).

134. *See supra* notes 132-33.

for several reasons. First, there is no federal statutory[135] or regulatory[136] definition of "reasonable efforts." As one author has noted, "it is up to the states and their court systems to define" reasonable efforts.[137] The few states that have enacted a statutory definition of "reasonable efforts," however, have not shed much light on the meaning of the phrase; generally, they refer vaguely to an agency's obligation to use "reasonable diligence and care"[138] or "due diligence"[139] and to utilize "appropriate and available services"[140] to meet the needs of children and their families.

Another source of confusion about the reasonable-efforts requirement is that the statute and its accompanying federal regulations do not mandate if or when the courts should determine whether an agency has made the requisite reasonable efforts; again, this determination is left to

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135. Shotton, *supra* note 11, at 225.

136. The Department of Health and Human Services (HHS) is the federal agency responsible for implementing the Act. *Id.* HHS has not defined "reasonable efforts," but has promulgated a regulation outlining services states should consider providing as part of their state plans: (1) twenty-four hour emergency caretakers and household services; (2) day care; (3) crisis counseling; (4) family and individual counseling; (5) emergency shelters; (6) emergency monetary assistance; (7) temporary child care; (8) home-based family services; (9) self-help groups; (10) single parent services; (11) drug and alcohol abuse counseling, mental health, vocational counseling and rehabilitation; and (12) post-adoption services. 45 C.F.R. § 1357.15(e)(2) (1991).

137. Shotton, *supra* note 11, at 225.

138. FLA. STAT. ANN. § 39.41(4)(b) (West 1988); MO. ANN. STAT. § 211.183(2) (Vernon Supp. 1992); *see* TENN. CODE ANN. § 37-1-166(g) (Supp. 1992) ("reasonable care and diligence"). A few states have attempted to clarify the definition of reasonable efforts by listing factors the courts should consider when making the reasonable-efforts determination. *See id.* § 37-1-166(c); WIS. STAT. ANN. § 48.355(2c)(a) (West Supp. 1992). Wisconsin requires the court making the reasonable-efforts determination to consider whether the agency made a "comprehensive assessment of the family's situation," provided financial assistance, or offered in-home support services (i.e., homemakers), in-home intensive treatment services, and community services (i.e., day care, training on parenting skills, employment training). WIS. STAT. ANN. § 48.355(2c)(a)(1)-(3)(c) (West Supp. 1992). Wisconsin courts must also consider whether the agency monitored client progress or offered alternative services when appropriate. *Id.* § 48.355(4)-(5).

Tennessee fleshes out its definition of reasonable efforts by requiring agencies to respond to four questions; these questions are intended to help the court determine if reasonable efforts have been made to avoid child removal and to reunite families. TENN. CODE ANN. § 37-1-166(c) (Supp. 1992). The foster care agency must first explain to the court whether removal is necessary to protect the child's safety. If it is, the agency must specify the risks to the child. *Id.* § 37-1-166(c)(1). Second, the agency must tell the court what services are needed to allow the child to remain at home. *Id.* § 37-1-166(c)(2). The agency must also tell the court what services it has provided to the family to prevent removal and to reunify the family if it was separated. *Id.* § 37-1-166(c)(3). Finally, the agency must explain whether it has had the opportunity to provide its services to the family. If not, the agency must specify why it has not had this chance. *Id.* § 37-1-166(c)(4).

139. MINN. STAT. ANN. § 260.012(b) (West 1992).

140. *Id.* Similarly, Missouri refers to an agency's duty to utilize "all available services" to assist families. MO. ANN. STAT. § 211.183(2) (Vernon Supp. 1992).

the states.[141] While many states have passed statutes addressing when a court should decide if reasonable efforts have been or are being made,[142] only a few have applied the reasonable-efforts requirement to several critical stages of their juvenile hearings.[143] Because of the lack of authority on the matter, many states have inaccurately interpreted the consequences of an agency's failure to make reasonable efforts to preserve or reunite a child's family.[144] Although the only result Congress intended from this failure is that the state or agency be denied federal matching funds for that case,[145] some states mistakenly have passed statutes that require a showing of reasonable efforts before a child can be removed from an unsafe home.[146]

While what efforts qualify as reasonable is unclear, the requirement does impose some substantive obligations on states requesting funding under the Act; state courts have addressed what those obligations are in various contexts.[147] Most of the cases interpreting the reasonable-efforts

141. Shotton, *supra* note 11, at 226.

142. FLA. STAT. ANN. §§ 39.402(2), (9), (10), 39.41(4)(a) (West 1988 & Supp. 1992); IND. CODE ANN. § 31-6-4-6(e) (Burns 1987); IOWA CODE ANN. §§ 232.52(6), 232.95(2)(a), 232.102(5)(b) (West Supp. 1992); MINN STAT. ANN. § 260.012(b) (West 1992); MISS. CODE ANN. §§ 43-21-301(4)(c), -309(4)(c), -405(6), -603(7) (Supp. 1988); N.C. GEN. STAT. §§ 7A-577(h), -651(c)(2) (1989); OR. REV. STAT. § 419.577(3)(b)(B) (1991); TENN. CODE ANN. § 37-1-166(a), (b), (c), (g) (Supp. 1992); VA. CODE ANN. §§ 16.1-251(A)(2), -252(A), (E)(2), -282(D) (Michie Supp. 1992); WIS. STAT. ANN. § 48.21(5)(b) (West 1987), § 48.355(2)(b)(6) (West Supp. 1992).

143. *See* CAL. WELF. & INST. CODE §§ 306(b) (social worker taking temporary custody), 319(d) (hearing on continued agency custody), 361(c) (court limitations on removal and parental control), 366.21(e) (six-month status hearing), 366.21(f) (12-month status hearing), 366.22(a) (18-month status hearing) (West Supp. 1992); CAL. CIV. CODE § 232(a)(7) (declaring parents free from custody) (West Supp. 1992). The California provisions usually refer to ensuring that an agency has provided "reasonable services" to families. *Id.*; *see also, e.g.*, GA. CODE ANN. § 15-11-41(b) (West Supp. 1992) (reasonable-efforts determination required for first order removing child from home and for "every subsequent review").

144. Shotton, *supra* note 11, at 227.

145. 42 U.S.C. § 671(b) (1988). When the Secretary finds that a state plan

> no longer complies with the provisions of subsection (a) of this section [which includes the reasonable-efforts requirement, part (a)(15)], or that in the administration of the plan there is a substantial failure to comply with the provisions of the plan, the Secretary shall notify the State that further payments will not be made to the State [under the Act or that payments will be] reduced by an amount which the Secretary determines appropriate until the Secretary [is convinced that the state is complying with the section].

Id. There is no reference in § 671 to an agency's need to meet the section's requirements in order to remove children from dangerous homes.

146. Shotton, *supra* note 11, at 227.

147. A few state courts have addressed the reasonable-efforts requirement in a context prior to a parental-rights termination action. *See In re* A.L.W., 773 S.W.2d 129, 134 (Mo. Ct. App. 1989) (finding no reasonable efforts in taking four children from mother's custody simply because agency worker responded to child abuse hotline "emergency" call); *In re* S.A.D., 382

clause have been decided in state courts, usually in the context of specific hearings brought by state agencies to determine whether a child should be removed from the home or whether a parent's rights should be terminated.[148] By comparison, reasonable-efforts suits in federal court are far less common and involve different issues. Children or parents in federal court have attempted to sue a state foster care agency for failing to make reasonable efforts to avoid removing children from homes and to reunite them with their families.[149] In these suits, plaintiffs had to prove that they were entitled to enforce the reasonable-efforts requirement in a private action, based on one of two theories: either the Act itself provided an implied cause of action, or § 1983 of the Civil Rights Act created a private right of action under the AACWA.[150] In *Suter v. Artist M.*, the Supreme Court rejected both of these theories.[151]

Chief Justice Rehnquist's opinion in *Artist M.* represents a critical departure from the Court's traditional § 1983 analysis in a number of important ways. Chief Justice Rehnquist briefly mentioned the skeleton test for applying § 1983, noting that it may not be used to enforce a federal statute when the statute does not create an enforceable right or when Congress has foreclosed § 1983 action within the statute.[152] This basic statement of the two exceptions to applying § 1983 was neither novel nor unusual.[153] What was highly unusual was the Chief Justice's failure to

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Pa. Super. 166, 176, 555 A.2d 123, 128 (1989) (finding no reasonable efforts when agency took child from responsible mother and refused to return child, instead of providing mother needed money and housing).

148. Most state court decisions interpreting the reasonable-efforts requirement have been parental right termination cases. *See, e.g., In re* Victoria M., 207 Cal. App. 3d 1317, 1330, 255 Cal. Rptr. 498, 505 (1989) (holding agency did not make reasonable efforts to provide appropriate services to mentally disabled parent); *In re* Derek W. Burns, 519 A.2d 638, 648-49 (Del. 1986) (holding agency did not make reasonable efforts with regard to housing); *In re* AMK, 723 S.W.2d 50-53 (Mo. Ct. App. 1986) (holding agency made reasonable efforts to encourage family to accept its services); *In re* Kristina L., 520 A.2d 574, 588-91 (R.I. 1987) (holding agency did not make reasonable efforts to protect visitation rights). For a comprehensive analysis of the above cases and others in which states have interpreted the substantive requirements of the reasonable-efforts provision, see Shotton, *supra* note 11, at 237-253.

149. See *supra* notes 132-33 for a list of some of the federal cases brought under the AACWA.

150. *See, e.g., Artist M.*, 112 S. Ct. at 1363. Courts traditionally have treated the § 1983 claim—that a statute is enforceable under § 1983—and the implied remedy claim—that a statute itself creates an implied remedy—as separate issues with distinct elements and burdens of proof. *See* Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498, 508-09 n.9 (1990) (noting that the § 1983 claim involves "a different inquiry than that involved in determining whether a private right of action can be implied from a particular statute"). For further discussion of this traditional distinction and how the *Artist M.* Court treated it, see *infra* notes 186-93 and accompanying text.

151. *Artist M.*, 112 S. Ct. at 1370.

152. *Id.* at 1366.

153. *See Wilder*, 496 U.S. at 508; Golden State Transit Corp. v. City of Los Angeles, 493

take the next step of the inquiry: outlining the three factors which *Wilder* cited as relevant to determining if an enforceable right has been created by the statute.[154]

Under the *Wilder* test, if the plaintiffs demonstrate that the federal statute was intended to benefit them, the statute creates a right enforceable under § 1983 as long as it is not too vague to be enforced competently and it does not reflect a mere "congressional preference" for a given type of conduct, but rather an obligation binding a governmental body.[155] Yet the *Artist M.* decision makes no reference to the relevance of this first factor in determining whether the statute created an enforceable right

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U.S. 103, 106 (1989); Wright v. Roanoke Redevelopment & Hous. Auth., 479 U.S. 418, 423 (1987).

154. *See, e.g., Wilder*, 496 U.S. at 509; *Golden State*, 493 U.S. at 106. Given the Court's departure from *Wilder*'s three-part test for determining whether a statute creates enforceable rights, and because the statutes involved in *Wilder* and *Artist M.* are notably similar, it is interesting to note how the Court carefully distinguishes *Artist M.*'s facts from those in *Wilder*. The *Wilder* Court held that Medicaid providers have an enforceable right to "reasonable and adequate" reimbursement rates under the Boren Amendment to the Medicaid Act, *Wilder*, 496 U.S. at 509-10, while the provision at issue in *Artist M.* involved the private plaintiff's right to reasonable efforts by foster care agencies to preserve and reunite families. Furthermore, both statutes require states to submit a "plan" in order to receive reimbursement from the federal government. 42 U.S.C. §§ 671(a), 1396a(a) (1988). Chief Justice Rehnquist distinguished the two statutes by pointing out that the Medicaid statute and accompanying regulations at issue in *Wilder* detail the factors one should consider in determining the methods for calculating reasonable rates. *Artist M.*, 112 S. Ct. at 1368. He stated that, by contrast, there is no federal statutory guidance on how to define reasonable efforts; the AACWA, Chief Justice Rehnquist continued, left the states a great deal of discretion to define the term. *Id.* at 1368-69 & n.15. The Court was not persuaded by the fact that the Department of Health and Human Services had suggested services that foster care agencies can offer to the public, even though by implication, the implementation of any of these suggestions might constitute evidence of reasonable efforts. 45 C.F.R. § 1357.15(e)(2) (1991). See *supra* note 136 for a list of these suggested services.

The Medicaid Act required a state to consider three factors when determining its method for calculating reasonable rates: statutory requirements for adequate nursing home care, the unique nature of a facility serving a large number of low-income patients, and special situations in which a hospital provides in-patient care when long-term nursing home care would be adequate but is not available. *Wilder*, 496 U.S. at 519 n.17. The majority in *Artist M.* apparently believed that the specificity of these Medicaid regulations—which outline the factors one must *always* consider when calculating reasonableness—are not comparable (in terms of demonstrating Congress's intent to create an enforceable right) to a list of *suggested* foster care services. *See Artist M.*, 112 S. Ct. at 1368. In contrast, Justice Blackmun believed the reasonable-efforts provision was specific enough to be enforceable by the courts. *Id.* at 1374 (Blackmun, J., dissenting). He analogized to *Wilder*, pointing to the Court's comment there that " '[w]hile there may be a range of reasonable rates, there certainly are *some* rates outside that range that no State could ever find to be reasonable and adequate under the Act.' " *Id.* at 1374 (Blackmun, J., dissenting) (quoting *Wilder*, 496 U.S. at 520).

155. *Wilder*, 496 U.S. at 509. The *Wilder* Court did not expressly state that there is a presumption in favor of enforceability under § 1983 when there is demonstrated legislative intent to benefit the putative plaintiff, but the language of the opinion implies such a presumption. *See id.* at 508-09 n.9.

under traditional § 1983 analysis. Furthermore, the opinion contains only indirect references to the other two factors traditionally considered in similar § 1983 actions.[156] The Chief Justice's entire analysis in *Artist M.* rested on his conclusion that Congress did not intend to require states receiving AACWA funding to make reasonable efforts to avoid removing children from their homes and to reunite families, yet he made no explicit reference to the "binding obligations versus congressional preference" exception described so explicitly in *Wilder*.[157]

While Chief Justice Rehnquist did not state *Wilder*'s three-part test for determining if an enforceable right had been created under § 1983,[158] he may have applied the three prongs indirectly.[159] Perhaps, since the Court made reference to the plaintiffs as "beneficiaries" of the AACWA,[160] it simply assumed, without articulation, that the plaintiffs in *Artist M.* were intended beneficiaries of the Act and moved on to examining whether the relevant exceptions—mere congressional preference or vagueness—applied.[161] Furthermore, in its extensive examination of the legislative intent of the reasonable-efforts clause, the Court may have addressed indirectly the second and third prongs of the *Wilder* test.[162]

The Court appeared to address the "binding obligation" prong by juxtaposing the language of the reasonable-efforts clause with its legislative intent.[163] Chief Justice Rehnquist acknowledged that the AACWA

156. These other two factors are the creation of a binding obligation (rather than a mere congressional preference) and the fact that the statute not be too vague for the courts to enforce. *Id.* at 509.

157. *Artist M.*, 112 S. Ct. at 1366-67; *Wilder*, 496 U.S. at 509, 510-12. Rather than relying on the traditional test for determining enforceable rights under § 1983, Chief Justice Rehnquist applied a more fact-based analysis. He outlined the Court's holdings in three decisions that were, presumably, the most relevant to the resolution of *Artist M.*: Pennhurst State School & Hospital v. Halderman, 451 U.S. 1 (1981) (discussed *supra* note 78); Wright v. Roanoke Redevelopment & Housing Authority, 479 U.S. 418 (1987) (discussed *supra* notes 89-103 and accompanying text); and *Wilder* (discussed *supra* notes 104-28 and accompanying text). *Wright* involved the reasonableness of utility rates for public housing tenants, *Wright*, 479 U.S. at 420, and *Wilder* involved the reasonableness of reimbursement rates for Medicaid providers, *Wilder*, 496 U.S. at 503. The Chief Justice noted that *Wright* and *Wilder*, like *Artist M.*, involved statutory provisions in which the word "reasonable" was critical to the resolution of the case. *Artist M.*, 112 S. Ct. at 1367. According to Chief Justice Rehnquist, however, the similarity between these three cases was not dispositive of the issues in *Artist M.* because in *Wright* and in *Wilder* the Court "took pains to analyze the statutory provisions in detail, in light of the entire legislative enactment," to determine if the statute had created rights enforceable under § 1983. *Id.*

158. *See supra* notes 56, 154-57, and accompanying text.

159. *See infra* notes 160-77 and accompanying text.

160. *Artist M.*, 112 S. Ct. at 1367, 1370.

161. *See id.* at 1367-70.

162. *See infra* notes 163-76 and accompanying text.

163. *Artist M.*, 112 S. Ct. at 1367-70.

"is mandatory in its terms";[164] nevertheless, he continued, courts must not hold every phrase of a statute to be enforceable, but must determine precisely what is required under the statute.[165] The Chief Justice quoted a passage from *Pennhurst State School & Hospital v. Halderman*[166] to support this view that § 1983 only applies to a federal statute when Congress unequivocally intended it to do so:

> "The legitimacy of Congress's power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.' There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, *it must do so unambiguously.*"[167]

This passage reflects a recurring theme throughout *Artist M.*'s majority opinion: To prove that the statute creates an enforceable right in their favor, complainants under § 1983 must demonstrate clear legislative intent to create such a right.[168] Using this approach, the Court analyzed the regulations enforcing the AACWA's reasonable-efforts requirement and concluded that they provide no evidence that Congress intended to require states to do anything more than submit a plan to the Secretary in order to receive AACWA funding.[169] Accordingly, the Court held that the AACWA only requires states which receive funding to have a plan asserting that they will make the requisite reasonable efforts to preserve and reunite families.[170] Analyzing the Court's opinion under the rubric of *Wilder*'s test for enforceable rights, one could interpret this holding as

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164. *Id.* at 1367.

165. *Id.*

166. 451 U.S. 1 (1981).

167. *Artist M.*, 112 S. Ct. at 1366 (quoting *Pennhurst*, 451 U.S. at 17 (citations omitted) (emphasis added)).

168. *Id.* at 1366-67.

169. *Id.* at 1369. The regulations referred to are 45 C.F.R. 1356.21, 45 C.F.R. 1357.15 (1991).

170. *Artist M.*, 112 S. Ct. at 1370. The Court reached this conclusion even though the AACWA requires state plans to be "in effect in all political subdivisions of the State and, if administered by them, be mandatory upon them." *Id.* at 1368 (quoting 42 U.S.C. § 671(a)(3) (1988)). The Court did not think the words "in effect" modified the word "plan," but thought that they simply meant that the plan must apply to all state entities administering the plan. *Id.*

Wilder and *Artist M.* both addressed the "plan is enough" issue—whether plaintiffs should have substantive rights instead of just procedural ones. *Id.* at 1370-71 (Blackmun, J., dissenting). The *Artist M.* Court held that the only enforceable right the AACWA creates in plaintiffs is the right that a state "have a plan" asserting that it is making reasonable efforts to keep children in the home and reunite families. *Id.* at 1367. The *Wilder* Court, in contrast, rejected this line of argument from Justice Rehnquist's dissent:

> The dissent . . . apparently would hold that the only right enforceable under § 1983 is

a finding by the Court that there is a binding obligation on the states under the reasonable-efforts requirement, but that obligation is simply to have a plan containing the requisite elements.[171]

Through his analysis of the legislative intent of the reasonable efforts clause in *Artist M.*, Chief Justice Rehnquist also may have addressed the third prong of *Wilder*'s enforceable rights test: the requirement that the statute not be so vague and amorphous that the judiciary cannot competently enforce it.[172] The Chief Justice explained that the reasonable-efforts clause is not like the statute at issue in *Wilder*, where the statute and accompanying regulations detailed the factors relevant to determining whether rates were reasonable.[173] By contrast, he continued, the AACWA's reasonable-efforts requirement lacks a statutory or regulatory definition; Congress intended that individual states have the chance to define and evaluate an agency's reasonable efforts.[174] Furthermore, the Chief Justice referred more than once in *Artist M.* to the plaintiff's burden of showing that the reasonable-efforts clause confers on its beneficiaries an "unambiguous" right to sue under § 1983.[175] Thus, the hypothesis that the *Artist M.* Court may have applied the third prong of *Wilder*'s enforceable rights test passively is supported by the Court's analysis of the AACWA's defining regulations, the autonomy given to the states to define "reasonable efforts," and the showing that the *Artist M.* plaintiffs had to make to succeed under § 1983.[176]

In short, Chief Justice Rehnquist's explanation of the legislative in-

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> the right to compel compliance with these bare procedural requirements [of submitting a plan]. . . .
>
> We reject that argument because it would render the statutory requirements . . . and thus the entire reimbursement provision, essentially meaningless . . . . We decline to adopt an interpretation of the Boren Amendment that would render it a dead letter.

Wilder, 496 U.S. at 513-14. In his dissent to *Artist M.*, Justice Blackmun contended that the majority's resolution of the "plan is enough" issue is more consistent with *Wilder*'s dissent than with its holding. *Artist M.*, 112 S. Ct. at 1375 (Blackmun, J., dissenting). Nevertheless, Chief Justice Rehnquist's view on the issue has prevailed. *Id.* at 1367.

171. *See Artist M.*, 112 S. Ct. at 1370.

172. *Wilder*, 496 U.S. at 509. In analyzing the reasonable-efforts clause under § 1983, Chief Justice Rehnquist relied on statements in Pennhurst State School & Hospital v. Halderman, 451 U.S. 1 (1981), regarding ambiguity with regard to implied causes of action, which arguably involve standards different from § 1983 cases. *Artist M.*, 112 S. Ct. at 1366-67. Notably, the *Artist M.* Court made no reference to the standard used in *Wilder* to judge ambiguity; according to *Wilder*, a statutory right is unenforceable on the grounds of ambiguity only if it is "too vague and amorphous" to be *competently enforced* by the judiciary. *Wilder*, 496 U.S. at 509 (emphasis added).

173. *Artist M.*, 112 S. Ct. at 1368.

174. *Id.*

175. *Id.* at 1367, 1370.

176. *See supra* notes 173-75 and accompanying text.

tent of the reasonable-efforts clause simply may have served as a vehicle for the application of *Wilder*'s test without explicit reference to its three prongs.[177] Careful examination of legislative intent in § 1983 cases involving federal statutes is not inconsistent with the Court's prior case law; as Chief Justice Rehnquist pointed out in *Artist M.*, the *Wilder* Court took great care to examine the relevant statute and its legislative history.[178] On the other hand, as Justice Blackmun noted, there is little precedential support for the manner in which the majority used legislative history in *Artist M.*[179]

The first unorthodox way in which the *Artist M.* majority analyzed legislative intent was to use Congress's enactment of alternative enforcement mechanisms as a factor relevant to determining whether enforceable rights had been created.[180] Congress included in the AACWA enforcement provisions that are triggered when a state agency fails to make the requisite reasonable efforts.[181] Chief Justice Rehnquist admitted that these enforcement remedies may not rise to the level of a "comprehensive enforcement mechanism" evidencing legislative intent to preclude a remedy under § 1983.[182] Still, the Chief Justice asserted, the existence of these remedies demonstrates that disallowing a private remedy under § 1983 will not make the reasonable-efforts clause "a dead letter."[183] Justice Blackmun, in dissent, was very disturbed by the *Artist M.* majority's finding that the existence of an alternative enforcement

177. *See supra* notes 160-76 and accompanying text.

178. *Artist M.*, 112 S. Ct. at 1367. The *Wilder* Court thought legislative history was relevant to the enforceable right inquiry. *Wilder*, 496 U.S. at 505 ("In order to determine whether the Boren Amendment is enforceable under § 1983, it is useful first to consider the history of the reimbursement provision."). But the Chief Justice may have mischaracterized Wright v. Roanoke Redevelopment & Housing Authority, 479 U.S. 418 (1987), by stating that the *Wright* Court analyzed legislative intent when applying the enforceable rights rule. The bulk of the *Wright* Court's legislative history analysis fell within its discussion of the preclusion exception, an issue that relies completely on an interpretation of congressional intent. *Id.* at 424-29. The *Wright* Court's enforceable right discussion, in contrast, simply applied the traditional elements of enforceable rights analysis (i.e., intent to benefit and no vagueness) without analyzing legislative history closely. *Id.* at 429-32.

179. *See Artist M.*, 112 S. Ct. at 1377 (Blackmun, J., dissenting).

180. *See infra* notes 181-85 and accompanying text.

181. *Artist M.*, 112 S. Ct. at 1368. The Secretary can reduce or cut off funding to a state if it is not complying with its own plan. 42 U.S.C. § 371(b) (1988); *Artist M.*, 112 S. Ct. at 1368. In addition, to receive reimbursements for services given to a child removed from the home, a state agency must demonstrate a judicial finding that the agency made the required reasonable efforts. 42 U.S.C. § 672(a)(1); *Artist M.*, 112 S. Ct. at 1368.

182. *Artist M.*, 112 S. Ct. at 1368. The Court recognized the existence of the preclusion exception, but held that it did not need to address that issue in *Artist M.* because it had not even found that the reasonable-efforts clause created an enforceable right, the violation of which could be redressed by a § 1983 action. *Id.* at 1368 n.11.

183. *Id.* at 1369.

mechanism—the Secretary's power to reduce or withdraw funding in response to a state's failure to make reasonable efforts—weighed in favor of finding that no enforceable rights existed.[184] In effect, the *Artist M.* majority applied to the enforceable rights inquiry a factor that traditionally was considered relevant only to the validity of the preclusion exception to applying § 1983.[185]

There is another critical distinction between the *Artist M.* Court's approach to the relevance of legislative intent to a § 1983 action and the Court's approach in previous cases; the *Artist M.* Court did not view as distinct, discreet analyses the inquiry into § 1983's applicability to a statute and the inquiry into whether an implied cause of action exists directly under a statute.[186] The *Artist M.* Court found that the implied remedy claim under the reasonable-efforts clause could "be disposed of quickly" once the Court had concluded that the provision did not create an enforceable right under § 1983.[187] The Chief Justice explained: "The most important inquiry here *as well* [as in implied remedy cases] is whether Congress intended to create the private remedy sought by the plaintiffs."[188] Like Justice O'Connor in *Wright*,[189] Chief Justice Rehnquist confounded the test for ascertaining an enforceable right under § 1983 with that employed to discern whether a right of action may be implied from a federal statute.[190]

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184. *Id.* at 1376 (Blackmun, J., dissenting). As Justice Blackmun noted, the Court rejected this line of argument explicitly in Wilder v. Virginia Hospital Ass'n, 496 U.S. 498 (1990), and other cases. *Artist M.*, 112 S. Ct. at 1376 (Blackmun, J., dissenting); *see Wilder*, 496 U.S. at 514.

185. *See Artist M.*, 112 S. Ct. at 1368-69. The preclusion exception holds that a federal statute is not enforceable under § 1983 if Congress specifically foreclosed a § 1983 suit in the statute.

186. *Id.* at 1370.

187. *Id.*

188. *Id.* (emphasis added).

189. Justice O'Connor wrote in that case:

> Whether a federal statute confers substantive rights is not an issue unique to § 1983 actions. In implied right of action cases, the Court also has asked . . . whether "the statute create[s] a federal right in favor of the plaintiff." In determining whether a statute creates enforceable rights, the "key to the inquiry is the intent of the Legislature."

Wright v. Roanoke Redev. & Hous. Auth., 479 U.S. at 432-33 (1987) (O'Connor, J., dissenting) (citations omitted).

190. *Artist M.*, 112 S. Ct. at 1370. In fact, the Court not only may see the implied remedy inquiry and the § 1983 inquiry as similar; the Court may be starting to incorporate the factors of Cort v. Ash, 422 U.S. 66, 78 (1975), into its § 1983 analysis. The *Cort* factors have been criticized by individual Justices, however. Justice Scalia, for example, has noted the Court's reluctance to imply remedies from federal statutes and has pointed out what he reads as the Court's alterations to the *Cort* test:

> It could not be plainer that we effectively overruled the Cort v. Ash analysis in

The *Wilder* Court expressly distinguished these two inquiries. Justice Brennan asserted in that case that the test for § 1983's applicability is "a different inquiry" than the one used to determine if a private right of action may be implied from the federal statute in question:

> In implied right of action cases, we employ the four-factored *Cort* test to 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 source of *express* congressional authorization of private suits," these separation of powers concerns are not present in a § 1983 case. Consistent with this view, we recognize an exception to the general rule that § 1983 provides a remedy for violation of federal statutory rights only when Congress has affirmatively withdrawn the remedy.[191]

Under the *Wilder* decision, then, private plaintiffs only needed to show, at most, that Congress had not "affirmatively withdrawn" their right to sue for violations of that statute under § 1983.[192] In contrast, *Artist M.* seems to require that private plaintiffs prove in § 1983 actions what they must prove in implied remedy actions: clear legislative intent to confer the private remedy.[193]

Some may regard *Suter v. Artist M.* as a welcome limitation on the over-application of § 1983 to federal statutes. Others may hail the case as a shining example of judicial adherence to legislative intent. Indeed, the Court may have been motivated by several unarticulated but legitimate policy concerns when deciding *Artist M.* For instance, the Court may have been motivated by its distaste for Congress's attempts to coerce certain state action through the use of the Spending Clause of the Consti-

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Touche Ross & Co. v. Redington, 442 U.S. 560, 575-76 (1979) and Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 18 (1979), converting one of its four factors (congressional intent) into *the determinative factor*, with the other three merely indicative of its presence or absence.

. . . .

. . . [T]his Court has . . . abandoned its hospitable attitude towards implied rights of action. . . . The recent history of our holdings is one of repeated rejection of claims of an implied right.

Thompson v. Thompson, 484 U.S. 174, 189-90 (1988) (Scalia, J., concurring in the judgment). Justice Scalia would prefer for the Court to take a "categorical position that federal private rights of action will not be implied." *Id.* at 191 (Scalia, J., concurring in the judgment). Clearly, if the Court is beginning to incorporate the *Cort v. Ash* factors into its § 1983 analysis, that trend does not bode well for plaintiffs attempting to sue under § 1983.

191. Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498, 508-09 n.9 (1990) (citations omitted).

192. *See id.*

193. *See Artist M.*, 112 S. Ct. at 1370.

tution.[194] Even if one approves of the result reached by the Court, however, its reasoning and analysis are not without fault.

First, in determining whether an enforceable right was created, the *Artist M.* Court ignored its own precedent without explaining or justifying this departure.[195] *Wilder* and previous cases carefully had fleshed out the factors relevant to deciding if an enforceable right had been created—namely, the intent to benefit the putative plaintiff,[196] the creation of a binding obligation rather than congressional preference,[197] and the requirement that the right created not be too vague or amorphous to be judicially enforced.[198] The *Artist M.* Court's failure to even state these factors, much less apply them explicitly, is highly inconsistent with precedent in this area.[199] Moreover, even if one accepts the argument that the Court functionally applied the three prongs of the *Wilder* test,[200] the Court collapsed the *Wilder* test into a vague inquiry into legislative intent without explaining how to apply this new approach.[201]

The second difficulty with the *Artist M.* Court's analysis is its unusually heavy emphasis on the requirement that plaintiffs demonstrate that Congress intended to permit enforcement of a federal statute under § 1983.[202] Before *Artist M.*, the Court had used legislative history to but-

194. The Spending Clause of the Constitution gives Congress the power to "provide for the . . . general Welfare of the United States." U.S. CONST. art I, § 8, cl. 1. Congress may, incident to this Constitutional provision, " 'further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.' " South Dakota v. Dole, 483 U.S. 203, 206 (1987) (quoting Fullilove v. Klutznick, 448 U.S. 448, 474 (1980)). The spending power is limited, however; specifically, if Congress intends to condition federal funding to states, it " 'must do so unambiguously . . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.' " *Id.* at 207 (quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)). The Court has recognized that in some situations, Congress's financial inducement "might be so coercive as to pass the point at which 'pressure turns into compulsion.' " *Dole*, 483 U.S. at 210 (quoting Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937)).

195. *See supra* notes 154-57 and accompanying text.

196. *See supra* notes 96, 113-15, and accompanying text.

197. *See supra* notes 116-17 and accompanying text.

198. *See supra* notes 97-98, 118-20, and accompanying text.

199. *See supra* notes 96-97, 113-20, and accompanying text.

200. This Note proposes a means by which one can read the *Artist M.* opinion to have addressed all three prongs implicitly. *See supra* notes 159-77 and accompanying text.

201. *See supra* notes 159-93 and accompanying text. The Court appeared to take a result-oriented approach, emphasizing the views of the dissenting opinions in Wright v. Roanoke Redevelopment & Housing Authority, 479 U.S. 418 (1987), and Wilder v. Virginia Hospital Ass'n, 496 U.S. 498 (1990): respect for state autonomy and a desire to restrict § 1983's scope. *See Wright*, 479 U.S. at 440-41 (O'Connor, J., dissenting); *Wilder*, 496 U.S. at 528 (Rehnquist, C.J., dissenting); *see also supra* notes 99-103 (commenting on *Wright* dissent).

202. *See supra* notes 167-68, 186-93 and accompanying text.

tress its application of the traditional test factors[203] or to validate the defendant's assertion that Congress precluded enforcement of the statute under § 1983.[204] Now, after *Artist M.*, plaintiffs bringing suit under § 1983 shoulder virtually the same burden of demonstrating favorable legislative intent as private plaintiffs who attempt to persuade the Court to find an implied cause of action. In reaching this result, the *Artist M.* Court blurs the distinction between two causes of action that until *Artist M.* had remained appropriately distinct and separate.[205] Furthermore, according to the Court's decision in *Maine v. Thiboutot*,[206] Congress intended for § 1983 to create a private remedy for the enforcement of federal statutory rights.[207] Consequently, *Artist M.*'s apparent equation of the plaintiff's burden of proof in § 1983 actions with the plaintiff's burden in implied remedy cases[208] thwarts Congress's original intent in passing § 1983[209] and renders it useless with regard to federal statutory violations made under color of state law.[210]

The basic flaw of the *Artist M.* decision, then, is that it unnecessarily muddles § 1983 jurisprudence in the area of enforceable rights.[211] The Court's refusal to state pointedly and apply its traditional factors for determining whether enforceable rights have been created by a federal statute accomplishes precisely what the Court (and all courts) normally

203. The *Artist M.* Court said *Wilder* and *Wright* examined legislative intent carefully, but failed to clarify that they did so in the context of addressing the three traditional factors relevant to the creation of an enforceable right. *See Wilder*, 496 U.S. at 510 (putative plaintiff), 512 (binding obligation), 519 (vagueness); *Wright*, 479 U.S. at 420-30 (putative plaintiff and binding obligation); 431 (vagueness).

204. *See supra* notes 91-95, 125-28, and accompanying text; *see also supra* note 87 (discussing Smith v. Robinson, 468 U.S. 992, 1011-12 (1984), where the Supreme Court held that the "carefully tailored and comprehensive scheme" under the Education of the Handicapped Act precluded a § 1983 action).

205. *See supra* notes 186-93 and accompanying text.

206. 448 U.S. 1 (1980).

207. *Id.* at 4-8; *see supra* notes 2, 5, and accompanying text.

208. *See supra* notes 186-93 and accompanying text.

209. *See supra* note 5 and accompanying text.

210. As the Court indicated in Wilder v. Virginia Hospital Ass'n, 496 U.S. 498 (1990), implied remedy claims require a substantial showing of legislative intent to create a private right of action because the Court wants to ensure that Congress, rather than the judiciary, controls the creation of private remedies for violations of federal statutes. *Id.* at 508 n.9. Section 1983 claims under federal statutes do not require such a substantial showing of legislative intent regarding the statute sought to be enforced because Congress indicated its intent to permit such enforcement by enacting § 1983. *Id.*; *see supra* notes 191-92 and accompanying text. The fact that the *Artist M.* Court stirs the § 1983 inquiry regarding enforceable rights into the implied remedy "pot" is especially dangerous for plaintiffs, in light of the Court's extreme reluctance—especially in recent cases—to imply a cause of action under federal statutes. *See supra* note 190.

211. *See supra* notes 195-210 and accompanying text.

attempt to avoid by adhering to the principle of "stare decisis et non quieta movere":[212] it invites confusion in the lower courts.[213] The Court would have served the lower courts far better by either announcing clearly that it was rejecting the traditional test for enforceable rights as articulated in *Wilder*,[214] or by explaining that it was addressing *Wilder*'s three-part test for enforceable rights through its analysis of the legislative intent of the reasonable-efforts clause.[215] In fact, there is a strong argument that if the Court had followed and applied *Wilder*'s three prongs in a manner consistent with its previous cases, it would have found the reasonable-efforts provision enforceable under § 1983.[216]

Lower courts may interpret the *Artist M.* holding in several ways. The narrowest reading of *Artist M.* is that it is a fact-specific decision; as one lower-court case has already demonstrated,[217] a court faced with a

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212. "To adhere to precedents, and not to unsettle things which are established." BLACK'S LAW DICTIONARY 1406 (6th ed. 1990).

213. The doctrine of stare decisis represents a judicial policy; "security and certainty require that established legal principle . . . be recognized and followed" in cases with facts substantially similar to those of the precedential case. *Id.*

214. *See supra* notes 154-57, 195-210, and accompanying text.

215. *See supra* notes 159-77 and accompanying text.

216. In his dissent to *Artist M.*, Justice Blackmun carefully explained how the *Wilder* test should have applied to the reasonable-efforts clause. First, he pointed out that the "plaintiff children" in *Artist M.* were "clearly the intended beneficiaries of the requirement that the State make 'reasonable efforts' to prevent unnecessary removal and to reunify temporarily removed children with their families." *Artist M.*, 112 S. Ct. at 1372-73 (Blackmun, J., dissenting). Next, Justice Blackmun noted that the *Wilder* Court rested its holding that the Boren Amendment created a binding obligation on two factors: (1) the Amendment was "cast in mandatory" terms, and (2) the Amendment expressly conditioned funding on state compliance with its provisions, requiring the Secretary of HHS to withhold funds from states not in compliance. *Id.* at 1372 (Blackmun, J., dissenting). According to Justice Blackmun, the reasonable-efforts clause had similar features and thus placed a binding obligation on the state. *Id.* at 1373 (Blackmun, J., dissenting). He noted that neither the defending state officials nor *amicus* United States disputed this point. *Id.* (Blackmun, J., dissenting). Finally, Justice Blackmun concluded that the Boren Amendment should not be distinguished from *Artist M.*'s statute with regard to the third prong of *Wilder*'s test. *Id.* (Blackmun, J., dissenting). He asserted that the Boren Amendment did not contain as "objective" a benchmark as the Illinois officials contended; furthermore, he argued that the *Wilder* Court had found that the Boren Amendment was not too vague to be enforced, even though Congress had given the states "considerable autonomy in selecting the methods" they would use to calculate what rates are reasonable. *Id.* at 1374 (Blackmun, J., dissenting). In light of these findings in *Wilder*, Justice Blackmun insisted, there was no reason to find that the reasonable-efforts clause was too vague to enforce. *Id.* (Blackmun, J., dissenting).

217. Pfoltzer v. Fairfax County Dept. Human Dev., 966 F.2d 1443 (1992) (affirming without opinion grant of summary judgment to defendants on plaintiffs' *Artist M.*-type claim). Of course, another result of the *Artist M.* ruling is that the courts that relied on the Seventh Circuit's decision in *Artist M.* will be compelled to reverse their verdicts if defendants request an appeal. *See, e.g.*, Winston v. Children & Youth Servs. of Del. County, 948 F.2d 1380, 1387-88 (1991) (following *Artist M.*), *abrogated by* Suter v. Artist M., 112 S. Ct. 1360 (1992), *cert. denied*, 112 S. Ct. 2303 (1992).

suit brought to enforce the reasonable-efforts requirement of the AACWA under § 1983 undoubtedly will dismiss the claim under *Artist M.*'s holding.[218] Many courts, however, may not restrict *Artist M.*'s applicability to the reasonable-efforts issue or even to all provisions of the AACWA. One court has already cited *Artist M.* as the Supreme Court's most recent word on "when a federal statute confers a right enforceable through § 1983."[219] Certainly, a court that applies *Artist M.* to all of its § 1983 cases involving federal statutes can do so without changing its prior approach to these cases too drastically. The court simply can apply the traditional analysis of § 1983 as used in *Wilder* and then use *Artist M.* as an example of how the Court has interpreted a given § 1983 fact pattern;[220] after all, the *Artist M.* Court did not overrule *Wilder*, and, in fact, presumed to rely partly on *Wilder*'s principles.[221]

For courts that want to limit the number of federal statutes that may be enforced under § 1983, however, *Artist M.* provides powerful ammunition. Courts may use the case to justify abandoning *Wilder*'s three-step test for evaluating the enforceable rights issue. Under this reading of *Artist M.*, these courts can shift a heavier burden onto plaintiffs to

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218. *Pfoltzer*, 966 F.2d at 1443.

219. Clifton v. Schafer, 969 F.2d 278, 283 (7th Cir. 1992). The Clifton court addressed the enforceability, under § 1983, of a portion of the Social Security Act; the provision in question required states to adopt a plan that provides for a system of hearings before reducing the benefits of a recipient of Aid for Families with Dependent Children (AFDC). *Id.* at 284. The court held that this provision, like the reasonable-efforts clause, requires only that the state "adopt a plan" that meets the statutory requirements. *Id.* Interestingly, the *Clifton* court distinguished Wilder v. Virginia Hospital Ass'n, 496 U.S. 498 (1990), from *Artist M.* by concluding that in *Wilder*, the Court "held simply that health care providers could sue to enforce their right to a state plan that did not violate the Boren Amendment." *Clifton*, 969 F.2d at 285. In contrast, the court continued, Clifton was suing—as had the plaintiffs in *Artist M.*—for a "violation of a concededly legal plan." *Id.*

The *Clifton* court's interpretation of *Wilder* seems odd in light of the *Wilder* Court's vehemently expressed intention to protect not only the procedural rights of the plaintiffs—the right to a plan—but their substantive rights as well. *Wilder*, 496 U.S. at 513-14; *see supra* note 170 (discussing the conflict between *Wilder* and *Artist M.* on the issue of procedural versus substantive rights under § 1983). *Clifton* represents the problem with the *Artist M.* decision that this Note attempts to address; because *Artist M.* is so inconsistent with *Wilder*—reaching quite different conclusions with regard to very similar facts, *see supra* notes 154, 216—the lower courts will have trouble applying both *Artist M.*'s principles *and Wilder*'s three-part test.

220. This is the approach the *Clifton* court used. *Clifton*, 969 F.2d at 283-84. Apparently, that court did not read *Artist M.* as a radical departure from traditional § 1983 jurisprudence; rather, the court simply noted that the *Artist M.* majority had "based its analysis, in large part, on the fact that [the statute in question] required only that a state have a plan providing that the state will make 'reasonable efforts' to prevent" removal and facilitate familial reunion. *Id.* at 284 (citing *Artist M.*, 112 S. Ct. at 1367, 1369). The *Clifton* court stressed *Artist M.*'s finding that the AACWA did not define "what 'reasonable efforts' might entail." *Id.* (citing *Artist M.*, 112 S. Ct. at 1367-69).

221. *Artist M.*, 112 S. Ct. at 1367-68.

produce evidence of Congress's intent to create a private remedy for violations of a statute under § 1983. Like the majority in *Artist M.*, courts so inclined may use a case-by-case approach, rather than the structured test of *Wilder*, to preserve their own flexibility in applying § 1983.

Artist M.'s significance lies not only in its departures from traditional legal analysis;[222] the ruling will also have important practical implications, both for the court and the foster care systems. One certain result will be that the courts will not be burdened with suits brought by every citizen who thinks a state foster care agency is not trying hard enough to keep children in their homes and keep families together. As a consequence, states will retain the freedom to define reasonable efforts without risking after-the-fact evaluations of their decisions in litigation by private citizens in litigation. On the other hand, any deterrent effect reasonable-efforts suits may have had on foster care agencies will be lost as a result of the *Artist M.* decision. Children and families utilizing foster care can no longer bring suit in federal court against state agencies failing to make the requisite reasonable efforts; now, those parties will have to rely on the juvenile courts—that determine whether reasonable efforts have been made in each case[223]—and the Secretary of Health and Human Services—who can block or diminish funding of states failing to meet the reasonable-efforts requirement[224]—to ensure that foster care agencies consistently make the required reasonable efforts.

Justice Blackmun characterized the alleged deficiencies of the *Artist M.* decision in strong terms:

> In sum, the Court has failed, without explanation, to apply the framework our precedents have consistently deemed applicable; it has sought to support its conclusion by resurrecting arguments decisively rejected less than two years ago in *Wilder*; and it has contravened 22 years of precedent by suggesting that the existence of other "enforcement mechanisms" precludes [section] 1983 enforcement. At least for this case, it has changed the rules of the game without offering even minimal justification, and it has failed to acknowledge that it is doing anything more extraordinary than "interpret[ing]" the Adoption Act "by its own terms." Readers of the Court's opinion will not be misled by this hollow assurance. And, after all, we are dealing here with children.[225]

As Justice Blackmun indicates, the children who shuffle through the fos-

222. *See supra* notes 195-216 and accompanying text.

223. 42 U.S.C. § 672(a)(1) (1988).

224. *Id.* § 671(b).

225. *Artist M.*, 112 S. Ct. at 1377 (Blackmun, J., dissenting) (citations omitted).

ter care system every year will bear the brunt—such as it may be—of the Court's restrained application of § 1983 in *Artist M.* It remains to be seen whether other classes of plaintiffs, suing under other federal statutes, will suffer the same fate under *Artist M.* remains to be seen. Like a sophisticated, specialized tool lying in the garage, *Artist M.* is available to judges who want to narrow the scope of § 1983; the question now is whether they will pick it up and use it.

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