Federalism & Separation of Powers

U.S. Supreme Court Jurisprudence on Implied Private Rights of Action: The Pendulum Swings Back

*By Brian J. Leske**

Congress often does not explicitly provide for a private right of action when it enacts federal legislation.[1] Whether a private right of action can be implied from a federal regulatory scheme is thus a question of tremendous practical significance.[2] Although the U.S. Supreme Court initially approached the "implication question" liberally, judicial creation of private enforcement rights eventually raised separation-of-powers concerns. These concerns, in turn, gave rise to the development of an analysis based largely on congressional intent. In his concurring opinion in *Cannon v. University of Chicago*,[3] then-Associate Justice William H. Rehnquist recognized the importance of congressional clarity in creating private rights of action and warned that "this Court in the future should be extremely reluctant to imply a cause of action absent such specificity on the part of the Legislative Branch."[4] Almost twenty-five years later, it has become readily apparent that the Rehnquist Court has followed this path. Several opinions handed down during the October 2000 and 2001 Terms show that a majority of the Court is now hostile to implied private rights of action and is unlikely to extend them further.

This article first examines the development of implied private rights of action and the threat of independent judicial lawmaking. It observes that the Supreme Court's current approach to the implication question responds to heightened separation-of-powers concerns. Next, the article discusses a number of recent Supreme Court opinions that similarly have construed private rights of action and ancillary issues very narrowly.[5] These cases show that the Rehnquist Court is generally unwilling to risk disrupting the statutory enforcement scheme or to substitute its own judgment for that of Congress. The outcome in these cases also is consistent with recent sovereign immunity and federalism jurisprudence, which reflects a general inclination against private individual litigation and a preference for federal agencies to enforce federal statutory rights. Last, this article briefly considers whether the current trend in resolving the implication question impacts a related legal theory, namely, the use of mandamus to enforce statutory duties where the underlying statute does not provide for a cause of action. This particular theory is being employed in the litigation against Vice President Richard B. Cheney and other federal officials to obtain information related to the development of the Bush Administration's national energy policy.

A Brief History of Implied Private Rights of Action

The Supreme Court's approach to the implication of private rights of action has evolved steadily over the past two centuries. In short, the Supreme Court is now much less willing to imply a cause of action from a federal statute than ever before. It also is well aware of the separation-of-powers concerns inherent in judicial implication of federal enforcement rights.

But this was not always so. At common law, plaintiffs were entitled to a remedy for every legal wrong. Relying upon the general common law powers recognized in *Swift v. Tyson*,[6] federal courts implied private rights of action for violations of federal statutes.[7] Federal courts also used their equity powers to fashion relief for plaintiffs alleging irreparable injury due to violations of federal laws.[8] These early approaches focused almost exclusively on whether the plaintiff had an adequate remedy for an injury, and not on whether the legislature had intended to create a cause of action.[9]

The question of whether a court could imply a right of action from a federal statute arose infrequently in the nineteenth century. Congress did not grant federal courts jurisdiction to hear federal claims until 1875,[10] and it was not until the New Deal Era that this country witnessed an explosion of federal legislation.[11] Because many of these latter statutes did not provide explicitly for a cause of action, the implication question then began to arise with much more frequency and quickly gained in importance.

At the same time, the Supreme Court began to rein in the general notion that judicially enforceable rights exist even though there is no state or federal law that authorizes them. In *Erie v. Tompkins*, the Supreme Court held that "[t]here is no federal general common law,"[12] thereby overruling *Swift v. Tyson*, which had given federal courts general lawmaking authority that was wholly independent of state law. The *Erie* Court ruled that in the absence of an applicable constitutional provision or federal statute, "the law to be applied in any case is the law of the State."[13] Consequently, federal courts were no longer free to fashion and apply "substantive rules of common law applicable in a State."[14] Under *Erie* (and the Rules of Decision Act, upon which *Erie* is based),[15] federal courts instead had to rely upon a federal source for the authority to create any substantive federal law, including federal rights.[16]

In *Guaranty Trust v. York*, the Supreme Court extended the *Erie* doctrine to equitable actions.[17] In that case, the Court held that federal courts sitting in diversity must apply state statutes of limitations to equitable claims and could not use federal equity powers "to deny substantive rights created by State law or to create substantive rights denied by State law."[18] Although Guaranty Trust recognized that equity authorized federal courts to provide a *remedy* for a substantive right created by a State,[19] it adopted the post-*Erie* view that federal courts were not free to create a substantive *right* where no state or federal law would have done so.

Even in the wake of these decisions, the Supreme Court continued its generous approach toward the implication of private rights of action.[20] This trend continued until the Supreme Court decided *Cort v. Ash*.[21] At issue in *Cort* was

whether a private right of action for damages could be implied under 18 U.S.C. § 610, which was a criminal statute prohibiting certain corporate expenditures. The Court concluded that no private right of action existed, and announced a new four-factor test for courts to analyze the implication question: (1) whether the plaintiff belonged to the class of persons the statute was designed to protect; (2) whether Congress intended to create or deny a private remedy; (3) whether that private remedy was consistent with the statutory scheme and/or purpose; and (4) whether the right and remedy traditionally were relegated to state law.[22]

Although the *Cort* factors included consideration of legislative intent, federal courts remained free to imply a cause of action without regard to whether Congress intended to grant one. This open-ended approach was strongly criticized, particularly on separation-of-powers grounds.[23] In his dissent in *Cannon*, for example, Justice Powell argued that because federal power is limited—that is, each branch of government can exercise only the power that is specifically and affirmatively granted to it—judicial recognition of causes of action risked distorting the constitutional process.[24]

To be sure, Article I of the U.S. Constitution provides in pertinent part that "All legislative Powers herein granted shall be vested in a Congress of the United States."[25] As the Legislative Branch, Congress is responsible for "making" law, which includes determining when private parties are to be given causes of action under legislation it enacts. Article III of the U.S. Constitution, on the other hand, provides that "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[26] This provision can be understood as both a grant and limitation on the authority of the federal courts, because Congress alone is responsible for determining the federal courts' jurisdiction. In exercising the judicial power, federal courts must evaluate federal statutes in light of a Constitution that provides for this separation of powers.

Under these principles, law "made" by the judiciary—here, judicial creation of private enforcement rights without regard to legislative intent—arguably lacks constitutional legitimacy because it does not follow constitutionally prescribed lawmaking procedures.[27] Likewise, by implying a cause of action where none is expressed in the text of a federal statute or otherwise clearly intended by the legislature, there is a legitimate concern that a federal court impermissibly expands the scope of its own jurisdiction by "creating" a federal question where one ordinarily does not exist.[28]

Beginning with *Cannon*, the Supreme Court began to abandon the *Cort* factors in favor of a much narrower approach.[29] This new approach limited the role of federal courts to determining whether Congress intended to create a private cause of action.[30] The judicial task, the Court emphasized in these post-*Cannon* cases, is to determine not only whether the federal statute demonstrates an intent to create a private right, but also whether the statute demonstrates an intent to create a private remedy.[31]

In these cases, the Supreme Court treated the implication question as one of statutory construction, which allowed it to avoid difficult questions regarding its constitutional authority to imply causes of action.[32] Indeed, when a federal court concludes that Congress intended to create a private cause of action, it can be said to be performing the traditional judicial task of interpreting and applying the statute, rather than improper lawmaking.[33]

Since *Cannon*, the primacy of congressional intent has prevailed, and the Supreme Court consistently has concluded that no private right of action exists unless the statutory text grants such a right, either explicitly or through evidence of clear congressional intent.[34]

Recent Supreme Court Jurisprudence: The Pendulum Continues To Swing

During the October 2000 and 2001 Terms, the Supreme Court decided several more cases that construed private rights of action or ancillary issues very narrowly. These opinions confirm not only a clear reluctance on the part of the Rehnquist Court to imply a private right of action from a federal regulatory scheme, but also that a majority of the Court is against extending implied private rights of action any further. In addition, these cases demonstrate that both separation-of-powers and federalism concerns guide the Court in approaching the implication question.

First, *Alexander v. Sandoval*[35] presented the question whether private individuals could sue to enforce disparate-impact regulations promulgated under § 602 of Title VI of the Civil Rights Act of 1964, which prohibits racial discrimination in federally funded programs and activities. In determining whether a private cause of action against the State could be implied from that section, the Supreme Court expressly rejected the invitation "'to provide such remedies as are necessary to make effective the congressional purpose.'"[36] The Court wholly refused to venture beyond Congress's statutory intent, observing that "[w]ithout it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute."[37]

After analyzing the text, structure, and remedial scheme of Title VI and its amendments, the *Sandoval* Court found no "'rights-creating'" language, and concluded that nowhere "does Title VI display an intent to create a freestanding private right of action to enforce regulations promulgated under § 602."[38] This conclusion is significant because the Court previously assumed that a private right of action existed to enforce § 601 of Title VI, which banned intentional discrimination.[39] In *Sandoval*, however, the Court clearly stated that it is no longer in favor of implying private rights of action in the statutory context.

Next, in *Barnes v. Gorman*[40] the Supreme Court limited the types of remedies available in private suits brought under Title VI and many other federal statutes. In that case, a jury had awarded both compensatory and punitive damages to a plaintiff who had sued certain state governmental entities under § 202 of the Americans with Disabilities Act of 1990 ("ADA"), which prohibits discrimination against the disabled by public entities, and § 504 of the Rehabilitation Act of 1973, which prohibits discrimination against the disabled by recipi-

ents of federal funding, including private organizations. Although a right of action existed, the scope of "appropriate relief" for violations of those statutes remained unclear under existing precedent.[41]

To determine the types of damages available, the Supreme Court noted that legislation that places conditions on the grant of federal funds (such as Title VI) invokes Congress's power under the Spending Clause.[42] The Court also noted that this relationship between the federal and state governments has been characterized as contractual in nature.[43] Observing that punitive damages are not available for breach of contract, the Court concluded that punitive damages could not be awarded in suits enforcing Spending Clause legislation.[44]

Because many statutes—including the ones at issue in *Barnes*—adopt the remedies, procedures and rights in Title VI, punitive damages will not be available under a large number of federal statutes. Moreover, Congress seldom explicitly authorizes the recovery of punitive damages in legislation it enacts, and, in light of *Barnes*, it is unlikely that the Supreme Court will imply a punitive damages provision in the future.

In addition to implied private rights of action, certain federal rights can be redressed through an action under 42 U.S.C. § 1983, which provides redress for violations of federal statutes under color of state law.[45] In *Gonzaga University v. Doe*[46] also decided during the October 2001 Term, a student brought a § 1983 action for damages against a private university to enforce provisions of the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g, which prohibits federal funding of education institutions that have a policy of releasing student records to unauthorized persons.[47] The Supreme Court foreclosed the suit, holding that there is no private right of action under § 1983 to enforce the relevant provisions of the statute.

Of particular importance, the Supreme Court in *Gonzaga* rejected the suggestion that its implied right of action cases are distinct from its § 1983 cases. It stated that although the question whether a statutory violation may be enforced through § 1983 is a different inquiry than whether a private right of action can be implied from a particular statute, "the inquiries overlap in one meaningful respect—in either case [a court] must first determine whether Congress *intended to create a federal right*."[48] Clarifying the test set forth in *Blessing v. Freestone*,[49] the Supreme Court declared that "if Congress wishes to create new rights enforceable under § 1983, it must do so in clear and unambiguous terms—no less and no more than what is required for Congress to create new rights enforceable under an implied private right of action."[50]

Gonzaga thus places plaintiffs seeking to enforce federal statutory rights under § 1983 on the same initial footing as plaintiffs proceeding under an implied private right of action theory.[51] It also confirms that where a remedial statute does not explicitly confer any enforceable rights,[52] individualized rights must unambiguously be found elsewhere to permit a cause of action. The practical effect is to replace the presumption found in the early § 1983 cases—specifically, that plaintiffs seeking to vindicate federal rights may proceed so long Congress has not foreclosed a § 1983 action—with the presumption now found in the implication cases. As discussed above, this presumption is against finding a right of action unless Congress has clearly demonstrated its intent to grant one.

Several considerations could explain the Court's more narrow approach to § 1983 cases and the implication question in general.[53] The Court may be concerned that the implied enforcement of a federal statute may be different than what Congress had intended, or that substantive and remedial provisions in the statute were a legislative compromise, which might be upset by judicial implication.[54] The Court also may have recognized that although numerous federal statutory provisions cannot be enforced in court under its new approach, they nonetheless could be enforced by the appropriate administrative agency. This may be what Congress intended in the first place, because specialized agencies are subject to outside political pressures and may be in the best position to pursue enforcement efforts. In fact, administrative law recognizes that the executive branch, rather than the judiciary, is responsible for enforcing federal policies embodied in federal legislation.

It also is worth noting here that the outcome in this line of cases is consistent with the Supreme Court's recent immunity and federalism jurisprudence, which reflects a general inclination against private individual litigation and a preference for federal agencies to enforce certain statutory rights. For example, in *Alden v. Maine*,[55] the Court dismissed an action under the Fair Labor Standards Act of 1938 on the grounds that States were immune from suits in their own state courts. In the Court's view, federal authorization of private suits against nonconsenting States raised serious federalism concerns. The Court believed that it also might threaten a State's financial integrity, which would not be present if decision-making was vested in a national power. Likewise, in dismissing a student's § 1983 action for unauthorized disclosure of educational records, the Court in *Gonzaga* refused to subject state and local school officials to private suits for money damages for failing to comply with federal funding conditions. The *Gonzaga* Court observed that "Congress expressly authorized the Secretary of Education to 'deal with violations' of the Act," and, thus, the Department of Education presumably could protect those students' rights.[56] And in *Equal Employment Opportunity Comm'n v. Waffle House, Inc.*,[57] the Court allowed the EEOC to pursue victim-specific judicial relief in an enforcement action under Title I of the ADA, despite an agreement between the employer and employee to arbitrate any dispute or claim. The Court appeared content to defer to the agency's decision regarding enforcement of various provisions of the statute, even though the law generally prefers arbitration over litigation.

Finally, in cases involving alleged violations of constitutional rights, the Supreme Court has approached the implication question very differently. Traditionally, the Court has been much more willing to recognize implied rights of action in constitutional cases than in statutory cases.[58] The chief basis cited for this distinction is that constitutional provisions rarely include an express cause of action, whereas Congress has the opportunity to include a private cause of action in legislation it enacts.

In *Correctional Services Corp. v. Malesko*,[59] however, the Supreme Court continued with its narrow approach to the implication question, applying it to a constitutional case. In

Malesko, the Court declined to extend the holding of *Bivens* to imply a cause of action against a private company that was a government contractor.[60] It concluded that the rationale of *Bivens*—which was to deter federal officers from committing constitutional violations—does not extend to corporations. The Court further observed that its prior cases meant that "[s]o long as the plaintiff had an avenue for some redress, bedrock principles of separation of powers foreclosed judicial imposition of a new substantive liability."[61] Here, the respondent, a federal inmate imprisoned in a private facility, was not "a plaintiff in search of a remedy," but rather had many alternative remedies, including parallel tort remedies unavailable to inmates in government facilities.[62] The Court thus found no basis to create a new constitutional tort.

Concurring in the judgment, Justice Scalia, joined by Justice Thomas, declared unequivocally that the rationale of *Bivens* should not be extended any further: "*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action—decreeing them to be 'implied' by the mere existence of a statutory or constitutional prohibition."[63] The concurrence noted that *Sandoval* "abandoned that power to invent 'implications' in the statutory field," and that "[t]here is even greater reason to abandon it in the constitutional field, since an 'implication' imagined in the Constitution can presumably not even be repudiated by Congress."[64]

Although the Rehnquist Court may not have abandoned implying private rights of action altogether, the pendulum clearly is swinging in that direction. The Court's narrow approach to the implication question applies in both constitutional and statutory cases, and generally reflects an unwillingness to risk distorting either the constitutional process or the statutory scheme. The result of this approach has been to reverse the presumption found in the first implication cases and to place the burden on plaintiffs to show that Congress clearly intended to grant a private right of action in the statute. And, assuming the ideological composition of the Court remains more or less the same, this trend likely will continue, and may impact the analysis of related legal theories.

The Use of Mandamus to Create A Private Right of Action: A New Look at the Question

Whether courts may use the mandamus jurisdictional statute[65] to provide a plaintiff with a right of action where the underlying substantive statute itself does not explicitly provide for one is an unresolved and complex question. Although a comprehensive analysis of this question (and the vitality of "nonstatutory" judicial review, discussed *infra*) is well beyond the scope of this article, this section will briefly consider how the Court's narrow approach toward the implication of private rights of action may impact certain claims in the litigation against Vice President Richard B. Cheney to obtain information related to the development of the Bush Administration's national energy policy.[66] This section first discusses the background of the Cheney litigation and the mandamus statute.[67] It next observes that current Supreme Court jurisprudence on implied rights of action casts doubt on the whether courts may use mandamus[68] essentially to create a cause of action where the underlying statute does not provide for one.

In January 2001, President George W. Bush created the National Energy Policy Development Group ("NEPDG") to gather information, deliberate, and provide him with recommendations for a national energy policy. The NEPDG consists of more than a dozen senior advisers, including the Vice President of the United States. In May 2001, the NEPDG issued a report that recommended a set of energy policies to be implemented through administrative action and proposed legislation.

Shortly thereafter, Judicial Watch, Inc., a self-described non-profit public interest law firm, filed suit in the U.S. District Court for the District of Columbia, alleging violations of the Federal Advisory Committee Act ("FACA") and the Freedom of Information Act ("FOIA"). In January 2002, the Sierra Club, a non-profit environmental organization, filed suit in U.S. District Court for the Northern District of California, asserting similar claims under FACA, the Administrative Procedures Act ("APA"), and the mandamus statute, 28 U.S.C. § 1361. The plaintiffs in these actions claimed that the NEPDG, Vice President Cheney, several Cabinet members, and certain private parties had unlawfully refused to provide copies of minutes and other documents related to NEPDG's deliberations and recommendations.

The suits eventually were consolidated before Judge Emmet G. Sullivan of the U.S. District Court for the District of Columbia. The federal defendants promptly moved for summary judgment, arguing (for purposes relevant here) that neither FACA nor the mandamus statute provides plaintiffs with a cause of action. The district court dismissed the FACA claims, concluding that, under *Sandoval*, "this Court has no choice but to hold that FACA provides no private right of action."[69]

However, the district court declined to dismiss the claims brought under the mandamus statute, relying on *Chamber of Commerce v. Reich*[70] and principles of so-called "nonstatutory" judicial review.[71] It ruled that "the mandamus statute may provide an avenue to remedy violations of statutory duties even when the statute that creates the duty does not contain a private right of action."[72] The district court concluded that FACA creates non-discretionary duties on the part of at least one of the federal defendants, and, therefore, that the plaintiffs properly stated a claim upon which relief could be granted.[73]

The district court's reliance on the mandamus statute is problematic for several reasons. Recent Supreme Court jurisprudence casts doubt over the propriety of "nonstatutory" judicial review under these particular circumstances and the use of mandamus to enforce FACA. The Supreme Court in *Sandoval* made clear that statutory intent to create a private right of action is controlling and courts simply are not free to imply one.[74] FACA does not explicitly confer a private right of action on plaintiffs, and therefore mandamus cannot be read to authorize judicial review of determinations made under that statute. Indeed, the *Sandoval* Court expressed grave concerns over the constitutionality of judicial implication of private enforcement rights.[75]

Recognizing these limitations, the district court concluded that no separation-of-powers concerns were presented because "Congress itself created the mandamus statute."[76] But

reliance on the mandamus statute as the sole basis for a cause of action is misplaced because the statute is jurisdictional in nature. In fact, Congress enacted the Mandamus and Venue Act of 1962[77] to broaden the venue in which mandamus actions against federal officers may be brought.[78] Specifically, section 1361 extended the power to issue mandamus to all federal district courts, which formerly was exercised only by the district court in Washington, D.C.

In enacting the mandamus statute, Congress did not intend to create any new substantive rights or a cause of action. Rather, section 1361 authorizes federal district courts to hear and award relief in statutory cases that are supported by independently-created substantive causes of action.[79] In this respect, the mandamus statute is much like section 1983, which is remedial in nature and confers no enforceable rights.[80] Additionally, the Supreme Court made clear in *Gonzaga* that a federal statute must unambiguously provide for a right of action to be enforceable under section 1983.[81] Because FACA does not explicitly confer a private right of action, it follows that it cannot be enforced through the mandamus statute.

Although the *Gonzaga* Court acknowledged that separation-of-powers concerns are more pronounced in the implied rights of action context than in the statutory context, it was not persuaded by this distinction. The Court explained: "But we fail to see how relations between the branches are served by having courts apply a multi-factor balancing test to pick and choose which federal requirements may be enforced by § 1983 and which may not."[82] This reasoning applies with equal force to the mandamus statute.

In light of the Supreme Court's narrow approach to the implication question, it is not clear that courts may use mandamus to create a cause of action where one does not exist in the substantive statute at issue. Under recent Supreme Court jurisprudence, reliance upon the mandamus statute to enforce those particular federal statutes may raise separation-of-power concerns, and it risks disrupting not only the enforcement scheme Congress has created, but the constitutional process as well.

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Footnotes

1. As used herein, the phrase "private right of action" refers to the right of a private party to seek judicial relief from injuries caused by a violation of a statutory duty.
2. This article does not expressly consider whether certain statutory rights may otherwise be enforced through an action brought under 42 U.S.C. § 1983. *See, e.g.*, Maine v. Thiboutot, 448 U.S. 1 (1980) (holding that persons may sue under § 1983 to enforce federal rights violated under color of state law). However, the Supreme Court has ruled that the threshold determination—"whether Congress *intended to create a federal right*"—is the same under both inquiries. Gonzaga Univ. v. Doe, 122 S. Ct. 2268, 2275 (2002).
3. 441 U.S. 677, 717 (1979) (Rehnquist, J., concurring).
4. *Id.* at 718. For a stronger contemporaneous criticism, see *id.* at 731 (Powell, J., dissenting) ("Absent the most compelling evidence of affirmative congressional intent, a federal court should not infer a private cause of action.").
5. *See, e.g.*, *Gonzaga*, 122 S. Ct. 2268; Barnes v. Gorman, 122 S. Ct. 2097 (2002); Correctional Services Corp. v. Malesko, 534 U.S. 61 (2001); Alexander v. Sandoval, 532 U.S. 275 (2001).
6. 41 U.S. (16 Pet.) 1, 18-19 (1842).
7. *See* Cass R. Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. CHI. L. REV. 394, 412 (1982) (citing Tex. & Pac. Ry. Co. v. Rigsby, 241 U.S. 33, 39-42 (1916) (implying a cause of action under the federal Safety Appliance Acts)).
8. *See* Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518 (1851) (invoking equity powers to conclude that a bridge constituted an actionable nuisance, even though no statutory cause of action existed); *see also* Boyle v. Zacharie, 31 U.S. (6 Pet.) 648, 658 (1832) (noting that "[i]n the exercise of [chancery] jurisdiction, the courts of the United States are not governed by the state practice").
9. Susan J. Stabile, *The Role of Congressional Intent in Determining the Existence of Implied Private Rights of Action*, 71 NOTRE DAME L. REV. 861, 864 (1996).
10. *Id.* at 865. This grant of authority is currently codified at 28 U.S.C. § 1331 (2000).
11. *Id.*
12. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).
13. *Id.*
14. *Id.*
15. The current version of the Rules of Decision Act, codified at 28 U.S.C. § 1652, provides that "[t]he laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."
16. *See Erie*, 304 U.S. at 78; *see also* Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1414-15 (2001) ("*Erie* demonstrates that federal courts—no less than Congress and the President—must respect federal law-making procedures.").
17. 326 U.S. 99, 111-12 (1945).
18. *Id*. at 105.
19. *See id.*
20. *See, e.g.*, J.I. Case Co. v. Borak, 377 U.S. 426, 433 (1964) (implying a private right of action under section 14(a) of the Securities Exchange Act of 1934 and declaring that "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose").
21. 422 U.S. 66 (1975).
22. *Id.* at 78.
23. *See, e.g.*, Cannon v. Univ. of Chi., 441 U.S. 677, 743 (1979) (Powell, J., dissenting) (observing that the *Cort* approach "allows the Judicial Branch to assume policymaking authority vested by the Constitution in the Legislative Branch").
24. *Id.*
25. U.S. CONST. art. I, § 1.
26. U.S. CONST. art. III, § 1.
27. *See Cannon*, 441 U.S. at 740 (Powell, J., dissenting) ("Of the four factors mentioned in *Cort*, only one refers expressly to legislative intent. The other three invite independent judicial lawmaking.").
Furthermore, some commentators have argued that rejection of unconventional federal lawmaking—that is, lawmaking that fails to comply with the procedures established in the Constitution for adopting the "Constitution," "Laws," and "Treaties" of the United States—not only preserves the Constitution's separation of powers, but also safeguards federalism, at least to the extent such lawmaking purports to displace state law. *See generally* Clark, *supra* note 16; *see also* Richard W. Creswell, *The Separation of Powers Implications of Implied Rights of Action*, 34 MERCER L. REV. 973, 991-92 (1983).
28. *See Cannon*, 441 U.S. at 746 (Powell, J., dissenting) ("By creating a private action, a court of limited jurisdiction necessarily extends its authority to embrace a dispute Congress has not assigned it to resolve.").
29. *See id*. at 688 (majority opinion) (relying on the *Cort* factors to find a private right of action under Title IX of the Education Amendments of 1972, but viewing them as the means through which to judge congressional intent).
30. *See, e.g.*, Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 15-16 (1979) (finding no private right of action under the Investment Advisers Act of 1940 and emphasizing that congressional intent to create a cause of action was dispositive); Touche Ross & Co. v. Redington, 442 U.S. 560, 568 (1979) (finding no private right of action under section 17(a) of the Securities Exchange Act of 1934 and limiting the approach "solely to determining whether Congress intended to create the private right of action").
31. *See Transamerica*, 444 U.S. at 14-16, 23-24; *Touche Ross & Co.*, 442 U.S. at 571.
32. *See* Clark, *supra* note 16, at 1424 (citing *Touche Ross & Co.*, 442 U.S. at 568); *see also Cannon*, 441 U.S. at 717 (Rehnquist, J., concurring) ("The question of the existence of a private right of action is basically one of statutory

construction.").

33. Even this point is subject to debate. Justice Scalia, for example, has suggested that the Court "get out of the business of implied private rights of action altogether" because "[a]n enactment by implication cannot realistically be regarded as the product of the difficult lawmaking process our Constitution has prescribed." Thompson v. Thompson, 484 U.S. 174, 191-92 (1988) (Scalia, J., concurring); *see also* Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 365 (1991) (Scalia, J., concurring) ("Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals.").

[34]. *See, e.g.*, Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A, 511 U.S. 164, 188 (1994) (finding no private right of action under the Securities Exchange Act of 1934 for conduct in aiding and abetting fraud by another); Karahalios v. Nat'l Fed'n of Fed. Employees, 489 U.S. 527, 532-33 (1989) (finding no private right of action under Title VII of the Civil Service Reform Act of 1978 for alleged violations of duty of fair representation); *see also Thompson*, 484 U.S. at 190 (Scalia, J., concurring) (compiling cases); Merrell Dow Pharms. Inc. v. Thompson, 478 U.S. 804, 812 n.9 (1986) (same).

35. 532 U.S. 275 (2001). In *Sandoval*, the Court split 5-4 along ideological lines. Justice Scalia authored the majority opinion, in which Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Thomas, joined.

36. *Id.* at 287 (quoting J.I. Case Co. v. Borak, 377 U.S. 426, 433 (1964)).

37. *Id.* at 286-87.

38. *Id.* at 288, 293.

39. *See Cannon v. Univ. of Chi.*, 441 U.S. 677, 699-701, 710-11 (holding that a private right of action existed to enforce Title IX of the Education Amendments of 1972, because it was patterned after Title VI).

40. 122 S. Ct. 2097 (2002). The decision in *Barnes* was unanimous. Justice Scalia delivered the opinion of the Court, in which Chief Justice Rehnquist and Justices O'Connor, Kennedy, Souter, and Thomas, joined. Justice Stevens disagreed with the analysis employed by the majority, and filed an opinion concurring in the judgment, in which Justices Ginsburg, and Breyer, joined. Justice Souter also filed a separate concurring opinion, in which Justice O'Connor joined.

41. *Id.* at 2100.

42. *Id.* (citing U.S. CONST. art. I, § 8, cl. 1).

43. *Id.* at 2100-01 (citing Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)).

44. *Id.* at 2102.

45. *See* Maine v. Thiboutot, 448 U.S. 1 (1980).

46. 122 S. Ct. 2268 (2002). The decision in *Gonzaga* was 7-2. Chief Justice Rehnquist authored the majority opinion, in which Justices O'Connor, Scalia, Kennedy, and Thomas, joined. Justice Breyer filed a concurring opinion, in which Justice Souter joined. Justice Stevens filed the dissenting opinion, in which Justice Ginsburg joined.

47. *Id.* at 2271. Although technically a suit against a private entity, the *Gonzaga* Court assumed without deciding that the disclosures occurred under color of state law. *Id*. at 2272 n.1.

48. *Id.* at 2275.

49. 520 U.S. 329 (1997).

50. *Gonzaga*, 122 S. Ct. at 2279.

51. The inquiries diverge when determining whether Congress intended to create a private *remedy* in the statute. This question is not raised by actions brought under § 1983, because in enacting that section, Congress intended to provide a mechanism for enforcing the violation of certain federal rights, albeit rights independently secured elsewhere.

52. In *Gonzaga*, "§ 1983 by itself does not protect anyone against anything." *Id.* at 2276 (quoting Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 617 (1979)).

53. *See generally* Sunstein, *supra* note 7, at 416-18 (outlining four considerations making it "troublesome to interpret section 1983 as conferring a [private] right of action").

54. *Id.* at 414.

55. 527 U.S. 706 (1999).

56. *Gonzaga*, 122 S. Ct. at 2278 (citation omitted).

57. 122 S. Ct. 754 (2002).

58. *See, e.g.*, Bivens v. Six Unknown Fed. Narcotics Agent, 403 U.S. 388 (1971) (implying a right of action for damages under the Fourth Amendment); *see also* Carlson v. Green, 446 U.S. 14 (1980) (implied damages remedy under the Cruel and Unusual Punishment Clause of the Eighth Amendment); Davis v. Passman, 442 U.S. 228 (1979) (implied damages remedy under the Due Process Clause of the Fifth Amendment). *But see* FDIC v. Meyer, 510 U.S. 471 (1994) (refusing to extend *Bivens* to a suit against a federal agency); Bush v. Lucas, 462 U.S. 367 (1983) (refusing to imply a new nonstatutory damages remedy for federal employees whose First Amendment rights are violated by their superiors).

The Supreme Court also consistently permits suits against state officers in their official capacities to enjoin ongoing violations of both federal statutory and constitutional law. *See, e.g.*, Ex parte Young, 209 U.S. 123 (1908); *see also* Verizon Md. Inc. v. Pub. Serv. Comm'n of Md., 122 S. Ct. 1753 (2002) (reaffirming the availability of *Ex parte Young*).

59. 534 U.S. 61 (2001). As in *Sandoval*, the Court split 5-4 along ideological lines. Chief Justice Rehnquist authored the majority opinion, in which Justices O'Connor, Scalia, Kennedy, and Thomas, joined.

60. *Id.* at 63.

61. *Id.* at 69.

62. *Id.* at 74.

63. *Id.* at 75 (Scalia, J., concurring).

64. *Id.*

65. 28 U.S.C. § 1361 (2000) ("The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.").

66. *See Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group*, No. 01-1530, 2002 U.S. Dist. LEXIS 12598 (D.D.C. July 11, 2002).

67. Virtually all the background information concerning the Cheney litigation was obtained from the Memorandum Opinion issued in the case on July 11, 2002, which can be found at 2002 U.S. Dist. LEXIS 12598. Likewise, much of the background concerning mandamus is from an article that appeared in the *Harvard Law Review*. *See* Clark Byse & Joseph V. Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action*, 81 HARV. L. REV. 308 (1962).

68. Often described as a "drastic remedy," mandamus may issue to compel a public official to perform a purely ministerial, i.e., nondiscretionary duty. The common law writ of mandamus was abolished by Federal Rule of Civil Procedure 81(b). However, 28 U.S.C. § 1651(a) (2000) provides that federal courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." Pursuant to their powers under that section, federal courts continue to grant equitable relief, including mandatory injunctions, which sometimes are referred to as "writs of mandamus."

69. *Judicial Watch*, 2002 U.S. Dist. LEXIS 12598, at *32-33. The district court did not dismiss the plaintiffs' APA claims against the Cabinet members, which alleged a failure to comply with FACA.

70. 74 F.3d 1322 (D.C. Cir. 1996).

71. *Judicial Watch*, 2002 U.S. Dist. LEXIS 12598, at *56-57. "Nonstatutory" review actions traditionally find their jurisdictional basis in the general grant of federal-question jurisdiction in 28 U.S.C. § 1331. *Reich*, 74 F.3d at 1327-28. Here, the district court identified the basis as the mandamus statute. Thus, "nonstatutory" judicial review is somewhat of a misnomer because all actions in the federal district courts must be based on some statute.

72. *Judicial Watch*, 2002 U.S. Dist. LEXIS 12598, at *58-59.

73. The district court acknowledged that it was premature to determine whether the relief of mandamus will or will not issue. To be sure, mandamus is a "drastic [remedy], to be invoked only in extraordinary situations." Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 34 (1980); *see also* Consolidated Edison Co. of N.Y. v. Ashcroft, 286 F.3d 600, 605 (D.C. Cir. 2002). Furthermore, it is not entirely clear that mandamus even could issue against the Vice President of the United States. *See* Franklin v. Massachusetts, 505 U.S. 788, 802-03 (1992); Swan v. Clinton, 100 F.3d 973, 978 (D.C. Cir. 1996).

74. *See* Alexander v. Sandoval, 532 U.S. at 275, 286 (2001); *see also* Correctional Servs. Corp. v. Malesko, 534 U.S. at 61, 66 (2001) (refusing to imply a cause of action for alleged constitutional violation).

75. This concern is particularly pronounced where Congress has manifested an intent to preclude judicial review in a statute. *See Reich*, 74 F.3d at 1328 ("To be sure, if Congress precluded non-statutory judicial review . . . that would be another matter."). In this regard, the federal defendants in the Cheney litigation noted that "Congress considered, but declined to include in FACA, an express right of action or other provision for judicial review." Memorandum In Support of Motion to Dismiss at 5, *Judicial Watch* (No. 01-1530).

76. *Judicial Watch*, 2002 U.S. Dist. LEXIS 12598, at *58.

77. Currently codified, in part, at 28 U.S.C. §§ 1361, 1391(e) (2000).

78. *See* Byse & Fiocca, *supra* note 67, at 318-19.

79. *See* Public Citizen v. Kantor, 864 F. Supp. 208, 213 (D.D.C. 1994); Mead Corp. v. United States, 490 F. Supp. 405, 407 (D.D.C. 1980), *aff'd*, 652 F.2d 1050 (D.C. Cir. 1981). *But see Reich*, 74 F.3d at 1327.

80. See Gonzaga Univ. v. Doe, 122 S. Ct. 2268, 2276 (2002) ("'[O]ne cannot go into court and claim a 'violation of §1983'—for § 1983 by itself does not protect anyone against anything.'") (citation omitted) (alteration in original).

81. *Id.*

82. *Id.* at 2277.