St. Mary's Law Journal

Volume 22 | Number 2 Article 6

1-1-1990

Under the Boren Amendment, Health Care Providers Have an Enforceable Right, Actionable under 42 U.S.C. 1983, to Challenge a State's Reimbursement Plan under the Medicaid Act.

C. Lee Cusenbary

CASENOTES

CIVIL RIGHTS—Medicaid Act—Under the Boren Amendment, Health Care Providers Have An Enforceable Right, Actionable Under 42 U.S.C. § 1983, to Challenge a State's Reimbursement Plan Under the Medicaid Act.

Wilder v. Virginia Hosp. Ass'n,
__ U.S.__, 110 S. Ct. 2510, 110 L. Ed. 2d 455 (1990).

The Virginia Hospital Association (VHA), a nonprofit corporation comprised of private and public hospitals, brought suit in federal district court against government officials[1] alleging that the Medicaid[2] reimbursement payments made by Virginia were not reasonable nor adequate as required under the Boren Amendment[3] to the Medicaid Act.[4] The state of Virginia

---

1. Wilder v. Virginia Hosp. Ass'n, 496 U.S. __, __, 110 S. Ct. 2510, 2514, 110 L. Ed. 2d 455, 463 (1990). The VHA brought suit in the United States District Court for the Eastern District of Virginia against state officials including the United States Secretary of Health and Human Services (Secretary), the Governor of Virginia, and the members of the State Department of Medical Assistance Services. *Id.* at __, 110 S. Ct. at 2514-15, 110 L. Ed. 2d at 459. The State Department of Medical Assistance Services administers Virginia's Medicaid program. *Id.*

2. Title XIX of the Social Security Act is also known as "the Medicaid Act." 42 U.S.C. § 1396a (1988). The Medicaid Act created a financial assistance program in which the federal government defrays a state's costs of medical care provided to the needy. *Id.*

3. 42 U.S.C. § 1396 (1988). The Boren Amendment, passed by Congress in 1980, created a new standard of compensation under the Medicaid Act, requiring "adequate and reasonable" compensation rather than "reasonable" compensation of intermediate care and nursing facilities. *Id.* In 1981, Congress extended the Boren Amendment's standard to include reimbursements to hospitals. Pub. L. 97-35, § 2175, 95 Stat. 808 (1981) (current version at 42 U.S.C. § 1396 (1988)). The reimbursement standard has also been extended to intermediate care facilities for the mentally retarded. Pub. L. 100-203, § 4211(h)(2)(A), 101 Stat. 1330 (1982) (current version at 42 U.S.C. § 1396a (1988)). The Boren Amendment states:

> a State plan for medical assistance must . . . provide . . . for payment. . .of the hospital services, nursing facility services, and services in an intermediate care facility for the mentally retarded provided under the plan through the use of rates (determined in accordance with methods and standards developed by the State. . .) which the State finds, and makes

filed a motion for summary judgment and, alternatively, a motion to dismiss on the ground that the Boren Amendment does not create a private right, redressable under 42 U.S.C. § 1983,[5] to challenge Virginia's compliance with the Medicaid Act.[6] The district court denied the motion.[7] Interpreting the

---

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 applicable 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.

42 U.S.C. § 1396a(a)(13)(A) (1988).

4. *Wilder*, 496 U.S. at __, 110 S.Ct. at 2513, 110 L. Ed. 2d at 460. The VHA sought injunctive and declaratory relief, including an order under which the state of Virginia would have to restructure their state plan to include new reimbursement rates. *Wilder*, 496 U.S. at __, 110 S.Ct. at 2515, 110 L. Ed. 2d at 464 (1990). Petitioners also seek compensation for 1982-1986, when the Consumer Price Index was used to determine reimbursement rates, rather than an index tied directly to inflation of medical care costs. *Id.* at __, 110 S.Ct. at 2514, 110 L. Ed. 2d at 463. In addition, the VHA contends that the appeals procedure in the Virginia Plan is inadequate due to its exclusion of an administrative appeals process. *Id.* at __, 110 S. Ct. at 2514 n.3, 110 L. Ed. at 463-64 n.3.

5. 42 U.S.C. § 1983 (1988). Section 1983 allows a civil cause of action for deprivation of rights. It states:

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. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Id.

6. *Wilder*, 496 U.S. at __, 110 S. Ct. at 2515, 110 L. Ed. 2d at 464. Petitioners' motion to dismiss was initially granted on grounds of collateral estoppel. *Id.* at __, 110 S. Ct. at 2515 n.4, 110 L. Ed. 2d at 464 n.4. On appeal, the Court of Appeals for the Fourth Circuit reversed on this issue. Virginia Hosp. Ass'n v. Baliles, 830 F.2d 1308, 1309 (4th Cir. 1987), *aff'd sub nom.*, Wilder v. Virginia Hosp. Ass'n, 496 U.S.—, 110 S. Ct. 2510, 110 L. Ed. 2d 455 (1990). The cooperative federal-state program created by the Medicaid Act is voluntary, but for a state to participate, it must submit a plan for medical assistance to the Secretary for approval. *See* 42 U.S.C. § 1396a(a) (1988). The plan must contain a comprehensive statement of the scope of the state's Medicaid plan. *See id.* at § 1396a(a)(13). Among other requirements, the state's plan must set forth a system of reimbursement to health care providers for the medical services provided to Medicaid patients. *Id.* The state plan for Medical Assistance for The Commonwealth of Virginia (the Plan) received approval from the Secretary in 1986. *See Wilder*, 496 U.S. at __, 110 S. Ct. at 2514, 110 L. Ed. 2d at 463. Virginia's Plan had previously been approved in 1982, but was resubmitted for approval following an amendment to the Plan. *Id.* The Plan sets forth a prospective formula which creates fixed reimbursement rates for specific medical services and procedures. *Id.* Providers are placed into "peer groups" according to the institution's size and location and compensated according to a formula which uses the median medical cost of medical care for each group. *Id.* The Plan bases the present reimbursement rates on the median cost of care for each peer group as of 1982, adjusted by an inflation index of medical care costs. *Id.* at __, 110 S. Ct. at 2514 n.3, 110 L. Ed. at 463 n.3. However, from

legislative history and language of the Boren Amendment, the Court of Appeals for the Fourth Circuit affirmed, holding that the Amendment created enforceable rights to reasonable and adequate reimbursement and that Congress did not foreclose a private remedy to enforce those rights.[8] The United States Supreme Court granted certiorari to determine whether the Boren Amendment created a federally protected right redressable under 42 U.S.C. § 1983 to challenge a state's compliance with the reimbursment provisions of the Medicaid Act.[9] Held—*Affirmed*. Under the Boren Amendment, health care providers have an enforceable right, actionable under 42 U.S.C. § 1983, to challenge a state's reimbursement plan under the Medicaid Act.[10]

The deprivation of a privilege, immunity, or right guaranteed by the Constitution or a law of the United States is actionable under 42 U.S.C. § 1983.[11] In most instances section 1983 provides a cause of action for violations of rights secured by federal statutes.[12] However, there are two exceptions to the availability of section 1983 to remedy a statutory violation.[13] A

1982 to 1986, the index used to adjust for inflation was the Consumer Price Index (CPI), which is not directly related to increases in medical care costs. *See id.*

7. *Wilder*, 496 U.S. at __, 110 S. Ct. at 2515, 110 L. Ed. at 464.

8. Virginia Hosp. Ass'n v. Baliles, 868 F.2d 653, 665 (4th Cir. 1989), *aff'd sub nom.*, Wilder v. Virginia Hosp. Ass'n, 496 U.S. __, 110 S. Ct. 2510, 110 L. Ed. 2d 455 (1990). Because the VHA sought merely prospective relief against the State, the Court of Appeals rejected Virginia's eleventh amendment argument challenging the justiciability of the suit. *Id.* at 662.

9. *See* Baliles v. Virginia Hosp. Ass'n, __ U.S. __, 110 S. Ct. 49, 107 L. Ed. 2d 18 (1989). The United States Supreme Court granted certiorari to decide a similar issue in a separate case, but that case was vacated as moot. *See* Coos Bay Care Center v. Oregon Dept. of Human Resources, 803 F.2d 1060 (9th Cir. 1986), *cert. granted*, 481 U.S. 1036, *vacated as moot*, 484 U.S. 806 (1987).

10. *Wilder*, 496 U.S. at __, 110 S. Ct. at 2525, 110 L. Ed. 2d at 476.

11. 42 U.S.C. § 1983 (1988). *See* Owen v. City of Independence, 445 U.S. 622, 649 (1980) (municipality liable for violation of individual's federally protected rights); Mitchum v. Foster, 407 U.S. 225, 240, n.30 (1972) (§ 1983 enlarged Civil Rights Act of 1971 to protect statutory rights). Section 1983 specifically protects rights, privileges, or immunities created by the Constitution and laws of the United States, and does not speak to violations of federal law not creating such rights, privileges or immunities. Golden State Transit Corp. v. Los Angeles, __ U.S.__, __, 110 S. Ct. 444, 448, 107 L. Ed. 2d 420, 427 (1989).

12. *See, e.g.*, Maine v. Thiboutot, 448 U.S. 1, 4 (1980) (Social Security Act provides rights protectable under § 1983); Monell v. Department of Social Services, 436 U.S. 658, 700-01 (1978) (legislative history of § 1983 reflects intent of Congress to provide remedy for abridgement of federally protected rights); Edelman v. Jordan, 415 U.S. 651, 675 (1974) (Aid to the Aged, Blind, and Disabled Act creates protectable right under § 1983); Rosado v. Wyman, 397 U.S. 397, 422 (1970) (§ 1983 suits appropriate to secure provisions of Social Security Act). *But see* Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 19 (1981) (two situations where federal statute does not provide federally protected right under § 1983).

13. *See* Wright v. Roanoke Redev. & Hous. Auth., 479 U.S. 418, 423 (1987) (Brooke Amendment clearly passes two-prong test restricting enforcement of rights under § 1983); *see*

plaintiff who alleges a violation of a federal statute may not bring suit under section 1983 where (1) the statute does not actually create enforceable rights, privileges, or immunities within the scope of section 1983, or (2) Congress intended to foreclose enforcement of the statute in its enactment.[14] To establish whether a federal statute creates a right enforceable under section 1983, a federal court must determine whether the statute in question was intended by Congress to assist the putative plaintiff.[15] If so found, the

---

also Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1, 19 (1981) (statutory provisions no more than congressional preference); *Sea Clammers*, 453 U.S. at 19 (Federal Water Pollution Control Act failed implied right of action prong of test required to utilize § 1983). Statutory provisions which are found to be only statements of findings indicating nothing more than a congressional preference of state action do not rise to the level of an enforceable right. *Sea Clammers*, 453 U.S. at 19; Shapiro, *Section 1983 Claims to Redress Discrimination in Public Employment: Are They Preempted by Title VII?*, 35 AM. U. L. REV. 93, 115 (1985) (statutory language necessary for § 1983 action); *see also* Note, *The Extension of Comity: Fair Assessment in Real Estate Ass'n v. McNary*, 32 AM. U. L. REV. 1123, 1142-43 (1983) (differentiating congressional preference from statute actionable under § 1983). The Court has held that administrative remedies, included in a statute which provides a right, may foreclose a private cause of action under § 1983 for violation of that right. *See* Smith v. Robinson, 468 U.S. 992, 1012 (1984) (Education of the Handicapped Act contains carefully tailored scheme for private causes of action which preclude § 1983 action).

14. *Wright*, 479 U.S. at 423. The two-part inquiry set forth in *Wright* is distinguishable from an inquiry regarding whether a private right of action is implied by a particular statute. *Compare Wright*, 479 U.S. at 423 (two-step inquiry to determine if Congress foreclosed enforcement of statute in enactment itself) *with* Cort v. Ash, 422 U.S. 66, 78 (1975) (four step inquiry to determine if Congress created private remedy within statute for violation of rights created by statute). The *Cort* analysis is a result of judicial concern for preserving the separation of powers, allowing Congress, rather than the courts, to control the availability of remedies for the violations of statutes. *See, e.g.*, Thompson v. Thompson, 484 U.S. 174, 191-92 (1988)(Scalia, J., concurring) (§ 1738 is additional source of expressed congressional authority for private causes of action). Since there are no separation of powers concerns in a § 1983 case, the *Cort* analysis is unnecessary. *See* Golden State Transit Corp. v. Los Angeles, __ U.S. __, __, 110 S. Ct. 444, 449, 107 L. Ed. 2d 420, 428 (1989) (supremacy clause does not create rights enforceable under § 1983); Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 613 (1979) (§ 1983 secures federal rights over state rights but creates no rights).

15. *Golden*, __ U.S. at __, 110 S. Ct. at 448, 107 L. Ed. 2d at 428. Historically, a plaintiff was required to establish that a statute implied a cause of action. *See Cort*, 422 U.S. at 79 (1975) (plaintiff must meet *Cort's* four pronged test). The courts would generally presuppose a cause of action where the statutory language explicitly bestowed a right directly on a class of persons which included the plaintiff in the case. Cannon v. University of Chicago, 441 U.S. 677, 690-91, n.13 (1979). Therefore, it was critical for a plaintiff's implied cause of action that he demonstrate that the statute contain a right specifically "in favor of" the plaintiff. *See Cort*, 422 U.S. at 78 (statute must create a right in plaintiff's favor); *see also Wright*, 479 U.S. at 432-33 (O'Connor, J., dissenting) (burden on plaintiff to show implicit or explicit right in statute). The Court in *Thiboutot* essentially eliminated the last three prongs of the *Cort* analysis in holding that a plaintiff alleging a statutory right enforceable under § 1983 must show that the statute either implicitly or explicitly confers a federal right in favor of the plaintiff. Maine V. Thiboutot, 448 U.S. 1, 8-11 (1980) (Court's analysis of § 1983 claim excluded last three prongs

statute creates an enforceable right under section 1983 unless the benefit was to be merely a congressional preference,[16] or unless the interest the plaintiff avers is too far-reaching and nebulous for the judiciary to enforce.[17]

To determine whether a federal statute dictates a binding obligation upon a state or is only an expression of congressional preference, courts must consider the statute in its entirety as well as the legislative intent behind the statute's enactment.[18] The United States Supreme Court has held that legislative intent alone is sufficient in some instances to imply protectable rights under federal statutes.[19] However, a statute which declares a congressional

---

of *Cort* analysis). *See generally*, N.Y.L.J., Sept. 8, 1990, at 3 (discussion of health care provider's rights under § 1983).

16. *See* Pennhurst State School and Hosp. v. Halderman, 451 U.S. 1, 19 (1981) (Congress may express preference for certain conduct, but preference does not bind government); *see also* Rosado v. Wyman, 397 U.S. 397, 413 (1970) (congressional innuendo not binding obligation); United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938) (statute guides Secretary's actions but does not create rights); Note, *Title VII as a Remedy for Alleged Employment Discrimination by State and Local Government Employers: Is It Exclusive or Only Supplementary to 42 U.S.C. § 1983*, 36 CASE W. RES. 519, 522 (1986) (congressional intent should determine whether a § 1983 cause of action may be brought under federal statute). *See generally* Rosenblatt, *Health Care Reform and Administrative Law: A Structural Approach*, 88 YALE L.J. 243, 276-77 (1978) (discussing rights created by Congress and courts' role in interpreting the rights).

17. *See* Golden State Transit Corp. v. City of Los Angeles, __ U.S. at __, 110 S. Ct. 444, 449, 107 L. Ed. 2d 420, 429 (1989) (availability of § 1983 remedy turns on whether statute is specific and definite enough to enforce); *see also* Wright v. Roanoke Redev. and Hous. Auth., 479 U.S. 418, 431-32 (1987) (§ 1983 inapplicable if not judicially enforceable right). The Medicaid Act contains no obligation-imposing language. *See* 42 U.S.C. § 1396 (1988); *see also* Schweiker v. Hogan, 457 U.S. 569, 571 (1982) (purpose of Boren Amendment discussed); 42 C.F.R. §§ 447.250-447.253 (1980) (repeating language of Boren Amendment). Federal statutes imply substantive rights through "specific language of obligation [that] narrowly cabins the discretion of officials." Edwards v. District of Columbia, 821 F.2d 651, 656 (D.C. Cir. 1987); *see also* Alexander v. Choate, 469 U.S. 287, 307-08 n.32 (1985) (implied obligation must come from specifically stated obligatory language in statute).

18. *See Pennhurst*, 451 U.S. at 18-19 (statutes may implicitly create federal right when considered in entirety); *see also* Philbrook v. Glodgett, 421 U.S. 707, 713 (1975) (look to provisions of the whole law to determine if Congress created right); District of Columbia v. Carter, 409 U.S. 418, 420 (1973) (character and aim of provision under interpretation found in reviewing entire statute); United States v. Heirs of Boisdore, 49 U.S. (8 How.) 113, 122 (1849) (object and policy of statute is discovered in analyzing the whole).

19. *See* Maine v. Thiboutot, 448 U.S. 1, 9-11 (1980) (Court relies on legislative history to establish congressional intent to create federal right); *see also Pennhurst*, 451 U.S. at 15 (paramount consideration in determination of implied private right of action is congressional intent); Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 13 (1981) (congressional intent alone sufficient to establish private right). The Court in *Pennhurst* examined the legislative history and language used in the Developmentally Disabled Assistance and Bill of Rights Act of 1975, 42 U.S.C. § 6000 (1975) (the Assistance Act). *Pennhurst*, 451 U.S. at 15. The Assistance Act, like the Medicaid Act, is a voluntary federal assistance program, in which the states must meet certain criteria to receive funding. *Id.* at 18. The

finding that a specific category of individuals have a right to "appropriate treatment" by state governments does not necessarily create rights enforceable under section 1983.[20] The statutory provision and the corresponding regulations must contain a demand of compliance as a condition precedent to receipt of federal funding, for the provision to be interpreted as mandatory, and a protectable right found to exist.[21] In addition, the statute must clearly state the conditions that must be met prior to the granting of funds to a state.[22] Clearly expressed congressional requirements assure that all states accepting those funds are aware of any standard they will become obligated to satisfy.[23]

Court held that a § 1983 cause of action could not lie because the congressional findings were no more than a "nudge in the preferred direction," and did not create an enforceable right. *Id.* at 19; *see also* Wright v. Roanoak Redev. and Hous. Auth., 479 U.S. 418, 423 (1987) (statutory provisions in *Pennhurst* merely precatory, creating no rights); Vantage Healthcare Corp. v. Virginia Bd. of Medical Assistance Servs., 684 F. Supp. 1329, 1334 (E.D. Va. 1988) (providers not entitled to reimbursement of a return on equity capital).

20. *See* Pennhurst State School v. Halderman, 451 U.S. 1, 19 (1981) (congressional findings do not alone create substantive right); *see also* Rosado v. Wyman, 397 U.S. 397, 413 (1970) (congressional innuendo is only a "nudge" in favored direction); United States v. Carolene Products Co., 304 U.S. 144, 152 (1938) (right protectable under § 1983 must be more than congressional preference). In *Pennhurst*, the Court considered whether a right, enforceable under § 1983, was created by § 6000 of the Developmentally Disabled Assistance and Bill of Rights Act of 1975, codified at 42 U.S.C. § 6000 (1976). *Pennhurst*, 451 U.S. at 13. The Court found the fact that Congress found that the states had an obligation to treat developmentally disabled individuals appropriately did not create a right under § 1983. *Id.*

21. *Pennhurst*, 451 U.S. at 24; *see also* Wright v. Roanoke Redev. & Hous. Auth., 479 U.S. 418, 432 (1987) (benefits Congress intended to confer must be sufficiently definite to enforce under § 1983 and *Pennhurst*). The *Wright* Court found that the Brooke Amendment to the Housing Act of 1937, codified at 42 U.S.C. § 1437a (1982), and its federal implementing regulations created rights which are enforceable under § 1983. *Id.* at 420; *see also* Comment, *The Brooke Amendment: Does "Shall Pay as Rent" Give Tenants a Right to Sue?*, 37 MERCER L. REV. 1087, 1096-97 (1986) (discussion of specificity required for enforcement of protectable right); Note, *Implied Private Rights of Action Under the United States Housing Act of 1937*, 1987 DUKE L. J. 915, 925-30 (1987) (discussing when private causes of action may be implied under federal statutes).

22. Pennhurst State School v. Halderman, 451 U.S. 1, 24 (1980) (congressional authority under spending power is coupled with responsibility to make clear to states the conditions precedent to receiving funds); *see also* Employees of Dept. of Public Health & Welfare v. Department of Public Health & Welfare, 411 U.S. 279, 285 (1973) (Congress must speak with clear voice to allow a state to choose programs knowingly); Steward Machine Co. v. Davis, 301 U.S. 548, 585-598 (1937) (state must knowingly accept terms of the contract which provides federal funding).

23. *See Pennhurst*, 451 U.S. at 19 (conditions to be met in order to receive funding must be made clear by statute). *See generally* Harris v. McRae, 448 U.S. 297, 309 (1980) (states can't enter into contract without knowing terms). The Court has held that by requiring Congress to clearly list requirements for receiving funding for a cooperative federal/state program, a state will know under what constraints it must structure its programs. *Employees of Dept. of Public Health & Welfare*, 411 U.S. at 285.

The funds provided to states under the Medicaid Act[24] are to assist states in providing medical treatment to those who cannot afford medical care.[25] The Act initially set forth a standard of reimbursement for hospital services by requiring states to remunerate the "reasonable cost" of the services provided.[26] Because the methods and standards for reimbursing hospital services were exclusively controlled by the United States Secretary of Health and Human Services (hereinafter "Secretary"), Congress expressed increasing concern that the Secretary possessed too much authority to determine reimbursement rates under the Act.[27] To quell the Secretary's authority, Congress amended the Act in 1972 to provide the states with an increased flexibility in determining reimbursement rates for hospital services rendered to Medicaid patients.[28] However, the "reasonable" reimbursement standard

---

24. 42 U.S.C. § 1396 (1988).

25. *Id.* The Medicaid Act provides federal financial assistance to a state if the state complies with the requirement that a State Plan for Medical Assistance be submitted to the Secretary of Health and Human Services. *Id.*; *see also* Harris v. McCrea, 448 U.S. 297, 308 (1980) (Medicaid is federal-state cooperative endeavor); King v. Smith, 392 U.S. 309, 316 (1968) (Medicaid program is "cooperative federalism"); Preterm, Inc. v. Dukakis, 591 F.2d 121, 132 (1st Cir.) (Medicaid program is fundamental to a state's treatment of needy), *cert. denied*, 441 U.S. 952 (1979); G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 236 (10th ed. 1980) (analysis of whether block grants or categorical grants of federal funds are more efficient); Note, *Injunctive Relief From State Violations of Federal Funding Conditions*, 82 COLUM. L. REV. 1236, 1238-39 (1982) (state officials act as middlemen in distributing federal funds under Medicaid program). Once a state accepts Medicaid funds they must abide by the provisions and purposes of the Medicaid Act. 42 U.S.C. § 1396(a) (1988). The Medicaid Act specifies that the states will be reimbursed the reasonable costs of hospital services for (1) "families with dependent children, and of aged, blind, or permanently and totally disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services," and (2) "rehabilitation and other services to help such families and individuals attain or retain capability for independence or self-care." *Id.* Congress authorizes and appropriates funding under the Medicaid Act by way of the "taxing and spending clause," which gives Congress the authority to promulgate taxes, collect taxes, and provide for the general welfare of the United States. *See* U.S. CONST. art I, cl. 1 (taxing and spending clause). The federal government spent 29 billion dollars on the Medicaid program in 1988. Savage, *Hospitals Sue States Over Medicaid Costs*, L. A. Times, June 15, 1990 at 1, col. 4 (*Wilder* decision provides hope for failing hospitals).

26. Pub. L. 89-97, § 1902(13)(B), 79 Stat. 346 (1965) (current version at 42 U.S.C. § 1396(a)A(13) (1982)). The "reasonable cost" standard was determined by the States' standards set forth in each State's Plan and approved by the Secretary. *Id.*

27. *See* S. REP. NO. 139, 97th Cong., 1st Sess. 292-293, *reprinted in* 1981 U.S. CODE CONG. & ADMIN. NEWS 396, 744.

28. Pub. L. 92-603, § 232(a), 86 Stat. 1410-11 (1972), *repealed by* Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35, 95 Stat. 808. The 1972 amendment required that States participating in the Medicaid program pay "the reasonable cost of inpatient hospital services . . . as determined in accordance with methods and standards which shall be developed by the States and reviewed and approved by the Secretary."

Id. The 1972 amendment made an attempt to loosen the stronghold of the Secretary over

was preserved in the new provision.[29] In 1980, the Boren Amendment created a new reimbursement standard of "reasonable and adequate" reimbursement of nursing and intermediate care facilities.[30] One year later, the Boren Amendment was extended to hospitals.[31]

The Boren Amendment declared that a state plan must provide for the reimbursement of health care providers in accordance with "reasonable and adequate" rates.[32] Thus, under this Amendment, the primary responsibility falls upon the states to develop reimbursement rates.[33] However, the Secretary is authorized to refuse disbursement of funds if the state plan does not meet the requirements of the Medicaid Act or when the state does not comply in practice.[34]

---

states and the manner by which the states reimbursed nursing and intermediate care facilities, but did not allow the states to determine what was "adequate" reimbursement.
See id.; *see also* H. R. REP. No. 231, 92nd Cong., 2nd Sess. pt. III, B 2(c), *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 4989, 5069-72.

29. *See* Pub. L. 92-603, § 232(a), 86 Stat. 1410-1411 (1972), *repealed by* Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35, 95 Stat. 808.

30. Pub. L. 96-499, § 962(a), 94 Stat. 2650 (1980) (current version at 42 U.S.C. § 1396a (1988)). Congress noted that rapidly increasing Medicaid costs were due to the complicated structure of the reimbursement regulations promulgated by the Secretary. *See* S. REP. NO. 139, 97th Cong., 1st Sess. 478, *reprinted in* 1981 U.S. CODE & ADMIN. NEWS 396, 744. The Boren Amendment was a result of Congress' finding that the regulations proclaimed by the Secretary had, in effect, compelled the states to accept Medicaid rates based upon a Medicare "reasonable cost" standard. *See id.* Congressional intent was to give the states greater latitude in creating reimbursement methodologies that would be more efficient and economical. *Id.* The Boren Amendment:

> delete[d] the current provision requiring States to reimburse hospitals on a reasonable cost basis [and] substitute[d] a provision requiring States to reimburse hospitals at rates . . . that are reasonable and adequate to meet the cost which must be incurred by efficiently and economically operated facilities in order to meet applicable laws and quality and safety standards.

S. REP. NO. 139, 97th Cong., 1st Sess. 478, *reprinted in* U.S. CODE CONG. & ADMIN. NEWS 396, 744 (states allowed to set prospective, statewide, and classwide reimbursement rates following passage of Boren Amendment).

31. Pub. L. 97-35, § 2173, 95 Stat. 808 (1981). Congress extended the Medicaid Act to health care providers in response to the rapidly increasing Medicaid costs. S. REP. NO. 239, 97th Cong., 1st Sess. 478, *reprinted in* 1981 U.S. CODE CONG. & ADMIN. NEWS 396, 744.

32. 42 U.S.C. § 1396a(a)(13) (1988); *see also* West Virginia Univ. Hosp. v. Casey, 885 F.2d 11, 20 (3d Cir. 1989) (Boren amendment congressional command and not merely suggestion), *cert. granted*, __ U.S. __, 110 S. Ct. 1294, 108 L. Ed. 2d 472 (1990). *But see* Brief for the United States as Amicus Curiae at 16, Wilder v. Virginia Hosp. Ass'n, 496 U.S. __, 110 S. Ct. 2510, 110 L. Ed. 455 (1990) (rate-making discretion remains with states). A state's only limitation under Boren Amendment is that the state must make assurances to the Secretary of adequate and reasonable reimbursement rates. *Id.*

33. *See* 42 U.S.C. § 1396a(c) (1988).

34. *See* 42 C.F.R. § 430.35 (1989) (noncompliance may arise from a state's lack of compliance in practice regardless of whether the state plan complies with the requirement). The Secretary can withhold funds if a state's reimbursement rates are found to be unreasonable and

Prior to the passage of the Boren Amendment, health care provider suits were commonplace in the federal courts.[35] To remedy the discord resulting from allowing states to fix rates, Congress adopted a provision which required states to waive eleventh amendment[36] immunity from suit for violations of the Medicaid Act.[37] Due to widespread opposition, the provision was repealed in the following congressional session.[38] Following the repeal,

---

inadequate, or if a state fails to comply with the state's approved reimbursement system set forth in its plan for medical assistance. 42 U.S.C. § 1396a (1988). In addition to submitting assurances that reimbursement rates are reasonable and adequate, a state's Medicaid agency must also submit (1) any increase or decrease in the rates of different types of providers from the preceding year; (2) the amount of the calculated average payment rate for each category of health care provided; and (3) short-term and long-term estimations of the effect the new rate will have on the availability of health care services, the degree of provider participation, and the degree to which costs are covered in hospitals which "serve a disproportionate number of low income patients," and the type of care furnished. 42 C.F.R. § 447.255 (1989). In addition, the Secretary may, in his discretion, seek additional information to complete the review of a state's assurances. 42 C.F.R. § 441.10 (1989).

35. *See, e.g.*, Alabama Nursing Home Ass'n v. Harris, 617 F.2d 388 (5th Cir. 1980); California Hosp. Ass'n v. Obledo, 602 F.2d 1357 (9th Cir. 1979); Minnesota Ass'n of Health Care Facilities v. Minnesota Dept. of Public Welfare, 602 F.2d 150 (8th Cir. 1979); Hospital Ass'n, Inc. v. Toia, 577 F.2d 790 (2d Cir. 1978); Massachusetts General Hosp. v. Weiner, 569 F.2d 1156 (1st Cir. 1978); St. Mary's Hosp., Inc. v. Ogilvie, 496 F.2d 1324 (7th Cir. 1974); Catholic Med. Center, Inc., v. Rockefeller, 430 F.2d 1297 (2d Cir. 1970), *appeal dismissed*, 400 U.S. 931 (1970); *cf.* National Union of Hosp. and Health Care Employees, RWDSU, AFL-CIO v. Carey, 557 F.2d 278, 280-281 (2d Cir. 1977) (providers may sue, but union representing provider's employees may not sue).

36. *See* U.S. CONST. amend. XI. The eleventh amendment of the United States Constitution states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Id.

37. *See* Pub. L. 94-182, § 111, 89 Stat. 1054 (1976) (states must waive eleventh amendment right or lose 10% of funds), *repealed by* Pub. L. 94-552, 90 Stat. 2540 (1976); *see also* S. REP. NO. 1240, 94th Cong., 2nd Sess. 3-4, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 5648, 5650-51 (1975) (discusses discontent with eleventh amendment right waiver). The eleventh amendment waiver was a result of many states freezing their Medicaid reimbursement rates to health care providers. *See id.* Congress stated that the noncompliance procedures established by the Secretary and the suits for injunctive relief brought by health care providers were insufficient to address the problem of a state's intentional noncompliance because granting injunctive relief did not remedy past underpayment. *See id.*

38. *See* Pub. L. 94-552, 90 Stat. 2540 (1976) (statute repealing eleventh amendment waiver) (current version at 42 U.S.C. § 1396a(44)(g) (1988)); *see also* S. REP. NO. 1240, 94th Cong., 2nd Sess. 3-4, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS, 5648, 5650-51 (remarks regarding repeal of amendment); Rosenblatt, *Medical Primary Care Case Management, the Doctor-Patient Relationship, and the Politics of Privation*, 36 CASE W. RES. 915, 933 (1986) (discussion of Omnibus Budget Reconciliation Act of 1981). The Senate stated:

> [that it did not intend the repeal to] be construed as in any way contravening or constraining the rights of the providers of Medicaid services, the State Medicaid agencies, or

the federal circuit courts reviewing challenges to state rates by health care providers have held that the Boren Amendment is enforceable under section 1983.[39]

The fundamental congressional objective in adopting the Boren Amendment was to allow states more liberty in setting reimbursement rates and, thereby, make reimbursement more economical.[40] However, by decentraliz-

---

the Department to seek prospective, injunctive relief in a federal or state judicial forum. Neither should the repeal . . . be interpreted as placing constraints on the rights of the parties involved to seek prospective, injunctive relief.

S. REP. NO. 1240, 94th Cong., 2nd Sess. 5, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 5648, 5651. Without the amendment, health care providers can bring suit for injunctive relief against state officials. State Compliance with Federal Medicaid Requirements: Hearings before the Subcommittee on Health of the Senate Committee on Finance, 94th Cong., 2d Sess. 3 (1976) (remarks by Assistant Secretary Kurzman).

39. *See, e.g.*, West Virginia Univ. Hosps., Inc. v. Casey, 885 F.2d 11, 17-22 (3d Cir. 1989), *cert. granted*, __ U.S.__, 110 S. Ct. 1294, 108 L. Ed. 2d 472 (1990); AMISUB, Inc. v. Colorado Dept. of Social Serv., 879 F.2d 789, 793 (10th Cir. 1989), *cert. granted*, __U.S.__, 110 S. Ct. 3212, 110 L. Ed. 2d 660 (1990); Coos Bay Care Center v. Oregon Dept. of Human Resources, 803 F.2d 1060, 1061-63 (9th Cir. 1986); Nebraska Health Care Ass'n, Inc. v. Dunning, 778 F.2d 1291, 1295-96 (8th Cir. 1985), *cert. denied*, 479 U.S. 1063 (1987). The courts have also entertained health care provider claims which did not rely upon section 1983 as the basis for private causes of action. *See, e.g.*, Hoodkroft Convalescent Center, Inc. v. New Hampshire Div. of Human Servs., 879 F.2d 968, 972-75 (1st Cir. 1989) (depreciation-recapture provisions in New Hampshire Medicaid plan does not violate due process rights), *cert. denied*, __ U.S. __, 110 S. Ct. 720, 107 L. Ed. 2d 740 (1990); Colorado Health Care Ass'n v. Colorado Dept. of Social Servs., 842 F.2d 1158, 1169-70 (10th Cir. 1988) (elimination of incentive program to Colorado nursing home providers not in violation of Medicaid Act); Hillhaven Corp. v. Wisconsin Dept. of Health and Human Servs., 733 F.2d 1224, 1225-1226 (7th Cir. 1984) (Wisconsin statute enjoining temporary increase in Medicaid funds not unconstitutional); Alabama Hosp. Ass'n v. Beasley, 702 F.2d 955, 961-962 (11th Cir. 1983) (Alabama medicaid plan deficient for failing to provide lower payment rates for out-patients); Mississippi Hosp. Ass'n, Inc. v. Heckler, 701 F.2d 511, 519-20 (5th Cir. 1983) (Mississippi statute disallowing cost reimbursement to providers from Medicaid plan not invalid); Charleston Memorial Hosp. v. Conrad, 693 F.2d 324, 326 (4th Cir. 1982) (South Carolina statute limiting Medicaid coverage not in violation of Medicaid Act); Washington Health Facilities Ass'n v. Washington Dept. of Social and Health Servs., 698 F.2d 964, 965 (9th Cir. 1982) (changes in Medicaid reimbursments must be approved by Secretary). *See generally* Comment, *The Medicare-Medicaid Anti-Fraud and Abuse Amendments: Their Impact on the Present Health Care System*, 36 EMORY L.J. 691 (1987) (causes of action concerning Medicaid Act not brought under § 1983).

40. *See* H.R. CONF. REP. NO. 208, 97th Cong., 1st Sess. 962, *reprinted in* 1981 U.S. CODE & ADMIN. NEWS 396, 1324; *see also* S. REP. NO. 139, 97th Cong., 1st Sess. 478, *reprinted in* 1981 U.S. CODE CONG. & ADMIN. NEWS 396, 744. The Boren Amendment demands that the states reimburse health care providers at rates reasonable and adequate to meet the costs incurred by an economically and efficiently operated facility. 42 U.S.C. § 1396a (1988). Congress intended to allow the states more economical alternative systems to provide reasonable and adequate reimbursement for services rendered to Medicaid patients. *See* S. REP. NO. 39, 97th Cong., 1st Sess. 293-94, *reprinted in* 1981 U.S. CODE CONG. & ADMIN. NEWS 396, 744. Senator Boren stated that the Boren Amendment "places responsibility squarely on the states to establish adequate payments." Medicaid and Medicare Amendments:

ing the method used for establishing reimbursement rates, Congress did not intend to encourage the states to disregard their existing obligation to pay reasonable rates.[41] The Secretary, while no longer responsible for setting rates, ensures state compliance with the state determined reasonable and adequate rates.[42] Furthermore, the Secretary has the final authority to review the rates and disapprove them if they do not meet statutory requirements.[43]

In order to allow flexibility, the Boren Amendment establishes general requirements for states regarding reimbursement rates.[44] Comparably vague

---

Hearings on H.R. 4000 before the Subcommittee on Health and the Environment of the House Committee on Interstate and Foreign Commerce, 96th Cong., 1st Sess. 845 (1979). The Boren Amendment "achieves the present law's objective of assuring high-quality care" and "differs from the present law with respect to the methods States may employ in determining reasonable and adequate rates." 126 CONG. REC. 17885 (1980) (discussion of Boren Amendment between Senator Pryor and Senator Boren). The Amendment deleted the stipulation that states must reimburse hospitals on a "reasonable cost" basis, and added a provision requiring states to reimburse hospitals at rates which are reasonable and adequate to meet the cost which must be incurred by efficiently and economically operated facilities in order to meet applicable laws and safety and quality standards. S. REP. NO. 139, 97th Cong., 1st Sess. 478, *reprinted in* 1981 U.S. CODE CONG. & ADMIN. NEWS 396, 744.

41. *See* H.R. REP. NO. 139, 97th Cong., 1st Sess. 478, *reprinted in* 1981 U.S. CODE CONG. & ADMIN. NEWS 396, 744. Congress allowed the states to adopt prospective or retrospective methods of setting rates, but still required them to meet the "reasonable and adequate" standard. *Id.* The Conference Committee Report states:

> the conferees intend that State hospital reimbursement policies should meet the costs that must be incurred by efficiently administered hospitals in providing covered care and services to medicaid eligibles as well as the costs required to provide care in conformity with State and Federal requirements.

H. R. CONF. REP. NO. 208, 97th Cong., 1st Sess. 962, *reprinted in* 1981 U.S. CODE CONG. & ADMIN. NEWS 396, 1324; *see also* S. REP. NO. 139, 97th Cong., 1st Sess. 478, *reprinted in* 1981 U.S. CODE CONG. & ADMIN. NEWS 396, 744 (states's rates must be reasonable and adequate); S. REP. NO. 139, 97th Cong., 1st Sess. 478, *reprinted in* 1981 U.S. CODE CONG. & ADMIN. NEWS 396, 744 (committee believes hospitals should be reimbursed in most efficient manner).

42. *See* S. REP. NO. 139, 97th Cong., 1st Sess. 478, *reprinted in* 1981 U.S. CODE CONG. & ADMIN. NEWS 396, 744. Although the Secretary retains the power to review states' reimbursement rates and assurances of the rates' reasonableness and adequacy, he should regulate the minimum amount possible without sacrificing accountability, and avoid excessive paperwork which is burdensome and costly. *See* H.R. CONF. REP. NO. 1479, 96th Cong., 2nd Sess. 154, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 5526, 5561.

43. *See* 42 U.S.C. § 1396a(a)13(A) (1988); *see also* H.R. CONF. REP. NO. 1479, 96th Cong., 2nd Sess. 154, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 5526, 5561.

44. *See* 42 U.S.C. § 1396a(a)(13)(A) (1988). When a state calculates rates which are reasonably and adequately related to the costs incurred by an efficiently and economically operated facility, the state must consider the following: (1) if the hospital services a disproportionate amount of low income patients; (2) the statutory requirement for what constitutes adequate care in a nursing home; and (3) whether the hospital provides inpatient care when the long term care of a nursing home is reasonably necessary but unavailable. *Id.* States have a wide range of boundaries in setting the scope of coverage in their Medicaid plan. Coe v. Hooker, 406 F. Supp. 1072, 1086 (D.N.H. 1976); *see also* Roe v. Norton, 522 F.2d 928, 933

state requirements set forth in federal legislation have been interpreted by the Court as not being too amorphous for judicial review.[45] However, a state may impede a section 1983 cause of action by demonstrating that the federal statute contains either an express provision or a remedial scheme reflecting congressional intent to foreclose private enforcement under section 1983.[46]

A remedial scheme, adequate to supersede the remedy provided in section 1983, has been noted in two United States Supreme Court cases.[47] In *Mid-*

(2d Cir. 1975) (states have latitude in structuring medical assistance plans); District of Columbia Podiatry Soc. v. District of Columbia, 407 F. Supp. 1259, 1263-64 (D.D.C. 1975) (Medicaid Act gives states considerable discretion in drafting reimbursment plan). The goals of the Boren Amendment were to (1) slow the quickly rising cost of inpatient hospital care, and (2) to reduce the amount of federal oversight by letting states set their own rates based on each state's unique situation. *See* West Virginia Univ. Hosp. v. Casey, 885 F.2d 11, 23 (3d Cir. 1989) (states' methodologies for reimbursement subject to only three federal limitations), *cert. granted*, __U.S.__, 110 S. Ct. 1294, 108 L. Ed. 2d 472 (1990); *see also* Colorado Health Care Ass'n v. Colorado Dep't of Social Servs., 842 F.2d 1158, 1165 (10th Cir. 1988) (Boren Amendment created to lessen Secretary's stronghold on reimbursement procedures); Wisconsin Hosp. Ass'n v. Reivitz, 733 F.2d 1226, 1228 (7th Cir. 1984) (Boren Amendment allows consideration of more efficient state reimbursment procedures).

45. *See* Wright v. Roanoke Redev. & Hous. Auth., 479 U.S. 418, 437 (1987)(O'Connor, J., dissenting) (right to challenge vague Housing Authority utility allowances requirements exists under § 1983); *see also* Smith v. Robinson, 468 U.S. 992, 1011-12 (1984) (Education of the Handicapped Act contains provisions specific enough for judicial review); Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 13 (1981) (federal statute may grant private right without express provision). The Court has held that to determine whether a right exists under a federal statute that does not explicitly state a right, a review of the legislative history and other evidences of congressional intent must be performed. *See, e.g., Sea Clammers*, 453 U.S. at 13; Texas Indus., Inc. v. Radcliff Materials, Inc. 451 U.S. 630, 639 (1981); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 15 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560, 568 (1979).

46. *See Wright*, 479 U.S. at 423. *Wright* held that individuals may bring a § 1983 action for violation of a federal statute which does not explicitly provide a remedy unless it can be demonstrated by express provision or other specific evidence that congressional intent was to foreclose a private remedy. *Id.* at 423; *see also Sea Clammers*, 453 U.S. at 19 (1981) (noncompliance orders, civil suits, and criminal penalties evidenced congressional intent to foreclose suit under § 1983). If there is no express provision precluding private enforcement, the Court has found a private remedy foreclosed only when the federal statute creates a remedial method or scheme that is "sufficiently comprehensive . . . to demonstrate congressional intent to preclude the remedy of suits under section 1983." *Sea Clammers*, 453 U.S. at 20. The complex administrative scheme in the Education of the Handicapped Act (EHA), 20 U.S.C. § 1400 (1988), was held to demonstrate congressional intent to foreclose a private remedy under § 1983. *See* Smith v. Robinson, 468 U.S. 992, 1010-1011 (1984). The EHA set forth a carefully tailored administrative and judicial mechanism which included both administrative and judicial review. *Id.* at 1011 (citing 20 U.S.C. §§ 1412(4), 1414(a)(5), 1415 (1987)).

47. *See* Smith v. Robinson, 468 U.S. 992 (1984); Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981); *see also Wright*, 479 U.S. at 423 (Congress may foreclose private enforcement in the statute itself).

dlesex County Sewerage Authority v. National Sea Clammers Association,[48] the Court held that extensive enforcement power afforded to a federal agency, including non-compliance orders, criminal penalties, civil suits, and two citizen-suit provisions, exhibited congressional intent to foreclose an action under section 1983.[49] Similarly in *Smith v. Robinson*,[50] the Court held that the numerous levels of local administrative review, concluding in a right to judicial review, made the remedial scheme in the Education of the Handicapped Act (EHA)[51] sufficiently comprehensive to preclude private reliance on section 1983.[52] This congressional foreclosure was held to be present in the intricate administrative scheme detailed in the EHA.[53]

In *Wilder v. Virginia Hospital Association*,[54] the United States Supreme Court held that the Boren Amendment to the Medicaid Act established a right, enforceable in a private cause of action under section 1983, to compel a state to adopt reimbursement rates which the state finds are reasonable and adequate to meet the costs of an efficient and economical health care provider.[55] The majority noted that health care providers are clearly the intended beneficiaries of the Boren Amendment[56] and are, therefore, entitled

---

48. 453 U.S. 1 (1981).

49. *Id.* at 19. The Environmental Protection Agency ("EPA") was afforded considerable enforcement power by the Federal Water Pollution Control Act (FWPCA), codified at 33 U.S.C. § 1251 (1972). *Id.* at 13. The FWPCA authorizes the EPA Administrator to respond to violations of the FWPCA with civil suits and compliance orders. 33 U.S.C. § 1319 (1988). He is authorized to allow a state to take action before doing so himself. 33 U.S.C. § 1319(a)(1). In addition, the Administrator may seek civil penalties of $10,000 per day, as well as criminal penalties. 33 U.S.C. § 1319(c),(d) (1988). *See* Note, *Title VII as a Remedy for Alleged Employment Discrimination by State and Local Government Employers: Is It Exclusive or Only Supplementary to 42 U.S.C. § 1983?*, 36 CASE W. RES. 519, 521 (1986) (comprehensive remedies legislation may suffice to demonstrate congressional intent to preclude § 1983 remedy); Note, *Private Actions for Violations of Securties Exchange Rules: Liability for Nonenforcement and Noncompliance*, 88 COLUM. L. REV. 610, 619 (1988) (conditions of congressional foreclosure of a private cause of action). *See generally* Note, *Preclusions of Section 1983 Causes of Action by Comprehensive Statutory Remedial Schemes*, 82 COLUM. L. REV. 1183 (1982) (analysis of federal courts' trend away from finding private causes of action exist under statute, including congressional foreclosure).

50. 468 U.S. 992 (1984).

51. 20 U.S.C. § 1411 (1988).

52. *Robinson*, 468 U.S. at 1011 (citing 20 U.S.C. §§ 1412(4), 1414(a)(5), 1415 (1988)). The EHA establishes an intricate procedural process to protect the rights of handicapped children which begins on the local level and includes continuing parental involvement, complex procedural safeguards, and the right to judicial review. *Id.*; *see also* S. REP. NO. 168, 94th Cong., 1st Sess. 11-12, *reprinted in* 1975 U.S. CODE CONG. & ADMIN. NEWS 1425, 1430 (emphasizing parental involvement in taking action to assure services are provided for handicapped child).

53. *Robinson*, 468 U.S. at 1011; *see also* 20 U.S.C. § 1400 (1978).

54. 496 U.S. ___, 110 S. Ct. 2510, 110 L. Ed. 2d 455 (1990).

55. *Id.* at ___, 110 S. Ct. at 2514, 110 L. Ed. 2d at 463.

56. *Id.* at ___, 110 S. Ct. at 2517, 110 L. Ed. 2d at 467. The Court noted that the Boren

to an enforceable right under section 1983.[57]

Having found that the Boren Amendment created an enforceable right, the majority reinforced their findings by emphasizing the legislative history of the Amendment.[58] The Court noted that the Boren Amendment contains mandatory conditions which must be addressed in the text of the state plan and met in the plan's actual execution.[59] If the Amendment's conditions are not met, federal funds may be withheld by the Secretary.[60] Based on this

---

Amendment established a system of reimbursement specifically naming health care providers as the recipients. *Id.*; *see also* 42 U.S.C. § 1396a(a)(13)(A)(1988).

57. *See* Wilder v. Virginia Hosp. Ass'n, 496 U.S. __, __, 110 S. Ct. 2510, 2517, 110 L. Ed. 2d 455, 467 (1990). The majority noted that intended beneficiaries are entitled to an enforceable right under § 1983 except in two distinct circumstances. *Id.* The first exception stated by the Court distinguished an "enforceable right" from a "congressional preference," the latter of which is unenforceable under § 1983. *Id.* at __, 110 S. Ct. at 2517, 110 L. Ed. 2d at 467; *see also* Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1, 19 (1981) (congressional preference does not create binding obligation on government agency). The Court noted that a second exception exists in the situation where an interest is too indefinite to be enforced by the judiciary and therefore does not constitute an enforceable "right." *See Wilder*, 496 U.S. at __, 110 S. Ct. at 2517, 110 L. Ed. 2d at 467; *see also* Golden State Transit Corp. v. Los Angeles, __ U.S.__, 110 S. Ct. 444, 448, 107 L. Ed. 2d 420, 428-29 (1989); Wright v. Roanoke Redev. & Hous. Auth., 479 U.S. 418, 431-32 (1987). In determining whether the exceptions existed in the case at bar, the Court distinguished *Wilder* from *Pennhurst* in which it was held that the general statement of congressional findings of what constitutes "appropriate treatment" of disabled individuals was "too thin a reed to support" a creation of obligations and rights. *See Wilder*, 496 U.S. at __, 110 S. Ct. at 2518, 110 L. Ed. 2d at 468. The Court noted that there is a need, in implied right of action cases, to consider the separation of powers and give deference to congressional intent. *See Wilder*, 496 U.S. at __, 110 S. Ct. at 2517 n.9, 110 L. Ed. 2d at 466 n.9 (discussing need for analysis under *Cort*'s four prong test). To exemplify what congressional language and intent is necessary to create rights enforceable under § 1983, the Court noted *Wright* which held that the Brooke Amendment to the Housing Act of 1937 did create such rights. *See Wilder*, 496 U.S. at __, 110 S. Ct. at 2518, 110 L. Ed. 2d at 467-69; *see also* Wright v. Roanoke Redev. & Hous. Auth., 479 U.S. 418, 430 (1987) (discussing rights under Brooke Amendment, 42 U.S.C. § 1437a (1988)); Schweiker v. Hogan, 457 U.S. 569, 588 (1982); Blum v. Bacon, 457 U.S. 132, 141 (1982). The Brooke Amendment set a limit on the amount of rent which a public housing tenant may be charged. 42 U.S.C. § 1437a (1988). The regulations adopted pursuant to § 1437a require that a "reasonable" allowance for utilities be included in the rent. *Id.*; *see also Wright*, 479 U.S. at 420. The Court in *Wilder* adopted the reasoning of the *Wright* Court in finding that the statute and the regulations were "mandatory limitation[s] focusing on the individual family and its income." *See Wilder*, 496 U.S. at __, 110 S. Ct. at 2518, 110 L. Ed. 2d at 468; *see also Wright*, 479 U.S. at 430. Further, the Court noted that the regulations set forth in *Wright* were "sufficiently specific and definite to qualify as [an] enforceable right under Pennhurst and section 1983 [and was] not . . . beyond the competence of the judiciary to enforce." *See Wilder*, 496 U.S. at __, 110 S. Ct. at 2518, 110 L. Ed. 2d at 468; *see also Wright*, 479 U.S. at 432.

58. *See Wilder*, 496 U.S. at __, 110 S. Ct. at 2520, 110 L. Ed. 2d at 470-71.

59. *See id.* at __, 110 S. Ct. at 2520, 110 L. Ed. 2d at 470.

60. *See* 42 C.F.R. § 430.35 (1989). The Secretary expressed his intention to withhold funds if the state plan does not meet with Amendment's requirements, or if failure to follow the state plan results in noncompliance. *Id.*

finding, the majority rejected the argument that the only right enforceable under section 1983 is the right to compel conformity with the procedural requirements of the Amendment.[61] In addition, the Court refused to interpret the Amendment as not requiring review of the state's findings by the Secretary because a state must submit certain assurances to the Secretary.[62] Further, the Court found that Congress did not foreclose a remedy under section 1983 because congressional intent expressed in the repeal of the waiver of immunity provision[63] of the Medicaid Act demonstrated that Congress did not limit the prospective injunctive relief available to health care providers.[64] Finally, the majority found that the flexibility given to states under the Boren Amendment to set reimbursement rates was not too "vague or amorphous" to prohibit judicial enforcement.[65]

---

61. *See* Wilder v. Virginia Hosp. Ass'n, 496 U.S. __, __, 110 S. Ct. 2510, 2519, 110 L Ed. 2d 455, 469-70 (1990). The Court rejected the argument that the rights under § 1396a end with the enforcement of procedural compliance with the Amendment because such an interpretation would render the Amendment meaningless. *Id.* at __, 110 S. Ct. at 2519-20, 110 L. Ed. 2d at 469-70. The majority stated that to argue that the Amendment's requirements of findings and assurances are only procedural and do not compel states to adopt reasonable and adequate rates is the same as arguing that the state's findings and assurances need not be correct. *Id.*

62. *Id.* at __, 110 S. Ct. at 2519, 110 L. Ed. 2d at 469. The Court stated that such an interpretation of the Boren Amendment would render it a "dead letter." *See id.* at __, 110 S. Ct. at 2520, 110 L. Ed. 2d at 470; *see also* Rodaso v. Wyman, 397 U.S. 397, 412-15 (1970) (interpretation of Social Security Amendments of 1967, § 402(a)(23) does not create meaningless bookkeeping); 2A C. SANDS, SUTHERLAND STATUTORY CONSTRUCTION § 45.12 (4th ed. 1984) (law favors rational construction and reasonable judicial interpretation).

63. Pub. L. 94-182, § 111, 89 Stat. 1054 (1975), *repealed by* Pub. L. 94-552, 90 Stat. 2540 (1976). The provision forced states to waive their eleventh amendment immunity rights in order to receive federal Medicaid funds. *Id.* The prerequisite was in direct response to the inability of the Secretary to deal with the outright noncompliance of states with the Secretary's "reasonable" reimbursement standard. *See* S. REP. NO. 1240, 94th Cong., 2nd Sess. 3-4, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 5648, 5650-51. In addition, the provision required the Secretary to withhold 10% of the federal funding from a state which had not submitted the waiver of its immunity by March 31, 1976. Pub. L. 94-182, § 111, 89 Stat. 1054 (1976).

64. *See Wilder*, 496 U.S. at __, 110 S. Ct. at 2522, 110 L. Ed. 2d at 472. The Court relied heavily on the the legislative intent behind the repeal of the eleventh amendment waiver section of the Medicaid Act to support its holding. *Id.*; *see also* S. REP. NO. 1240, 94th Cong., 2d Sess. 3-4, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 5648, 5650-51 (providers can continue to institute injunctive relief in State or Federal courts); State Compliance with Federal Medicaid Requirements: Hearings before the Subcommittee on Health of the Senate Committee on Finance, 94th Cong., 2d Sess. 3 (1976) (Assistant Sec. Kurzman remarked that provider's recourse includes injunctive relief); 122 CONG. REC. 13492 (1976) (providers have right to enjoin action of states but not recover lost funds).

65. Wilder v. Virginia Hosp. Ass'n, 496 U.S. __, __, 110 S. Ct. 2510, 2522-23, 110 L. Ed. 455, 472-73 (1990) (*Wright* statute and regulation similar and was held to instill affirmative rights).

Chief Justice Rehnquist, joined by Justices O'Connor, Scalia, and Kennedy, dissented on the basis that the majority's reading of the Boren Amendment disregarded the clearly established role Congress assigned to the Secretary.[66] The Chief Justice asserted that because the Boren Amendment requires states to make assurances to the Secretary, the Secretary must review the reasonableness and adequacy of those rates.[67] Thus, Chief Justice Rehnquist argued that the only discernable right conferred by the Boren Amendment is the right to force the establishment of rates in accordance with the "reasonable and adequate" standard.[68] Chief Justice Rehnquist asserted that the majority interpreted the Boren Amendment out of context and without proper regard for the Medicaid Act in its entirety.[69] Finally, Chief Justice Rehnquist noted that the majority misjudged the states by suggesting that states would intentionally disregard the Amendment's requirements, thereby depreciating the Secretary's role as overseer.[70]

Although congressional policy concerns[71] might be frustrated if health care providers are unable to bring suit under section 1983, this fact alone is

---

66. *See Wilder*, 496 U.S. at __, 110 S. Ct. at 2527, 110 L. Ed. 2d at 478-79 (Rehnquist, C.J., dissenting).

67. *Id.* (Rehnquist, C.J., dissenting). Chief Justice Rehnquist argued that even if one were to assume that the Boren Amendment gave health care providers a substantive right, the assurances required of the states must be submitted to and reviewed by the Secretary and not by the courts. *See id.*; *see also* 42 C.F.R. § 447.256(2) (1989) (Secretary sets forth criteria for review of state plans under the Health Care Financing Administration).

68. *See Wilder*, 496 U.S. at __, 110 S. Ct. at 2527, 110 L. Ed. 2d at 479 (Rehnquist, C. J., dissenting).

69. *See* Wilder v. Virginia Hosp. Ass'n, __ U.S. __, __, 110 S. Ct. 2510, 2526-27, 110 L. Ed. 2d 455, 472 (1990) (Rehnquist, C.J., dissenting). Chief Justice Rehnquist argued that the placement of the Amendment in the whole of Medicaid Act is fundamental to a proper judicial interpretation because the language cited by the majority is found within a list of thirteen requirements which must be met in order for a state to receive federal funds. *Id.* at __, 110 S. Ct. at 2526, 110 L. Ed. 2d at 472 (Rehnquist, C.J., dissenting). In addition, Chief Justice Rehnquist differentiated *Wright* from *Wilder* by recognizing that there is an absence of any express focus on health care providers as a beneficiary class in the Boren Amendment. *Id.* at __, 110 S. Ct. at 2527, 110 L. Ed. 2d at 473.

70. *Id.* at __, 110 S. Ct. at 2527, 110 L. Ed. 2d at 473 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist noted that the majority's concern that "[i]t would make little sense for Congress to require a State to make findings without requiring those findings to be correct . . . " was unfounded. *Id.* If the Boren Amendment were interpreted to not allow health care providers a cause of action under § 1983, Chief Justice Rehnquist maintained that it would not render the provision a "dead letter" amendment, as the majority contended. *Id.*

71. *Wilder*, 496 U.S. at __, 110 S. Ct. at 2520, 110 L. Ed. 2d at 470-71 (health care providers must be able to bring § 1983 action or Boren Amendment is rendered meaningless). While the majority's conclusion that the Boren Amendment would be rendered essentially ineffectual by not allowing health care providers to bring a § 1983 action to enforce adequate and reasonable reimbursement is somewhat accurate, the potential "dead letter" state of the Boren Amendment does not serve as a basis for finding a substantial right exists. *See id.* at __, 110 S. Ct. at 2525-26, 110 L. Ed. 2d at 477-78 (Rehnquist, C.J., dissenting).

insufficient to establish that health care providers have been conferred an enforceable right by Congress.[72] In the past, the Court has required that for relief to be had under section 1983,[73] the federal statute must confer an iden-

---

72. *Id.* (Rehnquist, C.J., dissenting). No prior United States Supreme Court holding supports the majority's position that protecting a congressional policy concern is an adequate basis for holding that Congress granted an enforceable right to a party. *Id.* at __, 110 S. Ct. at 2525, 110 L. Ed. 2d at 477. The language used by Congress to create a right must be unequivocally specific and mandatory. *See* Alexander v. Choate, 469 U.S. 287, 307 (1985). To create secured and enforceable rights within the meaning of § 1983, a statute must do more than state a "general prohibition or command" to be implemented by a state or federal agency. Universities Research Ass'n v. Coutu, 450 U.S. 754, 772 (1981). The Boren Amendment states, " [a] State plan for medical assistance *must* provide for payment . . . of the hospital . . . services. . ." 42 U.S.C. § 1396a(a)(13)(A) (1988) (emphasis added). The word "must," when considered in light of the surrounding text, is not used to confer a right, but introduces one of many requirements that must be met in order for states to receive federal funds. *See id.* In addition, a statute must confer definite and specific benefits in right or duty creating language. *See* Wright v. Roanoke Redev. & Hous. Auth., 479 U.S. 418, 432 (1987). The Boren Amendment does no more than compel participating states to provide assurances which must be found to be satisfactory by the Secretary and it contains no enforceable rights language. 42 U.S.C. § 1396a(a)(13)(A) (1988). If a statute confers no substantive rights, the Court does not need to address whether it can be enforced under § 1983. *See* Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1, 28 (1981) (citing Southeastern Comm. College v. Davis, 442 U.S. 397, 404 n.5 (1979)).

73. 42 U.S.C. § 1983 (1988). A right can also be implied in a statute under certain situations. Cort v. Ash, 422 U.S. 66, 77-85 (1975). *See generally* Note, Howard v. Pierce: *Implied Causes of Action and the Ongoing Vitality of* Cort v. Ash, 80 NW. U.L. REV. 722 (1985) (discussion of implied rights of action). After *Cort*, there was disagreement about the practical effect of the decision on the continuing ability of plaintiffs to bring lawsuits in federal court based on implied causes of action. *See* Cannon v. University of Chicago, 441 U.S. 677, 690 (1979) (legislative intent was the dispositive feature of the *Cort* test); *see also* Thompson v. Thompson, 484 U.S. 174, 188 (1988)(Scalia, J., concurring) (Congress, not courts create rights); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 15-16 (1979) (Congress, not courts, controls remedies for violated statutes); Touche Ross v. Redington, 442 U.S. 560, 575-76 (1979) (noting *Cort*'s holding that Congress determines rights). *Compare* Note, *Implied Private Rights of Action—the* Cort v. Ash *Test—Interaction of "Especial Beneficiary" and Legislative Intent*, 24 WAYNE L. REV. 1173, 1184-85 (1978) (*Cort* signaled a liberal attitude toward implication of private rights of action) *with* Mezey, *Judicial Interpretation of Legislative Intent: The Role of the Supreme Court in the Implication of Private Rights of Action*, 36 RUTGERS L. REV. 53, 76 (1983) (Court resists onslaught of private right of action claims); Note, *Implied Private Actions Under Federal Statutes—The Emergence of a Conservative Doctrine*, 18 WM. & MARY L. REV. 429, 450-57 (1976) (criticizing *Cort* test as highly restrictive test for the implication of private rights of action); Note, *Third Party Beneficiary and Implied Right of Action Analysis: The Fiction of One Governmental Intent*, 94 YALE L.J. 875, 876-77 (1985) (implied right of action doctrine becoming increasingly stringent). The standard manner in which Congress confers a right under § 1983 is to explicitly state "right-creating" or "duty-creating" language that is to benefit a certain group of individuals. *Cannon*, 441 U.S. at 690. An implication of substantive rights exists through "specific language of obligation [that] narrowly cabins the discretion of officials." Edwards v. District of Columbia, 821 F.2d 651, 656 (D.C. Cir. 1987).

tifiable enforceable right.[74] To find that a statute creates rights in favor of a plaintiff class, dispositive evidence in the form of a provision focusing on that plaintiff class is necessary.[75] There is no language in the Boren Amendment which indicates that, in conjunction with states receiving Medicaid funding from the government, the Medicaid providers acquire a substantive right.[76]

While the proper analysis of potentially enforceable rights in *Wilder* would have included a review of the statute as a whole,[77] the majority ig-

---

74. *See* Maine v.Thiboutot, 448 U.S. 1, 11 (1980); *see also Wilder*, 496 U.S. at __, 110 S. Ct. at 2526, 110 L. Ed. 2d at 477 (Rehnquist, C.J., dissenting) (consider language in context of entire amendment); Wright v. Roanoke Redev. & Hous. Auth., 479 U.S. 418, 432-33 (1987)(O'Connor, J., dissenting) (statute must confer a right to enforce under § 1983). The traditional rule which has been established by the Court in interpreting a statute is to look first to the statute's text, and to end the analysis there if the text fully imparts the meaning. *See, e.g.*, American Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982) (starting point in analysis should be language of statute). The Boren Amendment is not phrased in terms of the interests of health-care providers and therefore does not benefit them. *Compare Wright*, 479 U.S. at 420 n.2 (rent ceiling guaranteed not to exceed one-fourth family income) *with Wilder*, 496 U.S. at __, 110 S. Ct. at 2518-19, 110 L. Ed. 2d at 468-69 (health care providers have enforceable right to adequate reimbursement though not expressly stated in statute).

75. Wright v. Roanoke Redev. & Hous. Auth., 479 U.S. 418, 430-31 (1987); *see also* Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1, 19 (1981) (congressional preference does not create identifiable right); Rosado v. Wyman, 397 U.S. 397, 413 (1970) (statute contains only congressional preference without identifiable right expressed).

76. *See* 42 U.S.C. § 1396a (1988). The Boren Amendment requires the states to make certain findings and certain assurances to the Secretary regarding reasonable and adequate reimbursement rates to health care providers. *Id.* Thus, the dissent concluded the right of health care providers under § 1983 are limited to an action to require that rates be set according to the prescribed process. *See Wilder*, 496 U.S. at __, 110 S. Ct. at 2527, 110 L. Ed. 2d at 473 (Rehnquist, C.J., dissenting); *cf.* Geriatrics, Inc. v. Harris, 640 F.2d 262, 265 (10th Cir. 1981) (nursing home not intended beneficiary of Medicaid program); Northlake Comm. Hosp. v. United States, 654 F.2d 1234, 1242 (7th Cir. 1981) (community hospital not intended beneficiary of Medicaid program); Green v. Cashman, 605 F.2d 945, 946 (6th Cir. 1979) (Medicaid Act shows no legislative intent making providers beneficiaries of program). The *Wright* Court held that an action under § 1983 will not lie where there is no indication of congressional intent for the statutory provision "to rise to the level of an enforceable right." *Wright*, 479 U.S. at 430-31 (citing *Pennhurst*); *see also Pennhurst*, 451 U.S. at 19 (criteria for right enforceable under § 1983). The generality of the "reasonable and adequate" standard of the Boren Amendment and its implementing regulations separate it from the more specific mandatory language in the Brooke Amendment as interpreted by the *Wright* court. *Compare Wilder*, 496 U.S. at __, 110 S. Ct. at 2522, 110 L. Ed. 2d at 470 (Boren Amendment requires reasonable and adequate reimbursement), *with Wright*, 479 U.S. at 430 (mandatory limitation on rent charges).

77. *See* American Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982) (court should look no further than language in statute if it fully reveals meaning). The *Patterson* Court held that in order to establish legislative purpose, courts should make the assumption that it is expressed in the ordinary meaning of the language used. *Id.*; Reiter v. Sonotone Corp., 442 U.S. 330, 337 (1979) (starting point in statutory construction cases is language used by Congress); Richards v. United States, 369 U.S. 1, 9 (1962) (assume legislative purpose is expressed in words used in

nores relevant statutory language regarding the role of the Secretary.[78] The provision at issue is only one in a list of state plan requirements which must be met in order to receive federal funds.[79] If one were to assume that a right indeed exists, the language of the Boren Amendment in its entirety limits health care providers' rights to requiring that a state establish reimbursement rates and submit findings and assurances of the rates' reasonableness and adequacy to the Secretary.[80] In addition, the only language under the Medicaid Act which addresses provider challenges to rates is in the regulations promulgated by the Secretary.[81] These federal regulations mandate that state Medicaid agencies form an administrative appeals procedure for

---

statute); Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980) (absent clear legislative intent language used is conclusive).

78. *See* Wilder v. Virginia Hosp. Ass'n, 496 U.S. __, __, 110 S. Ct. 2520, 2526, 110 L. Ed. 2d 455, 478-479 (1990)(Rehnquist, C.J., dissenting). The Medicaid Act instituted a procedure for the establishment of rates for reimbursement of health care providers by a state. 42 U.S.C. § 1396a(a)(13)(A) (1988). A state participating in the Medicaid program is required to first make certain findings and then submit certain assurances to the Secretary for review. *Id.* The majority at no point addresses the role of the Secretary and the effect of the *Wilder* holding on the Secretary's role. *See generally, Wilder*, 496 U.S. at __, 110 S. Ct. 2510, 2513-25, 110 L. Ed. 2d 455, 462-76 (1990).

79. *See* 42 U.S.C. § 1396a(a)(13)(A) (1988). The Medicaid statute requires that states submit a comprehensive reimbursement plan for the Secretary's approval. *Id.* The plan must address and meet the requirements of the Medicaid Act to receive approval. *Id.*; *see also* Alabama Hosp. Ass'n v. Beasley, 702 F.2d 955, 958 (11th Cir. 1983) (discussing requirements set forth by Secretary which must be met in order to receive Medicaid funds); Alabama Nursing Home Ass'n v. Harris, 617 F.2d 388, 394 (5th Cir. 1980) (Secretary reviews state rates on "economical and efficiently operated facility" standard); Roe v. Norton, 408 F. Supp. 660, 662 (1975) (states must meet minimal requirements set forth by Secretary to qualify for Medicaid funds). If a state fails to supply assurances of reasonable and adequate rates to the Secretary, the health care provider who brings suit under § 1983 is entitled to have the court invalidate the state's current plan and issue an order to the state to create a new plan which complies with the act. *See* AMISUB v. Colorado Dept. of Social Servs., 879 F.2d 789, 794-801 (10th Cir. 1989), *cert. granted*, __ U.S. __, 110 S. Ct. 3212, 110 L. Ed. 2d 660 (1990); *see also* Wisconsin Hosp. Ass'n v. Reivitz, 733 F.2d 1226 (7th Cir. 1984); Mississippi Hosp. Ass'n v. Heckler, 701 F.2d 511, 516 (5th Cir. 1983). The Tenth Circuit invalidated a Colorado plan due to a lack of any state findings that the plan's rates were "reasonable and adequate." *See AMISUB*, 879 F.2d at 801. The Colorado plan incorporated a "Budget Adjustment Factor" which had no relationship to the actual costs incurred by an efficiently run hospital. *Id.* at 797. A Pennsylvania plan was invalidated by the Third Circuit because it made no justification for differentiating between in-state and out-of-state hospitals. *See* West Virginia Univ. Hosps., Inc. v. Casey, 885 F.2d 11, 22-23 (3d Cir. 1989), *cert. granted*, __ U.S. __, 110 S. Ct. 1294, 108 L. Ed. 2d 472 (1990).

80. *See* 42 U.S.C. § 1396a(a)(13)(A) (1988); *see also Wilder*, 496 U.S. at __, 110 S. Ct. at 2527, 110 L. Ed. 2d at 478-79 (Rehnquist, C.J., dissenting).

81. *See* 42 C.F.R. § 447.253(C)(2)(c) (1989). The Secretary set forth the following requirement for state plans:

> (c) Provider appeals. The Medicaid agency must provide an appeals or exception procedure that allows individual providers an opportunity to submit additional evidence

providers to contest Medicaid reimbursement rates.[82] The omission of any specific grant of a private cause of action by Congress, together with the administrative appeal procedure set forth by the Secretary, evinces that federal intent was to confine providers' challenges to administrative hearings.[83]

In allowing judicial scrutiny of a state's reimbursement rates, the Court disregarded the fundamental purpose of the Boren Amendment: to allow states more liberty in establishing Medicaid reimbursement rates.[84] The majority struggled to find support for its decision in policy considerations found in superseded versions of the Medicaid Act, and antiquated legislative histories.[85] The majority's indifference to the congressional intent underlying the

---

and receive prompt administrative review, with respect to such issues as the agency determines appropriate, of payment rates.

Id.

82. *See* 42 C.F.R. § 447.253 (1989).

83. *See* Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 147 (1981) (where a statute expresses a particular remedy courts should not infer others); *see also* Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 19 (1979) (where statute expressly provides particular remedy a court should not infer another); Touche Ross & Co. v. Redington, 442 U.S. 560, 571-574 (1979) (court should actively avoid reading rights into statute). Because the states generally include judicial review by state courts in their state uniform administrative procedure acts, the administrative review can lead to a state court review as well. *See Russell*, 473 U.S. at 147. There is a strong presumption that a remedy was purposefully omitted when Congress enacts a detailed legislative scheme which includes procedures for the scheme's enforcement. Northwest Airlines, Inc. v. Transport Workers, 451 U.S. 77, 97 (1981); *cf.* Mobil Oil Corp. v. Higgenbotham, 436 U.S. 618, 625 (1978) (difference exists between Court filling gap in legislative scheme and altering it with supplemental remedy).

84. *See* S. REP. NO. 139, 97th Cong., 1st Sess. 478, *reprinted in* 1981 U.S. CODE CONG. & ADMIN. NEWS 396, 744; *see also* 42 U.S.C. § 1396a (1988). Congress blamed the increasing Medicaid costs on the intricacy and rigidity of the Secretary's reimbursement regulations. *See* S. REP. NO. 139, 97th Cong., 1st Sess. 478, *reprinted in* 1981 U.S. CODE CONG. & ADMIN. NEWS 396, 744. Under the former version of the Medicaid Act, state Medicaid programs had to reimburse hospitals under the Secretary's "reasonable" reimbursement standard, which resulted in higher costs for states due to a lack of flexibility allowed for in the standard. *See id.*; *see also* Alabama Hosp. Ass'n v. Beasley, 702 F.2d 955, 958-59, n.9 (1983) (freedom from reasonable cost criterion would lower state Medicaid costs).

85. *See* Wilder v. Virginia Hosp. Ass'n, 496 U.S. __, __, 110 S. Ct. 2510, 2522, 110 L. Ed. 2d 455, 472 (1990). The majority relied on a past version of the statute and its repeal to evidence current legislative intent. *Id.* The previous statute and legislative history reflected a congressional belief that holding states responsible for inadequate past reimbursements to health care providers would lessen the Secretary's burden to enforce the rates. *See* Pub. L. 94-182, § 111, 89 Stat. 1054 (1975) (states must waive eleventh amendment right or lose 10% of funds), *repealed by*, Pub. L. 94-552, 90 Stat. 2540 (1977); *see also* S. REP. NO. 1240, 94th Cong., 2nd Sess. 3-4, *reprinted in* 1976 U.S. CODE CONG & ADMIN. NEWS 5648, 5650-51 (discusses need of eleventh amendment right waiver due to rate freezing by states). Congress stated that the noncompliance procedures established by the Secretary and the suits for injunctive relief by health care providers were insufficient to address the problem of intentional noncompliance because granting injunctive relief did not remedy past underpayment. *See* S. REP. NO. 1240, 94th Cong., 2nd Sess. 3-4, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS

Boren Amendment allows health care providers to bring an action under section 1983 and avoid the process of rate setting as provided in the statute and regulated by the Secretary.[86] The majority rationalized that if they were to hold to the contrary, it would mean that the states were no longer obligated to adopt "reasonable and adequate" rates.[87] However, in so holding, the majority supplanted the statutory rate-setting process.[88] The Boren

---

5648, 5650-51. The congressional intent behind the repealed law reflects an effort to assist the Secretary in his assigned role as administrator of the Medicaid reimbursement regulations, and did not constitute an endorsement to the position that health care providers have federally protected rights against states for reasonable and adequate reimbursement. *See Wilder*, 496 U.S. at __, 110 S. Ct. at 2525, 110 L. Ed. 2d at 477-478 (Rehnquist, C.J., dissenting).

86. *See Wilder*, 496 U.S. at __, 110 S. Ct. at 2527, 110 L. Ed. 2d at 473 (Rehnquist, C.J., dissenting). The purpose of the Boren Amendment is not to guarantee health care providers the right to any particular level of payment. *See* 126 CONG. REC. 17,885 (1980) (Senator Boren describing the effect Boren Amendment is to have). Senator Boren stated:

> This amendment permits and encourages States to develop simpler more efficient ways of paying for nursing home care, including budget-based and negotiated rates. While it provides for the continuation of cost-reporting and auditing requirements for accountability, the amendment will not require states to rely exclusively on provider cost data in determining rates. Other independent measures of what services ought to cost could be used.

Id. The purpose of the Boren Amendment was to encourage the states to institute payment rates based on findings regarding the expenditures that would be incurred by an "ideal" economic and efficient provider. *Id.* The intent was to utilize the concept of supply and demand in the Medicaid system. *Id.* Senator Boren testified that:

> Federal regulations issued under [the pre-1980 statutory reimbursement provision] require that Medicaid rates be established directly on the basis of actual costs reported by nursing homes. The target of my amendment is this total dependence of the rate-setting system on cost reporting by the providers. Such a system gives no consideration to its effects on provider behavior and insufficient consideration as to whether reported costs are a proper reflection of what services ought to cost in view of other factors, including supply and demand.

126 CONG. REC. 17,885 (1980). Following the *Wilder* decision, health care providers have utilized their right under the Boren Amendment to manipulate higher rates by threatening to sue in federal court. *See* Burda, *Ruling Encourages Hospitals to Contest Medicaid Payments*, Crains Cleveland Bus., Sept. 10, 1990, at 21.

87. *See Wilder*, 496 U.S. at __, 110 S. Ct. at 2520, 110 L. Ed. 2d at 469. The majority stated that "[i]t would make little sense for Congress to require a State to make findings without requiring those findings to be correct. . . . We decline to adopt an interpretation of the Boren Amendment that would render it dead letter." *Id.* In his dissent, Chief Justice Rehnquist expressed concern that the Court had made the assumption that the States were not to be trusted in setting reimbursement rates, and that States would purposefully disregard their obligation to providers without judicial enforceability. *Id.* at 2527 (Rehnquist, C.J., dissenting).

88. *See id.* (Rehnquist, C.J., dissenting). Chief Justice Rehnquist's concern over the majority's decision was founded not only in the misinterpretation of the Amendment by the Court, but that health care providers could bring a § 1983 cause of action to avoid the legislative process set forth in the Medicaid Act. *Id.* The legislative intent was to allow the Secretary to make formal findings concerning the states' rates, and not create rigorous federal scrutiny of the states' assurances of reasonable and adequate rates under the Boren Amendment. *See* 126

Amendment is clear in its declaration that the Secretary oversee the rate-setting process performed by the states.[89] Therefore, by allowing injunctive and declaratory actions by health care providers under section 1983, the Secretary's role under the Amendment was disregarded and the legislative purpose of the Amendment impugned.[90]

By allowing health care providers to challenge the adequacy of a state's Medicaid reimbursement rates under section 1983, the Court has abrogated the Secretary's function as set forth by Congress. Under the *Wilder* decision, health care providers may bring a section 1983 action to seek reasonable and adequate reimbursement, and successfully avoid the administrative channels prescribed by the Secretary. The Court has thereby shed its robes, and usurped the function of the legislature by altering the Secretary's role created by Congress. Admittedly, if health care providers were not able to bring a section 1983 cause of action to challenge reimbursement rates, a portion of the legislative design of the Boren Amendment could potentially be frustrated. However, the statutory construction of the Boren Amendment should be recast by Congress rather than by the courts. Indeed, the majority created an enforceable right where none was specifically set forth. By entrusting the nation's health care providers with this new right, the Court expressed the belief that health care providers will not inundate the already encumbered federal court system with every minor rate challenge. It is ironic that the Court did not extend this same confidence to the states, but instead declared that the states could not be trusted in establishing adequate reimbursement rates. In its decision to create a substantive right for health care providers, the Court acted as a super legislature by creating federally enforceable rights, superseded an administrative role originated by Congress and overlooked the potentially burdensome impact upon the federal court system.

C. Lee Cusenbary, Jr.

CONG. REC. 17886 (1980) (Senator Boren stated payment methods will carry presumption of compliance); *see also* 42 U.S.C. § 1396a(a)(13)(A) (1988) (Secretary to review rates and states' assurances).

89. *See* 42 U.S.C. § 1396a(b) (1988).

90. *See Wilder*, 496 U.S. at ___, 110 S. Ct. at 2527, 110 L. Ed. 2d at 472 (Rehnquist, C.J., dissenting); *see also* Nissen, *Court Ruling Boosts Clout of Health-Care Providers*, Minn.-St. Paul CityBus., July 9, 1990, at 13 (discussing problems arising between health care providers and state since *Wilder* holding); Campbell, *Hospital Suits on Medicaid Rates OK'd: Top Court Ruling May Hurt States*, Chicago Tribune, June 15, 1990, at 1 (states will suffer due to lack of restraint on health care providers challenges in federal court).