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Westside Mothers and Medicaid: Will This Mean the End of Private Enforcement of Federal Funding Conditions Using Section 1983?

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Westside Mothers and Medicaid: Will This Mean the End of Private Enforcement of Federal Funding Conditions Using Section 1983?

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Medicaid Program, Medicaid Act, Spending Clause, Section 1983

COMMENTS

WESTSIDE MOTHERS AND MEDICAID: WILL THIS MEAN THE END OF PRIVATE ENFORCEMENT OF FEDERAL FUNDING CONDITIONS USING SECTION 1983?

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INTRODUCTION

Currently, more than forty-one million people are enrolled in the Medicaid program, including one out of every five children in the United States.¹ Medicaid has been the principle source of health insurance for low-income and indigent people since the enactment of the “Medicaid Act,” which is Title XIX of the Social Security Act of 1965.² Although Medicaid recipients long have relied on the federal courts to enforce, privately, their right to certain Medicaid benefits,³ their ability to effect private enforcement in federal courts may be in

1. See Health Care Financing Administration, *A Profile of Medicaid: Chartbook 2000*, 12, 13 (Sept. 2000), available at <http://www.hcfa.gov/stats/2Tchartbk.pdf> (last visited Jan. 3, 2002). According to the Health Care Financing Administration, the Medicaid program is the third largest source of health insurance in the United States, after employer-based coverage and Medicare, and is the largest program in the federal “safety-net” of public assistance programs. *Id.* at 7.

2. Social Security Act of 1965, 42 U.S.C. §§ 1396-1396v (1994). 42 U.S.C. § 1396 (1994) states:

For the purpose of enabling each state . . . to furnish (1) medical assistance on behalf of families with dependent children and of aged, blind, or 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, there is hereby authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this subchapter.

See also Sara Rosenbaum & David Rousseau, *Medicaid at Thirty-Five*, 45 ST. LOUIS U. L.J. 7, 8 (2001) (describing the Medicaid program, its major challenges, and prospects for reform). According to Professors Rosenbaum and Rousseau, Medicaid, for the past thirty-five years, has been the “legislative vehicle” for a vast number of policy initiatives, including reducing infant mortality, improving child health care, maintaining health services for the elderly and the disabled, and advancing treatment for those with HIV/AIDS, cancer, tuberculosis, and mental illness. *Id.* at 9-10. See generally Health Care Financing Administration, *Medicaid: A Brief Summary*, at <http://www.hcfa.gov/pubforms/actuary/ormedmed/default4.htm> (last visited Jan. 3, 2002) (providing an overview of Medicaid, including a description of those persons eligible for Medicaid services and the types of services the Medicaid program provides).

3. See Lisa E. Key, *Private Enforcement of Federal Funding Conditions Under § 1983: The Supreme Court's Failure to Adhere to the Doctrine of Separation of Powers*, 29 U.C. DAVIS L. REV. 283, 320 (1996) (tracing the use of § 1983, first applied in 1980, to enforce rights created by federal law, such as those contained in the Medicaid Act); see also Leonard Weiser-Varon, *Injunctive Relief From State Violations of Federal Funding Conditions*, 82 COLUM. L. REV. 1236, 1243-44 (1982) (describing the courts as a forum for redress of state violations of Spending Clause conditions, especially those conditions that require the state to provide Aid to Families with Dependant Children (AFDC) and Medicaid services).

jeopardy. In *Westside Mothers v. Haveman*,⁴ a federal district court judge presented a framework for barring Medicaid recipients from bringing such citizen suits.⁵ This proposition has sent shock waves throughout the public interest community.⁶

By ruling that Medicaid recipients are barred from private enforcement of their right to Medicaid services, *Westside Mothers* creates the dangerous possibility that Medicaid can no longer be considered health insurance.⁷ As Professor Sara Rosenbaum suggests, “the ability to enforce your right to benefits is the essence of insurance. Without that ability, you no longer have health insurance.”⁸ More practically, Supreme Court adoption of the *Westside Mothers* rationale would eviscerate private enforcement of

4. 133 F. Supp. 2d 549 (E.D. Mich. 2001). *Westside Mothers* is currently on appeal in the Sixth Circuit Court of Appeals, docket number 01-1494. The case has been fully briefed and oral arguments have been scheduled for January 24, 2002 in Cincinnati, Ohio. E-mail from Robin Sumner, Associate, Dechert, Price & Rhoads (Nov. 29, 2001) (on file with author).

5. See *Westside Mothers*, 133 F. Supp. 2d at 587 (ruling that state sovereign immunity bars private Medicaid enforceability suits and that § 1983 fails to provide a cause of action).

6. See Robert Pear, *Ruling in Michigan Bars Suits Against State Over Medicaid*, N.Y. TIMES, May 12, 2001, at A18 (reporting the *Westside Mothers* decision and the reaction it received, including the supposition that this case would end the public’s conception of Medicaid as health insurance). The National Senior Citizens Law Center, Michigan Poverty Law Program, and even the conservative American Enterprise Institute are all publishing reports, on their respective websites, on *Westside Mothers*. While some public health interest groups view this case as an ominous threat to the enforcement of rights to health care, more conservative groups have heralded it as a blow for state’s rights and a step towards true federalism. Compare National Senior Citizens Law Center, *Court Declares Medicaid Statute Unenforceable*, at <http://www.nslc.org/westside.html> (last visited Jan. 3, 2002) (describing *Westside Mothers* as the “first fruits” of a “wholesale attack on the ability of private parties to enforce federal laws against states”), and Lisa Ruby, *Westside Mothers v. Haveman: Children’s Health Care Crisis*, ¶ 4, at <http://www.mplp.org/materials/newsletter/01Spring/publicbenefits1htm.htm> (last visited Jan. 3, 2002) (stating that *Westside Mothers* “would effectively preclude Medicaid recipients and beneficiaries of other federal programs from suing states to force them to provide services mandated by federal law”), with Michael S. Greve, *Federalism, Yes, Activism, No.*, FEDERALIST OUTLOOK, ¶ 14 (July 2001), available at <http://www.aei.org/fo/fo13092.htm> (last visited Jan. 3, 2002) (stating that the proposition of *Westside Mothers*—that federal programs enacted under the Constitution’s “spending clause” are not the supreme Law of the Land and therefore are unenforceable in federal court unless a state has specifically waived its defenses against private lawsuits—is “exactly right”).

7. See Pear, *supra* note 6, at A18 (describing possible implications of the *Westside Mothers* decision). In addition to eliminating the ability of Medicaid recipients to enforce their right to Medicaid benefits, Part II.C of this Comment argues that the reasoning of *Westside Mothers* may extend to a vast array of state-administered federal entitlement programs. This would deprive millions of people of the ability to use the courts to challenge state interference with federal entitlements. See *infra* Part II.C.

8. See Pear, *supra* note 6, at A18 (quoting Professor Rosenbaum’s reaction to the *Westside Mothers* decision and her conclusion that “[i]f the ruling stands, it is the end of the Medicaid program as a source of insurance”).

Medicaid requirements and other federal funding conditions.⁹ This is especially problematic given the vast number of occasions in which Medicaid recipients are forced to resort to federal litigation against a state to secure compliance with the Medicaid Act.¹⁰

Persons who qualify for Medicaid are entitled to receive a wide range of free medical services.¹¹ The Medicaid program is a federal-state cooperative effort created pursuant to Congress' spending power.¹² It is administered by the states, which are obligated to

9. See *infra* Part I.D (describing the *Westside Mothers* rationale and how it can be used to bar the private enforcement of Medicaid requirements). This statement does not apply to the private enforcement of federal funding conditions where a state has waived its Eleventh Amendment privilege of sovereign immunity. This is because the Eleventh Amendment only bars suits against non-consenting states. See *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1985) (recognizing that "if a state waives its immunity and consents to suit in federal court, the Eleventh Amendment does not bar the action"); see also *infra* note 65 (describing the history and scope of the Eleventh Amendment).

10. See, e.g., *Lewis v. N.M. Dep't of Health*, 261 F.3d 970 (10th Cir. 2001) (contending that delay in the provision of Medicaid waiver services to eligible Medicaid participants is permissible); *Concourse Rehab. & Nursing Ctr. Inc. v. Whalen*, 249 F.3d 136 (2d Cir. 2001) (alleging that operators of residential nursing facility were underpaid for rehabilitative services in violation of federal Medicaid Act); *HCMF Corp. v. Allen*, 238 F.3d 273 (4th Cir. 2001) (challenging Medicaid reimbursement rates as applied by the State of Virginia); *Am. Soc'y of Consultant Pharmacists v. Garner*, 2001 WL 893822 (N.D. Ill. Aug. 8, 2001) (contending that the formulas the State of Illinois used to pay providers of prescription drug services to Medicaid recipients violates the Medicaid Act); *Mertz ex rel. Mertz v. Houstoun*, 155 F. Supp. 2d 415 (E.D. Pa. 2001) (alleging that the State of Pennsylvania's denial of a Medicaid applicant's application for benefits violated the Medicaid Act); *Dajour B. v. City of New York*, 2001 WL 830674 (S.D.N.Y. July 23, 2001) (arguing that the State of New York failed to provide adequate EPSDT services for homeless children with asthma, in violation of the Medicaid Act).

11. See Health Care Financing Administration, *Medicaid: A Brief Summary*, ¶ 15, at <http://www.hcfa.gov/pubforms/actuary/ormedmed/default4.htm> (last visited Jan. 3, 2002). In addition to the typical doctor visits for illness or injury, Professors Rosenbaum & Rousseau point out that the federal Medicaid program extends well beyond the average health insurance plan. See Rosenbaum & Rousseau, *supra* note 2, at 13. For instance, Medicaid provides eligible beneficiaries with long-term personal care services, respite care, and case management. See 42 U.S.C. § 1396a(10)(A) (1994); Rosenbaum & Rousseau, *supra* note 2, at 13. Another unique feature of the Medicaid program is that it provides for medical services and benefits to any beneficiary, regardless of whether the beneficiary suffers from a chronic condition or a completely correctable illness or injury. See 42 C.F.R. § 440.230(b) (2000); Rosenbaum & Rousseau, *supra* note 2, at 14. In contrast, conventional health insurance plans, typically, only cover those services that are necessary to "restore normal functioning" following an illness or injury. See Rosenbaum & Rousseau, *supra* note 2, at 14.

12. See 42 U.S.C. § 1396 (1994) (authorizing the appropriation of federal funds to enable each state to provide medical assistance to those who cannot afford such assistance on their own); *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 502 (1990) (describing Medicaid as a cooperative federal-state program). Article I, section 8, clause 1 of the U.S. Constitution authorizes Congress to "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." This language is generally considered the source of Congress' spending power. But see David E. Engdahl, *The Basis of the*

provide certain prescribed services once they accept federal Medicaid funds.¹³ A serious legal issue arises out of this arrangement—what happens when a state fails to meet its obligations?¹⁴

The Medicaid Act itself provides for a simple remedial scheme by which the federal government can withhold Medicaid funds from a state that fails to abide by federal requirements.¹⁵ In addition to this scheme, beneficiaries of the Medicaid program, since the early 1980s, have been suing state officials on their own in federal courts to compel the states to fulfill their Medicaid obligations.¹⁶ Complainants assert their causes of action under 42 U.S.C. § 1983,¹⁷ a nineteenth-century civil rights law that authorizes suits against state officials who violate rights secured by federal law or the federal Constitution.¹⁸

Spending Power, 18 SEATTLE U. L. REV. 215, 216 (1995) (arguing that Article IV of the Constitution, the Property Clause, suffices to authorize all federal spending).

13. See Rosenbaum & Rousseau, *supra* note 2, at 17 (describing the structure of the Medicaid program).

14. See Key, *supra* note 3, at 284 (identifying the problem of states failing to meet their Medicaid obligations and arguing that the Supreme Court's 42 U.S.C. § 1983 jurisprudence does not give Congress the deference it deserves as a co-equal branch of government); see also Weiser-Varon, *supra* note 3, at 1239 (describing the remedies available to beneficiaries of federal grant-in-aid programs and criticizing the Supreme Court's limitations on retroactive and prospective remedies).

15. 42 U.S.C. § 1396c (1994) provides that:

If the Secretary, after reasonable notice and opportunity for hearing to the state agency administering or supervising the administration of the state plan approved under this subchapter, finds (1) that the plan has been so changed that it no longer complies with the provisions of section 1396a of this title; or (2) that in the administration of the plan there is a failure to comply substantially with any such provision; the Secretary shall notify such state agency that further payments will not be made to the state (or, in his discretion, that payments will be limited to categories under or parts of the state plan not affected by such failure), until the Secretary is satisfied that there will no longer be any such failure to comply.

See also Key, *supra* note 3, at 292 (noting the federal government's option to cut off funds is often the only enforcement mechanism that the federal government possesses to ensure compliance with the provisions of federal Spending Clause programs, which is one reason the federal government has not had much success in achieving such compliance).

16. See Key, *supra* note 3, at 302 (recounting the evolution of 42 U.S.C. § 1983 as a means to privately enforce federal rights); see also Weiser-Varon, *supra* note 3, at 1248 (describing the remedies available to beneficiaries of grant-in-aid programs).

17. 42 U.S.C. § 1983 (1994) provides that:

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

This section was enacted as § 1 of the Civil Rights Act of 1871, 17 Stat. 13.

18. See *Maine v. Thiboutot*, 448 U.S. 1, 4 (1981) (stating that § 1983 allows a remedy for violation of federal statutory law as well as constitutional law); see also Key, *supra* note 3, at 302-06 (describing § 1983 as indicative of the Reconstruction-Era

Despite the longtime use and Supreme Court recognition of 42 U.S.C. § 1983 as a basis for private enforcement of Medicaid rights, *Westside Mothers* has closed the door on such suits in the Eastern District of Michigan.¹⁹ More strikingly, *Westside Mothers* has provided an analytic framework to be used as persuasive caselaw in other private Medicaid suits.²⁰ In the case, Judge Robert H. Cleland initially ruled that the state sovereign immunity doctrine bars such citizen suits, relying on the Supreme Court's earlier characterization of federal Spending Clause legislation as a contract and the Court's recent federalism jurisprudence.²¹ According to Judge Cleland, the Supremacy Clause²² does not encompass the federal Medicaid Act because Congress possesses no power to force the states to participate in federal Spending Clause (or "grant-in-aid") programs.²³ Judge

shift in political philosophy away from state autonomy and towards the power of the federal government, which, after the Civil War, "was seen as the protector of individual rights from state infringement and abuse"; noting § 1983 was passed specifically to give individuals a federal right that could be enforced in federal courts, distrusting the states' own ability or willingness to enforce the privileges and immunities guaranteed in the Fourteenth Amendment).

19. See *Westside Mothers v. Haveman*, 133 F. Supp. 2d 549, 587 (E.D. Mich. 2001) (barring the private enforcement of Medicaid requirements against states that have agreed to accept federal Medicaid funds).

20. See, e.g., *Joseph A. v. Ingram*, 262 F.3d 1113, 1123 (10th Cir. 2001) (citing *Westside Mothers* as persuasive authority to deny private enforcement of provisions of Title IV and Title XX of the Social Security Act against the State of New Mexico); *Bonnie L. ex rel. Hadsock v. Bush*, 2001 WL 1580127, *6 (S.D. Fla. Dec. 4, 2001) (holding the comprehensive statutory and regulatory provisions of Titles IV and XX of the Social Security Act "demonstrate that Congress meant to preclude reliance on the broad provisions of an *Ex parte Young* suit to enforce the federal statutory standards governing state child adoption and welfare services"). While *Ingram* and *Bonnie L.* are, more accurately, each an application of the limitation placed on the *Ex parte Young* doctrine by *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), see *infra* note 79, the citation to *Westside Mothers* indicates the potential for other courts to adopt that decision's arguments that are more dangerous to private enforcement suits. For several federal district court decisions that reject the *Westside Mothers* rationale, see *infra* note 99.

21. See *Westside Mothers*, 133 F. Supp. 2d at 562. Judge Cleland stated:

Because congressional enactments pursuant to the Spending Power . . . depend on the voluntary agreement of participating states and are not within the ambit of the Supremacy Clause, they are not the supreme law of the land, and suits cannot be brought against state officials under *Ex parte Young* to enforce those requirements.

Id. The Supreme Court first discussed the contractual nature of Spending Clause legislation in *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) ("*Pennhurst I*"). See *infra* Part I.A. Judge Cleland also relied heavily upon the Court's recent federalism jurisprudence, especially *Alden v. Maine*, 527 U.S. 706 (1999) stating "the Supremacy Clause enshrines as 'the supreme Law of the Land' only those federal Acts that comport with the constitutional design," which he believed opened the door to a new conception of Spending Clause legislation as non-supreme federal law. See *infra* Part I.D.

22. U.S. CONST. art. VI, § 1, cl. 2.

23. See *Westside Mothers*, 133 F. Supp. 2d at 562 (citing *Brogdon v. Nat'l Healthcare Corp.*, 103 F. Supp. 2d 1322, 1339 (N.D. Ga. 2000)) (holding

Cleland considered the *Ex parte Young*²⁴ exception to sovereign immunity,²⁵ but ruled that exception could not be used to obtain prospective injunctive relief against officers of the State of Michigan in a federal court. This is because the *Ex parte Young* exception requires that the federal law alleged to have been violated be supreme federal law.²⁶ It is thus Judge Cleland's ruling—that Spending Clause legislation is not supreme federal law—that is the truly groundbreaking decision with respect to *Ex parte Young*. Furthermore, Judge Cleland, relying on his earlier ruling that the Medicaid program is a contract between the state and federal governments, held that even if sovereign immunity were not an obstacle, Medicaid recipients are merely third-party beneficiaries of that contract. As such, Judge Cleland determined that § 1983 provided them no cause of action.²⁷

congressional enactments under the spending power do not preempt state law). Judge Cleland buttresses this proposition, hypothesizing that should Michigan elect not to participate in the federal Medicaid program and instead opt to administer a similar program using its own state funds and its own guidelines, “Michigan’s guidelines would not be preempted by the competing federal Medicaid program, because a state’s participation in Medicaid is entirely volitional.” *Id.*

24. 209 U.S. 123 (1908). The terms “*Ex parte Young* exception,” “*Ex parte Young* doctrine,” and “*Ex parte Young* remedy” are used interchangeably throughout this Comment.

25. See *infra* note 74 and accompanying text (explaining the rationale of the *Ex parte Young* doctrine). Section 1983 merely provides a cause of action, but plaintiffs who bring suit against a state government must still overcome the bar of sovereign immunity. See *id.* The *Ex parte Young* doctrine allows plaintiffs to accomplish this by suing state officials in their official capacity, instead of the state itself. In accordance with this doctrine, plaintiffs need only ask for prospective injunctive relief from violation of a supreme federal law. See *id.*

26. See *Westside Mothers*, 133 F. Supp. 2d at 562. Judge Cleland further ruled the *Ex parte Young* doctrine could not be used to overcome the sovereign immunity bar because (1) the State of Michigan was the real party in interest; (2) the defendant state officers’ alleged violations were within the scope of discretionary functions; and (3) the funds-cutoff remedial scheme provided by the Medicaid Act is more limited than what the court might order under *Ex parte Young*, which, under *Seminole Tribe of Florida v. Florida*, 571 U.S. 44, 74 (1996), precludes the *Ex parte Young* remedy. *Westside Mothers*, 133 F. Supp. 2d at 573-75. See *infra* note 79 and accompanying text (discussing the *Seminole Tribe* limitation upon *Ex parte Young*). These additional rulings by Judge Cleland are in-and-of-themselves questionable, but a detailed discussion of each is beyond the scope of this Comment.

27. See *id.* at 579 (“Section 1983 cannot possibly create a cause of action for third-party donee beneficiaries to a contract, because it is not unambiguously clear that such a right existed at the time the statute was enacted [in 1871].”). Judge Cleland also ruled (1) in 1871, states could not be sued for breaches of contract; (2) in 1871, agency law did not permit state officers to be sued for “the contractual breaches of their employing states”; and (3) any rights created by the Medicaid Act are “secured” by state, not federal law, because no right to Medicaid services exists until the state agrees to participate in the Medicaid program. See *Westside Mothers*, 133 F. Supp. 2d at 577-78, 581-82. These rulings are all based on Judge Cleland’s premise that Medicaid is a contract between the state and federal governments. See *infra* Part I.D (describing in greater detail the *Westside Mothers* holding).

This Comment seeks both to clarify several issues that were presented yet muddled in *Westside Mothers* and to establish an analytic framework for maintaining *Ex parte Young* and § 1983 as a means of enforcing federal civil rights. Part I of this Comment describes the Medicaid program and the traditional manner in which citizens previously enforced Medicaid provisions in federal courts. Part I also explores the relevant sovereign immunity issues and how the *Westside Mothers* decision has built upon the Supreme Court's "New Federalism"²⁸ to bar such suits. Part II applies classic contract theory analysis to the Medicaid program in an effort to more thoroughly analyze the nature of the relationship between the federal and state governments under the Medicaid Program. This Comment

28. The term "New Federalism" has been used to refer to the Supreme Court's recent interpretations of the Commerce Clause and the Tenth, Eleventh, and Fourteenth Amendments to the U.S. Constitution. See David C. Feola & David R. Fine, *The "New Federalism": Ignore It at Your Peril*, COLO. LAW., Nov. 2000, at 5 (summarizing the important "New Federalism" cases and advising practitioners on how to avoid the problems presented by these cases). See, e.g., *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (holding that Congress did not appropriately use its enforcement authority under § 5 of the Fourteenth Amendment to abrogate state sovereign immunity when it passed Title I of the Americans with Disabilities Act); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 67 (2000) (ruling that Congress exceeded its power under § 5 of the Fourteenth Amendment when it abrogated state sovereign immunity in the Age Discrimination in Employment Act of 1967); *United States v. Morrison*, 529 U.S. 598, 617 (2000) (finding that the Commerce Clause did not empower Congress to enact the Violence Against Women Act of 1994); *Alden v. Maine*, 527 U.S. 706, 712 (1999) (holding that Article I of the U.S. Constitution does not grant Congress the power to subject a state to private suit in its own courts); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 691 (1999) (reasoning that the State of Florida could not be liable for intellectual property infringement because neither the Lanham Act nor the Patent Remedy Act validly abrogated the states' sovereign immunity); *Printz v. United States*, 521 U.S. 898, 935 (1997) (ruling that a federal law requiring state officers to conduct background checks on handgun purchasers violated the Tenth Amendment); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 47 (1996) (finding that neither the Commerce clause, nor any other Article I power grants Congress the authority to abrogate a state's sovereign immunity in federal court); *United States v. Lopez*, 514 U.S. 549, 567-68 (1995) (holding that Congress acted beyond its Commerce Clause authority by enacting a federal law criminalizing the possession of a firearm in a school area).

The conventional wisdom among legal commentators is that the Supreme Court, through its recent federalism cases, is making a concerted effort to address the interests of the states at the expense of the federal government. See Ann Althouse, *On Dignity and Deference: The Supreme Court's New Federalism*, 68 U. CIN. L. REV. 245, 245-46 (2000) (arguing that the Supreme Court's jurisprudence has evolved from a "normative, structural analysis" to a states' rights approach). However, Professor Herman S. Schwartz argues that the Court's allegiance to states' rights is a disguised effort to undermine both the civil rights revolution and the New Deal. Herman Schwartz, *The Supreme Court's Federalism: Fig Leaf for Conservatives*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 119, 120 (2001). According to Professor Schwartz, the debate over the balance of power between the states and the federal government is merely superficial, and the outcome of the Supreme Court's federalism cases is more a function of the race and class interests involved. See *id.*

concludes from the contract analysis that even if the Medicaid Act does not begin as supreme federal law,²⁹ it becomes supreme once a state accepts federal funds and assures the federal government that it will comply with that law. Therefore, the *Ex parte Young* doctrine and § 1983 should be maintained as the only means for Medicaid recipients to vindicate their federal right under the program. This Comment then briefly discusses the enormous implications for all beneficiaries of Spending Clause programs if the Supreme Court adopts the rationale of *Westside Mothers*. Finally, it concludes that the Supreme Court should instead adopt the contract analysis set forth in Part II.

I. BACKGROUND

A. *The Medicaid Program and the Supreme Court's Characterization of Spending Clause Programs*

The Medicaid program is a federal-state cooperative effort, enacted pursuant to Congress' spending power, for the "purpose of providing federal financial assistance to states that choose to reimburse certain costs of medical treatment for needy persons."³⁰

29. While this Comment acknowledges that the concept of non-supreme, yet constitutional, federal law is troubling and has little support outside a certain circle of conservative constitutional theorists, this Comment assumes the validity of the concept for purposes of analysis. However, the ultimate conclusion—that the Medicaid Act should remain enforceable by Medicaid recipients—and the contract analysis are both applicable whether or not the Supreme Court affirms the concept. Should the Court dismiss the very notion of non-supreme, yet constitutional, federal law, the contract analysis still serves to create a more precise conception of the Medicaid Act as both a creature of contract and federal law. It also should be noted that despite the lack of supporting precedent, at least one constitutional scholar believes that the Rehnquist Court is headed in the direction of stratifying federal law into supreme and non-supreme varieties. See Michael S. Greve, *Federalism, Yes, Activism, No.*, FEDERALIST OUTLOOK (July 2001), available at <http://www.aei.org/fo/fo13092.htm> (last visited Jan. 3, 2002) (arguing that the Supreme Court has "indicated" that, soon, it will likely hold Spending Clause legislation is not supreme federal law). See generally MICHAEL S. GREVE, REAL FEDERALISM: WHY IT MATTERS, HOW IT COULD HAPPEN 78 (1999) (extolling the virtues of "noncooperation" between the state and federal governments and of limiting the private enforcement of federal entitlement statutes).

30. *Harris v. McRae*, 448 U.S. 297, 301, 311 (1980) (holding that a state that participates in the Medicaid program is not obligated under Title XIX of Social Security Act to continue funding those medically necessary abortions for which federal reimbursement was unavailable under the Hyde Amendment). See also *Wildler v. Va. Hosp. Ass'n*, 496 U.S. 498, 502, 524 (1990) (holding that the Boren Amendment to the Medicaid Act created substantive federal rights enforceable under § 1983). See generally David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1, 62 (1994) (exploring the Supreme Court's spending power jurisprudence and proposing that Spending Clause legislation does not fall under the ambit of the Supremacy Clause).

To obtain federal funds, a state must submit to the U.S. Secretary of Health and Human Services (the “Secretary”) a state Medicaid plan that contains a “comprehensive statement describing the nature and scope of the State’s Medicaid Program.”³¹ If the state’s plan fulfills the conditions set forth in 42 U.S.C. § 1396a(a), then the Secretary must approve the plan and grant federal funds to help the state implement it.³² In addition to the requirements of 42 U.S.C. § 1396a(a), each state’s Medicaid plan must contain an “assurance that it will be administered in conformity with the specific requirements of Title XIX, the regulations [promulgated pursuant to Title XIX], and other applicable official issuances of the [Secretary].”³³

With regard to the mechanics of the Medicaid program, the Supreme Court has stated that Medicaid, like other Spending Clause legislation, is “much in the nature of a contract.”³⁴ In *Pennhurst State*

31. 42 C.F.R. § 430.10 (2000). See *Harris*, 448 U.S. at 308 (recounting the mechanics of the Medicaid program and explaining that once a state agrees to establish a Medicaid plan that satisfies the requirements of Title XIX, the federal government will pay a specified percentage of the state’s costs); see also *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (“*Pennhurst I*”) (“[O]ur cases have long recognized that Congress may fix the terms on which it shall disburse federal money to the states.”). As will be shown in Part II.A, the submission of the state Medicaid plan can be deemed an offer by the state to enter into a contract with the federal government.

32. See 42 U.S.C. § 1396a(b) (1994) (“The Secretary shall approve any plan which fulfills the conditions specified in subsection (a) of this section”); 42 U.S.C. § 1396b (1994) (detailing the federal grants that a state is entitled to once its plan is approved). This approval, as will be argued in Part II.A, should be viewed as an acceptance of the state’s offer to enter into a contract. All of the terms of the contract are embodied within the state Medicaid plan. See *infra* Part II.A.

The Medicaid Act is flexible, allowing states a good deal of discretion in crafting their Medicaid plans. See Rosenbaum & Rousseau, *supra* note 2, at 20-23 (describing the requirements of the Medicaid Act and the discretion afforded to states in determining eligibility). It is, therefore, possible for a state to vary the administration of its Medicaid plan and in doing so, breach its contract with the federal government. However, such a breach may not be so great as to violate the provisions of the Medicaid Act.

33. 42 C.F.R. § 430.10. Part II.B.1 of this Comment argues that this assurance is of special significance in overcoming the sovereign immunity bar imposed by *Westside Mothers*.

34. *Pennhurst I*, 451 U.S. at 17 (“[L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the states agree to comply with federally imposed conditions.”). In *Westside Mothers*, Judge Cleland heavily relied upon the language, “much in the nature of a contract,” to hold that Spending Clause legislation is of lesser authority than other federal laws. See *infra* Part I.D. It should be noted, however, that the *Pennhurst I* Court said no such thing. As indicated in Part II.A, the analogy to contract was used to resolve a dispute over the clarity of a condition placed upon receipt of federal funds. Indeed, the Court’s language in *Pennhurst I* can be taken to mean that Spending Clause legislation is also in the nature of “something else” as well. That is precisely the argument made by the plaintiffs and dismissed by Judge Cleland in *Westside Mothers*. See *Westside Mothers*, 133 F. Supp. 2d at 558.

School & Hospital v. Halderman,³⁵ the Court used its contract analogy to hold that the conditions placed on federal Spending Clause programs must be stated clearly and unambiguously, in a manner that empowers a state's knowing acceptance.³⁶ Absent such a clear statement, a condition placed upon receipt of federal funds is not enforceable.³⁷ The Court has subsequently used the contract analogy to hold that such conditions are only enforceable against those entities in a position to accept or reject federal funds,³⁸ and to hold that such conditions cannot be coercive.³⁹ The Court has also recognized that the federal government's spending power can be used as a carrot, urging a state to enact legislative programs that Congress could not otherwise mandate using its coercive powers enumerated in Article I of the U.S. Constitution.⁴⁰

35. 451 U.S. 1 (1981).

36. See *Pennhurst I*, 451 U.S. at 17 ("The legitimacy of Congress' power to legislate under the spending power thus rests on whether the state voluntarily and knowingly accepts the terms of the 'contract.'"). In *Brogdon v. Nat'l Healthcare Corp.*, 103 F. Supp. 2d 1322, 1339 (N.D. Ga. 2000), this language was used by Judge Harold L. Murphy to hold that the Supremacy Clause does not operate upon the regulatory scheme promulgated under the Medicare and Medicaid Acts. According to Judge Murphy, state laws that conflict with Medicare and Medicaid Acts do not become void once a state agrees to accept federal funds. *Id.* For a critique of this argument, see *infra* note 99 (criticizing the use of *Pennhurst I* as authority for the non-supremacy of Spending Clause legislation).

37. See *Pennhurst I*, 451 U.S. at 17, 25; see also Engdahl, *supra* note 30, at 70 (discussing *Pennhurst I* and the requisite clarity of congressional intent to impose conditions on grants of federal funds).

38. See *U.S. Dep't of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597, 606 (1986) (holding that the scope of § 504 of the Rehabilitation Act of 1973 is limited to those who actually receive federal financial assistance).

39. See *South Dakota v. Dole*, 483 U.S. 203, 211 (1987) ("Our decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937))).

40. See *New York v. United States*, 505 U.S. 144, 166 (1992) (holding that the "take-title" provision of the Low-Level Radioactive Waste Policy Act, requiring states to accept ownership of waste or regulate according to instructions of Congress, lies outside Congress' enumerated powers and is inconsistent with the Tenth Amendment). After invalidating the statute in *New York*, the Court qualified its position, stating:

This is not to say that Congress lacks the ability to encourage a State to regulate in a particular way, or that Congress may not hold out incentives to the States as a method of influencing a State's policy choices. Our cases have identified a variety of methods, short of outright coercion, by which Congress may urge a State to adopt a legislative program consistent with federal interests.

Id.

The use of the spending power has also been proposed as a way to circumvent other "New Federalism" holdings, such as *City of Boerne v. Flores*, 521 U.S. 507, 519, 536 (1997) (holding that Congress exceeded the scope of its enforcement power under § 5 of Fourteenth Amendment in enacting Religious Freedom Restoration Act). See Brett D. Proctor, Note, *Using the Spending Power to Circumvent City of Boerne v. Flores: Why the Court Should Require Constitutional Consistency in its Unconstitutional*

B. *Section 1983: The Typical Private Medicaid Enforceability Suit*

The Medicaid Act provides only one means by which the federal government can enforce a state's Medicaid obligations.⁴¹ If the Secretary is satisfied that a state has failed to comply substantially with any of the requirements of 42 U.S.C. § 1396a, then the Secretary may withhold all or some of the federal Medicaid grants.⁴² However, the Act does recognize that individual Medicaid recipients have certain rights and, therefore, mandates that participating states provide certain administrative procedures for recipients who believe they have been wrongfully denied care.⁴³ In addition, the Supreme Court has made it clear that the Medicaid Act provides no implied cause of action for Medicaid recipients to enforce their right to certain services.⁴⁴

In addition to the two enforcement mechanisms prescribed by law, the Supreme Court has recognized since 1980 that 42 U.S.C. § 1983 provides a cause of action for Medicaid recipients to sue state officers for failing to comply with conditions placed on federal spending programs.⁴⁵ In *Maine v. Thiboutot*,⁴⁶ the Supreme Court was forced to

Conditions Analysis, 75 N.Y.U. L. REV. 469, 469-70 (2000) (arguing that the Spending Clause should not be construed to empower Congress to accomplish functionally through conditional grants to states, what the Supreme Court has denied by other means).

41. See 42 U.S.C. § 1396c; see also Key, *supra* note 3, at 292-93 (describing the enforcement mechanism available to the federal government and arguing that it is an ineffective means of securing state compliance).

42. See 42 U.S.C. § 1396c; see also *Pennhurst I*, 451 U.S. at 52 (White, J., dissenting in part) (arguing that a funds cutoff is a drastic remedy with injurious consequences to the supposed beneficiaries of the a grant-in-aid program); Key, *supra* note 3, at 292-93 (arguing that the federal government's ability to withhold funds is an inadequate means of enforcing Spending Clause conditions). Specifically, Professor Key argues that federal agencies focus more on providing funds to participating states than on enforcing conditions, causing compliance and enforcement to receive a low priority. See *id.* Key also argues that a cutoff of funds is such a drastic remedy that it is "rarely, if ever, invoked." *Id.* According to Key, these federal agencies know that a funds cutoff is not likely to help anyone and would destroy the state's program. *Id.*

43. 42 U.S.C. § 1396a(a)(3) provides that:

A state plan for medical assistance must provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for medical assistance under the plan is denied or is not acted upon with reasonable promptness.

44. See *Pennhurst I*, 451 U.S. at 17 (holding that conditions placed on receipt of federal funds must be clearly stated). Because an implied cause of action relies on an unstated intention on the part of Congress, it is completely incongruent with the clear-statement requirement. See also Key, *supra* note 3, at 294-302 (describing the Supreme Court's denial of implied causes of action under Spending Clause programs, and the Court's general retreat from recognizing any implied causes of action).

45. See *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980) (holding that § 1983 encompasses violations of rights protected by any federal law, in the context of

decide whether § 1983's reference to federal "laws" applied only to equal protection laws or to all federal laws.⁴⁷ The plaintiffs had alleged that the State of Maine and its Commissioner of Human Services violated § 1983 by improperly calculating the amount of Aid to Families with Dependent Children benefits to which they were entitled under the federal Social Security Act.⁴⁸ In granting judgment for the plaintiffs, the Court ruled that § 1983 provided a cause of action for the violation of rights protected by any federal law.⁴⁹

The Court later placed limitations on the use of § 1983 to vindicate federal rights.⁵⁰ In *Wright v. City of Roanoke Redevelopment & Housing Authority*,⁵¹ it ruled that once a plaintiff established a § 1983 cause of action, the defendant/state actor must demonstrate "by express provision or other specific evidence from the statute itself that Congress intended to foreclose such private enforcement."⁵² Such evidence would be present if the statute provides its own comprehensive enforcement scheme.⁵³ The *Wright* Court further held that a § 1983 action will not be permitted if the statute at issue does not create enforceable rights, privileges, or immunities within the meaning of § 1983.⁵⁴ In *Wilder v. Virginia Hospital Ass'n*,⁵⁵ the

Maine's improperly calculating the plaintiff's Aid to Families with Dependent Children benefits); *see also* *Wright v. City of Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 424-25, 429-30 (1987) (reasoning that the tenants of low-income housing projects could use § 1983 to enforce their substantive rights created by the Brooke Amendment to the Housing Act of 1937); *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 524 (1990) (ruling that health care providers may use § 1983 to enforce their substantive rights created by the Boren Amendment to the Medicaid Act).

46. 448 U.S. 1 (1980).

47. *See Thiboutot*, 448 U.S. at 3 (stating one issue presented by the case is "whether § 1983 encompasses claims based on purely statutory violations of federal law").

48. *See id.* at 2-3.

49. *See id.* at 4 (relying on the plain language of § 1983 and the fact that Congress attached no modifiers to the phrase "and laws").

50. *See Key*, *supra* note 3, at 328-31 (describing the evolution of the Supreme Court's § 1983 jurisprudence).

51. 479 U.S. 418 (1987).

52. *Id.* at 423 (finding that Congress did not intend to foreclose a § 1983 action when it passed the Brooke Amendment to the Housing Act of 1937).

53. *See id.* at 424 (holding that the remedial devices provided in the statute must be sufficiently comprehensive to "demonstrate congressional intent to preclude the remedy of suits under § 1983" (quoting *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981))).

54. *See id.* at 423. In *Blessing v. Freestone*, 520 U.S. 329, 340 (1997), the Supreme Court cited to *Wright* and *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498 (1990), in establishing a three-prong test for determining whether a federal statute creates an enforceable right within the meaning of § 1983:

First, Congress must have intended that the provision in question benefit the plaintiff. *Wright*, 479 U.S. at 430. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so 'vague and amorphous' that its enforcement would strain judicial competence. *Id.* at 431-32. Third, the statute must unambiguously impose a binding obligation

Supreme Court specifically applied these limitations to a § 1983 suit brought to enforce provisions of the Boren Amendment⁵⁶ to the Medicaid Act.⁵⁷ The Court ruled that Congress did not foreclose a private judicial remedy for enforcement of the Medicaid Act under § 1983⁵⁸ and that the Amendment did create a federal right enforceable by § 1983.⁵⁹ The keen observer will note that the federal rights at issue in *Thiboutot*, *Wright*, and *Wilder* were all granted by federal legislation passed pursuant to Congress' spending power.⁶⁰ All of the plaintiffs in these cases, whom Judge Cleland would call third-party beneficiaries of a contract, were recognized by the Supreme Court as having causes of action under § 1983.

In *Will v. Michigan Dep't of State Police*,⁶¹ the Supreme Court specified rules of construction for § 1983.⁶² In holding that a state is not a "person" within the meaning of § 1983, the Court ruled that § 1983 should be construed in accordance with the common law as it existed in 1871.⁶³ The Court also ruled, in *Will*, that being subject to a § 1983 suit cannot be considered a condition placed on the receipt of

on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms. *Wilder*, 496 U.S. at 510-11.

Blessing, 520 U.S. at 340 (citations omitted).

55. 496 U.S. 498 (1989).

56. Pub. L. No. 96-499, § 962(a), 94 Stat. 2650 (1980).

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

58. *See id.* at 520-21 (concluding that because the federal statute did not expressly preclude the use of § 1983 and because no other comprehensive remedial scheme was created by the statute, the defendants could not demonstrate that Congress intended to preclude the use of the § 1983 remedy). While the court in *Westside Mothers* never reached the issue of whether Congress intended to preclude to use of § 1983 to enforce the Medicaid Act, *Wilder* is direct authority for the proposition that the State of Michigan would not be able to demonstrate such an intent.

59. *See id.* at 509-10 (holding that the Boren Amendment did create enforceable rights in health care providers secured by § 1983 "to the adoption of reimbursement rates that are reasonable and adequate to meet the costs of an efficiently and economically operated facility that provides care to Medicaid patients").

60. The federal statutes at issue in those cases, the Aid to Families with Dependent Children (now Temporary Assistance for Needy Families (TANF)), the Brooke Amendment to the Housing Act of 1937, and the Boren Amendment to the Medicaid Act, respectively, are all Spending Clause statutes. *See* 42 U.S.C. § 601 (2001); 42 U.S.C. § 1437 (1994); 42 U.S.C. § 1396 (1994).

61. 491 U.S. 58 (1989).

62. *See id.* at 65-66 (holding that a state is not a "person" within the meaning of § 1983).

63. *See id.* at 67 ("[I]n enacting § 1983, Congress did not intend to override well-established immunities or defenses under the common law."). Note, however, that *Hans v. Louisiana*, 134 U.S. 1 (1890) (holding that the Eleventh Amendment applied to cases arising under federal law and brought by individuals against their own state), was not decided until 1890, which undermines the Supreme Court's assertion in *Will* that § 1983, enacted in 1871, was meant to exclude suits brought against an actual state by that state's own citizens.

federal funds.⁶⁴

C. *Sovereign Immunity and the Ex parte Young Doctrine*

Sovereign immunity is the doctrine, embodied in the Eleventh Amendment,⁶⁵ that bars a citizen from suing a state without that state's consent.⁶⁶ The Supreme Court's sovereign immunity

64. See *Will*, 491 U.S. at 65 ("The language of § 1983 also falls far short of satisfying the ordinary rule of statutory construction that if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985))). This language was used by Judge Cleland in *Westside Mothers* as authority for the proposition that § 1983 does not provide a cause of action for third-party beneficiaries of a contract to enforce their rights. See *Westside Mothers v. Haveman*, 133 F. Supp. 2d 549, 581 (E.D. Mich. 2001).

65. See U.S. CONST. amend. XI ("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."); see also *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 72-73 (2000) (acknowledging that the precise text of the Eleventh Amendment is not as important as the principle for which it stands); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 669 (1999) (stating that the Eleventh Amendment does much more than simply bar federal jurisdiction over suits brought "against one State by citizens of another State or foreign state"). In fact, since *Hans v. Louisiana*, 134 U.S. 1 (1890), the Supreme Court has moved far beyond the actual text of the Eleventh Amendment. See *infra* note 66 (explaining the Supreme Court's interpretation of the Eleventh Amendment). But see JOHN V. ORTH, *THE JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY* 76 (1987) (arguing that *Hans* should not be treated as an interpretation of the Eleventh Amendment but, rather, as an interpretation of Article III of the Constitution).

The Eleventh Amendment, ratified in 1795, was passed in response to the Supreme Court's decision in *Chisholm v. Georgia*, 2 U.S. 419 (1793) (holding that Article III of the Constitution granted federal courts jurisdiction over the State of Georgia in a suit by a private citizen from South Carolina). See ORTH, *supra* note 65, at 18-20 (recounting the background to and aftermath of *Chisholm*). Congress was so shocked by the *Chisholm* decision that it took less than two years to overturn it by constitutional amendment. See *Principality of Monaco v. Mississippi*, 292 U.S. 313, 325 (1934) (describing the response to *Chisholm*). The purpose of the amendment was to protect the states from being burdened by possible financial and property claims resulting from the Revolutionary War. See generally LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 3-25, at 521 (3d ed. 2000) (discussing the history of the Eleventh Amendment).

66. See *Kimel*, 528 U.S. at 73 (confirming that the Constitution does not provide for federal jurisdiction over suits against nonconsenting states). The Supreme Court has taken the opportunity in its recent Eleventh Amendment cases to solidify the sovereign immunity protection of the states. See Ernest A. Young, *State Sovereign Immunity and the Future of Federalism*, 1999 SUP. CT. REV. 1, 4-5 (1999) (arguing that the Court's sovereign immunity decisions may be counterproductive because they "may squander the Court's political capital" and may encourage Congress to "subject the states to more intrusive means of ensuring compliance with federal law"). See, e.g., *Alden v. Maine*, 527 U.S. 706 (1999) (holding that a non-consenting state cannot be subjected to private suits under a federal cause of action in its own courts); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) (finding that the Commerce Clause does not grant Congress the power to abrogate a state's sovereign immunity in federal court (overruling *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 13-15 (1989) (holding that Congress' authority under the Commerce Clause could abrogate the

jurisprudence holds that a state does not waive its privilege of sovereign immunity simply by accepting federal funds.⁶⁷ Furthermore, the Court has held that no matter how explicitly it may attempt to do so, Congress may not abrogate a state's sovereign immunity, except in the exercise of its powers to enforce the Fourteenth Amendment.⁶⁸

However, with the *Ex parte Young*⁶⁹ decision in 1908, the Court

Eleventh Amendment by including a clear statement of abrogation in the language of the statute))).

Professor John C. Jeffries, Jr. confirms that "[a]s everyone knows, the Eleventh Amendment is a mess." See John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 47 (1998) (arguing that despite the consistent self-contradiction in Eleventh Amendment jurisprudence, the Eleventh Amendment almost never matters functionally because *Ex parte Young* and § 1983 continue to allow plaintiffs to effectively bring suit against states). Although the prevailing academic position maintains that the Eleventh Amendment only limits diversity jurisdiction, the Supreme Court made clear more than 100 years ago, in *Hans*, 134 U.S. at 15, that the Eleventh Amendment also applies to federal-question cases and to those cases brought by a state's own citizens. See Jeffries, *supra* note 66, at 48-49.

One of the most criticized of the Court's sovereign immunity cases, *Alden v. Maine*, relies on the theory that the states preexisted the Union and that they did not relinquish their sovereign immunity upon adopting the constitutional plan. See Louise Weinberg, *Of Sovereignty and Union: The Legends of Alden*, 76 NOTRE DAME L. REV. 1113, 1117 (2001) (arguing that *Alden* is flawed because it relies upon "myth" rather than fact). The disconnect between *Alden* and its holding in *Chisholm* ranks among the many flaws of the Court's *Alden* decision and of the preexisting states theory. See *id.* at 1147-48. If state sovereign immunity existed at the time of the Founding, then why is this not reflected in the *Chisholm* case of 1793, and why would there be a need for the Eleventh Amendment to begin with? See *id.* These are just some of the many contradictions that permeate the Court's sovereign immunity jurisprudence. See generally ORTH, *supra* note 65 (providing a comprehensive review of the origins and interpretations of the Eleventh Amendment).

67. See *Seminole Tribe*, 517 U.S. at 59 ("[T]he mere receipt of federal funds cannot establish that a state has consented to suit in federal court." (quoting *Atascadero*, 473 U.S. at 246-47)). This statement, as well as the Court's *Pennhurst I* requirement of unambiguously stated conditions, has put to rest the possibility of a "constructive" or "implied" waiver of sovereign immunity. See *Florida Prepaid*, 527 U.S. at 676 (criticizing the acceptance of implied waivers in and overruling *Parden v. Terminal R. of Ala. Docks Dep't*, 377 U.S. 184 (1964)).

68. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (holding that the Eleventh Amendment and the principle of state sovereignty are limited by the enforcement provisions of § 5 of the Fourteenth Amendment). Congress' limited power to abrogate the Eleventh Amendment was reaffirmed in *Seminole Tribe*, 517 U.S. at 59 (holding that Congress may not abrogate a state's sovereign immunity using its power under the Commerce Clause). *Fitzpatrick* and *Seminole Tribe* relied on a chronological theory, arguing that because the Eleventh Amendment preceded the Fourteenth Amendment, the Fourteenth empowers Congress to abrogate the Eleventh. See Weinberg, *supra* note 66, at 1128-29 (summarizing the chronological argument). If, however, *Alden* is correct in that the states' sovereign immunity preceded the U.S. Constitution, then a similar argument can be made that Article I of the Constitution altered that immunity, allowing abrogation through use of the Commerce Power. See *id.* (discussing Justice Brennan's use of this argument in *Union Gas*, 491 U.S. at 18-19).

69. 209 U.S. 123 (1908).

crafted a remedy for relief against illegal state action.⁷⁰ The *Ex parte Young* doctrine, in conjunction with § 1983, allows Medicaid recipients to enforce their right to Medicaid benefits and avoid the obstacle of sovereign immunity.⁷¹

Under the *Ex parte Young* doctrine, a suit against a state officer for prospective injunctive relief to vindicate a federal law is not considered a suit against that state for purposes of the Eleventh Amendment.⁷² The rationale for this exception to state sovereign immunity is that, as a constitutional matter, no state may violate or cause its officials to violate a superior federal law.⁷³ Any state official, therefore, who does violate a superior federal law, acts beyond the scope of the state's authority and in doing so exposes himself to suit, irrespective of the doctrine of sovereign immunity.⁷⁴

70. See ORTH, *supra* note 65, at 128-34 (analyzing the *Ex parte Young* decision).

71. See Jeffries, *supra* note 66, at 59 (describing how *Ex parte Young* routinely allows civil rights plaintiffs to evade the Eleventh Amendment when they seek injunctive relief).

72. See *Ex parte Young*, 209 U.S. at 158-60 (explaining how granting injunctive relief for the unconstitutional actions of a state officer does not affect the state "in its sovereign or governmental capacity"); Robert P. Capistrano, *Enforcing Federal Rights: The Law of Section 1983 (Part I)*, 33 CLEARINGHOUSE REV. 217, 235 (1999) ("[B]eginning with *Ex parte Young*, federal courts have . . . permitted plaintiffs to get around the Eleventh Amendment by seeking injunctive relief against the individual heading the state agency . . .").

73. See *Ex parte Young*, 209 U.S. at 157 (distinguishing between seeking an injunction against a state official for his individual unconstitutional actions and suing to enjoin the state official as a representative of the state, which is protected by sovereign immunity).

74. See *id.* at 159-60 (explaining that a state official's unconstitutional act strips him of "his official or representative character" and renders him a private individual, thereby precluding the state from affording him any immunity). The *Ex parte Young* doctrine rests on a legal fiction that the sovereign state cannot perform an act that is unconstitutional. Therefore, if one of the state's officers is alleged to have committed an unconstitutional act, that officer could not have done so with the authority of the state. See Eridania Perez-Jaquez, Note, *Constitutionalizing State Sovereign Immunity: Ex Parte Young and the Conservative Wing's Attempt to Restore Federalism and Empower States*, 51 RUTGERS L. REV. 229, 244-45 (1998) (explaining the *Ex parte Young* rationale and criticizing the Supreme Court for shifting the balance of Eleventh Amendment jurisprudence in favor of the states). Rather, that state officer committing the unconstitutional act is "stripped" of his status as a representative of the state. See *id.* at 245. He is said to be acting "ultra vires," or "beyond the powers" conferred upon him. See *id.* at 230-31. Thus, the suit against the officer is not regarded as a suit against the state and, therefore, is not barred by sovereign immunity. See *id.* at 245. The *Ex parte Young* Court limited the remedy available for redress of such an act to an injunction against the officer. See *Young*, 209 U.S. at 150 (noting the availability of equitable relief in federal courts to enjoin state officials from violating constitutional law); see also Vicki C. Jackson, *Seminole Tribe, the Eleventh Amendment, and the Potential Evisceration of Ex parte Young*, 72 N.Y.U. L. REV. 495, 511 (1997) (describing the rationale of *Ex parte Young* and criticizing the limitations the Supreme Court placed on the doctrine in *Seminole Tribe*); ORTH, *supra* note 65, at 128-34 (recounting the history and rationale of *Ex parte Young*). Professor Orth acknowledges that *Ex parte Young* received heavy academic criticism in 1908 because of its status as a legal fiction. See *id.* at 131. However, the decision was

Over the years, the Supreme Court has refined its conception of this doctrine. For example, in *Pennhurst State School & Hospital v. Halderman*,⁷⁵ the Supreme Court ruled that *Ex parte Young* may not be used to obtain prospective injunctive relief against a state officer for violation of a state law.⁷⁶ In doing this, the Court redefined the purpose of the doctrine in terms of the need to balance the Supremacy Clause against the Eleventh Amendment and to ensure the supremacy of federal law.⁷⁷ In *Seminole Tribe of Florida v. Florida*,⁷⁸ the Court placed a further limitation on the ability of plaintiffs to obtain relief for the action of state officers.⁷⁹ If the federal statute being sued upon contains detailed remedial provisions, such provisions can be taken as evidence that Congress did not want the *Ex parte Young* remedy to be available.⁸⁰ As will be noted in the next

tolerated, according to Professor Orth, because it was crucial to the establishment of "constitutional government and the rule of law." *Id.* (citing CHARLES ALAN WRIGHT, *THE LAW OF FEDERAL COURTS*, 292 (4th ed. 1983)).

The *Ex parte Young* doctrine has been widely considered to counterbalance the harsh rule of *Hans v. Louisiana*, 134 U.S. 1, 15 (1890). See Perez-Jaquez, *supra* note 74, at 230. While *Hans* holds that states are immune from suits brought in federal court by their own citizens, *Ex parte Young* functionally allows such suits, as long as they are crafted to perpetuate the legal "ultra vires" fiction. See *id.* at 230-31.

75. 465 U.S. 89 (1984) ("*Pennhurst II*").

76. *Id.* at 105 (holding that the purpose of the *Ex parte Young* remedy is to vindicate the "supreme authority of federal law"). The *Pennhurst II* Court claimed that it would be an intrusion upon a state's sovereignty for a federal court to instruct state officials how to comply with state law. See *id.* Such federal action, the Court stated, would violate the very "principles of federalism that underlie the Eleventh Amendment." *Id.*

77. See *id.* at 105 (holding that while the *Ex parte Young* doctrine exists to vindicate the supremacy of federal law, that purpose must be weighed against the need to ensure the sovereign immunity of the states). The *Pennhurst II* Court concluded that an alleged violation of state law is inconsequential to this balance and would not, therefore, be covered by the *Ex parte Young* doctrine. *Id.* See also Jackson, *supra* note 74, at 512 (recounting the Supreme Court's "modern retrenchment" from the *Ex parte Young* doctrine).

78. 517 U.S. 44 (1996).

79. See *id.* at 74 ("[W]here Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*."); see also Jackson, *supra* note 74, at 513-14 (arguing that the Court's reasoning in *Seminole Tribe* was flawed—first, because of the unsupported conclusion that an *Ex parte Young* action was more burdensome than an action available under the Indian Gaming Regulatory Act, and second, because the Court improperly claimed that it could not determine whether Congress would have intended an *Ex parte Young* action be available if it could not authorize an action against the state itself).

80. See *Seminole Tribe*, 517 U.S. at 74 (noting that the courts should not permit actions against state officials based on *Ex parte Young* where Congress has provided a remedial scheme for the enforcement against a state of a statutorily created right). This rationale appears to be very similar to the Court's test for determining whether Congress intended a § 1983 suit to be available. *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498 (1990), therefore, suggests that *Seminole Tribe*'s limitation on the *Ex parte Young* remedy is not a problem for the Medicaid enforcement suit. Consequently,

section, the Court's limitations on the *Ex parte Young* doctrine have been used recently, in *Westside Mothers*, to deprive Medicaid recipients of the use of this remedy.⁸¹

D. *Westside Mothers v. Haveman and the Argument in Favor of Eliminating the Medicaid Enforceability Suit*

Westside Mothers v. Haveman was crafted to fall under the *Ex parte Young* exception to sovereign immunity.⁸² The case began as the typical private enforcement suit under § 1983.⁸³ In a class action suit, the plaintiffs, who were parents seeking Medicaid services for their children, sued several Michigan officials, alleging that Michigan had failed to provide to their eligible children Early and Periodic Screening, Diagnosis, and Treatment Services (“EPSDT services”)—a required feature of Michigan's Medicaid plan under 42 U.S.C. § 1396a(a).⁸⁴ The plaintiffs sought prospective injunctive relief from a federal court against the officials responsible for administering Michigan's Medicaid program.⁸⁵ The purpose of the suit was to force the Michigan officials to comply with the obligations required by the Medicaid Act and undertaken by Michigan in its state Medicaid plan.⁸⁶ Although this type of suit has been brought hundreds of times in the federal courts, *Westside Mothers* is now the first case to hold that these suits can no longer get into court—using the Supreme Court's federalism jurisprudence to hold that *Ex parte Young* and § 1983 no longer provide a viable means to obtain relief.⁸⁷

Judge Cleland's ruling that the *Seminole Tribe* limitation applies to the Medicaid Act is highly questionable. See *Westside Mothers v. Haveman*, 133 F. Supp. 2d 549, 574 (E.D. Mich. 2001).

81. See *Westside Mothers*, 133 F. Supp. 2d at 562.

82. See Pear, *supra* note 6, at A18 (describing the suit).

83. *Id.*

84. See 42 U.S.C. § 1396a(a)(10)(A) (1994) (“A State plan for medical assistance must provide for making medical assistance available, including at least the care and services listed in paragraphs (1) through (5), (17) and (21) of section 1396d(a) of this title.”); 42 U.S.C. § 1396d(a)(4)(B) (1994) (“The term ‘medical assistance’ means payment of part or all of the cost of the following care and services . . . for individuals . . . whose income and resources are insufficient to meet all of such cost—early and periodic screening, diagnostic, and treatment services (as defined in subsection (r) of this section) . . .”); *Westside Mothers*, 133 F. Supp. 2d at 552.

85. See *Westside Mothers*, 133 F. Supp. 2d at 552.

86. See *id.*

87. See Pear, *supra* note 6 (quoting concerns that the decision “makes Medicaid unenforceable by private individuals”).

Westside Mothers is especially problematic for Medicaid recipients because it bars such suits on the two separate grounds of sovereign immunity and no cause of action. Both prongs of *Westside Mothers* must be dealt with in order for Medicaid recipients to get back into court. However, this is not as troubling as it seems. As will be seen in Part II.A, both prongs rely on the premise that the Medicaid Act is not equal to other federal laws, but rather is a creature of contract.

Relying upon the Supreme Court's holdings in the *Pennhurst* cases and *Alden v. Maine*,⁸⁸ Judge Cleland held that legislation passed under Congress' spending power is not supreme federal law covered by the Supremacy Clause.⁸⁹ This argument, also advocated by Professor David E. Engdahl,⁹⁰ rests on the Supreme Court's statement that Spending Clause legislation is in the "nature of a contract."⁹¹ The federal government, according to Judge Cleland, lacks the enumerated power to compel the states to participate in the Medicaid program.⁹² Rather, Congress relies on its power of the purse to seek participation from the states, and such participation is completely voluntary.⁹³ As the Supreme Court ruled in *Pennhurst I*,

It should also be noted that many of the federalism arguments made on behalf of the State of Michigan and later adopted by Judge Cleland in *Westside Mothers* were briefed by *amicus* participant, Jeffery Sutton, whose nomination by President George W. Bush to the Sixth Circuit Court of Appeals is currently pending in the U.S. Senate. See *Westside Mothers*, 133 F. Supp. 2d at 552 n.3 (commending the helpfulness of Mr. Sutton, whose participation was at Judge Cleland's own request); see also Neil A. Lewis, *Bush Appeals For Peace on His Picks For the Bench*, N.Y. TIMES, May 10, 2001, at A29 (naming Mr. Sutton as one of President George W. Bush's nominees to the Sixth Circuit Court of Appeals); U.S. Dep't of Just., Office of Legal Pol'y, Nominations, at <http://www.usdoj.gov/olp/nominations.htm> (last updated Dec. 21, 2001) (tracking the status of Mr. Sutton's nomination).

88. 527 U.S. 706 (1999) (holding that Congress may not subject a state to suit in the state's own courts without its consent).

89. See *Westside Mothers*, 133 F. Supp. 2d at 562. For three additional rulings made by Judge Cleland with respect to *Ex parte Young*, see *supra* note 27.

90. See Engdahl, *supra* note 30, at 62-63 (arguing that because conditions placed in Spending Clause legislation are secured by contract alone, such legislation does not fall under the Supremacy Clause).

91. See *Westside Mothers*, 133 F. Supp. 2d at 557, 561. The Supreme Court's analogy was made in *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) ("*Pennhurst I*"). See *supra* note 34 and accompanying text (explaining the basis for the Supreme Court's analogy).

92. See *Westside Mothers*, 133 F. Supp. 2d at 561.

93. See *id.* at 561-62. But see Lynn A. Baker, *The Spending Power and the Federalist Revival*, 4 CHAP. L. REV. 195, 212 (2001) (arguing that the greatest threat to the states' autonomy is Congress' spending power). According to Professor Baker, states that find federal funding conditions unattractive, yet do not wish to forego federal funds, are severely constrained in their decision-making. See *id.* This is because the state has no alternative sources of revenue, and there is "no competitor to the federal government" to which the state might turn as an alternative contract-partner. See *id.*

However, Professor Celestine Richards McConville takes a different view. See Celestine Richards McConville, *Federal Funding Conditions: Bursting Through the Dole Loopholes*, 4 CHAP. L. REV. 163, 173 (2001) (arguing that the presence or absence of coercion should not turn on the amount of federal funding at stake). According to Professor McConville, a state is not the subject of coercion simply because the federal government offers such a large sum of money that the state is incapable of rejecting the funding condition. See *id.* Rather, she states, coercion involves the state's ability to make decisions as a sovereign. See *id.* Coercion would exist, according to Professor McConville, where a state "cannot, by reason of the federal action, respond to and implement the will of its people, and the people of that state cannot hold its representatives accountable for the decision." *Id.* Under this rationale, the state's level of temptation is not a factor in determining whether that state's decision to enter into a contract with the federal government is voluntary. See *id.*

Congress' power to legislate under the Spending Clause rests on whether the state knowingly and voluntarily accepts the terms of the contract.⁹⁴ If Congress could force participation upon the states, Judge Cleland says, there would be no need for the Supreme Court to require acceptance to be knowingly voluntary.⁹⁵ Judge Cleland argues that, because Congress cannot force the states to participate in the Medicaid program, the Medicaid Act is not supreme federal law.⁹⁶

This position initially presented a problem for Judge Cleland because the Supreme Court has always held that Spending Clause legislation falls under the power of the Supremacy Clause.⁹⁷ Judge Cleland avoided this problem by claiming that the Court has, in recent years, "conducted a more searching analysis of the nature and extent of the Supremacy Clause."⁹⁸ He cited *Alden* for the proposition that "the Supremacy Clause enshrines as 'the supreme Law of the Land' only those federal acts that comport with the constitutional design. Appeal to the Supremacy Clause alone merely raises the question of whether a law is a valid exercise of the national power."⁹⁹

94. See *Pennhurst I*, 451 U.S. at 17 ("The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'"); *Westside Mothers*, 133 F. Supp. 2d at 561.

95. See *Westside Mothers*, 133 F. Supp. 2d at 558.

96. See *id.* at 562. As explained by Professor Engdahl,

What makes such conditions obligatory is that essence as contract, wholly apart from the circumstance that they happen to be spelled out in a statute or an agency rule. Although articulated in a statute or rule, they have no force as 'law'; their only force is contractual. Consequently, they are not among the 'Laws of the United States . . . made in Pursuance' of the Constitution, to which the Supremacy Clause applies.

Engdahl, *supra* note 30, at 71.

97. See *Westside Mothers*, 133 F. Supp. 2d at 561. See, e.g., *Blum v. Bacon*, 457 U.S. 132, 138 (1982) (invalidating under the Supremacy Clause certain provisions of New York state law that conflict with federal regulations promulgated under the federal AFDC program); *Carleson v. Remillard*, 406 U.S. 598, 600, 604 (1972) (finding a California welfare regulation invalid under the Supremacy Clause because it conflicted with AFDC provisions of Social Security Act); *Townsend v. Swank*, 404 U.S. 282, 285-86 (1971) (holding an Illinois statute conflicting with AFDC provisions of the Social Security Act invalid under the Supremacy Clause). Note that the Supreme Court decided *Blum* one year after *Pennhurst I*, which undermines any argument that *Pennhurst I* is a declaration by the Court that Spending Clause legislation does not fall under the Supremacy Clause.

98. *Westside Mothers*, 133 F. Supp. 2d at 561.

99. *Id.* (quoting *Alden v. Maine*, 527 U.S. 706, 731 (1999)). The *Alden* court held that Congress could not subject a state to suit in state court without its consent. Judge Cleland also relied on a federal district court decision, *Brogdon v. Nat'l Healthcare Corp.*, 103 F. Supp. 2d 1322, 1339 (N.D. Ga. 2000), which held that the Supremacy Clause does not apply to the Medicaid Act. *Westside Mothers*, 133 F. Supp. 2d at 561. The use of *Brogdon* as support for this contention, however, should be tempered by the fact that *Brogdon* relied exclusively on *Pennhurst I*. See *Brogdon*, 103 F. Supp. 2d at 1339-42. As explained above, *Pennhurst I* cannot possibly be used as authority to support the argument that the Supremacy Clause does not apply to the Medicaid Act because the Supreme Court subsequently ruled in *Blum* that the Social

Accordingly, Judge Cleland ruled that the Supremacy Clause “does not operate upon a State or its officers when Congress enacts a

Security Act was supreme federal law. See *supra* note 97 and accompanying text.

Note also that several federal district courts have recently rejected the arguments made by Judge Cleland in *Westside Mothers*. In *Boudreau v. Ryan*, 2001 WL 840583 (N.D. Ill. May 1, 2001), Judge John Grady refused to accept the notion that legislation passed pursuant to the Spending Clause is of “inferior dignity to other laws.” *Id.* at *5. Judge Grady also declined to “depart from the long line of cases allowing plaintiffs to use § 1983 to enforce rights under federal Spending Clause statutes.” *Id.* at *7. Following *Boudreau’s* lead nearly six months later, federal district court Judge Joan Lefkow, in *Memisovski v. Patla*, 2001 WL 1249615, *5 n.8 (N.D. Ill. Oct. 17, 2001), also rejected *Westside Mothers* as “unpersuasive and inconsistent with other settled law.”

In *Antrican v. Buell*, 158 F. Supp. 2d 663, 669 n.5 (E.D.N.C. 2001), the *Westside Mothers* argument was dismissed in a footnote stating: “Defendants argue that plaintiffs, as third party beneficiaries of the Medicaid Act, may not seek enforcement under section 1983. Defendants’ argument is without merit, and the court does not discuss it in detail.” The federal district of New Hampshire has also declined to follow the rationale of *Westside Mothers*, noting that, while it is of interest, *Westside Mothers* “is, of course, not the law of the First Circuit.” See *Bryson v. Shumway*, 2001 WL 1326578, *7 (D.N.H. Oct. 23, 2001) (ruling that a suit brought against state officials for prospective injunctive relief that alleges violation of the Medicaid Act is not barred by the Eleventh Amendment).

Another notable development occurred in *Markva v. Haveman*, 168 F. Supp. 2d 695 (E.D. Mich. 2001), where the State of Michigan declined to raise arguments it had successfully used in *Westside Mothers*. In *Markva*, a case virtually identical to *Westside Mothers*, a class of Medicaid recipients and potential Medicaid recipients brought a § 1983 action against Michigan state officials, alleging that the state’s refusal to allow them to exclude certain household income in determining eligibility was a violation of the Medicaid Act. See *id.* at 699. In Judge David Lawson’s order granting the plaintiffs’ motion for summary judgment, he noted the defendants had “disavowed reliance on any grounds for relief stated in [*Westside Mothers*], but reserve the right to reassert those grounds if *Westside Mothers* holds up on appeal.” *Id.* at 704. The *Markva* case was cited by the federal district court of Maine in its most recent rejection of the *Westside Mothers* rationale. See *Rancourt v. Concannon*, 2001 WL 1505421, *1 (D. Me. Nov. 28, 2001) (denying defendants’ motion to dismiss a § 1983 suit against Maine state official alleging violation of the Medicaid Act’s requirement that covered medical assistance be furnished with reasonable promptness to all eligible individuals).

In addition to the preceding decisions, the Tenth Circuit Court of Appeals recently held that sovereign immunity does not bar a § 1983 suit to enforce a plaintiff Medicaid recipient’s federal right to reasonably prompt waiver services pursuant to 42 U.S.C. § 1396a(a)(8). See *Lewis v. N.M. Dep’t of Health*, 261 F.3d 970, 975-77 (10th Cir. 2001). The court in *Lewis* affirmed the use of *Ex parte Young* to seek prospective injunctive relief against the Governor of New Mexico and the state’s Secretary of Health. See *id.* Of particular significance, the court’s opinion made no mention of the *Westside Mothers* decision, even though the defendants specifically brought *Westside Mothers* to the court’s attention. See National Senior Citizens Law Center, *Medicaid Act Enforceable Under Ex Parte Young*, at <http://www.nslc.org/lewis082701.htm> (last visited Jan. 3, 2002) (reporting that the Tenth Circuit, in *Lewis*, applied the *Ex parte Young* doctrine in a manner that led to a holding contradictory to *Westside Mothers*, even though the defendants brought *Westside Mothers* to the attention of the court).

As *Westside Mothers* makes its way through the Sixth Circuit, the foregoing decisions increase the likelihood of a circuit-split and a trip to the U.S. Supreme Court. This case would be a perfect vehicle for the Court to build upon an agenda already recognized as hostile to entitlements. See *supra* note 28 (describing the Court’s “New Federalism”).

program such as Medicaid . . . because neither the Spending Power nor any other Article I power grants Congress the authority to compel State action.”¹⁰⁰ Consequently, the limitation placed on the *Ex parte Young* doctrine in *Pennhurst II* becomes effective and the doctrine can no longer be used to sue a state officer for prospective injunctive relief from a violation of conditions placed on Spending Clause programs.¹⁰¹ Accordingly, *Westside Mothers* held that the sovereign immunity doctrine barred the suit.¹⁰²

Judge Cleland further ruled that, even if a Medicaid enforcement suit were not barred by sovereign immunity, § 1983 provides no cause of action for Medicaid recipients to vindicate their federal right.¹⁰³ For this argument, Judge Cleland relied on Justice Scalia’s concurring opinion in *Blessing v. Freestone*.¹⁰⁴ In *Blessing*, Justice Scalia contended that Medicaid recipients are essentially third-party beneficiaries to the contracts between the states and the federal governments.¹⁰⁵ Justice Scalia specifically left open the possibility that third-party beneficiaries could not, under § 1983, sue for violation of

100. *Westside Mothers*, 133 F. Supp. 2d at 562.

101. *See id.* at 561. Note, however, that the Supreme Court in *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984) (“*Pennhurst I*”) did not contemplate a distinction between supreme and non-supreme federal law. At the time, it simply recognized the distinction between state and federal law and ruled that *Ex parte Young* should not be available to remedy violations of state law. *See id.* at 106. *Pennhurst II* should therefore be of questionable value for the proposition that *Ex parte Young* also is not available for non-supreme federal law. As will be seen in Part II.B.1, the *Ex parte Young* remedy also seems applicable when the sovereign has assured the federal government that it will comply with the Medicaid Act, even if the Medicaid Act is not supreme federal law.

102. *See Westside Mothers*, 133 F. Supp. 2d at 562.

103. *See id.* at 576; *see also* Engdahl, *supra* note 30, at 104-05 (arguing that even though conditions placed on receipt of federal funds are prescribed in a federal statute, the conditions do not become binding upon a state until the state agrees to accept federal funds). According to Professor Engdahl, the entitlements of beneficiaries of these Spending Clause programs do not exist until the agreement is made. *See id.* Hence, Engdahl argues these third-party rights are “secured” not by the federal statute, but “only by contract.” *See id.* Engdahl ultimately uses this premise to conclude that § 1983 should not be allowed as a cause of action to enforce third-party rights because it was never meant to remedy contract violations. *See id.*

104. *See Westside Mothers*, 133 F. Supp. 2d at 577; *see also* *Blessing v. Freestone*, 520 U.S. 329 (1997) (holding that Title IV-D of Social Security Act did not create any federal rights, privileges, or immunities enforceable using § 1983).

105. *See Blessing*, 520 U.S. at 349 (Scalia, J., concurring).

The State promises to provide certain services to private individuals, in exchange for which the Federal Government promises to give the State funds. In contract law, when such an arrangement is made (A promises to pay B money, in exchange for which B promises to provide services to C), the person who receives the benefit of the exchange of promises between the two others (C) is called a third-party beneficiary.

Id.

their contract rights.¹⁰⁶ Judge Cleland, however, decided the issue despite having ruled that sovereign immunity barred the suit.¹⁰⁷ He used the Supreme Court's holding in *Will* for the proposition that § 1983 must be construed in accordance with the common law as it existed in 1871. Judge Cleland then made a finding of fact that, in 1871, third-party beneficiaries lacked common law rights to sue under a contract.¹⁰⁸ Accordingly, Judge Cleland ruled that § 1983 did not independently create a cause of action for Medicaid recipients to enforce their right to Medicaid EPSDT services.¹⁰⁹

Judge Cleland's conclusion, however, is logically flawed. Irrespective of whether or not a third-party beneficiary right to sue actually existed in 1871, the Supreme Court has clearly recognized, for the past twenty years, that § 1983 may be used by Medicaid recipients to enforce their right to services.¹¹⁰ Each year, the State of Michigan accepts federal Medicaid funds with this unambiguously clear statement from the Court that § 1983 includes a cause of action for Medicaid recipients. There can be no doubt that this satisfies the *Pennhurst I* clear-statement test. The only difference here is this clear statement comes from the Court instead of Congress.¹¹¹ Congress,

106. *See id.* at 350 (acknowledging that the third-party beneficiary issue was not raised by the parties and not necessary for resolution of the case, therefore leaving the issue open, but pointing out that allowing the use of § 1983 to vindicate third-party beneficiary rights would be a vast expansion of § 1983).

107. *See Westside Mothers*, 133 F. Supp. 2d at 575.

108. *See id.* at 579-81 (citing *Second Nat'l Bank v. Grand Lodge*, 98 U.S. 123, 124 (1878)) (recognizing "the general rule that privity of contract is required" to support an action to enforce a contract); C. LANGDELL, A SUMMARY OF THE LAW OF CONTRACTS 79 (2d ed. 1880) (noting that in the 1870s, the recognized rule was "that a person for whose benefit a promise was made, if not related to the promisee, could not sue upon the promise"); 1 W. STORY, A TREATISE ON THE LAW OF CONTRACTS 509 (M. Bigelow ed., 1874) (noting "the tendency of the [American] courts" to hold that "no stranger to the consideration can take advantage of a contract, though made for his benefit"); K. TEEVEN, A HISTORY OF THE ANGLO-AMERICAN COMMON LAW OF CONTRACT 230 (1990) (explaining that "the rights of donee beneficiaries were not clearly established until *Seaver v. Ransom* (1918)"). Judge Cleland also rejected the plaintiffs' reliance on both Corbin's and Williston's support for third-party beneficiary actions, noting that both had actually "acknowledged that the common law right of donee beneficiaries to sue was a 20th Century development that altered the previous state of affairs." *Westside Mothers*, 133 F. Supp. 2d at 580-81. Judge Cleland ultimately concluded that the plaintiffs failed to proffer any persuasive historical evidence that third-party beneficiaries had a right to sue in 1871. *See id.* at 581.

109. *See Westside Mothers*, 133 F. Supp. 2d at 581. Judge Cleland further ruled that the most charitable view of the state of the law in 1871 is that the existence of third-party beneficiary rights was ambiguous. If that were the case, he states, it would still fall short of the clear statement necessary to impose a condition upon the receipt of federal funds. *See id.*

110. *See supra* note 16 and accompanying text.

111. Despite the logic of this argument, the ability to place conditions upon the receipt of federal funds rests in Congress' exercise of the spending power, not in the hands of the judiciary. *See Pennhurst I*, 451 U.S. at 17 (recognizing the power of

meanwhile, has been conspicuously silent in the face of twenty years of § 1983 private enforcement, never expressing an intention to limit such litigation.¹¹²

II. ANALYSIS

A. *Applying Classic Contract Theory to Spending Clause Legislation Reaffirms the Legality of Medicaid Enforceability Suits*

The *Westside Mothers* decision is flawed because it relies too heavily upon the vague concept that Medicaid legislation is in the nature of a contract.¹¹³ The contract analogy has been sufficient for the Supreme Court to resolve whether certain conditions placed upon the receipt of federal funds have been made clear,¹¹⁴ whether such conditions are enforceable against third-party obligees,¹¹⁵ or whether they are coercive.¹¹⁶ However, *Westside Mothers* goes further than mere analogy and states that “[i]n short, the Medicaid program is a contract between Michigan and the Federal Government, and Medicaid recipients are third-party beneficiaries of that contract.”¹¹⁷ Judge

Congress to enact federal funding conditions).

112. *But see* 42 U.S.C. § 1320a-2 (1994). After the U.S. Supreme Court ruled in *Suter v. Artist M.*, 503 U.S. 347 (1992) that a certain provision of the Social Security Act could not be enforced using § 1983, Congress enacted 42 U.S.C. § 1320a-2, which states in part:

In an action brought to enforce a provision of this chapter, such provision is not to be deemed unenforceable because of its inclusion in a section of this chapter requiring a State plan or specifying the required contents of a State plan. This section is not intended to limit or expand the grounds for determining the availability of private actions to enforce State plan requirements other than by overturning any such grounds applied in *Suter v. Artist M.*, 112 S. Ct. 1360 (1992), but not applied in prior Supreme Court decisions respecting such enforceability

This enactment demonstrates, at least in the case of *Artist M.*, that Congress will clarify itself when it believes the Court has misconstrued congressional intent to allow private enforcement of a federal right using § 1983.

113. *See Westside Mothers*, 133 F. Supp. 2d at 557 (“Unlike legislation enacted under § 5 [of the Fourteenth Amendment], however, legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the states agree to comply with federally imposed conditions.” (quoting *Pennhurst I*, 451 U.S. at 17)).

114. *See South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (“[I]f Congress desires to condition the States’ receipt of federal funds, it ‘must do so unambiguously’” (quoting *Pennhurst I*, 451 U.S. at 17)).

115. *See U.S. Dep’t of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597, 606 (1986) (holding that the scope of Section 504 of the Rehabilitation Act of 1973 is limited to those who actually receive federal financial assistance).

116. *See Dole*, 483 U.S. at 211 (“Our decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which ‘pressure turns into compulsion.’” (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937))).

117. *Westside Mothers v. Haveman*, 133 F. Supp. 2d 549, 557 (E.D. Mich. 2001)

Cleland made this statement without actually performing a detailed contract analysis of the Medicaid program. In doing so, he discounted the fact that the State of Michigan may have violated the Medicaid law, and instead found that Michigan's actions (or more appropriately, inactions) merely constituted a breach of contract.¹¹⁸ Judge Cleland essentially failed to distinguish between the Medicaid law and the federal-state contract. When the Medicaid program is properly subjected to contract analysis, however, the contract and the law are seen to operate as two separate mechanisms.

These two mechanisms become apparent when the Medicaid program is explained, as it is in Part I.A of this Comment, as a grant of federal funds to a state in return for that state's submission of a Medicaid plan that conforms to the requirements of the Medicaid Act. The first mechanism is the federal Medicaid Act itself. The second is the state Medicaid plan. In terms of contract law, the state Medicaid plan should be viewed as the embodiment of the contract because it sets forth the terms of the bargain between the state and federal governments.¹¹⁹ The Medicaid Act, on the other hand, should be seen as the governing law of the contract because it establishes how the contract will be formed and administered.¹²⁰

The Restatement (Second) of Contracts states that a contract requires "a bargain in which there is a manifestation of mutual assent to the exchange and a consideration."¹²¹ Furthermore, "[t]he manifestation of mutual assent to an exchange ordinarily takes the form of an offer or proposal by one party followed by an acceptance by the other party or parties."¹²² Given this framework, it seems clear

(emphasis added).

118. See *id.* at 587-88. The plaintiffs in *Westside Mothers* fell into the same confused analysis of the Medicaid program. See *id.* at 558. The plaintiffs' brief claimed that the fact that the Medicaid program is "much in the nature of a contract" suggests it is also in the nature of "something else" as well. See *id.* That "something else," claimed the plaintiffs, is that the statute in question is a "law," not just a contract. See *id.* This argument, however, suffers from the same weakness as Judge Cleland's argument because it also confuses the state Medicaid plan with the federal Medicaid law. The plaintiffs' argument is essentially the reverse of Judge Cleland's—discounting the breach of contract and focusing instead upon Michigan's actions as a violation of the law.

119. See *infra* note 124 (describing the comprehensive nature of a state Medicaid plan).

120. See Brad S. Karp, *The Litigation Angle in Drafting Commercial Contracts*, 1219 PLI CORP. LAW & PRAC. 487, 505-11 (2000) ("Most parties to a contract . . . designate a particular state's law to govern disputes that arise out of the contractual relationship."). An example of such a clause is given as: "This Agreement shall be construed, and the obligations, rights and remedies of the parties hereunder shall be determined, in accordance with the laws of the State of New York." *Id.* at 533.

121. RESTATEMENT (SECOND) OF CONTRACTS § 17 (1981).

122. RESTATEMENT (SECOND) OF CONTRACTS § 22 (1981).

that the submission of a state Medicaid plan serves as a state's offer to form a contract with the federal government.¹²³ The contents of such an offer are dictated by the federal Medicaid Act.¹²⁴ The Medicaid Act, therefore, can be seen as, among other things, an invitation to make an offer—an advertisement to each state that there are federal grants to be had for any state willing to operate a Medicaid program under the specific terms listed in the Act.¹²⁵

When a state does submit a state Medicaid plan to the U.S. Secretary of Health and Human Services, the Secretary must decide whether or not to accept the state's offer.¹²⁶ The Secretary's actions are also governed by the Medicaid Act.¹²⁷ The Secretary may only accept a plan if it meets the requirements of 42 U.S.C. § 1396a(a).¹²⁸ If the plan does not meet the statutory requirements, then the Secretary may reject the offer and ask for the submission of a plan that conforms to the requirements of the law.¹²⁹ When satisfied with the state plan, the Secretary will accept the offer with a grant of

123. See RESTATEMENT (SECOND) OF CONTRACTS § 24 (1981) (“An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.”). The submission of a state Medicaid plan is the first step a state must take to obtain federal Medicaid funds. If the operation of a Medicaid program is indeed the result of a contract between the state and Federal government, then we can say that, by submitting a plan, the state has expressed its willingness to enter into that contract. Furthermore, because the Secretary (or the offeree) knows, pursuant to 42 U.S.C. § 1396a(b), that his assent to the plan is all that is needed to create the contract, the state Medicaid plan must be deemed an offer.

124. See 42 C.F.R. § 430.10 (2000) (“The State plan contains all information necessary for [the Secretary] to determine whether the plan can be approved to serve as a basis for Federal financial participation (FFP) in the State program.”). The specific provisions the state Medicaid plan must include are contained in 42 U.S.C. § 1396a(a). These two sources of law reinforce the argument that the submission of a plan is an offer. By law, the plan is drafted such that once it is submitted, the only options open to the Secretary are either to accept the plan and thereby create a contract, or to reject the plan and invite an alternative offer from the state.

125. See 42 U.S.C. § 1396a(b) (1994) (“The Secretary shall approve any plan which fulfills the conditions specified in subsection (a) [of this section].”); see also RESTATEMENT (SECOND) OF CONTRACTS § 26 cmt. d (1981) (“*Invitation of bids or other offers*. Even though terms are specified in detail, it is common for one party to request the other to make an offer.”).

126. See 42 U.S.C. § 1396a(b). The Secretary's acceptance is conditioned upon the state's Medicaid plan meeting the requirements of 42 U.S.C. § 1396a(a). See *id.*

127. See *id.* Such limits further support the contention that the federal Medicaid law serves as the “governing law” of the contract. See *supra* note 120 (describing a “governing law” clause). The law dictates the content of the offer and whether the Secretary may accept that offer and enter into a contract with the state. Furthermore, as will be seen in *infra* notes 132-135 and accompanying text, the Medicaid law also dictates the administration of the Medicaid program throughout the term of the contract.

128. See 42 U.S.C. § 1396a(b).

129. The logical implication of 42 U.S.C. § 1396a(b) is that the Secretary is empowered to reject any state Medicaid plan that fails to comport with 42 U.S.C. § 1396a(a).

federal funds.¹³⁰ On acceptance, mutual assent has been achieved and a contract comes into existence, the specific terms of which are memorialized in the state's Medicaid plan, which forms an "integrated agreement" in terms of contract law.¹³¹

The federal Medicaid regulations mandate that every state Medicaid plan must also contain an assurance that the state's Medicaid program "will be administered in conformity with the specific requirements of [the Medicaid Act], the regulations [promulgated under the Act], and other applicable official issuances of the Department [of Health and Human Services]."¹³² In contract law, this assurance has been referred to as a "compliance with law" clause.¹³³ This Comment argues that a state that gives this assurance submits to be governed by the federal Medicaid Act, as administered and interpreted by the U.S. Department of Health and Human Services, and even as potentially amended by Congress.

130. See 42 U.S.C. § 1396a(b); 42 U.S.C. § 1396b.

131. See RESTATEMENT (SECOND) OF CONTRACTS § 18 (1981) ("Manifestation of mutual assent to an exchange requires that each party either make a promise or begin or render a performance."); RESTATEMENT (SECOND) OF CONTRACTS § 209 (1981) ("An integrated agreement is a writing or writings constituting a final expression of one or more terms of an agreement."); see also 42 C.F.R. § 430.10 (2000) ("The State plan is a comprehensive written statement submitted by the [state] agency describing the nature and scope of its Medicaid program . . ."). In terms of the Medicaid program, a contract is deemed to exist between the state and federal governments because the state has exchanged a promise for a performance on the part of the federal government. The state's Medicaid plan consists of all the promises the state has made in order to receive federal Medicaid funds. The federal government's grant of these funds is performance rendered to secure the state's performance of the promises made in its state plan. Because the state Medicaid plan is the final expression of the bargain struck, the plan is considered the integrated agreement. As is noted in Part II.B, it is important to view this integrated agreement as an instrument distinct from the Medicaid Act, which actually prescribes the promises the state must make in its Medicaid plan.

132. 42 C.F.R. § 430.10.

133. See ROBERT A. FELDMAN & RAYMOND T. NIMMER, DRAFTING EFFECTIVE CONTRACTS: A PRACTITIONER'S GUIDE § 5.10, Form 5-218 (2d ed. 2000) ("6. Compliance with Law: You shall fully comply with all laws, ordinances, rules, and regulations which are applicable to the performance of your services."). As Feldman & Nimmer explain, a compliance with law clause is typically used in a contract for the sale of goods to secure a pledge from the producer/seller of those goods that the sold goods will be produced in compliance with federal labor laws. See *id.* at 5-161. Failure to adhere to these laws creates a risk for the purchaser because the purchaser would then be unable to move those goods through interstate commerce. See *id.* The compliance with law clause allows the purchaser to claim these "hot goods" were bought with a good faith knowledge that they met federal standards, and thereby exempt the goods from the federal law. See *id.* The clause also allows the purchaser to seek an indemnity from the producer/seller of "hot goods" if the purchaser incurs liability for reselling them. See *Wallace v. Pan Am. Fire & Cas. Co.*, 426 So. 2d 224 (La. Ct. App. 1982) (recognizing the right of a gas distributor to seek an indemnity against a gas manufacturer who warranted in a sales contract that the gas was produced in full and complete compliance with law, but denying the indemnity on public policy grounds).

Placing contract labels upon the various components of the Medicaid program indicates that the Supreme Court is incorrect in classifying Medicaid legislation as “in the nature of a contract.” It is more suitable to say, in accordance with the description set out in this section, that the contract is embodied in the state Medicaid plan.¹³⁴ The Medicaid legislation, on the other hand, exists as a separate mechanism, governing how that contract will be administered, interpreted, and possibly altered.¹³⁵ *Westside Mothers* fails to make this distinction between the law and the contract. The furthest Judge Cleland would venture in this respect was to acknowledge that the federal statute “authorized” the contract.¹³⁶ Judge Cleland concluded, however, that the Medicaid law was not “of equal force” with other federal law.¹³⁷ The next section of this Comment seeks to dispel that notion.

B. Results of a Contract Analysis

The foregoing contract analysis has two implications for *Westside Mothers*. First, it makes clear that, in agreeing to implement a Medicaid program, a state both enters into a contract with the federal government and submits to being governed by the federal Medicaid Act.¹³⁸ A second implication of this contract analysis for *Westside Mothers* is that when a state violates the provisions of its Medicaid program, it not only breaches its contract with the federal government, but more importantly, it violates a law that it undertook to obey.¹³⁹ This second implication naturally relies upon the existence of the first and constitutes the most significant result of a strict contract analysis. By not conducting a proper contract analysis in *Westside Mothers*, Judge Cleland overlooked this second implication and its significance. As this Comment’s analysis makes clear, the State of Michigan violated supreme federal law when it failed to

134. See *supra* note 131 (describing the rationale for considering the state Medicaid plan to be the embodiment of a contract).

135. See *supra* note 120.

136. See *Westside Mothers v. Haveman*, 133 F. Supp. 2d 549, 558 (E.D. Mich. 2001).

137. *Id.* As will be seen in Part II.B.1, the state’s assurance “gives life” to the federal Medicaid law.

138. See *supra* notes 134-135 and accompanying text (describing the two mechanisms that operate within the Medicaid program).

139. See *infra* Part II.B.2. As was noted in *supra* note 32, the Medicaid Act is flexible enough that a state may violate the terms of its own Medicaid plan without venturing so far contrary to the requirements of the Medicaid Act that it violates the law. This discussion, however, contemplates a *Westside Mothers*-type violation, such as the failure to provide required EPSDT services to eligible children.

provide Medicaid services to eligible recipients.¹⁴⁰ Such a violation of federal rights, irrespective of whether the violation of third-party beneficiary rights is actionable, allows a § 1983 cause of action.¹⁴¹

1. *The Medicaid Act becomes supreme federal law once a state submits to the federal Medicaid laws*

When a state submits to being governed by the federal Medicaid Act, the novel argument can be made that what was once the non-supreme federal Medicaid Act actually becomes supreme over that state. The assurance given by the state pursuant to 42 C.F.R. § 430.10 (the “assurance”) must have this effect because its vast scope operates as the functional equivalent of the Supremacy Clause.¹⁴²

In 42 U.S.C. § 1396c, the Medicaid Act specifically authorizes the Secretary to withhold federal funds if the state fails to comply with its obligations.¹⁴³ The state willingly consents to this arrangement when it accepts federal funds. The assurance, therefore, is not needed to ensure the state’s compliance with the Medicaid law vis-à-vis the federal government.¹⁴⁴ But what then is the significance of the additional step of requiring the state to assure the federal government that it will comply with the federal Medicaid laws?

This Comment argues that the assurance brings the Medicaid Act within the ambit of the Supremacy Clause. The assurance is far more powerful than the funds-cutoff provision of 42 U.S.C. § 1396c. While § 1396c simply provides the federal government with a remedy for a state’s failure to comply with the Medicaid Act, the assurance

140. See *infra* Part II.B.1 (arguing that the Medicaid Act becomes supreme federal law once a state agrees to submit to the federal Medicaid laws).

141. See *Wilder v. Va. Hosp. Ass’n*, 496 U.S. 498 (1990) (finding that the Boren Amendment did create certain federal rights enforceable through § 1983, without any discussion of third-party beneficiary rights).

142. See 42 C.F.R. § 430.10 (2000) (ensuring that state Medicaid programs will conform with all requirements of Title XIX of the Social Security Act).

143. 42 U.S.C. § 1396c provides:

If the Secretary . . . finds—(1) that the plan has been so changed that it no longer complies with the provisions of section 1396a of this title; or (2) that in the administration of the plan there is a failure to comply substantially with any such provision; the Secretary shall notify such state agency that further payments will not be made to the state (or, in his discretion, that payments will be limited to categories under or parts of the state plan not affected by such failure), until the Secretary is satisfied that there will no longer be any such failure to comply.

144. If the funds-cutoff provision of 42 U.S.C. § 1396c already serves to ensure a state’s compliance with the federal Medicaid Act, the assurance must serve a different function. Cf. Eleanor D. Kinney, *Clearing the Way for an Effective Federal-State Partnership in Health Reform*, 32 U. MICH. J.L. REFORM 899, 907 (1999) (identifying the assurance as a mechanism that provides how the state will meet federal requirements).

represents a state pledge to obey the federal Medicaid laws. The assurance includes obedience to all federal regulations promulgated pursuant to the Medicaid Act by the Secretary.¹⁴⁵ A state that gives the assurance, therefore, subscribes to every interpretation of the Act made by the Secretary. Presumably, the state also agrees to obey any amendment to the Medicaid Act itself, even one made during the term of the state's Medicaid contract with the federal government. The federal government may, as a result, act unilaterally to alter the Medicaid obligations of participating states. The participating states specifically have agreed to defer to such federal action. This displacement of state authority is precisely the function of the Supremacy Clause, which ensures consistent state adherence to federal law.¹⁴⁶

Accordingly, a sovereign state that gives the assurance effectively has consented to the supremacy of the federal Medicaid laws and has voluntarily brought those laws within the ambit of the Supremacy Clause.¹⁴⁷ Once the Supremacy Clause operates upon the federal Medicaid law, the *Ex parte Young* doctrine dictates that the state can no longer bestow authority upon one of its officers to violate the Medicaid Act.¹⁴⁸ If a state officer does violate the provisions of the federal law, then he will be individually liable.¹⁴⁹ The *Ex parte Young*

145. See 42 C.F.R. § 430.10.

146. See TRIBE, *supra* note 65, § 6-28, at 1172 ("So long as Congress acts within an area delegated to it, the preemption of conflicting state or local action . . . flow directly from the substantive source of whatever power Congress is exercising, coupled with the Supremacy Clause . . .").

147. This statement may actually depend upon certain conceptual issues regarding the relationship between the sovereign states and the federal government. Primarily, once a sovereign state assures the federal government that it will comply with the federal law, is it theoretically possible for the sovereign to violate that assurance? This Comment takes the position that a state's consent to defer to the supremacy of the federal Medicaid law is much like the state's consent to defer to the supremacy of other federal laws when it adopted the constitutional plan itself. The difference between a state's consent to the supremacy of federal law in the Constitution and its consent to the supremacy of the federal Medicaid law appears to be the extent to which the state has bound itself to that arrangement. Unlike the constitutional plan, a state can simply opt not to participate in the Medicaid program and thereby release itself from the assurance. However, once the sovereign state has assented to such a relationship with the national government, it cannot empower one of its officers to act in violation of the terms of that arrangement.

148. See *Ex parte Young*, 209 U.S. 123, 159-60 (1908) (holding that a state is powerless to direct a state officer to violate federal law). The Supreme Court has stated that the *Ex parte Young* remedy serves to ensure the supremacy of federal law. See *supra* note 77 and accompanying text. If that is the case, *Ex parte Young* should be just as applicable to federal laws that became supreme upon a state's granting the assurance as it is to federal laws that are supreme as a result of the state's adoption of the constitution plan.

149. Cf. *id.* (holding a state officer individually liable for violating a federal law that was, at the time of enactment, covered by the Supremacy Clause).

doctrine allows a plaintiff to overcome a state's sovereign immunity by focusing on this state officer's individual liability for the violation.¹⁵⁰ Without the ability to apply this doctrine in the context of a private Medicaid enforceability suit, the Medicaid Act will effectively become unenforceable.¹⁵¹ However, adopting the rationale set forth in this Comment would preserve such use of the *Ex parte Young* doctrine and thus ensure the viability of the Medicaid program.¹⁵²

2. *A violation of the Medicaid Act gives rise to a § 1983 cause of action*

Judge Cleland correctly concluded that a state that fails to abide by a provision of its Medicaid program breaches the terms of its state plan—its contract with the federal government.¹⁵³ As explained in Part II.A of this Comment, the Medicaid program encompasses two separate mechanisms, the contract and its governing law.¹⁵⁴ Thus a breach of the state plan also results in a violation of federal law.

Given the two mechanisms at work in the program, Medicaid recipients enjoy third-party rights from the contract as well as distinct federal entitlements. While they are indeed third-party beneficiaries to the contract, Medicaid recipients also are citizens to whom the Medicaid Act provided enforceable rights to certain Medicaid services.¹⁵⁵ Although Judge Cleland states otherwise, the Medicaid Act

150. See *supra* Part I.C (describing the *Ex parte Young* doctrine and its rationale).

151. Cf. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72 (1996) (noting that *Ex parte Young* is the primary avenue for an individual to obtain injunctive relief to remedy a state officer's ongoing violation of federal law).

152. Even if the Medicaid Act is ruled not to be supreme federal law, an argument can be made that the *Ex parte Young* doctrine should still be available to remedy a violation of non-supreme federal law when a state has given its assurance that it will comply with that law. See *supra* note 147 (analogizing the assurance to the states' adoption of the constitutional plan). Once the sovereign state assures the federal government that it will comply with the Medicaid law, a mechanism is necessary to ensure that state's contract obligations. The best mechanism available to achieve this is *Ex parte Young*. As noted in *supra* note 101, the Supreme Court in *Pennhurst II* failed to address the applicability of *Ex parte Young* to non-supreme federal law, as the concept did not yet exist. It therefore remains viable to argue that *Ex parte Young* should be available to ensure the integrity of a contract between the state and federal government.

153. See RESTATEMENT (SECOND) OF CONTRACTS § 235(2) (1981) ("When performance of a duty under a contract is due any non-performance is a breach."). A state's failure to abide by a provision of its Medicaid plan would constitute a failure to perform a duty under its contract with the federal government, and therefore, also constitute a breach.

154. See *supra* notes 119-120 and accompanying text (arguing that, in addition to the contract, the Medicaid Act functions as a separate mechanism governing the performance of the contract).

155. See *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 509-10 (1990) (holding that the Boren Amendment to the Medicaid Act created substantive federal rights enforceable under § 1983).

is not just an authorizing statute without force of its own.¹⁵⁶ The contract analysis instead makes clear that the federal law operates as a separate mechanism, empowered by the state's assurance that it will abide by that law.¹⁵⁷ When a state violates the Medicaid Act, it also violates the federal rights of Medicaid recipients.¹⁵⁸

Accordingly, Medicaid recipients theoretically should have two causes of action available—one for breach of their contract right and another for violation of their federal civil right.¹⁵⁹ Even if that federal civil right had not existed before the state entered into its agreement with the federal government, it came into existence when the state agreed to abide by the Medicaid Act.¹⁶⁰ In effect the state assured the federal government that, in administering its Medicaid program, it would not violate Medicaid recipients' federal right to certain required services.¹⁶¹

As *Westside Mothers* suggests, § 1983 may not provide a cause of action for breach of third-party beneficiary rights. However, in accordance with its original intention, § 1983 still offers protection against the violation of federal rights under the color of state law.¹⁶²

156. See *Westside Mothers v. Haveman*, 133 F. Supp. 2d 549, 558 (E.D. Mich. 2001) (contemplating the Act's contractual mechanism).

157. See *supra* Part II.B.1 (discussing the power of the assurance to secure state compliance of federal Medicaid law).

158. Cf. *Wilder*, 496 U.S. 498, 509, 520 (1990) (holding that when the Boren Amendment to the Medicaid Act was violated, the federal rights of health care providers were violated). The Court in *Wilder* held that the Boren Amendment bestowed upon health care providers an enforceable right within the meaning of § 1983 to "reasonable and adequate" reimbursement rates. *Id.* at 509. Because that right was violated under the color of state law, and because Congress did not intend to foreclose private enforcement, the Court sustained the plaintiffs' § 1983 suit. See *id.* at 520, 524. Although the court in *Westside Mothers* never reached the issue of whether the Medicaid Act created an enforceable right to EPSDT services within the meaning of § 1983, at least one federal court has determined that such a right does exist. See *Dajour B. v. City of New York*, 2001 WL 830674, *8 (S.D.N.Y. July 23, 2001) ("Under the *Wilder/Blessing* framework, it is clear that the EPSDT provisions provide the plaintiffs with an enforceable right under Section 1983.").

159. Until *Westside Mothers*, § 1983 was thought to provide for both causes of action. Conceptualizing a state's failure to provide required Medicaid services as giving rise to two separate causes of action is not unlike the many cases in which a single act gives rise to both a contract and a tort action.

160. See *supra* Part II.B.1 (arguing that the Supremacy Clause would not operate upon the Medicaid Act until the state gives its assurance that it will comply with that Act). This is because no citizen of a state can be eligible to receive Medicaid services until that state agrees to administer a Medicaid program.

161. A state's assurance that it will abide by the Medicaid Act is an implicit assurance that the rights provided by that Act will not be violated.

162. See *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980) (ruling that § 1983 provides a cause of action for the violation of rights protected by any federal law).

C. *Impact of Westside Mothers on Other State-Administered Federal Entitlement Programs*

The Medicaid Act is merely one of the many entitlement statutes passed pursuant to Congress' spending power that require state administration and place certain conditions upon the receipt of federal funds. Other such federal-state cooperative programs provide low-income people with food stamps,¹⁶³ public housing,¹⁶⁴ school lunches,¹⁶⁵ foster care,¹⁶⁶ education for the disabled,¹⁶⁷ and much more.¹⁶⁸

All of these federal entitlement programs parallel the Medicaid program's structure and are therefore subject to Judge Cleland's reasoning in *Westside Mothers*.¹⁶⁹ Should *Westside Mothers* become the Law of the Land, a state participating in any of the aforementioned programs may freely violate the federal entitlement rights granted under these programs without fear that these rights can be enforced privately using § 1983. When this is considered in conjunction with the unfortunate fact that the federal government rarely exercises its own power to enforce federal funding conditions placed on grant-in-aid programs,¹⁷⁰ it seems difficult to continue viewing these conditions as enforceable obligations. If private citizens cannot enforce these conditions and the federal government is unwilling to do so, then there are, practically speaking, no means to secure compliance by a state.

Fortunately, however, many, if not all of the federal grant-in-aid programs mentioned above require an assurance from each participating state that it will comply with all applicable federal laws and regulations.¹⁷¹ The arguments this Comment offers in support of

163. Food Stamp Act of 1964, 7 U.S.C. §§ 2011-2030 (1994).

164. United States Housing Act of 1937, 42 U.S.C. §§ 1437-1437x (1994).

165. National School Lunch Act, 42 U.S.C. §§ 1751-1769 (1994).

166. Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. §§ 620-628, 670-679(a) (1994).

167. Individuals with Disabilities in Education Act, 20 U.S.C. §§ 1400-1461 (1994). See generally Key, *supra* note 3, at 288 (recounting the various grant-in-aid programs passed in the 1960s and 1970s).

168. See *Maine v. Thiboutot*, 448 U.S. 1, 36-37 (1980) (Powell, J., dissenting) (listing thirteen grant-in-aid programs that could give rise to § 1983 actions).

169. See Key, *supra* note 3, at 288-89 (reviewing the common characteristics of nearly all federal grant-in-aid programs—a transfer of federal funds to the states, the filing of a state plan, designation of a state administrative entity, and federal power to impose regulations and adopt minimum standards).

170. See *id.* at 292 (noting that the federal government's power to withhold federal funds is rarely, "if ever," invoked).

171. See, e.g., 7 C.F.R. § 3016.11 (2000) (requiring any state receiving federal grant-in-aid funds through the U.S. Department of Agriculture to give an assurance in its state plan that it will comply with all applicable federal laws and regulations).

§ 1983, therefore, also apply to many of these programs and would maintain the obligatory nature of federal funding conditions.

CONCLUSION

The decision in *Westside Mothers v. Haveman* has wide-ranging implications. As mentioned, Medicaid can no longer be considered health insurance if *Westside Mothers* is upheld.¹⁷² This is especially important given that 41.4 million people, or twelve percent of the entire U.S. population, were enrolled in the Medicaid program during the 1998 fiscal year.¹⁷³ In addition to its far-reaching implications in the Medicaid context, as pointed out in the previous section, the impact of this case is not limited to Medicaid but rather affects a host of other federal entitlement programs.¹⁷⁴

Because these services are so important to the health and well-being of such a vast number of Americans, this Comment encourages the Supreme Court to continue to examine the Medicaid program and other Spending Clause programs in order to more clearly define the law and contract issues involved. Rather than viewing the entire program as solely in the nature of a contract, the Court should dissect the constituent parts of the program and perform a true contract analysis. Such analysis reveals that, even if the Medicaid Act is not supreme federal law initially, it becomes supreme law when a state assures the federal government that it will comply with that law. As the *Ex parte Young* doctrine only functions where the underlying federal law is supreme, this contract analysis maintains the applicability of that doctrine to the Medicaid program. In so doing, this analysis preserves the only means by which Medicaid recipients might force state officials to comply with the state's legal obligations. Furthermore, this analysis reestablishes § 1983 as a cause of action for

172. See Pear, *supra* note 6, at A14 (describing the *Westside Mothers* decision and the reaction it received). See *supra* note 99 (discussing the subsequent treatment of *Westside Mothers* in other jurisdictions).

173. See Health Care Financing Administration, *supra* note 1, at 12. The current economic downturn and the events of September 11, 2001 have most certainly increased these figures. See Dale Russakoff, *Out of Tragedy, N.Y. Finds Way to Treat Medicaid Need*, WASH. POST, Nov. 26, 2001, at A2 (reporting on the largest one-time enrollment increase in Medicaid history in New York City after September 11, 2001); see also Urban Institute, *Rising Unemployment and Medicaid*, 1 HEALTH POLICY ONLINE, 2 (Oct. 16, 2001), at http://www.urban.org/pdfs/HPOnline_1.pdf (last visited Jan. 3, 2002) (finding an increase in the unemployment rate from 4.5% to 5.5% would increase Medicaid enrollment by 1.5 million people, including one million children, and an unemployment rate increase to 6.5% would increase Medicaid enrollment by 3.3 million people).

174. See *supra* Part II.C (positing that *Westside Mothers* will adversely affect other federal entitlement programs such as foodstamps, public housing, and education for the disabled).

Medicaid recipients to enforce their right, by clarifying that recipients sue to vindicate not only their third-party beneficiary right, but also their right to Medicaid services created by federal law.