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IMPLIED EXECUTIVE AUTHORITY TO BRING SUIT TO ENFORCE THE RIGHTS OF INSTITUTIONALIZED CITIZENS

Persons who are involuntarily committed to institutions are at a distinct disadvantage in securing their constitutional rights. When such persons are institutionalized because of mental disabilities, that disadvantage is compounded. Although these citizens have committed no crime, society has decided to deprive them of their liberty, ostensibly for their own benefit. This dual handicap of confinement and disability reduces to a minimum any likelihood that these individuals will be successful in asserting their constitutional rights.

It can be argued that the society which has contributed to the handicap should help to insure that these citizens' rights are enforced. This notion lies at the heart of so-called "right to treatment" law. By implementing the fourteenth amendment's mandate of due process and equal protection, this law has been instrumental in establishing national standards for the care and treatment of institutionalized mentally ill and mentally retarded persons. Although these standards have received increasing judicial and legislative recognition, they have not always been given practical effect. The adequacy of

1. The right to receive treatment has its roots in the fourteenth amendment's guarantee that an individual will not be denied liberty without due process of law. As held by a unanimous Supreme Court in Jackson v. Indiana, 406 U.S. 715, 738 (1972): "At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." A considerable body of law is now developing around the idea of an analogous right to "protection from harm" which has the potential for being even more encompassing than the "right to treatment". See authority cited in note 5, infra.


(1) Persons with developmental disabilities have a right to appropriate treatment, services, and habilitation for such disabilities.

794
Rights of Institutionalized Citizens

each state's institutional program, and sometimes the adequacy of each institution within a state, must be individually litigated. This process is agonizingly slow, especially when viewed in the context of the seriously harmful environments in which many citizens are kept.

The requirement of case-by-case determination, together with the need for extensive proof and carefully detailed relief inherent in these "omnibus" right to treatment suits, raises a cogent question: who will bring such suits? Assuming that the hospitalized mentally handicapped patient is unlikely to sue on his own behalf, it is possible that a concerned friend or relative will bring suit. This is unlikely, however, because these suits attack the multifaceted operations of entire institutions, and the cost of discovery is prohibitive for most private plaintiffs.

In an effort to redress such inequities, the United States, through the Justice Department's Civil Rights Division, has become involved in much of the present right to treatment litigation. Until recently, participation by the United States in right to treatment suits was restricted to two levels. The most common entry of the Government into the suit was by invitation to act as amicus curiae. Unlike the traditional amicus, whose activity is limited to the submission of a brief, the United States has been permitted to conduct

(2) The treatment, services and habilitation for a person with developmental disabilities should be designed to maximize the developmental potential of the person and should be provided in the setting that is least restrictive of the person's personal liberty.

3. See, e.g., New York State Ass'n for Retarded Citizens, Inc. v. Carey, 393 F. Supp. 75 (E.D.N.Y. 1975) (exhaustively detailed relief applicable only to members of "Willowbrook class," those who were at one time residents of the Willowbrook Developmental Center). An action recently filed on behalf of residents of another state institution alleges that these standards are not being applied statewide. New York State Ass'n for Retarded Citizens, Inc. v. Carey, Civil No. 76-2860 (S.D.N.Y., filed Jun. 29, 1976).

4. Generally, several years elapse between the filing of the complaint and the final order. During this time, the residents of the institution are subject to continual threats of physical and psychological harm, which invariably cause regression (loss of skills) and can result in actual injury and even death. See Addenda A&C to Memorandum of the United States in Opposition to Defendants' Motion to Dismiss, United States v. Solomon, Civil No. N-74-181 (D. Md. 1976).

5. See, for example, the Willowbrook consent order, New York State Ass'n for Retarded Citizens, Inc. v. Carey, 393 F. Supp. 715 (E.D.N.Y. 1975), reprinted in 1 MENTAL DISABILITY L. REPR. 58 (1976), which covers 23 separate categories of relief.

6. See Alexander v. Hall, 64 F.R.D. 152, 154, 158 (D.S.C. 1974) (United States allowed to intervene in a mental health right to treatment case in which plaintiffs were financially unable to proceed with discovery).

itself as though it were a plaintiff, and has been designated a "litigating amicus" or "amicus curiae with the rights of a party." Subsequently, the United States began to petition the courts to enter as plaintiff-intervenor, which more appropriately classified the role that was taken.9

On February 21, 1974, the United States filed a complaint as party plaintiff in the United States District Court for the District of Maryland charging the state's mental health executives with failure to provide minimally adequate care and habilitation for the 2400 mentally retarded residents of Rosewood State hospital.10 After extensive discovery, the defendants moved to dismiss the action for lack of subject matter jurisdiction and failure to state a claim upon which relief could be granted.11 Following briefing and oral argument, the district court, per Chief Judge Northrop, granted the motion to dismiss on the ground that the federal executive did not have standing to bring the action.12

The judiciary's reluctance to recognize the United States' standing in such suits stems from the fact that there is no specific congressional enactment which authorizes the Government to sue in this particular situation. The


10. Complaint of the United States, United States v. Solomon, Civil No. N-74-181 (D. Md., filed Feb. 21, 1974). The complaint alleged that Rosewood State Hospital not only failed to carry out its mandate of providing treatment and habilitation, but that it failed even to keep the residents free from harm. Specifically, Rosewood was charged with failure to recruit sufficient numbers of qualified staff, failure to provide treatment plans, failure to provide psychiatric and social services, failure to provide a humane environment, failure to teach behavioral and social skills, failure to provide sufficient living and sleeping space, failure to maintain sanitary kitchen and laundry facilities, and failure to allow relief from the seclusion of residents in locked rooms or cells for extended periods of time.


A recent commentator noted that in certain situations it is difficult to distinguish between standing (a proper party doctrine) and related, issue-oriented doctrines, such as the existence of a claim upon which relief can be granted (cause of action). See Broderick, The Warth Optional Standing Doctrine: Return to Judicial Supremacy?; 25 Cath. U.L. Rev. 467, 469-71 (1976). This confusion has not bypassed the courts and is evidenced in the Solomon case.
United States brought these actions pursuant to the general statutory authority of the Attorney General to appear in matters in which the Government is interested, contending that the United States has an inherent interest in upholding the provisions of the Constitution against abuses affecting large numbers of its citizens.

This note will examine the authorities supporting the United States' assertion of a nonstatutory power to bring suit and will attempt to ascertain the limitations of such power. Thus defined, the theory will then be applied to the specific situation presented by *United States v. Solomon,* and some conclusions will be drawn both as to the applicability of the doctrine to this particular case and to its general viability.

I. THE DEVELOPMENT OF AN IMPLIED EXECUTIVE RIGHT OF ACTION

To bring suit on a federal claim, a plaintiff must have a cause of action legislated by Congress. Although not explicitly stated in the Constitution, it has been thought that Congress' power to authorize litigation can be exercised for the benefit of its co-equal executive branch. Lack of enabling legislation will foreclose a plaintiff's claim unless the court determines that there is sufficient evidence to imply a right to sue even though it was not specifically articulated by Congress. Evidence from which the inference of a right of action can be drawn has been found both in the Constitution and in federal statutes.

A. Debs and its Progeny

Early in this nation's history the Supreme Court found implicit in the Constitution the right of the United States to bring suit in its courts to protect its own interests. The first of these cases concerned the proprietary and

13. 28 U.S.C. § 518(b) (1970) provides:
   When the Attorney General considers it in the interests of the United States, he may personally conduct and argue any case in a court of the United States in which the United States is interested, or he may direct the Solicitor General or any officer of the Department of Justice to do so.
16. This power may be implied from article III, § 2, which grants the Supreme Court jurisdiction over "[c]ontroversies to which the United States shall be a Party." See, e.g., United States v. Raines, 362 U.S. 17, 27 (1960).
pecuniary\textsuperscript{18} interests of the United States, but the theory was soon expanded to include the Government's obligation to protect the public,\textsuperscript{19} a notion which received its broadest philosophical explication in the 1895 case of \textit{In re Debs}.\textsuperscript{20} Facing a threatened boycott which would have prevented interstate railroads from carrying mail out of Chicago, the Court found authority for the United States to pursue injunctive relief, and it refused to ground such authority solely on the well-established proprietary interest in the mails.\textsuperscript{21} Since Congress had activated its commerce power by assuming jurisdiction over interstate railroads, the Court found that the United States had a duty to remove any obstructions to commerce.\textsuperscript{22} It dismissed the idea that criminal punishment was the exclusive remedy and found submission to the peaceful jurisdiction of the courts preferable to forcible removal of the obstruction.\textsuperscript{23}

Acknowledging that the plaintiff United States had a property interest in the mails, the Court preferred to recognize the broader interest of every government in applying to its own courts for aid in the exercise of its powers and the discharge of its duties for the general welfare.\textsuperscript{24} Although the Court recognized the impropriety of allowing the United States to invoke its powers for the benefit of isolated individuals, it reasoned that "whenever the wrongs complained of are such as affect the public at large, and are in respect of matters which by the constitution are intrusted to the care of the nation," the United States must not be excluded from the courts.\textsuperscript{25}

In speaking of "matters . . . intrusted to the care of the nation" the Court appeared to be embracing a broad \textit{parens patriae}\textsuperscript{26} philosophy; but \textit{Debs} has most often been invoked for the more limited principle that the United States has the inherent authority to sue for removal of obstructions to interstate com-

\begin{enumerate}
\item See Kern River Co. v. United States, 257 U.S. 147, 154-55 (1921) (suit to enforce forfeiture of a right of way); United States v. San Jacinto Tin Co., 125 U.S. 273 (1888) (suit to set aside a fraudulently obtained land patent).
\item E.g., United States v. American Bell Tel. Co., 128 U.S. 315 (1888) (action to rescind fraudulently procured invention patent).
\item 158 U.S. 564 (1895).
\item \textit{Id.} at 584-86.
\item \textit{Id.} at 581, 586.
\item \textit{Id.} at 581-83.
\item \textit{Id.} at 583-84.
\item \textit{Id.} at 586.
\item Literally "father of his country", the term has come to define a quasi-sovereign interest in which the state, as a representative of the public, has an interest apart from that of the individuals affected. \textit{See, e.g.}, Hawaii v. Standard Oil Co., 405 U.S. 251, 257-60 (1972).
\end{enumerate}
merce. 27 Wyandotte Transportation Co. v. United States 28 culminated a series of these actions in which various obstructions to the nation's waterways were enjoined in suits brought by the United States. The Rivers and Harbors Appropriation Act of 1899 29 governed these matters, but the thrust of the Act was largely criminal, and it did not provide for injunctive relief. The Court considered the Debs rationale in its decision to imply a right of action for injunctive relief. Evaluating congressional intent, the Court concluded that the remedies provided by the Act were not intended to be exclusive 30 and that an injunctive action by the United States was appropriate, since the Government was a principal beneficiary of the Act. 31 Rather than providing an independent basis for allowing the United States to bring suit, the Debs case influenced subsequent judicial willingness to imply a federal remedy.

In the early 1960's, several cases were brought on the theory that certain types of discrimination violative of the fourteenth amendment could properly be challenged by the United States as an unconstitutional burden on interstate commerce. 32 Attacked were the racially segregatory policies of southern air-
port, railway, and bus terminals, and the often violent tactics employed by the Ku Klux Klan in furtherance of racial segregation. The decisions rested on a broader interpretation of Debs than had previously been enunciated. While Debs and its immediate successors had been factually limited to removing “obstructions” to interstate commerce, these cases dealt with the more ephemeral “interferences with” or “burdens upon” such commerce. Although all of the cases relied on Debs as a grant of authority for the Government to bring suit, most of them also cited the Interstate Commerce Act and the nondiscriminatory provisions of the Federal Aviation Act, along with provisions allowing the Attorney General, as agent of the Interstate Commerce Commission, to sue to enforce the Acts. The difficulty in relying on this statutory authority was that the United States had sued not only the carriers, but also state and local government authorities. The statutes could only imply a basis for the Government’s action against the noncarrier defendants, and Debs was used to bolster that implication.

Speaking for a three judge court in United States v. City of Jackson, Judge Wisdom found apparent statutory authority for the suit under the Interstate Commerce Act but felt that there was independent, nonstatutory standing under the commerce clause. The United States had alleged that the city of Jackson, through its use of segregated waiting rooms in interstate carrier facilities, had engaged in a pattern of conduct which continually violated the fourteenth amendment rights of many citizens. The fourteenth amendment violations, however, were considered relevant to the standing issue only insofar as they created a burden on interstate commerce. Although Judge Wisdom surmised that “[s]uch thinking may take us down the road to recognition of government standing to sue under the Fourteenth Amendment or under any clause of the Constitution,” the issue before him was framed under the commerce clause and he was content to rest his decision thereon.

36. 318 F.2d 1 (5th Cir.), rehearing denied, 320 F.2d 870 (5th Cir. 1963) (per curiam).
37. Id. at 17.
38. Id. at 11.
39. Id. at 14.
40. In denying the petition for rehearing of this matter, Judge Wisdom’s co-panelists, Judges Bootle and Ainsworth specially concurred, restricting their finding of standing to the “ample statutory basis” and finding no need to reach the question of nonstatutory authority. 320 F.2d at 871.
Judge Wisdom's prediction did not hold true for the school desegregation cases brought by the United States prior to the 1964 Civil Rights Act. In those actions it was claimed that federally subsidized community schools attended by children of United States military personnel should be enjoined under the fourteenth amendment and the School Facilities Construction Act from enforcing a policy of racial segregation. The United States' argument that the fourteenth amendment violations constituted a burden on the war powers clause of the Constitution was rejected by the courts.

The decisions in United States v. Biloxi Municipal School District and United States v. Madison County Board of Education reasoned that since Congress had not granted the executive the authority to enjoin racial segregation in schools, the United States had no standing to sue because it was not an individual and could not therefore invoke the fourteenth amendment. On consolidated appeal, the Fifth Circuit affirmed, but adopted the different reasoning used by the district court in United States v. County School Board, which was that Congress had not defined a uniform national policy on the education of military dependents and had actually recognized that state law, not the war powers clause, should be controlling.

Although the district and circuit courts unanimously rejected constitutional grounds for such suits, the district court in County School Board granted relief under the statute. The operative provision of the School Facilities Construction Act was an assurance that the schools receiving contributions for the education of military dependents would provide their services, according to state law, in the same manner in which they were provided to other children in the school district. Initially recognizing that federal grants


43. U.S. CONST. art. I, § 8, cl. 11.


49. 326 F.2d at 242.

authorized by Congress create binding contracts, the court then sought to interpret the contractual assurance.\textsuperscript{51} It concluded that (in enacting the statute) Congress had intended state law to govern but that the state law had changed as a result of the Supreme Court's decision in \textit{Brown v. Board of Education}\textsuperscript{52} which made state-imposed segregation illegal. The United States therefore could sue to enforce the contractual adherence to state law.

The Fifth Circuit interpreted the same statute but reached the opposite conclusion.\textsuperscript{53} It defined congressional intent as those remarks made by legislators at the time the statute was passed indicating a lack of intent to disturb then existing practices of segregation.\textsuperscript{54} Furthermore, the court held that the United States could not even sue to enforce the contract, finding that the statutory remedy of withholding funds was intended to be complete. The court made clear that if the remedy was inadequate, Congress must address the problem and concluded that Congress' desire not to interfere with local control of schools overrode its concern for active enforcement of the Act.\textsuperscript{55} To the extent that these cases reject the \textit{Debs parens patriae} rationale, they express the belief that there must be some congressional determination that the matter is an appropriate one for national policy, so that federal action will not infringe on the rights of local government.\textsuperscript{56}

Judge Wisdom's theory was revived in 1970 by the District Court for the Southern District of New York. In \textit{United States v. Brand Jewelers, Inc.},\textsuperscript{57} Judge Frankel held that the authority to remove large-scale burdens on interstate commerce and the authority to correct widespread deprivations of property without due process of law were alternate grounds of authority, each sufficient in itself, to support the United States' right to bring suit.\textsuperscript{58} Judge Frankel took the step that Judge Wisdom forecast in \textit{City of Jackson} and did so in reliance on the concepts expressed in earlier opinions rather than on the particular sets of facts they addressed. The case concerned a creditor's massive use of the illegal practice of "sewer service"\textsuperscript{59} to obtain default judgments against low-income debtors and to satisfy the judgments through garnishment of wages. Judge Frankel noted that the doctrinal bases for al-

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\textsuperscript{51}. 221 F. Supp. at 99.
\textsuperscript{52}. 347 U.S. 483 (1954).
\textsuperscript{53}. Madison County Bd. of Educ., 326 F.2d at 239-42.
\textsuperscript{54}. \textit{Id.} at 241.
\textsuperscript{55}. \textit{Id.} at 242.
\textsuperscript{56}. \textit{Id.} at 242-43, \textit{citing} United States v. County School Bd., 221 F. Supp. at 104.
\textsuperscript{58}. \textit{Id.} at 1295.
\textsuperscript{59}. The term refers to the fact that the ultimate recipient of the court authorized service of process is not the individual to whom the process is addressed. \textit{See} note 63, \textit{infra}. 

[Vol. 26:794]
lowing the United States to pursue injunctive relief against large-scale violations of both the commerce clause and the fourteenth amendment were "substantially identical."60 The Debs rationale, he asserted, was triggered by an obstruction of broad impact, sufficient to be thought public rather than private, threatening such injury as would bring into play the government's "powers and duties to be exercised and discharged for the general welfare."61 Judge Frankel advocated a classic parens patriae theory, expressing an undercurrent running through the Debs and City of Jackson opinions.

Responding to the defendants' concern that a recognition of fourteenth amendment-based standing would unfairly pit the resources of the federal government against a weaker party, Judge Frankel suggested that the action ultimately would be subject to congressional control and that no remedy would issue without careful judicial evaluation.62 The court's implication of such a broad right of action may have been influenced by the particularly egregious conduct of the defendants, which could have continued unchecked had the suit been dismissed.63

Statutory authority does exist for the commerce clause rationale in Brand Jewelers. The Consumer Credit Protection Act64 states that garnishment by creditors constitutes a substantial burden on interstate commerce. No statutory authority was cited to support the fourteenth amendment action, however, as the court did not even discuss the possible applications of either the civil65 or criminal66 civil rights statutes to the facts at hand. Brand Jewelers stands as the high-water mark of judicial willingness to extend the Debs rationale.

B. Standards For An Implied Action

The cases purporting to follow the Debs philosophy of implying inherent authority of the United States to bring suit range from almost pure constitutional implication (Brand Jewelers) to implication from a very particularized

61. Id. at 1299, quoting Debs, 158 U.S. at 584.
63. Id. at 1294. Brand Jewelers' salesmen peddled goods door to door in ghetto neighborhoods, securing business through easy credit, long term payment plans. They filed thousands of complaints yearly in the courts alleging default on payments and accompanied by false affidavits of service of process (sewer service). When the unknowing defendant failed to appear in court, Brand Jewelers would obtain default judgments which were satisfied through garnishment of wages. See 84 HARV. L. REV. 1930, 1938 (1971).
statute (Wyandotte). Since virtually all of these cases have used the principles of implied rights of action and remedies, it is useful to ascertain just what those principles are and how they have developed. First, it is pertinent to note that although these standards have evolved largely in cases which did not involve federal plaintiffs, the presence of a federal plaintiff would not substantially change the issues. There is one caveat, however, since some additional matters, which will be considered later, exist in federal plaintiff situations.

In *Cort v. Ash*, the Supreme Court attempted to summarize the standards for implication by articulating four considerations which determine whether a private remedy is implicit in a statute not expressly providing one. The first of these factors, and the one most often cited in the implication cases, is whether the plaintiff is of the class for whose benefit the statute was enacted. The second consideration is one with least support in prior law: whether there is any indication of legislative intent, explicit or implicit, to grant or deny the particular remedy. This approach has been criticized because by definition in implication cases Congress has failed to consider the matter, and therefore, has expressed no interest. The third focus, which is arguably the most important and is amply supported by the case law, considers statutory purpose and adequacy: whether implication is consistent with the underlying scheme of the statute, and would aid the primary congressional goal. Finally, the Court found it appropriate to consider

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67. *Brand Jewelers* and *Wyandotte* are both examples of cases which did involve a "federal plaintiff", i.e., the United States. Most of the authorities upon which these decisions were based, however, involved only private plaintiffs.
68. 422 U.S. 66 (1975).
69. 422 U.S. at 78. Although the specific situation addressed is one in which the plaintiff sought damage relief, the court noted that the same considerations would be applicable to a claim for injunctive relief. *Id.* at 78 n.9. The specific examples employed also indicate that the principles are applicable to a federal plaintiff and to constitutional implication. See notes 76-77 and accompanying text infra.
73. *See* Comment, supra note 72, at 1422.
whether the cause of action was one traditionally relegated to state law, in which case federal action would be inappropriate.\textsuperscript{75}

Presumably, failure to meet any one of these criteria would be fatal to the plaintiff's claim, with the possible exception that silent or inconclusive legislative history should not alone defeat other positive evidence of implication. By their terminology, these standards appear to be limited to statutory implication, but the Court's inclusion of \textit{Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics}\textsuperscript{76} in its discussion indicates that the principles are also applicable to constitutional implication. The same can be said for the fact that although the cases have generally involved only private plaintiffs, the continued reliance on \textit{Wyandotte}\textsuperscript{77} in this area is evidence that these standards can be applied to imply a right of action in favor of the United States.

One other significant factor which must be taken into account whenever the Executive is plaintiff in an implied action is the constitutional concept of balance of powers. Since it is generally Congress' realm to authorize causes of action, the Executive must be careful not to usurp power that Congress intended to retain. Likewise, it is also Congress' role to enact any laws which are "necessary and proper" to effectuate the Constitution.\textsuperscript{78} As the Constitution is the supreme law of the land, a determination by Congress that a law is necessary to enforce the Constitution predisposes the question of whether that law impinges on an area of state regulation and thereby implicates federalism.

The activities of Congress, therefore, are essential to the delineation of an Executive right of action. If Congress legislates a specific cause of action for the United States, there is no concern for balance of powers or federalism when the United States acts pursuant to that cause of action. Theoretically, if a cause of action in favor of the United States can properly be implied from a federal statute, as to that cause of action concerns about federalism and balance of powers are similarly vitiated. A more serious problem arises, however, when the right of action asserted by the Executive has been implied directly from the Constitution,\textsuperscript{79} or primarily from the Constitution with the

\textsuperscript{76} 403 U.S. 388 (1971) (private right of action for violation of fourth amendment rights implied directly from the Constitution). \textit{See} \textit{Cort v. Ash}, 422 U.S. at 78-80.
\textsuperscript{77} \textit{See} \textit{id.} at 79-80.
\textsuperscript{78} \textit{U.S. Const.} art. 1, § 8, cl. 18.
\textsuperscript{79} That is, from a constitutional clause which specifically grants the power to Congress, rather than to the Executive.
support of a very broad congressional enactment. In such an instance, *Debs*
implicates balance of powers concerns; if the defendant is a state rather than
a private party, federalism becomes an additional issue.

These concerns have been specifically articulated in those cases which have
rejected the United States' assertion of a constitutionally based right of
action;\(^{80}\) they played a significant role in the decision in *United States v. Solomon.*\(^{81}\)

II. *United States v. Solomon*: The Rosewood Case

In *Solomon*, both constitutional and statutory grounds were advanced as
bases for the United States' suit, but neither was found sufficient by the court.
The court, per Judge Northrop, read *Debs* and its successors to stand for the
principle that, while control over commerce was commonly the province of
Congress,\(^{82}\) certain emergency situations exist in which only the Executive
can respond quickly enough to alleviate the threat. The court found that
any further expansion of the *Debs* principle "works a subtle reorganization
of the balance of power" because the Constitution provided that Congress
and not the Executive should oversee the development of interstate commerce
policy.\(^{83}\) Judge Northrop rejected Judge Frankel's assurance in *Brand Jewelers*
\(^{84}\) that the courts and the legislature could provide an adequate check to
any executive usurpation of power, citing the possibility of capitulation by
a weaker defendant and the heaviness of such a burden of response on the
"time consuming and quite arduous" legislative process.\(^{85}\)

The court's strongest objection to a broad application of *Debs* was its im-
 pact on the federal system. If such expansion were allowed, "no state policy
or program [would] be safe from the questioning eyes of those few lawyer-
bureaucrats who have the authority to devise government lawsuits."\(^{86}\) The
same objections were found applicable to the assertion by the United States
of a fourteenth amendment-based right to sue.\(^{87}\) Such encroachment upon
federalism might be countenanced if there were no other adequate remedy
for fourteenth amendment rights, but the courts noted that there was a statu-

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80. See note 43 and accompanying text *supra.*
82. U.S. Const. art. I, § 8, cl. 3.
83. 419 F. Supp. at 366.
84. See notes 58-67 and accompanying text *supra.*
85. 419 F. Supp. at 366.
86. *Id.* The court indicates that it also disfavors "Congressional assaults on federal-
 ism through the Commerce Clause." *Id.* at 366-67.
87. *Id.* at 368.
tory provision by which the individuals themselves could and in some instances had brought suit.\textsuperscript{88}

Having thus dispensed with the United States' constitutional arguments for its authority to sue, Judge Northrop proceeded to reject any basis for statutory implication. Reading \textit{Debs} as holding that nonstatutory authority extends only to situations in which Congress, having expressed no opinion, presumably wants the executive to sue, the court concluded that Congress had indicated a desire not to grant executive power in this type of lawsuit.\textsuperscript{89} Support for this assertion was drawn from three sources. First, none of the many enforcement schemes in civil rights legislation covers this situation, thus indicating that Congress intended the Executive not to have such a remedy. Second, most legislation specifically concerned with the rights of the mentally retarded creates its own remedies.\textsuperscript{90} Third, the legislative histories of the 1957, 1960, and 1964 Civil Rights Acts purportedly show that Congress considered and rejected a provision which would authorize such a suit.\textsuperscript{91} The opinion concluded that since Congress apparently did not want the Executive to have this power, a heavy burden was placed on the Executive to prove that such a power is implicit in the Constitution.\textsuperscript{92} This burden could only be met by showing of a national emergency, which was not evidenced under the present set of facts. Therefore, the United States had not justified its standing and the action was dismissed.\textsuperscript{93}

\section*{III. Statutory and Constitutional Implication}

\subsection*{A. The Criminal Statute: 18 U.S.C. \S 242}

Judge Northrop found no basis for statutory implication in \textit{Solomon}. Had

\textsuperscript{88} \textit{Id.} The court refered to several such suits which are currently pending in Maryland courts.

\textsuperscript{89} \textit{Id.}

\textsuperscript{90} The Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. \S 6010 (Supp. V 1975), provides for a cutoff in federal funding to institutions which do not meet its articulated standards.


\textsuperscript{92} 419 F. Supp. at 371.

\textsuperscript{93} \textit{Id.} at 372. \textit{Solomon} was the first of two suits which the United States initiated as plaintiff. The second case, United States v. Mattson, Civil No. 74-138-BU (D. Mont. Sept. 29, 1976), based on nearly identical facts, was dismissed by a federal district court in Montana on the Authority of \textit{Solomon}. Both cases have been appealed, United States v. Solomon, 419 F. Supp. 358, appeal docketed, No. 76-2184 (4th Cir. Oct. 21, 1976); United States v. Mattson, Civil No. 74-138-BU, appeal docketed, No. 76-3568 (9th Cir. Dec. 3, 1976), and litigation initiated by the United States pursuant to a theory of nonstatutory governmental authority is in abeyance pending resolution of these issues.
he systematically applied the Ash standards, he might not have been so emphatic in his conclusions. He mentioned in passing that the criminal statute allowing the Attorney General to prosecute civil rights offenders\textsuperscript{94} did not provide the remedy sought by the United States, but he did not further investigate whether the remedy could, in fact, be implied from that statute.\textsuperscript{95}

Under the Ash criteria, it is arguable that the United States could properly be considered the beneficiary of a federal criminal statute such as this.\textsuperscript{96} The legislative history is silent on the matter of an injunctive remedy,\textsuperscript{97} authorizing neither a grant nor a denial of such relief.\textsuperscript{98} A cause of action for violation of the Constitution is not one "traditionally relegated to state law."\textsuperscript{99} The only remaining question is whether implication is consistent with and would effectuate the underlying scheme of the statute. The Fifth Circuit had occasion to consider the purpose of this statute in \textit{In re Estelle},\textsuperscript{100} a lawsuit alleging widespread and systematic deprivations of a prisoner's civil rights. In \textit{Estelle} the court found that the statute was aimed at redressing deprivations of civil rights under color of state law, but that criminal penalties alone would be inadequate to vindicate such pervasive activity.\textsuperscript{101} It chose, therefore, to accord the United States the benefit of the "deeply rooted" common law principle of "permitting civil relief where criminal sanctions are inadequate or ineffective."\textsuperscript{102} This rationale directly supports a finding of implication in \textit{Solomon}.

\textsuperscript{95} 419 F. Supp. at 368.
\textsuperscript{96} The Court of Claims has found the government to be the beneficiary of another of the federal criminal statutes, 18 U.S.C. § 201 (1970) (the bribery statute) which is similarly worded. Continental Management, Inc. v. United States, 527 F.2d 613 (Ct. Cl. 1975). This case, however, involved the repayment of funds to the Government, and the court stressed the compensatory nature of the action. 527 F.2d at 620. Nevertheless, the operative language of the two statutes, and indeed of all the federal criminal statutes, is virtually identical, in that they provide: "Whoever [engages in a particular crime] shall be fined [amount] or imprisoned [length of time] or both." 18 U.S.C. §§ 1-2510 (1970). The report of the House Committee on the Judiciary accompanying the enactment of Title 18 into positive law includes a history of the criminal code which indicates that the thrust of the code is aimed at redressing "crimes against the United States." See H.R. Rep. No. 304, 80th Cong., 1st Sess. 2 (1947). Under this rationale, the United States is the primary beneficiary of the federal criminal statutes.
\textsuperscript{98} See note 74 and accompanying text \textit{supra}.
\textsuperscript{100} 516 F.2d 480 (5th Cir. 1975).
\textsuperscript{101} \textit{Id.} at 486.
The Ash court had examined in detail the problem of implying a civil remedy from a criminal statute and extracted from prior decisions the maxim that the provision for a criminal penalty does not necessarily preclude a civil action when there is a “statutory basis for inferring that a civil cause of action of some sort lay in favor of someone.” In Solomon, the residents of Rosewood State Hospital could have brought individual actions pursuant to 42 U.S.C. § 1983; therefore, the Ash standards for implication appear to have been satisfied.

The serious difficulty with implication is raised in Judge Northrop's evaluation of the legislative histories of the 1957, 1960, and 1964 Civil Rights Acts, insofar as they address the consideration of a proposed “Title III,” which would have granted the Attorney General broad authority to bring suit to enjoin civil rights violations. Because of the linguistic and conceptual overlap of the civil with the criminal statutes, an authoritative congressional denial of a specific remedy in one might be an appropriate measure of the legislative intent of the other. The question then becomes whether Congress did specifically consider and reject such a remedy. The legislative histories show that such a provision was considered in the early stages of these Acts, but that it was not included in the final draft of any of the bills. The text of congressional discussion attending the consideration of “Title III” reflects the politically charged atmosphere of the early civil rights era and indicates that the provision may have been eliminated as a compromise to facilitate the passage of other sections of the bill. However, the histories are at best inconclusive and they should not alone suffice to undermine implication when all of the other relevant factors are satisfied.

B. The Developmentally Disabled Assistance and Bill of Rights Act

A statute which is more precisely directed to the alleged abuses in Solomon is the Developmentally Disabled Assistance and Bill of Rights Act. As

104. 42 U.S.C. § 1983 (1970) allows individuals to bring suit for injunctive or other relief for violations of their civil rights.
106. See authorities cited at note 91 supra.
108. See note 74 and accompanying text supra.
its title indicates, this statute enumerates congressional findings respecting the rights of persons with developmental disabilities, including the right to appropriate treatment in the setting that is least restrictive to personal liberties.\textsuperscript{110}

The purpose of the statute is to assure that institutions receiving federal funding for the care of developmentally disabled persons comply with the congressionally mandated level of their care and treatment.\textsuperscript{111} Since the Act focuses on both the proper expenditure of federal funds and the appropriate level of treatment for developmentally disabled persons, its beneficiaries are both the United States and those persons for whose care the funds are being provided. The cause of action can be viewed in two ways. It can be seen as an action to enforce those personal rights which the statute protects, but it can also be seen as one to enforce the specific terms of a contract created by a grant of federal funds.\textsuperscript{112} In neither instance is it a matter within the jurisdiction of state law.

Judge Northrop found that the specific remedy provided by the Act, a cutoff in federal funding, was intended to be exclusive.\textsuperscript{113} He reasoned that Congress would not have gone to such great lengths to devise a plan involving one executive agency (HEW) if it intended that another federal agency (Justice) with less expertise in the problems of the mentally retarded become involved in potentially conflicting enforcement.\textsuperscript{114} This argument overlooks the Act’s legislative history, which reveals that the Bill of Rights provision was retained over the objection of HEW,\textsuperscript{115} and that its purpose was to recognize that developmentally disabled persons “have a right to receive appropriate treatment for the conditions for which they are institutionalized, and that this right should be protected and assured by the Congress and the courts.”\textsuperscript{116} In light of the statutory purpose evidenced in this legislative history, the court could have concluded that termination of funding by HEW was not intended to be the exclusive remedy.

Judge Northrop also found that the statutory remedy was an adequate “carrot and stick” method to accomplish Congress’ goals and to achieve what the Justice Department intended in bringing the suit.\textsuperscript{117} This argument

\begin{itemize}
\item \textsuperscript{110} See note 2 supra.
\item \textsuperscript{111} 42 U.S.C. § 6010 (Supp. V 1975).
\item \textsuperscript{112} See note 119 and accompanying text infra.
\item \textsuperscript{113} 419 F. Supp. at 370.
\item \textsuperscript{114} Id.
\item \textsuperscript{117} 419 F. Supp. at 370.
\end{itemize}
similarly overlooks a crucial factor: that while a cut-off of funding may be an adequate means of preserving the integrity of federal expenditures, it does little to insure the congressionally mandated level of treatment for institutionalized persons. If Maryland fails to comply with the statutory standards, the “stick” comes down on the head of the Rosewood resident. Other courts recognized the anomaly of such reasoning and have held that the United States may sue to enforce the terms of contracts created by federal grants.\(^{118}\)

The question of the adequacy of the statute was further resolved by the court in its factual finding that there are alternative means to protect the rights of institutionalized mentally retarded persons as evidenced by several pending lawsuits brought on their behalf.\(^{119}\) The court noted, however, that none of those cases contained the breadth of allegations and claims for relief that were present in *Solomon*.\(^{120}\) The question remains whether the existing statutory causes of action and remedies are sufficient. If the United States is virtually the only party with the financial resources to conduct this type of litigation, then existing statutes may indeed be inadequate. Although there are hundreds of such institutions in the United States, few of these “omnibus” suits have been brought.\(^{121}\) The paucity of such suits might be encouraging if one could believe that the institutions provided adequate care and treatment, but investigation tends to lead to the opposite conclusion.

If, absent the participation of the United States, existing resources are inadequate to protect the rights of institutionalized citizens, these arguments must be considered under the *Ash* principle of aiding the congressional goal.\(^{122}\) Thus even if the court ultimately were to conclude that it could not imply a right of action from the criminal civil rights statute, the Developmentally Disabled Assistance and Bill of Rights Act appears to satisfy the standards for statutory implication.


\(^{119}\) 419 F. Supp. at 368.

\(^{120}\) Id., n.2.

\(^{121}\) The Association for Retarded Children, which was a plaintiff in the *Willowbrook* case (New York State Ass'n for Retarded Children v. Carey, 393 F. Supp. 715 (E.D.N.Y. 1975)), was largely responsible for the success of that case. However, the association is less powerful in other states and cannot be relied upon to shoulder the burden of this tremendous litigation. In Montana, for example, there has been no indication whatever of a private individual or organization interested in joining or taking over the *Mattson* litigation. See note 93 *supra*.

\(^{122}\) In the legislative history to the Developmentally Disabled Assistance and Bill of Rights Act, Congress articulated its goal of enforcement of the “Bill of Rights”. See note 117 and accompanying text *supra*.
C. Constitutional Implication

The more difficult question is whether Solomon satisfies the standards for constitutional implication and beyond that, whether there does and should exist a doctrine of pure constitutional implication of cause of action in favor of the United States. The principles of statutory implication are adaptable to constitutional implication, but the presence of a federal plaintiff raises important concerns about separation of powers, and the appearance of a state-affiliated defendant interjects questions of federalism. Whether these concerns alone will suffice to undermine a right of action is an issue courts have rarely faced, because in almost every instance there has been some type of congressional enactment used to bolster constitutional implication. The courts which have purported to espouse direct constitutional implication must have been somewhat influenced by the indication of the positive will of Congress. The cases in which greatest exposure was given to the idea of an inherent constitutional authority for the United States to bring suit are Debs, City of Jackson, and Brand Jewlers. The language they use to support their theories is strikingly similar to the underlying rationale of parens patriae actions, in which states have repeatedly been granted the right to sue to protect the welfare of their citizenry. The only instances in which state parens patriae actions have been denied occurred when the state attempted to sue the federal government. This could not be countenanced because, as the Supreme Court decreed, the United States was the ultimate parens patriae in representing the rights of citizens in their relations with the federal government. The decision whether to allow a state versus federal suit was based on policy concerns involving the proper allocation of authority within the federal system.

If these principles can be applied to a situation in which the Federal Government seeks to bring a parens patriae action against a state, the operative question becomes whether the interest asserted is of a state or a national nature. This test becomes circuitous because what one court defines as a national interest another court will characterize as a state concern. The problem has its roots in the fact that the parens patriae rationale does not

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127. 533 F.2d at 676.
consider separation of powers. If Congress had determined the matter to be one of federal interest, only the Supreme Court could rule otherwise. Since Congress has made no determination, the Executive is in no better position than a district court to decide what is or is not a federal concern. This is why there can be no "pure" constitutional implication in the parens patriae area; there is no way to assuage the balance of powers and federalism concerns.

On the other hand, these problems are less of an obstacle when a congressionally enacted statute defines a significant federal interest, whether or not it provides an explicit cause of action. The Supreme Court has recently recognized this possibility. From such a statute the will of Congress can be implied to ascertain that the matter is one in which the federal interest prevails.

The statutes on which the United States relied in Solomon define significant federal interests, both in the civil rights of the citizens and especially in the rights of mentally retarded citizens. Solomon would, therefore, appear to be a proper candidate for this quasi-constitutional implication under the parens patriae theory.

IV. CONCLUSION

Despite the breadth of language used to explicate their rationales, Debs and its successors do not grant unrestrained authority for the Executive to bring suit to enforce any constitutional provision. The integrity of our constitutional form of government, with its inherent concerns for a separation of powers and a balance between federal and state jurisdiction, would be undercut by such a rule.

There is, however, ample authority for a quasi-constitutional statutory implication of Executive authority to sue which would not offend other constitutional principles. This is the process which was followed but not defined in most of the decisions upholding a right of action under Debs. It may be characterized as a modified parens patriae doctrine under which the Executive, seeking to enforce the constitutionally and statutorily recognized welfare of the public, is allowed to bring suit to vindicate a significant federal interest as defined in a federal statute. The statute and the proposed action, under such an approach, would be evaluated under the same principles of

128. See Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463, 472-75 (1976), in which the Court indicates that the United States could have brought an action on behalf of an Indian tribe, based on its relationship with that tribe as defined in the Hell Gate Treaty and subsequent legislation, although there was no specifically enacted cause of action which included the Government. Id. at 474, n.13.
statutory implication which apply to private plaintiffs, as enunciated by the Supreme Court in Cort v. Ash, and the action would be sustained or dismissed based on that analysis.

The theory described does not require a straining of constitutional precepts; it merely advocates a logical extension of federal law to situations not specifically considered at the time of the legislature’s action in order to effectuate the purposes of those laws. In situations such as the one at Rosewood State Hospital, where a significant federal interest in the human rights of a large number of citizens is at stake, the courts should utilize the valid principles of implication to reach a just and constitutional result.

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* At the time of the writing of this note, the author was employed in the Office of Special Litigation, Civil Rights Division, Department of Justice. The opinions expressed are the author’s own and not those of the Department of Justice.