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NOTES

CAN FEDERAL REGULATIONS *EVER* CREATE FEDERAL RIGHTS PRIVATELY ENFORCEABLE UNDER SECTION 1983?

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INTRODUCTION

In 2002, the Central Puget Sound Regional Transit Authority planned to build a light-rail line connecting northern Seattle neighborhoods with Sea-Tac Airport.[1] The proposed route was to pass through several neighborhoods, including Rainier Valley, a Seattle neighborhood populated predominantly by minority residents.[2] The near five mile segment passing through Rainer Valley was to be built at street level, while the segments passing through other neighborhoods were to be elevated above street level, or to be built underground.[3] Save Our Valley ("SOV"), a community group, filed suit under 42 U.S.C. § 1983[4] alleging that the street-level alignment through Rainer Valley would cause a disproportionate adverse impact on minority residents, including the taking of residential and commercial properties, the displacement of community facilities, the disruption of business, and safety problems, in violation of a Department of Transportation "disparate impact" regulation.[5]

The regulation, promulgated pursuant to Title VI of the Civil Rights Act of 1964, prohibited recipients of federal funds (like Sound Transit) from taking

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1. Save Our Valley v. Sound Transit, 335 F.3d 932, 934 (9th Cir. 2003).
2. *Id*.
3. *Id*.
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> 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 . . . .

42 U.S.C. § 1983 (2000).

5. *Save Our Valley*, 335 F.3d at 934-35 (citing 49 C.F.R. § 21.5(b)(2)).

actions having the effect of discriminating on the basis of race.[6] The DOT regulation, however, went beyond the explicit language of the statute: the regulation proscribed activities having a disparate impact on racial groups while the enabling legislation prohibited only intentional discrimination.[7]

Nevertheless, SOV argued that this DOT regulation created an individual federal right privately enforceable under § 1983.[8] The district court disagreed, holding that the regulation did not create such a right, and granted summary judgment to Sound Transit.[9] The Ninth Circuit affirmed, and in the process confirmed what commentators[10] have viewed as the inevitable result of recent Supreme Court rulings in *Alexander v. Sandoval*[11] and *Gonzaga University v. Doe*:[12] agency regulations alone can *never* create rights privately enforceable under § 1983.[13]

Despite the Ninth Circuit's conclusion, the Supreme Court has never directly ruled on whether an agency regulation alone can go beyond the explicit language of a statute to establish a right enforceable under § 1983.[14] Prior to *Sandoval* and *Gonzaga*, several circuit courts had held that regulations alone may indeed create rights enforceable under § 1983.[15] In the face of the corrosive effects of *Sandoval* and *Gonzaga*, these cases remain as spirited reminders that federal rights, including those born of regulatory agencies, are presumptively enforceable under § 1983. This Note will analyze the effect of the *Sandoval* and *Gonzaga* decisions upon § 1983 actions which seek to enforce federal regulations. Specifically, this Note will argue that the majority opinion in *Save Our Valley* misapplied Supreme Court precedent, failed to consider contemporary administrative law principles, and failed to give § 1983 broad construction, when it concluded that regulations alone can never create enforceable rights under § 1983.

While legal scholars have paid little attention to this weighty question,[16] its

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6. *Id*. at 935.

7. *Id*. at 935 n.1. In *Guardians Ass'n v. Civil Service Commission of New York*, 463 U.S. 582, 584 n.2 (1983), five Justices voted to uphold similar disparate impact regulations. Such regulations, therefore, remain valid despite the proscription of activity allowed under the enabling legislation. *See Save Our Valley*, 335 F.3d at 960 n.10 (Berzon, J., dissenting in part).

8. *Save Our Valley*, 335 F.3d at 935.

9. *Id.*

10. Charles Davant IV, *Sorcerer or Sorcerer's Apprentice?: Federal Agencies and the Creation of Individual Rights*, 2003 WIS. L. REV. 613; Bradford C. Mank, *Suing Under § 1983: The Future After* Gonzaga University v. Doe, 39 HOUS. L. REV. 1417, 1461 (2003).

11. 532 U.S. 275 (2001).

12. 536 U.S. 273 (2002).

13. *Save Our Valley*, 335 F.3d at 939.

14. Mank, *supra* note 10, at 1460.

15. Loschiavo v. City of Dearborn, 33 F.3d 548 (6th Cir. 1994); Samuels v. District of Columbia, 770 F.2d 184 (D.C. Cir. 1985).

16. Davant, *supra* note 10, at 614.

possible implications have been described as "enormous,"[17] and of "singular importance."[18] If the Supreme Court concludes that federal agency regulations can never create federal rights enforceable through § 1983, many federal regulations having the "force and effect of law,"[19] including proscriptions relating to racial discrimination and environmental degradation, may nevertheless be privately unenforceable.[20] Beyond its consequence to the enforcement of certain federal laws, this question has broader implications concerning the definition and distinction of federal rights and available remedies for their violation.[21] It further implicates separation of powers concerns and the proper function of the executive branch in the legislative process.[22] Ultimately, if the Supreme Court should hold that agencies cannot create privately enforceable rights, the presumptive enforceability of certain kinds of statutory rights through § 1983 will be undermined, seriously harming civil liberties.[23]

Part I of this Note begins with a brief review of the history and origins of § 1983. This part then addresses the application of § 1983 to statutory rights, the standard for applying § 1983 to statutory rights, and the exceptions recognized by the Supreme Court in limiting § 1983 to statutory rights. Part I concludes with an analysis of the Supreme Court's recognition that § 1983 may enforce statutory rights even absent an explicit or implicit private right of action.

Part II of this Note follows the early development of § 1983 actions which sought to enforce regulatory laws. This part then acknowledges the circuit split that developed over whether an agency regulation may create a federal right enforceable under § 1983. Part III turns to the merger of rights-creating analyses predicate to implied rights of action and § 1983 actions in *Sandoval* and *Gonzaga*.

Part IV of this Note addresses the Ninth Circuit decision that agency regulations can never create rights enforceable under § 1983. This part analyzes the majority opinion's interpretation of *Sandoval* and *Gonzaga*. Part IV concludes that the majority extends *Sandoval* and *Gonzaga* beyond their holdings, fails to take into consideration contemporary notions of administrative law, including the *Chevron* and *Chrysler* doctrines, and fails to give § 1983 its required broad interpretation.

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17. South Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 274 F.3d 771, 790 (3d Cir. 2001) (noting its importance with regard to Title VI disparate impact regulations).

18. Davant, *supra* note 10, at 613.

19. Chrysler Corp. v. Brown, 441 U.S. 281, 295 (1979).

20. *See* Davant, *supra* note 10, at 613.

21. Mank, *supra* note 10, at 1420.

22. *See* Davant, *supra* note 10, at 613.

23. Mank, *supra* note 10, at 1420.

I. HISTORY AND APPLICATION OF § 1983

A. Origins of § 1983

The Reconstruction Era following the Civil War signified a fundamental change in American political philosophy,[24] brought on by a radical shift in the balance of power between the federal and state governments.[25] Prior to the Civil War, state autonomy was championed, owing to a belief that individual and states' rights would be threatened by too powerful a central government.[26] In the aftermath of the war, this earlier theory of federalism was discredited.[27] As Confederate attempts to restore white supremacy in the South led to the continued persecution of emancipated African-Americans,[28] the federal government, motivated by a Reconstructionist Congress led by abolitionists with strong federalist and nationalist tendencies,[29] became the protector of individual rights against state and private action.[30] This novel role became manifest with the passage of the Civil Rights Act of 1871.[31]

Section 1983 has its origins in section 1 of the Civil Rights Act of 1871, the Ku Klux Klan Act.[32] The Act created a private cause of action for the deprivation, under color of state law, of "any rights, privileges, or immunities secured by the Constitution of the United States."[33] As the name suggests, the 1871 Act was the national government's attempt to restrain the "organized terrorism" of the Klan and its sympathizers.[34] The Act, however, guaranteed only constitutional rights, privileges, and immunities and did not count statutory rights among those it protected.[35]

B. Addition of "and laws" to § 1983

With the comprehensive revision and codification of the United States statutes in 1874, Congress added the phrase "and laws" to section 1 of the Civil

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24. 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, 303 (1996).

25. Paul Wartelle & Jeffrey Hadley Louden, *Private Enforcement of Federal Statutes: The Role of the Section 1983 Remedy*, 9 HASTINGS CONST. L.Q. 487, 504 (1982).

26. Key, *supra* note 24, at 303.

27. *Id*.

28. Mank, *supra* note 10, at 1427.

29. Wartelle & Louden, *supra* note 25, at 504.

30. *Id*.

31. *Id*. at 505.

32. *Id*.

33. Civil Rights Act of 1871, Ch. 22, § 1, 17 Stat. 13 (1871).

34. *See* Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 611 n.25 (1979); *see also* Todd E. Pettys, *The Intended Relationship Between Administrative Regulations and Section 1983's "Laws,"* 67 GEO. WASH. L. REV. 51, 55-56 (1998).

35. Key, *supra* note 24, at 304.

Rights Act.[36] Although the statutory revisions were meant only to "clarify existing law rather than to amend it,"[37] when Representative Lawrence read the new provisions aloud on the floor of the House of Representatives, he noted that the revised provisions "possibly [show] verbal modifications bordering on legislation,"[38] and in some cases may in fact operate differently from the old provisions.[39] Nevertheless, there was no specific discussion regarding the term "laws,"[40] and thus it was unclear whether Congress intended a substantive change of the statute.[41]

Whether and how any substantive change should be interpreted from the addition of the "and laws" language has spawned great debate, generally categorized into three main theories.[42] First, advocates of the "Consistency Theory" contend that the revisers intended for the provisions of the Civil Rights Act to be consistent.[43] Proponents of this theory read the "laws" language in light of the entire Act, and limit its meaning to "laws providing for equal rights."[44] Second, supporters of the "No Modification Theory" believe that the changes should be viewed as a clarification of prior law, not as a modification of it.[45] Like the consistency theory, proponents of no modification read "laws" as referring to only those "laws providing for equal rights."[46] Third, others suggest a "Plain Language Theory," arguing that "and laws" should be given its plain and literal meaning to include any federal law or statute.[47]

In *Chapman v. Houston Welfare Rights Organization*,[48] the Supreme Court weighed in on the debate over the "and laws" language. The Court held that 28 U.S.C. § 1343(3) did not give federal jurisdiction over violations of statutory rights that did not secure "equal rights."[49] Although the Court did not explicitly address the question of whether the "laws" language of § 1983 applied to statutory violations, Justices Powell and White vigorously debated the tangential

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36. Cass R. Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. CHI. L. REV. 394, 402 (1982).

37. Key, *supra* note 24, at 304.

38. Maine v. Thiboutot, 448 U.S. 1, 7-8 (1980) (citing 2 CONG. REC. 827 (1874)).

39. Key, *supra* note 24, at 304.

40. *Id*.

41. *See* Mank, *supra* note 10, at 1427.

42. Key, *supra* note 24, at 306.

43. *Id*. at 307.

44. *Id*.

45. *Id*. at 307-08.

46. *Id*. at 308.

47. *Id*. at 310.

48. 441 U.S. 600 (1979).

49. *Id*. at 603 (citing 28 U.S.C. § 1343(3) which provided: "The district courts shall have original jurisdiction . . . [t]o redress the deprivation, under color of any State law . . . any right, privilege or immunity secured by the Constitution of the United States or any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.").

§ 1983 issue in their respective concurring opinions.[50] Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, concluded that to remain consistent with the 1871 Act, "and laws" should be read as shorthand for "and laws providing for equal rights."[51] Although Justice Powell acknowledged the lack of definitive legislative history concerning the "laws" language, he nevertheless concluded that the "history of the revision makes abundantly clear that Congress did not intend . . . to alter the content of federal statutory law."[52] In addition to his consistency and no modification arguments, Justice Powell expressed concern that a plain language interpretation, allowing for the enforcement of *any* federal statutory right, would grant federal jurisdiction over virtually every federal funding provision, even without Congressional approval.[53]

Justice White, on the other hand, emphasized a "straightforward and natural reading of [§ 1983's] language."[54] Thus, he concluded that § 1983 provides a remedy for federal statutory as well as constitutional rights.[55] In dissent, Justices Stewart, Brennan, and Marshall agreed with Justice White's plain language interpretation.[56]

C. Application of § 1983 to Statutory Rights

One year later, in *Maine v. Thiboutot*,[57] the Court directly faced the proper interpretation of the "and laws" language contained in § 1983. In that case, the Court considered whether the deprivation of welfare benefits to which Mr. Thiboutot was indisputably entitled under the federal Social Security Act gave rise to a § 1983 claim.[58] In addressing whether § 1983 encompassed claims based on purely statutory violations of federal law,[59] Justice Brennan opined for a majority of the Court that "the plain language of [§ 1983] undoubtedly embraces [Thiboutot's] claim that [the State of Maine] violated the Social Security Act."[60] Justice Brennan's plain language interpretation focused on Congress's failure to attach any modifiers to the phrase "and laws."[61] Although Justice Brennan emphasized that "the legislative history does not permit a definitive answer,"[62] he bolstered his plain language reasoning with a

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50. *Id.* at 623 (Powell, J., concurring); *id.* at 646 (White, J. concurring).

51. *Id.* at 624 (Powell, J., concurring).

52. *Id*. at 625 (Powell, J., concurring).

53. *Id.* at 645 (Powell, J., concurring).

54. *Id.* at 649 (White, J., concurring).

55. *Id*.

56. *Id.* at 674 (Stewart, J., dissenting).

57. 448 U.S. 1 (1980).

58. *Id*. at 2-3.

59. *Id*. at 3.

60. *Id.* at 4.

61. *Id.* "Congress was aware of what it was doing, and the legislative history does not demonstrate that the plain language was not intended." *Id*. at 8.

62. *Id.* at 7.

comprehensive record of the Court's several cases suggesting, explicitly or implicitly, that the § 1983 remedy broadly encompasses violations of both federal statutory and constitutional law.[63] Finally, he noted that any limitations to be inferred from the language of § 1983 could best be addressed by Congress, which importantly remained silent despite the Court's many pronouncements on the scope of § 1983.[64] In short, the Court's explicit holding resolved the conflict over the "and laws" language of § 1983, concluding that such language does not constrain the § 1983 remedy to violations of rights protected by the Constitution and federal equal protection laws but implicates violations of rights protected by statutory law as well.[65]

In dissent, Justice Powell, again joined by Chief Justice Burger and Justice Rehnquist,[66] vigorously reiterated his stance from *Chapman*: "[T]he historical evidence . . . convincingly shows that the phrase ["and laws"] . . . was—and remains—nothing more than a shorthand reference to equal rights legislation enacted by Congress."[67] To read that phrase more broadly, Justice Powell scolded, "is to ignore the lessons of history, logic, and policy."[68] The dissent then engaged in a lengthy analysis, first refuting the majority's "casual" plain language interpretation,[69] and then turning to the historical evidence surrounding § 1983's enactment,[70] the weighty policy and pragmatic consequences of the Court's holding,[71] and finally the majority's treatment of the Court's § 1983 precedents.[72]

D. The Availability and Scope of Enforcing Statutory Rights Under § 1983

The year after *Thiboutot*, the Court began to rein in the availability of § 1983 statutory causes of action.[73] In *Pennhurst State School and Hospital v. Halderman*,[74] the Court considered whether an implied cause of action existed in a grant-in-aid statute.[75] Specifically, the Court was asked whether the patients' "bill of rights" provisions of the Developmentally Disabled Assistance and Bill of Rights Act (DDA) created substantive and enforceable rights in favor of the

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63. *Id.* at 4. *Thiboutot*, therefore, was essentially a *stare decisis* decision. *See* Save Our Valley v. Sound Transit, 335 F.3d 932, 961 n.12 (9th Cir. 2003) (Berzon, J., dissenting in part).

64. *Thiboutot*, 448 U.S. at 8.

65. *Id.* at 4.

66. *Id*. at 11.

67. *Id*. at 12; *see* Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 624 (1979) (Powell, J., concurring).

68. *Thiboutot*, 448 U.S. at 12.

69. *Id.* at 11-12.

70. *Id.* at 14.

71. *Id*. at 19.

72. *Id*. at 26.

73. *See* Key, *supra* note 24, at 324; *see also* Pettys, *supra* note 34, at 68.

74. 451 U.S. 1 (1981).

75. *Id.* at 5.

mentally challenged to bring suit to compel states to comply with certain requisite standards for receiving federal funds.[76] Justice Rehnquist, writing for the majority, concluded that the bill of rights provisions calling for "appropriate treatment" in the "least restrictive environment" constituted mere "precatory" treatment standards, not detailed conditions requisite to the receipt of federal moneys, and thus did not implicitly create any enforceable rights.[77] The Court emphasized that private enforcement, against a state, of a condition in a federal grant-in-aid statute requires that Congress "speak with a clear voice" to create the condition "unambiguously."[78] More importantly, however, the Court remanded the case to the Third Circuit to determine whether other provisions in the Act were enforceable under § 1983.[79]

In the advisory portion of his opinion, Justice Rehnquist implied two limitations on § 1983 actions brought to enforce statutory rights.[80] First, he suggested that a § 1983 action must be based on the violation of specific statutory *rights*.[81] Second, he emphasized Justice Powell's dissent in *Thiboutot* which suggested that § 1983 would not be available where the "governing statute provides an exclusive remedy for violations of its terms."[82] Under the DDA, for example, the agency had the exclusive remedial power of withholding funds when states failed to comply with the necessary conditions.

Justices Blackmun, White, Brennan, and Marshall filed separate opinions, noting their disagreement with Justice Rehnquist's advisory opinion.[83] Justice Blackmun concurred in the Court's judgment, but refused to join the Court's advisory discussion which appeared to have a "negative attitude" toward future positive holdings in favor of private plaintiffs seeking to enforce rights created by the DDA.[84] Justice White, joined by Justices Brennan and Marshall, concluded that the bill of rights provisions created enforceable rights,[85] and that *Thiboutot* created a presumption that federal statutory rights may be enforced under § 1983, even where Congress provided for the federal agency to disapprove a State's plan for violations of the terms of the Act.[86] Although the

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76. *Id*.

77. *Id*. at 17-18; *see* Wright v. City of Roanoke Redev. & Hous. Auth., 479 U.S. 418, 423 (1987) ("In *Pennhurst*, a § 1983 action did not lie because the statutory provisions were thought to be only statements of findings indicating no more than a congressional preference—at most a nudge in the preferred direction, and not intended to rise to the level of an enforceable right.") (internal citations and quotations omitted).

78. *Pennhurst*, 451 U.S. at 17.

79. *Id*. at 30.

80. *Id.* at 28.

81. *Id*.; *see* Mank, *supra* note 10, at 1435.

82. *Id*. (quoting Maine v. Thiboutot, 448 U.S. 1, 22 n.11 (1980) (Powell, J., dissenting)).

83. *Id*. at 32 (Blackmun, J., concurring); *id*. at 33 (White, J., dissenting in part, joined by Justices Brennan and Marshall).

84. *Id*. at 32 (Blackmun, J., concurring).

85. *Id.* at 35 (White, J., dissenting in part).

86. *Id.* at 51 (White, J., dissenting in part).

Court did not explicitly decide the § 1983 issue, *Pennhurst* exhibited the Court's deep divisions regarding the availability and scope of enforcing statutory rights through § 1983.

1. Violation of a Statutory Right as a § 1983 Predicate.—After *Pennhurst*, the Court elaborated upon the two limitations in Justice Rehnquist's majority opinion. In *Golden State Transit Corp. v. City of Los Angeles*[87] and *Blessing v. Freestone*,[88] the Court defined the standard for which types of federal statutory rights are enforceable under § 1983. In *Golden State*, the Court noted that a § 1983 suit must assert the violation of a federal right.[89] "Section 1983," the Court stated, "speaks in terms of '*rights*, privileges, or immunities,' not violations of federal *law*."[90] In *Blessing*, the Court identified three factors to be considered when deciding whether a federal right had been violated: first, Congress must have intended that the provision in question benefit the putative plaintiff;[91] second, the plaintiff must show that the right assertedly protected is not so "vague and amorphous" that its enforcement would strain judicial competence;[92] and third, the statute must unambiguously impose a binding obligation on the States.[93] That is, following *Pennhurst*, the asserted right must be "couched in mandatory, rather than precatory, terms."[94]

Under *Blessing*, even if the plaintiff is able to show that a federal statute creates an individual right, there is only a rebuttable presumption that the right is enforceable under § 1983.[95] Because the Court's statutory rights inquiry is rooted in congressional intent, the defendant may demonstrate that Congress intended to foreclose the § 1983 remedy with respect to specific statutory provisions.[96]

2. Congressional Foreclosure of the § 1983 Remedy.—In *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*,[97] the Court confirmed that Congress may foreclose a § 1983 remedy for violations of statutory rights.[98] In *Sea Clammers*, the Court was faced with the question of whether the Federal Water Pollution Control Act and the Marine Protection, Research, and Sanctuaries Act implicitly created enforceable rights.[99] After holding that

87. 493 U.S. 103 (1989).

88. 520 U.S. 329 (1997).

89. *Golden State*, 493 U.S. at 106.

90. *Id*. (quoting 42 U.S.C. § 1983) (emphasis added).

91. *Blessing*, 520 U.S. at 340.

92. *Id.*

93. *Id*. at 341.

94. *Id*. (citing Pennhurst State Sch. & Hop. v. Halderman, 451 U.S. 1, 17 (1981) (discussing whether Congress created obligations giving rise to an implied cause of action)).

95. *Id*.

96. *Id.*

97. 453 U.S. 1 (1981).

98. *Id*. at 20.

99. *Id.* at 12.

Congress did not intend to create an implied right of action under the Acts,[100] Justice Powell addressed whether the Acts created statutory rights enforceable under § 1983.[101] Citing *Pennhurst*, Justice Powell noted that in addition to the rights requirement, § 1983 actions for violations of statutory rights were subject to an additional exception: "whether Congress had foreclosed private enforcement of that statute in the enactment itself."[102]

The Court indicated that Congress may explicitly prohibit recourse to § 1983 in the statute itself.[103] The Court further explained that Congress can implicitly forbid recourse to § 1983 "[w]hen the remedial devices provided in a particular Act are sufficiently comprehensive . . . to demonstrate congressional intent to preclude the remedy of suits under § 1983."[104] Thus, when a state official is alleged to have violated a federal statute which provides for its own comprehensive enforcement mechanism, the requirements of that enforcement scheme may not be bypassed by bringing suit directly under § 1983.[105]

E. Section 1983 Enforces Statutory Rights Even Absent Congressional Approval of a Private Right of Action

Despite an emerging antagonism toward the broad application of § 1983 suits, in *Wilder v. Virginia Hospital Ass'n*,[106] the Court recognized that an alleged statutory rights violation is presumptively enforceable under § 1983 even if Congress did not create a statutory remedy, and the statute itself did not create an implied right of action.[107] In *Wilder*, the Court considered whether a health care provider could bring a § 1983 suit to challenge the method by which a state reimburses health care providers under the Boren Amendment to the Medicaid Act.[108] Under the Act, the Federal Government provides financial assistance to states so that they may provide medical care to impoverished patients. Despite the voluntary nature of the program, states are required to comply with certain requirements imposed by the Act, including a "plan for medical assistance" approved by the Secretary of Health and Human Services.[109] The Boren Amendment provides that a state's plan for reimbursing health care providers must "provide . . . for payment . . . of the hospital services . . . which the State finds, and makes assurances satisfactory to the Secretary, are reasonable and adequate to meet the costs which must be incurred by efficiently and

100. *Id*. at 18.
101. *Id*. at 19.
102. *Id*.
103. *See* Blessing v. Freestone, 520 U.S. 329, 341 (1997).
104. *Sea Clammers*, 453 U.S. at 20.
105. *Id*.
106. 496 U.S. 498 (1990).
107. *Id.* at 509-10.
108. *Id.* at 501-02.
109. *Id*. at 502 (citing 42 U.S.C. § 1396a(a) (1982 Supp. V)).

economically operated facilities."[110] The Virginia Hospital Association (VHA) filed suit alleging that Virginia's plan for reimbursement violated this provision because the rates were not "reasonable and adequate" to provide care.[111]

In holding that the Act created a substantive statutory right to "reasonable and adequate" reimbursement rates enforceable by health care providers under § 1983,[112] the Court concluded that whether § 1983 provides a cause of action for violation of federal statutes is a "different inquiry" than "determining whether a private right of action can be implied from a particular statute."[113] To determine whether a statute creates an implied right of action, courts apply the four-factor test established in *Cort v. Ash*:[114] (1) whether the plaintiff is a member of the class for whose special benefit the statute was enacted; (2) whether there is any evidence of legislative intent, explicit or implicit, to either create or deny a private remedy; (3) whether the statute is consistent with the underlying legislative scheme to imply a private remedy; and (4) whether the cause of action is one traditionally relegated to state law, so that it would be inappropriate to infer a cause of action based solely on federal law.[115]

The *Cort* implied right of action test is grounded in two separation of powers concerns.[116] First, Justice Powell in his dissenting opinion in *Cannon v. University of Chicago*,[117] noted that to interpret a right of action into a statute, without express language, conflicts with the principle that "[t]he jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation."[118] If federal courts were permitted to simply imply a cause of action to enforce statutory rights willy-nilly, it would conflict with the exclusive authority of Congress under Article III to set the limits of federal jurisdiction.[119] Thus, whenever federal courts rely on an implied cause of action for their source of jurisdiction, they arguably usurp Congress's authority.[120] Justice Powell emphatically warned his fellow Justices that "we should not condone the implication of any private action from a federal statute absent the most compelling evidence that Congress in fact intended such an action to exist."[121] Otherwise, "the legislative process with its public scrutiny and participation has

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110. *Id*. at 502-03 (citing 42 U.S.C. § 1396a(a)(13)(A)).

111. *Id*. at 503.

112. *Id*. at 523.

113. *Id*. at 509 n.9.

114. 422 U.S. 66, 78 (1975).

115. *Id.*; *see* Cannon v. Univ. of Chicago, 441 U.S. 677, 690 n.13 (1979) (requiring that the right of action be "phrased in terms of the persons benefited").

116. Key, *supra* note 24, at 299.

117. 441 U.S. 677.

118. *Id*. at 747 (Powell, J., dissenting) (quoting Am. Fire & Cas. Co. v. Finn, 341 U.S. 6, 17 (1951)).

119. *Id*. (citing U.S. CONST. art. III, § 3); *see* Mank, *supra* note 10, at 1439-40; Key, *supra* note 24, at 299.

120. Key, *supra* note 24, at 299.

121. *Cannon*, 441 U.S. at 749 (Powell, J., dissenting).

been bypassed, with attendant prejudice to everyone concerned."[122]

Second, implied rights of action threaten the exclusivity of Congress's power to interfere with the lawmaking powers of the states.[123] The separation of powers is at least partially a means of safeguarding states' rights.[124] It follows that, because Congress is the only branch in which the states are represented, Congress alone should have the power to impose a federal rule of law on areas that are traditionally relegated to the states.[125] Consequently, implying a private cause of action against a state, absent express congressional authorization, would constitute an unconstitutional intrusion on the state's powers.[126]

Distinct from implied rights of action, the *Wilder* Court noted that § 1983 provides an "alternative source of *express* congressional authorization of private suits," and thus the separation of powers concerns that accompany implied rights of action are absent.[127] Section 1983 does not create substantive rights.[128] Rather, it is a self-contained remedy that provides access to federal courts whenever a citizen is subject to the deprivation of a right secured elsewhere by the Constitution and laws of the United States.[129] In effect, Congress is presumed to legislate against the background of § 1983, and must contemplate the private enforcement of relevant statutes.[130] Consequently, unless Congress has affirmatively withdrawn the § 1983 remedy, a plaintiff is not required to demonstrate that Congress specifically intended the statutory right to be enforceable under §1983.[131] The *Wilder* Court, therefore, delineated a clear demarcation between rights and remedies, and in turn determined that, as a matter of reason, a different standard applies for implied rights of action cases than for § 1983 suits.[132]

In dissent, Chief Justice Rehnquist, and Justices O'Connor, Scalia, and Kennedy, concluded that the text of the Boren Amendment did not clearly confer any substantive rights on Medicaid service providers.[133] While the dissenters were on common ground with the majority's discussion of the differing standards

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122. *Id*. at 743 (noting that "the intended beneficiaries of the legislation are unable to ensure the full measure of protection their needs may warrant," and "those subject to the legislative constraints are denied the opportunity to forestall through the political process potentially unnecessary and disruptive litigation").

123. Key, *supra* note 24, at 299.

124. *Id*.

125. *Id*. at 299-300.

126. *Id*. at 300.

127. Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 509 n.9 (1990) (emphasis in original) (quoting Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 19 (1981)).

128. *Id*.

129. *Id*.

130. *Id*; *see* Samuels v. District of Columbia, 770 F.2d 184, 193 (D.C. Cir. 1985).

131. *Wilder*, 496 U.S. at 509 n.9.

132. *Id.* Implied right of action analysis requires a showing that both a right and a remedy exist. Under § 1983 analysis, the only required showing is that a right exists.

133. *Id*. at 527 (Rehnquist, J., dissenting).

that attach to implied rights of action and § 1983 actions, they foreshadowed the *Sandoval* and *Gonzaga* decisions, noting that "a significant area of overlap [between § 1983 and implied right of action suits] remained."[134] Jurisdiction under both causes of action rely on language conferring identifiable enforceable rights. Thus, like implied rights of action, the § 1983 remedy is only available where Congress intended for the "statutory provision to rise to the level of an enforceable right."[135] Here, Chief Justice Rehnquist argued, the statutory language merely established one of the many conditions for receiving Medicaid funds, not any substantive right to reasonable and adequate reimbursement rates.[136] The dissent's focus on unambiguous congressional intent would inform the Court's application of § 1983 to regulatory law.

II. THE DEVELOPMENT OF REGULATORY LAW AND § 1983

Congress commonly relieves the burden of effectuating broad policy goals by enacting expansive, undefined statutes, and delegating the process of filling in the details to executive agencies.[137] The Supreme Court confirmed in *Chevron U.S.A. v. Natural Resources Defense Council*,[138] that when Congress leaves a gap in a statute, executive agencies have the power to formulate policy and make rules to fill that gap.[139] If Congress is explicit in directing an agency to fill a statutory gap, there is an express delegation of authority to the agency to explicate a provision of the statute by regulation.[140] Upon judicial review, such "quasi-legislative" regulations are controlling, unless they are arbitrary, capricious or manifestly contrary to the statute.[141] If Congress is silent or ambiguous concerning a statutory gap, legislative delegation is implicit. In such cases, courts must defer to the agencies' reasonable interpretation of the statute.[142]

In *Chrysler Corp. v. Brown*,[143] the Court clarified that properly promulgated, substantive agency regulations may have "the force and effect of law."[144] In order for a regulation to have the "force and effect of law," the Court explained, it must meet three criteria.[145] First, the regulation must be a "substantive rule" rather than an "interpretive rule[], general statement[] of policy, or rule[] of

134. *Id*. at 526 (Rehnquist, J., dissenting).
135. *Id*. at 526 (Rehnquist, J., dissenting) (internal quotations and citations omitted).
136. *Id*. at 527 (Rehnquist, J., dissenting).
137. Mank, *supra* note 10, at 1459; Davant, *supra* note 10, at 642.
138. 467 U.S. 837 (1984).
139. *Id*. at 843-44; *see* Morton v. Ruiz, 415 U.S. 199, 231 (1974).
140. *Chevron U.S.A.*, 467 U.S. at 843-44.
141. *Id*. at 844.
142. *Id*.
143. 441 U.S. 281 (1979).
144. *Id*. at 295.
145. *Id.* at 301-03.

agency organization, procedure, or practice."[146] A substantive rule is a "legislative-type rule" that affects "individual rights and obligations."[147] Second, the agency's "quasi-legislative" authority must be "rooted in a grant of such power by the Congress and subject to limitations which that body imposes."[148] Third, the promulgation of such regulations must "conform with any procedural requirements imposed by Congress."[149]

Together, *Chevron* and *Chrysler* stand for the proposition that federal agencies, even absent explicit statutory language, may promulgate substantive regulations which have the force and effect of law. While the Constitution allocates power to create individual federal rights solely to Congress, the *Chevron* and *Chrysler* doctrines provide at least presumptive evidence that executive agencies can fill statutory gaps by defining individual statutory "rights,"[150] which have "the force and effect of law," and are therefore enforceable under § 1983.[151] While not offering an explicit answer, the Supreme Court has skirted the issue several times, resulting in a circuit split.

A. Guardians Ass'n v. Civil Services Commission of New York

Since *Thiboutot*, many lawyers, judges, and scholars believed that private individuals could enforce federal regulations through § 1983.[152] The Supreme Court first suggested the possibility of enforcing rights secured by federal regulations in *Guardians Ass'n v. Civil Services Commission of New York*.[153] In *Guardians*, Justice Stevens, joined by Justices Brennan and Blackmun, offered a dissenting opinion stating: "[I]t is clear that the § 1983 remedy is intended to redress the deprivation of rights secured by all valid federal laws, including statutes and regulations having the force of law."[154] Justice Stevens reasoned that *Maine v. Thiboutot*, whose holding was limited only to federal statutes, should apply equally to administrative regulations having the force of law.[155]

B. Wright v. City of Roanoke Redevelopment & Housing Authority

In *Wright v. City of Roanoke Redevelopment & Housing Authority*,[156] the Court held that certain Housing and Urban Development (HUD) regulations

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146. *Id*. at 301 (citing 5 U.S.C. § 553(b),(d)).

147. *Id*. at 302 (citing Morton v. Ruiz, 415 U.S. 199, 236 (1974)).

148. *Id*.

149. *Id*. at 303 (citing *Morton*, 415 U.S. at 232).

150. That is, agency regulations which use rights-creating language and thereby meet the *Blessing* rights test.

151. *See*, *e.g.*, Mank, *supra* note 10, at 1461; Davant, *supra* note 10, at 642.

152. Davant, *supra* note 10, at 648.

153. 463 U.S. 582 (1983); Pettys, *supra* note 34, at 71-72.

154. *Guardians*, 463 U.S. at 638.

155. *Id*. at 637 n.6.

156. 479 U.S. 418 (1987).

created enforceable rights under § 1983.[157] Under the United States Housing Act of 1937, public housing authorities (PHA's) throughout the country established housing for low-income people.[158] In 1969, the Brooke Amendment imposed a rent ceiling, providing that a low-income family "shall pay as rent" a specified percentage of their income.[159] HUD regulations defined "contract rent"—the amount actually charged to low-income tenants—as including a reasonable amount for the use of utilities.[160] In *Wright*, the plaintiffs, tenants in a municipal low-income housing project, alleged that the PHA failed to comply with the applicable HUD regulations in establishing the amount of utility service to which they were entitled.[161] The plaintiffs argued that the PHA imposed a surcharge for "excess" utility consumption that should have been included in their rent calculation, depriving them of their statutory right to pay only the prescribed maximum portion of their income as rent.[162] The Court held in a five-to-four decision that "[t]he [HUD] regulations . . . defining the statutory concept of 'rent' as including utilities, have the force of law, *Chrysler Corp. v. Brown* . . . [and] the benefits Congress intended to confer on tenants are . . . enforceable rights under . . . § 1983."[163]

In dissent, Justice O'Connor, joined by Chief Justice Rehnquist, and Justices Powell and Scalia, concluded that the majority had stopped short of holding the HUD "regulations *alone* could create such a right" without explicit language in the statute, legislative history, or administrative interpretation of the Brooke Amendment that Congress intended to create an enforceable right to utilities.[164] While the majority thought it "clear that the regulations gave low-income tenants an enforceable right to a reasonable utility allowance and that the regulations were fully authorized by the statute,"[165] the dissent raised questions as to whether the majority tied this right to the statute or the regulation.[166] While Justice O'Connor did not resolve the issue, concluding that even if the regulations could create rights enforceable in a § 1983 action the regulations at issue were not capable of judicial enforcement, she expressed strong doubts:

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

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157. *Id*. at 431-32.
158. *Id*. at 419-20 (citing 42 U.S.C. § 1401).
159. *Id*. at 420 (citing 42 U.S.C. § 1437a).
160. *Id*. (citing 24 C.F.R. § 860.403).
161. *Id*. at 421.
162. *Id*. at 421-22.
163. *Id*. at 431-32.
164. *Id*. at 437 (O'Connor, J., dissenting) (emphasis in original).
165. *Id*. at 420 n.3.
166. Mank, *supra* note 10, at 1463; Pettys, *supra* note 34, at 75-76.

> Thus, HUD's frequently changing views on how best to administer the provision of utilities to public housing tenants becomes the focal point for the creation and extinguishment of federal "rights." Such a result, where determination of § 1983 "rights" has been unleashed from any connection to congressional intent, is troubling indeed.[167]

Following *Wright*, circuit courts split on whether regulations could create "rights" enforceable under § 1983.

C. The Circuit Split

1. Agency Regulations Cannot Create Federal "Rights" Enforceable Through § 1983.—In *Smith v. Kirk*,[168] the Fourth Circuit held that an administrative regulation promulgated pursuant to the Social Security Act could not create rights privately enforceable under § 1983.[169] In *Kirk*, the Director of the North Carolina Division of Vocational Rehabilitation Services applied an economic needs test in denying the plaintiffs' applications for certain equipment needed to accommodate physical disabilities. The plaintiffs brought a § 1983 suit, alleging that the State's use of the economic needs test violated Social Security Administration regulations promulgated pursuant to the Social Security Act.[170] Despite mandatory language in the regulation, the court concluded that the regulations could not create enforceable rights "not already implicit in the enforcing statute."[171] "The Supreme Court has never held that [a regulation] could [create an enforceable right]," the court stated, "to the contrary, members of the Court have expressed doubt that administrative regulations *alone* could create such a right."[172]

The Eleventh Circuit confronted a similar issue in *Harris v. James*:[173] whether federal regulations requiring state Medicaid plans to ensure recipients necessary non-emergency transportation to and from providers gave recipients an enforceable right to enforce such transportation under § 1983.[174] The court ultimately held that regulations could not create privately enforceable federal

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167. *Wright*, 479 U.S. at 438.

168. 821 F.2d 980 (4th Cir. 1987).

169. *Id*. at 984.

170. *Id*. at 982.

171. *Id*. at 984; *see also* Former Special Project Employees Ass'n v. City of Norfolk, 909 F.2d 89 (4th Cir. 1990) (holding that the Model Cities Act and directives and regulations issued by HUD did not create enforceable rights under § 1983); Ritter v. Cecil County Office of Hous. & Cmty. Dev., 33 F.3d 323, 327 n.3 (4th Cir. 1994) ("Rights created by regulation alone, if rights can be so created, probably cannot form the basis for a § 1983 action.").

172. *Kirk*, 821 F.2d at 984 (citing Wright v. City of Roanoke Redev. & Hous. Auth., 479 U.S. 418, 438 (1987) (O'Connor, J., dissenting) (emphasis in original)).

173. 127 F.3d 993 (11th Cir. 1997).

174. *Id*. at 995-96. The transportation requirement did not appear in the statute, only in the regulation.

rights.[175] The court reasoned that the majority in *Wright* did not hold that federal rights can be created by regulations "alone," or by any valid administrative interpretation of a statute which appears to have created enforceable rights. Rather, the court reasoned that the *Wright* majority located the enforceable right in the statutory provision, relying on the regulation only to define the content of a right that Congress had conferred.[176] Thus, the court interpreted *Wright* to require that the statutory provision itself confer a specific right under the *Blessing* rights test, and that valid regulations may "merely further define[] or flesh[] out the content of that right."[177]

The court further emphasized the Supreme Court's growing focus on the requirement that Congress intend to create a particular federal right.[178] A regulation, which defines the content of a statutory provision that itself does not meet the *Blessing* rights test, or a regulation which goes beyond the mere interpretation of the specific content of a statutory provision and imposes distinct obligations to further the broad objectives which underlie the statute, "is too far removed from Congressional intent to constitute a 'federal right' enforceable under § 1983."[179]

The Third Circuit concurred with the Fourth and Eleventh Circuits, holding in *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*[180] that Environmental Protection Agency disparate impact regulations promulgated pursuant to Title VI did not alone create enforceable rights under § 1983.[181] The court read *Wright* narrowly: "Clearly . . . the regulation at issue in *Wright* merely defined the specific right that Congress already had conferred through the statute. There should be no doubt on this point."[182] Like the Eleventh Circuit, therefore, the *South Camden* court concluded that a regulation promulgated pursuant to a statute that does not itself confer a federal right, or a regulation that portends to create an entitlement through extra-statutory interpretation, cannot create enforceable federal rights remedied through § 1983.[183] However, despite the Third and Eleventh Circuits' vigorous attempts to construe *Wright* as unambiguous, other circuits have reached opposite conclusions as to *Wright*'s legal significance.

2. Agency Regulations Can Create Federal "Rights" Enforceable Through § 1983.—In *Samuels v. District of Columbia*,[184] the D.C. Circuit held that where

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175. *Id*. at 1009-10.

176. *Id*. at 1007-08.

177. *Id*. at 1008-09.

178. *Id*. at 1008 (noting that the "driving force behind the Supreme Court's case law . . . is a requirement that courts find a Congressional intent to create a particular federal right").

179. *Id*. at 1009.

180. 274 F.3d 771 (3d Cir. 2001).

181. *Id.* at 790.

182. *Id*. at 783 (internal citations omitted).

183. *Id*. at 790.

184. 770 F.2d 184 (D.C. Cir. 1985).

federal regulations have the "force and effect of federal law" under *Chrysler*,[185] they are enforceable in a § 1983 action.[186] The plaintiffs in *Samuels* were a class of public housing tenants in Washington D.C. who alleged that the District had failed to implement and maintain an administrative grievance procedure for complaints concerning the operation and maintenance of public housing projects in violation of the United States Housing Act and its accompanying HUD regulations.[187] The Act provided that HUD "shall by regulation require each public housing agency receiving assistance [under the Act] to establish and maintain an administrative grievance procedure" to remedy tenant-management disputes.[188] Pursuant thereto, HUD enacted regulations providing the availability of administrative grievance procedures for tenants disputing "any PHA action or failure to act involving the tenant's lease with the PHA or PHA regulations which adversely affect the tenant's rights, duties, welfare or status."[189]

The defendant, the District of Columbia, argued that the Act indicated a congressional intent only to provide a grievance procedure when a PHA actively purposed to take some affirmative future action (e.g., raising rent or terminating a tenancy), but not, as here, where a PHA failed to act.[190] In rejecting the defendant's act/omission distinction, the D.C. Circuit concluded that the HUD regulations implementing the grievance procedure provision required a procedure "for *any* adverse PHA 'action or failure to act' involving a tenant's lease or the PHA's regulations."[191] The plaintiffs' complaint, therefore, was not rooted in the language of the Act, but in the applicable HUD regulations. "[T]hat allegation alone," the D.C. Circuit concluded, "states a cognizable section 1983 claim."[192] The court reasoned that the Supreme Court's broad analysis in *Thiboutot* of the "laws" clause of § 1983 indicated that the § 1983 remedy was available for all valid federal laws,

> including at least those federal regulations adopted pursuant to a clear congressional mandate that have the full force and effect of law. Such regulations have long been recognized as part of the body of federal law, and *Thiboutot* expressly held that Congress did not intend to limit section 1983 to some subset of federal laws.[193]

The D.C. Circuit's approach suggests that a regulation having the force of law is a sufficient predicate for its enforcement under § 1983. As *Pennhurst* and *Blessing* suggest, however, the § 1983 remedy is available only for the

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185. Chrysler Corp. v. Brown, 441 U.S. 281, 301-03 (1979).

186. *Samuels*, 770 F.2d at 199.

187. *Id.* at 191.

188. *Id.* at 189 (quoting 42 U.S.C. § 1437d(k)).

189. *Id.* (quoting 24 C.F.R. § 966.50 (1984)).

190. *Id*. at 199.

191. *Id*. (emphasis in original) (quoting 24 C.F.R. §§ 966.51(a), 966.53(a) (1984)).

192. *Id*.

193. *Id*. (citing Chrysler Corp. v. Brown, 441 U.S. 281, 301-03 (1979); Maine v. Thiboutot, 448 U.S. 1, 4 (1980)).

deprivation of "rights . . . *secured* . . . [by] laws."[194] Thus, despite a regulation having the force of law, if it does not secure some federal right it remains unenforceable under § 1983.

The Sixth Circuit, in *Loschiavo v. City of Dearborn* and its kin,[195] recognized the necessity of establishing the existence of a federal right secured by a federal law.[196] In *Loshiavo*, the plaintiffs had installed a receive-only satellite dish antenna in the backyard of their single-family home. Three days later, the plaintiffs received a "Notice of Violation" for failing to comply with a local zoning ordinance which required both approval and a permit from local authorities prior to the installation of an antenna exceeding a certain size.[197] After their application for a variance was denied, the plaintiffs filed a § 1983 suit, seeking to enforce rights conferred by certain Federal Communications Commission regulations which, it was alleged, preempted the local zoning ordinance by prohibiting the enforcement of ordinances that unduly interfered with the installation of satellite antennas.[198] The court casually concluded: "As federal regulations have the force of law, they likewise may create enforceable rights."[199] The court then employed the *Blessing* rights test, holding that the plaintiffs were the intended beneficiaries of the regulation at issue, the language of the regulation spoke in terms of a mandate, and the regulation was within the competence of the judiciary to enforce.[200] Thus, the court held, the regulations created enforceable rights under § 1983.

III. CONTEMPORARY SUPREME COURT JURISPRUDENCE: APPLYING IMPLIED RIGHT OF ACTION ANALYSIS TO § 1983

In recent years, the Supreme Court has developed a growing hostility toward the administrative state, the burgeoning federal government, and civil rights generally.[201] This antagonism toward the creation and enforcement of federal

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194. Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 28 (1981) (noting that the § 1983 remedy is available for the violation of rights, not merely laws); 42 U.S.C. § 1983 (2000) (emphasis added).

195. 33 F.3d 548 (6th Cir. 1994); Wood v. Tompkins, 33 F.3d 600 (6th Cir. 1994) (applying the *Blessing* rights test to certain Medicaid regulations, and concluding that the regulations created enforceable rights under § 1983); Levin v. Childers, 101 F.3d 44 (6th Cir. 1996) (noting that the *Blessing* rights test is used to determine whether a federal regulation created enforceable rights under § 1983).

196. *Loschiavo*, 33 F.3d at 551.

197. *Id*. at 550.

198. *Id*.

199. *Id*. at 551 (citing Wright v. City of Roanoke Redev. & Hous. Auth., 479 U.S. 418, 431 (1987)).

200. *Id*. at 552-53.

201. Davant, *supra* note 10, at 627-28 (noting that the Court has "invalidated administrative regulations as 'unreasonable,' invalidated federal statutes as invading state sovereignty, and made it more difficult to enforce § 1983 against state officers").

rights has surfaced in two recent decisions which, in effect, have endorsed the more stringent implied right of action analysis in § 1983 suits.[202]

In *Alexander v. Sandoval*,[203] the Court considered whether Department of Justice ("DOJ") disparate-impact regulations promulgated pursuant to Title VI of the Civil Rights Act of 1964 created an implied private right of action.[204] Section 601 of Title VI provides that no person shall purposefully "be excluded from participation in, denied the benefits of, or be subjected to discrimination under any program or activity," on the basis of "race, color, or national origin."[205] Section 602 of Title VI authorized federal agencies to "effectuate the provisions of [§ 601] . . . by issuing rules, regulations, or orders of general applicability."[206] In an exercise of their authority under § 602, the DOJ promulgated regulations prohibiting recipients of federal funds from using "criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin."[207] The Alabama Department of Public Safety subjected itself to this regulation when it accepted financial assistance from the DOJ.

The Alabama Department of Public Safety, in accordance with a State mandate declaring English the official language of Alabama, decided to administer state driver's license examinations only in English.[208] The plaintiff class brought suit, alleging that the DOJ regulation created an implied right of action and the English-only policy violated the DOJ regulation because it had the effect of subjecting non-English speakers to discrimination on the basis of national origin.[209]

Justice Scalia, writing for Chief Justice Rehnquist, and Justices Thomas, O'Connor, and Kennedy, began his analysis with three straightforward propositions: (1) § 601 of Title VI creates an implied right of action, and therefore may be privately enforced;[210] (2) § 601 of Title VI prohibits only intentional discrimination;[211] and (3) for purposes of deciding this case, it is assumed that "regulations promulgated under § 602 of Title VI may validly proscribe activities that have a disparate impact on racial groups, even though such activities are permissible under § 601."[212] Following these propositions, the

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202. *See* Alexander v. Sandoval, 532 U.S. 275 (2001); Gonzaga Univ. v. Doe, 536 U.S. 273 (2002).

203. 532 U.S. 275.

204. *Id*. at 278.

205. *Id*. (citing 42 U.S.C. § 2000d).

206. *Id*. (citing 42 U.S.C. § 2000d-1).

207. *Id*. (citing 28 C.F.R. § 42.104(b)(2) (2000)).

208. *Id*. at 278-79.

209. *Id*. at 279.

210. *Id*. at 279-80 (citing Cannon v. Univ. of Chicago, 441 U.S. 677 (1979)).

211. *Id*. at 280 (citing Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978)).

212. *Id*. at 281 (noting that Alabama did not challenge the regulations, thus it was assumed that they were valid); *see id*. at 305 (Stevens, J., concurring) (stating "regulations promulgated pursuant to § 602 may 'go beyond . . . § 601' as long as they are 'reasonably related' to its antidiscrimination

Court concluded that a regulation applying § 601's prohibition on *intentional* discrimination could be enforced under the recognized implied cause of action available to enforce § 601 itself.[213] The Court reasoned that regulations banning intentional discrimination would, "if valid and reasonable, authoritatively construe the statute itself."[214] It would be meaningless to speak of a separate cause of action to enforce the regulations apart from the statue: "A Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute to be so enforced as well."[215]

In *Sandoval*, however, the plaintiffs sought to enforce DOJ regulations which prohibited activities having a discriminatory impact, rather than activities which were intentionally discriminatory.[216] "It is clear," the Court stated, "that the disparate-impact regulations do not simply apply § 601—since they indeed forbid conduct that § 601 permits—and therefore clear that the private right of action to enforce § 601 does not include a private right to enforce these regulations."[217] Thus, the Court was confronted with the narrow issue of whether the disparate-impact regulation by itself created an implied right of action.

The Court held that the DOJ regulation did not create an implied right of action, reasoning that private rights of action must be created by Congress.[218] "The judicial task," Scalia wrote, "is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy."[219] This is grounded in separation of powers concerns: "Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals."[220] In other words, Congress has the exclusive authority to set the limits of federal jurisdiction, and only Congress has the authority to interfere with the lawmaking powers of the states.[221] Thus, *Sandoval* emphasizes that an implied right of action to enforce agency regulations must be derived from the statute itself, not from the regulation alone.[222] The Court stated:

> Language in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that

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mandate"); *see also* Guardians Ass'n v. Civil Serv. Comm'n of New York, 463 U.S. 582, 637 (1983) (Stevens, J., dissenting).

213. *Sandoval*, 532 U.S. at 284.

214. *Id*.

215. *Id*.

216. *Id*. at 285.

217. *Id*. at 285-86 (citing Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 173 (1994)).

218. *Id*. at 286.

219. *Id.*

220. *Id*. at 287 (quoting Lampf, Pleva, Lipkino, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 365 (1991) (Scalia, J., concurring in part and concurring in judgment)).

221. Key, *supra* note 24, at 299.

222. *Sandoval*, 532 U.S. at 286-89.

> Congress has not. . . . Thus, when a statute has provided a general authorization for private enforcement of regulations, it may perhaps be correct that the intent displayed in each regulation can determine whether or not it is privately enforceable. But it is most certainly incorrect to say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress. Agencies may play the sorcerer's apprentice but not the sorcerer himself.[223]

Here, the only statutory support for the promulgation of the DOJ disparate-impact regulation was § 602 of Title VI. The only congressional intent sounding in § 602 was that necessary to authorize federal agencies to effectuate the provisions of § 601: "Each federal department and agency . . . is authorized and directed to effectuate the provisions of [§ 601]."[224] Thus, the Court read § 602 independent of § 601, and concluded that § 602 is purely focused on authorizing the promulgation of regulations, not on the creation of new rights of action.[225]

One year after *Sandoval*, the Court held in *Gonzaga University v. Doe*,[226] that the Family Educational Rights and Privacy Act (FERPA) did not create individual rights enforceable under § 1983.[227] Congress enacted FERPA under its spending power, conditioning the receipt of federal funds to educational institutions on the satisfaction of certain requirements relating to the access and disclosure of student educational records.[228] Under the Act, funds were to be withheld if an educational institution had a "policy or practice of permitting the release of education records (or personally identifiable information contained therein . . .) of students without the written consent of their parents to any individual, agency, or organization."[229]

In *Gonzaga*, the plaintiff was denied certification as a Washington schoolteacher when his undergraduate university contacted the state agency responsible for teacher certification, identified the plaintiff by name, and discussed his involvement in an investigation into allegations of sexual misconduct.[230] The plaintiff brought suit for damages, alleging that FERPA conferred a federal right, enforceable under § 1983, to prevent "education records" from being disclosed to unauthorized persons without their express written consent.[231] The Court rejected the plaintiff's argument, holding,

> [I]f Congress wishes to create new rights enforceable under § 1983, it must do so in clear and unambiguous terms—no less and no more than what is required for Congress to create new rights enforceable under an

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223. *Id*. at 291.
224. *Id*. (quoting 42 U.S.C. § 2000d-1).
225. *Id.* at 288-89.
226. 536 U.S. 273 (2002).
227. *Id*. at 276.
228. *Id*. at 278.
229. *Id*. (quoting 20 U.S.C. § 1232g(b)(1)).
230. *Id*. at 277.
231. *Id*. at 280.

> implied private right of action. FERPA's nondisclosure provisions contain no rights-creating language . . . .They therefore create no rights enforceable under § 1983.[232]

The Court's reasoning, as its holding suggests, places singular focus on Congress's unambiguous intent to create enforceable statutory rights. The Court recognized that under the *Blessing* rights test,[233] the inquiry into congressional intent was limited to whether Congress intended the statutory provision in question to "benefit" the plaintiff.[234] This led some courts to "discover" federal statutory rights enforceable under § 1983 when the plaintiff merely fell within the "general zone of interest that the statute [was] intended to protect."[235] The Court found this curious, noting that in such cases the rights-creating language faced a less exacting standard than that which had been required for a statute to create rights enforceable directly from the statute itself under an implied private right of action.[236] In an implied right of action context, the Court prompted, before the plaintiff show that the statute manifests an intent to create a private remedy, the plaintiff must first show that the statute's text manifests an intent, "phrased in terms of the persons benefited," to create a private right.[237] The Court rejected the apparent dual standard of rights creation, offering two critical conclusions: first, "[w]e now reject the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983";[238] second, "we further reject the notion that our implied right of action cases are separate and distinct from our § 1983 cases."[239]

Together, these conclusions stand for the proposition that in *both* a § 1983 and an implied right of action context a plaintiff who seeks to enforce statutory rights must first show that Congress, through unambiguous statutory terms, intended to create a federal right phrased in terms of the persons benefited. Thus, by merging the implied right of action standard with rights creation generally, the Court strengthened the first prong of the *Blessing* rights test,[240] and now requires that the initial inquiry into whether federal statutory rights are enforceable under § 1983 *or* an implied right of action is identical: "[I]n either case [courts] must first determine whether Congress *intended to create a federal right*."[241] By

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232. *Id*. at 290.

233. *See infra* note 240.

234. *Gonzaga*, 536 U.S. at 282.

235. *Id.* at 283.

236. *Id.*

237. *Id*. at 284 (citing Touche Ross v. Redington, 442 U.S. 560, 576 (1979)).

238. *Id*. at 283.

239. *Id.*

240. *Blessing* merely requires that the statutory provision "benefit the plaintiff." Blessing v. Freestone, 520 U.S. 329, 340 (1997). *Gonzaga* strengthens this prong, requiring the statutory provision to be "*phrased* in terms of the persons benefited." *Gonzaga*, 536 U.S. at 274, 284 (emphasis added).

241. *Gonzaga*, 536 U.S. at 283 (emphasis in original).

apparently extending *Sandoval's* holding[242] (only Congress can create implied rights of action) to the creation of federal statutory rights enforceable under § 1983, and concluding that only unambiguous congressional intent may create individual statutory rights, it appears that the Court has placed thousands of rights-creating regulations on the brink of irrelevancy.

IV. THE NINTH CIRCUIT AND THE ENFORCEMENT OF ADMINISTRATIVE REGULATIONS UNDER § 1983

Save Our Valley v. Sound Transit (*SOV*) is the first case to consider whether federal regulations can, by themselves, create rights enforceable under § 1983 since *Sandoval* and *Gonzaga*.[243] In *SOV*, the plaintiff alleged that Sound Transit's plan to build a light-rail line at street-level through Rainier Valley would violate a Department of Transportation regulation which prohibited recipients of federal funds from taking actions having the effect of discriminating on the basis of race.[244] Although the regulation proscribed activity (actions having a disparate impact on race) that was permitted under the enabling legislation (Title VI only prohibited intentional discrimination), the plaintiffs contended that the regulation created an individual federal right enforceable under § 1983.[245] The court disagreed: "[B]ecause of controlling Supreme Court precedent [in *Sandoval* and *Gonzaga*], we hold that an agency regulation cannot create individual rights enforceable through § 1983."[246]

After surveying the circuit split, the majority turned to Supreme Court precedent.[247] The court focused on *Sandoval*, emphasizing it's holding that the implementing regulations of § 602 of Title VI do not create a private right of action.[248] The *Sandoval* Court's analysis turned "not on the *regulation's* text but on the *statute's* text,"[249] and thus the Ninth Circuit concluded that the Supreme Court intended that "only *Congress by statute* can create a private right of action."[250] While recognizing that *Sandoval* addressed only one kind of federal right—implied rights of action—the *SOV* court suggested that *Sandoval's*

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242. Alexander v. Sandoval, 532 U.S. 275, 286 (2001) (holding that only Congress can create implied rights of action).

243. Save Our Valley v. Sound Transit, 335 F.3d 932, 935-36 (9th Cir. 2003).

244. *Id*. at 935. The disparate-impact regulation was promulgated pursuant to § 602 of Title VI, in which "Congress authorized federal agencies to 'effectuate the provisions of [§ 601], . . . by issuing rules, regulations, or orders of general applicability.'" *Id.* (citing 42 U.S.C. § 2000d-1). Pursuant to § 602, DOT promulgated a regulation prohibiting "recipients" of federal funding from "utiliz[ing] criteria or methods of administration which have the effect of subjecting persons to discrimination because of their race, color, or national origin." *Id*. (citing 49 C.F.R. § 21.5(b)(2)).

245. *Id*.

246. *Id*. at 935-36.

247. *Id*. at 936-37.

248. *Id*. at 937.

249. *Id*. (emphasis in original).

250. *Id.* (emphasis in original).

reasoning had broader implications.[251] The conclusion that only Congress by statute could create private rights of action, the *SOV* majority argued, encompassed the "creat[ion] of individual rights of *any* kind (including, we conclude, rights enforceable through § 1983)."[252] Although the *Sandoval* Court never performed a *Blessing* rights-creating analysis on the regulations themselves,[253] the Ninth Circuit majority interpreted the Supreme Court's singular focus on Congressional intent in the creation of private rights of action as dispositive in the context of rights-creation generally. The court concluded, "[i]ndividual rights enforceable through § 1983—like implied rights of action—are creatures of substantive federal law; therefore, they must be created by Congress."[254]

The *SOV* court then turned to *Gonzaga*, arguing that the Supreme Court laid to rest any previously conceived distinction between the creation of implied rights of action and individual rights enforceable under § 1983.[255] While an inquiry into whether § 1983 provides a cause of action for violation of federal statutes is a different inquiry than determining whether a private right of action can be implied from a particular statute, the *Gonzaga* Court recognized a crucial similarity: in either case courts are first required to determine "whether Congress intended to create a federal right."[256] Thus, the Ninth Circuit synthesized *Sandoval's* holding that only Congress can create implied rights of action with *Gonzaga*'s conclusion that § 1983 and implied rights of action remedies are both predicated on the creation of enforceable federal rights, to conclude that only Congress, and not agencies through regulation, can create rights enforceable through § 1983.[257]

In her partial dissent, Judge Berzon attacked the majority's "utter[] confus[ion]" regarding the Supreme Court's blurred distinction between rights and rights of action,[258] and advocated for the proposition that because binding regulations have the form, function, and force of law, § 1983's "laws" language includes rights secured by regulations under a *Blessing* analysis.[259] These propositions are integral to the preservation of an enforcement scheme which will allow the intended beneficiaries of federal programs to enforce the conditions placed upon state agencies and institutions for the receipt of federal funds.[260]

Judge Berzon, like Justice Brennan in *Wilder*, made clear the distinction

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251. *Id*.

252. *Id*. (emphasis in original).

253. Such an analysis was unnecessary because the Court concluded that only Congress by statute could create a private right of action. Because Congress did not create such a right of action under § 602, it was inapposite whether the regulation created an enforceable right.

254. *Id*. at 938.

255. *Id*.

256. *Id*. at 938 (emphasis omitted).

257. *Id*. at 939.

258. *Id*. at 946 (Berzon, J., dissenting in part).

259. *Id*. at 945 (Berzon, J., dissenting in part).

260. *See, e.g.*, Mank, *supra* note 10, at 1480.

between the creation and existence of rights, and their subsequent enforceability.[261] "A legal right," Judge Berzon wrote, "is an entitlement that inheres in an individual and enables her to make certain demands of other individuals, which demands are backed by the coercive power of the state."[262] This tripartite relationship between two individuals and the state is *not* the same as the process by which the right may be enforced in court.[263] "To the contrary," Judge Berzon instructed, "a cause of action is a specific type of remedy, a procedural vehicle for redressing a violation of a right. Some rights may not be enforceable through such an affirmative remedy in court, and others may not be enforceable in court at all."[264]

For example, the Fourth Amendment provides "[t]he right of the people to be secure in their . . . houses . . . against unreasonable searches and seizures, shall not be violated."[265] The language of the amendment, "the right . . . shall not be violated," suggests that the right to be secure in one's home was possessed prior to the existence of the national government.[266] Moreover, after the Republic was founded, this right continued to have significance apart from any private remedial scheme to redress its violation.[267] Congress is required to respect it when legislating, and Executive officials must adhere to it when enforcing the law.[268] This demonstrates that "a person can possess a meaningful right, and that right can have real-life consequences for the conduct of other persons, independent of a concomitant ability to sue for violation of that right."[269]

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261. *Save Our Valley*, 335 F.3d at 946 (Berzon, J., dissenting in part); *see* Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 499 (1990) (noting the distinction between rights and remedies: whether § 1983 provides a cause of action for violation of a federal statute is a "different inquiry" than "determining whether a private right of action can be implied from a particular statute").

262. *Save Our Valley*, 335 F.3d at 947.

263. This tripartite relationship may include variations where one of the "individuals" is another level of government, or where the "state" is embodied in the Constitution or other binding document which regulates government officials in their relationships with individuals. *Id*. at 947 n.1 (Berzon, J., dissenting in part).

264. *Id*.

265. U.S. CONST. amend. IV.

266. *See Save Our Valley*, 335 F.3d at 948.

267. *Id*. In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Supreme Court permitted a direct private right of action against government officials to redress violations of constitutional rights. However, as Judge Berzon noted, "[i]t would be absurd to say that, until *Bivens*, individuals did not possess with respect to the federal government, or possess in any meaningful sense, the Fourth Amendment right to be free of unreasonable searches and seizures." *Save Our Valley*, 335 F.3d at 950 (Berzon, J., dissenting in part).

268. *Save Our Valley*, 335 F.3d at 950 (Berzon, J., dissenting in part).

269. *Id*. at 951. Another example is contained in the Declaration of Independence. That document declared that some rights, like the right to life, liberty, and property, derive from a source independent of the state, and that it is the government's role to secure these rights. Providing civil remedies is one way that such rights may be enforced. However, as the Declaration of

This distinction is crucial when considering the relationship between implied rights of action and the enforcement of federal rights under § 1983. When considering the former, courts are guided by *Cort v. Ash* which requires, first a determination of whether the statute in question creates a federal right, and second, whether Congress intended to provide for its private enforcement.[270] This creates an essential dichotomy between right and remedy. If either part fails, a private right of action does not exist.[271]

Section 1983, as Justice Brennan clarified in *Wilder*, by itself creates a right of action.[272] In fact, its *only* function is to supply a cause of action for the enforcement of those individual rights, "secured by the Constitution and laws,"[273] for which Congress has not otherwise prescribed a private remedy.[274] Thus, the availability of the § 1983 remedy where the rights-creating statute does not also create a private right of action "is premised on, and only makes sense in light of, the idea that rights and remedies are distinct."[275] While the first question in both an implied right of action and § 1983 context is whether a right exists,[276] the second question, whether the statute creates a mechanism for private redress, is answered in the nature of § 1983 itself. The majority in *SOV* failed to make the crucial distinction between rights and remedies when it argued that *Sandoval's* reasoning "applies equally" to both questions.[277]

Sandoval's holding related solely to the second inquiry: a regulation may not create a private right of action when the statute it implements demonstrates no congressional intent to do so.[278] This singular focus was driven by the separation of powers concern that because Congress is the sole provider of access to federal courts, only congressional intent is relevant in determining whether to imply a cause of action.[279] The *SOV* majority committed a fatal flaw when it extended *Sandoval's* holding and separation of powers reasoning to rights creation. When Congress expressly authorized access to federal courts under § 1983 it removed the separation of powers concerns, leaving intact the question of whether a right exists.[280] While "rights" and "rights of action" may both be "creatures of

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Independence makes clear, these rights may be "enforceable" in the absence of civil remedies: they may be enforced by insurrection. *Id*. at 947-48.

270. Cort v. Ash, 422 U.S. 66, 78 (1975). The first factor of the *Cort* test is whether the statute creates a federal right the final three factors relate to a determination of whether Congress intended for the right to be privately enforced. *See id*.

271. *See Save Our Valley*, 335 F.3d at 952 (Berzon, J., dissenting in part).

272. Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 509 n.9 (1990).

273. 42 U.S.C. § 1983 (2000).

274. *See Save Our Valley*, 355 F.3d at 952 (Berzon, J., dissenting in part).

275. *Id*.

276. *See* Gonzaga Univ. v. Doe, 536 U.S. 273, 283 (2002).

277. *See Save Our Valley*, 355 F.3d at 937.

278. Alexander v. Sandoval, 532 U.S. 275, 291 (2001).

279. *Id*. at 287; *see* Key, *supra* note 24, at 299.

280. *See* Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 509 n.9 (1990).

substantive federal law,"[281] they are different breeds of law, existing apart from one another, and which require distinct analyses. Thus, after *Sandoval*, uncertainties remained about whether a regulation "is the type of legal prescript that Congress meant to be enforceable under § 1983."[282]

The *SOV* majority erroneously relied on *Gonzaga* to ease doubts "as to the genesis of individual rights enforceable through § 1983 after *Sandoval*."[283] While *Gonzaga* stands for the proposition that § 1983 rights and private rights of action both require a showing that the law at issue creates an individual right, that is *all* it does: "[T]he inquiries overlap in *one* meaningful respect"—whether a federal right exists.[284] It did *not* merge the unique private right of action inquiry—whether Congress intended to create a private right of action—with rights creation.[285] Thus, *Gonzaga* did *not* conclude that only Congress can create rights enforceable through § 1983.[286] Rather, the *Gonzaga* Court's emphasis on congressional intent arose from the plaintiff's unique legal posture in which it was argued that the statute itself secured the right he sought to enforce under § 1983.[287] *Gonzaga* did not address whether a particular type of law—a federal regulation—*can* create a right.[288] This analysis requires consideration of contemporary administrative law principles.

Section 1983 contemplates the private enforcement of "rights" secured by the "Constitution and laws."[289] Thus, whether a federal regulation can create rights enforceable under § 1983 requires a two-step inquiry: first, whether regulations can create "rights," and second, whether regulations are "laws" that may secure rights. Fundamental administrative law principles embodied in the *Chevron* and *Chrysler* doctrines suggest that agency regulations may secure rights independent of specific congressional intent, and that such rights may be vindicated under § 1983.

The majority in *SOV*, and at least one recent commentator, contend that because "Congress, rather than the executive, is the lawmaker in our democracy," only Congress can create rights enforceable under § 1983.[290] This truism fails to "capture the nuances of our contemporary understanding of the relationship between Congress and the administrative agencies."[291] *Chevron* provides that Congress need not legislate with particularity, but may delegate to agencies the

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281. *Save Our Valley*, 335 F.3d at 937.

282. *Id*. at 953 (Berzon, J., dissenting in part).

283. *Id*. at 938.

284. *Gonzaga*, 536 U.S. at 283 (emphasis added).

285. *See Sandoval*, 532 U.S. at 286-87.

286. *See Save Our Valley*, 335 F.3d at 954 (Berzon, J., dissenting in part).

287. *Id*.

288. *See id*. at 954.

289. 42 U.S.C. § 1983 (2000).

290. *Save Our Valley*, 335 F.3d at 939; *see also* Davant, *supra* note 10, at 635-41 (arguing that "right-making" is a legislative function which separation of powers and federalism principles limit to Congress alone).

291. *Save Our Valley*, 335 F.3d at 957-58 (Berzon, J., dissenting in part).

power to fill legislative gaps.[292] Where the delegation is explicit, the meaning effectuated by the agency is controlling unless it is "arbitrary, capricious or manifestly contrary to the statute."[293] If the grant of authority is implicit, reasonable interpretations made by the administrator of the agency are valid.[294] Thus, even absent express congressional intent, an agency's elucidation of a provision of a statute, "if valid and reasonable, authoritatively construe[s] the statute itself."[295] In this way, the promulgation of reasonable and valid regulations is an extension of the legislative process. When given proper authorization, agencies may create new obligations not expressly intended by Congress as a matter of course.[296] Under this conception, Congress may circumscribe an area within which agencies may perform many of the same functions that Congress itself performs. In this way, a regulation's validity is not limited to fleshing out specific statutory provisions.[297] Rather, these principles of administrative law suggest that agencies may promulgate regulations that have the "particular form of rules that we describe as creating 'rights.'"[298]

Broadly defined, a federal "right" enforceable under § 1983 arises from a tripartite legal relationship between two persons and the state—an entitlement inhering in an individual which enables him to make demands of others, and "which demands are backed by the coercive power of the state."[299] Since *Blessing*, the Supreme Court requires that such entitlements take the form of an unambiguous benefit conferred through "rights-creating" language.[300] Agencies regularly use "rights-creating" language to promulgate substantive rules whose effect is to confer unambiguous benefits to certain classes of persons.[301] In fact,

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292. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843-44 (1984).

293. *Id*.

294. *Id*. at 844.

295. *Sandoval*, 532 U.S. at 284.

296. *See*, *e.g.*, *Chevron*, 467 U.S. at 845 (holding that Congress did not specifically intend to create the "bubble rule," but that the rule represented a reasonable policy choice that Congress left the agency to make).

297. *See Save Our Valley*, 335 F.3d at 959 (Berzon, J., dissenting, in part); *see also* Mank, *supra* note 10, at 1467-69 (arguing that after *Gonzaga* regulations are likely limited to defining the scope of a right which a statute demonstrates that Congress intended to establish); *but see* Harris v. James, 127 F.3d 993, 1008 (1997) (concluding that regulations may merely further define or flesh out the content of a statutory right).

298. *Save Our Valley*, 335 F.3d at 959 (Berzon, J., dissenting in part).

299. *Id*. at 947.

300. *See* Davant, *supra* note 10, at 632; Blessing v. Freestone, 520 U.S. 329, 340-41 (1997). *Gonzaga* further strengthened this prong, requiring that the statute be phrased in terms of the persons benefited. Gonzaga Univ. v. Doe, 536 U.S. 273, 284 (2002).

301. For example, the DOT disparate-impact regulation at issue in *Save Our Valley*, prohibiting recipients of federal funds from using methods of administration which have the effect of discriminating on the basis of race, color, or national origin, is intended to benefit a certain class of persons—racial and ethnic minorities; is not so vague and amorphous that it would strain judicial competence; and, its command on the states is mandatory. *See Save Our Valley*, 335 F.3d at 964

the Supreme Court has stated, "an important touchstone for distinguishing those [agency] rules that may be 'binding' or have the 'force of law'" is that the rule "affect[] individual rights and obligations."[302]

Practical considerations also favor agency rights creation.[303] When Congress seeks to effectuate broad policy objectives, it may not have the expertise or incentive to craft individual rights to achieve its goals.[304] Agency administrators are often in a better position to balance competing interests that support and oppose the creation of individual rights.[305] Not only do "agency technocrats" oftentimes have greater expertise, they are less prone to "special-interest capture" which may discourage members of Congress from creating individual rights, even when it is in the public interest to do so.[306] Unpopularity provides a further disincentive for Congress to create individual rights, even when it is proper.[307] Finally, if regulations do not confer individual rights which may be privately enforced, then many regulations will have little, if any, effect.[308] Of course, this does not end the inquiry. The mere presence of rights-creating language in a regulation and underlying practical considerations, suggest only that a regulation may create rights, not that a regulation can "secure" those rights.

Section 1983 only permits the enforcement of those rights "secured by the Constitution and laws."[309] Thus, assuming that a regulation may create a "right," its ultimate enforceability turns on whether the regulation is a "law" within the meaning of § 1983. In *Guardians*, Justices Stevens, Brennan, and Blackmun argued that the plain reading of "laws" in *Thiboutot* encompassed "all valid federal laws, including statutes and regulations having the force of law."[310] While this view has never garnered majority support, as a matter of practice regulations have the same form, effect, and are based on similar considerations as statutes, and thus regulations, may properly be considered "laws."[311]

(Berzon, J., dissenting in part). However, as explained infra, this regulation likely cannot meet the strengthened first requirement—phrased in terms of the persons benefited.

302. Chrysler Corp. v. Brown, 441 U.S. 281, 302 (1979).

303. *See* Davant, *supra* note 10, at 635. Davant ultimately concludes that these considerations are outweighed by separation of powers concerns—Congress alone has the power to create rights. However, as Judge Berzon contends, this view fails to take into account the nuances of the relationship between Congress and administrative agencies in the contemporary legislative process. *Save Our Valley*, 335 F.3d at 957-58 (Berzon, J., dissenting in part).

304. *Id*.

305. *See Chevron*, 467 U.S. at 865.

306. *See* Davant, *supra* note 10, at 635.

307. *Id*.

308. *Id*.; Mank, *supra* note 10, at 1480-81.

309. 42 U.S.C. § 1983 (2000).

310. Guardians Ass'n v. Civil Serv. Comm'n of New York , 463 U.S. 582 (1983) (Stevens, J., dissenting).

311. *See Save Our Valley*, 335 F.3d at 955 (Berzon, J., dissenting in part). *See* Brian D. Galle, *Can Federal Agencies Authorize Private Suits Under § 1983? A Theoretical Approach*, 69 BROOK. L. REV. 163, 165 (2003) (arguing that "any reasonable court reading § 1983 would presume that

The promulgation of regulations, like legislation generally, "looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power."[312] They are, in short, like statutes in that they "are prescriptive, forward-looking, and of general applicability."[313] In addition, agency administrators, like legislators, must weigh "manifestly competing interests."[314] In fact, the Supreme Court has recognized that Congress often lacks the technical expertise to accommodate or balance specific competing interests, and thus, "consciously desire[s] the Administrator to strike the balance at this level [of specificity], thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so."[315] Finally, regulations have the "force of law" when they "affect[] individual rights and obligations."[316] Thus, they bind individuals to whom they apply the same way that statutes do.[317]

In addition, the language, structure, and Supreme Court's command for generous construction of § 1983 stipulates that the "laws" language is not limited to statutes, but embraces regulations as well.[318] Section 1983 indicates that Congress was keenly aware of the myriad sources of state action that could deprive one of a federal right—"any statute, ordinance, regulation, custom, or usage."[319] Elsewhere in that provision, Congress referred to rights secured by the "Constitution and laws."[320] The *SOV* court noted "when Congress uses different words in a statute, it intends them to have different meanings."[321] Thus, in this context, Congress did not intend for "laws" to be limited to or synonymous with the term "statute."[322] The Supreme Court declared, "as remedial legislation, § 1983 is to be construed generously to further its primary purpose."[323] Thus, consummate with *Thiboutot's* demand that "laws" is not limited to civil rights and equal protection legislation, but embraces all federal law,[324] this provision should provide for the vindication of rights secured by regulatory law as well.

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the word 'laws' includes regulations"); *but see* Pettys, *supra* note 34, at 84 (arguing that the "and laws" language of § 1983 was not intended to include regulations: the word "laws" and "regulations having the force of law" are plainly different, and that the latter phrase concedes that regulations are not "laws," but only have, in certain circumstances, the force of law).

312. Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 226 (1908); *see also Save Our Valley*, 335 F.3d at 954 (Berzon, J., dissenting in part).

313. *Save Our Valley*, 335 F.3d at 954 (Berzon, J., dissenting in part).

314. *Chevron*, 467 U.S. at 865.

315. *Id.*

316. Chrysler Corp. v. Brown, 441 U.S. 281, 302 (1979).

317. *Save Our Valley*, 335 F.3d at 955 (Berzon, J., dissenting in part).

318. *See id*; *see also* Gomez v. Toledo, 446 U.S. 635, 639 (1980).

319. 42 U.S.C. § 1983 (2000).

320. *Id*.

321. *Save Our Valley*, 335 F.3d at 960 (Berzon, J., dissenting in part).

322. *Id*.

323. *Gomez*, 446 U.S. at 639.

324. *See Guardians*, 463 U.S. at 637 (Stevens, J., dissenting).

In sum, the *SOV* majority misapplied Supreme Court precedent, ignored contemporary administrative law principles, and failed to provide a generous construction of § 1983 to further its remedial purpose when it offered its sweeping holding that agency regulations cannot alone create rights enforceable under § 1983. Notwithstanding this broad holding, however, *Sandoval* and *Gonzaga* do support the majority's narrow conclusion that the DOT disparate-impact regulations at issue did not create enforceable rights.[325]

After *Sandoval*, the DOT regulations which implement § 601 and § 602 of Title VI cannot be read together.[326] Thus, the question is whether the disparate impact regulation, on its own, is a valid rights-creating legislative regulation.[327] After *Gonzaga*, the first prong of the *Blessing* rights test has been strengthened, requiring that a right enforceable under § 1983 be unambiguously conferred in terms of the persons benefited.[328] While the DOT regulation at issue in *SOV* satisfies the latter two requirements under *Blessing*—the regulation is not so vague and amorphous as to preclude judicial enforcement and is couched in mandatory terms—the regulation is not phrased in terms of the persons benefited.[329] Rather, the regulation is directed at the "recipient" of federal funds, and precludes that recipient from prescribing criteria having a disparate racial impact.[330] The focus of the regulation, therefore, is on the fund recipient and its method of administering the funded program, not on any individual affected thereby.[331] Thus, the regulation fails *Gonzaga*'s heightened "rights-creating language" requirement.

CONCLUSION

Because the scope of a federal right's significance is cast in terms of the remedy provided "to enforce it," degrading the presumptive enforceability of rights when the law does not require it will harm civil liberties.[332] This Note has

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325. *See Save Our Valley*, 335 F.3d at 961 (Berzon, J., dissenting in part).

326. *Alexander v. Sandoval* held that disparate-impact regulations promulgated under § 602 of Title VI do not simply apply § 601's prohibition on intentional discrimination. 532 U.S. 275 (2001). Thus, while the DOT regulation, 49 C.F.R. § 21.5(a) (2003), which provides that "no person . . . shall" be subject to intentional discrimination under any DOT program which receives federal funds uses rights-creating language to implement § 601's prohibition on intentional discrimination, the disparate impact regulation, 49 C.F.R. § 21.5(b)(2), cannot be read as spelling out the meaning of discrimination promulgated in § 601, and as repeated in the regulation. *See Save Our Valley*, 335 F.3d at 961 (Berzon, J., dissenting in part).

327. *Save Our Valley*, 335 F.3d at 961.

328. Gonzaga Univ. v. Doe, 536 U.S. 273, 283 (2002).

329. *See Save Our Valley*, 335 F.3d at 935 (citing 49 C.F.R. § 21.5(b)(2)).

330. *Id*. (citing 49 C.F.R. § 21.5(b)(2)).

331. *See id*. at 961 (Berzon, J., dissenting in part).

332. *See Recent Cases: Federal Courts—Civil Rights Litigation—Ninth Circuit Holds That an Administrative Regulation Can Never Create an Individual Federal Right Enforceable Through § 1983*—Save Our Valley v. Sound Transit*, 335 F.3d 932 (9th Cir. 2003)*, 117 HARV. L. REV. 735,

traced the history and application of § 1983, and the recent trend toward limiting its applicability in the realm of regulatory law. In *Save Our Valley v. Sound Transit*, the Ninth Circuit misapplied recent Supreme Court rulings which merge implied right of action and § 1983 analyses in only one meaningful respect. In addition, the Ninth Circuit failed to consider contemporary administrative law principles, and refused to give § 1983 broad construction, which leads to the conclusion that regulations may create rights enforceable under § 1983.

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742 (2003); *see also* Davant, *supra* note 10, at 613.