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Can Administrative Regulations Interpret Rights Enforceable Under Section 1983?: Why Chevron Deference Survives Sandoval and Gonzaga

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**CAN ADMINISTRATIVE REGULATIONS INTERPRET
RIGHTS ENFORCEABLE UNDER SECTION 1983?:
WHY CHEVRON DEFERENCE SURVIVES
SANDOVAL AND GONZAGA**

BRADFORD C. MANK*

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I. INTRODUCTION

There is a split in the circuits regarding whether and when agency regulations may establish rights enforceable through 42

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U.S.C. § 1983.¹ The District of Columbia Circuit and Sixth Circuit have held that at least some valid federal regulations may create rights enforceable through § 1983.² Concluding that only Congress, by enacting a statute, may create an individually enforceable right, however, the Third, Fourth, and Eleventh Circuits have held that an agency regulation cannot create an individual federal right enforceable through § 1983, although some decisions in these circuits have recognized that valid regulations may help courts interpret, “define,” or “flesh out” the content of statutory rights.³ Most recently, in 2003, the Ninth Circuit in *Save Our Valley v. Sound Transit*⁴ held that valid agency regulations alone could not establish individual rights enforceable through § 1983 because only Congress may establish enforceable rights through statutes, although one judge disagreed in a

1. See Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (current version at 42 U.S.C. § 1983 (2000)); Charles Davant IV, *Sorcerer or Sorcerer's Apprentice?: Federal Agencies and the Creation of Individual Rights*, 2003 WIS. L. REV. 613, 613-14 (discussing split in circuits over whether regulations are enforceable through § 1983); Brian D. Galle, *Can Federal Agencies Authorize Private Suits Under Section 1983?: A Theoretical Approach*, 69 BROOK. L. REV. 163, 164 n.3, 171-76 (2003) (same); Bradford C. Mank, *Suing Under § 1983: The Future After Gonzaga University v. Doe*, 39 HOUS. L. REV. 1417, 1460-61, 1465-69 (2003) [hereinafter Mank, *The Future After Gonzaga*] (same); Bradford C. Mank, *Using § 1983 to Enforce Title VI's Section 602 Regulations*, 49 U. KAN. L. REV. 321, 346-53 (2001) [hereinafter Mank, *Using § 1983*] (same); Todd E. Pettys, *The Intended Relationship Between Administrative Regulations and Section 1983's "Laws,"* 67 GEO. WASH. L. REV. 51, 76-80 (1998) (discussing conflicting approaches among the federal circuit courts); Derek Black, Comment, *Picking up the Pieces After Alexander v. Sandoval: Resurrecting a Private Cause of Action for Disparate Impact*, 81 N.C. L. REV. 356, 363-76 (2002) (same); Recent Case, *Save Our Valley v. Sound Transit*, 335 F.3d 932 (9th Cir. 2003), 117 HARV. L. REV. 735, 735 (2003) (same); Sam Spital, Note, *Restoring Brown's Promise of Equality After Alexander v. Sandoval: Why We Can't Wait*, 19 HARV. BLACKLETTER L.J. 93, 111-20 (2003) (same); *infra* notes 2-7, 43, 136-54 and accompanying text.

2. See *Loschiavo v. City of Dearborn*, 33 F.3d 548, 551 (6th Cir. 1994) (holding FCC regulations enforceable through § 1983 and stating that “[a]s federal regulations have the force of law, they likewise may create enforceable rights”); *Samuels v. District of Columbia*, 770 F.2d 184, 199 (D.C. Cir. 1985) (holding HUD regulations enforceable through § 1983 and citing the “force and effect” standard articulated in *Chrysler Corp. v. Brown*, 441 U.S. 281, 301-03 (1979)); see also *Robinson v. Kansas*, 295 F.3d 1183, 1187 (10th Cir. 2002) (stating Title VI regulations are enforceable through § 1983); *Langlois v. Abington Hous. Auth.*, 234 F. Supp. 2d 33, 47-54 (D. Mass. 2002) (holding properly promulgated regulations are enforceable through § 1983, although recognizing that the First Circuit had never decided issue); Davant, *supra* note 1, at 614 (identifying the District of Columbia and Sixth Circuits as having “held that an agency can create an individual federal right”); Recent Case, *supra* note 1, at 735 n.3 (citing *Loschiavo* and *Samuels*).

3. See *S. Camden Citizens in Action v. N.J. Dep't of Env'tl. Prot.*, 274 F.3d 771, 784-90 (3d Cir. 2001) (concluding that regulations alone may not create rights enforceable through § 1983); *Harris v. James*, 127 F.3d 993, 1007-12 (11th Cir. 1997) (same); *Smith v. Kirk*, 821 F.2d 980, 984 (4th Cir. 1987) (same); Davant, *supra* note 1, at 614 (identifying the Third, Fourth, Ninth, and Eleventh Circuits as having held that an agency cannot create an individual federal right); Recent Case, *supra* note 1, at 735 n.3 (citing *South Camden*, *Harris*, and *Smith*).

4. 335 F.3d 932 (9th Cir. 2003).

partial dissent.⁵ By contrast, in the same year, the First Circuit in *Rolland v. Romney*⁶ acknowledged that regulations by themselves could not establish enforceable rights, but the court concluded that an agency's regulations interpreting a statutory right could clarify the right so that it is sufficiently definite to be enforceable through a § 1983 suit.⁷

The Supreme Court has never directly answered the question whether § 1983 suits may enforce valid administrative regulations,⁸ although several of its decisions have important implications for this issue.⁹ In 1980, in *Maine v. Thiboutot*,¹⁰ the Supreme Court held that a violation of statutory rights may be remedied through § 1983 because the plain meaning of the phrase "and laws" in the statute authorized plaintiffs to bring claims under the statute based on violations of federal statutory rights.¹¹ A crucial issue is whether the phrase "and laws" in § 1983 includes regulations or only refers to statutes.¹² Additionally, even if regulations are considered "laws" for purposes of § 1983, there is the further issue of whether agency regulations can establish individual "rights" under § 1983.¹³

Although the Supreme Court collectively has not answered the question whether administrative regulations can establish individual rights that are enforceable when they are only implicit in a statute, individual Justices have suggested their views on this subject.¹⁴ In

5. Compare *id.* at 935-44 ("[W]e hold that an agency regulation cannot create individual rights enforceable through § 1983."), with *id.* at 946-61 (Berzon, J., dissenting in part) and Recent Case, *supra* note 1, at 739-42 (criticizing Ninth Circuit's holding in *Save Our Valley* that an agency regulation cannot create individual rights enforceable through § 1983 as contrary to well-established administrative law principles). Judge Berzon agreed with the majority, however, that the Title VI regulations at issue could not be enforced through § 1983. *Save Our Valley*, 335 F.3d at 961-65 (Berzon, J., dissenting in part); see *infra* Part VI.A.

6. 318 F.3d 42 (1st Cir. 2003).

7. *Id.* at 48-58.

8. See *Save Our Valley*, 335 F.3d at 936-37; Davant, *supra* note 1, at 613, 628.

9. See *infra* notes 10-11, 17-18, 21-22, 24-27, 33-38, 57-59, 61, 64, 66-69, 79-81, 84-86, 89-97, 101, 104-05, 107, 109-10, 118, 128-35, 158, 161, 168-72, 176-77, 186, 200-04, 208, 213-14, 225-29, 235, 324-25 and accompanying text.

10. 448 U.S. 1 (1980).

11. See *id.* at 4-8; Mank, *Using § 1983*, *supra* note 1, at 330; Pettys, *supra* note 1, at 67. Section 1983 has remained unchanged since 1980 and provides as follows:

Every person who, under color of any statute . . . [or] regulation . . . of any State . . . 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) (emphasis added).

12. See *infra* notes 14-19, 30, 49-57, 66-76, 76, 103-05, 168 and accompanying text.

13. See Davant, *supra* note 1, at 624; *infra* notes 14-19, 24-42, 105-06, 116-27, 131-32, 136-37, 139-54, 225-26, 228-29, 287 and accompanying text.

14. See Davant, *supra* note 1, at 613.

1983, in *Guardians Ass'n v. Civil Service Commission of New York*,¹⁵ Justice Stevens, in a dissenting opinion, argued that § 1983 could be used to enforce "all valid federal laws, including statutes and regulations having the force of law."¹⁶ In 1987, in *Wright v. City of Roanoke Redevelopment and Housing Authority*,¹⁷ the Supreme Court held, in a five-to-four decision, that the Brooke Amendment to the Housing Act of 1937 and HUD regulations interpreting the statute could create enforceable rights under § 1983, but the Court left unclear to what extent it had relied on the regulations alone to reach this conclusion.¹⁸ In her dissenting opinion, Justice O'Connor contended that the majority opinion was "troubling" to the extent that it suggested or implied that regulations alone could establish enforceable rights through a § 1983 suit.¹⁹

In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,²⁰ the Supreme Court, in 1984, stated that courts should give significant deference to agency regulations that provide a reasonable interpretation of an ambiguous statute or that fill a "gap" in a silent statute, at least in those cases in which Congress has delegated to the agency the authority to issue regulations that carry "the force of law."²¹ Conversely, if a statute has a clear meaning regarding a spe-

15. 463 U.S. 582 (1983).

16. *Id.* at 638 (Stevens, J., dissenting).

17. 479 U.S. 418 (1987).

18. The Court stated:

The regulations . . . defining the statutory concept of "rent" as including utilities, have the force of law. . . . In our view, the benefits Congress intended to confer on tenants are sufficiently specific and definite to qualify as enforceable rights under *Pennhurst* and § 1983, rights that are not, as respondent suggests, beyond the competence of the judiciary to enforce.

Id. at 431-32 (citation omitted). Additionally, in a footnote, the majority stated: "The dissent may have a different view, but to us it is 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." *Id.* at 421 n.3. Commentators have debated the extent to which the *Wright* majority relied on the regulations alone in establishing a right to sue under § 1983. Compare Davant, *supra* note 1, at 621 ("Although the *Wright* Court expressed no opinion as to whether the regulation created individual federal rights independent from federal statute, the Justices in the majority may have tacitly assumed that regulations can create rights."), Mank, *Using § 1983, supra* note 1, at 343 ("It is not clear whether the [*Wright*] majority simply deferred to the HUD regulation as a reasonable interpretation of the statutory phrase 'rent' or held that the regulations themselves may establish a private cause of action under § 1983."), and Pettys, *supra* note 1, at 74-75 (same), with Spital, *supra* note 1, at 116 ("*Wright* located the alleged right in the statutory provision and then relied upon the implementing regulations to define and interpret that right.").

19. *Wright*, 479 U.S. at 437-38 (O'Connor, J., dissenting); Mank, *Using § 1983, supra* note 1, at 344-45.

20. 467 U.S. 837, 842-43 (1984) (stating that both courts and agencies are bound by clear statutory language addressing the precise issue in question); see also Recent Case, *supra* note 1, at 741.

21. See *Chevron*, 467 U.S. at 842-44 (stating courts should defer to an agency's "permissible" interpretation of an ambiguous statute or filling of a "gap" in a silent statute); *id.*

cific issue in an agency's enabling statute, then courts will not defer to an agency interpretation that fails to follow that meaning because the agency is bound by that statutory language.²² The *Chevron* Court stated:

If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.²³

In 2001, in *Alexander v. Sandoval*,²⁴ the Court indirectly cast doubt on the use of regulations to create enforceable rights by holding that there is no private right of action to enforce disparate impact regulations promulgated under Title VI of the 1964 Civil Rights Act.²⁵ The Court concluded that a private right of action must be based on a *clear statement* of rights plainly established in the statute itself and may not arise from regulations alone, declaring that “[l]anguage in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not.”²⁶ The Court suggested that regulations alone may not establish individual rights, observing that “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

at 865-66 (stressing that executive agencies have a more appropriate role than the judiciary in defining ambiguous statutory language or filling in a “gap” in a silent statute because they possess greater substantive expertise than courts and because agencies, unlike courts, are politically accountable through election of the Chief Executive); *United States v. Mead Corp.*, 533 U.S. 218, 227-30 (2001) (discussing *Chevron*); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 625-26 (1996) (describing the presumption established in *Chevron* that silence in a statute shows the intent of Congress to leave the act of interpretation in the hands of the agency in charge of administering the act); Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 833-34, *passim* (2001) (explaining that *Chevron* fundamentally expanded deference of courts to agency interpretations of statutes by presuming that gaps or ambiguities in a statute reflected implicit congressional intent to delegate interpretive authority to the agency); *infra* notes 23, 186-99, 289 and accompanying text.

22. *Chevron*, 467 U.S. at 842-43 (stating that both courts and agencies are bound by clear statutory language addressing the precise issue in question); *see also* Recent Case, *supra* note 1, at 741.

23. *Chevron*, 467 U.S. at 843-44; *see also Mead*, 533 U.S. at 227 (“Delegation of such authority may be shown in a variety of ways, as by an agency’s power to engage in adjudication or notice-and-comment rulemaking or by some other indication of a comparable congressional intent.”); *Rolland v. Romney*, 318 F.3d 42, 48 (1st Cir. 2003) (“Where an agency has been endowed with the power to administer a congressionally created program, as here, regulations should be given substantial deference . . .”).

24. 532 U.S. 275 (2001).

25. *Id.* at 291.

26. *Id.* (emphasis added); Galle, *supra* note 1, at 165, 170, 177-78 (discussing *Sandoval* as adopting a “clear statement rule” for private rights of action).

himself.²⁷ Although Justice Scalia refused to apply *Chevron* deference to agency Title VI regulations prohibiting disparate impact discrimination because the Court had construed Title VI to ban only intentional discrimination, he acknowledged in *Sandoval* that “regulations, if valid and reasonable, authoritatively construe the statute itself.”²⁸

In his dissenting opinion in *Sandoval*, Justice Stevens contended that Section 602²⁹ regulations could be enforced indirectly under § 1983 even if they could not create an implied right of action directly because regulations are “laws” within the statute’s meaning.³⁰ Additionally, he argued that the majority’s refusal to defer to the agency’s Section 602 regulations was contrary to the Court’s *Chevron* decision.³¹ Justice Stevens argued, “In most other contexts, when the agencies charged with administering a broadly worded statute offer regulations interpreting that statute or giving concrete guidance as to its implementation, we treat their interpretation of the statute’s breadth as controlling unless it presents an unreasonable construction of the statutory text.”³²

27. *Sandoval*, 532 U.S. at 291.

28. *Id.* at 284; Recent Case, *supra* note 1, at 741.

29. 42 U.S.C. § 2000d-1 (2000).

30. According to Justice Stevens:

[T]o the extent that the majority denies relief to the respondents merely because they neglected to mention 42 U.S.C. § 1983 in framing their Title VI claim, this case is something of a sport. Litigants who in the future wish to enforce the Title VI regulations against state actors in all likelihood must only reference § 1983 to obtain relief; indeed, the plaintiffs in this case (or other similarly situated individuals) presumably retain the option of rechallenging Alabama’s English-only policy in a complaint that invokes § 1983 even after today’s decision.

Sandoval, 532 U.S. at 299-300 (Stevens, J., dissenting). See generally Mank, *Using § 1983, supra* note 1, at 367-82 (arguing Title VI disparate impact regulations may be enforced through § 1983).

31. *Sandoval*, 532 U.S. at 309 (Stevens, J., dissenting).

32. *Id.* at 309 (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)); see also Bradford C. Mank, *Are Title VI’s Disparate Impact Regulations Valid?*, 71 U. CIN. L. REV. 517, 530 (2002) (arguing that the majority opinion in *Sandoval* ignored the *Chevron* deference principle); Jonathan M.H. Short, “*Something of a Sport: The Effect of Sandoval on Title IX Disparate Impact Discrimination Suits*,” 9 WM. & MARY J. WOMEN & L. 119, 133 (2002); Black, *supra* note 1, at 361-62 (arguing agency interpretations of Title VI deserve deference); David J. Galalis, Note, *Environmental Justice and Title VI in the Wake of Alexander v. Sandoval: Disparate-Impact Regulations Still Valid Under Chevron*, 31 B.C. ENVTL. AFF. L. REV. 61, 65, 92-101 (2004) (arguing Justice Scalia’s *Sandoval* decision was wrong to question the validity of Title VI’s Section 602 disparate impact regulations because they are entitled to deference under *Chevron*, because the term “discrimination” in Section 602 is ambiguous and disparate impact regulations are reasonable interpretation of statute); Note, *After Sandoval: Judicial Challenges and Administrative Possibilities in Title VI Enforcement*, 116 HARV. L. REV. 1774, 1781 (2003) (arguing Justice Scalia’s *Sandoval* decision was wrong to question the validity of Title VI’s Section 602 disparate impact regulations because they deserve deference under *Chevron*, because Section 602 is ambiguous and disparate impact regulations are reasonable interpretation and means to effectuate Section 601’s antidiscrimination requirement).

In 2002, in *Gonzaga University v. Doe*,³³ the Supreme Court held that the Family Educational Rights and Privacy Act's³⁴ non-disclosure provisions were not privately enforceable through § 1983.³⁵ The Court concluded that individual rights enforceable through § 1983 are similar to implied rights of action because courts are required to "determine whether Congress *intended to create a federal right*."³⁶ Because the Court held in *Sandoval* that only Congress can create implied rights of action, the *Gonzaga* decision suggests that only Congress can create rights enforceable through § 1983 and that regulations alone may not.³⁷ The *Gonzaga* decision did not directly resolve, however, whether and to what extent regulations may interpret rights implicit in a statute.³⁸ Unfortunately, the Ninth Circuit in *Save Our Valley* read dicta in *Sandoval* and *Gonzaga* too broadly in suggesting the erroneous conclusion that courts may never consider agency regulations in determining whether rights are enforceable pursuant to § 1983.

It is not clear whether the *Chevron* decision or similar deference principles apply to the interpretation of individual rights enforceable under § 1983.³⁹ If a regulation goes beyond the explicit language of a statute to clarify or establish a right that is generally compatible with the statute's goals, should courts treat that right as enforceable under § 1983? In a recent article, Charles Davant argues "that, in the absence of any indication in the language or legislative history of a regulation-authorizing statute that Congress intended to create enforceable rights, regulations that purport to create privately enforceable individual rights usually will be contrary to statutory law and not entitled to deference."⁴⁰ Davant contends that fundamental sepa-

33. 536 U.S. 273 (2002).

34. 20 U.S.C. § 1232g (2000) (providing that educational institutions will not disclose student records to the public).

35. *Gonzaga*, 536 U.S. at 287-91; see also Mank, *The Future After Gonzaga*, *supra* note 1, at 1450-52.

36. *Gonzaga*, 536 U.S. at 283; see also Mank, *The Future After Gonzaga*, *supra* note 1, at 1448.

37. See *Save Our Valley v. Sound Transit*, 335 F.3d 932, 939 (9th Cir. 2003) ("We believe the Supreme Court's *Sandoval* and *Gonzaga* decisions, taken together, compel the conclusion we reach today: that agency regulations cannot independently create rights enforceable through § 1983."); Mank, *The Future After Gonzaga*, *supra* note 1, at 1467 ("In light of *Gonzaga*, the argument that regulations alone may create rights enforceable through § 1983 is probably untenable because a regulation alone normally cannot provide 'clear' and 'unambiguous' evidence that Congress intended to establish an individual right.").

38. Mank, *The Future After Gonzaga*, *supra* note 1, at 1467-69.

39. See *infra* notes 40-43, 197-99 and accompanying text.

40. Davant, *supra* note 1, at 615. But see Galle, *supra* note 1, at 165, 177-92, 226-28 (arguing valid agency regulations are laws based on a reasonable interpretation of the term "laws" in § 1983 and therefore are entitled to *Chevron* deference); Galalis, *supra* note 32, at 65, 92-101 (arguing Title VI's disparate impact regulations are valid laws under § 1983 and therefore are entitled to *Chevron* deference).

ration of powers principles give Congress the sole authority to create individual rights that are enforceable under § 1983.⁴¹

By contrast, although acknowledging that special care is required in evaluating the authority of agency regulations purporting to establish individual rights, this Article argues that courts should defer to agency regulations that clarify or further define individual rights reasonably implicit in a statute without contradicting the central underlying principle in *Sandoval* and *Gonzaga* that Congress alone possesses the legislative authority necessary to create individual rights in a statute.⁴² The First Circuit's *Romney* decision is a good example of a court using agency regulations to clarify the scope of a right that Congress clearly intended to create in a statute, but appropriately chose to delegate the details of its implementation to an agency.⁴³ As Parts VI and VII demonstrate, where Congress mandates or clearly implies that it is delegating to an agency the authority to issue regulations implementing an individual right that Congress intends to create on behalf of a class of individuals, then the agency's interpretation of the statutory "rights" contained in its regulations are presumptively enforceable through § 1983.⁴⁴

II. SECTION 1983 SUITS AND "FEDERAL LAW"

A. History of "and Laws" in § 1983 Suits

Section 1983 has its origins in the Civil Rights Act of 1871, the Ku Klux Klan Act, which created a private right of action for persons who "under color of any law, statute, ordinance, regulation, custom, or usage of any State" were denied constitutional rights, especially due process and equal protection rights under the Fourteenth Amendment.⁴⁵ The main purpose of the statute was to protect African Americans from the attempt of former Confederates to reassert white supremacy in several southern states by denying African Americans many legal rights.⁴⁶ The 1871 statute protected only con-

41. See Davant, *supra* note 1, at 615-16, 633-41, 645-48; *supra* notes 1-3, 8, 13-14, 16, 18-19 and accompanying text; *infra* notes 55-56, 58, 61, 83, 85-88, 93-95, 107, 155, 185, 191, 196, 200 and accompanying text.

42. See *infra* notes 157-349 and accompanying text.

43. See *infra* Part VI.B.

44. See *infra* notes 255-339 and accompanying text.

45. See Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (current version at 42 U.S.C. § 1983 (2000)); 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, 303-04 (1996); Mank, *The Future After Gonzaga*, *supra* note 1, at 1427; Mank, *Using § 1983*, *supra* note 1, at 327; see also Pettys, *supra* note 1, at 51, 54-61 (discussing the origin of § 1983); Sasha Samberg-Champion, Note, *How to Read Gonzaga: Laying the Seeds of a Coherent Section 1983 Jurisprudence*, 103 COLUM. L. REV. 1838, 1841 n.20 (2003).

46. See Mank, *The Future After Gonzaga*, *supra* note 1, at 1427; Mank, *Using § 1983*, *supra* note 1, at 327; Pettys, *supra* note 1, at 51-61, 67-68 (discussing the origin of § 1983).

stitutional rights and did not mention rights protected by federal law.⁴⁷

However, in 1874, Congress, as part of a comprehensive revision of existing statutes, added the phrase “and laws” to section 1 of the Civil Rights Act.⁴⁸ There is no explicit legislative history explaining whether Congress intended the addition of the “and laws” language to change the meaning of the statute.⁴⁹ This revised statute is the basis for the current 42 U.S.C. § 1983, which provides, in relevant part, as follows:

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 redress⁵⁰

Commentators have long debated whether Congress’s addition of the phrase “and laws” changed the meaning of the statute to include enforcement of statutory rights.⁵¹ Proponents of the “Consistency Theory” argue that the language “and laws” must be read together with other provisions in the Civil Rights Act to limit the term “law” to only laws protecting equal rights.⁵² Conversely, proponents of the “No Modification Theory” narrowly interpret the addition of “and laws” as only a clarification of the 1871 statute’s existing protection

47. Key, *supra* note 45, at 304; Mank, *Using § 1983*, *supra* note 1, at 327; Pettys, *supra* note 1, at 57.

48. Key, *supra* note 45, at 304-05; Mank, *Using § 1983*, *supra* note 1, at 327; Pettys, *supra* note 1, at 57-60.

49. See Key, *supra* note 45, at 305 (describing the legislative history of 1874 amendment to § 1983 as unhelpful); Mank, *The Future After Gonzaga*, *supra* note 1, at 1427 (same); Mank, *Using § 1983*, *supra* note 1, at 327 (same); Pettys, *supra* note 1, at 59-60 & n.59 (discussing the absence of legislative history explaining the addition of “and laws” language in § 1983). Compare Cass R. Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. CHI. L. REV. 394, 398-409 (1982) (arguing that the 1874 legislative history is consistent with the conclusion that Congress intended § 1983 to reach all violations of federal law), with *Maine v. Thiboutot*, 448 U.S. 1, 16 (1980) (Powell, J., dissenting) (“[T]he legislative history unmistakably shows that the variations in phrasing introduced in the 1874 revision were inadvertent . . .”).

50. 42 U.S.C. § 1983 (emphasis added).

51. Key, *supra* note 45, at 306-13 (discussing the debate concerning various interpretations of “and laws” in § 1983); Mank, *The Future After Gonzaga*, *supra* note 1, at 1427-28 (same); Mank, *Using § 1983*, *supra* note 1, at 327-28 (same).

52. See Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 623-37 (1979) (Powell, J., concurring) (arguing that the legislative history of § 1983 demonstrates that the phrase “and laws” refers only to civil rights legislation and not federal statutes in general); Key, *supra* note 45, at 306-07 (discussing “Consistency Theory” interpretation of “and laws” in § 1983); Mank, *The Future After Gonzaga*, *supra* note 1, at 1427; Mank, *Using § 1983*, *supra* note 1, at 327-28.

for constitutional rights.⁵³ Finally, proponents of the "Plain Language Theory" contend that the term "and laws" includes all federal statutes and perhaps other federal laws as well.⁵⁴

Before 1961, there were relatively few § 1983 cases.⁵⁵ From the nineteenth century until 1961, courts narrowly construed § 1983 claims, limiting them to civil rights cases alleging violations of federal constitutional rights, especially deprivation of the right to make contracts or purchase property.⁵⁶ In dicta, the Supreme Court suggested in 1900 that the phrase "and laws" in the statute was limited to civil rights cases, and the Court did not clarify that issue for several decades.⁵⁷

In 1961, the Supreme Court in *Monroe v. Pape*⁵⁸ reinvigorated the statute by holding that § 1983 allowed a plaintiff alleging injury caused by the unconstitutional action of police officers to sue for damages in federal court because their actions were "under color of" law even if their actions also violated state law, and it also indicated that § 1983 could remedy a wide range of state violations of federal constitutional rights.⁵⁹ During the 1960s and 1970s, the Supreme Court allowed a broad range of suits pursuant to § 1983 and declared that courts should construe § 1983 "generously" to advance its broad

53. See *Thiboutot*, 448 U.S. at 16 (Powell, J., dissenting) ("[T]he legislative history unmistakably shows that the variations in phrasing introduced in the 1874 revision were inadvertent . . ."); Key, *supra* note 45, at 307-08 (discussing "No Modification Theory" interpretation of "and laws" in § 1983); Mank, *The Future After Gonzaga*, *supra* note 1, at 1427 (same); Mank, *Using § 1983*, *supra* note 1, at 328 (same).

54. Key, *supra* note 45, at 308-13 (discussing and supporting "Plain Language Theory" interpretation of "and laws" in § 1983); Mank, *The Future After Gonzaga*, *supra* note 1, at 1427-28; Mank, *Using § 1983*, *supra* note 1, at 328, 339-52 (discussing whether the phrase "and laws" in § 1983 allows enforcement of valid federal regulations); Sunstein, *supra* note 49, at 398-409 (supporting "plain language" interpretation that "and laws" in § 1983 applies to all violations of federal law).

55. See MICHAEL G. COLLINS, SECTION 1983 LITIGATION IN A NUTSHELL 5 (1997) (stating that some authorities estimate fewer than two dozen § 1983 cases from 1870s until 1920s); Samberg-Champion, *supra* note 45, at 1842 (stating the same proposition and also stating that § 1983 was infrequently used until 1960s).

56. See Davant, *supra* note 1, at 617-19; Samberg-Champion, *supra* note 45, at 1841-43 (stating that federal courts interpreted § 1983 narrowly until 1960s).

57. For instance, in *Holt v. Indiana Manufacturing Co.*, 176 U.S. 68 (1900), the Supreme Court concluded that federal jurisdiction was generally limited to constitutional and civil rights claims and suggested in dicta that "and laws" in § 1983 was limited to civil rights laws. See *id.* at 72-73; Key, *supra* note 45, at 314 ("Following *Holt* [in 1900], the Supreme Court was silent on the question of the proper interpretation of the 'and laws' language for several decades."); Mank, *Using § 1983*, *supra* note 1, at 328 (observing that almost all pre-1980 § 1983 suits raised constitutional claims); Pettys, *supra* note 1, at 52 (same); Samberg-Champion, *supra* note 45, at 1841-42 (stating that federal courts narrowly interpreted § 1983 until 1960s).

58. 365 U.S. 167, 183-87 (1961), *overruled by* *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

59. *Id.*; see also Davant, *supra* note 1, at 619; Samberg-Champion, *supra* note 45, at 1842.

remedial goals.⁶⁰ During the 1960s and 1970s, a few Supreme Court decisions suggested that a § 1983 suit might be based on a statutory right violation, but none of these cases clearly resolved the question because they focused on constitutional claims.⁶¹

By the late 1970s, more plaintiffs began filing § 1983 suits alleging statutory violations because the underlying substantive statutes did not contain an explicit private right of action.⁶² From 1964 until the late 1970s, the Supreme Court and lower courts had liberally construed implied private rights of action that allowed plaintiffs to file statutory suits even if a statute did not contain an explicit remedy for individual suits; often, such statutes only explicitly allowed, for instance, suits by federal administrative agencies.⁶³ By the late 1970s, however, the Supreme Court began restricting implied private right of action suits by demanding that plaintiffs demonstrate that Congress intended to allow suits by private plaintiffs.⁶⁴ It was most

60. See, e.g., *Gomez v. Toledo*, 446 U.S. 635, 639 (1980) (“As remedial legislation, § 1983 is to be construed generously to further its primary purpose.”); *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 700-01 (1978) (stating that § 1983 was “intended to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights”); Recent Case, *supra* note 1, at 742; *infra* notes 62-63 and accompanying text.

61. See, e.g., *Edelman v. Jordan*, 415 U.S. 651, 675 (1974) (stating in dicta that “[i]t is, of course, true that *Rosado v. Wyman*, 397 U.S. 397 (1970), held that suits in federal court under § 1983 are proper to secure compliance with the provisions of the Social Security Act on the part of participating States.”); *City of Greenwood v. Peacock*, 384 U.S. 808, 829-30 (1966) (citing *Monroe* and stating in dicta that an individual has cause of action under § 1983 “not only for violations of rights conferred by federal equal civil rights laws, but for violations of other federal constitutional and statutory rights as well”); *Davant*, *supra* note 1, at 619 (observing that “the Court in the 1970s began to assume, without discussion, that plaintiffs could use § 1983 to enforce provisions of the Social Security Act”); *Key*, *supra* note 45, at 313-18; *Mank, The Future After Gonzaga*, *supra* note 1, at 1428; *Mank, Using § 1983*, *supra* note 1, at 328 & n.48.

62. See *Samberg-Champion*, *supra* note 45, at 1842-43.

63. See, e.g., *Rosado v. Wyman*, 397 U.S. 397 (1970) (implying a private right of action in Social Security Act of 1935, as amended in 1967); *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969) (implying a private right of action in Voting Rights Act of 1965); *Wyandotte Transp. Co. v. United States*, 389 U.S. 191 (1967) (implying a private right of action in the Rivers and Harbors Act of 1899); *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964) (implying a private right of action in the Securities Exchange Act of 1934); *Key*, *supra* note 45, at 294 (describing the effect of *Borak* on private rights of action); *Bradford C. Mank, Is There a Private Cause of Action Under EPA’s Title VI Regulations?: The Need to Empower Environmental Justice Plaintiffs*, 24 COLUM. J. ENVTL. L. 1, 25-27 (1999) [hereinafter *Mank, Private Right*] (demonstrating that the Supreme Court or lower courts from 1964 until late 1970s often found implied private rights of action in federal statutes); *Mank, The Future After Gonzaga*, *supra* note 1, at 1423; *Michael A. Mazzuchi, Note, Section 1983 and Implied Rights of Action: Rights, Remedies, and Realism*, 90 MICH. L. REV. 1062, 1073-74 (1992) (observing that between 1964 and 1975 the Supreme Court took an expansive approach to private rights of action). *But see Susan J. Stabile, The Role of Congressional Intent in Determining the Existence of Implied Private Rights of Action*, 71 NOTRE DAME L. REV. 861, 866-67 & nn.32, 34 (1996) (arguing that courts were reluctant before 1975 to imply private rights of action, except perhaps in securities area).

64. See *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15-16 (1979) (“[W]hat must ultimately be determined is whether Congress intended to create the private remedy asserted”); *id.* at 19, 23-24; *Touche Ross & Co. v. Redington*, 442 U.S.

likely because of new restrictions on implied right of action suits that plaintiffs instead began filing § 1983 suits for alleged statutory violations.⁶⁵

B. Statutory § 1983 Suits: *Thiboutot*

It was not until 1980, when the Supreme Court held, for the first time, in *Maine v. Thiboutot*,⁶⁶ that the term "and laws" in § 1983 included a broad range of federal statutory violations.⁶⁷ After finding the statute's legislative history inconclusive, the Court broadly interpreted the plain meaning of the term "laws" in § 1983 to include all federal laws, rather than just the Constitution and civil rights statutes.⁶⁸ Thus, the Court held that plaintiffs may use § 1983 to enforce both constitutional and federal statutory rights, but it did not specifically address whether regulations are enforceable.⁶⁹

In his dissenting opinion, Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, contended that § 1983's legislative history demonstrated that Congress intended the phrase "and laws" to apply only to equal rights statutes.⁷⁰ Additionally, Powell main-

560, 578 (1979) ("The ultimate question is one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law."); *Davis v. Passman*, 442 U.S. 228, 241 (1979) (noting that *Cort* states the "criteria through which [congressional] intent could be discerned"); *Cort v. Ash*, 422 U.S. 66, 78 (1975) (imposing four-part test for deciding whether to imply a private right of action, with congressional intent being one factor). See generally Key, *supra* note 45, at 294-96 (explaining the evolution of the Court's private right of action jurisprudence); Mank, *The Future After Gonzaga*, *supra* note 1, at 1423-25; Mank, *Private Right*, *supra* note 63, at 31-32, 44-46 (arguing that the Supreme Court in 1979 made congressional intent the main factor in determining whether to imply private right of action); Stabile, *supra* note 63, at 868-71 (arguing that the Supreme Court beginning in 1979 began shifting away from four-factor *Cort* test to "an exclusive reliance on legislative intent").

65. Samberg-Champion, *supra* note 45, at 1842-43.

66. 448 U.S. 1 (1980).

67. *Id.* at 4-8; see also Mank, *The Future After Gonzaga*, *supra* note 1, at 1430 (discussing *Thiboutot's* "plain meaning" interpretation of "and laws" in § 1983); Mank, *Using § 1983*, *supra* note 1, at 330 (same); Pettys, *supra* note 1, at 52 (same).

68. See *Thiboutot*, 448 U.S. at 4-8 (rejecting the argument that "the phrase 'and laws' should be read as limited to civil rights or equal protection laws"); Mank, *The Future After Gonzaga*, *supra* note 1, at 1430 (explaining that the *Thiboutot* decision concluded that "and laws" in § 1983 refers to federal statutory rights in general and not just civil rights laws); Mank, *Using § 1983*, *supra* note 1, at 330 (same); Pettys, *supra* note 1, at 67 (same); Recent Case, *supra* note 1, at 742 (same); *infra* notes 69-77 and accompanying text.

69. *Thiboutot*, 448 U.S. at 4-8; Mank, *Using § 1983*, *supra* note 1, at 330 (explaining that the *Thiboutot* decision concluded that "and laws" in § 1983 refers to most federal statutory rights, as well as constitutional rights); Pettys, *supra* note 1, at 67 (same).

70. *Thiboutot*, 448 U.S. at 14-22 & 19 n.6 (Powell, J., dissenting) (contending that the legislative history of the phrase "and laws" supports limiting it to civil rights laws); see also *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 623-37 (1979) (Powell, J., concurring) (arguing that the legislative history of § 1983 demonstrates that the phrase "and laws" refers only to civil rights legislation and not federal statutes in general); Mank, *The Future After Gonzaga*, *supra* note 1, at 1429-30 (discussing Justice Powell's interpretation in *Thiboutot* and *Chapman* that the "and laws" language in § 1983 refers only to civil

tained that the majority's decision did not consider the financial impacts on state and local officials resulting from broad § 1983 liability for violations of federal grant-in-aid programs that now funded numerous state programs, often referred to as Spending Clause legislation.⁷¹ During the 1960s, the federal government rapidly expanded Spending Clause programs that provided money to state agencies to provide welfare benefits to individuals, but in exchange it also imposed numerous requirements on states to provide a minimum level of care for beneficiaries.⁷² Because the growth of these programs led to an increasing number of beneficiaries and various social movements during the 1960s and 1970s, poor people became more willing to challenge the government⁷³ and many beneficiaries began filing suits against states.⁷⁴ Notably, the *Thiboutot* decision allowed a recipient of Aid to Families with Dependent Children to use § 1983 to sue a state for allegedly violating federal welfare policy.⁷⁵ Because suits against state and local programs would give federal courts "unprecedented authority to oversee state actions," Justice Powell argued that the majority's broad reading of § 1983 jurisdiction "creates a major new intrusion into state sovereignty under our federal system."⁷⁶ The fear that § 1983 suits often intrude on state governments and thus interfere with federalist concerns likely explains recent decisions, such as *Sandoval* and *Gonzaga*, that have restricted such suits.⁷⁷

rights legislation); Mank, *Using § 1983*, *supra* note 1, at 329-30 (same); Pettys, *supra* note 1, at 52, 67-68 (same).

71. *Thiboutot*, 448 U.S. at 22-37 (Powell, J., dissenting); see also Key, *supra* note 45, at 323-24 (discussing Justice Powell's concerns in *Thiboutot* about the majority decision's financial impact on state and local governments); Mank, *The Future After Gonzaga*, *supra* note 1, at 1429-31 (same); Mank, *Using § 1983*, *supra* note 1, at 329-30 (same); Pettys, *supra* note 1, at 67-68 (discussing Justice Powell's *Thiboutot* opinion).

72. See Key, *supra* note 45, at 313-18; Mank, *The Future After Gonzaga*, *supra* note 1, at 1428; Edward A. Tomlinson & Jerry L. Mashaw, *The Enforcement of Federal Standards in Grant-in-Aid Programs: Suggestions for Beneficiary Involvement*, 58 VA. L. REV. 600, 619-23 (1972) (discussing frequent state failures to comply with federal grant-in-aid requirements and reasons for "less than total success").

73. See Key, *supra* note 45, at 314; Mank, *The Future After Gonzaga*, *supra* note 1, at 1428; Tomlinson & Mashaw, *supra* note 72, at 600 (stating that federal outlays for aid programs increased tenfold from 1951 until 1971, from \$2.4 billion to \$27.6 billion); Samberg-Champion, *supra* note 45, at 1843 n.27 (explaining growth in federal aid programs to states as one factor in increased § 1983 suits by individuals against states).

74. See Key, *supra* note 45, at 314; Mank, *The Future After Gonzaga*, *supra* note 1, at 1428; Samberg-Champion, *supra* note 45, at 1843 n.27.

75. 448 U.S. at 3.

76. *Id.*; see also Key, *supra* note 45, at 323-24 (discussing Justice Powell's concerns in *Thiboutot* about the majority decision giving federal courts too great a role in supervising state and local governments); Mank, *The Future After Gonzaga*, *supra* note 1, at 1429-31 (same); Mank, *Using § 1983*, *supra* note 1, at 329-30 (same).

77. See Galle, *supra* note 1, at 166, 170, 192-93 (suggesting the Supreme Court has read rights enforceable through § 1983 narrowly because of federalism concerns, but arguing that § 1983 suits are compatible with federalism); Mank, *The Future After Gonzaga*,

C. *The Standard for § 1983 Statutory Suits*

Since the *Thiboutot* decision, a series of Supreme Court cases has established standards for when a plaintiff may bring a § 1983 suit to enforce federal statutory rights.⁷⁸ To understand how the Supreme Court has defined rights in § 1983 cases, it is helpful to first examine how the Court has defined them in private right of action cases. In *Cort v. Ash*,⁷⁹ a case involving an implied right of action and not a § 1983 suit, the Court stated that the existence of a federal substantive right depended upon whether the person claiming the right was "one of the class for whose *especial* benefit the statute was enacted."⁸⁰ The Court considered the question whether a statute created a "federal right" to be the first step in its four-step analysis of whether a statute created a private right of action.⁸¹ Subsequently, in his dissenting opinion in *Wilder v. Virginia Hospital Ass'n*,⁸² Chief Justice Rehnquist maintained that in § 1983 suits, the Court should use the same analysis of "federal rights" as it had in the *Cort* decision.⁸³ In *California v. Sierra Club*,⁸⁴ another private right of action case, the Court explained that a "general ban . . . designed to benefit the public at large" did not create individual federal rights but that a provision "created for the especial benefit of a particular class" does create enforceable rights.⁸⁵

Under *Cort's* especial-benefit-of-a-particular-class test, a large number of regulations arguably could create individual federal rights because numerous "regulations are promulgated for the especial benefit of a particular class of persons."⁸⁶ For example, Congress and agencies intended Title VI regulations to especially benefit racial and ethnic minorities,⁸⁷ and they intended Title IX regulations to provide

supra note 1, at 1429-31 (same); Samberg-Champion, *supra* note 45, at 1841-42 ("Section 1983 jurisprudence has always been driven more by judicial policy decisions about federal courts' proper role in policing states than by pure statutory interpretation . . .").

78. See, e.g., *Blessing v. Freestone*, 520 U.S. 329, 340-41 (1997); *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 520-21 (1990); *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 106-07 (1989); Mank, *The Future After Gonzaga*, *supra* note 1, at 1436-45 (discussing Supreme Court's evolving § 1983 jurisprudence prior to *Gonzaga*).

79. 422 U.S. 66 (1975).

80. *Id.* at 78 (quoting *Tex. & Pac. Ry. Co. v. Rigsby*, 241 U.S. 33, 39 (1916)) (internal quotation marks omitted).

81. *Id.*

82. 496 U.S. 498 (1990).

83. See *id.* at 525-26 (Rehnquist, C.J., dissenting); see also Davant, *supra* note 1, at 631 & n.114.

84. 451 U.S. 287 (1981).

85. *Id.* at 294-95; see also Davant, *supra* note 1, at 631 (quoting *Sierra Club*, 451 U.S. at 294-95).

86. Davant, *supra* note 1, at 631-32 (listing examples).

87. *Id.* Section 601 of Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving

special benefits for women.⁸⁸ However, the *Sandoval* decision has restricted private right of action suits by requiring plaintiffs to demonstrate that Congress intended to allow such suits.⁸⁹

Influenced by its approach in implied right of action cases, the Court eventually began to define enforceable rights under § 1983 as mandatory obligations to provide specific benefits to a special class of persons.⁹⁰ In determining whether a plaintiff may enforce a federal statute by filing suit under § 1983, a court initially assessed whether a plaintiff's complaint alleges the violation of specific, not merely precatory, "federal right[s]" in a statute, whether the statute indicates that those specific rights are intended for the benefit of individuals including the plaintiff, and whether those rights are capable of judicial enforcement.⁹¹ To determine whether a federal statute establishes specific and individually enforceable federal rights, the Supreme Court in *Blessing v. Freestone* used a three-part test:

First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so "vague and amorphous" that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms.⁹²

Federal financial assistance." Civil Rights Act of 1964, Pub. L. No. 88-352, § 601, 78 Stat. 252 (codified at 42 U.S.C. § 2000d (2000)). Section 602 of Title VI states in part:

Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity . . . is authorized and directed to effectuate the provisions of section [601] with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.

42 U.S.C. § 2000d-1; see also Davant, *supra* note 1, at 631; Bradford C. Mank, *Title VI, in THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS 23-25* (Michael B. Gerrard ed., 1999); James H. Colopy, Note, *The Road Less Traveled: Pursuing Environmental Justice Through Title VI of the Civil Rights Act of 1964*, 13 STAN. ENVTL. L.J. 125, 152-55 (1994).

88. Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." Pub. L. No. 92-318, § 901, 86 Stat. 373 (1972) (codified at 20 U.S.C. § 1681a (2000)); Davant, *supra* note 1, at 631-32; Black, *supra* note 1, at 377 n.148; see also H.R. REP. NO. 92-554, at 51-52 (1971) (discussing types of discriminatory practices against women that Congress intended Title IX to redress).

89. See *infra* Part V.A.

90. See *infra* notes 91-95 and accompanying text.

91. *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 106-07 (1989); Mank, *The Future After Gonzaga*, *supra* note 1, at 1436; Mank, *Using § 1983*, *supra* note 1, at 332-33; Pettys, *supra* note 1, at 68-69.

92. *Blessing v. Freestone*, 520 U.S. 329, 340-41 (1997) (citations omitted); see Mank, *Using § 1983*, *supra* note 1, at 332-33.

The *Blessing* three-part test is somewhat narrower than the original *Cort* test.⁹³ “[A] right exists when the language of a law requires the government to provide an unambiguous benefit to a particular person.”⁹⁴ If a federal statutory right meets the three-part test, there is a strong rebuttable presumption that a plaintiff may use § 1983 to enforce that right.⁹⁵

Even when the plaintiff had asserted a federal right, however, the Supreme Court, in *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*,⁹⁶ created an exception to *Thiboutot* by holding that a § 1983 suit based on a statutory right may not proceed if a defendant shows that Congress intentionally denied a remedy under § 1983, either expressly or impliedly, by providing a thorough enforcement scheme for the purpose of protecting a federal right.⁹⁷ The *Sea Clammers* Court rejected the plaintiff's § 1983 suit because the two federal environmental statutes at issue, the Federal Water Pollution Control Act⁹⁸ and the Marine Protection, Research, and Sanctuaries Act,⁹⁹ contained “unusually elaborate” enforcement mechanisms that authorized private citizens to bring injunctive actions after giving sixty days notice to the United States Environmental Protection Agency, the state, and the alleged violator.¹⁰⁰ Subsequent decisions have limited the *Sea Clammers* exception to statutory § 1983 suits by clarifying that a defendant bears a heavy burden of proof to establish that a statute's remedy and enforcement scheme are so comprehensive that a court must presume that Congress did not intend to allow a separate remedy in a § 1983 suit. In *Livadas v. Bradshaw*, the Court declared that “apart from [some] exceptional cases, § 1983 re-

93. Davant, *supra* note 1, at 632; Mank, *Using § 1983*, *supra* note 1, at 332-33.

94. Davant, *supra* note 1, at 632.

95. *Blessing*, 520 U.S. at 341; *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 520 (1990) (explaining that courts “do not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy for the deprivation of a federally secured right”) (quoting *Wright v. City of Roanoke Redevelopment & Hous. Auth.*, 497 U.S. 418, 423-24 (1987) (citations and internal quotation marks omitted)); Mank, *The Future After Gonzaga*, *supra* note 1, at 1436; Mank, *Using § 1983*, *supra* note 1, at 334.

96. 453 U.S. 1 (1981).

97. *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 106 (1989); *Sea Clammers*, 453 U.S. at 20; Mank, *The Future After Gonzaga*, *supra* note 1, at 1437-38; Mank, *Using § 1983*, *supra* note 1, at 334-36.

98. Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified at 33 U.S.C. §§ 1251-1387 (2000)).

99. Pub. L. No. 92-532, 86 Stat. 1052 (1972) (codified as amended at 33 U.S.C. §§ 1401-45 (2000)).

100. *Sea Clammers*, 453 U.S. at 13; see also Mank, *The Future After Gonzaga*, *supra* note 1, at 1437-38 (discussing *Sea Clammers*); Mank, *Using § 1983*, *supra* note 1, at 335 (same); Lisa L. Frye, Note, *Suter v. Artist M. and Statutory Remedies Under Section 1983: Alteration Without Justification*, 71 N.C. L. REV. 1171, 1181-82 (1993) (same); Michael A. Zwibelman, Comment, *Why Title IX Does Not Preclude Section 1983 Claims*, 65 U. CHI. L. REV. 1465, 1468 n.18 (1998) (same).

mains a generally and presumptively available remedy for claimed violations of federal law."¹⁰¹

All three prongs of the *Blessing* test imply that any right at issue must ultimately derive from congressional intent as expressed in a statute. The *Blessing* standard does not specifically address the role that regulations may play in defining statutory rights. Two important issues were left unresolved: (1) how explicitly must a statute create a right and (2) to what extent may a regulation help to define an implicit statutory right so that it is enforceable under § 1983? Part V.B examines whether the Court's *Gonzaga* decision has clarified these issues.¹⁰²

III. THE SPLIT IN THE CIRCUITS OVER WHETHER FEDERAL REGULATORY RIGHTS ARE ENFORCEABLE UNDER § 1983

A key issue is whether the term "and laws" in § 1983 includes not only federal statutory rights but also "rights" contained in federal agency regulations. In his 1983 *Guardians* dissent, Justice Stevens argued that *Thiboutot's* holding that "and laws" includes federal statutory rights "applies equally to administrative regulations having the force of law."¹⁰³ When he used the term "regulations having the force of law," Justice Stevens was most probably referring to his majority opinion in *Chrysler Corp. v. Brown*, a 1979 decision that did not involve § 1983.¹⁰⁴ In summary, the *Chrysler* Court held that

regulations may have "the force and effect of law" if: (1) they are substantive rules affecting individual rights and obligations, and not merely interpretive rules or general policy statements; (2) Congress has granted "quasi-legislative" power to the agency; and (3) the agency has complied with applicable procedures such as the Administrative Procedure Act.¹⁰⁵

If regulations can ever create rights enforceable under § 1983, regulations would have to meet these three requirements.¹⁰⁶ Unfortu-

101. 512 U.S. 107, 133 (1994); Mank, *Using § 1983*, *supra* note 1, at 334.

102. See *infra* notes 234-54 and accompanying text.

103. *Guardians Ass'n v. Civil Serv. Comm'n of New York*, 463 U.S. 582, 638 n.6 (1983) (Stevens, J., dissenting).

104. 441 U.S. 281 (1979); Mank, *Using § 1983*, *supra* note 1, at 341 (discussing Justice Stevens's reference in *Guardians* to regulations having "force of law" as referring to his earlier *Chrysler* decision); Pettys, *supra* note 1, at 72 (same).

105. Mank, *Using § 1983*, *supra* note 1, at 341 (discussing *Chrysler*, 441 U.S. at 301-04, 308, 312-15 (quoting 5 U.S.C. §§ 553(b), (d))); Pettys, *supra* note 1, at 72 (same); see also Administrative Procedure Act, 5 U.S.C. §§ 551-59 (2000).

106. See *Samuels v. District of Columbia*, 770 F.2d 184, 199 (D.C. Cir. 1985) ("At least where Congress directs regulatory action, we believe that the substantive federal regulations issued under Congress' mandate constitute 'laws' within the meaning of section 1983."); Mank, *Using § 1983*, *supra* note 1, at 347-48 (discussing District of Columbia Circuit's analysis in *Samuels* that regulations having force of law are enforceable under § 1983).

nately, the Court has never directly addressed whether Justice Stevens's analysis, that regulations having the force of law may establish rights enforceable through § 1983, is correct.¹⁰⁷

A. *Wright v. City of Roanoke Redevelopment and Housing Authority*

In *Wright v. City of Roanoke Redevelopment and Housing Authority*,¹⁰⁸ the Supreme Court considered both specific Department of Housing and Urban Redevelopment (HUD) regulations¹⁰⁹ and more general statutory language in holding that low-income tenants in a municipal housing project could bring a § 1983 action against Roanoke's public housing authority.¹¹⁰ The plaintiffs contended that the city's housing authority violated the Brooke Amendment to the Housing Act of 1937,¹¹¹ which set "a maximum percentage of income that public housing tenants should pay as rent."¹¹² The plaintiffs argued that the Roanoke Housing Authority violated the Brooke Amendment by failing to include a reasonable amount for utility use in determining a tenant's rent, despite relevant HUD regulations defining the statutory term "rent" to include reasonable utility payments.¹¹³ Justice White's majority opinion, which was joined by Justices Brennan, Marshall, Blackmun, and Stevens, agreed with the plaintiffs that courts should defer to HUD's interpretation of the definition of rent in the statute.¹¹⁴ The Court stated that the Brooke Amendment and relevant HUD regulations established enforceable rights under § 1983:

[R]espondent asserts that neither the Brooke Amendment nor the interim regulations gave the tenants any specific or definable rights to utilities, that is, no enforceable rights within the meaning of § 1983. We perceive little substance in this claim. The Brooke Amendment could not be clearer: as further amended in 1981, tenants could be charged as rent no more and no less than 30 percent of their income. This was a mandatory limitation focusing on the

107. See *Save Our Valley v. Sound Transit*, 335 F.3d 932, 936-37 (9th Cir. 2003); Davant, *supra* note 1, at 613, 628.

108. 479 U.S. 418 (1987).

109. *Id.* at 419, 420 & n.3, 421 & n.4, 422.

110. See *id.* at 431-32; Mank, *The Future After Gonzaga*, *supra* note 1, at 1462-65 (discussing *Wright*); Mank, *Using § 1983*, *supra* note 1, at 342-43 (same); Spital, *supra* note 1, at 115-16 (same).

111. *Wright*, 479 U.S. at 419-21 & 420 n.2 (citing 42 U.S.C. § 1437a (1982 & Supp. III)).

112. *Id.* at 419-22; Mank, *The Future After Gonzaga*, *supra* note 1, at 1462-65 (discussing *Wright*); Mank, *Using § 1983*, *supra* note 1, at 342-43 (same); Spital, *supra* note 1, at 115-16 (same).

113. *Wright*, 479 U.S. at 419-22; Mank, *The Future After Gonzaga*, *supra* note 1, at 1462 (discussing *Wright*); Mank, *Using § 1983*, *supra* note 1, at 342-43 (same); Spital, *supra* note 1, at 115-16 (same).

114. *Wright*, 479 U.S. at 429-32; Mank, *The Future After Gonzaga*, *supra* note 1, at 1462 (discussing *Wright*); Mank, *Using § 1983*, *supra* note 1, at 342-43 (same); Spital, *supra* note 1, at 115-16 (same).

individual family and its income. The intent to benefit tenants is undeniable. Nor is there any question that HUD interim regulations . . . expressly required that a "reasonable" amount for utilities be included in rent that a PHA was allowed to charge, an interpretation to which HUD has adhered both before and after the adoption of the Brooke Amendment. HUD's view is entitled to deference as a valid interpretation of the statute, and Congress in the course of amending that provision has not disagreed with it.¹¹⁵

It is not clear whether the Court used the HUD regulations to just interpret the statutory language in the Brooke Amendment or relied on the regulations as providing additional rights beyond the statutory rights.¹¹⁶ To some extent, the Court may have viewed the regulations as helping to explicate the statutory rights Congress intended to provide to tenants such as the plaintiffs. The Court stated:

The regulations . . . defining the statutory concept of "rent" as including utilities, have the force of law In our view, the benefits Congress intended to confer on tenants are sufficiently specific and definite to qualify as enforceable rights under *Pennhurst* and § 1983, rights that are not, as respondent suggests, beyond the competence of the judiciary to enforce.¹¹⁷

Additionally, in a footnote, the majority arguably implied that regulations alone may create rights enforceable through § 1983 provided that the governing statute delegates broad authority to the implementing agency to define rights implicit in the statute: "The dissent may have a different view, but to us it is 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."¹¹⁸

115. *Wright*, 479 U.S. at 429-30.

116. Compare Mank, *The Future After Gonzaga*, *supra* note 1, at 1462-63 (stating that "the Court's opinion did not clearly explain whether the HUD regulations simply defined a right already implicit in the statute's definition of 'rent,' or whether the regulations alone created rights enforceable though [sic] § 1983"), and Mank, *Using § 1983*, *supra* note 1, at 343-44 ("It is not clear whether the majority simply deferred to the HUD regulation as a reasonable interpretation of the statutory phrase 'rent' or held that the regulations themselves may establish a private cause of action under § 1983."), with Spital, *supra* note 1, at 115-16 & n.157 (suggesting that *Wright* primarily relied on congressional intent and the statutes in defining rights of tenants, although considering regulations to help understand congressional intent).

117. *Wright*, 479 U.S. at 431-32 (citation omitted); Mank, *The Future After Gonzaga*, *supra* note 1, at 1462-63 (discussing *Wright*); Spital, *supra* note 1, at 115-16 & n.157 (suggesting that *Wright* used regulations to interpret congressional intent in statute).

118. *Wright*, 479 U.S. at 421 n.3; Mank, *The Future After Gonzaga*, *supra* note 1, at 1462-63 (suggesting that the footnote in *Wright* may have relied on regulations to create rights greater than those in the statute). *But see* Spital, *supra* note 1, at 115-16 & n.157 (suggesting that *Wright* used regulations to interpret congressional intent in the statute and not to create additional rights).

Justice O'Connor's dissenting opinion in *Wright*, which was joined by Chief Justice Rehnquist and Justices Powell and Scalia, argued that regulations alone may not establish enforceable rights under § 1983 because only Congress, in a statute, may create such an individual right.¹¹⁹ She observed that the majority's opinion did not clearly articulate whether the HUD regulations created a right implicit in the statutory definition of "rent" or whether the regulations' definition of rent, which included utilities, by itself established a right enforceable by the plaintiffs under § 1983.¹²⁰ While she disagreed with the majority view that either the statute or regulations at issue created a clear right in favor of tenants, O'Connor was most concerned with the majority's implication that regulations might establish rights enforceable under § 1983 despite the absence of any evidence in the statute that Congress intended to create an individual right on behalf of the tenants. She contended that in § 1983 cases, courts should make the same initial inquiry as they do in implied private right of action cases—that is, to determine whether Congress intended to establish an individual right in favor of a class including the plaintiff—because "[w]hether a federal statute confers substantive rights is not an issue unique to § 1983 actions. In implied right of action cases, the Court also has asked . . . whether 'the statute create[s] a federal right in favor of the plaintiff.'"¹²¹ Her emphasis in *Wright* on the need for evidence that Congress intended to create an individual right before it could be enforced under § 1983 anticipated the *Gonzaga* decision's standard.¹²² She also argued that the congressional intent analysis in implied private right of action cases was also the "key to the inquiry" in applying the *Sea Clammers* test for deciding whether a statute's remedial scheme is so comprehensive that it precludes an action under § 1983.¹²³ Even assuming *arguendo* that the HUD regulations in the case established definite rights in favor of the plaintiffs,¹²⁴ she contended that these rights were not en-

119. *Wright*, 479 U.S. at 432-33, 437-38, 441 (O'Connor, J., dissenting); Key, *supra* note 45, at 331; Mank, *The Future After Gonzaga*, *supra* note 1, at 1463-64; Mank, *Using § 1983*, *supra* note 1, at 344.

120. See *Wright*, 479 U.S. at 437-38 (O'Connor, J., dissenting); Mank, *The Future After Gonzaga*, *supra* note 1, at 1462-63; Mank, *Using § 1983*, *supra* note 1, at 343-44; Pettys, *supra* note 1, at 74-75.

121. See *Wright*, 479 U.S. at 432-33 (O'Connor, J., dissenting) (quoting *Cort v. Ash*, 422 U.S. 66, 78 (1975)); Mank, *The Future After Gonzaga*, *supra* note 1, at 1463; see also Mank, *Using § 1983*, *supra* note 1, at 344. But see Key, *supra* note 45, at 332-33 (arguing that Justice O'Connor incorrectly relied on implied right of action cases because "§ 1983 itself explicitly authorizes private causes of action").

122. See Mank, *The Future After Gonzaga*, *supra* note 1, at 1463.

123. See *Wright*, 479 U.S. at 432-33 (O'Connor, J., dissenting) (quoting *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 13 (1981)); Mank, *The Future After Gonzaga*, *supra* note 1, at 1463; Mank, *Using § 1983*, *supra* note 1, at 344.

124. Justice O'Connor contended, however, that the HUD regulations at issue were too ambiguous in defining the crucial term "reasonable" rent to create valid tenant rights suit-

forceable under § 1983 because the Brooke Amendment did not demonstrate that “Congress intended to create a statutory entitlement to reasonable utilities.”¹²⁵ Justice O’Connor stated:

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. . . . Such a result, where determination of § 1983 “rights” has been unleashed from any connection to congressional intent, is troubling indeed.¹²⁶

Subsequent Supreme Court decisions have not elucidated whether or when regulations may establish or help define individual rights enforceable through § 1983.¹²⁷ In *Wilder v. Virginia Hospital Ass’n*,¹²⁸ the Supreme Court considered implementing regulations and concluded that a statutory mandate requiring states to adopt “reasonable and adequate” reimbursement procedures for Medicaid costs was sufficiently clear to be enforceable by beneficiaries against states.¹²⁹ The Court stated: “As in *Wright*, the statute and regulation set out factors which a State must consider in adopting its rates.”¹³⁰ The *Wilder* decision did not explain whether the right at issue in the case was created by the statute alone or the regulations as well.¹³¹ However, the *Wilder* decision appeared to ground the right primarily in the statutory language and to consider the regulations only as a secondary factor.¹³² In *Suter v. Artist M.*,¹³³ Chief Justice Rehnquist

able for judicial enforcement. See *Wright*, 479 U.S. at 438-40 (O’Connor, J., dissenting); Mank, *The Future After Gonzaga*, *supra* note 1, at 1463 n.317; Mank, *Using § 1983*, *supra* note 1, at 345 & n.178 (citing *Wright*); Pettys, *supra* note 1, at 75.

125. *Wright*, 479 U.S. at 434-37 (O’Connor, J., dissenting); Mank, *The Future After Gonzaga*, *supra* note 1, at 1463-64; Mank, *Using § 1983*, *supra* note 1, at 344.

126. *Wright*, 479 U.S. at 438 (O’Connor, J., dissenting).

127. Mank, *The Future After Gonzaga*, *supra* note 1, at 1464.

128. 496 U.S. 498 (1990).

129. *Id.* at 519; Mank, *The Future After Gonzaga*, *supra* note 1, at 1464.

130. *Wilder*, 496 U.S. at 519; Mank, *The Future After Gonzaga*, *supra* note 1, at 1464.

131. *Wilder*, 496 U.S. at 519; Mank, *The Future After Gonzaga*, *supra* note 1, at 1464.

132. *Wilder*, 496 U.S. at 519-21 (stating that the statute at issue “provides, if anything, more guidance than the provision at issue in *Wright*”); Pa. Pharmacists Ass’n v. Houstoun, 283 F.3d 531, 536-37 (3d Cir. 2002) (en banc) (concluding that the *Wilder* decision paid more attention to the statute than the regulations at issue); Mank, *Using § 1983*, *supra* note 1, at 346 & n.187 (arguing that because the *Wilder* Court relied so heavily on the statute, “*Wright* remains the Supreme Court’s most direct and important use of regulations to create enforceable rights under § 1983”); Mank, *The Future After Gonzaga*, *supra* note 1, at 1464 (same). *But cf.* *Suter v. Artist M.*, 503 U.S. 347, 357 (1992) (“The opinions in both *Wright* and *Wilder* took pains to analyze the statutory provisions in detail, in light of the entire legislative enactment”); Spital, *supra* note 1, at 115-16 & n.157 (suggesting that *Wright* primarily relied on congressional intent and the statutes in defining the rights of tenants, although considering regulations to help understand congressional intent).

133. 503 U.S. 347.

considered both the statute and the relevant Health and Human Services (HHS) regulations in determining whether they provided notice to the state that the plan it submitted to the federal agency, in order to receive federal funds, established enforceable rights on behalf of the beneficiaries.¹³⁴ The Court ultimately concluded that the regulations did not furnish clear notice to states that beneficiary parents could sue a state that did not comply with conditions in its plan, but the *Suter* decision did find the regulations to be relevant in determining the scope of the rights enforceable under § 1983.¹³⁵

B. *The Split in the Circuits Since Wright*

There has been controversy over the meaning of *Wright* and especially over whether the Supreme Court indicated that a regulation alone could be enforceable through § 1983. Lower courts have disagreed over whether *Wright* implied that a regulation alone could be enforceable through § 1983.¹³⁶ Based on a broad reading of *Thiboutot's* reference to "laws" and of *Wright's* use of HUD regulations to find a right to fair rent, both the Sixth and the District of Columbia Circuits have held that an agency regulation *can* create an individual federal right.¹³⁷ In 1985, before the Court decided *Wright*, the District of Columbia Circuit in *Samuels*, citing *Chrysler Corp. v. Brown*,¹³⁸ stated that valid federal regulations would create a right enforceable under § 1983, at least where the regulation was issued by the agency pursuant to an explicit congressional requirement:

While *Thiboutot* involved a statutory violation, the Court's broad analysis of the "laws" clause of section 1983 indicates that section 1983 provides a legal remedy for the violation of 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, *see, e.g., Chrysler*, 441 U.S. at 301-03 . . . and

134. *See id.* at 362-63; Mank, *The Future After Gonzaga*, *supra* note 1, at 1464-65.

135. *Suter*, 503 U.S. at 359-63 (analyzing both the statute and regulations in concluding that neither created specific and enforceable right on behalf of parents); Mank, *The Future After Gonzaga*, *supra* note 1, at 1443-44, 1464-65 (discussing *Suter*). *But cf.* Key, *supra* note 45, at 339-45 (critiquing the *Suter* Court's rationale).

136. *See Ceaser v. Pataki*, No. 98 CIV.8532 (LMM), 2002 WL 472271, at *2-*3 (S.D.N.Y. Mar. 26, 2002) (discussing disagreement by courts over whether *Wright* allows § 1983 claims based on regulations alone or only where "regulation is linked to the federal statutes [sic] authorizing it"); Mank, *Using § 1983*, *supra* note 1, at 342-46 (discussing conflicting interpretations of whether *Wright* allows regulation alone to establish right enforceable through § 1983); Bradford C. Mank, *South Camden Citizens in Action v. New Jersey Department of Environmental Protection: Will Section 1983 Save Title VI Disparate Impact Suits?*, 32 ENVTL. L. REP. 10454, 10475-76 (2002) [hereinafter Mank, *South Camden*] (same).

137. *See Loschiavo v. City of Dearborn*, 33 F.3d 548, 553 (6th Cir. 1994); *Samuels v. District of Columbia*, 770 F.2d 184, 199 (D.C. Cir. 1985).

138. 441 U.S. 281, 301-03 (1979).

Thiboutot expressly held that Congress did not intend to limit section 1983 to some subset of federal laws.¹³⁹

Citing *Wright*, the Sixth Circuit in *Loschiavo v. City of Dearborn* declared: "As federal regulations have the force of law, they likewise may create enforceable rights."¹⁴⁰ The Sixth Circuit's broad language arguably implied that any valid federal regulations alone may create rights that are enforceable under § 1983.¹⁴¹ The *Samuels* decision more carefully and appropriately suggested that an agency regulation may create rights only if Congress has delegated to the agency the authority to issue rules having the force of law. After *Sandoval* and *Gonzaga*, the Sixth Circuit's language is too broad, but the *Samuels* approach is still valid. Part VI.B demonstrates the validity of the *Samuels* approach by analyzing the First Circuit's decision in *Romney*.¹⁴²

The Fourth Circuit, the Eleventh Circuit, the Third Circuit, and now the Ninth Circuit have narrowly interpreted *Wright* as enforcing only statutory rights and relying on the HUD regulations only to interpret statutory rights.¹⁴³ According to these courts, *Wright* did not rely on the HUD regulations to create independent rights enforceable through § 1983.¹⁴⁴ For instance, in *Harris v. James*,¹⁴⁵ the Eleventh Circuit concluded "that the *Wright* majority did not hold that federal rights are created either by regulations 'alone' or by any valid administrative interpretation of a statute creating some enforceable

139. *Samuels*, 770 F.2d at 199 ("At least where Congress directs regulatory action, we believe that the substantive federal regulations issued under Congress' mandate constitute 'laws' within the meaning of section 1983."); see also *DeVargas v. Mason & Hanger-Silas Mason Co.*, 844 F.2d 714, 724 n.19 (10th Cir. 1988) (citing *Samuels* and stating in dicta that "[i]n at least some instances, violations of rights provided under federal regulations provide a basis for § 1983 suits"); Mank, *Using § 1983, supra* note 1, at 347-48 (discussing *Samuels*, *Chrysler Corp.*, and *De Vargas*). But see *S. Camden Citizens in Action v. N.J. Dep't of Env'tl. Prot.*, 274 F.3d 771, 783-85 (3d Cir. 2001) (arguing that prior cases, including *Samuels*, did not hold that regulations alone may create rights enforceable through § 1983). The Supreme Court first used the "force and effect of law" test in *Chrysler Corp.*, 441 U.S. at 301-03, to give greater deference to agency regulations that are issued pursuant to an explicit congressional mandate. Mank, *The Future After Gonzaga, supra* note 1, at 1460-61 & n.298.

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

141. *Id.* at 548; Mank, *The Future After Gonzaga, supra* note 1, at 1460 & n.297 (citing and discussing *Loschiavo*); Mank, *Using § 1983, supra* note 1, at 347 (same).

142. See *infra* notes 303-39 and accompanying text.

143. See *Save Our Valley v. Sound Transit*, 335 F.3d 932, 939-43 (9th Cir. 2003); *South Camden*, 274 F.3d at 783-90 (interpreting *Wright* as deciding that the regulation "merely defined the specific right that Congress already had conferred through the statute"); *Harris v. James*, 127 F.3d 993, 1008 (11th Cir. 1997); Mank, *The Future After Gonzaga, supra* note 1, at 1461; Mank, *Using § 1983, supra* note 1, at 348-53 (discussing *Harris*).

144. See *Save Our Valley*, 335 F.3d at 939-43; *South Camden*, 274 F.3d at 783-90; *Harris*, 127 F.3d at 1008; Mank, *The Future After Gonzaga, supra* note 1, at 1461; Mank, *Using § 1983, supra* note 1, at 348-53 (discussing *Harris*).

145. 127 F.3d 993 (11th Cir. 1997).

right.”¹⁴⁶ Courts concluding that regulations may not establish rights enforceable under § 1983 have usually argued that Congress alone has the constitutional legislative power to create individually enforceable rights through the constitutionally prescribed process of enacting statutes.¹⁴⁷ According to these courts, the key question is whether Congress intended to create an individual right in the statute.¹⁴⁸ For example, the Eleventh Circuit has stated that regulations may not independently establish rights under § 1983, but may only *further define* or *flesh out* rights established by Congress in the underlying statute.¹⁴⁹

Relying on Supreme Court decisions requiring congressional intent to create an implied right of action, the Eleventh Circuit, in *Harris*, determined that congressional intent was also crucial in determining whether a right was enforceable under § 1983:

In our view, the driving force behind the Supreme Court's case law in this area is a requirement that courts find a Congressional intent to create a particular federal right. . . . In light of this focus [on congressional intent], we reject the Sixth Circuit's approach—i.e., finding a “federal right” in any regulation that in its own right meets the three-prong “federal rights” test. For the same reason, we also reject the approach labeled “troubling” by the dissent in *Wright*—i.e., finding enforceable rights in any valid administrative interpretation of a statute that creates some enforceable right.¹⁵⁰

The Eleventh Circuit concluded that “federal rights must ultimately emanate from either explicit or implicit statutory requirements.”¹⁵¹ A regulation may serve as the basis of a § 1983 suit only if there is an appropriate “nexus” between the right in the regulation and congressional intent to establish an enforceable federal right in the statute that authorized the regulation. Similarly, the Third Circuit, in *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*,¹⁵² agreed with the *Harris* court that regulations alone may not establish enforceable rights and interpreted *Wright* as allowing plaintiffs to use § 1983 to enforce only those rights that Congress has explicitly included in a statute:

146. *Id.* at 1008.

147. *South Camden*, 274 F.3d at 783-90; *Harris*, 127 F.3d at 1007-08.

148. *South Camden*, 274 F.3d at 784 (“[T]he Supreme Court [has] refined its analysis to focus directly on Congress’ intent to create enforceable rights and to confine its holdings to the limits of that intent.”); *Harris*, 127 F.3d at 1008-09.

149. *Doe v. Chiles*, 136 F.3d 709, 717 (11th Cir. 1998); *Harris*, 127 F.3d at 1008-09; Mank, *The Future After Gonzaga*, *supra* note 1, at 1461; Mank, *Using § 1983*, *supra* note 1, at 348-53 (discussing *Doe* and *Harris*).

150. *Harris*, 127 F.3d at 1008 (citation omitted); Mank, *Using § 1983*, *supra* note 1, at 348-49.

151. *Harris*, 127 F.3d at 1009 n.21.

152. 274 F.3d 771 (3d Cir. 2001).

Clearly, therefore, 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, for the Court plainly stated that “the benefits Congress intended to confer on tenants are sufficiently specific and definite to qualify as enforceable rights under . . . § 1983, rights that are not, as respondent suggests, beyond the competence of the judiciary to enforce.” Therefore, the *Wright* Court located the alleged right in the statutory provision and then relied upon the implementing regulations to define and interpret that right.¹⁵³

Both *Harris* and *South Camden* applied an “unambiguous” evidence-of-congressional-intent standard similar to the one that the Supreme Court later adopted in *Gonzaga*.¹⁵⁴

IV. UNDER THE SEPARATION OF POWERS, CONGRESS HAS THE PRIMARY ROLE IN CREATING ENFORCEABLE INDIVIDUAL RIGHTS, BUT AGENCIES CAN PLAY SOME ROLE IN DEFINING THE DETAILS OF THESE RIGHTS

Davant contends that fundamental separation of powers principles give Congress the sole authority to create individual rights that are enforceable under § 1983.¹⁵⁵ Even if it has the ultimate legislative authority to establish individual rights, however, Congress may delegate some authority for defining such rights to administrative agencies.¹⁵⁶ If the delegation of legislative authority is sufficiently clear, agencies may play a role in defining a right generally but incompletely defined by Congress.¹⁵⁷

153. *Id.* at 783 (citations omitted).

154. See *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002) (“We now reject the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983.”); *id.* at 290 (“In sum, if Congress wishes to create new rights enforceable under § 1983, it must do so in clear and unambiguous terms—no less and no more than what is required for Congress to create new rights enforceable under an implied private right of action.”); *South Camden*, 274 F.3d at 786-87 (concluding that because the regulations at issue went “beyond explicating the specific content of the statutory provision,” they did not confer a “federal right’ enforceable under § 1983” because “[t]o hold otherwise would be inconsistent . . . with the Supreme Court’s directive that courts must find that Congress has *unambiguously* conferred federal rights on the plaintiff”); *Harris*, 127 F.3d at 1011-12 (stating that test for § 1983 suits was whether there was evidence in the statute that Congress had “unambiguously conferred” upon Medicaid recipients a federal right to transportation enforceable under § 1983); Mank, *The Future After Gonzaga*, *supra* note 1, at 1446, 1466 & nn.336-38 (discussing and criticizing unambiguous evidence standard for § 1983 suits); *infra* note 258 and accompanying text.

155. See Davant, *supra* note 1, at 615-16, 633-41, 645-48.

156. See *infra* notes 168-79, 182, 186-93 and accompanying text.

157. See *infra* notes 169-79, 186, 192-93, 197-98, 252 and accompanying text.

A. *The Primacy of the Legislative Role*

1. *The Separation of Powers*

In *INS v. Chadha*,¹⁵⁸ the Supreme Court articulated a fairly rigid demarcation of the powers of the three branches of government: "The Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility."¹⁵⁹ Although it recognized that the three branches are "not 'hermetically' sealed from one another," the *Chadha* Court concluded that "the powers delegated to the three Branches are functionally identifiable."¹⁶⁰ Subsequently, however, the Court has sometimes adopted a less rigid approach to the separation of powers and acknowledged some overlapping functions among the three branches, especially in *Mistretta v. United States*,¹⁶¹ which involved an unsuccessful challenge to the United States Sentencing Commission. The *Mistretta* Court held that Congress had not violated the separation of powers by placing the Sentencing Commission within the judicial branch, by delegating to the judicial branch nonadjudicatory rulemaking functions with the aim of helping Congress to establish determinate sentences, by requiring active Article III federal judges to serve as commissioners along with non-judges, or by giving the President the power to appoint all Commission members and remove them "for cause" because none of these functions interfered with core judicial functions and because sentencing involves shared functions within the three branches.¹⁶² The *Mistretta* decision recognized that there could be some overlapping of functions among the three branches as long as no single branch exercised control over another:

Madison recognized that our constitutional system imposes upon the Branches a degree of overlapping responsibility, a duty of interdependence as well as independence

. . . .

In adopting this flexible understanding of separation of powers, we simply have recognized Madison's teaching that the greatest security against tyranny—the accumulation of excessive authority in a single Branch—lies not in a hermetic division among the

158. 462 U.S. 919 (1983).

159. *Id.* at 951; see also *TVA v. Hill*, 437 U.S. 153, 194 (1978) ("Our system of government is . . . a tripartite one, with each branch having certain defined functions delegated to it by the Constitution.")

160. *Chadha*, 462 U.S. at 951.

161. 488 U.S. 361 (1989).

162. See *id.* at 383-412.

Branches, but in a carefully crafted system of checked and balanced power within each Branch.¹⁶³

The Constitution grants the legislative power only to Congress. Article I, Section 1 of the Constitution states that “[a]ll legislative Powers herein granted shall be vested in a Congress . . . which shall consist of a Senate and House of Representatives.”¹⁶⁴ In the steel seizure case, *Youngstown Sheet & Tube Co. v. Sawyer*, the Supreme Court interpreted the term “[a]ll legislative Powers” in Article I to indicate that “[t]he Founders of this Nation entrusted the lawmaking power to the Congress alone.”¹⁶⁵ In *TVA v. Hill*,¹⁶⁶ the Supreme Court concluded:

[I]t is . . . emphatically . . . the exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation. Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought.¹⁶⁷

2. Delegation

To understand the issue whether and when regulations may create rights enforceable under § 1983, one must understand the concept of legislative delegation of authority to executive agencies. To prevent the executive branch from arrogating the legislative function, the nondelegation doctrine, which is based on Article I, Section 7 and the Due Process Clause of the United States Constitution, prohibits Congress from delegating essential legislative decisions to the agencies.¹⁶⁸ However, courts have liberally construed the nondelegation doctrine to allow Congress to delegate authority to an agency as long as a statute delegating authority to an agency contains an “intelligible principle” that defines the scope of agency authority, including its power to issue regulations.¹⁶⁹ In *Mistretta*,¹⁷⁰ the Court upheld

163. *Id.* at 381.

164. U.S. CONST. art. I, § 1.

165. 343 U.S. 579, 588-89 (1952).

166. 437 U.S. 153 (1978).

167. *Id.* at 194.

168. See *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (“Article I, § 1, of the Constitution vests ‘[a]ll legislative Powers herein granted . . . in a Congress of the United States.’ This text permits no delegation of those powers”); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935) (“Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is . . . vested.”).

169. See, e.g., *Whitman*, 531 U.S. at 472-76 (finding intelligible principle in Clean Air Act’s “adequate margin of safety” standard for setting ambient air quality standards); *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928) (announcing “intelligible principle” standard for reviewing delegation of legislative authority and upholding delega-

congressional authority to delegate extensive quasi-legislative powers to a federal Sentencing Commission that has the discretionary authority to establish determinate criminal sentences for a wide range of federal offenses as long as the sentences are within the typically broad range initially established by Congress. The Court also stated that "this Court has deemed it constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority."¹⁷¹ The Supreme Court has invalidated a statute for lack of an "intelligible principle" only two times—both in 1935.¹⁷² Because modern courts have often treated the nondelegation doctrine as mere window dressing lacking any real substance,¹⁷³ a number of commentators have argued for its reinvigoration, but so far to no avail.¹⁷⁴

Although modern courts have not strictly applied the nondelegation doctrine, courts have required agency actions to be based on a reasonable construction of the statute authorizing the agency to act. Thus, a regulation is valid only if a statute authorizes the agency to issue it.¹⁷⁵ For instance, in *Ernst & Ernst v. Hochfelder*,¹⁷⁶ the Su-

tion to Executive Branch of authority to revise tariff duties); Mank, *Using § 1983, supra* note 1, at 339-40; Richard J. Pierce, Jr., *Agency Authority to Define the Scope of Private Rights of Action*, 48 ADMIN. L. REV. 1, 1-2, 8, 20-21 (1996); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000).

170. 488 U.S. 361 (1989).

171. *Id.* at 372-73 (internal quotation marks omitted).

172. See *A.L.A. Schechter Poultry Corp.*, 295 U.S. at 541-42; *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 429-30 (1935); J.R. DeShazo & Jody Freeman, *The Congressional Competition to Control Delegated Power*, 81 TEX. L. REV. 1443, 1459 n.53 (2003); Sunstein, *supra* note 169, at 322. Since 1935, the Court has never struck down a statute as an excessive delegation of legislative authority. See, e.g., *Whitman*, 531 U.S. at 472-76 (holding that the Clean Air Act's delegation of ambient air quality standards to EPA is constitutional and observing that the Court has not invalidated a statute as lacking an "intelligible principle" since 1935); DeShazo & Freeman, *supra*, at 1459 n.53 ("[N]ot once since the 1930s, has the Supreme Court found a delegation to be so utterly without an 'intelligible principle' to guide the exercise of discretion that it violates the nondelegation doctrine."); Richard B. Stewart, *Beyond Delegation Doctrine*, 36 AM. U. L. REV. 323, 326 n.20 (1987) ("The year 1937 signalled the end of the brief *Schechter* era during which the Court invoked the delegation doctrine to invalidate broad delegations of power.").

173. See *Save Our Valley v. Sound Transit*, 335 F.3d 932, 957 (9th Cir. 2003) (Berzon, J., dissenting in part) ("Thus, while it is indisputably true that Congress may not delegate its legislative power to administrative agencies, in practice this limitation operates to prohibit only the broadest of delegations.").

174. See, e.g., DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* 3-21 (1993) (arguing for revival of nondelegation doctrine); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 131-34 (1980) (same); Theodore J. Lowi, *Two Roads to Serfdom: Liberalism, Conservatism and Administrative Power*, 36 AM. U. L. REV. 295, 296-312, 314-18, 321-22 (1987) (same).

175. See *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979) (stating that "the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress"); *Oceanair of Fla., Inc. v. United States Dep't of Transp.*, 876 F.2d 1560, 1565 (11th Cir. 1989) ("An administrative agency . . . is a creature of Congress and has no authority beyond that granted by Congress."); Mank, *Using § 1983, supra* note 1, at 339; Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103

preme Court stated: "The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather, it is 'the power to adopt regulations to carry into effect the will of Congress as expressed by the statute.'"¹⁷⁷ If a regulation is inconsistent with the authorizing statute's authority, then the invalid regulation could not create any valid rights or cause of action.¹⁷⁸ Furthermore, an agency must issue regulations that are a reasonable interpretation of a statute, or in other words, not arbitrary and capricious in substance.¹⁷⁹

B. Chevron and the Realities of the Administrative State: Agencies Have the Primary Role in Interpreting Ambiguous Statutes when Congress Delegates Such Authority to Them

Because of judicial acquiescence to legislative delegation,¹⁸⁰ Congress has frequently enacted statutes that establish broad goals and then delegate extensive authority to an executive agency to determine how to achieve those goals.¹⁸¹ Courts usually allow Congress to delegate substantial authority to agencies provided that an enabling statute includes basic governing principles.¹⁸² Because statutes often contain broad goals or delegate considerable authority to an agency,¹⁸³ agencies often promulgate regulations to interpret and help define rights that are only implicit or generally defined in the enabling statute.¹⁸⁴ Although agencies may not exercise full legisla-

HARV. L. REV. 405, 415 (1989) (describing faithful agent theory, which maintains that courts use judicial review as a method to insure that agency behavior is faithful to statutory mandates).

176. 425 U.S. 185 (1976).

177. *Id.* at 213-14 (quoting *Dixon v. United States*, 381 U.S. 68, 74 (1965)) (citation and internal quotation marks omitted).

178. See Mank, *Using § 1983*, *supra* note 1, at 339-40; Pierce, *supra* note 169, at 1-2, 8, 20-21.

179. See, e.g., *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 34 (1983).

180. See *infra* notes 182, 185 and accompanying text.

181. SCHOENBROD, *supra* note 174, at 3-21 (acknowledging frequency of legislative delegations, but arguing that broad delegations of legislative power to agencies delegitimize representative governance); DeShazo & Freeman, *supra* note 172, at 1444 ("When passing legislation, Congress routinely delegates considerable discretionary authority to administrative agencies."); *id.* at 1452-54; Thomas O. Sargentich, *The Delegation Debate and Competing Ideals of the Administrative Process*, 36 AM. U. L. REV. 419 (1987) (discussing frequent practice of legislative delegation).

182. See generally Richard J. Pierce, Jr., *Political Accountability and Delegated Power: A Response to Professor Lowi*, 36 AM. U. L. REV. 391 (1987) (discussing debate regarding legitimacy of congressional delegation of legislative authority to agencies and reporting that courts have almost invariably approved such delegations).

183. DeShazo & Freeman, *supra* note 172, at 1452-53 ("Hundreds of federal statutes delegate powers, many sweeping, to administrative agencies."); *infra* notes 186-91, 289 and accompanying text.

184. DeShazo & Freeman, *supra* note 172, at 1453-54 ("In practical terms, agencies frequently determine the extent to which a law will be binding, and upon whom.")

tive authority, the Supreme Court has acknowledged that agency rulemaking resembles lawmaking and is sometimes quasi-legislative in nature.¹⁸⁵

If a statute is silent or ambiguous about the particular issue in question, the Supreme Court in its 1984 *Chevron* decision¹⁸⁶ established the principle that courts should defer to an agency's reasonable interpretation of that statute, including filling in "gaps" in the statute, both because agencies usually possess greater substantive expertise than courts and because the executive branch is politically accountable.¹⁸⁷ Before *Chevron*, the Court had usually deferred to an agency interpretation of a statute only where Congress had expressly delegated authority to an agency "to define a statutory term or prescribe a method of executing a statutory provision."¹⁸⁸ Conversely, if a statute's language is clear and specific, a court must reject an agency interpretation that is contrary to that language.¹⁸⁹

The *Chevron* decision specifically states that Congress may delegate quasi-legislative authority to agencies to fill "gaps" in a statute.¹⁹⁰ "The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."¹⁹¹ *Chevron* suggests that in filling such gaps an agency could, in some circumstances, reasonably clarify or amplify

185. See *INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983) ("To be sure, some administrative agency action—rulemaking, for example—may resemble 'lawmaking.' . . . This Court has referred to agency activity as being 'quasi-legislative' in character. . . . [But w]hen the Attorney General performs his duties . . . he does not exercise 'legislative' power." (citations omitted)); Davant, *supra* note 1, at 641-42 (conceding existence of "quasi-legislative authority" in agencies).

186. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

187. *Id.* at 842-44 (stating that courts should defer to an agency's interpretation of ambiguous statutory language or of filling in a "gap" in a silent statute if the interpretation is reasonable); *id.* at 865-66 (stressing that executive agencies have a more appropriate role in defining ambiguous statutory language because they possess greater substantive expertise than courts and because agencies are politically accountable through elections, unlike courts); Manning, *supra* note 21, at 625-26 (describing the presumption established in *Chevron* that silence in a statute shows the intent of Congress to leave the act of interpretation in the hands of the agency in charge of administering the act); *supra* note 21 and accompanying text; *infra* notes 188-93, 289 and accompanying text.

188. See *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 24 (1982) (quoting *Rowan Cos. v. United States*, 452 U.S. 247, 253 (1981)) (internal quotation marks omitted); Merrill & Hickman, *supra* note 21, at 833 & n.2 (2001) (citing cases).

189. *Chevron*, 467 U.S. at 842-43.

190. See *id.* at 843-44; Manning, *supra* note 21, at 625-26; Merrill & Hickman, *supra* note 21, at 833-34, *passim* (explaining that *Chevron* fundamentally expanded the courts' deference to agency interpretations of statutes by presuming that gaps or ambiguities in a statute reflected implicit congressional intent to delegate interpretive authority to an agency).

191. *Chevron*, 467 U.S. at 843-44 (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974) (internal quotation marks omitted)); Davant, *supra* note 1, at 642.

rights that are only inchoate or implicit in an ambiguous statute or one that contains obvious gaps.¹⁹² The Court wrote:

If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.¹⁹³

Some commentators have argued that courts should not apply *Chevron* deference where a statute is silent because such legislative silence does not necessarily reflect congressional intent to delegate omitted issues to the discretion of agency interpretation and may in fact reflect a conscious congressional intent not to delegate authority to an agency; but the *Chevron* presumption remains good law.¹⁹⁴

Courts and commentators have recognized that *Chevron's* presumption that agencies may issue rules to fill gaps in ambiguous statutes requires courts to give considerable deference to agency regulations interpreting a statute. For example, the First Circuit has held that “[a]n inquiring court—even a court empowered to conduct *de novo* review—must examine the Secretary’s interpretation of the statute, as expressed in the regulation, through a deferential glass.”¹⁹⁵ Although generally opposed to the idea of agencies defining rights enforceable under § 1983, Davant acknowledges that *Chevron's* gap-filling, or implicit delegation, doctrine suggests that agencies may at least sometimes define rights in ambiguous statutes, including filling a “gap” in a silent statute, that in turn could be enforced through § 1983.¹⁹⁶

Arguably, however, the *Chevron* deference doctrine is limited to regulations that merely interpret a statutory right and does not apply to regulations that create or “effectuate” rights based on the gen-

192. See *Chevron*, 467 U.S. at 843-44; Merrill & Hickman, *supra* note 21, at 833-34, *passim*.

193. *Chevron*, 467 U.S. at 843-44 (footnote omitted); Merrill & Hickman, *supra* note 21, at 833-34, *passim*.

194. See, e.g., Merrill & Hickman, *supra* note 21, at 844-45 (contending that congressional silence should be assumed to reflect an intent to withhold *Chevron* deference when the legal question at issue is “extraordinary”).

195. *Strickland v. Comm’r, Me. Dep’t of Human Servs.*, 48 F.3d 12, 16 (1st Cir. 1995).

196. Davant, *supra* note 1, at 642-44 (conceding that the *Chevron* doctrine suggests agencies could in certain circumstances fill a statutory gap by defining a right enforceable through § 1983, but arguing that courts should be very cautious in doing so unless the statute very explicitly delegates authority to define rights to an agency).

eral goals of a statute.¹⁹⁷ Although the Court's opinion is not completely clear on this point, a narrow view of the *Chevron* doctrine is that the deference principle applies to agency interpretations of statutory rights but arguably not to agency regulations that go beyond a statute to effectuate the statute's general goals.¹⁹⁸ In light of *Sandoval's* insistence that regulations may only interpret rights, but not create them,¹⁹⁹ the narrower view of the *Chevron* deference doctrine is more defensible today.

C. Recent Chevron Cases: A Recent Trend Toward Less Deference?

Some recent Court decisions have arguably narrowed the *Chevron* doctrine—that agencies may fill gaps in statutes—by refusing to defer to agency interpretations of statutory rights that are not contained in a rule, but instead are issued by the agency in a less formal interpretive statement that is not promulgated with the opportunity for public notice and comment.²⁰⁰ For example, in *United States v. Mead Corp.*,²⁰¹ the Court narrowed the application of the *Chevron* deference doctrine by holding that such deference applies only where “it appears that Congress delegated authority to the agency generally to make rules carrying the force of law” and that if an agency issues an interpretation of a statute without following the public notice-and-comment rulemaking procedures utilized in *Chevron*, then courts should apply the less deferential *Skidmore* standard.²⁰² In

197. See Brianne J. Gorod, Case Comment, *The Sorcerer's Apprentice: Sandoval, Chevron, and Agency Power to Define Private Rights of Action*, 113 YALE L.J. 939, 943, 945-46 nn.40-42 (2004).

198. *Id.* at 946 & n.42.

199. See *supra* notes 24-25, 28, 37 and accompanying text; *infra* notes 213-16, 222, 224-27 and accompanying text.

200. See *United States v. Mead Corp.*, 533 U.S. 218, 226 (2001); *Solid Waste Agency of N. Cook County (SWANCC) v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001) (rejecting agency interpretation issued without public notice and comment in preamble to rule); *Christensen v. Harris County*, 529 U.S. 576, 586-88 (2000) (limiting *Chevron* deference to agency actions that have the “force of law”); *Davant*, *supra* note 1, at 645-46; Derek P. Langhauser, *Executive Regulations and Agency Interpretations: Binding Law or Mere Guidance? Developments in Federal Judicial Review*, 29 J.C. & U.L. 1, 3 (2002).

201. 533 U.S. 218 (2001).

202. See *id.* at 226-30; Michael P. Healy, *Spurious Interpretation Redux: Mead and the Shrinking Domain of Statutory Ambiguity*, 54 ADMIN. L. REV. 673, 677-81 (2002) (discussing *Mead*); Cooley R. Howarth, Jr., *United States v. Mead Corp.: More Pieces for the Chevron/Skidmore Deference Puzzle*, 54 ADMIN. L. REV. 699, 699-702, 707-10 (2002) (same); Langhauser, *supra* note 200, at 3, 14-18 (same); Jonathan T. Molot, *Reexamining Marbury in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretation*, 96 NW. U. L. REV. 1239, 1328-36 (2002) (same). A year before *Mead*, the Court, in *Christensen v. Harris County*, 529 U.S. 576, 586-88 (2000), had also limited *Chevron* deference to agency actions that have the “force of law,” but the majority's opinion did not clearly delineate the line between interpretations entitled to *Chevron* deference and those only entitled to *Skidmore* deference. See Howarth, *supra*, at 714-17; Merrill & Hickman, *supra* note 21, at 846-47; Molot, *supra*, at 1334-35. Thus, *Mead* is likely to have more impact than *Christensen*.

1944, the Court, in *Skidmore v. Swift & Co.*,²⁰³ stated that where Congress has not expressly delegated interpretive authority to an agency, courts should give only limited deference to agency interpretations, depending upon the persuasiveness of that interpretation and the agency's degree of expertise.²⁰⁴ The *Mead* decision is broader than *Skidmore* concerning what type of proof might be sufficient to demonstrate that Congress delegated authority to an agency: "Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent."²⁰⁵ The *Mead* decision and some other recent Court decisions suggest a switch by the Court from an expansive *Chevron* deference to agency statutory interpretations toward a more critical inquiry of agency action under the *Skidmore* doctrine.²⁰⁶ In some cases, the Court has even refused to defer to an agency's interpretation of an ambiguous statute promulgated in a rule if the Court believes the interpretation, nonetheless, is unreasonable and contrary to congressional intent.²⁰⁷

A recent 2004 decision, *Alaska Department of Environmental Protection v. EPA*,²⁰⁸ however, may portend that the Court is returning to a more deferential position.²⁰⁹ In *Alaska Department of Environ-*

203. 323 U.S. 134 (1944).

204. *Id.* at 137-40; Howarth, *supra* note 202, at 713-16 (discussing differences between *Skidmore* and *Chevron* deference doctrines); Langhauser, *supra* note 200, at 11-14 (same); Merrill & Hickman, *supra* note 21, at 853-56 (same).

205. *Mead*, 533 U.S. at 227.

206. *See id.* at 226-30 (concluding that *Chevron* deference does not apply to an agency interpretation contained in informal interpretive documents lacking rulemaking status); *Solid Waste Agency of N. Cook County (SWANCC) v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001) (rejecting agency interpretation issued without public notice and comment in preamble to rule); *Christensen v. Harris County*, 529 U.S. at 586-88 (2002) (limiting *Chevron* deference to agency actions that have the "force of law"); Langhauser, *supra* note 200, at 3, 14-18 (discussing *Mead's* use of *Skidmore* deference and the implications for limiting *Chevron*); Merrill & Hickman, *supra* note 21, at 856-58 (discussing Supreme Court cases using the *Skidmore* deference doctrine and implications for limiting *Chevron*); Molot, *supra* note 202, at 1328-36 (discussing *Mead*); *see also supra* notes 200-05 and accompanying text; *infra* note 207 and accompanying text.

207. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 481-86 (2001) (invalidating an Environmental Protection Agency regulation interpreting an ambiguous statute because the interpretation was unreasonable and contrary to congressional intent); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000) (concluding that normal *Chevron* deference to agency interpretation did not apply because of "extraordinary" circumstances suggesting Congress did not want the agency to regulate tobacco); Healy, *supra* note 202, at 684-86 (discussing the *Whitman* Court's conclusion that agency interpretation of an ambiguous statute was not entitled to deference under *Chevron*); Merrill & Hickman, *supra* note 21, at 844-45 (discussing the *Brown & Williamson* Court's refusal to apply *Chevron* deference and the implications for future cases); Molot, *supra* note 202, at 1324-28 (criticizing the *Brown & Williamson* Court's use of vague "extraordinary" exception to *Chevron* doctrine and discussing whether the case portends a narrower application of *Chevron*).

208. 540 U.S. 461 (2004).

209. *See infra* notes 210-12 and accompanying text.

mental Protection, the Court deferred to the agency interpretation of the Act's "best available control technology" (BACT) provisions even though the agency had only issued internal guidance that was not entitled to *Chevron* deference, which applies only to valid and duly promulgated rules published after notice and comment.²¹⁰ In his dissenting opinion in *Alaska Department of Environmental Protection*, Justice Kennedy complained that while the majority had technically rejected *Chevron* deference because the EPA had not issued a qualifying regulation, the Court had applied a de facto similar standard.²¹¹ Despite *Mead*, the Court still follows the *Chevron* deference principle that courts should defer to a "reasonable" agency interpretation of an ambiguous or silent statute, at least in cases in which agencies promulgate their interpretation in a rule issued through notice-and-comment rulemaking and, in *Alaska Department of Environmental Protection*, even in a case in which the agency did not utilize rule-making.²¹²

V. THE IMPACT OF SANDOVAL AND GONZAGA: CONGRESS MUST ESTABLISH ENFORCEABLE RIGHTS

A. Sandoval: *Only Congress Can Create a Private Right of Action*

In 2001, in *Alexander v. Sandoval*,²¹³ the Supreme Court concluded that only Congress may create rights that are enforceable in a private right of action and that agency regulations purporting to establish broader rights are not enforceable as a private right of action in federal court. In *Sandoval*, the plaintiffs claimed that a private right of action was established through agency regulations prohibiting recipients of federal funds, including state agencies, from engaging in actions that cause disparate impacts to minority groups.²¹⁴ The Court had interpreted Title VI's statutory language to prohibit only intentional discrimination and not to prohibit disparate impact discrimination so that any right of action against disparate impact discrimination could only arise from the regulations.²¹⁵ The plaintiffs contended that the Alabama Department of Public Safety's policy of administering its driver's license examination only in English established a prima facie case of disparate impact discrimination in violation of the relevant Section 602 regulations.²¹⁶

210. 540 U.S. at 487-93 (holding that agency interpretation in several internal guidance documents is entitled to deference even though *Chevron* doctrine does not apply).

211. *Id.* at 517-18 (Kennedy, J., dissenting).

212. See *supra* notes 209-10 and accompanying text.

213. 532 U.S. 275 (2001).

214. See *id.* at 278-79.

215. See *infra* notes 228-29 and accompanying text.

216. See *Sandoval*, 532 U.S. at 278-79.

In determining whether Section 602 disparate impact regulations establish a private right of action, the *Sandoval* Court used its post-*Cort* principle that “private rights of action to enforce federal law must be created by Congress.”²¹⁷ In determining statutory intent, the *Sandoval* Court refused to consider whether a private right of action would serve Title VI’s purposes or even whether the Congress that enacted the statute in 1964 assumed that courts would imply a private right of action. The *Sandoval* Court observed that since its 1975 decision in *Cort v. Ash*,²¹⁸ the Court had consistently rejected the view in its 1964 decision *J.I. Case Co. v. Borak*²¹⁹ that “it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose’ expressed by a statute,” even when the Court reviewed statutes enacted before the *Cort* decision.²²⁰ Rejecting the respondents’ argument that it should apply *Borak*’s approach to a statute enacted just after that decision, the *Sandoval* Court declared: “Having sworn off the habit of venturing beyond Congress’s intent, we will not accept respondents’ invitation to have one last drink.”²²¹

The Court focused on the text of Section 602 in deciding whether Congress intended to create an enforceable private right of action to enforce regulations promulgated under Section 602. Applying a textualist approach to statutory interpretation, the Court observed: “The judicial task 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. *Statutory intent* on this latter point is determinative.”²²² The *Sandoval* Court concluded that “[w]e therefore begin (and find that we can end) our search for Congress’s intent with the text and structure of Title VI.”²²³ The Court’s focus on the statute’s text in determining whether the statute established a private right of action led it to reject the respondents’ argument that rights might arise from agency regulations.²²⁴ The Court announced: “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 Congress has not.”²²⁵ The Court emphasized that regulations alone may not create individual rights, stating that “it is most cer-

217. *Id.* at 286.

218. 422 U.S. 66 (1975).

219. 377 U.S. 426 (1964).

220. *Sandoval*, 532 U.S. at 287-88 (quoting *Borak*, 377 U.S. at 433).

221. *Id.* at 287; Bradford C. Mank, *Legal Context: Reading Statutes in Light of Prevailing Legal Precedent*, 34 ARIZ. ST. L.J. 815, 859-60 (2002); Short, *supra* note 32, at 128.

222. *Sandoval*, 532 U.S. at 286 (emphasis added) (citation omitted).

223. *Id.* at 288; Mank, *supra* note 221, at 860; Short, *supra* note 32, at 128-29.

224. *Sandoval*, 532 U.S. at 291; Mank, *supra* note 221, at 860; Short, *supra* note 32, at 129.

225. *Sandoval*, 532 U.S. at 291 (emphasis added); Mank, *supra* note 221, at 860; Short, *supra* note 32, at 129.

tainly 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."²²⁶ The *Sandoval* Court held that "[n]either as originally enacted nor as later amended does Title VI display an intent to create a freestanding private right of action to enforce regulations promulgated under § 602. We therefore hold that no such right of action exists."²²⁷

However, the *Sandoval* decision acknowledged that plaintiffs could still bring a private right of action against recipients alleging that they had committed intentional discrimination in violation of either Section 601 or "regulations applying [Section] 601's ban on intentional discrimination."²²⁸ Citing *Chevron*, the Court stated that regulations, including those issued under Section 602, were enforceable to the extent that they effectuated the core prohibition against intentional discrimination in Section 601:

We do not doubt that regulations applying § 601's ban on intentional discrimination are covered by the cause of action to enforce that section. Such regulations, if valid and reasonable, authoritatively construe the statute itself 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.²²⁹

1. Justice Stevens's Dissenting Opinion

In his dissenting opinion in *Sandoval*, Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, argued that the majority's refusal to defer to the agency's Section 602 regulations was contrary to the *Chevron* doctrine, which requires courts to defer to an agency's appropriate interpretation of an ambiguous statutory term such as "discrimination."²³⁰ Justice Stevens argued, "In most other contexts, when the agencies charged with administering a broadly worded statute offer regulations interpreting that statute or giving concrete guidance as to its implementation, we treat their interpretation of the statute's breadth as controlling unless it presents an unreason-

226. *Sandoval*, 532 U.S. at 291.

227. *Id.* at 293 (footnote omitted).

228. *Id.* at 284.

229. *Id.* (citing *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 257 (1995), and *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984)).

230. *Id.* at 309 (Stevens, J., dissenting) (citing *Chevron*); Mank, *supra* note 32, at 530 (arguing that the majority opinion in *Sandoval* ignored the *Chevron* deference principle); Short, *supra* note 32, at 133.

able construction of the statutory text."²³¹ Under *Chevron*, there is a good argument that courts should defer to agency interpretations of Title VI and Title IX because the term "discrimination" in these statutes is ambiguous.²³² Justice Stevens contended that the majority opinion might have little significance because even if there was no private right of action available to enforce Section 602 regulations, then a suit under § 1983 could enforce those same regulations indirectly because the standard for enforcing federal rights under § 1983 is broader than the standard for implying private rights of action.²³³

B. *Gonzaga: Congress Must Create Rights Enforceable Through § 1983*

Before the Supreme Court's *Gonzaga* decision, several decisions had allowed suits under § 1983 to vindicate federal statutory rights even when the underlying statute creating the right was not enforceable as a private right of action.²³⁴ The *Gonzaga* Court, however, con-

231. *Sandoval*, 532 U.S. at 309 (Stevens, J., dissenting) (citing *Chevron*); Mank, *supra* note 32, at 530; Short, *supra* note 32, at 133.

232. See Black, *supra* note 1, at 361-62 (arguing that agency interpretations of Title VI deserve deference because agencies such as the Department of Education possess significant experience and expertise in applying statute); Galalis, *supra* note 32, at 65, 92-98, 101 (arguing that Justice Scalia's *Sandoval* decision was wrong to question the validity of Title VI's Section 602 disparate impact regulations because they are entitled to deference under *Chevron* since the term "discrimination" in Section 602 is ambiguous and disparate impact regulations are a reasonable interpretation of the statute); Note, *supra* note 32, at 1781 (same).

233. Justice Stevens stated:

[T]o the extent that the majority denies relief to the respondents merely because they neglected to mention 42 U.S.C. § 1983 in framing their Title VI claim, this case is something of a sport. Litigants who in the future wish to enforce the Title VI regulations against state actors in all likelihood must only reference § 1983 to obtain relief; indeed, the plaintiffs in this case (or other similarly situated individuals) presumably retain the option of re-challenging Alabama's English-only policy in a complaint that invokes § 1983 even after today's decision.

Sandoval, 532 U.S. at 299-300 (Stevens, J., dissenting). See generally Mank, *Using § 1983*, *supra* note 1, at 348-53, 367-82 (arguing that Title VI disparate impact regulations may be enforced through § 1983).

234. See *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 508 n.9 (1990) (observing that whether a § 1983 suit is available presents a "different inquiry" than whether an implied right of action exists); *Mallett v. Wis. Div. of Vocational Rehab.*, 130 F.3d 1245, 1248-57 (7th Cir. 1997) (determining that a plaintiff could bring a § 1983 claim based on the Rehabilitation Act because it created an enforceable right and did not foreclose such relief but deciding that there was no private right of action under the act because its language and legislative history suggested that the statute's administrative remedy was a more appropriate enforcement mechanism); *Chan v. City of New York*, 1 F.3d 96, 102-06 (2d Cir. 1993) (concluding, under the *Cort* analysis, that the Housing and Community Development Act did not create a private right of action, but did, based on the *Blessing/Wilder* analysis, create substantive rights which could be enforced through a § 1983 action); *Fay v. S. Colonie Cent. Sch. Dist.*, 802 F.2d 21, 33 (2d Cir. 1986) (holding that although the Family Educational Rights and Privacy Act ("FERPA") itself does not give rise to a private cause of action, plaintiffs could nonetheless bring suit under § 1983 to enforce rights created by

cluded that individual rights enforceable through § 1983 and implied private rights of action are similar. “[W]e . . . reject the notion that our implied right of action cases are separate and distinct from our § 1983 cases. To the contrary, our implied right of action cases should guide the determination of whether a statute confers rights enforceable under § 1983.”²³⁵ The Court continued:

We have recognized that whether a statutory violation may be enforced through § 1983 “is a different inquiry than that involved in determining whether a private right of action can be implied from a particular statute.” But the inquiries overlap in one meaningful respect—in either case we must first determine whether Congress *intended to create a federal right*.²³⁶

Accordingly, the *Gonzaga* Court stated: “[I]mplied right of action cases should guide the determination of whether a statute confers rights enforceable under § 1983.”²³⁷ The *Gonzaga* Court held that the Family Educational Rights and Privacy Act did not establish individual rights that could be enforced through § 1983 because Congress intended to give only the Department of Education, and not private individuals, the authority to bring suit against schools that violated the statute’s nondisclosure provisions.²³⁸

Although the *Gonzaga* decision has made the congressional intent test for implied rights of action the initial inquiry in § 1983 cases,²³⁹ it is still possible to enforce a federal statutory right through § 1983 even if that right cannot be enforced as a direct private right of ac-

FERPA), *overruled*, Taylor v. Vt. Dep’t of Educ., 313 F.3d 768 (2002) (overruling *Fay* in light of *Gonzaga*); Keaukaha-Panaewa Cmty. Ass’n v. Hawaiian Homes Comm’n, 739 F.2d 1467, 1470-71 (9th Cir. 1984) (concluding that plaintiffs could bring a § 1983 action because the statute at issue clearly mandated that the trust at issue be established for the benefit of Hawaiians such as plaintiffs and it did not foreclose a § 1983 remedy, but also concluding that no private right of action existed under the statute); Mank, *The Future After Gonzaga*, *supra* note 1, at 1438-42 & n.166; Mank, *Using § 1983*, *supra* note 1, at 353-59; Henry Paul Monaghan, *Federal Statutory Review Under Section 1983 and the APA*, 91 COLUM. L. REV. 233, 246-47 (1991). *But see* Mazzuchi, *supra* note 63, at 1064, 1093 (arguing that statutory rights under § 1983 should be limited in the future to cases in which rights could be enforced through an implied or explicit private right of action, but acknowledging that prior cases have applied a more lenient standard in § 1983 suits).

235. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002); Mank, *The Future After Gonzaga*, *supra* note 1, at 1446-51.

236. *Gonzaga*, 536 U.S. at 283 (quoting *Wilder*, 496 U.S. at 508 n.9) (citation omitted); Mank, *The Future After Gonzaga*, *supra* note 1, at 1448.

237. *Gonzaga*, 536 U.S. at 283; Mank, *The Future After Gonzaga*, *supra* note 1, at 1448-51.

238. *Gonzaga*, 536 U.S. at 287-91; Mank, *The Future After Gonzaga*, *supra* note 1, at 1450-52. Justice Stevens wrote a vigorous dissent in *Gonzaga*, which was joined by Justice Ginsburg, in which he argued that the statute did seek to create rights on behalf of individuals. *Gonzaga*, 536 U.S. at 293-303 (Stevens, J., dissenting); Mank, *The Future After Gonzaga*, *supra* note 1, at 1453-55, 1457-58.

239. *See Gonzaga*, 536 U.S. at 283-86; Mank, *The Future After Gonzaga*, *supra* note 1, at 1448-51.

tion.²⁴⁰ Under the *Gonzaga* decision, for both suits asserting a private right of action and those proceeding under § 1983, a court first examines whether Congress intended, either expressly or by implication, to establish an individual federal right on behalf of a class including the plaintiff.²⁴¹ After the initial *Gonzaga* inquiry about whether Congress intended to establish a federal right, however, there is a difference in determining whether the remedies are available under a private right of action and a § 1983 suit.²⁴² Under a private right of action, a plaintiff must demonstrate not only that Congress intended to create a right on behalf of the plaintiff²⁴³ but also that Congress intended that plaintiffs have the right to sue to enforce that right.²⁴⁴ By contrast, in § 1983 cases, under the Supreme Court's three-part *Blessing* test, once a plaintiff shows that Congress intended to establish a right in favor of the plaintiff,²⁴⁵ there is a strong presumption that the plaintiff may enforce that right because § 1983 itself provides the remedy, unless the narrow *Sea Clammers* exception applies.²⁴⁶ Because § 1983 provides an "alternative source of *express*

240. See *Gonzaga*, 536 U.S. at 284 ("Once a plaintiff demonstrates that a statute confers an individual right, the right is presumptively enforceable by § 1983."); Mank, *The Future After Gonzaga*, *supra* note 1, at 1448-50, 1455-59, 1481-82 (arguing that *Gonzaga* changes initial inquiry in § 1983 suits, but not the presumption that federal rights are enforceable by § 1983).

241. See *Gonzaga*, 536 U.S. at 283-86; Mank, *The Future After Gonzaga*, *supra* note 1, at 1448-51.

242. See *Gonzaga*, 536 U.S. at 284; Mank, *The Future After Gonzaga*, *supra* note 1, at 1455-59, 1481-82.

243. *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568, 575, 578 (1979) ("The ultimate question is one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law."); Mank, *The Future After Gonzaga*, *supra* note 1, at 1423-25; Mank, *Private Right*, *supra* note 63, at 31-32, 44-46 (arguing that beginning in 1979 the Supreme Court made congressional intent the main factor in determining whether to imply a private right of action); *Stabile*, *supra* note 63, at 868-71 (arguing that in 1979 the Supreme Court began "an exclusive reliance on legislative intent" in determining a private right of action).

244. See *Suter v. Artist M.*, 503 U.S. 347, 363 (1992) (stating that the plaintiff has the burden to demonstrate Congress's intent to make a private remedy available); *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 508 n.9 (1990); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15-16, 19, 23-24 (1979) ("[W]hat must ultimately be determined is whether Congress intended to create the private remedy asserted . . ."); Mank, *Using § 1983*, *supra* note 1, at 357-58 (stating that the plaintiff in a private right of action case must show that Congress intended the remedy to be available to the plaintiff).

245. See *Blessing v. Freestone*, 520 U.S. 329, 340-41 (1997); Mank, *Using § 1983*, *supra* note 1, at 332; *supra* notes 92-95 and accompanying text.

246. See *Gonzaga*, 536 U.S. at 284 ("Once a plaintiff demonstrates that a statute confers an individual right, the right is presumptively enforceable by § 1983."); *Wilder*, 496 U.S. at 508 n.9 (stating Supreme Court has "recognize[d] an exception to the general rule that § 1983 provides a remedy for violation of federal statutory rights only when Congress has affirmatively withdrawn the remedy"); *id.* at 525-26 (Rehnquist, C.J., dissenting) (stating that "§ 1983 generally . . . supplies the remedy for vindication of rights arising from federal statutes"); Mank, *The Future After Gonzaga*, *supra* note 1, at 1439-41, 1448-50, 1455-59, 1481-82 (arguing that *Gonzaga* changes the initial inquiry in § 1983 suits, but not the presumption in *Wilder* that federal rights are enforceable through § 1983); Mank, *Us-*

congressional authorization of private suits," the separation of powers concerns that require congressional intent to authorize remedies in a private cause of action are not present in a § 1983 case.²⁴⁷ Although emphasizing that plaintiffs suing under § 1983 bear the same burden as plaintiffs in a private cause of action suit to show Congress intended to establish individually enforceable rights, the *Gonzaga* Court acknowledged the rule set forth in its earlier decisions that the plaintiff in the former type of suit does not have to prove that Congress intended to provide individual remedies, stating:

Plaintiffs suing under § 1983 do not have the burden of showing an intent to create a private remedy because § 1983 generally supplies a remedy for the vindication of rights secured by federal statutes. Once a plaintiff demonstrates that a statute confers an individual right, the right is presumptively enforceable by § 1983.²⁴⁸

Because the Court held in *Sandoval* that only Congress can create implied rights of action, the *Gonzaga* decision's conclusion that only Congress may establish federal rights enforceable through § 1983 implies that a regulation alone may not create a right enforceable through § 1983.²⁴⁹ The *Gonzaga* Court stated that rights are enforceable by individuals through § 1983 only where there is "clear" and "unambiguous" evidence that Congress intended to establish an individual right.²⁵⁰ If an agency seeks to create a right in a regulation alone that is not at all in the underlying statute, then that right could not meet *Gonzaga's* requirement that there must be "clear" and "unambiguous" evidence that Congress intended to establish an individual right.²⁵¹

Yet even after *Gonzaga*, a court might examine agency regulations that interpret statutory language or legislative history to un-

ing § 1983, *supra* note 1, at 357-59 (discussing *Wilder*, 496 U.S. at 508 n.9, and Chief Justice Rehnquist's dissent in *Wilder*); Monaghan, *supra* note 234, at 246-47 (discussing *Wilder*, 496 U.S. at 508 n.9).

247. See *Wilder*, 496 U.S. at 509 n. 9 (quoting *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 19 (1981)) (internal quotation marks omitted); *Gonzaga*, 536 U.S. at 300 (Stevens, J., dissenting); Mank, *The Future After Gonzaga*, *supra* note 1, at 1439-41 (discussing *Wilder*, 496 U.S. at 508 n.9); Mank, *Using § 1983*, *supra* note 1, at 357-59 (discussing *Wilder*, 496 U.S. at 508 n.9); Monaghan, *supra* note 234, at 246-47 (discussing *Wilder*, 496 U.S. at 508 n.9).

248. *Gonzaga*, 536 U.S. at 284 (citation omitted); Mank, *The Future After Gonzaga*, *supra* note 1, at 1448-49.

249. Mank, *The Future After Gonzaga*, *supra* note 1, at 1461, 1466-69.

250. See *Gonzaga*, 536 U.S. at 290 ("In sum, if Congress wishes to create new rights enforceable under § 1983, it must do so in clear and unambiguous terms—no less and no more than what is required for Congress to create new rights enforceable under an implied private right of action."); see also *id.* at 283 ("We now reject the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983."); Mank, *The Future After Gonzaga*, *supra* note 1, at 1446, 1461, 1466 (discussing and criticizing the unambiguous evidence standard for § 1983 suits).

251. Mank, *The Future After Gonzaga*, *supra* note 1, at 1461, 1466-69.

derstand whether Congress intended to create a statutory right.²⁵² Because agencies are often involved in Congress's drafting of a statute that delegates authority to that agency, a court may find agency regulations useful in providing understanding of congressional intent.²⁵³ Although it demanded "clear" and "unambiguous" evidence in a statute that Congress intended to establish individually enforceable rights, the *Gonzaga* Court did not purport to overrule the Court's earlier *Wright* decision, which examined agency regulations in conjunction with a statute to help determine whether an enforceable right existed under § 1983, or the *Chevron* deference principle.²⁵⁴

VI. AFTER SANDOVAL AND GONZAGA: THE FIRST AND NINTH CIRCUITS DISAGREE ABOUT WHETHER REGULATIONS CAN HELP INTERPRET RIGHTS ENFORCEABLE UNDER § 1983

Because neither *Sandoval* nor *Gonzaga* clearly addressed the extent to which an agency's interpretation of statutory rights in regulations is entitled to deference, the lower courts have disagreed about that issue. The Ninth Circuit in *Save Our Valley* held that valid agency regulations alone could not establish individual rights enforceable through § 1983 because only Congress may establish enforceable rights through statutes, although Judge Berzon disagreed in a partial dissent.²⁵⁵ The *Save Our Valley* majority did not directly address the question of *Chevron* deference, but Judge Berzon's partial dissent did recognize the importance of that case.²⁵⁶ Conversely, the First Circuit, in *Rolland v. Romney*, acknowledged that regulations by themselves could not establish enforceable rights, but the court appropriately applied *Chevron* deference principles in concluding that an agency's regulations interpreting a statutory right could clarify a right so that it is sufficiently definite to be enforceable in a § 1983 suit.²⁵⁷

252. See *id.* at 1461-62, 1467-69, 1482.

253. Bradford C. Mank, *Is a Textualist Approach to Statutory Interpretation Pro-Environmentalist?: Why Pragmatic Agency Decisionmaking Is Better than Judicial Literalism*, 53 WASH. & LEE L. REV. 1231, 1283-84 (1996) [hereinafter Mank, *Textualist*] (explaining the close ties between federal agencies and the legislative process); Mank, *The Future After Gonzaga*, *supra* note 1, at 1461-62 (same).

254. Mank, *The Future After Gonzaga*, *supra* note 1, at 1462.

255. Compare *Save Our Valley v. Sound Transit*, 335 F.3d 932, 935-44 (9th Cir. 2003) ("[W]e hold that an agency regulation cannot create individual rights enforceable through § 1983."), with *id.* at 946-61 (Berzon, J., dissenting in part). See also *infra* notes 258-59, 268, 270-78 and accompanying text.

256. See *infra* Part VI.A.

257. 318 F.3d 42, 48-58 (1st Cir. 2003); *infra* notes 303-39 and accompanying text.

A. Sound Transit: *Following Sandoval and Gonzaga's Dicta*

In *Save Our Valley*, the Ninth Circuit read *Gonzaga* as strengthening and supporting the approach in *Harris* and *South Camden* that regulations cannot establish rights enforceable under § 1983 and as weakening the rationales in *Loschiavo* and *Samuels*.²⁵⁸ The Ninth Circuit held that valid agency regulations alone could not establish individual rights enforceable through § 1983 because only Congress may establish enforceable rights through statutes.²⁵⁹ In reaching this broad conclusion, the Ninth Circuit falsely assumed that *Sandoval* and *Gonzaga* compelled its holding and failed to consider important principles of administrative law and statutory interpretation, especially *Chevron*.²⁶⁰

The Central Puget Sound Regional Transit Authority ("Sound Transit") proposed to extend an existing rail line between Seattle and Sea-Tac, Washington, through south Seattle's Rainier Valley, a predominantly minority neighborhood.²⁶¹ Although most portions of the new line were "to be elevated above street level or to be built underground," Sound Transit decided that the segment running through Rainier Valley had to run at street level because of cost and other factors.²⁶² *Save Our Valley* (SOV), a community group, brought suit against Sound Transit in federal district court and argued that Sound Transit's proposal violated a Department of Transportation (DOT) disparate impact regulation²⁶³ that DOT issued pursuant to authority under Title VI of the Civil Rights Act of 1964,²⁶⁴ which prohibits recipients of federal funds from taking actions that have a racially discriminatory effect.²⁶⁵ SOV also contended that this DOT

258. *Save Our Valley*, 335 F.3d at 936-43 (discussing *Gonzaga's* impact on the validity of *Harris*, *South Camden*, *Loschiavo*, and *Samuels*).

259. *Id.* at 935-44 ("[W]e hold that an agency regulation cannot create individual rights enforceable through § 1983."); *see id.* at 943-44; Recent Case, *supra* note 1, at 735.

260. *See* Recent Case, *supra* note 1, at 735; *infra* notes 270-78 and accompanying text.

261. *See Save Our Valley*, 335 F.3d at 934; Recent Case, *supra* note 1, at 735.

262. *Save Our Valley*, 335 F.3d at 934.

263. 49 C.F.R. § 21.5(b)(2) (2004).

264. Specifically, the regulation was promulgated under the authority of Section 602 of the Civil Rights Act of 1964, 42 U.S.C. §2000d-1 (2000). *See* 35 Fed. Reg. 10080, 10080 (June 18, 1970). That section provides that "[e]ach Federal department and agency which is empowered to extend Federal financial assistance to any program or activity . . . is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability." 42 U.S.C. §2000d-1.

265. *See* 49 C.F.R. § 21.5(b)(2) (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"). SOV also alleged that Sound Transit's plan violated the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370f (2000), the Fair Housing Act, 42 U.S.C. §§ 3601-3631, and the intentional discrimination portion of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. *See Save Our Valley*, 335 F.3d at 934 n.1. The district court dismissed the National Environmental Policy Act claim and granted Sound Transit summary judgment on the Fair Housing Act

regulation created an individual right to be free from disparate impact and that this right was enforceable through § 1983.²⁶⁶

In *Save Our Valley*, the Ninth Circuit affirmed the district court's conclusion that the DOT regulations could not establish a right enforceable under § 1983 and, therefore, that the defendants were entitled to summary judgment.²⁶⁷ In light of both *Sandoval* and *Gonzaga*, the majority concluded that "agency regulations cannot independently create rights enforceable through § 1983."²⁶⁸ In *Sandoval*, the Supreme Court had focused on the text of Title VI itself, rather than the implementing regulation, in determining whether the DOT regulation created a private right of action.²⁶⁹ The Ninth Circuit concluded that *Sandoval's* emphasis on the statute's text implied that "only Congress by statute can create a private right of action."²⁷⁰ Although acknowledging that *Sandoval* had dealt only with implied or private rights of action and had not addressed when individual rights are enforceable under § 1983, the majority determined that "the [*Sandoval*] Court's reasoning applie[d] equally to both kinds of rights."²⁷¹ Similarly, the majority concluded that *Gonzaga* "confirmed that individual rights enforceable through § 1983 and implied private rights of action are similar in respects relevant to this appeal."²⁷² Quoting *Gonzaga*, the Ninth Circuit observed that in both private right of action cases and § 1983 cases, "courts are required to 'determine whether Congress intended to create a federal right.'"²⁷³ "Since only Congress can create implied rights of action" under *Sandoval*, the Ninth Circuit concluded that *Gonzaga* "suggests that only Congress can create rights enforceable through § 1983"²⁷⁴ because "rights enforceable through § 1983, no less than implied rights of action, are creatures of substantive federal law."²⁷⁵ The majority concluded that the *Gonzaga* decision strongly implied that "the Court's reasoning [in

claim. *Id.* The district court also held that the claim brought under Section 601 of Title VI could stand if SOV could prove intentional discrimination. *Id.* None of these issues was raised on appeal. *Id.*; Recent Case, *supra* note 1, at 736.

266. See *Save Our Valley*, 335 F.3d at 934-35; Recent Case, *supra* note 1, at 736.

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

268. *Id.* at 939; Recent Case, *supra* note 1, at 737.

269. See *Save Our Valley*, 335 F.3d at 937 (observing that "[t]he [*Sandoval*] Court rejected the claim, basing its analysis not on the regulation's text but on the statute's text" and citing several examples of the *Sandoval* Court's emphasis on the statutory language); Recent Case, *supra* note 1, at 737 (discussing the Ninth Circuit's emphasis on *Sandoval's* analysis of statutory language).

270. See *Save Our Valley*, 335 F.3d at 937; Recent Case, *supra* note 1, at 737 (discussing the Ninth Circuit's emphasis on *Sandoval's* analysis of statutory language).

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

272. *Id.* at 938; Recent Case, *supra* note 1, at 737 n.29.

273. *Save Our Valley*, 335 F.3d at 938 (quoting *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002) (emphasis added)); Recent Case, *supra* note 1, at 737 n.29.

274. *Save Our Valley*, 335 F.3d at 939; Recent Case, *supra* note 1, at 737 n.29.

275. *Save Our Valley*, 335 F.3d at 938 n.4; Recent Case, *supra* note 1, at 740.

Sandoval] applie[d] equally to both kinds of rights”²⁷⁶ and that, “[l]ike substantive federal law itself, private rights of action to enforce federal law must be created by Congress.”²⁷⁷ Accordingly, the Ninth Circuit held that enforceable rights “cannot be created by executive agencies.”²⁷⁸

In a lengthy partial dissent, Judge Berzon disagreed with the majority’s conclusion that regulations can never create rights enforceable through § 1983. Judge Berzon contended that “the majority opinion demonstrates that it does not understand what a right is, and how it differs from a right of action.”²⁷⁹ Judge Berzon stated that “[a]ny analysis of the reach of § 1983 must . . . begin with, and not lose sight of, the unexceptional proposition that rights are entirely distinct from any private, affirmative, judicial remedy that may exist for violation or deprivation of those rights.”²⁸⁰ Judge Berzon argued that *Sandoval* had merely required that Congress create any right of action enforceable in a court but that neither *Sandoval* nor *Gonzaga* had held that Congress alone must explicitly establish rights.²⁸¹ She explained that an individual right is simply the legal relationship between two individuals and the state and that administrative agency regulations almost inevitably define such relationships and rights.²⁸² Indeed, the Supreme Court has held that an agency rule has the “force and effect of law” only if it “affect[s] individual rights and obligations.”²⁸³

Judge Berzon responded to the majority’s argument that the *Sandoval* and *Gonzaga* decisions implied that agencies cannot create either private rights of action or enforceable rights by observing that the Supreme Court had never held that administrative regulations may not create rights.²⁸⁴ To the contrary, Judge Berzon argued that the Court’s precedent clearly supported the view that regulations

276. *Save Our Valley*, 335 F.3d at 937; Recent Case, *supra* note 1, at 737.

277. *Save Our Valley*, 335 F.3d at 937 (quoting *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) (emphasis added) (internal quotation marks omitted)); Recent Case, *supra* note 1, at 737-38.

278. *Save Our Valley*, 335 F.3d at 938 n.4 (citing *Sandoval*, 532 U.S. at 286); Recent Case, *supra* note 1, at 740.

279. *Save Our Valley*, 335 F.3d at 946 (Berzon, J., dissenting in part); Recent Case, *supra* note 1, at 737.

280. *Save Our Valley*, 335 F.3d at 946-51 (Berzon, J., dissenting in part) (explaining the difference between a right and a right of action); Recent Case, *supra* note 1, at 737-38.

281. *Save Our Valley*, 335 F.3d at 946-51 (Berzon, J., dissenting in part); Recent Case, *supra* note 1, at 737-38.

282. *See Save Our Valley*, 335 F.3d at 947 (Berzon, J., dissenting in part); Recent Case, *supra* note 1, at 740.

283. *Save Our Valley*, 335 F.3d at 955 (Berzon, J., dissenting in part) (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 301-02 (1979)) (citation and internal quotation marks omitted); Recent Case, *supra* note 1, at 740.

284. *Save Our Valley*, 335 F.3d at 954-60 (Berzon, J., dissenting in part); Recent Case, *supra* note 1, at 738 (discussing Judge Berzon’s partial dissent).

clearly establish rights and are “laws” for purposes of § 1983, at least where Congress has delegated authority to agencies to promulgate rules having the force of law.²⁸⁵ After extensively discussing general administrative law principles, Supreme Court caselaw, and Ninth Circuit precedent, Judge Berzon concluded that valid federal regulations could easily create “the particular form of rules that we describe as creating ‘rights.’”²⁸⁶ Accordingly, Judge Berzon determined that valid regulations that have the force and effect of law are “laws” within the meaning of § 1983 and, therefore, that where regulations establish individual and specific legal rights, those rights are enforceable under § 1983.²⁸⁷

Judge Berzon’s argument that rights are different from rights of action is solidly based on the Court’s precedent, including *Chevron* and *Chrysler*.²⁸⁸ If a statute is ambiguous or contains a gap, the *Chevron* decision presumes that Congress has implicitly delegated to the agency interpretive authority to construe the meaning of the statute, provided that the agency has promulgated a reasonable interpretation of the statute in a rule carrying the force of law.²⁸⁹ Justice Scalia acknowledged in *Sandoval* that “regulations, if valid and reasonable, authoritatively construe the statute itself.”²⁹⁰ Furthermore, the Supreme Court recognized in *Chrysler* that Congress may implicitly delegate the authority to define rights to an agency as long as it is sufficiently clear that the legislature intended to delegate to the agency the authority to issue regulations having the force of law.²⁹¹

285. *Save Our Valley*, 335 F.3d at 946-60 (Berzon, J., dissenting in part) (citing *Chrysler*, 441 U.S. at 308); Recent Case, *supra* note 1, at 738.

286. *Save Our Valley*, 335 F.3d at 946-59 (Berzon, J., dissenting in part); Recent Case, *supra* note 1, at 738.

287. *Save Our Valley*, 335 F.3d at 960-61 (Berzon, J., dissenting in part) (“Applying the *Chrysler* presumption, ‘laws’ in § 1983 includes regulations as well.”); Recent Case, *supra* note 1, at 738. Judge Berzon concluded, however, that the Title VI disparate impact regulations in the case did not establish an individual right enforceable under § 1983. *Save Our Valley*, 335 F.3d at 963 (Berzon, J., dissenting in part) (“Applying *Gonzaga* to [49 C.F.R.] § 21.5(b)(2) [(2003)], I conclude that the regulation does not create a separate right in the affected group of people.”).

288. See *supra* notes 279-87, 289-91 and accompanying text.

289. See *United States v. Mead Corp.*, 533 U.S. 218, 221 (2001) (stating that courts will defer to agency statutory interpretation where the statute is ambiguous and the agency has issued an interpretation in a rule carrying force of law); *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-44 (1984) (stating that courts will defer to an agency rule interpreting an ambiguous statute or a statute containing a “gap” based on the presumption that Congress has implicitly delegated interpretive authority to the agency); Recent Case, *supra* note 1, at 741; *supra* notes 21-23, 187-93 and accompanying text.

290. *Alexander v. Sandoval*, 532 U.S. 275, 284 (2001); Recent Case, *supra* note 1, at 741.

291. See *Chrysler Corp. v. Brown*, 441 U.S. 281, 308 (1997) (explaining that Congress does not need to be “specific before regulations promulgated pursuant to [a congressional delegation of authority] can be binding on courts in a manner akin to statutes” as long as

The majority's conclusion that administrative agencies may establish neither rights of action nor any type of individual right enforceable through § 1983 is based on an overly broad reading of dicta in *Sandoval* and *Gonzaga*.²⁹² In *Sandoval*, the Court concluded that the separation of powers doctrine requires that Congress must intend to create any private rights of action in the federal courts because Congress alone defines federal jurisdiction and, accordingly, that regulations alone may not create a private right of action.²⁹³ Congress, however, has explicitly enacted § 1983 to provide remedies for violations that deprive individuals of their rights under federal law, and therefore § 1983 suits are fully authorized by Congress under separation of powers principles.²⁹⁴ As discussed below, *Chevron* and subsequent cases firmly establish that Congress may delegate to agencies the authority to define rights that carry the force of law and, hence, are enforceable under § 1983.²⁹⁵

The majority also appeared to rely on dicta in the *Sandoval* decision suggesting that only explicit statutory language may create a private right of action.²⁹⁶ However, any implication in *Sandoval* that only express statutory language may establish a private right of action is contrary to the Court's prior precedent, and *Sandoval* never purported to overrule that precedent.²⁹⁷ The *Sandoval* decision did

"the reviewing court [is] reasonably . . . able to conclude that the grant of authority contemplates the regulations issued"); see also Recent Case, *supra* note 1, at 741 & n.58.

292. Recent Case, *supra* note 1, at 738-42.

293. See *Save Our Valley*, 335 F.3d at 953 (Berzon, J., dissenting in part) ("The special separation of powers concerns underlying *Sandoval* do not apply in a § 1983 case."); Recent Case, *supra* note 1, at 738-41 (arguing that *Sandoval's* requirement that private right of action suits must be expressly authorized by Congress reflects separation of powers concerns not applicable to enforcement of regulations under § 1983). See generally *Sandoval*, 532 U.S. at 287-93 (concluding that only Congress and not agencies may create a private right of action); *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 509 n.9 (1990) (observing that the need for proof of congressional intent to authorize an implied private right of action "reflects a concern, grounded in separation of powers, that Congress rather than the courts controls the availability of remedies for violations of statutes").

294. See *Wilder*, 496 U.S. at 509 n.9 ("Because § 1983 provides an 'alternative source of express congressional authorization of private suits,' these separation of powers concerns are not present in a § 1983 case." (quoting *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 19 (1981)) (citation omitted)); see also Mank, *Using § 1983*, *supra* note 1, at 322-24, 326, 354-57 (arguing § 1983 suits do not raise same separation of powers concerns as implied right of action suits because Congress has specifically authorized § 1983 suits to enforce federal laws creating individual rights); Sunstein, *supra* note 49, at 415 ("[I]f Congress itself has created the cause of action, it cannot be argued that judicial enforcement is illegitimate judicial lawmaking."); Recent Case, *supra* note 1, at 738-40 (arguing that § 1983 suits do not raise the same separation of powers concerns as implied right of action suits because Congress has specifically authorized § 1983 suits to enforce federal laws creating individual rights).

295. See *infra* Part VII.

296. See *supra* notes 213-33, 292 and accompanying text; Mank, *The Future After Gonzaga*, *supra* note 1, at 1461.

297. Sara Rosenbaum & Joel Teitelbaum, *Civil Rights Enforcement in the Modern Healthcare System: Reinvigorating the Role of the Federal Government in the Aftermath of*

not reject implied rights of action in all circumstances but held only that Title VI disparate impact regulations that exceed Section 601's prohibition against intentional discrimination may not establish a private right of action.²⁹⁸ Even though Section 601 does not explicitly provide such a right of action, the *Sandoval* decision recognized that, in light of *Cannon* and *Guardians*, Section 601 creates an implied right of action for victims of intentional discrimination.²⁹⁹ Thus, *Sandoval* did not hold that a private right of action must always be explicit in the text of a statute, and it acknowledged that the Court would recognize implicit rights of action if there is sufficient evidence in the statute that Congress intended to create a private right of action.³⁰⁰

The *Sandoval* decision itself acknowledged that a private plaintiff may file an implied right of action suit under Section 601 of Title VI alleging intentional discrimination despite the absence of express statutory authorization for such suits. Similarly, the Court has recognized a cause of action under Title IX for sexual harassment even though the statute does not explicitly prohibit such conduct because such suits are consistent with the statute's core prohibition against intentional sex discrimination.³⁰¹ Additionally, the Court has held that under Title IX a student may sue school officials for deliberate indifference concerning her complaints of sexual harassment by other students even though the statute contains no explicit provision authorizing such a private right of action.³⁰²

B. *The First Circuit in Rolland v. Romney Considers Agency Regulations in Defining Rights Under § 1983*

1. *Nursing Home Reform Amendments ("NHRA") to the Medicaid Law Require States to Provide Specialized Services*

Most recently, after the Supreme Court decided *Gonzaga*, the First Circuit, in *Rolland v. Romney*,³⁰³ relied on regulations in interpreting the scope of statutory rights.³⁰⁴ A class of developmentally

Alexander v. Sandoval, 3 YALE J. HEALTH POL'Y L. & ETHICS 215, 244 (2003) (arguing that *Sandoval* implies that a private right of action must be based on explicit statutory language, but contending that such a view is contrary to precedent).

298. Black, *supra* note 1, at 363 & n.42; *supra* notes 217-29 and accompanying text.

299. *Sandoval*, 532 U.S. at 279-81 (citing Alexander v. Choate, 469 U.S. 287, 293 (1985), and Guardians Ass'n v. Civil Serv. Comm'n of New York City, 463 U.S. 582, 610-11 (1983)); Short, *supra* note 32, at 125-26.

300. *Sandoval*, 532 U.S. at 280-87; *supra* notes 292-99 and accompanying text.

301. See *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 639-49 (1999); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 277 (1998); Black, *supra* note 1, at 362-63 (discussing *Davis* and *Gebser*).

302. See *Davis*, 526 U.S. at 639-49; see also Black, *supra* note 1, at 362-63.

303. 318 F.3d 42 (1st Cir. 2003).

304. *Id.* at 48-58.

disabled and mentally retarded residents living in Massachusetts nursing homes filed suit against the Commonwealth of Massachusetts in federal district court in 1998 "on behalf of a putative class of approximately 1600 similarly disabled residents of Massachusetts nursing homes, alleging violations of a variety of federal statutes, including 42 U.S.C. § 1396r, a part of the Nursing Home Reform Amendments ("NHRA") to the Medicaid law."³⁰⁵ Initially, the Commonwealth entered into a settlement agreement with the plaintiffs, which obligated the state to provide specialized services under NHRA to the Medicaid law, but the plaintiffs then filed a motion for further relief under § 1983 concerning specialized services.³⁰⁶ The plaintiff-residents sought various forms of relief but, in particular, requested an injunction requiring the Commonwealth to provide them with "specialized services," a term given a specialized meaning in the NHRA and its implementing regulations.³⁰⁷ The United States District Court for the District of Massachusetts ordered the Commonwealth of Massachusetts to provide specialized services and implement a policy of active treatment.³⁰⁸ The state appealed. The First Circuit Court of Appeals in *Romney* held that (1) states are required to provide specialized services to persons found to require both nursing facility care and specialized services for mental illness or mental retardation; (2) the residents had a private right of action under § 1983 to enforce that entitlement; and (3) the district court's injunction requiring the state to implement a policy of "active treatment" for mentally retarded residents needing specialized services was proper.³⁰⁹ The First Circuit concluded that developmentally disabled and mentally retarded nursing home residents who were entitled to specialized services under the NHRA of the Medicaid law had a private right of action to enforce those rights in an action under § 1983, although federal Medicaid funding is not specifically conditioned upon the provision of specialized services, because the term "specialized services" is a specific right suitable to judicial enforcement and the NHRA unambiguously binds the states.³¹⁰

305. *Id.* at 47-52 (finding that states are required under the Nursing Home Reform Amendments (NHRA) to the Medicaid law to provide specialized services to certain individuals who require services for mental illness or retardation as well as nursing facility care).

306. *Id.* at 44-45.

307. *Id.* at 45.

308. *Rolland v. Celluci*, 198 F. Supp. 2d 25 (D. Mass. 2002); *Romney*, 318 F.3d at 45.

309. 318 F.3d at 48-58.

310. *Id.* at 44-48 (discussing 42 U.S.C. § 1983, various provisions of the Social Security Act, and applicable regulations).

311. *Id.* at 48-49.

The *Romney* court concluded that the statutory scheme as a whole supported the HHS regulations.³¹¹ In interpreting the statute, the court initially stated that “the plain meaning of the statutory language, as derived from the whole of the statute, including its overall policy and purpose, controls.”³¹² The court concluded that the statute, when read as a whole and in light of the HHS regulations, demonstrated an intent to create rights on behalf of dual need patients:³¹³

Applying these precepts to the question of whether Congress intended to require states to provide specialized services to dual need residents, we look first at the NHRA’s plain language. The NHRA is silent on this precise question, but we gather clues of congressional intent from several separate provisions in the statute, ever mindful of its overriding purpose, to protect individuals from being warehoused in nursing facilities and denied necessary services.³¹⁴

Examining the statute’s structure, the First Circuit initially concluded that “although the NHRA does not specify states’ obligations to provide specialized services to dual need residents, it does explicitly require states to provide specialized services to residents who do need them but who do *not* require nursing facility care.”³¹⁵ In light of the statute’s overall structure, the First Circuit determined “[i]t is clear that the statute’s intent in this regard was not to elevate those individuals with only the need for specialized services above those with dual needs, but rather to bring them up to par with the dual needs group.”³¹⁶ Additionally, Congress required states to establish a screening process for current and potential residents to examine both “whether nursing facility care is required *and* whether specialized services are required.”³¹⁷ While not conclusive, the requirement of a screening process suggests that Congress intended states to actually provide the services that the screening indicated that a resident needed.³¹⁸ Furthermore, the First Circuit found that “[a] third statutory clue to Congress’s intent can be discerned in the requirement that states create an appeals process for individuals adversely impacted by the outcome of any PASARR screening determination. It is clear that Congress perceived the screening as vesting individuals with rights to the services deemed necessary”³¹⁹

312. *Id.* at 48 (citing *Summit Inv. & Dev. Corp. v. Leroux*, 69 F.3d 608, 610 (1st Cir. 1995)).

313. *Id.* at 48-51.

314. *Id.* at 48 (citing H.R. REP. NO. 100-391, pt. 1, at 459 (1987), *reprinted in* 1987 U.S.C.C.A.N. 2313-1, 2313-279).

315. *Id.* at 48-49.

316. *Id.*

317. *Id.* at 49.

318. *Id.*

319. *Id.* (citation omitted).

Unlike the Ninth Circuit in *Save Our Valley*, the First Circuit in *Romney* relied in part on the interpretation of the agency responsible for the NHRA's implementation, Health and Human Services (HHS). The First Circuit initially found that

Congress gave the Secretary very broad duties under the NHRA Specifically, Congress required the Secretary to oversee the PASARR screening process by developing "minimum criteria for States to use in making [screening] determinations . . . and in permitting individuals adversely affected to appeal such determinations." Further, the NHRA required the Secretary to specifically monitor state compliance with certain requirements.³²⁰

To fulfill these duties, despite the objections of several states, the Secretary "promulgated a rule explicitly requiring states to provide specialized services to dual need residents."³²¹ The First Circuit considered the Secretary's interpretation in that rule along with its own interpretation of the statutory language and legislative history in concluding that the NHRA required states to provide specialized services to dual need residents.³²² In light of its own interpretation of the statute, the First Circuit likely would have found such a right even in the absence of the HHS rule.

2. *The Right to Specialized Services in the NHRA Is Enforceable Under § 1983*

The First Circuit next addressed whether the right to specialized services that both it and the HHS regulations found in the NHRA is enforceable under § 1983. In light of *Sandoval* and *Gonzaga*, the First Circuit observed that the crucial issue is whether Congress intended to create a private right for nursing home residents to receive specialized services.³²³ The First Circuit echoed the Supreme Court's statement in *Cannon v. University of Chicago*³²⁴ by maintaining that the most crucial factor in determining whether Congress intended to create a cause of action is whether the statute contains "right-or-duty-creating language."³²⁵

In determining whether the NHRA contains "right-or-duty-creating language," the First Circuit considered the HHS regulations. Quoting *Sandoval*, the First Circuit acknowledged that a regulation "may not create a right that Congress has not."³²⁶ Even after

320. See *id.* at 50 (quoting 42 U.S.C. § 1396(f)(8)(A), (B)) (alteration in original) (citations omitted).

321. *Id.* (citing 42 C.F.R. § 483.116(b)).

322. See *id.* at 50-51.

323. See *id.* at 51-52.

324. 441 U.S. 677 (1979).

325. See *Romney*, 318 F.3d at 52 (quoting *Cannon*, 441 U.S. at 690 n.13).

326. *Id.* at 52 (quoting *Alexander v. Sandoval*, 532 U.S. 275, 291 (2001)).

Sandoval, however, the Eleventh Circuit had concluded that “regulations that merely interpret a statute may provide evidence of what private rights Congress intended to create.”³²⁷ Citing *Wright*, which had in turn cited *Chevron*, the *Romney* court concluded that regulations that interpret what rights Congress intended to create in a statute are “entitled to some deference.”³²⁸

Reviewing the statute’s language, its legislative history, and its interpretation by HHS, the First Circuit concluded that the NHRA contained “rights-creating” language that established an enforceable right under § 1983. The *Romney* court applied the three-part *Blessing* test to decide whether the statute’s provision for “specialized services” created an enforceable right under § 1983. The Commonwealth had conceded that Congress intended the statute to benefit especially persons such as the residents and, therefore, that the NHRA met the first part of the *Blessing* test for an enforceable right.³²⁹

Relying on *Gonzaga*, the Commonwealth contended, however, that the statute’s reference to “specialized services” was too vague and amorphous to be judicially enforceable and, accordingly, did not meet the second *Blessing* prong.³³⁰ The First Circuit relied on the HHS definition of specialized services in determining that the NHRA’s reference to “specialized services” was clear enough to be enforced under the second *Blessing* standard because Congress had expressly delegated authority to the HHS Secretary to define the term and the HHS regulations provided the necessary clarity.³³¹

In the instant case, the NHRA expressly delegates authority to define “specialized services” and the Secretary has complied. The agency’s definition, consistent with rights affirmed in prior case law, provides contextual guidance, and it is sufficient to allow residents to understand their rights to services, states to understand their obligations, and courts to review states’ conduct in fulfilling those obligations. In complex areas such as this, more cannot reasonably be expected.³³²

Finally, the First Circuit concluded that the NHRA unambiguously requires states to provide specialized services and, therefore, meets the third *Blessing* test.³³³ The statute repeatedly stated that states “must” screen potential residents to determine if they need

327. *Love v. Delta Air Lines*, 310 F.3d 1347, 1354 (11th Cir. 2002) (citing *Sandoval*, 532 U.S. at 284).

328. See *Romney*, 318 F.3d at 52 (citing *Wright v. City of Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 427 (1987) (citing *Jean v. Nelson*, 472 U.S. 846, 865 (1985)); *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)).

329. See *Romney*, 318 F.3d at 52-53.

330. *Id.* at 53-54.

331. *Id.* at 54.

332. *Id.*

333. *Id.* at 55.

services, must review whether current residents need such services, and must consider the results of such screening and reviews in determining how to provide care to patients.³³⁴ The *Romney* court determined that the mandatory language in the NHRA made it enforceable under § 1983 and distinguished it from the discretionary right against disparate impact discrimination in the Title VI agency regulations that the *Sandoval* Court had found did not create a private right of action.

This is not a situation akin to that in *Sandoval*, where the sole source of the right at issue was found in the regulations and the statute did not utilize rights-creating language, limited the agency's ability to effectuate individual rights, and focused on the implementing agency rather than the individuals being protected.³³⁵

The First Circuit concluded that “[b]ecause we find that the right at issue is not vague and amorphous and that the NHRA unambiguously binds the states, we hold that the residents are endowed with a private right of action, which they may enforce via section 1983.”³³⁶ The First Circuit had found that the statute and its legislative history at least implicitly indicated that Congress intended to establish a right to specialized services.³³⁷ Thus, the court found the right to these services in the statute itself and not the regulations.³³⁸ Where there were gaps in the statute regarding the definition of such services, however, the *Romney* court relied upon and deferred to the HHS regulations.

In the complex field of care for mentally retarded individuals and the related regulation of nursing homes and states, however, Congress has made it clear that the Secretary is to fill in gaps and provide definition. The products of that delegation of authority, responding to widespread documented problems, provide an effective manner for care of mentally retarded nursing home residents and are entitled to deference.³³⁹

Accordingly, the First Circuit, in *Romney*, used the agency's interpretation to help define the details of a right it had first found that Congress had intended to create in the statute itself.

334. *Id.*

335. *Id.* (citing *Alexander v. Sandoval*, 532 U.S. 275, 288-89 (2001)).

336. *Id.* at 56.

337. See *supra* notes 275, 288-89 and accompanying text.

338. See *supra* notes 311-19 and accompanying text.

339. *Romney*, 318 F.3d at 58.

VII. CONCLUSION

In *Save Our Valley*, the Ninth Circuit reached the erroneous conclusion that administrative regulations can never establish rights enforceable through § 1983 by misreading dicta in *Sandoval* and *Gonzaga*.³⁴⁰ Instead, the Court's precedent in *Chevron* and *Wright* supports the view that Congress may delegate to an agency the authority to promulgate rules that help interpret, define, and clarify details in a statute so that implicit rights in a statute become sufficiently definite to be enforceable through § 1983.³⁴¹ Under *Chevron*, there is, in effect, a rebuttable presumption that an agency's rulemaking authority includes the authority to interpret statutes and thus define rights.³⁴²

The *Save Our Valley* court misread *Sandoval* and *Gonzaga* in concluding that agency regulations can never establish rights enforceable through § 1983.³⁴³ The *Sandoval* Court's emphasis that only Congress may create a private right of action is based on separation of powers principles that are inapplicable in § 1983 cases.³⁴⁴ Because Congress explicitly authorized § 1983 suits to remedy violations of specific federal rights by state actors, Congress has met separation of powers requirements for such suits.³⁴⁵ As a private right of action case, *Sandoval* simply does not apply to rights enforceable through § 1983.³⁴⁶ Although the *Gonzaga* Court to some extent shared the *Sandoval* Court's concern that courts should only enforce rights that

340. See *supra* notes 270-80, 292 and accompanying text.

341. See *supra* notes 21-23, 186-93, 289 and accompanying text.

342. See *supra* notes 21-23, 186-93, 289 and accompanying text.

343. Recent Case, *supra* note 1, at 738 n.38.

344. See *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 509 n.9 (1990) (observing that the need for proof of congressional intent to authorize implied private right of action "reflects a concern, grounded in separation of powers, that Congress rather than the courts controls the availability of remedies for violations of statutes"); *Save Our Valley v. Sound Transit*, 335 F.3d 932, 953 (9th Cir. 2003) (Berzon, J., dissenting in part).

345. See *Wilder*, 496 U.S. at 509 n.9 ("Because § 1983 provides an 'alternative source of express congressional authorization of private suits,' these separation of powers concerns are not present in a § 1983 case.") (quoting *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 19 (1981)) (citation omitted); see also Mank, *Using § 1983, supra* note 1, at 322-24, 326, 354-57 (arguing that § 1983 suits do not raise the same separation of powers concerns as implied right of action suits because Congress has specifically authorized § 1983 suits to enforce federal laws creating individual rights); Sunstein, *supra* note 49, at 415 ("[I]f Congress itself has created the cause of action, it cannot be argued that judicial enforcement is illegitimate judicial lawmaking."); Recent Case, *supra* note 1, at 738-40.

346. See *Alexander v. Sandoval*, 532 U.S. 275, 300 (2001) (Stevens, J., dissenting) (arguing majority's decision was "something of a sport" because "[i]tligants who in the future wish to enforce the Title VI regulations against state actors in all likelihood must only reference § 1983 to obtain relief"); Recent Case, *supra* note 1, at 739 (arguing that *Sandoval* only addressed private rights of action and not § 1983 suits). See generally Mank, *Using § 1983, supra* note 1, at 348-53, 367-82 (arguing that Title VI disparate impact regulations may be enforced through § 1983).

Congress intended to create,³⁴⁷ administrative agency regulations that have the force of law are by their very nature based on at least an implicit delegation by Congress to the agency to establish rights and, accordingly, at least in some circumstances may be enforced through § 1983.³⁴⁸

The First Circuit in *Romney* appropriately considered the agency's interpretation in defining the scope of a statutory right. Although the statute did not explicitly state that nursing home residents had a right to specialized services, the First Circuit concluded that the statutory language as a whole and the legislative history demonstrated that Congress had intended to create a right to specialized services in the NHRA. The Commonwealth argued that any such "right" in the statute was too vague and ambiguous to enforce because the statute does not adequately define the term "specialized services," but the *Romney* court concluded that Congress had expressly delegated to HHS the task of defining the details of which services are required by the right to "specialized services" and that the regulations gave sufficient clarity to the definition of the term. As demonstrated by the *Romney* decision, courts should consider agency interpretations in deciding whether Congress created a right in a statute that is sufficiently clear to meet the three-part *Blessing* standard. The *Romney* decision illustrates the realities of modern administrative statutes in which Congress creates a general right and then delegates to an agency the task of filling in the often highly technical details of that right. If there is sufficient evidence in a statute and its legislative history that Congress intended to create a mandatory right on behalf of a defined group of beneficiaries, courts should enforce that right through § 1983 even if an agency has filled some gaps in the details of that right. That is an example of the agency serving as the "sorcerer's apprentice but not the sorcerer himself"³⁴⁹ and is consistent with the Supreme Court's approach in both *Sandoval* and *Gonzaga*.

347. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002); Mank, *The Future After Gonzaga*, *supra* note 1, at 1446-51.

348. See generally Mank, *The Future After Gonzaga*, *supra* note 1, at 1467-69; *supra* notes 157-347 and accompanying text.

349. *Sandoval*, 532 U.S. at 291.