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Using § 1983 to Enforce Title VI’s Section 602 Regulations

Bradford C. Mank

I. INTRODUCTION

In Powell v. Ridge,\(^1\) the Third Circuit recently held that there is a private right of action to enforce administrative regulations prohibiting disparate impact discrimination under section 602 of Title VI of the Civil Rights Act of 1964,\(^2\) which forbids federal agencies from providing funding to recipients that discriminate on the basis of race.\(^3\) Additionally, the Third Circuit concluded that the plaintiffs could sue under § 1983 to enforce the same Title VI regulations.\(^4\) While most civil rights litigants are likely to focus on Powell’s private right of action holding, its § 1983 analysis could prove more valuable.

Because judicial implication of private rights of action raises serious separation of powers issues, courts have increasingly refused to imply private suits unless there is substantial evidence that Congress intended to allow private remedies for statutory violations.\(^5\) The Supreme Court has held that there is a private right of action under Title VI to challenge intentional discrimination by recipients of federal funds, but there is a serious question whether the Court would agree that private litigants may use agency regulations under section 602 of the statute to sue recipients for

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1. 189 F.3d 387 (3d Cir. 1999), cert. denied, 120 S. Ct. 579 (1999).


3. Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, 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 which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. § 602, 42 U.S.C. § 2000d-1. See generally Paul K. Sonn, Note, Fighting Minority Underrepresentation in Publicly Funded Construction Projects After Croson: A Title VI Litigation Strategy, 101 YALE L.J. 1577, 1581 n.25 (1992) (listing Title VI regulations for several federal agencies).

4. Powell, 189 F.3d at 403.

5. See infra notes 246–69 and accompanying text.
disparate impact discrimination. Civil rights groups have sought to enforce agency regulations in federal courts because agencies have often been slow to enforce their own Title VI regulations against states accused of discriminatory practices and because Title VI regulations do not provide remedies to individual plaintiffs. Several courts have recognized a private right of action to enforce disparate impact regulations under section 602 of Title VI, but other courts have limited private rights of action under Title VI to cases alleging intentional discrimination. It remains to be seen how the Supreme Court will decide the question. In 1998, the Supreme Court granted certiorari to review a decision by the Third Circuit recognizing a

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6. See infra notes 8-10 and accompanying text.
7. See infra notes 312-26 and accompanying text.
8. There clearly is a private right of action under section 601 of Title VI, but the Supreme Court has required plaintiffs suing under that provision to prove intentional discrimination by the recipient. See infra notes 299-311 and accompanying text. A key question is whether there is also a private right of action under disparate impact regulations issued pursuant to section 602 of Title VI. See Sandino v. Hagan, 197 F.3d 484, 501-07 (11th Cir. 1999) (holding that a private right of action exists under disparate impact regulations issued pursuant to section 602 of Title VI), cert. granted sub nom. Alexander v. Sandoval, No. 99-1908, 2000 U.S. LEXIS 4860 (Sept. 26, 2000); Powell, 189 F.3d at 397-400 (allowing plaintiffs to maintain a private cause of action under disparate impact regulations issued pursuant to section 602 of Title VI); Villanueva v. Caree, 85 F.3d 481, 486 (10th Cir. 1996) (citing Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582 (1983), in finding a private right of action under Title VI's implementing regulations and stating that "[a]lthough Title VI itself proscribes only intentional discrimination, certain regulations promulgated pursuant to Title VI prohibit actions that have a disparate impact on groups protected by the act, even in the absence of discriminatory intent"); N.Y. Urban League, Inc. v. New York, 71 F.3d 1031, 1036 (2d Cir. 1995) (citing Guardians and Alexander v. Choate, 469 U.S. 287 (1985) and permitting plaintiffs to assert a disparate impact claim under Title VI's implementing regulations); City of Chicago v. Lindsey, 66 F.3d 819, 827-29 (7th Cir. 1995) (citing Guardians and Alexander, the court acknowledged a private right of action for disparate impact discrimination under Title VI's implementing regulations); Md. State Conference of NAACP Branches v. Md. Dept. of State Police, 72 F. Supp. 2d 560, 567 (D. Md. 1999) (holding that a private right of action exists under administrative regulations promulgated pursuant to section 602); Flores v. Arizona, 189 F. Supp. 2d 937, 941-42 (D. Ariz. 1999) (permitting a private right of action to enforce regulations under Title VI); Gilbert Paul Carrasco, Public Wrong, Private Rights: Private Attorneys General for Civil Rights, 9 VILL. ENVT'L L. J. 321 (1998) (discussing whether regulations implementing Title VI are enforceable by private parties); Bradford C. Manka, Is There a Private Cause of Action Under E.P.A.’s Title VI Regulations?: The Need to Empower Environmental Justice Plaintiffs, 24 COLUM. J. ENVTL. L. 13, 33-49 (1999) (hereinafter Manka, Private Right); Amanda C.L. Vig, Casenote, Using Title VI to Salvage Civil Rights from Waste: Chester Residents Concerned for Quality Living v. Seif, 132 F.3d 925 (3d Cir. 1997), 67 U. CHI. L. REV. 907 (1999) (examining the Third Circuit’s holding in Chester that a private cause of action exists under section 602).

9. E.g., N.Y. City Envtl. Justice Alliance v. Giuliani, 50 F. Supp. 2d 250, 253 (S.D.N.Y. 1999) (stating that plaintiff must meet difficult standard of proving Congress intended to create a private right of action to enforce Title VI regulations, but not deciding the issue because plaintiffs failed to present credible evidence of disparate impacts); aff’d on other grounds, 214 F.3d 65, 72-73 (2d Cir. 2000); Jackson v. Katy Indep. Sch. Dist., 951 F. Supp. 1293, 1298-99 (S.D. Tex. 1996) (limiting implied actions under Title VI to cases of intentional discrimination); see also S. Bronx Coalition for Clean Air, Inc. v. Connolly, 20 F. Supp. 2d 565, 572 (S.D.N.Y. 1998) (noting that “there is a serious question as to whether plaintiffs may even bring a ‘disparate impact’ private cause of action... under Section 602 of Title VI,” but declining to decide the issue due to plaintiffs’ insufficient allegations).
private right of action under section 602, but the underlying case became
moot. The Court therefore vacated the decision below without resolving the
issue. On September 26, 2000, the Court granted certiorari of Alexander v.
Sandoval to review a decision by the Eleventh Circuit recognizing a
private right of action under section 602.1

Even if the Supreme Court eventually rejects a private cause of action
under Title VI’s implementing regulations, courts could still use § 1983 to
enforce the same regulations. Section 1983 suits do not raise the same
separation of powers concerns as implied private rights of action because
Congress has clearly authorized § 1983 suits.12 The Supreme Court has
recognized that courts should use a “different inquiry” in deciding whether
a statutory “right” may be enforced under § 1983 than in determining if
there is an implied private right of action based on the same underlying
statute and right.13 The standard for allowing a § 1983 suit based on a
violation of a federal statute is generally lower than that for implying a
private right of action under the same underlying statute because Congress
has authorized § 1983 suits. To imply a private right of action, courts place
an increasingly difficult burden on a plaintiff to prove that Congress
intended to allow private suits under a particular substantive statute.14
Conversely, once a court recognizes that a federal statute creates a distinct
“right” and that the plaintiff is an intended beneficiary of that right, there
is a presumption that the right is enforceable under § 1983.15 The burden
is then on the defendant to show that Congress expressly prohibited a suit
under § 1983 or implicitly did so by enacting a comprehensive remedial

10. Chester Residents Concerned for Quality Living v. Seif, 132 F.3d 925 (3d Cir. 1997), vacated
11. Sandoval v. Hagan, 197 F.3d 484, 501-07 (11th Cir. 1999) (holding that a private right of
action exists under disparate impact regulations issued pursuant to section 602 of Title VII), cert.
12. See infra notes 270-75 and accompanying text.
is available presents a “different inquiry” than whether an implied right of action exists); see Suter v.
Artist M., 503 U.S. 347, 358-64 (1992) (applying a different analysis to determine whether beneficiaries
can bring a § 1983 claim or an implied cause of action under the Adoption Assistance and Child Welfare
allows for a private cause of action is a separate issue from whether that statute may be enforced via §
1983.”), aff’d on other grounds, 197 F.3d 484 (11th Cir. 1999), cert. granted sub nom. Alexander v.
Sandoval, No. 99-1908, 2000 U.S. LEXIS 4860 (Sept. 26, 2000); Henry Paul Monaghan, Federal
Wilder); infra notes 270-90 and accompanying text.
14. Monaghan, supra note 13, at 246-48; Michael A. Mazzuchi, Note, Section 1983 and Implied
Rights of Action: Rights, Remedies, and Realism, 90 MICH. L. REV. 1062, 1064, 1093 (1992); infra notes
245-69 and accompanying text.
15. See infra notes 83-87 and accompanying text.
scheme that is incompatible with a § 1983 suit. Accordingly, courts have recognized that a valid § 1983 cause of action may exist even where there is no private right of action under the same statutory provision. Furthermore, even if a statute's comprehensive remedies would make it inappropriate for a court to allow statutory remedies under § 1983, courts have divided regarding whether a § 1983 suit may enforce constitutional remedies based on the same operative facts addressed by an otherwise "comprehensive" statutory remedy.

This Article examines the circumstances under which § 1983 suits may be used to enforce agency regulations in general, and Title VI's disparate impact regulations in particular. There are greater separation of powers concerns about whether violations of "rights" in agency regulations may serve as the basis for a suit under § 1983 because executive agencies should not independently establish rights unless Congress has at least implicitly intended to create them. The federal circuit courts have split regarding whether agency regulations alone may create "rights" that are enforceable through § 1983 suits. Some circuits allow § 1983 suits based on rights created by regulations issued by agencies acting under delegated congressional authority. However, in other circuits, regulations may only help define the scope of a statutory right created by Congress, and may not serve as an independent basis for § 1983 suits. Under the more restrictive test for § 1983 suits, there must be evidence in the statute that Congress

16. See infra notes 96-112 and accompanying text.
17. E.g., Fay v. S. Colonie Cent. Sch. Dist., 802 F.2d 21, 33 (2d Cir. 1986); see Sandoval, 7 F. Supp. 2d at 1252 & n.15 (discussing how analyses of § 1983 claims and implied rights of action differ).
18. Compare Seamons v. Snow, 84 F.3d 1226, 1233-34 (10th Cir. 1996) (holding that Title IX does not preempt suits under § 1983 to enforce constitutional rights), Lillard v. Shelby County Bd. of Educ., 76 F.3d 716, 722-24 (6th Cir. 1996) (holding that Title IX does not preempt suits under § 1983 to enforce constitutional rights), Lakoski v. James, 66 F.3d 751, 754-57 (5th Cir. 1995) (holding that Title IX does not preempt § 1983 claims), and Alston v. Va. High Sch. League, Inc., 176 F.R.D. 220, 223-24 (W.D. Va. 1997) (holding that Title IX does not preempt independent constitutional claims), with Pfeiffer v. Marion Ctr. Area Sch. Dist., 917 F.2d 779, 789 (3d Cir. 1990) (stating plaintiff's constitutional claims under § 1983 were "subsumed" with Title IX claim and otherwise precluded by Title IX's comprehensive enforcement scheme) (citations omitted). See generally Powell v. Ridge, 189 F.3d 387, 402-03 (3d Cir. 1999), cert. denied, 120 S. Ct. 579 (1999) (questioning and limiting Pfeiffer decision to rule that court should try to resolve statutory issues before addressing constitutional claims under § 1983 that involve the same set of facts); infra notes 405-27 and accompanying text.
19. See infra notes 137-44 and accompanying text.
21. Loschiavo v. City of Dearborn, 33 F.3d 548, 552-53 (6th Cir. 1994) (holding that civil rights suit against municipality may be based on alleged violation of agency rule); Pettys, supra note 20, at 77-79; see also infra notes 190-98 and accompanying text.
22. Harris v. James, 127 F.3d 993, 1007-12 (11th Cir. 1997); Pettys, supra note 20, at 79-80; see also infra notes 200-227 and accompanying text.
intended to create a right for the benefit of the plaintiff before courts will
examine agency regulations to help explicate the scope of that right.\textsuperscript{23}

Even under the more restrictive view that agency regulations may only
"define" statutory rights that are enforceable under § 1983, there is a strong
case for using § 1983 to enforce Title VI’s administrative regulations. First,
a court must address whether Title VI and its regulations create an
enforceable federal right under § 1983. In section 602 of Title VI, Congress
specifically directed federal funding agencies to promulgate anti-
discrimination regulations.\textsuperscript{24} Additionally, the Supreme Court has clearly
recognized that Title VI is intended to protect individuals from
discrimination and that federal agencies may promulgate regulations that
prohibit recipients of federal funds from engaging in activities that cause
disparate impacts.\textsuperscript{25} Even in circuits that limit the role of regulations in §
1983 to “further defining” or “fleshing out” existing statutory rights, there
is a good argument that section 602 regulations merely serve to define the
anti-discrimination right that Congress clearly intended to create in Title VI,
and that the disparate impact standards in those regulations are enforceable
under § 1983.\textsuperscript{26} Thus, under the three-part test for enforcing statutory rights
through § 1983, there is a strong basis for concluding that Title VI and its
section 602 regulations create a “right” against disparate impact
discrimination for the benefit of individuals affected by the activities of
federal fund recipients and that this right is enforceable pursuant to § 1983.

Second, a court must address whether Title VI or its administrative
enforcement scheme is incompatible with § 1983 actions. Neither Title VI
nor its implementing regulations expressly preclude suits under § 1983.\textsuperscript{27}

Courts have disagreed about whether Title VI’s administrative remedies are
sufficiently comprehensive to preclude a § 1983 suit.\textsuperscript{28} In Powell, the Third
Circuit concluded that Title VI’s administrative enforcement procedures do
not preclude § 1983 suits.\textsuperscript{29} On the other hand, in Alexander v. Chicago
Park District,\textsuperscript{30} the Seventh Circuit held that Title VI’s administrative
enforcement procedures preclude § 1983 suits.\textsuperscript{31} However, the Court’s

\textsuperscript{23} See infra notes 221-22 and accompanying text.
\textsuperscript{24} See infra notes 292-98 and accompanying text.
\textsuperscript{25} See infra notes 299-306 and accompanying text.
\textsuperscript{26} See infra notes 335-44 and accompanying text.
\textsuperscript{27} See infra notes 363-64 and accompanying text.
\textsuperscript{28} See infra notes 312-404 and accompanying text.
\textsuperscript{29} See infra notes 365-69 and accompanying text.
\textsuperscript{30} 773 F.2d 850 (7th Cir. 1985).
\textsuperscript{31} Id. at 856; accord Jackson v. Katy Indep. Sch. Dist., 951 F. Supp. 1293, 1301 (S.D. Tex. 1996)
(agreeing with the Seventh Circuit’s reasoning in Alexander that Title VI’s remedial scheme precludes
suits under § 1983).
conclusion in *Alexander* is questionable in light of subsequent Supreme Court decisions that have emphasized that preclusion of § 1983 suits is limited to exceptional cases where such suits would interfere with a federal statute's comprehensive remedial scheme. Title VI's administrative remedies do not protect the rights of individuals, which is one of the two major purposes of the statute, and therefore do not preclude the use of § 1983 to enforce Title VI's section 602 regulations.

Because Congress has specifically authorized § 1983 suits, the separation of powers analysis used to determine whether a right may be enforced under § 1983 is different from the analysis used to determine whether a statute creates an implied right of action. To imply a private right of action, a plaintiff must demonstrate that Congress intended to allow such suits. By contrast, a § 1983 plaintiff need only show that Congress intended to create a right for the benefit of the plaintiff. A presumption then arises that a § 1983 suit is available to enforce that right unless there is strong evidence that the underlying statute's remedial scheme is incompatible with allowing a remedy under § 1983. Because there are different tests for enforcing the same statutory rights under § 1983 rather than through a private right of action, there is a stronger argument for using § 1983 to enforce Title VI's disparate impact regulations than for implying a private right of action to enforce those same regulations.

Despite Supreme Court decisions that recognize different tests for § 1983 suits and implied rights of action, some readers may still feel uncomfortable with the idea that a § 1983 suit could be used to enforce Title VI regulations even if there is no implied right of action under the regulations themselves. Alternatively, a court could recognize an implied right of action under Title VI's disparate impact regulations and allow a § 1983 claim as well. In *Powell*, the Third Circuit found an implied right of action under Title VI's disparate impact regulations, but refused to dismiss a § 1983 claim based on state officials' alleged violation of these same regulations in their personal capacities. A § 1983 claim can complement a Title VI action by allowing suits against state officials in their individual capacities and permitting plaintiffs to raise constitutional claims that may

32. See infra notes 97-112, 352-53 and accompanying text.
33. See infra notes 245-69 and accompanying text.
34. See infra notes 97-112 and accompanying text.
35. See infra notes 281-90 and accompanying text.
36. Powell v. Ridge, 189 F.3d 387, 401-03 (3d Cir. 1999), cert. denied, 120 S. Ct. 579 (1999); see infra note 429 and accompanying text.
offer additional remedies beyond those limited remedies established in Title VI.\(^\text{37}\)

## II. SECTION 1983 SUITS TO ENFORCE "FEDERAL LAW"

The Supreme Court has interpreted § 1983 to allow the enforcement of a broad range of statutory rights. By contrast, Part IV will show that the Court has applied a more stringent standard for implying private rights of action.

### A. The Phrase "and Laws" in § 1983

Section 1983 originated in the Civil Rights Act of 1871, which was part of a series of civil rights legislation enacted after the Civil War to secure the rights of African-Americans.\(^\text{38}\) The original statute protected only constitutional rights and did not refer to rights protected by federal law.\(^\text{39}\) 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.\(^\text{40}\) There was no discussion at the time in Congress that specifically addressed to what extent the addition of the "and laws" language changed the meaning of the statute.\(^\text{41}\) Section 1983 currently states:

> 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 . . . .\(^\text{42}\)

There has been a longstanding controversy over whether and how the addition of the term "and laws" to the statute changed its meaning.\(^\text{43}\) First,
the "Consistency Theory" contends that the phrase "and laws" must be read consistently with other provisions in the Civil Rights Act to mean "and laws providing for equal rights." Second, the "No Modification Theory" suggests that the revisions were only intended to be clarifications of existing law, but this position raises difficult questions about how to interpret the addition of "and laws." Third, the "Plain Language Theory" contends that the plain meaning of the language "and laws" refers to any federal law.

Before 1980, § 1983 was primarily invoked in cases alleging injuries for violations of constitutional rights. During the 1960s and 1970s, a few Supreme Court decisions appear to have assumed that a § 1983 claim could be based on the violation of a statutory right, but none of these cases squarely addressed the issue.

In 1979, the Supreme Court, in Chapman v. Houston Welfare Rights Organization, examined the jurisdiction of courts to hear statutory causes of action under the now largely obsolete 28 U.S.C. § 1343(a)(3), and held that there was no such jurisdiction under that statute to hear statutory claims that were not based on constitutional rights or equal protection statutes. Because neither claim met the $10,000 threshold then in existence for general federal question jurisdiction under 28 U.S.C. § 1331, the Court never addressed whether § 1331 could provide jurisdiction for other types of statutory claims under § 1983. While Justice Stevens's majority opinion did not address whether § 1983 claims may be based on violations of statutory rights, his opinion did express doubts about the value of the

44. Id. at 306-07.
45. Id. at 307-08. Many proponents of the No Modification Theory argue that the term "and laws" means "and laws providing for equal rights." Id. at 308. This interpretation, however, is inconsistent with the view that the 1874 revision did not change the statute. Id.
46. Id. at 308-13.
47. Pettys, supra note 20, at 52.
48. E.g., Edelman v. Jordan, 415 U.S. 651, 674-76 (1974); see also Key, supra note 38, at 313-20 (discussing the Supreme Court's treatment of the phrase "and laws").
49. 441 U.S. 600 (1979).
51. Chapman, 441 U.S. at 602-03.
52. Id. at 606 & n.9 (citing the then-current version of 28 U.S.C. § 1331). See generally Key, supra note 38, at 311-12 (discussing 28 U.S.C. §§ 1331, 1343(a)(3)); Pettys, supra note 20, at 63 & n.77 (discussing Chapman and 28 U.S.C. §§ 1331, 1343(a)(3)).
statute's legislative history, and thus implied that the statute's plain language provided a better guide to its meaning.\footnote{\textit{Chapman}, 441 U.S. at 610-15 ("[T]he legislative history of the provisions at issue ... provides us with little guidance ... "); \textit{Pettys}, supra note 20, at 64 (discussing Justice Stevens's opinion in \textit{Chapman}).} In his concurring opinion, Justice White argued that the plain meaning of the phrase "and laws" referred to all federal statutory rights as well as constitutional claims and that dicta in prior Court decisions supported this view.\footnote{\textit{Chapman}, 441 U.S. at 649-69 (White, J., concurring); see also \textit{Key}, supra note 38, at 318-19 (discussing Justice White's concurring opinion); \textit{Pettys}, supra note 20, at 65-66 (same).} By contrast, Justice Powell's concurring opinion contended that while the statute's legislative history was of limited value, there was no evidence that Congress intended to change the meaning of the statute when it adopted the 1874 revisions. Therefore, Justice Powell claimed, the meaning of "and laws" should be read narrowly to mean "and laws providing for equal rights."\footnote{\textit{Chapman}, 441 U.S. at 623-24, 625-27, 645-46 (Powell, J., concurring, joined by Burger, C.J. & Rehnquist, J.); see also \textit{Key}, supra note 38, at 319-20 (discussing Justice Powell's concurring opinion); \textit{Pettys}, supra note 20, at 65 (same).} Furthermore, Justice Powell raised policy concerns that Justice White's interpretation of § 1983 would dramatically expand judicial supervision of states administering federal grant programs, despite the lack of any evidence that Congress intended courts to exercise such jurisdiction.\footnote{\textit{Chapman}, 441 U.S. at 645 (Powell, J., concurring); see also \textit{Key}, supra note 38, at 320 (pointing out that broadly reading "and laws" grants individuals the right to enforce every federally funded program irrespective of Congress's intent).} Justice Stewart, in dissent, agreed with Justice White that the term "and laws" included claims based on violations of statutory rights.\footnote{\textit{Chapman}, 441 U.S. at 674-75 (Stewart, J., dissenting, joined by Brennan & Marshall, JJ.); \textit{Pettys}, supra note 20, at 66 n.92.}

Justice White's and Justice Powell's opposing concurring opinions in \textit{Chapman}, while not deciding whether the phrase "and laws" allows suits under § 1983 for violations of statutory rights, defined the terms of the debate when the Court finally decided the issue. Justice Powell was concerned that Justice White's broad reading of § 1983's jurisdiction would give courts virtually unlimited power to supervise a wide range of federal programs that are administered by state officials.\footnote{\textit{Chapman}, 441 U.S. at 645 (Powell, J., concurring); see also \textit{Key}, supra note 38, at 320 (pointing out that broadly reading "and laws" allows individuals to have the courts enforce compliance of every federally funded program).} Justice White contended that the phrase "and laws" authorized plaintiffs to use § 1983 to enforce a broad range of rights established by Congress in various federal statutes.\footnote{\textit{Chapman}, 441 U.S. at 671-72 (White, J., concurring); \textit{Key}, supra note 38, at 318-19; \textit{Pettys}, supra note 20, at 65-66.}
B. Statutory Rights and § 1983

1. Maine v. Thiboutot

In 1980, the Supreme Court, in Maine v. Thiboutot, held that the plain meaning of the phrase “and laws” in § 1983 authorized plaintiffs to bring claims under the statute based on violations of federal statutory rights. Justice Brennan’s majority opinion stated that the statute’s legislative history was inconclusive. Instead, the Court relied on the plain meaning of the phrase “and laws” to hold that § 1983 suits may be based on violations of federal statutory rights in general, and not just those statutes conferring “equal rights.” The statute’s explicit language does not limit the term “laws” to only civil rights laws.

However, Justice Powell, in dissent and repeating his arguments from Chapman, argued that § 1983’s legislative history indicated that Congress intended the phrase “and laws” to apply only to equal rights legislation enacted after the Civil War to protect African-Americans from the vestiges of slavery. Furthermore, he argued that the majority decision had failed to consider the policy consequences to state and local officials of expanding § 1983 liability to a wide range of statutory violations. Justice Powell was especially concerned that there could be state or local liability for violations of federal grant-in-aid programs that reached almost every area of state administration, and that such suits would give federal courts “unprecedented authority to oversee state actions.” Accordingly, he argued that the

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60. 448 U.S. 1 (1980) (6-3 decision).
61. Id. at 4-8; see also Pettys, supra note 20, at 52 (discussing the Court’s treatment of “and laws” in Thiboutot).
63. Thiboutot, 448 U.S. at 4-8; see also Pettys, supra note 20, at 67 (explaining that the Court in Thiboutot concluded “and laws” included most federal statutes).
64. Thiboutot, 448 U.S. at 4-8; see also Pettys, supra note 20, at 67 (explaining that the Court in Thiboutot concluded “and laws” included most federal statutes).
65. Thiboutot, 448 U.S. at 14-22 & n.6 (Powell, J., dissenting, joined by Burger, C.J. & Rehnquist, J.) (arguing 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); Pettys, supra note 20, at 52, 67-68 (discussing Justice Powell’s interpretation of “and laws”).
66. Thiboutot, 448 U.S. at 22-25 (Powell, J., dissenting); see also Key, supra note 38, at 323-24 (discussing Justice Powell’s concerns about the majority’s plain language interpretation of “and laws”); Pettys, supra note 20, at 67-68 (discussing Justice Powell’s opinion).
67. Thiboutot, 448 U.S. at 22-25, 36-37 (Powell, J., dissenting); see also Key, supra note 38, at 323-24 (discussing Justice Powell’s opinion).
majority's broad reading of § 1983 jurisdiction "creates a major new intrusion into state sovereignty under our federal system."68

2. Pennhurst State School & Hospital v. Halderman

In Pennhurst State School & Hospital v. Halderman,69 the Supreme Court indirectly limited the scope of Thiboutot by emphasizing that a statute must create "enforceable rights" before a court will imply a private cause of action, and that mere "precatory" language in a statute is insufficient to establish a federal cause of action.70 The main issue in Pennhurst was whether a private cause of action existed under section 111 of the Developmentally Disabled Assistance and Bill of Rights Act71 for disabled persons to sue states that received federal funds for allegedly failing to comply with certain provisions of the statute.72 While the so-called patient's "bill of rights" in section 111 declared that states are to provide appropriate treatment, services or housing, the statute does not explicitly require states to meet these conditions to receive federal funds, unlike other sections of the statute that contain specific requirements for receiving aid.73 The Court concluded that section 111 did not create enforceable substantive rights, but was mere precatory language suggesting that Congress preferred that states provide certain types of treatment.74 Accordingly, the Court held that there is no enforceable private right of action under the statute.75 After determining that there was no implied cause of action, the Court remanded the case to the court of appeals to decide the issue of whether certain other provisions in the statute were enforceable under § 1983.76 In remanding the case, Justice Rehnquist's majority opinion raised the issue of whether a § 1983 suit must be based on specific statutory violations or whether it could include the failure of a state to meet its own promises in a

68. Thiboutot, 448 U.S. at 33 (Powell, J., dissenting).
70. Id. at 15-27; see also Key, supra note 38, at 300-02 (discussing how a private cause of action cannot exist if the state does not know to which conditions it is binding itself).
72. Pennhurst, 451 U.S. at 5; see also Key, supra note 38, at 300-01 (discussing Pennhurst).
73. Pennhurst, 451 U.S. at 13; see also 42 U.S.C. § 6010 (current version at 42 U.S.C. § 6009); Key, supra note 38, at 300-01 (noting § 6010's lack of conditional funding language); Courtney G. Joslin, Recognizing a Cause of Action Under Title IX for Student-Student Sexual Harassment, 34 HARV. C.R.-C.L. L. REV. 201, 219-20 (1999) (same).
74. Pennhurst, 451 U.S. at 18; Joslin, supra note 73, at 220; Key, supra note 38, at 301-02.
75. Pennhurst, 451 U.S. at 22-27; Joslin, supra note 73, at 220; Key, supra note 38, at 302.
76. Pennhurst, 451 U.S. at 27-30; Key, supra note 38, at 325.
plan required by a federal statute, even though these assurances went beyond the requirements in the statute.\textsuperscript{77} Justice Rehnquist implied that he believed that a § 1983 suit must be based on a violation of specific statutory rights.\textsuperscript{78}

Not all of the Justices agreed with Justice Rehnquist's implication that the court of appeals should narrowly construe the possibility of § 1983 rights under the Developmentally Disabled Act. In his concurring opinion, Justice Blackmun declined to join this portion of Justice Rehnquist's majority opinion because of its "negative attitude" regarding the possibility of enforceable rights under the Developmentally Disabled Act.\textsuperscript{79} Dissenting in part, Justice White argued that \textit{Thiboutot} creates a strong presumption in favor of enforcing federal statutes under § 1983 and that the remote possibility that a federal agency could impose the drastic remedy of terminating funding to a state should not preclude the possibility of a § 1983 suit.\textsuperscript{80} Nevertheless, \textit{Pennhurst} clearly raised questions about which types of statutory rights courts would enforce in § 1983 suits.

C. The Three-Part Test for § 1983 Rights

Since \textit{Pennhurst}, the Court has emphasized that § 1983 suits must be based on the violation of a specific "federal right" that is capable of judicial enforcement, and not the breach of a mere precatory statement in a federal statute.\textsuperscript{81} Furthermore, the statute must intend to benefit the plaintiff in question in order for the plaintiff to bring suit.\textsuperscript{82} The Supreme Court has developed a three-part test for determining whether a statute creates an enforceable "right" that establishes a cause of action under § 1983.\textsuperscript{83} First, a statute must clearly impose a binding obligation.\textsuperscript{84} Second, Congress

\textsuperscript{77} \textit{Pennhurst}, 451 U.S. at 27-30; Key, supra note 38, at 325.
\textsuperscript{78} \textit{Pennhurst}, 451 U.S. at 27-30; Key, supra note 38, at 325.
\textsuperscript{79} \textit{Pennhurst}, 451 U.S. at 32 (Blackmun, J., concurring); see also Key, supra note 38, at 326 (discussing Justice Blackmun's opinion).
\textsuperscript{80} \textit{Pennhurst}, 451 U.S. at 51-52 (White, J., dissenting in part); Key, supra note 38, at 326-27.
\textsuperscript{81} See Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 509 (1990) (discussing method for determining whether a statute creates a "federal right" that is enforceable under § 1983"); Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 107-08 (1989) ("In all cases, the availability of the § 1983 remedy turns on whether the statute... creates obligations 'sufficiently specific and definite' to be within the 'competence of the judiciary to enforce'...") (citations omitted); Pettys, supra note 20, at 68 (discussing \textit{Golden State Transit}).
\textsuperscript{82} \textit{Golden State Transit}, 493 U.S. at 106 (citations omitted); see also Mazzuchi, supra note 14, at 1094-95 (discussing when a federal statute creates enforceable rights under § 1983).
\textsuperscript{84} Blessing, 520 U.S. at 341; \textit{Wilder}, 496 U.S. at 509; \textit{Golden State Transit}, 493 U.S. at 106; Pettys, supra note 20, at 68.
must intend that the statute in question benefit the plaintiff.\[85\] Third, "[t]he interest the plaintiff asserts must not be 'too vague and amorphous' to be 'beyond the competence of the judiciary to enforce.'"\[86\] If the plaintiff demonstrates that the statute in question meets the three-part test, then a rebuttable presumption arises that an enforceable statutory "right" exists under § 1983.\[87\] As Part IV will discuss, the three-part test for determining whether a federal statutory right is enforceable under § 1983 is significantly easier to meet than the four-part test the Court uses to determine whether Congress specifically intended to allow a private cause of action under the same underlying substantive statute.\[88\]

In 1992, the Supreme Court in *Suter v. Artist M.*\[89\] did not even discuss the three-part test, and instead focused on whether the statutory enactment as a whole demonstrated that Congress intended to establish rights for the benefit of the plaintiff that are definite enough to be enforceable under § 1983.\[90\] In determining whether the statute in issue created enforceable rights under § 1983, the Court in *Suter* stated the question as follows: "Did Congress, in enacting the Adoption Act, unambiguously confer upon the child beneficiaries of the Act a right to enforce the requirement that the State make 'reasonable efforts' to prevent a child from being removed from his home, and once removed to reunify the child with his family?"\[91\] In his dissenting opinion, Justice Blackmun criticized the majority for failing even to mention the three-part test for determining whether a federal statute creates an enforceable right under § 1983 and for shifting the burden onto the plaintiffs to prove that Congress had conferred on them the right to enforce the statute under § 1983.\[92\]

In retrospect, the Court simply applied, in *Suter*, a narrow reading of whether Congress had created a specific statutory right for the benefit of the plaintiff and did not significantly restrict § 1983 suits for statutory

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\[85\] Blessing, 520 U.S. at 340; Wilder, 496 U.S. at 509; Golden State Transit, 493 U.S. at 106; Pettys, supra note 20, at 68-69.
\[86\] Golden State Transit, 493 U.S. at 106 (quoting Wright v. City of Roanoke Redevelopment & Hous. Auth., 479 U.S. 418, 431-32 (1987)); see also Blessing, 520 U.S. at 340-41 (quoting Wright); Wilder, 496 U.S. at 509 (quoting Wright); Pettys, supra note 20, at 69 (quoting Golden State Transit).
\[87\] Blessing, 520 U.S. at 341; Pettys, supra note 20, at 69; Recent Cases, Harris v. James, 127 F.3d 993 (11th Cir. 1997), 111 HARV. L. REV. 2444, 2446 n.28 (1998).
\[88\] See infra Part IV.
\[91\] 503 U.S. at 357.
\[92\] Id. at 364-77 (Blackmun, J., dissenting); see also Frye, supra note 90, at 1179-80, 1201-05 (arguing that *Suter* confused lower courts about whether the three-part test under § 1983 still applied).
violations. Furthermore, subsequent Supreme Court and lower court decisions have explicitly endorsed the three-part test rather than Suter's approach. Under the three-part test, the amount of evidence needed to establish that a statutory right may be enforced on behalf of a plaintiff under § 1983 is usually far less than what is required to imply a private right of action under the same substantive statute.

D. Statutory Preclusion of § 1983 Suits by Comprehensive Remedial Schemes

Even if the plaintiff meets the three-part test, a defendant may rebut the presumption that § 1983 is available by demonstrating that Congress intended to bar access to § 1983 for violations of the underlying statute at issue by explicitly foreclosing private enforcement of the statute, or by enacting a comprehensive remedial scheme that is incompatible with separate enforcement under § 1983. However, the Supreme Court has emphasized that once a court finds an enforceable right under the three-part test, there is a strong presumption against preclusion and in favor of enforcing those federal rights under § 1983. In Livadas v. Bradshaw, the Court stated that § 1983 claims based upon statutory rights are "generally and presumptively available" and that preclusion of federal rights is the "exceptional case[]."

93. See Albiston v. Me. Comm'r of Human Servs., 7 F.3d 258, 263 & n.9 (1st Cir. 1993) (stating that Suter did not replace or overrule either Wilder or Wright); see also Joslin, supra note 73, at 222 & n.173 (stating the "prevailing view among Circuit Courts is that Suter preserved the Wright/Wilder framework, simply adding another factor to the inquiry"); Pettys, supra note 20, at 69 n.112 (stating that Suter "can and should be synthesized with decisions" applying the three-part test); Frye, supra note 90, at 1194-97 (comparing Suter and Wilder).

94. E.g., Blessing v. Freestone, 520 U.S. 329, 340-41 (1997); Harris v. James, 127 F.3d 993, 1004-05 (11th Cir. 1997); Buckley v. City of Redding, 66 F.3d 188, 190-91 (9th Cir. 1995); Wood v. Thomkins, 33 F.3d 600, 605-06 (6th Cir. 1994); Miller v. Whithurn, 10 F.3d 1315, 1319 (7th Cir. 1993); see Pettys, supra note 20, at 69 n.112 (stating that the above cited cases applied the three-part test).

95. See infra notes 270-90 and accompanying text.


97. See Blessing, 520 U.S. at 346 (observing that a defendant arguing preclusion of statutory § 1983 rights has "difficult showing" to make); Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 520 (1990) ("We do not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy for the deprivation of a federally secured right."); (citations omitted); see also Zwibelman, supra note 96, at 1474-75 (acknowledging the strong presumption against preclusion of § 1983 claims).


99. Id. at 133.
In 1981, the Supreme Court, in *Middlesex County Sewerage Authority v. National Sea Clammers Ass’n*,100 limited the scope of *Thiboutot* by holding that § 1983 claims based on violations of statutory rights could be precluded if the defendant proves that the underlying statute provides a comprehensive remedial scheme that precludes relief under § 1983.101 The Court concluded that a § 1983 suit was precluded because the two federal environmental statutes at issue, the Federal Water Pollution Control Act,102 and the Marine Protection, Research, and Sanctuaries Act,103 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.104 If a remedial statute is "sufficiently comprehensive," *Sea Clammers* presumes that Congress intended to preclude § 1983 suits based on violations of such a statute to prevent plaintiffs from circumventing existing remedies.105 *Sea Clammers*’s preclusion test applies only to statutory claims; a different analysis is used to determine if a plaintiff may bring a constitutional claim under § 1983.106

In determining whether a statute precludes a § 1983 cause of action, the Supreme Court has emphasized that the defendant state actor has the burden of demonstrating that an express remedial system in the statute is so comprehensive that it would be inappropriate to allow a § 1983 suit.107 In *Wright v. City of Roanoke Redevelopment & Housing Authority*,108 the Court stated that § 1983 normally established a remedial cause of action for violation of federal statutory rights "unless the state actor demonstrates by express provision or other specific evidence from the statute itself that Congress intended to foreclose such private enforcement."109

101. Id. at 20; Frye, supra note 90, at 1181-82; Zwibelman, supra note 96, at 1466-68.
104. *Sea Clammers*, 453 U.S. at 13; see also Frye, supra note 90, at 1181-82 (discussing *Sea Clammers*); Zwibelman, supra note 96, at 1468 & n.18 (discussing *Sea Clammers*).
105. *Sea Clammers*, 453 U.S. at 20; Frye, supra note 90, at 1181-82 & n.82; Zwibelman, supra note 96, at 1468.
106. Zwibelman, supra note 96, at 1469-70; see Smith v. Robinson, 468 U.S. 992, 1008-09 (1984) (stating that a statutory remedy precludes a constitutional claim under § 1983 if that claim is virtually identical to the statutory claim, provided Congress intended such a result).
107. See Frye, supra note 90, at 1183-89 (discussing the defendant’s burden to prove the preclusion exception); Zwibelman, supra note 96, at 1475-76 (discussing the application of *Sea Clammers*’s comprehensiveness analysis).
Virginia Hospital Ass'n, the Court declared that it would "recognize 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." Thus, the Supreme Court has created a strong presumption in favor of § 1983 actions based on statutory violations unless the statute explicitly forecloses § 1983 claims or contains a comprehensive remedial scheme that is incompatible with separate suits under § 1983.

E. Remedies Under § 1983: Suits for Injunctive Relief Against States and Damage Suits Against State Officials in Their Individual Capacities

Under § 1983, a person may sue only if the challenged conduct was committed by a "person" acting under color of state law. However, the Eleventh Amendment recognizes that states generally enjoy sovereign immunity from being sued in federal court. Additionally, courts have applied immunity principles to limit suits against states even in state court. Accordingly, in Will v. Michigan Department of State Police, the Supreme Court limited the possibility of § 1983 suits against states even in state courts by holding that "States or governmental entities that are considered 'arms of the State' for Eleventh Amendment purposes" are not persons under § 1983. Furthermore, Will concluded that a suit for damages against a state official in his official capacity should be treated as one against the state and that such a state official is not to be considered a "person" under § 1983.

Wright). The Fifth Circuit has considered the availability of other statutory remedies, but at least one commentator has criticized this approach as inconsistent with Wright's conclusion that only explicit remedies in a statute should preclude a § 1983 action. Compare Lakoski v. James, 66 F.3d 751, 754-55 (5th Cir. 1995) (stating that if the court confined its inquiry into congressional intent to the remedies afforded by Title IX, it would ignore the fact that Title IX is part of a larger federal scheme to protect individuals from employment discrimination), with Zwibelman, supra note 96, at 1476-77 (criticizing the Fifth Circuit's consideration of other statutory remedies in Lakoski).

111. Id. at 509 n.9 (citations omitted).
112. See Frye, supra note 90, at 1183-89 (discussing the Court's preclusion analysis in Wright and Wilder); Zwibelman, supra note 96, at 1475-78 (discussing the strong presumption against preclusion for claims based on federal statutes and the argument that a court must limit its comprehensiveness analysis to the statute's express remedial scheme).
117. 491 U.S. at 71 & n.10; Doe, 131 F.3d at 839 (discussing Will); see also Powell, 189 F.3d at
On the other hand, in *Hafer v. Melo*,\(^{118}\) the Supreme Court clarified that when a § 1983 suit seeks damages against a state official in her individual or personal capacity, a suit may be brought even though she acted in her official capacity in committing the alleged violation.\(^{119}\) However, qualified immunity doctrines often limit the ability of plaintiffs to sue officials in their individual capacities because a plaintiff must generally show that an official's conduct violated clearly established constitutional or statutory rights that a reasonable person should know.\(^{120}\)

Under Section 5 of the Fourteenth Amendment, Congress may waive a state's Eleventh Amendment immunity.\(^{121}\) Congress has explicitly waived states' immunity to suits under Title VI.\(^{122}\) Furthermore, by accepting federal funds, a state may waive its protection under the Eleventh Amendment from suits related to that federal funding.\(^{123}\) However, while a plaintiff may sue a state directly under Title VI, it is likely that a suit for

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\(^{119}\) 199 C. at 27; *Powell*, 189 F.3d at 401 (quoting *Hafer*).


\(^{122}\) 42 U.S.C. § 2000d-7(a)(1) (1994); *see Farmer v. Ramsay*, 41 F. Supp. 2d 587, 592 n.5 (D. Md. 1999) (stating that Title VI claims do not raise Eleventh Amendment immunity issues). However, there is some dispute about whether Congress has waived state's immunity under its Article I or Fourteenth Amendment authority. The source of Title VI's waiver may matter because only a waiver under the Fourteenth Amendment would automatically overcome the Eleventh Amendment's protections. However, even if the waiver is under Article I's Spending Clause, a state may waive its Eleventh Amendment immunity by accepting federal funds. *Compare Lesage v. Texas*, 158 F.3d 213, 216-18 (5th Cir. 1998) (arguing that Congress relied on the Fourteenth Amendment to waive state immunity in enacting Title VI and, therefore, Title VI is exempt from the Eleventh Amendment), *overruled on other grounds*, 528 U.S. 18 (1999), *Franks v. Ky. Sch. for the Deaf*, 142 F.3d 360, 362-63 (6th Cir. 1998) (arguing that Congress relied on the Fourteenth Amendment to waive Eleventh Amendment under Title IX), *Doe v. Univ. of Ill.*, 138 F.3d 653, 657-60 (7th Cir. 1998) (concluding that Congress relied on the Fourteenth Amendment to waive Eleventh Amendment immunity under Title IX), and *Crawford v. Davis*, 109 F.3d 1281, 1282-84 (8th Cir. 1997) (same analysis under Title IX), *with Sandoval v. Hagan*, 7 F. Supp. 2d 1234, 1268-72 (M.D. Ala. 1998) (concluding that Title VI's waiver of state immunity is based on Article I, but state waived Eleventh Amendment immunity by accepting federal funds), *aff'd*, 197 F.3d 484 (11th Cir. 1999) (holding that state waived its sovereign immunity under Eleventh Amendment against Title VI suit by accepting federal funds), *cert. granted sub nom. Alexander v. Sandoval*, No. 99-1908, 2000 U.S. LEXIS 4860 (Sept. 26, 2000), and *William E. Thro, The Eleventh Amendment Revolution in the Lower Federal Courts*, 25 J.C. & U.L. 501, 505, 517 (1999) (arguing that Title VI is not exempt from Eleventh Amendment because Congress actually enacted the statute pursuant to its Article I powers rather than the Fourteenth Amendment).

\(^{123}\) *See Litman*, 186 F.3d at 550-57 (holding that state university waived its Eleventh Amendment immunity by accepting federal funding under Title IX); *Sandoval*, 197 F.3d at 500 & n.15 (holding that state waived Eleventh Amendment immunity from Title VI suits by accepting federal funds).
damages against a state under § 1983 to enforce Title VI or other statutory rights exempt from the Eleventh Amendment is still barred because Congress did not intend to override the Eleventh Amendment when it enacted § 1983.\textsuperscript{124}

The Supreme Court has been more willing to allow suits for injunctive relief against state officials. In \textit{Ex parte Young},\textsuperscript{125} the Supreme Court established that suits for injunctive relief may provide a narrow exception to Eleventh Amendment immunity.\textsuperscript{126} Despite recent Supreme Court cases that have tended to take an expansive view of states’ immunity under the Eleventh Amendment, the \textit{Ex parte Young} exception to state immunity remains valid where a plaintiff seeks injunctive or declaratory relief for an ongoing violation of federal law.\textsuperscript{127} In \textit{Will}, the Supreme Court concluded that a suit for prospective relief against a state official for conduct in his or her official capacity is not treated as a suit against the state and, therefore, a state official sued for injunctive relief is a “person” under § 1983.\textsuperscript{128}

As will be discussed in Part V, suits under section 602 of Title VI alleging disparate impact discrimination are probably limited to prospective relief.\textsuperscript{129} Thus, any suit under § 1983 to enforce Title VI’s disparate impact regulations against a state or a state official in his official capacity is most likely limited to prospective relief, such as an injunction barring discriminatory conduct.\textsuperscript{130} Additionally, as will be discussed in Part VI, § 1983 suits may be brought against state officials in their individual capacities if they have violated clear duties under Title VI.\textsuperscript{131}

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\textsuperscript{125} 209 U.S. 123 (1908).

\textsuperscript{126} \textit{Id.} at 149-56.


\textsuperscript{128} \textit{Will}, 491 U.S. at 71 n.10; Powell v. Ridge, 189 F.3d 387, 401 (3d Cir. 1999), cert. denied, 120 S. Ct. 579 (1999).

\textsuperscript{129} \textit{See infra} notes 302, 387-88 and accompanying text.

\textsuperscript{130} \textit{See infra} notes 387-88 and accompanying text.

\textsuperscript{131} \textit{See infra} notes 438-39 and accompanying text.
III. SUITS UNDER § 1983 TO ENFORCE AGENCY REGULATIONS

Because many regulatory statutes delegate considerable authority to agencies to promulgate regulations to fill gaps in the statute or address details Congress could not or would not address, a major question after *Thiboutot* has been whether agency regulations may constitute "laws" enforceable under § 1983. If statutory language is broad or vague, courts have recognized that regulations may help define or "flesh[] out" a statutory right that otherwise would be too vague to be enforceable in a § 1983 suit. However, courts have divided about whether regulations alone may create rights enforceable in a § 1983 suit.

A. Agency Regulations May Not Exceed the Scope of Statutory Authority

It is a basic principle of administrative law that the authority of agencies to issue rules is limited by the scope of the enabling statute. In *Ernst & Ernst v. Hochfelder* the Supreme 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.'" To prevent executive agencies from usurping the legislative function, the nondelegation doctrine places outer limits on the extent to which administrative agencies may engage in lawmaking through issuing regulations that extend far beyond any "intelligible principle" in the enabling statute.


133. Harris v. James, 127 F.3d 993, 1008-09 (11th Cir. 1997); see infra notes 213-22 and accompanying text.

134. Compare Harris, 127 F.3d at 1008-10 (holding that agency regulations alone may not create rights enforceable under § 1983), with Loschiavo v. City of Dearborn, 33 F.3d 548, 552-53 (6th Cir. 1994) (holding that civil rights suit against municipality may be based on alleged violation of agency rule). See generally Pettys, supra note 20, at 71-82 (discussing whether agency regulations alone may create rights enforceable under § 1983).

135. See Chrysler Corp. v. Brown, 441 U.S. 281, 302 (1979) (stating "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 Fl., Inc. v. 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.") (citation omitted).


137. Id. at 213-14 (quoting Dixon v. United States, 381 U.S. 68, 74 (1965) (citation omitted).

138. See J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928) (requiring an "intelligible principle" when Congress delegates authority to an agency); Am. Trucking Ass'ns, Inc. v.
statute's authority, then any cause of action based on the invalid regulation would be presumptively invalid.\textsuperscript{139}

However, Congress often delegates considerable authority to agencies to make policy decisions about how to implement regulatory statutes as long as the agencies' regulations do not violate express congressional directives.\textsuperscript{140} Thus, in the real world of administrative law, courts must decide to what extent they will acknowledge rights in agency regulations that are far from explicit in the governing statute.

A key question in determining whether courts will defer to "rights" set forth in agency regulations is whether an agency's regulations simply interpret the scope of rights already implicit in the statute or whether they constitute lawmaking. If a statute is silent or ambiguous about the particular issue in question, the agency's interpretation is entitled to considerable deference under the Supreme Court's \textit{Chevron} doctrine.\textsuperscript{141} On the other hand, if an agency goes beyond mere interpretation and essentially exercises lawmaking authority in promulgating a regulation creating rights that are not apparent in the governing statute, then courts have divided about whether agency regulations alone may create "rights" enforceable under § 1983.\textsuperscript{142} Even courts that refuse to permit § 1983 suits based on regulations alone recognize that regulations may help to define statutory rights that Congress intended to create for the benefit of the plaintiff.\textsuperscript{143} Thus, many of the disagreements about whether a "right" contained in a regulation is enforceable under § 1983 depend on a court's interpretation of whether the underlying statute creates a right that serves as the basis of the regulatory right.\textsuperscript{144}

\textsuperscript{139} See \textit{Chrysler Corp.}, 441 U.S. at 302-03 (stating agency rules must be based on statutory authority to have binding effect); \textit{Amalgamated Transit Union v. Skinner}, 894 F.2d 1362, 1368 (D.C. Cir. 1990) (stating agency lacked statutory authority to promulgate regulations); \textit{Drake v. Honeywell}, Inc., 797 F.2d 603, 607 (8th Cir. 1986) (stating commission is powerless to issue legislative rules because statute does not contain general enabling language).

\textsuperscript{140} Pierce, \textit{supra} note 132, at 1-2, 8, 20-21.


\textsuperscript{142} Compare \textit{Harris v. James}, 127 F.3d 993, 1008-10 (11th Cir. 1997) (holding agency regulations alone may not create rights enforceable under § 1983), with \textit{Loschiavo v. City of Dearborn}, 33 F.3d 548, 552-53 (6th Cir. 1994) (holding civil rights suit against municipality may be based on alleged violation of agency rule). \textit{See generally} Pettys, \textit{supra} note 20, at 71-82 (discussing whether agency regulations alone may create right enforceable under § 1983); \textit{infra} notes 192-222 and accompanying text.

\textsuperscript{143} \textit{See infra} notes 213-22, 240-42 and accompanying text. \textit{See generally} Pettys, \textit{supra} note 20, at 71-82 (discussing whether agency regulations alone may create rights enforceable under § 1983).

\textsuperscript{144} \textit{See generally} Pettys, \textit{supra} note 20, at 71-82 (discussing whether agency regulations alone may create rights enforceable under § 1983); \textit{infra} notes 212-18 and accompanying text (discussing...
B. Wright: Section 1983 and Agency Regulations

1. Guardians Ass'n v. Civil Service Commission

Ironically, for the purposes of this Article, the first Supreme Court case to touch on the issue of whether agency regulations are enforceable under § 1983 involved Title VI, but the majority in that decision never resolved the issue. In Guardians Ass'n v. Civil Service Commission, Justice Stevens argued in a dissenting opinion that § 1983 suits may be based on violations of regulatory rights if the regulations have the force of law. He stated:

[It is clear that the § 1983 remedy is intended to redress the deprivation of rights secured by all valid federal laws, including statutes and regulations having the force of law.

Thiboutot itself involved only federal statutes, not regulations. Its analysis of § 1983, however, applies equally to administrative regulations having the force of law.

Apparently, Justice Stevens's reference to "force of law" refers to a phrase he used in a 1979 decision that did not involve § 1983, Chrysler Corp. v. Brown. In Chrysler, the 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.

On the other hand, in his concurring opinion in Guardians, Justice Powell argued that there should be neither a private right of action under Title VI nor should the statute be enforceable under § 1983. Citing Sea Clammers and his dissenting opinion in Thiboutot, Justice Powell stated in

Harris court's conclusion that a regulation may serve as basis for § 1983 suit if it merely defines a right implicit in a statute).

146. Id. at 635-38 (Stevens, J., dissenting, joined by Brennan & Blackmun, JJ.).
147. Id. at 638 & n.6 (Stevens, J., dissenting).
148. 441 U.S. 281, 301-02 (1979); Pettys, supra note 20, at 72.
150. Guardians, 463 U.S. at 610 & n.3 (Powell, J., concurring, joined by Burger, C.J.).
a footnote:

I also would hold that private actions asserting violations of Title VI may not be brought under 42 U.S.C. § 1983. Congress' creation of an express administrative procedure for remedying violations strongly suggests that it did not intend that Title VI rights be enforced privately either under the statute itself or under § 1983.151

In another footnote, Justice Powell argued that it would be inconsistent to allow Title VI's disparate impact regulations to be enforced through § 1983 when the majority had only permitted a private right of action to enforce Title VI's discriminatory-intent standard.152 However, the Supreme Court has applied a "different inquiry" in addressing implied right of action claims than in § 1983 suits.153 Accordingly, inconsistency between these two types of actions is possible.154

Unfortunately, the Guardians Court never resolved the issue of whether § 1983 suits may enforce either Title VI itself or section 602's disparate impact regulations. It was not until four years later that the Supreme Court confronted the question of enforcing regulations through § 1983.

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

In Wright v. Roanoke Redevelopment & Housing Authority,155 the Supreme Court concluded that regulations could clarify an otherwise vague statute and thus help establish a definite federal "right" enforceable under § 1983.156 However, there is considerable uncertainty about whether and to what extent Wright established the principle that a regulation may have the force of law and serve as the primary basis for a private cause of action under § 1983 or any other federal statute.157 In Wright, the plaintiffs were tenants in a municipal low-income housing project who alleged that the city's redevelopment and housing authority overbilled them for their utilities, and thus violated the rent ceiling in the Brooke Amendment to the Housing Act of 1937.158 The tenants relied on a Department of Housing and Urban Development (HUD) regulation that defined the statutory term

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151. Id. at 610 n.3 (Powell, J., dissenting) (citations omitted).
152. Id. at 608 n.1 (Powell, J., dissenting).
153. See infra notes 243-90 and accompanying text.
154. See infra notes 270-90 and accompanying text.
156. Id. at 431-32.
157. See Pettys, supra note 20, at 73-76 (arguing Wright is ambiguous about whether regulations may serve as the basis for § 1983 suit).
“rent” to include payments for reasonable utility costs, and argued that the authority failed to consider utility costs as part of the maximum rent allowed under the statute.\(^{159}\)

a. Justice White’s Majority Opinion

In his majority opinion, Justice White used HUD’s regulations to define the scope of a statutory limit on rent in a § 1983 suit.\(^{160}\) The Supreme Court concluded that nothing in the Housing Act or the Brooke Amendment demonstrated that Congress had intended to preclude a private cause of action under § 1983 for violations of tenants’ rights under this federal law.\(^{161}\) In addition, the Court concluded that the Brooke Amendment imposed a mandatory limitation of thirty percent of the tenant’s income and that Congress clearly intended the statute to benefit the tenants.\(^{162}\)

The Court rejected the housing authority’s argument that the HUD interim regulations, which expressly stated that a “reasonable” amount for utilities be included in computing the maximum amount of rent that a public housing authority may charge, were too vague and amorphous to establish an enforceable “right” within the meaning of § 1983.\(^{163}\) 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.\(^{164}\)

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.”\(^{165}\)

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.\(^{166}\) At least where Congress has intended to delegate

\(^{159}\) Id. at 420-21 & nn.3-4.

\(^{160}\) Id. at 430.

\(^{161}\) Id. at 424-29.

\(^{162}\) Id. at 429-30.

\(^{163}\) Id. at 431-32.

\(^{164}\) Id.

\(^{165}\) Id. at 421 n.3.

\(^{166}\) Pettys, supra note 20, at 74-75.
lawmaking authority to a regulatory agency, agency interpretations of ambiguous statutes are usually entitled to deference if the interpretation is reasonable. While the four dissenting Justices argued that the HUD regulations did not deserve deference because in their view, the inclusion of utilities was "a matter of agency discretion, not statutory entitlement," they did not disagree with the general proposition that agency interpretations of a statute are entitled to judicial deference in appropriate circumstances.

b. Justice O'Connor's Dissent

In applying the three-part test, Justice O'Connor argued that the key to determining whether an enforceable right exists under § 1983 should be whether Congress intended to create a specific statutory right for the benefit of a class including the plaintiff. She contended that the Court should examine implied right of action cases in determining whether a statute creates a federal right in favor of 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 has also asked ... whether 'the statute create[s] a federal right in favor of the plaintiff.'" She observed that implied right of action cases focus on congressional intent in determining whether a federal right exists in favor of the plaintiff and that congressional intent was also the "key to the inquiry in Sea Clammers." She contended that there was no evidence that "Congress intended to create a statutory entitlement to reasonable utilities." Accordingly, she argued that it was "necessary to ask whether administrative regulations alone could create such a right."

Justice O'Connor's dissent claimed that the majority had not reached the issue of whether regulations may serve as the basis for a private suit under § 1983 and, hence, that there was no holding to that effect. She stated that the question of whether regulations alone could create an enforceable right "is a troubling issue not briefed by the parties, and I do not

169. Wright, 479 U.S. at 433 (O'Connor, J., dissenting).
170. Id. at 432-33 (quoting Cort v. Ash, 422 U.S. 66, 78 (1975)); Key, supra note 38, at 332-33.
171. Wright, 479 U.S. at 433 (O'Connor, J., dissenting) (quoting Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 13 (1981)).
172. Id. at 434.
173. Id. at 437.
174. Id. at 437-38; Pettys, supra note 20, at 75.
attempt to resolve it here.\textsuperscript{175} She then observed that the majority’s “questionable reasoning” that HUD believed Congress required enforceable utility standards “apparently allows it to sidestep the question” of whether regulations alone may create enforceable rights.\textsuperscript{176} She then 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, \textit{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 §\textsuperscript{1983} “rights” has been unleashed from any connection to congressional intent, is troubling indeed.\textsuperscript{177}

She concluded that the temporary HUD regulations were too vague in defining the term “reasonable” to create valid rights capable of judicial enforcement, even assuming that agency regulations could create rights enforceable in private suits under §\textsuperscript{1983}.\textsuperscript{178}

Justice O’Connor’s dissent sought to place two limitations on the use of agency regulations to support §\textsuperscript{1983} suits. First, the underlying statute itself must at least implicitly create an enforceable right before agency regulations are considered.\textsuperscript{179} Second, Justice O’Connor also indicated that there must be evidence in the statute itself that Congress intended to create an enforceable right on behalf of the plaintiff.\textsuperscript{180} While she did not carry the majority in \textit{Wright}, Justice O’Connor’s intent-based approach to §\textsuperscript{1983} rights has influenced some lower court judges who believe it is inappropriate for regulations alone to create “rights” enforceable under §\textsuperscript{1983}.\textsuperscript{181}

A major problem with Justice O’Connor’s intent-based approach is that she inappropriately relied on the standards for inferring a private cause of action in determining whether a statutory right can be enforced through a §\textsuperscript{1983} suit.\textsuperscript{182} While congressional intent is an important factor in both §\textsuperscript{1983} and implied right of action suits, a different analysis is applied in determining whether there is sufficient congressional authorization for each type of suit. As Part IV will discuss, courts in implied right of action cases examine whether Congress intended that a statute create a private remedy.

\textsuperscript{175} Wright, 479 U.S. at 437 (O’Connor, J., dissenting).
\textsuperscript{176} Id. at 437-38.
\textsuperscript{177} Id. at 438.
\textsuperscript{178} Id. at 438-40; Pettys, supra note 20, at 75.
\textsuperscript{179} Wright, 479 U.S. at 437, 441 (O’Connor, J., dissenting); Key, supra note 38, at 331-32.
\textsuperscript{180} Wright, 479 U.S. at 433 (O’Connor, J., dissenting); Key, supra note 38, at 331-32.
\textsuperscript{181} See infra notes 208-09 and accompanying text.
\textsuperscript{182} Wright, 479 U.S. at 432-33 (O’Connor, J., dissenting); Key, supra note 38, at 332-33.
By contrast, in § 1983 suits, Congress has already authorized such private
suits and the relevant question is whether Congress intended to create a
definite right on behalf of the plaintiff.183

3. *Wilder v. Virginia Hospital Ass’n*

In *Wilder v. Virginia Hospital Ass’n*,184 the Supreme Court relied in
part on implementing regulations in rejecting the defendant’s contention
that a statutory obligation which requires that states adopt “reasonable and
adequate” reimbursement procedures for Medicaid costs was “too ‘vague
and amorphous.’”185 The Court stated: “As in Wright, the statute and
regulation set out factors which a State must consider in adopting its
rates.”186 However, the *Wilder* Court appeared to rely more heavily on the
statute and less on the implementing regulations than the *Wright* decision.187
Thus, *Wright* remains the Supreme Court’s most direct and important use
of regulations to create enforceable rights under § 1983.

C. *Conflict in the Circuits*

Some federal circuit courts, most notably the Sixth Circuit, have held
that federal regulations may independently create enforceable § 1983 rights
if the regulations establish “rights” under the same three-part test used to
determine whether a statute gives rise to a § 1983 cause of action.188 Other
circuit courts, especially the Eleventh Circuit, have not been willing to find
that agency regulations alone can create § 1983 rights, but have recognized
that regulations may “further define” or “flesh out” implicit rights in a
statute that would otherwise be too vague to establish valid § 1983 rights.189
The Sixth Circuit’s approach would most easily justify a § 1983 suit based
on agency regulations, but even the more restrictive analysis in the Eleventh
Circuit is elastic enough to validate such a cause of action, as long as there
is evidence in the statute that Congress intended to create a particular
federal right for the benefit of the plaintiff and the regulations merely
explicate the contours of that right.

183. Key, supra note 38, at 332-33.
185. Id. at 519.
186. Id.
187. Id. at 519-21.
188. See infra notes 190-99 and accompanying text.
189. See infra notes 200-42 and accompanying text.
1. Regulations May Create § 1983 Rights

Some courts have interpreted *Wright* as recognizing that regulations may independently establish rights enforceable under § 1983. For example, citing *Wright*, the Third Circuit has stated in dicta that "valid federal regulations as well as federal statutes may create rights enforceable under section 1983." While explicitly relying on a federal statute, the Ninth Circuit has implicitly used the three-part rights test to conclude that agency regulations imposed an enforceable, binding obligation on a municipality receiving federal funds for recreational boating facilities to allow river access for recreational boaters.

The Sixth Circuit has indicated most clearly that federal regulations may create rights that are enforceable under § 1983. 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." In determining whether Federal Communications Commission (FCC) regulations preempted municipal zoning regulations of satellite antennas, the Sixth Circuit applied *Wilder*’s three-part test for determining whether an enforceable right exists under § 1983. The *Loschiavo* court found that the FCC intended the regulation to benefit persons using satellite antennas at home, that the regulation imposed a binding obligation on the City of Dearborn, and that the regulation’s prohibition against local ordinances that impose "unreasonable limitation[s]" was sufficiently clear to be susceptible of judicial enforcement.

Additionally, some federal courts have suggested that a federal regulation may create a right enforceable under § 1983 if the regulation has the "force and effect of law" under *Chrysler Corp. v. Brown*. In *Samuels v. District of Columbia*, the D.C. Circuit stated: "At least where Congress directs regulatory action, we believe that the substantive federal regulations issued under Congress’ mandate constitute ‘laws’ within the meaning of

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191. *Buckley v. City of Redding*, 66 F.3d 188, 190-92 (9th Cir. 1995) (holding that the Fish Restoration and Management Projects Act and accompanying regulations provided a right enforceable under § 1983); *Pettys*, supra note 20, at 78; *see also* *Mazzuchi*, supra note 14, at 1093-94 (discussing *Boatowners & Tenants Ass’n v. Port of Seattle*, 716 F.2d 669 (9th Cir. 1983), which applied the *Cort v. Ash* test to a § 1983 claim).
192. 33 F.3d 548 (6th Cir. 1994).
193. *Id.* at 551.
194. *Id.*; *Pettys*, supra note 20, at 77.
196. 441 U.S. 281, 301-03 (1979); *Pettys*, supra note 20, at 78-79.
197. 770 F.2d 184 (D.C. Cir. 1985).
Citing Samuels, the Tenth Circuit stated in dicta that "[i]n at least some instances, violations of rights provided under federal regulations provide a basis for § 1983 suits."

2. Regulations May Help Define Statutory Rights Under § 1983

At least two circuits, the Fourth and Eleventh, have concluded that regulations may not independently establish rights under § 1983. For example, the Fourth Circuit, citing the dissenting opinion in Wright, has declared that "[a]n administrative regulation . . . cannot create an enforceable § 1983 interest not already implicit in the enforcing statute." However, even when they do not allow regulations alone to serve as the sole basis for a § 1983 action, courts often recognize that regulations can play a role in interpreting or explicating rights implicit in an underlying statute.

a. Harris v. James: Regulations May Define Only Existing Statutory Rights

In Harris v. James, the Eleventh Circuit held that a Medicaid regulation purporting to give recipients the right of publicly funded transportation to and from health care providers for nonemergency care exceeded the scope of any rights given by Congress in the underlying statute and, therefore, that the regulation did not create a federal right enforceable under § 1983. The Eleventh Circuit "conclude[d] [that] federal rights must ultimately emanate from either explicit or implicit statutory requirements." 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."
The *Harris* opinion contains a lengthy analysis of the issue of whether regulations alone may create rights enforceable in a § 1983 suit. The court first reviewed the approach taken by the Sixth Circuit in *Loschiavo* and by Justice Stevens’s dissenting opinion in *Guardians* that a valid regulation may create a federal right enforceable under § 1983. The Eleventh Circuit then examined the opposing viewpoint expressed by the dissenters in *Wright* and in the Fourth Circuit that regulations alone may not create “federal rights” enforceable under § 1983.

The *Harris* court “conclude[d] 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 right.” The Eleventh Circuit maintained that the *Wright* majority had never directly disagreed with statements in Justice O’Connor’s dissent contending that the opinion’s actual holding was limited to situations in which Congress had intended to create a right in the statute and that the *Wright* majority had not addressed whether regulations alone could create such a right.

Citing the Supreme Court’s intent-based approach to § 1983 rights in *Suter v. Artist M.*, the Eleventh Circuit concluded:

> 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.

*Harris* did not attempt to “define the precise role which a valid regulation may play in the ‘federal rights’ analysis.” The Eleventh

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206. *Harris*, 127 F.3d at 1005-06.
207. *Id.* at 1006-07.
208. *Id.* at 1008.
209. *Id.* at 1008-09. In a footnote, the *Harris* court argued that footnote three in *Wright*, which stated “that the regulations gave low-income tenants an enforceable right . . . and that the regulations were fully authorized by the Statute,” did not clearly state that regulations alone may create enforceable rights. *Id.* at 1008 n.19 (quoting *Wright v. City of Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 420 n.3 (1987)). But, it might have been a response “to the dissent’s position that, even assuming a regulation could create a federal right, the particular regulation at issue was incapable of judicial enforcement.” *Id.*
211. *Harris*, 127 F.3d at 1008.
212. *Id.*
Circuit suggested *Wright* implied that if a statute itself confers a specific right upon a plaintiff, a valid regulation could "further define[]" or "flesh[]" out the content of that right."\(^{213}\) The Supreme Court in *Harris*, however, argued that there are limits on the power of regulations to define federal rights:

On the other hand, if the regulation defines the content of a statutory provision that creates no federal right under the three-prong test, or if the regulation goes beyond explicating the specific content of the statutory provision and imposes distinct obligations in order to further the broad objectives underlying the statutory provision, we think the regulation is too far removed from Congressional intent to constitute a federal right enforceable under § 1983.\(^{214}\)

The majority in *Harris* recognized that there is a difference between an agency's interpretation of a right implicit in a statute and an agency's promulgation of a regulation that has no basis in the underlying statute. In a footnote, the Eleventh Circuit explained: "This, of course, assumes that the administrative interpretation is not implicit in the statute."\(^{215}\) In *Golden State Transit Corp. v. City of Los Angeles*,\(^{216}\) the Supreme Court stated that "[a] rule of law that is the product of judicial interpretation of a vague, ambiguous, or incomplete statutory provision" may be enforced under § 1983.\(^{217}\) Similarly, an administrative agency could interpret a statute to contain an implicit federal right even if agency regulations alone may not create § 1983 rights.\(^{218}\)

The Eleventh Circuit argued that a regulation may not serve as an independent basis for a § 1983 claim.\(^{219}\) A regulation may be valid even if it merely "furthers the broad objectives underlying each statutory provision."\(^{220}\) However, for a "right" to be enforceable under § 1983, there must be evidence in the statute itself that Congress intended to create a right for the benefit of the plaintiff.\(^{221}\) Thus, to bring a § 1983 suit, a plaintiff must show there is sufficient evidence in the statute itself that Congress

\(^{213}\) Id. at 1008-09.
\(^{214}\) Id. at 1009.
\(^{215}\) Id. at 1009 n.22.
\(^{217}\) Id. at 112.
\(^{218}\) See *Petty*, *supra* note 20, at 81-82 ("[C]ourts that hold that regulations alone may not confer section 1983 rights under any circumstances must walk the fine line that separates granting appropriate deference to agencies' statutory interpretations and permitting a section 1983 right by its own force.").
\(^{219}\) *Harris*, 127 F.3d at 1010-11.
\(^{220}\) Id. at 1011; *Recent Cases, supra* note 87, at 2446.
\(^{221}\) *Harris*, 127 F.3d at 1009-11; *Recent Cases, supra* note 87, at 2446.
intended to create a federal right before the court will look to the regulation for help in defining the scope of that statutory right.\textsuperscript{222}

Addressing the merits of the case, the majority in \textit{Harris} concluded that the transportation regulation did not "define the content of any specific right conferred upon the plaintiffs by Congress" because there was no provision in the statute for nonemergency transportation.\textsuperscript{223} The \textit{Harris} majority contended that there simply was not enough proof in the statute that Congress "unambiguously conferred upon Medicaid recipients a federal right to transportation enforceable under \S\ 1983."\textsuperscript{224} According to the majority, "the nexus between the regulation and Congressional intent to create federal rights is simply too tenuous to create an enforceable right to transportation."\textsuperscript{225} The court was willing to assume for the sake of argument that the transportation regulation was a "valid interpretation" of the statute and could even create some "federal rights."\textsuperscript{226} The court noted, however, that even if these two factors were true, they would not be enough to create a specific federal right to transportation for the benefit of the plaintiffs enforceable under \S\ 1983.\textsuperscript{227}

\textbf{b. Judge Kravitch’s Dissent in \textit{Harris}}

In dissent, Judge Kravitch argued that the statute and regulations together met the three-part test reiterated in \textit{Wilder} and, therefore, that the majority had erred in not finding an enforceable right to transportation under \S\ 1983.\textsuperscript{228} Judge Kravitch contended that the Supreme Court and at least eight federal courts of appeals had "consider[ed] both the statute and its implementing regulations in determining whether an enforceable right exists under the \textit{Wilder} test and in defining the precise contours of such a right."\textsuperscript{229} Previous decisions had considered regulations in analyzing all three prongs of the test.\textsuperscript{230} "By concluding that the statute, \textit{standing alone}, must meet all three prongs of the \textit{Wilder} test, the majority thus departs from

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\textsuperscript{222} \textit{Harris}, 127 F.3d at 1010-12; Recent Cases, \textit{supra} note 87, at 2446.
\textsuperscript{223} \textit{Harris}, 127 F.3d at 1010.
\textsuperscript{224} Id. at 1012; Recent Cases, \textit{supra} note 87, at 2446.
\textsuperscript{225} \textit{Harris}, 127 F.3d at 1010.
\textsuperscript{226} Id. at 1010 \& n.23.
\textsuperscript{227} Id. at 1011 \& n.27 ("We assume for the sake of argument only that these provisions create some federal right.").
\textsuperscript{228} Id. at 1012 (Kravitch, J., dissenting); Recent Cases, \textit{supra} note 87, at 2446-48.
\textsuperscript{229} \textit{Harris}, 127 F.3d at 1014-15 (Kravitch, J., dissenting).
\textsuperscript{230} Id. at 1015-16.
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Supreme Court precedent and the established practice of most courts of appeals.\textsuperscript{231}

Instead of following the Supreme Court’s three-part test, Judge Kravitch argued that the majority had improperly imposed a new approach based on whether Congress intended to create a particular federal right enforceable under § 1983.\textsuperscript{232} “Under [the three-part] test, the only Congressional intent that the plaintiffs must show is the intent to benefit them.”\textsuperscript{233} By contrast, the majority had inappropriately “impose[d] on § 1983 plaintiffs the more stringent burden of showing that Congress affirmatively intended to create a specific federal right enforceable under § 1983.”\textsuperscript{234}

Even under the majority’s overly stringent intent test, Judge Kravitch argued that the transportation regulation merely further defined the statute’s enforceable right to medical assistance.\textsuperscript{235} Furthermore, “because the agency’s transportation requirement originated contemporaneously with the founding statute, Congress effectively has consented to the regulation.”\textsuperscript{236}

c. \textit{Harris’s “Fleshing Out” Test for Regulations Leaves Room for Regulations that Are Broader than the Statute}

\textit{Harris} represents the most restrictive approach to enforcing rights in administrative regulations under § 1983, but the case allows some role for regulations in defining existing statutory rights under § 1983. Under \textit{Harris}, Congress must have intended to create a specific right for the benefit of the plaintiff before there may be a claim under § 1983.\textsuperscript{237} There must be a sufficient “nexus” between any rights asserted in a regulation and an enforceable right in the underlying statute.\textsuperscript{238} Nevertheless, \textit{Harris} recognized that regulations could further define or “flesh out” an existing statutory right.\textsuperscript{239}

In \textit{Doe v. Chiles},\textsuperscript{240} the Eleventh Circuit used \textit{Harris’s “fleshing out” test} to determine that certain Medicaid regulations “further define[d] the contours of [a] statutory right” and held that the statute “as further fleshed

\textsuperscript{231.} Id. at 1016.
\textsuperscript{232.} Id. at 1014; Recent Cases, supra note 87, at 2447.
\textsuperscript{233.} \textit{Harris}, 127 F.3d at 1014 (Kravitch, J., dissenting); Recent Cases, supra note 87, at 2447.
\textsuperscript{234.} \textit{Harris}, 127 F.3d at 1014 (Kravitch, J., dissenting); Recent Cases, supra note 87, at 2447.
\textsuperscript{235.} \textit{Harris}, 127 F.3d at 1017-18 (Kravitch, J., dissenting).
\textsuperscript{236.} Id. at 1018 (citing EEOC v. Associated Dry Goods Corp., 449 U.S. 590, 600 n.17 (1981)).
\textsuperscript{237.} See supra notes 208-22 and accompanying text.
\textsuperscript{238.} See supra notes 223-25 and accompanying text.
\textsuperscript{239.} \textit{Harris}, 127 F.3d at 1009.
\textsuperscript{240.} 136 F.3d 709 (11th Cir. 1998).
out by [the] regulations—creates a federal right."241 Thus, the Doe court was able to use Harris's framework to conclude that regulations in conjunction with a federal statute created a "federal right" that gave rise to a § 1983 suit.242

IV. SECTION 1983 SUITS REQUIRE LESS CONGRESSIONAL INTENT THAN PRIVATE RIGHTS OF ACTION

If the Supreme Court eventually recognizes a private right of action under Title VI's disparate impact regulations, then the issue of whether these regulations may also be enforced under § 1983 will be less important. However, there is a significant possibility that the Supreme Court could reject a private right of action under Title VI's regulations because Congress has never specifically authorized suits to enforce agency disparate impact regulations issued pursuant to section 602.243 Because it is easier for plaintiffs to meet the standard for enforcing a statutory right under § 1983 than it is to prove Congress intended to create a private right of action to enforce the same underlying statute,244 there is a strong argument that a § 1983 suit to enforce Title VI regulations may be valid even if a private right of action under Title VI's disparate impact regulations is not.

A. Implied Private Rights of Action: The Increasing Focus on Congressional Intent

Courts readily recognize a private right of action if a statute expressly authorizes a private person to bring suit against either the government or another private person to enforce a statutory right.245 A much more difficult question is whether a statute may implicitly establish a private right of action.246 The Supreme Court has increasingly emphasized that it will not

241. Id. at 717.
242. Id.
243. See Mank, Private Right, supra note 8, at 40-47 (reviewing judicial interpretations of congressional intent to authorize private rights of action under Title VI).
246. See Key, supra note 38, at 285, 297 (discussing the difficulties inherent in proving congressional intent absent express language); Mank, Private Right, supra note 8, at 25 ("A much more
recognize an implied private right of action unless there is significant evidence that Congress intended to allow such a suit. The fundamental principle of separation of powers prohibits the judiciary from assuming the legislative task of defining statutory remedies without evidence that Congress intended to authorize a private right of action.

Before 1964, the Supreme Court rarely allowed a plaintiff to bring an implied cause of action. However, in 1964, the Supreme Court in *J.I. Case Co. v. Borak* recognized an implied private right of action under section 14 of the Securities Exchange Act of 1934. Subsequent cases have also found an implied private cause of action under several regulatory statutes.

In 1975, the Supreme Court in *Cort v. Ash* announced a four-factor test for deciding whether a private remedy is implicit in a statute: (1) is the plaintiff part of a class that the statute intends to provide with special status

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247. See Cent. Bank v. First Interstate Bank, 511 U.S. 164, 178-80 (1994) (focusing on Congress's intent in deciding whether a plaintiff may maintain an implied aiding and abetting suit under section 10(b) of the Securities Exchange Act of 1934). See generally Key, supra note 38, at 294-96 (explaining the evolution of the Court's private right of action jurisprudence); Mank, *Private Right*, supra note 8, at 31-32, 44-46 (discussing Justice Powell's dissent in *Cannon v. Univ. of Chi.*, 441 U.S. 677 (1979), which argued that the Court should "focus exclusively on whether Congress intended to create a private remedy"); Stabile, supra note 246, at 868-71 (discussing the Court's implied cause of action jurisprudence).

248. Key, supra note 38, at 298-300. Additionally, a second separation of powers concern arguably relates to the view that only Congress should enact laws limiting the authority of states because Congress is the only branch in which states are represented. Id. at 299-300.

249. See *Cannon*, 441 U.S. at 732-35 (Powell, J., dissenting) (discussing the history of Supreme Court decisions allowing or denying private rights of action). See generally Key, supra note 38, at 294 (describing the effect of J.I. Case Co. v. Borak, 377 U.S. 426 (1964), on private rights of action); Mank, *Private Right*, supra note 8, at 25-26 (describing *Borak*); Stabile, supra note 246, at 865 (describing the Court's retreat from its private right of action decisions generally).


251. Id. at 430-32.


or benefits?; (2) is there implicit or explicit evidence that Congress intended to create or deny the proposed private right of action?; (3) is such a private right of action "consistent with the underlying purposes of the legislative scheme?"; and (4) "is the cause of action one traditionally relegated to state law" and, thus, in an area where a federal cause of action would intrude on important state concerns?254 While the Court probably intended the Cort test to restrict the availability of private rights of action, many lower federal courts initially used the test to find an implied private action under various federal statutes by emphasizing that such a private cause of action would advance the statute’s purposes.255

In Cannon v. University of Chicago,256 the Supreme Court used the Cort test to imply a private right of action for private plaintiffs to sue educational institutions receiving federal funds under section 901(a) of Title IX of the 1972 Education Act Amendments.257 After observing that Congress modeled Title IX after Title VI, the Supreme Court in Cannon concluded that Congress assumed that there would be a private right of action under Title IX because lower courts had already construed Title VI to create a private remedy.258

Furthermore, the Court determined that Congress intended both Title VI and Title IX to serve the dual purposes of preventing the use of federal funds to support discriminatory programs and to "provide individual citizens effective protection against [these] practices."259 The Court stated that only a private right of action could accomplish the second goal of safeguarding individual rights because individuals did not enjoy the right to participate in the administrative process.260 Moreover, the Court determined that the administrative remedy of terminating federal funding to recipients found guilty of discrimination could provide no direct relief to individuals.261 Finally, the Court concluded that a private remedy would not interfere with the agency’s administrative enforcement process.262 Thus, while only explicitly addressing Title IX, the Court in Cannon

254. Id. at 78; Mank, Private Right, supra note 8, at 26-27; Stabile, supra note 246, at 867 & n.38.
255. Cannon v. Univ. of Chi., 441 U.S. 677, 740-42 (1979) (Powell, J., dissenting) (citing cases that used the Cort test expansively); see also Key, supra note 38, at 295-96 (observing that commentators disagree about whether Cort’s four-part test was intended to restrict private rights of action); Mank, Private Right, supra note 8, at 31 (discussing Justice Powell’s dissent in Cannon).
256. 441 U.S. 677 (1979).
257. Cannon, 441 U.S. at 709; Key, supra note 38, at 297-98; Mank, Private Right, supra note 8, at 27-30.
258. Cannon, 441 U.S. at 694-703, 710-11; Mank, Private Right, supra note 8, at 28-29.
259. Cannon, 441 U.S. at 704; Mank, Private Right, supra note 8, at 29.
260. Cannon, 441 U.S. at 706 n.41; Mank, Private Right, supra note 8, at 22, 30.
261. Cannon, 441 U.S. at 704-08; Mank, Private Right, supra note 8, at 22, 30, 48, 56.
262. Cannon, 441 U.S. at 704-08; Mank, Private Right, supra note 8, at 30.
strongly implied that there is a private right of action under Title VI.263 However, the Court did not address whether there is also a private cause of action under either statute's regulations.264

_Cannon_ was one of the last significant Supreme Court decisions to take an expansive view of implied private rights of action.265 In his dissenting opinion in _Cannon_, Justice Powell argued that _Cort_’s four-part test was susceptible to manipulation by judges improperly seeking to usurp the legislative function by creating private causes of action and that such judicial lawmaking violated the separation of powers principle.266 Justice Powell contended that to prevent judicial lawmaking, courts should concentrate on whether there was strong evidence that Congress intended to create a private remedy.267 Subsequent Supreme Court decisions have never overruled _Cort_ or _Cannon_, but have increasingly followed Justice Powell’s approach by emphasizing whether Congress intended to create a private right of action.268 Thus, courts are increasingly reluctant to recognize implied private rights of action.269

263. See Guardians Ass’n v. Civil Servo Comm’n, 463 U.S. 582, 594 (1982) (White, J., plurality opinion) (“[I]t was the unmistakable thrust of the _Cannon_ Court’s opinion that the congressional view was correct as to the availability of private actions to enforce Title VI.”); Chowdhury v. Reading Hosp. & Med. Ctr., 677 F.2d 317, 319 n.2 (3d Cir. 1982) (“C]ourts have consistently held the [Title IX] language of _Cannon_ to be applicable in discussions of Title VI.”); _Cannon_, 441 U.S. at 694-703 (explaining the similarities between Title IX and Title VI and stating that Congress “understood Title VI as authorizing an implied private cause of action”); _Cannon_, 441 U.S. at 749 (Powell, J., dissenting); _Karahalios v. Nat’l Fed’n of Fed. Employees_, Local 1263, 489 U.S. 527, 532 (1989) (explaining that courts should focus on congressional intent in deciding whether to imply a private cause of action); _Thompson v. Thompson_, 484 U.S. 174, 179 (1988) (stating that the four factors in _Cort_ are guides to congressional intent); _Merrill Lynch_, _Pierce_, _Fenner & Smith_, Inc. v. _Curran_, 456 U.S. 353, 377-78, 388 (1982) (implying private right of action from Commodities Exchange Act, but stating “there is no need . . . to ‘trudge through all four of the [Cort] factors when the dispositive question of legislative intent has been resolved’” (quoting _California v. Sierra Club_, 451 U.S. 278, 302 (1981) (Rehnquist, J., concurring)); _Middlesex County Sewerage Auth. v. Nat’l Sea Clambers Ass’n_, 453 U.S. 1, 15, 25 (1981) (explaining that the ultimate issue is congressional intent, but _Cort_ factors are criteria through which to ascertain this intent); _California v.
B. Section 1983 Simply Requires Congressional Intent to Benefit the Beneficiary

It is easier for courts to recognize a remedy under § 1983 than to imply a private right of action because § 1983 explicitly authorizes a private right of action. In her Harris dissent, Judge Kravitch argued that the majority had improperly "imported into the § 1983 context the framework established by Cort v. Ash . . . for determining whether a federal statute creates an implied right of action." Judge Kravitch contended that "such an affirmative showing of specific Congressional intent is not necessary to establish a § 1983 cause of action." In Wilder v. Virginia Hospital Ass'n, the Supreme Court explicitly recognized that there is a "different inquiry" regarding whether a suit may be filed under § 1983 than if the same underlying statute allows a private cause of action. The Court stated that there is a different standard for § 1983 actions than for implied rights of action under a statute: "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."

In light of § 1983's presumption in favor of enforcing federal statutory rights, there is no need to prove that Congress specifically intended that a

269. Key, supra note 38, at 296-300; see also Mank, Private Right, supra note 8, at 31-32, 44-46 (discussing the limited role of subsequent legislative history); Stabile, supra note 246, at 868-71 ("[R]ecent cases suggest that a private plaintiff has no cause of action unless the statute grants one or there is clear congressional intent to grant one.").
270. Key, supra note 38, at 332-33.
271. Harris v. James, 127 F.3d 993, 1014 (11th Cir. 1997) (Kravitch, J., dissenting).
272. Id.
274. Id. at 508 n.9.
275. Id. at 509 n.9 (quoting Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 19 (1981)).
particular statutory right be enforceable under § 1983.276 Instead, a plaintiff only needs to comply with the three-part test for determining whether a federal right is enforceable under § 1983.277 She must show that the right is sufficiently definite to be capable of judicial enforcement and that Congress intended to benefit a class that includes the plaintiff.278 Thus, while plaintiffs in a private right of action case have the burden of demonstrating that a private remedy is allowed under Cort's four-part test, there is a presumption that a plaintiff may file a § 1983 suit once the minimal three-part test is met.279 Accordingly, courts have recognized a § 1983 cause of action even while refusing to infer a private right of action under the same statutory provision.280

C. Does a Separate Standard for Implied Rights of Action and § 1983 Suits Make Sense?

Despite the different tests used by the Supreme Court for § 1983 suits and implied rights of action, some readers may object that it does not make sense to allow a § 1983 suit where courts would not authorize an implied right of action.281 In his dissenting opinion in Guardians, Justice Powell argued that it would be inconsistent to allow Title VI's disparate impact regulations to be enforced through § 1983 when the majority had only permitted a private right of action to enforce Title VI's discriminatory intent standard.282 One commentator has recognized that Wilder's test for enforcing statutory rights under § 1983 is far more permissive than the standard for implying private rights of action, but argued that this inconsistency should be eliminated by limiting § 1983 suits to cases in which a private right of action is available.283 This commentator would limit statutory rights available under § 1983 to those rights which may be

276. Key, supra note 38, at 332-33.
277. See supra notes 97-112 and accompanying text.
278. Key, supra note 38, at 332-33.
279. Harris v. James, 127 F.3d 993, 1014 (11th Cir. 1997) (Kravitch, J., dissenting).
281. See infra notes 282-90 and accompanying text.
enforced through an implied or explicit private cause of action under the statute. He acknowledges that his proposal to limit § 1983 remedies to those available in a private right of action "would be a drastic departure from current doctrine," which recognizes that § 1983 may create independent remedies.

By contrast, Professor Monaghan has argued that Wilder explicitly recognized that the availability of a § 1983 action is based on the existence of a "primary right" in a statute even if federal law does not allow that right to be enforced as a "remedial" right through a private cause of action. Chief Justice Rehnquist's dissenting opinion in Wilder recognized that the majority opinion allowed § 1983 suits to enforce statutory rights that could not be enforced in a private right of action. Professor Monaghan argues that it is appropriate to use § 1983 to vindicate "primary" statutory rights that are intended for the benefit of a class including the plaintiff as long as the plaintiff meets fundamental Article III standing requirements.

In Wilder, the Supreme Court implicitly agreed with Professor Monaghan's view that § 1983 suits may be used to enforce "primary" federal rights that could not be enforced through an implied private right of action by adopting a different inquiry for the former, and by focusing on whether there is an enforceable federal right intended for the benefit of a class including the plaintiff. If a plaintiff meets the three-part test, there is a strong presumption in favor of allowing a § 1983 suit unless such a cause of action would interfere with a comprehensive remedial scheme in the statute. As Parts V and VI will explain, a § 1983 suit to enforce Title VI rights would not interfere with administrative enforcement of the statute, but would instead vindicate individual rights that Title VI's administrative remedies do not address.

284. See id. at 1105-18.
285. Id. at 1109.
287. See id. (discussing Chief Justice Rehnquist's dissent in Wilder).
288. Id. at 247-48.
289. See supra notes 286-88 and accompanying text.
290. See supra notes 97-112 and accompanying text; infra notes 364-82 and accompanying text.
V. TITLE VI'S REGULATIONS ARE ENFORCEABLE UNDER § 1983

A. Section 602 Allows Disparate Impact Regulations

Title VI prohibits federal agencies from giving assistance to recipients that discriminate on the basis of race.291 Section 602 of the statute requires every federal agency to issue regulations that prohibit grant applicants or recipients from engaging in discrimination.292 Since Congress enacted Title VI in 1964, the government has consistently interpreted section 602 to allow federal agencies to deny funding to applicants that engage in practices having discriminatory effects.293 The Supreme Court has recognized that federal agencies may promulgate disparate impact regulations pursuant to section 602.294 Furthermore, Title VI now clearly prohibits any discrimination by federal fund recipients, even if the discrimination occurs in a separate program or subprogram of the recipient that does not receive such assistance.295

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293. Guardians Ass'n v. Civil Servo Comm'n, 463 U.S. 582, 618 (1983) (Marshall, J., dissenting) (stating that recipients may not use "criteria or methods of administration which have the effect of subjecting individuals to discrimination" (quoting 45 C.F.R. § 80.3(b)(2) (1964)); id. at 592 n.13 (White, J.) (observing "every Cabinet department and about 40 federal agencies adopted Title VI regulations prohibiting disparate-impact discrimination"); see also Mank, Title VI, supra note 291, at 25; Mank, Private Right, supra note 8, at 12-13 (discussing section 602 disparate impact regulations); Sidney D. Watson, Reinvigorating Title VI: Defending Health Care Discrimination—It Shouldn't Be So Easy, 58 FORDHAM L. REV. 939, 947-48 (1990) (noting that a presidential task force in 1964 assisted federal agencies in promulgating comparable disparate impact regulations under Title VI).

294. Guardians, 463 U.S. at 618 (1983) (Marshall, J., dissenting) (stating that recipients may not use "criteria or methods of administration which have the effect of subjecting individuals to discrimination" (quoting 45 C.F.R. § 80.3(b)(2) (1964)); infra notes 301-06 and accompanying text.

Section 602 also mandates that federal agencies establish a framework for investigating and assessing complaints of racial discrimination. Federal funding agencies have the authority to conduct compliance reviews on their own initiative. In addition, the section 602 regulations also usually allow private citizens to file complaints with the federal agency alleging that a recipient is committing discriminatory acts. The federal agency then conducts its own investigation and decides if the recipient has committed discriminatory violations.

During 1983, in *Guardians Ass'n v. Civil Service Commission*, a divided Supreme Court issued an opinion that demanded proof of intentional discrimination under section 601 of Title VI, but also held that agency implementing regulations under section 602 may prohibit disparate impact discrimination. According to Justice White, a majority of the

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300. In *Guardians*, seven members of the Supreme Court agreed that proof of discriminatory intent is required by the statute in section 601. 463 U.S. at 610-11 (Powell, J., concurring, joined by Burger, C.J. & Rehnquist, J.); id. at 615 (O'Connor, J., concurring); id. at 642-45 (Stevens, J., dissenting, joined by Brennan & Blackmun, JJ.); Mank, *Private Right*, supra note 8, at 14-15; Colopy, *supra* note 295, at 159. Justices White and Marshall each argued that showing disparate impacts was sufficient to prove a violation under section 601. *Guardians*, 463 U.S. at 584 & n.2, 589-93; id. at 615, 623 (Marshall, J., dissenting); Mank, *Private Right*, supra note 8, at 14-15.

301. In addition, Justices Brennan, White, Marshall, Blackmun, and Stevens concluded that section 602 of Title VI permits federal agencies to promulgate regulations that prohibit disparate impact discrimination:

> The threshold issue before the Court is whether the private plaintiffs in this case need to prove discriminatory intent to establish a violation of Title VI . . . and [the] administrative implementing regulations promulgated thereunder. I conclude, as do four other Justices, in separate opinions, that the Court of Appeals erred in requiring proof of discriminatory intent. *Guardians*, 463 U.S. at 584 (footnote omitted); id. at 584 & n.2; id. at 642-45 (Stevens, J., dissenting, joined by Brennan & Blackmun, JJ.); id. at 623 (Marshall, J., dissenting); Richard J. Lazarus, *Pursuing "Environmental" Justice: The Distributional Effects of Environmental Protection*, 87 Nw. U. L. REV. 787, 834-35 (1993); Mank, *Private Right*, supra note 8, at 14; Colopy, *supra* note 295, at 159. Justice Stevens, joined by Justices Brennan and Blackmun, concluded that intentional discrimination is a necessary element under section 601 of Title VI, but that regulations promulgated pursuant to section 602 may only require a disparate impact standard. *Guardians*, 463 U.S. at 641-45 (Stevens, J., dissenting, joined by Brennan & Blackmun, JJ.); Mank, *Private Right*, supra note 8, at 14-15. Justices White and Marshall would have allowed disparate impact suits under either section 601 or 602.
Guardians Court agreed that compensatory damages are available under Title VI only for intentional discrimination and that victims of disparate impact discrimination are limited to prospective remedies. In Alexander v. Choate, a case involving section 504 of the Rehabilitation Act of 1973, the Court stated in dicta: "[T]he [Guardians] Court held that actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI." The Alexander Court explained that Congress had "delegated to the agencies in the first instance the complex determination

Guardians, 463 U.S. at 584 & nn.1-2, 589-93 & n.12; id. at 615, 623, 631 & n.26 (Marshall, J., dissenting); Mank, Private Right, supra note 8, at 15. 302. There is some question whether a majority of the Court in Guardians explicitly agreed that compensatory relief is limited under Title VI to cases of intentional discrimination, but it is likely that this is the law now in any case. See Guardians, 463 U.S. at 584, 593-603, 607 n.27 (Rehnquist, J., joined discussion of remedies) (arguing that only prospective relief is available for "unintentional" violations of Title VI); Farmer v. Ramsay, 41 F. Supp. 2d 587, 592 (D. Md. 1999) (citing Guardians in support of the proposition that a plaintiff must prove discriminatory intent to qualify for compensatory relief); Mank, Title VI, supra note 291, at 35-37 (discussing Justice White's contention in Guardians that only equitable relief is available for "unintentional" violations of Title VI and concluding that subsequent Supreme Court decisions have tended to support his view). But see Joslin, supra note 73, at 229-35 (arguing that the Guardians majority never accepted Justice White's argument that only equitable relief is available for "unintentional" violations of Title VI and that subsequent cases have not followed his approach). Additionally, subsequent Supreme Court decisions under Title IX have limited damages to situations in which there is essentially intentional discrimination. Thus, it is highly questionable whether courts would allow a damages remedy under Title VI for disparate impact discrimination. See Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 640-53 (1999) (holding that a school district is not liable for student-on-student sexual harassment unless it has actual notice of the harassment and is deliberately indifferent); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 277 (1998) (holding that school district is not liable for damages resulting from a teacher's sexual harassment of a student unless it has actual notice of harassment and is deliberately indifferent); Joslin, supra note 73, at 209-10 (discussing Gebser's clarification of damages issues); Mank, Title VI, supra note 291, at 36-37 (discussing Gebser's favorable treatment of Justice White's views on damages in cases of unintentional discrimination). It is possible that an action under § 1983 could offer greater remedies than a private right of action under Title VI, including the opportunity for damages in cases of disparate impact discrimination. However, under federal statutes enacted pursuant to the Spending Clause and providing grants to states and local governments, the Court has often been reluctant to allow damages for unintentional disparate impact and prefers limiting remedies for unintentional discrimination to prospective relief, usually an injunction. See, e.g., Joslin, supra note 73, at 203-04, 229-39 (discussing the Court's expansive view of the Spending Clause doctrine); Mank, Title VI, supra note 291, at 35-37 (discussing the Court's preference for protecting individuals from discrimination via injunctive relief). Additionally, a suit for damages raises greater concerns under the Eleventh Amendment's limitation on suits by individuals against state agencies, but a suit for prospective relief alone against a state official involves lesser concerns. See generally Ex parte Young, 209 U.S. 123, 149-56 (1908) (allowing declaratory and injunctive relief to prevent unconstitutional actions by state officials in their official capacities despite state sovereign immunity under the Eleventh Amendment); supra notes 125-28 and accompanying text.


305. 469 U.S. at 293; see Mank, Private Right, supra note 8, at 15 (discussing Alexander).
of what sorts of disparate impacts upon minorities constituted sufficiently significant social problems, and were readily enough remediable, to warrant altering the practices of the federal grantees that had produced these impacts.\textsuperscript{306}

In \textit{Guardians}, the Supreme Court clearly established that section 601 of Title VI creates a private right of action.\textsuperscript{307} There is a plausible argument that five members of the \textit{Guardians} Court implied that private litigants may state a claim of action for disparate impact discrimination under Title VI's implementing regulations.\textsuperscript{308} However, a majority of the \textit{Guardians} Court never explicitly held that such a private remedy exists under Title VI's section 602 regulations.\textsuperscript{309} The Supreme Court has never decided whether there is an implied right of action under Title VI's disparate impact regulations.\textsuperscript{310} Most lower courts have recognized a private right of action, but several courts have refused to do so.\textsuperscript{311}

\textbf{B. Title VI Administrative Complaints Do Not Protect Individual Rights}

A Title VI investigation by an administrative agency does not necessarily protect the individual rights of a complainant.\textsuperscript{312} First, a complainant has no right to participate in the agency's investigation, although the agency in its discretion may allow the complainant to comment on particular issues that arise.\textsuperscript{313} Second, because some agencies do not comply with their own time limits for reaching a final decision in a Title VI case, it sometimes takes agencies several years to reach a decision.\textsuperscript{314} For example, in June 2000, the EPA had a backlog of fifty pending Title VI

\textsuperscript{306} 469 U.S. at 293-94.

\textsuperscript{307} \textit{Guardians}, 463 U.S. at 594 (stating that at least eight Justices in \textit{Cannon v. Univ. of Chi.}, 441 U.S. 677 (1979), shared the view that Title VI could be the basis for a private right of action); see \textit{Mank, Private Right, supra note 8}, at 14-16 (discussing \textit{Guardians}).

\textsuperscript{308} 463 U.S. at 584 & n.2, 589-95; \textit{id.} at 635-39 (Stevens, J., joined by Brennan \& Blackmun, JJ.); \textit{id.} at 625-26, 634 (Marshall, J.); \textit{Chester Residents Concerned for Quality Living v. Seif}, 132 F.3d 925, 930 (3d Cir. 1997), vacated as moot, 524 U.S. 974 (1998); \textit{Mank, Private Right, supra note 8}, at 33-36.

\textsuperscript{309} \textit{Chester Residents}, 132 F.3d at 929-30; \textit{Mank, Private Right, supra note 8}, at 33-36.

\textsuperscript{310} See \textit{supra} notes 10-11 and accompanying text.

\textsuperscript{311} See \textit{supra} notes 8-9 and accompanying text.

\textsuperscript{312} See \textit{Cole, supra note 298}, at 321-24 (discussing problems with the EPA's administrative complaint process); \textit{Mank, Private Right, supra note 8}, at 21-23 (discussing advantages and disadvantages of Title VI administrative complaints).


\textsuperscript{314} \textit{Mank, Title VI, supra note 291}, at 26-27; \textit{Mank, Private Right, supra note 8}, at 18-20.
complaints, some of which had been under investigation since 1994, although the agency’s regulations normally require a resolution within 180 days. 315 Third, a complainant has essentially no rights under either Title VI or the Administrative Procedure Act to challenge the agency’s findings, but a recipient has elaborate procedural rights to challenge any finding of discrimination, and an agency head must notify Congress before terminating funding to a discriminatory recipient. 316

Furthermore, under most agency regulations, the primary remedy that the agency may impose against a discriminatory recipient is termination of the recipient’s funding. 317 However, agencies are often reluctant to impose such a drastic penalty and usually seek negotiated settlements in which the recipients agree to change allegedly discriminatory practices. 318 Title VI’s administrative regulations do not provide for any direct remedies or attorneys fees for complainants. 319

By contrast, a plaintiff in federal court would enjoy extensive discovery rights and the right to appeal an adverse ruling by the trial court. 320 Furthermore, a Title VI plaintiff could seek an injunction for disparate impact discrimination and damages for intentional discrimination. 321 Additionally, attorneys’ fees would be available if the plaintiff is the prevailing party. 322

A person who files an administrative complaint under section 602 of Title VI with a federal funding agency is not entitled to any attorneys’ fees. 323 For plaintiffs filing an implied right of action alleging intentional discrimination under section 601 of Title VI, Guardians recognized that


316. Mank, Private Right, supra note 8, at 21-22 & n.123; Mank, Title VI, supra note 291, at 29.

317. 40 C.F.R. § 7.130 (1999); Colopy, supra note 295, at 179; Fisher, supra note 313, at 316; Mank, Private Right, supra note 8, at 22-23, 30, 48, 55; Mank, Title VI, supra note 291, at 28-29.

318. Key, supra note 38, at 292-93; Mank, Private Right, supra note 8, at 23; Mank, Title VI, supra note 291, at 28-29.

319. E.g., 40 C.F.R. § 7.130(a); Colopy, supra note 295, at 178-80; Fisher, supra note 313, at 316; Mank, Private Right, supra note 8, at 23, 30, 55; supra note 302 and accompanying text; infra notes 387-88 and accompanying text.

320. Mank, Private Right, supra note 8, at 23-24; Mank, Title VI, supra note 291, at 29.

321. Mank, Title VI, supra note 291, at 29; see Mank, Private Right, supra note 8, at 23-24 (evaluating the advantages and disadvantages of private lawsuits).


323. Mank, Private Right, supra note 8, at 23; see Key, supra note 38, at 292-93 ("[O]ften the agency’s only enforcement mechanism is a cutoff of federal funds . . . . ").
successful plaintiffs could recover attorneys' fees.\(^{324}\) To the extent that courts allow implied rights of action under section 602 of Title VI, successful plaintiffs arguably should be able to recover attorneys' fees even if their remedies are limited to prospective relief in the form of an injunction or declaratory judgment.\(^{325}\) Accordingly, most civil rights litigants would strongly prefer to bring a § 1983 suit or private right of action in federal court, despite the generally lower cost of filing an administrative complaint.\(^{326}\)

C. Title VI Creates "Enforceable Rights" Under § 1983

1. Powell v. Ridge

In *Powell v. Ridge*,\(^{327}\) the Third Circuit recently held that plaintiffs could sue under § 1983 to enforce Title VI regulations.\(^{328}\) Because the defendant's main argument was that Title VI's "comprehensive enforcement scheme" precluded a § 1983 claim, the Third Circuit only indirectly addressed whether Title VI and its regulations create a federal right that is enforceable under § 1983.\(^{329}\) In concluding that a private right of action exists under Title VI's disparate impact regulations, the *Powell* court determined that Title VI serves the dual purpose of preventing discrimination by recipient agencies and providing citizens with effective protection against discrimination.\(^{330}\) The Third Circuit's holding that there is a private right of action under section 602 for the benefit of private parties clearly contemplated that Title VI and its implementing regulations create federal rights.\(^{331}\) The *Powell* court observed that "[o]nce a plaintiff has identified a federal right that has allegedly been violated, there arises a rebuttable presumption that the right is enforceable under § 1983."\(^{332}\) The Third Circuit clearly assumed that Title VI's administrative regulations

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325. Mank, Private Right, supra note 8, at 22-25.
326. See generally Mank, Private Right, supra note 8, at 23-24 (discussing the advantages of a private right of action); Mank, Title VI, supra note 291, at 29 (discussing the advantages of private suits over administrative complaints).
327. 189 F.3d 387 (3d Cir. 1999), cert. denied, 120 S. Ct. 579 (1999).
328. Id. at 400-03.
329. Id. at 401-03.
330. Id. at 398 (citing Cannon v. Univ. of Chi., 441 U.S. 677, 704 (1979)).
331. Id. at 398-400.
332. Id. at 401 (quoting Blessing v. Freestone, 520 U.S. 329, 341 (1997)).
created a federal "right" and that the rebuttable presumption in favor of enforcing federal rights through § 1983 applied.\(^{333}\)

2. Sandoval v. Hagan

In *Sandoval v. Hagan*,\(^ {334} \) the United States District Court for the Middle District of Alabama did not directly address the issue of § 1983 suits. Nevertheless, in concluding that there is a private right of action available under Title VI's implementing regulations, the court discussed *Harris v. James*\(^ {335} \) and *Doe v. Chiles*\(^ {336} \) in determining when a regulation may "further define" or "flesh out" the content of a statutory right.\(^ {337} \) "*Doe and *Harris indicate that a federal regulatory right may be established if it can be shown that: (1) the enabling statute conferred a specific right and (2) a valid regulation merely further defines or fleshes out the content of that right.\(^ {338} \) Accordingly, *Sandoval*, while not a § 1983 case, provided an analysis of whether Title VI regulations create "federal rights"; the *Sandoval* court's analysis relates directly to the issue of whether these regulations create enforceable rights under § 1983.

The court in *Sandoval* observed that it was "clear that Title VI prohibits discrimination in programs that receive federal funds, and confers an implied private cause of action for victims of the prohibited discrimination."\(^ {339} \) Accordingly, the only important issue was whether the disparate impact regulations "merely define or flesh out" the content of Title VI's statutory right to be free from discrimination in federally funded programs" or set forth additional rights not already in the statute.\(^ {340} \) The district court held that the disparate impact regulations merely fleshed out Title VI's anti-discrimination objective even though the statute itself only prohibits intentional discrimination and the regulations prohibit actions by recipients that cause disparate impacts.\(^ {341} \) The court observed that section 602 authorizes agencies "to effectuate the provisions of section 2000d [of this title] by issuing rules, regulations, or orders of general applicability

\(^{333}\) Id. at 401-03.

\(^{334}\) 7 F. Supp. 2d 1234 (M.D. Ala. 1998), aff'd, 197 F.3d 484 (11th Cir. 1999), cert. granted sub nom. Alexander v. Sandoval, No. 99-1908, 2000 U.S. LEXIS 4860 (Sept. 26, 2000). On the merits, the court held that the Alabama Department of Public Safety had violated Title VI by promulgating a regulation that required all driver's license examinations to be administered in English. *Id.* at 1315.

\(^{335}\) 127 F.3d 993 (11th Cir. 1997).

\(^{336}\) 136 F.3d 709 (11th Cir. 1998).

\(^{337}\) *Sandoval*, 7 F. Supp. 2d at 1253-54 (citing *Harris*, 127 F.3d at 1008-09).

\(^{338}\) *Id.* at 1254 (citing *Doe*, 136 F.3d at 717; *Harris*, 127 F.3d at 1008-09).

\(^{339}\) *Id.* (quoting *Cannon v. Univ. of Chi.*, 441 U.S. 677, 703 (1979)).

\(^{340}\) *Id.*

\(^{341}\) *Id.*
which shall be consistent with achievement of the objectives of the statute.342 Based upon section 602's authorization that agencies promulgate regulations that achieve the fundamental objective of preventing discrimination in federally funded programs, the district court concluded that "[t]he regulations merely define the contour of and flesh out the statutory right to be free from discrimination in federally funded programs."343 Sandoval used this conclusion to find that a private right of action exists under Title VI's disparate impact regulations,344 but the same analysis would justify a suit under § 1983 to enforce Title VI's disparate impact regulations.

D. Title VI's Administrative Enforcement Scheme Does Not Preclude § 1983 Suits

1. Alexander v. Chicago Park District

Under Sea Clammers,345 even if a statute creates a federal right, a § 1983 suit is precluded if the underlying statute's remedial scheme is so comprehensive that a § 1983 action would interfere with that remedial scheme.346 In 1985, the Seventh Circuit, in Alexander v. Chicago Park District,347 held that Title VI's administrative enforcement procedures preclude § 1983 suits.348 The Alexander court first observed that Title VII's remedial scheme for employment discrimination is sufficiently comprehensive to preclude § 1983 suits.349 The Court concluded that the same preclusion principle should apply to Title VI as well:

Title VI provides its own administrative enforcement procedures which would be bypassed by pleading Title VI violations under § 1983. Moreover, the remedies available under Title VI should in some cases be limited to declaratory and injunctive relief. ... This limitation would be lost in the broad grant of a remedy at law or equity available under § 1983.

342. Id. (quoting 42 U.S.C. § 2000d-1 (1994)).
343. Id.
344. Id.
346. Id. at 20; supra notes 97-112 and accompanying text; infra notes 378-80 and accompanying text.
347. 773 F.2d 850 (7th Cir. 1985).
Since Title VI provides its own remedial scheme, we hold that private actions based on Title VI may not be brought under § 1983.350

The court's comparison between Title VI and Title VII is misplaced because Title VII offers a far broader range of remedies for individual plaintiffs, including back pay and other damages, than Title VI's disparate impact administrative regulations, which do not provide remedies for individuals.351 Furthermore, while the Alexander court's reading of Sea Clammers may have been plausible in 1985, subsequent Supreme Court decisions have emphasized that statutory preclusion is an unusual exception to the general presumption that federal rights may be enforced in a § 1983 suit.352 Accordingly, even in light of Title VII's broad remedial scheme, some courts have held that a plaintiff may file suit under both Title VII and § 1983 when an employer's conduct violates both Title VII and a separate constitutional or statutory right under the same set of facts.353

2. Title IX and § 1983

While Alexander's analogy between Title VII's significantly different remedial scheme and Title VI's narrow remedial regime was misplaced, there is a much closer relationship between Title VI and Title IX. Because Congress used Title VI as a model when it enacted Title IX, there are a number of similarities between the two statutes.354 There is a split in the federal courts of appeals regarding whether Title IX precludes § 1983 remedies.355 Courts concluding that Title IX's remedial scheme bars § 1983

350. Id. at 856 (citations omitted).
351. See generally Jackson v. City of Atlanta, 73 F.3d 60, 63 (5th Cir. 1996) (holding that Title VII's broad remedial scheme precludes suits under § 1983); Lakoski v. James, 66 F.3d 751, 754-57 (5th Cir. 1995) (holding that plaintiffs may not sue for damages for employment discrimination under § 1983 where Title IX, in conjunction with Title VII, precludes a damages remedy, but that § 1983 may still provide a remedy for violations of constitutional rights); Michele W. Homsey, Employment Discrimination in the Public Sector: The Implied Repeal of Section 1983 by Title VII, 15 LAB. LAW. 509, 511, 545 (2000) (arguing that Title VII precludes suits under § 1983 to vindicate statute-based rights under Title VII, but § 1983 may still provide a remedy for constitutional rights).
352. See supra notes 97-112 and accompanying text.
353. E.g., Southard v. Tex. Bd. of Criminal Justice, 114 F.3d 539, 549-50 (5th Cir. 1997); Johnston v. Harris County Flood Control Dist., 869 F.2d 1565, 1573-76 (5th Cir. 1989); Flot v. Orleans Parish Sch. Bd., Nos. Civ.A. 96-3661, Civ.A. 96-3693, 1998 WL 915864, at *6-7 (E.D. La. Dec. 29, 1998). But see Jackson, 73 F.3d at 63 (concluding that Title VII's broad remedial scheme precludes both statutory and constitutional claims under § 1983 when both are supported by the same underlying facts).
355. Compare Crawford v. Davis, 109 F.3d 1281, 1284 (8th Cir. 1997) (holding that Title IX does not preclude a separate action under § 1983), Seamos v. Snow, 84 F.3d 1226, 1233-34 (10th Cir. 1996) (same), Lillard v. Shelby County Bd. of Educ., 76 F.3d 716, 723 (6th Cir. 1996) (same), and Doe v. Old
claims have argued that the existence of an implied right of action for money damages under Title IX is evidence of a comprehensive remedial scheme that precludes § 1983 suits. On the other hand, courts holding that Title IX does not preclude § 1983 claims have emphasized that Title IX’s only explicit remedy is administrative termination of a recipient’s funding, and that such a remedy is insufficiently comprehensive to preclude a § 1983 action. The conflicting arguments about whether Title IX precludes § 1983 actions are relevant to the issue of whether Title VI bars such suits.

However, there are differences between Title IX and Title VI. Title IX’s legislative history is quite different from Title VI’s. While there is a good argument that neither Title IX nor Title VI precludes § 1983 suits, there is an even stronger case that Title VI does not bar these type of actions.

3. Powell v. Ridge

In Powell v. Ridge, the Third Circuit implicitly agreed with courts that had concluded that Title IX does not preclude § 1983 actions. Furthermore, Powell called into question courts which had concluded that Title IX precludes § 1983 cases, by pointing out that it was necessary to distinguish between statutory and constitutional claims in determining whether either Title VI or Title IX precludes § 1983 claims. Accordingly, Powell has significant implications for both Title VI and Title IX plaintiffs that seek to raise § 1983 claims.

The Powell court persuasively reasoned that only Title VI’s explicit remedial scheme was relevant in determining whether the statute’s remedies were sufficiently comprehensive to preclude a § 1983 claim. Because neither Title VI nor its regulations expressly restrict the availability of §


356. E.g., Bruneau, 163 F.3d at 756-57; Waid, 91 F.3d at 862-63; Doe, 56 F. Supp. 2d at 118 (summarizing the positions of courts holding that Title IX precludes § 1983 suits).

357. E.g., Crawford, 109 F.3d at 1284; Lillard, 76 F.3d at 722-24; Seamons, 84 F.3d at 1233-34; Doe, 56 F. Supp. 2d at 118; Zwibelman, supra note 96, at 1476-78.

358. See infra notes 399-402 and accompanying text.


360. See infra notes 398, 412 and accompanying text.

361. See infra notes 405-27 and accompanying text.

362. See infra notes 405-27 and accompanying text.

363. 189 F.3d at 401-03.
1983 suits, the Third Circuit emphasized that the defendants "must make the difficult showing that allowing a § 1983 action" would be inconsistent with Title VI's remedial scheme.\textsuperscript{364} The \emph{Powell} court also observed that: "[o]nly twice has the Supreme Court found a remedial scheme sufficiently comprehensive to supplant § 1983. . . . In both instances, the Supreme Court emphasized that the statutes that were held to be displaced themselves specifically provided aggrieved individuals with extensive statutory remedies."\textsuperscript{365}

In \emph{Blessing v. Freestone},\textsuperscript{366} the Supreme Court stated that "a plaintiff's ability to invoke § 1983 cannot be defeated simply by '[t]he availability of administrative mechanisms to protect the plaintiff's interests."\textsuperscript{367} The only express remedial provision in Title VI is authority for federal funding agencies to promulgate regulations that allow them to terminate funding to recipients that discriminate.\textsuperscript{368} The \emph{Powell} court stated that "[o]n at least three occasions the Court found that an agency's authority to cut off federal funding was insufficient to justify the denial of a § 1983 remedy."\textsuperscript{369} In \emph{Lakoski v. James},\textsuperscript{370} the Fifth Circuit similarly concluded that Title IX's remedy of allowing federal agencies to terminate the funding of discriminatory recipients was insufficiently comprehensive to preclude § 1983 suits based on statutory rights created by Title IX.\textsuperscript{371}

Furthermore, Title VI's administrative regulations fail to protect the rights of individual plaintiffs. Thus, only a private cause of action can vindicate the statute's second purpose, protecting individuals from discrimination by recipients of federal funds.\textsuperscript{372} A complainant who files

\textsuperscript{364.} \textit{Id.} at 401 (quoting \textit{Blessing v. Freestone}, 520 U.S. 329, 346 (1997)).

\textsuperscript{365.} \textit{Id.} at 401-02 (citing \textit{Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n}, 453 U.S. 1 (1981) and \textit{Smith v. Robinson}, 468 U.S. 992, 1008-09 (1984), which state that a statutory remedy precludes a constitutional claim under § 1983 if that claim is virtually identical to the statutory claim and Congress intended such a result).

\textsuperscript{366.} 520 U.S. 329 (1997).

\textsuperscript{367.} \textit{Id.} at 347 (quoting \textit{Golden State Transit Corp. v. City of Los Angeles}, 493 U.S. 103, 106 (1989)).


\textsuperscript{369.} 189 F.3d at 402 (citing \textit{Blessing}, 520 U.S. at 347-48); \textit{Wilder v. Va. Hosp. Ass'n}, 496 U.S. 498, 521-22 (1990) (holding that the Secretary's power to withhold federal funds to states is "limited" and thus "insufficient to demonstrate an intent to foreclose relief. . . . under § 1983"); \textit{Wright v. City of Roanoke Redevelopment & Hous. Auth.}, 479 U.S. 418, 428 (1987) ([The Department of Housing and Urban Development's] authority to audit, enforce annual contributions contracts, and cut off federal funds [represents] generalized powers [that] are insufficient to indicate a congressional intention to foreclose § 1983 remedies."); \textit{see also} \textit{Zwibelman, supra} note 96, at 1478 & n.85 (discussing \textit{Wright}).

\textsuperscript{370.} 66 F.3d 751 (5th Cir. 1995).

\textsuperscript{371.} \textit{Id.} at 754-55.

\textsuperscript{372.} \textit{See, e.g., Powell v. Ridge}, 189 F.3d 387, 402 (3d Cir. 1999) (noting that Title VI does not provide individual plaintiffs with an administrative remedy), \textit{cert. denied}, 120 S. Ct. 579 (1999); \textit{Mank, Private Right, supra} note 8, at 48-49, 54-58 (arguing that a private right of action under section 602
an administrative complaint alleging discriminatory activities by a recipient has no right to participate in the agency’s investigation and has limited judicial review rights to challenge the agency’s findings. An agency cannot provide any direct relief or attorneys’ fees to the complainant. Because Title VI’s administrative scheme provides limited remedies for individuals, a plaintiff may file a Title VI suit without having to first exhaust her administrative remedies. In general, a plaintiff may file a § 1983 action without exhausting her administrative remedies.

By contrast, in Smith v. Robinson, in which the Court found that the statute’s remedial scheme precluded the plaintiff from raising constitutional claims under § 1983, the Court observed that the statute at issue provided “an elaborate procedural mechanism to protect the rights of [individual would advance Title VI’s dual purposes]."

373. Cannon v. Univ. of Chi., 441 U.S. 677, 706 n.41 (1979); Powell, 189 F.3d at 402; Chowdhury v. Reading Hosp. & Med. Ctr., 677 F.2d 317, 319 (3d Cir. 1982); Block, supra note 313, at 10 (“Complainant has no official standing in the [Title VI] administrative [complaint] process.”); see also Cole, supra note 298, at 321 (noting that complainants are often left out of EPA investigations); Mank, Private Right, supra note 8, at 21-23, 30, 48-49, 54-58 (discussing disadvantages facing complainants in Title VI complaints).

374. See, e.g., Cannon, 441 U.S. at 715 (suggesting that Title VI generally does not allow private suits against the federal government); Fisher, supra note 313, at 317 n.158 (noting that the Administrative Procedure Act precludes suits challenging dismissal of Title VI complaints because the complainants can file a private suit under Title VI and because of traditional deference accorded to executive agencies in deciding whether to prosecute a case); Mank, Private Right, supra note 8, at 22 & n.123 (noting complainants’ limited appeal rights); Colopy, supra note 295, at 167-71 (same); see also Cole, supra note 298, at 323 (noting that complainant may lose the right to present new evidence in court if she waits until after the administrative agency has made its decision).

375. See, e.g., 40 C.F.R. § 7.130(a) (2000) (showing the limits of the EPA’s administrative remedies); Natalie M. Hammer, Title VI as a Means of Achieving Environmental Justice, 16 N. Ill. U. L. Rev. 693, 711 (1996) (discussing the drawbacks of addressing Title VI through administrative processes); Mank, Private Right, supra note 8, at 21-23, 30, 48-49, 54-58 (discussing the disadvantages of the administrative complaint process).

376. See Cannon, 441 U.S. at 707 n.41 (“[W]e are not persuaded that individual suits are inappropriate in advance of exhaustion of administrative remedies.”); Neighborhood Action Coalition v. City of Canton, 882 F.2d 1012, 1015 (6th Cir. 1989) (“Courts . . . squarely hold that litigants need not exhaust their administrative remedies prior to bringing a Title VI claim in federal court.”) (citations omitted); Chowdhury, 677 F.2d at 322-23 (holding that exhaustion of agency funding termination procedures is not a necessary prerequisite to a private action for injunctive relief); Colopy, supra note 295, at 157-58 n.144 (citing several cases holding that exhaustion is not required); Mank, Private Right, supra note 8, at 56-57. But see Wrenn v. Kansas, 561 F. Supp. 1216, 1222 (D. Kan. 1983) (requiring Title VI plaintiffs to either exhaust administrative remedies or demonstrate that exhaustion is not required before seeking redress in federal court). See generally Coit Independence Joint Venture v. Fed. Sav. & Loan Ins. Corp., 489 U.S. 561, 587 (1989) (stating plaintiff may file suit without first exhausting administrative scheme where administrative remedies are limited compared to those available in a suit).


plaintiffs].”379 In *Sea Clammers*, the existing statutory enforcement remedies were “unusually elaborate” and obviated the need for a § 1983 action.380 Because Title VI provides essentially no individual remedies for victims of disparate impact discrimination, the Third Circuit in *Powell* concluded that the statute’s remedies do not preclude relief under § 1983.381

The Third Circuit’s conclusion in *Powell* that Title VI’s remedies do not preclude actions under § 1983 is far more persuasive than the Seventh Circuit’s older decision in *Alexander*. Since *Alexander* was decided in 1985, several Supreme Court decisions have emphasized that preclusion of § 1983 claims is unusual and limited to situations in which the underlying statute provides comprehensive remedies.382 *Alexander*’s analogy between Title VI and Title VII is wrong because the latter statute provides extensive remedies to individual plaintiffs, including back pay and damages.383 By contrast, under Title VI’s disparate impact regulations, a federal agency has discretionary authority to terminate funding or to negotiate a settlement with a recipient that engages in discriminatory activities. A complainant, however, has no right to intervene in the investigation, seek individual relief, or even collect attorneys’ fees.384 Title VI’s administrative regulations do not provide a comprehensive enforcement scheme similar to the environmental statutes at issue in *Sea Clammers*, nor do they provide for the protection of individual rights as had the statute at issue in *Smith v. Robinson*.385 Accordingly, there is no convincing basis to preclude § 1983 suits based on Title VI regulations.

Furthermore, Title VI’s administrative enforcement scheme does not preclude § 1983 claims. A § 1983 suit would advance Title VI’s interest in protecting individual rights without interfering with a federal funding agency’s discretionary authority to terminate federal funding to

379. *Id.* at 1010-11 (concluding that the comprehensive enforcement scheme contained in the Education of the Handicapped Act precludes a § 1983 remedy for equal protection claims); *see also* *Powell v. Ridge*, 189 F.3d 387, 402 (3d Cir. 1999) (discussing *Smith*), cert. denied, 120 S. Ct. 579 (1999).

380. *Middlesex County Sewerage Auth. v. Nat’l Sea Clammers Ass’n*, 453 U.S. 1, 13 (1981) (concluding the “elaborate” enforcement schemes provided by the Federal Water Pollution Control Act and the Marine Protection, Research and Sanctuaries Act preclude implied private actions and § 1983 claims); *Powell*, 189 F.3d at 401-02 (discussing *Sea Clammers*).

381. 189 F.3d at 402; *cf.* Zwibelman, *supra* note 96, at 1478 (noting that the limited remedy of funding termination in Title IX does not preclude a § 1983 suit based on Title IX) (citations omitted).

382. *See supra* notes 97-112 and accompanying text.

383. *See supra* note 351 and accompanying text.

384. *See Key*, *supra* note 38, at 292-93 (noting that a cutoff of funds is generally the only administrative enforcement mechanism); Mank, *Private Right*, *supra* note 8, at 22-23 (“The primary remedy that [an] agency may impose . . . is termination of the recipient’s funding.”).

385. *See supra* notes 100-106 and accompanying text; *infra* note 415 and accompanying text.
discriminatory recipients. Because *Guardians* apparently confines damages under Title VI to cases of intentional discrimination, a § 1983 suit to enforce section 602’s disparate impact regulations is probably limited to prospective relief prohibiting discriminatory behavior and cannot include a damages award that might effectively reduce the amount of funding available to the recipient. Furthermore, a suit under Title VI’s section 602 regulations would not interfere with the agency’s enforcement of its administrative sanctions, because a private party may not request that a court terminate funding to a discriminatory recipient. Hence, a private suit would not interfere with a federal agency’s decision whether to terminate funding to a discriminatory recipient. Thus, there is no evidence that federal agencies are concerned that private suits under Title VI or § 1983 against recipients will affect the authority of federal agencies to provide funding to recipients. For example, the EPA has strongly argued that a private right of action based on its Title VI regulations would not interfere with the agency’s Title VI enforcement program.

4. Differences Between the Legislative Histories of Title IX and Title VI

The Second Circuit has stated that courts should take into account implied rights of action in deciding whether Title IX precludes suits under § 1983 and not just consider explicit statutory remedies. In *Wright v. City of Roanoke Redevelopment & Housing Authority*, the Supreme Court stated that § 1983 normally establishes a remedial cause of action for violation of federal statutory rights “unless the state actor demonstrates by


388. See supra notes 302, 387 and accompanying text.


390. See *Chester Residents*, 132 F.3d at 935-36 (finding an implied right of action consistent with Title VI’s legislative scheme); Mank, *Private Right*, supra note 8, at 21-23, 30, 47-48, 55 (discussing reasons why implied rights of action complement Title VI’s legislative scheme).


392. See Bruneau ex rel. Schofied v. S. Kortright Cent. Sch. Dist., 163 F.3d 749, 757 (2d Cir. 1998) (“[W]e must look to more than just the express remedies contained within the statute to ascertain fully Congress’ purpose.”), cert. denied, 526 U.S. 1145 (1999).

express provision or other specific evidence from the statute itself that Congress intended to foreclose such private enforcement.\textsuperscript{394} In Bruneau ex rel. Schofield v. South Kortright Central School District,\textsuperscript{395} the Second Circuit contended that "other specific evidence" could include material from a statute's legislative history demonstrating that Congress intended to create a private right of action and that Title IX's legislative history clearly indicated that Congress intended to create a private right of action.\textsuperscript{396} The Bruneau court then concluded that "given Title IX's administrative and judicial remedies, we believe it was Congress' scheme that a claimed violation of Title IX be pursued under Title IX and not § 1983."\textsuperscript{397} On the other hand, other federal courts of appeals have concluded that only express remedies in a statute itself are relevant to the issue of whether it precludes a § 1983 claim and that Title IX's sole remedy of terminating federal support is not a comprehensive remedy that would foreclose a § 1983 action.\textsuperscript{398}

While Title IX's statutory language is based upon the earlier Title VI statute,\textsuperscript{399} their legislative histories are quite different because Title IX was enacted in 1972, eight years after Title VI. When Congress enacted Title IX in 1972, there were numerous judicial decisions implying a private right of action under Title VI and some members of Congress anticipated that courts would imply private rights of action under Title IX.\textsuperscript{400} By contrast, in 1964, when Congress enacted Title VI, it was unusual for courts to imply private rights and, accordingly, there is no evidence Congress anticipated that courts would imply a private right of action under Title VI.\textsuperscript{401} Title VI and Title IX have different legislative histories, in part because the authors of Title IX had the benefit of eight years of judicial interpretation of Title VI, and there was a significant change during those years because courts were far more likely to recognize implied rights of action in 1972 than in

\textsuperscript{394} Id. at 423.
\textsuperscript{395} 163 F.3d 749.
\textsuperscript{396} Id. at 757 (citations omitted).
\textsuperscript{397} Id.
\textsuperscript{399} See Cannon v. Univ. of Chi., 441 U.S. 677, 694-703 (1979) (analyzing the legislative history of Title IX and the similarities between Title IX and Title VI); Mank, Private Right, supra note 8, at 28-30 (discussing Cannon).
\textsuperscript{400} Cannon, 441 U.S. at 694-703; see Bruneau, 163 F.3d at 757 (discussing Cannon); Mank, Private Right, supra note 8, at 28-30 (discussing Cannon).
\textsuperscript{401} See Mank, Private Right, supra note 8, at 40-46 (discussing the legislative history of section 602 of Title VI).
1964. Thus, even if \textit{Bruneau} is correct that Title IX's legislative history recognizes a private right of action and thereby precludes § 1983 suits, the same analysis would not apply to Title VI's legislative history. In light of \textit{Wright}'s emphasis that preclusion of § 1983 claims requires either explicit statutory language or "other specific evidence from the statute itself" demonstrating that Congress intended to foreclose these private remedies, mere congressional acquiescence in judicial implication of private rights of action under Title VI is far from the type of evidence needed to preclude § 1983 actions. Furthermore, \textit{Powell}'s argument that only Title VI's explicit remedy of administrative funding termination is relevant to whether the statute precludes § 1983 suits is better reasoned in light of both \textit{Sea Clammers} and \textit{Smith v. Robinson}.

5. Constitutional Claims and § 1983

There is a split among the federal courts of appeals about whether Title IX precludes § 1983 claims that assert constitutional rights. This is an important issue because, for example, Title IX plaintiffs who allege sexual harassment also frequently file constitutional claims under § 1983. While \textit{Powell} did not directly address whether Title IX precludes § 1983 actions, the Third Circuit limited its prior decisions that had addressed the issue by carefully distinguishing between constitutional and statutory claims under § 1983.

In \textit{Bruneau}, the Second Circuit concluded that a statutory claim under Title IX should preclude constitutional claims under § 1983. First, as discussed above, the Second Circuit reasoned that when Title IX's administrative remedies and private right of action are taken together, they are sufficiently comprehensive to preclude an action under § 1983. Second, the Second Circuit contended that nothing in \textit{Sea Clammers} supports treating constitutional claims separately from statutory remedies; therefore, Title IX precludes even constitutionally based § 1983 suits.

\begin{itemize}
\item \textbf{402.} See supra notes 249-52 and accompanying text.
\item \textbf{403.} Wright v. City of Roanoke Redevelopment & Hous. Auth., 479 U.S. 418, 423 (1987); see supra notes 107-12 and accompanying text (discussing \textit{Wright}).
\item \textbf{404.} See Mank, \textit{Private Right}, supra note 8, at 40-46 (arguing that isolated references in legislative history of Civil Rights Restoration Act of 1987 were insufficient to create a private right of action under section 602 of Title VI where the 1987 Act had a different legislative purpose).
\item \textbf{405.} See \textit{infra} notes 407-14 and accompanying text.
\item \textbf{406.} Zwibelman, supra note 96, at 1465.
\item \textbf{408.} \textit{Id.} at 756-57; see supra notes 395-97 and accompanying text.
\item \textbf{409.} \textit{Bruneau}, 163 F.3d at 757-58.
\end{itemize}
While *Bruneau* contains the most thorough discussion of the issue, the Third Circuit in *Pfeiffer v. Marion Center Area School District*\(^{410}\) and *Williams v. School District*\(^{411}\) was the first to suggest that a plaintiff could not use a single set of facts, such as intentional discrimination, to file both a Title IX suit and a § 1983 action asserting a constitutional claim under the Equal Protection Clause.\(^{412}\) The Seventh Circuit later agreed with the Third Circuit’s conclusion.\(^{413}\)

Other courts have concluded that suits asserting constitutional claims under § 1983 statutory rights are quite different from Title IX actions because the rights involved are distinct.\(^{414}\) Even if claims under a statute and under § 1983 arise out of the same facts, the rights involved can be quite different.\(^{415}\) For example, in a case involving a sexual assault, a Title IX claim may be based on a sex discrimination theory, but a § 1983 suit may be premised on a substantive due process right to bodily integrity.\(^{416}\) Thus, a § 1983 suit is not necessarily duplicative of Title IX. Furthermore, under *Smith v. Robinson*, it is appropriate to preclude a constitutionally based § 1983 claim only if it is virtually identical to the statutory claim under Title IX or another statute and the statute’s legislative history indicates Congress intended to preclude a § 1983 claim in that area.\(^{417}\)

In *Powell*, the court rejected the defendants’ argument that *Pfeiffer* and *Williams* had held that all § 1983 suits are precluded by Title IX and that the court should apply the same rule under Title VI.\(^{418}\) In the Title IX cases cited by the defendants, the plaintiffs raised both constitutional claims under § 1983 and statutory claims under Title IX. The Third Circuit in these Title IX cases had merely indicated that “courts should refrain from deciding constitutional issues unnecessarily” until after deciding any statutory claims.

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\(^{410}\) 917 F.2d 779 (3d Cir. 1990).

\(^{411}\) 998 F.2d 168 (3d Cir. 1993).

\(^{412}\) *Williams*, 998 F.2d at 176; *Pfeiffer*, 917 F.2d at 789.

\(^{413}\) Waid v. Merrill Area Pub. Sch., 91 F.3d 857, 862-63 (7th Cir. 1996).

\(^{414}\) *Lillard v. Shelby County Bd. of Educ.*, 76 F.3d 717, 722-23 (6th Cir. 1996); *Seamons v. Snow*, 84 F.3d 1227, 1233-34 & n.8 (10th Cir. 1996); *see also Zwibelman, supra* note 96, at 1469-70, 1478-86 (stating that § 1983 claims based on constitutional rights are not precluded by Title IX).

\(^{415}\) Zwibelman, *supra* note 96, at 1473.

\(^{416}\) *id.*

\(^{417}\) 468 U.S. 993, 1009 (1984) (deciding Congress intended for handicapped children with constitutional claims to bring the claim exclusively through the statute and not § 1983 because the rights are identical); *Lillard*, 76 F.3d at 723 (holding that a § 1983 and a Title IX claim contain distinct rights and a plaintiff may recover under both); Zwibelman, *supra* note 96, at 1478-82 (discussing how rights under Title IX and § 1983 differ).

under Title IX. These cases were based on the "prudential imperative not to resolve a constitutional issue unnecessarily." According to Powell, these prior Third Circuit cases had not established a broad rule that Title IX always precludes a § 1983 claim. By contrast, the plaintiffs in Powell were using § 1983 to raise claims of federal statutory violations, and hence prior cases involving constitutional claims were inapplicable. Accordingly, the Powell court held that "a § 1983 suit is not incompatible with Title VI and the Title VI regulation." The Third Circuit observed that the plaintiff's counsel had stated that "at some point in the litigation" it might not have been necessary for the trial court to proceed with both the Title VI and § 1983 claims, but the Powell court allowed the plaintiffs to proceed with both claims at that stage of the litigation.

Because the Seventh Circuit in particular had relied heavily on Pfeiffer and Williams for the proposition that Title IX always precludes § 1983 claims, the Powell court's narrow interpretation of these decisions could lead other courts to rethink under which circumstances either Title VI or Title IX limits § 1983 actions. The court in Powell correctly suggested that constitutional and statutory claims ought to be treated separately. Even if the same facts apply to both, a constitutional claim may involve separate rights and should be treated separately from a Title VI or Title IX statutory claim. Additionally, Powell properly observed that it is appropriate in some cases to resolve statutory rights claims before deciding § 1983 claims based on constitutional rights.

VI. SECTION 1983 SUITS THAT COMPLEMENT TITLE VI

Despite Wilder's implication that § 1983 suits may be used to enforce "primary" federal rights that may not be enforced through an implied right of action, some readers may remain troubled by the apparent

419. Powell, 189 F.3d at 402-03 (discussing Williams).
420. Id. (discussing Williams).
421. Id. (discussing Williams).
422. Id. See generally Zwibelman, supra note 96 (arguing that a different test applies to constitutional and statutory Title IX claims when determining whether § 1983 claims are precluded).
423. 189 F.3d at 403.
424. Id.
426. See supra notes 414-16 and accompanying text.
427. See 189 F.3d at 402-03 (discussing Williams v. Sch. Dist., 998 F.2d 168, 176 (3d Cir. 1993), and the Supreme Court's directive to refrain from unnecessarily deciding constitutional claims).
428. See supra notes 273-90 and accompanying text.
inconsistency of using § 1983 to enforce statutory rights that cannot be implemented through a private cause of action. Alternatively, a court could recognize an implied right of action under Title VI's disparate impact regulations and allow a § 1983 claim as well. In Powell, the Third Circuit found an implied right of action under Title VI's disparate impact regulations, but refused to dismiss a § 1983 claim based on state officials' alleged violation in their individual or personal capacities of these same regulations. A § 1983 claim can complement a Title VI action by allowing suits against state officials in their individual or personal capacities and allowing plaintiffs to raise constitutional claims based on facts that overlap with those in a plaintiff's Title VI suit.

It is very common for Title IX plaintiffs to also file claims under § 1983 alleging the violation of either constitutional or statutory rights contained in Title IX. There is a split in the circuits about whether Title IX's remedies are sufficiently broad to preclude § 1983 actions, but the better argument is that Title IX's explicit remedy of administrative sanctions against a recipient is insufficiently comprehensive to preclude § 1983 suits seeking to enforce either constitutional or statutory rights. A teacher or student who is alleging racial or gender discrimination under Title IX may also wish to raise a § 1983 claim based on the denial of due process or equal protection under the Fourteenth Amendment. Furthermore, a Title IX plaintiff may wish to file suit against officials in their individual capacities, especially supervisors, because § 1983 generally requires a showing of gross negligence by an official, whereas Title IX demands an even higher standard of actual knowledge and deliberate indifference by a supervisory official or institution. Thus, it is often very important to allow a § 1983 claim in conjunction with a Title IX action.

Similarly, a Title VI plaintiff may wish to use § 1983 to raise constitutional claims, especially under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Additionally, in Title

429. 189 F.3d at 401-03.
430. See supra notes 414-16 and accompanying text; infra notes 431-39 and accompanying text.
431. Zwibelman, supra note 96, at 1465 & passim.
432. See generally Zwibelman, supra note 96 (arguing that Title IX should not preclude claims under § 1983); supra notes 363-90, 414-27 and accompanying text.
433. Zwibelman, supra note 96, at 1479.
434. E.g., Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 277 (1998) (holding that a school district is not liable for damages as result of a teacher's sexual harassment of a student unless the district has actual notice of the harassment and is deliberately indifferent to the teacher's conduct); Joslin, supra note 73, at 209-10 (discussing Gebser); Zwibelman, supra note 96, at 1466-67, 1484-85; see also Mank, Title VI, supra note 291, at 36-37 (discussing Gebser).
435. See generally Zwibelman, supra note 96, at 1479-82 (arguing that Title IX plaintiffs may also want to bring Fourteenth Amendment Due Process and Equal Protection Clause claims because they may
VI cases a plaintiff may usually sue only the entity receiving federal funds and not any individual officials.\(^{436}\) By contrast, § 1983 allows suits against officials in their individual, as opposed to official, capacities.\(^{437}\) Under *Ex parte Young*, a § 1983 suit based on Title VI could allow a plaintiff to secure injunctive relief against officials in their official capacities.\(^{438}\) Furthermore, a § 1983 suit against an official in her individual capacity might allow for the recovery of compensatory damages if the official knew or should have known that her behavior violated clearly established legal requirements, including either constitutional or statutory rights.\(^{439}\)

Finally, if a plaintiff prevails on a § 1983 claim, the plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust."\(^{440}\) Even where the Eleventh Amendment bars retroactive monetary relief, a prevailing plaintiff who obtains injunctive relief may also obtain attorneys' fees because they are "matters ancillary to a grant of prospective relief."\(^{441}\) A suit under § 1983 alleging that state officials in their individual capacities have violated the plaintiffs' rights under Title VI would potentially allow for the recovery of attorneys' fees from these officials.

VII. CONCLUSION

While many commentators have discussed whether there is a private cause of action under Title VI's implementing regulations,\(^{442}\) there has been little attention to whether suits under § 1983 could enforce the same regulations. Courts have become increasingly reluctant to recognize

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\(^{437}\) Haferv. Melo, 502 U.S. 21, 27-28 (1991); *Powell*, 189 F.3d at 401; *Farmer*, 41 F. Supp. 2d at 592-93; *supra* notes 118-20 and accompanying text; *infra* note 439 and accompanying text.

\(^{438}\) *Powell*, 189 F.3d at 401 (citing Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 n.10 (1989)); *supra* notes 125-28 and accompanying text.

\(^{439}\) *Farmer*, 41 F. Supp. 2d at 593-94.


\(^{441}\) N.Y. City Health & Hosps. Corp. v. Perales, 50 F.3d 129, 135 (2d Cir. 1995); *Am. Auto. Mfrs. Ass'n*, 53 F. Supp. 2d at 187 n.8. *See generally* 42 U.S.C. § 1988(b) (providing that "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee" in civil rights actions).

\(^{442}\) *See supra* note 8 and accompanying text.
implied rights of action because they require proof that Congress intended
to create such a private remedy.443

By contrast, because § 1983 already authorizes private rights of action
to enforce federal statutory rights, a plaintiff suing under § 1983 need
merely comply with a three-part test that focuses on whether a statute
contains a right that is sufficiently definite to be capable of judicial
enforcement and on whether Congress intended to benefit a class including
the plaintiff.444 Once a court recognizes that a federal statute creates a
“right” that Congress intended to benefit persons like the plaintiff, there is
a presumption that the right is enforceable under § 1983.445 Accordingly,
the standard for recognizing a § 1983 suit based on a statutory violation of
a federal statute is generally less than that for implying a private right of
action under the same underlying statute.446 The burden is then on the
defendant to show that Congress expressly prohibited a suit under § 1983
or implicitly did so by enacting a comprehensive remedial scheme
incompatible with a § 1983 suit.447 There is a strong presumption against
using a statute’s remedial scheme to preclude § 1983 suits.448 Accordingly,
courts have recognized that a valid § 1983 cause of action may exist even
where there is no private right of action under the same statutory
provision.449

Whether agency regulations alone may create a federal right is more
controversial, and there is a split in the circuits on this issue.450 However,
even the Eleventh Circuit in Harris recognized that a regulation may flesh
out rights that are implicit in the underlying statute.451

Even under the Eleventh Circuit’s restrictive test that agency
regulations may only “define” statutory rights that are enforceable under §
1983,452 Title VI’s administrative regulations merely flesh out the anti-
discrimination rights Congress established in the statute. In section 602,

443. See supra notes 266-69 and accompanying text.
444. See supra notes 82-96 and accompanying text.
445. See supra notes 270-90 and accompanying text.
446. Mazzuchi, supra note 14, at 1064, 1093; see also Monaghan, supra note 13, at 246-47
(discussing how the availability of § 1983 “turns only on whether federal statutory law creates a
‘primary’ right, even though the federal law does not otherwise establish a ‘remedial’ right (i.e., a right
of action)’’); supra notes 270-90 and accompanying text.
447. See supra notes 97-112 and accompanying text.
448. See supra notes 97-112, 364-85 and accompanying text.
449. Fay v. S. Colonie Cent. Sch. Dist., 802 F.2d 21, 33 (2d Cir. 1986); Sandoval v. Hagan, 7 F.
Supp. 2d 1234, 1252 n.15 (M.D. Ala. 1998), aff’d on other grounds, 197 F.3d 484 (11th Cir. 1999), cert.
450. See supra notes 189-242 and accompanying text.
451. See supra notes 212-18, 237-42 and accompanying text.
452. See supra notes 335-43 and accompanying text.
Congress expressly directed federal funding agencies to promulgate regulations that forbid recipients from engaging in discrimination and to establish enforcement mechanisms to prevent such discrimination. In _Guardians_, the Supreme Court held that agency regulations issued pursuant to section 602, which prohibit recipients from engaging in activities that cause disparate impacts, are valid. Subsequently, Congress amended the statute to make it clear that Title VI forbids any discriminatory actions by a recipient even if the conduct occurs in a program that is not funded by the federal government. Accordingly, even in the Eleventh Circuit, the district court in _Sandoval_ concluded that section 602 regulations simply “further define” or “flesh out” the anti-discrimination right that Congress clearly created in Title VI. While the _Sandoval_ case addressed whether there is a private right of action under Title VI’s section 602 regulations, that court’s analysis strongly supports a finding that those regulations are also enforceable under § 1983.

Furthermore, in _Powell_, the Third Circuit correctly concluded that Title VI’s express remedy of funding termination does not preclude § 1983 suits. Several Supreme Court decisions have emphasized that preclusion of § 1983 suits is limited to exceptional cases in which such suits would interfere with a federal statute’s comprehensive remedial scheme. Title VI’s administrative remedies do not protect the rights of individuals, which is one of the two major purposes of the statute, and therefore do not preclude the use of § 1983 to enforce Title VI’s section 602 regulations. Furthermore, there is no evidence in Title VI’s legislative history that Congress intended to create a private right of action that might arguably preclude suits under § 1983. Accordingly, even if the Supreme Court eventually refuses to recognize a private right of action under Title VI’s section 602 regulations, there is a strong argument that the disparate impact test used in those regulations is enforceable through a § 1983 suit.

Despite the _Wilder_ court’s distinction between § 1983 suits and implied rights of action, some may still object to the argument that a § 1983 suit could be used to enforce Title VI regulations even if there is no implied right of action under the regulations themselves. Alternatively, a court could allow a plaintiff to bring both an implied right of action under Title VI's regulations and a § 1983 suit.
VI’s disparate impact regulations and a § 1983 claim raising either constitutional or statutory rights. For example, the Third Circuit in Powell recognized an implied right of action under Title VI’s disparate impact regulations and refused to dismiss a § 1983 claim based on state officials’ alleged violation in their individual capacities of these same regulations.\footnote{Powell v. Ridge, 189 F.3d 387, 401-03 (3d Cir. 1999); \textit{cert. denied}, 120 S. Ct. 579 (1999); \textit{supra} notes 359-81, 418-27, 429 and accompanying text.}

A § 1983 claim can complement a Title VI action by allowing suits against state officials in their personal capacities, injunctive relief against officials in their official capacities, or by permitting plaintiffs to raise constitutional claims that may offer additional remedies in addition to Title VI’s administrative sanctions.\footnote{See \textit{supra} notes 430-41 and accompanying text.}

Section 1983 is a powerful tool for vindicating both constitutional and federal statutory rights, including regulations such as those issued pursuant to section 602 that “flesh out” existing statutory rights. In light of Title VI’s limited explicit remedies, there is no basis to find that the statute precludes § 1983 claims. Title VI plaintiffs should be able to use § 1983 suits to raise constitutional claims and sue officials in their individual capacities because Title VI itself does not provide such remedies.