

THE SELECTIVE USE OF ADMINISTRATIVE REGULATIONS IN CREATING RIGHTS ENFORCEABLE THROUGH § 1983 ACTIONS

Abstract: For over 125 years, 42 U.S.C. § 1983 has provided a means for plaintiffs to bring a cause of action against any person acting under color of state law who deprives them of their rights. Since the U.S. Supreme Court expanded § 1983 to encompass remedies for violations of rights secured by federal laws, federal circuit courts of appeals have disagreed whether federal agency regulations, in addition to federal statutes, can create rights enforceable under § 1983. This Note explores this debate, as well as the Court's treatment of federal regulations and the evolution of the Court's approach to recognizing individual rights under § 1983. This Note argues that those regulations that create cognizable rights, that possess the full force and effect of law, and that deserve judicial deference should be eligible to create § 1983 interests. This Note also argues that both our modern administrative state and public policy considerations support the derivation of § 1983 interests from federal regulations.

INTRODUCTION

The 2003 decision of the Ninth Circuit Court of Appeals in *Save Our Valley v. Sound Transit* refreshed the debate among federal circuit courts of appeals over whether federal administrative agency regulations may create rights enforceable under 42 U.S.C. § 1983.¹ Section 1983 provides a mechanism for individuals to bring causes of action against any person acting under color of state law who violated their rights.² Although the statute alone does not create substantive federal rights, it provides a private remedy to individuals for the actions of state officials that deprive them of rights that already are established.³ Until 1980, claimants could only bring § 1983 actions for violations of constitutional rights.⁴ The U.S. Supreme Court then expanded § 1983 to encompass remedies for violations of federal laws.⁵

¹ 335 F.3d 932, 936 (9th Cir. 2003); see *infra* notes 121–194 and accompanying text.

² 42 U.S.C. § 1983 (2000).

³ See *id.*

⁴ See *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980).

⁵ See *id.*

The current controversy among federal circuit courts of appeals focuses on whether § 1983 should include remedies for violations of rights created by federal administrative agency regulations.⁶ Congress has delegated the ability to create regulations to federal administrative agencies.⁷ Although courts recognize regulations as carrying varying degrees of validity and weight, the Supreme Court has not ruled on whether Congress intended regulations, as a class, to create interests that can be used as grounds for § 1983 actions.⁸ As § 1983 suits allow individuals to safeguard their federal rights against actions of the state, the resolution to this controversy will determine whether a host of new regulatory rights can be recognized and preserved through private enforcement.⁹ If a multitude of federal agency regulations could create rights enforceable under § 1983, plaintiffs would enjoy far greater protection than if such rights could only find origin in federal statutes.¹⁰ For example, if federal Medicaid regulations afforded recipients the right to certain grievance procedures before the termination of their benefits and a state Medicaid plan failed to provide such a process, a recipient under the state plan would be able to bring a § 1983 action against officials of that state.¹¹ If regulations could not create rights enforceable under § 1983, however, the right to such grievance procedures would need to be directly articulated by statute for a plaintiff to sue under § 1983.¹²

Beyond the potential that this debate has to restrict or to expand the application of § 1983, broader constitutional and administrative law issues are at stake.¹³ If regulations can create § 1983 rights, some courts are concerned that this will have the capacity to erode the power of statutes and will assign authority that Congress never intended regulations to possess.¹⁴ Alternatively, if regulations are prohibited from creating § 1983 interests, some courts are concerned

⁶ See *infra* notes 121–194 and accompanying text.

⁷ See *Loving v. United States*, 517 U.S. 748, 758 (1996); *Mistretta v. United States*, 488 U.S. 361, 372 (1989); *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (citing *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)).

⁸ See *infra* notes 23–120 and accompanying text.

⁹ See 42 U.S.C. § 1983 (2000); *infra* note 258 and accompanying text.

¹⁰ See *infra* notes 258–260 and accompanying text.

¹¹ See *Harris v. James*, 127 F.3d 993, 996 (11th Cir. 1997); *Samuels v. District of Columbia*, 770 F.2d 184, 188 (D.C. Cir. 1985).

¹² See *Harris*, 127 F.3d at 996; *Samuels*, 770 F.2d at 188.

¹³ See *Wright v. City of Roanoke Redev. & Hous. Auth.*, 479 U.S. 418, 438 (1987) (O'Connor, J., dissenting); *Save Our Valley*, 335 F.3d at 939; *id.* at 954–60 (Berzon, J., dissenting).

¹⁴ See *Wright*, 479 U.S. at 438 (O'Connor, J., dissenting); *Save Our Valley*, 335 F.3d at 939.

that this will minimize the role that administrative regulations play in the modern administrative state despite the increasing reliance that Congress necessarily must have on federal agencies.¹⁵ Ultimately, this controversy is demonstrative of problems that the judiciary encounters in attempting to preserve a delicate balance between reserving lawmaking authority for Congress while simultaneously recognizing the validity and necessity of the modern administrative state.¹⁶

Part I of this Note reviews the U.S. Supreme Court's treatment of federal administrative agency regulations during the past sixty years.¹⁷ This Part identifies different methods that the Court has used to measure the weight and import of regulations.¹⁸ Part II traces the historical application of § 1983 and the evolution of the Supreme Court's approach to preserving individual rights under § 1983.¹⁹ Part III examines the current controversy among the federal circuit courts of appeals over whether federal administrative agency regulations can create rights enforceable under § 1983.²⁰ Finally, Part IV argues that the requirements for statutes to create rights and for courts to accord respect to certain regulations provide stringent tests that should reveal those regulations that have the potential to create rights enforceable under § 1983.²¹ This Note argues that those regulations that create cognizable rights, that possess the full force and effect of law, and that deserve judicial deference should be eligible to create § 1983 interests.²²

I. THE SUPREME COURT AND FEDERAL ADMINISTRATIVE AGENCY REGULATIONS

The U.S. Supreme Court long has monitored the amount of authority possessed by regulations of federal administrative agencies.²³ In 1944, in *Skidmore v. Swift & Co.*, the Supreme Court declared a method of determining the amount of respect due to agency rulings

¹⁵ See *Save Our Valley*, 335 F.3d at 954–60 (Berzon, J., dissenting).

¹⁶ See *Wright*, 479 U.S. at 438 (O'Connor, J., dissenting); *Save Our Valley*, 335 F.3d at 939; *id.* at 954–60 (Berzon, J., dissenting).

¹⁷ See *infra* notes 23–81 and accompanying text.

¹⁸ See *infra* notes 23–81 and accompanying text.

¹⁹ See *infra* notes 82–120 and accompanying text.

²⁰ See *infra* notes 121–194 and accompanying text.

²¹ See *infra* notes 195–284 and accompanying text.

²² See *infra* notes 195–284 and accompanying text.

²³ See *United States v. Mead Corp.*, 533 U.S. 218, 234–35 (2001); *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–44 (1984); *Chrysler Corp. v. Brown*, 441 U.S. 281, 301–03, 312–15 (1979); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

and interpretations.²⁴ Since that time, a sequence of more recent Supreme Court cases have simultaneously preserved and expanded upon this method.²⁵ The result is a legal patchwork of approaches that guides principles of modern administrative law.²⁶

In *Skidmore*, the Supreme Court held that the nature and weight of an administrative agency's rulings determine the degree to which courts should defer to the agency's interpretations of a statute.²⁷ In the case, workers sued their employer under the Fair Labor Standards Act of 1938 (the "FLSA") for failing to provide overtime compensation for overnight on-call services.²⁸ An administrator of the Department of Labor's Wage and Hours Division, however, issued interpretive rules indicating that time spent on-call at night did not qualify as working time for the purposes of the FLSA.²⁹ The Court determined that although the interpretations that the administrator issued could serve as an informed judgment, they were non-binding and should not control a court's interpretation of the FLSA's provisions.³⁰ In arriving at this decision, the Court formulated a three-part test that determined the weight that courts should assign to such an administrative judgment.³¹ First, courts should consider the thoroughness of the agency's consideration of the issue.³² Next, courts should examine the validity of the reasoning contained within the interpretive document.³³ Finally, courts should evaluate the interpretative pronouncement's "consistency with earlier and later pronouncements."³⁴ The degree to which agency interpretive rules satisfy these elements will determine how much respect and persuasiveness courts will afford them.³⁵

Although in 1983, the Supreme Court would take up the issue of assigning deference to agency rules, in 1979, in *Chrysler Corp. v. Brown*, the Court ruled on a closely related matter when it created an innovative multi-factorial measure for assigning authority to administrative

²⁴ See 323 U.S. at 140.

²⁵ See *Mead*, 533 U.S. at 234-35; *Chevron*, 467 U.S. at 842-44; *Chrysler*, 441 U.S. at 301-03, 312-15.

²⁶ See *Mead*, 533 U.S. at 234-35; *Chevron*, 467 U.S. at 842-44; *Chrysler*, 441 U.S. at 301-03, 312-15; *Skidmore*, 323 U.S. at 140.

²⁷ 323 U.S. at 140.

²⁸ *Id.* at 135.

²⁹ *Id.* at 137-38.

³⁰ *Id.* at 140.

³¹ *Id.*

³² *Skidmore*, 323 U.S. at 140.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

regulations.³⁶ The Court in *Chrysler* considered a government contractor's challenge, under the authority of the Freedom of Information Act, of the government's requirement that the contractor disclose employment information.³⁷ The Department of Labor's Office of Federal Contract Compliance Programs promulgated regulations that required the contractor to furnish such information.³⁸ In assessing the legitimacy of these regulations, the Court determined that regulations may have "the force and effect of law" if they satisfy a three-part test.³⁹ First, regulations must fit the Administrative Procedure Act (the "APA") definition of "substantive rules" rather than "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice."⁴⁰ Using the standard established in 1974, by the Supreme Court in *Morton v. Ruiz*, the Court noted that a substantive rule "affect[s] individual rights and obligations."⁴¹ Second, Congress must grant the requisite authority to the agency to promulgate the rule.⁴² There must be some "nexus" between the regulation and congressional legislative authority.⁴³ Likewise, regulations must not exceed limitations set by Congress.⁴⁴ Third, the agency must follow congressional procedural requirements when promulgating regulations.⁴⁵ Those procedural requirements, prescribed by the APA, contain the minimal elements to which substantive regulations must conform.⁴⁶ Agencies that issue regulations by affording notice to interested parties and permitting them an opportunity to comment prior to the creation of regulations have satisfied the APA's procedural requirements.⁴⁷

In 1983, in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Supreme Court articulated a measure of according deference to agency regulations by holding that if a statute is silent or ambiguous about its meaning and implications, courts should defer to the

³⁶ See *Chevron*, 467 U.S. at 842-44; *Chrysler*, 441 U.S. at 301-03.

³⁷ 441 U.S. at 286-87.

³⁸ *Id.* at 286.

³⁹ *Id.* at 301-03. For the origins of the phrase "force and effect of law," see *Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977), cited in *Chrysler*, 441 U.S. at 295 n.18; U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30 n.3 (1979).

⁴⁰ *Chrysler*, 441 U.S. at 301 (quoting 5 U.S.C. §§ 553(b) (3) (A), 553(d) (1974)).

⁴¹ *Id.* at 302 (quoting *Morton v. Ruiz*, 415 U.S. 199, 232 (1974)).

⁴² *Id.*

⁴³ *Id.* at 304.

⁴⁴ *Id.* at 302.

⁴⁵ *Chrysler*, 441 U.S. at 303.

⁴⁶ 5 U.S.C. § 553 (2000); *Chrysler*, 441 U.S. at 313.

⁴⁷ See 5 U.S.C. § 553; *Chrysler*, 441 U.S. at 313, 316.

appropriate administrative agency's reasonable interpretation of that statute.⁴⁸ The case involved judicial review of an Environmental Protection Agency ("EPA") interpretation of the term "stationary source" as included in the Clean Air Act Amendments of 1977.⁴⁹ The EPA defined the term "stationary source" in a manner that led environmental advocates to bring this suit in hopes that the judiciary would review and reject the EPA definition.⁵⁰ Justice John Paul Stevens's majority opinion offered a two-step judicial review process of administrative agency interpretations of congressional acts.⁵¹ First, Justice Stevens identified the need for the reviewing court to determine whether Congress directly addressed the issue that the agency interpreted.⁵² Administrative agencies and courts must always defer to congressional speech on any question at issue because such speech is indicative of congressional intent.⁵³ If Congress, however, has not spoken to the question at issue because it has written ambiguously or remained silent on a precise issue, the Court declared the second analytical step to be an examination of whether the administrative agency has offered a permissible construction of the statute.⁵⁴ In this analysis, courts must defer to reasonable administrative agency interpretations.⁵⁵ The Court's rationale for this deference was that Congress intentionally leaves gaps and ambiguities within statutes so that it either explicitly or implicitly may delegate the task of policy development and rulemaking to federal administrative agencies.⁵⁶

Given this analytical framework, the Court in *Chevron* proceeded to look first to the plain meaning of the statutory language, and determined that it was not conclusive as to the meaning of the term "stationary source."⁵⁷ The Court then examined the legislative history to comb for congressional intent and found it "unilluminating."⁵⁸ Confident that Congress failed to address directly the meaning of the term, the Court declared the EPA's interpretation of "stationary source" a "rea-

⁴⁸ 467 U.S. at 842-44.

⁴⁹ *Id.* at 839-40.

⁵⁰ *See id.*

⁵¹ *See id.* at 842-44.

⁵² *Id.* at 842.

⁵³ *Chevron*, 467 U.S. at 842-43.

⁵⁴ *Id.* at 843-44.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 859-62.

⁵⁸ *Chevron*, 467 U.S. at 862-64.

sonable accommodation of . . . competing interests.”⁵⁹ The Court thus granted deference to the EPA’s interpretation of the term because Congress delegated regulatory authority to EPA administrators, who are experts in the field of environmental safety, rather than to judges.⁶⁰ The Court recognized potential criticism that the Court should not defer to interpretations of administrative agencies that are not held politically accountable for their actions.⁶¹ In anticipation of this criticism, the Court noted that the President, as head administrator, remains politically accountable for the entire system and is entitled to make policy choices to resolve conflicting interests of Congress.⁶² Thus, the Court held the EPA’s definition of “stationary source” to be a permissible construction of the Clean Air Act Amendments of 1977.⁶³

In 2001, in *United States v. Mead Corp.*, the Supreme Court reintroduced the *Skidmore* measures for courts to use in analyzing administrative agencies’ interpretations of statutory language apart from the test in *Chevron*.⁶⁴ *Mead* involved regulations created by the Secretary of the Treasury that permitted the U.S. Customs Service to issue a ruling letter categorizing certain imports subject to tariff.⁶⁵ An importer challenged a ruling letter, contending that the Customs Service improperly categorized certain imports and, therefore, that the imports should not be subject to tariff.⁶⁶ Justice David Souter offered the opinion of an eight-justice majority, which held that, in determining the scope of the category of imports subject to tariff, the Court would not grant the Customs Service’s ruling letters the same amount of deference as the notice and comment regulations at issue in *Chevron*.⁶⁷ The Court observed that the substantial degree of deference that the *Chevron* Court afforded an agency regulation can only be the consequence of both congressional intent that an agency possess the authority to promulgate regulations that carry the force of law and an agency’s proper use of such authority in issuing regulations.⁶⁸ Congressional intent to give such authority is embedded in an agency’s capacity to create rules through a fair and deliberate administrative procedure

⁵⁹ *Id.* at 865–66.

⁶⁰ *Id.* at 865.

⁶¹ *Id.* at 865–66.

⁶² *Id.*

⁶³ *Chevron*, 467 U.S. at 866.

⁶⁴ See *Mead*, 533 U.S. at 234–35.

⁶⁵ *Id.* at 221–22, 225.

⁶⁶ *Id.* at 224–25.

⁶⁷ *Id.* at 231; see *Chevron*, 467 U.S. at 843–44.

⁶⁸ *Mead*, 533 U.S. at 226–27; see *Chevron*, 467 U.S. at 843–44.

appropriate for a credible pronouncement, such as the notice and comment procedures developed in the APA.⁶⁹ According to the *Mead* Court, only those regulations that are composed through proper notice and comment procedures or that bear a similar mark from Congress identifying a ruling as deserving respect typically earn the substantial level of deference found in *Chevron*.⁷⁰

The *Mead* Court also refused to assign substantial deference to the ruling letter because when the Customs Service issued such a pronouncement, it concerned only the importer and failed to clarify or to define rights or obligations beyond the specific matter at hand.⁷¹ The Customs Service was clear that the issued letters did not bind third parties.⁷² The Customs Service also put all third parties on notice that they could not assume reliance on such letters.⁷³ The Court noted that in light of these features, classification rulings of the Customs Service more closely resembled "interpretations contained in policy statements, agency manuals, and enforcement guidelines" than the regulations promulgated through a notice and comment process.⁷⁴ The Court determined that these attributes indicated that neither Congress nor the Customs Service intended the letters to carry the force of law.⁷⁵ Therefore, the Court refrained from according the agency pronouncement *Chevron* deference.⁷⁶ In going beyond the precedent set forth in *Chevron*, the Court in *Mead* concluded that interpretive pronouncements of agencies still can be deemed persuasive to the degree that they satisfy the requirements that the Court set forth in *Skidmore*.⁷⁷ The Court reiterated the seminal factors, as described in *Skidmore*, that determine the weight that the Court affords an agency interpretive rule and noted that they include "the thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements."⁷⁸ The Court vacated the judgment of the Court of Appeals for the Federal Circuit in *Mead* and remanded the case to the lower court because the Federal Circuit should have applied the *Skidmore* assessment in tan-

⁶⁹ *Mead*, 533 U.S. at 230; see 5 U.S.C. § 553 (2000).

⁷⁰ *Mead*, 533 U.S. at 230-31; see 5 U.S.C. § 553; *Chevron*, 467 U.S. at 843-44.

⁷¹ 533 U.S. at 232-33.

⁷² *Id.* at 233.

⁷³ *Id.*

⁷⁴ *Id.* at 234 (quoting *Christensen v. Harris County*, 529 U.S. 576, 587 (2000)).

⁷⁵ *Id.* at 231-33.

⁷⁶ *Mead*, 533 U.S. at 231; see *Chevron*, 467 U.S. at 843-44.

⁷⁷ See *Mead*, 533 U.S. at 234-35; *Skidmore*, 323 U.S. at 140.

⁷⁸ *Mead*, 533 U.S. at 228 (quoting *Skidmore*, 323 U.S. at 140).

dem with the *Chevron* test.⁷⁹ The *Mead* decision recognized the validity of the binary *Chevron* analysis of notice and comment regulations, while simultaneously lending credence to the multi-factorial measures of interpretive rulings in *Skidmore*.⁸⁰ These cases represent methods of determining the deference and weight due to federal agency regulations in a manner that will prove essential to understanding the relationship between these regulations and § 1983 causes of action.⁸¹

II. EVOLUTION OF THE U.S. SUPREME COURT'S § 1983 JURISPRUDENCE RELATING TO ADMINISTRATIVE AGENCIES

Since its inception in 1871, 42 U.S.C. § 1983 has provided a mechanism for plaintiffs to bring a cause of action for violations of rights.⁸² Although the statute originally conceived of providing remedies only for violations of constitutional rights, the Supreme Court has included statutory rights as eligible for enforcement under § 1983.⁸³ The Supreme Court has failed to provide a definitive ruling as to whether federal regulations can create rights enforceable under § 1983.⁸⁴ Over the past twenty-five years, however, the Court has addressed many related issues that illuminate the complexities of § 1983 actions and has created seeming ambiguities that have set the stage for disagreement among the federal circuit courts of appeals over this issue.⁸⁵

Section 1983 emerged from the first section of the Civil Rights Act of 1871 (the "1871 Act"), a post-Civil War attempt to safeguard the rights established by the Fourteenth Amendment.⁸⁶ Originally, section 1 of the 1871 Act only provided causes of action for the deprivation of rights, privileges, or immunities secured by the Constitution.⁸⁷ The statute, however, underwent a series of revisions that resulted in its encompassing rights, privileges, and immunities secured by federal

⁷⁹ *Id.* at 221, 238–39; see *Chevron*, 467 U.S. at 843–44; *Skidmore*, 323 U.S. at 140.

⁸⁰ See *Mead*, 533 U.S. at 234–35; *Chevron*, 467 U.S. at 843–44; *Skidmore*, 323 U.S. at 140.

⁸¹ See *Mead*, 533 U.S. at 234–35; *Chevron*, 467 U.S. at 842–44; *Chrysler*, 441 U.S. at 301–03, 312–15; *Skidmore*, 323 U.S. at 140; *infra* notes 82–120 and accompanying text.

⁸² See *infra* notes 86–91 and accompanying text.

⁸³ See *Maine v. Thiboutot*, 448 U.S. 1, 4, 7 (1980); *id.* at 15 (Powell, J., dissenting) (discussing the legislative history of the Civil Rights Act of 1874).

⁸⁴ See *Save Our Valley v. Sound Transit*, 335 F.3d 932, 936 (9th Cir. 2003).

⁸⁵ See *infra* notes 92–120 and accompanying text.

⁸⁶ ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* § 8.2, at 453–54 (3d ed. 1999); see 42 U.S.C. § 1983 (2000).

⁸⁷ *Thiboutot*, 448 U.S. at 15 (Powell, J., dissenting).

laws as well.⁸⁸ The provision, § 1983, creates a cause of action against any person who, acting under color of state law, abridges "rights, privileges, or immunities secured by the U.S. Constitution and laws" of the United States.⁸⁹ The statute itself does not create substantive federal rights.⁹⁰ Section 1983, rather, provides a private remedy for the actions of state officials that result in a deprivation of rights that already are established by federal law.⁹¹

In 1980, in *Maine v. Thiboutot*, the U.S. Supreme Court held that the Social Security Act established rights that individual plaintiffs may enforce under § 1983.⁹² For the first time, the Court applied § 1983 to the violation of federal statutory rights, whereas previously § 1983 had only been a remedy for a violation of constitutional rights.⁹³ To justify this application of § 1983, the majority opinion dismissed the legislative history of § 1983 as inconclusive.⁹⁴ The Court instead applied a plain-meaning analysis to conclude that the phrase "and laws" contained within § 1983 should encompass all federal laws.⁹⁵ The Court reasoned that because Congress did not attach any modifying words to the phrase "and laws," the statute could recognize a claim for violation of rights created by the Social Security Act.⁹⁶ The dissent, however, contested that the phrase "and laws" was intended to reference only equal rights legislation that Congress created after the Civil War.⁹⁷ The dissenters also feared that the majority's holding could create an overly broad application of § 1983 to all federal statutes.⁹⁸

A single comment contained within the dissent of Justices Stevens, William Brennan, and Harry Blackmun in the 1983 case of *Guardians Ass'n v. Civil Service Commission of New York* provided the first mention that § 1983 could enforce rights created through regulations, in addition to federal statutes.⁹⁹ The dissenters interpreted the

⁸⁸ *Id.* (Powell, J., dissenting).

⁸⁹ 42 U.S.C. § 1983; *Save Our Valley*, 335 F.3d at 936.

⁹⁰ *Samuels v. District of Columbia*, 770 F.2d 184, 193 (D.C. Cir. 1985).

⁹¹ *Id.*

⁹² 448 U.S. at 4, 9.

⁹³ *See id.* at 4. For further discussion of previous applications of § 1983, see Todd E. Pettys, *The Intended Relationship Between Administrative Regulations and Section 1983's "Laws,"* 67 GEO. WASH. L. REV. 51, 52 (1998).

⁹⁴ *Thiboutot*, 448 U.S. at 7-8.

⁹⁵ *Id.* at 4.

⁹⁶ *Id.*

⁹⁷ *Id.* at 12 (Powell, J., dissenting).

⁹⁸ *See id.* (Powell, J., dissenting).

⁹⁹ *See* 463 U.S. 582, 638 (1983) (Stevens, J., dissenting). The majority decision in *Guardians* did not concern § 1983 or federal regulations, but rather denied compensation

Court's analysis in *Thiboutot* to mean 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."¹⁰⁰ The dissenting opinion went on to elaborate that although the *Thiboutot* decision only spoke to federal statutes, "[i]ts analysis of § 1983 . . . applies equally to administrative regulations having the force of law."¹⁰¹ The dissenting justices speculated that regulations that meet the *Chrysler Corp. v. Brown* test and that have the force of law may create rights enforceable under § 1983.¹⁰²

In 1987, in *Wright v. City of Roanoke Redevelopment & Housing Authority*, the U.S. Supreme Court handed down a decision which has provided the focal point for the debate among the federal circuit courts of appeals regarding the use of agency regulations in creating rights enforceable under § 1983.¹⁰³ The strength with which four dissenters contested an opinion supported by a terse majority rationale has fueled the controversy regarding this case and the subsequent disagreement among the federal circuit courts of appeals.¹⁰⁴

In *Wright*, the parties asked the Court to decide whether a local housing authority violated both a federal statute by establishing rent controls and the accompanying implementing regulations to the statute because the housing authority failed to make reasonable utility allowances in tenants' rents.¹⁰⁵ The Court found that Congress had not intended to preclude plaintiffs from invoking § 1983 under the Brooke Amendment to the Housing Act of 1937 (the "Brooke Amendment"), which contained implementing regulations in which the Department of Housing and Urban Development ("HUD") established rent controls.¹⁰⁶ The Court also dismissed the defendant's claim that neither the Brooke Amendment nor the implementing regulations produced rights that plaintiffs could enforce under § 1983.¹⁰⁷ Reasoning that the implementing regulations carry the force of law under the *Chrysler* analysis, the Court held that the regu-

to members of a police department that had brought a Title VI suit challenging the city hiring policy because of the absence of intentional discrimination. *Id.* at 584.

¹⁰⁰ *Id.* at 638 (Stevens, J., dissenting).

¹⁰¹ *Id.* at 638 n.6 (Stevens, J., dissenting) (citing *Chrysler Corp. v. Brown*, 441 U.S. 281, 301-03 (1979)).

¹⁰² See *id.* (Stevens, J., dissenting) (citing *Chrysler*, 441 U.S. at 301-03).

¹⁰³ See 479 U.S. 418, 431-32 (1987).

¹⁰⁴ See *id.* at 438 (O'Connor, J., dissenting); *infra* notes 121-194 and accompanying text.

¹⁰⁵ See *id.* at 419.

¹⁰⁶ *Id.* at 429.

¹⁰⁷ *Id.* at 429-30.

lations are specific and definite enough to create rights enforceable under § 1983.¹⁰⁸

The dissenting opinion of four justices in *Wright* articulated a concern that, under the majority opinion, any agency regulation adopted within the purview of a statute that contains an enforceable right can possess enforceable federal rights, even if Congress or the agency never intended for the regulations to create such rights.¹⁰⁹ Additionally, the dissenters were skeptical of the enduring authority of HUD regulations, which contain the "frequently changing views" of a federal administrative agency, and of the capacity of such regulations to create federal rights.¹¹⁰ Although some federal circuit courts of appeals have interpreted *Wright* as holding that a regulation promulgated by a federal agency can create a right enforceable under § 1983, others have interpreted the case as standing for the proposition that regulations are limited to further defining rights already created by statutes.¹¹¹

The Court also has decided cases that articulate requirements that statutes, and as this Note argues, regulations, must satisfy to be eligible to create enforceable § 1983 rights.¹¹² In 1989, in *Golden State Transit Corp. v. City of Los Angeles*, the U.S. Supreme Court held that to bring a § 1983 suit, a plaintiff must demonstrate a deprivation of a specific federal right that Congress intended to benefit a class that includes the plaintiff.¹¹³ Additionally, a plaintiff must demonstrate that the rights that are the subject of a § 1983 action are not too vague to be judicially enforceable.¹¹⁴

In 1997, in *Blessing v. Freestone*, the Court further fleshed out the qualifications for a § 1983 suit as originally laid out in *Golden State*.¹¹⁵ In *Blessing*, the Court established a three-part test for determining whether a statute creates an enforceable right that establishes a cause of action under § 1983:

First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so

¹⁰⁸ *Wright*, 479 U.S. at 431-32; see *supra* notes 39-47 and accompanying text.

¹⁰⁹ *Id.* at 438 (O'Connor, J., dissenting).

¹¹⁰ *Id.* (O'Connor, J., dissenting).

¹¹¹ See *infra* notes 121-194 and accompanying text.

¹¹² See *Blessing v. Freestone*, 520 U.S. 329, 340-41 (1997); *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 106 (1989); *infra* notes 218-226 and accompanying text.

¹¹³ 493 U.S. at 106.

¹¹⁴ *Id.*

¹¹⁵ See *Blessing*, 520 U.S. at 340-41; *Golden State*, 493 U.S. at 106.

"vague and amorphous" that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms.¹¹⁶

There is a rebuttable presumption that a federal statutory right that meets this three-part test is enforceable under § 1983.¹¹⁷ Although rare, such a presumption can be overcome if Congress expressly prohibits use of § 1983 in the statute or implicitly prohibits use by enacting a comprehensive remedial scheme.¹¹⁸

There are a plethora of U.S. Supreme Court decisions that have addressed § 1983 generally and cases that have attempted to address the interplay between regulations and § 1983 with ambiguous results.¹¹⁹ The Court, however, has refrained from hearing any cases that would resolve a debate among the federal circuit courts of appeals as to whether federal regulations can create rights that individuals may enforce using § 1983.¹²⁰

III. THE CONTROVERSY AMONG FEDERAL CIRCUIT COURTS OF APPEALS

A. Federal Agency Regulations May Create § 1983 Rights

A minority of federal circuit courts of appeals—the Sixth Circuit Court of Appeals and the Court of Appeals for the District of Columbia—have ruled, based upon a broad reading of both *Maine v. Thiboutot* and *Wright v. City of Roanoke Redevelopment & Housing Authority*, that agency regulations independently may create rights enforceable under 42 U.S.C. § 1983.¹²¹ These two courts of appeals have interpreted the language of § 1983 that permits remedies for violations of rights created through laws to include violations of rights derived from agency regulations.¹²²

¹¹⁶ 520 U.S. at 340–41 (citations omitted).

¹¹⁷ *Id.* at 341.

¹¹⁸ *Id.* In 1997, the Supreme Court in *Blessing* noted that the Court has only twice found comprehensive remedial schemes that have precluded § 1983 suits. *Id.* at 347 (citing *Smith v. Robinson*, 468 U.S. 992, 1005 n.9 (1984); *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 20 (1981)).

¹¹⁹ See *supra* notes 92–118 and accompanying text.

¹²⁰ See *Save Our Valley*, 335 F.3d at 936.

¹²¹ See *Loschiavo v. City of Dearborn*, 33 F.3d 548, 551 (6th Cir. 1994); *Samuels v. District of Columbia*, 770 F.2d 184, 199–200 (D.C. Cir. 1985).

¹²² See *Loschiavo*, 33 F.3d at 551; *Samuels*, 770 F.2d at 199–200.

In 1985, in *Samuels v. District of Columbia*, the D.C. Circuit became the first federal circuit court of appeals to find that agency regulations may create rights enforceable under § 1983.¹²³ In *Samuels*, the court considered the case of tenants of a housing project that received federal funds.¹²⁴ The tenants contended that local public housing officials violated HUD regulations that set forth grievance procedures and brought a § 1983 action for a violation of rights created by such regulations.¹²⁵ After establishing that the public housing officials violated the HUD regulations, the court decided whether the regulations alone created rights enforceable under § 1983.¹²⁶ The HUD regulations possessed the full force and effect of federal law under the *Chrysler Corp. v. Brown* test because they were "issued under a congressional directive to implement specific statutory norms and they affect individual rights and obligations."¹²⁷ The *Samuels* court cited the Supreme Court decision in *Chrysler*, which held that regulations that meet certain criteria may have the force and effect of laws, as evidence that such regulations are considered part of federal law.¹²⁸

The court then looked to the Supreme Court's decision in *Maine v. Thiboutot*, which interpreted the phrase "and laws" in § 1983 to include all federal laws, to conclude that the phrase includes federal regulations "adopted pursuant to a clear congressional mandate that have the full force and effect of law."¹²⁹ According to the *Samuels* court, the Court in *Thiboutot*, which held that federal statutory rights may provide grounds for § 1983 actions, did not intend to limit § 1983 to any particular set of federal laws.¹³⁰ The court viewed the HUD regulations as particularly appropriate to create rights enforceable under § 1983, as they were the result of an explicit congressional direction to HUD that the agency issue such grievance procedure regulations.¹³¹ This clear congressional direction to a federal administrative agency to act persuaded the *Samuels* court to recognize a valid § 1983 claim for the violation of HUD regulations.¹³²

¹²³ See 770 F.2d at 199-200.

¹²⁴ *Id.* at 188.

¹²⁵ *Id.*

¹²⁶ *Id.* at 199-200.

¹²⁷ *Id.* at 199.

¹²⁸ See *Samuels*, 770 F.2d at 199 (citing *Chrysler Corp. v. Brown*, 441 U.S. 281, 301-03 (1979)).

¹²⁹ *Id.*

¹³⁰ *Id.* (citing *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980)).

¹³¹ *Id.*

¹³² *Id.* at 199-200.

More recent among this tandem of cases, in 1994, in *Loschiavo v. City of Dearborn*, the Sixth Circuit determined that a Federal Communications Commission ("FCC") regulation possessed the potential to create a private right enforceable under § 1983.¹³³ After receiving notice that a recently installed satellite dish antenna in their backyard was in violation of a local zoning ordinance, the plaintiffs were denied a variance by a zoning board of appeals and were ordered to remove the antenna.¹³⁴ The plaintiffs brought a claim under § 1983 based on the FCC regulation that bars the enforcement of zoning ordinances that unduly interfere with installing satellite dish antennas.¹³⁵ The court in *Loschiavo* cited *Wright v. City of Roanoke Redevelopment & Housing Authority* for the propositions that plaintiffs may use § 1983 to enforce rights defined by federal statutes, and that federal regulations can create enforceable rights because they possess the force of law.¹³⁶ In *Loschiavo*, the Sixth Circuit found that the FCC regulation had the capacity to create rights that are enforceable under § 1983.¹³⁷

*B. Federal Agencies May Never Independently Create Rights
Enforceable Under § 1983*

In contrast, many federal circuit courts of appeals, including the Third, Fourth, Eleventh, and, most recently, Ninth Circuit Courts of Appeals, have held that an agency regulation cannot create an individual federal right enforceable through § 1983.¹³⁸ Most of these courts have followed patterns of reasoning similar to the Supreme Court's § 1983 cases, linking the claimed right with Congress's intent to create the right.¹³⁹ As a result, these federal circuit courts of appeals have decided that administrative regulations provide interpreta-

¹³³ 33 F.3d at 551-52.

¹³⁴ *Id.* at 550.

¹³⁵ *Id.*

¹³⁶ *Id.* at 551 (citing *Wright v. City of Roanoke Redev. & Hous. Auth.*, 479 U.S. 418, 431 (1987)).

¹³⁷ *Id.* at 551-52.

¹³⁸ *Save Our Valley v. Sound Transit*, 335 F.3d 932, 936 (9th Cir. 2003); *S. Camden Citizens in Action v. N.J. Dep't. of Envtl. Prot.*, 274 F.3d 771, 788, 790 (3d Cir. 2001) (holding that regulations cannot enforce federal rights under § 1983 unless Congress already has articulated such rights in a statute); *Harris v. James*, 127 F.3d 993, 1008, 1009 (11th Cir. 1997) (holding that regulations cannot create federal rights that are not already found in a statute because regulations do not contain sufficient evidence of congressional intent to create rights and the Supreme Court's decision in *Wright* did not assign regulations such creative authority); *Smith v. Kirk*, 821 F.2d 980, 984 (4th Cir. 1987).

¹³⁹ See *Save Our Valley*, 335 F.3d at 936; *S. Camden*, 274 F.3d at 788; *Harris*, 127 F.3d at 1008.

tions that merely define the content of statutory rights and cannot create rights enforceable under § 1983 independently.¹⁴⁰

In 1987, in *Smith v. Kirk*, the Fourth Circuit Court of Appeals became the first federal circuit court of appeals to rule that federal administrative agency regulations cannot create rights enforceable under § 1983.¹⁴¹ The court addressed the question of whether a state's selective determination of disability benefits violates rights created by a Social Security Administration regulation promulgated under the Social Security Act.¹⁴² In determining whether the state action violated statutory rights, the court first looked to Supreme Court precedent regarding § 1983 to determine that the statute did not create a right.¹⁴³ In addressing the issue of rights created through administrative agency regulations, however, the Fourth Circuit held that rights "not already implicit in the enforcing statute" cannot exist independently in regulations.¹⁴⁴ The Fourth Circuit also supported its decision with the observation that the Supreme Court had refrained from holding that administrative regulations alone can create rights enforceable under § 1983.¹⁴⁵

In 2003, in *Save Our Valley v. Sound Transit*, the Ninth Circuit Court of Appeals decided the most recent entry into this split among the federal circuit courts of appeals, holding that Title VI administrative regulations cannot independently create rights enforceable through § 1983.¹⁴⁶ The plaintiffs, a community group in Washington State, challenged the decision of the regional transit authority to build a light-rail line through the neighborhoods of the group's members.¹⁴⁷ The plaintiffs alleged that the decision violated a Department of Transportation disparate impact regulation that prohibits actions by recipients of federal funds that burden racial minorities disproportionately.¹⁴⁸ In this case, the line was proposed to run through Seattle's Rainier Valley, a neighborhood with a large population of racial minorities.¹⁴⁹ The court recognized that whether the

¹⁴⁰ See *Save Our Valley*, 335 F.3d at 936; *S. Camden*, 274 F.3d at 788; *Harris*, 127 F.3d at 1008.

¹⁴¹ See 821 F.2d at 984.

¹⁴² See *id.* at 982.

¹⁴³ See *id.*

¹⁴⁴ *Id.* at 984.

¹⁴⁵ *Id.*

¹⁴⁶ See 335 F.3d at 939.

¹⁴⁷ *Id.* at 934.

¹⁴⁸ *Id.* at 934-35.

¹⁴⁹ *Id.* at 934.

Department of Transportation's disparate impact regulation created a right that is enforceable under § 1983 was predicated upon first determining whether the regulations of a federal agency ever can create rights enforceable under § 1983.¹⁵⁰

The *Save Our Valley* court first looked to Supreme Court precedent in the decisions of *Alexander v. Sandoval* and *Gonzaga University v. Doe* because these cases, although not necessarily controlling, contributed insight into how the court should decide this controversial issue.¹⁵¹ In 2001, in *Alexander v. Sandoval*, the Court held that violations of disparate impact regulations under § 602 of the Civil Rights Act of 1964 do not provide individuals with a private cause of action.¹⁵² Plaintiffs in the case claimed that Title VI and its implementing regulations created a private right that was violated by the Alabama Department of Public Safety's policy of administering driver's license examinations only in English.¹⁵³ The Court concluded that because Congress did not intend for Title VI to create a private right of action for the enforcement of disparate impact regulations, the Court would not imply a right of action.¹⁵⁴ According to the Ninth Circuit in *Save Our Valley*, the Court in *Sandoval* held that only Congress can create implied rights of action through statutes, meaning that Congress alone must directly create all individual rights enforceable under § 1983.¹⁵⁵ The *Save Our Valley* court reasoned that as both implied rights of action and § 1983 rights are "creatures of federal substantive law," Congress alone can create such rights because only Congress has the ability to make laws.¹⁵⁶

The *Save Our Valley* majority then explored the 2002 decision in *Gonzaga University v. Doe*, in which the U.S. Supreme Court, in addressing whether spending legislation can create enforceable rights under § 1983, provided a rigorous test to determine whether rights generally are enforceable under § 1983.¹⁵⁷ The Court in *Gonzaga* stated that under § 1983, courts can only enforce "unambiguously conferred right[s]" that bear the mark of clear congressional intent.¹⁵⁸ The Ninth

¹⁵⁰ See *id.* at 935.

¹⁵¹ See *Save Our Valley*, 335 F.3d at 937 (citing *Gonzaga*, 536 U.S. 273, 283 (2002); *Sandoval*, 532 U.S. 275, 291 (2001)).

¹⁵² See 532 U.S. at 293.

¹⁵³ *Id.* at 278-79.

¹⁵⁴ *Id.* at 293.

¹⁵⁵ *Save Our Valley*, 335 F.3d at 937 (citing *Sandoval*, 532 U.S. at 291).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 938-39; see *Gonzaga*, 536 U.S. at 283.

¹⁵⁸ 536 U.S. at 280, 283.

Circuit in *Save Our Valley* maintained that, like *Sandoval*, the ruling of the *Gonzaga* Court suggested that courts should only permit statutes, to the exclusion of federal agency regulations, to create federal rights.¹⁵⁹ The court in *Save Our Valley* also found that the *Gonzaga* decision, like the decision in *Sandoval*, inextricably tied together implied rights of action with individual rights enforceable under § 1983 because both are federal substantive law and therefore exist only when “‘Congress intended to create a federal right.’”¹⁶⁰ The combined reasoning of the Supreme Court’s *Sandoval* and *Gonzaga* decisions, in the eyes of the *Save Our Valley* court, compelled the conclusion that agency regulations independently cannot create individual rights enforceable through § 1983.¹⁶¹

The *Save Our Valley* court then assessed the impact of the U.S. Supreme Court’s decision in *Wright v. City of Roanoke Redevelopment & Housing Authority*, relied upon heavily by the plaintiffs, which held that an implementing regulation that carries the force of law under the *Chrysler* analysis can create a right enforceable under § 1983.¹⁶² The Ninth Circuit in *Save Our Valley* summarily rejected the plaintiff’s assessment of the *Wright* decision as standing for the proposition that regulations can create enforceable rights.¹⁶³ The emphasis that the *Wright* Court placed upon congressional intent in enacting the statute, according to the Ninth Circuit, provided evidence that the Supreme Court was suggesting that the statute, not the regulations, created the right.¹⁶⁴ The Ninth Circuit also relied upon the dissenting opinion of four justices in *Wright*, who observed that the majority never addressed whether agency regulations can create rights enforceable under § 1983.¹⁶⁵ The court maintained that the *Wright* precedent merely allows valid regulations to define further rights already conferred by statutes.¹⁶⁶

Finally, the Ninth Circuit criticized the decisions of the federal circuit courts of appeals that have held that regulations can create individual rights enforceable under § 1983.¹⁶⁷ According to the *Save Our Valley* court, the D.C. Circuit in *Samuels* and the Sixth Circuit in *Loschiavo* built their decisions upon the faulty premise that regulations that have the full force and effect of laws independently have the po-

¹⁵⁹ *Save Our Valley*, 335 F.3d at 938 (citing *Gonzaga*, 536 U.S. at 283).

¹⁶⁰ *Id.* (quoting *Gonzaga*, 536 U.S. at 283).

¹⁶¹ *See id.* at 939.

¹⁶² *Id.* at 939–40; *see Wright*, 479 U.S. at 431–32; *Chrysler*, 441 U.S. at 301–03.

¹⁶³ *Save Our Valley*, 335 F.3d at 939.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 940 (citing *Wright*, 479 U.S. at 437–38 (O’Connor, J., dissenting)).

¹⁶⁶ *Id.* at 939.

¹⁶⁷ *Id.* at 942–43.

tential to create rights enforceable under § 1983.¹⁶⁸ In addition, the Ninth Circuit pointed out that the *Samuels* and *Loschiavo* decisions predate the Supreme Court's *Sandoval* and *Gonzaga* decisions, which otherwise would compel federal circuit courts of appeals to recognize the exclusive domain of Congress to create rights enforceable under § 1983.¹⁶⁹ After considering Supreme Court and federal circuit courts of appeals precedents, the Ninth Circuit concluded in *Save Our Valley* that "although a regulation may be relevant in determining the scope of the right conferred by Congress," only statutes can create an individual right enforceable under § 1983.¹⁷⁰ Therefore, as Congress never intended to create an enforceable right for racial minorities to be free from racially disparate effects in the Department of Transportation regulations, § 1983 did not apply, and the Ninth Circuit affirmed the lower court's judgment dismissing the action.¹⁷¹

In her dissenting opinion, Judge Marsha Berzon stridently disagreed with the sweeping rule established by the majority opinion that administrative agency regulations never can create rights enforceable under § 1983, even though she agreed that the Department of Transportation regulations in the case presented to the court did not create enforceable rights.¹⁷² Judge Berzon began by exploring the nature of rights as an ordering of relationships and limitations on state actions that, at times, may be entirely distinct from private judicial remedies.¹⁷³ She then criticized the majority opinion for an overly broad reading of *Sandoval* and *Gonzaga*.¹⁷⁴ She disagreed with the majority conclusion that although *Sandoval* and *Gonzaga* speak to the applicability of implied rights of action under § 1983, they also discourage the derivation of rights from federal administrative agencies that are enforceable under § 1983.¹⁷⁵ Judge Berzon maintained that the Supreme Court in *Gonzaga* failed to determine that Congress maintains exclusive jurisdiction over directly creating rights enforceable under § 1983.¹⁷⁶

¹⁶⁸ *Save Our Valley*, 335 F.3d at 942-43 (citing *Loschiavo*, 33 F.3d at 551; *Samuels*, 770 F.2d at 199).

¹⁶⁹ *Id.* at 943.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 944.

¹⁷² *Id.* at 946 (Berzon, J., dissenting).

¹⁷³ *Save Our Valley*, 335 F.3d at 946-51 (Berzon, J., dissenting).

¹⁷⁴ *Id.* at 952-53 (Berzon, J., dissenting).

¹⁷⁵ *See id.* at 952, 954 (Berzon, J., dissenting).

¹⁷⁶ *Id.* at 953-54 (Berzon, J., dissenting) (indicating that the separation of powers concern of the Supreme Court in *Sandoval*, that only Congress should provide access to the federal courts, does not apply to § 1983 actions because Congress explicitly granted access to the federal courts by enacting § 1983).

Judge Berzon's dissent is significant because she concluded that under the lens of modern administrative law, certain agency regulations should have the capacity to create individual rights.¹⁷⁷ She criticized the majority decision for interpreting Congress's delegation of rulemaking authority to federal agencies too formalistically and for commenting that "Congress, rather than the executive, is the law-maker in our democracy."¹⁷⁸ The rules that administrative agencies promulgate either are qualified as interpretive or legislative rules: the agencies can create the former "independently of any express grant of power from Congress and without following special procedures," while the latter "require an express delegation of rule-making authority from Congress and must be promulgated according to specific procedures."¹⁷⁹ As legislative regulations can bind and impose obligations on individuals beyond those imposed by statute, they maintain the character of statutes.¹⁸⁰ Judge Berzon pointed out other features common to both laws and legislative regulations:

[They] are prescriptive, forward looking, and of general applicability . . . often reflect a careful balance between competing interests and policy considerations . . . "affect individual rights and obligations" . . . [and] are binding on the individuals to whom they apply . . . can order the relationship between one individual and another, and they are backed by the coercive power of the government.¹⁸¹

Judge Berzon's characterizations of federal regulations are consistent with her position to permit certain agency regulations to create individual rights.¹⁸²

Judge Berzon then addressed prominent criticisms of agency regulations by offering functional justifications for the use of agency regulations in enforcing rights under § 1983.¹⁸³ She also pointed out that although regulations are more numerous and specific than statutes, such characteristics should only reinforce their capacity for cre-

¹⁷⁷ See *id.* at 954 (Berzon, J., dissenting).

¹⁷⁸ *Save Our Valley*, 335 F.3d at 956 (Berzon, J., dissenting) (quoting majority, *id.* at 939).

¹⁷⁹ *Id.* at 954 (Berzon, J., dissenting) (citing RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 6.4, at 325 (4th ed. 2002)).

¹⁸⁰ *Id.* (Berzon, J., dissenting) (citing PIERCE, *supra* note 179, § 6.4, at 325).

¹⁸¹ *Id.* at 954-55 (Berzon, J., dissenting) (quoting *Chrysler*, 441 U.S. at 302 (citations omitted)).

¹⁸² See *id.* at 954-55 (Berzon, J., dissenting).

¹⁸³ *Save Our Valley*, 335 F.3d at 955-56 (Berzon, J., dissenting).

ating rights.¹⁸⁴ She indicated that although regulations may be more transient than statutes, the short-lived nature of rights created through regulations are appropriate for the time and context of their creation, just as statutory rights are less permanent than constitutional rights and yet appropriate for the context of their creation.¹⁸⁵

According to Judge Berzon, the language of § 1983 produces ambiguities between the use of the terms "laws" and "statute."¹⁸⁶ She pointed out that in drafting § 1983, Congress used the phrase "laws" instead of "statutes" when referring to potential sources for rights enforceable under § 1983, even though the word "statute" appears in the same sentence.¹⁸⁷ Congress's deliberate and separate use of these terms, in Judge Berzon's evaluation, indicates that Congress did not intend the term "laws" to include only statutes to the exclusion of regulations.¹⁸⁸ This inclusive reading of § 1983, as Judge Berzon indicated, also is consistent with the Court's broad interpretation of the term "laws" in *Thiboutot*, which first provided that § 1983 should encompass all rights derived from federal laws rather than merely constitutional rights.¹⁸⁹

Furthermore, according to Judge Berzon, the majority decision of the Ninth Circuit in *Save Our Valley* rested on formalistic thinking that ignores the Supreme Court's evolving recognition that Congress has the power to delegate some of its authority to administrative agencies.¹⁹⁰ She argued that the majority worked from the misguided premise that a law's ability to create rights is determined solely by its origin in Congress.¹⁹¹ She concluded that this premise has given way in modern administrative law to a more functional view that recognizes a greater allocation of power to, and independence of, administrative agencies.¹⁹² She maintained that, subject to appropriate limita-

¹⁸⁴ *Id.* at 955 (Berzon, J., dissenting).

¹⁸⁵ *Id.* at 955-56 (Berzon, J., dissenting).

¹⁸⁶ *Id.* at 960-61 (Berzon, J., dissenting) (citing 42 U.S.C. § 1983 (2000)).

¹⁸⁷ *Id.* at 960 (Berzon, J., dissenting) (citing 42 U.S.C. § 1983).

¹⁸⁸ *Save Our Valley*, 335 F.3d at 960 (Berzon, J., dissenting).

¹⁸⁹ *Id.* at 961 (Berzon, J., dissenting) (citing *Thiboutot*, 448 U.S. at 7).

¹⁹⁰ *Id.* at 956-57 (Berzon, J., dissenting) (quoting *Loving v. United States*, 517 U.S. 748, 758 (1996) ("This Court established long ago that Congress must be permitted to delegate to others at least some authority that it could exercise itself."); and *Mistretta v. United States*, 488 U.S. 361, 372 (1989) ("[O]ur jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.")).

¹⁹¹ *Id.* at 956 (Berzon, J., dissenting).

¹⁹² *See id.* at 957 (Berzon, J., dissenting).

tions, agencies may exercise delegations of authority from Congress to issue regulations that can create rights, that are binding, and that have the force and effect of laws.¹⁹³ Judge Berzon concluded that, using functional principles of modern administrative law, courts should permit agency regulations to create individual rights, and, therefore, the majority should not have declared administrative agencies incapable of creating rights enforceable under § 1983.¹⁹⁴

IV. ANALYSIS: SELECT REGULATIONS SHOULD HAVE THE CAPACITY TO CREATE § 1983 INTERESTS

As discussed in Part III of this Note, there is a vibrant controversy among the federal circuit courts of appeals over whether federal administrative agency regulations can create rights enforceable under 42 U.S.C. § 1983.¹⁹⁵ The absence of controlling U.S. Supreme Court precedent on this issue and the modern role of federal agencies in our government should permit an exploration of whether federal agency regulations can create rights enforceable under § 1983.¹⁹⁶ Those regulations that demonstrate that they can create cognizable rights, that have the force and effect of law, and that are afforded deference by courts should be eligible to create § 1983 interests.¹⁹⁷ Additionally, public policy considerations support the derivation of § 1983 interests from federal regulations.¹⁹⁸

A. *The Potential for Regulations to Create § 1983 Interests*

To date, there is no evidence of clear congressional intent or controlling Supreme Court precedent that bars the use of administrative regulations in creating § 1983 interests.¹⁹⁹ Additionally, the significant position that administrative agencies occupy in our democracy begs a consideration of regulations as rights-creating pronouncements.²⁰⁰

¹⁹³ *Save Our Valley*, 335 F.3d at 959 (Berzon, J., dissenting).

¹⁹⁴ *Id.* at 946, 954 (Berzon, J., dissenting).

¹⁹⁵ See *supra* notes 121–194 and accompanying text.

¹⁹⁶ See *infra* notes 199–214 and accompanying text.

¹⁹⁷ See *infra* notes 215–254 and accompanying text.

¹⁹⁸ See *infra* notes 255–284 and accompanying text.

¹⁹⁹ See *Loschiavo v. City of Dearborn*, 33 F.3d 548, 551 (6th Cir. 1994); *Samuels v. District of Columbia*, 770 F.2d 184, 199 (D.C. Cir. 1985); *Pettys*, *supra* note 93, at 71 (noting that the Supreme Court has not indicated whether agency regulations may create rights under § 1983 and that the Court has provided little more than vague signals as to how the controversy should be resolved).

²⁰⁰ See Brian D. Galle, *Can Federal Agencies Authorize Private Suits Under § 1983?: A Theoretical Approach*, 69 BROOK. L. REV. 163, 165 (2003) (asserting that principles of modern

Congressional intent regarding the role that administrative regulations should play in § 1983 actions is ambiguous, as the legislative history behind § 1983 is unclear.²⁰¹ As Judge Berzon pointed out in her dissent to the Ninth Circuit Court of Appeals's *Save Our Valley v. Sound Transit* decision, which held that federal regulations cannot create § 1983 interests, the language of § 1983 produces ambiguities between the use of the terms "laws" and "statutes" in a way that casts doubt about congressional intent.²⁰² Despite the holdings in *Alexander v. Sandoval*, that violations of disparate impact regulations do not provide private causes of action, and in *Gonzaga University v. Doe*, that under § 1983 courts can only enforce an unambiguously conferred right that bears the mark of clear congressional intent, the Supreme Court has refrained from ruling on whether federal agency regulations can create § 1983 interests.²⁰³ Although some courts may construe the *Sandoval* and *Gonzaga* decisions broadly to prohibit the use of federal agency regulations to create § 1983 interests, the courts should read the holdings of these decisions with greater specificity to concern only implied rights of action.²⁰⁴ Such a reading properly places these precedents outside the scope of the current controversy among the federal circuit courts of appeals.²⁰⁵ The absence of clear congressional intent and controlling Supreme Court precedent creates the potential for competing perspectives in determining whether federal agency regulations create § 1983 interests.²⁰⁶ If not expressly prohibited by

administrative law and federalism support the use of regulations in § 1983 suits); Melissa A. Hoffer, *Closing the Door on Private Enforcement of Title VI and EPA's Discriminatory Effects Regulations: Strategies for Environmental Justice Stakeholders After Sandoval and Gonzaga*, 38 *New Eng. L. Rev.* 971, 995, 996 (2004) (maintaining that the Supreme Court's administrative law decisions suggest that regulations should be eligible to create rights enforceable under § 1983); *infra* notes 208–214 and accompanying text.

²⁰¹ See *Maine v. Thiboutot*, 448 U.S. 1, 7 (1980).

²⁰² 335 F.3d 932, 939 (9th Cir. 2003); *id.* at 960–61 (Berzon, J., dissenting) (citing 42 U.S.C. § 1983 (2000)); *infra* notes 186–189 and accompanying text.

²⁰³ See *Gonzaga Univ. v. Doe*, 536 U.S. 273, 280, 283 (2002); *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001).

²⁰⁴ See *Save Our Valley*, 335 F.3d at 952, 954 (Berzon, J., dissenting). Compare Hoffer, *supra* note 200, at 994, 995 (arguing that the Supreme Court's implied right of action analysis should not be overextended to determine whether federal regulations can create rights enforceable under § 1983), with Bradford C. Mank, *Suing Under § 1983: The Future After Gonzaga University v. Doe*, 39 *Hous. L. Rev.* 1417, 1461, 1467 (2003) (asserting that, in light of *Gonzaga*, the Supreme Court would be unlikely to find that regulations could evince the requisite congressional intent to establish rights under § 1983, although regulations still may be able to further develop a right already created by statute).

²⁰⁵ See *Save Our Valley*, 335 F.3d at 952, 954 (Berzon, J., dissenting).

²⁰⁶ See *Loschiavo*, 33 F.3d at 551; *Samuels*, 770 F.2d at 199.

Congress, regulations, in some circumstances, should be eligible to create § 1983 interests due to the ubiquitous modern use of federal regulations and a functional need for the creation of such interests.²⁰⁷

As Judge Berzon observed, the majority decision in *Save Our Valley* illustrated a formalistic approach to Congress's delegation of rulemaking authority to federal agencies when the majority commented that "Congress, rather than the executive, is the lawmaker in our democracy."²⁰⁸ This perspective not only expresses reservation about the basic function of agencies issuing rules, but also underlies the hesitancy of many federal circuit courts of appeals to recognize that administrative agency regulations, as a class, contain the capacity to create rights enforceable under § 1983.²⁰⁹ The Supreme Court and constitutional scholars, however, have recognized that the existence and function of modern administrative agencies are constitutionally valid and necessary for the efficient operation of our highly regulated society.²¹⁰ In 1983, the U.S. Supreme Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* held that administrative agencies exercise their proper function when courts permit them to formulate policies and to create rules that "fill any gap left, implicitly or explicitly, by Congress."²¹¹ Therefore, the Supreme Court has expressed an observation that contradicts the image of Congress as sole author of authoritative pronouncements.²¹² By recognizing that courts should be highly deferential to agencies' interpretations of statutes, the Court in *Chevron* placed a great deal of authority in agencies to craft regulations that courts should recognize as possessing controlling weight and respect in interpreting a statute.²¹³ The frequency with which Congress currently leaves either explicit or implicit gaps for

²⁰⁷ See *Save Our Valley*, 335 F.3d at 957 (Berzon, J., dissenting); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 487 (1989) (suggesting that a flexible delegation of powers among the branches of government and functional administrative state has been necessary for an increasingly complex society).

²⁰⁸ 335 F.3d at 956 (Berzon, J., dissenting) (quoting majority, *id.* at 939).

²⁰⁹ See *id.* (Berzon, J., dissenting).

²¹⁰ See *Loving v. United States*, 517 U.S. 748, 758 (1996); *Mistretta v. United States*, 488 U.S. 361, 372 (1989); *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984); Farina, *supra* note 207, at 487.

²¹¹ 467 U.S. at 843 (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)).

²¹² See *id.* at 842-44. But see *Save Our Valley*, 335 F.3d at 939.

²¹³ See 467 U.S. at 842-44.

agencies to fill in with regulatory schemes indicates the significant authority that agency regulations collectively possess.²¹⁴

B. Criteria to Permit Regulations to Create § 1983 Interests

If courts allow federal regulations to create rights under § 1983, courts must apply a myriad of stringent tests to regulations to identify those that are eligible to create such rights.²¹⁵ Therefore, a regulation that can create a § 1983 interest should create a judicially cognizable right and carry the force and effect of law by adhering to APA procedural requirements.²¹⁶ Such a regulation also should possess controlling weight by satisfying the binary test established in *Chevron* and the multi-factorial measure introduced in *Skidmore v. Swift & Co.*²¹⁷

To be eligible to create a federal right that plaintiffs may assert under § 1983, a regulation first should create a judicially cognizable right using the criteria articulated by the U.S. Supreme Court in *Blessing v. Freestone*, which established a three-part test for determining whether a statute creates a § 1983 interest.²¹⁸ Although the Court in *Blessing* applied the criteria to determine whether a statute may provide grounds for a § 1983 claim, these criteria also could serve as a credible measurement of whether a regulation could provide similar grounds.²¹⁹

In applying the *Blessing* criteria, a regulation first must reflect congressional intent to create a benefit for the plaintiff.²²⁰ A regulation may reflect congressional intent to benefit a plaintiff if, for example, it creates an individualized entitlement or confers a direct benefit on a plaintiff rather than merely having an impact on a larger

²¹⁴ See *id.* at 843; JERRY L. MASHAW, GREED, CHAOS AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 152 (1997) (arguing that because it is more costly for Congress to legislate than it is for federal agencies to promulgate regulations, the rulemaking function of the administrative state is necessary).

²¹⁵ See 5 U.S.C. § 553 (2000); *United States v. Mead Corp.*, 533 U.S. 218, 234–35 (2001); *Blessing v. Freestone*, 520 U.S. 329, 340–41 (1997); *Chevron*, 467 U.S. at 842–44; *Chrysler Corp. v. Brown*, 441 U.S. 281, 301–03, 312–15 (1979); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

²¹⁶ See 5 U.S.C. § 553; *Mead*, 533 U.S. at 234–35; *Blessing*, 520 U.S. at 340–41; *Chrysler*, 441 U.S. at 301–03, 312–15; Petrys, *supra* note 93, at 81 (observing that no federal circuit court of appeals has employed both the *Chrysler* force and effect of law test in tandem with the three-part *Blessing* analysis in discerning whether regulations can create rights enforceable under § 1983).

²¹⁷ See *Chevron*, 467 U.S. at 842–44; *Skidmore*, 323 U.S. at 140.

²¹⁸ See 520 U.S. at 340–41.

²¹⁹ See *id.*

²²⁰ See *id.* at 340.

system and an indirect benefit on an individual.²²¹ Second, the right created by a regulation cannot be too "vague and amorphous" for a court to enforce.²²² A court would consider a regulation too vague or amorphous if it contained ambiguous terms without providing any guidance as to how to interpret these terms.²²³ Finally, a regulation must be mandatory and impose an obligation on the states.²²⁴ For example, a regulation that cannot command a non-complying state to take any remedial action would not be a mandatory provision.²²⁵ If a regulation possesses all three of these qualities, it should be able to create a right that a court can enforce.²²⁶

If a regulation can create a judicially cognizable right, courts should consider the weight of the regulation and the deference due to its interpretations in determining whether it can create a right enforceable under § 1983.²²⁷ The Court in *Chrysler Corp. v. Brown* offered a test to determine whether regulations possess the force of law that the Court of Appeals for the District of Columbia has used to evaluate whether regulations can create § 1983 interests.²²⁸ The Court in *Chrysler* differentiated between substantive rules that possess the force and effect of law and interpretive rules that agencies have not issued through notice and comment rulemaking in a manner that could provide guidance in assessing their capacity to create § 1983 interests.²²⁹ Substantive rules should carry sufficient weight to be eligible to create § 1983 interests as they "affect individual rights and obligations" and are sufficiently binding to carry the force of law.²³⁰ The *Chrysler* requirements that a congressional grant of authority authorize the promulgating agency to issue substantive regulations and that the agency follow congressional procedural requirements when issuing such regulations also can provide guidance in determining the eligibility of regulations to create § 1983 interests.²³¹

²²¹ See *id.* at 343-45.

²²² See *id.* at 340-41 (quoting *Wright v. City of Roanoke Redev. & Hous. Auth.*, 479 U.S. 418, 431-32 (1987)).

²²³ See *Blessing*, 520 U.S. at 345.

²²⁴ See *id.* at 341.

²²⁵ See *id.* at 344.

²²⁶ See *id.* at 340-41.

²²⁷ See 5 U.S.C. § 553 (2000); *Mead*, 533 U.S. at 234-35; *Blessing*, 520 U.S. at 340-41; *Chevron*, 467 U.S. at 842-44; *Chrysler*, 441 U.S. at 301-03, 312-15; *Skidmore*, 323 U.S. at 140.

²²⁸ See 441 U.S. at 301-03, 312-15; *Samuels*, 770 F.2d at 199.

²²⁹ See 441 U.S. at 301-03, 312-15.

²³⁰ See *id.* at 301-02 (quoting *Morton*, 415 U.S. at 232).

²³¹ See *id.* at 302-03.

At least one federal circuit court of appeals has not permitted agency regulations to create rights enforceable under § 1983 because of a lack of evidence that Congress ever intended for regulations to possess this characteristic.²³² Congressional intent that agencies create regulations possessing the force of law, however, is evident in those regulations created pursuant to the APA.²³³ Congress must authorize an agency to promulgate notice and comment regulations, according to the APA, through a grant of authority in crafting an agency's organic statute—the law through which Congress establishes an administrative agency.²³⁴ Therefore, if an agency creates a regulation pursuant to the notice and comment procedural requirements of the APA, there is evidence of congressional intent for the promulgating agency to compose rules that have the force and effect of law.²³⁵ In contrast, interpretive rules, such as the U.S. Customs Service's pronouncements in *United States v. Mead Corp.*, which reiterated the *Skidmore* measure of deference that courts should grant interpretive rules, are not subject to the APA requirements of notice and comment procedures.²³⁶ Congress need not grant permission for an agency to promulgate interpretive rules.²³⁷ Therefore, interpretive rules are unsuitable for creating rights enforceable under § 1983.²³⁸ The difference between regulations created according to notice and comment rulemaking and regulations created outside of such procedural requirements suggests that the former should exert greater force than the latter.²³⁹ Thus, if an agency regulation carries the force and effect of law under the *Chrysler* analysis, particularly if it is the product of notice and comment rulemaking under the APA, courts should give that regulation further consideration as to whether it can create a right enforceable under § 1983.²⁴⁰

Finally, by examining those regulations that are qualified to fill statutory gaps, the degree of deference accorded to a regulation's interpretations under both *Chevron* and *Skidmore* also can provide sound guidance in determining whether that regulation can create rights enforceable under § 1983.²⁴¹ The extent to which courts defer to an

²³² See *Save Our Valley*, 335 F.3d at 939, 940.

²³³ See 5 U.S.C. § 553 (2000); *Chrysler*, 441 U.S. at 312–13.

²³⁴ 5 U.S.C. § 553; BLACK'S LAW DICTIONARY 1421 (7th ed. 1999).

²³⁵ See 5 U.S.C. § 553.

²³⁶ See *id.*; *Mead*, 533 U.S. at 234–35.

²³⁷ See 5 U.S.C. § 553; *Mead*, 533 U.S. at 230; *Chrysler*, 441 U.S. at 313–16.

²³⁸ See 5 U.S.C. § 553; *Mead*, 533 U.S. at 230; *Chrysler*, 441 U.S. at 313–16.

²³⁹ See 5 U.S.C. § 553.

²⁴⁰ See *id.*; *Chrysler*, 441 U.S. at 313.

²⁴¹ See *Mead*, 533 U.S. at 234–35; *Chevron*, 467 U.S. at 842–44; *Skidmore*, 323 U.S. at 140.

agency's interpretations of a regulation does not control whether courts must accept a regulation as creating rights enforceable under § 1983.²⁴² The criteria that the Supreme Court in *Chevron* and *Skidmore* used in determining the extent of judicial deference due to agency interpretations of statutes, however, reveals both the manner in which the Supreme Court permits qualified agency regulations authoritatively to fill the gaps left by statutes and the characteristics that such regulations must possess.²⁴³ If certain regulations can fill gaps where Congress has not spoken through statute, these regulations should have the ability to create rights based on a reasonable interpretation of the statute that the regulation is designed to fill.²⁴⁴ *Chevron's* holding—that agency regulations that offer a permissible construction of a statute carry authoritative interpretations of the statute—supports the creation of regulatory rights, in accordance with the statute, that are enforceable under § 1983.²⁴⁵

Nevertheless, courts may criticize the “reasonable interpretation” measure by which *Chevron* determines the degree of deference due to regulations as insufficiently demanding if used alone to determine § 1983 eligibility by courts that are hesitant to invest such creative force behind regulations.²⁴⁶ A more comprehensive test, as articulated in *Skidmore* and recently reaffirmed by the Court in *Mead*, although typically applied to interpretive rules, should work in tandem with the binary *Chevron* test to determine whether notice and comment regulations can create § 1983 interests.²⁴⁷ Despite its intended use for interpretive rules rather than notice and comment regulations, the *Skidmore* test implemented in the context of creating § 1983 rights provides a second step to the *Chevron* test and a more thorough examination of agency regulations.²⁴⁸ In order to possess the authority necessary to create a § 1983 interest, a regulation first should be the product of thorough agency consideration.²⁴⁹ The most common example of such a regulation could be the product of notice and comment rulemaking under the APA.²⁵⁰ A regulation also should be the product of agency experience and expertise to be considered eligible

²⁴² See *Mead*, 533 U.S. at 234–35; *Chevron*, 467 U.S. at 842–44; *Skidmore*, 323 U.S. at 140.

²⁴³ See *Mead*, 533 U.S. at 234–35; *Chevron*, 467 U.S. at 842–44; *Skidmore*, 323 U.S. at 140.

²⁴⁴ See *Mead*, 533 U.S. at 234–35; *Chevron*, 467 U.S. at 842–44; *Skidmore*, 323 U.S. at 140.

²⁴⁵ See 467 U.S. at 842–44.

²⁴⁶ See *id.*; see also, e.g., *Save Our Valley*, 335 F.3d at 939.

²⁴⁷ See *Mead*, 533 U.S. at 234–35; *Chevron*, 467 U.S. at 842–44; *Skidmore*, 323 U.S. at 140.

²⁴⁸ See *Mead*, 533 U.S. at 234–35; *Chevron*, 467 U.S. at 842–44; *Skidmore*, 323 U.S. at 140.

²⁴⁹ See *Mead*, 533 U.S. at 235; *Skidmore*, 323 U.S. at 140.

²⁵⁰ See 5 U.S.C. § 553 (2000).

to create a § 1983 interest.²⁵¹ Finally, to merit consideration, a regulation should have a substantial degree of consistency with both prior and subsequent regulations issued by the agency.²⁵² Regulations that give rise to rights enforceable under § 1983 should be visibly part of some logical patchwork of rules that an agency has issued over time.²⁵³ These criteria, when coupled with the *Chevron* standard and procedural requirements of the APA, recognize the important function of federal regulations while still scrupulously examining the nature of the right, the weight of the regulation, and the intent of Congress in granting authority for agencies to issue regulations.²⁵⁴

C. Public Policy Arguments Supporting Regulations' Creation of § 1983 Interests

Courts may be reluctant to entertain federal regulations as the source of rights enforceable under § 1983 due to public policy concerns.²⁵⁵ Although such policy concerns are not without foundation, a broader consideration of the purpose of § 1983 and the nature of federal regulations reveals public policy considerations that bolster, rather than refute, the proposition that regulations can create rights enforceable under § 1983.²⁵⁶

Some courts may contend that it would be inefficient to recognize federal regulations as creating rights enforceable under § 1983 because of the abundance of regulations that would be eligible and the excessive manner in which these numerous claims would consume judicial resources.²⁵⁷ Recognizing regulations as a source of rights enforceable under § 1983 undoubtedly would increase the number of claims brought under the statute.²⁵⁸ The expense of increased claims, however, should not be a significant consideration in this determination, as § 1983 is de-

²⁵¹ See *Mead*, 533 U.S. at 234–35; *Skidmore*, 323 U.S. at 140.

²⁵² See *Mead*, 533 U.S. at 234–35; *Skidmore*, 323 U.S. at 140.

²⁵³ See *Mead*, 533 U.S. at 234–35; *Skidmore*, 323 U.S. at 140.

²⁵⁴ See 5 U.S.C. § 553; *Mead*, 533 U.S. at 234–35; *Blessing*, 520 U.S. at 340–41; *Chevron*, 467 U.S. at 842–44; *Chrysler*, 441 U.S. at 301–03, 312–15; *Skidmore*, 323 U.S. at 140.

²⁵⁵ See *Save Our Valley*, 335 F.3d at 955–56 (Berzon, J., dissenting); *infra* notes 257–284 and accompanying text.

²⁵⁶ See *Save Our Valley*, 335 F.3d at 955–56 (Berzon, J., dissenting).

²⁵⁷ See *id.* at 955 (Berzon, J., dissenting).

²⁵⁸ See *id.* (Berzon, J., dissenting); Charles Davant IV, *Sorcerer or Sorcerer's Apprentice?: Federal Agencies and the Creation of Individual Rights*, 2003 WIS. L. REV. 613, 640 (asserting that if regulations could create rights enforceable under § 1983, federal courts would be burdened with an excessive volume of such claims); Keith E. Eastland, *Environmental Justice and the Spending Power: Limits on Using Title VI and § 1983*, 77 NOTRE DAME L. REV. 1601, 1615 (2002) (concluding that the use of federal regulations to create rights enforceable under § 1983 would increase federal litigation substantially).

signed to safeguard the rights of the individual from abusive state actions.²⁵⁹ As a result, courts should permit plaintiffs to assert § 1983 claims liberally, and an abundance of claims is a signal of achieving our democratic goal of preserving the rights and interests of the minority.²⁶⁰

In light of the concern of judicial efficiency that some courts may maintain, accepting regulations as creating § 1983 interests still will not cause an undue strain on the judicial system.²⁶¹ An increase in § 1983 suits grounded in rights from federal regulations would be similar in scope to the increase of suits that resulted after the expansion of § 1983 by the holding of the Supreme Court in *Maine v. Thiboutot* to encompass statutory rights in addition to constitutional rights.²⁶² Moreover, if statutes provided the only grounds for § 1983 interests, there is a substantial risk that the efficiency of the entire rulemaking system could be in jeopardy.²⁶³ Universally ignoring those § 1983 interests created by regulatory rights would threaten the legitimacy and authority of federal regulations as a class.²⁶⁴ As one of the central functions of agency regulations is to fill the gaps left open by Congress, the erosion of regulatory authority necessarily would result in an increased reliance on statutory authority and heightened strain on congressional resources.²⁶⁵ If Congress were less able to delegate authority to administrative agencies, the current system of delegating rulemaking authority would be rendered less efficient.²⁶⁶

Although some courts maintain that regulations should not create § 1983 interests because they are more transient than statutes, the transience of federal regulations does not render them less valid or inadequate to create rights.²⁶⁷ Courts consider regulations more transitory than statutes because federal agencies create and terminate regulations with greater ease than when Congress promulgates statutes.²⁶⁸ The potentially brief lifespan of federal regulations, however,

²⁵⁹ See 42 U.S.C. § 1983 (2000); CHEMERINSKY, *supra* note 86, § 8.2, at 453–54.

²⁶⁰ See 42 U.S.C. § 1983; CHEMERINSKY, *supra* note 86, § 8.2, at 453–54.

²⁶¹ See *Thiboutot*, 448 U.S. at 4.

²⁶² See *id.*

²⁶³ See *Chevron*, 467 U.S. at 843 (citing *Morton*, 415 U.S. at 231).

²⁶⁴ See *id.*

²⁶⁵ See *id.*

²⁶⁶ See *id.*

²⁶⁷ See *Wright*, 479 U.S. at 438 (O'Connor, J., dissenting); *Save Our Valley*, 335 F.3d at 940; *id.* at 955–56 (Berzon, J., dissenting); *Eastland*, *supra* note 258, at 1615, 1644 (arguing, in the context of Title VI disparate impact regulations, that transient agency regulations are unfit to create federal rights).

²⁶⁸ See *Wright* 479 U.S. at 438 (O'Connor, J., dissenting); *Save Our Valley*, 335 F.3d at 940; *id.* at 955 (Berzon, J., dissenting).

should not render them unable to create rights.²⁶⁹ As Judge Berzon pointed out in her dissenting opinion in *Save Our Valley*, it is uncertain why relatively short-lived rights created by federal regulations are objectionable, as they are no less valid during their existence, even if brief.²⁷⁰ Just as regulations impose short-lived obligations on individuals, they should likewise be able to create equally transient rights.²⁷¹ Moreover, as Judge Berzon argued, the transience of regulations can only be defined in relative terms.²⁷² Although the nature of regulatory rights may be more short-lived than those of statutes, statutory rights are far more transient than the immutable rights found in the U.S. Constitution.²⁷³ Nonetheless, courts have deemed statutory rights enforceable under § 1983, just as regulatory rights should be.²⁷⁴

Although some courts may be hesitant to permit regulations to create § 1983 interests because the public cannot hold administrative agencies, unlike Congress, politically accountable for their actions, the President remains ultimately accountable as executive of all federal agencies.²⁷⁵ The Supreme Court in *Chevron* justified its decision to accord substantial deference to agency interpretations of a statute by refuting the argument that agencies are unaccountable.²⁷⁶ In *Chevron*, the Court maintained that the President, as head administrator, remains politically accountable for the entire system of federal administrative agencies and is entitled to make policy choices to resolve conflicting interests of Congress.²⁷⁷ This same direct chain of responsibility is equally applicable to regulations in their rights-creating capacity.²⁷⁸

Finally, some courts may object to the use of regulations as grounds for § 1983 suits because regulations are insufficiently authoritative or binding.²⁷⁹ As Judge Berzon indicated, however, regulations contain the

²⁶⁹ See *Save Our Valley*, 335 F.3d at 955–56 (Berzon, J., dissenting).

²⁷⁰ *Id.* at 955 (Berzon, J., dissenting).

²⁷¹ *Id.* (Berzon, J., dissenting).

²⁷² *Id.* at 955–56 (Berzon, J., dissenting).

²⁷³ *Id.* (Berzon, J., dissenting).

²⁷⁴ See *Thiboutot*, 448 U.S. at 4; *Save Our Valley*, 335 F.3d 955–56 (Berzon J., dissenting).

²⁷⁵ See *Chevron*, 467 U.S. at 865–66; Davant, *supra* note 258, at 639, 640 (maintaining that, compared to acts of Congress, federal agencies are less accountable to the states and their policy decisions are not subject to the same rigorous examination by multiple branches of government).

²⁷⁶ See *Chevron*, 467 U.S. at 865–66.

²⁷⁷ *Id.*

²⁷⁸ See *id.*

²⁷⁹ See *Save Our Valley*, 335 F.3d at 954–55 (Berzon, J., dissenting); Pettys, *supra* note 93, at 96–99 (indicating that Congress intended a sharp divide between the authority of regulations and statutes as demonstrated by the inability of regulations to create obligations that impose criminal penalties or confer vested employment rights).

same properties as statutes because they are binding on individuals, as well as on branches of government, and contain the same form and effect as statutes.²⁸⁰ Regulations, like statutes, are also "prescriptive, forward-looking, and of general applicability."²⁸¹ Additionally, regulations are only inferior to statutes in that they must conform to, and cannot be an arbitrary or capricious expression of, the authority that statutes give them.²⁸² Valid regulations are no less legitimate or authoritative than statutes.²⁸³ The manner in which courts examine regulations to be a proper exercise of authority, coupled with the proposed judicial tests mentioned earlier in this Note, should help courts identify those regulations that create valid rights enforceable under § 1983.²⁸⁴

CONCLUSION

Courts should resolve the conflict among the federal circuit courts of appeals regarding whether federal administrative agency regulations can create § 1983 interests by selectively allowing certain regulations to create such interests. When taken together, the rights-creation test of *Blessing v. Freestone*, the full-force-of-law measure of *Chrysler Corp. v. Brown*, the binary criteria of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, and multi-factorial criteria of *Skidmore v. Swift & Co.* produce a battery of thorough evaluations that should guide courts in permitting certain regulations to create § 1983 interests. Such a thorough evaluation should assuage the concerns of those courts that are hesitant to permit regulations to provide rights enforceable under § 1983. The benefit of providing individuals with a cause of action to preserve their regulatory rights against abusive actions of state actors outweighs opposing public policy concerns. Additionally, permitting federal regulations to create § 1983 interests should be reflective of, and necessary in light of, the increased authority and deference that Congress and the judiciary accord to regulations.

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²⁸⁰ *Save Our Valley*, 335 F.3d at 955 (Berzon, J., dissenting).

²⁸¹ *Id.* at 954 (Berzon, J., dissenting); see 5 U.S.C. § 551(4) (2000) (defining "rule").

²⁸² See *Save Our Valley*, 335 F.3d at 955 (Berzon, J., dissenting) (citing 5 U.S.C. § 706(2) (A), (C)).

²⁸³ See *id.* (Berzon, J., dissenting).

²⁸⁴ See 5 U.S.C. § 553; *Mead*, 533 U.S. at 234-35; *Blessing*, 520 U.S. at 340-41; *Chevron*, 467 U.S. at 842-44; *Chrysler*, 441 U.S. at 301-03, 312-15; *Skidmore*, 323 U.S. at 140; *supra* notes 215-254 and accompanying text.