Many of the ugly pages of American history have been obscured and forgotten. . . . America owes a debt of justice which it has only begun to pay. If it loses the will to finish or slackens in its determination, history will recall its crimes and the country that would be great will lack the most indispensable element of greatness—justice.

—Dr. Martin Luther King, Jr.1

I. INTRODUCTION

Jim Crow is not dead.2 Though the decades since the Civil Rights Movement have seen a deep change in the conscience of this country and

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2. The name “Jim Crow,” which appears to have originated as the pejorative reference to a black man in a minstrel song written by Thomas Dartmouth Rice in the early nineteenth century, was subsequently used to describe the segregation laws, rules, and customs that arose after Reconstruction ended in 1877 and continued until the mid-1960s. FERRIS STATE UNIVERSITY MUSEUM OF RACIST MEMORABILIA, WHO WAS JIM CROW?, available at http://www.ferris.edu/news/jimcrow/who.htm. Demonstrations and protests during the civil rights movement produced many memorable scenes, one of which was captured early on at the NAACP Detroit Branch’s “Parade for Victory” in 1944, available at http://www.jimcrowhistory.org/scripts/jimcrow/gallery.cgi?term=&collection=jimcrow&index=54 (last visited May 3, 2006). The image portrays parade participants dressed as pallbearers and they carry a casket with a banner above which reads “Here Lies Jim Crow.” Id.
much progress has been made toward eliminating racial discrimination, Jim Crow still lurks throughout American society. These days, however, while he no longer strides invincibly in the armor of apartheid, the law still furnishes his means and serves his ends. Racial discrimination now occurs primarily through the disproportionate distribution of the costs and benefits of infrastructure, industry, and community development, and institutional administration. Such disproportionate distribution favors affluent, predominantly white communities over communities of color primarily because the latter are less able to challenge the legal processes that authorize such inequitable development. The inability to


. . . [T]he separate but equal doctrine and its vampire-like ethos simply refused to die with the mighty blow struck by Brown. Instead, this doctrine is now lurking more subtly in the shadows of nominally colorblind legal norms that perpetuate the differential treatment of blacks and other communities of color, which constitutes a modern incursion against the very victory whose anniversary we now celebrate.

Id. at 46.


6. See BULLARD, supra note 4, at 105–06 (discussing racially discriminatory effects of highway construction programs).

7. See infra Section II.A.; People Who Care v. Rockford Bd. of Educ., School Dist. No. 205, 851 F. Supp. 905, 915–33 (N.D. Ill. 1994) rev’d in part on other grounds, 111 F.3d 528 (7th Cir. 1997) (finding that school board created and maintained a racially segregated school system through various means including the manipulation of attendance zones, the provision of inequitable transportation and access to transportation to students based upon their race and national origin, and the disparate placement of facilities and equipment so as to burden minority students and not provide them with an equal educational opportunity).

8. See ROBERT D. BULLARD, DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY (1994); see also ROBERT D. BULLARD, DECISION MAKING, ENVIRONMENT (May 1994), reprinted in FACES OF ENVIRONMENTAL RACISM: CONFRONTING ISSUES OF GLOBAL JUSTICE at 3, 16 (Laura Westra & Peter S. Wentz eds., 1995) ("few poor or minority communities have the resources to hire lawyers, expert witnesses, and doctors needed to sustain [a challenge to pollution-causing industrial development that disproportionately impacts communities of color]"). Though Bullard’s work focuses on a specific subset of the theory of institutional racism that has been termed "environmental racism," see Hoffer, supra note 5, his analysis applies as well to the more generalized theory of institutional racism set forth in this Comment.
effectively challenge such institutional injustice results from lack of access to legal representation and the lack of legal bases upon which to mount such challenges. In this manner the law still stands as a tool of racial injustice, insofar as it authorizes the acts of those who perpetrate discrimination. This is the face of racism today. Jim Crow lives, though his crimes are now committed in a more complex, institutional mode.

A prime example of this phenomenon can be found in the recent development plan for a sorely needed mass transit system in and around Seattle, Washington. The local transit authority, Sound Transit, is building a light-rail system to serve the greater Puget Sound area, but because of the irregular topography of Seattle, developing a construction plan has been a difficult task. Sound Transit decided to build the rail underground through tunnels in some neighborhoods, elevated above ground in other neighborhoods, and at street-level in others. To the south of Seattle lies Rainier Valley, a community composed predominantly of persons of color. Rainier Valley is one of those neighborhoods through which the light-rail is being built at street-level, at an overwhelmingly disproportionate cost to its residents. This shocking

9. See infra Section II.
12. See Alex Fryer, A Milestone for Light Rail—Regional Board Selects Station Sites, Alignment, SEATTLE TIMES, Nov. 19, 1999.
14. Sound Transit's estimates of the significant unavoidable adverse impacts reveal a troubling inequality of impact. See 1 SOUND TRANSIT, CENTRAL LINK LIGHT RAIL TRANSPORTATION PROJECT, SEATTLE, FINAL ENVIRONMENTAL IMPACT STATEMENT [hereinafter FEIS] S-33-34 (1999). The light rail is broken up into six segments, A through F. Id. at S-3. Segment A will serve North Seattle, a predominantly white area, and will displace between two and ten residences, businesses, and organizations. See id. at S-33. Segment B, which also serves a predominantly white part of Seattle, will displace between four and twenty residences, businesses, and organizations. See id. Segment C, which also serves an area in which whites are a majority, will also displace between four and twenty residences, businesses, and organizations. See id. Segment E, which serves an area that is also predominantly white, will displace between five and sixteen residences, businesses, and organizations. See id. at S-34. Segment F, which serves a less predominantly white area but in which whites are still a majority, will displace between fourteen and fifty-three residences. See id. at S-34. Segment D, which is the predominantly African-American and minority portion of the Greater Seattle Area, will suffer displacement of between 62 and 191 businesses, residences, and organizations. See id. S-33-34. Sound Transit’s preferred route alignment would result in at most thirteen property acquisitions in Segment A, eight property acquisitions in Segment B, twenty-four property acquisitions in Segment C, ninety property acquisitions in Segment E, fifty-one property acquisitions in Segment F, and 240 property acquisitions in Segment D. Id. at 4-38. Sound Transit’s FEIS Addendum of 2001 disclosed a modification to the plan for Segment D that reduced the number of property
disparity prompted George Curtis, a member of the Save Our Valley organization, to denounce Sound Transit’s administration of the project as an “epic of ongoing deceit and institutional racism.” Save Our Valley’s subsequent unsuccessful legal challenge to the Sound Transit project highlights both the reality of institutional racism and the inadequacy of current tools to challenge it in the courts.

Institutional racism, a conceptually distinct form of racial discrimination, seems to have surfaced first in the terminology of activists Kwame Toure and Charles Hamilton. In the influential book Black Power: The Politics of Liberation, Toure and Hamilton contrasted institutional racism with the more familiar individual racism as being “less overt, but far more subtle, less identifiable in terms of specific individuals committing the act[s] . . . that are destructive of human life.” Another noted scholar defined institutional racism in two stripes: “direct institutionalized discrimination” consisting of “organizationally prescribed or community-prescribed actions which have an intentionally differential and negative impact on members of subordinate groups,” and “indirect institutionalized discrimination” consisting of the same type of practices which, “though organizationally prescribed, are carried out without prejudice or intent to discriminate.”

acquisitions by seventeen and increased the number of partial acquisitions by sixty. FEIS Addendum at 17. Sound Transit also estimated a disproportionate number of businesses and employees would be displaced in Segment D. See FEIS at 4-19.

15. Save Our Valley is a community organization that was formed for the purpose of resisting the construction of the light rail segment at ground-level through Rainier Valley. See David Shaefer, Rainier Valley Residents Want Transit Tunnel, SEATTLE TIMES, Dec. 16, 1998.


17. Save our Valley v. Sound Transit, 335 F.3d 932 (9th Cir. 2003).

18. See infra Parts III, IV.

19. Kwame Toure was the name taken by Stokely Carmichael in the 1970s. When he was known as Stokely Carmichael, he was an extremely influential activist who popularized the terms “Black Power” and “Black is Beautiful.” He served as the Prime Minister of the Black Panther Party and Chairman of the Student Nonviolent Coordinating Committee. STOKELY CARMICHAEL, THE MARTIN LUTHER KING, JR., PAPERS PROJECT AT STANFORD UNIVERSITY, available at http://www.stanford.edu/group/King/about_king/encyclopedia/carmichael_stokely.html (on file with author).


21. DISCRIMINATION AMERICAN STYLE, supra note 4, at 30–32. Joe R. Feagin, editor, is currently the Ella McFadden Professor of Liberal Arts in the Department of Sociology at Texas A&M University, has authored or co-authored over forty books and 100 articles, was a Scholar-in-Residence for the U.S. Commission on Civil Rights, and has received countless other honors and awards for his research and scholarship in the field of race and gender relations. See Joe Feagin’s Homepage, Curriculum Vitae, available at http://sociology.tamu.edu/feagin (last visited May 24, 2006).
neering theorists, Louis Knoules and Kenneth Prewitt. They stressed that it must be recognized as a historical phenomenon, "embedded in American society," and defined it pithily as a "network of institutional controls through which social benefits are allocated." This Comment employs a definition that is perhaps more narrow in theoretical and sociological scope, but more comprehensive in terms of its description of effects. Institutional racism is racial discrimination perpetrated whether intentionally or not within the policies, practices, procedures, laws, rules, or regulations of any public or private institution. It is the legacy of American slavery and a lingering obstacle to true racial equality in this country.

Institutional racism is a very difficult problem to solve. It is much more complex and more difficult to identify than conventional racial discrimination, and for this reason it is "more dangerous—harder to combat and easier to ignore." A primary reason for this difference is that while only intentional discrimination is currently prohibited by the U.S. Constitution, institutional racism often occurs without intent, or without satisfactory proof of intent, by operation of seemingly benign policies, procedures, and practices that cause the same devastating results of discrimination, segregation, and inequality of opportunity. Moreover, although some such policies and procedures have been identified as discriminatory and prohibited by law, these prohibitions too often fail to

23. Id. at 13-14.
24. Id.
27. See FEAGIN, supra note 4, at 26-27. Though this Comment suggests ways in which private enforcement of disparate impact regulations can and should be used to remedy institutional racism, it does not address the merits of the debate over whether the constitutional standard should remain one of intentionality, or should contemplate disparate impact as well, though this is an important and well-considered issue. See generally Paul Brest, Foreword: In Defense of the Antidiscrimination Principle, 90 HARV. L. REV. 1 (1976) (arguing, in the wake of Davis, that the constitutional standard should not contemplate disparate impact); Charles R. Lawrence, III, The Id, Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 STAN. L. REV. 317 (1987) (arguing that the constitutional standard should be construed to prohibit disparate impact because of the psychological realities that underlie the interaction of groups and individuals); Donald E. Lively & Steven Pass, Equal Protection: The Jurisprudence of Denial and Evasion, 40 AMER. L. REV. 1307 (1991) (arguing that the intentionality requirement has denied, evaded, and accommodated racism and racial discrimination); Michael Selmi, Was the Disparate Impact Theory a Mistake?, 53 U.C.L.A. L. REV. 701 (2006); (discussing disparate impact theory and arguing that it failed to produce much meaningful change and at the same time limited the jurisprudential conception of intentional discrimination in an undesirable way).
28. See infra Part II.C (discussing federal regulations promulgated pursuant to Title VI of the Civil Rights Act of 1964).
protect the victims of discrimination because they cannot be privately enforced, and the government officials charged with enforcing them are either unable or unwilling to do so.  

This Comment has two goals. First, it seeks to contextualize, within the reality of institutional racism, the debate over the private enforceability of federal regulations under 42 U.S.C. § 1983. On the one hand, the regulations promulgated pursuant to Title VI of the Civil Rights Act of 1964 already include many provisions which effectively confront the vestiges of racially discriminatory law and policy. The logical inference is that these perfectly proscriptive federal regulations ought to be enforceable, through private lawsuits if necessary, in order to enjoin and deter such policy and procedure. On the other hand, federal administrative agencies have the ability to attend to the complex social, political, and economic factors perpetuating systematic racial discrimination, and this is a compelling reason to recognize and encourage such activity on their part in the future.

The second aim of this Comment is to contribute to the developing discourse by proposing a more sound approach to the legal question of whether agencies can exercise their delegated authority to create rights that are privately enforceable under § 1983. Split decisions in the circuit

29. See Matthew C. Stephenson, Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies, 91 VA. L. REV. 93, 107–13 (2005). Professor Stephenson explains the many disadvantages of public enforcement by administrative agencies, including limited budgets which render agencies incapable of acting to enforce regulatory standards or effectively monitor institutional actors for noncompliance, as well as the tendency of political pressure to result in “excessively lax” enforcement by the agency. Id. Moreover, even where a complaint procedure exists by which minority citizens can inform the government of violations, there may be a problem in minority citizens’ access to knowledge of how to utilize the procedure. See, e.g., SOUND TRANSIT, TITLE VI COMPLIANCE REVIEW OF THE CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY, FINAL REPORT PREPARED FOR THE FEDERAL TRANSPORTATION ADMINISTRATION 37–38 (2005) (discussing Sound Transit’s deficiency in complying with requirements under Title VI that the procedure for filing Title VI discrimination complaints be communicated and made available to the public), available at www.fta.dot.gov/documents/SoundTransitFinalReport.doc.

30. 42 U.S.C. § 1983 is the primary vehicle for redressing civil rights violations in the federal courts; it is the symbol for “the commitment of our society to be governed by law and to protect the rights of those without power against oppression at the hands of the powerful.” The Honorable Harry A. Blackmun, Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away? 60 N.Y.U. L. REV. 1, 28 (1985). It provides a cause of action for the deprivation of rights “secured by the Constitution and laws.” See infra Part II.A.

31. 42 U.S.C. § 2000d (“No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”).

32. See infra Part II.C.

33. Indeed, the importance of the rights created by the Title VI regulations, combined with the ineffectiveness of the Title VI administrative complaint procedure, has already prompted at least one commentator to argue for their private enforceability. See Bradford C. Mank, Using § 1983 to Enforce Title VI’s Section 602 Regulations, 49 U. KAN. L. REV. 321, 360–80 (2001).
courts\textsuperscript{34} and two United States Supreme Court cases not squarely addressing the issue but nonetheless suggesting the answer\textsuperscript{35} have begun to produce a small body of competent scholarship.\textsuperscript{36} However, not only has most of this commentary failed to contextualize the legal issue with respect to racial justice and equal protection,\textsuperscript{37} the legal arguments for refusing to recognize agencies' power to create individually enforceable rights are untenable. The primary doctrinal justification\textsuperscript{38} relies on a theory of the nondelegation doctrine\textsuperscript{39} that is marked by remarkable obsolescence—such a narrow view of legislative delegation "flies in the face of seventy years of administrative law."\textsuperscript{40} A refusal to recognize agencies' power to create privately enforceable rights serves little purpose but to maintain a withering and unworkable framework for addressing exercises of delegated authority, while at the same time risking the loss of a very effective tool in confronting institutional racism. It also represents a

\textsuperscript{34} Cf. Save our Valley v. Sound Transit, 335 F.3d 932 (9th Cir. 2003), S. Camden Citizens in Action v. New Jersey Dep't of Envtl. Pro., 274 F.3d 771 (3d. Cir. 2001), Banks v. Dallas Hous. Auth., 271 F.3d 605 (5th Cir. 2001), Harris v. James, 127 F.3d 993 (11th Cir. 1997), and Smith v. Kirk, 821 F.2d 980 (4th Cir. 1987) with Loschiavo v. City of Dearborn 33 F.3d 548 (6th Cir. 1994) and Samuels v. District of Columbia, 770 F.2d 184 (D.C. Cir. 1985).


\textsuperscript{37} One piece of commentary has addressed the private enforceability of federal regulations under § 1983 in view of threats to equal educational opportunity for African-Americans. Sam Spital, Restoring Brown's Promise of Equality after Sandoval: Why We Can't Wait, 19 HARV. BLACKLETTER L.J. 93, 111–20 (2003), and another has briefly considered the issues in view of the racially disparate impact of individual litigants' diminishing ability to enforce due process rights in the administration of welfare programs, Risa E. Kaufman, Bridging the Federalism Gap: Procedural Due Process and Race Discrimination in a Devolved Welfare System, 3 HASTINGS RACE AND POVERTY L.J. 1, 4, 10–14 (2005).

\textsuperscript{38} See Save our Valley, 335 F.3d at 938; Davant, supra note 36, at 635; McKennett, supra note 36, at 209–17.

\textsuperscript{39} "The principle (based on the separation-of-powers concept) limiting Congress's ability to transfer its legislative power to another governmental branch, esp. the executive branch." BLACK'S LAW DICTIONARY 459 (8th ed. 2004). See infra Parts III.B and IV.

\textsuperscript{40} Save our Valley, 335 F.3d at 954 (Berzon, J., dissenting in part).
crabbed conformity to the current trend in the federal judiciary of limiting remedies for the violation of rights,\textsuperscript{41} which is, in turn, a serious threat to the realization of equal justice under law.

Part II of this Comment will sketch the contours of institutional spheres where racism persists today. Part III of this Comment then proceeds to acquaint the reader with the relevant cases and commentary that have addressed the issues relating to the private enforceability of federal regulations as a matter of law. These sources focus primarily on principles of administrative law, statutory interpretation, and congressional intent as to the creation of individually enforceable rights and remedies. Part IV of this Comment will then undertake a discussion of the nondelegation doctrine and its theoretical bases in the context of regulatory rights creation, which compels the conclusion that the soundest approach is to recognize the power of agencies to create rights privately enforceable under § 1983, so long as the discretion to do so is properly constrained by particularized judicial review.

II. CONSTITUTIONALLY UNPROTECTED SPACES: INSTITUTIONAL RACISM IN HOUSING AND EDUCATION

The movement for racial justice in the United States was dealt a crushing blow by the Supreme Court’s decision in Washington v. Davis.\textsuperscript{42} In that case, plaintiffs brought suit to challenge the recruitment practices of the Washington, D.C. Police Department on equal protection grounds.\textsuperscript{43} They argued that various practices, namely a written personnel test, deprived them of their constitutional rights because black applicants failed the test at a disproportionate rate.\textsuperscript{44} Writing for the Court, Justice White reversed summary judgment for the plaintiffs, holding that “[d]isproportionate impact is not irrelevant, but it is not the sole touchstone of invidious intent forbidden by the Constitution.”\textsuperscript{45} The principle that purpose or intent must be shown in order to sustain a constitutional challenge to racial discrimination has become a central tenet of the

\textsuperscript{41} The Honorable Marsha S. Berzon, Rights and Remedies, 64 LA. L. REV. 519, 525 (2004).
\textsuperscript{42} 426 U.S. 229 (1976).
\textsuperscript{43} \textit{id.} at 229. Because plaintiffs challenged the procedure of the District of Columbia, not a State, they actually alleged a violation of the Due Process Clause of the 5th Amendment. See \textit{id}. That clause has been read to incorporate an element of the guarantee of equal protection explicitly stated in the 14th Amendment. Bolling v. Sharpe, 347 U.S. 497, 498–99 (1954).
\textsuperscript{44} Davis, 426 U.S. at 232.
\textsuperscript{45} \textit{id.} at 242.
Court’s equal protection jurisprudence and relief from racial discrimination under the Constitution has been precluded as a result.

Yet in *Davis*, Justice White recognized that the effects of discrimination can at times rise to the level of unconstitutionality. Focusing on the effects of discrimination is necessary because the problem of separating the general, acceptable effects of policy and administration from the racially discriminatory effects is a very difficult one. This is the task that faces the current generation of Americans committed to ending racial injustice. It demands a “sensitive inquiry” into complex and interrelated social, historical, and economic factors, and tools that are sufficiently particular to address them.

This is the practical justification for agency creation of individually enforceable rights. Racism has changed a great deal; it has evolved into a more complex and clandestine institutional form. Therefore, to confront it effectively requires greater subtlety and precision than Congress can undertake; it requires “continuous expert supervision, capable of ad hoc development parallel to the development of the subject matter involved.” Parts A and B of this section examine some of the conditions under which racial discrimination persists. Part C then looks briefly at


47. See, e.g., City of Cuyahoga Falls v. Buckeye Comm. Hope Found., 538 U.S. 188, 194–95 (2003) (no proof of racial animus in city’s proposal of referendum to halt construction of low-income housing for minority residents); Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 270–71 (1977) (no proof that city’s refusal to permit rezoning for construction for racially integrated low-income housing was motivated by discriminatory intent); Indianapolis Minority Contractors Ass’n v. Wiley, 187 F.3d 743, 752–53 (7th Cir. 1999) (no proof that racially discriminatory administration of minority-owned business participation requirement of federal highway funding scheme was motivated by racial animus); Hispanic Taco Vendors of Wash. State v. City of Pasco, 994 F.2d 676, 679–80 (9th Cir. 1993) (no proof that enactment of licensing and other requirements for street vendors that had “severe disparate impact” was racially motivated); Riddick v. Sch. Bd. of City of Norfolk, 784 F.2d 521, 542–44 (4th Cir. 1986) (no proof of discriminatory intent behind school assignment plan that re-segregated public schools through racially discriminatory pupil assignment); Alexander v. Youngstown Bd. of Educ., 675 F.2d 787, 798–801 (6th Cir. 1982) (insufficient proof of discriminatory intent in manipulation of school attendance zones and school site selection).

48. See *Davis*, 426 U.S. at 242–44. Of course, Justice White viewed effects as relevant only insofar as they were determinative of the underlying intent, which is still required to succeed on an equal protection claim. *Id.*


50. *Arlington Heights*, 429 U.S. at 266.

51. See supra notes 4–7 and accompanying text.

52. WALTER GELLHORN, FEDERAL ADMINISTRATIVE PROCEEDINGS 9 (1941), reprinted in ADMINISTRATIVE LAW: CASES AND MATERIALS, 10 (Cass et al. eds., 2002).
the present viability of Title VI regulations\textsuperscript{53} that can be used to combat institutional racism, notwithstanding the room for development of regulatory enactments that could more specifically address institutional racism.

\textit{A. Institutional Racism in Education}

Despite the mandate issued in the historic \textit{Brown v. Board of Education} decisions,\textsuperscript{54} schools in the United States are still separate and unequal.\textsuperscript{55} In 1978, approximately twenty years later, sixty percent of African-American primary school students attended predominantly minority or racially isolated schools.\textsuperscript{56} In 2003, a majority of black students\textsuperscript{57} attended schools where minorities represented a majority of the student body. Moreover, desegregation as a national educational policy has languished since the 1980s and has been characterized as a process "in crisis."\textsuperscript{58}

It is the effect of persistent segregation that is truly disturbing. In schools that are comprised primarily of students of color, the conditions are appalling.\textsuperscript{59} The major problems stem from disparities in class size—black students’ classes are on average eighty percent larger than white students’ classes—and the quality of teachers.\textsuperscript{60} There is a seriously high teacher turnover rate in schools with large minority concentrations, reaching fifty percent in some school districts.\textsuperscript{61} Moreover, the teachers that are present for students of color are shockingly under-qualified. In some of the worst schools, students of color have less than a fifty percent chance of getting a math or science teacher with a degree in that field.\textsuperscript{62}

\begin{footnotesize}
\begin{enumerate}
\item Title VI regulations mirror the language of the enabling statute, 42 U.S.C. § 2000d, and provide more specific prohibitions as well. See infra Part II.C.
\item 347 U.S. 483 (1954) (holding that separate educational facilities are inherently unequal); 349 U.S. 294, 301 (1955) (\textit{Brown II}, ordering integration “with all deliberate speed”).
\item \textsc{NATIONAL COMM’N ON TEACHING AND AMERICA’S FUTURE, FIFTY YEARS AFTER BROWN: A TWO-TIERED EDUCATION SYSTEM} 5 (2004), available at http://www.nctaf.org/documents/nctaf/Brown_Full_Report_Final.pdf [hereinafter \textsc{AFTER BROWN}].
\item \textsc{THE COUNCIL ON INTERRACIAL BOOKS FOR CHILDREN, FACT SHEETS ON INSTITUTIONAL RACISM}, (Jan. 1982) (quoting a 1981 report by the U.S. Department of Education).
\item See, e.g., \textsc{AFTER BROWN, supra} note 55, at 15–19.
\item \textsc{AFTER BROWN, supra} note 55, at 12.
\item \textsc{DARLING-HAMMOND, supra} note 60, at 28–32.
\end{enumerate}
\end{footnotesize}
and black students are twice as likely to get teachers with less than three years of experience.\(^63\) These serious problems combine with inadequate facilities, computer and internet access, textbooks, and sanitary and safety standards—such as infestation with vermin like cockroaches, rats, and mice\(^64\)—to render these schools shamefully unfit to close the recognized gap in educational opportunity.\(^65\)

These problems flow most directly from the disparities in funding.\(^66\) The wealthiest ten percent of American schools spend ten times more than the poorest ten percent (overwhelmingly comprised of students of color); and within a given state, a spending ratio of three to one between such schools is not uncommon.\(^67\) These inequalities result primarily from property tax school finance schemes\(^68\). However, since San Antonio v. Rodriguez,\(^69\) such schemes have been unassailable on constitutional grounds. In that case, the plaintiffs’ challenged a finance scheme which resulted in roughly twice the per-pupil expenditure for predominantly white districts as for predominantly minority districts,\(^70\) but the Supreme Court refused to apply strict scrutiny to (and thereby effectively sustained) a system that discriminated against “such a large, diverse, and amorphous class” as a school district.\(^71\) Certainly the statistical data were complex and not perfectly conclusive, but it seems a stretch to describe as “amorphous” a school district composed of seventy-nine percent minority students.\(^72\)

Nevertheless, despite the unavailability of a constitutional equal protection claim to challenge funding inequities, the unequal educational opportunity resulting from this form of institutional racism\(^73\) can obvi-

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\(^{64}\) After Brown, supra note 55, at 15–19.

\(^{65}\) Darling-Hammond, supra note 60, at 28–32.

\(^{66}\) Id.

\(^{67}\) Id.

\(^{68}\) See Jonathan Kozol, Savage Inequalities: Children in America’s Schools 54–55 (1991). Under such schemes, the expenditures for each district are a function of the taxable property wealth for that district. Id. Since people of color are less likely to own valuable property and more likely to live in districts with less property wealth generally, the expenditures for predominantly minority schools in predominantly minority districts are measurably inferior to those of property-rich, predominantly white districts. See id.

\(^{69}\) 411 U.S. 1 (1973).

\(^{70}\) Id. at 13 n.35.

\(^{71}\) Id. at 28.

\(^{72}\) Id. at 16 n.38.

\(^{73}\) Aside from the traditional arguments against sustaining an equal protection challenge on disparate impact grounds, see Lawrence, supra note 27, at 320, some might defend property-tax funding schemes by arguing that their effect on the quality of educational opportunity for children of color is in fact not an example of institutional racism at all. If socio-economic status is separated from the causal chain, there may be support for the argument that such schemes are really more
ously be circumvented through real, meaningful desegregation of schools. Yet, as mentioned above, school desegregation as a national educational policy is in crisis.\textsuperscript{74} While many of the nation’s schools were successfully desegregated throughout the 1960s, 1970s, and 1980s, a continuous process of school resegregation has been observed since then.\textsuperscript{75} This is due in large part to the termination of desegregation orders issued by federal district courts pursuant to the \textit{Brown} decisions\textsuperscript{76} and to the prohibition of voluntary continuance with desegregation plans by local school boards.\textsuperscript{77}

In the heyday of school desegregation, local school districts undertook various measures to ameliorate the problem of “racially imbalanced”\textsuperscript{78} schools. The Supreme Court’s decisions in \textit{Green v. County School Board}\textsuperscript{79} and \textit{Swann v. Charlotte-Mecklenburg Board of Education}\textsuperscript{80} were central in setting the course for remedial action.\textsuperscript{81} In \textit{Green}, the Court imposed an affirmative duty on school boards to do whatever necessary to end segregation,\textsuperscript{82} and reaffirmed the directive that district courts overseeing desegregation orders were to assess the racial impact of the boards’ actions in the areas of: (1) school facilities, (2) transportation systems, (3) personnel, (4) extracurricular activities, and (5) school district attendance zones.\textsuperscript{83} In \textit{Swann}, the Court approved the use of ra-

\textsuperscript{74} See Smith, supra note 49, at 53–54 (explaining the significance of economic disadvantage in studies on disparate racial impact, and explaining the author’s choice to attempt to identify and analyze institutional racism, “controlling for social class” in order to separate discrimination based on economic disadvantage from that based on race). However, as a theoretical matter, it seems clear that institutional racism is itself largely responsible for the economic disparities that allow such schemes to result in disproportionate racial impact, especially when one considers that substantial portions of American history are characterized by the systematic political and economic disenfranchisement of minority groups. See KNOULES & PREWITT, supra note 22, at 4. Moreover, there is statistical evidence to suggest that race is more of an influential factor than class in predicting which communities bear disproportionate burdens, at least with respect to the risk of exposure to toxic pollution. See Laura Westra & Peter S. Wenz, \textit{Forward to FACES OF ENVIRONMENTAL RACISM}, supra note 8, at xv–xvi.

\textsuperscript{75} Erica Frankenberg, Chungmei Lee & Gary Orfield, \textit{A Multiracial Society with Segregated Schools: Are we Losing the Dream?}, THE HARVARD CIVIL RIGHTS PROJECT (2003), at 4, available at http://www.civilrightsproject.harvard.edu/research/reseg03/AreWeLosingtheDream.pdf.

\textsuperscript{76} Id.

\textsuperscript{77} Id. at 6.

\textsuperscript{78} The term appears in much of the literature and case law following the \textit{Brown} decisions. See cases compiled in E.H. Schopler, Annotation, \textit{De Facto Segregation of Races in Public Schools}, 11 A.L.R.3d 780 (2005).

\textsuperscript{79} 391 U.S. 430 (1968).

\textsuperscript{80} 402 U.S. 1 (1971).


\textsuperscript{82} Green, 391 U.S. at 437–38.

\textsuperscript{83} Id. at 435–37.
cial considerations to meet the challenges in these areas, so that race-conscious measures such as racial ratios for student populations, \textsuperscript{84} minority student transfer options, \textsuperscript{85} school district attendance zone selection, \textsuperscript{86} and busing programs \textsuperscript{87} were permissible.

Tools like these are necessary because racially imbalanced schools are rendered so not only by past \textit{de jure} segregation, but often by residential housing patterns and other subtle factors as well. \textsuperscript{88} One such factor is the location of school facilities—\textit{where} a new school is to be built often directly determines \textit{who} will attend it. \textsuperscript{89} If a school is built in the center of a segregated neighborhood, the school itself is likely to be segregated, especially if there is a neighborhood school policy in effect. \textsuperscript{90} This segregation is compounded by feeder school policies, which require students that graduate from certain elementary schools to attend certain middle or junior high schools, and students from certain junior high schools to attend certain high schools. \textsuperscript{91} In addition to the location of the school in relation to the surrounding neighborhood, the nature of the location itself can have a serious segregative effect. \textsuperscript{92}

Despite the real progress made during the last thirty years, \textsuperscript{93} efforts to desegregate schools and to equalize educational opportunity have withered on the vine since the Reagan Administration reoriented the De-

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\textsuperscript{84} Swann, 402 U.S. at 25.
\textsuperscript{85} Id.
\textsuperscript{86} Id. at 28.
\textsuperscript{87} Id. at 30–31.
\textsuperscript{89} DISCRIMINATION AMERICAN STYLE, supra note 4, at 124. \textit{See also} Keyes v. Sch. Dist. No. 1, 413 U.S. 189 (1973).
\textsuperscript{90} A neighborhood school policy, as the name suggests, is a policy under which school attendance district lines are drawn as nearly as possible to include only the residential area surrounding the school, with geographical and other factors sometimes being considered. Students living in immediate residential vicinity are ordinarily required to attend that school. \textit{See} Downs v. Bd. of Educ. of Kansas City, 336 F.2d 988, 991–92 (10th Cir. 1964). Such plans do not of themselves violate the Fourteenth Amendment. \textit{See} Crawford v. Bd. of Educ. of City of Los Angeles, 458 U.S. 527, 536–37 (1982) (citing \textit{Village of Arlington Heights v. Metro. Hous. Dev. Corp.}, 429 U.S. 252, 265 (1977); \textit{Washington v. Davis}, 426 U.S. 229, 238–48 (1976)).
\textsuperscript{91} Downs, 336 F.2d at 992.
\textsuperscript{92} \textit{See}, e.g., Bivins v. Bd. of Public Educ. and Orphanage for Bibb County, 284 F. Supp. 888, 894–95 (M.D. Georgia 1967). In \textit{Bivins}, the court upheld an injunction against construction of a new high school because it was located in a predominantly black neighborhood and also because the proposed site was so small that it could not foreseeably be enlarged to accommodate non-minority students or to separate it into two separate schools for both sexes, which the court recognized was customary in the local white schools and presumably required if white students were to choose to attend a particular school.
\textsuperscript{93} Frankenberg, et al., \textit{supra} note 75 at 6.
\end{flushright}
partment of Justice against desegregation in the 1980s. Since then, and the confluence of a majority of conservative justices, three Supreme Court decisions have departed from the strong standards set forth in Green and Swann and have paved way for termination of dozens of desegregation orders across the country. The consequence is an alarming resegregation that threatens to undo the progress made since Brown, though one could argue that this has already occurred since, nationwide, schools are now more segregated than they were in 1970.

B. Institutional Racism in Housing

Racial segregation in housing exists today because of a wide range of private action and public policy throughout the twentieth century. For the purposes of this discussion, however, the story begins with the suburban expansion following World War II. At that time, the newly created Federal Housing Administration facilitated white flight from

94. Id. at 18.
95. See The Honorable David S. Tatel, Judicial Methodology, Southern Desegregation, and the Rule of Law, 79 N.Y.U. L. REV. 1071, 1072 (2004). Judge Tatel identifies the appointment of conservative Supreme Court Justices by Presidents Nixon, Reagan, and George H. W. Bush with each President having the intention to appoint “strict constructionists” to the Court in order to eschew judicial activism, but in Judge Tatel’s view, the opposite result occurred, at least in the context of desegregation jurisprudence.
97. See Tatel, supra note 95, at 1076–77.
98. For a summary of desegregation orders that have been terminated, see Frankenberg, et al., supra note 75, at 69–75.
99. Id. at 6.
100. See id. at 30–31.
101. See Gary Orfield, Housing and the Justification of School Segregation, 143 U. PA. L. REV. 1397, 1398 (1995); Deborah Kenn, Housing Choice Case Studies: The Twin Cities Region in Minnesota and City of Rochester/Monroe County, New York, 11 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 303, 304 (2002) (providing a fairly comprehensive outline that traces the segregative effects of housing policy from the turn of the twentieth century to the present).
102. Since 42 U.S.C. §1983 applies only to state action, this Comment’s focus on institutional racism is primarily limited to discrimination by public entities. See infra Part III.A.1.
104. Interestingly enough, the term has a definition in the Merriam-Webster Dictionary: “the departure of whites from places (as urban neighborhoods or schools) increasingly or predominantly populated by minorities.” available at http://www.m-w.com/cgi-bin/dictionary?book=Dictionary&va=white+flight (last visited Sept. 4, 2006). White flight also has a significant effect on housing segregation; the two are entwined in a “vicious cycle.” Deborah Kenn, Institutionalized Legal Racism: Housing Segregation and Beyond, 11 B.U. PUB. INT. L.J. 35, 48 (2001). Property tax finance schemes work to devalue property because wealthier people choose not to live in areas with poorer schools, thus driving the property value down further. Id. at 49. Moreover, residential areas are coextensive with formal and informal opportunity structures, including schools, the most beneficial of
the cities by using redlining and other lending practices aimed at ensuring neighborhood stability by preventing infiltration of "inharmonious racial or nationality groups" into the suburbs. However, these policies created segregated, poverty-stricken, and deteriorated minority communities in the cities that soon presented problems for affluent whites in the suburbs. Whites clamored for federal relief from urban deterioration because they had economic interests in the universities, hospitals, and businesses in the dilapidated urban centers, and because those deteriorated minority communities often stood in the way of highway development to bring suburban whites to and from these institutions.

In order to address these issues, so-called "urban renewal" projects began. Such projects involve the formulation of a renewal plan based on undesirable conditions, acquisition of the property by a local agency pursuant to the power of eminent domain, and substantial fi-

which are denied to persons of color segregated in urban centers. Id. at 51. See also Orfield, supra note 101, at 1398, 1404–06.

105. Redlining was based on a property value rating system used by the FHA to determine which communities posed too high a lending risk; administrators marked inner-city minority neighborhoods in red on city maps to identify them. The FHA and the Veteran's Administration (VA) borrowed this system from the Home Owner's Loan Corporation (HOLC), a similar agency of the federal government created in 1933 to help homeowners avoid foreclosure or default on their mortgages. Kenn, supra note 101, at 305.


107. Redlining, for example, artificially lowers property values causing homeowners to move out and preventing new ones from moving in; "the community goes into a tailspin, with the ultimate result that sound existing housing prematurely deteriorates and the community dies a premature death." DISCRIMINATION AMERICAN STYLE, supra note 4, at 102–03 (quoting the U.S. Senate, Hearings on S. 1281 Before the Senate Committee on Banking, Housing, and Urban Affairs, 94th Cong. 1 (1975)).

108. Bryant, supra note 103, at 134.

109. Id.

110. DISCRIMINATION AMERICAN STYLE, supra note 4, at 107.

111. David H. Harris, Jr., Esq., The Battle For Black Land: Fighting Eminent Domain, NBA NAT'L B. ASS'N MAG. 12 (Apr. 1995). See also Lisa A. Kelly, Race and Place: Geographic and Transcendent Community in the Post-Shaw Era, 49 VAND. L. REV. 227, 294 n.217 (quoting K. Leroy Ervis, long-time activist in the Pittsburg area as saying "Of course, we all knew in those days that 'urban renewal' was just another name for 'negro removal'.")

112. Bryant, supra note 103, at 134.


114. Several state statutes also authorize and provide for urban redevelopment projects planned and undertaken by private corporations with the state contributing its power of eminent domain. See generally Annotation, C.C. Marvel, Validity, Construction, and Effect of Statutes Providing for Urban Redevelopment by Private Enterprise, 44 A.L.R.2d 1414 (2003). During the editing of this Comment, the U.S. Supreme Court issued the decision in Kelo v. City of New London, Conn., 125 S. Ct. 2655 (2005), which held that privately held property could be transferred to another private entity under the takings clause of the Fifth Amendment so long as it satisfies the public use require-
nancing by the Department of Housing and Urban Development (HUD). Though they disproportionately affected urban residents by demolishing their economically deprived neighborhoods, this activity was, almost without exception, held to be a "public use" justifying the exercise of eminent domain. Moreover, although Congress charged HUD with the "elimination of substandard and other inadequate housing," the minority victims of "urban renewal" have been shuffled into just that: inadequate, segregated public housing projects. More often than not, however, they are actually left homeless.

The placement of public housing within certain communities, like the placement of schools, has often been used to perpetuate segregation. In Chicago, for example, legislation was once in force that allowed the city council to delegate veto power over proposed public housing sites to affluent white neighborhoods.

More recently, courts have identified this form of institutional racism being practiced in various cities under the auspices of HUD. Discriminatory public housing site selection, operating in tandem with discriminatory zoning laws, offered a very effective means of isolating people of color. And it still does, since although racial zoning was outlawed in 1917, wealthy white suburban communities have used exclusionary zoning to limit residential lot-sizes and prevent low-to-moderate income housing developments in their neighborhoods.

It seems clear that if the permissible scope of takings is increased by any measure, the possibility of such exercises of eminent domain that perpetuate disparate treatment of communities of color will also increase. Indeed, securing compliance by private developers with existing antidiscrimination standards and otherwise preventing those entities from unjustly distributing the costs and benefits of development are tasks which in the future may require specific and detailed attention by administrative agencies.


116. DISCRIMINATION AMERICAN STYLE, supra note 4, at 106-07.


119. Bryant, supra note 103, at 134.

120. DISCRIMINATION AMERICAN STYLE, supra note 4, at 107.

121. See supra notes 89-92 and accompanying text.

122. See Bryant, supra note 103, at 134-35, 138-39.

123. Id. at 135.

124. Id. at 137.

125. See id. at 131-32.

126. Buchanan v. Warley, 245 U.S. 60 (1917)

127. See Bryant, supra note 103, at 132, citing the noteworthy case of Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977). Zoning raises important questions about the treatment of housing segregation in an institutional racism model. One can argue that discrimination effectuated by zoning is a sad but inevitable reality because white people, like persons of color, have a right to choose where they want to live and to protect the value of their property through
The means to tackle certain forms of housing discrimination exist in the form of Fair Housing laws, though these are certainly of questionable effectiveness. As to "urban renewal," the phrase has become even more euphemistic since the advent of Community Development Block Grants (CDBG) because funds are remitted to local agencies before their specific use has been determined, so that local agencies are too often captured by private enterprise. These projects now more often function as commercial tax abatements, subsidizing shopping malls and commercial developments rather than addressing deteriorated housing. However, they are very difficult to challenge because of the expansive reading of the "public use" requirement.

Even when urban redevelopment demolishes communities of color and displaces residents, HUD is supposed to provide "adequate relocation assistance." Historically, however, this has not been the case.

measures such as residential zoning. In this view, exclusion of minority and low-income citizens from a predominantly white socio-economic enclave as in Arlington Heights is not racism, but perhaps, the cause and effect of market forces. See John Charles Boger, Toward Ending Residential Segregation: A Fair Share Proposal for the Next Reconstruction, 71 N.C.L.R. 1573, 1576 (1993). However, an alternative perspective of racial discrimination, viewing it in terms of agency, will lead one to a different conclusion. See Justin D. Cummins, Refashioning the Disparate Impact Treatment and Disparate Impact Doctrines in Theory and in Practice, 41 How. L.J. 455, 470–72 (1998). In this view, individuals must be understood as relational beings, shaped by experience and interaction with others and society at large. Id. at 470. If past societal discrimination has created inequities which currently exist, then conduct which perpetuates this status quo, even if not consciously or intentionally discriminatory, is a discriminatory agency that is responsible for its continued effects. Id. Indeed, this concept is recognized insofar as the discriminatory purpose that offends the Constitution may be established in part by proof of the maintenance of a particular policy or practice with knowledge of its discriminatory effect. Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 465 (1982). Accordingly, it is not such a stretch to suggest that a failure to address the maintenance of deteriorated urban minority communities and attendant dual school systems of disparate quality would amount to racial discrimination that is at least culpable enough in a broad policy sense to be remedied.

128. Kenn, supra note 104, at 37. "It may even be opined that the Fair Housing Act presents a smoke screen behind which lawmakers can hide, pretending the consequences of our racism are being dealt with, while in truth the separation of races remains unchallenged." Id. "The current ineffectiveness of the Fair Housing Act goes beyond the initial deliberate ineffectiveness of the Act, which was passed into legislation in 1968 without any substantial enforcement mechanisms." Id.

129. Urban renewal under HUD and the Urban Renewal Agency were replaced in 1974 with the Community Development Block Grant (CDBG) program. Gordon, supra note 113, at 323. CDBGs are often given to local housing authorities before the specific use of the funds has even been determined. Hellegers, supra note 117, at 926.

130. Hellegers, supra note 117, at 926.

131. See id. at 905 ("the greater involvement of business in setting local public policy, the increasing competition for jobs between localities, and a concomitant rise in the amount of state and local government subsidy of corporate activity all suggest that local government is extremely susceptible to corporate interest influence when making its economic development decisions.") (citations omitted).


133. See supra note 116–17 and accompanying text.

and it is still a problem today, even though HUD regulations are supplemented by the provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970. The lack of clear regulatory standards for federal financial support may be part of the problem, but the main obstacle to relief for displaced minority residents is the woefully inadequate federal oversight that fails to ensure local compliance with HUD regulations. This suggests the need for private enforcement under § 1983.

C. Regulatory Remediation: Title VI Regulations and Beyond

Although the Supreme Court held that purpose or intent is required to sustain an equal protection claim under the Constitution and Title VI, there are literally dozens of federal regulations that forbid any recipient of federal financial assistance from subjecting anyone to discrimination on the basis of race. These disparate impact regulations were promulgated pursuant to Title VI of the Civil Rights Act of 1964 and were based on a model draft developed by a Presidential Task Force

135. See Bryant, supra note 103, at 134.
136. 42 U.S.C. §§ 4601–4651 (2004). See, e.g., § 4621(b) ("The primary purpose of this Title to ensure that [persons displaced as a result of programs or projects undertaken by a Federal agency or with Federal financial assistance] shall not suffer disproportionate injuries as a result of programs or projects undertaken for the benefit of the public as a whole and to minimize the hardship of displacement on such persons."); § 4621(c)(3) ("It is the intent of Congress that . . . the policies and procedures of this Act will be administered in a manner is consistent with fair housing requirements and which assures all persons of their rights under . . . Title VI of the Civil Rights Act of 1964.").
137. See generally Hellegers, supra note 117. Hellegers argues generally, and specifically with respect to CDBGs, that HUD approval and support of local urban redevelopment should be contingent on a full cost-benefit analysis, and as opposed to the "vague and toothless policy of minimizing displacement," should take into account the fiscal and social costs of displacement. Id. at 952.
138. Id. at 926.
139. See supra notes 42–47 and accompanying text.

The purpose of this part is to effectuate the provisions of Title VI of the Civil Rights Act of 1964 (hereafter referred to as the Act) to the end that no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity receiving Federal financial assistance [from the agency].

Subsequent regulations in each part then proceed to describe the types of programs covered by the regulations, and the types of activities having disparate impact on people on the basis of race that are proscribed.

that included the Department of Justice and several executive agencies.\textsuperscript{143} There has been considerable confusion and controversy over whether Title VI and its implementing regulations are privately enforceable,\textsuperscript{144} but as a general matter, the precision with which they speak to certain factual situations demonstrates how well-suited regulations are for use in combating institutional racism. What follows is a brief discussion of some regulations that keenly address the complex factors responsible for institutional racism.

1. Education

As more and more still-segregated school districts are declared desegregated\textsuperscript{145} and the federal courts withdraw from their historic mandate of supervising the equalization of educational opportunity, the progress made toward racial justice is seriously threatened.\textsuperscript{146} Yet, federal regulations promulgated by the Department of Education (DOE)\textsuperscript{147} can fill the void. These regulations address the specific factual predicates of institutional racism and segregation that were previously identified in the \textit{Green} and \textit{Swann} decisions.\textsuperscript{148}

At the outset, the fact that federal judicial supervision was necessary to ensure local compliance by school boards might demonstrate once again why federal regulations should be privately enforceable. However, the reason courts have moved toward restoring control to local school boards does not seem to square well with private enforceability of federal regulations.\textsuperscript{149} Nevertheless, local school districts, like most local governmental entities, are already subject to federal regulations because they choose to accept financial assistance from the federal govern-

\begin{itemize}
\item \textsuperscript{143} See Guardians Ass'n v. Civil Serv. Com'n of City of New York, 463 U.S. 582, 618 (1983) (Marshall, J., dissenting).
\item \textsuperscript{144} See infra note 197.
\item \textsuperscript{145} Frankenberg, et al., \textit{supra} note 75, at 4.
\item \textsuperscript{146} See \textit{supra} note 54-58 and accompanying text.
\item \textsuperscript{147} 34 C.F.R. § 100 (2005).
\item \textsuperscript{148} See \textit{supra} note 64 and accompanying text.
\item \textsuperscript{149} The reason is the notion that restoration of local control is and always has been the ultimate goal of the judicial supervision of desegregation. See Freeman v. Pitts, 503 U.S. 467, 489–90 (1992). Justice Kennedy stated:
\begin{quote}
Although this temporary measure has lasted decades, the ultimate objective has not changed—to return school districts to the control of local authorities. Just as a court has the obligation at the outset of a desegregation decree to structure a plan so that all available resources of the court are directed to comprehensive supervision of its decree, so too must a court provide an orderly means for withdrawing from control when it is shown that the school district has attained the requisite degree of compliance.
\end{quote}
\textit{Id.}
\end{itemize}
Furthermore, the context in which concerns over federal control of local school boards arose was that of structural injunctive relief, which is distinguishable from financial assistance conditions in terms of the type and extent of federal control. To allow citizen suits for violations of these federal regulations would not raise the specter of an overbearing federal government because it would not substantially increase federal control of local entities. Instead, it would allow effective confrontation of institutional racism and segregation, since racism "and its manifestations may emerge in new and subtle forms."

The regulations of the Office for Civil Rights of the DOE not only prohibit the use of federal funds in any program of a recipient of federal financial assistance, but also prohibit certain "specific discriminatory

150. "It is far from a novel proposition that, pursuant to its powers under the Spending Clause, Congress may impose conditions on the receipt of federal funds, absent some independent constitutional bar." Lawrence County v. Lead-Deadwood Sch. Dist. No. 40-1, 469 U.S. 256, 269–70 (1985).

151. Desegregation decrees and subsequent judicial supervision of compliance therewith is relief that is injunctive in nature. See Bd. of Educ. of Oklahoma v. Dowell, 498 U.S. 237, 248–49 (1991). "Citation of the many elements of a structural injunction is sometimes difficult," but generally, it is an injunction intended "to alter broad social conditions by reforming the internal structural relationships of government agencies or public institutions. Instrumentally, it operates through forward-looking mandatory injunction but assumes a relatively intrusive form, a more or less detailed order whose prescriptions displace significant areas of defendants' discretion." Robert E. Easton, The Dual Role of the Structural Injunction, 99 Yale L.J. 1983, 1983 n.1 (1990) (citing P. Shuck, Suing Government: Citizen Remedies for Official Wrongs 151 (1983)). The structural injunction is said to have first been used in Brown itself. See Michael B. Mushlin, Unsafe Havens: The Case for Constitutional Protection of Foster Children from Abuse and Neglect, 23 Harv. C.R.-C.L. L. Rev. 199, 252 n.287 (1988). Since then, they have been issued in order to remedy the deprivation of rights in prisons, mental hospitals, and public housing. Missouri v. Jenkins, 515 U.S. 70, 126 (1995) (Thomas, J., dissenting). Needless to say, structural injunctions have been staunchly criticized by some as overreaching exercises of the court's equitable power that offend constitutional norms of federalism and the separation of powers. See id. "Judges have directed or managed the reconstruction of entire institutions and bureaucracies, with little regard for the inherent limitations on their authority." See also generally Robert F. Nagel, Controlling the Structural Injunction, 7 Harv. J.L. & Pub. Pol'y 395 (1984).

152. In my opinion, many of the concerns present in judicial supervision of institutional reform can be alleviated by private suits to enforce statutory or regulatory rights. Whereas structural injunctive relief contemplates judicial pronouncements as to how to achieve sweeping institutional reform that may be infeasible, private suits can shift the responsibility of securing compliance to the institutional actors themselves, at least with respect to forward-looking decisions like school facility site selection, by simply preventing them from implementing discriminatory plans in the first place. In this way, courts are relieved from the difficult tasks of trying to foresee unintended consequences and trying not to affect unanticipated parties when ordering particular remedial action.

153. It would also allow for effective concurrent and collaborative regulation by the states and the federal government. See Galle, supra note 36, at 192–208.

154. Freeman, 503 U.S. at 490.

155. 34 C.F.R. § 100.3(a) (2005) provides, in pertinent part, that "No person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program to which this part applies."
actions."156 Fortunately, one such prohibited action is "subject[ing] an individual to segregation."157 Moreover, the specific problem of school site selection that threatens to maintain or resuscitate segregation in schools is addressed by another specific prohibition.158 That section of the Code prohibits the selection of school or facilities locations that have "the effect of excluding individuals from, denying them the benefits of, or subjecting them to discrimination."159 An action brought under § 1983 to enforce these regulations could serve to prevent the construction of an elementary school in the heart of a ghetto which would perpetuate separate and unequal education for years to come.160

The DOE regulations also provide generally that recipients of federal funding may not "utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin."161 An attempt to enforce this regulation could help to thrust the school funding problem to the forefront.162

As this discussion illustrates, the potential efficacy of administrative regulations to keenly address forms of institutional racism yet to be discovered (and yet to be developed) should not be discounted. The expertise and ability to focus on specific issues163 and the insulation from

156. See 34 C.F.R. § 100.3(b) (2005).
157. Id. § 100.3(b)(iii).
158. Id. § 100.3(b)(vi)(3).
159. Id. This subdivision also states that in determining the site or location of facilities, no selections may be made "with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of [The Civil Rights Act or 34 C.F.R.]."
160. See Swann, 402 U.S. at 20 ("[t]he construction of new schools and the closing of old ones are two of the most important functions of local school authorities . . . [o]ver the long run, the consequences of the choices will be far reaching.").
161. 34 C.F.R. § 100.3(b)(2) (2005).
162. See, e.g., Paynter ex rel. Stone v. New York, 290 A.D.2d 95 (N.Y. App. Div. 2001). In Paynter, a class action on behalf of 35,000 New York public school students, the plaintiffs asserted a claim under 42 U.S.C. § 1983 for violation of 34 C.F.R. § 100.3(b)(2). See supra note 123 and accompanying text. Plaintiffs argued that New York's Education Law, § 3202, which mandated a neighborhood school policy, had a racially disparate impact in violation of the regulation. Paynter, 290 A.D.2d at 102-03. Sidestepping the issue of whether the regulation could be enforced under § 1983, the court held that the Education Law was applied uniformly and so could not be said to have a racially disparate impact. Id. Arthur Eisenberg, Legal Director for the New York Civil Liberties Union, later mentioned the involvement of the New York Civil Liberties Union as amicus in Paynter as well as other similar cases in testimony before the New York State Commission on Education Reform, and discussed the problem of "failing schools" and urged the commission to cure the "constitutional deficiencies" in the New York State education system. Testimony of Arthur N. Eisenberg On Behalf of the New York Civil Liberties Union Presented to the New York State Commission on Education Reform, available at http://www.nyclu.org/education_reform_testimony_121203.html (last visited May 11, 2006).
political pressure that administrative agencies enjoy place them in an enviable position to do the work of rooting out persistent institutional injustices. Desegregation of public schools, for example, was a task that required “awareness that complex and multifaceted problems would arise which would require time and flexibility for a successful resolution.” Among these were the aforementioned difficulties inherent in school site selection, attendance zones, and school funding. But the future will probably bring more complex instantiations of institutional racism, as well as revelation of yet undiscovered forms, and for this reason, creation of specific and nuanced individually enforceable rights is desirable.

2. Housing

The replacement of federal urban renewal programs with CDBGs and the inability of HUD to properly oversee local projects have given municipalities “virtual autonomy.” This results in the lack of enforcement of many of the most progressive regulations that confront head-on the institutional racism in urban redevelopment. First, people who are displaced by a program funded by a CDBG are entitled to relocation assistance in accordance with the Uniform Relocation Assistance and Real Property Acquisition Policies Act. The regulations mandate that persons receive adequate notice of a displacement resulting from a federally funded project and that comparable housing be made available.

164. Of course, agencies are less politically insulated than courts, but more insulated than the legislature: “[they] fall between the extremes of the politically over-responsive Congress and the over-insulated courts.” Mark Seidenfeld, A Civic Republican Justification for the Bureaucratic State, 105 Harv. L. Rev. 1511, 1542 (1992).

165. Green, 391 U.S. at 437.

166. See supra notes 82-92 and accompanying text.

167. Hellegers, supra note 117, at 926.

168. Id.


171. 49 C.F.R. § 24.203(a). The code provides as follows:

[A] person scheduled to be displaced shall be furnished with a written description of the displacing agency’s relocation program which does at least the following: (1) Inform the person that he or she may be displaced for the project and generally describes the relocation payment(s) for which the person may be eligible, the basic conditions of eligibility, and the procedures for obtaining the payment(s), (2) Informs the person that he or she will be given reasonable relocation advisory services, including referrals to replacement properties, help in filing payment claims, and other necessary assistance to help the person successfully relocate . . . .

172. 49 C.F.R. § 24.204(a) (2005) (“No person to be displaced shall be required to move from his or dwelling unless at least one comparable replacement dwelling . . . . has been made available to the person.”).
The regulations covering the relocation of residents of public housing tenements are similar. More importantly, however, both the public housing resident relocation regulation and the URA regulations prohibit discrimination on the basis of race, color, or national origin in the provision of these benefits.

The case of *Wallace v. Chicago Housing Authority* demonstrates why these regulations are necessary to combat institutional racism. In *Wallace*, the court reversed summary judgment against the plaintiff residents of public housing that was to be demolished so that other apartments for persons with higher incomes could be built. Although the Chicago Housing Authority (CHA) was obligated to provide relocation services, it failed to provide any relocation services at all for two years. When it finally began to provide such services, the plaintiffs alleged that the CHA discriminated against them because it discouraged them from inspecting or renting in predominantly white or racially integrated neighborhoods. The CHA failed to inform them of the desirable features of white or racially integrated neighborhoods, actively steered them toward predominantly African-American neighborhoods, and failed to effectively and affirmatively assist families in moving to integrated neighborhoods.


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173. 24 C.F.R. § 970.5(a) (2005) (displaced residents “must be offered opportunities to relocate to other comparable/suitable . . . decent, safe, sanitary, and affordable housing”).

174. 49 C.F.R. § 24.8 (2005) (“The implementation of this part must be in compliance with other applicable laws and implementing regulations, including but not limited to, the following . . . (b) Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d et seq.”); 24. C.F.R. § 970.5 (2005) (the opportunity for housing offered must, in addition to being “decent, safe, sanitary, and affordable,” be “to the maximum extent practicable, housing of their choice, on a nondiscriminatory basis, without regard to race, color, national origin . . .”) (emphasis added).

175. 298 F. Supp. 2d 710 (N.D. Ill. 2003).

176. Id. at 714.

177. Local housing authorities are public or administrative agencies of municipalities that contract with HUD to receive federal funds for housing programs, and therefore must comply with HUD regulations prohibiting discriminatory administration of such programs. See 40A AM. JUR. 2d, *Housing Laws and Urban Redevelopment* § 11 (2006).


179. Id. at 714.

180. “Steering” is a form of housing discrimination “in which minority homebuyers are shown houses, but in systematically different neighborhoods than those shown or recommended to comparable white homebuyers.” Margery Austin Turner & Maris Mikelsons, *Patterns of Racial Steering in Four Metropolitan Areas*, 2 J. OF HOUSING ECON. 199 (Sept. 1992). It is prohibited by the Fair Housing Act, 42 U.S.C. § 3604 (2005).


182. 42 U.S.C. §§ 3601–3631 (2004). Plaintiffs here alleged violation of § 3608(e)(5), which requires that the Secretary of HUD “administer the programs and activities relating to housing and urban development in a manner affirmatively to further [fair housing].”
tions, and Executive Orders 11,603 and 12,892. The court rejected the defendant’s claim that § 1983 could not be used to enforce the regulations or the Executive Orders, holding that the affirmative duty to further fair housing established by each had been incorporated into the Fair Housing Act. In this way, the court was able to sidestep the issue of executive branch rights-creation (which will be discussed in Part IV). What Wallace demonstrates, however, is that because HUD and other regulations address specific factual predicates of housing discrimination, they are therefore well-suited for use in combating institutional racism.

III. SECTION 1983 AND STATUTORY SORCERY: THE FOUNDATION OF THE CURRENT DEBATE

The questions of law bearing on whether individuals can privately enforce federal regulations are several and varied; they involve statutory construction, legislative intent, administrative law principles, and constitutional issues. However, in anticipation of these specific, focused inquiries, a broader framing of the relevant jurisprudential context is appropriate. The fight over private enforceability of regulations is larger than the issues of administrative discretion and congressional oversight of agency action. It speaks to the fundamental question of whether citizens may seek redress for their grievances in the courts of law—whether the law “means what it says” or whether legal protections purposefully created will languish as a mere “form of words.”

183. Wallace, 298 F. Supp. 2d at 718 (citing C.F.R. §§ 107.20(a), 903.7(o), 960.103(b) (2005)).
184. Exec. Order 11,603, 27 Fed. Reg. 11527 (Nov. 20, 1962). Section 101 stated: I hereby direct all departments and agencies in the executive branch of the Federal Government, insofar as their functions relate to the provision, rehabilitation, or operation of housing and related facilities, to take all action necessary and appropriate to prevent discrimination because of race, color, creed, or national origin. Id. It was revised in 1980 to include the words “religion” and “sex” in the list of prohibited bases of discrimination. Exec. Order 12,259, 46 Fed. Reg. 1253 (Dec. 31, 1980).
185. Exec. Order 12,982 was issued by President William Jefferson Clinton in 1994 and provides that the heads of every executive agency are “responsible for ensuring that its programs and activities relating to housing and urban development are administered in a manner affirmatively to further the goal of fair housing.” Exec. Order 12,892, 59 Fed Reg. 2939, § 2-202 (Jan. 17 1994).
186. Wallace is a very interesting case for this discussion because the court actually held that Executive Orders 11,603 and 12,892 were enforceable under § 1983. Wallace, 298 F. Supp. 2d at 720. To some extent, rights-creation by executive order represents the extreme end of delegated right-making authority, since it is accepted that executive agencies exercise “quasi-legislative” power and the question seems a closer one in terms of the delegation issues presented. However, rights-creation by executive order should not be dismissed without further consideration of the non-delegation doctrine in the context of delegated right-making authority.
188. Mapp v. Ohio, 367 U.S. 643, 648 (1961) (explaining the need for the exclusionary rule to safeguard Fourth Amendment rights, since otherwise those guarantees would be meaningless).
There is a disturbing trend in the federal courts to limit the availability of remedies for the violation of rights. Judge Berzon noted the departure from the common law maxim of Marbury v. Madison, to a jurisprudence of "disembodied federal rights" characterized by rights that are "uncoupled" from the remedies that are most often the only means for their enforcement. Berzon understands this shift as a result of conceptual confusion between rights and remedies, and urges vigilance in maintaining the analytical distinction between the two since failure to do so "can effect tremendous harm to legal doctrine and to individual rights enforcement."

Judge Berzon saw this "uncoupling" of rights from remedies from the vantage point of the dissent in Save our Valley v. Sound Transit. In response to the proposed plan that would disproportionately burden the residents of Rainier Valley, the Save our Valley organization took action. It brought suit under 42 U.S.C. § 1983 alleging a violation of a disparate impact regulation promulgated by the Department of Transportation. It alleged that Sound Transit had "utilized criteria or methods of administration which [had] the effect of subjecting persons to discrimination because of their race." Judge Gould, writing for the Ninth Circuit Court of Appeals, held that federal administrative regulations alone could never create a right enforceable through § 1983 and affirmed the district court's grant of summary judgment against Save our Valley.

Judge Gould relied on two recent cases of the Supreme Court in his decision: Gonzaga University v. Doe and Alexander v. Sandoval. In Gonzaga, the Court held that the inquiry to determine whether a statute creates an implied right of action is the same as the inquiry to determine

189. Berzon, supra note 41, at 525.
190. 5 U.S. 137, 147 (1803). "It is a settled and invariable principle that every right, when withheld, must have a remedy, and every injury its proper redress." Id.
192. Apart from confusion spurred by doctrinal specifics discussed infra, rights and remedies are also confused on a superficial level because of terminology—another name for a remedy, i.e., the ability to go to court and sue, is a "right of action." See id. at 532 n.43.
193. Id. at 531.
194. 335 F.3d 932 (9th Cir. 2003). The facts of the case are referenced at the introduction of this comment in notes 10–18 and the accompanying text. This case in large part prompted this Comment as the author resides less than five miles from the Rainier Valley community.
196. See infra Part III.A.
197. Save our Valley, 335 F.3d at 934–35.
199. Save our Valley, 335 F.3d at 941.
200. Id. at 946.
whether it creates a right enforceable through § 1983.203 In Sandoval, the Court held that implied rights of action could only be created by Congress.204 Judge Gould read these two cases together to require that only Congress could create rights enforceable through § 1983.205 However, although congressional intent in this area is of paramount importance after Sandoval and Gonzaga,206 it has been argued that the holding in Save our Valley is too broad and unsupported by precedent.207 For these reasons, it should be reconsidered and rejected in favor of an approach that is more consonant with well-established principles of administrative law.208 The next Part sets out a brief history of § 1983 and explains more fully the inferential leap in the Save our Valley holding, and why it is unwarranted.

A. The Reach of 42 U.S.C. § 1983

Section 1983 provides for a civil action against any person who, under color of law, causes any citizen or person within a jurisdiction of the United States to be subjected to the "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws."209 The statute was originally enacted as part of the Ku Klux Klan Act of 1871,210 but it was narrowly interpreted for over for ninety years.211 The beginning of the current debate over whether § 1983 can be used to enforce federal regulations came in Maine v. Thiboutot, in which the Court ex-

204. Sandoval, 532 U.S. at 286.
205. Save our Valley, 335 F.3d at 937–39.
206. See infra Part III.A.2.
207. See, e.g., Save our Valley, 335 F.3d at 952–60; Mank, supra note 36, at 888.
208. Save our Valley, 335 F.3d at 954–59; Mank, supra note 36, at 888.
211. See Blackmun, supra note 30, at 8–10. In the beginning, the courts allowed use of § 1983 only to enforce rights like the right to sue, be sued, to testify in court, to make contracts, and the right to buy, sell, and inherit property. Id. Thereafter, the reach of the statute was only as broad as the Court’s understanding of the state action requirement and the meaning of various constitutional provisions. Id. (citing and discussing United States v. Harris, 106 U.S. 629 (1883); United States v. Cruikshank, 92 U.S. 542 (1876); and The Slaughterhouse Cases, 83 U.S. 36 (1873)). The statute did not begin to have the efficacy that it has today until the Court held in Monroe v. Pape, 365 U.S. 167 (1961), that it could be used to sue a police officer for egregious conduct in violation of the Fourth Amendment. 
panded the reach of the "and laws" clause. Writing for the majority, Justice Brennan relied on the plain language of the statute, legislative history, and case law to hold firmly that "the phrase 'and laws,' as used in § 1983, means what it says." That is, the section can be used to remedy a deprivation of rights secured only by statute.

During the 1980s, the Court began limiting the reach of *Thiboutot* by setting out exceptions to the apparently broad reach of the statute. One such exception was that only federal laws that spoke to individuals in mandatory, not precatory language, could create rights enforceable under § 1983. Another was that § 1983 could only be used to privately enforce a statutory right if Congress had not created a comprehensive enforcement scheme. However, in a fragmented decision in *Guardians Association v. Civil Service Commission of the City of New York*, several justices opined that § 1983's "and laws" clause covered not only federal statutes but also regulations having the force of law. Only once

212. 448 U.S. 1 (1980).

213. Justice Brennan was convinced that "Congress knew what it was doing [when it inserted the phrase "and laws"] and the legislative history does not demonstrate that the plain language was not intended." *Id.* at 8. The argument made by the state of Maine was that when the 1874 Congress divided the predecessor to 42 U.S.C. § 1983 from the jurisdictional provision therein (which later became the model for the current jurisdictional section, 28 U.S.C. § 1343(3)), it meant to revise the predecessor to § 1983 to apply to deprivations of rights secured by the Constitution or "of any right secured by any law providing for equal rights" because it had so revised the predecessor to the jurisdictional section. *Id.* at 7 (emphasis added) (citations omitted). Although it is well settled that § 1983 is available as a remedy for the deprivation of all rights (as that is term is defined doctrinally) created by federal law, it bears mentioning for the purpose of this discussion that the laws (regulations) at issue in this Comment are of the kind that provide for equal rights, and so any resurrected legislative history argument to limit the scope of § 1983 as to the subject matter intended to be addressed by the statute would fail in the context of this Comment.


218. 463 U.S. 582 (1983) (Justice White announced the judgment of the Court, in which Justice Rehnquist joined in part, Justices Powell and O'Connor filed separate dissenting opinions, Justice Marshall filed a dissenting opinion, and Justice Stevens filed a dissenting opinion in which Justices Brennan and Blackmun joined).

219. Justice White stated that he believed that, even if Title VI did not prohibit disparate impact discrimination, its implementing regulations did and were valid and enforceable. *Guardians*, 463 U.S. at 593. Justice Marshall explained in a lengthy opinion that while Title VI may otherwise be read to prohibit only intentional discrimination, it should not be so read in view of the authoritative construction it received by the several administrative agencies that interpreted it in promulgating Title VI disparate impact regulations. *Id.* at 617–18. Justice Stevens stated that since Title VI was intended to reach governmental actors, it probably required a showing of intent for a violation, but that the implementing regulations that prohibited disparate impact were a different story, and are privately enforceable under § 1983. *Id.* at 643–45. *Guardians* is a very interesting case in addition to the question of whether regulations can be privately enforced under § 1983 because the Court was
since that decision has the Court held that the statute could be used to enforce HUD regulations that secured a right to a reasonable allowance for utilities in the computation of rents required by residents of publicly subsidized housing.\footnote{220}{Wright v. City of Roanoke Redevelopment and Housing Authority, 479 U.S. 418 (1987). Although \textit{Wright} held that the regulations at issue created rights that were privately enforceable under § 1983, the Court did not explain whether the right was created implicitly by the enabling statute or by the regulations alone. \textit{See} Mank, \textit{supra} note 33, at 343 n.166; Pettys, \textit{supra} note 210, at 74–75. \textit{See also} Bradford C. Mank, \textit{Suing under § 1983: The Future after Gonzaga University v. Doe}, 39 HOUS. L. REV. 1417, 1462–63 (2003).}

For awhile, it seemed that rights individually enforceable under § 1983 could be created by federal regulations provided that they satisfied the test.\footnote{221}{Davant, \textit{supra} note 36, at 620–24.}

The applicable test to determine whether a statutory provision creates an individually enforceable federal right was set out most clearly in \textit{Blessing v. Freestone}.\footnote{222}{520 U.S. 329 (1997).} The Court summarized it as follows: a statutory provision gives rise to a federal right when (1) Congress intended the provision to benefit the plaintiff, (2) the right protected by the provision is “not so vague and amorphous that its enforcement would strain judicial competence,” and (3) the provision unambiguously imposes a binding obligation on the state.\footnote{223}{Id. at 340–41.} If the provision satisfies these three elements, it merely raises a presumption that a right has been created.\footnote{224}{Id. at 341.} The presumption can be rebutted by evidence that Congress has foreclosed a remedy under § 1983, either expressly by stating so in the statute or impliedly by creating a comprehensive enforcement scheme that is incompatible with private enforcement under § 1983.\footnote{225}{Id. at 341–42.}

At this point, it is appropriate to note that many regulations, including the DOE regulations discussed above in Part II, satisfy the \textit{Blessing} test. For example, the regulation guaranteeing that “[n]o person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be otherwise divided over whether Title VI itself prohibited only intentional discrimination or disparate impact discrimination. The primary point of contention was whether the Court in \textit{Regents of Univ. of California v. Bakke}, 438 U.S. 265 (1973), by holding that Title VI incorporated the Constitutional intentionality standard, overruled the Court’s previous decision in \textit{Lau v. Nichols}, 414 U.S. 563 (1974), which held that proof of discriminatory impact was enough to sustain a Title VI claim. In \textit{Guardians}, only Justices White and Marshall believed that Title VI still reached disparate impact discrimination after \textit{Bakke}, though the arguments and case law marshaled in support of the differing positions seemed a close question. \textit{See generally} Guardians, 463 U.S. at 591, 623–24; Patricia Lines, J.D., \textit{Intent to Discriminate and Title VI of the Civil Rights Act of 1964: Lau, Bakke, and Guardians}, 17 ED. LAW REP. 443 (1984); Bradford C. Mank, \textit{Are Title VI’s Disparate Impact Regulations Valid?}, 71 U. CIN. L. REV. 517, 521–28 (2002).
subjected to discrimination under any program to which this part applies,²² sixty satisfies all three elements; in fact, the Court pointed to the enacting Title VI statute,²²¶ which is nearly identical,²²° as a model of individual rights-creating language for purposes of § 1983.²²¹ Likewise, other regulations, such as the provision prohibiting school site selection with discriminatory effects,²²² display the requisite focus on individuals and create a right which is neither vague nor amorphous, and unambiguously impose a binding obligation on governmental actors.

In view of the fact that many regulations do satisfy the Blessing test, the debate over their private enforceability has tended to focus on whether right-making is a proper activity in which administrative agencies should be engaged.²²³ Those in favor of recognizing agencies’ power to create individually enforceable rights make the so-called Chevron argument.²²⁴ The Chevron rule requires a two-step inquiry to determine whether an agency’s regulation is a valid interpretation of its enabling statute.²²⁵ First, the court must determine whether Congress has “directly spoken to the question at issue.”²²⁶ If the intent of Congress as to the meaning of the statute is clear, then that meaning is controlling.²²⁷ If not, then the court must undertake the second step of the inquiry and determine whether the agency’s construction of the statute is reasonable.²²⁸ If so, it is entitled to judicial deference.²²⁹ The Chevron argument for agency rights-creation is that a regulation containing rights-creating language that is a reasonable construction of the enabling statute must create an individual right privately enforceable under § 1983 in the same way a statute would.²³⁰

²²⁶. 34 C.F.R. § 100.3(a) (2005).
²²⁸. It is exactly the same except for the word “otherwise.”
²³⁰. 34 C.F.R. § 100.3(b)(3) (2005) (“In determining the site or location of a facilities, an applicant or recipient may not make selections with the effect of excluding individuals from . . . or subjecting them to discrimination under any programs to which [this part] applies”) (emphasis added). See supra note 149 and accompanying text.
²³⁴. Id.
²³⁵. Id.
²³⁶. Id.
²³⁷. Id.
²³⁸. See Galle, supra note 36, at 177–92; Davant, supra note 36, at 642–44. Galle offers a sophisticated analysis of the issues of statutory interpretation and federalism concerns raised by the Chevron argument and agency rights-creation in general.
Those who argue against agency creation of such rights maintain that separation of powers principles, specifically the nondelegation doctrine, strongly suggest that it is unconstitutional. They reject the *Chevron* argument on the ground that an agency regulation purporting to create an individually enforceable right where the enabling statute does not must be an unreasonable construction of the enabling statute, and therefore invalid. While these arguments must be considered, it is appropriate first to examine the congressional intent issues made central by *Sandoval* and *Gonzaga*.

**B. Sandoval, Gonzaga, and Congressional Intent to Create Remedies (or Rights?)**

The talismanic phrase is “congressional intent.” Did Congress intend regulations promulgated pursuant to its statutes to be privately enforceable under § 1983? The question is a confusing one, in part, because of the importation of the doctrine of implied rights of action to the § 1983 context in *Gonzaga.* That importation has also exacerbated what Judge Berzon calls the “uncoupling” of rights from remedies in federal courts.

The doctrine of implied rights of action is largely a judicial response to the legal-historical development of code pleading. The Supreme Court’s current statement of the doctrine is that it allows for judicial implication of a private remedy for violation of a federal statute if four elements are satisfied: (1) the plaintiff is a member of the class intended to be benefited by the statute, or in other words, the statute creates a right in the plaintiff, (2) Congress intended, either expressly or impliedly, to create a private remedy, (3) such a remedy is consistent with the statutory scheme, and (4) the remedy is not one traditionally relegated to

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239. See infra Part IV.
240. See Davant, supra note 36, at 628–41; McKennet, supra note 36, at 211–17.
241. Davant, supra note 36, at 644–48; McKennet, supra note 36, at 214.
243. See Berzon, supra note 41, at 540.
244. See Anthony J. Bellia, Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777 (2004). At common law, redress for violations of rights required pleading in the particular, specific cause of action, which carried with it “unique procedural incidents, a particular form of relief, and specific forms of judgment and execution.” *Id.* at 784. Developments in the law revealed this system to be overwhelmingly rigid, and the development of code pleading with its putative one form of action resulted. *Id.* at 793. Courts thereafter struggled with whether to recognize a cause of action for statutory violations when the statute was silent as to a cause of action, and some began to recognize implied rights of action where a statute conferred a benefit on an individual. *Id.* at 838. One of the most celebrated cases is *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), in which the Supreme Court found implied in the Constitution a remedy for the violation of *Bivens*’ Fourth Amendment right to be free from unreasonable search and seizure.
state law in a field which is basically the concern of the states. This test is notably more burdensome to meet for plaintiffs than the Blessing test since it focuses almost entirely on the creation of a remedy and thus implicates important separation of powers concerns.

In Sandoval, the Court circumscribed the application of the doctrine of implied rights of action. In that case, the plaintiffs brought suit alleging a violation of Title VI’s disparate impact regulations under an implied right of action theory, but the Court held that “like substantive federal law itself, private rights of action to enforce federal law must be created by Congress.” The judicial task,” Justice Scalia stated, “is to interpret the statute Congress has passed to determine whether it displays intent to create not just a private right but also a private remedy,” and “statutory intent on this latter point is determinative." However, while the Court’s holding in Sandoval made it clear that only Congress could create implied rights of action, the holding in Gonzaga provided what Judge Gould regarded as the nail in the coffin for agency creation of rights enforceable under § 1983.

In Gonzaga, the plaintiff sued under § 1983 for violation of the Family Educational Rights and Privacy Act of 1974 (FERPA) when he was denied a teaching certification. The denial occurred after the Gonzaga University teaching certification specialist overheard another student discussing alleged sexual misconduct on the part of the plaintiff, and then relayed this information to the state licensing agency. The Court held that the FERPA statute did not create a right enforceable under § 1983 because the statutory language did not focus specifically on individuals. But more importantly, the Court made it clear that the initial inquiry in determining whether a statute has created an implied right of action is the same inquiry to use in determining whether a statute confers

246. See supra notes 206–08 and accompanying text.
247. See Save our Valley v. Sound Transit, 335 F.3d 932, 952 (9th Cir. 2003) (noting that while § 1983 is itself specific congressional intent to afford a private remedy for violation of rights, and hence the inquiry is whether rights have been created by federal laws, the test for implied rights of action is a four-part test, the last “three factors [of which] all concern whether it would be appropriate for a court to permit a private remedy in federal court to vindicate that right”).
250. Id.
253. Id.
254. Id. at 288.
a right enforceable under § 1983.255 Citing implied right of action case law, Chief Justice Rehnquist identified the new test256 as follows: Congress must have intended an unambiguously conferred right to be created, and the statute purportedly creating it must manifest that intent and be phrased in terms of the identifiable, individual persons to be benefited.257

What is significant about Gonzaga is that, in importing the standard for implied rights of action to § 1983 cases, it raised considerably the burden on plaintiffs for establishing an individually enforceable right under § 1983. This shift was not acknowledged by the Court, but was identified by Justice Stevens,258 Judge Berzon,259 and various commentators.260 Moreover, the decision seemed to imply, at least for some,261 that since only Congress could create an implied right of action, only Congress could create a right enforceable under § 1983. A superficial reading of the tests might indicate that such an interpretation is justified by the fact that each test does incorporate the element of whether Congress intended to create a federal right. On a doctrinal level, too, Chief Justice Rehnquist's attempt to synthesize the doctrines, in light of Sandoval's holding, may also suggest that privately enforceable rights must be created by Congress.

However, the inferential leap is erroneous because the difference between implied rights of action and rights enforceable under § 1983 is definitely a difference that makes a difference. Section 1983 is a completely different animal than an implied right of action. It is, in itself,

255. Id. at 283.
256. See Samberg-Champion, supra note 215, at 1854–57. Samberg-Champion provides an excellent commentary on Gonzaga, and describes the rationale offered by the Court for its apparent change of direction as "even murkier" than where the change seems to be directed.
257. Gonzaga, 536 U.S. at 283–85.
258. See id. at 301 ("What has never before been required is congressional intent specifically to make the right enforceable under § 1983 . . . . Yet that is exactly what the Court, at points, appears to require by relying on implied right of action cases . . . .") (emphasis in original).
259. See Berzon, supra note 41, at 540 ("the line of cases from Thiboutot through Blessing had recognized that federal rights could be inferred from the intent and structure of the law in question[] Gonzaga University raised the bar.").
261. See Save our Valley v. Sound Transit, 335 F.3d 932, 937–39 (9th Cir. 2003) (reasoning that, because Gonzaga held that Congress must have specifically intended to create a right in either the implied right of action or § 1983 context, and because Sandoval held that only Congress could create implied rights of action, only Congress can create rights enforceable under § 1983). See also Davant, supra note 36, at 638–39 (reading Touche Ross & Co. v. Redington, 442 U.S. 560 (1979), which held that the remedy component of an implied right of action must be provided by Congress because the Court "is not at liberty to legislate," to suggest that right-making in any context is a legislative activity and therefore, only Congress can do it). The latter argument is of course based on the nondelegation doctrine, but it demonstrates the analytical consequence of incautiously importing the doctrine of implied rights of action analysis into the § 1983 context. See infra part IV.
specific congressional intent to create a private remedy. The implied right of action test, with three of its four prongs dedicated to discerning whether Congress specifically and deliberately intended a private remedy, is inapposite, because that requirement is always met in a § 1983 case.

In addition to the lack of separation of powers concerns in the § 1983 context, the implied right of action analysis should also not be imported to § 1983 cases with respect to rights-creation for another important reason. The Supreme Court has repeatedly declined to import "even well-settled common law principles" into the § 1983 context. Common law principles should not be used as anything more than a starting point in the § 1983 analysis unless they are consistent with the statutory analysis, have support in other textual provisions of § 1983, or when the principles were so widely known at the time § 1983 was passed in its original form that Congress cannot be presumed to have abrogated them silently. The doctrine of the implied right of action is at present an unsettled common law principle, let alone one that could have been known in its present form in 1871. For these reasons, the preoccupation with explicit congressional intent in the implied right of action context should not be hastily imported to the § 1983 context to require that only Congress can create that kind of privately enforceable right.

Ultimately, the argument that because only Congress can create an implied right of action, only Congress can create a right enforceable under § 1983 is dangerous because it ignores its own premise—that congressional intent is the touchstone. To pretend that § 1983 was enacted in its original form to require specific and precise congressional intent to create the right is to presume congressional intent to include a require-

262. See Recent Cases, supra note 36, at 740.
263. Id.
266. Id.
267. See Bellia, supra note 239, at 851 ("the Court's current approach [to implied rights of action] lies in some tension with historical practice"); Berzon, supra note 41 (noting that, beginning in the 1970s, the Court restricted the implied right of action by narrowing the range of factors to be considered in determining whether a remedy existed from several to the single question of whether Congress specifically intended to permit suits in federal court, thereby "abandoning any independent judicial role of ensuring redress for violation of federally-created rights.").
268. See Bellia, supra note 239, at 839–48 (describing the historical common law precedents of the implied right of action, its transition in America after code pleading was developed, and concluding that contrary to a superficial reading of the cases before the merger of law and equity, "it is inaccurate to describe judicial practice before merger as creating remedies for the violation of statutorily created rights.").
ment in addition to those spelled out in the statute, something which is not to be done lightly.269

Instead, a more appropriate inquiry might be what the forty-second Congress thought about regulations. For example, one can argue that, although the authority to promulgate regulations has been delegated since the founding of this nation,270 the forty-second Congress did not envision the vast expansion of the modern regulatory state in the post-New Deal era. However, the quality of some regulations to carry the force of law has been recognized since 1845.271 Given the principle that § 1983 is to be liberally construed to further its purpose272—which was to codify the Marbury maxim273—it would seem more likely than not that the forty-second Congress contemplated the meaning of the phrase “and laws” that it inserted in the predecessor to § 1983274 and meant it to “mean what it says,”275 that regulations having the force of law could be enforced with the statute.

Assuming that the Supreme Court or a lower court takes into consideration the foregoing thoughts, the bigger question is whether, as a matter of constitutional law, agencies have or should have the power to create individually enforceable rights. This question is actually one of delegation, since everything agencies do is pursuant to statutory grants of authority. In the following excerpt from Sandoval, Justice Scalia described the current Court’s apparent position toward the creation of individual federal rights by holding that only Congress can wield the power to do so: “[a]gencies may play the sorcerer’s apprentice, but not the sorcerer himself.”276 Although he was speaking in the implied right of action context, the question is at the heart of whether agencies can create rights

270. The First Congress granted military pensions “under such regulations as the President of the United States may direct.” Cass R. Sunstein, Nondelegation Canons, 67 U. CHI. L. REV. 315, 322 (2000) (citing 1. Stat. 95 (1789)).
271. Gratiot v. United States, 45 U.S. 80 (1846); United States v. Freeman, 44 U.S. 556, 567 (1845) (army regulations sanctioned by the executive have the force of law). See also United States v. Mora, 97 U.S. 413, 417 (1878) (bond regulations promulgated by the Secretary of the Treasury have the force of law). Mora was, of course, decided after the 1871 enactment of the predecessor to § 1983, but for the proposition the Court cited Gratiot, which dealt with army regulations, and apparently considered the precedent to be generally applicable to all regulations. Today, it is widely understood that validly enacted legislative regulations have the force of law. See Save Our Valley v. Sound Transit, 335 F.3d 932, 954 (9th Cir. 2003).
272. Monell v. Dep’t of Soc. Servs., 436 U.S. 658, 700–01 (1978) (“there can be no doubt that [the predecessor to § 1983] was intended to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights.”).
273. See Berzon, supra note 41, at 541–42.
274. See supra notes 210, 213.
275. See supra note 213.
enforceable under § 1983. Just what kind of “sorcery” is right-making, and to what extent may or should agencies exercise it? Is it the kind of power that must be exercised by Congress alone, lest the constitutional sin of legislative delegation be committed?

IV. NONDELEGATION AS A NONISSUE: AGENCY CREATION OF RIGHTS ENFORCEABLE UNDER § 1983 DOES NOT VIOLATE THE DOCTRINE

Article I, Section 1 of the Constitution vests legislative power in the Congress, and the negative implication is that such power may not be delegated to any other branch. At least two commentators have argued that right-making is most probably a legislative activity, and therefore, it is not properly delegable to administrative agencies. But this argument is weakly supported because the definition of legislative activity taken from INS v. Chadha begs the question of what legislative activity is.

277. “All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives.” U.S. CONST. art. I, § 1.

278. The basic premise of the doctrine is an application of the common law agency maxim to the grant of legislative power in Article I, Section 1. The maxim is “delegata potestas non potest delegari,” or “a delegated authority cannot be delegated; a delegated power cannot itself be delegated.” BLACK’S LAW DICTIONARY 1713 (8th Ed. 2004). However, although the concept of limits on the congressional delegation of authority has earlier roots, see, e.g., Wayman v. Southard, 23 U.S. 1 (1825), Field v. Clark, 143 U.S. 649 (1892), it was not associated with Article I, Section 1, in a U.S. Supreme Court decision until the petitioners in J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 404 (1928), argued that authority had been impermissibly delegated in violation of that section of the Constitution. The doctrine of nondelegation was not concretely linked with Article I, Section 1, as a matter of constitutional law by a Supreme Court holding until the only two cases in which it has been used to strike down a statute: Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935), and A.L.A. Schechter Poultry Co. v. United States, 295 U.S. 495 (1935).

279. See Davant, supra note 36, at 635–41; McKennet, supra note 36, at 209–15.

280. 462 U.S. 919 (1983). In determining whether a one-house veto was unconstitutional delegation, the Court held that the test for whether activity is legislative is whether it “contains matter which is properly to be regarded as legislative in character and effect.” Id. at 952. The Court then elaborated on this broad definition by identifying two factors that were dispositive in its decision that the one-house veto was “legislative activity”: (1) it had the purpose or effect of altering the legal rights, duties and relations of persons outside the legislative branch, and (2) it involved a determination of policy that Congress can implement only by bicameral passage and presentment to the President. Id. at 952–54.

281. The primary holding in Chadha is entirely tautological: “legislative activity is activity that is legislative.” Moreover, the Court’s elaboration of this definition with its factors is not helpful either because they are likewise overbroad. Applied to the activities of various branches of government, it would appear that judicial decisions of the Supreme Court itself in cases like Brown are “legislative activity” because they alter the legal rights, duties, or relations of persons outside the legislative branch and involve determinations of policy. Likewise, the Attorney General’s authority to criminalize the manufacture, possession, or distribution of various drugs under the Controlled Substances Act, or to change the penalties associated with those acts for certain drugs, would undoubtedly be an important policy determination that has the purpose and effect of altering the legal rights, duties, and relations of persons outside the legislative branch; however, a constitutional challenge on nondelegation grounds to this activity was rejected in Touby v. United States, 500 U.S. 160, 167 (1991).
In all fairness to the Chadha Court, the task of defining the non-delegation doctrine is not an easy one. Accordingly, the question of whether legislative power has been unconstitutionally delegated nearly always becomes one of degree that strains judicial competence. 282 Thus, the first problem with the discussion of delegation in the context of regulatory rights-creation is the problem with discussion of delegation in general. Due in large part to the doctrine's dubious constitutional legitimacy, 283 there is a healthy debate about the doctrine's viability in general, 284 let alone whether or not it precludes creation of individually enforceable rights by federal agencies. Part A of this section traces some of this debate and places regulatory rights-creation in a nondelegation context that is cognizant of the current state of the doctrine. Part B then suggests an analytical framework for judicial assessment of whether regulations that create privately enforceable rights are reasonable constructions of their enabling statutes.

A. The Cliché is Dead

Probably the greatest cliché in all of constitutional law is that of the nondelegation doctrine's "death," 285 However, some commentators argue that although the doctrine fell into disuse after Schechter Poultry 286 and Panama Refining Co., 287 the pendulum has swung back with Whitman v. American Trucking Associations, Inc. 288 and the conventional nondelega-


285. The many varied uses of this metaphor to discuss the doctrine and its utility suggests that many legal scholars might have had as much success in post-graduate literary studies. See supra note 279. See also Gary Lawson, Delegation and Original Meaning, 88 VA. L. REV. 327, 330–32 (2002) (characterizing the doctrine as the "Energizer Bunny" of constitutional law that keeps on going and going, although any "any rational observer would have issued a 'code blue' long ago.").


288. 531 U.S. 457 (2001). American Trucking overruled the D.C. Circuit, 175 F.3d 1027 (1999), which held that the Clean Air Act (CAA) unconstitutionally delegated legislative power to the Environmental Protection Agency (EPA). The D.C. Circuit reasoned that the agency’s interpreta-
tion doctrine may be rising from the ashes. Professor Sunstein argues that instead of dying off, the nondelegation doctrine has “merely been renamed and relocated” to a set of nondelegation canons. These canons, he contends, are an essential and useful feature of public law which ensures that certain rights and interests will not be compromised without sufficient congressional involvement. Professors Posner and Vermeule, on the other hand, urge complete disposal of the doctrine. They stress its constitutional pretensions and declare that any executive agent engaging in rulemaking pursuant to a statutory grant of authority is exercising executive, not legislative power. They assert that the conventional nondelegation doctrine is merely a metaphor to describe grants of authority that deliver too much discretion to agencies. In any event, the very unsettled state of the doctrine makes it difficult to say with any certainty that it prohibits agencies from creating individually enforceable rights as a matter of constitutional law.

Whether or not one takes the somewhat extreme position of Posner and Vermeule on nondelegation, the view of nondelegation as a metaphor is probably the most intellectually honest way to consider it. Although the values meant to be served by the nondelegation doctrine are

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290. Sunstein, supra note 270, at 315.
291. Professor Sunstein identifies three categories of nondelegation canons: (1) those that promote constitutional goals, such as the rule against allowing agencies to construe statutes in a such a way as to raise constitutional doubts and the rule against allowing agencies to construe statutes to preempt state law; (2) sovereignty-inspired canons, such as the rule that agencies cannot apply statutes outside the territorial borders of the United States and the rule that agencies cannot construe statutes unfavorably to Native Americans; and (3) perceived public policy canons, exemplified by rules that preclude agencies from making policy decisions against widely held social commitments, such as the narrow constructions of income tax exemptions and the presumption against allowing agencies to defeat the general federal policy against anticompetitive practices. Id. at 331–35.
292. Id. at 337–39.
293. See Posner & Vermeule, supra note 283, at 1724–25.
294. Id. at 1723. The professors explain their “naïve view” of delegation beginning with the claim that the problem of judicial competence has resulted in a “guilt complex of constitutional law,” and they “offer a course of therapy that will relieve constitutional law of its neurotic burden by showing that the Constitution just doesn’t contain any nondelegation principle . . .” Id.
295. Id.
296. Id. at 1726–27.
concededly of the utmost importance, it is recognized by most that "Congress simply cannot do its job absent an ability to delegate power under broad general directives." And the sky has not yet fallen despite the fact that legislative power is delegated to the executive and to independent regulatory agencies as a matter of course.

Early recognition of the reality that legislative authority is routinely delegated to administrative agencies helped develop the debate on another level: the "old" doctrine versus the "new." The "old" nondelegation doctrine is the traditional prohibition on any congressional delegation of legislative power; the "new" nondelegation doctrine is a reformulated approach in which the constitutionality of a statutory delegation of authority rests on whether the agency's interpretation of it contains adequate standards with which the agency effectively guides its own action. However, the "new" doctrine did not really take hold and was arguably repudiated by the Supreme Court's holding in American Trucking. Moreover, self-imposed limiting interpretations may not further the highly important goal of political accountability while at the same decreasing the flexibility that agencies need in order to be effective.

297. Justice Rehnquist stated in his concurrence in The Industrial Union Dept., AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607 (1980) (the Benzene case) that the three purposes of the nondelegation doctrine are: (1) "it ensures to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will," (2) it "guarantees that, to the extent Congress finds it necessary to delegate authority, it provides the recipient of that authority with an 'intelligible principle' to guide the exercise of the delegated discretion," (3) "and derivative of [(2)], the doctrine ensures that courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards." Id. at 685-86. Other commentators have identified the purposes as political accountability, separation of powers, and the protection of individual liberty by way of increased legislative transaction costs. See Sunstein, supra note 270, at 317-20.


299. See, e.g., Bowsher v. Synar, 478 U.S. 714, 757-58 (1986) ("it is well settled that Congress may delegate legislative power to independent agencies or to the Executive, and thereby divest itself of a portion of its lawmaking power . . . "); INS v. Chadha, 462 U.S. 919, 984 (1983) (White, J., dissenting) ("legislative authority is routinely delegated to the Executive Branch, [and] to the independent regulatory agencies . . . "). One can say that the formulation of generally applicable prospective rules that are binding and carry the force of law is not lawmaking but rather "agency interpretation," "gap-filling," or the delegation of "policy-making authority." However, slips of the judicial tongue and the functional analysis seem to make those who refuse to acknowledge that agencies wield lawmaking power look like ostriches burying their heads.

300. See Mark Seidenfeld & Jim Rossi, The False Promise of the "New" Nondelegation Doctrine, 76 NOTRE DAME L. REV. 1, 2 (2000); Wagner, supra note 284, at 30-38. Both authors cite as the source of the "new" doctrine Professor Kenneth Culp Davis, who argued in the 1960s and 1970s that agencies should be given broad delegations of legislative authority, but should confine their own discretion by providing self-limiting standards.

301. Seidenfeld & Rossi, supra note 300, at 7.

302. See supra note 288; Wagner, supra note 284, at 38.

303. Seidenfeld & Rossi, supra note 300, at 12-13. The professors argue that this is so given the empirical evidence that the public does not engage in discussion about the value choices underlying-
It is for these reasons that Professors Seidenfeld and Rossi favor judicial review of an agency rule after the interpretation of the statute has been made. Judicial review of agency rulemaking that utilizes various canons of construction, including the Chevron doctrine, is very effective at limiting the scope of congressional delegation. Indeed, Chevron operates in the same way the "new" nondelegation doctrine would, upholding exercises of agency discretion if they are reasonable. Chevron is thus, in a very real sense, a better answer to the problem of delegation for two reasons. First, unlike the "old" nondelegation doctrine, it is judicially enforceable because it is principled analysis rather than an arbitrary "I-know-it-when-I-see-it" approach to grants of excessive discretionary authority. Second, unlike the "new" doctrine, it is meaningful, after-the-fact review of agency action that neither sacrifices accountability or flexibility, nor places an agency in the position of exercising the discretion that is forbidden in the first place.

One answer to the nondelegation problem and to the question of agency creation of rights enforceable under § 1983, then, is reliance on Chevron-inspired canons of interpretation that address particular types of delegated lawmaking authority. They would allow agencies' flexibility in rulemaking to address the specific factual issues that necessitate the delegation of legislative authority in general and those that perpetuate institutional racism. Indeed, a few commentators have already proposed contextualized Chevron applications as a better approach to the nondelegation problem. Professor Zellmer argues for a very reasoned alternative to strict nondelegation review based on Chevron that synthesizes that rule's deference to agency interpretation with the "hard look" of agency decisionmaking, but rather cares only about the "bottom line acceptability" of the actual rules. Id. at 12. Because of this, the "new" nondelegation doctrine would have an agency set its own limiting standards with a binding interpretation of the enabling statute which may be consistent with public values in one situation but inconsistent with public values in the next. Id. at 13-14. In this way, political accountability is decreased because the agency is nevertheless committed to a previous interpretation that is not consistent with the public's values. Id.

304. Seidenfeld & Rossi, supra note 300, at 15-16. The professors explain that, because constraints of any kind on agency discretion which are set before any exercise of that discretion are necessarily imperfect, an agency's adoption of binding interpretation can easily become defective by discovery of additional factors that are relevant in applying a statute. Id.

305. See generally id.

306. Cudahy, supra note 284, at 19.

307. Id. at 17.

308. Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 473 (2001) ("The very choice of which portion of the power to exercise—that is to say, the prescription of the standard that Congress had omitted—would itself be an exercise of the forbidden legislative authority.").

309. See supra notes 51–53 and accompanying text.

310. See supra Section II.

review of agency action first set out in Citizens to Preserve Overton Park v. Volpe, and proposes tiered review of statutory delegations contextualized with reference to the implications of the subject matter. Likewise, the following section proposes a reasoned alternative to a conclusory determination that agency creation of a § 1983 right violates the nondelegation doctrine. Instead, courts should undertake a particularized application of the Chevron doctrine to a regulation purporting to create such a right, one that is contextualized with reference to the values underlying § 1983 jurisprudence.

B. Chevron Review Tailored Specifically to § 1983 Regulatory Rights Creation

Admittedly, an argument that is partly descriptive but also partly normative about the nondelegation doctrine is a large premise on which to rest a smaller argument for a proposed method of analysis. But the nondelegation doctrine is so unsettled and unworkable that any decision that agencies lack the power to create rights enforceable under § 1983 would be an arbitrary one, and the current state of the doctrine does not provide the answer at present anyway. Moreover, although the argument that agency rulemaking that has the effect of creating such rights are unreasonable and therefore not entitled to Chevron deference may be supported by recent Supreme Court decisions restricting the scope of Chevron, another recent decision may suggest the opposite trend, and there are many unresolved questions about what kinds of rules Chevron deference should apply to.

Nevertheless, one could argue that, whether under the traditional nondelegation doctrine or under a Chevron analysis, the power of federal agencies to create rights enforceable under § 1983 is simply a bad idea because it gives too much discretion to agencies. Perhaps it is one of those “important choices of social policy” that only Congress should make. The potential for disruption of economic and other expectations and activities that private enforcement creates may be something that

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313. See Zellmer, supra note 311, at 998–99. She proposes a higher level of scrutiny for statutes that pose dangers of overreaching, factionalism, or abuse of discretion, and a lower level for other statutes, used simply to ensure principled, unbiased agency decisionmaking.
314. See supra notes 282–89 and accompanying text.
315. See Davant, supra note 36, at 644.
316. See Mank, supra note 36, at 874.
317. Id.
318. See generally Thomas W. Merrill & Kristin E. Hickman, Chevron’s Domain, 89 GEO. L.J. 833, 849–52 (2001) (identifying 14 concrete unresolved questions in addition to theoretical questions about the scope of Chevron).
319. See supra note 297.
federal agencies should not be allowed to create. Private enforcement also may risk over-enforcement and therefore over-deterrence of useful and efficient activity.320 However, these objections are really support for the contrary position: the issues are highly specific factual questions that Congress is not capable of addressing.321 For example, in the context of regulations mandating nondiscriminatory school site selection,322 private lawsuits may risk interference with a public enforcement scheme that is better equipped to secure consistent compliance,323 and if so, the risk might be outweighed by the inability of an agency to overcome political pressure, inadequate funding, or other obstacles to enforcement,324 such that private enforceability is necessitated. Such inquiries would most fairly and effectively be conducted by agency rulemaking procedures, which allow for the most meaningful public participation by all affected parties.325

Indeed, this is the very type of analysis that Congress intends agencies to undertake when it issues broad directives with gaps that agencies must fill. Giving full effect to congressional intent that agencies effectuate such directives requires agencies to consider how best to do so, which sometimes results in proscriptive regulations. In this sense, if an agency did decide to create rights enforceable under § 1983, it would not have the effect of subjecting local governmental actors to any greater liability than they are already; it would only allow agencies to calibrate compliance levels to effectuate the will of Congress. This Comment proposes simply that when Congress expressly delegates the authority to make rules carrying the force of law, then the creation of rights enforceable under § 1983 should be a policy decision made by the agency.326 An at-

320. See Stephenson, supra note 29, at 114–16.
321. Id. at 106–07. Professor Stephenson explains: [T]he desirability of authorizing private actions involves difficult policy judgments and is likely to depend on a number of context-specific factors . . . [T]hus, when considering how to allocate authority over private enforcement policy, an institutional designer must take into account the capacity of various decisionmakers to trade off a host of complex advantages and disadvantages within a particular substantive context, as well as the incentives such decisionmakers are likely to face.
322. See supra notes 155–60.
324. Id. at 110–12.
326. During the editing of this Comment, Professor Stephenson published his article "making the case" for private enforcement which makes this argument in the context of implied rights of action, and is extremely helpful in this area because it succinctly sets out the advantages and disadvantages to private enforcement generally. Stephenson, supra note 29, at 106–20. Specifically, Professor Stephenson argues that in the implied rights of action context, the Supreme Court should abandon its insistence on specific congressional intent to create a private remedy and instead treat a
tempt to privately enforce regulations that create such rights should precipitate judicial review of the reasonableness of the regulations that is tailored precisely to the issue of private enforcement under § 1983.

Thus, when a duly promulgated agency regulation 327 satisfies the § 1983 rights-creation standard and thus creates a privately enforceable right, a reviewing court should engage in a Chevron style analysis. The first step should be similar to the first step of Chevron, i.e., whether Congress has spoken to the issue of rights creation. 328 If Congress has prohibited the creation of rights enforceable under § 1983, then the regulation obviously cannot create rights and it can be enforced only through enforcement methods not foreclosed. Likewise, Congress may constrain an agency’s authority to create rights by requiring the agency to conduct a cost-benefit analysis 329 through which the agency must balance the alternatives of public, private, and hybrid enforcement schemes. This requirement would constrain agency authority to create privately enforceable rights unless they are cost-effective.

If Congress has not precluded the creation of rights enforceable under § 1983, and has not constrained agency discretion by a cost-benefit analysis requirement (or if the regulation at issue satisfies that requirement), then the reviewing court should apply a Chevron second step and ask the general question of whether the regulation that purports to create rights under § 1983 rights is reasonable. 330 However, the rights-creation context requires an elaboration of that inquiry with factors relevant to both § 1983 jurisprudence and administrative policy-making in general.

The creation of a right enforceable under § 1983 should be reasonably necessary to effectuate the underlying statutory objective. Regulations, if they are to be valid, must be reasonable constructions of the statute that is ambiguous on that score as an implied delegation of authority to the agency to determine whether a private right of action is desirable. Id. at 95–96. Professor Stephenson also notes his proposal’s intersection with § 1983 jurisprudence and suggests that his proposal counsels in favor of recognizing agencies’ ability to create rights enforceable § 1983 as well. Id. at 163–66.

327. Agency regulations must of course comply with the Administrative Procedure Act, 5 U.S.C. § 500 (2005). For example, Section 553(c) of the APA requires that rules adopted contain a “concise general statement of their basis and purpose.” Many statutes are also more specific as to the support that agencies must produce for the rules they have adopted. See, e.g., The Clean Air Act, 42 U.S.C. § 7607(d)(6)(C) (2005) ("the promulgated rule may not be based (in part or whole) on any information or data which has not been placed in the docket . . . ").


330. Chevron, 467 U.S. at 844.
enabling statute, but given the Supreme Court’s recent heightened emphasis on congressional intent in the rights-creation context, it only makes sense that such a regulation must be not only reasonable, but reasonably necessary to achieve the statutory goal. Raising the reasonableness bar in this way for regulations that purport to create privately enforceable rights incorporates the important value of congressional intent as feature of § 1983 jurisprudence in the sense that, given the importance of congressional intent, the authority to create such rights should not be presumed where it would not be reasonably necessary. This approach could also be understood as the strictest form of *Chevron* review in Professor Zellmer’s framework.

In deciding whether a right enforceable under § 1983 is reasonably necessary, the court should consider the balance of the advantages and disadvantages of private enforcement, and whether the agency has struck the right balance under a substantial evidence standard. The court should consider whether the likelihood of greater and more efficient enforcement, overcoming agency slack, and the desirability of various innovations in approaches to enforcement outweigh the risks of excessive enforcement or interference with public enforcement schemes that may be more efficient under the circumstances without private intervention.

The comprehensiveness of any alternative enforcement scheme, a factor which in § 1983 cases rebuts the presumption that a right has been created, should serve as a reference point in this assessment, playing its role as a rebuttal fact a little bit differently than usual. A fairly comprehensive alternative enforcement scheme would be evidence of agency slack if, historically, violations are documented and enforcement is limited. If so, the balance tips in favor of a finding that privately enforceable rights are reasonably necessary. On the other hand, if the alternative enforcement scheme is comprehensive and documentation does not demon-

331. *Id.*
332. See *supra* Part III.B.
333. This is so because *Chevron* is itself a presumption as to congressional intent. See Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 740–41 (1996) ("We accord deference to agencies under *Chevron*, not because of a presumption that [agencies] drafted the provisions in question, or were present at the hearings, or spoke to the principal sponsors; but rather because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows."). Therefore, the explicit intent language used by the Court in *Sandoval* and *Gonzaga* suggests that the presumption should operate only where it would be reasonably necessary to achieve the statutory goal.
334. See *supra* notes 311–13, and accompanying text.
strate agency slack, then this weighs against a finding of reasonable necessity.

Applied to Title VI, this analysis, however potentially useful, does not necessarily yield an easy answer. This is so because the "tension" between Title VI and its implementing disparate impact regulations, may lead some courts to conclude that this proposed analysis is precluded in the first instance. Because Title VI has been held to prohibit only intentional discrimination, some courts might find that disparate impact regulations do not serve the same statutory goal or are not reasonably necessary to serve that statutory goal. However, to the extent that the regulations have been held valid, reasonable constructions of Title VI, this "hiccup" in Title VI jurisprudence does not preclude analysis of whether particular Title VI regulations or future regulations are supported by substantial evidence sufficient to demonstrate that their private enforceability is reasonably necessary to serve the statutory goal.

Generally, however, the time and expertise that agencies can bring to bear on complex issues suggests that they will be more sensitive to the intricacies of injustice—that they will in many instances be able to identify and proscribe conduct that would not otherwise have been identified as responsible for institutional racism. Furthermore, there is no principled reason why agencies cannot exercise the power of rights-creation effectively and responsibly, and a conclusion that they cannot risks abandoning effective tools that could bring us closer to eradicating racial discrimination. Therefore, it is time to recognize federal administrative agencies as "journeymen" in the job of calibrating compliance with federal anti-discrimination standards, not as mere "apprentices" without the authority to act. In this way, courts and agencies can demonstrate their "partnership in furtherance of the public interest . . . as collaborative instrumentalities of justice" by bringing principled judicial review of expert agency attention to bear on lingering racial inequality.

V. Conclusion

The war against racial injustice has not been won in America, but rather the battleground has shifted to an institutional setting. Institutional racism, however, is much more difficult to identify and combat because

338. Since regulations "forbid conduct that [the enabling statute] permits." Id. at 285.
339. See Mank, supra note 219, at 519 ("the Supreme Court has indicated in several cases, at least in dicta, and arguably in language deserving precedential value, that agencies may promulgate regulations, pursuant to section 602 of Title VI, that prohibit practices creating unjustified discriminatory effects . . . however, the Supreme Court may soon reject section 602 disparate impact regulations.").
the conditions producing it are often complex. In the context of education, for example, nuanced issues such as the effect that school site selection and attendance zones have on communities of color were recognized by the Supreme Court in the wake of Brown v. Board of Education. These factual issues are important to address so that institutional racism in the form of school segregation can be prevented, but challenges based on these circumstances can no longer be brought in federal court in many places because desegregation orders are being terminated. This unfortunate gap in the law is mirrored to some extent by HUD regulations that address housing discrimination, but which are ineffective because they cannot be privately enforced and federal oversight and enforcement is lacking.

It is clear that federal administrative agencies have the time and expertise to address the specific factual circumstances responsible for institutional racism. In fact, some of the regulations already enacted under Title VI of the 1964 Civil Rights Act specifically address the examples of school segregation and housing discrimination herein provided. These regulations, if privately enforced under 42 U.S.C. § 1983, could go a long way toward achieving the goal of true racial justice in America, and the continued refusal to allow them to be enforced is a distressing example of what Judge Berzon calls the "uncoupling" of rights from remedies. Moreover, if agencies used the power of rights-creation responsibly, they could very effectively target institutional racism in a way that has not heretofore been achievable.

However, courts are averse to recognizing agency creation of rights enforceable under § 1983. This is clear from the case of Save our Valley v. Sound Transit, which exemplifies both the factual need for regulatory rights-creation as well as the error in refusing to recognize that power on the part of agencies. It may be that the Supreme Court has held that implied rights of action can only be created by Congress, and that the first step in determining whether a statute has created an implied right of action is the same as determining whether a statute creates a right enforceable under § 1983. However, there are important differences between implied rights of action and § 1983 that preclude the inferential leap that only Congress can create rights enforceable under § 1983. Most importantly, § 1983 does not require a finding of congressional intent to create a private remedy, which is the overwhelming focus of the doctrine of implied rights of action. Instead, § 1983 is specific congressional intent to afford a remedy for any deprivation of rights secured by federal law, and it is to be broadly construed. For these reasons, a more considered analysis of whether agencies can and should create rights privately enforceable under § 1983 should be undertaken.
The primary argument against agency rights-creation, the undead nondelegation doctrine, provides no basis for arguing that it is something only Congress can do. Although the doctrine was recently reaffirmed, it is so unsettled and unmanageable that it is clear to many that the real issue of delegation is addressed by canons of construction that contemplate the important values served by the metaphor of nondelegation, but realistically focus on controlling the discretionary lawmaking authority that is routinely delegated to administrative agencies. In this sense, the *Chevron* doctrine is a valuable tool in constraining this discretion, and a variation of it should be used to review agency rules that purport to create rights enforceable under § 1983. Such a *Chevron*-inspired canon of construction would require a reviewing court to first consider whether rights-creation exceeds the authority given to an agency by the enabling statute. If the statute expressly prohibits the creation of rights privately enforceable under § 1983, or if it impliedly constrains agency power to do so, then the rule purporting to create § 1983 rights is invalid. If, on the other hand, there is no preclusion, then the court should move to the second step and ask whether the regulation is reasonable. This general question should be elaborated in the rights-creation context to consider whether privately enforceable rights are reasonably necessary to effectuate the statutory goal in light of specific evidence and the efficacy of alternative enforcement mechanisms.

Recognition of the reality of institutional racism and the attributes of the modern administrative state strongly suggest that administrative agencies ought not to play "apprentice" to Congress in the context of rights-creation in order to ensure achievement of statutory antidiscrimination goals. Rather, they should operate as "journeymen," exercising the power to create rights responsibly, but with adequate supervision that constrains their discretion appropriately.