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Can Federal Agencies Authorize Private Suits Under Section 1983?

A THEORETICAL APPROACH

*Brian D. Galle**

I. INTRODUCTION

Although since 1980 the Supreme Court has recognized that private suits against state actors can be premised on violations of “the laws” of the United States,¹ no one seems quite sure whether “laws” include regulations or executive orders.² The circuit courts have disagreed.³ Indeed, a high-

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[†] A.B. Harvard University, J.D. Columbia University School of Law. I am grateful for the generous grants of time, advice, and support I have received from readers of earlier drafts, who number among them Michael Dorf, Robert Katzmann, Stephen Orlofsky, Jim Pfander, David Schizer, and Peter Strauss, as well as a number of my hapless friends, such as Jon Connolly, Maria Gillen, Jeff M. Hauser, Aziz Huq, and Kaimi Wenger. I also must thank Kent Greenawalt, Mark Tushnet, and my supervisors at the Office of Legal Counsel, especially Jonathan Cedarbaum, Robert Delahunty, and Trevor Morrison, for many fruitful conversations on related issues. (Almost) needless to say, all errors are my own, the views here do not represent the views of the United States, etc.

¹ See 42 U.S.C. § 1983 (2000); *Maine v. Thiboutot*, 448 U.S. 1, 4-8 (1980). Section 1983 provides that:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[.]

² See, e.g., *Alexander v. Sandoval*, 532 U.S. 275, 298-301 (2001) (Stevens, J., dissenting) (arguing that § 1983 is available to enforce disparate impact regulations promulgated pursuant to Title VI of the Civil Rights Act, 42 U.S.C. 2000d (2000));

profile case of “environmental racism,” decided in late 2001 by the Third Circuit, has drawn renewed attention to this remarkably broad and unsettled question.⁴

The stakes are large. Already, the Supreme Court has recognized that the fate of wide swaths of anti-discrimination law may rest on the availability of the key federal authorizing statute, 42 U.S.C. § 1983, to enforce suits alleging disparate impact in violation of federal regulations.⁵ Indeed, § 1983 allows private individuals or entities to argue in federal or state court that virtually any state or local policy is inconsistent with federal law. Thus, the question of who will enforce key provisions of nearly every policy initiative shared by the states and the federal government – from Medicaid and Social Security to subsidized housing – is also up for grabs.

Despite its prominent policy implications, the theoretical literature on the use of § 1983 is surprisingly underdeveloped. The Third Circuit’s opinion, for instance, although heavily dependent on a particular view of statutory interpretation, never engages the possibility that alternative views of the right way to read a statute would produce different outcomes.⁶

Wright v. City of Roanoke Redev. & Hous. Auth., 479 U.S. 418, 437-38 (1987) (O’Connor, J., dissenting) (expressing doubt that “administrative regulations alone” can create a right of action under § 1983).

³ Compare *S. Camden Citizens in Action v. N.J. Dep’t of Env’tl. Prot.*, 274 F.3d 771, 790 (3d Cir. 2001), *Banks v. Dallas Hous. Auth.*, 271 F.3d 605, 610 n.4 (5th Cir. 2001), *Harris v. James*, 127 F.3d 993, 1008-09 (11th Cir. 1997), and *Smith v. Kirk*, 821 F.2d 980, 984 (4th Cir. 1987), with *San Lazaro Ass’n, Inc. v. Connell*, 286 F.3d 1088, 1098-1102 (9th Cir. 2002) (en banc), *Powell v. Ridge*, 189 F.3d 387, 403 (3d Cir. 1999), and *Loschiavo v. City of Dearborn*, 33 F.3d 548, 552-53 (6th Cir. 1994).

⁴ See *S. Camden Citizens*, 274 F.3d 771.

⁵ See *Sandoval*, 532 U.S. at 300 (Stevens, J., dissenting). The disparate impact regulations are a crucial component of debates about many other important areas, including special education, school financing, and racial profiling, not to mention environmental justice. See Jennifer C. Braceras, *Killing the Messenger: The Misuse of Disparate Impact Theory to Challenge High-Stakes Educational Tests*, 55 VAND. L. REV. 1111 (2002) (special education); Daniel J. Losen & Kevin G. Welner, *Disabling Discrimination in Our Public Schools: Comprehensive Legal Challenges to Inappropriate and Inadequate Special Education Services for Minority Children*, 36 HARV. C.R.-C.L. L. REV. 407, 409-10 (2001) (special education); Sarah S. Erving, Note & Comment, *New York’s Education Finance Litigation & the Title VI Wave: An Analysis of Campaign for Fiscal Equity v. State*, 10 J.L. & POL’Y 271, 272 (2001) (school financing); Brandon Garrett, *Remediating Racial Profiling*, 33 COLUM. HUM. RTS. L. REV. 41, 73 & n.107 (2001) (racial profiling); Julia B. Latham Warsham, *Disparate Impact Lawsuits Under Title VI, Section 602: Can a Legal Tool Build Environmental Justice?*, 27 B.C. ENVTL. AFF. L. REV. 631, 632-33 (2000) (environmental justice).

⁶ See *infra* Part II.C.

This Article offers a few thoughts on the theory of regulatory enforcement under § 1983. Section 1983, I argue, itself authorizes federal agencies to make their regulations privately enforceable. In recent years, the Supreme Court has announced that federal norms are unenforceable in the absence of clear statutory authorization – a “clear statement rule” for private rights of action.⁷ Drawing on key tenets of modern statutory interpretation, I claim that the plain text of § 1983 allows many federal regulations to meet this test. Because § 1983 has an important function in coordinating state regulatory efforts with federal law, a court approaching the words of the statute must have in mind both administrative law principles as well as the idea of “federalism,” the notion that even in federally-initiated programs there should be policy-making space left for states to experiment and innovate. This Article argues that both factors weigh so clearly in favor of allowing federal agencies to designate their own regulations for private enforceability that any reasonable court reading § 1983 would presume that the word “laws” includes regulations.

On the administrative end, the executive branch is generally entrusted, as part of its power to enforce the laws, with filling in policy gaps left by unclear statutory text.⁸ Under the so-called “*Chevron* doctrine,” federal courts must defer to any suitably authoritative, reasonable administrative interpretation of federal law.⁹ It is intuitively appealing to say that *Chevron* itself resolves the § 1983 question in favor of allowing suits predicated on regulations. Under that view, the choice to superintend a statute through agency personnel, or by delegation to private litigants, is simply a choice of enforcement methods best left to the executive. However, as the Court has become increasingly reluctant to allow private rights of action without express congressional authorization, *Chevron* deference has come into tension with the private right of action clear statement rule.

The resolution, I argue, depends largely on one’s views about statutory interpretation. For an intentionalist, willing to find clarity in widely held but unwritten congressional

⁷ See *Sandoval*, 532 U.S. at 287-88 (citing *Cort v. Ash*, 422 U.S. 66, 78 (1975)).

⁸ *Martin v. Occupational Safety & Health Review Comm’n*, 499 U.S. 144, 150-51 (1991); *Chevron U.S.A. Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 843 (1984) (citing *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)).

⁹ *Id.*

assumptions, the very prevalence of *Chevron* answers the question in all but the hardest of cases. By contrast, for a textualist, disinclined to credit unwritten assumptions about anything except which language we're speaking, *Chevron's* judgment about relative institutional competence might not translate to the reading of statutes that create private rights of action. However, *Chevron* deference is not the only canon of construction that courts should consider when construing the statute.

In addition to *Chevron* deference, federalism and its canons of construction play a crucial role. It has been common practice on the Court to assume (wrongly) that, because § 1983 permits federal courts to issue orders to state bureaucrats, any expansion of § 1983 jurisdiction necessarily diminishes state power. For example, Chief Justice Rehnquist's opinion for the Court in *Gonzaga*, a case tightening slightly the standard for implying a cause of action under § 1983, rested in part on the claim that federalism concerns favor narrow readings of that statute.¹⁰ These assumptions fail to recognize that § 1983 presents unique advantages for states in their relationship to the federal government. Emerging scholarship in the field of joint federal-state administrative law suggests that collaborative vertical arrangements between federal and state agencies often empower states. Section 1983 litigation makes these arrangements possible, both by offering a viable enforcement mechanism to secure the deals between the agencies and other actors, and by incentivizing states to develop innovative alternatives to being sued by private parties.

At the same time, a common fear of cooperative state/federal regulatory ventures is that the combined bureaucracy of both governments, perhaps regulating with the arrogance and assurance of expertise and political insulation, will slip the ordinary political controls of legislative and presidential or gubernatorial oversight. Present statutory and constitutional solutions to this problem, such as due process rational-basis or state Administrative Procedure Act review, are limited by the institutional handicaps of the federal

¹⁰ See *Gonzaga Univ. v. Doe*, 536 U.S. 273, 286-87 (2002) (citing *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989)). For an extended discussion of the *Gonzaga* opinion, see Sasha Samberg-Champion, Note, *How to Read Gonzaga: Laying the Seeds of a Coherent Section 1983 Jurisprudence*, 103 COLUM. L. REV. (forthcoming Nov. 2003).

judiciary." Uncertain where heightened review will further popular political will or the agency's policy agenda, and unable to gather empirical data about the combined bureaucracy's effectiveness, courts usually (and wisely) review the substance (as opposed to the procedure) of agency decisions only gingerly. If § 1983 suits are only available when a federal agency authorizes them, though, the courts are relieved of these problems. Indeed, if one thinks that states have political influence on the upper reaches of federal agencies, one would expect the availability of § 1983 pursuant to federal regulations to protect, not undermine, state autonomy. Even if states lack that power, a court presiding over § 1983 litigation is more solicitous of the states' autonomy than agency regulators need be. Perhaps more importantly, many § 1983 suits could be brought in state court, where the state has the power to choose how best to ensure the political accountability of its judges. On balance, far from weakening states, agency-authorized § 1983 suits would significantly enhance state sovereignty.

Thus, in interpreting § 1983, courts should apply two critical canons of construction. The first, epitomized by the Supreme Court's decision in *Chevron*,¹² favors executive control over the means for enforcing federal law. The second, identified most often with the Court's decision in *United States v. Bass*,¹³ emphasizes that statutes should be read with a background presumption against shifting power away from states. Where

¹¹ By "due process rational-basis review," I mean federal constitutional challenges to state regulatory actions based on the theory that the state activity is not rationally related to its objective. See, e.g., *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 314-15 (1976) (per curiam); *Johnson v. Robison*, 415 U.S. 361, 376 (1974); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487-88 (1955); Michael Asimow, *The Fourth Reform: Introduction to the Administrative Law Review Symposium on State Administrative Law*, 53 ADMIN. L. REV. 395, 397 (2001). For a leading examination of the shortcomings of this form of due process review, see Ann Woolhandler & Michael G. Collins, *Judicial Federalism and the Administrative States*, 87 CAL. L. REV. 613, 681-700 (1999).

Due process challenges to state administrative action may also take the form of claims for deprivations of "liberty" or "property" interests defined by state law. See, e.g., *Parratt v. Taylor*, 451 U.S. 527, 529 & n.1 (1981); Edward L. Rubin, *Due Process and the Administrative State*, 72 CAL. L. REV. 1044 (1984). But these suits largely depend upon, rather than seek to unsettle, underlying state law and regulations. Thus, they are mainly useful for attacking improper applications of (or failures to apply) state law. Since my interest is mainly with the consistency of state regulation with federal law, I do not give this variety of claim much attention. Others, however, have commented extensively on the troubled theory underlying the Court's present approach. See, e.g., Rubin, *supra*, at 1082-1130.

¹² *Chevron*, 467 U.S. 837.

¹³ 404 U.S. 336, 349-50 (1971).

an agency chooses to allow private suits to enforce its own regulations, and it appears that an intent to allow private litigation can fairly be imputed to Congress in light of federalism concerns, courts should recognize a right of action under § 1983.

The sections that follow provide supporting arguments and more elaborate content to these general principles. Part II provides a short summary of how courts go about deciding whether a statute is enforceable under § 1983, and how three circuits went wrong when they decided that agency regulations had little or no role to play in that process. Part III explores what the principles of *Chevron* reveal about whether the word "laws" in § 1983 includes regulations clearly enough to satisfy the clear statement rule. Since Part III concludes that *Chevron* is unlikely to satisfy everyone, especially the most exacting of textualists, Part IV argues that federalism concerns also suggest that "laws" does include regulations, at least for some purposes. Part V examines some special problems of private supervision of state regulators, and explains how those problems could be largely blunted by federal agency, or joint federal and state agency, control over the availability of private rights of action. That Part also addresses some of the major consequences that flow from the Court's sovereign immunity jurisprudence, perhaps not all of them intended. Finally, the Conclusion considers how a court would go about using regulations to find a private right of action, noting some variances depending on which justifications it accepted or rejected.

II. A BRIEF SUMMARY OF § 1983

This Part offers a short review of the use of § 1983 to enforce both statutory and regulatory federal norms. Judicial implementation of the latter, I note, has been fairly troubled. In the last subsection I consider closely the claim by two courts of appeals that federal regulations are not enforceable under § 1983.

A. *From Thiboutot to Blessing and Gonzaga*

Section 1983 authorizes private rights of action for violations of the “Constitution and laws” of the United States.¹⁴ The “and laws” clause saw little use until the 1970s, when several Supreme Court decisions suggested that it might provide an independent source of federal jurisdiction.¹⁵ *Maine v. Thiboutot*, in 1980, confirmed that suggestion.¹⁶ Over the succeeding two decades or so, the Court has sharpened – and generally narrowed – the criteria for determining whether a particular federal statute is enforceable under § 1983.

In essence, the Court now applies a four-part test, summarized in its opinion in *Blessing v. Freestone*.¹⁷ First, a court must determine that the specific provision in question is intended to benefit the plaintiff.¹⁸ This factor is identical to the first branch of the now – largely obsolete method for discovering an implied right of action: The “text and structure” of the statute in question must demonstrate that Congress intended to confer the particular individual right the plaintiff seeks to enforce upon the particular class of persons or entities to which the plaintiff belongs.¹⁹ Next, the plaintiff must show that the right he or she claims is not so “vague and amorphous” as to escape judicial cognizance.²⁰ The plaintiff’s final burden, and the third prong of the test, is to show that the statute imposes mandatory obligations on states, rather than simply setting goals or standards.²¹ A plaintiff who succeeds in leaping those three hurdles creates a presumption that a private right of action is available.²² Under the fourth prong of the test, that

¹⁴ 42 U.S.C. § 1983 (2000).

¹⁵ See *Owen v. City of Independence*, 445 U.S. 622, 649-50 (1980); *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 700-01 (1978); *Edelman v. Jordan*, 415 U.S. 651, 675-77 (1974); *Rosado v. Wyman*, 397 U.S. 397, 420 (1970); *Greenwood v. Peacock*, 384 U.S. 808, 829-30 (1966). The question also loomed significantly in the background of the Court’s dispute at the end of the decade over the jurisdictional reach of 28 U.S.C. § 1343. See *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600 (1979). For a more comprehensive account of § 1983’s origins and interpretive history, see Cass R. Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. CHI. L. REV. 394, 396-411 (1982).

¹⁶ *Maine v. Thiboutot*, 448 U.S. 1 (1980).

¹⁷ *Blessing v. Freestone*, 520 U.S. 329 (1997).

¹⁸ *Id.* at 340.

¹⁹ *Gonzaga Univ. v. Doe*, 536 U.S. 273, 285-86 (2002).

²⁰ *Blessing*, 520 U.S. at 340-41.

²¹ *Id.* at 341 (citing *Wilder v. Va. Hosp. Ass’n*, 496 U.S. 498, 510-11(1990); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)).

²² *Blessing*, 520 U.S. at 341.

presumption can be rebutted if Congress has withdrawn § 1983 enforcement, either expressly or, by creating an alternate scheme incompatible with private enforcement, impliedly.²³

Section 1983 rights of action, then, have charted something of a middle course between other forms of private suits to enforce federal standards. Under the Court's clear statement rule, most federal statutes are presumptively unenforceable unless Congress states clearly, perhaps expressly, otherwise.²⁴ On the other hand, under the Administrative Procedure Act (APA),²⁵ courts generally presume that they may review any final federal agency action for compliance with federal law.²⁶ Section 1983 shares with the APA a clear textual commitment to judicial review, and serves a similar structural function in ensuring that state agencies comply with federal law.²⁷ That its scope remains narrower than APA review probably stems from federalism-related concerns over subjecting state governments to federal judicial supervision, or perhaps simply from an effort to prevent easy shortcuts around the Supreme Court's attempt at curtailing other private rights of action.²⁸ Nonetheless, § 1983's APA-type function raises an important subsidiary question. Most state agencies carry out their tasks subject not only to federal statutory requirements, but also under the auspices of extensive federal regulation. To what extent, then, does the moderate presumption of judicial enforceability of federal standards extend not only to statutory but also to regulatory requirements on the states? Within the context of § 1983 jurisprudence, how, if at all, should federal regulations relate to the *Blessing* test?

²³ *Id.* (citing *Livadas v. Bradshaw*, 512 U.S. 107, 133 (1994); *Smith v. Robinson*, 468 U.S. 992, 1005 n.9 (1984)).

²⁴ See *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001).

²⁵ 5 U.S.C. §§ 702-706 (2000).

²⁶ See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971); *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967).

²⁷ See Henry Paul Monaghan, *Federal Statutory Review Under Section 1983 and the APA*, 91 COLUM. L. REV. 233, 235 (1991). Other commentators, noting the importance of judicial review to administrative processes, have cautioned that the Supreme Court's view of § 1983 may be too narrow to achieve all the benefits of direct judicial review. See William H. Timbers & David A. Wirth, *Private Rights of Action and Judicial Review in Federal Environmental Law*, 70 CORNELL L. REV. 403, 416-17 (1985).

²⁸ Cf. Keith E. Eastland, Note, *Environmental Justice and the Spending Power: Limits on Using Title VI and § 1983*, 77 NOTRE DAME L. REV. 1601, 1611 (2002) (arguing that "recognition of a § 1983 cause of action would essentially circumvent the Court's [private right of action] holding[s]").

B. *Wright and Confusion in the Lower Courts*

According to conventional understandings of its precedents, the Supreme Court has never taken a definitive position on the relationship of federal regulations to the *Blessing* test.²⁹ On two occasions, though, the Court has looked to regulations to help clarify a statute that might otherwise be too “vague and amorphous” for judicial enforcement.³⁰ As the majority explained in one opinion, *Wright v. Roanoke Redevelopment & Housing Authority*, valid regulations may “defin[e]” otherwise broad statutory concepts, helping to bring them within judicial cognizance.³¹ The dissent emphasized, though, that it is unclear to what extent the majority’s reasoning could extend to other requirements of the *Blessing* test, such as the determination that Congress intended to benefit a particular class of persons.³²

Not surprisingly, then, the Courts of Appeals have divided over the proper reading of *Wright*.³³ A number of lower courts have assumed that regulations can satisfy any of the prongs of the *Blessing* test, including whether Congress intended to benefit the would-be plaintiff.³⁴ Others have said

²⁹ For a very helpful overview of the doctrinal approaches to this question, see Bradford C. Mank, *Using § 1983 to Enforce Title VI’s Section 602 Regulations*, 49 U. KAN. L. REV. 321, 342-53 (2001).

³⁰ See *Wilder v. Va. Hosp. Ass’n*, 496 U.S. 498, 519 (1990); *Wright v. Roanoke Redev. & Hous. Auth.*, 479 U.S. 418, 431-32 (1987).

Arguably, the Court actually did decide as early as 1983 that at least some regulations are generally enforceable under § 1983. See *Guardians Ass’n v. Civil Serv. Comm’n*, 463 U.S. 582, 635-38 & n.6 (1983) (Stevens, J., dissenting). In their separate concurring opinion, Justice Powell and Chief Justice Burger argued that Congress’ creation of express administrative remedies, and the Court’s finding of a private remedy under Title VI only for intentional discrimination, both counseled against finding disparate impact regulations privately enforceable under § 1983. See *id.* at 608 n.1, 610 n.3 (Powell, J., concurring). They seemed to accept Justice Stevens’ premise, however, that § 1983 would be generally available to enforce rules having the force and effect of law. See *id.* There is an argument, therefore, that including Justices Brennan and Blackmun, who both joined Justice Stevens’s opinion, there were at least five justices willing to recognize that valid regulations can support a right of action under § 1983.

³¹ See *Wright*, 479 U.S. at 431-32.

³² See *id.* at 433-38 (O’Connor, J., dissenting).

³³ See *King v. Town of Hempstead*, 161 F.3d 112, 115 (2d Cir. 1998) (per curiam) (noting circuit split).

³⁴ See *San Lazaro Ass’n v. Connell*, 286 F.3d 1088, 1097-1101 (9th Cir. 2002) (en banc); *Wesley Health Care Ctr., Inc. v. DeBuono*, 244 F.3d 280, 284 (2d Cir. 2001); *Indianapolis Minority Contractors Ass’n v. Wiley*, 187 F.3d 743, 751-52 (7th Cir. 1999); *Marie O. v. Edgar*, 131 F.3d 610, 620 & n.17 (7th Cir. 1997); *Doe v. District of Columbia*, 93 F.3d 861, 867 (D.C. Cir. 1996); *Buckley v. City of Redding*, 66 F.3d 188, 192-93 (9th Cir. 1995); *DeVargas v. Mason & Hanger-Silas Mason Co.*, 844 F.2d 714,

that regulations may be consulted only to clarify an otherwise vague or ambiguous statute.³⁵ Finally, a handful of courts have considered explicitly what role regulations should play in the availability of a right of action under § 1983.³⁶ These courts may have been misled to some degree by Justice O'Connor's doubts that "regulations alone" may create a private right of action.³⁷ Yet none of the reported cases involve a *Youngstown*-type situation, where the executive sought to act without legislative authority.³⁸ Each case concerned a regulation validly promulgated pursuant to a federal statute. The right question, and the genuinely difficult question, is whether, on a given requirement, regulations that have the force and effect of law can satisfy the *Blessing* test when the underlying statute by itself does not.³⁹

724 n.19 (10th Cir. 1988); *Samuels v. District of Columbia*, 770 F.2d 184, 199-201 (D.C. Cir. 1985).

³⁵ See *Graus v. Kaladjian*, 2 F. Supp. 2d 540, 542-43 (S.D.N.Y. 1998); *Ceaser v. Pataki*, 2002 WL 472271, at 2-3 (S.D.N.Y. Mar. 26, 2002).

³⁶ See *S. Camden Citizens in Action v. N.J. Dep't of Env'tl. Prot.*, 274 F.3d 771 (3d Cir. 2001); *Banks v. Dallas Hous. Auth.*, 271 F.3d 605, 610 n.4 (5th Cir. 2001); *Kissimmee River Valley Sportman Ass'n v. City of Lakeland*, 250 F.3d 1324, 1327 & n.4 (11th Cir. 2001); *Powell v. Ridge*, 189 F.3d 387, 401-03 (3d Cir. 1999); *Boatman v. Hammons*, 164 F.3d 286, 289 (6th Cir. 1998); *Harris v. James*, 127 F.3d 993, 1008-09 (11th Cir. 1997); *Doe*, 93 F.3d at 881 (Rogers, J., dissenting); *Loschiavo v. City of Dearborn*, 33 F.3d 548, 551 (6th Cir. 1994); *Smith v. Kirk*, 821 F.2d 980, 984 (4th Cir. 1987).

³⁷ *Wright v. City of Roanoke Redev. & Hous. Auth.*, 479 U.S. 418, 437 (1987) (O'Connor, J., dissenting); see, e.g., *Smith*, 821 F.2d at 984 (citing *Wright*, 479 U.S. 418); *Campaign for Fiscal Equity, Inc. v. New York*, 744 N.Y.S. 2d 130, 147-48 (App. Div. 1st Dep't 2002) (same), *aff'd in part as modified, rev'd in part*, N.Y. Slip Op. 15615, 2003 WL 21468502 (N.Y. June 26, 2003).

³⁸ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Even during the period when the Court was open to implied rights of action, see *Cort v. Ash*, 422 U.S. 66, 78 (1975), the Courts of Appeals were confident that executive orders, with no underlying authority in an act of Congress, could not give rise to a private suit. See *Dreyfus v. Von Finck*, 534 F.2d 24, 29 (2d Cir. 1976) (collecting cases). That presumption is, if anything, more clearly established now that Congress' role as the exclusive source of federal jurisdiction is more in vogue. See *Zhang v. Slattery*, 55 F.3d 732, 747-48 (2d Cir. 1995); *Chen Zhou Chai v. Carroll*, 48 F.3d 1331, 1338 (4th Cir. 1995); *Facchiano Const. Co. v. United States Dep't of Labor*, 987 F.2d 206, 210 (3d Cir. 1993); *In re Surface Mining Litigation*, 627 F.2d 1346, 1356 n.7 (D.C. Cir. 1980); Note, *Enforcing Executive Orders: Judicial Review of Agency Action Under the Administrative Procedure Act*, 55 G.W. LAW. REV. 659, 685 & n.156 (1985). My point, then, is that Justice O'Connor's concern is largely a straw-man position; few would seriously contend that an agency, without any underlying congressional authority, can create rights of action. *But cf.* John E. Noyes, *Executive Orders, Presidential Intent, and Private Rights of Action*, 59 TEX. L. REV. 837, 860-62 (1981) (arguing that the President could justify grants of jurisdiction in emergency situations).

³⁹ The Supreme Court has held that regulations having the "force and effect" of law can serve the same function as a statute. See *Chrysler Corp. v. Brown*, 441 U.S. 281, 304-06 (1979). A regulation has the force and effect of law if it is validly promulgated and has some "nexus" with – that is, is a reasonable extrapolation from–

Posed in just that way, four circuits have definitively answered the question. The Sixth Circuit appears willing to look to regulations for any of the four prongs of *Blessing*,⁴⁰ while the Fourth and Eleventh Circuits seem to look to regulations only to define vague and amorphous statutes.⁴¹ After initially appearing to agree with the Sixth Circuit,⁴² the Third Circuit reversed course, and may be unwilling to consider regulations for any of the *Blessing* factors.⁴³ The rationales of the Eleventh Circuit, in *Harris v. James*,⁴⁴ and of the Third Circuit, in *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*,⁴⁵ are a bit opaque, and require closer analysis.

C. *Section 1983 Gets Cement Shoes: Harris, South Camden Citizens, and Sandoval*

Both *Harris* and *South Camden Citizens* involved efforts by private plaintiffs to compel state officers to comply with federal regulations. Willie Mae Harris represented a class of Alabama Medicaid recipients who were unable to transport themselves to their Medicaid providers.⁴⁶ Although the Social Security Act itself was silent on whether states were required to provide transportation services, the U.S. Department of Health and Human Services (HHS) had issued a regulation conditioning issuance of federal funds on the state's guarantee that its Medicaid agency would get Medicaid recipients to and from their providers.⁴⁷ HHS claimed that it had authority to issue the transportation regulation under its general power to

the underlying statute. *See id.*

⁴⁰ *See Boatman*, 164 F.3d at 289-90; *Loschiavo*, 33 F.3d at 551-52.

⁴¹ *See Kissimmee*, 250 F.3d at 1327 & n.4; *Harris*, 127 F.3d at 1008-09; *Smith*, 821 F.2d at 984.

⁴² *See Powell v. Ridge*, 189 F.3d 387, 401-03 (3d Cir. 1999).

⁴³ *See S. Camden Citizens in Action v. N.J. Dep't of Env'tl. Prot.*, 274 F.3d 771, 790 (3d Cir. 2001). As the dissent in *South Camden Citizens* observed, it is not immediately obvious why the panel was not bound by the Third Circuit's recent contrary precedent. *See id.* at 793-99 (McKee, J., dissenting).

⁴⁴ 127 F.3d 993 (11th Cir. 1997).

⁴⁵ 274 F.3d 771 (3d Cir. 2001). While this Article was being edited, the Ninth Circuit decided *Save Our Valley v. Sound Transit*, 335 F.3d 932 (9th Cir. 2003). *Save Our Valley*, without citing prior Ninth Circuit opinions expressly applying *Blessing* to the terms of federal agency regulations, *see, e.g.*, *San Lázaro Ass'n v. Connell*, 286 F.3d 1088, 1097-1101 (9th Cir. 2002) (en banc), adopted the Third Circuit's reasoning in *South Camden Citizens*. *See Save Our Valley*, 335 F.3d at 936-44.

⁴⁶ *Harris v. James*, 896 F. Supp. 1120, 1122 (M.D. Ala. 1995).

⁴⁷ *See Harris*, 127 F.3d at 996 (citing 42 C.F.R. § 431.53 (1994)).

require that states provide "such safeguards as may be necessary to assure that . . . care and services will be provided . . . in . . . the best interests of the recipients."⁴⁸ The Eleventh Circuit concluded that this requirement, along with other similarly general provisions of the Social Security Act, were by themselves too vague, and not sufficiently mandatory, to be enforceable under § 1983, leaving the regulation as the only possible source of law for the plaintiffs.⁴⁹

Similarly, in *South Camden Citizens*, the plaintiffs were residents of a neighborhood sited for a new cement factory.⁵⁰ Before the factory could open, the New Jersey Department of Environmental Protection (NJDEP) had to issue the factory owners a permit. When the NJDEP issued the permit, South Camden Citizens sued, arguing that the federal Environmental Protection Agency's (EPA) regulations required the state agency, before issuing the permit, to conduct a "disparate impact" study to determine whether the factory's emissions would disproportionately burden minority communities (South Camden is over ninety percent Black and Hispanic).⁵¹ The EPA's regulation was intended to enforce Title VI of the Civil Rights Act of 1964, which prohibits recipients of federal funding from discriminating based on race.⁵² While the plaintiffs' suit was pending, the Supreme Court decided that Title VI did not authorize private suits to enforce federal "disparate impact" regulations.⁵³ The plaintiffs then argued that the EPA's regulations were also enforceable under § 1983.⁵⁴

Both courts found that the substantive requirements of the relevant federal regulations could not be enforced under § 1983. The courts held that a regulation may only serve as the basis for a private suit under § 1983 when it affects substantially the same set of acts, or "obligations," as its underlying statute.⁵⁵ In that situation, according to the two

⁴⁸ *Id.* at 1005 (citing 42 U.S.C. § 1396a(a)(19) (1994)).

⁴⁹ *See id.* at 1010-11.

⁵⁰ *Camden Citizens in Action v. N.J. Dep't of Env'tl. Prot.*, 274 F.3d 771, 774-75.

⁵¹ *Id.* at 774-76.

⁵² 42 U.S.C. § 2000d (2000).

⁵³ *S. Camden Citizens*, 274 F.3d at 776.

⁵⁴ *Id.*

⁵⁵ *See id.* at 790; *Harris v. James*, 127 F.3d 993, 1008-09 & n.20 (11th Cir. 1997).

courts, the agency is merely “defin[ing]” a statutory right.⁵⁶ On the other hand, when a regulation affects conduct not covered by statute, it is “creat[ing] a right that Congress has not,”⁵⁷ and cannot satisfy the *Blessing* test.

Although the source of this principle was a bit mysterious at the time of *Harris*, by the time the Third Circuit decided *South Camden Citizens*, the Supreme Court had decided *Alexander v. Sandoval*.⁵⁸ *Sandoval* held that “[l]anguage in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not.”⁵⁹ Apparently, an agency “creates” a right when it attempts to regulate conduct that would not have been affected by the underlying statute.⁶⁰

⁵⁶ *S. Camden Citizens*, 274 F.3d at 788.

⁵⁷ *Id.* at 787.

⁵⁸ 532 U.S. 275 (2001).

⁵⁹ *Id.* at 291.

⁶⁰ Justice Scalia’s opinion offers no real explanation for this holding. The best the Court can do is to cite to *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 173 (1994), cited in *Sandoval*, 532 U.S. at 285-86. However, *Central Bank* depended not on general rules of administrative law, but rather on particularized policy and linguistic considerations going to the scope of liability under the Securities Exchange Act of 1934. See *id.* at 174-77. As the Court explained, “It is inconsistent with settled methodology in § 10(b) cases to extend liability beyond the scope of conduct prohibited by the statutory text.” *Id.* at 177 (emphasis added). Indeed, Justice O’Connor’s offer of a similar theory in an earlier case had attracted only four votes. See *Guardians Ass’n v. Civil Serv. Comm’n of City of N.Y.*, 463 U.S. 582, 612-15 (1983) (O’Connor, J., concurring); *id.* at 611 n.5 (Powell, J., concurring). Justice O’Connor’s opinion relied primarily on a securities case, *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 212-14 (1976), in which the Court had observed that the power of a regulation “cannot exceed the power granted the Commission by Congress.” *Id.* at 214. The *Ernst* Court went on to observe that, while the underlying statutory text was limited to willful conduct, the SEC had enacted regulations affecting even negligent breaches of duty. *Id.* at 206-12. The Court never addressed whether the regulation was invalid because, as Justice O’Connor seemed to think, it affected conduct not strictly targeted by the authorizing statute, or simply because penalties on negligent conduct were an unreasonable extension or outright contradiction of the more limited statutory text.

South Camden Citizens gamely attempts to justify the conduct rule by arguing that it is “of paramount importance that Congress intended to create such a right.” 274 F.3d at 788 (emphasis added). But it is still unclear why ordinary restrictions on the reasonableness and lawfulness of an agency’s activities are not enough to account for what, by its terms, appears to be a garden-variety non-delegation concern. See *infra* text accompanying notes 102-109. For example, *Sandoval* and *South Camden Citizens* do not offer any convincing argument why an agency’s determination to cover some conduct not explicitly targeted by an underlying statute is not part of the agency’s power to enforce the statute. See John Arthur Laufer, Note, *Alexander v. Sandoval and its Implications for Disparate Impact Regimes*, 102 COLUM. L. REV. 1613, 1635-40 (2002). Even Congress, which according to the Court is limited by the strictures of the Tenth and Eleventh Amendments, can enact laws that “remedy or prevent unconstitutional actions,” notwithstanding that the targeted action is not itself unconstitutional. *City of Boerne v. Flores*, 521 U.S. 507, 519-20 (1997). Thus, the

But what should courts do with a statute that delegates to an agency the power to define, within certain broad parameters, the conduct that must be regulated in order to achieve statutory goals? *Sandoval* allows for that possibility, noting that “when a statute has provided a general authorization for private enforcement of regulations, it may perhaps be correct that the intent displayed in each regulation can determine whether or not it is privately enforceable.”⁶¹ Depending upon how one reads “laws,” § 1983 may well provide “a general authorization for private enforcement of regulations.”⁶² Nonetheless, both *Harris* and *South Camden Citizens*, by insisting that a *Blessing* search for rights-creating language be limited to statutes, presume that the power to create a right of action either is not delegable, or that, by the use of “laws” in § 1983, Congress did not, in fact, delegate it. However, as the following Parts illustrate, both presumptions are difficult to defend.

Court’s earlier suggestion, in *Musick, Peeler & Garrett v. Employers Ins. of Wausau*, 508 U.S. 286, 291-92 (1993), that a *court* should not imply a right to contribution when contribution would extend liability to conduct not covered by the underlying statute, does not support the outcome in *Sandoval*. It is one thing to say that courts cannot expand the coverage of a statute; it is quite another to say that the executive, which is charged by the Constitution with enforcing Congress’ laws, cannot.

Of course, one can always say that permitting some conduct to come within an existing right of action is not part of an agency’s enforcement powers. The question for the *Sandoval* court, however, is: Why not? As I suggest later in this Article, rights of action that exist at the sufferance of a federal agency are equally infused with agency accountability and expertise as any other enforcement choice. *See infra* text accompanying notes 244-275. However, for reasons I discuss in a moment, my argument can be reconciled with *Sandoval*.

⁶¹ *Sandoval*, 532 U.S. at 291.

⁶² For example, the word “laws” in the statutory phrase, “arising under the Constitution, laws, or treaties of the United States,” 28 U.S.C. § 1331 (2000), has often been read to include regulations and executive orders, or at least those executive enactments having the “force and effect of law.” *See, e.g.,* *Chasse v. Chasen*, 595 F.2d 59, 62 (1st Cir. 1979); *Murphy v. Colonial Fed. Sav. & Loan Ass’n*, 388 F.2d 609, 615 (2d Cir. 1967) (Friendly, J.); *Farkas v. Tex. Instrument*, 375 F.2d 629, 632 & n.1 (5th Cir. 1967); *Farmer v. Philadelphia Elec. Co.*, 329 F.2d 3, 3 (3d Cir. 1964). The federal habeas corpus statute, which grants federal jurisdiction over writs challenging “custody in violation of the Constitution or laws or treaties of the United States,” 28 U.S.C. § 2241(c)(3) (2000), has been interpreted to include challenges to federal regulations. *See Jean v. Nelson*, 472 U.S. 846, 849, 857 (1985) (avoiding constitutional question by directing District Court, on remand, to consider whether INS had complied with its own regulations in denying parole to § 2241 petitioner). And the Supreme Court has from time to time read the word “laws” outside the jurisdictional context to include regulations, as well. *See, e.g., Md. Cas. Co. v. United States*, 251 U.S. 342, 349 (1920).

III. CHEVRON AND § 1983

This Part argues that the assumptions of the *Harris* and *South Camden Citizens* courts were neither inevitable nor particularly well considered. The first subsection examines the *Chevron* doctrine and notes that even if Article I of the Constitution makes Congress the ultimate source of law authorizing private suits, that power is almost certainly delegable. Implicitly, then, the claims of the two courts depend not on their reading of the Constitution, but on what prove simply to be the courts' assumptions about what Congress intended when it enacted § 1983. That is, the courts of appeals in *Harris* and *South Camden Citizens* presumed that even *Chevron's* pervasive and powerful unwritten assumption in favor of executive control over statutory enforcement is inapplicable unless written explicitly on the face of the statute. Whether one agrees with that view likely depends on what one believes to be the best way to read a statute. Thus, the second subsection analyzes how the predominant modern theories of statutory interpretation would tackle the problem. Ultimately, most would produce outcomes different from the decisions in *Harris* and *South Camden Citizens*, although some textualists might concur with those opinions.

A. *The Chevron Challenge to Harris and South Camden Citizens*

The rationale of *Harris* and *South Camden Citizens* is fundamentally textualist. Relying on dicta from *Sandoval*,⁶³ the *South Camden Citizens* court claimed that "language in a regulation . . . may not create a right that Congress has not."⁶⁴ *Sandoval*, in turn, insisted on the clear statement rule: Private rights of action may have their origin only in the clear text of congressionally-enacted statutes.⁶⁵ That rule, Justice Scalia and others have said, is necessary to protect the role of Congress as the sole authoritative source of law giving rise to private rights of action.⁶⁶

⁶³ 532 U.S. 275 (2001).

⁶⁴ *S. Camden Citizens*, 274 F.3d at 778. *Harris* takes a similar textualist turn, although less explicitly than *South Camden Citizens*.

⁶⁵ See *Sandoval*, 532 U.S. at 286-87.

⁶⁶ See *Thompson v. Thompson*, 484 U.S. 174, 191-92 (1988) (Scalia, J., concurring); *Cannon v. Univ. of Chicago*, 441 U.S. 677, 742-49 (1979) (Powell, J., dissenting).

As a general principle, the clear statement rule for rights of action has some merit. There is a credible argument that Article I gives Congress sole responsibility for opening or closing the doors of the federal courts – arguably including state courts hearing federal actions.⁶⁷ The clear statement rule all but guarantees that those doors will swing open only at the command of both houses of Congress and the President, or a supermajority of both houses.⁶⁸ But the clear statement rule seems insignificant when it comes to finding that a particular statute should be enforceable under § 1983 precisely because § 1983 itself provides the necessary clear statutory text.⁶⁹ Nor has there ever been a serious claim that the power to authorize private rights of action cannot be delegated, within reasonable bounds, to the executive.⁷⁰

Thus, by applying the clear statement rule only to the underlying statute, the *South Camden Citizens* court omitted necessary intermediate questions: Does the text of § 1983 satisfy the clear statement rule for any regulation that satisfies the *Blessing* test?⁷¹ And does Congress' use of the word "laws" in § 1983 include regulations clearly enough to satisfy the textualist/Article I demands of the clear statement rule? These

⁶⁷ See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95, 101 (1998); Akhil Reed Amar, *Taking Article III Seriously: A Reply to Professor Friedman*, 85 NW. U. L. REV. 442 (1991); Laura S. Fitzgerald, *Is Jurisdiction Jurisdictional?*, 95 NW. U. L. REV. 1207, 1273-74 (2001). For a laundry list of older writings making (or assuming) a similar claim, see Barry Friedman, *A Different Dialogue: The Supreme Court, Congress, and Federal Jurisdiction*, 85 NW. U. L. REV. 1, 1 n.4 (1990).

⁶⁸ See Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1199, 1221-22 (1982) (explaining that under the "formalist thesis," courts "invade the legislative domain by creating remedies that Congress has not provided" explicitly in statutory text).

⁶⁹ See *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 508 n.9 (1990); Mank, *supra* note 29, at 323; Monaghan, *supra* note 27, at 251; Sunstein, *supra* note 15, at 415-16.

⁷⁰ See, e.g., *Loving v. United States*, 517 U.S. 748, 767-68 (1996) (upholding Congress' power to delegate its "plenary power" to regulate the Army); *id.* at 775-76 (Scalia, J., concurring) (arguing that, absent any textual limitation in the Constitution, Congress may assign responsibility to the executive to carry out any congressional power); *United States v. Grimaud*, 220 U.S. 506, 518 (1911) (permitting Congress to delegate to the executive power to define elements of a criminal offense); I KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 6.3, at 234 (3d ed. 1995) ("[A] legislative rule can impose distinct obligations on members of the public in addition to those imposed by statute, as long as the rule is within the scope of rulemaking authority conferred on the agency by statute.").

⁷¹ Cf. Matthew D. Adler, *Judicial Restraint in the Administrative State: Beyond the Counter-majoritarian Difficulty*, 145 U. PA. L. REV. 759, 764-68 (1997) (arguing that legislative supremacy justification for limiting judicial review does not extend to acts of administrative agencies); Stewart & Sunstein, *supra* note 68, at 1200 (claiming that the link between electoral responsibility and administrative action is too weak to justify limiting judicial review, even in the absence of textual basis for review).

are troublesome questions, not least because the Court has not yet set out a definitive list of the factors it will consider when deciding whether statutory text creating a private right of action is “clear.”

One thing that is clear, though, is that the *South Camden Citizens* approach is inadequate. Recall that *South Camden Citizens* held that regulations are enforceable under § 1983 only if Congress “intended” to render them enforceable.⁷² The court further held that congressional intent can be demonstrated only where the acts covered or obligations demanded by the regulation match those of the underlying statute.⁷³ But that is an odd standard to impose upon regulations that are, by assumption, valid.⁷⁴ By definition, regulations that have the force and effect of law are “reasonably within the contemplation” of Congress.⁷⁵ So, what *South Camden Citizens* in effect demands is that Congress not merely have contemplated and acquiesced in the creation of a right of action, but actively desired that it come about and taken affirmative steps to supplement § 1983’s language. That is a fine distinction to make even for individual human actors. Scholars since Max Radin have argued that it is an impossible distinction to make for a legislature.⁷⁶ Indeed, few modern theorists of interpretation would take seriously the claim that a court should look for an actual, specific intention of Congress,⁷⁷ especially not at the level of detail suggested in *South Camden Citizens*.⁷⁸

Even setting aside that theoretical problem, identifying Congress’ intent as the mandatory source of authority to bring suit is simply question begging. As Professor William Eskridge

⁷² *S. Camden Citizens in Action v. N.J. Dep’t of Env’tl. Prot.*, 274 F.3d 771, 788 (3d Cir. 2001).

⁷³ *See id.* at 790.

⁷⁴ *See id.*

⁷⁵ *Chrysler Corp. v. Brown*, 441 U.S. 281, 303-06 (1979).

⁷⁶ *See* Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870-72 (1930).

⁷⁷ I should emphasize here that, in claiming that the two courts of appeals were looking for the “intentions” of Congress, I do not mean that they were interested in some sort of hypothetical intention, *see, e.g.*, Roscoe Pound, *Spurious Interpretation*, 7 COLUM. L. REV. 379, 381 (1907), or intentions generalized at some high level of abstraction.

⁷⁸ *See* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 19-20, 22-25 (2001) (explaining that both textualists and modern purposivists reject idea that interpretation is a search for actual intentions of legislature).

and others have argued, there are a number of interpretive attitudes that could be consistent with vesting exclusive authority with Congress.⁷⁹ For example, one could read § 1983 as expressing a “general intention” of Congress to grant the executive branch authority to make more particularized decisions about the appropriateness of private litigation in future, unforeseen circumstances.⁸⁰ Or, as the *Sandoval* Court put it, § 1983 might “provide[] a general authorization for private enforcement of regulations.”⁸¹

In short, the rationale of *South Camden Citizens* is inconsistent with the theoretical structure of modern administrative law. One of administrative law’s key premises, known now as the “*Chevron* doctrine,” is that Congress intends to delegate difficult policy decisions implicating the enforcement of a statute to the executive branch.⁸² Applied to § 1983, that idea might allow any regulation to create a right of action when it is sufficiently formal to satisfy *Chevron*, and also meets *Chevron*’s test of reasonableness.⁸³ Federal agencies, after all, can preempt state law with any regulation “necessary to ensure the achievement of the [agency’s] statutory responsibilities,” regardless of whether the agency’s authorizing statute clearly gives the agency the power to preempt.⁸⁴ Section 1983, while certainly a constraint on state

⁷⁹ See William N. Eskridge, Jr., *Spinning Legislative Supremacy*, 78 GEO. L.J. 319, 333-43 (1989); Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 284-91 (1989).

⁸⁰ See Eskridge, *supra* note 79, at 342-43.

⁸¹ *Alexander v. Sandoval*, 532 U.S. 275, 291 (2001).

⁸² See *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001); *id.* at 257 (Scalia, J., dissenting) (“*Chevron* sets forth an across-the-board presumption, which operates as a background rule of law against which Congress legislates . . .”); *Chevron U.S.A., Inc. v. Natural Res. Def. Counsel*, 467 U.S. 837, 864-65 (1984); Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 861-62 (2001); Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2086-90, 2102-03 (1990).

⁸³ See *Guardians Ass’n v. Civil Serv. Comm’n*, 463 U.S. 582, 619 n.6, 635-38 (1983) (Stevens, J., dissenting). Only interpretations issued pursuant to the conditions set by Congress for exercise of an agency’s legislative power are entitled to *Chevron* deference. See *Mead Corp.*, 533 U.S. at 230-31; *Christensen v. Harris County*, 529 U.S. 576, 586-88 (2000). For the most part, that means either adjudications or rules issued pursuant to notice and comment. See *Mead Corp.*, 533 U.S. at 230. My argument is not intended to cover adjudication, not least because it is hard to imagine how an administrative law judge could have occasion to declare that a regulation is enforceable in federal court.

⁸⁴ *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699-700 (1984) (quoting *FCC v. Midwest Video Corp.*, 440 U.S. 689, 706 (1979)). In other words, a pre-emptive regulation is valid to the same extent any other legislative rule is valid: if it does not exceed the agency’s authority, and is not an arbitrary or unreasonable use of the

authority, is considerably less burdensome than preemption.⁸⁵ To the extent that an administrative agency fulfills the mandate of a general congressional goals or values statute with a detailed policy regulation,⁸⁶ this argument goes, the agency should be presumed to have the freedom also to choose the most appropriate enforcement mechanism for its policy.⁸⁷

The question remains, though, whether *Chevron* is one of the factors a court can consider when deciding whether a statement is sufficiently “clear.” Several commentators have now pointed out that a federal agency’s broad preemption power may be inconsistent with the Court’s rule against reading statutes in a way that diminishes state power.⁸⁸ It similarly might be possible for defenders of *South Camden Citizens* to respond to the *Chevron* critique simply by arguing that the *unspoken* assumption of administrative competence embodied by *Chevron* is inconsistent with a rule permitting private rights of action only upon a clear *statement*. But that claim is hard to take seriously without a more elaborate underlying theoretical justification. Modern interpretive theory now universally recognizes that at least some “unspoken”

agency’s power. *See id.* at 699 (citing *Fidelity Fed. Sav. & Loan Ass’n v. Cuesta*, 458 U.S. 141, 153-54 (1982); *United States v. Shimer*, 367 U.S. 374, 383 (1961)); *see also* *City of New York v. FCC*, 486 U.S. 57, 64 (1988).

⁸⁵ *But see* Michael S. Greve, *Business, the States, and Federalism’s Political Economy*, 25 HARV. J.L. & PUB. POLY 895, 906 (2002) (arguing that “For state governors, federal preemption is usually unpleasant but, as a rule, less intrusive and frustrating than federal micro-management and mandates that entail the expenditure of state funds.”). It is unclear whether Greve’s contention is intended as political science or psychological observation—or what the empirical basis for it may be in either case.

⁸⁶ By a “goals or values” statute, I mean simply a statute that sets out general principles but leaves some or all of the details of implementation to an agency. For example, the Rehabilitation Act of 1973 provides rather broadly that “no otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 29 U.S.C. § 794 (2000). In carrying out that mandate, the Justice Department has developed more elaborate regulations explaining what it means to be “qualified” and “disabled,” and setting out in exquisite detail what recipients of funds must do to comply with the statute, including maps and sketches of acceptably accessible facilities. *See generally* 28 C.F.R. § 41 (2003).

⁸⁷ *See Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 101-02 (O’Connor, J., dissenting); Sunstein, *supra* note 15, at 414; *cf.* *United States v. O’Hagan*, 521 U.S. 642, 673 n.19 (1997) (holding that an agency’s power to “define” a statute Congress has directed it to enforce “logically and practically” includes the power to enact prophylactic rules).

⁸⁸ *See* Jack W. Campbell IV, *Regulatory Preemption in the Garcia/Chevron Era*, 59 U. PITT. L. REV. 805 (1998); Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085 (2000); Damien J. Marshall, Note, *The Application of Chevron Deference in Regulatory Preemption Cases*, 87 GEO. L.J. 263 (1998).

assumptions are a necessary element of any interpretation – indeed, of human communication.⁸⁹ The challenge, then, is to sort out which assumptions are consistent with the underlying principles of the clear statement rule for private rights of action. The next section, therefore, interrogates two (or, accounting for internal variations, as many as six) possible views of interpretation, asking of each whether it could accept *Chevron* within its version of the clear statement rule.

B. Can Chevron Fill the Gaps in § 1983? Two (or More) Views from Statutory Interpretive Theory

The majority of interpretive theories would probably accommodate both *Chevron* and the Article I clear statement rule. Although these theories would not denigrate the clear statement rule, they would not draw strong distinctions between assumptions underlying the semantic and other dimensions of a statutory text.⁹⁰ From the textualist perspective, however, the *Chevron* question is a fairly vexing one. It is important to note, though, that the clear statement rule can be justified under theoretical approaches other than textualism – approaches that would almost certainly accept *Chevron* as well. The two canons may exist in tension, but they are by no means incompatible.

Before beginning the individual analyses, I must explain some of my terminology. Whether explicitly or not, all sophisticated theories of interpretation now accept that a reader begins the task of reading with a certain set of assumptions and background knowledge.⁹¹ This Article terms that background of knowledge and supposition as the set of “pre-interpretive assumptions” a reader brings to the document. Additionally, some theorists believe that one’s pre-interpretive assumptions about a text evolve in the process of interpreting.⁹² Thus, one might realize, halfway through reading a statute, that it defines the scope of its own text. I call these revisions, commanded by the text, “interpretive facts,”

⁸⁹ See WILLIAM N. ESKRIDGE, JR. ET AL., *LEGISLATION AND STATUTORY INTERPRETATION* 249 (2000); John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2455-57 (2003).

⁹⁰ By “semantic” I mean the portion of a text’s meaning that we acquire from the dictionary definitions of words and the rules of grammar.

⁹¹ See *supra* note 89 and accompanying text.

⁹² See, e.g., Eskridge, *supra* note 79, at 346-49 (describing interpretation as a process of evolving conversation between text and interpreter).

and refer to this approach to interpretation as the “iterative view.”⁹³ The *Chevron* doctrine can be described as a canon of construction favoring executive over judicial prerogative. In this Article’s nomenclature, therefore, it is a pre-interpretive assumption about the hierarchy of sources for authoritative constructions of statutes.

1. Intentionalism and the Legal Process School

Most non-textualist interpretive theorists describe the process of reading a statute as a search for legislative “intent.” In most cases, though, that description is rhetorical or aspirational.⁹⁴ Modern theorists are generally not concerned with the actual intentions of legislators, largely because those intentions can be irrecoverable, hard to cumulate, and at times simply unworthy of respect.⁹⁵ For example, although the “legal process” school, epitomized by Professors Henry Hart and Albert Sacks, claimed that the judge’s duty was to find the “intent” of the legislator, they recommended finding it by assuming that the legislature was comprised of “reasonable” persons acting “reasonably.”⁹⁶ More recent iterations of “legal

⁹³ To be more precise, an iterative theorist’s first step in the interpretive process is to formulate a set of pre-interpretive assumptions. Based on these assumptions, she identifies the four corners of the authoritative text she is to construe. For example, if she is an originalist, when she reads the Constitution, she will consider as authoritative not only the text of the Constitution, but also the surrounding history of its creation and reception among some or all of nascent American society. (In that case, there are more like four million corners, rather than four.) She next begins reading the text according to other sets of pre-interpretive assumptions: for example, that the rules of English grammar apply, and that the literal meaning of words will be what they meant at the time they were written, or what they mean now, or what they have meant to a reasonable reader over all the intervening periods. As she encounters the text, she may discover some commands that seem contrary to some of her pre-interpretive assumptions—perhaps reading Article III to forbid someone like her, a judge, from applying originalist principles. John Rawls described the end result of this process of calibration and re-calibration, of adjustment of text to values, and values to text, as the “reflective equilibrium.” See JOHN RAWLS, *A THEORY OF JUSTICE* 19-21, 45-51 (1971). Another commentator has argued that interpreters inevitably so color their understanding of what is required of them by intermediate steps in the iterative chain that, in effect, there is only one interpretation, guided primarily by the reader’s notion of what makes the “best” text. He claims, furthermore, that this result is not only defensible but also the better of the two approaches. See RONALD DWORKIN, *LAW’S EMPIRE* 228-38, 250-75 (1986).

⁹⁴ See Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 817 (1983) (describing interpretative process as “one of imaginative reconstruction”).

⁹⁵ See DWORKIN, *supra* note 93, at 317-27.

⁹⁶ HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1378 (William Eskridge & Phillip Frickey eds., 1994).

process” also impute similar value-laden “intentions” to statutory text.⁹⁷

That is not to say that most legal process theorists view the statutory text as an open invitation to import the values of the interpreter. The legal process interpreter relies instead on only a limited universe of imputed intentions, generally those resting on assumptions that either have, or are deserving of, widely-held popular support.⁹⁸ Thus, the rules of grammar or constitutionally-protected norms are fair game, but a judicial preference for a particular outcome in a particular case probably is not.⁹⁹ Although the legal process theorist recognizes the importance of democracy in law making, she believes that democratic values can be satisfied either by the requirement that imputed norms be widely-held (either actually or hypothetically) or by the exercise of legislative intent at a very high level of generality.¹⁰⁰

Despite her willingness to find legislative “intent” without direct semantic support in many instances, the legal process interpreter nonetheless could agree that some congressional clear statement rules, such as the private-right-of-action rule, are necessary. Again, constitutionally-inspired norms are a common source of authority for the legal process interpreter’s canons of construction.¹⁰¹ Thus, the legal process interpreter might refuse to read a statute in a way that would violate the Constitution, unless a higher priority canon – for example, the rules of English language and grammar – commanded an opposite result.¹⁰² Since there might be a fair

⁹⁷ See DWORKIN, *supra* note 93, at 336-38; William N. Eskridge, Jr., *All About Words: Early Understandings of the “Judicial Power” in Statutory Interpretation, 1776-1806*, 101 COLUM. L. REV. 990, 1002, 1099 (2001); Eskridge, *supra* note 79, at 350-51.

⁹⁸ See William N. Eskridge, Jr., *The Circumstances of Politics and the Application of Statutes*, 100 COLUM. L. REV. 558, 565 (2000); Stewart & Sunstein, *supra* note 68, at 1229-32.

⁹⁹ Cf. HART & SACKS, *supra* note 96, at 1374, 1380 (arguing that statutory terms should not be given meanings the text cannot bear). Needless to say, there are divisions within the intentionalist school on which pre-interpretive assumptions are permissible, and what priority these assumptions have over interpretive facts. Thus, Professor Dworkin seems open to judicial applications of a wide variety of judicial norms, at least in cases that implicate more than mere “policy,” and would give priority to those norms over interpretive facts in many instances. See DWORKIN, *supra* note 93, at 202-06, 219-25.

¹⁰⁰ See Eskridge, *supra* note 98, at 572-74; Eskridge, *supra* note 79, at 323-24; Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616, 625-26 (1949).

¹⁰¹ See HART & SACKS, *supra* note 96, at 1376.

¹⁰² See *id.*

argument that non-legislative creation of private rights of action would violate constitutional principles of separation of powers,¹⁰³ the legal process interpreter could well agree that only a semantically clear text should be read to require that result.

It is more likely, however, that the legal process interpreter will see no conflict between *Chevron* and the right-of-action clear statement rule. For one thing, she might see the clear statement rule as identical to the textualist claim that Article I authority proceeds only from semantically clear statutory language.¹⁰⁴ Since she views *Chevron* as an exercise of congressional meta-intent, or perhaps as an imputed preference for executive decision making, she would find it sufficiently grounded in congressional agreement to satisfy Article I.¹⁰⁵

There are several other justifications for the clear statement rule, though, that might give the legal process interpreter a bit more pause. First, as Professor Sunstein points out, we can view clear statement rules as a sort of republican¹⁰⁶ non-delegation doctrine, where a court insists that for certain constitutional or prudential reasons, Congress first actually deliberate and reach agreement on an issue before a court will act on it.¹⁰⁷ But, by hypothesis, the legal process interpreter believes that *Chevron* already commands or deserves widely-held respect. What would be the point of deliberating – or, in effect, re-deliberating – the same question?

We might say that, although *Chevron* commands wide support as a general principle, it should not apply in circumstances where legislators, or voters, would prefer to make critical value judgments themselves, even in the event of changing circumstances. Indeed, in *FDA v. Brown & Williamson Tobacco Corp.*, the Supreme Court recognized just such a limitation on the scope of *Chevron* deference.¹⁰⁸

¹⁰³ See *supra* text accompanying notes 67-68.

¹⁰⁴ See *infra* note 110.

¹⁰⁵ See ESKRIDGE ET AL., *supra* note 89, at 318.

¹⁰⁶ That is, a decisional process that is the result of reflective and informed debate, rather than passing popular opinion. The grandfather of all republican theories is THE FEDERALIST NO. 10, at 42-47 (James Madison) (George W. Carey & James McClellan eds., 2001).

¹⁰⁷ See ESKRIDGE ET AL., *supra* note 89, at 179, 344-45; Sunstein, *supra* note 82, at 2114.

¹⁰⁸ 529 U.S. 120 (2000); see also *Hampton v. Mow Sun Wong*, 426 U.S. 88, 116 (1976) (holding that “due process requires that the decision to impose [a] deprivation of

Deliberation might serve to supplement *Brown & Williamson*, providing for shared, republican consideration of the margins of what judgments Congress considers so critical that it is unwilling to delegate them. But it seems implausible that the existence of a private right of action for any particular statute has such monumental social importance that it even approaches the *Brown & Williamson* exception, and so the rationale for deliberation remains rather thin.¹⁰⁹

In short, then, an intentionalist interpretation of § 1983 will very likely conclude that it is appropriate to apply the *Chevron* presumption to the word “laws,”¹¹⁰ authorizing private rights of action on the basis of agency regulations. *Chevron*, of course, does not supercede the Constitution, but to the extent that the clear statement rule is based on constitutional values, *Chevron* largely meets those concerns.

2. Textualism

a. How Textual is My Text?

The general outline of textualism is fairly familiar. According to textualists, the separation of powers embodied in the Constitution limits proper judicial attention to the semantic dimension of a statutory text.¹¹¹ That is, because laws

an important liberty be made either [by Congress or the President] or, if it is to be made by the [agency], that it be justified by reasons which are properly the concern of that agency”); Merrill & Hickman, *supra* note 82, at 844-45 (arguing that for “extraordinary” legal questions, congressional silence should be assumed to reflect an intent to withhold *Chevron* deference (citing *Brown & Williamson*, 529 U.S. at 159; *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468-69 (2001)).

¹⁰⁹ Sunstein’s remaining claim is that clear statement rules help to re-inflate the enforcement of constitutional norms that the Court, for the classic prudential reasons, often under-enforces or finds nonjusticiable. See Sunstein, *supra* note 82, at 2114-15. But limits on the Article III power of courts to create remedies are unlikely candidates for “underenforced” rights. Indeed, to the legal process scholar, the recent growth of constitutional standing doctrine, textualism, and textualist-inspired limits on federal jurisdiction make Article III over-enforced, if anything.

¹¹⁰ Even if she did believe that a clear statement rule was necessary, a legal process interpreter might well find that “laws” in § 1983 clearly includes federal regulations. For example, an originalist might consider what “laws” meant at the time of its enactment, while other intentionalists, such as Professors Dworkin or Michelman, might look to how society’s understanding has evolved through history. The Congress that amended the Civil Rights Act in 1874 thought it possible that its predecessor Congress, in using the term “Constitution,” might have meant every law authorized under the Constitution. See Sunstein, *supra* note 15, at 404-05. By analogy, the word “law” could include any valid regulation promulgated pursuant to law. Subsequent history has ratified this understanding, albeit in different contexts. See *Chrysler Corp. v. Brown*, 441 U.S. 281, 295-96 (1979).

¹¹¹ See Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role*

may not have binding effect unless they have been passed by both houses of Congress, either with the President's agreement or by a supermajority of both houses, courts unconstitutionally expand a law's reach when they insert elements that could not command such widespread support.¹¹²

Similarly, the textualist explanation for the private right of action clear statement rule is essentially libertarian and majoritarian; it displaces private ordering only in the face of language ratified by a majority of directly elected public officials.¹¹³ Private rights of action, in contrast, allow a single individual to rearrange the results of any number of unregulated transactions, as long as she can convince a judge that her theory of the law is correct.¹¹⁴ When enforcement depends on action by the government itself, however, the very same underlying law can have a distinctly majoritarian flavor. Thus, Congress' monopoly over private rights of action might be explained as an effort to preserve the majoritarian character of law; individuals may only control the decision to enforce a law when an elected majority decides to devolve that power.¹¹⁵ This, in turn, might be said to enhance the overall autonomy of the citizenry, because it ensures not only that most outcomes are those that were chosen by most voters, but also that purely private choices will govern where no clear consensus emerges.¹¹⁶

Viewed through the majoritarian lens, the separation-of-powers explanation for textualism is rather friendly to *Chevron*. The textualist would likely argue that courts should presume that uncertainties in statutory law should be resolved principally by the executive, as the more representative, and therefore more majoritarian, branch.¹¹⁷ *Chevron* and textualism

of *United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION 3, 9-13, 34-35 (Amy Gutmann ed., 1997).

¹¹² See *Bank One Chicago v. Midwest Bank & Trust Co.*, 516 U.S. 264, 279 (1996) (Scalia, J., concurring); Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119, 1119-20 (1998); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 539 (1983) [hereinafter Easterbrook, *Statutes' Domains*].

¹¹³ See Stewart & Sunstein, *supra* note 68, at 1221-22.

¹¹⁴ In this respect, hostility to private rights of action piggy-backs on the now-familiar concerns about the "countermajoritarian difficulty." ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (1962).

¹¹⁵ See Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033, 1038 (1968).

¹¹⁶ Cf. Easterbrook, *Statutes' Domains*, *supra* note 112, at 549-50 (arguing that one major justification for textualist approach is that it preserves private orderings).

¹¹⁷ See, e.g., John F. Manning, *Constitutional Structure and Judicial Deference*

can thus be reconciled as a preference for policy making by the "political branches" over the judiciary.¹¹⁸ That leaves open, however, the crucial question for us here: What presumption does separation of powers theory suggest when the choice of authority lies not between the executive and judiciary, but rather between the executive and the legislative branches? Or, put another way, should we trust the executive branch to preserve the autonomy-enhancing character of law as much, less than, or more than Congress?¹¹⁹

In order to answer that question, a textualist would likely turn to a functional comparison of the two branches.¹²⁰ However, as the next subpart explains, a functional analysis fails to resolve the question.

b. The Indeterminate Functional Analysis

Most traditional theoretical models of government would be receptive to agency-authorized private rights of

to *Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 625-26 (1996).

¹¹⁸ See *id.* at 627.

¹¹⁹ I should emphasize that my question for the remainder of this Part is not whether the executive has the power to create private rights of action on its own, without Congressional support. Rather, I ask only whether, given the relative competencies of the two branches, we should impute to Congress an intention to share its own undisputed authority to establish a private right of action with the executive branch. Although one could argue that the power should be absolutely non-delegable, I cannot see any purely textual—rather than functional—argument for that position.

¹²⁰ See Frank H. Easterbrook, *The State of Madison's Vision of the State: A Public Choice Perspective*, 107 HARV. L. REV. 1328, 1339 (1994).

A textualist who thinks textualism is rooted in the original understanding of the Constitution would also likely be interested in an originalist historical analysis. See *infra* notes 138-139. In that regard I note that one earlier commentator has argued that the Congress of 1871 would have not have understood "laws" to include regulations. See Todd E. Pettys, *The Intended Relationship Between Administrative Regulations and Section 1983's "Laws,"* 67 GEO. WASH. L. REV. 51 (1998). Although an extended discussion is beyond the scope of this article, Pettys's evidence is not very persuasive. He argues first that the strong version of the non-delegation doctrine prevailing in the nineteenth century would have led congressmen to think of "law" as distinct from "regulation." *Id.* at 86-93. But that demonstrates, at best, an understanding of the legislative power, not the linguistic meaning of the word "law." Nineteenth-century thinkers may well have considered the executive power to be entirely distinct from the legislative, but both as subspecies of "law" in general. Indeed, Pettys' own examples demonstrate that by 1890, federal judges were willing to consider a validly enacted regulation a "law." See *id.* at 97 (quoting *United States v. Manion*, 44 F. 800, 801 (D. Wash. 1890)). Finally, Pettys points to the fact that the revised statutes provided that some "regulations" could not be inconsistent with "law" or "laws." *Id.* at 96. What he fails to recognize is that a century later, in 1979, the United States Code still directed, in the Administrative Procedure Act, that regulations were invalid if "contrary to law." Yet the Supreme Court still held that the term "law" included valid regulations. See *Chrysler Corp. v. Brown*, 441 U.S. 281, 295-96 (1979).

action. For example, “public interest” theorists, who are generally sympathetic to bureaucratic decision making,¹²¹ might actually prefer an agency’s discretion to that of Congress. A judge who adhered to the more cynical “capture” theory, which is highly dubious that agencies can make public-minded determinations,¹²² would want the power to read agency regulations aggressively in search of greater opportunities for judicial review.¹²³ Finally, a proponent of so-called “public choice” theory, which extends its cynicism to include legislatures and courts, would seem nonetheless to favor, at least slightly, decisions by the President and his highest advisors.¹²⁴ Thus, under the three common models of

¹²¹ Public interest theory claims that agency bureaucrats are committed to representing the public interest, and have the tools – centralized authority, universal jurisdiction, expertise, and shelter from political storms – to carry out their appointed mission. See I DAVIS & PIERCE, *supra* note 70, § 2.6, at 78; Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI.-KENT L. REV. 1039, 1049 (1997). As Merrill points out, the most eloquent advocate of the public interest view was probably James Landis. See JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* (1938).

¹²² Capture theory embodies a disenchantment with agency bureaucrats, arguing that their close dealings with regulated entities, and their dependency on those groups for power and influence with the other branches of government, leaves the bureaucrats vulnerable to co-optation by the narrow interests of the regulated at the expense of the public at large. See Merrill, *supra* note 121, at 1050-51; Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335 (1974); David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L. J. 97, 114 (2000).

¹²³ See III DAVIS & PIERCE, *supra* note 70, § 16.11, at 69; Sunstein, *supra* note 82, at 2082. Indeed, the D.C. Circuit is presently engaged in the same kind of exercise in its interpretation of the “procedural rule” exception to the APA. See Jon Connolly, Note, *Alaska Hunters and the D.C. Circuit: A Defense of Flexible Interpretive Rulemaking*, 101 COLUM. L. REV. 155, 162-67 (2001). As the *Alaska Hunters* controversy illustrates, an agency will be able to fight back against aggressive judicial interpretation of its regulations by issuing more formal regulations clearly disclaiming the court’s reading. But that largely accomplishes the purpose the court is seeking: to force public scrutiny and input into the procedures, if not the outcomes, of the agency’s decisions.

¹²⁴ For example, Professor Mashaw argues that the President is the most representative member of the federal government, and his overwhelming influence over major policy decisions in the executive agencies makes those decisions highly democratic, perhaps more democratically legitimate than legislation. See JERRY L. MASHAW, GREED, CHAOS, & GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 152-56 (1997); see also *Chevron U.S.A., Inc. v. Natural Res. Def. Counsel*, 467 U.S. 837, 865-66 (1984); BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 67, 83, 106 (1991); Easterbrook, *supra* note 120, at 1341. Mashaw points out that the President is responsive to a more diverse pool of voter interests than any individual legislator, and he is better at escaping the agenda-setting problems that hamper the democratic character of legislation. MASHAW, *supra*, at 152-56.

Other writers have argued that agencies help to restore Madison’s vision of a relatively insulated, deliberative body lost with the enactment of the Seventeenth Amendment. See JOHN A. ROHR, *TO RUN A CONSTITUTION: THE LEGITIMACY OF THE ADMINISTRATIVE STATE* 171-94 (1986); Spence & Cross, *supra* note 122, at 131-33. Finally, advocates of the so-called “unitary Executive”—that is, an executive branch

government, there are strong arguments favoring agency exercise of the delegated power to authorize private rights of action.

The trouble with this conclusion is that there is trouble with the “big three.” All three models, after all, are just that: models. They simplify reality by making certain questionable assumptions – most notoriously, for example, public choice theory often presumes that agency bureaucrats are rationally self-maximizing.¹²⁵

A new wave of critics of public choice theory has begun to suggest alternative models of government behavior based on more psychologically realistic assumptions about human behavior.¹²⁶ A social psychologist, for example, might begin by observing that a person’s perception of her social role has an important influence on her behavior.¹²⁷ Societies form sets of expectations for the way that individuals in certain roles – “mother” or “boss” – will behave, reinforcing those expectations through social sanctions, such as shaming, and through ritual and repetition.¹²⁸ Once these social expectations are internalized, we experience cognitive dissonance, shame, or embarrassment when we behave in ways that are role inappropriate.¹²⁹ Thus, a society that expects its public servants

entirely subject to the formal legal control of the President—would likely agree that, if their vision of the President’s legal powers were widely shared, the executive would be more genuinely representative of national interests than Congress. For examples of the unitary executive school, see CHARLES A. FRIED, *ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT* 151-71(1991); Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 *YALE L.J.* 541 (1994); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 *HARV. L. REV.* 1153 (1991).

¹²⁵ Of course, one could also construct something that looks much like a public choice analysis using alternative, perhaps more realistic, sets of assumptions. See David B. Spence, *A Public Choice Progressivism, Continued*, 87 *CORNELL L. REV.* 397, 398 (2002).

¹²⁶ See, e.g., Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 *N.Y.U. L. REV.* 630 (1999); Gregory Mitchell, *Taking Behavioralism Too Seriously? The Unwarranted Pessimism of the New Behavioral Analysis of Law*, 43 *WM. & MARY L. REV.* 1907, 1910 n.5 (2002) (observing that the past three years have seen five separate law review symposia on law and behavioral psychology).

¹²⁷ See BERNARD GUERIN, *SOCIAL FACILITATION* 164 (1993); Philip E. Tetlock et al., *Social & Cognitive Strategies for Coping with Accountability: Conformity, Complexity, and Bolstering*, 57 *J. PERSONALITY & SOC. PSYCHOL.* 632, 638 (1989).

¹²⁸ See Robert Cooter, *Expressive Law & Economics*, 27 *J. LEGAL STUD.* 585, 585-86 (1998); Robert C. Ellickson, *Law & Economics Discovers Social Norms*, 27 *J. LEGAL STUD.* 537, 539-40 (1998); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 *CAL. L. REV.* 1051, 1130 (2000)

¹²⁹ See Jon Elster, *Social Norms and Economic Theory*, 3 *J. ECON. PERSP.* 99,

to be public minded creates social pressure on those servants to act accordingly.¹³⁰ Similarly, social psychology also could lead to renewed analysis of institutional ideology – the idea that members of some parts of the government, such as the Senate or the federal judiciary, see themselves as possessing a unique role, and tend to act consistently with that view despite what pure economics would predict are strong incentives to the contrary.¹³¹

This suggests that the relative trustworthiness of any two branches of government is socially contingent. That, in turn, deeply undercuts the categorical presumption that, because the executive can be trusted truly to reflect democratic will, Congress “intends” to delegate to the executive the authority to create a private right of action. Worse, because the effectiveness of social roles depends in large part on the degree to which they are internalized by individual actors, trustworthiness is contingent in ways that are not readily measurable, whether by judges or anyone else.¹³² A presumption based on, for instance, judicial synthesis of historical and present social norms and expectations would be unlikely to be much more than ad hoc, even if Hercules himself¹³³ were to conduct it.

Another critique of *Chevron* could be fashioned from an entirely different direction, by challenging the idea that the executive is meaningfully democratic or representative. Matthew Adler has argued, for instance, that *Chevron* fails to

99-100 (1989).

¹³⁰ This approach could give theoretical muscle to the suggestions by some political scientists that the theories of government are actually self-fulfilling prophecies. See MASHAW, *supra* note 124, at 26-27; Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology & Optimal Government Design*, 87 CORNELL L. REV. 549, 607-08 (2002).

¹³¹ See STEPHEN KELMAN, MAKING PUBLIC POLICY 244-45 (James Q. Wilson ed., 1987); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 562, 570 (2000); Edward L. Rubin, *Getting Past Democracy*, 149 U. PA. L. REV. 711, 767 (2001); Amartya K. Sen, *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory*, 6 PHIL. & PUB. AFF. 317 (1977).

¹³² Cf. I DAVIS & PIERCE, *supra* note 70, § 2.6, at 79 (observing that courts cannot predict accurately the outcome of any truly accurate behavioral explanation for the conduct of public actors); ROBERTO M. UNGER, FALSE NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY 187 (1987) (noting that the relationship between the mindsets of workers and managers, and their corresponding institutions and practices, are highly contingent and difficult to predict or extrapolate from).

¹³³ Hercules is Professor Dworkin’s imaginary judge, whose considerable knowledge and analytical powers allow him to reach right answers even to difficult legal questions. See DWORKIN, *supra* note 93, at 239.

enhance the democratic character of government.¹³⁴ According to Adler, an average voter might simultaneously desire to delegate decision-making power to an expert agency, but also have individual preferences or particularized values contrary to the agency's decisions, and further desire that the agency not have the power to make decisions contrary to or incommensurable with those individual preferences or values.¹³⁵

In sum, a textualist would have reason to be uneasy with applying a *Chevron*-type presumption to statutory text creating private rights of action.¹³⁶ The ensuing Parts of this Article consider whether textualists or others would be swayed by an alternative presumption, one that Congress ordinarily intends not to undermine the power of states to determine their own form of government. It is also important to note again that, on the other hand, the clear statement rule and *Chevron* are not incompatible. Textualism is not the only theory that could justify the clear statement rule, and each of the alternative theories have little difficulty with *Chevron*. For the non-textualist, there is not much reason why valid regulations should not be able to satisfy the various prongs of the *Blessing* test.

IV. SECTION 1983 AND THE FEDERALISM CANON

This Part argues that the Court's federalism canon favors enforceability of agency regulations under § 1983. Federal regulation, in the conventional view, undermines state autonomy. Yet concurrent regulation of the same social problems by states and the federal government can offer significant autonomy gains for states. This is especially so in a scheme that is not only concurrent but also designed to maximize cooperation between the two levels of government.

¹³⁴ See Adler, *supra* note 71.

¹³⁵ In my view, the force of Adler's critique is undercut somewhat by the *Brown & Williamson* exception to *Chevron* – that no delegated authority should be presumed in matters of "great importance." That is a debate for another time.

¹³⁶ In raising these two objections, of course, I do not mean to suggest there are no others. One can imagine, for instance, an argument akin to the critical legal studies complaint that interest-group based theories of judicial review are indeterminate without underlying normative baselines. See, e.g., Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 *YALE L.J.* 31, 49-59 (1991); LANI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* (1994) (arguing that the modern American concept of "representation" is a social construct grounded in illegitimate subordination of some groups).

Private rights of action under § 1983 are an important aspect of any genuinely successful cooperative design. Most crucially, privately-invoked judicial oversight offers a safety valve of public accountability for a state bureaucracy that might otherwise escape the controls of its state executive. Agency-authorized suits under § 1983 avoid many of the classic problems that hamstringing traditional state administrative-law efforts to achieve the same result. Finally, judicial resolution of disputes between federal and state agencies is superior to resolution through “informal” dealings between the two sets of regulators, in which states generally fare poorly. In turn, these considerations suggest that if courts take the federalism canon¹³⁷ seriously, they should read § 1983 to permit agency authorization of private suits. First, though, I must establish that a textualist would be willing to consider an atextual presumption in favor of federalism values.

A. *The Bass Hook: Would a Textualist Bite?*

This subpart argues that the textualist assumptions of *South Camden Citizens* and *Harris* must give way to another canon, one that commands Congress to speak clearly before a court will upset the balance of state and federal power. The inquiry turns on whether granting agencies the power to define a right of action has implications for federalism, and if so, in what direction. I explore that complicated question in the subparts following this one. First, though, this subpart examines the relationship between textualism and the principles of federalism.

One view of textualism describes that theory as a necessary product of an originalist interpretation of the Constitution.¹³⁸ It follows from that premise that any pre-interpretive assumptions that anteceded the originalist reading of the Constitution, and survive that process of interpretation, should continue to govern readings of statutory text.¹³⁹ The

¹³⁷ See *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991).

¹³⁸ See John F. Manning, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 COLUM. L. REV. 1648, 1649-51 (2001) (summarizing originalist constitutional argument for textualist statutory interpretation).

¹³⁹ See Manning, *supra* note 78, at 113 (noting that textualists can “draw upon settled background conventions of the legal system, which judges can use to fill in gaps left by the text alone”). Professor Manning goes on to conclude that textualism is consistent with an atextual presumption in favor of federalist values, unless the semantic dimension of a text is inconsistent with that presumption. See *id.* at 122-23.

federalism canon, expressed most famously in *United States v. Bass*,¹⁴⁰ is logically prior to both textualism and the quasi-textualist Article I justifications of *Harris* and *South Camden Citizens* in just this way. The principle of federalism, as the Supreme Court has explained it, derives its constitutional authority from the fact that it was a widely-shared assumption of the founding generation when they crafted and ratified the Constitution.¹⁴¹ The Court has often relied upon this preexisting understanding as a basis for concededly extra-textual aspects of federalism, such as the states' sovereign immunity from suit.¹⁴²

Nor is there anything in the text of the Constitution that would contradict this pre-interpretive assumption. Textualism, under my working theory, is grounded in the Article I and Article III limits on federal courts to expand their own power, on structural inferences about the three branches derived from the text of the Constitution, and on historical

One is also tempted simply to argue that any textualist who accepts the *Ashwander* principle of constitutional avoidance should welcome the *Bass* canon. See *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347-48 (1936) (Brandeis, J., concurring). Justice Brandeis' approach in *Ashwander*—and the approach of subsequent cases, such as *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988)—assume that the most natural reading of a statute should give way to semantically possible, but less favored, readings that stand farther from the penumbra of constitutional requirements. Indeed, the avoidance canon is only meaningful when it rearranges the ordinary semantic meaning of the text. See Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71, 86. If the textualist is content allowing a judge's prediction of what the Constitution *would* say to displace a semantically preferred meaning, she should, *a fortiori*, be willing to impute clear, preexisting constitutional requirements into texts that are open to them. Justice Scalia has often invoked the avoidance canon. See, e.g., *FEC v. Akins*, 524 U.S. 11, 32 (1998) (Scalia, J., dissenting); *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 356 (1998) (Scalia, J., concurring); *Almendarez-Torres v. United States*, 523 U.S. 224, 250 (1998) (Scalia, J., dissenting). In fact, though, the avoidance principle is a serious problem for a Manning-type textualist, who believes that textualist methods are themselves required by the Constitution. See Manning, *supra* note 78, at 121, 125 (tentatively endorsing avoidance canon because it permits textualism to account for concerns about justice reflected in the Constitution, but noting that the doctrine presents other theoretical problems for the textualist). How are we supposed to reconcile what are, in effect, two competing constitutional requirements? Thus, in the succeeding paragraphs, I rely on my claim that some constitutional commands may take logical precedence over others. Cf. Sunstein, *supra* note 82, at 2109-10 (explaining that there is a hierarchy of canons).

¹⁴⁰ 404 U.S. 336 (1971). Other prominent federalism-canon cases include *Gregory*, 501 U.S. at 460-63, and *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242-43 (1985) (asserting that if Congress intends to alter "the usual constitutional balance between the States and the Federal Government," it must "unequivocally express this intention in the statutory language.").

¹⁴¹ See *Alden v. Maine*, 527 U.S. 706, 713, 715-19, 722-27 (1999); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996).

¹⁴² See *Seminole Tribe*, 517 U.S. at 54-55 & n.7 (collecting cases).

developments in the founding era.¹⁴³ Limits on private rights of action are grounded more particularly in Article I.¹⁴⁴ Yet the Supreme Court has already held that Article I, and the other texts and events preceding the enactment of the Eleventh Amendment, cannot undo the founder's presumptions about the nature of federalism.¹⁴⁵ It would be understatement to say anything but that the decisions setting out that theory – *Hans*,¹⁴⁶ *Alden*, and their kin – have an angry throng of critics.¹⁴⁷ It is also hard to see how one could avoid agreeing that, while those cases remain good law, federalism survives the textualist constitutional genesis, and should remain a feature of any reading of the text of § 1983.

One can also justify the ways of federalism to textualism by employing a jurisprudential account of textualism.¹⁴⁸ Professor Jeremy Waldron has described textualism as a product of respect for the source of authoritative law.¹⁴⁹ According to that view, lawmaking is binding on us only if it is the product of genuine debate among numerous and diverse legislators over honest disagreements about values and methods.¹⁵⁰ Yet, as Waldron seems to agree, not everything that becomes law is disputed, or even written.¹⁵¹ The Statutes at Large do not include a copy of Webster's Dictionary, yet one surely owes respect not to a series of symbols and glyphs, but to a widely held or fair understanding of the words the legislature uses to embody its agreement.¹⁵² Otherwise the debates we are supposed to respect are debates about nothing. Widely-held understandings, about which there

¹⁴³ See *supra* text accompanying notes 112-116.

¹⁴⁴ See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95, 101 (1998).

¹⁴⁵ See *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 364 (2001) (citing *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 79 (2000); *Seminole Tribe*, 517 U.S. at 72-73; *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 672 (1999); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 636 (1999); *Alden*, 527 U.S. at 730-33).

¹⁴⁶ *Hans v. Louisiana*, 134 U.S. 1 (1890).

¹⁴⁷ See Alfred Hill, *In Defense of Our Law of Sovereign Immunity*, 42 B.C. L. REV. 485, 485 n.1 (2001) (collecting angry critics).

¹⁴⁸ For a recent, more comprehensive effort in this direction, see John F. Manning, *Legal Realism and the Canons' Revival*, 5 GREENBAG 2D 283, 289-93 (2002).

¹⁴⁹ See JEREMY WALDRON, *LAW AND DISAGREEMENT* 105-06, 108 (1999).

¹⁵⁰ See *id.* at 79-80, 105-18, 136-38, 141.

¹⁵¹ See Jeremy Waldron, *Legislators' Intentions and Unintentional Legislation*, in *LAW AND INTERPRETATION* 339 (Andrei Marmor ed., 1995); see also Joseph Raz, *Intention in Interpretation*, in *THE AUTONOMY OF LAW* 249, 258-59 (Robert P. George ed., 1996).

¹⁵² See Waldron, *supra* note 151, at 339.

is no need for debate, concerning the meaning of words that actually appear in the statute, demand our respect and bind us to their authority.¹⁵³ While there might be some quibbles about how widely held is wide enough,¹⁵⁴ or about the fairness of the processes that lead to that ultimate agreement, constitutional commands would probably meet any standard.¹⁵⁵ This view of textualism suggests that the theory is open to constitutionally-inspired definitions of statutory text.

In its various forms, then, textualism is not only compatible with the Court's federalism canons, but also necessarily secondary to them. When construing statutes, a textualist court must also consider implicit presumptions about the balance of state and federal power. From here, the following subparts argue that the federalism canon in fact supports reading § 1983's "laws" to include valid regulations.

¹⁵³ Professor Eskridge, in offering a similar analysis of Waldron, claims that proper respect for what legislatures do should also take account of an array of unwritten, and in his view largely uncontroversial, assumptions about what the legislature sought to accomplish. See Eskridge, *supra* note 98, at 565, 572-74. In this respect, he echoes two decades or more of criticism, much his own, that have been leveled at the textualist school. See, e.g., Eskridge, *supra* note 79, at 210-15; Stewart & Sunstein, *supra* note 68, at 1230-31, 1317 (arguing that textualism "denies the respect for the sovereign lawgiver upon which it is supposedly based" and that "silence is inarticulate in the absence of background understandings that give it meaning").

I agree that Waldron has no especially compelling response to these arguments. Still, even textualists who permit some widely-held background assumptions, such as those required by the Constitution, often draw a distinction between assumptions that are needed to understand or define words in the statute, and added terms that give fuller content to the statute as a whole. See, e.g., Ernst & Ernst v. Hochfelder, 425 U.S. 185, 199 n.19 (1976) (Powell, J.) ("To let general words draw nourishment from their purpose is one thing. To draw on some unexpressed spirit outside the bounds of the normal meaning of words is quite another . . .") (quoting Addison v. Holly Hill Fruit Prods., Inc., 322 U.S. 607, 617-18 (1944)). Perhaps that evanescent distinction can be justified by arguing that "definitions" are necessary to make the results of legislative processes meaningful, but, as "implied terms" are not, we should not risk binding ourselves unnecessarily to a presumption that might not be as uncontroversial as we think. Regardless, my argument in this Part focuses on the definition of the word "laws" in § 1983. No implied terms are necessary.

¹⁵⁴ For example, some justices have drawn the line between permissible judicial amendments of "absurd" results, and impermissible re-writing of a statute, at whether "the alleged absurdity is so clear as to be obvious to most anyone." Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 470-71 (1989) (Kennedy, J., concurring). Absurdity, in this view, is simply a measure of the degree of popular agreement or disagreement with a particular interpretation. The slippery part, of course, is how many people it takes to make "most," and whether some of those people count more than others.

¹⁵⁵ Cf. Green v. Bock Laundry, 490 U.S. 504, 527-30 (1989) (Scalia, J., concurring) (declaring that the concurring Justice would disregard plain text when it produced an "irrational" or "unconstitutional" result).

B. *Collaboration or Federal Control?*

My focus in this Article is on § 1983 challenges to state action that is contrary to a federal statute or regulation. Thus, the vast majority of cases that would be affected by any change in § 1983 doctrine would come in the realm of what I refer to here as “collaborative” regulation – where the state regulates jointly with, or subject to the supervision of, the federal government.

Collaboration occurs in two broad forms. Generally, federal law establishes the framework of the regulatory sphere – pollution control, for example – and within that sphere, invites or commands states to regulate their citizens with varying degrees of autonomy for the state. As presently constituted, the affected areas of regulation are collaborative in a second sense as well. Because there is no private right of action, when the state and the federal government disagree, the dispute is usually resolved informally, through discussion and compromise between the two sets of actors. Some disputes take place in the shadow of sanctions, many of which are themselves relatively informal, such as the power to withhold grants, needed information, or aid in enforcement. The specific questions for this subpart will be: How do states fare in their informal, collaborative relationship with federal agencies? If the answer, as we might guess, is “poorly,” are private rights of action a viable alternative?

1. Federal Dominance

One aspect of the potential for federal domination of collaborative federal-state regulatory relationships is relatively obvious. State regulatory authority often exists only by sufferance of the United States, and in the shadow of the Supremacy Clause and preemption.¹⁵⁶ States are therefore limited in their ability to take alternative paths to underlying problems.¹⁵⁷ For example, the states and the federal government ostensibly work together in regulating health care, and both have a strong interest in providing decent and affordable

¹⁵⁶ See Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 225-26 (2000). For a discussion of preemption as a legal entity separate and apart from the Supremacy Clause, see Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767 (1994).

¹⁵⁷ See S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. REV. 685, 714-18 (1991).

health care to everyone. But the federal government has asserted exclusive control over group health plans,¹⁵⁸ frustrating any state that wants to attack the health care problem through innovative regulations of group health benefits.¹⁵⁹

A more subtle, but probably more widespread, problem is that a collaborative enterprise between federal and state bureaucrats is not the same as a collaboration between federal and state governments. The problems identified, and solutions proposed, by state regulators may be far removed from what an elected state official would say in the same circumstances.¹⁶⁰ True, the states retain some power to shape how their own bureaucrats will be made to answer to popular will¹⁶¹ – for instance, how bureaucrats will be selected and removed.¹⁶² However, the ultimate relationship between state popular will and bureaucratic outcome will depend not only on these structural devices but also on a complex web of interactions between the bureaucrats of each state and the federal bureaucrats, who will be drawing information from and responding not to one set of state concerns, but to fifty, thus diluting the ability of a single state to exercise its own will.¹⁶³

A related complaint about how federal cooperation undermines state control draws on the argument that some cooperative workplaces, rather than empowering workers,

¹⁵⁸ See 29 U.S.C. § 1144(a) (2000).

¹⁵⁹ See John Kincaid, *Foreword: The New Federalism Context of the New Judicial Federalism*, 26 RUTGERS L.J. 913, 933 (1995) (noting 439 explicit statutory preemptions of state law, and an unknown number of additional preemptions through regulation and court decision).

¹⁶⁰ See Matthew Diller, *The Revolution in Welfare Administration: Rules, Discretion, and Entrepreneurial Government*, 75 N.Y.U. L. REV. 1121, 1208 (2000) (noting that in system of shared authority between state and federal bureaucracies, key decisions are made at levels of administration of both governments that are inaccessible to public oversight); Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1553-54 (1994) [hereinafter Kramer, *Understanding Federalism*] (claiming that expert regulators at state level are likely to follow guidance of federal fellow experts over that of non-expert state political superiors); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 284 (2000) [hereinafter Kramer, *Political Safeguards*] (same); cf. David Schoenbrod, *Separation of Powers and the Powers that Be: The Constitutional Purposes of the Delegation Doctrine*, 36 AM. U. L. REV. 355, 386-87 (1987) (arguing that bureaucrats are motivated by their own purposes in ways that frustrate political controls).

¹⁶¹ See generally Arthur Earl Bonfield, *The Federal APA and State Administrative Law*, 72 VA. L. REV. 297, 303-20 (1986).

¹⁶² See Jim Rossi, *Overcoming Parochialism: State Administrative Procedure and Institutional Design*, 53 ADMIN. L. REV. 551, 557-59 (2001).

¹⁶³ See Kramer, *Understanding Federalism*, *supra* note 160, at 1553-54.

instead result in management co-opting the shop floor.¹⁶⁴ Similarly, collaboration between federal and state regulators may simply cause state officials to throw over their own views in favor of the federal outlook. To be clear, I am not arguing that federal agencies will necessarily intend to suborn their state counterparts. Still, co-optation can come by accident. State bureaucrats have incentives to become “yes men” (or women), parroting back what they believe the federal agency wants to hear. For instance, an agency may condition federal grants on criteria crafted by the federal agency before it has consulted with the officers in the field, or at the beginning of a new regulatory enterprise about which not much information is available. If the agency then evaluates the grantee based on how well it met the preestablished criteria, it might become very difficult for the program to evolve in new directions. Incentives also influence individual behavior. Federal work is more prestigious, and often better compensated, than comparable state positions. State bureaucrats might act according to the perceived expectations of the prospective federal employer, rather than striking out in new directions or zealously representing the interests of the state. Even workers who are not looking to get hired can be influenced by the institutional culture of the federal bureaucracy.¹⁶⁵

Thus, collaborative administration between state and federal agencies can reduce both the representation of a state’s interests and a state’s control over its governmental institutions. For example, suppose that a state’s governor and legislature have a strong preference for vigorous enforcement of a particular regulation, one whose enforcement the state must share with the federal government. Suppose further that the professional staff of the federal and state bureaucracies prefer nonenforcement, and that political leadership of the federal agency is ambivalent.¹⁶⁶ To be more concrete, consider the Department of Housing and Urban Development during

¹⁶⁴ See Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379, 1457-59 (1993); *NLRB v. Pa. Greyhound Lines*, 303 U.S. 261, 268-69 (1938).

¹⁶⁵ Cf. Diller, *supra* note 160, at 1209-10 & n.450 (noting study that demonstrated that cooperation between agency and its contractors tended to undermine the independent thinking and problem-solving of the contractor, which instead came simply to “police compliance” with norms generated by the agency).

¹⁶⁶ I consider the relationship between a federal agency’s professional staff and its political leadership more closely a bit later. See *infra* text accompanying notes 215-218.

the Reagan administration. HUD shared, with state and local housing finance agencies and public housing authorities, the responsibility to monitor the financing and upkeep of federally subsidized low-income housing.¹⁶⁷ Despite widespread agreement in some state governments that close supervision of privately owned low-income housing was desirable, none was ever in the offing.¹⁶⁸ Billions of dollars disappeared illicitly, with state governments largely left to pick up the resulting housing burden.¹⁶⁹

2. Is Reinvented Government the Answer?

The recent work of several scholars on the nature of joint public and private regulation suggests that the prevalence of collaborative regulation may itself be a solution to the problem of federal domination.¹⁷⁰ Collaboration with the states can have a number of benefits for the federal agency. State regulators, like workers on an assembly line, may be more familiar with the day-to-day operations and problems of a regulated industry, and therefore have better capacity to implement policy, and identify places where policy needs improvement.¹⁷¹ By avoiding directly adversarial relationships, negotiation may also extend the ability of the federal agency to win cooperation from otherwise recalcitrant state officials.¹⁷² A

¹⁶⁷ See 12 U.S.C. § 1701q(g)-(j) (2000) (setting forth HUD Secretary's responsibilities in supervising housing assistance for the elderly); *id.* § 1701s(b), (e) (same, for rent supplement payments on behalf of low-income tenants, including those living in state- or locally-financed homes); *id.* § 1715l(f) (same, for housing receiving federal mortgage insurance); *id.* § 1715z-1(b), (e), (o), (p), (s)(6) (same, for housing receiving "interest reduction" subsidies from federal government); 42 U.S.C. §§ 1437c-1, 1437f (2000) (authorizing Secretary to enter into contracts with public housing agencies to establish public housing); *id.* § 8003 (same, to create "congregate housing" for the elderly and disabled).

¹⁶⁸ See OFFICE OF THE INSPECTOR GENERAL, U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, AUDIT OF SECTION 8 MODERATE REHABILITATION PROGRAM, at iii (1989) (summarizing the OIG's findings that one of HUD's cooperative low-income housing programs operated with "little or no documentation or accountability").

¹⁶⁹ For a useful overview of the dozen or so overlapping HUD abuses, and the resulting impact on housing for low-income families, see Michael Allen Wolf, *HUD and Housing in the 1990s: Crises in Affordability and Accountability*, 18 *FORDHAM URB. L.J.* 545, 553-70 (1991).

¹⁷⁰ For prominent positive descriptive accounts of collaborative regulation, see AL GORE, NATIONAL PERFORMANCE REVIEW, IMPROVING REGULATORY SYSTEMS 29-30 (1993); Freeman, *supra* note 131, at 549; Rubin, *supra* note 131, at 785-88.

¹⁷¹ See Freeman, *supra* note 131, at 571.

¹⁷² See Rubin, *supra* note 131, at 783; Mark Seidenfeld, *Empowering Stakeholders: Limits on Collaboration as the Basis for Flexible Regulation*, 41 *WM. & MARY L. REV.* 411, 412 (2000).

rational federal regulator, this theory goes, won't kill the goose that lays golden eggs. If independent state officials provide the information and flexibility critical to a federal agency's mission, the federal agency is unlikely to risk losing the benefits of collaboration in order to win policy disputes. More critically, to the extent that state feedback provides the raw information for future federal policy, the states are, in effect, steering their own ship.

Professors Michael Dorf and Charles Sabel have taken these arguments one step further, proposing an integrated federal, state, and private regulatory structure in which local units work independently to solve social problems defined broadly at the national level.¹⁷³ As the local units gather information about the nature of these problems, and the best methods for solving them, the federal agency pools the data and analyzes it for the "best practices," sometimes discovering in the process that the nature of the problem itself must evolve in light of the new information.¹⁷⁴ Dorf and Sabel's system is "experimentalist," because it constantly evaluates both ends and means, and also "democratic," because it distributes design authority throughout the regulatory apparatus and enhances deliberation.¹⁷⁵

Significantly, for our purposes, Dorf and Sabel claim to solve many of the problems of joint federal-state regulation. For instance, they argue that their process of rolling standards creates room for local innovations, and gives states influence in the process of developing national ends and norms.¹⁷⁶ Moreover, they claim that their design enhances agency accountability, not only through direct public participation and deliberation, but also by exposing local agencies to competitive forces – that is, to information revealing that other localities have reached for the same ends more effectively.¹⁷⁷

Notwithstanding these optimistic views of shared regulatory power, many commentators are still highly critical of collaboration.¹⁷⁸ To some, it is no more than "capture" writ

¹⁷³ See Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998).

¹⁷⁴ See *id.* at 299-301, 354.

¹⁷⁵ See *id.* at 313, 351-53.

¹⁷⁶ See *id.* at 322, 347, 444.

¹⁷⁷ See *id.* at 314, 321.

¹⁷⁸ See, e.g., Susan Rose-Ackerman, *American Administrative Law Under Siege: Is Germany a Model?*, 107 HARV. L. REV. 1279, 1283, 1301 (1994); William Funk, *Bargaining Toward the New Millennium: Regulatory Negotiation and the Subversion of*

large.¹⁷⁹ Dorf and Sabel admit that their scheme is, potentially, open to “obstruction” by participants who give misleading information, attempt to game the system, or use it as a vehicle for expanding already-existing power inequities.¹⁸⁰ Their non-judicial solutions – to rely on “internal dissenters” who reveal bad performance, and to put their faith in benchmarking and rolling best practices to reveal and disincentivize gaming behavior¹⁸¹ – are unlikely to satisfy all critics.¹⁸²

Nonetheless, to the extent that the optimistic view of collaboration correctly predicts that states retain significant autonomy in a shared regulatory environment, one might justifiably argue that any additional protections that a court could provide, in the name of federalism, would be largely redundant. Thus, the next subpart examines the place for private rights of action under both the bright and gloomy descriptions of collaboration.

3. Collaboration and Private Rights of Action

Collaborative regulation’s claim to serve federalism values may still leave a place for agency-created private rights of action in the federalism equation. For those who remain dubious of how much autonomy states retain in an overlapping system of regulation, private rights of action sidestep serious dangers that state regulators will become more responsive to their federal counterparts than to the state electorate. I elaborate that point in part IV.B.3.b. First, however, I argue in part IV.B.3.a. that private rights of action are a necessary

the Public Interest, 46 DUKE L.J. 1351, 1374-88 (1997); Seidenfeld, *supra* note 172, at 413.

¹⁷⁹ *USA Group Loan Servs., Inc. v. Riley*, 82 F.3d 708, 714 (7th Cir. 1996) (Posner, J.); Seidenfeld, *supra* note 172, at 428.

¹⁸⁰ Dorf & Sabel, *supra* note 173, at 348-49.

¹⁸¹ *See id.* at 348-53. In other words, Dorf and Sabel expect that careful measures of good performance – benchmarking – will demonstrate when an entity is failing to perform as well as others who are pursuing the same goals. Consumers of the entity’s “product” – example, people who use the public service it provides – may put pressure on the entity to meet or exceed the standards of performance set by other local participants. This is part of their theory of “rolling best practices,” the process by which each autonomous unit borrows the best of what the others do in order to match one another’s performance. Thus, they theorize that self-dealing and obstruction will show up on the bottom line, and that in a system where there is genuine competition for the best results, those subpar results will be punished.

¹⁸² *See* Rose-Ackerman, *supra* note 178, at 1283 (arguing that collaborative systems fail to resolve problems of distributive justice); Seidenfeld, *supra* note 172, at 413, 448 (noting potential of collaborative model to serve as a tool for strategic advantage).

feature of more optimistic collaborative schemes, so that the federalism benefits of one go hand-in-hand with the other.

a. Private Rights of Action and the
Optimistic View of Collaboration

Suppose, first, we believe that reinvented government empowers states. In order to reap that benefit, though, we will also need judicial involvement. Some optimistic collaborative models also imagine a clear-cut role for private enforcement. For example, Dorf and Sabel acknowledge that courts may be necessary to protect citizens' rights to participate in their collaborative system against intimidation, "clientelism," and company unionism.¹⁸³ Courts also help to assure that government, rather than growing slack, will continually have to justify its behavior with reference to the best available values and data, or, as they put it, "elaborate fundamental principles while assessing the practical consequences of different rules of order."¹⁸⁴

Other collaborative theorists note that, like any set of deal-makers, collaborators need guarantees of enforceability in order to make deals worth bargaining for.¹⁸⁵ Nor are the regulators a satisfactory candidate for enforcement duties, since they are often one of the parties to the dispute and, in any event, the entire design of the collaborative system is to relieve agencies of the burdens of enforcement. One recent commentator has suggested that collaborative schemes should be enforceable through common-law contract.¹⁸⁶ Private entities who participate in designing a collaborative scheme could be made third-party beneficiaries to contracts between the principal regulator and intermediary regulators or service-providers.

Unfortunately, the contract enforcement proposal will fail. Many beneficiary groups cannot afford to hire counsel to enforce a breach of contract. Suits challenging administrative action or involving interpretations of regulations are typically

¹⁸³ Dorf & Sabel, *supra* note 173, at 405, 459-64.

¹⁸⁴ *Id.* at 388-89.

¹⁸⁵ See Freeman, *supra* note 131, at 667; Jonathan R. Macey, *Promoting Public-Regarding Legislation through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 234 (1986); Rose-Ackerman, *supra* note 178, at 1280; Seidenfeld, *supra* note 172, at 424.

¹⁸⁶ See Freeman, *supra* note 131, at 667-71; Jody Freeman, *The Contracting State*, 28 FLA. ST. U. L. REV. 155, 201-07 (2000).

lengthy, complex, expensive, and unsuccessful.¹⁸⁷ If the plaintiffs are only seeking “specific performance,” and do not have meaningful damages to pay a contingency fee, finding counsel will be very difficult.¹⁸⁸ Once it becomes apparent that the agreements struck collaboratively are binding, in effect, only on the parties least able to enforce them in court, the collaborative process will fall apart.

The contractual enforcement plan is workable, though, if the complaining parties can get the benefits of the fee-shifting provisions available to prevailing parties under § 1983.¹⁸⁹ As discussed below, § 1988, the mechanism for shifting fees in § 1983 claims, provides far less than a guarantee that counsel will be available to aggrieved parties.¹⁹⁰ Indeed, § 1988 primarily helps entities that already have a certain minimum of resources, public support, and organizational acumen. But those are exactly the same parties that have the sophistication and initiative to seek negotiations with federal and state regulators, and probably the only parties that have the influence and persuasiveness to win actual commitments.¹⁹¹ Section 1988, then, is good enough to keep at the table the parties who are likely to be there in the first place.

Under this view, private rights of action under § 1983 are an essential feature of the federalism-preserving system of collaborative regulation. First, by creating a right of action, a federal agency in effect carves out a space in which enforceable deals can be struck between all parties. For example, a state housing finance agency is more likely to be able to attract community support for a new development, and private investment dollars to build it, if the parties are confident their bargain will not change once the beams have begun to go up.

Agency-created private rights of action can help to bring about genuinely collaborative systems in another sense, as well. Dorf and Sabel acknowledge that one major weakness of their plan lies in identifying transitional rules. They have no clear answer to the question of how to switch from the current, (in their eyes) disfunctional system into their experimental one, other than by fumbling half-steps, each (they hope) better than

¹⁸⁷ See *infra* text accompanying notes 265-267.

¹⁸⁸ *Id.*

¹⁸⁹ See 42 U.S.C. § 1988 (2000).

¹⁹⁰ See *infra* text accompanying notes 263-271.

¹⁹¹ See Susan Rose-Ackerman, *Consensus Versus Incentives: A Skeptical Look at Regulatory Negotiation*, 43 DUKE L.J. 1206, 1210 (1994).

the status quo.¹⁹² One possible transition begins by allowing an agency to make the availability of private rights of action contingent on exhaustion of state remedies, assuming that the agency has “certified” or otherwise examined the state’s solutions and determined that those remedies offer a genuine solution to the problems its regulations are aimed at solving. Exhaustion requirements give states the incentive to develop remedies.¹⁹³ Agency oversight and rolling benchmarking could also make state remedies not only a half-hearted replacement for private suit, but also a genuinely experimental and evolving process, integrating citizens and other private interest groups into the regulatory process, and injecting local information into federal norms.

b. Private Rights of Action and the Dim View of Collaboration

The skeptical view of reinvented government envisions federal and state bureaucrats working together to escape state political controls. In that scenario, private litigation breaks open the bureaucratic beehive, exposing internal behavior to outside control once more.¹⁹⁴ For example, a private suit could offer a route for states to bypass moribund bureaucracies and revitalize regulations that a state deems to have been underenforced.¹⁹⁵ At the same time, a private suit can be a vehicle to check overaggressive state regulators – for example, if federal regulations seem to contemplate that a permit to broadcast, cut timber, or release hot water be granted under circumstances rather broader than the state agency seems to allow.¹⁹⁶

¹⁹² See Dorf & Sabel, *supra* note 173, at 463-64, 469.

¹⁹³ See *Patsy v. Bd. of Regents of Fla.*, 457 U.S. 496, 532-33 (1982) (Powell, J., dissenting).

¹⁹⁴ See Jaffe, *supra* note 115, at 1044-45.

¹⁹⁵ There is some data to suggest that, even if judicial review does not directly alter regulatory outcomes, it can produce more care and effort on the part of state regulators. See F. Andrew Hanssen, *Independent Courts and Administrative Agencies: An Empirical Analysis of the States*, 16 J.L. ECON. & ORG. 534, 534 (2000).

¹⁹⁶ Of course, judicial resolution of regulatory questions comes in for a world of criticism, and much of it is merited. On the other hand, as I will explain in Part V, *infra*, many of the critic’s complaints are more properly directed at the traditional, and inadequate, remedies afforded by standard administrative law and due process challenges to irrational state action. Most of those critiques can be met by the particular features of agency-enabled rights of action under § 1983, and for the most part the rest can be solved with sensible assumptions about the availability of those rights.

The critical question is whether state political autonomy is enhanced by taking enforcement decisions out of the hands of unaccountable bureaucrats and putting them into the hands of unaccountable judges.¹⁹⁷ Section 1983 claims, however, can be brought in state court,¹⁹⁸ where state elected officials have complete control over the form of judicial responsibility to public will.¹⁹⁹ Many state judges are elected; others are appointed but serve limited terms subject to reappointment.²⁰⁰ Section 1983 litigation, then, offers the state community an opportunity to shift enforcement disputes into a forum controlled by the people of the state.²⁰¹ While state agency defendants could certainly remove suits against themselves to federal court, the state could not seriously claim that it was deprived of sovereignty as a result of the litigation choices of its own officers.²⁰² In any event, state attorneys general, as elected

¹⁹⁷ Again, by hypothesis, we are working within the set of textualist assumptions. Although there are a variety of plausible arguments about why judges are "accountable," or about why traditional notions of accountability are not especially relevant to judicial legitimacy, I presume that such arguments are not persuasive to the textualist.

¹⁹⁸ See *Howlett v. Rose*, 496 U.S. 356, 358, 367-70 (1990).

¹⁹⁹ See *id.* at 373 ("The States . . . have great latitude to establish the structure and jurisdiction of their own courts."); GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 53 (1982); John Choon Yoo, *Who Measures the Chancellor's Foot: The Inherent Remedial Authority of the Federal Courts*, 84 CAL. L. REV. 1121, 1167 (1996); cf. *Republican Party of Minn. v. White*, 536 U.S. 765, 783-84 & n.12 (2002) (arguing that elected state judges are part of "the enterprise of representative government").

²⁰⁰ See *White*, 536 U.S. at 790-91 (O'Connor, J., concurring); Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 725 (1995).

²⁰¹ See DANIEL A. FARBER & PHILLIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 71 n.26 (1991); Mark Tushnet, *Constitutional Interpretation and Judicial Selection: A View from the Federalist Papers*, 61 S. CAL. L. REV. 1669, 1669 (1988). *But see* Croley, *supra* note 200, at 726-42, 787 (arguing that elected judges undermine democratic values).

²⁰² Several of the grizzled veteran litigators (including one federal judge) who commented on an earlier draft of this Article remarked that, in their experience, few § 1983 claims were ever brought in state court. While I do not doubt that claim is accurate, I think it is a state of affairs that is unlikely to continue. Until very recently, plaintiffs could routinely bring both § 1983 and supplemental state law (such as state APA) challenges together in federal court. Although in theory the Eleventh Amendment could shield the state from defending state law claims in federal court, see *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 120-21 (1984), as a practical matter state attorney generals' offices had no incentive to litigate similar sets of claims in two separate fora. Plaintiffs therefore rarely faced a choice between their preferred forum for federal claims, which evidently was federal court, and the problem of dual litigation. Recently, though, the Supreme Court has clarified that, while sovereign immunity may sometimes be waived by state legislators, state litigators cannot, merely by failing to raise a jurisdictional defense, expand the scope of a federal court's supplemental jurisdiction. See *Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 539-

officials themselves, are likely to respond to popular preferences for state judicial resolution of important state problems.²⁰³

Finally, federal agencies can themselves ensure that states retain control over the resolution of disputes that produce § 1983 suits. Section 1983 plaintiffs do not have to exhaust state judicial or administrative remedies before bringing suit in federal court.²⁰⁴ That is a sensible policy, in general, because, as a vehicle for enforcing federal law on what might be recalcitrant states, § 1983 in effect presumes the possible inadequacy of state fora.²⁰⁵ A federal court, with little data about the effectiveness of state courts in enforcing federal law, and at best only an indirect connection to popular norms of “effectiveness,” is in a poor position to determine otherwise. A federal agency, however, might craft a regulation making a private right of action under § 1983 contingent on exhaustion of state remedies certified by the agency as “effective.”²⁰⁶ The agency is well positioned to evaluate what encompasses effective dispute resolution, and, if inspired by the Dorf and Sabel model, might permit wide experimentation in methods, and encourage rolling benchmarking to improve their quality over time.

One might object that these benefits are unattainable unless the relevant federal agency chooses to act. Why would a

542 (2002). As a result, federal district courts are beginning to dismiss supplemental state law claims against sovereign defendants on their own motion. *See, e.g., Bowers v. NCAA*, 188 F. Supp. 2d 473, 477 & n.2 (D.N.J. 2002). The result is that plaintiffs are now rather more likely to bring their § 1983 claims challenging state administrative actions in state court, so as to avoid the decision either to abandon state law claims or conduct a parallel litigation in order to pursue them.

²⁰³ Even if a suit does end up in federal court, it might not necessarily be decided by a federal judge. Litigation against state agencies can be republican-forcing; that is, by focusing public attention on decisions that normally receive relatively little attention from all but the most interested voters, a lawsuit may encourage debate and, ultimately, a settlement or other resolution prior to final judicial determination. *See* III DAVIS & PIERCE, *supra* note 70, § 185, at 187; Macey, *supra* note 185, at 256; Seidenfeld, *supra* note 172, at 459; Stewart & Sunstein, *supra* note 68, at 1294. As I explain below, the majority of § 1983 litigation against state officials will be brought by “public interest” organizations or large corporations, both of whom are interested in, and capable of, fostering public solutions to private disputes. *See infra* text accompanying notes 263-273. As a result, § 1983 suits, even more than, say generic state law claims against the state government are amenable to negotiated outcomes.

²⁰⁴ *See Patsy v. Bd. of Regents of Fla.*, 457 U.S. 496, 501 (1982); *Monroe v. Pape*, 365 U.S. 167 (1961).

²⁰⁵ *See Allen v. McCurry*, 449 U.S. 90, 98-99 (1980).

²⁰⁶ A court reviewing such a regulation could find that it is “reasonable,” even though contrary to the general rule for § 1983 litigation, because it effectuates the imputed intention of Congress under the *Bass* rationale.

federal agency care about state political control over state bureaucracies? One possible answer is that the states themselves demand it. Federal agencies, at least at their highest levels, are somewhat responsible to the President, and interpretive authority is highly centralized in the most political regions of the cabinet.²⁰⁷ States might use their national political power to prevent federal agency behavior that would tend to undermine their ability to control their own instrumentalities of government. Yet state political influence is also a challenge to private rights of action; if the states are strong enough to protect themselves, what need have they for judicial protection? The next subpart analyzes these two potentially competing threads.

²⁰⁷ There are several factors that enhance the influence of the President over agency decision making, at least at the upper echelons of the executive agencies. Most prominent among these is the influence of the Office of Management and Budget, which pursuant to executive order now has authority to consider most significant regulation for its "cost-benefit" effectiveness. See I DAVIS & PIERCE, *supra* note 70, § 7.9 at pp. 352-53; Peter L. Strauss & Cass R. Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181 (1986). Major policy decisions in each executive agency, such as the issuance of formal regulation, must be "cleared" through the office of the Secretary. See, e.g., Katharine Q. Seelye, *White House Rejected a Stricter E.P.A. Alternative to the President's Clear Skies Plan*, N.Y. TIMES, April 28, 2002, at A26 (reporting that the Bush administration rejected implementation plan for Clean Air Act proposed by the EPA). The Secretary and his or her chief deputies are appointed directly by the President, and, unlike many parliamentary governments, there is a very strong correlation between the general ideological positions a President campaigns on and the views of his cabinet. Through the Attorney General's power to render opinions "binding" on the rest of the executive branch, the President can centralize interpretive authority, and the Solicitor General's power to refuse to appeal can serve the same function when the agencies litigate. See American Bar Association, *A Blackletter Statement of Federal Administrative Law*, 54 ADMIN. L. REV. 1, 83 (2002); Douglas W. Kmiec, *OLC's Opinion Writing Function: The Legal Adhesive for a Unitary Executive*, 15 CARDOZO L. REV. 337 (1993). Finally, the President exerts significant control over agencies through public relations. President George W. Bush, for example, centralized the press secretaries and information offices of all of the executive agencies, see Dan Balz & Mike Allen, *Hughes to Leave White House; Key Bush Aide Wants to Return to Texas With Family*, WASH. POST, April 23, 2002, at A1, so that agencies would have difficulty generating public sentiment on their own, independent of the administration's will.

At the same time, one has to acknowledge that the power of the President and his staff to monitor developments in the agencies, especially at the field level, is limited. See I DAVIS & PIERCE, *supra* note 70, § 7.9, at 356-57; see also Eric Schmitt, *Administration Split on Local Role in Terror Fight*, N.Y. TIMES, April 29, 2002, at A1 (describing White House officials "blindsided" by ruling of Office of Legal Counsel on powers of local law enforcement agencies to aid in antiterrorism efforts). For an interesting example of Cabinet secretaries themselves caught flat-footed by major developments in the field, see Katharine Q. Seelye, *Snowmobile Letter Surprises E.P.A. Leader and Interior Chief*, N.Y. TIMES, May 3, 2002, at A14. Nonetheless, it seems likely that private rights of action are sufficiently important to draw the administration's attention, and, if not, it is almost certain that prospective defendants would do so.

C. *Does State Political Power Make the Judiciary Irrelevant?*

Perhaps the most substantial counter to the claim that collaborative rulemaking makes serious inroads into state autonomy hinges on state political power. If states have political influence over the upper levels of federal agencies, it might be expected that they would use their influence to preserve their control over state governmental processes. In Professor Wechsler's famous formulation, state influence arises out of structural interdependence between state and federal governments.²⁰⁸ In that view, the disproportionate power of small states in the Senate, as well as the fact that congressional representatives are chosen on a state-by-state basis with electoral qualifications controlled by the states, gives states enough power to defend themselves against federal encroachments.²⁰⁹

More recently, Professor Larry Kramer has proposed an alternative sort of interdependence, in which federal officials depend for their initial and continuing political livelihood on support from national political parties, which in turn draw much of their strength from field-level state parties.²¹⁰ Federal officials' indebtedness to state officials, as well as their likely philosophical sympathy with their former peers in the state government, lead federal lawmakers to be protective enough of state governmental autonomy that no additional judicial protections are required.²¹¹

One set of Professor Kramer's critics has argued that, even if his premise of political interdependence is accurate, his conclusion that interdependence leads to more protection for states is not.²¹² According to these critics, states will not necessarily use their power to protect state governmental processes. Instead, state actors may well wish to pursue short-term policy goals, regardless of the consequences for state

²⁰⁸ See Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

²⁰⁹ See *id.* at 559.

²¹⁰ See Kramer, *Political Safeguards*, *supra* note 160, at 279-85.

²¹¹ See *id.* at 280, 285.

²¹² See Lynn A. Baker, *Putting the Safeguards Back into the Political Safeguards of Federalism*, 46 VILL. L. REV. 951, 954-56 (2001); Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459, 1484-88 (2001).

governance.²¹³ Since it is state political autonomy, not simply the expression of momentary political preferences, that is the heart of federalism, this would be a fatal flaw.²¹⁴

As explained in the subparts that follow, regardless of one's view on the connection between federal/state interdependence and state autonomy, private rights of action are superior to negotiation between state and federal agencies. Under Professor Kramer's view, political accountability will ensure that agencies will only create private rights of action where it will improve state political independence. Indeed, states can use their political power to resolve many of what, to the federalist, are the shortcomings of collaborative federal/state regulation. Additionally, the safeguards provided by state sovereign immunity and related doctrines serve states better than the rough and arbitrary competition that results when states wield the power of federal agencies against one another.

1. When the Safeguards Work

Assume both that states have influence over national politics and also that states will use that power to promote policies that enhance their own autonomy. But if it is politics that empowers states, then state influence extends only as far as the reach of political influence over administrative activity. Certainly major initiatives or policy shifts, especially if issued with full notice and comment, are firmly in the hands of the administration.²¹⁵ As other commentators have pointed out, however, the activity of field staff in carrying out day-to-day review of state activity is largely insulated from effective political oversight by bureau heads.²¹⁶ Top supervisors might lack the technical expertise to effectively review decisions by field staff, as in the case of the Environmental Protection Agency, or a bureaucracy might be so huge that close oversight is simply impractical, such as in the case of the Department of

²¹³ See Baker, *supra* note 212, at 955, 967; Prakash & Yoo, *supra* note 212, at 1478-79; Greve, *supra* note 85, at 897, 904-05.

²¹⁴ See Kramer, *Political Safeguards*, *supra* note 160, at 222-23; Baker, *supra* note 212, at 959; Prakash & Yoo, *supra* note 212, at 1477-79.

²¹⁵ See *supra* note 207.

²¹⁶ See, e.g., Diller, *supra* note 160, at 1208-09; Julie A. Roin, *Reconceptualizing Unfunded Mandates and Other Regulations*, 93 NW. U. L. REV. 351, 353-54 (1999); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1555-57 (1992).

Health and Human Services.²¹⁷ Slowdowns in the nomination and confirmation process can leave career staff in charge for long stretches. Additionally, because much of the erosion of state autonomy happens at the field level, the daily interactions between federal and state bureaucrats are the main way in which the state's objectives, perhaps initially shared by its own appointees and professionals, slowly blend into the shared view of the joint federal/state bureaucracy.

In response, rational state officials will look for ways to counteract the relative unresponsiveness of professional administrators. Private rights of action present one powerful instrument for shifting enforcement power from the hands of federal and state bureaucrats into institutions more directly within control of the state electorate.²¹⁸ Rights of action, at least as I have argued for them, could only be created or undone by regulations issued through notice and comment. As such, they would lie squarely within the reach of the upper, political echelons of federal agencies – at the apex of state political power, far from the nadir of the field.²¹⁹ While private rights of action are not the perfect tool for recapturing the benefits of federalism, there would not seem to be many alternatives for the states. Thus, when state and federal elected officials are politically interdependent, private rights of action under § 1983 serve the interest of state autonomy.

²¹⁷ One might argue that the relative distance of political appointees from field-level decisions does not necessarily dilute the political accountability of field decisions. We could imagine a well-designed agency, for example, where field staff have carefully designed missions, and exercise their discretion mostly in the process of collecting information, analyzing it rationally, and responding with a choice among authorized alternatives. The problem is that “analyzing it rationally” usually involves what are actually political assumptions, such as how to rank two or more goals established by superiors, whether or not to make assumptions at the top or bottom ends of plausible ranges, whether or not to make aggressive accounting or other mathematical assumptions, and the like. See Thomas O. McGarrity, *Regulatory Analysis and Regulatory Reform*, 65 TEX. L. REV. 1243, 1299-1301 (1987). The result is that important policy decisions may be not only inaccessible, but also invisible, to the public or their political agents. *Id.*

²¹⁸ See *supra* text accompanying notes 194-206.

²¹⁹ See *supra* note 207. On the generally pro-democratic benefits of the notice and comment process, see Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1373-74 (1992); Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 402-03.

2. When the Safeguards Fail

The alternative view of political interdependence posits that states view federalism instrumentally, so that they tend to use their political access for short-term gains that do not necessarily enhance their own autonomy in the long run.²²⁰ In other words, states, like other market actors, manipulate regulators in order to impose externalities on other market participants, including other states.²²¹ The alternative view might also take note of the fact that states can have uneven political influence. States might all value sovereignty equally, but those having more influence at a particular time might realize more of it at the expense of their less powerful neighbors. Thus, “downwind” states might demand that the EPA force state regulators in “upwind” states to tighten inspection and approval of private polluters.²²² Under this alternative view of the world, § 1983 litigation safeguards state institutional autonomy over agency enactment of momentary policy preferences urged by more politically powerful states.²²³

²²⁰ See Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1488, 1500 (1992); Prakash & Yoo, *supra* note 212, at 1478-79.

²²¹ See, e.g., Susan Rose-Ackerman, *Cooperative Federalism and CoOptation*, 92 YALE L.J. 1344, 1345 (1983). For a classic analysis of the externality problem, see William Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663 (1974). Even Cary's critics acknowledge that interstate competition poses a serious threat of externalities. See, e.g., Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251 (1977).

²²² See Jennifer Lee, *7 States to Sue E.P.A. Over Standards on Air Pollution*, N.Y. Times, Feb. 21, 2003, at A25; see also *Michigan v. Env'tl. Prot. Agency*, 213 F.3d 663, 672 (D.C. Cir. 2000) (per curiam); Susan Rose-Ackerman, *Environmental Policy and Federal Structure: A Comparison of the United States and Germany*, 47 VAND. L. REV. 1587, 1609-11 (1994).

²²³ To see the difference between institutional autonomy and policy preferences, consider the upwind and downwind states again. Viewed as a discrete transaction, the state emissions standard question looks distinctly unfair to the downwind states; not only do they lose capital to the upwind states, where the cost of doing business is cheaper, but they also have to breathe in the resulting pollution. (Thanks to the transaction costs of buying off the upwind states—not least of which is the difficulty that the states, because they cannot make interstate compacts without federal approval, see *Cuyler v. Adams*, 449 U.S. 433, 440 (1981), must involve the EPA in any meaningful deal—there is no ready Coasian solution to the downwind states' woes. See *Michigan*, 213 F.3d at 676 & n.3.) And all because the upwind states, for the most part, happen to be politically important swing states, while the downwind states are, for the most part, reliably Democratic. In the long run, though, the, ahem, winds of fortune will reverse. State autonomy gains, measured as a realization of policy preferences over those of other states, largely sum out to zero over time. The same can't necessarily be said of a system that encourages federal control over state instruments of government. See Kramer, *Political Safeguards*, *supra* note 160, at 222-23; McConnell, *supra* note 220, at 1507-11. Thus, a state that pushes control over some issues into the federal realm to win today's battle loses autonomy in the long run. I

The safeguards of § 1983 litigation are superior to agency interaction for two reasons: the difficulty of forcing a state to pay damages in a § 1983 suit and the comparative ease with which federal agencies can affect the state purse. As a general matter, the safeguards grow out of limits on suits against states and state officers imposed by the Supreme Court's sovereign immunity jurisprudence. The exact scope of those limitations is worth exploring in some detail.

A private litigant has a handful of options in bringing a § 1983 suit to compel state agency action (or inaction). Although the plaintiff cannot name the state directly, she can sometimes sue a state-created entity in its own name.²²⁴ More commonly, the plaintiff sues state or state entity officers in their "official capacity" – in effect, suing the uniform or title, not the person.²²⁵ Suits against officers in their official capacity may seek only prospective injunctive relief.²²⁶ Finally, plaintiffs can sue officers in their individual capacity, for both damages and injunctive relief.²²⁷ States often indemnify their officers for individual capacity suits, so that the plaintiff may, in theory, be able to influence the state through its pocketbook by means of individual capacity suits.²²⁸

In fact, though, it would be almost impossible to force a state to pay damages for violating a duty imposed by federal regulations. After a long history of equivocation, the Supreme Court now seems to have settled on the principle that the states have complete control over whether a state-created entity is an "arm of the state," entitled to the state's own sovereignty.²²⁹ If so, the entity is completely immune from suit

therefore focus my analysis on long-term protection for the structures of state government, rather than temporary wins or losses.

²²⁴ See *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 41-48 (1994).

²²⁵ See generally RICHARD H. FALLON ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1124-26 (4th ed. 1996) (discussing litigation strategies for suits against states and state policies).

²²⁶ See *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989).

²²⁷ See *Hafer v. Melo*, 502 U.S. 21, 25-26, 31 (1991).

²²⁸ But see Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 373-80 (2000) (arguing that the effect of liability for individual officer torts on the state's behavior is "simply indeterminate").

²²⁹ See *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429-31 (1997) (citing *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977)); *Bowers v. Nat'l Collegiate Athletic Ass'n*, 171 F. Supp. 2d 389, 401-02 (D.N.J. 2001) (explaining *Doe* as holding that federal courts must honor states' decisions to treat a state-created entity as an arm of the state entitled to its sovereign immunity). But cf. *McMillian v. Monroe County*, 520 U.S. 781, 804-05 (1997) (Ginsburg, J., dissenting) (arguing that the

under § 1983, regardless of what relief is sought.²³⁰ In order to overcome the qualified immunity of state officers sued in their individual capacity, a plaintiff must show that a reasonable officer would have known she was violating clearly established law at the time of the plaintiff's injury.²³¹ Federal regulations, even those that have been narrowed by the agency to make them suitable for private enforcement, will often be too open-textured, or too complex, to describe as "clearly established." It will also often be difficult for a plaintiff who has suffered injuries as a result of a state's administration of federal regulations to connect her injuries to the actual person responsible for the state's decision. That is, since § 1983 requires "personal direction or . . . actual knowledge and acquiescence" for individual liability,²³² most plaintiffs will only be able to make out a case against the low-level field staff or enforcement officials. But a jury may find that a reasonable field staffer would have no reason to know what procedure federal law imposed on the state agency.²³³

In contrast, federal agencies have considerable power to pull the states by their purse-strings. Most obviously, many agencies are authorized to control the allocation of grant funds or grant-in-aid dollars. Agencies can, and sometimes do, exact conditions from the states in exchange.²³⁴ Some regulatory

majority opinion implies that a state cannot "insulate counties and municipalities from . . . liability by change-the-label devices"). It may be that both Justice Ginsburg and the District Court in *Bowers* are right; although a state can use largely formalistic labels to grant immunity to many state entities, counties and cities, although creatures of state law, might be special exceptions. The rationale for that distinction might rest on the long judicial pedigree for such exceptions, *see* *Lincoln County v. Luning*, 133 U.S. 529 (1890), or a historical claim that no matter what the state might say about such matters, towns and counties simply have never been thought of as, and therefore cannot be made, sovereign entities. *But cf.* *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 124 n.34 (1984) (suggesting that suit against local entity might be barred by sovereign immunity if state would foot the bill).

²³⁰ *See Will*, 491 U.S. at 70-71 (1989); *id.* at 85 (Brennan, J., dissenting).

²³¹ *See Saucier v. Katz*, 533 U.S. 194, 201-02 (2001). Individuals, however, have no qualified immunity in suits solely for injunctive relief. *See Pulliam v. Allen*, 466 U.S. 522, 539-40 (1984).

²³² *Rode v. Dellarciprete*, 845 F.2d 1195, 1207 (3d Cir. 1988) (citing *Parratt v. Taylor*, 451 U.S. 527, 537 n.29 (1981)); *see Rizzo v. Goode*, 423 U.S. 362, 375-77 (1976); *Wright v. Smith*, 21 F.3d 496, 501 (2d Cir. 1994); *Wanger v. Bonner*, 621 F.2d 675, 679 (5th Cir. 1980); *Vinson v. Richmond Police Dep't*, 567 F.2d 263, 265 (4th Cir. 1977); *Kostka v. Hogg*, 560 F.2d 37, 39-40 (1st Cir. 1977).

²³³ The courts of appeals have taken differing views of the extent to which the qualified immunity of a defendant can be a jury question. *See Curley v. Klem*, 298 F.3d 271, 278 & n.3 (3d Cir. 2002) (summarizing circuit split).

²³⁴ *See, e.g.,* 42 C.F.R. § 431.53 (2002) (requiring states to provide transportation to Medicaid beneficiaries in order for state to receive federal Medicaid

schemes allow agencies to impose fines or other monetary sanctions, such as back pay awards, against states. Admittedly, compliance with court-ordered injunctions can cost a state as much or more than a damages award.²³⁵ The premise of the Court's sovereign immunity jurisprudence, however, appears to be that the possibility of money flowing from the public treasury more directly threatens the state's control over its governmental processes than do injunctions.²³⁶

Taken together, these doctrines provide a significant measure of protection for state institutional autonomy simply not present in the everyday workings of the federal agencies. If one is dubious about the value of the political interconnectedness of federal and state governments in protecting that autonomy, all other things being equal, one should prefer an enforcement regime that includes the safeguards of the courtroom at least some of the time.²³⁷ A state would much rather defend a suit asserting that its policies interfered with the right to a free and appropriate public education under the Individuals with Disabilities Education Act,²³⁸ than face suspension of its federal education dollars by the Department of Education.²³⁹

Naturally, that phrase, "all other things being equal," is a significant fudge factor. Judicial dispute resolution has its detractors, especially in the administrative context. Some

funds); 34 C.F.R. §§ 300.110 - 300.756 (2002) (setting forth highly detailed requirements for states who wish to receive funding under Individuals with Disabilities Education Act).

²³⁵ See Stewart J. Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719, 754 (1988).

²³⁶ See *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 39-41 (1994); *Edelman v. Jordan*, 415 U.S. 651, 665-68 & n.11 (1974). One can imagine justifications, albeit perhaps not especially well-grounded empirically, for this view. For example, even if compliance with injunctive relief is, in fact, more expensive, it may be that misperception is political reality: If state governments are more afraid of damages awards than court orders, the loss of autonomy at the very threat of regulation may genuinely be greater when damages are available.

²³⁷ This accords with the general trend that conservative scholars who believe cooperative federalism undermines the accountability of government entities typically favor judicial review. See, e.g., Michael S. Greve, *Against Cooperative Federalism*, 70 MISS. L.J. 557, 603, 613-21 (2000).

²³⁸ See 20 U.S.C. § 1415(i)(2) (2000).

²³⁹ See 20 U.S.C. § 1416 (2000). Another way of putting the same point is that the threat of a damages remedy may deter the state, out of caution, from engaging in conduct that would not be affected by an actual injunction. Cf. *Jorden v. Nat'l Guard Bureau*, 799 F.2d 99, 110 (3d Cir. 1986) (relying on this argument to distinguish immunity of military defendants from suits for damages as opposed to liability of same defendants for suits seeking injunctive relief).

might find the policy arguments against private rights of action serious enough to outweigh the evident federalism benefits. A textualist, though, should not, as policy should not enter into her reading of the statute. That, after all, is the point of textualism: to minimize the policy judgments of the reader in the interpretive process. Yet, as I have argued, at least certain policy questions must influence a proper textualist reading. Policy objections to private rights of action that would undermine the federalism benefits we have seen, or perhaps that would lead to lesser individual autonomy, are permissible considerations in a textualist analysis. Thus, the next part considers some of the more significant criticisms of private rights of action.

V. THE LEAST DANGEROUS REMEDY

Up until now I have proceeded without seriously questioning the notion that agency-authorized private rights of action are, at best, the lesser of two evils. This Part considers critically some common complaints about private litigation.

Commentators have argued, for example, that private rights of action compelling or challenging administrative action place inexperienced judges with little institutional capacity for research in the position of making expert policy decisions for which they are inadequately prepared.²⁴⁰ Such suits, the commentators also say, undermine the consistency and predictability of centralized agency decision making,²⁴¹ and sap whatever political accountability comes from congressional or executive control over the scope of enforcement.²⁴² Finally, some critics claim that the doors to the courthouse should not open for solitary litigants whose views are far out of step with the public interest, especially when even a sympathetic court could never forge enough political or moral authority to see its ruling

²⁴⁰ See Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 389 (1986); Richard J. Pierce, *Agency Authority to Define the Scope of Private Rights of Action*, 48 ADMIN. L. REV. 1, 2 (1996); Spence & Cross, *supra* note 122, at 140; Stewart & Sunstein, *supra* note 68, at 1208-09; Sunstein, *supra* note 15, at 416-17.

²⁴¹ See Stewart & Sunstein, *supra* note 68, at 1209; Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1105-10, 1114 (1987); Sunstein, *supra* note 15, at 417.

²⁴² See Easterbrook, *supra* note 120, at 1342-43; Macey, *supra* note 185, at 239; Stewart & Sunstein, *supra* note 68, at 1209, 1212.

truly respected.²⁴³ As this part illustrates, many of these critiques, while arguably accurate with respect to litigation in general, or under the APA, can easily be met with sensible limitations on the availability of § 1983. Others are already met by limitations on suits against states arising out of the Supreme Court's sovereign immunity jurisprudence.

A. *Judicial Competence, or Lack Thereof*

That courts lack expertise is one of the most common criticisms of the judicial role in administration, yet it is a problem readily solved. As several observers have pointed out, judicial ignorance in administrative law is largely an artifact of doctrine. The notion of judicial ignorance grows from the fact that courts must review agency regulations before seeing their real-world consequences, and thus courts lack data to evaluate whether a given regulation is good policy.²⁴⁴

Professors Dorf and Sabel draw on a similar insight in situating courts within their experimentalist system. They claim that, in a world where government policies are radically diverse in their implementation strategies, and rigorously analytical in comparing the effectiveness of the varying strategies, courts can draw on that comparative data to make policy judgments. This judicial use of real-world data frees the process of litigation from guesswork and turns it into the more reasoned and principled institution that we often only hope it will be.²⁴⁵ The proposal set forth in this Article aims at capturing the same features. By requiring would-be litigants to exhaust effective state remedies, agencies can foster experimental solutions to conflicts between personal rights and state and federal interests. Over time, that process should produce a meaningful record to guide judicial decision making. In situations where exhaustion is impractical or no meaningful data will develop, and court intervention will frustrate agency policy, the rational agency will not provide for a right of action. Finally, if the agency nonetheless authorizes a right of action, a court could avoid deciding by invoking *Blessing's* "judicial

²⁴³ See Yoo, *supra* note 199, at 1137-38; see also Cary Coglianese, *Social Movements, Law, and Society: The Institutionalization of the Environmental Movement*, 150 U. PA. L. REV. 85, 108-09 (2001).

²⁴⁴ See MASHAW, *supra* note 124, at 164-80; Pierce, *supra* note 240, at 2.

²⁴⁵ See Dorf & Sabel, *supra* note 173, at 363.

competence” prong,²⁴⁶ sidestepping a decision until the agency generated more meaningful information for the court to rely upon.

Another common complaint about transferring agency power to courts is that federal courts, at least in their current institutional design, are likely to disagree with one another, producing uncertainty and over-deterrence of desirable outcomes.²⁴⁷ That criticism seems especially pointed if we expect many § 1983 suits to be brought in state courts, with review by the Supreme Court probably on the order of once in a generation. Yet, again, agency control over both the scope and content of a right of action largely forestalls problems of inconsistency. If the agency finds that divergent court opinions are bringing a regulated field close to chaos, it can reclaim the reigns of enforcement.²⁴⁸ Or, an agency can issue a regulation authoritatively interpreting the confusing provision.²⁴⁹

²⁴⁶ *Blessing v. Freestone*, 520 U.S. 329, 340-41 (1997).

²⁴⁷ See *supra* note 241 and accompanying text.

²⁴⁸ See *Pierce*, *supra* note 240, at 10; cf. *Stewart & Sunstein*, *supra* note 68, at 1227 (noting that if Congress finds level of enforcement under private right of action disruptive of regulatory scheme, Congress can expressly modify the statute to preclude private enforcement).

²⁴⁹ An agency can use interpretive regulations to, in effect, stand in the place of the Supreme Court, resolving splits in authority. See *Strauss*, *supra* note 241, at 1121-22. Interpretive regulations do not need to go through notice and comment, and can be issued relatively expeditiously. See Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretative Rules*, 52 ADMIN. L. REV. 547, 549 (2000). Nonetheless, they are at least somewhat binding on courts, see *id.* at 553, especially if couched as interpretations of other regulations, rather than of the authorizing statute, see *Auer v. Robbins*, 519 U.S. 452, 461 (1997); *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). Assuming that agencies are as alert to the problem of inconsistent interpretation, and as interested in resolving it, when the interpretations occur outside their own ranks, there should not be much loss of predictability in allowing courts, rather than agency staff, to make any necessary interpretations incident to enforcement. Indeed, the Supreme Court has recognized that the centralized interpretive power of the Federal Sentencing Commission is so effective that the Court presumes that certiorari is unnecessary in non-constitutional questions of Sentencing Guidelines interpretation. See *Braxton v. United States*, 500 U.S. 344, 348-49 (1991).

On the other hand, one of the potential attractions of my proposal is that private rights of action help to enhance the accountability of federal and state agencies. That benefit might be lost if agencies can largely undo the effects of judicial supervision by relatively non-public means, such as might be possible through the use of interpretive rules. The D.C. Circuit has already experimented with one possible solution to a similar dilemma: require notice and comment for an interpretive rule that looks as though it is an effort by the agency to evade public participation. See *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 584-85 (D.C. Cir. 1997) (Silberman, J.). That choice has the unfortunate consequence, however, of dramatically limiting the agency's flexibility, as well as its ability to control its own staff (outside the use of litigation) and to create predictable rules for the public. See *Connolly*, *supra* note 123, at 169-72. An alternative is simply to give rather lower deference to such rules,

Another species of the centralization critique is that private rights of action shift the decision to enforce against a particular actor from the agency into the hands of the public at large. That movement has implications for the public accountability of enforcement decisions, an issue I discuss in the next subpart. It also presents more practical problems, though, for federal agencies engaged in long-term relationships with regulated entities. When the agency shares its enforcement power with outsiders, the agency cannot make deals promising not to enforce the full letter of its regulations.²⁵⁰ Yet executive control largely resolves this problem, as well. An agency can decline to authorize private suits where they would jeopardize a deal, or revise existing regulations to withdraw a right of action that is proving problematic for an ongoing compromise.

B. *Accountability*

Much of this Article has been, in one sense or another, about the accountability of courts, either federal or state, relative to other governmental entities. Courts enforcing agency-elaborated rights of action are uniquely accountable, however, in a way that is worth emphasizing. Some defenders of the Supreme Court's power to declare statutes unconstitutional have argued that the democratic legitimacy of judicial review arises at least in part out of an ongoing dialogue, of sorts, between the Court and the political branches.²⁵¹ When the Court's defense of rights is too vigorous,

thereby offering the agency the choice between rules that are either slow but accountable and sure or fast but possibly insecure. *See id.* at 177.

A similar logic may have been at work in Judge Silberman's earlier opinion in *Kelley v. EPA*, 15 F.3d 1100, 1106-08 (D.C. Cir. 1994), where the D.C. Circuit held that it owed no deference to the EPA's interpretation of a statute under which the EPA was bringing an enforcement action. By analogy, or in reliance on the dicta of *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990) (reasoning that where Congress has created a private right of action, it has assigned the courts, not the enforcing agency, primary responsibility for interpreting the statute), a court might refuse to defer to agency interpretations of private rights of action arising from its own regulations. If, however, we found the policy consequences of that determination undesirable, we might distinguish *Adams Fruit* by pointing out that rights of action "created" by regulations in fact are premised on the notion that Congress assigned interpretive authority directly to the executive, which in turn determined to devolve some of that authority to courts.

²⁵⁰ *See Seidenfeld, supra* note 172, at 420.

²⁵¹ *See BICKEL, supra* note 114, at 240; MICHAEL J. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY* 12-17, 129-30 (1984).

the argument goes, Congress moves to restrict federal jurisdiction. In that way, the Court's power is limited, by a kind of deterrent, through the threat of jurisdiction stripping and related tactics. Yet evidence that such dialogue occurs more than epochally, or that it in fact exerts any meaningful influence on any of the pertinent institutional actors, is scarce.²⁵²

The dialogic effect is more evident, and has more explanatory power for the Court's behavior, in the context of statutory interpretation.²⁵³ But even there, Congress' occasional response to judicial interpretations it believes are "wrong" does not clearly legitimize the judicial role, assuming one believes that judicial policy making is illegitimate in the first place. Rather, such "corrections" merely lower the error cost of illegitimate decisions.²⁵⁴ A more compelling case for legitimacy could be made by showing that Congress monitored the way in which courts interpreted and enforced its laws, expanding or withdrawing judicial power over each statute as experience demonstrated that courts, as institutions, were an effective method for elaborating and carrying out each particular scheme. That would suggest powerfully that continuing judicial supervision was a product not only of inertia, but also of an affirmative legislative choice of how to best develop a given set of statutory norms.²⁵⁵ Again, though, there is little evidence of any such dialogue.²⁵⁶

By contrast, the system proposed by this Article virtually requires a continuing give-and-take between the judiciary and the executive of precisely this nature. Rights of action will generally exist only when consistent with agency policy, or when aggressive interpretation of agency regulations by a suspicious court forces public agency evaluation of the place of private enforcement in its regulatory scheme. Further,

²⁵² I should emphasize that although I am skeptical of direct inter-branch dialogue of the classic kind envisioned by Bickel and Perry, I am inclined to agree with Professor Friedman that courts do engage in "dialogue" with the public at large through the courts' role as coordinators of constitutional meaning. See Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 653-71 (1993).

²⁵³ See JOHN HART ELY, *DEMOCRACY & DISTRUST* 4, 67-69 (1980); Peter L. Strauss, *The Supreme Court, Textualism, and Administered Law*, ADMIN. & REG. L. NEWS, Fall 1994, at 1, 14.

²⁵⁴ See CALABRESI, *supra* note 199, at 92-93.

²⁵⁵ Cf. ESKRIDGE ET AL., *supra* note 89, at 279 (doubting that congressional failure to amend a law represents a meaningful endorsement of judicial interpretations of that statute).

²⁵⁶ See ROBERT A. KATZMANN, *COURTS AND CONGRESS* 83-84 (1997).

if federal agencies require exhaustion of “effective” state remedies, those agencies will become part of a continuing, multi-lateral exploration of the best way to carry out federal policy. Part of the process of weighing the efficacy of state remedies will, necessarily, be a comparison of those solutions to the quality of results being produced by private suits. Courts thus become “answerable” to popular will at many levels – to federal agencies ultimately controlled by higher-ups in the executive branch, to a Congress that is better armed with experimental data to evaluate the wisdom of private enforcement, and to state governments, whose innovations challenge courts to do better.

C. *Voices Crying in the Wilderness*

A third major set of criticisms focuses on the power of courts to vindicate the rights of narrow, sometimes vanishingly small, interest groups at the expense of popular will. While the unsettling of popular expectations might be defensible where individual rights are central to the fairness or continued viability of the republic and its ideals, the argument goes, mere “policy” decisions below that level should be left principally to politics. Thus, reluctance to discover adjudicable legal rights prevents shifting too much that is truly policy into the hands of courts and solitary figures not acting in the public interest.²⁵⁷ Some critics go on to claim that courts inherently lack the political and moral authority genuinely to move social policy.²⁵⁸ While a court might enjoin a single cement plant from opening, they suggest, in the end, the only way for politically weak communities to avoid being the situs for the world’s unwanted environmental hazards is to become politically strong. By implication, private rights of action are inadequate to vindicate even clear legal rights stemming from large structural features of society, which can only be affected via political processes.

In one sense, these concerns are bigger than this Article. But crucially, the Supreme Court’s federalism jurisprudence is already a sort of compromise position in this debate. Obviously,

²⁵⁷ See, e.g., *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-54 & n.4 (1938).

²⁵⁸ See PETER H. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* 156-61 (Yale Univ. Press 1983); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394-404 (1978); Yoo, *supra* note 199, at 1137-39.

that compromise has not been satisfactory to many people, including myself. The point is that the current law does much to blunt the criticism that might otherwise be aimed at private rights of action to compel state regulators, perhaps in ways that the Court has not anticipated. State sovereign immunity from suit often politicizes the enforcement of federal law against the states. When the effectiveness of a particular provision depends heavily on the availability of a damages remedy, the provision will bind states only when there is political will at the national level to bring enforcement actions.²⁵⁹ In the Court's view, this limitation ties exercise of the Supremacy Clause to popular accountability.²⁶⁰ Relatedly, the necessity for federal intervention prevents the federal government from enacting mandates without allocating its own tax revenues.²⁶¹ The Court is thus able to nudge some of Congress's more expansive tendencies a bit closer to the center of popular attention without resorting to the dramatic step of invalidating Congress's entire substantive policy as inconsistent with the Tenth Amendment.²⁶²

In addition to protecting a state's power over its purse, the absence of damages remedies under § 1983 also increases the public character of § 1983 plaintiffs. When a plaintiff can expect a substantial damages award, all she needs in order to secure competent counsel is, as the New York Lottery Commission once put it, "a dollar and a dream." Despite the availability of attorney's fee awards for prevailing plaintiffs in § 1983 litigation,²⁶³ plaintiffs suing only for prospective injunctive relief have trouble retaining counsel.²⁶⁴ Challenges to state administrative action are among the most complex and time-consuming categories of litigation.²⁶⁵ Because the success

²⁵⁹ See *Alden v. Maine*, 527 U.S. 706, 756 (1999); cf. Stewart & Sunstein, *supra* note 68, at 1298-99 (arguing that forcing private plaintiffs to bear some of the risks of unsuccessful litigation helps to reduce dangers of over-deterrence and inefficiently high levels of enforcement through private right of action).

²⁶⁰ See *Alden*, 527 U.S. at 756.

²⁶¹ See Bruce La Pierre, *The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation*, 60 WASH. U. L.Q. 779, 988-89 (1982).

²⁶² See Kramer, *Understanding Federalism*, *supra* note 160, at 1512.

²⁶³ See 42 U.S.C. § 1988 (2000).

²⁶⁴ See *Pa. Pharmacists Ass'n v. Houstoun*, 283 F.3d 531, 559 & n.5 (3d Cir. 2002) (Becker, C.J., dissenting).

²⁶⁵ See Frank B. Cross, *The Judiciary and Public Choice*, 50 HASTINGS L.J. 355, 361 (1999). Time demands fall not only on the plaintiff's counsel, but also on the plaintiff himself. *Id.* Thus, a lone plaintiff or a small group is at a disadvantage relative

of an administrative challenge suit often requires extensive expert testimony, with corresponding up-front outlays, few plaintiffs' attorneys can afford to litigate them, notwithstanding the possibility of winning costs upon a favorable outcome.²⁶⁶ And few attorneys are willing to try, considering the odds of prevailing.²⁶⁷ The Supreme Court's recent determination that plaintiffs who force change, but secure no court-approved settlement, cannot recover fees under § 1988²⁶⁸ has also tightened the market for counsel. Although the Court argued in its opinion that most defendants would have an incentive to settle, rather than simply move on their own to moot the plaintiff's case,²⁶⁹ plaintiffs' attorneys thus far seem unconvinced that lower courts will take the broad view of mootness upon which the Supreme Court's analysis depends.²⁷⁰ Yet another factor in the reluctance of the plaintiffs' bar is the potential ethical quandary for attorneys who represent clients seeking only injunctive relief. A defendant will occasionally offer to settle the remedial claims of a suit but refuse to pay out any money, including for fees. The ethical rules of some states arguably require the plaintiff's attorney to recommend settlement in those cases.²⁷¹

to a larger organization, which can spread out among its members the burdens of appearing at depositions, meeting with counsel, negotiating with the opposition, and so forth.

²⁶⁶ See Schwab & Eisenberg, *supra* note 235, at 752-53. Schwab & Eisenberg also reported that the probability of the plaintiff's success was inversely related to the costs of the litigation. *Id.* The logical conclusion, though, is not that frugal lawyers did better, but rather that plaintiffs spend more in difficult cases, so that as expenses rose, the shortfall between what the plaintiff and its counsel actually spent, and what it needed to spend to win, grew progressively larger.

²⁶⁷ See Louis S. Rulli, *Employment Discrimination Litigation Under the ADA from the Perspective of the Poor: Can the Promise of Title I Be Fulfilled for Low-Income Workers in the Next Decade?*, 9 TEMP. POL. & CIV. RTS. L. REV. 345, 381 (2000) (noting that data demonstrated that, despite fee-shifting statutes, ADA plaintiffs could not obtain counsel unless their case was unusually likely to succeed); Schwab & Eisenberg, *supra* note 235, at 774 (demonstrating that the private market failed to supply counsel even to meritorious prisoner lawsuits in two of three federal districts studied).

²⁶⁸ See *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598 (2001).

²⁶⁹ See *id.* at 609.

²⁷⁰ See LAWRENCE A. FROLIK & MELISSA C. BROWN, *ADVISING THE ELDERLY OR DISABLED CLIENT: LEGAL, HEALTH CARE, FINANCIAL, AND ESTATE PLANNING* ¶ 7.09[1] (2d ed. 2000); DAVID F. HERR, *ANNOTATED MANUAL FOR COMPLEX LITIGATION* § 24.13 (3d ed. 2001); Margaret Sanner & Carl Tobias, *Shifting Winds: Court Whittles Away at Plaintiff's Recovery of Attorney Fees*, 87 A.B.A. J. 39, 39 (2001); *Remedies: Say Goodbye to "Catalyst Theory" Fee Awards*, FED. LITIGATOR, Jul. 2001, at 183; see also William Funk, *Supreme Court News*, 26 ADMIN. & REG. L. NEWS 12, 12 (2001).

²⁷¹ See *Evans v. Jeff D.*, 475 U.S. 717, 743 (1986) (Brennan, J., dissenting) (arguing that Court's holding, permitting states to impose ethical obligation to settle on

In short, plaintiffs who wish to challenge state administrative determinations under § 1983 usually must be able to find an attorney capable of bankrolling and otherwise supporting a lengthy, expensive, difficult litigation with only moderate chances for recovering any fees. For most individuals, that means an organization committed to effecting social change, such as the NAACP, ACLU, Chamber of Commerce, or the pro bono committee of a state or local bar association. It will be extremely rare for such an organization to take on litigation, especially litigation representing such a substantial investment of time and money, when it disagrees, at some pertinent level of generality, with the policy goals of the suit. In effect, a plaintiff can only find a lawyer if his or her issue appeals to at least a fair slice of society. Granted, that is not the same as a guarantee that only genuinely public-regarding suits will find their way to court. Some aggrieved plaintiffs will be rich, and need no outside assistance to secure representation. Some well-heeled organizations are only too happy to support causes that very few persons outside their walls would call public regarding. The general trend, however, will be away from lawsuits that serve only a single person or entity toward litigation that is capable of inspiring collective action and public service.²⁷²

Another implication of the fact that most plaintiffs will be represented by self-described "public interest" organizations is that the success of any remedy imposed by the court will not

civil rights attorney, would prevent many indigent plaintiffs from finding counsel); Rulli, *supra* note 267, at 382 (claiming that "history has proven Justice Brennan correct"). A related problem is suggested by Case Note, *Settle or Else — Federal Rule 68 Makes Civil Rights Litigation a Risky Business*: Marek v. Chesney, 21 U.S.F. L. REV. 535 (1987) (observing that, under FED. R. CIV. P. 68, a civil rights defendant can dramatically reduce the plaintiff's fee award by making an early offer to settle conduct claim without fees). Since a sovereign defendant faces no risk of a damages award at trial, it can almost always squeeze the plaintiff's fee award by offering to settle the conduct claim on substantially the terms sought by the plaintiff, but with no fees; then, if the plaintiff prevails at trial, since he has gained no more than was offered under the Rule 68 settlement, his attorney gets no fees for the intervening work. The sovereign defendant, in effect, never has any incentive to offer to settle the attorney's fees. *But see* Marrayshow v. Flynn, 986 F.2d 689, 690-92 (4th Cir. 1993) (holding that Rule 68 offer was not more favorable than result obtained at end of litigation, because the Rule 68 offer, although otherwise comparable, did not include attorney's fees). Although in its first iteration a beneficial outcome for plaintiffs because they can obtain almost all their desired relief at the very beginning of the litigation in the long run, the effect is that plaintiff's counsel won't accept such cases.

²⁷² For a more general argument that interest groups promote democratic and/or republican values, see ROBERT DAHL, PLURALIST DEMOCRACY IN THE UNITED STATES: CONFLICT AND CONSENT 23-24 (1967); THEODORE LOWE, THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES 51 (2d ed. 1979).

depend upon the court's political and moral influence alone. In all likelihood, the organization representing the plaintiffs will be "on the ground" from before the suit is filed, organizing the community, educating lawmakers, and generally attempting to convince the public of the rightness of their cause.²⁷³ South Camden Citizens in Action, for example, with the help of Camden Regional Legal Services, generated national attention over a single cement plant.²⁷⁴ The literature of the civil rights movement suggests that litigation and activism have synergistic effects; dramatic court decisions can energize a political movement.²⁷⁵ Thanks to the constraints of state sovereign immunity, § 1983 suits against state agencies present an unusually good likelihood of generating political support, and, therefore, a relatively bad target for critics of the courts.

Judicial review is often offered as a solution to the problem of intransigent bureaucracies. In its traditional forms, though, it has been open to accusations that it is a remedy more bitter than the sickness cured. Yet, as the preceding discussion reveals, § 1983 litigation does not have to fall into the same traps that have hamstrung judicial review in other contexts. Instead, it can be an effective tool for rendering state bureaucracies at once more efficient and also more democratic. A carefully-considered reading of "laws" should take account of these important federalism effects.

²⁷³ Cf. Susan Sturm, *Lawyers and the Practice of Workplace Equity*, 2002 WIS. L. REV. 277, 281-82, 284 (2002) (describing the practice of "structural lawyering," in which the lawyer is not only a litigator but also a creative and sometimes pro-active problem-solver).

²⁷⁴ See Marcia Coyle, *Backyard Blues*, NAT'L L.J., Oct. 15, 2001, at A10; *All Things Considered: Analysis - Disparate Impact Laws Tested in New Jersey* (NPR radio broadcast, May 7, 2001), available at 2001 WL 9434663.

²⁷⁵ See TAYLOR BRANCH, PILLAR OF FIRE 44-45 (1998) (noting that civil rights leaders saw coalitions with other powerful parties with similar interests as a major benefit of law suits, even when those suits were actually filed against the civil rights leaders); JACK GREENBERG, CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION 354-62 (1994) (arguing that the NAACP's failed effort to enjoin Governor Wallace from interfering with the 1965 Selma demonstration led directly to passage of the Civil Rights Act of 1965); JOEL F. HANDLER, SOCIAL MOVEMENTS & THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE 214-22 (1978); Catharine A. MacKinnon, *The Logic of Experience: Reflections on the Development of Sexual Harassment Law*, 90 GEO. L.J. 813, 817 (2002) (contending that litigation and social movements reinforced each other in effort to advance the empowerment of women); see also Stewart & Sunstein, *supra* note 68, at 1279-80 (arguing that litigation helps to shape public values by process of reasoned debate and public response).

VI. CONCLUSION

The debate over enforcing regulations under § 1983 has often been couched in the language of statutory interpretation. Thus far, the conversation has been directed, misleadingly, towards Congress' "intent." Justice O'Connor's dissent in *Wright* frets that "determination of § 1983 'rights' has been unleashed from any connection to congressional intent."²⁷⁶ More recently, several courts of appeals have relied on evanescent distinctions between what was actually intended and what was merely within the "reasonable contemplation" of Congress to reject the availability of rights of action under § 1983.²⁷⁷

This Article has attempted to replace ad hoc guesswork about the minds of legislators with a more theoretically coherent approach to statutory interpretation, ultimately concluding that the *Chevron* and *Bass* canons require an interpreter to conclude that the word "laws" includes agency regulations.²⁷⁸

How, then, does this conclusion relate back to the *Blessing* test? A court's first step should be to look not to the statute, but to the agency's regulations. The court may well wish to require a fairly clear statement from the agency about what it intends. After all, if the principal benefit of court-agency cooperation in recognizing rights of action is that the court can rely on the agency's accountability and policy judgments, a court should not be too eager to discover rights that the agency itself would reject.²⁷⁹ Once a court is satisfied with what the agency intends, it can then turn back to the statute to make certain that the regulation in question has the "force and effect of law" – in other words, that the regulation is

²⁷⁶ 479 U.S. 418, 438 (1987).

²⁷⁷ See *supra* notes 43-62 and accompanying text.

²⁷⁸ My analysis also suggests that the Supreme Court's recent decision in *Gonzaga University v. Doe*, 536 U.S. 273 (2002), was, if not wrongly decided, then decided on the wrong basis. One of the principal motivations for the Court's demand for clarity in statutory rights-creating language was its presumption that § 1983 liability undermines state autonomy. *Id.* at 286-87. Although intuitively appealing, we now can see that that assumption fails to account not only for significant limitations on the scope of § 1983 suits against states and their officers, but also for the wide, systemic effects that § 1983 can produce. Rather than stingily guarding against the possibility of § 1983 litigation, the Court might well do better to remove some of its present barriers to suit.

²⁷⁹ See *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 908-09 (2000) (Stevens, J., dissenting).

validly promulgated, and that private enforcement is consistent with the statutory scheme Congress enacted.

There are two other important components of the analysis. First, regulations serving as the basis for a right of action should be the product of the Administrative Procedure Act's informal rulemaking. The agency must publish the proposed rule in the Federal Register, or otherwise make it available to the public; the public must get an opportunity to make comments about the proposed rule; and the agency must respond to each comment in issuing a final rule.²⁸⁰ This requirement is often essential under the *Chevron* rationale, because it is one of the criteria upon which Congress rests its willingness to delegate policymaking authority.²⁸¹ Notice and comment is appealing under a *Bass* rationale, as well, because it increases the public visibility and republican character of the decision to create a right of action.²⁸² Additionally, to the extent that rights of action are palatable only because control over them rests in the highest reaches of each agency, a rulemaking requirement helps to ensure that a court will not infer the existence of a private right of action from less authoritative sources, such as agency handbooks or informal directives, that might issue from the professional staff.

The last essential element of successful administration of agency-created rights of action is a *Chevron*-inspired judicial attitude towards the nature of the judicial task. When a court gives deference to an agency's interpretation of law under *Chevron*, the court leaves open to the agency the opportunity to change its mind and devise a new interpretation. That is, rather than adopting the agency's interpretation as the one correct reading of the statute, the court merely agrees that the agency's view is a permissible one. Without this willingness on the part of courts to limit their involvement to striking down impermissible interpretations, agencies would lose the flexibility to adapt to changing circumstances – a flexibility that is one of *Chevron*'s essential rationales.²⁸³ Because agency control over the existence and content of a right of action is

²⁸⁰ See 5 U.S.C. § 553 (2000).

²⁸¹ See *United States v. Mead Corp.*, 533 U.S. 218, 230 n.11 (2001); Merrill & Hickman, *supra* note 82, at 883-85.

²⁸² See *id.* at 885-87; *cf. Geier*, 529 U.S. at 909-10 & n.24 (Stevens, J., dissenting) (suggesting that notice and comment helps to assure that states will have an opportunity to engage in a dialogue with federal agencies, which might otherwise be deaf to the states' views on whether to preempt states).

²⁸³ See *Mead Corp.*, 533 U.S. at 247-48 (Scalia, J., dissenting).

critical under both the *Chevron* and *Bass* rationales, courts should take the same malleable approach in deciding whether a right of action exists under § 1983.

Finally, it is worth noting that this Article's conclusion would not necessarily end the controversy over the availability of private rights of action to enforce the EPA's disparate impact regulations, or any other highly controversial set of regulations affecting state entities. As with *Chevron* itself, judges will have different notions of what is a "reasonable" interpretation of a statute, and judges will disagree about which laws embody a remedial scheme that comports with private enforcement. That fact is an inevitable feature of the fact that different interpreters have different theories of interpretation, and are unlikely to relinquish them, regardless of our best efforts to the contrary. Even within a single interpretive theory, many outcomes will be value dependent. Still, the power of the executive to enforce the law, and the right of the states to maintain control over their own governmental processes, demand that the burden of making those determinations be entrusted to the courts.