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THE THIRD CIRCUIT'S APPROACH TO THE PRIVATE ENFORCEMENT OF ADMINISTRATIVE AGENCY REGULATIONS UNDER SECTION 1983

I. Introduction

An individual who has been injured by a state's violation of a federal statute may generally advance two distinct causes of action. First, the private plaintiff may bring suit directly under the statutory provision allegedly violated. In particular circumstances, however, this option may be either inappropriate or unavailable. The other option for the private plaintiff is to bring suit under 42 U.S.C. § 1983, which provides a private cause of action against any person acting under color of state law who has violated a citizen's rights, privileges or immunities, as secured by the Constitution and laws of the United States.

Whether federal regulations, promulgated by administrative agencies pursuant to congressional delegation of authority, are privately enforceable

1. For a further discussion of the available actions against state actors, see infra notes 2-4 and accompanying text.

2. For a discussion of private causes of action under federal statutes, see infra notes 54-55 and accompanying text.


4. Section 1983 states:

   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[.]

42 U.S.C. § 1983. For a further discussion of the § 1983 cause of action, see infra Part II.A.

(1139)
ble under § 1983 remains an unsettled issue in the federal court system.\textsuperscript{5} The United States Court of Appeals for the Third Circuit recently considered this issue and concluded that an administrative regulation may only create an enforceable § 1983 right if the asserted "interest already is implicit in the statute authorizing the regulation."\textsuperscript{6} Thus, regulations that purport to confer rights that Congress has not already created through statute are not privately enforceable.\textsuperscript{7} Regulations that merely interpret or implement established statutory rights, however, might create privately enforceable § 1983 interests.\textsuperscript{8} Although the Third Circuit has drawn this distinction between enforceable and unenforceable regulatory interests, in practice, this boundary is not quite so clear.\textsuperscript{9}

This Casebrief discusses the Third Circuit’s approach to the availability of a § 1983 cause of action to redress a violation of a federal administrative regulation and its authorizing statute. Part II reviews the § 1983 cause of action, discusses the concerns related to the private enforcement of federal regulations under § 1983 and analyzes the Third Circuit’s recent decision in this area, South Camden Citizens in Action v. New Jersey Department of

\textsuperscript{5} For a discussion of the United States Supreme Court Justices’ views on this issue, see infra notes 16-17 and accompanying text. For a discussion of the lower federal courts’ approaches, see infra note 18 and accompanying text.

\textsuperscript{6} See S. Camden Citizens in Action v. N.J. Dept’ of Envtl. Prot., 274 F.3d 771, 774 (3d Cir. 2001) (“S. Camden III”) (finding that regulations at issue did not create enforceable rights because asserted interest was not already implicit in authorizing statute). For a discussion of the Third Circuit’s approach to the private enforcement of regulations prior to this decision, see infra notes 30-33 and accompanying text.

\textsuperscript{7} For examples of these types of regulations, see infra Part III.B.1. Furthermore, there is also the question of whether these regulations are valid in the first place because by their nature, they confer rights not implicit in the authorizing statutes. See William Funk, Supreme Court News: Court Holds That There Is No Private Right of Action for Disparate Impact Discrimination Under Regulations Issued Under Title VI of 1964 Civil Rights Act, ADMIN. & REGULATORY L. NEWS, Summer 2001, at 14 (doubting whether Court will find disparate-impact regulations valid under Title VI in light of Court’s recent cases analyzing Title VI and interpreting Congress’ power to adopt legislation enforcing Fourteenth Amendment). Title VI of the Civil Rights Act of 1964, which prohibits intentional discrimination by a federally funded program or activity, expressly authorizes administrative agencies to issue regulations that implement that objective. See 42 U.S.C. § 2000d-1 (2000) (directing agencies to issue implementing regulations). Because certain regulations issued under that statute prohibit unintentional discrimination, it is questionable whether these regulations are truly implementing Title VI. See, e.g., 40 C.F.R. §§ 7.30, 7.35(b) (2001) (prohibiting conduct with discriminatory effect by programs receiving Environmental Protection Agency (“EPA”) assistance). The Supreme Court has not ruled on this issue, but instead has simply assumed the validity of these administrative regulations. See Alexander v. Sandoval, 532 U.S. 275, 281 (2001) (assuming, for purposes of deciding case, that disparate-impact regulations are valid). For a further discussion of Title VI and its disparate-impact regulations, see infra note 23 and accompanying text.

\textsuperscript{8} For examples of regulations that should remain enforceable in the Third Circuit under this approach, see infra Part III.B.2.

\textsuperscript{9} For a discussion of the characteristics significant to this distinction, see infra Part III.B.
Environmental Protection.10 Part III outlines the separation of powers concerns relevant to the judicial implication of federal rights and predicts what types of regulations might create enforceable rights under the South Camden approach.11 Finally, Part IV provides the limitations to the § 1983 remedy and evaluates the overall effectiveness of a § 1983 cause of action in these circumstances.12

II. BACKGROUND


In general, § 1983 provides a remedy to persons deprived of a right, privilege or immunity "secured by the Constitution and laws" of the United States.13 Thus, by its terms, § 1983 explicitly provides a cause of action to redress violations of federal constitutional rights.14 Moreover, the United States Supreme Court has established as a general rule that § 1983 also provides a cause of action to redress violations of federal statutory law.15 Despite adopting this general rule, a majority of the Court has never expressly held that federal administrative agency regulations alone constitute "laws" within the meaning of § 1983 and thus may independently create

10. 274 F.3d 771 (3d Cir. 2001). For a further discussion of the background of § 1983 claims, see infra notes 13-42 and accompanying text.

11. For a further discussion of the practical implications of the South Camden decision, see infra notes 41-121 and accompanying text.

12. For a further discussion of the availability and effectiveness of § 1983 causes of action to redress violations of administrative regulations, see infra notes 124-52 and accompanying text.

13. See 42 U.S.C. § 1983 (2000) (emphasis added) (describing methods for bringing civil actions for deprivation of rights). A valid § 1983 claim requires three principal elements: (1) the defendant must be a "person"; (2) the defendant must have been "acting under color of" state law; and (3) the defendant must have deprived the plaintiff of a right secured by the Constitution or the laws of the United States. See id. (stating elements). To satisfy the third element, a plaintiff must assert a violation of a "federal right," not just a violation of federal law. See Blessing v. Freestone, 520 U.S. 329, 340 (1997) (analyzing whether statutory provision created federal right within meaning of § 1983); Golden St. Transit Corp. v. City of Los Angeles, 493 U.S. 103, 106 (1989) (noting that § 1983 "speaks in terms of "rights, privileges, or immunities," not violations of federal law"). For a discussion of two significant limitations to the presumption of an enforceable § 1983 right, see infra Part IV.A.


15. See Thiboutot, 448 U.S. at 1 (concluding that § 1983 protects statutory rights). For the exceptions to this principle, see infra notes 128-129 and accompanying text.
privately enforceable rights. On the contrary, four Supreme Court Justices have maintained that § 1983 rights can never derive from administrative regulations alone. The circuit courts are similarly split with regards to the status of regulations under § 1983.

Congress originally enacted § 1983 as Section 1 of the Civil Rights Act of 1871 for the express purpose of enforcing the provisions of the Fourteenth Amendment. Soon thereafter, Congress amended the statute to protect rights secured by federal law, in addition to constitutional rights. The marked hesitancy of the current courts toward deciding that § 1983 provides a cause of action to enforce administrative regulations seems to turn on the interpretation of the term "and laws" within the language of

16. But see Alexander v. Sandoval, 532 U.S. 275, 301 (2001) (Stevens, J., dissenting) (finding clear precedent that administrative regulations are enforceable under § 1983). Justice Stevens stated, "[I]t is clear that the § 1983 remedy is intended to redress the deprivation of rights secured by all valid federal laws, including statutes and regulations having the force of law.").


18. Compare Harris v. James, 127 F.3d 993, 1005-09 (11th Cir. 1997) (concluding that valid regulation, in conjunction with statute, may only create enforceable right if it defines or fleshes out specific statutory right), and Smith v. Kirk, 821 F.2d 980, 984 (4th Cir. 1987) ("An administrative regulation... cannot create an enforceable § 1983 interest not already implicit in the enforcing statute.")., with Levin v. Childers, 101 F.3d 44, 47 (6th Cir. 1996) (suggesting that administrative regulations may create rights, privileges, or immunities within meaning of § 1983), and Loschiavo v. City of Dearborn, 33 F.3d 548, 551 (6th Cir. 1994), cert. denied, 513 U.S. 1150 (1995) (asserting that because federal regulations have force of law, they may independently create rights under § 1983).


21. See Rev. Stat. § 1979 (1874) (providing remedy for violations of rights secured by United States Constitution and laws); see also Sunstein, supra note 14, at 408-09 (asserting that Congress did intend, through 1874 revisions, to broaden scope of § 1983's protection to cover laws other than those secured by United States Constitution). Sunstein emphasized that these revisions to Section 1 of the Civil Rights Act were enacted in the aftermath of the Civil War, when the national government was attempting to increase the federal government's regulation of state governments. See id. at 408-09 (discussing scope of § 1983).
§ 1883.22 Furthermore, although Congress may delegate to federal agencies the authority to issue valid regulations under federal statutes, many agencies have issued regulations that create independent and discrete federal interests unrelated to Congress' underlying statutory objectives.23

22. See Maine v. Thiboutot, 448 U.S. 1, 4 (1980) (viewing Congress' decision not to include any modifiers to term "and laws" as clear indication that Congress intended to protect broad range of federal legislation); Todd E. Pettys, The Intended Relationship Between Administrative Regulations and Section 1983's "Laws", 67 GEO. WASH. L. REV. 51, 53 (1998) (asserting that use of language "Constitution and laws" suggests that Congress intended to confine scope of § 1983 to protect only constitutional and statutory rights, not regulatory interests); Sunstein, supra note 14, at 404-09 (analyzing legislative history of § 1983 and interpreting term, "and laws," to comprehend all federal law, not merely subset of laws).

23. See, e.g., 28 C.F.R. § 42.104(b)(2) (2001) (prohibiting recipient of federal funds from carrying out programs in manner that has effect of discriminating on basis of race, color or national origin); 40 C.F.R. §§ 7.30, 7.35(b) (2001) (prohibiting disparate-impact discrimination by any federal program receiving EPA assistance).

Federal anti-discrimination statutes, in conjunction with their accompanying agency regulations, provide the clearest examples of statute-regulation combinations that purport to create independent federal rights. See, e.g., 20 U.S.C. § 1681 (2000) ("Title IX") (prohibiting gender discrimination under any educational program or activity receiving federal funds); 42 U.S.C. § 2000d (2000) ("Title VI") (proscribing discrimination by federally funded program or activity on basis of race, color or national origin); 42 U.S.C. § 2000e-2 (2000) ("Title VII") (making it unlawful for employer to participate in discriminatory employment practices). Not surprisingly, the current jurisprudence in this area is based on cases involving Title VI of the Civil Rights Act of 1964 and regulations issued pursuant to that statute that prohibit disparate-impact discrimination. See, e.g., Alexander v. Sandoval, 532 U.S. 275, 275 (2001) (considering claim alleging violation of Title VI disparate-impact regulation issued by Department of Justice); S. Camden Citizens in Action v. N.J. Dep't of Envl. Prot., 274 F.3d 771, 774 (3d Cir. 2001) (hearing claim alleging violation of EPA disparate-impact regulation). Section 601 of Title VI prohibits discrimination on the basis of race, color or national origin by any federally funded program or activity. See 42 U.S.C. § 2000d (2000). This section, however, which also encompasses a private right of action, applies only to instances of intentional discrimination. See Sandoval, 532 U.S. at 280 (stating that it is "beyond dispute" that Title VI proscribes only intentional discrimination.

In section 602 of Title VI, Congress authorized the administrative agencies that extend assistance to the federal programs to issue rules and regulations that are consistent with the objectives of section 601. See 42 U.S.C. § 2008d-1 (2000) (delegating lawmaking authority to agencies). Pursuant to this authority, at least forty federal agencies have adopted regulations prohibiting conduct that has the effect of discriminating, even in the absence of proof of intent to discriminate. See, e.g., 7 C.F.R. § 15.3(b)(2) (2001) (Dep't of Agric.) (prohibiting utilization of "criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin"); 15 C.F.R. § 8.4(b)(2) (2001) (Dep't of Com.) (same); 22 C.F.R. § 209.4(b)(2) (2001) (Agency for Int'l Dev.) (same); 24 C.F.R. § 1.4(b)(2)(i) (2001) (Dep't of Hous. & Urban Dev.) (same); 28 C.F.R. § 42.104(b)(2) (2001) (Dep't of Just.) (same); 29 C.F.R. § 31.3(b)(2) (2001) (Dep't of Lab.) (same); 32 C.F.R. § 195.4(b)(2) (2001) (Dep't of Educ.) (same); 45 C.F.R. § 80.3(b)(2) (2001) (Dep't of Health & Human Servs.) (same); 49 C.F.R. § 21.5(b)(2) (2001) (Dep't of Transp.) (same). Despite the abundance of these
B. Private Enforcement of Regulations Under § 1983: Title VI and Its Implementing Regulations

The matter of the private enforceability of administrative regulations came into the forefront last year after the Supreme Court concluded in Alexander v. Sandoval24 that Title VI of the Civil Rights Act of 1964 did not confer a private right of action to enforce administrative regulations promulgated pursuant to that statute.25 In Sandoval, the regulations at issue prohibited a federally funded program or activity from engaging in conduct that had a discriminatory effect on any group protected by the statute.26 Prior to this decision, the law of most circuits, including the regulations, a noticeable discrepancy between section 601’s ban on intentional discrimination and the section 602 regulations’ ban on disparate-impact discrimination did exist and this discrepancy persuaded the United States Supreme Court to grant certiorari to consider this issue. See Sandoval, 532 U.S. at 293 (finding no private right of action to enforce regulations).


25. See Sandoval, 532 U.S. at 293 (stating holding). In Sandoval, the Court addressed a challenge to the Alabama Department of Public Safety’s official policy of administering its driver’s license examinations in English only. See id. at 278-79 (stating facts). The respondents alleged that this policy violated a Department of Justice regulation promulgated pursuant to Title VI that prohibited federal funding recipients from utilizing criteria or administrative methods that have the effect of subjecting individuals to discrimination based on national origin. See id. at 279 (stating facts). The Court first established that section 601 of Title VI does in fact confer a private right of action. See id. at 279 (“[P]rivate individuals may sue to enforce § 601 of Title VI and obtain both injunctive relief and damages.”). The Court then determined, however, that that right of action did not encompass suits for violations of the section 602 disparate-impact regulations because while section 601 prohibits only intentional discrimination, the regulations go one step further by prohibiting unintentional discrimination. See id. at 285 (analyzing section 601). The Court then looked to the text and structure of section 602 and determined that Congress did not intend to create a private right of action under either that section or the regulations promulgated pursuant to it. See id. at 288-89 (analyzing text of section 602). Accordingly, the Court held that “[n]either as originally enacted nor as later amended does Title VI display an intent to create a freestanding private right of action to enforce regulations promulgated under § 602. We therefore hold that no such right of action exists.” Id. at 293.

26. See 28 C.F.R. § 42.104(b)(2) (forbidding funding recipients to “utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin”). Although the decision precluded private persons from suing under Title VI to redress violations of the statute’s disparate-impact regulations, Title VI explicitly contains an administrative remedy, which charges the administrative agencies that issued the regulations with the obligation to also enforce them. See 42 U.S.C. § 2000d-1 (2000) (providing remedial scheme). Section 602 states that an agency may secure compliance with an implementing regulation by either terminating or refusing to grant or continue assistance to any recipient as to whom there has been an express finding of a failure to comply or simply by any other means authorized by law. See id. (stating requirements for compliance). Furthermore, individuals may be able to file administrative complaints alleging discriminatory effects in violation of Title VI regulations. See EPA Office of Civil Rights, Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits (1998) (providing uniform framework for consideration of complaints), at http://www.epa.gov/civilrights/docs/interim.pdf (last visited Apr. 6, 2002).
27. See Chester Residents Concerned for Quality Living v. Seif, 132 F.3d 925, 937 (3d Cir. 1997), vacated sub nom., 524 U.S. 974 (1998) (finding Pennsylvania Department of Environmental Protection violated Title VI regulatory effects mandate, regulations to provide private right of action). The Court of Appeals stated, "private plaintiffs may maintain an action under discriminatory effect regulations promulgated by federal administrative agencies pursuant to section 602 of Title VI of the Civil Rights Act of 1964." Id. The Third Circuit reinforced this position two years later. See Powell v. Ridge, 189 F.3d 387, 397-400 (3d Cir. 1999) (defining Title VI disparate-impact regulation to provide private right of action). In Powell, the Third Circuit relied on its earlier decision in Chester Residents and held that the Department of Education regulation prohibiting discriminatory effects in educational programs gave rise to an implied private right of action. See id. (discussing right of action under regulation).

Most other circuits reached similar conclusions in response to claims alleging disparate-impact discrimination in violation of Title VI and its implementing regulations. See, e.g., David K. v. Lane, 839 F.2d 1265, 1274 (7th Cir. 1988) ("It is clear that plaintiffs may maintain a private cause of action to enforce the regulations promulgated under Title VI of the Civil Rights Act. Moreover, plaintiffs need not show intentional discriminatory conduct to prevail on a claim brought under these administrative regulations. Evidence of a discriminatory effect is sufficient." (citation omitted)); Burton v. City of Belle Glade, 178 F.3d 1175, 1202-03 (11th Cir. 1999) (recognizing implied private right of action to enforce regulations promulgated under section 602 of Title VI, which permitted individuals to "obtain injunctive or declaratory relief by showing, inter alia, that the challenged action has 'a disparate impact on groups protected by the statute, even if those actions are not intentionally discriminatory'" (quoting Elston v. Talladega County Bd. of Educ., 997 F.2d 1394, 1406 (11th Cir. 1993))); see also Villanueva v. Carere, 85 F.3d 481, 486 (10th Cir. 1996) ("[C]ertain regulations promulgated pursuant to Title VI prohibit actions that have a disparate impact on groups protected by the act, even in the absence of discriminatory intent."); N.Y. Urb. League, Inc. v. New York, 71 F.3d 1031, 1036 (2d Cir. 1995) (stating that individuals alleging violations of Title VI regulations may make prima facie showing that alleged conduct had disparate impact); Elston, 997 F.2d at 1406 ("While Title VI itself, like the Fourteenth Amendment, bars only intentional discrimination, the regulations promulgated pursuant to Title VI may validly proscribe actions having a disparate impact on groups protected by the statute, even if those actions are not intentionally discriminatory." (citations omitted)); Ga. St. Conf. of Branches of NAACP v. Georgia, 775 F.2d 1403, 1417 (11th Cir. 1985) (applying disparate-impact analysis to claim predicated on Title VI regulations); Larry P. v. Riles, 793 F.2d 969, 981-82 (9th Cir. 1984) ("[P]roof of discriminatory effect suffices to establish liability when the suit is brought to enforce regulations issued pursuant to the statute rather than the statute itself." (footnote omitted)). The federal circuit courts usually applied the following analysis to claims of disparate-impact discrimination: First, the courts placed the initial burden on the plaintiff to establish a prima facie case that a facially neutral practice had resulted in a racial disparity. See Powell, 189 F.3d at 393 (reviewing analysis). If the plaintiff met this burden, the courts then required the defendant to establish a legitimate, nondiscriminatory justification for the action. See id. (stating analysis). If the defendant met this rebuttal burden, the courts then shifted the burden back to the plaintiff to establish either that the defendant overlooked a less discriminatory, but equally effective alternative, or that the proffered justification was only a pretext for racial discrimination. See id. at 594 (providing analysis); see also N.Y. Urban League, 71 F.3d at 1036 (analyzing burden of proof); Elston, 997 F.2d at 1407 (providing analysis).
read Sandoval as destroying a major avenue through which private plaintiffs commonly sought relief for injuries caused by unintentional discrimination by the state.\(^{28}\)

Soon after Sandoval, however, the United States District Court for the District of New Jersey endorsed an alternative basis for relief, which would allow a plaintiff to assert a cause of action under §1983 to redress a violation of a Title VI disparate-impact regulation.\(^{29}\) At the time of the district court's decision, the private enforceability of administrative regulations under §1983 was not a generally accepted principle within the federal court system.\(^{30}\) Moreover, although the Third Circuit had never explicitly held that regulations alone might create enforceable §1983 rights, it had

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28. See Stephen Seplow, 'Potentially huge' bias-suit ruling draws closer look, PHILA. INQUIRER, May 10, 2001, at 1 (arguing that Sandoval decision will make it "significantly harder for victims of the most pervasive kinds of discrimination to win court relief"); No Private Right to Enforce Title VI Disparate Impact Regulations, at http://www.nscclc.org/sandoval.html (last visited Apr. 6, 2002) (discussing potentially broad implications of Sandoval decision); James Harrington & Charles Wesselhoft, Ross & Hardies Environmental, Health & Safety Update, Recent Events on the Environmental Justice Front (June 2001) (asserting that Sandoval decision dealt significant blow to persons seeking to bring environmental justice actions under Title VI in federal court), at http://www2.rosshardies.com/publication.cfm?publication_id=46 (last visited Apr. 6, 2002). Furthermore, courts might apply the Sandoval line of reasoning to prohibit the enforcement of disparate-impact regulations issued under other federal statutes, such as section 504 of the Rehabilitation Act of 1974, 28 U.S.C. §794, Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. §12131, or the Education Amendments of 1972, which bar gender discrimination in education, (Title IX), 20 U.S.C. §1681, which all contain remedial provisions similar to Title VI. See Joanna Grossman, The Supreme Court's Recent Disparate Impact Case and Its Implications for Gender Equity, (May 8, 2001) (predicting impact of Sandoval on claims for disparate-impact discrimination under Title IX), at http://writ.news.findlaw.com/grossman/20010508.html (last visited Apr. 6, 2002). A Pennsylvania district court, however, decided that Sandoval did not apply to either the ADA or Section 504 because each of those statutes, unlike Title VI, themselves prohibit disparate-impact discrimination notwithstanding the language of the regulations. See Frederick L. v. Dep't of Pub. Welfare, 157 F. Supp. 2d 509, 536-39 (E.D. Pa. 2001) (analyzing impact of Sandoval and finding private right of action under both statutes to enforce disparate-impact regulations). Nevertheless, a district court in Virginia did extend Sandoval to bar the enforcement of anti-retaliation regulations issued pursuant to Title IX, because those regulations expanded the scope of discrimination prohibited by that statute. See Litman v. George Mason Univ., 156 F. Supp. 2d 579, 587 (E.D. Va. 2001) (concluding that Sandoval decision bars plaintiff's claim for Title IX retaliation).

29. See S. Camden Citizens in Action v. N.J. Dep't of Env'l Prot., 145 F. Supp. 2d 505, 509 (D.N.J. 2001) ("S. Camden II"), rev'd, 274 F.3d 771 (3d Cir. 2001) (discussing impact of Sandoval decision on that case). The United States District Court for the District of New Jersey issued this decision as a supplement to its first decision that was decided before Sandoval; defendants subsequently appealed, and the Third Circuit then reversed. See S. Camden Citizens in Action v. N.J. Dep't of Env'l Prot., 274 F.3d 771, 791 (3d Cir. 2001) (reversing district court's grant of preliminary injunctive relief).

30. For a further discussion of approaches to the private enforceability of regulations under §1983, see supra notes 16-18 and accompanying text.
suggested as much. For instance, over a decade ago, the Third Circuit stated, in dicta, that "valid federal regulations as well as federal statutes may create rights enforceable under section 1983." Recently, the Third Circuit reached a similar conclusion, deciding that § 1983 suits were not incompatible with claims alleging violations of Title VI disparate-impact regulations.

C. The South Camden Decision

Last year, in South Camden, the United States Court of Appeals for the Third Circuit strayed from its previous position regarding the private enforcement of federal administrative regulations. In reaching this conclusion, the court rejected the United States District Court for the District of New Jersey's decision that a federal regulation could create an enforceable § 1983 right even when the alleged interest did not explicitly appear in the implementing statute. In South Camden, the plaintiffs alleged that the New Jersey Department of Environmental Protection's (the "NJDEP") decision to issue a permit to an industrial company allowing it to open a facility that would emit pollutants constituted disparate-impact discrimination in violation of regulations enacted by the EPA pursuant to Title VI.

31. For a further discussion of the Third Circuit's suggestions, see infra notes 32-33 and accompanying text. Likewise, to determine when a court should imply a private right of action to enforce an administrative regulation, the Third Circuit developed a three-prong test which asked "(1) 'whether the agency rule is properly within the scope of the enabling statute'; (2) 'whether the statute under which the
rule was promulgated properly permits the implication of a private right of action'; and (3) 'whether implying a private right of action will further the purpose of the enabling statute.'" Polaroid Corp. v. Disney, 862 F.2d 987, 994 (3d Cir. 1988) (quoting Angelastro v. Prudential Bache-Securities, Inc., 764 F.2d 939, 947 (3d Cir. 1985)).


33. See Powell v. Ridge, 189 F.3d 387, 403 (3d Cir. 1999) (finding § 1983 claim appropriate to redress violation of federal law). In Powell, parents of minority school students alleged that Pennsylvania's method of funding public education had a racially discriminatory effect on Philadelphia public school children in violation of a regulation promulgated by the Department of Education pursuant to Title VI. See id. at 391 (establishing facts).

34. See generally S. Camden III, 274 F.3d at 771 (concluding that regulations at issue did not create private enforceable rights).

35. See id. at 791 (reversing district court).

36. See id. at 774 (stating plaintiff's cause of action); see also 42 U.S.C. § 2000d (2000) (prohibiting discrimination by federal programs). The proposed facility was to be used to grind and process granulated blast furnace slag and would emit certain pollutants into the air, including mercury, lead, carbon monoxide, and sulfur oxide. See S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 145 F. Supp. 2d 446, 450 (D.N.J. 2001) ("S. Camden I") (summarizing facts). The plaintiffs included members of South Camden Citizens in Action ("SCCA"), a community organization comprised of residents of "Waterfront South," an impoverished neighborhood located in Camden, New Jersey. See id. at 450-51 (stating facts).
In a supplemental opinion released after the Supreme Court decided *Sandoval*, the district court determined that although the plaintiffs could not bring suit directly under Title VI to enforce the regulations, they could instead assert a claim under § 1983.  

The defendants in the case included NJDEP, a state agency responsible for enforcing the federal and state environmental laws and regulations, as well as the Commissioner of NJDEP and St. Lawrence Cement Company. *See id.* at 450 (discussing facts). Many industrial facilities are situated in the neighborhood and accordingly, residents of Waterfront South, ninety-one percent of which are minorities, suffer from a disproportionately high rate of asthma and other respiratory ailments. *See id.* at 451 (summarizing facts). The plaintiffs argued that the operation of the proposed facility would have an adverse, disparate impact on the residents of the Waterfront South Community based on the race, color or national origin of its residents. *See id.* at 481-82 (stating plaintiffs' claim). The EPA regulations at issue provided:

> No person shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving EPA assistance on the basis of race, color, [or] national origin . . . . A recipient shall not use criteria or methods of administering its program which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, national origin, or sex.

40 C.F.R. §§ 7.30, 7.35(b) (2001). In its first opinion, the district court held that the plaintiffs made a prima facie showing under the regulations that the operation of the facility would have a racially disparate adverse impact on them in violation of Title VI. *See S. Camden I*, 145 F. Supp. 2d at 493 (stating conclusions of law). As a result, the district court granted the plaintiffs' request for a preliminary injunction and vacated the air permits issued by NJDEP. *See id.* at 505 (granting injunction). Five days after the district court released this opinion, however, the Supreme Court decided *Sandoval*. *See Alexander v. Sandoval*, 532 U.S. 275, 293 (2001) (holding that disparate-impact regulations cannot be enforced through private cause of action). Because the district court proceeded initially on the assumption that Title VI did create a private right of action to enforce the disparate-impact regulations, *Sandoval* effectively mooted that decision. *See S. Camden I*, 145 F. Supp. 2d at 474 (asserting that law of circuit supports private right of action under section 602).

37. *See S. Camden Citizens in Action v. N.J. Dep't of Envl. Prot.*, 145 F. Supp. 2d 505, 549 (D.N.J. 2001), rev'd 274 F.3d 771 (3d Cir. 2001) (stating conclusion). The district court stated that the *Sandoval* holding was limited to the notion that Title VI does not create an implied private cause of action to enforce regulations promulgated under section 602 of the Act that prohibit disparate-impact discrimination. *See id.* at 518 ("The holding in *Sandoval* is explicitly limited to the determination that § 602 itself does not create a right of private action."). Thus, the court concluded, as a threshold matter, that *Sandoval* did not preclude the plaintiffs "from pursuing any cause of action" for disparate-impact discrimination in violation of the EPA's section 602 implementing regulations. *See id.* at 517 (noting that any arguments or interpretations to contrary reach far beyond *Sandoval*'s narrow holding). The district court relied heavily on Third Circuit precedent and on application of the three-part analysis to determine if a federal statute confers an enforceable right. For a discussion of this three-part analysis, see *infra* notes 128-31 and accompanying text. The court concluded that the EPA's implementing regulations conferred upon the plaintiffs a federal right to be free from disparate-impact discrimination by recipients of federal funds—a right that is enforceable under § 1983. *See S. Camden II*, 145 F. Supp. 2d at 542 (concluding plaintiffs as-
The district court’s decision presented the question of whether a “federal right” should be enforceable under § 1983, even though it was not enforceable under the federal statute that provided the right in the first place. Following the prevailing trend of the courts in refusing to acknowledge the existence of federal rights without any clear congressional sanction, the Third Circuit reversed the district court’s decision. In the heart of its analysis, the court took pains to distinguish the South Camden facts from other opinions in which courts concluded that administrative regulations could be enforced through § 1983. The Third Circuit reasoned that the regulations at issue in those cases, as opposed to the dispa-

terred violation of “federal right”). Furthermore, the court held that the regulations did not contain any provisions that demonstrated congressional intent to foreclose a § 1983 remedy. See id. at 545 (concluding that limited enforcement power of EPA to enforce regulations was insufficient to warrant implication of congressional intent to foreclose § 1983 remedy). As a result, the district court concluded that private plaintiffs could enforce disparate-impact regulations, promulgated pursuant to section 602 of Title VI, under § 1983. See id. at 549 (stating conclusion).

38. See S. Camden II, 145 F. Supp. 2d at 542 (finding right to be free from disparate-impact discrimination enforceable under § 1983, but not under Title VI). The decision also presented a concern that a proliferation of new litigation might emerge if interests created by an administrative regulation alone could be enforced under § 1983. Cf. Maine v. Thiboutot, 448 U.S. 1, 12 (1980) (Powell, J., dissenting) (asserting that expanding scope of § 1983 to include deprivation of statutory rights in addition to constitutional rights would “dramatically expand the liability of state and local officials”). Furthermore, because § 1983 only provides a remedy when a state actor deprives an individual of a federal right, these persons could bear the burden of joint state and federal discrimination. See id. at 22 (Powell, J., dissenting) (analyzing scope of § 1983).

39. See S. Camden III, 274 F.3d at 774 (holding that disparate-impact regulation did not create enforceable § 1983 right).

40. See id. at 782-85 (analyzing relevant case law). The court first distinguished Wright v. City of Roanoke Redevelopment & Hous. Auth., 479 U.S. 418 (1987). See id. at 782 (explaining that issue in Wright was different than issue in South Camden). In Wright, the plaintiffs alleged that the housing authority violated a federal statute imposing a rent ceiling as well as regulations implementing that statute. See Wright, 479 U.S. at 419 (presenting claim). The Supreme Court held that the statute and its implementing regulations created an enforceable § 1983 right. See id. at 432 (finding valid cause of action under § 1983). In South Camden, the Third Circuit explained that “the regulation at issue in Wright merely defined the specific right that Congress already had conferred through the statute.” S. Camden III, 274 F.3d at 783. In contrast, the regulations at issue in South Camden purported to create the right to be free from disparate-impact discrimination, a right that was not implicit in the authorizing statute. See id. (explaining teachings of Wright to deal with regulations at issue). The Court of Appeals then distinguished what appeared to be the controlling circuit precedent. See id. at 784-85 (analyzing relevant Third Circuit cases).

In Powell v. Ridge, the Third Circuit held that the plaintiffs could use § 1983 to redress an alleged violation of Title VI and Title VI regulations promulgated by the Department of Education. See Powell v. Ridge, 189 F.3d 387, 403 (3d Cir. 1999) (allowing § 1983 claim for violation of regulation). The South Camden court asserted, however, that Powell did not squarely confront the current issue regarding whether a regulation in itself, independent from the governing statute, could create a right enforceable under § 1983. See S. Camden III, 274 F.3d at 784 (asserting
rate-impact regulations at issue in *South Camden*, created interests that were already provided in the enforcing statutes. As a result, the Third Circuit concluded that:

an administrative regulation cannot create an interest enforceable under section 1983 unless the interest already is implicit in the statute authorizing the regulation, and that inasmuch as Title VI proscribes only intentional discrimination, the plaintiffs do not have a right enforceable through a 1983 action under the EPA’s disparate impact discrimination regulations.

III. THE CREATION OF ENFORCEABLE FEDERAL RIGHTS

In the United States Constitution, the Framers articulated the precise powers of the judicial and legislative branches of government. Various constitutional provisions expressly grant Congress the power to enact federal legislation. Similarly, the Constitution provides that the judiciary shall adjudicate individuals’ claims challenging the validity of a law or requesting redress because of a violation of a federal right conferred by a

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41. See *S. Camden III*, 274 F.3d at 783 (explaining that Wright Court located alleged right in statutory provision and relied upon implementing regulation to define and interpret that right).

42. Id. at 774; cf. *Harris v. James*, 127 F.3d 993, 1009 (11th Cir. 1997) (stating that “if the regulation goes beyond explicating the specific content of the statutory provision and imposes distinct obligations in order to further the broad objectives underlying the statutory provision, . . . the regulation is too far removed from Congressional intent to constitute a ‘federal right’ enforceable under § 1983”). Dissenting in *South Camden III*, Judge McKee argued that the enforcement of the disparate-impact regulations under § 1983 comported with the controlling law of the Third Circuit as well as the Supreme Court precedent. See *S. Camden III*, 274 F.3d at 791-98 (McKee, J., dissenting) (reviewing decisions). Judge McKee stated that Powell controlled the dispute because the Court of Appeals was considering precisely the same issue in both cases. See id. at 791 (McKee, J., dissenting) (finding Powell controlling). Furthermore, Judge McKee argued that Wright is consistent with the proposition that regulations themselves may create enforceable federal rights. See id. at 797-98 (asserting that Supreme Court precedent provides additional support for plaintiffs’ claim).

43. See U.S. CONST. arts. I, III (setting forth powers of legislative and judicial branches). For a discussion of these powers, see infra notes 44-47 and accompanying text.

44. See U.S. CONST. amend. XIV, § 5 (providing Congress with power to enforce provisions of Fourteenth Amendment through appropriate legislation); U.S. CONST. art. I, § 8, cl. 1 (empowering Congress to regulate commerce among states and with foreign countries); U.S. CONST. art. I, § 8, cl. 3 (commanding Congress to provide for general welfare of United States). Congress enacted Title VI of the Civil Rights Act of 1964, which conditions the receipt of federal funds on the absence of discrimination by a federally funded agency, pursuant to this spending power. See 42 U.S.C. § 2000d-27 (2000) (prohibiting discrimination based on race, color or national origin).
law. The power of the federal judiciary is provided in Article III, which explicitly vests federal jurisdiction in one Supreme Court, and those lower federal courts that Congress, in its sole discretion, may establish. In addition, while Article III sets the precise limits of the Supreme Court’s original jurisdiction, it gives Congress the power to make exceptions to the stated categories of the Court’s appellate jurisdiction.

A. Expansion of Rights Jurisprudence

Although the legislative and judicial branches retain discrete authority over certain specified governmental functions, the roles of both branches frequently overlap in practice. For instance, Congress often sets forth rules and regulations in legislation, but fails to set forth the remedies available to private individuals if these rules and regulations are not followed. In these situations, the judiciary may be placed in a position to potentially create or expand federal rights, although the Constitution explicitly vests such law-making authority in Congress. As a result, federal courts are extremely hesitant to imply private causes of action or to infer private remedies outside of the statute in question if it is not readily apparent that Congress intended to do so. The pervasiveness of this principle...
is manifest in the reasoning and implications of the Third Circuit’s decision in South Camden.52

A court has the potential to expand federal rights in two principle areas: (1) the implication of a private right of action under a federal statute, and (2) the determination that a federal law creates a right enforceable under § 1983.53 Until the past decade, the Supreme Court was willing to imply a private right of action under a federal statute if Congress had not explicitly denied the right and if allowing private suits would further the statute’s purpose.54 Presently, the Supreme Court is more hesitant to


52. See S. Camden Citizens in Action v. N.J. Dep’t of Envtl. Prot., 274 F.3d 771, 790 (3d Cir. 2001) (stating The Supreme Court’s primary concern in considering enforceability of federal claims under section 1983 has been to ensure that Congress intended to create the federal right being advanced. Accordingly, we hold that a federal regulation alone may not create a right enforceable through section 1983 not already found in the enfor ming statute. Similarly, we reject the argument that enforceable rights may be found in any valid administrative implementation of a statute that in itself creates some enforceable right) (citations omitted). After applying these principles, the Third Circuit concluded that Congress did not intend to create a right to be free from disparate-impact discrimination through the adoption of Title VI, and therefore, regulations that prohibited this conduct did not create enforceable rights under § 1983. See id. at 791 (reversing district court order granting injunctive relief to plaintiffs).

53. Compare Cort v. Ash, 422 U.S. 66, 78 (1975) (articulating four-factor test to determine if statute contains implied cause of action), with Blessing v. Freestone, 520 U.S. 329, 340-41 (1997) (setting forth three-part analysis to determine if statute confers federally enforceable right). Although in many respects the analyses are similar, in a § 1983 action, a plaintiff must only establish that Congress intended to create a privately enforceable federal right in favor of the plaintiff. See W. Va. Univ. Hosps., Inc. v. Casey, 885 F.2d 11, 18-19 n.1 (3d Cir. 1989) (discussing relevant inquiries to determine if right of action exists under § 1983). A plaintiff asserting a claim directly under a federal statute, however, must not only show that Congress intended to create a federal right in favor of the plaintiff, but also that Congress intended the right to encompass a private remedy through a cause of action under the statute. See id. at 19 (reviewing factors to establish implied right of action under federal statutes).

imply private rights of action unless Congress' intent to do so is manifest either in the language or structure of the statute or in the circumstances surrounding its enactment.\(^5\) Additionally, the Supreme Court has made clear that rights conferred by administrative regulations alone can never be enforced through a private cause of action.\(^6\) Nevertheless, the Court has suggested that regulations that define or interpret statutory provisions may be enforced through the underlying statute's cause of action, if that right so exists.\(^7\)

(1) Is the plaintiff of the class for whose special benefit the statute was enacted?

(2) Is there any indication of congressional intent to provide (or deny) a remedy?

(3) Is the implication of a remedy consistent with the underlying purposes of the legislative scheme?

(4) Is the cause of action one traditionally relegated to state law, so that it would be inappropriate to infer a cause of action based on federal law?

See Cort, 422 U.S. at 78 (providing four-factor inquiry). The problem with this test, however, was that only one of the four factors involved an analysis of congressional intent to create the right, while the rest involved "judicial lawmaking." See Cannon v. Univ. of Chi., 441 U.S. 677, 740 (1979) (Powell, J., dissenting) (stating that four-part Cort analysis "too easily may be used to deflect inquiry away from the intent of Congress, and to permit a court instead to substitute its own views as to the desirability of private enforcement"). Justice Powell argued that Congress alone should have the authority to establish a private cause of action, and when Congress has not explicitly done so, the judiciary should not imply the existence of the right without compelling evidence to do so. See id. at 730-51 (discussing appropriate test to determine when Court should imply right of action to enforce federal statute).


56. See Alexander v. Sandoval, 532 U.S. 275, 291 (2001) (stating 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").

57. See id. at 284 (asserting that if Congress intended federal statute to be enforced through private cause of action, it also intended authoritative interpretation of statute to be so enforced). The Court recognized that regulations that "authoritatively construe" Title VI, such as regulations that prohibit intentional discrimination, will remain enforceable through section 601's private cause of action. See id. (discussing enforcement of Title VI disparate-impact regulations).
The second area in which this issue arises is the judicial approval of a private remedy for violation of a federal right under § 1983.\textsuperscript{58} Although the text of § 1983 expressly grants a private right of action, courts faced with these claims must also discern whether Congress intended for the asserted right to be privately enforceable under § 1983.\textsuperscript{59} Without an unmistakable mandate from Congress that it intended to create a federally enforceable right, the courts will not infer this intent by permitting the plaintiff to seek relief under § 1983.\textsuperscript{60}

Most significant to the matter at hand is the application of these principles to the private enforceability of federal regulations under § 1983.\textsuperscript{61} With congressional intent as the determinative factor in a § 1983 analysis, it is arguable whether regulations, promulgated by administrative agencies (and not Congress itself), should be able to create federal rights worthy of private § 1983 remedies.\textsuperscript{62} This inconsistency also troubled the Third Cir-

\textsuperscript{58} For a discussion of the § 1983 cause of action, see supra Part II.A.

\textsuperscript{59} For a further discussion of the judicial implication of congressional intent to create an enforceable § 1983 right, see infra notes 124-41 and accompanying text. Because the implication of a private cause of action requires a court to infer Congress' intent to create or deny a right of action, while § 1983 explicitly confers such a right, courts may be slightly less hesitant to imply an enforceable § 1983 right than to imply a private right of action under a federal statute. See Wilder, 496 U.S. at 509 (noting that Congress has expressly authorized private suits under § 1983); Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 19 (1981) (referring to § 1983 as "alternative source of express congressional authorization of private suits"); W. Va. Univ. Hosps., Inc. v. Casey, 885 F.2d 11, 19 n.1 (3d Cir. 1989) (asserting that § 1983 remedy is presumed once existence of federal right is established); Bradford C. Mank, Using § 1983 to Enforce Title VI's Section 602 Regulations, 49 U. KAN. L. REV. 321, 323 (2001) (arguing that courts should recognize § 1983 as valid cause of action to enforce regulations because these suits do not raise same separation of powers concerns as do implied causes of action under regulations themselves).

\textsuperscript{60} See Suter v. Artist M., 503 U.S. 347, 357 (1992) (considering whether "Congress, in enacting the Adoption Act, unambiguously confer[red] upon the child beneficiaries of the Act a right to enforce the requirement that the State make 'reasonable efforts' to prevent a child from being removed from his home"); Wilder, 496 U.S. at 509 (addressing whether Congress intended statutory provision to benefit plaintiffs and thus confer "federal right"); Golden St. Transit Corp. v. City of Los Angeles, 493 U.S. 103, 111 (1989) (looking to language, history and structure of National Labor Relations Act to determine whether statute created certain labor and management rights against governmental interference); Wright v. City of Roanoke Redevelopment & Hous. Auth., 479 U.S. 418, 430 (1987) (analyzing text of statutory provisions to determine whether Congress intended to create "enforceable rights, privileges, or immunities within the meaning of § 1983"); S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot. 274 F.3d 771, 784 (3d Cir. 2001) ("[T]he Supreme Court refined its analysis to focus directly on Congress' intent to create enforceable rights and to confine its holdings to the limits of that intent.").

\textsuperscript{61} For a discussion of the potential enforceability of regulations in a § 1983 action under the South Camden approach, see infra Part III.B.

\textsuperscript{62} See S. Camden III, 274 F.3d at 790 ("If there is to be a private enforceable right under Title VI to be free from disparate impact discrimination, Congress, and not an administrative agency or a court, must create this right."). But see Chrysler Corp. v. Brown, 441 U.S. 281, 285-86 (1979) (deciding whether agency
cuit in *South Camden*, which led to its conclusion that if an administrative agency is purporting to confer a right through a rule or regulation, that right must already be implicit in an existing statute to be enforceable under § 1983. In other words, only Congress itself may create federal rights, but if a regulation does nothing more than interpret that right, the combined statutory-regulatory interest may be enforceable under § 1983.

B. *Beginning the South Camden Era: What Regulations Represent Valid Administrative Interpretations?*

Viewed against this backdrop, the *South Camden* decision and the reasoning behind it surely encompass a broad section of federal regulations and their enforcing statutes. Unmistakable in its concern over invading a traditional sphere of congressional power, the Third Circuit decisively concluded that an administrative regulation *alone* can never create a right enforceable under § 1983; but instead, may only be enforced if the asserted right is coupled with a guarantee implicit in the enforcing federal statute. Accordingly, plaintiffs who wish to enforce federal regulations under § 1983 in the Third Circuit should argue that the asserted right is merely defining or fleshing out an established statutory right. The easiest way to determine the types of regulations this definition will encompass is to parse through various examples of regulation-statute combinations.

1. *Regulations that Create Independent Interests*

The clearest examples of regulations that will be categorically unenforceable in the Third Circuit following *South Camden* are Title VI disparate-impact regulations may be regarded as “law” within meaning of Trade Secrets Act, 18 U.S.C. § 1905). The Court maintained that “properly promulgated” federal agency regulations might have “the force and effect of law” if they are “substantive” or “legislative-type” rules that affect individual rights and obligations and have been validly promulgated pursuant to a congressional grant of legislative authority, in conformity with any procedural requirements imposed by Congress. See *Brown*, 441 U.S. at 294-98 (considering circumstances in which administrative regulations may have force and effect of law).

63. See *S. Camden III*, 274 F.3d at 774 (stating holding). For a further discussion of the *South Camden III* decision, see supra notes 38-42 and accompanying text.

64. For examples of regulations that interpret federal statutory rights, see infra Part III.B.2.

65. See *S. Camden III*, 274 F.3d at 774 (asserting that regulations can never independently create enforceable federal rights). The broad language used by the Third Circuit in *South Camden* suggests that the court did not intend to limit the holding to apply only to Title VI disparate-impact regulations. For a further discussion of the decision, see supra notes 37-40 and accompanying text.

66. For the holding of the *South Camden* decision, see supra note 39 and accompanying text.

67. For examples of regulations that should satisfy this definition, see infra Part III.B.2.

68. For a discussion of these examples, see infra Parts III.B.1 and III.B.2.
rate-impact regulations.\textsuperscript{69} The \textit{South Camden} decision established that these regulations advance a right that is not implicit in the authorizing statute.\textsuperscript{70} It is indisputable that Title VI itself prohibits only intentional discrimination, as established by a wealth of Supreme Court decisions.\textsuperscript{71} The disparate-impact regulations do not merely interpret or define this right, but instead attempt to create a wholly new right—the right to be free from unintentional discrimination.\textsuperscript{72} Thus, so long as the Supreme Court's interpretation of Title VI rejects a prohibition on unintentional discrimination, the Title VI regulations that prescribe such conduct will be unenforceable under both the statute itself and § 1983.\textsuperscript{73}

Similar to Title VI, Title IX of the Education Amendments of 1972 prohibits an educational institution receiving federal funding to discriminate with respect to gender.\textsuperscript{74} Pursuant to this statute, the Department of Education has issued various regulations, one of which prohibits a federal funding recipient from retaliating against a person for filing a complaint of gender discrimination in violation of Title IX.\textsuperscript{75} Title IX itself does not include a similar anti-retaliation provision.\textsuperscript{76} Therefore, to determine

\begin{itemize}
  \item \textsuperscript{69} See \textit{S. Camden III}, 274 F.3d at 771, 774 (holding that plaintiffs did not have right enforceable through § 1983 action under EPA's disparate-impact discrimination regulations).
  \item \textsuperscript{70} See id. at 789-90 (explaining that regulations are not based on any federal right present in statute). \textit{But see id.} at 798 (McKee, J., dissenting) (arguing that disparate-impact regulations may be traced to Title VI and "may very well reflect an agency's practical considerations and definition of discrimination").
  \item \textsuperscript{71} See Alexander v. Sandoval, 532 U.S. 275, 280 (2001) (asserting that it is agreed that § 601 of Title VI proscribes only intentional discrimination); Alexander v. Choate, 469 U.S. 287, 293 (1985) ("Title VI itself directly reach[es] only instances of intentional discrimination."); Guardians Ass'n v. Civ. Serv. Comm'n of N.Y., 463 U.S. 582, 610 (1983) (Powell, J., concurring) (asserting that Title VI only prohibits intentional discrimination); Regents of Univ. of Cal. v. Bakke, 486 U.S. 265, 287 (1978) (stating that Title VI proscribes only racial classifications that would violate Equal Protection Clause or Fifth Amendment); \textit{see also} Washington v. Davis, 426 U.S. 229, 240 (1976) (adhering to "basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose").
  \item \textsuperscript{72} For a further discussion of these regulations, see \textit{supra} note 23 and accompanying text.
  \item \textsuperscript{73} See Edward Lazarus, \textit{The Case That Roared}: A Limited "Disparate-Impact" Holding That Could Have Large Repercussions, available at http://writ.news.findlaw.com/lazarus/20010501.html (last visited Apr. 6, 2002) (questioning agenda of current conservative Supreme Court to eliminate claims for disparate-impact discrimination). Lazarus asserts that while conservatives, including a majority of the present Justices, would focus exclusively on whether rules or policies reflect discriminatory intent, liberals would argue that disparate-impact discrimination provides a useful tool for uncovering such discriminatory intent, which is often impossible to prove. \textit{See id.} (discussing pros and cons of disparate-impact litigation).
  \item \textsuperscript{74} See 20 U.S.C. §§ 1681-1688 (2000) ("Title IX") (prohibiting discrimination based on gender in education).
  \item \textsuperscript{75} See 34 C.F.R. § 100.7(e) (2001) (barring retaliation).
  \item \textsuperscript{76} \textit{But cf.} 42 U.S.C. § 2000e-3(a) (2001) ("Title VII") (barring retaliation by employer against employee alleging discriminatory employment practices).
\end{itemize}
whether the anti-retaliation regulations are enforceable under the *South Camden* approach, a court must first determine whether Title IX’s definition of discrimination implicitly embraces a prohibition on retaliation.\(^{77}\) If so, the regulation would merely be interpreting the statute instead of expanding its scope.\(^{78}\) It is more likely, however, that a court would view the regulation as creating a completely new right because the harm that the anti-retaliation regulation addresses is not a direct consequence of the initial discrimination, but occurs only when a victim of discrimination responds to that discrimination by complaining about it.\(^{79}\) Therefore, it is unlikely that Congress impliedly included the right to be free from retaliation in its definition of discrimination under Title IX.\(^{80}\)

Other types of regulations that should not constitute valid administrative interpretations under the *South Camden* approach are those regulations that do not impose mandatory requirements on states, but instead provide guidance or suggest procedures intended to further the stated goals of the relevant statutory provisions.\(^{81}\) For instance, Title XIX of the Social Security Act of 1965 gives states the option of participating in Medicaid, a program through which the participating states agree to bear some of the medical expenses of poor citizens within the state.\(^{82}\) In return, the

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\(^{78}\) See id. (comparing Title VII anti-retaliation provisions found in statute itself).

\(^{79}\) See id. (interpreting discrimination under Title IX).

\(^{80}\) See id. at 584-85 (refusing to acknowledge right of action for retaliation under Title IX). Thus, to find that a Title IX anti-retaliation regulation confers an enforceable § 1983 right, a court would have to interpret “discrimination” under the statute to include retaliation. See id. at 583-85 (rejecting argument that harm from retaliation is prohibited by Title IX’s text). Similarly, to find that a Title VI disparate-impact regulation confers an enforceable § 1983 right, a court would have to interpret “discrimination” under Title VI to include disparate-impact discrimination. See Alexander v. Sandoval, 532 U.S. 275, 280 (2001) (stating that it is undisputable that § 601 of Title VI proscribes only intentional discrimination). Because the Supreme Court has not done so, and it does not seem likely that it will do so soon, these regulations will be categorically unenforceable in the Third Circuit under the *South Camden* approach. See S. Camden Citizens in Action v. N.J. Dep’t of Envl Prot., 274 F.3d 771, 774 (3d Cir. 2001) (finding that right conferred by regulation must be implicit in authorizing statute to be enforceable).

\(^{81}\) See, e.g., 42 C.F.R. § 431.53 (2001) (compelling states to provide some sort of non-emergency transportation to and from patients’ medical care providers). In *Harris v. James*, the Eleventh Circuit suggested that these types of regulations are not enforceable under § 1983 because although they may further the “broad objectives underlying each statutory provision,” they do not define the “content” of these statutory rights. See *Harris v. James*, 127 F.3d 993, 1011 (11th Cir. 1997) (discussing validity of regulations). Thus, although these regulations may be valid because they provide a “means of ensuring” compliance with the statutory right, the link between the regulatory interest and congressional intent to create a comparable federal statutory right is insufficient. See id. at 1012 (finding plaintiffs did not have federal right enforceable under § 1983).

\(^{82}\) See 42 U.S.C. § 1396 (1994) (governing Medicaid program); see also Silver v. Baggiano, 804 F.2d 1211, 1215 (11th Cir. 1986) (describing Medicaid program).
federal government subsidizes a portion of these financial obligations. A particular regulation issued under Title XIX requires participating states to specify in their Medicaid plans that the Medicaid agency will provide some sort of non-emergency transportation to and from patients’ medical care providers. For this regulation to be enforceable under the South Camden approach, a court must interpret Title XIX to require participating states to provide this transportation service as part of its Medicaid plans. If so, the regulation would only be defining a statutory right. If not, the regulation would be attempting to confer a federal interest not implicit in the statute.

On the one hand, Congress clearly intended Title XIX to confer a benefit to Medicaid recipients by ensuring that their medical needs were provided for under the program. Accordingly, a court might construe the regulation as delineating the specific contours of the statutory right by requiring access to transportation. On the other hand, a court might find conclusive the fact that Title XIX does not mention a transportation requirement. For example, the Eleventh Circuit concluded that the nexus between the regulation and the congressional intent to create a comparable federal right was too tenuous to infer an enforceable right to transportation. Nevertheless, for the reasons expressed above, a court

83. See 42 U.S.C. § 1396 (setting forth Medicaid program); see also Silver, 804 F.2d at 1215 (describing Medicaid program).
84. See 42 C.F.R. § 431.53 (requiring states to establish transportation procedures).
86. Cf. id. (relying on Wright v. City of Roanoke Redevelopment & Housing Authority to support private enforcement of right).
87. Cf. Harris v. James, 127 F.3d 993, 1010-11 (11th Cir. 1997) (concluding that transportation regulation does not define any rights already conferred by Congress).
89. Cf. Doe v. Chiles, 136 F.3d 709, 717 (11th Cir. 1998) (finding that administrative regulations at issue defined contours of statutory right to reasonably prompt provision of medical assistance under Title IX, 42 U.S.C. § 1396a(a)(8)).
90. Cf. Harris, 127 F.3d at 1009-12 (finding no federal right to transportation in text of specific statutory sections).
91. See id. (comparing transportation regulation to specific statutory provisions); cf. Kissimmee River Valley Sportsman Ass’n v. City of Lakeland, 250 F.3d 1324, 1326-27 (11th Cir. 2001) (rejecting claim that Federal Aid in Sportfish Recreation Act, 16 U.S.C. §§ 771a-777k, in conjunction with implementing regulations, created federal right of equal access for boats with common horsepower ratings). Relying on its decision in Harris, the Eleventh Circuit in Kissimmee River Valley found an insufficient nexus between the regulations at issue and any federal right implicit in the authorizing statute. See Kissimmee River Valley, 250 F.3d at 1327 (quoting Harris, 127 F.3d at 1009) (finding regulation to impose “new and ‘distinct obligations’ not found in the statute itself, and thus [was] ‘too far removed from the Congressional intent to constitute a ‘federal right’ enforceable under § 1983’”).
could rationally view the regulation as a valid interpretation of Title XIX.92

In a similar case, the Sixth Circuit heard a claim under the Child Abuse Prevention and Treatment Act, which requires states to promptly investigate reports of abuse and neglect and to implement procedures, personnel and facilities to effectively address the confirmed cases.93 Regulations promulgated under that statute offer numerous suggestions as to what the investigations might include and what the emergency services might entail.94 On the one hand, these regulations may to some extent flesh out the general statutory requirements.95 On the other hand, these regulations do not speak in either specific or mandatory terms, and thus may not sufficiently define or implement the authorizing federal statute to create enforceable rights.96 As a result of this ambiguity, it is not readily apparent how the Third Circuit would view these regulations under the South Camden approach.97

2. Regulations that Validly Interpret Federal Statutes

An example of a regulation that does not create an independent right, but merely defines a statutory right is found in Wright v. City of Roanoke Redevelopment Center.98 In Wright, the United States Supreme Court addressed a claim that the housing authority violated both a federal statute that imposed a rent ceiling and the statute’s implementing regulations that required public housing authorities to include a reasonable utility allowance in the tenants’ rent.99 The Court referred to the regulation as a “valid interpretation of the statute” because it merely “defin[ed] the statutory concept of ‘rent’ as including utilities.”100 Thus, regulations such as

92. Cf. Buckley v. City of Redding, 66 F.3d 188, 189 (9th Cir. 1995) (finding regulations at issue in Kissimmee River Valley confers enforceable § 1983 right to access waterways for use of personal watecraft with common horsepower ratings). In Buckley, the Ninth Circuit decided that the regulation’s language should be read to require the facility and waterway in question to comply with the requirements of the statute. See id. at 193 (concluding that Congress intended boating facilities to comply with regulation’s requirements).


95. See Childers, 71 F.3d at 1189 (suggesting that implementing regulations are clearly intended to provide guidance to states when initiating investigation and emergency services).

96. See id. (noting that because regulations use word “may,” states are not required to rely on examples of procedures provided).

97. See id. (abiding by reasoning of South Camden and concluding that regulations at issue did not create enforceable rights because neither statute nor regulations imposed binding obligations on states).


99. See Wright, 479 U.S. at 419 (establishing facts of case).

100. See id. at 431 (concluding that regulation conferred enforceable rights under § 1983).
these, that do not create discrete federal interests, but instead only delineate the specifics of established statutory rights, clearly comport with the South Camden approach. 101

A related type of administrative regulation requires states to implement certain procedures to secure compliance with a corresponding federal statutory right. 102 The Third Circuit addressed this type of claim in Farley v. Philadelphia Housing Authority, 103 which involved a federal housing statute and its implementing regulations. 104 The United States Housing Act authorizes the Department of Housing and Urban Development to provide grants, low interest loans and tax exemptions to local public housing agencies. 105 One particular section of the Act requires the public agencies to implement an administrative grievance procedure for resolving tenant disputes. 106 Certain regulations issued under that provision require the grievance awards to be binding on local housing authorities and obliges the housing authorities to take all steps necessary to carry out the judgments. 107 In Farley, the Third Circuit determined that this regulation clearly implemented the federal statute. 108 The terms of the statutory provision exhibit Congress' intent to grant tenants the right to a grievance

101. Cf. Doe v. Chiles, 136 F.3d 709, 717 (11th Cir. 1998) (finding federal regulations promulgated pursuant to Title XIX to “further define the contours of the statutory right to reasonably prompt provision of assistance”). The regulations at issue in Chiles imposed unambiguous obligations on state agencies to promptly furnish Medicaid to all eligible recipients without undue delay and also set forth acceptable time limits in which eligibility determinations should be made. See 42 C.F.R. §§ 435.930(a)-(b), 435.911(a), (e)(1) (2001) (setting forth Medicaid requirements). Similarly, the relevant statutory provision ensured that all individuals who apply for medical assistance under Medicaid would receive such assistance with “reasonable promptness.” See 42 U.S.C. § 1396(a)(8) (2000) (stating requirement); Chiles, 136 F.3d at 714 (explaining text of statute). The Eleventh Circuit concluded that the statutory provision, as further fleshed out by the regulations, created a federal right to reasonably prompt medical assistance that was enforceable under § 1983. See id. at 717, 719 (discussing enforceability of asserted right to assistance without unreasonable delay).

102. See, e.g., 7 C.F.R. §§ 246.24(a), (b) (2001) (requiring notice and fair hearing before termination of benefits granted under Supplemental Nutrition Program for Women, Infants and Children); 24 C.F.R. § 966.57(b) (2001) (requiring local public housing authorities to take all steps necessary to carry out binding grievance awards).

103. 102 F.3d 697 (3d Cir. 1996).


106. See id. at § 1437d(k) (setting forth procedures for resolutions of tenant disputes).

107. See 24 C.F.R. § 966.57(b) (compelling agencies to follow through with grievance awards).

108. See Farley, 102 F.3d at 699 (stating that cause of action arises strictly under statute because regulation is merely interpreting it).
procedure for complaints. Accordingly, the court concluded that the administrative regulations flesh out this right by ensuring that the housing authorities comply with the results of the grievance procedure.

In 1984, the Third Circuit faced a related challenge by a class of four-year-old children against the City of Philadelphia concerning its administration of a federal grant-in-aid program. Under the Supplemental Food Program for Women, Infants, and Children ("WIC"), the federal government provided cash grants to states that established a system to provide food to women and children faced with the risk of malnutrition. The court agreed with the plaintiffs that the city violated "fair-hearing" regulations issued under the WIC program when it terminated the children's benefits without first informing them of their right to a fair hearing. As the South Camden court explained, the right to a fair hearing upon the termination of benefits could certainly "be traced to and was consistent with" the statutory right to supplemental food to those who qualified under the statute.

Another category of federal regulations that should constitute valid administrative interpretations under the South Camden approach are regulations that invalidate any state laws that contradict the provisions of the authorizing federal statutes. For instance, the Cable Communications Act of 1984 was designed to "promote the growth of satellite programming and to facilitate individual reception of unencrypted satellite signals." In an amendment to the Act, Congress specifically authorized private persons to install antennas to receive unscrambled satellite programming for private viewing. In response, the FCC issued a regulation that preempted local ordinances that interfered with this right.

109. See 42 U.S.C. § 1437d(k) (setting forth grievance/arbitration procedure that public housing authorities must follow and rights to which tenants are entitled).
110. Cf. Farley, 102 F.3d at 704 (concluding that public housing tenants could enforce federal right to enforceable grievance procedure under § 1983).
111. See Alexander v. Polk, 750 F.2d 250, 261, 265 (3d Cir. 1984) (holding that city violated fair hearing regulations by failing to give recipients notice of termination of benefits and right to fair hearing).
113. See Polk, 750 F.2d at 252 (explaining plaintiffs' claim); 7 C.F.R. §§ 246.24(a), (b) (1978) (ensuring recipients received notice and fair hearing).
114. See S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 274 F.3d 771, 783 (3d Cir. 2001) (discussing Polk decision and concluding that fair-hearing regulation, in conjunction with authorizing statute, created interest enforceable under § 1983).
117. See 47 U.S.C. § 605(b) (ensuring private persons received benefit of Act).
118. See 47 C.F.R. § 25.104 (preempting conflicting local ordinances).
is a valid implementation of the statutory right.119 Through the enactment of the statute and the related amendment, Congress intended to provide individuals with the right to receive authorized television signals.120 By preempting local ordinances that interfered with this interest, the regulation did nothing more than carry out Congress’ original intent.121

These examples demonstrate types of federal administrative regulations that comport with the South Camden formulation of enforceable regulatory rights.122 This approach requires the nexus between the regulatory right and the statutory right to be strong enough to impute congressional approval of the enforceability of the combined interest under § 1983.123

IV. THE LIMITATIONS TO THE § 1983 CAUSE OF ACTION

A. Two Exceptions to the Presumption of Enforceability

Determining that an agency regulation is a valid administrative interpretation of a federal statute means only that the regulatory interest, in conjunction with the statutory interest, may create a federal right enforceable under § 1983.124 A court must also determine whether Congress intended the asserted right to encompass a private remedy within the purview of § 1983.125 In effect, the asserted interest constitutes a statutory

119. Cf. Loschiavo, 33 F.3d at 553 (asserting that FCC adopted regulation to further goals of statute).

120. See id. (emphasizing that Congress intended to promote individual access to satellite programming).

121. Cf. id. (concluding that plaintiffs were entitled to bring § 1983 action to enforce federal right created by regulation in conjunction with statute).

122. For a further discussion of these examples, see supra notes 98-121 and accompanying text.

123. See S. Camden Citizens in Action v. N.J. Dep’t of Envtl. Prot., 274 F.3d 771, 790 (3d Cir. 2001) (stating that Supreme Court’s primary concern in ruling upon enforceability of rights under § 1983 has been to determine Congress’ intent). The requirement of a common interest between the authorizing statute and the regulation indicates that the prevalent analysis used to determine whether a statute creates an enforceable § 1983 right is not appropriate when determining whether a regulation itself creates a § 1983 right. See id. at 781 (stating that district court erred in applying rights test to EPA regulations). Before South Camden, however, Third Circuit courts typically scrutinized only the regulations at issue to determine if they alone created enforceable § 1983 rights. See W. Va. Univ. Hosps., Inc. v. Casey, 885 F.2d 11, 18 (3d Cir. 1989) (applying rights test to regulation and noting that “valid federal regulations as well as federal statutes may create rights enforceable under section 1983”) (emphasis added); Alexander v. Polk, 750 F.2d 250, 259-61 (3d Cir. 1984) (analyzing only regulation and concluding that violation of it was actionable under § 1983). For a discussion of the three-part rights analysis used to determine if a statute creates an enforceable § 1983 right, see infra notes 130-33 and accompanying text.

124. See Harris v. James, 127 F.3d 993, 1008-09 (11th Cir. 1997) (interpreting enforceability of administrative regulations).

125. See Harris, 127 F.3d at 1009 (finding that regulations that define statutory provisions, which themselves do not create federal rights under three-prong test, are “too far removed from congressional intent to constitute a ‘federal right’ en-
right, which is presumptively enforceable under § 1983. This rule, however, is subject to two significant limitations. First, a § 1983 remedy is not available “where the statute d[oes] not create enforceable rights, privileges, or immunities within the meaning of § 1983.” Second, a § 1983 remedy is not available where Congress has specifically foreclosed access to private relief under § 1983.

Lower federal courts consistently apply a three-part analysis to statutory provisions to determine if they fulfill the former requirement, that the asserted interest create a right, privilege or immunity within the meaning of § 1983. First, Congress must have intended the statute in ques-

forceable under § 1983”); see also Howe v. Ellenbecker, 8 F.3d 1258, 1263 (8th Cir. 1995) (finding that statute imposed binding obligations on states in light of specific regulatory requirements and thus asserted interest was enforceable under § 1983). But see Doe v. District of Columbia, 93 F.3d 861, 865-67 (D.C. Cir. 1996) (analyzing statute to determine that right created, in conjunction with regulatory provision, was not enforceable under § 1983); Tony L. ex. rel. Simpson v. Childers, 71 F.3d 1182, 1189 (6th Cir. 1995) (concluding that federal statute, in conjunction with implementing regulations, did not impose binding obligation on states and thus did not create enforceable § 1983 right).

126. See Golden St. Transit Corp. v. City of Los Angeles, 493 U.S. 103, 105 (1989) (“As the language of the statute plainly indicates, the remedy encompasses violations of federal statutory as well as constitutional rights.”); Maine v. Thiboutot, 448 U.S. 1, 4 (1980) (holding that § 1983 actions are available to enforce statutory rights).

127. For a discussion of these limitations, see infra notes 128-29 and accompanying text.


129. See Blessing v. Freestone, 520 U.S. 329, 341 (1997) (quoting Smith v. Robinson, 468 U.S. 992, 1005 n.9 (1984)) (explaining that presumption of enforceable federal right may be rebutted “if Congress ‘specifically foreclosed a remedy under § 1983’ . . . [either] expressly, by forbidding recourse to § 1983 in the statute itself, or impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983”); Golden St., 493 U.S. at 106 (discussing congressional intent to create federal rights); Middlesex County Sewerage Auth. v. Nat’l Sea Clammers Ass’n, 453 U.S. 1, 20 (1981) (“When the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983.”).

130. See Albistion v. Maine, 7 F.3d 258, 264-69 (1st Cir. 1993) (applying factors to federal grant-in-aid program and concluding that governing statute gave rise to federal right to prompt disbursement of child-support payments); see also Banks v. Dallas Hous. Auth., 271 F.3d 605, 610-11 (5th Cir. 2001) (concluding that on basis of three-part analysis, Section 8 Moderate Rehabilitation Program, 42 U.S.C. § 1437(f)(e) (1994), did not create enforceable right under § 1983); AT&T Wireless PCS, Inc. v. City of Atlanta, 210 F.3d 1322, 1325-27 (11th Cir. 2000) (finding that Telecommunications Act of 1996, 47 U.S.C. § 151-615, gave rise to federal right after satisfying three-part analysis); Indianapolis Minority Contractors Ass’n, Inc. v. Wiley, 187 F.3d 743, 750-52 (5th Cir. 1999) (finding that rights conferred by two federal transportation statutes did not satisfy analysis and thus did not create
tion to confer a benefit on the plaintiff.\textsuperscript{131} Second, the statute must speak in mandatory terms and thus impose a binding obligation on the states.\textsuperscript{132} Third, the right must not be so "vague or amorphous" that its enforcement would strain judicial competence.\textsuperscript{133}

Plaintiffs generally have the least difficulty in meeting the first two factors.\textsuperscript{134} The third factor, however, which requires that the interest be specific enough to be judicially enforced, sometimes proves more difficult.\textsuperscript{135} Nevertheless, a plaintiff who reaches this stage of litigation should enforceable \$ 1983 rights). For a discussion of this analysis, see infra notes 131-33 and accompanying text.

131. See Blessing, 520 U.S. at 340-41 (delineating factors to determine whether particular statutory provision gives rise to federal right); Wright, 479 U.S. at 430 (discussing whether statute and implementing regulation displayed undeniable intent to benefit plaintiff).

132. See Blessing, 520 U.S. at 340-41 (analyzing factors relevant to determining whether particular statute creates federal right); Wilder, 496 U.S. at 510-11 (considering whether statute imposed binding obligation on states and gave rise to enforceable right); see also Pennhurst St. Sch. and Hosp. v. Halderman, 451 U.S. 1, 24 (1981) (concluding that statutory provision created pursuant to Congress' spending power was unenforceable because it spoke in terms not intended to be mandatory). In Halderman, the Court stated,

[The] legitimacy of Congress' power to legislate under the spending power rests on whether the State voluntarily and knowingly accepts the terms of the "contract." [A State can not make a] knowing acceptance of [it] is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.

Id. at 17.

133. See Blessing, 520 U.S. at 340-41 (articulating analysis); Wright, 479 U.S. at 431-32 (discussing whether benefits conferred upon plaintiffs were within competence of judiciary to enforce).

134. For a discussion of these factors, see supra notes 129-30 and accompanying text. One issue that does arise in this area involves proving that a statute imposes a binding obligation on the states when the statutory provision uses an ambiguous term or terms in its critical language, such as statutes that require a state to act reasonably to accomplish a stated goal. See Suter v. Artist M., 505 U.S. 347, 363 (1992) (finding that "reasonable efforts" provision did not unambiguously confer enforceable right upon statute's beneficiaries). In Suter, the Court concluded that "[t]he term 'reasonable efforts' in this context [wa]s at least as plausibly read to impose only a rather generalized duty on the State." Id.; see also Harris v. James, 127 F.3d 993, 1010-11 (11th Cir. 1997) (concluding that statute's provision requiring State Medicaid plan to specify that Medicaid agency would ensure transportation was not specific enough to impose binding obligation on states). But see Doe v. Childers, 136 F.3d 709, 718 (11th Cir. 1998) (holding that statute requiring state Medicaid plan to provide medical assistance with "reasonable promptness" imposed mandatory obligation on states).

135. See Suter, 503 U.S. at 360 (concluding that statute did not confer enforceable right because it provided no guidance regarding how to measure "reasonable efforts"); see also Harris, 127 F.3d at 1010 n.24 (suggesting that enforcement of requirement that state practice comply with goals of "simplicity of administration" and "the best interest of the recipients" might strain judicial competence); Tony L. ex rel. Simpson v. Childers, 11, 71 F.3d 1182, 1188-89 (6th Cir. 1995) (holding that requirements conferred upon states by Child Abuse Prevention and Treatment Act, 42 U.S.C. \$ 5106A(a)(b)(2) (1988), were not specific enough to create en-

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not have difficulty in proving this factor because a court must already have established that the regulation in question is specific and definite enough to be considered a valid administrative interpretation of a federal statute.136

Once a court determines that the asserted interest creates a federal right within the meaning of §1983, a rebuttable presumption of enforceability is created.137 At this point, the defendant can rebut the prima facie showing by proving that Congress intended to foreclose recourse to a §1983 remedy.138 Even if Congress has not explicitly foreclosed a private remedy in the text of a statute, a court may infer an implicit intent to do so if "the remedial devices provided in a particular Act are sufficiently comprehensive."139 In other words, the existence of a detailed administrative remedy may suggest that Congress intended that to be the exclusive remedy and thus has already rejected a §1983 private cause of action to enforce the asserted right.140 Furthermore, a court may decide that the

136. See Harris, 127 F.3d at 1011 n.24 (suggesting that regulations may bring specific content of statutory rights into realm of judicial enforceability).
137. See Blessing, 520 U.S. at 341 (discussing rebuttable presumption).
139. See Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 20 (1981) (finding that elaborate enforcement provisions of federal pollution control statutes displayed congressional intent to foreclose additional private remedy); see also Livadas v. Bradshaw, 512 U.S. 107, 123 (1994) (asserting that Congress may foreclose §1983 remedy expressly in words of statute or impliedly by setting forth comprehensive enforcement scheme that is incompatible with private remedy).
140. See Sunstein, supra note 14, at 427-36 (providing categorical approach to determine when federal statute's comprehensive enforcement scheme should preempt cause of action under §1983 in absence of clear statement by Congress). Sunstein suggests that the appropriate test to determine whether a federal statute is enforceable under §1983 is to examine whether there is a "manifest inconsistency" between the statute's enforcement scheme and the private remedy, and if there is, the private right of action should be precluded under §1983. See id. at 425-26 (discussing preemption of §1983 through explicit statutory enforcement scheme). Sunstein provides seven general types of statutory schemes that may present a "manifest inconsistency" with a §1983 remedy: (1) statutes that create independent private causes of action against state officials; (2) statutes involving open-ended substantive standards subject to distortion by the judicial branch; (3) stat-
imposition of a judicial remedy would hinder the effectiveness of the exclusive administrative enforcement scheme.141

B. Effectiveness of the Section 1983 Remedy

One must question the effectiveness of the Third Circuit's existing § 1983 remedy to redress violations of administrative regulations.142 As discussed, many plaintiffs resort to § 1983 in this context because either the authorizing statute does not confer a private cause of action or because the statute's private right of action does not extend to the enforcement of the asserted regulatory interests.143

In cases where the statute lacks a private right of action, a federal court is also likely to reach the same conclusion regarding the existence of an enforceable § 1983 right.144 Although distinct, the tests are similar in that demand the development and implementation of a consistent and coordinated system of enforcement by an administrative agency; (4) statutes that evince legislative calibration of sanction to expected enforcement level; (5) statutes containing remedies against federal government to compel state conformity with federal law; (6) statutes utilizing informal methods of enforcement as exclusive route; and (7) statutes protecting collective interests. See id. at 427-36 (providing examples of "manifest inconsistencies").

141. See Peter W. Low and John C. Jeffries, Jr., Federal Courts and the Law of Federal-State Relations 1081-82 (1998) (analyzing enforcement of federal statutes in private damage actions brought under § 1983). Low and Jeffries maintain that if Congress intended for a statute's explicit enforcement mechanism to be the exclusive remedy, allowing a private right of action would lead to overenforcement of the statute's regulatory standards. See id. at 1082 (discussing problems raised by private damage actions to enforce grant-in-aid standards). Furthermore, private enforcement may introduce a judicial remedy that invades agency specialization, impairs an agency's ability to devise consistent enforcement policies or diminishes the political accountability of those who disburse funds to the federal programs. See id. (concluding that judicial enforcement of federal statutes under § 1983 may disrupt federal regulatory objectives). The courts have based many decisions in this area on the concern that a judicially created remedy may undercut a federal statute's express administrative regulatory scheme. See, e.g., Cannon v. Univ. of Chi., 441 U.S. 677, 749 (1979) (Powell, J., dissenting) ("Where a statutory scheme expressly provides for an alternative mechanism for enforcing the rights and duties created, I would be especially reluctant ever to permit a federal court to volunteer its services for enforcement purposes."); Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers, 414 U.S. 455, 461-65 (1974) (determining that private claims by railroad passengers seeking injunctions against discontinuance of rail service would undermine Amtrak Act's administrative procedures).

142. For a further discussion of the effectiveness of the existing § 1983 remedy to redress violations of administrative regulations, see infra notes 143-50 and accompanying text.

143. See Alexander v. Sandoval, 592 U.S. 275, 293 (2001) (holding that section 602 of Title VI did not contain private cause of action and that private cause of action under section 601 of Title VI did not extend to Title VI administrative disparate-impact regulations).

theory—both turn on whether Congress intended to provide a private individual with access to a judicial remedy to redress a violation of the asserted interest. 145 Furthermore, similar to the second exception to the presumptive enforceability of statutory rights under § 1983, the existence of a detailed administrative enforcement scheme may also suggest that Congress did not intend the private enforcement of the statutory interest directly under the statute. 146

In other instances, a statute may confer a private right of action, but that right might not extend to the enforcement of certain regulations promulgated pursuant to it. 147 In all likelihood, this is because the regulations in question attempt to confer rights that the statute does not. 148 South Camden, however, illustrates that these regulations are never enforceable under § 1983 because they create interests not implicit in the authorizing statute. 149

For these reasons, it is likely that regulatory interests that are not enforceable through a federal statute’s private right of action will also be unenforceable under § 1983. 150 If this is so, individuals that suffer violations of these regulations will not have access to a private remedy, but must instead rely on administrative remedial mechanisms to redress their injuries. 151 Furthermore, in the circumstances where a federal statute

Suter Court reasoned that Congress did not intend to make any type of remedy available to private persons who sought to enforce the provisions of the Act. See id. at 364-65 (denying existence of implied cause of action and private remedy). After examining the statute’s enforcement scheme and concluding that Congress sought to preclude a private remedy under § 1983, the Court stated that “[t]he most important inquiry [in finding an implied cause of action] as well is whether Congress intended to create the private remedy sought by the plaintiffs.” Id. at 364; see also Middlesex, 453 U.S. at 20 (concluding that elaborate statutory enforcement provisions evinced congressional intent to foreclose both private § 1983 remedy and implied right of action under Federal Water Pollution Control Act, 33 U.S.C. §§ 1319, 1342, 1365, 1369 (1994), or Marine Protection, Research, or Sanctuaries Act, 33 U.S.C. § 1415 (1994)); cf. Powell v. Ridge, 189 F.3d 387, 403 (3d Cir. 1999) (deciding that Title VI disparate-impact regulations were enforceable under both Title VI’s implied cause of action and action brought under § 1983).

145. For a further comparison of these analyses, see supra notes 51-52 and 130-33 and accompanying text.

146. See Middlesex, 453 U.S. at 14 (concluding that Congress did not intend to create right of action for private citizens suing under statutes in light of elaborate enforcement provisions).

147. Cf. Sandoval, 532 U.S. at 285 (holding that disparate-impact regulations may not be enforced through Title VI’s private right of action).

148. Cf. id. (finding Title VI regulations that prohibited disparate-impact discrimination unenforceable under statute’s private cause of action because Title VI itself did not protect right to be free from disparate-impact discrimination).


150. For a further discussion of the effectiveness of the § 1983 remedy, see supra notes 142-52 and accompanying text.

151. For a discussion of the Title VI administrative remedies, see supra note 25 and accompanying text.
does contain a private right of action that is available to enforce the asserted regulatory interest, an alternative § 1983 remedy may not even be necessary or desirable to the plaintiff.\textsuperscript{152}

V. CONCLUSION

The \textit{South Camden} decision will certainly serve as a final pronouncement in the Third Circuit on the availability of § 1983 claims to redress state violations of administrative regulations.\textsuperscript{153} The decision has undoubtedly foreclosed all suits that assert the right to be free from disparate-impact discrimination in violation of Title VI regulations, in addition to any other claims that seek to enforce regulatory interests that are not implicit in the provisions of the enforcing federal statutes.\textsuperscript{154}

Although those regulations that do constitute valid administrative interpretations under the \textit{South Camden} formulation, together with their authorizing federal statutes, are presumed to create enforceable § 1983 rights, this presumption is subject to two significant limitations.\textsuperscript{155} First, the asserted interest must constitute a federal right within the meaning of § 1983.\textsuperscript{156} Second, a reviewing court must also ensure that Congress did not intend to foreclose a private § 1983 remedy for a violation of the asserted interest.\textsuperscript{157} Therefore, in only limited circumstances will the \textit{South Camden} decision permit plaintiffs in the Third Circuit to enforce rights conferred by administrative regulations under § 1983.\textsuperscript{158}

The \textit{South Camden} decision further exemplifies the hesitancy of courts to imply the existence of federal rights without a clear and unambiguous mandate from Congress that it intended to create such rights.\textsuperscript{159} Unless a regulatory interest undoubtedly emanates from an established statutory right, a plaintiff will not have access to a § 1983 cause of action to vindicate that right.\textsuperscript{160} Furthermore, the regulatory interest, in conjunction with

\textsuperscript{152} See Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 18 (1981) (discussing whether § 1983 exists as alternative source of relief in addition to right of action expressly provided under federal statute).

\textsuperscript{153} For a discussion of the potential implication of the \textit{South Camden} decision, see supra Part III.B.

\textsuperscript{154} For a discussion of the \textit{South Camden} decision, see supra notes 124-141 and accompanying text.

\textsuperscript{155} For a discussion of these limitations, see supra Part IV.A.

\textsuperscript{156} For a further discussion of this limitation, see supra notes 128, 130-36 and accompanying text.

\textsuperscript{157} For a further discussion of this limitation, see supra notes 129, 137-41 and accompanying text.

\textsuperscript{158} For a discussion of these circumstances, see infra Parts III.B.2 and IV.A.

\textsuperscript{159} For a further discussion of the concerns surrounding the judicial expansion of rights, see supra Part III.A.

\textsuperscript{160} For examples of such regulatory interests, see supra Part III.B.2.
the statutory interest, must evince that Congress intended to comprise a private § 1983 remedy.161

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161. For a discussion of the factors that a court will consider to determine Congress' intention, see supra notes 124-33 and accompanying text.