A Proposal to Support Enforcing Regulations for the Rule of Law

BY GREGORY E. LOUIS

Because government agencies administer public benefits, representing low-income clients is often practicing administrative law.[1] But legal aid attorneys face a hurdle when they want to enforce federal regulations in the context of federal public benefits programs. That hurdle stems from two U.S. Supreme Court doctrines.

Legal aid attorneys face a hurdle when they want to enforce federal regulations in the context of federal public benefits programs.

The first is the *Heckler v. Chaney* doctrine holding that a federal agency is not required to prosecute any particular violation of a statute it is charged with enforcing unless the statute mandates that the agency do so.[2] The Supreme Court reasoned that an agency must possess such "prosecutorial discretion" as incident to managing its limited resources, and because a judge has no clear way to tell an agency how to expend its resources, the Court concluded that an agency's deliberation about whether to enforce is presumed not to be a question supplying any standard for judicial review.[3]

The second doctrine comes from *Alexander v. Sandoval* and *Gonzaga University v. Doe*.[4] These cases stand for the proposition that federal regulations, if they can even qualify as federal "law" for the purposes of 42 U.S.C. § 1983, so qualify only if they clarify a right that is expressly conferred by the underlying statute.[5]

Whatever we want to say about the Section 1983 question in particular, federal regulations are firmly "law" in the most important and fundamental sense of legal norms.[6] Regulations are issued by bodies that Congress has created to enforce statutes by means of issuing rules and regulations and deciding controversies pursuant to such standards.[7] Agency rules and regulations are part of the "law" in the sense of a dispute-resolution system within the administrative state.[8] Yet we are left with a disparity that is the essence of the *Sandoval–Gonzaga University* doctrine: regulations can be "law" under the Administrative Procedure Act while somehow not being law under statutes, such as Section 1983, that enable private enforcement of the law.[9]

Here I put forward a proposal for a prudential doctrine governing whether federal courts can hear a private Section 1983 lawsuit to enforce regulations as a means of upholding the rule of law. My proposal responds to two questions: (1) when should the beneficiary of a federal

1 Harry W. Jones, *The Rule of Law and the Welfare State*, 58 Columbia Law Review 143 (Feb. 1958).

2 *Heckler v. Chaney*, 470 U.S. 821 (1985).

3 *Id*. at 834–35.

4 *Gonzaga University v. Doe*, 536 U.S. 273 (2002); *Alexander v. Sandoval*, 532 U.S. 275 (2001).

5 See Robert P. Capistrano, *Express Causes of Action, Section 1983, Elements of the Claim* § 5.1.A.1.f, Federal Practice Manual for Legal Aid Attorneys (2013) ("Every recent appellate decision to address the issue has embraced the *Sandoval* analysis, essentially holding that regulations cannot independently create rights, and are enforceable under Section 1983 only to the extent that the regulations merely 'flesh out' a statutory provision which itself creates the right."); Rochelle Bobroff, *You Have a Federal Right, but Do You Have a Remedy?*, 44 Clearinghouse Review 428, 434 (Jan.–Feb. 2011) ("the enforcement of regulations under both express and implied rights of action has been limited in recent years"); Rochelle Bobroff & Jane Perkins, *Recent Developments in Court Access for Medicaid and Medicare Cases*, 42 Clearinghouse Review 246, 250 (Sept.–Oct. 2008) ("Every circuit court to have ruled on the issue since *Gonzaga* has decided that only Congress may create rights, and thus agency regulations cannot be independently enforced through Section 1983."). For an explanation of Section 1983, see Capistrano, *supra*, § 5.1.A ("Section 1983 authorizes a wide variety of suits against state and local governments and officials for deprivations of federal rights under color of state law....").

6 *United States v. Haggar Apparel Company*, 526 U.S. 380, 391 (1999) ("Valid regulations establish legal norms."); *Chrysler Corporation v. Brown*, 441 U.S. 281, 295 (1979) ("It has been established in a variety of contexts that properly promulgated, substantive agency regulations have the 'force and effect of law.'") (citation omitted).

7 See *Galbraith v. Lenape Regional High School District*, 964 F. Supp. 889, 894 (D.N.J. 1997). See also *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743, 773 (2002) (Breyer, J., dissenting).

8 See Jones, *supra* note 1 (what constitutes "administrative state").

9 For an explanation of the Administrative Procedure Act, see Gill Deford & Jeffrey S. Gutman, *Express Causes of Action, Administrative Procedure Act* § 5.1.C, Federal Practice Manual for Legal Aid Attorneys (2015).

administrative scheme have a judicial remedy to enforce a regulation implementing the scheme, and (2) what sort of judicial remedy should the beneficiary have?[10]

Here I am not concerned with answering the question that the Supreme Court has never resolved: whether regulations are "law" for the purposes of 42 U.S.C. § 1983.[11] Rather I focus on the practical problem that the two doctrines create for representing poor people.[12]

When Should the Beneficiary of a Federal Administrative Scheme Have a Judicial Remedy to Enforce a Regulation Implementing the Scheme?

Ideally we would not look only at the person expressly named in the statute to determine whether a person is conferred any rights by it; rather we would also analyze what interests the statute serves or advances. To be clear, *Sandoval* and *Gonzaga University* insist that a statute must name a person or class of persons to confer a right on the person or the class.[13] That Congress has conferred a right upon persons whom it has named in a particular section of a statute is certainly clear, but thinking about a statute from the standpoint of legal consequences could highlight other ways to discover conferral of rights.

Here I put forward a proposal for a prudential doctrine governing whether federal courts can hear a private Section 1983 lawsuit to enforce regulations as a means of upholding the rule of law.

When we ask who is directly harmed if the statute or regulation goes unenforced, we quickly arrive at people who are injured by nonenforcement even if they are not named as a class within the scheme.[14] Such people should have some particular remedy either to compel the agency to enforce a regulation or, far more palatable to the *Heckler* doctrine, to allow the injured to enforce the regulation themselves.[15]

Two principles support the idea of a right to enforce regulations in a private action: (1) assuming that an agency has no duty to enforce under the statute at issue, nobody can compel an agency to expend its resources in any way that it does not want to; and (2) an agency simply has no personal interest in its regulations that confer rights—rather agencies simply carry out congressional schemes. A private person's filing a lawsuit to enforce a regulation that an agency does not care to enforce should never be thought of as some obtrusion upon the agency's prerogative.[16]

If an agency opposes some private attempt to enforce a regulation on the ground that its regulation should no longer control, then it should simply waive or repeal the regulation; its silence should not operate as the tacit expungement of rights that its regulations confer. No judge should allow an agency to avoid the political accountability of waiving or repealing an essential regulation that the agency, for whatever political reasons, may now disfavor. To allow this is to conduce agency intrigue—agencies tolerating violations or coddling parties whom they are charged with regulating for a variety of unsavory, untoward, or illegal reasons.[17] Thus we may add democratic transparency upon which political accountability depends to the list of principles, including the rule of law, that private enforcement of regulations advances.[18]

10 I have limited my remarks to federal regulations because I do not wish here to generalize about the problem of enforcement at the state level. I suspect, however, that much of what I say here applies to state agencies and the enforcement of state regulations.

11 See Bradford C. Mank, *Can Administrative Regulations Interpret Rights Enforceable Under Section 1983?: Why Chevron Deference Survives* Sandoval *and* Gonzaga, 32 Florida State University Law Review 843, 845–46 (2005).

12 Several civil legal aid experts in federal litigation caution against diving headlong into a Section 1983 suit (see Capistrano, *supra* note 5, § 5.1A.1.a ("Given the Supreme Court's tendency to restrict further the ability of private litigants to enforce federal laws, one should be very leery of the consequences of exploring new ground on this issue."); Bobroff & Perkins, *supra* note 5 (cautioning attorneys to look out for far-reaching negative consequences of bad decisions or even dicta)).

13 See Marsha S. Berzon, *Rights and Remedies*, 64 Louisiana Law Review 519, 540–42 (2004).

14 E.g., the "housing quality standards" under the Section 8 housing choice voucher benefit (42 U.S.C. § 1437f(o) (2014)). The scheme on the whole exists to assist families to "afford decent, safe, and sanitary housing" (24 C.F.R. § 982.1(a); see 42 U.S.C. § 1437f(a)). The housing quality standards elaborate the characteristics of decent, safe, and sanitary housing. Yet public housing agencies that administer the Section 8 voucher program and are responsible for conducting inspections to ensure compliance with housing quality standards expressly disclaim in the housing assistance payment contracts between them and building owners that tenants have any third-party beneficiary rights in the agencies' enforcement of housing quality standards under the contract (see Housing Assistance Payments Contract, Form HUD-52641, at 6 (April 2015)). For this reason, tenants have been found not to have an enforceable right to housing quality standards (see, e.g., *Johnson v. City of Detroit*, 446 F.3d 614, 626–27 (6th Cir. 2006)). However, I do not see how tenants cannot be third-party beneficiaries of the housing quality standards and thereby have an enforceable right to housing through them. Whether the housing is substandard is the day-to-day problem of the tenant who lives in the building, not of the Section 8 public housing agency caseworker who would never be seen there. Certainly the public housing agency (or rather Congress through the U.S. Department of Housing and Urban Development (HUD)) has an interest in not paying for substandard housing. But I do not see how that interest is not meant to benefit the tenant, especially since the public housing authority has the right to seek a contractual remedy, in its discretion, to compel redress of the violations (see 24 C.F.R. § 982.456). If Congress merely meant to craft the right as the agency's own independent fiscal one, then it would have provided that the owners' violation of housing quality standards automatically terminates the contract. In considering whether tenants must have a right to enforce, see also *McNeill v. New York City Housing Authority*, 719 F. Supp. 233, 249 (S.D.N.Y. 1989).

15 See Berzon, *supra* note 13, at 543.

16 But see Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 Virginia Law Review 93 (2005) (wisdom of enforcement in particular instance depends on balance of factors that agencies are best equipped to conduct due to their expertise within regulated industry).

17 See Paul J. Quirk, Industry Influence in Federal Regulatory Agencies (1981); David J. Arkush, *Direct Republicanism in the Administrative Process*, 81 George Washington Law Review 1458, 1473–75 (2013).

18 See Robert G. Vaughn, *Federal Information Policy and Administrative Law*, in Administrative Law Anthology 219 (Thomas O. Sargentich ed., 1999) (how Freedom of Information Act furthers democratic process ideal in administrative law).

Agencies are not persons who have mere views about the meaning of a statute; rather they are legislative creatures that exist to give statutes effect.[19] For this reason, to speak of agencies as though they were private litigants advocating perspectives to which a court must confine itself, as our common-law adversarial system appears to require, is rather odd.[20] Really the *Chevron* doctrine is a corollary of administrative ontology: because agencies exist to flesh out statutory details and enforce the statute as so elaborated, a court must apply the agency's view as it would the policy set forth in the statute unless the agency is doing something (1) that a statute does not allow (that cannot be reconciled with the statute) or (2) that the government itself has no power to authorize (i.e., something flowing from an unconstitutional law).[21] So long as these two possibilities can be ruled out, a court must regard the agency's view as virtually incorporated into the statute itself. And to think of this in *Gonzaga University* terms, the statute *with the regulatory gloss* is really that which a beneficiary should have the right to enforce as part of the beneficiary's statutory interest.[22]

I answer the first question as follows: a person should have a right to enforce a regulation when that person is a beneficiary of the statute that the regulation implements and when the regulation confers a right upon the beneficiary. A regulation confers a right upon a person when that person's interest under the statutory scheme is directly affected by whether the regulation is followed or violated.

So long as a statutory beneficiary has *some* judicial remedy for an injury to an interest secured under a regulation, then the rule of law is served.

What Sort of Judicial Remedy Should the Beneficiary Have?

We must consider the second question out of regard for what I suspect provoked the incoherent holding of *Sandoval*: Justice O'Connor's fear that holding regulations to be "law" for Section 1983 purposes will further inundate federal dockets and aggravate the overtaxing of federal judicial resources.[23] As she says in *Wright v. City of Roanoke*, under the standard that I argue for here, any regulation adopted within the purview of a statute confers an enforceable right; there are thousands of such regulations.[24]

However much I think that regulations should be judicially enforceable under Section 1983 since they are plain law, I agree that federal courts (or state courts for that matter) simply cannot hear every case where some person is alleged to have violated a regulation. My main concern here is to advance the rule of law: I am concerned that a regulation have teeth for my clients, or, to put it more floridly, that the maxim *ubi jus ibi remedium* have concrete meaning in the administrative state; I am not particularly concerned with how that comes about.[25] So long as a statutory beneficiary has *some* judicial remedy for an injury to an interest secured under a regulation, then the rule of law is served. It does not matter whether a court or agency supplies the remedy.

Based on this ultimate concern to give litigants a judicial remedy for an injury flowing from a violation of regulations, I think that federal courts are well within their rights to develop a prudential doctrine governing whether they can hear a Section 1983 case seeking to enforce regulations. I do not presume to tell judges, and especially life-tenured federal ones, how to do justice.[26] But in surveying the jurisprudence on other prudential doctrines I should think that allowing for such a remedy would have, and would be guided by, the elements and principles listed below.

First, where a private litigant seeks to enforce federal regulations, the litigant should be limited to either a Section 1983 suit or some challenge to an agency's refusal to enforce its own regulations under the Administrative Procedure Act or an equivalent statute. Choosing one would foreclose pursuing the other in a manner that the agency defendant can enforce through a motion to dismiss under the election-of-remedies doctrine.[27]

Second, to encourage the litigant to seek a remedy from the administrative agency and the administrative agency to supply

19 Cf. *Heckler*, 470 U.S. at 833 ("Congress did not set agencies free to disregard legislative direction in the statutory scheme that the agency administers.").

20 See, e.g., *United States v. Berkowitz*, 927 F.2d 1376, 1384 (7th Cir. 1991) (quoting *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983)) ("'The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them.'").

21 See *Chevron USA Incorporated v. Natural Resources Defense Council Incorporated*, 467 U.S. 837 (1984). See, e.g., *U.S. West Incorporated v. Federal Communications Commission*, 182 F.3d 1224, 1231 (10th Cir. 1999) (applying Chevron).

22 See *Fishman v. Daines*, 743 F. Supp. 2d 127, 143 (E.D.N.Y. 2010) (regulations inform scope of statutory right to fair hearing).

23 See William A. Liess, *A Call for Doctrinal Consistency in the Adjudication of § 1983 Claims Based on Violations of Federal Regulations*, 38 Rutgers Law Journal 947, 959–60 (2007).

24 See *Wright v. City of Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 438 (1987) (O'Connor, J., dissenting).

25 "*Ubi jus ibi remedium*" means "Where there is a right, there is a remedy" (see *Catanzano v. Wing*, 103 F.3d 223, 229 (2d Cir. 1996)).

26 See Fed. R. Civ. P. 1.

27 See, e.g., *Alexander v. Gardner-Denver Company*, 415 U.S. 36 (1974).

the remedy, a court would impose the soft exhaustion requirement that the litigant choosing the Section 1983 course must plead that the litigant futilely asked the agency to act on alleged violations of its own regulations to no avail.[28] The futility would come from the agency's having remained silent or having issued a *Heckler*-type letter where the agency invoked its discretion to do nothing about an alleged violation of its own regulations.

Such a letter would serve to endow the complained-of violation with "color of law" under the theory that the federal agency had encouraged the state or local body to engage in the unlawful activity by not bothering to denounce it with some declaratory statement—an easy step that even federal agencies managing limited resources can take to regulate a matter outside their priorities. Mechanically speaking, such a letter would essentially universalize the current procedure for bringing suits asserting rights and interests that the Equal Employment Opportunity Commission is primarily charged with vindicating.[29] In a corporate analogy, the letter would be like the demand that is a predicate for a shareholder derivative suit.[30] Most relevant to the consideration of self-help, the shareholder derivative suit is of course the way individual shareholders take in their hands the means to "protect the interests of the corporation from the misfeasance and malfeasance of 'faithless directors and managers.'"[31] So, too, can an action under Section 1983 be for beneficiaries under federal schemes.

The poor are exemplars of those who are usually prejudiced by agency inaction, especially since they are functionally locked out of rulemaking by virtue of prohibitions on federally funded legal services attorneys.

Third, leaving aside the sort of challenge to a pattern of nonenforcement, a successful suit under the Administrative Procedure Act—i.e., one overcoming the *Heckler* doctrine's presumption—should prove that the agency's failure to interpret, enforce, or apply its own regulations has prejudiced the plaintiff.[32] I can hardly hope to spell out here what that tremendous nebulosity is, but, for some guidance, "prejudice" largely reflects the elements of the test for determining when agency delay is actionable under the Administrative Procedure Act.[33] At its core the successful suit would ask a judge to order the agency to do or clarify something that, even if not mandated by any particular statute, is the exact sort of straightforward thing that a person understanding the statutory policy or the agency's purpose would expect the agency to do or clarify in order to prevent grave harm such as eviction or hunger to its beneficiaries.[34]

Fourth, the specter of *Carolene Products* also looms large in consideration of prejudice in that the same unpopular or politically powerless groups lacking an army of lobbyists are usually the ones who are most harmed by an agency's refusal to enforce its regulations.[35] Often the agency declines to enforce a regulation for fear of offending the majority by going against the political trend or some powerful industry.[36] The poor are exemplars of those who are usually prejudiced by agency inaction, especially since they are functionally locked out of rulemaking by virtue of prohibitions on federally funded legal services attorneys.[37] Such attorneys remain the main source of legal counsel, and, by extension, a means for meaningful participation in administrative processes, for the poor.[38]

Despite the frequency with which the poor are disenfranchised, federal judges need not be concerned about their dockets since ordinary Article III standards limit judicial review to ripe, concrete, and particularized injuries.[39] Such injuries often do not accrue until the agency's silence has emboldened some private party in contract with the government or subject to government regulation to do something that violates the agency's regulations.

Fifth, the core of *Heckler* limits the prejudice analysis: no matter how harmed a regulatory beneficiary may be, absent a clear congressional directive in the statute at issue, the beneficiary should not expect to compel an agency to take enforcement

28 See, e.g., *Cabinet Mountains Wilderness v. Peterson*, 510 F. Supp. 1186, 1190–91 (D.D.C. 1981).

29 See 42 U.S.C. § 2000e-5 (f)(1) (right-to-sue letter procedure).

30 See *Delaware and Hudson Company v. Albany and Susquehanna Railroad*, 213 U.S. 435, 447 (1909).

31 See *Kamen v. Kemper Financial Services Incorporated*, 500 U.S. 90, 95 (1990) (quoting *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541, 548 (1949)).

32 See *Heckler*, 470 U.S. at 839 (Brennan, J., concurring).

33 See *Natural Resources Defense Council Incorporated v. United States Food and Drug Administration*, 710 F.3d 71, 84 (2d Cir. 2013); *Families for Freedom v. Napolitano*, 628 F. Supp. 2d 535, 540 (S.D.N.Y. 2009); *Shinnecock Indian Nation v. Kempthorne*, No. 06-CV-5013 (E.D.N.Y. Sept. 30, 2008).

34 See, e.g., *Intercity Transportation Company v. United States*, 737 F.2d 103, 108 (D.C. Cir. 1984) (agency's decision not to grant declaratory relief was reviewable because it was necessary to protect petitioner's interests, would not impair agency administration, and was expressly authorized by Administrative Procedure Act).

35 See *United States v. Carolene Products Company*, 304 U.S. 144, 152 n.4 (1938).

36 See Quirk, *supra* note 17.

37 See Prohibited Legislative and Administrative Activities, 45 C.F.R. § 1612.3(b) (2016).

38 See Deborah L. Rhode, Access to Justice 186–87 (2004).

39 See, e.g., *Denney v. Deutsche Bank AG*, 443 F.3d 253, 263 (2d Cir. 2006) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992); *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)).

action that taxes agency resources.[40] Any problem requiring a great deal of factual investigation and development is the exemplary type that the beneficiary should resolve through the beneficiary's own Section 1983 lawsuit: ordinary civil discovery equips the litigant to conduct the investigation. To give the agency some chance to determine whether it freely desires to undertake such a burdensome investigation, the beneficiary should satisfy the soft exhaustion requirement that I suggested above and should await a reasonable period under the circumstances in view of the threatened harm to confirm the agency's inevitable declining to take action.

Sixth, a suit challenging a federal agency's sheer indifference to potential violations of rights and interests under schemes of cooperative federalism—I mean one where the federal agency simply will not respond to alleged violations even though no burdensome investigation is required—is generally the sort that a federal court should hear. The supremacy clause under Article VI of the U.S. Constitution renders a federal agency's tacit consent practically determinative of any potential state court litigation about the meaning of federal law; what state can effectively overturn the creature of federal law's interpretation of what federal law means?[41] In essentially whittling down federal agencies' discretion not to act in such cases, federal courts can force federal agencies to do their job and enforce federal law (including regulations)—a practice that tends to be unpopular in states wishing to have federal money and spend it with no federal restrictions.[42] This state tendency creates grave lawlessness when federal agencies stand aside and fiddle.

Seventh, the ultimate reason why private suits to enforce regulations should be allowed is that a court hearing a Section 1983 suit seeking to enforce a regulation should more strongly favor suits for injunctive relief over suits seeking only monetary damages.[43] This preference would serve to ensure that the plaintiff seeks to enforce the law instead of merely using courts to coerce agencies into weighing in on quintessentially private concerns. Suits where one understanding of a regulation has direct monetary significance for parties (as opposed to ones where the application of a regulation would compel or restrain action that may secondarily have monetary significance) largely lack the public law dimension that should serve as a limiting principle.

For the continuity of our "government of laws, and not of men," a private person should have a judicial remedy to enforce a regulation whenever (1) the regulation confers a right upon that person under a scheme of which the person is a beneficiary and (2) agency activity or inactivity threatens to deprive the person of a remedy for a violation of that right.[44] The plaintiff should have the choice of either suing the agency to compel regulatory enforcement or directly enforcing the regulation in a Section 1983 suit. In allowing such suits, however, federal courts should take every effort to limit them to situations where the beneficiary absolutely requires a federal court to enjoy a judicial remedy and to redress the scourge of lawlessness. I have enumerated seven factors or principles that could give courts a potential framework for deciding whether to hear such a case.

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40 See, e.g., *NAACP v. Secretary of HUD*, 817 F.2d 149 (1st Cir. 1987) (clear congressional directive aimed at affirmatively furthering fair housing found at 42 U.S.C. § 3608 (e)(5)).

41 See *Fieger v. Glen Oaks Village Incorporated*, 309 N.Y. 527, 533 (N.Y. 1956) ("the State courts have no power whatever to revise such official acts performed by Federal officials under authority of acts of Congress"); *Sokol Apartments Incorporated v. Berlenghi*, 71 A.D.2d 622, 623 (N.Y. App. Div. 1979) (declining to review HUD's internal procedures); *Fox v. 34 Hillside Realty Corporation*, 87 N.Y.S.2d 351 (N.Y. Sup. Ct. 1949).

42 See, e.g., *United States v. American Library Association*, 539 U.S. 194 (2003); *South Dakota v. Dole*, 483 U.S. 203 (1987); *West Virginia v. U.S. Department of Health and Human Services*, 289 F.3d 281 (4th Cir. 2002).

43 See *Edelman v. Jordan*, 415 U.S. 651 (1974).

44 John Adams, *Novanglus Essay No. VII*, in The Novanglus Essays 66, 70 (n.d.). See *Wal-Mart Stores v. Rodriguez*, 238 F. Supp. 2d 395, 421 (D.P.R. 2002). See also *Youngstown Sheet and Tube Company v. Sawyer*, 343 U.S. 579, 646 (1952) (Jackson, J., concurring).