GONZAGA'S GHOSTS

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Pursuant to its sweeping Spending Power, Congress will spend several hundreds of billions of dollars funding federal-state spending programs this year, which states must utilize in accordance with Congress's specifications—not unlike a "contract" according to the Supreme Court. But what if a state does not toe the line Congress drew, i.e. the State "breaches" its promise? The Supreme Court opened a door in Maine v. Thiboutot, the genesis of the personal rights doctrine, to allow beneficiaries to use 42 U.S.C. § 1983 to challenge state officials' violation of spending legislation. But almost from the doctrine's inception, the Court has stressed § 1983 enforceability is the exception—not the rule.

Gonzaga University v. Doe's stringent test and hostile tone pose a substantial obstacle to personal rights. In Gonzaga's immediate

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aftermath, legal scholarship addressed its scope and ambiguity. This Article offers an original comprehensive analysis of how the federal courts of appeals have dealt with Gonzaga in the ensuing sixteen years. By providing a novel synthesis of these cases, this Article uncovers the confusion Gonzaga has spawned both in and among the circuits, with almost every circuit exhibiting multiple approaches. Moreover, most circuit decisions deny Gonzaga its sea-change status by continuing to recite, and often apply, the Blessing factors that Gonzaga repudiated.

Several problems stem from this doctrinal confusion. Most obvious, the state of circuit law violates vertical and horizontal stare decisis principles, yielding unpredictability, inequity, and inefficiency. Another uncertainty is the validity of the Court's few cases allowing § 1983 enforcement, which Gonzaga discounted in part and approved in part; Gonzaga's progeny has only deepened this question. Finally, how far the Court is willing to take the contract analogy is unclear. Although the Court relies on it to deny § 1983 relief, the enforcement gap that results from the rarity and undesirability of agency funding cut-offs—the only means left for challenging state noncompliance—reveals a "contract" formation problem because the state has merely made an "illusory promise." In addition, there is momentum among the justices for barring beneficiaries' § 1983 claims in total based solely on their third-party status under contract law. In sum, Gonzaga's ghosts of confusion regarding the governing standard, the health of prior cases, the validity of the contract analogy, and the relevance of contract law haunt the personal rights doctrine.

INTRODUCTION

Although the Supreme Court has twice declared—"[s]ince 1871, when it was passed by Congress, [42 U.S.C.] § 1983 has stood as an independent safeguard against deprivations of federal constitutional and statutory rights"—that is an overstatement.[1] Despite § 1983's plain language,[2] it took over a 100 years for the Court to extend the remedy to statutory rights in *Maine v. Thiboutot*,[3] acknowledging §

1. City of Rancho Palos Verdes v. Abrams, 544 U.S. 113, 131 (2005) (quoting Smith v. Robinson, 468 U.S. 992, 1012 (1984)).

2. 42 U.S.C. § 1983 provides that anyone who, under color of a state statute, regulation, or custom deprives another of any rights, privileges, or immunities "secured by the Constitution *and laws*" shall be liable to the injured party. 42 U.S.C. § 1983 (2012) (emphasis added).

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

1983 "means what it says."[4] *Thiboutot* involved the Social Security Act,[5] which established a federal-state cooperative Spending Clause[6] program ("spending program"[7]).[8] Not surprisingly, the perfect storm caused by *Thiboutot* coupled with the ubiquitous nature of spending programs[9] exploded into a myriad of § 1983 lawsuits.[10]

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4. *Id.* Although *Thiboutot* points to earlier cases in support of its holding, the Supreme Court clearly stated in *Gonzaga University v. Doe*, 536 U.S. 273 (2002), that *Thiboutot* "recognized *for the first time* that § 1983 actions may be brought against state actors to enforce rights created by federal statutes as well as by the Constitution." *Gonzaga*, 536 U.S. at 279 (emphasis added).

5. The specific provision of the Social Security Act at issue in *Maine v. Thiboutot*, 448 U.S. 1 (1980), was 42 U.S.C. § 602(a)(7). *Thiboutot*, 448 U.S. at 3.

6. The Constitution grants Congress the power "to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. CONST. art. I, § 8, cl. 1. "Put simply, Congress may . . . spend." Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 537 (2012); *see* United States v. Comstock, 560 U.S. 126, 152–53 (2010) (Kennedy, J., concurring) (recognizing the Court has implied Congress's "spending power" from this provision). Although "not unlimited," *South Dakota v. Dole*, 483 U.S. 203, 207 (1987), Congress's spending power "remain[s] extremely broad." Eloise Pasachoff, *Conditional Spending After* NFIB v. Sebelius*: The Example of Federal Education Law*, 62 AM. U. L. REV. 577, 589 (2013). Pursuant to its Spending Power, Congress "may offer funds to the States, and may condition those offers on compliance with specified conditions," and thus, "induce the States to adopt policies that the Federal Government itself could not impose." *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 537 (citation omitted); *see* Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981) ("Turning to Congress' power to legislate pursuant to the spending power, our cases have long recognized that Congress may fix the terms on which it shall disburse federal money to the States.").

7. Spending programs are "cooperative ventures between the states and the national government, with federal statutes both providing funding and setting standards for state administration." Sasha Samberg-Champion, *How to Read* Gonzaga*: Laying the Seeds of a Coherent Section 1983 Jurisprudence*, 103 COLUM. L. REV. 1838, 1838 (2003); *see Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 576 ("We have long recognized that Congress may use [the spending] power to grant federal funds to the States, and may condition such a grant upon the States' taking certain actions that Congress could not require them to take. . . . Such measures encourage a State to regulate in a particular way, [and] influenc[e] a State's policy choices." (quotations omitted)). A state's participation in a spending program "is voluntary and the States are given the choice of complying with the conditions set forth in the [spending legislation] or forgoing the benefits of federal funding." *Pennhurst*, 451 U.S. at 11. But "once a State elects to participate, it must comply with the [spending program's] requirements." Harris v. McRae, 448 U.S. 297, 301 (1980).

8. *Thiboutot*, 448 U.S. at 2–3.

9. *See* Eloise Pasachoff, *Agency Enforcement of Spending Clause Statutes: A Defense of the Funding Cut-Off*, 124 YALE L.J. 248, 251 (2014) ("[G]rant relationships between federal agencies and their state and local counterparts are pervasive."); *see also* Samberg-Champion, *supra* note 7, at 1838 ("Many of the federal government's most important programs now derive their authority from the Spending Clause.").

10. *See* David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1, 101 (1994) (stating "*Maine v. Thiboutot* worked a profound change, exponentially increasing the

However, § 1983 does not provide a vehicle for recovery every time a state official violates spending legislation; it only does so when such legislation creates a "personal right[]."[11] Determining whether a personal right exists is steeped in congressional intent,[12] a routinely "difficult" inquiry[13] but "especially vexing" when dealing with spending statutes.[14] Since *Thiboutot*'s expansion of § 1983's

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prospect of third-party beneficiary suits to enforce spending conditions" under § 1983 (footnote omitted)); John A. McBrine, *The Selective Use of Administrative Regulations in Creating Rights Enforceable Through § 1983 Actions*, 46 B.C. L. REV. 183, 212 (2004) (recognizing "the increase of suits that resulted after the expansion of § 1983 by the holding of the Supreme Court in *Maine v. Thiboutot*"); *see also* Parratt v. Taylor, 451 U.S. 527, 554 n.13 (1981) (Powell, J., concurring) ("For many years [§ 1983] remained a little-used, little-known section of the Code. In the past two decades, however, resourceful counsel and receptive courts have extended its reach vastly. . . . As a result, § 1983 has become a major vehicle for general litigation in the federal courts by individuals and corporations."), *overruled by* Daniels v. Williams, 474 U.S. 327 (1986). From 1990 to 2015, the number of § 1983 filings in the federal district courts went from 9,780 to 16,561; in 1990, there were 18,793 total civil rights cases filed (Title VII, ADA, voting rights, § 1983, etc.). U.S. COURTS, TABLE 4.4 U.S. DISTRICT COURTS—CIVIL CASES FILED, BY NATURE OF SUIT 2, http://www.uscourts.gov/sites/default/files/data_tables/Table4.04.pdf (last visited Feb. 2, 2019).

11. Gonzaga Univ. v. Doe, 536 U.S. 273, 282, 285 (2002); *see* Blessing v. Freestone, 520 U.S. 329, 340 (1997). While the Supreme Court has referred to statutory rights enforceable pursuant to § 1983 as "private rights" and "personal rights," *Gonzaga*, 536 U.S. at 276, 290, I use the term "personal right" in order to (1) avoid confusing statutory rights that give rise to § 1983 claims and implied private rights of action "based directly on a [federal] statute," Caroline Bermeo Newcombe, *Implied Private Rights of Action: Definition, and Factors to Determine Whether a Private Action Will Be Implied from a Federal Statute*, 49 LOY. U. CHI. L.J. 117, 120 (2017), and (2) better capture the essence of what the Court requires—that the asserted provisions create a "person-specific right," s*ee McCready v. White*, 417 F.3d 700, 703 (7th Cir. 2005). I note that § 1983 and implied private rights of action are related, *see Gonzaga*, 536 U.S. at 285, so much of what is said in this Article applies in the implied-private-right-of-action context; however, I focus on *Gonzaga*'s impact on the *Blessing* test, which was not utilized in the implied-right-of-action context.

12. *See* City of Rancho Palos Verdes v. Abrams, 544 U.S. 113, 120 (2005); *Gonzaga*, 536 U.S. at 286; *see also* Sabree *ex rel.* Sabree v. Richman, 367 F.3d 180, 191 (3d Cir. 2004) (stating that *Gonzaga*'s "instruction makes good sense: we cannot presume to confer [personal] rights—that is a task for Congress"); Rochelle Bobroff, *Section 1983 and Preemption: Alternative Means of Court Access for Safety Net Statutes*, 10 LOY. J. PUB. INT. L. 27, 57 (2008) ("*Gonzaga* returned to the approach of O'Connor's *Wright* dissent—requiring a demonstration of congressional intent to create enforceable rights.").

13. California v. Sierra Club, 451 U.S. 287, 301 (1981); *see* Robert J. Pushaw, Jr., *Talking Textualism, Practicing Pragmatism: Rethinking the Supreme Court's Approach to Statutory Interpretation*, 51 GA. L. REV. 121, 198 (2016) ("[S]pecific legislative intent is often difficult to ascertain . . . .").

14. *See* 13D CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 3573.2 (3d ed. 2015).

availability, the Supreme Court has been narrowing the spending statutes that confer personal rights and emphasizing their rarity.[15] The Court has only allowed § 1983 enforcement in the spending program context twice, in *Wright v. City of Roanoke Redevelopment & Housing Authority*[16] and *Wilder v. Virginia Hospital Association*[17]—both 5–4 decisions—and has not done so in almost thirty years.[18]

The focus of this Article is *Gonzaga University v. Doe*'s[19] retooling of the personal right test,[20] which dealt a substantial blow to personal rights.[21] *Gonzaga* replaced the amenable *Blessing* factors[22] with a stringent two-prong test.[23] In addition to this strict test, the Court's language exhibited hostility toward personal rights in spending programs,[24] emphasizing the infrequency with which the Court has allowed § 1983 enforcement in this context and stressing *Wright* and *Wilder*'s narrowness.[25] *Gonzaga*'s exacting test coupled with its antagonistic tone signaled a significant narrowing of the availability of the § 1983 remedy for violations of spending clause legislation.[26]

But *Gonzaga* is "murky" and resulted in immediate and ongoing debate in the lower federal courts.[27] The First Circuit summed up the disagreement neatly, asking was "*Gonzaga* . . . a tidal shift or merely

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15. *Gonzaga*, 536 U.S. at 279–82 (noting the Court's historical reluctance to find Congress conferred a personal right through Spending Clause legislation); *see infra* Part I.

16. 479 U.S. 418 (1987).

17. 496 U.S. 498 (1990).

18. *See Wilder*, 496 U.S. 498 (1990); *Wright*, 479 U.S. 418 (1987).

19. 536 U.S. 273 (2002).

20. *Gonzaga*, 536 U.S. at 287–89.

21. *See infra* notes 261–63 and accompanying text.

22. In *Blessing v. Freestone*, the Court combined its § 1983 spending power jurisprudence regarding step one into a three-factor inquiry (the "*Blessing* factors"). 520 U.S. 329, 340–41 (1997).

23. *See infra* notes 182–206 and accompanying text.

24. *See infra* note 262 and accompanying text.

25. *See infra* notes 152–64 and accompanying text.

26. *See infra* note 261–63 and accompanying text.

27. Samberg-Champion, *supra* note 7, at 1839; *see* Gee v. Planned Parenthood of Gulf Coast, Inc., 139 S. Ct. 408, 409 (2018) (Thomas, J., dissenting) (noting "[t]he division in the lower courts" regarding "the appropriate framework for determining when a case of action is available under § 1983" that "stems, at least in part, from this Court's own lack of clarity on the issue"). Although the state courts' handling of *Gonzaga* is not addressed here, I note that the Supreme Court of New Jersey issued a decision "refin[ing]" the *Blessing* test in light of *Gonzaga* in June 2018 to demonstrate the proper test is a live issue, despite *Gonzaga* being issued over sixteen years ago. *See* Harz v. Spring Lake, 191 A.3d 547, 555 (N.J. 2018).

a shift in emphasis"?[28] The only response based on its test and tone is that *Gonzaga* marked "a tidal shift" in the Supreme Court's personal right jurisprudence, but most circuit courts have failed to recognize its transformative nature.[29] This Article provides a novel synthesis of post-*Gonzaga* circuit cases and illustrates how *Gonzaga* has spawned confusion in the circuits. There is both inter- and intra-circuit disagreement as to the proper personal right test.[30] Among the varied approaches, most circuit courts constrict *Gonzaga* and miss the paradigm shift it ushered in: replacing the *Blessing* factors entirely.[31] Accordingly, the circuit courts should abandon the *Blessing* factors completely and, instead, apply the *Gonzaga* two-prong test.

Misconstruing the *Gonzaga* standard has far reaching consequences because spending programs infiltrate citizen interaction with state government as indicated by the federal government's sizeable contribution—an estimated $728 billion in 2018,[32] which makes up a large chunk of state budgets.[33] Thus, potential personal rights abound. Furthermore, the circuit courts failure to ask the right question exacerbates an already difficult area

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28. Long Term Care Pharm. All. v. Ferguson, 362 F.3d 50, 59 (1st Cir. 2004); *see* Oral Argument at 17:31–17:43, 18:09–18:23, Midwest Foster Care & Adoption Ass'n v. Kincade, 712 F.3d 1190 (8th Cir. 2013) (No. 12–1834), http://media.ca8.uscourts.gov/cgi-bin/oaByCase.pl (debating *Gonzaga*'s impact with the State asserting *Gonzaga* moved the line to demonstrate a personal right a great distance such that pre-*Gonzaga* precedent does not have much value, while the foster parents argued *Gonzaga* did not substantially change the *Blessing* test).

29. *See Long Term Care Pharm. All.*, 362 F.3d at 59. The dissent in *Gonzaga* certainly took this view, suggesting the majority has created a "second class" of rights—those that satisfy *Blessing* but not "the Court's 'new' approach." Gonzaga Univ. v. Doe, 536 U.S. 273, 300 n.8, 302–03 (2002) (Stevens, J., dissenting).

30. *See infra* notes 281–93 and accompanying text.

31. *See infra* Part II.

32. ROBERT JAY DILGER, CONG. RESEARCH SERVICE, FEDERAL GRANTS TO STATE AND LOCAL GOVERNMENTS: A HISTORICAL PERSPECTIVE ON CONTEMPORARY ISSUES 1 (2018), https://fas.org/sgp/crs/misc/R40638.pdf (citing U.S. OFFICE OF MGMT. & BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2019: HISTORICAL TABLES, TABLE 12.3, TOTAL OUTLAYS FOR GRANTS TO STATE AND LOCAL GOVERNMENTS, http://www.whitehouse.gov/omb/budget/Historicals (last visited Feb. 17, 2019)).

33. For example, in 2016, over 60% of state Medicaid benefits were covered by federal funds. NAT'L ASS'N OF STATE BUDGET OFFICERS, STATE EXPENDITURE REPORT: FISCAL YEAR 2016, at 47 (2017), https://www.nasbo.org/reports-data/state-expenditure-report/state-expenditure-archives.

of the law.[34] In sum, *Gonzaga* has not delivered the clarity it promised.[35]

This Article proceeds in three parts. Part I covers the creation of § 1983 liability in the spending legislation context and tracks the Supreme Court trend away from recognizing personal rights in spending programs.[36] This Part centers on *Gonzaga*—the governing standard for the personal right analysis—but, to fully elucidate *Gonzaga*, also examines both the Supreme Court cases *Gonzaga* discussed and those discussing *Gonzaga*.[37] This Part includes a chart breaking down the current personal right test by summarizing *Gonzaga*'s treatment of each of the *Blessing* factors.[38]

Part II categorizes the approaches the federal courts of appeals have taken in dealing with *Gonzaga*'s impact on the *Blessing* factors, critiques those approaches, and reveals the inter- and intra-circuit conflict as to the personal right standard.[39] The vast majority of circuit courts mis-read *Gonzaga* as a mere clarification of the first *Blessing* factor; a few interpret *Gonzaga* too broadly, injecting the spending statute's enforcement mechanism into the personal right inquiry; and only a few get close to the *Gonzaga* two-prong test.[40] Accordingly, the current state of the law at the circuit level violates both vertical and horizontal principles of stare decisis, hindering fairness, predictability, and efficiency.[41]

Part III discusses problems stemming from this doctrinal confusion. First, the circuits disagree on whether *Wilder* and *Wright* are good law.[42] Second, *Gonzaga*'s constriction of the personal rights doctrine coupled with agency inaction—likely because such action would have a catastrophic impact on the program and its beneficiaries[43]—leaves many spending program beneficiaries essentially remedy-less. Accordingly, there is an enforcement gap for

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34. *See supra* notes 13–14 and accompanying text; *infra* notes 66–73 and accompanying text.

35. *See* Gonzaga Univ. v. Doe, 536 U.S. 273, 282–83 (2002); Doe v. Kidd, 501 F.3d 348, 365–66 (4th Cir. 2007) (Whitney, J., concurring in part and dissenting in part) ("*Gonzaga* . . . was explicitly intended to resolve considerable uncertainty stemming from the Court's prior opinions on the subject." (footnote omitted)).

36. *See infra* Part I.

37. *See infra* Part I.

38. *See infra* notes 199–206 and accompanying text.

39. *See infra* Part II.

40. *See infra* notes 281–93 and accompanying text.

41. *See infra* notes 294–306 and accompanying text.

42. *See infra* Section III.A.

43. *See infra* Section III.B.1.

spending programs,[44] which undermines the contract analogy that the Court has relied on to justify denying the § 1983 remedy.[45] Borrowing that analogy, absent private or agency enforcement, the State has made only an "illusory promise," meaning there is no contract at all.[46] Finally, contract law poses a threat to the personal rights doctrine where members of the Court have indicated support for transposing contract principles that would categorically bar spending program beneficiaries from bringing § 1983 claims.[47]

In conclusion, this Article briefly addresses possible solutions to the enforcement gap, which intersects all three branches of government, concluding Congress is the most likely branch to resolve the issue.[48]

I. THE EVOLUTION OF THE SUPREME COURT'S PERSONAL RIGHT JURISPRUDENCE

This Part tracks the Court's development of the current personal right test for spending statutes elucidated by *Gonzaga*. To do so, I address the origins of § 1983 liability in this context; flesh out the cases *Gonzaga* relied upon, elucidating *Gonzaga*'s reformation of the personal right test; and cover the Court's handling of *Gonzaga*. Retracing the Court's spending program cases demonstrates that—from the delay in recognizing potential § 1983 applicability to *Gonzaga* and its progeny—the Court is not receptive to § 1983's application in the spending program context.

A. Recognition of the Remedy

Section 1983's roots run to the tumultuous Reconstruction Era. The 42nd United States Congress passed the Civil Rights Act of 1871,[49] predecessor to § 1983,[50] largely in response to Southern state officials ignoring, or even approving, the Ku Klux Klan's violation of African-Americans' civil rights in horrific fashion.[51] With the 1871

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44. *See infra* Section III.B.1.

45. Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 28 (1981); *see* Gonzaga Univ. v. Doe, 536 U.S. 273, 280 (2002).

46. *See infra* note 370 and accompanying text.

47. *See infra* Section III.B.2.

48. *See infra* Conclusion.

49. Pub. L. No. 42-22, 17 Stat. 13.

50. "The civil remedy provided by 42 U.S.C. § 1983 was enacted in 1871." City of Greenwood v. Peacock, 384 U.S. 808, 852 (1966) (citing 17 Stat. 13).

51. *See* Wilson v. Garcia, 471 U.S. 261, 276–77 (1985) (describing in vivid detail the Act's origins); *see also* Will v. Mich. Dep't of State Police, 491 U.S. 58, 66 (1989)

Act, Congress sought to resolve the violation of the Fourteenth Amendment by providing a "subtle" civil remedy.[52] In doing so, Congress delineated "the Federal Government as a guarantor of basic federal rights against state power,"[53] working "an important . . . basic alteration in our federal system"—a huge departure "from the concepts of federalism that had prevailed in the late 18th century."[54]

The 1871 Act only covered constitutional rights, but Congress "enlarged" the provision in the Revised Statutes of 1874 to include statutory rights.[55] In its modern form, Section 1983 declares:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . 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.[56]

This "uniquely federal remedy"[57] itself provides no rights; rather, it is the "mechanism for enforcing individual rights 'secured' elsewhere."[58] Prior to *Thiboutot*'s recognition that § 1983 extended to

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("Congress enacted § 1 of the Civil Rights Act of 1871, 17 Stat. 13, the precursor to § 1983, shortly after the end of the Civil War 'in response to the widespread deprivations of civil rights in the Southern States and the inability or unwillingness of authorities in those States to protect those rights or punish wrongdoers.'" (quoting Felder v. Casey, 487 U.S. 131, 147 (1988)). Congress used § 2 of the Civil Rights Act of 1866 as the model, *Will*, 491 U.S. at 69, which sought "to protect all Persons in the United States in their Civil Rights, and furnish the Means of their Vindication." Civil Rights Act of 1866, Pub. L. No. 39-31, 14 Stat. 27.

52. *Wilson*, 471 U.S. at 276–77; *see* Mitchum v. Foster, 407 U.S. 225, 239 (1972).

53. *Mitchum*, 407 U.S. at 239; *see also Will*, 491 U.S. at 66 ("Although Congress did not establish federal courts as the exclusive forum to remedy these deprivations, it is plain that 'Congress assigned to the federal courts a paramount role' in this endeavor . . . ." (citation omitted) (quoting Patsy v. Bd. of Regents of Fla., 457 U.S. 496, 503 (1982)).

54. *Mitchum*, 407 U.S. at 238–43.

55. *Id.* at 240 n.30 (citing Rev. Stat. § 1979).

56. 42 U.S.C. § 1983 (2012).

57. *Mitchum*, 407 U.S. at 239.

58. *See* Gonzaga Univ. v. Doe, 536 U.S. 273, 285 (2002) ("[O]ne cannot go into court and claim a 'violation of § 1983'—for § 1983 by itself does not protect anyone against anything." (quoting Chapman v. Hous. Welfare Rights Org., 441 U.S. 600, 617 (1979)).

a statutory spending program,[59] the remedy had only been used to enforce constitutional rights.[60] *Thiboutot* plus pervasive spending programs has equaled a mass of § 1983 lawsuits by those who benefit from such programs, seeking to enforce the statutes that govern them against the state officials who administer them.[61]

However, as the Court has repeatedly cautioned, "§ 1983 does not provide an avenue for relief *every* time a state actor violates a federal law."[62] Rather, it only remedies the violation of federal statutes that confer personal rights,[63] which, according to the Court, spending legislation rarely does.[64] Instead, the "typical remedy" for state noncompliance is the administering agency cutting off funding—not a § 1983 action.[65] Drawing the line between spending legislation that confers a personal right and that which does not has proven difficult.[66] This is not surprising because it centers on the elusive concept of

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59. 448 U.S. 1, 4 (1980).

60. *See supra* notes 2–4 and accompanying text.

61. *See supra* note 10.

62. City of Rancho Palos Verdes v. Abrams, 544 U.S. 113, 119 (2005) (emphasis added); *see Gonzaga*, 536 U.S. at 280; Blessing v. Freestone, 520 U.S. 329, 340 (1997); Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 509 (1990).

63. *Gonzaga*, 536 U.S. at 276, 285; *see Blessing*, 520 U.S. at 340.

64. *See Gonzaga*, 536 U.S. at 276, 285; *see also* Samuel R. Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 DUKE L.J. 345, 403 (2008) ("It is possible that Spending Clause statutes may be especially likely, as an empirical matter, to lack [right-creating] language."); Newcombe, *supra* note 11, at 126 ("A court is also less likely to imply a private right of action from a spending clause statute.").

65. Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 28 (1981). Although "a plaintiff invoking § 1983 . . . may seek a variety of remedies—including damages," *see Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1392 (2015) (Sotomayor, J., dissenting), the fact that the personal right at issue is the product of a spending program bears on what types of relief are available to successful plaintiffs. This Article will not delve into the specifics, but "[i]n a number of cases, the Court has applied *Pennhurst* to hold that particular *remedies* will not be available for violation of a funding condition unless the states were on notice that those remedies would be available at the time they agreed to accept the federal money." Bagenstos, *supra* note 64, at 395; *see, e.g.*, Barnes v. Gorman, 536 U.S. 181, 186–90 (2002) (holding that punitive damages are not available under Title VI and Title IX, which are Spending Clause statutes).

66. *See Gonzaga*, 536 U.S. at 282–83; *see also* Mo. Child Care Ass'n v. Martin, 241 F. Supp. 2d 1032, 1037 (W.D. Mo. 2003) ("This principle, while easily stated, is not easily applied.").

legislative intent,[67] which, to borrow from Winston Churchill, could be characterized as a "riddle wrapped in a mystery inside an enigma."[68]

In ascertaining congressional intent, the Court first looks to the statute itself and only turns to legislative history where the statute's meaning is not revealed by the statutory text.[69] What a court ascertains as Congress's intent is unpredictable because "such intent is not just a fact out there in the world, waiting to be discovered by the judge astute enough to find it,"[70] and "even such 'hard' evidence as statutory text turns out to be quite flexible."[71] Furthermore, as John Manning explains: "actual legislative intent," is a myth that "does not—and could not—describe Congress's *actual* decision or intention about a litigated issue. In hard cases, the truth is that

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67. Because "§ 1983 is a statutory remedy . . . [t]he crucial consideration is what Congress intended." Smith v. Robinson, 468 U.S. 992, 1012 (1984) (citations omitted), *superseded by statute on other grounds*, Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796, *as recognized in* Fry v. Napoleon Cmty. Sch., 137 S. Ct. 743, 750 (2017); *see Abrams*, 544 U.S. at 120; *see also Gonzaga*, 536 U.S. at 291 (Breyer, J., concurring) ("The ultimate question, in respect to whether private individuals may bring a lawsuit to enforce a federal statute, through 42 U.S.C. § 1983 or otherwise, is a question of congressional intent.").

68. Winston Churchill, Prime Minister, U.K., The Russian Enigma (Oct. 1, 1939), http://www.churchill-society-london.org.uk/RusnEnig.html; *see* WRIGHT & MILLER, *supra* note 14, § 3573.2 ("These [steps] can be simply stated, but their application can be very complex. They often raise difficult questions on which statutory interpretation is intimately intertwined with constitutional law, and on which Supreme Court decisions may be in a state of fluidity."); *see also* Newcombe, *supra* note 11, at 131 ("[T]here is no easy solution to the problem of deciding whether a statute creates the necessary 'right' to support an implied private action.").

69. Train v. Colo. Pub. Interest Research Grp., 426 U.S. 1, 9 (1976).

70. John F. Manning, *Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 18–20 (2014).

71. William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation As Practical Reasoning*, 42 STAN. L. REV. 321, 325 (1990).

Congress has made no decision."[72] Personal right cases are "hard cases."[73]

To ferret out which federal spending clause statutes confer personal rights, the Court employs a two-step test.[74] The focus here is the first step, which determines whether the statute confers a personal right;[75] making this showing gives rise to "a rebuttable presumption that the right is enforceable under § 1983."[76] The defendant can overcome the presumption "by demonstrating that Congress did not intend that remedy for a newly created right" at step two, either in the statute itself or impliedly by providing a "'comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983.'"[77]

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72. *See* Manning, *supra* note 70, at 18–20; *see also* JEREMY WALDRON, LAW AND DISAGREEMENT 10 (1999) ("[I]n most cases legislation is enacted by and in the name of a large bunch of people who do not share a view about anything except the procedures that for the time being allow them to deliberate together in the assembly."). Manning observes:

> Professor Max Radin famously wrote that the chances that "several hundred" legislators "will have exactly the same determinate situations in mind . . . are infinitesimally small." Even if they did, the legislative record does not show the basis on which most legislators cast their votes, making it near impossible to glean the majority's actual intentions on any given question. And even if it were possible to assemble a complete table of legislators' preferences, there is no value-neutral way to decide how to weight and aggregate those views, which may not break out cleanly or decisively.

Manning, *supra* note 70, at 18–20 (quoting Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930)).

73. *See* Manning, *supra* note 70, at 18–20; *see also* WRIGHT & MILLER, *supra* note 14, § 3573.2.

74. *See* Gonzaga Univ. v. Doe, 536 U.S. 273, 284 & n.4 (2002); Blessing v. Freestone, 520 U.S. 329, 340–41 (1997).

75. City of Rancho Palos Verdes v. Abrams, 544 U.S. 113, 120 (2005); *Blessing*, 520 U.S. at 340–41.

76. *Abrams*, 544 U.S. at 120 (quoting *Blessing*, 520 U.S. at 341).

77. *Id.* (quoting *Blessing*, 520 U.S. at 341). The Court has found schemes sufficiently comprehensive to supplant the § 1983 remedy in three cases. *See generally* City of Rancho Palos Verdes v. Abrams, 544 U.S. 113 (2005); Smith v. Robinson, 468 U.S. 992 (1984); Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1 (1981).

B. Pre-Gonzaga

Because *Gonzaga* discussed *Wright v. City of Roanoke Redevelopment & Housing Authority*,[78] *Wilder v. Virginia Hospital Association*,[79] and *Suter v. Artist M.*,[80] I briefly address them to give context to *Gonzaga* as well as my own analysis of *Gonzaga*'s impact on *Wright* and *Wilder* in Section III.A. The last case in this section, *Blessing v. Freestone*,[81] is key because it lays out the personal right test *Gonzaga* replaced.

1. Personal Rights Do Exist

Wright and *Wilder* are the Court's only two spending legislation cases to find both steps of the personal rights analysis satisfied and allow § 1983 enforcement post-*Thiboutot*.[82]

a. *Wright*

In *Wright*, three public housing tenants sued their public housing authority (PHA) pursuant to § 1983, alleging it had violated the rent ceiling imposed by the Brooke Amendment[83] to the Housing Act of 1937[84] and its implementing Department of Housing and Urban Development (HUD) regulations.[85] The Brooke Amendment provided that "[a] family" living in a public housing project "shall pay as rent" a specified percentage of its income.[86] The tenants alleged that their PHA "overbilled them for utilities" according to HUD regulations,[87] which, when combined with their rent, brought their monthly payments above the statutorily permissible percentage.[88] In a 5–4 decision authored by Justice White, the Court held the tenants had a

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78. 479 U.S. 418 (1987).
79. 496 U.S. 498 (1990).
80. 503 U.S. 347 (1992), *superseded by statute*, Improving America's Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518.
81. 520 U.S. 329 (1997).
82. Maine v. Thiboutot, 448 U.S. 1 (1980).
83. Housing and Urban Development Act of 1969, Pub. L. No. 91-152, § 213, 83 Stat. 379, 389.
84. Pub. L. No. 75-412, 50 Stat. 888.
85. Wright v. City of Roanoke Redevelopment & Hous. Auth., 479 U.S. 418, 419–21 (1987).
86. *Id.* at 420 n.2 (quoting 42 U.S.C. § 1437a(a) (1982 & Supp. III 1985)).
87. *Id.* at 419.
88. *Id.* at 420–21.

personal right not to be charged rent above the portion of their income prescribed by the Brooke Amendment.[89]

As a threshold matter, the Court found it irrelevant that the tenants relied on an interpretation of a personal right that appeared in HUD regulations, given the interpretive deference owed to HUD as the implementing agency.[90] At step one, the Court observed, "The Brooke Amendment could not be clearer: . . . tenants could be charged as rent no more and no less than 30 percent of their income. This was a mandatory limitation focusing on the individual family and its income. The intent to benefit tenants is undeniable."[91] In addition, the Court noted that the applicable HUD regulations "expressly required that a 'reasonable' amount for utilities be included in rent that a PHA was allowed to charge."[92] Finally, the Court concluded that the reasonable-allowance-for-utilities provision was not "too vague and amorphous" for judicial enforcement given that HUD regulations "set out guidelines that the PHAs were to follow in establishing utility allowances."[93]

Regarding step two, the Court determined that neither the Housing Act nor the Brook Amendment demonstrated Congress's intent to preclude § 1983 enforcement,[94] citing the Act's lack of a private judicial remedy.[95] The Court also observed that, even if the tenants could raise their challenge through a local grievance procedure or by suing on their lease in state court, neither state administrative or court remedies "ordinarily" bar § 1983's applicability.[96] The Court also characterized HUD's funding cut-off authority as a "generalized power[] . . . insufficient to indicate a congressional intention to foreclose § 1983 remedies."[97]

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89. *Id.* at 419–32.
90. *Id.* at 430.
91. *Id.*
92. *Id.*
93. *Id.* at 431–32.
94. *Id.* at 427.
95. *Id.*
96. *Id.* at 427–29 (citing Patsy v. Bd. of Regents, 457 U.S. 496, 516 (1982)).
97. *Id.* at 428 (citing Cannon v. Univ. of Chicago, 441 U.S. 677, 704–07 (1979); Rosado v. Wyman, 397 U.S. 397, 420 (1970)).

b. *Wilder*

In *Wilder*, health care providers in Virginia brought a § 1983 action against several commonwealth officials, alleging its reimbursement rate did not comply with the Boren Amendment to the Medicaid Act.[98] According to the Boren Amendment, "a State plan for medical assistance must . . . provide . . . for" reimbursement according to rates that a "State finds, and makes assurances satisfactory to the Secretary, are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities."[99] In a 5–4 decision authored by Justice Brennan, the Court held the providers had a personal right to reasonable-and-adequate reimbursement rates enforceable pursuant to § 1983.[100]

At step one, after concluding the Boren Amendment obviously benefitted health care providers,[101] the Court framed the key question as "whether the Boren Amendment imposes a 'binding obligation' on the States."[102] The Court concluded that the provision did so by (1) using "mandatory rather than precatory terms,"[103] and (2) preconditioning funding on compliance and authorizing the Secretary to cut off funding for noncompliance.[104] In sum, the provision's "language succinctly set[] forth a congressional command, which is wholly uncharacteristic of a mere suggestion or 'nudge.'"[105] In addition, the Court concluded the Boren Amendment was not too "vague and amorphous" to be judicially enforceable.[106] The Court acknowledged the reasonable-and-adequate-rates language gave

98. Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 501 (1990). The Medicaid Act is found at Pub. L. No. 89-97, 79 Stat. 286, 343 (1965). In 1980, Congress enacted the Boren Amendment, changing the standard for reimbursement of nursing and intermediate care facilities, Pub. L. No. 96-499, § 962(a), 94 Stat. 2599, 2650, which it extended to hospitals the following year, Pub. L. No. 97–35, § 2173, 95 Stat. 357, 808. Post-*Wilder*, Congress repealed the Borden Amendment in 1997. *See* Balanced Budget Act of 1997, Pub. L. No. 105-33, § 4711, 111 Stat. 251, 507–08.

99. *Wilder*, 496 U.S. at 501–02 (quoting 42 U.S.C. § 1396a(a)(13)(A) (Supp. V 1987)).

100. *Id.* at 501–23.

101. *Id.* at 512.

102. *Id.* at 510.

103. *Id.* at 512.

104. *Id.* (citing 42 U.S.C. § 1396c (1982)).

105. *Id.* (quoting W. Va. Univ. Hosp., Inc. v. Casey, 885 F.2d 11, 20 (3d Cir. 1989) (quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 19 (1981))); *see also* Boatman v. Hammons, 164 F.3d 286, 288 (6th Cir. 1998) ("States . . . must follow federal law in managing the [Medicaid] program.").

106. *Wilder*, 496 U.S. at 519–20.

states "substantial discretion,"[107] which could impact the standard of review but did not grant states unlimited flexibility.[108] Rather, states (1) "must consider" statutory and regulator factors in adopting their rates as in *Wright* and (2) "judge the reasonableness of [such] rates against the objective benchmark[s]."[109] Finally, the Court recognized that "some knowledge of the hospital industry might be required to evaluate a State's findings with respect to the reasonableness of its rates" but found that was "well within the competence of the Judiciary."[110]

At step two, the Court concluded the Medicaid Act's remedial scheme fell short of establishing Congress's intent to supplant the § 1983 remedy.[111] The Court recognized the scheme included "limited state administrative processes," "the Secretary's limited oversight,"[112] and a state appeal procedure.[113] However, the Court pointed out that the providers sought "to challenge the overall method by which rates are determined," and like most states' administrative process, Virginia's did not allow for this type of claim.[114] Finally, the Court concluded that the Medicaid Act's enforcement mechanism was not "comparable" to the only two remedial schemes it had found sufficient to preclude the § 1983 remedy.[115]

2. Or Do They?

In, *Suter* and *Blessing* the Court reigned in its personal rights jurisprudence.

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107. *Id.* at 519. Neither the Act nor its implementing regulations define the terms "'reasonable and adequate' to meet the costs of 'efficiently and economically operated facilit[ies],'" leaving it to the states to establish "the factors to be considered in determining" if the terms are met. *Id.* at 507 (citing 48 Fed. Reg. 56,049 (1983)).

108. *Wilder*, 496 U.S. at 519–20.

109. *Id.* at 519. The *Wilder* Court noted, "The Boren Amendment provides, if anything, more guidance than the provision at issue in *Wright." Id.* at 519 n.17 (citing Wright v. City of Roanoke Redevelopment & Hous. Auth., 479 U.S. 418, 437 (1987) (O'Connor, J., dissenting)).

110. *Wilder*, 496 U.S. at 520.

111. *Id.* at 520–23.

112. *Id.* at 522–23.

113. *Id.* By regulation, the Medicaid Act "requires States to adopt a procedure for postpayment claims review." *Id.* at 521–22; *see* 42 C.F.R. § 447.253(c) (1989).

114. *Wilder*, 496 U.S. at 523; *see* 42 C.F.R. § 447.253(c) (1989).

115. *Wilder*, 496 U.S. at 521; Smith v. Robinson, 468 U.S. 992, 1009–11 (1984) (holding that Congress supplanted the § 1983 remedy in the Education of the Handicapped Act (EHA), based on its "elaborate procedural mechanism," including local administrative review and a right to judicial review).

a. *Suter*

In *Suter*, a class of biological parents and their children in foster care sued Illinois Department of Children and Family Services' officials pursuant to § 1983 for violating the Adoption Assistance and Child Welfare Act of 1980 (AACWA).[116] The plaintiffs asserted state officials failed to make "reasonable efforts" to prevent the children's removal from their home and facilitate reunification with their families as required by 42 U.S.C. § 671(a)(15).[117] The Northern District of Illinois and the Seventh Circuit agreed that the suit could proceed pursuant to § 1983, but the Supreme Court reversed in a 7–2 decision authored by Chief Justice Rehnquist.[118]

Regarding step one, the Court identified the key question as this: "Did Congress, in enacting the [AACWA], unambiguously confer 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, and once removed to reunify the child with his family?"[119] The Court concluded, even though the class of foster children were Adoption Assistance and Child Welfare Act (AACWA) beneficiaries, the "reasonable efforts" provision did not unambiguously confer a personal right on them because (1) "reasonable efforts . . . will obviously vary with the circumstances of each individual case . . . within broad limits, left up to the State,"[120] (2) the provision "impose[d] only a rather generalized duty on the State, to be enforced not by private individuals, but by the Secretary" of Health and Human Services,[121] and (3) legislative history "indicated that the Act left a great deal of discretion to [states]."[122]

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116. Suter v. Artist M., 503 U.S. 347, 350 (1992).

117. *Id.* at 352. "In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary which . . . provides that . . . reasonable efforts shall be made to preserve and reunify families" both prior to removal from the child's home and, post-removal, "to make it possible for a child to safely return to the child's home." 42 U.S.C. § 671(a)(15) (2012).

118. *Suter*, 503 U.S. at 350, 353. The Supreme Court also rejected both lower courts' conclusions that the case could proceed because § 671(a)(15) contained an implied right of action. *Id.* at 363–64.

119. *Suter*, 503 U.S. at 357; *cf.* Lisa L. Frye, Suter v. Artist M. *and Statutory Remedies Under § 1983: Alteration Without Justification*, 71 N.C. L. REV. 1171, 1188 (1993) (stating *Suter* adopts the congressional-intent test articulated by the dissents in *Wilder*/*Wright*, implicitly rejecting the "multi-faceted test for § 1983" articulated by the "narrow majority" (5–4 in both cases)).

120. *Suter*, 503 U.S. at 360.

121. *Id.* at 363.

122. *Id.* at 362. The Court also held there could be no personal right because § 671(a)(15) only required Illinois to have a "plan" with a reasonable-efforts provision.

Although the Court noted it need not resolve step two, it went on to address it, pointing to (1) the Secretary's power to reduce or cut off funding for noncompliance, and (2) the availability of federal reimbursement requiring a child's removal from home being "the result of a judicial determination . . . that reasonable efforts of the type described in section 671(a)(15) . . . have been made."[123] The Court concluded, "While these statutory provisions may not provide a comprehensive enforcement mechanism so as to manifest Congress' intent to foreclose remedies under § 1983, they do show that the absence of a remedy to private plaintiffs under § 1983 does not make the 'reasonable efforts' clause a dead letter."[124]

b. *Blessing*

In *Blessing*, five Arizona mothers whose children were eligible for state child support services pursuant to Title IV–D of the Social Security Act ("Title IV–D"[125]) sued the Director of Arizona's child support agency under § 1983, asserting the state agency failed to take adequate steps to resolve their child support applications.[126] In

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Id. at 358–59; *see* 42 U.S.C. § 671(a) (2012). The Court acknowledged *Wilder* involved the same plan structure but distinguished it because "the statute and regulations set forth in some detail the factors to be considered in determining the methods for calculating rates" there, which the AACWA's reasonable-efforts provision lacked. *Suter*, 503 U.S. at 359–60 (citing Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 519 & n.17 (1990)). Following a presidential veto of Congress's efforts to overturn *Suter*'s "plan" holding, *Eric L. ex rel. Schierberl v. Bird*, 848 F. Supp. 303, 311 (D.N.H. 1994), Congress amended the Social Security Act (of which the AACWA is a part), adding 42 U.S.C. § 1320a–2 (the "*Suter* Fix"). Ball v. Rodgers, 492 F.3d 1094, 1111 (9th Cir. 2007). The *Suter* Fix overruled *Suter* to the extent it held a court could find no personal right based exclusively on the asserted provision requiring a plan or dictating a plan requirement but left it intact based on its no-unambiguously-conferred-right rationale. 42 U.S.C. § 1320a–2 (2012); s*ee* Midwest Foster Care & Adoption Ass'n v. Kincade, 712 F.3d 1190, 1200 (8th Cir. 2013); Watson v. Weeks, 436 F.3d 1152, 1158 (9th Cir. 2006); S.D. *ex rel.* Dickson v. Hood, 391 F.3d 581, 603 (5th Cir. 2004); Harris v. James, 127 F.3d 993, 1002–03 (11th Cir. 1997).

123. *Suter*, 503 U.S. at 360–61 & n.11 (quoting 42 U.S.C. §§ 671(b), 672(a)(1)). "The Secretary has the authority to reduce or eliminate payments to a State on finding that the State's plan no longer complies with § 671(a) or that 'there is a substantial failure' in the administration of a plan such that the State is not complying with its own plan." *Id.* (quoting 42 U.S.C. § 671(b)).

124. *Suter*, 503 U.S. at 360–61 (footnote omitted).

125. 42 U.S.C. §§ 651–669b (1994 & Supp. II 1996). Title IV creates a spending program, *Blessing v. Freestone*, 520 U.S. 329, 349 (1997) (Scalia, J., concurring), which provides federal funding to states for "welfare benefits to needy families," *Blessing*, 520 U.S. at 333; *see* 42 U.S.C. §§ 601–17 (2012).

126. *Blessing*, 520 U.S. at 337.

carrying out its Title IV–D plan,[127] a State must "substantially compl[y]" with its provisions, which means, for example, enforcement of support obligations in seventy-five percent of cases;[128] failure to do so warrants the reduction of federal funds.[129] The Ninth Circuit concluded the plaintiffs "had a [personal] right to require the Director . . . to bring the State's program into substantial compliance with Title IV–D."[130]

At step one, the Supreme Court summed up its precedent as establishing three factors to determine whether a statute creates a personal right (the "*Blessing* factors"):

1. "Congress . . . intended that the provision in question benefit the plaintiff,"[131]
2. "the plaintiff . . . demonstrate[d] that the right assertedly protected by the statute is not so 'vague and amorphous' that its enforcement would strain judicial competence,"[132] and
3. "the statute . . . unambiguously impose[s] a binding obligation on the States. In other words, the provision giving rise to the asserted right [is] couched in mandatory, rather than precatory, terms."[133]

If weighing these three factors does not demonstrate that the asserted statute creates a personal right, § 1983 is unavailable to the plaintiff.[134]

At the outset, the Supreme Court identified the plaintiffs' and Ninth Circuit's "blanket approach" to Title IV-D, as a whole, conferring a personal right as fatal,[135] stressing the section-specific nature of the § 1983 analysis of "very specific right[s]."[136] In addition, the Court held the plaintiffs did not have a personal right because the

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127. Program participants, like Arizona, submit a plan that must be approved by the Secretary of Health and Human Services as to how the State's program will comply with Title IV-D's numerous requirements. *Blessing*, 520 U.S. at 333 (citing 42 U.S.C. §§ 651–669b (1994 & Supp. II 1996)).

128. *Blessing*, 520 U.S. at 343 (citing 45 C.F.R. § 305.20(a)(3)(iii) (1995)).

129. *Id.* at 335 (citing 42 U.S.C. § 609(a)(8)).

130. *Id.* at 343.

131. *Id.* at 340.

132. *Id.* at 340–41 (citations omitted) (quoting Wright v. City of Roanoke Redevelopment & Hous. Auth., 479 U.S. 418, 431–32 (1987)).

133. *Id.* at 341 (citations omitted).

134. *Id.*

135. *Id.* at 342–44.

136. *Id.* at 342–43 (citations omitted).

substantial compliance "requirement . . . was not intended to benefit individual children and custodial parents" but as "a yardstick for the Secretary to measure the *systemwide* performance."[137] The Court supported its conclusion by observing that "even when a State is in 'substantial compliance' with Title IV-D, any individual plaintiff might still be among the . . . persons whose needs ultimately go unmet."[138]

Although the Court identified several Title IV–D provisions that do not give rise to personal rights, it acknowledged that this did mandate that no Title IV-D provision did so and went on to address step two.[139] The Court noted that it had held the government made the step two showing in only two cases, *Sea Clammers* and *Smith*.[140] *Blessing* characterized the scheme in *Sea Clammers* as "unusually elaborate," giving the overseeing federal agency "a panoply of enforcement options, including noncompliance orders, civil suits, and criminal penalties," and "authorized private persons to initiate enforcement actions."[141] Similarly, *Blessing* pointed out "the review scheme in [*Smith*] permitted aggrieved individuals to invoke 'carefully tailored' local administrative procedures," which would been "superfluous" if plaintiffs could pursue a § 1983 remedy instead.[142] In contrast, "a plaintiff's ability to invoke § 1983 cannot be defeated simply by '[t]he availability of administrative mechanisms to protect the plaintiff's interest'" as established by *Wright* and *Wilder*'s holdings allowing § 1983 enforcement, even though both cases involved statutes that gave the overseeing secretary funding-cut-off power coupled with "limited state grievance procedures for individuals."[143]

Turning its attention to Title IV-D's enforcement scheme, the Court observed, "Title IV-D contains no private remedy—either judicial or administrative—through which aggrieved persons can seek redress."[144] Furthermore, the Secretary has only "limited powers to audit and cut federal funding," and the program can be in substantial compliance even though "up to 25 percent" of those eligible are not

137. *Id.* at 343.
138. *Id.* at 344.
139. *Id.* at 345–46.
140. *Id.* at 347 (citing Smith v. Robinson, 468 U.S. 992 (1984); Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1 (1981)).
141. *Id.* (quoting *Sea Clammers*, 453 U.S. at 13–14, 20).
142. *Id.* (quoting *Smith*, 468 U.S. at 1009, 1011).
143. *Id.* at 347–48 (citing Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 521, 523 (1990); Golden State Transit Corp v. City of L.A., 493 U.S. 103, 106 (1989); Wright v. City of Roanoke Redevelopment & Hous. Auth., 479 U.S. 418, 427–28 (1987)).
144. *Id.* at 348.

receiving Title IV-D services.[145] Therefore, the Court found Title IV-D's enforcement scheme to be "far more limited than those in *Sea Clammers* and *Smith*" and to "closely resemble those powers at issue in *Wilder* and *Wright*."[146] The Court concluded, "To the extent that Title IV-D may give rise to [personal] rights, . . . the Secretary's oversight powers are not comprehensive enough to close the door on § 1983 liability."[147]

C. Gonzaga

The Supreme Court announced its current personal right test in *Gonzaga*, involving a former student's attempt to sue Gonzaga University under § 1983 for releasing information in violation of the Family Educational Rights and Privacy Act of 1974 (FERPA).[148] In a 7–2 decision, the Court rejected the suit; however, Justices Breyer and Souter only concurred in the judgment.[149] The FERPA provision at issue states the following:

> No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein . . .) of students without the written consent of their parents to any individual, agency, or organization.[150]

Chief Justice Rehnquist, writing for the majority, began by observing that "we have never before held, and decline to do so here, that spending legislation drafted in terms resembling those of FERPA can confer enforceable rights."[151]

The majority begins by tracing the Court's § 1983 spending program precedent, highlighting principles that limit the remedy's availability,[152] underscoring the very few cases it had allowed § 1983

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145. *Id.*

146. *Id.*; *see Wilder*, 496 U.S. at 521, 523; *Wright*, 479 U.S. at 427–28; *Smith*, 468 U.S. at 1009, 1011; *Sea Clammers*, 453 U.S. at 13–14.

147. Blessing v. Freestone, 520 U.S. 329, 348 (1997).

148. Gonzaga Univ. v. Doe, 536 U.S. 273, 276 (2002) (citing 20 U.S.C. § 1232g).

149. *Id.* at 275.

150. *Id.* at 279 (quoting 20 U.S.C. § 1232g(b)(1)).

151. *Id.*

152. *Id.* at 279–83.

enforcement—only two post-*Thiboutot*: *Wright*[153] in 1987 and *Wilder*[154] in 1990, and emphasizing the narrowness of both cases.[155] *Gonzaga* explained *Wright*'s holding "on the ground that [its language] unambiguously conferred 'a mandatory [benefit] focusing on the individual family and its income.'"[156] *Gonzaga* stressed that in *Wright*, (1) "Congress spoke in terms that 'could not be clearer' [in the PHA] and conferred entitlements 'sufficiently specific and definite'" and (2) the PHA lacked any mechanism for tenants to lodge their complaints against state agencies failing to comply with the Act.[157] Turning to *Wilder*, *Gonzaga* clarified that the provision asserted there passed muster because (1) "Congress left no doubt of its intent for private enforcement . . . because the provision required States to pay an 'objective' monetary entitlement to individual health care providers" and (2) individual health care providers had "no sufficient administrative means of enforcing the requirement against States that failed to comply."[158] The *Gonzaga* Court concluded that the provisions in *Wright* and *Wilder* are very similar: (1) for purposes of step one, because both "explicitly conferred specific monetary entitlements upon the plaintiffs"[159] and (2) for step two, because the tenants in *Wright* and the health care providers in *Wilder* lacked "sufficient administrative means" to challenge noncompliant states.[160]

The Court concluded its overview by stressing the length of time since it had allowed § 1983 enforcement in a spending-program case, observing that its "more recent decisions . . . have rejected [such] attempts,"[161] citing *Suter*[162] and *Blessing*[163] as examples.[164] The *Gonzaga* Court explained *Suter*'s holding on the basis that the AACWA's reasonable-efforts provision "conferred no specific,

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153. Wright v. City of Roanoke Redevelopment & Hous. Auth., 479 U.S. 418, 432 (1987).

154. Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 500 (1990).

155. *Gonzaga*, 536 U.S. at 280–81 (citing *Wilder*, 496 U.S. at 522–23; *Wright*, 479 U.S. at 426, 430, 432).

156. *Id.* at 280 (quoting *Wright*, 479 U.S. at 430).

157. *Id.* (quoting *Wright*, 479 U.S. at 432).

158. *Id.* at 280–81 (citing *Wilder*, 496 U.S. at 522–23).

159. *Id.* at 280 (citing *Wright*, 479 U.S. at 431–32).

160. *Id.* at 280–81 (citing *Wilder*, 496 U.S. at 522–23); *see Wright*, 479 U.S. at 430, 432.

161. *Gonzaga*, 536 U.S. at 281.

162. Suter v. Artist M., 503 U.S. 347, 363–64 (1992).

163. Blessing v. Freestone, 520 U.S. 329, 348–49 (1997).

164. *Gonzaga*, 536 U.S. at 281 (citing *Blessing*, 520 U.S. at 343; *Suter*, 503 U.S. at 357–58, 363).

individually enforceable rights . . . even by a class of the statute's *principal* beneficiaries."[165] *Gonzaga* stated that *Blessing* is like *Suter* in that the provisions at issue required only that states "substantially comply" with the requirements the plaintiffs asserted.[166] The *Gonzaga* Court made no mention at all of the *Blessing* factors in explaining *Blessing*'s holding, which it explained as being grounded on the statute's "focus[] on 'the aggregate services provided by the State,' rather than 'the needs of any particular person.'"[167]

Gonzaga then addressed the plaintiff's argument that the Court's spending program precedent constitutes "a relatively loose standard for finding rights enforceable by § 1983" such that "a federal statute confers such rights so long as Congress intended that the statute '*benefit*' putative plaintiffs,"[168] relying on *Blessing* and *Wilder*'s use of the term "benefit."[169] The Court recognized the benefit language was problematic because it "might be read to suggest that something less" than what was actually necessary would show Congress's intent to create a personal right.[170] Accordingly, "some courts . . . interpret *Blessing* as allowing plaintiffs to enforce a statute under § 1983 so long as the plaintiff falls within the general zone of interest that the statute is intended to protect."[171] The Court acknowledged it had contributed to this misunderstanding of personal rights by proffering the *Blessing* factors—using the term "benefit"—"[i]n the same paragraph" as it "emphasize[d] that it is only violations of *rights*, not *laws*, which give rise to § 1983 actions."[172] *Gonzaga* clarified: "[I]t is *rights*, not the broader or vaguer 'benefits' or 'interests,' that may be enforced under [§ 1983's] authority."[173] Leaving no room for confusion on this point, the Court declared: "We now reject the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983."[174]

The Court also rejected the plaintiff's argument that implied-right-of-action cases and § 1983 precedent "are separate and

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165. *Id.* (emphasis added) (citing *Suter*, 503 U.S. at 357).
166. *Id.* (citing *Blessing*, 520 U.S. at 332).
167. *Id.* at 282.
168. *Id.* (emphasis added) (citation omitted).
169. *Id.* (citing *Blessing*, 520 U.S. at 340–41; Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 509 (1990)).
170. *Id.*
171. *Id.* at 283.
172. *Id.* at 282–83 (citing *Blessing*, 520 U.S. at 340).
173. *Id.* at 283 (quoting 42 U.S.C. § 1983).
174. *Id.*

distinct."[175] Again, the Court acknowledged that its precedent was at the root of the confusion regarding the relationship between the two types of private right of action cases: with *Wilder* suggesting no overlap but *Suter* and *Pennhurst* to the contrary.[176] *Gonzaga* rejected a complete dichotomy between the two types of cases, explaining that, although the two analyses are not identical,[177] the step one inquiry is the same for both: "whether Congress *intended to create a federal right*."[178] And the same showing is required for both § 1983 claims and implied right of actions to answer this question in the affirmative: Congress must speak "in clear and unambiguous terms."[179] So that, where Congress did not do so, a plaintiff cannot bring either a § 1983 claim or an implied right of action.[180] Thus, the Court's "implied right of action cases should guide the determination of whether a statute confers rights enforceable under § 1983."[181]

Next, the Court encapsulated its "'rights-creating' language" standard into a two-prong test (the "*Gonzaga* two-prong test") to resolve the step one inquiry.[182] The test consists of a terminology prong and a focus prong.[183] If either prong is not met, the spending statute does not create a personal right.[184]

The terminology prong requires that the asserted provision be phrased in terms of the class of individuals to which the plaintiff belongs.[185] *Gonzaga* pointed to two examples of statutes that contain

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175. *Id.*; *see* Bobroff, *supra* note 12, at 57. There are two theories of recovery for private plaintiffs asserting a federal statutory violation by a state actor: (1) § 1983 claims predicated on the asserted statute and (2) implied-right-of-action claims under the statute itself. Michael A. Mazzuchi, *Section 1983 and Implied Rights of Action: Rights, Remedies, and Realism*, 90 MICH. L. REV. 1062, 1063 (1992). In implied-right-of-action cases, "evidence is required that Congress intended a private remedy," but in "§ 1983 cases . . . a remedy is generally presumed." Bradford C. Mank, *Suing Under § 1983: The Future After* Gonzaga University v. Doe, 39 HOUS. L. REV. 1417, 1418–19 (2003).

176. *Gonzaga*, 536 U.S. at 283. *Compare* Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 508–09 n.9 (1990), *with* Suter v. Artist M., 503 U.S. 347, 363–64 (1992), *and* Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 28 n.21 (1981).

177. In implied-right-of-action cases, "evidence is required that Congress intended a private remedy," but in "§ 1983 cases . . . a remedy is generally presumed." *See* Mank, *supra* note 175, at 1418–19.

178. *Gonzaga*, 536 U.S. at 283.

179. *Id.* at 290.

180. *Id.* at 285.

181. *Id.* at 283; *cf.* Bobroff, *supra* note 12, at 57.

182. *Gonzaga*, 536 U.S. at 287–89.

183. *Id.*

184. *Id.*

185. *Id.* at 284 (quoting Cannon v. Univ. of Chi., 441 U.S. 677, 692 n.13 (1979)).

the requisite terminology: Title VI of the Civil Rights Act of 1964[186] and Title IX of the Education Amendments of 1972,[187] which both declare: "No person . . . shall . . . be subjected to discrimination."[188] This language has "an unmistakable focus on the benefited class"[189] by "explicitly conferr[ing] a right directly on a class of persons."[190] However, "[s]tatutes that focus on the person regulated rather than the individuals protected create 'no implication of an intent to confer rights on a particular class of persons.'"[191] For example, statutes "written . . . simply as a ban on discriminatory conduct by recipients of federal funds or as a prohibition against the disbursement of public funds to educational institutions engaged in discriminatory practices" lack the requisite terminology.[192] By focusing on the state's behavior—what it must or must not do—this language fails to satisfy this prong, even though individuals will obviously benefit from the state's behavior.[193]

Turning to the focus prong, the Court disqualified statutes with "an 'aggregate' focus" because "they are not concerned with 'whether the needs of any particular person have been satisfied,' and they cannot 'give rise to [personal] rights.'"[194] The Court explained that statutes have an aggregate focus if they (1) require only substantial compliance or (2) "speak only in terms of institutional policy and practice."[195] In either case, such a systemwide focus shows Congress did not intend to create a personal right.[196]

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186. Pub. L. No. 88-352, 78 Stat. 241, 252.

187. Pub. L. No. 92-318, 86 Stat. 235, 304.

188. *See* 20 U.S.C. § 1681(a) (2012) ("No person in the United States shall, on the basis of sex, . . . be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ."); 42 U.S.C. § 2000d (2012) ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.").

189. *Gonzaga*, 536 U.S. at 287 (quoting *Cannon*, 441 U.S. at 690–93).

190. *Id.* at 285 (quoting *Cannon*, 441 U.S. at 693 n.13). *Gonzaga* cites *Cannon* for a long list of statutes that do this, *Gonzaga*, 536 U.S. at 284–85 n.3 (citing *Cannon*, 441 U.S. at 690 n.13 (listing provisions)); although *Cannon* was discussing the implied-right-of-action standard, *Gonzaga* equated the step one inquiry in § 1983 cases to implied-right-of-action cases. *See supra* notes 175–81 and accompanying text.

191. *See Gonzaga*, 536 U.S. at 287 (quoting Alexander v. Sandoval, 532 U.S. 275, 289 (2001) (quoting California v. Sierra Club, 451 U.S. 287, 294 (1981))).

192. *Id.* at 287 (quoting *Cannon*, 441 U.S. at 690–93).

193. *Id.* at 284 (quoting *Cannon*, 441 U.S. at 691).

194. *Id.* at 288 (citations omitted) (quoting Blessing v. Freestone, 520 U.S. 329, 343–44 (1997)).

195. *Id.* at 288.

196. *Id.* at 288–89.

So although the Court quoted the *Blessing* factors,[197] it only did so in the context of walking through its case law before pointing out *Blessing*'s ambiguity and ultimately rejecting the *Blessing* factors.[198] On the following page is a breakdown of *Gonzaga*'s transformation of step one from the *Blessing* factors to the *Gonzaga* two-prong test.

197. *Id.* at 282–83 (citing *Blessing*, 520 U.S. at 340–41).
198. *See id.* at 283, 286.

***Blessing* Factors**	***Gonzaga*'s Impact**
"Congress must have intended that the provision in question benefit the plaintiff."[199]	Expressly rejected this factor as insufficient[200] and heightened the requisite showing, requiring that Congress use *terminology* expressly referencing the class of individuals to which the plaintiff belongs.[201]
"[T]he plaintiff must demonstrate that the right assertedly protected by the statute is not so 'vague and amorphous' that its enforcement would strain judicial competence."[202]	Abandoned this factor, so it is no longer a part of the personal right test.[203]
"[T]he statute must unambiguously impose a binding obligation on the States."[204]	Implicitly rejected this factor as too easily met[205] and raised the requisite showing to require that Congress *focus* on mandating that individuals' needs be met rather than setting parameters for the system, as a whole.[206]

199. *Blessing*, 520 U.S. at 340.

200. *See supra* notes 168–74 and accompanying text.

201. *Gonzaga*, 536 U.S. at 283; *see supra* notes 185–93; *see also* Midwest Foster Care & Adoption Ass'n v. Kincade, 712 F.3d 1190, 1199 (8th Cir. 2013) (recognizing that a statutory benefit is "necessary but not sufficient; the statutory text also 'must be "phrased in terms of the persons benefitted"'" (quoting *Gonzaga*, 536 U.S. at 284)); Cuvillier v. Taylor, 503 F.3d 397, 406 (5th Cir. 2007) ("[T]he Court made clear in *Gonzaga University* that individuals may be beneficiaries even though Congress did not confer a right on them."); *cf.* Bagenstos, *supra* note 64, at 363 ("No spending legislation affects all regions in exactly the same way, and all spending legislation could be seen as benefiting the people more generally.").

202. *Blessing*, 520 U.S. at 340–41; *see Gonzaga*, 536 U.S. at 292 (Breyer, J., concurring) ("Much of the statute's key language is broad and nonspecific. . . . Under these circumstances, Congress may well have wanted to make the agency remedy that it provided exclusive.").

203. *See Gonzaga*, 536 U.S. at 282–89. Justice Breyer, concurring in the judgment and joined by Justice Souter, would have cited this factor as an additional ground for concluding that Congress did not create a personal right because "[m]uch of the statute's key language is broad and nonspecific." *Id.* at 292 (Breyer, J., concurring).

204. *Blessing*, 520 U.S. at 341. When *Gonzaga* recites this factor, it does not even quote the actual factor language from *Blessing* but the next sentence: "the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms." *Gonzaga*, 536 U.S. at 282 (quoting *Blessing*, 520 U.S. at 341).

205. *See Gonzaga*, 536 U.S. at 288–89. The imposition of a binding obligation on the recipient of the funds is a part of every spending program. *See supra* note 7.

206. *See Gonzaga*, 536 U.S. at 288 (quoting *Blessing*, 520 U.S. at 343). As Judge Smith observed in dissent in *Midwest Foster Care & Adoption Ass'n v. Kincade*, 712

Applying the terminology prong, the Court found FERPA's nondisclosure provisions lack "individually focused terminology."[207] Rather, the provisions speak only to the agency's obligation, mandating "'[n]o funds shall be made available' to any 'educational agency or institution,' which has a prohibited 'policy or practice.'"[208] The Court stated, "This focus is two steps removed from the interests of individual students and parents and clearly does not confer the sort of '*individual* entitlement' that is enforceable under § 1983."[209]

Turning to the focus prong, the Court concluded that FERPA's nondisclosure provisions lacked the requisite individual focus because they (1) proscribe "a *policy or practice* of permitting the release of education records"[210]—"not individuals instances of disclosure,"[211] and (2) only require substantial compliance.[212] The Court noted that each of the "individual consent" provisions the plaintiff pointed the Court to were "in the context of describing the type of 'policy or practice' that triggers a funding prohibition."[213] Accordingly, FERPA's nondisclosure provisions "speak only in terms of *institutional policy and practice*" evincing an aggregate focus.[214] Having found neither prong of step one satisfied,[215] the *Gonzaga* Court characterized this as an easy case, stating there was "*no question* that FERPA's nondisclosure provisions fail to confer enforceable rights."[216]

Next, the Court turned to the step two consideration, FERPA's administrative enforcement mechanism apparently to bolster its step one conclusion.[217] Although the Court did not actually resolve whether FERPA's enforcement procedure was "'sufficiently comprehensive' to offer an independent basis for precluding private enforcement,"[218] it

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F.3d 1190 (8th Cir. 2013), the focus prong comes down to whether the provision focuses on getting an entity to behave a certain way, or on getting an individual his or her benefit addressed in the statute. *Kincade*, 712 F.3d at 1205 (Smith, J., dissenting) (citing *Gonzaga*, 536 U.S. at 288).

207. *Gonzaga*, 536 U.S. at 287.

208. *Id.* (citing 20 U.S.C. § 1232g(b)(1)).

209. *Id.* (citation omitted) (quoting *Blessing*, 520 U.S. at 343).

210. 20 U.S.C. § 1232g(b)(1) (2012).

211. *Gonzaga*, 536 U.S. at 288.

212. *Id.* (citing 20 U.S.C. § 1234c(a)).

213. *Id.* at 288–89.

214. *Id.* at 288 (emphasis added).

215. *Id.* at 287–89.

216. *Id.* at 287 (emphasis added).

217. *Id.* at 289.

218. *Id.* at 290 & n.8 (quoting Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 20 (1981)).

observed that it "further counsel[ed] against . . . finding a congressional intent to create individually enforceable rights."[219]

The Court noted, "Congress expressly authorized the Secretary of Education to '*deal with* [FERPA] *violations*' . . . and required the Secretary to 'establish or designate [a] review board' for investigating and adjudicating such violations."[220] Pursuant to this statutory authority, the Secretary set up the Family Policy Compliance Office to (1) receive written complaints of alleged FERPA violations from the public;[221] (2) investigate, notify, and request a response from the school;[222] (3) issue factual findings and identify steps the school must take to bring it into FERPA compliance in the event of a violation finding; [223] and (4) adjudicate noncomplying institutions in "exceptional cases."[224] The *Gonzaga* Court stated that FERPA's federal administrative procedures distinguished it from the statutes at issue in *Wright* and *Wilder*, both of which left aggrieved individuals without "any *federal* review mechanism."[225] Finally, the Court pointed to FERPA's legislative history, in which Congress centralized

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219. *Id.* at 290. However, the dissent characterized FERPA's administrative enforcement regime as "fall[ing] far short of what is necessary to overcome the presumption of enforceability." *Id.* at 298 (Stevens, J., dissenting) (emphasis added). The dissent went on to point out: "We have only found a comprehensive administrative scheme precluding enforceability under § 1983 in two of our past cases—*Middlesex County Sewerage Authority v. National Sea Clammers Assn.*, 453 U.S. 1 (1981), and *Smith v. Robinson*, 468 U.S. 992 (1984)," both of which the dissent found distinguishable. *Id.* (citations omitted). The dissent concluded that FERPA did not contain a comprehensive enforcement scheme that is compatible with individual enforcement as in *Sea Clammers* and *Smith* because "FERPA provides no guaranteed access to a formal administrative proceeding or to federal judicial review; rather, it leaves to administrative discretion the decision whether to follow up on individual complaints." *Id.* The dissent stated that as in *Blessing*, FERPA's administrative avenues are "far more limited than those in *Sea Clammers* and *Smith*," and thus fall short of precluding § 1983 enforcement. *Id.* (citing Blessing v. Freestone, 520 U.S. 329, 348 (1997)).

220. *Gonzaga*, 536 U.S. at 289 (quoting 20 U.S.C. § 1232g(f), (g)).

221. *Id.* (citing 34 C.F.R. § 99.63 (2001)).

222. *Id.* (citing 34 C.F.R. §§ 99.64(a)–(b), 99.65 (2001)).

223. *Id.* (citing 34 C.F.R. § 99.60(a), (b), (c)(1) (2001)); *see also* 34 C.F.R. §§ 99.63–99.67 (2001).

224. *Id.* at 297 (citing 20 U.S.C. § 1234).

225. *Id.* at 290 (emphasis added); *see* Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 522–23 (1990) (concluding that Congress did not foreclose a private judicial remedy under § 1983, despite "the Secretary's limited oversight" and "limited state administrative procedures"); Wright v. City of Roanoke Redevelopment & Hous. Auth., 479 U.S. 418, 428–29 (1987) (concluding that federal agency's "generalized powers" to audit and cut off federal funds and the availability of grievance procedures were insufficient to foreclose § 1983).

FERPA's federal administrative review procedure,[226] as weighing against § 1983 enforcement.[227] The Court found it "implausible to presume that the same Congress [that concentrated administrative review in such a way] nonetheless intended private suits to be brought before thousands of federal- and state-court judges, which could only result in the sort of 'multiple interpretations' the Act explicitly sought to avoid."[228]

D. Post-Gonzaga

The best evidence of *Gonzaga*'s impact on the *Blessing* factors—other than *Gonzaga* itself—is the Supreme Court's post-*Gonzaga* § 1983 cases. Post-*Gonzaga*, the Supreme Court has cited *Blessing*'s majority opinion in a majority opinion three times.[229] None of these cases mention the *Blessing* factors or provide an in-depth discussion of *Blessing*,[230] but *City of Rancho Palos Verdes v. Abrams* offers the most reliance.[231] The Supreme Court has also cited *Gonzaga* three times in a majority opinion,[232] but only *Abrams*[233] and *Armstrong v.*

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226. Congress added FERPA's "centralized review provision . . . just four months after FERPA's enactment due to 'concern that regionalizing the enforcement of [FERPA] may lead to multiple interpretations of it, and possibly work a hardship on parents, students, and institutions.'" *Gonzaga*, 536 U.S. at 290 (quoting 120 CONG. REC. 39,863 (1974) (joint statement)).

227. *Gonzaga*, 536 U.S. at 290 (quoting 120 CONG. REC. 39,863 (1974) (joint statement)).

228. *Id.*

229. *See* City of Rancho Palos Verdes v. Abrams, 544 U.S. 113, 120 (2005) (discussion to follow); *see also* Heffernan v. City of Paterson, 136 S. Ct. 1412, 1422 (2016) ("In order to seek redress through § 1983, . . . a plaintiff must assert the violation of a federal *right*, not merely a violation of federal *law*." (quoting Blessing v. Freestone, 520 U.S. 329, 340 (1997))); *cf.* Pharm. Research & Mfrs. of Am. v. Walsh, 538 U.S. 644, 675 (2003) (Scalia, J., concurring). In *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005), a post-*Gonzaga* case, the Supreme Court held that Title IX of the Education Amendments of 1972, a Spending Clause statute, confers an implied private right of action for retaliation. *Jackson*, 544 U.S. at 191 (Thomas, J., dissenting). However, the majority opinion of that case did not cite *Gonzaga* or discuss whether Title IX "unambiguously" conferred the right. *See id.*

230. *See generally* Heffernan v. City of Paterson, 136 S. Ct. 1412 (2016); Turner v. Rogers, 564 U.S. 431 (2011); City of Rancho Palos Verdes v. Abrams, 544 U.S. 113 (2005).

231. 544 U.S. 113, 120 (2005); *see infra* Section I.D.1.

232. *See* Armstrong v. Exceptional Child Ctr., Inc., 135 S. Ct. 1378, 1387–88 (2015) (discussion to follow); Brunner v. Ohio Republican Party, 555 U.S. 5, 6 (2008) (per curiam); City of Rancho Palos Verdes v. Abrams, 544 U.S. 113, 119–20 (2005); *see also* Pharm. Research & Mfrs. of Am. v. Walsh, 538 U.S. 644, 683 (2003) (Thomas, J., concurring); Face v. Nat'l Home Equity Mortg. Ass'n, 537 U.S. 802 (2002) (mem.).

233. 544 U.S. at 119–20.

Exceptional Child Center, Inc.[234] provide any discussion. *Abrams* is the only Supreme Court majority opinion that cites both *Blessing* and *Gonzaga*.[235] Accordingly, I will briefly address *Abrams* and *Armstrong*.

1. *Abrams*

Mark Abrams, residential property owner in the City of Rancho Palos Verdes, California,[236] brought a § 1983 action against the City following the denial of his permit application, alleging violation of his rights under the Telecommunications Act of 1996 (TCA).[237] The Supreme Court unanimously denied § 1983 relief, but Justice Stevens concurred only in the judgment and Justice Breyer filed a concurring opinion joined by Justices O'Connor, Souter, and Ginsberg.[238]

Although *Abrams* is the Supreme Court majority opinion that provides the most discussion of *Gonzaga*, it is still scant because the City conceded the TCA provision at issue gave Abrams a personal right.[239] Thus, *Abrams* only briefly addresses step one, but, in doing so, makes no mention of the *Blessing* factors and does not cite *Blessing* at all.[240] Instead, *Abrams* relied on *Gonzaga* for the following statement:

> As a threshold matter, the text of § 1983 permits the enforcement of "*rights*, not the broader or vaguer 'benefits' or 'interests.'" Accordingly, to sustain a § 1983 action, the plaintiff must demonstrate that the federal statute creates an individually enforceable right in the class of beneficiaries to which he belongs.[241]

Abrams only cites *Blessing* regarding step two, relying on *Blessing* to articulate the well-established rule regarding the presumption that

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234. 135 S. Ct. at 1387–88.
235. *Abrams*, 544 U.S. at 119–20.
236. *Id.* at 116.
237. *Id.* at 117–18; *see* 47 U.S.C. § 151 (2012). The TCA is not spending legislation, *MCI Telecomm. Corp. v. Ill. Bell Tel. Co.*, 222 F.3d 323, 342 (7th Cir. 2000) (stating Congress enacted the TCA pursuant to its Commerce Power), but *Abrams* "treats *Gonzaga* as establishing the effect of § 1983 itself," *McCready v. White*, 417 F.3d 700, 703 (7th Cir. 2005).
238. *Abrams*, 544 U.S. at 114.
239. *Id.* at 120.
240. *See id.* at 119–20.
241. *Id.* (quoting Gonzaga Univ. v. Doe, 536 U.S. 273, 283 (2002)).

comes into effect where step one is satisfied and how it may be rebutted at step two.[242] *Abrams* also cites *Blessing* in support of its observation that "in all of the cases in which we have held that § 1983 is available for violation of a federal statute, we have emphasized that the statute at issue . . . did *not* provide a private judicial remedy (or, in most of the cases, even a private administrative remedy) for the rights violated."[243] So, although the Court declined to adopt a *per se* rule, it observed that Congress providing "a more restrictive private remedy for statutory violations" generally supplants the § 1983 remedy.[244] Although the Court recognized that the TCA's remedies and statute of limitations were less generous than § 1983's, it held that Congress supplanted the § 1983 remedy "by providing a judicial remedy different from § 1983 in [the TCA] itself" because to hold otherwise "would distort the [TCA's] scheme of expedited judicial review and limited remedies," thwarting Congress's intent.[245]

2. *Armstrong*

In *Armstrong*, habilitation services providers sued Idaho officials under various theories, claiming Idaho's Medicaid reimbursement rates were lower than § 30(A) of the Medicaid Act[246] permitted, and asked the court to enjoin Idaho officials to increase these rates.[247] The Supreme Court granted certiorari to consider the Ninth Circuit's conclusion that the providers' suit could proceed as an implied right

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242. *Id.* (citing Blessing v. Freestone, 520 U.S. 329,341 (1997)).

243. *Id.* at 121–22 (citing *Blessing*, 520 U.S. at 348).

244. *Id.* at 121.

245. *Id.* at 122–23, 127.

246. 81 Stat. 911 (codified as amended at 42 U.S.C. § 1396a(a)(30)(A) (1968)). Section 30(A) requires a state's plan to:

> provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan . . . as may be necessary to safeguard against unnecessary utilization of such care and services and to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area . . . .

Armstrong v. Exceptional Child Ctr., Inc., 135 S. Ct. 1378, 1382 (2015) (quoting 42 U.S.C. § 1396a(a)(30)(A)).

247. *Armstrong*, 135 S. Ct. at 1382.

of action under the Supremacy Clause.[248] In a 5–4 decision,[249] the Court reversed, holding there is no "implied right of action contained in the Supremacy Clause."[250] In issuing this holding, the Court, relying on *Gonzaga*, made a relevant observation concerning *Wilder*[251]: "[O]ur later opinions plainly repudiate the ready implication of a § 1983 action that *Wilder* exemplified."[252] In addition, in an explanatory parenthetical, the *Armstrong* Court characterized *Gonzaga* as "expressly 'reject[ing] the notion,' implicit in *Wilder*, 'that [the Court's precedent] permit[ted] anything short of an unambiguously conferred right to support a cause of action brought under § 1983.'"[253]

In addition, although the service providers did not assert an implied right of action pursuant to § 30(A) itself,[254] a plurality made up of Justice Scalia (the author), Chief Justice Roberts, and Justices Alito and Thomas addressed *sua sponte* whether one existed.[255] Before applying the *Gonzaga* standard, the plurality took up the threshold question of whether Medicaid providers were categorically barred from asserting an implied right of action based on the contractual nature of Medicaid as a spending program.[256] The Court observed,

> The notion that [Medicaid providers] have a right to sue derives, perhaps, from the fact that they are beneficiaries of the federal-state Medicaid agreement, and that intended beneficiaries, in modern times at least, can sue to enforce the obligations of private contracting parties. We doubt, to begin with, that providers are intended beneficiaries (as opposed to mere incidental beneficiaries) of the Medicaid

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248. *Id.* at 1383.

249. Justice Scalia delivered the opinion of the Court with respect to all parts of the decision except Part IV, joined by Chief Justice Roberts and Justices Thomas, Breyer, and Alito. *Armstrong*, 135 S. Ct. at 1381. *See infra* notes 254–60 and accompanying text. Justice Breyer filed an opinion concurring in part and concurring in the judgment. *Armstrong*, 135 S. Ct. at 1388. Justice Sotomayor filed a dissenting opinion, joined by Justices Kennedy, Ginsburg, and Kagan. *Id.* at 1390 (Sotomayor, J., dissenting).

250. *Id.* at 1384.

251. Wilder v. Va. Hosp. Ass'n, 496 U.S. 498 (1990).

252. *Armstrong*, 135 S. Ct. at 1386 n.*.

253. *Id.* (quoting Gonzaga Univ. v. Doe, 536 U.S. 273, 283 (2002)).

254. *Id.* at 1387. The service providers also did not allege a § 1983 claim. *Id.* at 1386 n.*.

255. *Armstrong*, 135 S. Ct. at 1387–88 (plurality opinion).

256. *Id.* (plurality opinion).

> agreement, which was concluded for the benefit of the infirm whom the providers were to serve, rather than for the benefit of the providers themselves. More fundamentally, however, the modern jurisprudence permitting intended beneficiaries to sue does not generally apply to contracts between a private party and the government—much less to contracts between two governments.[257]

The plurality went on to dispense with the unalleged implied-right-of-action theory in two sentences. The Court, relying on *Gonzaga*, explained: "Our precedents establish that a private right of action under federal law is not created by mere implication, but must be 'unambiguously conferred.' Nothing in the Medicaid Act suggests that Congress meant to change that for the commitments made under § 30(A)."[258] The plurality concluded that Medicaid providers did not have a private right of action under the Medicaid Act, itself, to enforce § 30(A) of the Act.[259] In sum, *Abrams* and *Armstrong* leave the *Gonzaga* two-prong test unaltered.[260]

In a nut shell, Part I's journey through the Supreme Court's personal rights jurisprudence shows the Court was slow to recognize § 1983's plain language application to statutes and, following a brief period of friendliness to such claims, has rolled up the welcome mat. Post-*Wilder*, the Court appears to be ridding the doctrine of its potency.[261] *Gonzaga*'s restrictive test coupled with its hostile tone

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257. *Id.* (plurality opinion) (citations omitted).

258. *Id.* (plurality opinion) (quoting Gonzaga Univ. v. Doe, 536 U.S. 273, 283 (2002) (citations omitted)). The Court also held that the suit could not proceed in equity. *Id.* at 1384–85.

259. *Id.* at 1387–88 (plurality opinion).

260. *See supra* notes 236–59 and accompanying text; *see also* Planned Parenthood of Kan. v. Andersen, 882 F.3d 1205, 1229 n.16 (10th Cir. 2018) ("*Armstrong* did no more than reaffirm *Gonzaga*'s requirement that rights must be unambiguously conferred.").

261. *See supra* Part I; *see also* Unite Here Local 355 v. Mulhall, 571 U.S. 83, 85 (2013) (Breyer, J., dissenting) (acknowledging "the Court's more restrictive views on private rights of action in recent decades"); Lankford v. Sherman, 451 F.3d 496, 508 (8th Cir. 2006) ("[T]he Supreme Court has rarely found enforceable rights in spending clause legislation . . . ."); Johnson v. Hous. Auth. of Jefferson Par., 442 F.3d 356, 360 (5th Cir. 2006) ("The Court's approach to § 1983 enforcement of federal statutes has been increasingly restrictive; in the end, very few statutes are held to confer rights enforceable under § 1983."); Kapps v. Wing, 404 F.3d 105, 127 (2d Cir. 2005) ("[T]he Court has appeared to be increasingly reluctant to find § 1983–enforceable rights in statutes which . . . set forth their requirements in the context of delineating the obligations that accompany participation in [spending] programs."); WRIGHT &

signals a significant limiting of the availability of the § 1983 remedy for violations of spending clause legislation.[262] Post-*Gonzaga* lower federal court cases bear this out.[263]

II. *GONZAGA*'S FALLOUT IN THE CIRCUIT COURTS

This Part (1) synthesizes a mass of federal circuit cases interpreting *Gonzaga* into a typology of four approaches, (2) reveals both inter- and intra-circuit disagreement as to the step one test, and (3) identifies circuit level issues resulting from this discord.

Circuit decisions fall into three categories of misinterpretation of *Gonzaga* and one category coming close to the correct construction:

1. **Minimal Impact**: acknowledges *Gonzaga*'s rights-focus, but with little emphasis, and applies the original *Blessing* factors.

MILLER, *supra* note 14, at § 3573.2 ("The Court has narrowed its view of what 'laws' may be invoked under § 1983.").

262. *See Gonzaga*, 536 U.S. at 280–81; Samberg-Champion, *supra* note 7, at 1839 ("Academics and lawyers have noted *Gonzaga*'s obvious hostility toward private enforcement of Spending Clause statutes."); *see supra* Section I.C. *Cf.* Sarah D. Greenberger, *Enforceable Rights, No Child Left Behind, and Political Patriotism: A Case for Open-Minded § 1983 Jurisprudence*, 153 U. PA. L. REV. 1011, 1042 (2005) ("[L]anguage in *Gonzaga* expressing a general disinclination to imply rights might drown out the decision's precise language suggesting situations when courts can and should find rights.").

263. *See* Bobroff, *supra* note 12, at 28 (recognizing *Gonzaga*'s "repercussions have been felt in the dismissal of numerous § 1983 cases involving Medicaid, housing statutes, protections for foster children, and other federal benefits"); Devi M. Rao, *"Making Medical Assistance Available": Enforcing the Medicaid Act's Availability Provision Through § 1983 Litigation*, 109 COLUM. L. REV. 1440, 1455 (2009) ("Although Medicaid has been the primary focus of most post-*Gonzaga* enforcement suits, courts have addressed education, housing, child support, and adoption assistance under statutes passed using Congress's spending power. These cases show a general trend away from enforceability . . . .") (footnotes omitted). *But see* BT Bourbonnais Care, LLC v. Norwood, 866 F.3d 815, 820–21 (7th Cir. 2017) ("[N]othing in *Armstrong*, *Gonzaga*, or any other case we have found supports the idea that plaintiffs are now flatly forbidden in section 1983 actions to rely on a statute passed pursuant to Congress's Spending Clause powers."); *see, e.g.,* S.R. *ex rel* Rosenbauer v. Pa. Dep't of Human Servs., 309 F. Supp. 3d 250, 255–62 (M.D. Pa. 2018) (holding various Medicaid Act provisions confer personal rights enforceable under § 1983).

2. **Too Narrow**:

   A. **Parallel**: puts the original *Blessing* factors and *Gonzaga*'s requirements on equal footing, forming a two-part test for step one.

   B. **First-Factor Only**: recognizes *Gonzaga* tweaked the first *Blessing* factor to require that the asserted statute evince Congress's intent to confer a personal right but applies the original second and third *Blessing* factors.

3. **Quasi-Proper**: replaces the *Blessing* factors entirely with a standard close to the *Gonzaga* two-prong test.

4. **Too Broad**: replaces the *Blessing* factors with three considerations: the first two reflect the *Gonzaga* two-prong test and the third is the enforcement-mechanism inquiry.

Each of the above interpretations besides the quasi-proper approach misconstrue *Gonzaga*'s impact on step one of the personal rights analysis. Three of the four circuit approaches display a misunderstanding of *Gonzaga* with two either reducing *Gonzaga* to a mere clarification of the *Blessing* factors or putting the two on equal footing and one bloating *Gonzaga*'s impact by bleeding step two into step one.[264]

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264. *See, e.g.*, Newark Parents Ass'n v. Newark Pub. Sch., 547 F.3d 199, 207–08 (3d Cir. 2008) ("We noted . . . *Gonzaga* had not abandoned [the *Blessing*] test . . . ." (citing Sabree *ex rel.* Sabree v. Richman, 367 F.3d 180, 186–87 (3d Cir. 2004)); Watson v. Weeks, 436 F.3d 1152, 1159 (9th Cir. 2006) ("The Supreme Court clarified the first prong of the *Blessing* test in *Gonzaga* . . . ."); ASW v. Oregon, 424 F.3d 970, 975 n.6 (9th Cir. 2005) ("In *Gonzaga University*, the Court acknowledged the continuing relevance of the *Blessing* test . . . ."); Rio Grande Cmty. Health Ctr., Inc. v. Rullan, 397 F.3d 56, 73 (1st Cir. 2005) ("*Gonzaga* tightened up the *Blessing* requirements."); *see also* Greenberger, *supra* note 262, at 1042 ("*Gonzaga* should be interpreted by courts as a reaffirmation of the *Blessing* test for creating rights and the *Thiboutot* presumption for their enforcement under section 1983."). *But see* Doe v. Kidd, 501 F.3d 348, 365–66 (4th Cir. 2007) (Whitney, J., concurring in the judgment in part, and dissenting in part) ("With respect, I do not believe the [*Blessing*] three-factor test . . . should control our analysis in light of the Supreme Court's more current opinion in *Gonzaga* . . . .") (footnote omitted); *cf.* Bontrager v. Indiana Family & Soc. Servs. Admin., 697 F.3d 604, 607 (7th Cir. 2012) ("*Gonzaga* may have taken a new analytical approach . . . ." (quoting Bertrand *ex rel.* Bertrand v. Maram, 495 F.3d 452, 456 (7th Cir. 2007)); Day v. Apoliona, 496 F.3d 1027, 1035 (9th Cir. 2007) ("*Gonzaga* arguably

First, the minimal impact approach is puzzling. By treating *Gonzaga* as a mere application of *Blessing*, this approach ignores *Gonzaga*'s test and tone.[265] At a minimum, there is simply no way to read *Gonzaga* and continue to apply the original first *Blessing* factor.[266] Even though circuit cases taking varying approaches continue to recite the original *Blessing* factors,[267] the majority acknowledges later that the first *Blessing* factor is bad law.[268] Moreover, the Court has never applied the *Blessing* factors other than in *Blessing* itself and has only articulated them once post-*Blessing*—in *Gonzaga* where the Court went on to repudiate them.[269] Accordingly, the minimum-impact approach is the worst of the various approaches for step one.

Second, both too-narrow approaches shortchange *Gonzaga*. The parallel approach is incorrect because *Gonzaga* did not add another layer to the *Blessing* test; it abandoned it entirely.[270] The first-factor only approach, although the majority approach,[271] is also wrong. Although there is a range in the detail with which the first-factor only courts address *Gonzaga*, most simply acknowledge that the word "benefit" in the first *Blessing* factor has been replaced with the word "right." But reducing *Gonzaga* to this change of wording alone misses its overhaul of the step one inquiry. *Gonzaga* nullified *Blessing*'s factor approach by adopting two, mandatory requirements—individual terminology and individual focus—which, if not met, necessitate a finding the statute at issue does not confer a personal

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shifted the focus of § 1983 analysis more than *Blessing* . . . ."); *Rio Grande Cmty. Health Ctr.*, 397 F.3d at 73 (*Gonzaga* "did not precisely follow the *Blessing* test but rather relied on several somewhat different factors in determining whether a right existed.").

265. *See supra* note 264.

266. *See supra* Section I.C.

267. S*ee, e.g.*, N.Y. Citizens' Coal. for Children v. Poole, No. 14-2919, 2019 WL 1747011, at *5 (2d Cir. Apr. 19, 2019); Planned Parenthood Ariz. Inc. v. Betlach, 727 F.3d 960, 966 (9th Cir. 2013).

268. *See infra* notes 271, 282–93 and accompanying text.

269. S*ee supra* Part I.

270. *See supra* notes 201–07 and accompanying text. For example, recently employing the parallel approach and "hold[ing] without difficulty" that the *Blessing* factors were met, the Middle District of Pennsylvania pointed out the defendants "offer[ed] no argument that the three requirements of the *Blessing* framework are not satisfied," focusing "each of [their] arguments . . . on their contention that the [relevant provision] does not unambiguously confer individual rights." *See* S.R. *ex rel* Rosenbauer v. Pa. Dep't of Human Servs., 309 F. Supp. 3d 250, 260–61 (M.D. Pa. 2018). The defendants recognized what the court did not—the Blessing factors have no application in a post-*Gonzaga* world. *See id.*

271. *See infra* notes 283–94 and accompanying text.

right without any analysis of *Blessing*'s second and third factors.[272] In sum, while both too narrow approaches employ pieces of *Gonzaga*, they fail to recognize *Gonzaga* transformed the test and rendered the *Blessing* factors obsolete.

Third, while an understandable mis-interpretation of *Gonzaga* in that it is exactly what Justice Stevens's dissent accused the majority of doing[273]—the too-broad approach is incorrect. The Court did not add an enforcement-provision prong, which is what the step two query assesses,[274] to the step one personal right inquiry.[275] *Gonzaga* makes three statements about FERPA's enforcement mechanism *after* issuing its step one conclusion, i.e. FERPA's nondisclosure provisions do not create a personal right:

> 1. "Our conclusion that FERPA's nondisclosure provisions fail to confer enforceable rights is *buttressed* by the mechanism that Congress chose to provide for enforcing those provisions."[276]
>
> 2. FERPA's "administrative procedures squarely distinguish this case from *Wright* and *Wilder*, where an aggrieved individual lacked any federal review mechanism, and further counsel against our finding a congressional intent to create individually enforceable private rights."[277]
>
> 3. "We need not determine whether FERPA's procedures are 'sufficiently comprehensive' to offer an *independent* basis for precluding private enforcement, due to our finding that FERPA creates no private right to enforce."[278]

The *Gonzaga* Court was not issuing a step two holding as to whether FERPA's enforcement mechanism illustrated Congress's intent to

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272. *See supra* Section I.C.

273. Suter v. Artist M., 503 U.S. 347, 376 (Blackmun, J., dissenting).

274. *See supra* note 77 and accompanying text.

275. *See infra* notes 276–80 and accompanying text; *see also* Cal. State Foster Parent Ass'n v. Wagner, 624 F.3d 974, 982 (9th Cir. 2010) ("The State is of course correct that the absence of an administrative enforcement mechanism does not compel the conclusion that Congress intended to create a right enforceable in the courts.").

276. Gonzaga Univ. v. Doe, 536 U.S. 273, 289 (2002) (emphasis added).

277. *Id.* at 289–90 (citation omitted).

278. *Id.* at 290 n.8 (emphasis added) (citation omitted).

disallow § 1983 enforcement, despite creating a personal right—because the Court has already stated there is no such right. Rather, the Court was peeking ahead to step two and foreshadowing its conclusion had it needed to get there. The *Suter* Court made the same maneuver,[279] likely to soften its step one conclusion finding no personal right. Later, *Gonzaga* made clear it was not relying on FERPA's administrative procedures (step two) as a rationale for its holding that FERPA creates no personal right (step one) when it summarized its holding: "FERPA's nondisclosure provisions contain no rights-creating language[;] they have an aggregate, not individual, focus[;] and they serve primarily to direct the Secretary of Education's distribution of public funds to educational institutions. They therefore create no rights enforceable under § 1983."[280] So, *Gonzaga* does not restructure the step one and two dichotomy as the too-broad approach does.

Regarding the circuits, most circuits have precedent falling in multiple categories,[281] making it impossible to classify a circuit overall. The exceptions are the Tenth Circuit, which has uniformly adopted the first-factor only approach,[282] and the D.C. Circuit, which has utilized the minimal-impact approach in its only case on point.[283]

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279. *See supra* notes 121–22 and accompanying text.

280. *Gonzaga,* 536 U.S. at 290.

281. I could not find a case from the Federal Circuit citing either *Blessing* or *Gonzaga*. Some of the cases do not fit any of the categories perfectly, so I have classified them in the category closest to the court's approach.

282. *See* Planned Parenthood of Kan. v. Andersen, 882 F.3d 1205, 1225–26 (10th Cir. 2018) (first-factor only); Hobbs *ex rel.* Hobbs v. Zenderman, 579 F.3d 1171, 1179–83 (10th Cir. 2009) (same); Mandy R. *ex rel.* Mr. & Mrs. R. v. Owens, 464 F.3d 1139, 1146–47 (10th Cir. 2006) (same); Qwest Corp. v. City of Santa Fe, 380 F.3d 1258, 1265 (10th Cir. 2004) (quasi-proper).

283. The United States Court of Appeals for the District of Columbia Circuit has only issued one opinion citing both *Blessing* and *Gonzaga*. *See* DuBerry v. D.C., 824 F.3d 1046, 1052–55 (D.C. Cir. 2016) (minimal impact). *But see* Barry Farm Tenants v. D.C. Hous. Auth., 311 F. Supp.3d 57, 75–76 (D.D.C. 2018) (first-factor only).

For the rest of the circuits, I have broken the precedent out by circuit with case-by-case categorizations in the notes: First Circuit,[284] Second Circuit,[285] Third Circuit[286] Fourth Circuit,[287] Fifth Circuit,[288]

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284. *See* DeCambre v. Brookline Hous. Auth., 826 F.3d 1, 10–13 (1st Cir. 2016), *cert. denied*, 137 S. Ct. 813 (2017) (first-factor only); Town of Portsmouth v. Lewis, 813 F.3d 54, 62–63 (1st Cir. 2016) (too broad); Colon-Marrero v. Velez, 813 F.3d 1, 17–20 (1st Cir. 2016) (first-factor only); Rio Grande Cmty. Health Ctr., Inc. v. Rullan, 397 F.3d 56, 73 n.10 (1st Cir. 2005) (too broad/parallel); Long Term Care Pharmacy All. v. Ferguson, 362 F.3d 50, 57 (1st Cir. 2004) (too broad); Rolland v. Romney, 318 F.3d 42, 51–56 (1st Cir. 2003) (minimal impact); Bryson v. Shumway, 308 F.3d 79, 88–89 (1st Cir. 2002) (minimal impact).

285. *See* N.Y. Citizens' Coal. for Children v. Poole, No. 14-2919, 2019 WL 1747011, at **5–9 (2d Cir. Apr. 19, 2019) (first-factor only); Davis v. Shah, 821 F.3d 231, 244 (2d Cir. 2016); Allco Finance Ltd. v. Klee, 805 F.3d 89, 95 (2d Cir. 2015) (first-factor only); Briggs v. Bremby, 792 F.3d 239, 242–45 (2d Cir. 2015) (first-factor only); Backer *ex rel.* Freedman v. Shah, 788 F.3d 341, 344 (2d Cir. 2015) (minimal impact); Torraco v. Port Auth. of N.Y. & N.J., 615 F.3d 129, 136 (2d Cir. 2010) (minimal impact); Loyal Tire & Auto Ctr., Inc. v. Town of Woodbury, 445 F.3d 136, 149–50 (2d Cir. 2006) (quasi-proper); Wachovia Bank, N.A. v. Burke, 414 F.3d 305, 322 (2d Cir. 2005) (minimal impact); Rabin v. Wilson-Coker, 362 F.3d 190, 201 (2d Cir. 2004) (quasi-proper); Taylor v. Vt. Dep't of Educ., 313 F.3d 768, 784–86 (2d Cir. 2002) (quasi-proper).

286. *See* Health Sci. Funding, LLC v. N.J. Dep't of Health & Human Servs., 658 Fed. Appx. 139, 140 (3d Cir. 2016) (too broad); Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Port Auth. of N.Y. & N.J., 730 F.3d 252, 254–58 (3d Cir. 2013) (minimal impact); N.J. Primary Care Ass'n v. N.J. Dep't of Human Servs., 722 F.3d 527, 538 (3d Cir. 2013) (minimal impact); Lewis v. Alexander, 685 F.3d 325, 344–45 (3d Cir. 2012) (first-factor only); Grammer v. John J. Kane Reg'l Ctrs.–Glen Hazel, 570 F.3d 520, 527 (3d Cir. 2009) (parallel); Doe v. Pennsylvania Bd. of Prob. & Parole, 513 F.3d 95, 103–04 (3d Cir. 2008) (too broad); Newark Parents Ass'n v. Newark Pub. Sch., 547 F.3d 199, 203–04 (3d Cir. 2008) (too broad); Three Rivers Ctr. for Indep. Living v. Hous. Auth. of Pittsburgh, 382 F.3d 412, 419–20 (3d Cir. 2004) (quasi-proper); Sabree *ex rel.* Sabree v. Richman, 367 F.3d 180, 189–90 (3d Cir. 2004) (parallel).

287. *See* Tankersley v. Almand, 837 F.3d 390, 404–05 (4th Cir. 2016) (first-factor only); Clear Sky Car Wash LLC v. City of Chesapeake, 743 F.3d 438, 442 (4th Cir. 2014) (quasi-proper); Hensley v. Koller, 722 F.3d 177, 181–83 (4th Cir. 2013) (first-factor only); Pee Dee Health Care, P.A. v. Sanford, 509 F.3d 204, 210–12, n.11 (4th Cir. 2007) (parallel); Doe v. Kidd, 501 F.3d 348, 355–56 (4th Cir. 2007) (minimal impact).

288. *See* Legacy Cmty. Health Servs., Inc. v. Smith, 881 F.3d 358, 371–72 (5th Cir. 2018), *as revised* (Feb. 1, 2018) (parallel); Romano v. Greenstein, 721 F.3d 373, 377–78 (5th Cir. 2013) (parallel); Delancy v. City of Austin, 570 F.3d 590, 592–93 (5th Cir. 2009) (quasi-proper); Anderson v. Jackson, 556 F.3d 351, 356–59 (5th Cir. 2009) (first-factor only); Sn. Bell Tel., LP v. City of Houston, 529 F.3d 257, 260 (5th Cir. 2008) (too broad); Equal Access for El Paso, Inc. v. Hawkins, 509 F.3d 697, 702–03 (5th Cir. 2007) (first-factor only); Cuvillier v. Taylor, 503 F.3d 397, 402–08 (5th Cir. 2007) (quasi-proper); Johnson v. Hous. Auth. of Jefferson Parish, 442 F.3d 356, 360 (5th Cir. 2006) (first-factor only); S.D. *ex rel.* Dickson v. Hood, 391 F.3d 581, 602–03 (5th Cir. 2004) (first-factor only).

Sixth Circuit,[289] Seventh Circuit,[290] Eighth Circuit,[291] Ninth Circuit,[292] and Eleventh Circuit.[293] This inter- and intra-circuit

289. *See* D.O. v. Glisson, 847 F.3d 374, 377–78 (6th Cir. 2017), *cert. denied*, 138 S. Ct. 316 (2017) (first-factor only); Barry v. Lyon, 834 F.3d 706, 716 (6th Cir. 2016) (minimal impact); Hughlett v. Romer-Sensky, 497 F.3d 557, 562 (6th Cir. 2006) (too broad); Westside Mothers v. Olszewski, 454 F.3d 532, 541–43 (6th Cir. 2006) (first-factor only); Johnson v. City of Detroit, 446 F.3d 614, 621 (6th Cir. 2006) (first-factor only); Harris v. Olszewski, 442 F.3d 456, 461 (6th Cir. 2006) (first-factor only); Caswell v. City of Detroit Hous. Comm'n, 418 F.3d 615, 618–20 (6th Cir. 2005) (first-factor only); Sandusky Cty. Democratic Party v. Blackwell, 387 F.3d 565, 572 (6th Cir. 2004) (first-factor only).

290. *See* BT Bourbonnais Care, LLC v. Norwood, 866 F.3d 815, 820–22 (7th Cir. 2017) (minimal impact); Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't Health, 699 F.3d 962, 972–74 (7th Cir. 2012) (first-factor only); Bontrager v. Ind. Family & Soc. Servs. Admin., 697 F.3d 604, 606–07 (7th Cir. 2012) (minimal impact); Ind. Prot. & Advocacy Servs. v. Ind. Family & Soc. Servs. Admin., 603 F.3d 365, 375 (7th Cir. 2010) (quasi-proper); Jogi v. Voges, 480 F.3d 822, 827–28 (7th Cir. 2007) (quasi-proper); McCready v. White, 417 F.3d 700, 703 (7th Cir. 2005) (quasi-proper).

291. *See* Osher v. City of St. Louis, 903 F.3d 698, 702 (8th Cir. 2018) (too broad); Does v. Gillespie, 867 F.3d 1034, 1039–40 (8th Cir. 2017) (too broad); Spectra Commc'ns. Grp., LLC v. City of Cameron, 806 F.3d 1113, 1118 (8th Cir. 2015) (quasi-proper); Midwest Foster Care & Adoption Ass'n v. Kincade, 712 F.3d 1190, 1195–202 (8th Cir. 2013) (too broad); Ctr. for Special Needs Tr. Admin., Inc. v. Olson, 676 F.3d 688, 698–700 (8th Cir. 2012) (minimal impact); Colbert v. Roling, 233 Fed. Appx. 587, 589 (8th Cir. 2007) (minimal impact); Lankford v. Sherman, 451 F.3d 496, 508–09 (8th Cir. 2006) (first-factor only); Pediatric Specialty Care, Inc. v. Ark. Dept. of Human Servs., 443 F.3d 1005, 1014 (8th Cir. 2006) (quasi-proper); Walters v. Weiss, 392 F.3d 306, 312–13 (8th Cir. 2004) (minimal impact); *see also Spectra Commc'ns Grp., LLC* , 806 F.3d at 1118–20 (stating the test is whether Congress intended to create a personal right without fleshing out any factors or prongs); Frison v. Zebro, 339 F.3d 994, 998–1000 (8th Cir. 2003) (same).

292. *See* Stilwell v. City of Williams, 831 F.3d 1234, 1242 n.5 (9th Cir. 2016) (quasi-proper); Cal. Ass'n of Rural Health Clinics v. Douglas, 738 F.3d 1007, 1011–13 (9th Cir. 2013) (minimal impact); Planned Parenthood Ariz. Inc. v. Betlach, 727 F.3d 960, 965–68 (9th Cir. 2013) (minimal impact); All. of Nonprofits for Ins., Risk Retention Grp. v. Kipper, 712 F.3d 1316, 1325–26 (9th Cir. 2013) (first-factor only); *Cal. Ass'n of Rural Health Clinics*, 738 F.3d at 1012 (first-factor only); Henry A. v. Willden, 678 F.3d 991, 1005 (9th Cir. 2012) (first-factor only); Crowley v. Nev. *ex rel.* Nev. Sec'y of State, 678 F.3d 730, 735 (9th Cir. 2012) (minimal impact); Developmental Servs. Network v. Douglas, 666 F.3d 540, 546–48 (9th Cir. 2011) (first-factor only); Cal. State Foster Parent Ass'n v. Wagner, 624 F.3d 974, 978–82 (9th Cir. 2010) (minimal impact and too broad); AlohaCare v. Haw. Dep't of Human Serv's., 572 F.3d 740, 745–46 (9th Cir. 2009) (quasi-proper); Guzman v. Shewry, 552 F.3d 941, 952–53 (9th Cir. 2009) (first-factor only); Day v. Apoliona, 496 F.3d 1027, 1034–38 (9th Cir. 2007) (parallel); Ball v. Rodgers, 492 F.3d 1094, 1103–16 (9th Cir. 2007) (first-factor only); Watson v. Weeks, 436 F.3d 1152, 1159 (9th Cir. 2006) (first-factor only); ASW v. Oregon, 424 F.3d 970, 975–77 (9th Cir. 2005) (first-factor only); Sanchez v. Johnson, 416 F.3d 1051, 1056–62 (9th Cir. 2005) (quasi-proper); Price v. City of Stockton, 390 F.3d 1105, 1109 (9th Cir. 2004) (first-factor only); Save Our Valley v. Sound Transit, 335 F.3d 932, 936 (9th Cir. 2003) (first-factor only).

disagreement on the personal right standard both (1) violates stare decisis principles and (2) exhibits unfairness, unpredictability, and inefficiency.

Pursuant to vertical stare decisis, not only the Supreme Court's result—but also its *test*—is binding on lower courts.[294] Moreover, horizontal stare decisis requires that within a circuit, a published panel decision binds the circuit "absent *en banc* reconsideration or a superseding contrary decision by the Supreme Court."[295] Both types of stare decisis "play[] an important role in orderly adjudication" and "serve[] the broader societal interests in evenhanded, consistent, and predictable application of legal rules."[296] In addition, adhering to the horizontal stare decisis principle "obviates the need for repeated appeals."[297]

Almost every circuit decision administering the personal right test either stretches *Gonzaga* too far or cabins it, violating the bedrock

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293. *See* Martes v. Chief Exec. Officer of S. Broward Hosp. Dist., 683 F.3d 1323, 1326 (11th Cir. 2012) (too broad); Houston v. Williams, 547 F.3d 1357, 1361 (11th Cir. 2008) (first-factor only); Collier v. Dickinson, 477 F.3d 1306, 1310–11 (11th Cir. 2007) (first-factor only); Arrington v. Helms, 438 F.3d 1336, 1345 (11th Cir. 2006) (too-broad); Schwier v. Cox, 340 F.3d 1284, 1290–92 (11th Cir. 2003) (parallel); 31 Foster Children v. Bush, 329 F.3d 1255, 1270 (11th Cir. 2003) (too broad).

294. United States v. Duvall, 740 F.3d 604, 609 (D.C. Cir. 2013). "[O]nce a rule, test, standard, or interpretation has been adopted by the Supreme Court, that same rule, test, standard, or interpretation must be used by lower courts in later cases." *Id.* at 609–10 (citing Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 67 (1996) ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound.")); *see also* Randall v. Sorrell, 548 U.S. 230, 243 (2006) (Breyer, J., plurality) (stating stare decisis "commands judicial respect for a court's earlier decisions and the rules of law they embody"); Cty. of Allegheny v. Am. Civil Liberties Union, Greater Pittsburgh Chapter, 492 U.S. 573, 668 (1989) (Kennedy, J., concurring in part and dissenting in part) ("As a general rule, the principle of stare decisis directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law."); United States v. Martinez-Cruz, 736 F.3d 999, 1006 (D.C. Cir. 2013) (Kavanaugh, J., dissenting) ("As a lower court in a system of absolute vertical stare decisis headed by one Supreme Court, it is essential that we follow both the words and the music of Supreme Court opinions.").

295. United States v. Springer, 875 F.3d 968, 975 (10th Cir. 2017), *cert. denied*, 138 S. Ct. 2002 (2018) (quotation omitted) (citing Green Sol. Retail, Inc. v. United States, 855 F.3d 1111, 1115 (10th Cir. 2017).

296. Thomas v. Wash. Gas Light Co., 448 U.S. 261, 272 (1980) (footnote omitted); *see* Bormuth v. Cty. of Jackson, 870 F.3d 494, 520 (6th Cir. 2017) (Rogers, J., concurring), *cert. denied sub nom*, Bormuth v. Jackson Cty., 138 S. Ct. 2709 (2018) (stating stare decisis rules "protect[] the fundamental interest of deciding like cases alike (basic fairness), and the interest of having people know what the law is (notice)").

297. *Bormuth*, 870 F.3d at 520 (Rogers, J., concurring).

principle of vertical stare decisis.[298] Furthermore, all but two circuits exhibit conflicting tests among their panels,[299] contravening the horizontal stare decisis concept.[300] The circuit courts' failure to adhere to the *Gonzaga* test injects uncertainty as to the contours of the personal rights doctrine and, in turn, inequity and inefficiency. For example, foster parents in the Sixth and Ninth Circuits can use § 1983 to enforce their personal right to foster care payments that comply with the AACWA, while those in the Eighth Circuit cannot.[301] Moreover, patients in the Fifth, Sixth, Seventh, Ninth, and Tenth Circuits can utilize § 1983 to challenge a State's determination regarding a "qualified" Medicaid provider,[302] while those in the Eighth Circuit cannot.[303] Certainly, the courts' treatment of *Gonzaga* has a direct relationship with their personal right conclusions.[304] Moreover, unpredictability abound where almost every circuit exhibits multiple approaches to the *Gonzaga* test, making it is a toss-up as to which

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298. *See supra* notes 264–93 and accompanying text.

299. *See supra* notes 281–93 and accompanying text.

300. *See supra* note 295 and accompanying text.

301. S*ee infra* note 304.

302. *See* 42 U.S.C. § 1396a(a)(23) (providing that a state's Medicaid plan must provide beneficiaries with their choice of provider).

303. *Compare* Planned Parenthood of Kan. & Mid-Mo. v. Andersen, 882 F.3d 1205, 1224 (10th Cir. 2018), Planned Parenthood of Gulf Coast, Inc. v. Gee (Gee II), 862 F.3d 445, 459–60 (5th Cir. 2017), *rehearing en banc denied by an equally divided court*, 876 F.3d 699 (5th Cir. 2017), Planned Parenthood of Ariz. Inc. v. Betlach, 727 F.3d 960, 966–68 (9th Cir. 2013), Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't Health, 699 F.3d 962, 977 (7th Cir. 2012), *and* Harris v. Olszewski, 442 F.3d 456, 459 (6th Cir. 2006), *with* Does v. Gillespie, 867 F.3d 1034, 1046 (8th Cir. 2017) (holding that there was no enforceable federal right of action under § 1983). *See* Gee v. Planned Parenthood of Gulf Coast, Inc., 139 S. Ct. 408, 409 (2018) (Thomas, J., dissenting from denial of cert) ("[P]atients in different States—even patients with the same providers—have different rights to challenge their State's provider decisions.").

304. Pursuant to the Adoption Assistance and Child Welfare Act (AACWA), 42 U.S.C. § 675(4)(A), a divided panel of the Second, Sixth, and Ninth Circuits agree foster parents have a personal right to foster care payments that "cover" the costs listed in the AACWA. *See* N.Y. Citizens' Coal. for Children v. Poole, No. 14-2919, 2019 WL 1747011, at **1, 5–9 (2d Cir. Apr. 19, 2019) (applying the first-factor only approach); D.O. v. Glisson, 847 F.3d 374, 378 (6th Cir. 2017) (applying the first-factor only approach), *cert. denied*, 138 S. Ct. 316 (2017); Cal. State Foster Parent Ass'n v. Wagner, 624 F.3d 974, 978–82 (9th Cir. 2010) (applying the minimal-impact approach initially and then giving a nod to the too-broad approach by citing that the AACWA's lack of an administrative review "buttressed" its conclusion). However, a divided panel of the Eighth Circuit disagreed. *See* Midwest Foster Care & Adoption Ass'n v. Kincade, 712 F.3d 1190, 1196–202 (8th Cir. 2013) (applying the too-broad approach and explaining, "[d]espite the relative lack of federal review opportunities, . . . the other elements of *Gonzaga*'s analysis of *Blessing*'s first prong strongly tilt against the finding of an unambiguous intent to create an individually enforceable right.").

approach any given panel will apply, which leaves litigants in an untenable position and encourages appeals.

By largely failing to use the *Gonzaga* two-prong test for step one of the personal right analysis, the circuit courts have compounded the difficulties in an already complicated area of the law.[305] Moreover, the enormous scope of spending programs means that an incorrect and inconsistent personal right test has a far-reaching impact on beneficiaries, states, policy, and potential personal rights.[306] Thus, the circuit courts should rid their step one personal right analyses of the *Blessing* factors and use the *Gonzaga* two-prong test. Furthermore, given the breadth and depth of circuit variability, this issue is primed for the Supreme Court to revisit it. Citing this widespread disagreement, many states have asked the Court to do so.[307]

III. *GONZAGA*'S REPERCUSSIONS

Gonzaga has reverberated through the federal courts, shaking up the personal rights doctrine. First, there is the debate surrounding *Wright* and *Wilder*'s application in a post-*Gonzaga* world. Second, *Gonzaga* and the Supreme Court's characterization of it has cast doubt on (1) the Court's reliance on the contractual nature of spending programs to justify not finding personal rights and (2) the doctrine's viability.

A. The Health of Wright and Wilder

One question surrounding the Supreme Court's personal right jurisprudence is whether *Wright*[308] and *Wilder*[309] remain good law in the post-*Gonzaga* era.[310] A recent amicus brief joined by many states to support Kentucky officials' petition for certiorari asserted, "The

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305. *See supra* notes 12–14 and accompanying text; *supra* Part II.

306. *See supra* notes 6–7, 9 and accompanying text.

307. *See* Brief of the State of Indiana et al. as Amici Curiae Supporting Petitioner at 1, Gee v. Planned Parenthood of Gulf Coast, Inc., 139 S. Ct. 408 (2018) (No. 17-1492), 2018 WL 2684563 (joined by Georgia, Idaho, Indiana, Kansas, Michigan, Missouri, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, West Virginia, Wisconsin, and Wyoming); Brief for State of Washington et al. as Amici Curiae Supporting Petitioner at 16–18, Glisson v. D.O., 138 S. Ct. 316 (2017) (No. 17-17), 2017 WL 3225518 (joined by Alaska, Colorado, Connecticut, Hawaii, Idaho, Indiana, Michigan, Mississippi, Nebraska, New York, North Dakota, Rhode Island, Utah, and Washington).

308. Wright v. Roanoke Redevelopment & Hous. Auth., 479 U.S. 418 (1987).

309. Wilder v. Va. Hosp. Ass'n, 496 U.S. 498 (1990).

310. *See infra* notes 311–42 and accompanying text.

Wilder/*Wright* framework employed by the Courts of Appeal is inconsistent with the analysis set forth in *Gonzaga University* . . . . The Courts of Appeal's continued application of the disavowed *Wilder*/*Wright* analytical framework reveals the need for further guidance by the Court."[311]

The easy answer is *Wright* and *Wilder* remain good law because the Supreme Court has not expressly overruled them.[312] As the Supreme Court has repeatedly stated, "[I]t is this Court's prerogative alone to overrule one of its precedents."[313] However, *Gonzaga*'s uneven treatment of *Wright* and *Wilder*,[314] Judge Stevens's assertion in his *Gonzaga* dissent that the majority overruled *Wilder* and *Wright sub silentio*,[315] and *Armstrong*'s disapproval of *Wilder*'s approach,[316] warrant a discussion of whether the Court has, in effect, overruled *Wright* and *Wilder*.

A court overrules precedent *sub silentio* by "[r]epudiating [it] without expressly overruling it";[317] in essence, the court invalidates the case by issuing decisions that discredit the rationale on which the

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311. Brief for State of Washington et al. as Amici Curiae Supporting Petitioner, *supra* note 307, at 16.

312. *See supra* notes 152–60 and accompanying text; *infra* notes 331–32, 335–41 and accompanying text.

313. Bosse v. Oklahoma, 137 S. Ct. 1, 2 (2016) (quoting United States v. Hatter, 532 U.S. 557, 567 (2001) (quoting State Oil Co. v. Khan, 522 U.S. 3, 20 (1997)) (internal quotation marks omitted)).

314. *See supra* notes 155–60, 168–75, 176–82 and accompanying text.

315. Gonzaga University v. Doe, 536 U.S. 273, 300 n.8 (2002) (Stevens, J., dissenting). Justice Stevens made the same conclusion with respect to *Wright*. *Id.* Justice Stevens explained, "In those cases[,] we concluded that the statutes at issue created rights enforceable under § 1983, but the statutes did not 'clearly and unambiguous[ly],' intend enforceability under § 1983." *Id.* (citation omitted) (citing the majority *ante* at 2278). *But see* Sanchez v. Johnson, 416 F.3d 1051, 1056 n.3 (9th Cir. 2005) (stating Justice Stevens' footnote "suggested" the implications of the *Gonzaga* majority's reasoning, rather than serving as an interpretation of *Gonzaga* overruling the two cases).

316. *See* Armstrong v. Exceptional Child Ctr., Inc., 135 S. Ct. 1378, 1387 n.* (2015) (citing *Gonzaga*, 536 U.S. at 283) ("[O]ur later opinions plainly repudiate the ready implication of a § 1983 action that *Wilder* exemplified.").

317. Lisa J. Allegrucci & Paul E. Kunz, *The Future of* Roe v. Wade *in the Supreme Court: Devolution of the Right of Abortion and Resurgence of State Control*, 7 ST. JOHN'S J. LEGAL COMMENT. 295, 326 (1991); *see Sub Silentio*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "*sub silentio*" as "[u]nder silence; without notice being taken; without being expressly mentioned"); *see also* Does v. Gillespie, 867 F.3d 1034, 1040 (8th Cir. 2017) (observing that the Supreme Court "uses the terms [repudiation and overruling] interchangeably").

case stands.[318] *Sub silentio* overruling is problematic because it "often clouds the law and undermines the legitimacy of both the new decision and the precedent."[319] Although a frequent accusation by dissenters,[320] the Supreme Court maintains that it "does not normally overturn, or . . . dramatically limit, earlier authority *sub silentio*."[321] But commentators agree that the Supreme Court overrules cases *sub silentio*.[322]

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318. *See* Allegrucci & Kunz, *supra* note 317, at 326–27 (stating the "effect [of a *sub silentio* overruling] can be discerned by examining how the [court's subsequent decisions] detract from the tenets of" the case).

319. *See* Allegrucci & Kunz, *supra* note 317, at 327; Joan Stumpf, Comment*, A New Standard for Ineffective Assistance of Counsel Claims*—Commonwealth v. Pierce, 61 TEMP. L. REV. 515, 534–35 (1988) (arguing *sub silentio* overruling obscures existing case law and impacts precedential value).

320. *See, e.g.*, Abdul-Kabir v. Quarterman, 550 U.S. 233, 281–82 (2007) (Scalia, J., dissenting) (claiming that the Court overruled Johnson v. Texas, 509 U.S. 350 (1993), *sub silentio*); Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 382 (2006) (Thomas, J., dissenting) (claiming the Court overruled Hoffman v. Conn. Dep't of Income Maintenance, 492 U.S. 96 (1989), *sub silentio*); Solem v. Helm, 463 U.S. 277, 304 (1983) (Burger, C.J., dissenting) (claiming the Court overruled Rummel v. Estelle, 445 U.S. 263 (1980), *sub silentio*); James v. United States, 366 U.S. 213, 241 (1961) (Clark, J., concurring in part and dissenting in part) (claiming the majority overruled Comm'r of Internal Revenue v. Glenshaw Glass Co., 348 U.S. 426 (1955), *sub silentio*); *see also* McCullen v. Coakley, 134 S. Ct. 2518, 2546 (2014) (Scalia, J., concurring) (claiming the Court overruled Hill v. Colorado, 530 U.S. 703 (2000), *sub silentio*); Allegrucci & Kunz, *supra* note 317, at 326–28 (claiming the Supreme Court overruled Roe v. Wade, 410 U.S. 113 (1973), *sub silentio*).

321. Shalala v. Ill. Council on Long Term Care, Inc., 529 U.S. 1, 18 (2000).

322. *See* J.M. Balkin, *Constitutional Interpretation and the Problem of History*, 63 N.Y.U. L. REV. 911, 947 (1988) ("In the history of the [Supreme] Court many a decision has been overruled *sub silentio* . . . .") (quoting Raoul Berger, *A Study of Youthful Omniscience: Gerald Lynch on Judicial Review*, 36 ARK. L. REV. 215 (1982)); *see also* Allegrucci & Kunz, *supra* note 317, at 327 ("*[S]ub silentio* overruling is a common practice in our system of jurisprudence . . . ."); Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2025 n.104 (1994) ("A lower court will occasionally hold that a decision of a higher court has been effectively overruled *sub silentio* by subsequent decisions of that same higher court."); *cf.* Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 GEO. L.J. 1863, 1875 (2008) ("[T]he [Supreme] Court sometimes arguably overrules precedent in the substantive law context without engaging in any stare decisis analysis.").

Most courts and commentators addressing *Wright*,[323] *Wilder*,[324] or both cases packaged together have concluded they remain good law.[325] Only the Eighth Circuit has expressly concluded the Supreme Court has overruled *Wilder sub silentio*, explaining *Armstrong* "made explicit what was implicit in *Gonzaga*" and "the Court will have no occasion formally to overrule *Wilder*" since "Congress repealed . . . the Boren Amendment."[326] Justices Thomas, Alito, and Gorsuch recently agreed with the Eighth Circuit's construction of *Armstrong*.[327] Justice

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323. *See* DeCambre v. Brookline Hous. Auth., 826 F.3d 1, 14 (1st Cir. 2016), *cert. denied*, 137 S. Ct. 813 (2017); Johnson v. Hous. Auth. of Jefferson Par., 442 F.3d 356, 360 (5th Cir. 2006); Bobroff, *supra* note 12, at 57.

324. *See* Planned Parenthood of Kan. v. Andersen, 882 F.3d 1205, 1229 (10th Cir. 2018); Bontrager v. Ind. Family & Soc. Servs. Admin., 697 F.3d 604, 607 (7th Cir. 2012); Nicole Huberfeld, *Where There Is A Right, There Must Be A Remedy (Even in Medicaid)*, 102 KY. L.J. 327, 336 (2014). Courts also continue to rely on *Wilder* without any stare-decisis discussion. *See, e.g.*, Planned Parenthood of Gulf Coast, Inc. v. Gee, 862 F.3d 445, 460 n.49 (5th Cir. 2017); D.O. v. Glisson, 847 F.3d 374, 379–80 (6th Cir.), *cert. denied*, 138 S. Ct. 316 (2017); Briggs v. Bremby, 792 F.3d 239, 243–44 (2d Cir. 2015).

325. *See Briggs*, 792 F.3d at 244; Cal. State Foster Parent Ass'n v. Wagner, 624 F.3d 974, 978 (9th Cir. 2010); Ohio Republican Party v. Brunner, 544 F.3d 711, 720 (6th Cir 2008.), *vacated on other grounds*, 555 U.S. 5 (2008); Sabree v. Richman, 367 F.3d 180, 184 (3d Cir. 2004); Cal. All. of Child & Family Servs. v. Allenby, 459 F. Supp. 2d 919, 923 n.2 (N.D. Cal. 2006); *see also* Bobroff, *supra* note 12, at 57 ("[T]he Court did not overrule *Thiboutot*, *Wright* or *Wilder*."); *see also* N.Y. Citizens' Coal. for Children v. Poole, No. 14-2919, 2019 WL 1747011, at *8 (2d Cir. Apr. 19, 2019) (applying *Wright* and *Wilder*). *But see* Brief of the State of Indiana et al. as Amici Curiae Supporting Petitioner, *supra* note 307, at 5–7 (including *Wright* and *Wilder* in a list of "[t]he Court's older (and now discarded) precedents [that] demonstrated a highly permissive view of private enforcement of federal law").

326. Does v. Gillespie, 867 F.3d 1034, 1040 (8th Cir. 2017) (citing Balanced Budget Act of 1997, Pub. L. No. 105-33, § 4711, 111 Stat. 251, 507–08 (1997) (repealing the Borden Amendment)); *cf.* BT Bourbonnais Care, LLC v. Norwood, 866 F.3d 815, 820 (7th Cir. 2017) ("[E]ven though the Supreme Court has never overruled its decision in *Wilder*, that decision addressed a version of the statute that is now history."); Stilwell v. City of Williams, 831 F.3d 1234, 1242 n.5 (9th Cir. 2016) (stating *Gonzaga* "had the effect of cabining the line of cases that had held § 1983 actions to be available to enforce . . . statutes"); Jones v. District of Columbia, 996 A.2d 834, 845 (D.C. 2010) (rejecting "plaintiffs' heavy reliance on *Wilder*" because *Gonzaga* "was a game-changer . . . [a]nd to the extent that *Wilder* retains any validity" it was not applicable); Bradley J. Sayles, *Preemption or Bust: A Review of the Recent Trends in Medicaid Preemption Actions*, 27 J. CONTEMP. HEALTH L. & POL'Y 120, 129 (2010) ("Although, *Wilder* is still considered 'good law,' its applicability is questionable because of the Boren Amendment's repeal . . . ."); Brief of the State of Indiana et al. as Amici Curiae Supporting Petitioner, *supra* note 307, at 2 ("The Court has never expressly revisited *Wilder*, but its decisions in *Armstrong* . . . and *Gonzaga* . . . have cast substantial doubt on its continued vitality . . . .").

327. Gee v. Planned Parenthood of Gulf Coast, Inc., 139 S. Ct. 408, 410 (2018) (Thomas, J., dissenting from denial of cert.).

Thomas acknowledged the uncertainty in this area: "Courts are not even able to identify which of our decisions are 'binding.'"[328] Justice Thomas went on to observe that the Tenth Circuit had incorrectly applied *Wilder*, a decision, he noted, that the Court "recently said [in *Armstrong*] had been 'plainly repudiate[d].'"[329] However, Justice Thomas excused the court's purported error, noting "[o]ne can hardly blame the Tenth Circuit for misunderstanding. We created this confusion."[330]

The Eighth Circuit/Justice Thomas approach—the clear minority approach—is incorrect because it ignores a portion of *Gonzaga*. Not only did the *Gonzaga* Court repeatedly reference *Wright* and *Wilder*,[331] *Gonzaga* cites both holdings with approval.[332] The Sixth Circuit observed, "*Gonzaga* expressly relied on *Wright*, pointing to it as a paradigmatic example of an appropriate case for finding the presence of a private right of action under § 1983 and leaving no doubt that *Wright* survives as good law."[333] The Third Circuit observed, "*Gonzaga University* did not overrule *Wilder*; rather, it explained that 'Congress left no doubt of its intent for private enforcement.' Neither did the Court overrule *Wright*; rather, it identified it as an instance in which Congress 'unambiguously conferred a mandatory [benefit] focusing on the individual family and its income.'"[334]

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328. *Id.* (Thomas, J., dissenting from denial of cert.).

329. *Id.* (Thomas, J., dissenting from denial of cert.) ((citing Planned Parenthood of Kan. v. Andersen, 882 F.3d 1205 (10th Cir. 2018) (quoting Armstrong v. Exceptional Child Ctr., Inc., 135 S. Ct. 1378, 1378 n.* (2015)).

330. *Id.* (Thomas, J., dissenting from denial of cert.).

331. *See* Gonzaga Univ. v. Doe, 536 U.S. 273, 280–81, 284 n.4, 285–86, 288 n.6, 290 (2002) (citing Wilder v. Va. Hosp. Ass'n, 496 U.S. 498 (1990)).

332. *See id.* at 280–81 (citing Wright v. Roanoke Redevelopment & Hous. Auth., 479 U.S. 418, 426, 430, 432 (1987); *Wilder*, 496 U.S. at 522–23)*; see also Gonzaga*, 536 U.S. at 288 n.6 (stating that the plaintiff's claim was "a far cry from the sort of individualized, concrete monetary entitlement found enforceable in *Maine v. Thiboutot*, 448 U.S. 1 (1980), *Wright*, and *Wilder*"); *id.* at 289–90 (stating that FERPA's "administrative procedures squarely distinguish this case from *Wright* and *Wilder*, where an aggrieved individual lacked any federal review mechanism"); *cf.* Mo. Child Care Ass'n v. Martin, 241 F. Supp. 2d 1032, 1041 (W.D. Mo. 2003) ("If the Supreme Court had intended to overrule *Wilder*, one would express the criticisms or clarification to be directed at *Wilder* and not *Blessing* and *Suter*.").

333. Johnson v. Hous. Auth. of Jefferson Par., 442 F.3d 356, 360 (5th Cir. 2006).

334. Sabree *ex rel.* Sabree v. Richman, 367 F.3d 180, 192 (3d Cir. 2004) (citation omitted) (quoting *Gonzaga*, 536 U.S. at 280–81) (citing *Wilder*, 496 U.S. at 522–23; *Wright*, 479 U.S. at 430).

What *Gonzaga* disapproved of is the "relatively loose" personal right standard in *Wright* and *Wilder*[335]—the same implication that the plurality in *Armstrong* openly criticized *Wilder* for.[336] Further, *Gonzaga* expressly disavowed a part of *Wilder*'s reasoning, rejecting the complete distinction between the Court's personal right and implied right of action jurisprudence that *Wilder* had preserved.[337] There might have been an argument that *Gonzaga* overruled *Wright* and *Wilder sub silentio* if *Gonzaga* had been silent as to whether the statutes at issue in *Wright* and *Wilder* survived the new step one test. But, although *Gonzaga* altered *Wright* and *Wilder*'s foundations by adopting a stricter test and marrying § 1983 and implied right of action cases, *Gonzaga* concluded their holdings satisfied the *Gonzaga* test.[338] In sum, *Gonzaga* (1) invalidated a portion of *Wright* and *Wilder*'s rationales,[339] (2) clarified why the statutes at issue in both cases conferred personal rights subject to § 1983 enforcement,[340] and (3) approved of both holdings.[341] *Armstrong* does not alter this.[342] Accordingly, *Gonzaga* saved *Wright* and *Wilder*'s holdings, but courts should only rely on them for the reasons offered by *Gonzaga*.

B. The Fallacy and Force of the Contract Analogy

The Supreme Court has repeatedly analogized spending programs to contracts because they "offer[] the States a bargain: Congress provides federal funds in exchange for the States' agreement to spend them in accordance with congressionally imposed conditions."[343] But

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335. *See Gonzaga*, 536 U.S. at 282; *see also* Minn. Pharmacists Ass'n v. Pawlenty, 690 F. Supp. 2d 809, 818 n.5 (D. Minn. 2010) (concluding that "it is clear that [*Gonzaga*] rejected some implications of *Wilder*").

336. Armstrong v. Exceptional Child Ctr., Inc., 135 S. Ct. 1378, 1386 n.* (2015).

337. *See Gonzaga*, 536 U.S. at 283 (citing *Wilder*, 496 U.S. at 508–09 n.9).

338. *See id.* at 280–81.

339. *See id.* at 282–83.

340. *See supra* notes 156–60 and accompanying text; *see also* Mandy R. *ex rel.* Mr. & Mrs. R. v. Owens, 464 F.3d 1139, 1147 (10th Cir. 2006) ("Although professing not to overrule *Wilder*, *Gonzaga* recharacterized the earlier decision as a case finding an enforceable private right in a 'provision [that] required States to pay an objective monetary entitlement to individual health care providers.'" (quoting *Gonzaga*, 536 U.S. at 280)); *cf.* Williams v. U.S. Dep't of Hous. & Urban Dev., No. 04-CV-3488 NGG RLM, 2006 WL 2546536, at *6 (E.D.N.Y. Sept. 1, 2006) (observing that, despite *Gonzaga* not overruling *Wright* and *Wilder*, "*Gonzaga* could easily be construed to find the statutes under consideration in *Wright* and *Wilder* to be unenforceable").

341. *See supra* notes 156–60 and accompanying text.

342. *See supra* notes 246–60 and accompanying text.

343. Armstrong v. Exceptional Child Ctr., Inc., 135 S. Ct. 1378, 1382 (2015); *see* Sossamon v. Texas, 563 U.S. 277, 290 (2011); Barnes v. Gorman, 536 U.S. 181, 186

the application of this analogy is problematic. First, *Gonzaga*'s strict test coupled with the rarity of funding cut-offs show the flaw in this analogy. Second, the overreliance on the contractual nature of spending programs may be the means of overruling the personal rights doctrine.

1. The Spending Program Enforcement Gap

Based on the contractual nature and substantial cost of spending programs,[344] one would expect Congress to get the benefit of its bargain, i.e. state compliance with Congress's specifications so that its policies are carried out, including providing recipients with what Congress specified. In general, there are three routes for beneficiaries to challenge a state's violation of spending legislation: (1) the "potential" remedy: the statutory mechanism Congress provided,[345] (2) the "typical" remedy: agency funding cut-off,[346] and (3) the "exceptional" remedy: § 1983 enforcement.[347]

Recipients may be able to challenge state noncompliance pursuant to a spending statute's enforcement mechanism. Congress has provided enforcement for some spending programs that vary in their coverage, and, for some, it has provided none.[348] Thus, the availability of a statutory remedy is too unpredictable to be considered a likely

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(2002); Davis *ex rel.* LaShonda D. v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 640 (1999); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 286 (1998); Guardians Ass'n v. Civil Serv. Comm'n of New York City, 463 U.S. 582, 599 (1983) (White, J., dissenting in part); *Guardians Ass'n*, 463 U.S. at 632–33 (Marshall, J., dissenting); Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981); Lau v. Nichols, 414 U.S. 563, 568–69 (1974). For a detailed discussion of the contract theory, see Bagenstos, *supra* note 64, at 384–410.

344. *See supra* notes 7, 32–33, 343 and accompanying text.

345. *Gonzaga*, 536 U.S. at 289 (noting Congress can provide mechanisms for enforcement in spending statutes).

346. *Gonzaga*, 536 U.S. at 280 (quoting *Pennhurst*, 451 U.S. at 28).

347. *See supra* notes 62–65, 152 and accompanying text.

348. *See Gonzaga*, 536 U.S. at 289–90 (noting FERPA's "administrative procedures squarely distinguish this case from *Wright* and *Wilder*, where an aggrieved individual lacked any federal review mechanism"). *Compare* AACWA, 42 U.S.C. §§ 621–628, 670–679a (2018) (providing for some individual administrative review but not, for example, for foster care providers to challenge the sufficiency of their foster-care maintenance payments), *with* FERPA, 20 U.S.C. § 1232g (2018) (providing the Family Policy Compliance Office to: (1) receive written complaints of alleged violations; (2) investigate, notify, and request a response from the school; (3) issue factual findings and identify steps the school must to take to bring it into compliance in the event of a violation; and (4) adjudicate noncomplying institutions in "exceptional cases"); *see also* 34 C.F.R. §§ 99.63–99.67 (2001).

path toward relief.[349] And, as the Court dims the prospect of § 1983 relief,[350] recipients are left with the sole option of turning to the administering agency to seek termination of the spending program's federal funding.[351] The *Armstrong* Court explained:

> [T]he dissent speaks as though we leave these plaintiffs with no resort [by foreclosing the § 1983 remedy]. That is not the case. Their relief must be sought initially through the Secretary rather than through the courts. The dissent's complaint that the sanction available to the Secretary (the cut-off of funding) is too massive to be a realistic source of relief seems to us mistaken. We doubt that the Secretary's notice to a State that its compensation scheme is inadequate will be ignored.[352]

However, what the Court "doubt[ed]" is reality.[353] Agencies "rarely" take the "generally disfavored" action of cutting off funding.[354] For example, in a 2014 decision involving the AACWA and foster care, the First Circuit observed, "The Secretary has chosen not to [terminate federal funding] here. *No one in this case* wants the Secretary to cut off the roughly $60 million Massachusetts receives from [the Department of Health and Human Services]."[355] Rather, "[s]pending . . . program requirements have been enforced primarily by citizens acting as 'private attorneys general'" in § 1983 actions[356]—*not* the federal agencies that oversee them.[357] Moreover, as the Eighth Circuit pointed out, agency inaction does not impact the § 1983 analysis:

> The Providers argue that the Secretary has failed to review adequately the State's plan or impose sanctions for nonconformity, relegating them to the pursuit of

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349. *See supra* note 348 and accompanying text.

350. *See supra* notes 9, 37, 262 and accompanying text.

351. *Gonzaga*, 536 U.S. at 279–80 (quoting *Pennhurst*, 451 U.S. at 28).

352. Armstrong v. Exceptional Child Ctr., Inc., 135 S. Ct. 1378, 1387 (2015).

353. *See id.*

354. *See* Pasachoff, *supra* note 9, at 253; Samberg-Champion, *supra* note 7, at 1839.

355. Connor B. *ex rel.* Vigurs v. Patrick, 774 F.3d 45, 61 (1st Cir. 2014) (citation omitted) (emphasis added). *But see* Pasachoff, *supra* note 9, at 260 (arguing the merits of the federal-funding cut-off mechanism).

356. Samberg-Champion, *supra* note 7, at 1838.

357. *See* Pasachoff, *supra*, note 9, at 253.

> other means of enforcing compliance. But the manner in which the Secretary has chosen to oversee this federal matching program has little bearing on the task at hand.[358]

So, *Armstrong* instructs beneficiaries to go to the administering agency,[359] but the Eighth Circuit acknowledges that, when the agency fails to act, there is no recourse.[360] Accordingly, the typical remedy is toothless, and *Armstrong*'s assertion that it was not leaving spending program recipients remedy-less rings hollow.[361]

In addition, even if federal agencies were willing to cut off funding, as Justice Sotomayor recognized in a recent dissent, this is asking spending program beneficiaries to take "self-defeating" action.[362] Expecting recipients, who believe they are entitled to more under spending legislation than their state is providing them, to put themselves in more egregious situations by seeking "agency action resulting in a reduced flow of federal funds to [their] State" is illogical.[363] Such action would be fatal for spending programs, recipients, and Congress's policy goals in enacting the spending legislation as highlighted by the *Midwest Foster Care* oral argument before the Eighth Circuit.[364] The State's attorney noted that about sixty percent of the money used for Missouri's foster care payments is federal funding pursuant to the AACWA,[365] and the foster care providers' attorney noted that the loss of such funding "would be a

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358. Midwest Foster Care & Adoption Ass'n v. Kincade, 712 F.3d 1190, 1203 (8th Cir. 2013).

359. *See supra* note 352 and accompanying text.

360. *See supra* note 358 and accompanying text. *But see* Long Term Care Pharmacy All. v. Ferguson, 362 F.3d 50, 59 (1st Cir. 2004) ("[I]f [providers] think that state reimbursement is inadequate [under the Medicaid Act]—and cannot persuade the Secretary to act—they must vote with their feet.").

361 *See Armstrong*, 135 S. Ct. at 1387.

362. *Id.* at 1393 (Sotomayor, J., dissenting). *But see* Pasachoff, *supra* note 9, at 285–93 (criticizing the argument that funding cut-off should be avoided because it hurts beneficiaries).

363. *Armstrong*, 135 S. Ct. at 1393 (Sotomayor, J., dissenting); *see* Samberg-Champion, *supra* note 7, at 1839 ("Program beneficiaries desiring compliance with federal requirements could only ask the federal government to further cripple the program—not a result they are likely to seek.").

364. *See generally* Midwest Foster Care & Adoption Ass'n v. Kincade, 712 F.3d 1190 (8th Cir. 2013).

365. Oral Argument at 19:44–56, Midwest Foster Care & Adoption Ass'n v. Kincade, 712 F.3d 1190 (8th Cir. 2013) (No. 12–1834), http://media-oa.ca8.uscourts.gov/OAaudio/2012/11/121834.MP3.

disaster" for Missouri's foster care system.[366] In other words, as articulated by an amicus brief filed by former Department of Health and Human Services officials in *Armstrong*, the typical remedy for a "state's noncompliance creates a damned-if-you-do, damned-if-you-don't scenario" for beneficiaries.[367] In sum, the "typical" remedy is problematic because (1) agencies seldom invoke it,[368] and (2) if they did so, recipients would be much worse off.[369]

The varying extent of statutory enforcement mechanisms *if* they exist, the Supreme Court's shrinking of personal rights in the spending program context, and agency inaction create an enforcement gap, which harms both Congress's policy goals in creating the programs and beneficiaries' interest in obtaining that which Congress intended for them to have. Furthermore, the spending program "contract" between the federal and state governments breaks down because the state has merely made an "illusory promise" to adhere to Congress's requirements in exchange for federal funding, depriving Congress of the benefits of its bargain.[370]

2. Is the End in Sight for the Personal Rights Doctrine?

There is another means of attack on the personal rights doctrine: contract law. Although the Supreme Court repeatedly relies on the

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366. *Id.* at 17:31–17:43; *see also supra* note 355 and accompanying text.

367. *See* Brief of Former HHS Officials as Amici Curiae Supporting Respondent, at 18, Armstrong v. Exceptional Child Ctr., Inc., WL 73660655 (2014) (No. 14–15)).

368. Pasachoff, *supra* note 9, at 284 ("While agency efforts to withhold funds have persisted over time to some extent, use of this enforcement mechanism has generally remained rare, and expressions of significant discomfort have surrounded the mechanism." (footnoted omitted)); *see* Wright v. Roanoke Redevelopment & Hous. Auth., 479 U.S. 418, 428 (1987) (noting the unlikelihood that HUD would cut-off federal funding); Samberg-Champion, *supra* note 7, at 1839 (noting the "the blunt and *seldom-used* club of withholding federal funding for the program in question") (emphasis added)).

369. Armstrong v. Exceptional Child Ctr., Inc., 135 S. Ct. 1378, 1393 (2015) (Sotomayor, J., dissenting). *But see* Pasachoff, *supra* note 9, at 285–93 (rejecting the argument that federal funding cut-off should be avoided because it hurts beneficiaries).

370. "[A]n illusory promise is . . . a promise merely in form, but in actuality not promising anything," and, because "the promisor may perform or not, solely on the condition of his whim, his promise will not serve as consideration." 3 RICHARD A. LORD, WILLISTON ON CONTRACTS § 7:7 (4th ed. 2008). I note that "courts [are] to avoid constructions of contracts that would render promises illusory," M & G Polymers USA, LLC v. Tackett, 135 S. Ct. 926, 936 (2015), and rely on the term merely as an extension of the Supreme Court's use of the "contract" analogy in the spending program context.

contract analogy to characterize spending programs,[371] the Court has also declared that such programs are not ordinary contacts governed by standard contract law: "Unlike normal contractual undertakings, [spending] programs originate in and remain governed by statutory provisions expressing the judgment of Congress concerning desirable public policy."[372] The Court has explained: "suits under Spending Clause legislation are [not] suits in contract," "contract-law principles [do not] apply to all issues that they raise,"[373] and spending programs "should [not] be viewed in the same manner as . . . bilateral contract[s]."[374] Despite these assertions, the Court acknowledges it has "discussed" the Spending Clause contract analogy "as a potential limitation on liability."[375]

Using the contract analogy, a private individual who sues state officials pursuant to § 1983 to enforce spending legislation does so as a "third-party beneficiary" to the "contract" between the federal and state governments.[376] Prior to the *Gonzaga* era and in cases where the issue was not presented to the Court, Justices Scalia and Thomas indicated their willingness to take up the question of whether

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371. *See supra* note 344 and accompanying text; *see also* Westside Mothers v. Havemen, 289 F.3d 852, 858 (6th Cir. 2002) ("[T]he Court in [*Pennhurst*] makes clear that it is using the term 'contract' metaphorically, to illuminate certain aspects of the relationship formed between a state and the federal government in a [spending] program . . . ." (citing Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)).

372. Bennett v. Ky. Dep't of Educ., 470 U.S. 656, 656 (1985).

373. Sossamon v. Texas, 563 U.S. 277, 290 (2011) (quoting Barnes v. Gorman, 536 U.S. 181, 189 n.2 (2002)).

374. *Bennett*, 470 U.S. at 656; *see Westside Mothers*, 289 F.3d at 858 (stating that *Pennhurst* "does not say that [a spending program] is only a contract. It describes the program as "much in the nature of" a contract, and places the term "contract" in quotation marks when using it alone." (quoting *Pennhurst,* 451 U.S. at 17)).

375. *Sossamon*, 563 U.S. at 290.

376. Justice Scalia explained this label in his concurrence in *Blessing*:

> The state promises to provide certain services to private individuals, in exchange for which the Federal government promises to give the State funds. In contract law, when such an arrangement is made (A promises to pay B money, in exchange for which B promises to provide services to C), the person who receives the benefit of the exchange of promises between two others (C) is called a third-party beneficiary.

Blessing v. Freestone, 520 U.S. 329, 349–50 (1997) (Scalia, J. concurring); *see* 13 RICHARD A. LORD, WILLISTON ON CONTRACTS § 37:1 (4th ed. 2000) ("Broadly speaking, a third party beneficiary contract arises when a promisor agrees with a promisee to render a performance to a third party instead of to the promisee, which is what might typically be expected.").

spending program beneficiaries are categorically barred from bringing § 1983 actions due to their third-party beneficiary status.[377] Justice Scalia noted in his *Blessing* concurrence that contract law in effect when § 1983 was enacted prohibited suit by a third-party beneficiary.[378]

In *Armstrong v. Exceptional Child Center, Inc.*,[379] a plurality made up of Chief Justice Roberts and Justices Alito, Thomas, and Scalia took up the threshold question Scalia and Thomas had raised in the § 1983 context,[380] whether Medicaid providers were barred from bringing an implied right of action claim based on the contractual nature of Medicaid, a spending program.[381] The plurality concluded the Medicaid providers were probably not intended beneficiaries and, even if they were, contract law allowing intended beneficiaries to sue does not apply to contracts between federal and state governments.[382] Thus, the *Armstrong* plurality indicated a willingness to treat a spending program as an actual contract and rely on the strictures of contract law to cut off recovery completely.[383]

The *Armstrong* plurality was not addressing the § 1983 remedy,[384] but, since the Court was relying on the contractual nature of a spending program and *Gonzaga* married implied right of actions and § 1983 cases,[385] the *Armstrong* rationale could easily be used to bar

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377. Pharm. Research & Mfrs. of Am. v. Walsh, 538 U.S. 644, 682–83 (2003) (Thomas, J., concurring); *Blessing*, 520 U.S. at 350 (Scalia, J. concurring); *see* David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1, 102 (1994) (asserting that "*Thiboutot* alters everything [that the Supreme Court] said about third-party enforcement. For that and other more important reasons, the *Thiboutot* rule merits critical scrutiny"); *see also* Nicole Huberfeld, *Bizarre Love Triangle: The Spending Clause, § 1983, and Medicaid Entitlements*, 42 U.C. DAVIS L. REV. 413, 460 (2008) ("Justices currently sitting on the Supreme Court have suggested that conditions on spending can never be privately enforced through § 1983 because beneficiaries of [spending] programs are the equivalent of third-party beneficiaries.").

378. *Blessing*, 520 U.S. at 349–50 (Scalia, J., concurring). "[T]he traditional view proved too harsh and inflexible," and "[o]ver time, through legislation and judicial decision, this traditional view was abandoned . . . ." 13 RICHARD A. LORD. WILLISTON ON CONTRACTS § 37:1 (4th ed. 2000). Even though the absolute bar is gone, there are prerequisites to the enforcement of a third-party contract. *See id.* §§ 37:1, 37:25.

379. 135 S. Ct. 1378 (2015).

380. *See supra* notes 377–78 and accompanying text.

381. *Armstrong*, 135 S. Ct. at 1387–88 (Scalia, J., plurality opinion).

382. *Id.* (Scalia, J., plurality opinion).

383. *See id.* (Scalia, J., plurality opinion).

384. *See id.* (Scalia, J., plurality opinion).

385. *See* Gonzaga Univ. v. Doe, 536 U.S. 273, 284–85 (2002) (equating step one of the § 1983 applicability-inquiry to "the initial inquiry in an implied right of action case . . . ."); *supra* notes 176–82 and accompanying text.

beneficiaries from seeking § 1983 relief.[386] Although *Armstrong* is not binding,[387] five votes seem possible with three sitting justices remaining from the *Armstrong* plurality and the addition of Justices Gorsuch and Kavanaugh. Justice Gorsuch's judicial philosophy makes him likely to vote like the late Justice Scalia and Justice Thomas,[388] and he has voted with the members of the *Armstrong* plurality remaining on the Court more than anyone else.[389] Importantly, Justice Gorsuch joined Justice Thomas's recent dissent from the denial of certiorari, advocating that the Court revisit the test for § 1983's availability in the federal statutory context.[390] Statistically, it is very likely that Justice Gorsuch would join the *Armstrong* plurality regarding the implications of contract law on § 1983's unavailability in the statutory context.[391] Although Justice Kavanaugh's judicial philosophy also likely aligns him with Justice Thomas,[392] given Kavanaugh's extremely short stint on the Court, there is much less to

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386. *Compare* Legacy Cmty. Health Servs., Inc. v. Smith, 881 F.3d 358, 372 (5th Cir. 2018), *as revised* (Feb. 1, 2018), *and cert. denied,* 139 S. Ct. 211 (2018), ("[T]he [*Armstrong*] plurality's statement, if taken to the conclusion urged by Texas, would likely overrule cases such as *Wilder* . . . thus Texas's contention goes too far."), *with* Planned Parenthood Gulf Coast, Inc. v. Kliebert, 141 F. Supp. 3d 604, 641 (M.D. La. 2015) ("*Armstrong* did not overrule . . . *Wilder* . . . ."), *aff'd sub nom,* Planned Parenthood of Gulf Coast, Inc. v. Gee, 862 F.3d 445, 461–462 (5th Cir. 2017).

387. CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 81 (1987); *see* O.B. v. Norwood, 170 F. Supp. 3d 1186, 1191 (N.D. Ill. 2016), *aff'd*, 838 F.3d 837 (7th Cir. 2016); *Norwood,* 170 F. Supp. 3d at 1191 n.3 (citing cases).

388. *See* Max Alderman & Duncan Pickard, *Justice Scalia's Heir Apparent?: Judge Gorsuch's Approach to Textualism and Originalism*, 69 STAN. L. REV. ONLINE 185, 186 (2017) (noting Justices Gorsuch and Scalia's academic writing "demonstrate[s] a commitment to textualism and originalism"); Bradley P. Jacob, *Will the Real Constitutional Originalist Please Stand Up?,* 40 CREIGHTON L. REV. 595, 649 (2007) (categorizing Justices Scalia and Thomas as originalists).

389. *See* Oliver Roeder, *Which Justices Were BFFs This Supreme Court Term,* FIVETHIRTYEIGHT (June 27, 2018), https://fivethirtyeight.com/features/which-justices-were-bffs-this-scotus-term/ (observing that, during his first two terms on the Court, Justice Gorsuch has voted with Justice Thomas in 84% of case, Justice Alito 83%, and Justice Roberts 81%); *see also* Johnson v. Alabama*,* 137 S. Ct. 2292, 2292–93 (2017) (5–4 decision) (Roberts, C.J., dissenting); McWilliams v. Dunn, 137 S. Ct. 1790, 1801–11 (2017) (5–4 decision) (Alito, J., dissenting).

390. Gee v. Planned Parenthood of Gulf Coast, Inc., 139 S. Ct. 408, 408–10 (2018) (Thomas, J., dissenting from denial of cert).

391. *See supra* note 389 and accompanying text.

392. Alex Swoyer, *Brett Kavanaugh Best Described As 'Originalist,' Say Legal Scholars,* WASH. TIMES, (Sept. 3, 2018), https://www.washingtontimes.com/news/2018/sep/3/brett-kavanaugh-best-described-as-originalist-say-/; Aziz Huq, *Why You Shouldn't Care Whether Kavanaugh Is an 'Originalist'*, POLITICO (Aug. 9, 2018), https://www.politico.com/magazine/story/2018/08/09/kanavaugh-originalist-why-you-shouldnt-care-219344.

point to in order to speculate how he would come out on the contract law issue. However, he did not join Justice Thomas's dissent and the grant of certiorari might have provided the Court with the opportunity to consider the issue.[393] On the whole, the current makeup of the Supreme Court puts personal rights on shaky ground, and the contract analogy could be the final nail in the coffin.

CONCLUSION

Section 1983 enforcement of spending program provisions enmeshes all three branches of the federal government, along with the state government. So, there are a lot of players and hundreds of billions of dollars in federal funding at stake. The enforcement gap puts Congress's policy goals in jeopardy and punishes spending program beneficiaries.[394] To harken back to the Court's contract analogy, Congress is not getting what it is paying for—and it is paying rather a lot.

What can be done to resolve this "mess"?[395] The three, most obvious means of bridging the enforcement gap is for: (1) the Supreme Court to revert to its "ready" recognition of personal rights,[396] (2) agencies to reverse course and regularly cut off noncompliant states' funding, or (3) Congress to (a) draft new spending legislation to satisfy *Gonzaga* and amend existing legislation, or (b) provide a comprehensive enforcement mechanism when it creates a spending program and amending spending legislation to incorporate such review.[397] Nothing in the Supreme Court's jurisprudence or membership indicates that first option is a real possibility.[398] In addition, federal agencies routinely utilizing funding cutoffs, which in many instances would be devastating for states and program

393. *Planned Parenthood of Gulf Coast, Inc.*, 139 S. Ct. at 408 (Thomas, J., dissenting from denial of cert.).

394. *See supra* Section III.B.1.

395. *See Planned Parenthood of Gulf Coast, Inc.*, 139 S. Ct. at 409 (Thomas, J., dissenting from denial of cert.).

396. *See* Armstrong v. Exceptional Child Ctr., Inc., 135 S. Ct. 1378, 1386 n* (2015).

397. Even if Congress could not do so for all spending programs, it could for those like the AACWA and Medicaid that have such high stakes and are the subject of circuit disagreement. *Cf.* Greenberger, *supra* note 262, at 1040 ("Not only has the Court never found an enforcement comprehensive that lacks any kind of individual process, it has also been hesitant to allow statutes to remain without this characteristic.").

398. *See* Mank, *supra* note 175, at 1445 ("After *Gonzaga*, *Suter*'s restrictive approach to § 1983 now appears to be the model rather than the liberal standard presented in the *Wright*, *Wilder*, *Blessing*, and the *Golden State* line of cases."); *supra* Part I; *supra* note 262 and accompanying text; *supra* Section III.B.2.

recipients,[399] seems equally unlikely and undesirable. Thus, Congress is left to address this lack of accountability, which makes good sense since it is Congress's intent being frustrated in a doctrine purportedly built on congressional intent.[400]

399. *See supra* notes 362–69 and accompanying text.

400. *See supra* notes 12 and 16 and accompanying text; Gonzaga Univ. v. Doe, 536 U.S. 273, 283 (2002).