Section 1983: “Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ..., subjects, or causes to be subjected, any citizen of the United States or other person ..., 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.”
Many of the New Deal and post–New Deal statutes enacted by the U.S. Congress to address income-related disparities do not expressly discuss judicial enforcement by the statutes’ beneficiaries. This is not surprising since most of these laws were enacted when Congress worked under U.S. Supreme Court precedent that recognized a remedial imperative—the “right of every individual to claim the protection of the laws, whenever he receives an injury”—and the duty of the courts to accord an appropriate remedy in the absence of any express statutory authorization of a federal cause of action.1

In recent years the Supreme Court has turned away from this rights-remedy principle, particularly when individuals from among disadvantaged population groups are seeking to force states to adhere to the provisions of federal law.2 The Court’s evolving concept of federalism, based largely on a series of 5-to-4 decisions, is affecting private enforcement at seemingly every turn. Michael S. Greve, director of the Federalism Project of the conservative American Enterprise Institute, put it this way:

The Supreme Court’s antientitlement doctrines are connected, such that plaintiffs who manage to evade one obstacle are bound to stumble over

---

1Marbury v. Madison, 5 U.S. 137, 163 (1803); see also, e.g., J.I. Case Co. v. Borak, 377 U.S. 426, 433 (1964) (finding that “it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose”).

2See, e.g., Alexander v. Sandoval, 532 U.S. 275, 293 (2001) (Clearinghouse No. 51,706) (refusing to imply private right of action allowing individuals to enforce “disparate impact” regulations implementing Title VI of the Civil Rights Act). The U.S. Supreme Court has been particularly skeptical of private enforcement of statutes that Congress enacted pursuant to the spending clause of the U.S. Constitution. U.S. Const. art. I, § 8, cl. 1; see, e.g., Gonzaga University v. Doe, 536 U.S. 273, 280 (2002) (Clearinghouse No. 54,643) (“Since Pennhurst [Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981) (Clearinghouse No. 12,902)], only twice have we found spending legislation to give rise to enforceable rights.”). For further analysis of Sandoval, see Jane Perkins & Sarah Jane Somers, Sandoval’s Retrenchment on Civil Rights Enforcement: The Ultimate Sorcerer’s Magic, 35 CLEARINGHOUSE REVIEW 433 (Nov.–Dec. 2001).
another. Plaintiffs who escape from restrictive statutory interpretation into Section 1983 will find that route, too, strewn with obstacles. They may find that their purported right was unrecognized in 1871. Or they may find that their claims for monetary damages—which are often the only effective means of forcing state and local governments into compliance—are blocked by a slew of Supreme Court decisions granting the states sovereign immunity against such lawsuits.\(^3\)

Private enforcement of federal statutes through Section 1983 has indeed become more complicated. A 2002 Supreme Court case, *Gonzaga University v. Doe*, has added to the confusion and caused state attorneys to raise new arguments that Medicaid, housing, food stamp, and other federal acts may not be enforced through Section 1983.\(^4\)

In this article I focus on private enforcement of federal laws pursuant to Section 1983. I review the history of federal statutory enforcement of the provision and discuss *Gonzaga*. I then describe how the lower courts are applying *Gonzaga* in poverty law cases.

### I. Overview of the Section 1983 Remedy

Section 1983 does not create substantive rights but rather provides an express cause of action when a state deprivies a person of a right secured by federal law. It reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.\(^5\)

Section 1983 was enacted as a part of the Ku Klux Klan Act of 1871; however, the law was little used until the 1970s.\(^6\) Rather, beneficiaries who were being injured by state violations of New Deal and post–New Deal statutes, and actually attempted to enforce them, usually would claim an implied right of action to enforce the statute.\(^7\) However, in 1979 the Supreme Court disfavored the

---


\(^4\)Gonzaga University, 536 U.S. 273.


implied right of action and required instead that a plaintiff establish a clear legislative intent to create a judicial remedy.8 As a result, Section 1983 became more important.9

Just one year later, the Court decided Maine v. Thiboutot, which affirmed the availability of Section 1983 to redress violations of federal statutes.10 The case concerned enforcement of the Social Security Act provisions dealing with the calculation of welfare benefits.11 The state argued that Section 1983 could not be used to enforce the Social Security Act but rather was limited to enforcement of civil rights or equal protection laws.12 The Supreme Court disagreed:

The question before us is whether the phrase “and laws,” as used in § 1983, means what it says or whether it should be limited to some subset of laws. Given that Congress attached no modifiers to the phrase, the plain language of the statute undoubtedly embraces respondents’ claim that petitioners violated the Social Security Act.13

Thiboutot generated much debate, with opponents of the Section 1983 remedy calling for it to be overruled.14 In the years after Thiboutot was announced, the Supreme Court began to narrow it. The Court decided that private enforcement of a federal right through Section 1983 is foreclosed if the underlying statute contains a comprehensive remedial scheme.15 The Court refused to allow Section 1983 enforcement of statutes that are written

---

9How to Read Gonzaga, supra note 7, at 1844 n.35.
10Thiboutot, 448 U.S. at 4–9. The Thiboutot Court noted that previous cases “explicitly or implicitly” suggested that the Section 1983 remedy encompasses violations of federal statutes. Id. at 4 (citing Rosado v. Wyman, 397 U.S. 397 (1970) (Clearinghouse No. 1886); Edelman v. Jordan, 415 U.S. 651, 675 (1974)). In Rosado, a Social Security Act case filed by program beneficiaries pursuant to Section 1983, Justice Harlan observed: “It is, of course, no part of the business of this Court to evaluate, apart from federal constitutional or statutory challenge, the merits or wisdom of any welfare programs, whether state or federal, in the large or in the particular. It is, on the other hand, peculiarly part of the duty of this tribunal, no less in the welfare field than in other areas of the law, to resolve disputes as to whether federal funds allocated to the States are being expended in consonance with the conditions that Congress has attached to their use.” 397 U.S. at 422–23; see also Edelman, 415 U.S. at 674 (stating that Rosado “held that suits in federal court under § 1983 are proper to secure compliance with provisions of the Social Security Act on the part of the participating States”). The majority opinions in the Court’s more recent cases do not acknowledge Section 1983’s early history of enforcement. See, e.g., Suter v. Artist M., 503 U.S. 347, 355 (1992) (Rehnquist, C.J.) (“In Maine v. Thiboutot, 448 U.S. 1, 100 S. Ct. 2502, 65 L. Ed. 2d 555 (1980), we first established that § 1983 is available as a remedy for violations of federal statutes as well as for constitutional violations.”); see also Gonzaga, 536 U.S. at 279 (“In Maine v. Thiboutot, 448 U.S. 1, 100 S. Ct. 2502, 65 L. Ed. 2d 555 (1980), six years after Congress enacted [the Family Educational Rights and Privacy Act], we 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.”).
11Thiboutot, 448 U.S. at 3 (concerning Social Security Act, 42 U.S.C. § 602(a)(7), dealing with Aid to Families with Dependent Children).
12Id. at 6.
13Id. at 4.
14But see, e.g., How to Read Gonzaga, supra note 7, at 1845 (“[W]hen looked at in conjunction with contemporary narrowing of other remedies, [Thiboutot] merely maintained the status quo.”); Paul Wartelle & Jeffrey Hadley Louden, Private Enforcement of Federal Statutes: The Role of the Section 1983 Remedy, 9 HASTINGS CONSTITUTIONAL LAW QUARTERLY 487, 522 (1982) (“The issue in Thiboutot was not whether or not to protect the courts from new litigation but whether or not the federal courts would close their doors to cases that [were] currently heard.”).
### Table 1.—Section 1983 Enforcement of Selected Medicaid Act Provisions, Post-Gonzaga (Jan. 2005)

<table>
<thead>
<tr>
<th>SECTION (42 U.S.C.)</th>
<th>ENFORCEABLE</th>
<th>UNENFORCEABLE</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 1396a(a)(8): reasonable promptness</td>
<td><em>Bryson v. Shumway</em>, 308 F.3d 79 (1st Cir. 2002), vacating and remanding in part on other grounds 177 F. Supp. 2d 78 (D. N.H. 2001) (Clearinghouse No. 54,939)</td>
<td></td>
</tr>
<tr>
<td></td>
<td><em>Rabin v. Wilton-Coker</em>, 266 F. Supp. 2d 332 (D. Conn. 2003), rev'd on other grounds and remanded by 362 F.3d 190 (2d Cir. 2004) (Clearinghouse No. 55,594)</td>
<td></td>
</tr>
<tr>
<td></td>
<td><em>Pediatric Specialty Care v. Arkansas Department of Human Services</em>, 293 F.3d 472 (8th Cir. 2002) (Clearinghouse No. 54,686)</td>
<td></td>
</tr>
<tr>
<td></td>
<td><em>Clark</em>, 339 F. Supp. 2d 631</td>
<td></td>
</tr>
<tr>
<td></td>
<td><em>Kerr</em>, 2004 U.S. Dist. LEXIS 7804</td>
<td></td>
</tr>
<tr>
<td>§ 1396a(a)(10)(B): amount, duration, and scope</td>
<td><em>Health Care for All</em>, 2004 U.S. Dist. LEXIS 26470</td>
<td></td>
</tr>
<tr>
<td></td>
<td><em>Mendez</em>, 311 F. Supp. 2d 134</td>
<td></td>
</tr>
<tr>
<td></td>
<td><em>McCree</em>, No. 4:00-CV–173(H)(4)</td>
<td></td>
</tr>
<tr>
<td></td>
<td><em>Watson</em>, 2004 WL 1445113</td>
<td></td>
</tr>
<tr>
<td></td>
<td><em>Keup v. Wisconsin Department of Health and Family Services</em>, 675 N.W.2d 755 (Wis. 2004)</td>
<td></td>
</tr>
</tbody>
</table>
### Table 1.—Section 1983 Enforcement of Selected Medicaid Act Provisions, Post-Gonzaga (Jan. 2005)

<table>
<thead>
<tr>
<th>SECTION (42 U.S.C.)</th>
<th>ENFORCEABLE</th>
<th>UNENFORCEABLE</th>
</tr>
</thead>
</table>
| § 1396a(a)(17): reasonable standards | Mendez, 311 F. Supp. 2d 134  
Kerr, 2004 U.S. Dist. LEXIS 7804 | Sanders v. Kansas Department of Social and Rehabilitation Services, 317 F. Supp. 2d 1233  
(D. Kan. 2004) (citing district courts in M.A.C. and Sabree)  
Watson, 2004 WL 1445113 |
| § 1396a(a)(19): administration in best interest of recipients | Kerr, 2004 U.S. Dist. LEXIS 7804  
Mendez | Bruggeman v. Blagojevich, 324 F.3d 906 (7th Cir. 2003) (Clearinghouse No. 55,231)  
Belen Consolidated Schools v. Otten, 259 F. Supp. 2d 1203  
(D. N.M. 2003) |
| § 1396a(a)(30): outpatient payments, equal access | Clark, 339 F. Supp. 2d 631  
Memisovski | Long Term Care Pharmacy Alliance v. Ferguson, 362 F.3d 50 (1st Cir. 2004)  
(Clearinghouse No. 55,579)  
Health Care for All, 2004 U.S. Dist. LEXIS 26470  
(citing Long Term Care Pharmacy Alliance regarding recipients)  
In re NYAHSA Litigation, 318 F. Supp. 2d 30  
(N.D.N.Y. 2004) (regarding providers and distinguishing recipients)  
Sanchez v. Johnson, 301 F. Supp. 2d 1060  
(Clearinghouse No. 53,167), appeal docketed, No. 04-15228 (9th Cir. 2004)  
Association of Residential Resources in Minnesota, 2003 U.S. Dist. LEXIS 15056  
(discussing 42 C.F.R. § 447.20)  
Burlington United Methodist Family Services v. Atkins, 227 F. Supp. 2d 593  
(S.D. W. Va. 2002) (regarding providers) |
| §§ 1396a(a)(43), 1396d(a)(4)(B), 1396d(r): Early and Periodic Screening, Diagnostic, and Treatment (EPSDT) | S.D., 391 F.3d 581, aff’g 2002 U.S. Dist. LEXIS 23535  
(Pediatric Specialty Care, 293 F.3d 472)  
Clark | Long Term Care Pharmacy Alliance v. Ferguson, 362 F.3d 50 (1st Cir. 2004)  
Health Care for All, 2004 U.S. Dist. LEXIS 26470  
(not noting that enforcement of Section 1396d(a)(4)(B), 1396d(r) is through Section 1396a(a)(10)(A)) |
| § 1396d(a)(4)(A): nursing facility services | Health Care for All, 2004 U.S. Dist. LEXIS 26470  
(N.D. Ga. 2003) |
| § 1396d(a)(15): intermediate nursing facility services | Health Care for All, 2004 U.S. Dist. LEXIS 26470  
(N.D. Ga. 2003) |
| § 1396d(f): nursing facility services | Watson, 2004 WL 1445113 | Watson, 2004 WL 1445113 |
Table 1.—Section 1983 Enforcement of Selected Medicaid Act Provisions, Post-Gonzaga (Jan. 2005)  (Continued)

<table>
<thead>
<tr>
<th>SECTION (42 U.S.C.)</th>
<th>ENFORCEABLE</th>
<th>UNENFORCEABLE</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 1396n(c): home- and community-based waiver provisions</td>
<td>Masterman v. Goodno, No. 03-2939 (JRT/FLN), 2004 WL 51271 (D. Minn. Jan. 8, 2004) (discussing Section 1396n(c)(2)(a), (c))</td>
<td>Association of Residential Resources in Minnesota, 2003 U.S. Dist. LEXIS 15056 (discussing Section 1396n(c)(2)(a) and 42 C.F.R. § 441.302 and finding that recipients but not providers have standing)</td>
</tr>
<tr>
<td></td>
<td>Association of Residential Resources in Minnesota, 2003 U.S. Dist. LEXIS 15056 (discussing Section 1396n(c)(2)(a) and 42 C.F.R. § 441.302 and finding that recipients but not providers have standing)</td>
<td>Masterman v. Goodno, No. 03-2939 (JRT/FLN), 2004 WL 51271 (D. Minn. Jan. 8, 2004) (discussing Section 1396n(c)(2)(a), (c))</td>
</tr>
<tr>
<td>§ 1396o: cost sharing</td>
<td>Spry v. Thompson, No. CV-03-121-ST, 2003 U.S. Dist. LEXIS 24050 (D. Or. Dec. 8, 2003) (holding that refusing enforcement provision did not put state on clear notice that it included the right to community placement near the family home) (Clearinghouse No. 53,950)</td>
<td>M.A.C., 284 F. Supp. 2d 1298 (citing district court in Sabree and discussing Section 1396n(c)(2)(c))</td>
</tr>
<tr>
<td>§ 1396r(e)(7): Pre-Admission Screening and Resident Review (PASARR)</td>
<td>Rolland, 318 F.3d 42</td>
<td>Rolland v. Romney, 318 F.3d 42 (1st Cir. 2003) (Clearinghouse No. 52,838)</td>
</tr>
<tr>
<td>§ 1396r-6: transitional medical assistance</td>
<td>Rabin, 362 F.3d 190</td>
<td>M.A.C., 284 F. Supp. 2d 1298 (citing district court in Sabree and discussing Section 1396n(c)(2)(c))</td>
</tr>
</tbody>
</table>

“merely in precatory terms” rather than as a congressional mandate. 16

Other cases recognized that Section 1983 provides a remedy for violations of only “federal rights,” not all federal laws. 17 To determine whether a statute creates federal rights, the Court established a three-part test that looks at the provision in question to determine whether (1) Congress intended the provision in question to benefit the plaintiff; (2) the provision is not so vague and amorphous that its enforcement would strain judicial competence; and (3) the statute unam-

---

16 Pennhurst State School and Hospital, 451 U.S. at 18–19. In Pennhurst Justice Rehnquist also stated, “Indeed, in those instances where Congress has intended the States to fund certain entitlements as a condition of receiving federal funds, it has proved capable of saying so explicitly.” Id. at 17–18 (citing King v. Smith, 392 U.S. 309, 333 (1968) (holding that the “Social Security Act creates a ‘federally imposed obligation [on the States] to furnish aid to families with dependent children … with reasonable promptness to all eligible individuals’”) (quoting the Act, 42 U.S.C. § 602(a)(9) (1964 ed. Supp. II)).

Using Section 1983 to Enforce Federal Laws

biguously imposes an obligation on the state. 18

If the three parts are answered affirmatively, the statute is enforceable unless the state makes the “difficult showing” that Congress has foreclosed resort to Section 1983 by including a comprehensive administrative remedial scheme in the statute. 19

The 1992 decision Suter v. Artist M. revealed some justices’ discontent with the three-part test. 20 Without mentioning the test, the Suter Court asked whether a provision of the Adoption Assistance and Child Welfare Act “unambiguously confer[red] an enforceable right upon the Act’s beneficiaries” and concluded that it did not. 21 Provisions of the Social Security Act, the Court further stated, do not create enforceable rights if they are placed in a statute that merely lists mandatory elements of state plans submitted to receive federal funds. 22

This statement regarding state plans had potentially far-reaching ramifications because most Social Security Act titles, including Medicaid, are written in terms of what a state plan must include for a state to receive federal funds to operate the plan. 23 Congress quickly reacted to the Suter decision by amending the Social Security Act to clarify that, “[i]n an action brought to enforce a provision of the Social Security Act, such provision is not to be deemed unenforceable because of its inclusion in a section of the Act requiring a State plan or specifying the required contents of a State plan.” 24 According to the Conference Committee, [t]he intent of this provision is to assure that individuals who have been injured by the State’s failure to comply with the Federal mandates of the State plan titles of the Social Security Act are able to seek redress in federal courts to the extent they were able to prior to the decision in Suter v. Artist M. 25

Thus, on the one occasion when the Supreme Court found the Social Security Act to be unenforceable in a Section 1983 action, Congress took immediate steps to overturn the decision. Thereafter, in Blessing v. Freestone, the Supreme Court restated the three-part test, which it then referred to as the “traditional criteria for identifying statutory rights.” 26

To sum up, for more than twenty-five years, the lower courts have applied the Supreme Court’s ground rules: when the provisions of federal enactments are couched in vague or “precatory” terms or create alternative, comprehensive administrative enforcement mechanisms, they will not give rise to a Section 1983 remedy. However, when the provisions at issue bind states and confer rights on individuals, those will be regarded as rights secured by the laws of the United States and as rights that are


19Blessing, 520 U.S. at 346; see also Wilder, 496 U.S. at 521–23 (holding that the Medicaid Act does not contain a comprehensive remedial scheme); Wright, 479 U.S. at 424–25 (holding that the Housing Act does not contain a comprehensive remedial scheme).

20Suter, 503 U.S. 347.

21Id. at 363; Adoption Assistance and Child Welfare Act, 42 U.S.C. § 617(a)(15).

22Suter, 503 U.S. at 358.

23Soon after Suter was decided, some courts began to hold that entire titles of the Social Security Act could not be enforced. See, e.g., Mason v. Bradley, 789 F. Supp. 273, 276–77 (N.D. Ill. 1992) (finding no private right to enforce Title IV, Aid for Families with Dependent Children program).

24Social Security Act, 42 U.S.C. §§ 1320a-2, 1320a-10 (also stating: “This section is not intended to limit or expand the grounds for determining the availability of private actions to enforce State plan requirements other than by overturning any such grounds applied in Suter v. Artist M., 112 S. Ct. 1360 (1992), but not applied in prior Supreme Court decisions respecting such enforceability; provided, however, that this section is not intended to alter the holding in Suter v. Artist M. that section 471(a)(15) of the Act is not enforceable in a private right of action.”).


26Blessing, 520 U.S. at 342.
enforceable through Section 1983. Thousands of court decisions have applied these rules to federal laws involving Medicaid, food stamps, public housing, education, and prisons.

II. Gonzaga University v. Doe

In Gonzaga University v. Doe the Supreme Court again addressed the Section 1983 remedy. The case concerned the Family Educational Rights and Privacy Act, which is a spending clause enactment but not part of the Social Security Act. The specific Family Educational Rights and Privacy Act provision at issue provides:

No federal funds shall be made available ... to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information ...) of students without the written consent of their parents to any individual, agency, or organization.

Writing for the majority, Justice Rehnquist used the occasion to reiterate and develop thoughts expressed in his earlier opinion in Pennhurst State School and Hospital v. Halderman. Refusing to allow enforcement of the Family Educational Rights and Privacy Act provision through Section 1983, he stated, "[W]e have never before held, and decline to do so here, that spending legislation drafted in terms resembling those of [the Act] can confer enforceable rights." According to the majority, the typical remedy for state violations of spending clause programs is for the federal government to terminate funding to the state. Thus, "unless Congress 'speak[s] with a clear voice,' and manifests an 'unambiguous' intent to confer individual rights, federal funding provisions provide no basis for private enforcement" under Section 1983. According to the majority, the Act’s provision had three fatal characteristics:

No Rights-Creating Language. According to the Court, the initial inquiry into whether a statute creates a federal right under Section 1983 “is no different from the initial inquiry in an implied right of action case.” In both situations, explicit “right- or duty-creating language” is critical to showing the requisite congressional intent. Falling within the “general zone of interest that the statute is intended to protect” is not enough. The majority contrasts the language of the Family Educational Rights and Privacy Act—“no federal funds shall be made available”—with the language of Civil Rights Act statutes, which, the Court stated, confer individual rights by providing that “No person in the United States shall … be subjected to discrimination” on the basis of race, color or national origin (Title VI), or sex (Title IX).

---

27 Gonzaga University, 536 U.S. 273.
29 Id. § 1232g(b)(1).
30 See Pennhurst State School and Hospital, 451 U.S. at 11–32 (refusing to allow enforcement of 42 U.S.C. § 6010, a provision of the Developmental Disability and Bill of Rights Act).
31 Gonzaga, 536 U.S. at 279.
32 Id. at 280 (citing Pennhurst, 451 U.S. at 28).
33 Id. (quoting Pennhurst, 451 U.S. at 17, 28 & n.21).
34 Id. at 285; but see Wilder, 496 U.S. at 508–9 n.9 (stating that inquiry into whether a right exists under Section 1983 is different from the inquiry into whether an implied right of action exists).
35 Gonzaga, 536 U.S. at 284 n.3 (quoting Cannon v. University of Chicago, 441 U.S. 677, 690 n.13 (1979) (Clearinghouse No. 21,638)).
36 Id. at 283.
37 Id. at 284; Family Educational Rights and Privacy Act, 42 U.S.C. § 1232g(b)(1); Civil Rights Act, id. §§ 2000d (Title VI), 1681(a) (Title IX). This aspect of the ruling was foreshadowed a year earlier in Alexander v. Sandoval: “Statutes 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.”’ 532 U.S. at 289 (quoting California v. Sierra Club, 451 U.S. 287, 294 (1981)).
**Aggregate Focus.** The majority notes that the Family Educational Rights and Privacy Act’s nondisclosure provision speaks only in terms of institutional policy and practice, not individual instances of disclosure.\(^{38}\) According to the Court, the provision does not show concern for the needs of a particular individual but rather focuses on the aggregate policies of an educational institution.\(^{39}\)

**Provisions for Enforcement.** The Court was impressed by the centralized administrative enforcement scheme of the Family Educational Rights and Privacy Act. Congress authorized the secretary of education to deal with violations of the Act by creating a centralized office and review board for investigating and adjudicating violations.\(^{40}\) This, according to the majority, “buttressed” its finding of no right-creating language and further counseled against finding a congressional intent to create individually enforceable private rights.\(^{41}\)

According to the chief justice, the goal of *Gonzaga* was to “resolve any ambiguity” in the Court’s Section 1983 jurisprudence.\(^{42}\) However, since the decision was announced, *Gonzaga* certainly has caused confusion. State attorneys are arguing that *Gonzaga* has completely reshaped the legal landscape. In case after case, they are opposing private enforcement of long-recognized federal rights and, in some cases, entire federal statutes. Federal programs enacted under the spending clause are particular targets because they often are phrased to direct a federal agency to provide funding to states as long as they comply with the requirements of the federal law. State attorneys argue that such statutes may not be enforced because they are focused on the person regulated rather than the individual protected.

The states’ arguments are being accepted by some lower courts. They are also being encouraged by some jurists, most notably Justices Scalia and Thomas. For example, in *Pharmaceutical Research and Manufacturers of America v. Walsh*, Justice Scalia filed a separate concurrence to opine that the Medicaid Act claim at issue in the case should have been rejected because the remedy for a state’s failure to adhere to the Medicaid Act is termination of funding by the secretary of health and human services, not a private action in court.\(^{43}\) Justice Thomas wrote separately to observe that spending clause legislation is “much in the nature of a contract,” and if Congress wishes to allow private enforcement of such a law, it must clearly state this intent.\(^{44}\) Citing *Gonzaga*, Justice Thomas concluded that the petitioner “obviously” could not meet this showing.\(^{45}\)

### III. *Gonzaga* in the Lower Courts

Since June 20, 2002, when the Supreme Court decided *Gonzaga*, a number of courts have been asked to decide whether a federal provision may be enforced through Section 1983. This article’s two tables illustrate post-*Gonzaga* enforcement of the Medicaid Act (Table 1) and other selected federal statutes (Table 2).\(^{46}\) Some aspects of these rulings deserve particular mention.

---

\(^{38}\) *Gonzaga*, 536 U.S. at 288.

\(^{39}\) *Id.* (citing *Blessing*, 520 U.S. at 343).

\(^{40}\) *Id.* at 278–79.

\(^{41}\) *Id.* at 289.

\(^{42}\) *Id.* at 278.


\(^{44}\) *Id.* at 682–83 (Thomas, J., concurring) (quoting *Pennhurst*, 451 U.S. at 17).

\(^{45}\) *Id.*; but see *Pharmaceutical Research and Manufacturers of America v. Thompson*, 362 F.3d 817, 819 n.3 (D.C. Cir. 2004) (rejecting state’s reliance on Justices Scalia’s and Thomas’s opinions and stating: “By addressing the merits of the parties’ arguments without mention of any jurisdictional flaw, the remaining seven Justices appear to have sub silentio found no flaw.”).

\(^{46}\) These tables include only published cases assessing selected federal laws. For comprehensive pre- and post-*Gonzaga* Medicaid case citations, see the National Health Law Program’s Court Watch Project, www.healthlaw.org/courtwatch/index.shtml.
First, while an increasing number of cases concern enforcement of federal housing provisions, the Medicaid Act has received the bulk of courts’ post-Gonzaga attention with at least forty cases discussing private enforcement. To date, most decisions have maintained Medicaid beneficiaries’ access to the Section 1983 remedy. For example, most courts are continuing to allow enforcement of provisions ensuring that individuals actually receive needed coverage with reasonable promptness, that individuals have a right to an adequate notice when services are denied, and that children receive preventive care and treatment through the Early and Periodic Screening, Diagnostic, and Treatment Act. These sweeping opinions radically depart from the traditional Blessing/Wilder test, which demands pleading in “manageable analytic bites” so that enforcement can be decided provision by provision. The most notable of these cases, Sabree v. Richman, broadly disapproved of enforcement of the Medicaid Act and was reversed on appeal. While the Sabree district court opinion rested on Gonzaga and Pennhurst, the Third Circuit’s decision carefully reviewed and applied all of the Supreme Court’s recent Section 1983 jurisprudence—an analysis that the court noted was “assuredly not for the timid.”

Second, courts have focused much on the “intended beneficiaries” requirement for enforcement, but they are not ignoring the remaining Blessing/Wilder prongs. Some post-Gonzaga briefing argues that the only question for enforcement is whether the plaintiffs are the intended beneficiaries; however, most courts have not stopped their analysis of enforceability there. Rather, they continue to apply the three-part Blessing/Wilder test. This is not surprising in that the Gonzaga Court did not overrule any of its previous Section 1983 cases.

Third, a few judges have applied Gonzaga broadly to say that entire federal statutes may not be enforced. These sweeping opinions radically depart from the traditional Blessing/Wilder test, which demands pleading in “manageable analytic bites” so that enforcement can be decided provision by provision. The most notable of these cases, Sabree v. Richman, broadly disapproved of enforcement of the Medicaid Act and was reversed on appeal. While the Sabree district court opinion rested on Gonzaga and Pennhurst, the Third Circuit’s decision carefully reviewed and applied all of the Supreme Court’s recent Section 1983 jurisprudence—an analysis that the court noted was “assuredly not for the timid.”

Fourth, statutes that are not part of the Social Security Act do not benefit from Congress’ recent amendment intended to verify the availability of the Section

---

47See Tables 1 and 2. Since Gonzaga, courts have not allowed provisions of the Family Educational Rights and Privacy Act (the Act at issue in Gonzaga) to be enforced pursuant to Section 1983. See, e.g., Shockley v. Svoboda, 342 F.3d 736 (7th Cir. 2003); Slavinec v. DePaul University, 332 F.3d 1068 (7th Cir. 2003); Taylor v. Vermont Department of Education, 313 F.3d 768 (2d Cir. 2002) (Clearinghouse No. 55,081); Cudjoe v. Independent School District Number 12, 297 F.3d 1058 (10th Cir. 2002).

48For the specific provisions, see 42 U.S.C. §§ 1396a(a)(3) (requiring medical assistance to all individuals with reasonable promptness); 1396a(a)(3) (requiring due process when an individual’s claim for assistance is denied); 1396a(a)(10) (requiring medical assistance for all individuals who meet the eligibility requirements); 1396a(a)(43), 1396d(a)(4)(B), 1396d(r) (requiring states to provide Early and Periodic Screening, Diagnostic, and Treatment Program services and information). See Table 1 for names of cases allowing enforcement of these provisions.

49See, e.g., Sabree v. Richman, 367 F.3d 180, 183 (3d Cir. 2004) (Clearinghouse No. 55,662) (applying three-part Blessing/Wilder test to Medicaid Act provisions); Bruggeman v. Blagojevich, 324 F.3d 906, 911 (7th Cir. 2003) (Clearinghouse No. 55,231) (finding that a Medicaid Act provision failed to meet the second Blessing/Wilder prong); Keup v. Wisconsin Department of Health and Family Services, 675 N.W.2d 755, 755 (Wis. 2004) (finding that a Medicaid Act provision failed to meet the third Blessing/Wilder prong).


51See Blessing, 520 U.S. at 342, 349 (remanding and stating: “Only when the complaint is broken down into manageable analytic bites can a court ascertain whether each separate claim satisfies the various criteria we have set forth…..”).


53Sabree, 367 F.3d at 183.

54See, e.g., M.A.C., 284 F. Supp. 2d 1298 (citing district court in Sabree); Capitol People First, No. 2002038715 (citing district courts in M.A.C. and Sabree).
**Table 2.—Section 1983 Enforcement of Selected Federal Statutes, Post-Gonzaga (Jan. 2005)**

<table>
<thead>
<tr>
<th>STATUTE</th>
<th>ENFORCEABLE</th>
<th>UNENFORCEABLE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Housing and Community Development Act</td>
<td><em>Price v. City of Stockton</em>, 390 F.3d 1105 (9th Cir. 2004) (Clearinghouse No. 54,800) (regarding 42 U.S.C. §§ 5304(k) and 5304(k)(2), relocation assistance)</td>
<td><em>Price, 390 F.3d 1105 (regarding 42 U.S.C. § 5304(d)(2)(A), relocation plans)</em></td>
</tr>
<tr>
<td></td>
<td></td>
<td><em>Freeman v. Fahey</em>, 374 F.3d 663 (8th Cir. 2004) (Clearinghouse No. 55,743) (regarding 42 U.S.C. § 5309, prohibition on housing discrimination)</td>
</tr>
<tr>
<td>Housing Choice [Section 8] Voucher Program</td>
<td></td>
<td><em>Thompson, 348 F. Supp. 2d 398 (regarding 42 U.S.C. § 1437f, standard for assistance)</em></td>
</tr>
<tr>
<td></td>
<td></td>
<td><em>Wallace v. Chicago Housing Authority, 298 F. Supp. 2d 710 (N.D. Ill. 2003) (Clearinghouse No. 55,072) (regarding 42 U.S.C. § 3608(e)(5) and 42 U.S.C. § 1437c-d(1), duty to further fair housing)</em></td>
</tr>
<tr>
<td></td>
<td></td>
<td><em>Mair, 303 F. Supp. 2d 237 (regarding 42 U.S.C. § 4851, need for assessment and elimination of residential lead-based paint hazards)</em></td>
</tr>
</tbody>
</table>
Using Section 1983 to Enforce Federal Laws

Table 2.—Section 1983 Enforcement of Selected Federal Statutes, Post-Gonzaga (Jan. 2005) (Continued)

<table>
<thead>
<tr>
<th>STATUTE</th>
<th>ENFORCEABLE</th>
<th>UNENFORCEABLE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Privacy Act</td>
<td>Schwier v. Cox, 340 F.3d 1284 (11th Cir. 2003) (regarding 5 U.S.C. § 552a, privacy of social security numbers when voting)</td>
<td></td>
</tr>
</tbody>
</table>

1983 remedy. In these non–Social Security Act cases, some courts are focusing on the statutory structure of the spending clause enactment to deny enforcement and finding that the provision is aimed at the person regulated rather than the individual protected. For example, in Almendares v. Palmer the court decided that a statutory requirement that state food stamp programs assure access to limited-English-speaking individuals was directed at the state, not individual food stamp applicants or recipients.

Fifth, Gonzaga has caused the lower courts to look at whether federal regulations, standing alone, are “laws” under Section 1983. The Supreme Court has not

---

55See supra notes 24–25 and accompanying text; see also, e.g., S.D. v. Hood, 391 F.3d 581, 603 (5th Cir. 2004) (citing 42 U.S.C. § 1320a-2 to allow beneficiaries to enforce a Medicaid Act provision); Rabin v. Wilson-Coker, 362 F.3d 190, 202 (2d Cir. 2004) (Clearinghouse No. 55,594) (same).

Section 1983 plainly authorizes private individuals to bring suits to enforce the federal Constitution and laws, the Supreme Court recognized in *Maine v. Thiboutot* and earlier cases. Nevertheless, states’ rights advocates have resisted private enforcement of New Deal and post–New Deal laws, and recent Supreme Court decisions by the states’ rights majority have narrowed the application of Section 1983. *Gonzaga University v. Doe*, the Court’s most recent decision addressing the Section 1983 remedy, targets spending clause enactments in particular and, while intended to clarify Section 1983 enforcement, has instead caused some confusion in the lower courts. As the controversies become more defined, the Court likely will issue further guidance.

Meanwhile, attorneys who represent the beneficiaries of federal statutes can take the following six steps:

1. **Cite the specific section of the federal statute that is being enforced.**

2. **Attempt to enforce only those provisions that focus on the individual and contain right- or duty-creating language.**

---

57 Wright, 479 U.S. at 431–32; but see id. at 437 (O’Connor, J., dissenting) (“[I]t is necessary to ask whether administrative regulations alone could create such a right. This is a troubling issue.....”).


59 Gonzaga, 536 U.S. at 287; Sandoval, 532 U.S. at 291 (“Language in a regulation may invoke an [implied] private right of action that Congress through statutory text created, but it may not create a right that Congress has not.”).

60 See, e.g., Three Rivers Center for Independent Living v. Housing Authority of Pittsburgh, 382 F.3d 412, 422–32 (3d Cir. 2004); Save Our Valley Citizen v. Sound Transit, 335 F.3d 932, 939 (9th Cir. 2003) (Clearinghouse No. 53,757); see also South Camden Citizens in Action v. New Jersey Department of Environmental Protection, 274 F.3d 771, 790 (3d Cir. 2001) (Clearinghouse No. 53,759) (pre-*Gonzaga* case refusing to allow enforcement of federal regulation); *Harris v. James*, 127 F.3d 993, 1005–9 (11th Cir. 1997) (Clearinghouse No. 50,797) (same); but see *Price v. City of Stockton*, 390 F.3d 1105, 1112 n.6 (9th Cir. 2004) (Clearinghouse No. 54,800) (“It is now well settled that regulations alone cannot create rights ... however, regulations ‘may be relevant in determining the scope of the right conferred by Congress’ and ‘therefore may be considered in applying the three-prong Blessing test.’ (citation omitted).”)

61 S.D., 391 F.3d at 607.

62 On September 28, 2004, the Supreme Court agreed to hear a Section 1983 case focusing on whether the Telecommunications Act, 47 U.S.C. § 332(c), contains a comprehensive remedial scheme. See *Abrams v. City of Rancho Palos Verdes*, 354 F.3d 1094 (9th Cir. 2004) (finding no comprehensive scheme), cert. granted, 125 S. Ct. 26. The Court has denied certiorari in cases questioning the determination of whether a federal law creates rights that may be enforced through Section 1983. See, e.g., *Frew v. Hawkins*, 538 U.S. 905 (2003) (Clearinghouse Nos. 50,456 & 55,435) (granting certiorari in part but denying request to review whether Medicaid provisions were enforceable pursuant to Section 1983); *Westside Mothers v. Haveman*, 289 F.3d 852 (6th Cir. 2002), cert. denied, 537 U.S. 1045 (Clearinghouse No. 52,678) (finding that Medicaid Act provisions create enforceable federal rights pursuant to Section 1983).
3. If the Social Security Act is being enforced, remember that Section 1320a of the Act states Congress’ intent that provisions of the Act be enforced through Section 1983.

4. Clearly distinguish the language of the provision being enforced from the Family Educational Rights and Privacy Act provision at issue in Gonzaga.

5. Rely on Congressional history and regulations to flesh out statutes that have a clear individual focus.

6. Be familiar with pre- and post-Gonzaga enforcement of the provision.

**Author's Acknowledgments**

_I thank Christopher Jackson, a law student at the University of North Carolina School of Law, for researching Gonzaga's application to non-Medicaid statutes. Work on this article was made possible through the generous support of the Nathan Cummings Foundation._

---

**Federal Practice Manual for Legal Aid Attorneys**

Printed copies of Federal Practice Manual for Legal Aid Attorneys, a manual for attorneys who represent low-income people and use systemic-reform litigation, are available for sale.


“Fifteen years of substantive legal development, good and bad, were also incorporated in the text,” says Gutman. Lawyers in legal services, public interest organizations, law schools, and law firms engaged in systemic-reform litigation will find Federal Practice Manual helpful.

Federal Practice Manual is published by the Sargent Shriver National Center on Poverty Law and was prepared in collaboration with the National Legal Aid and Defender Association.

Softcover copies at $50. To order copies, call Nancy Carey at 312.263.3830 ext. 223, or e-mail nancycarey@povertylaw.org.