

## COMMENTS

### **“On Behalf of Each Child”: Section 1983 Enforcement of the Right to Foster Care Maintenance Payments under the Child Welfare Act**

*Parker C. Eudy*†

*In 1980, Congress passed the Adoption Assistance and Child Welfare Act (CWA). As a piece of Spending Clause legislation, the CWA imposes upon states numerous conditions in exchange for federal funding. One of these conditions is that states must make foster care maintenance payments to foster caregivers “on behalf of each child” who qualifies for assistance. Because the CWA does not include a federal mechanism for reviewing individual claims, foster caregivers seeking to compel their state to make adequate foster care maintenance payments have resorted to suing under 42 USC § 1983. However, since the 1980s, the Supreme Court has narrowed the scope of § 1983, holding that private individuals may enforce only constitutional and statutory rights, not benefits, under § 1983. Due to ambiguity in the Court’s opinions, a circuit split has emerged over whether a foster caregiver may enforce the right to foster care maintenance payments on behalf of the foster child under his or her care.*

*This Comment argues that the CWA creates an enforceable right to foster care maintenance payments under § 1983 by analyzing the CWA’s text and structure and by drawing on the context of the Act’s enactment and subsequent legislative history. The circuit courts have overlooked several aspects of the CWA’s text and structure that indicate Congress’s intent to create an enforceable right. Moreover, the circuit courts have almost exclusively analyzed the text of the CWA, ignoring aspects of the CWA’s enactment and later pieces of legislative history that provide further signs of congressional intent to create an enforceable right. Lastly, this Comment concludes that § 1983 enforcement of foster care maintenance payments furthers the legislative purpose of the CWA. By ensuring that foster caregivers are adequately supported to provide care throughout the entire duration of a child’s placement in foster care, § 1983 enforcement reduces the likelihood that a foster child is shuffled between foster homes for indefinite periods of time.*

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† BA 2014, Rice University; JD Candidate 2019, The University of Chicago Law School.

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## INTRODUCTION

In 1980, Congress enacted the Adoption Assistance and Child Welfare Act<sup>1</sup> (CWA), which added Title IV-E to the Social Security Act<sup>2</sup> (SSA). The purpose of the CWA was to enable states to establish foster care and transitional independent living programs for eligible children and to provide adoption assistance for children with special needs.<sup>3</sup> Passed under Congress's Spending Clause power,<sup>4</sup> the CWA gives each state the option of

<sup>1</sup> Pub L No 96-272, 94 Stat 500 (1980), codified as amended at 42 USC § 670 et seq.

<sup>2</sup> 49 Stat 620 (1935), codified as amended at 42 USC § 301 et seq. The CWA amended Title IV-B of the SSA.

<sup>3</sup> 42 USC § 670.

<sup>4</sup> See *D.O. v Glisson*, 847 F3d 374, 376 (6th Cir 2017); *Midwest Foster Care and Adoption Association v Kincaide*, 712 F3d 1190, 1194 (8th Cir 2013). See also US Const Art 1, § 8, cl 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts

creating its own foster care system in compliance with certain conditions in exchange for federal funding. Any state choosing to opt into the federal program must submit to the Secretary of Health and Human Services a state plan that satisfies a list of requirements for approval.<sup>5</sup> For example, because family preservation and reunification were major goals of the CWA,<sup>6</sup> one of these requirements is that states make “reasonable efforts . . . to preserve and reunify families.”<sup>7</sup> Upon approval by the Secretary, states become eligible to receive federal funding.<sup>8</sup>

The CWA also mandates that states with approved plans make foster care maintenance payments on behalf of qualifying children.<sup>9</sup> These payments must be provided to each child’s foster caregiver,<sup>10</sup> and they are intended to cover the costs of, among other things, food, clothing, and shelter.<sup>11</sup> Because the CWA does not explicitly provide aggrieved parties with a private right of action to compel states to provide adequate foster care maintenance payments, foster caregivers have resorted to suing under 42 USC § 1983.<sup>12</sup> In recent years, three circuit courts have diverged over whether the CWA creates a statutory right to foster care maintenance payments that is enforceable under § 1983.<sup>13</sup>

The stakes are high for many foster caregivers and foster children. With over 420,000 children living in foster care,<sup>14</sup> ensuring that states provide adequate assistance to foster caregivers is

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and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States. . .”).

<sup>5</sup> See 42 USC § 671(a).

<sup>6</sup> See text accompanying notes 51–54. See also John E.B. Myers, *A Short History of Child Protection in America*, 42 Fam L Q 449, 459 (2008) (“The effort to preserve families—called family preservation—was a key component of [the CWA], and the dominant paradigm of child protection in the 1980s.”).

<sup>7</sup> 42 USC § 671(a)(15)(B).

<sup>8</sup> 42 USC § 671(a).

<sup>9</sup> 42 USC § 672(a).

<sup>10</sup> 42 USC § 672(b).

<sup>11</sup> 42 USC § 675(4)(A) (defining “foster care maintenance payments” and stipulating the costs that such payments should cover).

<sup>12</sup> Section 1983 imposes liability on any “person who, under color of any statute” deprives a citizen “of any rights, privileges, or immunities secured by the Constitution and laws.” 42 USC § 1983.

<sup>13</sup> Compare *Midwest Foster*, 712 F3d at 1203 (holding that the CWA does not confer a right to foster care maintenance payments that is enforceable under § 1983), with *Glisson*, 847 F3d at 380–81 (holding that the CWA confers a right to foster care maintenance payments that is enforceable under § 1983); *California State Foster Parent Association v Wagner*, 624 F3d 974, 982 (9th Cir 2010) (same).

<sup>14</sup> *Foster Care Statistics 2015* \*4 (Children’s Bureau, March 2017), archived at <http://perma.cc/R8JY-EWA2>.

vital. If § 1983 actions are not available to compel states to make adequate foster care maintenance payments, foster caregivers will have few alternatives to force their states to comply. Another remedy for a state's noncompliance would be for foster caregivers to ask the federal government to terminate funding to their state.<sup>15</sup> Such a drastic move is rare<sup>16</sup> and would likely devastate any state's foster care system and ultimately harm foster caregivers and foster children.<sup>17</sup> However, consistent failure by states in providing adequate foster care maintenance payments may result in multiple placements for more foster children and exacerbate "foster care drift" because fewer foster caregivers would be able to provide care for the entire duration of a foster child's removal.<sup>18</sup> These systemic problems severely hinder efforts toward family reunification and permanency for foster children.<sup>19</sup>

This Comment argues that the CWA's text, structure, purpose, and legislative history unambiguously affirm that Congress intended the CWA to create a right to foster care maintenance payments that is enforceable under § 1983. Part I delves into the history of child welfare legislation in the United States and highlights several pivotal developments that ultimately led to the CWA. Part I also maps the evolution of § 1983 actions as a vehicle for enforcing federal statutory rights. Part II summarizes the reasoning of the circuit courts that have addressed whether the CWA confers an enforceable right to foster care maintenance payments under § 1983. Finally, Part III argues that the text and structure of the CWA's foster care maintenance payment provisions closely

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<sup>15</sup> See text accompanying notes 291–92.

<sup>16</sup> See Sasha Samberg-Champion, Note, *How to Read Gonzaga: Laying the Seeds of a Coherent Section 1983 Jurisprudence*, 103 Colum L Rev 1838, 1859 (2003) ("Empirical data show [that] . . . [f]ederal agency action following state noncompliance is a rarity.").

<sup>17</sup> See *id.* at 1839 (explaining that asking the federal government to eliminate funding to one's state program would not ensure compliance and would further "cripple" the program).

<sup>18</sup> For a discussion of the impacts of "multiple placements" on foster children and the foster care system, see Melissa J. Dorris, *Federal Oversight and Private Actions: Maintaining a Balance in Rights Enforcement of Federal Child Welfare Legislation*, 23 Children's Legal Rts J 23, 32–33 (2003) (identifying multiple placements as one of the problems plaguing the foster care system and suggesting that "litigation may be the means necessary to achieve broad sweeping reform"). See also text accompanying notes 306–08. See also Leonard P. Edwards, *Improving Implementation of the Federal Adoption Assistance and Child Welfare Act of 1980*, *Juvenile & Fam Ct J* 3, 4 & n 19 (1994) (defining "foster care drift" as "the situation of children lost in the child welfare system who move from placement to placement without ever achieving permanency"). See also text accompanying notes 42–45.

<sup>19</sup> See text accompanying notes 295–308.

resemble statutory provisions that the Supreme Court has found create a right that is enforceable under § 1983 for reasons the circuit courts have not addressed. Part III ends by contending that § 1983 actions further the CWA's purpose by reducing the likelihood of foster care drift and that the context of the CWA's enactment and later legislative history strongly indicate that Congress intended the CWA to create a right to foster care maintenance payments that is enforceable under § 1983.

#### I. CHILD WELFARE LEGISLATION AND SECTION 1983 ENFORCEMENT

Although the origins of 42 USC § 1983 trace back to the Civil Rights Act of 1871,<sup>20</sup> it was not until 1980 that the Supreme Court declared that federal statutory rights could be enforced under § 1983.<sup>21</sup> However, § 1983 actions had already proliferated during the 1960s and 1970s to enforce a variety of federal welfare provisions.<sup>22</sup> During the same period, Congress passed significant pieces of legislation that made major changes to the foster care system.<sup>23</sup> Since the passage of the CWA in 1980, § 1983 actions have remained the primary vehicle utilized by foster caregivers to compel states to provide foster care maintenance payments in accordance with the CWA.<sup>24</sup>

Part I.A chronicles some of the key historical developments in child welfare legislation and the public policy shifts that ultimately led Congress to pass the CWA. Part I.B recounts the origin and growth of § 1983 actions as a means for enforcing federal laws up until 1980, noting that the use of § 1983 actions to enforce provisions of the SSA had become commonplace by the time Congress enacted the CWA. Part I.C analyzes several pivotal cases spanning from the early 1980s to 2000s in which the Supreme Court developed a multifactor test to determine if a provision of Spending Clause legislation creates an enforceable right under § 1983.

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<sup>20</sup> Civil Rights Act of 1871, 17 Stat 13. Section 1983 emerged as part of the Civil Rights Act of 1871, "which attempted to deal with widespread legal abuses and physical violence, often backed by the Ku Klux Klan, against Southern Blacks and their white supporters." Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 Cornell L Rev 482, 484 (1982).

<sup>21</sup> See *Maine v Thiboutot*, 448 US 1, 4–6 (1980); Cass R. Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U Chi L Rev 394, 394–95 (1982).

<sup>22</sup> See note 79 and accompanying text.

<sup>23</sup> See notes 30–41 and accompanying text.

<sup>24</sup> See Dorris, 23 Children's Legal Rts J at 28–33 (cited in note 18) (summarizing cases in which plaintiffs have sought enforcement of the CWA's provisions under § 1983).

### A. Child Welfare Legislation: A Brief History

The earliest institutional efforts in the United States to care for children whose parents could not adequately care for them date back to the early nineteenth century. Led by private and religious organizations, these efforts resulted in the creation of some of the country's first orphanages and almshouses for the poor.<sup>25</sup> By the 1850s, the poor living conditions of children in these facilities spurred the development of new methods of providing care for dependent children.<sup>26</sup> Reform-minded organizations, such as the Children's Aid Society in New York, were founded with the goal of establishing local and statewide agencies to place orphaned children in the homes of families for temporary periods, giving rise to the "foster home movement."<sup>27</sup> This Section explores how the relationship between the federal government and states has evolved over time with respect to administering child welfare services.

Most early child welfare agencies were subsidized and regulated by the states. In 1935, with the enactment of the SSA, the federal government became more extensively involved in administering assistance to states for child welfare services.<sup>28</sup> Title IV of the SSA provided federal matching grants to help states create and manage their own child welfare agencies to care for dependent children living in fatherless and impoverished homes. This

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<sup>25</sup> See Kasia O'Neill Murray and Sarah Gesiriech, *A Brief Legislative History of the Child Welfare System* \*1 (The Pew Charitable Trusts, Nov 1, 2004), archived at <http://perma.cc/7K9N-UXVY>; Martin Guggenheim, *What's Wrong with Children's Rights* 181–82 (Harvard 2005).

<sup>26</sup> See Brenda G. McGowan, *Historical Evolution of Child Welfare Services*, in Gerald P. Mallon and Peg McCartt Hess, eds, *Child Welfare for the Twentieth-First Century: A Handbook of Practices, Policies, and Programs* 10, 13–15 (Columbia 2005).

<sup>27</sup> *Id.* at 14–15.

<sup>28</sup> Guggenheim, *What's Wrong with Children's Rights* at 182 (cited in note 25). However, the federal government was involved in other forms of child welfare prior to the enactment of the SSA. The most prominent example of the federal government's involvement in this arena was the United States Children's Bureau, which was established in 1912 and which initially dedicated its efforts to reducing infant mortality. During the early twentieth century, "the Bureau expanded its efforts to include research and standard-setting in the areas of child labor, juvenile delinquency, mothers' aid, illegitimacy, child welfare, and child health." *The Children Bureau's Legacy: Ensuring the Right to Childhood* \*28 (Children's Bureau, Apr 1, 2013), archived at <http://perma.cc/CC3E-RF7H>. Prior to the enactment of the SSA, the Children's Bureau encouraged states to reform their adoption and foster care laws, and it ultimately played a key role in drafting provisions of the SSA related to child welfare. Moreover, it was responsible for distributing federal grants-in-aid to states under the newly enacted legislation. See *id.* at \*62. See also *US Children's Bureau* (The Adoption History Project), archived at <http://perma.cc/W666-YVT3>.

federal program is now known as the Aid to Families with Dependent Children (AFDC) program.<sup>29</sup> However, initially this program did not authorize states to use federal grant money to provide assistance to foster caregivers even if a foster child would have otherwise qualified for aid.

Federal aid to states did not cover foster care services until the 1960s,<sup>30</sup> and in the decade that followed, the federal government began to play an increasingly prominent role in shaping state-provided child welfare services.<sup>31</sup> Congress amended the SSA in 1961 to give states the option of using federal aid to provide payments to foster caregivers under what became known as the AFDC-FC program.<sup>32</sup> In 1968, Congress made the AFDC-FC program mandatory for states to receive AFDC funding.<sup>33</sup> As the federal government expanded the number of children eligible to receive reimbursable welfare services, the amount of money flowing into states increased.<sup>34</sup> In effect, "By attaching conditions to the receipt of considerable federal dollars that paid for the out-of-home placement of children, Congress has been able to persuade every state to conform its child welfare laws with federal law."<sup>35</sup>

The expansion of child welfare services during the 1960s was driven by public attitudes about the harmful effects of poverty on the living conditions and well-being of children.<sup>36</sup> But by the 1970s, public support for welfare programs aimed at assisting minorities and the poor began to sour.<sup>37</sup> This led many lawmakers and foster care advocates to reframe policy rationales for expanding and improving foster care not as efforts to address poverty but

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<sup>29</sup> McGowan, *Historical Evolution* at 26 (cited in note 26). See also Irene Lurie, *Major Changes in the Structure of the AFDC since 1935*, 59 *Cornell L Rev* 825, 826 (1974).

<sup>30</sup> See Deborah L. Sanders, *Toward Creating a Policy of Permanence for America's Disposable Children: The Evolution of Federal Foster Care Funding Statutes from 1961 to Present*, 29 *J of Legis* 51, 55 (2003).

<sup>31</sup> Guggenheim, *What's Wrong with Children's Rights* at 183–85 (cited in note 25).

<sup>32</sup> See Act of May 8, 1961, Pub L No 87-31, § 2, 75 Stat 76. See also Sanders, 29 *J of Legis* at 56–57 (cited in note 30).

<sup>33</sup> Act of Jan 2, 1968, Pub L No 90-248, § 208(a), 81 Stat 892. See also Lurie, 59 *Cornell L Rev* at 827–28 (cited in note 29) (chronicling the legislative changes to the AFDC program during the 1960s).

<sup>34</sup> See Murray and Gesiriech, *A Brief History of the Child Welfare System* at \*2–3 (cited in note 25).

<sup>35</sup> See Guggenheim, *What's Wrong with Children's Rights* at 183–84 (cited in note 25).

<sup>36</sup> See Sanders, 29 *J of Legis* at 57–58 (cited in note 30).

<sup>37</sup> See Judith M. Gueron, *Welfare and Poverty: The Elements of Reform*, 11 *Yale L & Pol Rev* 113, 124 (1993) (attributing shifts in the public's attitude toward welfare programs to growing "public anger at a welfare system that seem[ed] to provide people with a long-term alternative to work").

rather as efforts to “protect” children and to ensure “safety” from abuse and neglect.<sup>38</sup> This rhetorical shift gave rise to what some have dubbed the “child rescue philosophy,”<sup>39</sup> which produced new federal legislation premised on the belief that many children were living in unsafe homes with families unfit to care for them and that foster care placement was the best way to help solve this problem.<sup>40</sup> Regardless of the justifications for expanding child welfare programming, legislation from the early 1960s to mid-1970s invariably led to foster care programs with funding structures that were “aimed at sustaining children in care and not at moving children out of the foster care system.”<sup>41</sup>

By the late 1970s, concerns emerged that too many children were being removed from their homes unnecessarily.<sup>42</sup> Once children entered the foster care system, they were often shuffled from one foster home to another and subjected to “perpetual states of familial uncertainty.”<sup>43</sup> Many lawmakers and child welfare advocates began to view this phenomenon, which was coined “foster care drift,” as the most pressing problem facing children in the foster care system.<sup>44</sup> Congress realized that the funding structure of previous AFDC-FC legislation was partly to blame.<sup>45</sup>

In 1980, Congress passed the CWA to address these mounting issues. In addition to creating Title IV-E of the SSA, the CWA transferred the AFDC-FC program to the new title.<sup>46</sup> The CWA left intact the federal funding mechanism for the AFDC-FC program, but it imposed upon states new conditions that they must

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<sup>38</sup> See Guggenheim, *What's Wrong with Children's Rights* at 184–85 (cited in note 25).

<sup>39</sup> See Kathleen A. Bailie, *The Other “Neglected” Parties in Child Protective Proceedings: Parents in Poverty and the Role of the Lawyers Who Represent Them*, 66 *Fordham L Rev* 2285, 2290 (1998).

<sup>40</sup> See, for example, Child Abuse Prevention and Treatment Act (CAPTA), Pub L No 93-247, 88 Stat 4 (1974), codified as amended in various sections of Title 42.

<sup>41</sup> Sanders, 29 *J of Legis* at 56–57 (cited in note 30).

<sup>42</sup> See Murray and Gesiriech, *A Brief History of the Child Welfare System* at \*3 (cited in note 25).

<sup>43</sup> Sanders, 29 *J of Legis* at 61 (cited in note 30). See also Michael J. Bufkin, Note, *The “Reasonable Efforts” Requirement: Does It Place Children at Increased Risk of Abuse or Neglect?*, 35 *U Louisville J Fam L* 355, 357 (1996) (stating that the “average foster child spend[t] time in three or four homes”).

<sup>44</sup> See Bailie, 66 *Fordham L Rev* at 2289 (cited in note 39). See also *Smith v Organization of Foster Families for Equality and Reform*, 431 US 816, 837–38 & n 41 (1977).

<sup>45</sup> See Martin Guggenheim, Book Review, *Somebody's Children: Sustaining the Family's Place in Child Welfare Policy*, 113 *Harv L Rev* 1716, 1726–27 (2000).

<sup>46</sup> See Murray and Gesiriech, *A Brief History of the Child Welfare System* at \*3 (cited in note 25).



satisfy to continue receiving federal funding for foster care services.<sup>47</sup> Unlike in previous legislation, states were now required to implement procedural safeguards, such as active case management, periodic foster care placement reviews throughout the duration of each child's placement in foster care, and long-term permanency planning for moving children out of foster care.<sup>48</sup> The CWA also required states to establish an adoption assistance program for children.<sup>49</sup>

By discouraging unwarranted removals and encouraging reunification and permanent placement in a timely manner, the CWA aimed to reduce foster care drift.<sup>50</sup> The CWA was largely built on the "family preservation philosophy," which "has as its starting point the belief that a child's biological family is the placement of first preference."<sup>51</sup> Ultimately, the goal of the CWA was to create stable and permanent living environments for children and to avoid lengthy removals.<sup>52</sup> The CWA requires that, in order for states to receive funding for foster care services, they must make "reasonable efforts" to prevent removal of children from their homes before placing them in foster care.<sup>53</sup> After removing children from their homes, states are required to make reasonable efforts to "reunify" children and their families to prevent indefinite periods of foster placement and foster care drift.<sup>54</sup>

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<sup>47</sup> See *id.* at \*3–4 (explaining that the CWA was the "first time [that Congress] established a major federal role in the administration and oversight of child welfare services" and listing several major changes to prior child welfare services under the AFDC-FC program).

<sup>48</sup> See 42 USC §§ 671(a)(16), 675(5), 675a(a)(1)–(3).

<sup>49</sup> See 42 USC §§ 673–673b.

<sup>50</sup> See Sara J. Klein, Note, *Protecting the Rights of Children: Suing Under § 1983 to Enforce Federal Child Welfare Law*, 26 *Cardozo L Rev* 2611, 2619–20 (2005) ("In response to . . . the growing number of children who were lingering in foster care for many years, Congress passed the [CWA]. The CWA focused on reducing the number of children in foster care by preserving and reuniting families whenever possible.") (citations omitted).

<sup>51</sup> See Alice C. Shotton, *Making Reasonable Efforts in Child Abuse and Neglect Cases: Ten Years Later*, 26 *Cal W L Rev* 223, 255 (1990).

<sup>52</sup> When a child is removed from his or her family and reunification becomes unsuitable, the CWA includes provisions to ensure swift placement with an adoptive family. See Sanders, 29 *J of Legis* at 58 (cited in note 30).

<sup>53</sup> 42 USC § 671(a)(15)(B).

<sup>54</sup> See 42 USC § 671(a)(15)(B) (stating that "reasonable efforts shall be made to preserve and reunify families . . . to make it possible for a child to safely return to the child's home"). See also David J. Herring, *Inclusion of the Reasonable Efforts Requirement in Termination of Parental Rights Statutes: Punishing the Child for the Failures of the State Child Welfare System*, 54 *U Pitt L Rev* 139, 158–59 (1992) ("Children caught in foster care drift are neither returned to their parents' home nor freed for placement in adoptive homes.").

Like other SSA programs, the CWA functions as a federal-state cooperative, and states that do not opt into the program forgo all federal funding for foster care services. Section 671(a) directs that, “[i]n order for a State to be eligible for payments [from the federal government,] . . . it shall have a plan approved by the Secretary [of Health and Human Services].”<sup>55</sup> State plans are subject to periodic review by the secretary, and to remain compliant, a state program must be in “substantial conformity” with the requirements in § 671.<sup>56</sup> The first listed requirement is to “provide[ ] for foster care maintenance payments in accordance with section 672.”<sup>57</sup>

Section 672 explains how each state must implement its foster care maintenance payment program, and § 675(4)(A) defines what the payments must cover. Section 672 explicitly mandates that “[e]ach State with a plan approved under this part shall make foster care maintenance payments on behalf of each child who has been removed from the home of a relative.”<sup>58</sup> Although foster families and childcare institutions are the recipients of foster care maintenance payments, eligibility for payments is tied to the circumstances of the foster child.<sup>59</sup> The eligibility criteria “closely track[ ]” those of the AFDC-FC program, which are based on the financial needs and income level of a child’s parent(s) prior to removal.<sup>60</sup> Thus, not all foster children are eligible for having payments made on their behalf. Finally, § 675(4)(A), which is located in the CWA’s definitional section, defines foster care maintenance payments as payments intended to cover “the cost of . . . food, clothing, shelter, daily supervision, school supplies, . . . [and] reasonable travel to the child’s home for visitation.”<sup>61</sup>

Because the CWA lacks any mechanism for reviewing individual claims,<sup>62</sup> foster caregivers have resorted to bringing

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<sup>55</sup> 42 USC § 671(a).

<sup>56</sup> 42 USC §§ 1320a–1322a(a).

<sup>57</sup> 42 USC § 671(a)(1).

<sup>58</sup> 42 USC § 672(a)(1).

<sup>59</sup> See 42 USC § 672(c) (defining “foster family home” and “child-care institution”).

<sup>60</sup> House Committee on Ways and Means, *Child Welfare: Legislative History*, in *Green Book: Background Material and Data on the Programs within the Jurisdiction of the Committee on Ways and Means* \*5 (2011), archived at <http://perma.cc/CW43-EZ8Z> (“2011 Green Book”). See also 42 USC § 672(a)(1)(B); 42 USC § 672(a)(3).

<sup>61</sup> 42 USC § 675(4)(A).

<sup>62</sup> See *D.O. v Glisson*, 847 F3d 374, 380 (6th Cir 2017); *Midwest Foster Care and Adoption Association v Kincaid*, 712 F3d 1190, 1202 (8th Cir 2013); *California State Foster Parent Association v Wagner*, 624 F3d 974, 982 (9th Cir 2010). The only exceptions are 42 USC § 671(a)(18)(A), which prohibits states from “deny[ing] to any person the opportunity

private causes of action under § 1983 to enforce the right to foster care maintenance payments.<sup>63</sup> In some cases, foster caregivers allege that their state has failed to make payments even though their foster child meets the eligibility requirements.<sup>64</sup> In others, foster caregivers may receive foster care maintenance payments but allege that the payments inadequately cover the costs enumerated in § 675(4)(A).<sup>65</sup> While some courts have authorized foster caregivers to sue under § 1983 to compel their state to comply with § 672 and § 675(4), other courts have found that the statutory language and structure of these provisions foreclose § 1983 actions.<sup>66</sup>

#### B. From Implied Causes of Action to § 1983 Actions

The Court’s § 1983 doctrine underwent massive changes around the same time the CWA was enacted, and it has continued to evolve ever since. Section 1983 imposes liability on any “person who, under color of any statute” deprives a citizen “of any rights, privileges, or immunities secured by the Constitution and laws.”<sup>67</sup> The Supreme Court did not affirm the availability of § 1983 actions for plaintiffs alleging violations of constitutional rights until 1961.<sup>68</sup> As for violations of purely federal statutory rights—in the absence of constitutional claims—the Court did not affirm the availability of § 1983 actions until 1980.<sup>69</sup> This Section discusses the rise of § 1983 actions during the 1960s and 1970s, which roughly coincided with the decline of implied causes of action.

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to become an adoptive or a foster parent, on the basis of the race, color, or national origin of the person, or of the child, involved,” and 42 USC § 671(a)(18)(B), which prohibits states from “delay[ing] or deny[ing] the placement of a child for adoption or into foster care, on the basis of the race, color, or national origin of the adoptive or foster parent, or the child, involved.”

<sup>63</sup> *Black’s Law Dictionary* defines “private right of action” as “[a]n individual’s right to sue in a personal capacity to enforce a legal claim.” *Black’s Law Dictionary* 1520 (West 10th ed 2014).

<sup>64</sup> See, for example, *Glisson*, 847 F3d at 376.

<sup>65</sup> See, for example, *Wagner*, 624 F3d at 976–77.

<sup>66</sup> See Part II.

<sup>67</sup> 42 USC § 1983.

<sup>68</sup> See *Monroe v Pape*, 365 US 167, 171 (1961) (holding that an “[a]llegation of facts constituting a deprivation under color of state authority of a right guaranteed by the Fourteenth Amendment satisfies to that extent the requirement of [42 USC § 1983]”).

<sup>69</sup> See *Maine v Thiboutot*, 448 US 1, 4–6 (1980).

For over half a century starting in 1916,<sup>70</sup> federal courts generally found an implied private cause of action for a plaintiff injured by the violation of a federal statute or constitutional provision so long as the plaintiff was a member of the class of persons that the statutory or constitutional provision was meant to protect.<sup>71</sup> This judicial power to create private causes of action was derived from common law doctrine and provided litigants with access to federal courts.<sup>72</sup> By the 1960s, courts were frequently reading implied causes of action into federal laws in which an express right was absent as a means of guaranteeing that statutes were implemented effectively.<sup>73</sup> In 1964, the Supreme Court reaffirmed the power of courts to fashion private remedies for the violation of federal statutes, holding that “it is the duty of the courts” to provide “remedies as are necessary to make effective the congressional purpose” of federal laws.<sup>74</sup> And again, in 1975, the Supreme Court affirmed that courts could read implied causes of action into federal statutes and enunciated a four-part test for determining whether a statute creates an implied right of action.<sup>75</sup>

Over the course of several cases in the late 1970s,<sup>76</sup> the Supreme Court became increasingly reluctant to find implied

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<sup>70</sup> Sunstein, 49 U Chi L Rev at 412–13 (cited in note 21). For the case in which the federal doctrine of implied rights of action originated, see *Texas & Pacific Railway v Rigsby*, 241 US 33, 39 (1916) (“A disregard of . . . the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied.”).

<sup>71</sup> See John H. Bauman, *Implied Causes of Action in the State Courts*, 30 Stan L Rev 1243, 1243 (1978) (stating that the function of “[t]he implied cause of action doctrine [was to] allow[] courts to create civil remedies without express legislative permission”); Tamar Frankel, *Implied Rights of Action*, 67 Va L Rev 553, 555–56 (1981) (discussing the judicial power to create private rights of action).

<sup>72</sup> Sunstein, 49 U Chi L Rev at 411–12 (cited in note 21) (citations omitted):

At common law, private persons injured by violation of state statutes were generally permitted to bring suit in state court to seek redress if they belonged to the class of persons the statute was designed to protect. The federal courts, exercising the common law powers recognized in *Swift v Tyson*, used this rationale to create private rights of action for violations of federal laws.

<sup>73</sup> See Patrick B. Fazzone, Comment, *Implied Rights of Action in Federal Legislation: Harmonization within the Statutory Scheme*, 1980 Duke L J 928, 930 (describing the “liberal approach” of courts during this time).

<sup>74</sup> *J.I. Case Co v Borak*, 377 US 426, 433 (1975).

<sup>75</sup> See *Cort v Ash*, 422 US 66, 78 (1975).

<sup>76</sup> See, for example, *Touche Ross & Co v Redington*, 442 US 560, 570 (1979) (finding that § 17(a) of the Securities Exchange Act of 1934 implied no private cause of action); *Transamerica Mortgage Advisors, Inc v Lewis*, 444 US 11, 19–24 (1979) (finding that one provision of the Investment Advisers Act of 1940 implied a private cause of action but that other provisions merely proscribed certain state actions without implying a private cause of action). See also Sunstein, 49 U Chi L Rev at 413 (cited in note 21) (explaining that, in

causes of action under federal statutes due to its “concern with the separation-of-powers aspects of such implied remedies.”<sup>77</sup> Meanwhile, claims for violations of constitutional rights brought under § 1983 proliferated.<sup>78</sup> Many plaintiffs sought redress in federal court under § 1983 for state violations of various provisions of the SSA, including provisions pertaining to foster payments through the AFDC-FC program.<sup>79</sup> Although cases during this period typically included constitutional claims, which “provid[ed] a jurisdictional base, [ ] the statutory claims were allowed to go forward, and were decided on the merits, under the court’s pendent jurisdiction.”<sup>80</sup>

The Supreme Court’s § 1983 doctrine reached a tipping point in 1980, when the Court held that § 1983 “broadly encompasses violations of federal statutory as well as constitutional law.”<sup>81</sup> In *Maine v Thiboutot*,<sup>82</sup> the Court authorized two parents, who had eight children, to pursue a § 1983 action to sue the Maine Department of Human Services for withholding AFDC benefits to which they were entitled.<sup>83</sup> The Court drew support from a line of § 1983 cases involving claims that alleged violations of both constitutional rights and statutory rights created by the SSA.<sup>84</sup> The Court noted that “§ 1983 was necessarily the exclusive statutory cause of action because . . . the SSA affords no private right of action” on its own.<sup>85</sup> The Court refused to limit the scope of § 1983

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the late 1970s, the Supreme Court “sharply restricted the availability of private rights of action, effectively abandoning the approach of *Borak* and *Cort*”).

<sup>77</sup> See Sunstein, 49 U Chi L Rev at 413–15 (cited in note 21). See also Richard B. Stewart and Cass R. Sunstein, *Public Programs and Private Rights*, 95 Harv L Rev 1193, 1207 (1982) (explaining that implied “private rights of action may usurp [an] agency’s responsibility for regulatory implementation, decrease legislative control over the nature and amount of enforcement activity, and force courts to determine in the first instance the meaning of a regulatory statute”); Bauman, 30 Stan L Rev at 1243 (cited in note 71) (“On the one hand, an implied cause of action may further legislative goals by relieving the burden placed on overworked or indifferent administrators. On the other hand, an improperly implied cause of action may frustrate the legislature’s purpose by circumventing bureaucratic expertise or prosecutorial discretion.”).

<sup>78</sup> See Note, *Developments in the Law—Section 1983 and Federalism*, 90 Harv L Rev 1133, 1172 (1977).

<sup>79</sup> See, for example, *Quern v Mandley*, 436 US 725, 729 & n 3 (1978); *Hagans v Lavine*, 415 US 528, 531–33 (1974); *Carter v Stanton*, 405 US 669, 670 (1972); *Miller v Youakim*, 440 US 125, 133–34 (1979).

<sup>80</sup> *Thiboutot*, 448 US at 5–6.

<sup>81</sup> *Id* at 4.

<sup>82</sup> 448 US 1 (1980).

<sup>83</sup> *Id* at 3–4.

<sup>84</sup> *Id* at 6 (collecting cases). See also text accompanying note 79.

<sup>85</sup> *Thiboutot*, 448 US at 6.

protections “to some subset of laws” and found that § 1983 expressly provides a private cause of action for plaintiffs to enforce rights created by any federal law,<sup>86</sup> including Spending Clause legislation such as the SSA and its subsequent amendments.<sup>87</sup>

### C. Section 1983 Enforcement following *Thiboutot*

*Thiboutot* did not articulate a precise standard for determining whether a statute creates a right that is privately enforceable under § 1983, and it was only through subsequent Supreme Court decisions that a test began to emerge. In *Pennhurst State School and Hospital v Halderman*,<sup>88</sup> one year after *Thiboutot*, the Court provided some guidance while slightly narrowing the scope of § 1983 actions. The Court held that Spending Clause legislation “is much in the nature of a contract,” and hence there can “be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it.”<sup>89</sup> According to the Court, if there is no “language suggesting that [a statutory provision represents] a ‘condition’ for the receipt of federal funding,” then the provision does not create a right that is enforceable under § 1983.<sup>90</sup> Thus, the *Pennhurst* Court qualified *Thiboutot* by stressing that a provision of Spending Clause legislation may be enforced via § 1983 only if the provision is tied to federal funding. But with the exception of *Pennhurst*, the Court took a liberal approach toward § 1983 actions during the 1980s.

Part I.C.1 analyzes the Court’s initial approach to § 1983 enforcement, which was relatively favorable to plaintiffs alleging violations of a statutory right. By the 1990s, the Supreme Court began chipping away at the availability of § 1983 actions.<sup>91</sup> Part I.C.2 examines this shift, which began with the one case in which the Supreme Court has analyzed § 1983 enforceability of a provision of the CWA. Part I.C.3 discusses the Court’s more recent and narrow approach to finding an enforceable statutory right, focusing especially on the Court’s attempts to clarify the

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<sup>86</sup> *Id.* at 4.

<sup>87</sup> See *id.* at 22 (Powell dissenting) (“In practical effect, today’s decision means that state and local governments, officers, and employees now may face liability whenever a person believes he has been injured by the administration of *any* federal-state cooperative program.”) (citations omitted).

<sup>88</sup> 451 US 1 (1981).

<sup>89</sup> *Id.* at 17.

<sup>90</sup> *Id.* at 13.

<sup>91</sup> See Samberg-Champion, 103 Colum L Rev at 1841 (cited in note 16).

confusion caused by past § 1983 cases.<sup>92</sup> However, this confusion persists today, and it strikes at the core of the circuit split that this Comment seeks to resolve.

1. The Supreme Court took a liberal approach toward § 1983 enforcement in the 1980s.

*Pennhurst* was followed by a brief detour of expansive § 1983 enforcement that lasted until the early 1990s.<sup>93</sup> In two cases during this period, the Supreme Court upheld the enforceability of statutory provisions under § 1983.<sup>94</sup> Both of these decisions represented an initially “liberal standard” under which the Court generally viewed federal statutes that benefitted the plaintiff as enforceable under § 1983.<sup>95</sup> So long as a provision of Spending Clause legislation was “phrased in terms benefiting” the plaintiff and used mandatory and specific language, the Court appeared willing to uphold the enforceability of a provision under § 1983.<sup>96</sup> These two cases have not been overruled, and lower courts have relied extensively on both to find rights within other statutes that are enforceable under § 1983.<sup>97</sup>

First, in *Wright v City of Roanoke Redevelopment and Housing Authority*,<sup>98</sup> the Court held that tenants in a low income housing project could bring a § 1983 action against their city’s public housing authority for overcharging them for rent in violation of the Brook Amendment of the Housing Act of 1937,<sup>99</sup> a piece of Spending Clause legislation.<sup>100</sup> The Brook Amendment required that “[a] family shall pay as rent for a dwelling unit assisted under this chapter” an amount not to exceed a prescribed portion of the family’s income.<sup>101</sup> The provision was located within a section titled “Rental payments”<sup>102</sup> and a subsection titled “Families included;

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<sup>92</sup> See note 145 and accompanying text.

<sup>93</sup> See Nicole Huberfield, *Bizarre Love Triangle: The Spending Clause, Section 1983 Enforcement, and Medicaid Entitlements*, 42 UC Davis L Rev 413, 430 (2008).

<sup>94</sup> See generally *Wilder v Virginia Hospital Association*, 496 US 498 (1990); *Wright v City of Roanoke Redevelopment and Housing Authority*, 479 US 418 (1987).

<sup>95</sup> Bradford C. Mank, *Suing under 1983: The Future after Gonzaga University v. Doe*, 39 Houston L Rev 1417, 1445 (2003).

<sup>96</sup> *Wilder*, 496 US at 510.

<sup>97</sup> See notes 214–16 and accompanying text.

<sup>98</sup> 479 US 418 (1987).

<sup>99</sup> Housing and Urban Development Act of 1969, Pub L No 91-152, § 213(a), 83 Stat 379, codified as amended at 42 USC § 1437a(a).

<sup>100</sup> *Wright*, 479 US at 430.

<sup>101</sup> *Id* at 420 n 2, citing 42 USC § 1437a(a).

<sup>102</sup> 42 USC § 1437a.

amount.”<sup>103</sup> According to the Court, the language of the provision indicated that the limits on rental payments were “mandatory” and that Congress’s “intent to benefit tenants [was] undeniable.”<sup>104</sup> Moreover, the Court noted that the legislative history indicated that private actions were to be “anticipated.”<sup>105</sup>

Second, in *Wilder v Virginia Hospital Association*,<sup>106</sup> the Supreme Court held that the Boren Amendment to the Medicaid Act<sup>107</sup> provided medical providers with an enforceable right under § 1983 to medical service reimbursements that were “reasonable and adequate.”<sup>108</sup> Like the Brook Amendment at issue in *Wright*, the Boren Amendment was also a piece of Spending Clause legislation. It mandated that for states to receive federal funds, they needed to submit and have approved medical assistance plans that “provide[d] . . . for payment . . . of the hospital services, nursing facility services, and services in an intermediate care facility . . . through the use of rates . . . which the State [found] . . . [were] reasonable and adequate.”<sup>109</sup> The Court found that the language of the statute left “little doubt that health care providers [were] the intended beneficiaries of the Boren Amendment” because they were the recipients of the payments.<sup>110</sup> Moreover, because the statutory provision prescribed an action states “must” take, it imposed a “binding obligation” on states.<sup>111</sup> Thus, the Court found that § 1983 actions were available to medical care providers to enforce their right to adequate payments for the medical services they provided.

In both *Wright* and *Wilder*, the Court observed that there are only two “exceptions to [the] rule” that § 1983 provides private individuals with a cause of action for violations of a federal law.<sup>112</sup> First, § 1983 actions are unavailable to enforce statutes that foreclose enforcement, either explicitly or implicitly.<sup>113</sup> While statutory

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<sup>103</sup> 42 USC § 1437a(a).

<sup>104</sup> *Wright*, 479 US at 430.

<sup>105</sup> *Id* at 425.

<sup>106</sup> 496 US 498 (1990).

<sup>107</sup> See Omnibus Budget Reconciliation Act of 1987, Pub L No 100-203, § 4112, 101 Stat 1330, codified as amended at 42 USC § 1396a(a)(13)(A).

<sup>108</sup> *Wilder*, 496 US at 510.

<sup>109</sup> 42 USC § 1396a(a)(13)(A) (1988).

<sup>110</sup> *Wilder*, 496 US at 510.

<sup>111</sup> *Id* at 512.

<sup>112</sup> *Id* at 508; *Wright*, 479 US at 423.

<sup>113</sup> See *Wilder*, 496 US at 520–21, citing *Middlesex County Sewage Authority v National Sea Clammers Association*, 453 US 1, 20 (1981). See also *Wright*, 479 US at 423.



text that explicitly forecloses private enforcement is fairly straightforward, implicit foreclosure is less so. The Court has explained that, when a statutory provision includes an elaborate administrative scheme or an enforcement mechanism for federal review of individual claims, courts may infer that Congress intended for private enforcement under § 1983 to be incompatible with administrative enforcement and thus unavailable.<sup>114</sup> The second and more fundamental exception to § 1983 enforcement of a federal law is if “the statute [does] not create enforceable rights.”<sup>115</sup> According to the Court, “Section 1983 speaks in terms of ‘rights, privileges, or immunities,’ not violations of federal law.”<sup>116</sup>

In *Wright* and *Wilder*, the Court found that the statutory provisions at issue conferred statutory rights because they were phrased in terms benefitting the plaintiffs and employed mandatory and specific language. The Court further found that the existing enforcement mechanisms in the statutes were not so comprehensive as to imply a congressional intent to foreclose enforcement under § 1983, with the *Wilder* court adding that the “availability of *state* administrative procedures ordinarily does not foreclose resort to § 1983.”<sup>117</sup> Soon after, however, the Court began to shift away from the relatively liberal approach regarding enforcement epitomized by *Wright* and *Wilder*.

2. The Supreme Court began to limit the scope of § 1983 following *Wright* and *Wilder* in the 1990s, and Congress responded.

In 1992, the Court took a sharp turn away from the liberal approach toward § 1983 enforcement in *Wright* and *Wilder*. The Court analyzed the “reasonable efforts” provision of the CWA in *Suter v Artist M*<sup>118</sup> and held that it was unenforceable under § 1983 because it was too vague.<sup>119</sup> Invoking the family preservation paradigm,<sup>120</sup> this provision imposed on states an obligation to

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<sup>114</sup> See *Wilder*, 496 US at 520–21; *Wright*, 479 US at 423. See also *Sea Clammers*, 453 US at 20 (“When the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983.”).

<sup>115</sup> *Wilder*, 496 US at 508, quoting *Wright*, 479 US at 423.

<sup>116</sup> *Wilder*, 496 US at 509, quoting *Golden State Transit Corp v Los Angeles*, 493 US 103, 106 (1989).

<sup>117</sup> *Wilder*, 496 US at 523 (emphasis added).

<sup>118</sup> 503 US 347 (1992).

<sup>119</sup> *Id* at 364.

<sup>120</sup> See text accompanying notes 51–54.

make “reasonable efforts” to “prevent or eliminate the need for removal” of a child from his or her home before doing so as one of the conditions for receiving federal funding under the CWA.<sup>121</sup> The Court observed that the CWA provides no specific guidance for how courts or state agencies are to measure “reasonable efforts” in order to ensure compliance with the statutory provision.<sup>122</sup> Consequently, the Court found that Congress did not intend the vague provision to be privately enforceable.<sup>123</sup>

The *Suter* Court’s conclusion that the CWA’s “reasonable efforts” provision was unenforceable due to a lack of specific statutory language was in line with *Pennhurst*,<sup>124</sup> *Wilder*,<sup>125</sup> and *Wright*,<sup>126</sup> but other parts of the decision were not. Specifically, *Suter* departed from earlier cases because it also questioned the enforceability of any statutory provision of Spending Clause legislation that is a requirement that state plans must satisfy for approval. According to the Court, the CWA did “not provide notice to the States that failure to do anything *other than submit a plan with the requisite features*” was required to receive federal funding.<sup>127</sup> In short, the Court held that the CWA only requires states to submit plans that satisfy the listed conditions—and nothing more—in order to receive federal funding.<sup>128</sup> After the state plan is approved, states do not have to abide by the CWA’s conditions because the statute does not condition federal funding on anything “other than” submitting the plan.<sup>129</sup> Because of *Pennhurst*’s requirement that only statutory provisions that are conditions for federal funding are enforceable under § 1983,<sup>130</sup> the Court found that the CWA’s provisions that require state action beyond submitting a state plan are not tied to funding and thus unenforceable.<sup>131</sup>

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<sup>121</sup> 42 USC § 671(a)(15).

<sup>122</sup> *Suter*, 503 US at 360.

<sup>123</sup> *Id.* at 364.

<sup>124</sup> See *Pennhurst*, 451 US at 19.

<sup>125</sup> See *Wright*, 479 US at 432.

<sup>126</sup> See *Wilder*, 496 US at 511–12.

<sup>127</sup> *Suter*, 503 US at 362 (emphasis added).

<sup>128</sup> See *id.* at 358 (“[T]he Act does place a requirement on the States, but that requirement only goes so far as to ensure that the State have a plan approved by the Secretary.”).

<sup>129</sup> See *id.* at 362.

<sup>130</sup> See note 90 and accompanying text.

<sup>131</sup> See *Suter*, 503 US at 359–60.

Congress responded swiftly to the *Suter* decision by amending the SSA.<sup>132</sup> The amended provision, commonly called the “*Suter* fix,”<sup>133</sup> applied to all provisions of the SSA, and it provides: “[A] provision is not to be deemed unenforceable because of its inclusion in a section of this chapter requiring a State plan or specifying the required contents of a State plan.”<sup>134</sup> Although the *Suter* fix did not overturn the holding in *Suter* that the “reasonable efforts” provision of the CWA is unenforceable under § 1983,<sup>135</sup> it did purport to overturn all of the *Suter* Court’s reasoning that was not present in prior Supreme Court decisions.<sup>136</sup> The practical effect of the *Suter* fix is that the “reasonable efforts” provision remained unenforceable under § 1983 due to its lack of guidance and specificity. However, the basic fact that Spending Clause legislation, such as the CWA, requires states to submit plans that satisfy a list of conditions *before* receiving federal funding does not foreclose private enforcement of the required conditions *after* states receive approval and implement their plans.

### 3. The Supreme Court’s current approach to § 1983 actions.

The current test that guides the judicial inquiry into whether a statute creates an enforceable right under § 1983 is known as the “*Blessing* test,” and it incorporates several of the factors analyzed in *Pennhurst*, *Wright*, *Wilder*, and *Suter*.<sup>137</sup> In *Blessing v Freestone*,<sup>138</sup> the Supreme Court crystallized three factors that must be satisfied to find an enforceable right: (1) “Congress must have intended that the provision in question benefit the plaintiff”;<sup>139</sup> (2) “the plaintiff must demonstrate that the right assertedly protected by the statute is not so ‘vague and amorphous’ that its enforcement would strain judicial competence”;<sup>140</sup> and (3) “the statute must unambiguously impose a binding obligation on the

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<sup>132</sup> See Erwin Chemerinsky, *Ensuring the Supremacy of Federal Law: Why the District Court Was Wrong in Westside Mothers v. Haveman*, 12 Health Matrix 139, 153 (2002).

<sup>133</sup> See Dorris, 23 Children’s Legal Rts J at 30 (cited in note 24).

<sup>134</sup> 42 USC § 1320a-2.

<sup>135</sup> See 42 USC § 1320a-2 (stating that “this section is not intended to alter the holding in [*Suter*] that section 671(a)(15) of this title is not enforceable in a private right of action”).

<sup>136</sup> See 42 USC § 1320a-2 (stating that the section’s intention is to “overturn[ ]” any grounds for determining the availability of private actions to enforce requirements of state plans that were “applied in [*Suter*], but not applied in prior Supreme Court decisions respecting such enforceability”).

<sup>137</sup> See, for example, *Midwest Foster Care*, 712 F3d at 1196; *Wagner*, 624 F3d at 979.

<sup>138</sup> 520 US 329 (1997).

<sup>139</sup> *Id.* at 340.

<sup>140</sup> *Id.* at 340–41.

States. In other words, . . . the asserted right must be couched in mandatory rather than precatory terms.”<sup>141</sup> The Court in *Blessing* cautioned, however, that a plaintiff who satisfies these three factors has only staked out a “rebuttable presumption” that a statutory right is enforceable under § 1983. A defendant may rebut this presumption by showing that Congress foreclosed a § 1983 remedy for violations of the asserted statutory right, either explicitly or implicitly.<sup>142</sup>

For courts applying the *Blessing* test, the first factor—whether Congress intended the statute in question to benefit the plaintiff—has proved the most contentious. Five years after *Blessing*, in *Gonzaga University v Doe*,<sup>143</sup> Chief Justice William Rehnquist opined that the Court’s “opinions in this area may not be models of clarity.”<sup>144</sup> Therefore, the Court sought to clear up “confusion” among “some courts” resulting from the language of the first *Blessing* factor.<sup>145</sup> According to the Court, the judicial inquiry into whether a federal statutory provision creates an enforceable right under § 1983 “is no different from the initial inquiry in an implied right of action case, the express purpose of which is to determine whether or not a statute ‘confer[s] rights on a particular class of persons.’”<sup>146</sup> Thus, the Court imported part of the judicial inquiry underlying earlier implied causes of action doctrine “as to whether or not Congress intended to confer individual rights upon a class of beneficiaries.”<sup>147</sup>

The *Gonzaga* Court held that a former university student could not bring a § 1983 action against his university for allegedly releasing personal information without consent in violation of the Family Educational Rights and Privacy Act<sup>148</sup> (FERPA), a piece of Spending Clause legislation.<sup>149</sup> The Court did not apply the entire *Blessing* test because it found that the FERPA provision failed

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<sup>141</sup> *Id.* at 341.

<sup>142</sup> See *Blessing*, 520 US at 341, citing *Livadas v Bradshaw*, 512 US 107, 113 (1994).

<sup>143</sup> 536 US 273 (2002).

<sup>144</sup> *Id.* at 278.

<sup>145</sup> *Id.* at 283.

<sup>146</sup> *Id.* at 285, quoting *California v Sierra Club*, 451 US 287, 294 (1981).

<sup>147</sup> *Gonzaga*, 536 US at 285. See also note 75 and accompanying text. Under the implied right of action doctrine, “[i]n determining whether a private remedy is implicit in a statute not expressly providing one,” courts first consider whether the plaintiff is a member “of the class for whose *especial* benefit the statute was enacted.” *Cort*, 422 US at 78, quoting *Texas & Pacific Railway*, 241 US at 39 (emphasis in original).

<sup>148</sup> Pub L No 93-380, 88 Stat 571 (2000), codified as amended at 20 USC § 1232g.

<sup>149</sup> *Gonzaga*, 536 US at 278.

the first factor—whether Congress intended the statute in question to benefit the plaintiff.<sup>150</sup> The remaining two factors of the *Blessing* test—whether the asserted right is too “vague and amorphous” for courts to enforce and whether the right is couched in “mandatory” terms<sup>151</sup>—are presumably unaffected by *Gonzaga*.

In its efforts to harmonize its analysis in earlier § 1983 cases with that in implied cause of action cases, the Court in *Gonzaga* added additional layers to *Blessing*’s requirement that a statutory provision benefit the plaintiff. The *Gonzaga* Court drew on several factors that plaintiffs were required to satisfy in earlier implied cause of action cases and incorporated these factors into the fold of its § 1983 analysis.<sup>152</sup> These factors included: (1) whether the statute employs “‘rights-creating language’ critical to showing the requisite congressional intent to create new rights;”<sup>153</sup> (2) whether the statute conveys an “aggregate” focus on federal funding and regulating statewide polices or an “individual” focus on the needs and interests of individuals;<sup>154</sup> and (3) whether the statute supplies a “federal review mechanism” through which aggrieved individuals can submit claims.<sup>155</sup>

The Court applied these factors to the FERPA provision and found that it failed all three. The FERPA provision states that “[n]o funds shall be made available . . . to any educational agency or institution which has a policy or practice of permitting the release of education records . . . of students without the written consent of their parents.”<sup>156</sup> First, the Court held that the FERPA provision does not contain “rights-creating” language because it ties a loss of funding not to individual instances of unauthorized disclosures of a student’s educational records but rather to the use of certain prohibited policies or practices.<sup>157</sup> Second, by focusing on the system-wide policies of state educational institutions, the FERPA provision contained an “aggregate” focus that was “two steps removed from the interests of individual students.”<sup>158</sup> Lastly, FERPA provided a federal review mechanism in which it

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<sup>150</sup> *Id.* at 282–84.

<sup>151</sup> See *Blessing*, 520 US at 340–41.

<sup>152</sup> See, for example, *Alexander v Sandoval*, 532 US 275, 288–89 (2001); *California v Sierra Club*, 451 US 287, 294 (1981).

<sup>153</sup> *Gonzaga*, 536 US at 287, citing *Alexander*, 532 US at 288–89.

<sup>154</sup> *Gonzaga*, 536 US at 288, citing *Blessing*, 520 US at 343.

<sup>155</sup> *Gonzaga*, 536 US at 289–90.

<sup>156</sup> 20 USC § 1232g(b)(1).

<sup>157</sup> *Gonzaga*, 536 US at 287.

<sup>158</sup> *Id.* at 287–88.

“required the Secretary to ‘establish or designate [a] review board’ for investigating and adjudicating [alleged] violations.”<sup>159</sup> Finding that the FERPA provision did not satisfy the first factor of the *Blessing* test, the Court ended its analysis.<sup>160</sup>

Courts have struggled to incorporate *Gonzaga* into the *Blessing* framework in a consistent manner. Although the *Gonzaga* Court aimed to clear up confusion among lower courts about how to determine if a statutory provision confers an enforceable right under § 1983,<sup>161</sup> the decision further entrenched disagreement in lower federal courts.<sup>162</sup> Because *Gonzaga* did not explicitly overrule precedents and instead relied heavily on *Pennhurst*, *Wright*, *Wilder*, and *Blessing*, many lower courts have continued to do the same.<sup>163</sup> However, whereas the Court’s precedents routinely analyzed whether statutory provisions benefitted the plaintiff, *Gonzaga* stressed that “it is *rights*, not the broader or vaguer ‘benefits’ or ‘interests,’ that may be enforced” under § 1983.<sup>164</sup> Where to draw the line between rights on the one hand and benefits or interests on the other is far from settled.

## II. FOSTER CARE MAINTENANCE PAYMENTS: A PRIVATELY ENFORCEABLE RIGHT?

In recent years, many foster parents and foster care providers have filed actions under § 1983 alleging state violations of their statutory right to foster care maintenance payments granted by the CWA. Courts have analyzed the relevant provisions of the CWA according to the *Blessing* test and in light of *Gonzaga*. Currently, the Sixth and Ninth Circuits hold that the CWA confers a

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<sup>159</sup> Id at 289, quoting 42 USC § 1232g(g).

<sup>160</sup> *Gonzaga*, 536 US at 290.

<sup>161</sup> Id at 283.

<sup>162</sup> See Samberg-Champion, Note, 103 Colum L Rev at 1839 (cited in note 16) (“Despite *Gonzaga*’s assertions that it will ‘resolve any ambiguity’ about the Court’s Section 1983 jurisprudence, it is as confusing an opinion as the Supreme Court has issued in this traditionally fuzzy area.”) (citations omitted).

<sup>163</sup> See note 216.

<sup>164</sup> *Gonzaga*, 536 US at 283.

privately enforceable right to foster care maintenance payments under § 1983,<sup>165</sup> whereas the Eighth Circuit holds the opposite.<sup>166</sup>

At the core of the circuit split is how courts, in light of *Gonzaga*, should interpret and apply the first factor of the *Blessing* test—whether Congress intended the statutory provision in question to benefit the plaintiff. For this inquiry, the *Gonzaga* court identified the existence of “rights-creating language” and an individual focus, rather than an aggregate focus, as two of the three elements for inferring congressional intent to confer an individual right.<sup>167</sup> The third element is whether the statute has a federal review mechanism for individual claims,<sup>168</sup> which all of the circuits agree the CWA lacks.<sup>169</sup> But only the Sixth and Ninth Circuits hold that the foster care maintenance payment provisions contain rights-creating language and an individual focus. The Sixth and Ninth Circuits applied the remaining *Blessing* factors, and both courts found that the statutory language satisfies all three factors. In contrast, the Eighth Circuit concluded that the foster care maintenance payment provisions fail the first factor of the *Blessing* test and therefore found that it “need not analyze the remaining *Blessing* factors.”<sup>170</sup> Parts II.A and II.B summarize each side of this unresolved circuit split.

#### A. The Sixth and Ninth Circuits: The CWA Focuses on Protecting Individual Rights

In *California State Foster Parent Association v Wagner*,<sup>171</sup> the Ninth Circuit became the first federal court of appeals to uphold the enforceability of the CWA’s requirement that states make foster care maintenance payments on behalf of eligible children

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<sup>165</sup> See *D.O. v Glisson*, 847 F3d 374, 380 (6th Cir 2017); *California State Foster Parent Association v Wagner*, 624 F3d 974, 982 (9th Cir 2010). Several district courts have also found that the CWA confers a privately enforceable right to foster care maintenance payments under § 1983. See, for example, *C.H. v Payne*, 683 F Supp 2d 865, 878 (SD Ind 2010).

<sup>166</sup> See *Midwest Foster Care and Adoption Association v Kincade*, 712 F3d 1190, 1202 (8th Cir 2013). Several district courts have held the same. See, for example, *New York State Citizens’ Coalition for Children v Carrion*, 31 F Supp 3d 512, 527 (EDNY 2014).

<sup>167</sup> *Gonzaga*, 536 US at 287–88.

<sup>168</sup> *Id* at 289.

<sup>169</sup> See *Midwest Foster Care*, 712 F3d at 1202; *Glisson*, 847 F3d at 380; *Wagner*, 624 F3d at 982.

<sup>170</sup> *Midwest Foster Care*, 712 F3d at 1202. The *Gonzaga* Court similarly found that the FERPA provision failed the first factor of the *Blessing* test and did not apply the remaining factors. See *Gonzaga*, 536 US at 287–90.

<sup>171</sup> 624 F3d 974 (9th Cir 2010).

under § 1983.<sup>172</sup> There, a nonprofit organization representing foster parents in California alleged that the foster care maintenance payments that foster parents received from the State of California failed to cover the costs required by the CWA.<sup>173</sup> Similarly, in *D.O. v Glisson*,<sup>174</sup> the Sixth Circuit authorized a foster parent to sue the State of Kentucky for making inadequate foster care maintenance payments.<sup>175</sup>

Both circuits spent the majority of their analysis on applying the first factor of the *Blessing* test to the CWA. Comparing the CWA to the FERPA provision in *Gonzaga*, the Ninth Circuit found that the CWA is “unlike FERPA” because it has an individual focus, rather than an aggregate focus, and because payments can be made only to an “individual” foster parent or institution providing care for a qualifying foster child.<sup>176</sup> The Ninth Circuit found that the language “on behalf of each child” found in § 672(a)(1)—the provision that requires states to make foster care maintenance payments to eligible foster caregivers—rose to the level of rights-creating language under this factor because it “focuses squarely on the individuals protected rather than the entities regulated.”<sup>177</sup>

The Sixth Circuit reasoned that Congress intended the CWA to confer upon the plaintiffs a right to foster care maintenance payments because statutory language, such as that in § 672(a), “phrased in the active voice, with the state as the subject, confer[s] individually enforceable rights.”<sup>178</sup> The State of Kentucky argued that, when statutory language employs the active voice with the state as the subject, the statute indicates an aggregate focus on states regulated, rather than on individual rights.<sup>179</sup> The court disagreed, finding that making the state the subject of the statutory provision was necessary to make clear to states that they are required to make foster care maintenance payments with respect to each individual foster child who qualifies.<sup>180</sup>

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<sup>172</sup> See *id.* at 982.

<sup>173</sup> *Id.* at 976–77.

<sup>174</sup> 847 F3d 374 (6th Cir 2017).

<sup>175</sup> *Id.* at 376.

<sup>176</sup> *Wagner*, 624 F3d at 980–81.

<sup>177</sup> *Id.* at 980.

<sup>178</sup> *Glisson*, 847 F3d at 379.

<sup>179</sup> *Id.*

<sup>180</sup> See *id.* (“When Congress names the state as the subject, writes in the active voice, and uses mandatory language, it leaves no doubt about the actor’s identity or what the law requires.”).



After finding the first *Blessing* factor was satisfied, the Sixth and Ninth Circuits applied the second and third factors of the *Blessing* test, finding that both factors were easily met. Analyzing the second factor, both circuits found that the right conferred upon the plaintiffs was not “vague and amorphous” to the extent that its enforcement would strain judicial competence.<sup>181</sup> The circuits analyzed § 672(a)(1) in conjunction with § 675(4)(A), the provision that defines foster care maintenance payments, and concluded that the itemized list of costs therein establishes clearly the content of the asserted right.<sup>182</sup>

As for the third factor of the *Blessing* test, both circuits found that the phrase “shall make” in § 672(a)(1) unambiguously commands that the payment of foster care maintenance payments is mandatory.<sup>183</sup> The courts found that, by dictating what a state “shall” do “on behalf of each child,”<sup>184</sup> the statutory provision could not be more mandatory.<sup>185</sup> As the Sixth Circuit bluntly concluded: “It isn’t optional.”<sup>186</sup> Likewise, the Ninth Circuit noted that “the State does not seriously contend that the § 672(a)’s language is precatory rather than mandatory,” suggesting that the use of “shall” could not be reasonably interpreted as imposing anything less than a binding obligation.<sup>187</sup>

Ultimately, both circuits quickly concluded that the state in each case failed to rebut the presumptive enforceability of the right to foster care maintenance payments.<sup>188</sup> Although the CWA requires that states grant “an opportunity for a fair hearing before the State agency” for the aggrieved,<sup>189</sup> the Act lacks a federal review mechanism for addressing claims raised by foster caregivers.<sup>190</sup> According to the Ninth Circuit, the lack of a federal administrative forum for reviewing individual claims “lends additional support” to the conclusion that Congress intended to create an

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<sup>181</sup> See *id.* at 378; *Wagner*, 624 F3d at 981.

<sup>182</sup> See *Glisson*, 847 F3d at 378; *Wagner*, 624 F3d at 980. See also Adoption Assistance and Child Welfare Act of 1979, S Rep No 96-336, 96th Cong, 1st Sess 15 (1979), reprinted in 1980 USCCAN 1448, 1464 (explaining that Congress provided the specific definition as a response to “general confusion about what can be called a foster care maintenance payment”).

<sup>183</sup> See *Glisson*, 847 F3d at 378; *Wagner*, 624 F3d at 982.

<sup>184</sup> 42 USC § 672(a)(1) (emphasis added).

<sup>185</sup> See *Glisson*, 847 F3d at 378; *Wagner*, 624 F3d at 982.

<sup>186</sup> *Glisson*, 847 F3d at 379.

<sup>187</sup> *Wagner*, 624 F3d at 982.

<sup>188</sup> See *Glisson*, 847 F3d at 380; *Wagner*, 624 F3d at 982.

<sup>189</sup> 42 USC § 671(a)(12).

<sup>190</sup> *Glisson*, 847 F3d at 380–81, quoting *Wilder*, 496 US at 523.

enforceable right to foster care maintenance payments.<sup>191</sup> Similarly, the Sixth Circuit found that the CWA lacks a federal review mechanism and that the available state administrative procedures do not foreclose access to § 1983 remedies.<sup>192</sup>

#### B. The Eighth Circuit: The CWA Focuses on Regulating States

Unlike the Sixth and Ninth Circuits, the Eighth Circuit interpreted the foster care maintenance payment provision as primarily addressing state compliance, and therefore it found the focus of the statutory provision to be on regulating states in the aggregate rather than on protecting individual rights. Applying the same test to the same statutory provisions as the other circuits, the Eighth Circuit held in *Midwest Foster Care and Adoption Association v Kincade*<sup>193</sup> that the CWA does not create an enforceable right to foster care maintenance payments under § 1983.<sup>194</sup> The Eighth Circuit compared the CWA's language to the FERPA provision at issue in *Gonzaga*, and it determined that the foster care maintenance payment provisions similarly failed the first factor of the *Blessing* test because of its focus on regulating states in the aggregate.<sup>195</sup>

First, the court found that the CWA's statutory language falls short of constituting "rights-creating" language. According to the court, the foster care maintenance payment provisions address the states as participants with the federal government within the federal-state cooperative design of the CWA.<sup>196</sup> Second, the Eighth Circuit found that the CWA's provisions maintain an aggregate focus on overall compliance rather than an emphasis on the rights of individuals. The court cited the federal compliance scheme located in another section of the SSA, which states that the "Secretary [of Health and Human Services] 'must promulgate regulations for the review of [state] programs to determine whether

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<sup>191</sup> *Wagner*, 624 F3d at 982, citing *Gonzaga*, 536 US at 289–90 ("The fact that [foster caregivers] have no administrative forum in which to raise their concerns lends additional support to [the] conclusion that Congress intended to create an enforceable right here, just as the presence of an administrative mechanism 'buttressed' the Supreme Court's opposite conclusion in *Gonzaga*.").

<sup>192</sup> *Glisson*, 847 F3d at 380–81.

<sup>193</sup> 712 F3d 1190 (8th Cir 2013).

<sup>194</sup> *Id.* at 1202.

<sup>195</sup> *Id.* at 1197.

<sup>196</sup> See *id.* at 1200, quoting *Gonzaga*, 536 US at 284 ("The unmistakable focus of § 672(a) and § 675(4)(A) on the states as regulated participants in [a] federal cost-sharing program precludes us from finding that these provisions are 'phrased in terms of the [foster caregivers].'").

[such programs are in] *substantial conformity*” with the requirements that various titles of the SSA, including the CWA, place on state programs.<sup>197</sup> According to the Eighth Circuit, this emphasis on “substantial” rather than “perfect” compliance “cuts against an individually enforceable right because, even where a state substantially complies with its federal responsibilities, a sizeable minority of its beneficiaries may nonetheless fail to receive the full panoply of offered benefits.”<sup>198</sup>

However, the Eighth Circuit recognized that the Brook Amendment to the Medicaid Act, which was at issue in *Wilder*, was also subject to the SSA’s substantial compliance regime, and yet the *Wilder* Court still found the statutory provision to be enforceable.<sup>199</sup> Thus, the Eighth Circuit reasoned that “a substantial compliance regime may suggest an absence of the requisite congressional intent, [but] it cannot by itself establish an aggregate focus.”<sup>200</sup> Nevertheless, the court inferred that the CWA contains an aggregate focus because of its conclusion that each reference to foster care maintenance payments is enmeshed within a broader statutory framework focused on state compliance and federal funding.<sup>201</sup> Lastly, the Eighth Circuit conceded that there is no federal mechanism for reviewing the claims of foster caregivers.<sup>202</sup> Nevertheless, the court decided that this absence is outweighed by the lack of “rights-creating” language and the CWA’s “aggregate focus.”<sup>203</sup>

In sum, the Eighth Circuit disagreed with the Sixth and Ninth Circuits over what the *Gonzaga* Court meant by “aggregate focus” and “rights-creating” language. According to the Sixth and Ninth Circuits, § 672(a) employs obligatory language to address states, and it is specific about what each foster caregiver is entitled to receive from her state for caring for an eligible child. Thus, these circuits viewed § 672(a) as having a focus on individual foster caregivers with the purpose of creating a right to foster care maintenance payments. On the other hand, the Eighth Circuit

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<sup>197</sup> See *Midwest Foster Care*, 712 F3d at 1194, citing 42 USC § 1320a-2a (emphasis added).

<sup>198</sup> *Midwest Foster Care*, 712 F3d at 1200–01.

<sup>199</sup> *Id.* at 1201.

<sup>200</sup> *Id.*, citing *Sabree v Richman*, 367 F3d 180, 192 (3d Cir 2004).

<sup>201</sup> See *Midwest Foster Care*, 712 F3d at 1201 (noting that, “[w]here the Supreme Court has found individually enforceable rights, they have not been ensconced by references to actions that trigger such a funding prohibition”).

<sup>202</sup> *Id.* at 1202.

<sup>203</sup> *Id.* at 1201–02.

viewed foster caregivers and eligible foster children as less central to § 672(a). Consequently, it found that the statutory provision serves a regulatory function in which the primary focus is on overall state compliance for the purpose of receiving federal funds.

### III. ENFORCING THE RIGHT TO FOSTER CARE MAINTENANCE PAYMENTS

All of the circuit courts involved in the split drew on the statutory provisions at issue in *Wright*, *Wilder*, and *Gonzaga* to either support or distinguish the CWA, but there are several similarities and differences between the statutory provisions that the courts have overlooked. Moreover, all of the circuit courts focused almost exclusively on § 672(a) and § 675(4)(A), paying less attention to the other provisions within the CWA's structure that shed some light on how to interpret the foster care maintenance payment provisions. In the circuit courts' attempt to infer congressional intent to create (or not create) an enforceable right, the courts limited their opinions mostly to the text, ignoring important answers available in the legislative history.

This Part argues that Congress intended to confer upon foster caregivers a privately enforceable right to foster care maintenance payments by drawing support from aspects of the CWA's text, structure, and legislative history and purpose that the circuit courts have ignored. Part III.A analyzes the text and structure of the CWA's provisions and, in particular, examines how the language of § 672 is more focused on the individual rights of foster caregivers compared to other sections of the CWA. Part III.B locates the CWA within the broader context of its enactment and analyzes how private enforcement of foster care maintenance payments comports with the CWA's legislative purpose. In addition, Part III.B highlights some of the CWA's legislative history implying that Congress intended provisions of the CWA to be privately enforceable under § 1983.

#### A. Rereading the CWA for Rights-Creating Language and an Individual Focus under *Gonzaga*

The overarching inquiry in § 1983 actions is whether the "text and structure" of the statute indicate that Congress intended to

create an enforceable individual right.<sup>204</sup> A statutory provision is enforceable under § 1983 if it contains “rights-creating language” and conveys an “individual focus.”<sup>205</sup> This Section draws on aspects of the *Wright*, *Wilder*, and *Gonzaga* provisions pertaining to “rights-creating language” and an “individual focus.” Whereas the *Gonzaga* court found the FERPA provision easily distinguishable from the *Wright* and *Wilder* provisions, this Section argues that the foster care maintenance payment provisions, § 672(a) and § 675(4)(A), are much more similar to the *Wright* and *Wilder* provisions than to the FERPA provision in *Gonzaga*.<sup>206</sup> While the FERPA provision explicitly references federal funding in the context of states’ policies to ensure student privacy, the foster care maintenance provisions lack any reference to federal funding and refer only to the exchange of monetary assistance between states and individual foster caregivers.

To this day, *Wright* and *Wilder* remain the only cases since *Thiboutot* in which the Court found examples of Spending Clause legislation creating enforceable rights under § 1983.<sup>207</sup> *Gonzaga* relied on both *Wright* and *Wilder*, implying that the Supreme Court would still find the provisions at issue in each case enforceable today. As the *Gonzaga* Court noted, *Wright* and *Wilder* both involved statutes that “explicitly conferred specific monetary entitlements upon the plaintiffs.”<sup>208</sup> Addressing *Wilder* specifically, the Court explained that there was “no doubt” that Congress intended for the provision in *Wilder* to be privately enforceable under § 1983 because it required states to pay a “monetary entitlement” to certain individuals.<sup>209</sup> *Gonzaga*’s nod of approval toward the holdings of *Wright* and *Wilder* suggests that the Court may be more willing to uphold the enforceability of a specific monetary entitlement under § 1983. As Part III.B.2 further contends, suing for damages to recover an unpaid monetary entitlement imposes

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<sup>204</sup> See *Gonzaga*, 536 US at 286.

<sup>205</sup> See *id.* at 290–91.

<sup>206</sup> This Part does not focus on the second and third factors of the *Blessing* test because there is no circuit split over how these factors should be applied to foster care maintenance payments.

<sup>207</sup> *Gonzaga*, 536 US at 280. *Pennhurst*, *Suter*, *Blessing*, and *Gonzaga* each involved provisions of Spending Clause legislation that the Court found unenforceable under § 1983.

<sup>208</sup> *Gonzaga*, 536 US at 280.

<sup>209</sup> *Id.* at 280–81, citing *Wilder*, 496 US at 522–23 (“Congress left no doubt of its intent for private enforcement, we said, because the provision required States to pay an ‘objective’ monetary entitlement to individual health care providers, with no sufficient administrative means of enforcing the requirement against States that failed to comply.”).

less of a burden on state autonomy than does suing for equitable relief to enjoin a state practice or policy.<sup>210</sup>

However, as the Supreme Court later explained in *Armstrong v Exceptional Child Center, Inc.*,<sup>211</sup> *Gonzaga* rejected the inference that *Wilder* permits § 1983 actions to enforce “anything short of an unambiguously conferred right.”<sup>212</sup> *Armstrong* involved implied rights of action rather than § 1983 actions, holding that Medicaid does not confer implied rights of action.<sup>213</sup> Nevertheless, circuit courts have recently emphasized that “*Armstrong* isn’t a § 1983 case,” and thus *Armstrong*’s implied right of action holding is not binding on analysis in the § 1983 context.<sup>214</sup> Although finding an implied right of action within a statute requires that the plaintiff show that Congress intended to create a right *and* a remedy for violation of that right, § 1983 cases require only that the plaintiff show that Congress intended to create an enforceable right because § 1983 supplies the remedy.<sup>215</sup> In the Tenth Circuit’s assessment of *Armstrong*, “[B]ecause Justice [Anthony] Kennedy didn’t join Justice [Antonin] Scalia’s Spending Clause reasoning, it is not binding” in the § 1983 context—on the other hand, “*Wilder* still is.”<sup>216</sup>

Acknowledging the additional hurdles imposed by *Gonzaga*, many circuit courts have continued to draw heavily on *Wright* and *Wilder* to find private rights of action under § 1983 to enforce a variety of Spending Clause statutory provisions.<sup>217</sup> For example,

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<sup>210</sup> In *Pennhurst, Suter*, and *Blessing*, the plaintiffs sued for equitable relief, whereas in *Wright, Wilder*, and *Gonzaga*, the plaintiffs sued for damages. Only in *Wright* and *Wilder* did the provision in question confer upon the plaintiffs a monetary entitlement that the state was required to provide and protect.

<sup>211</sup> 135 S Ct 1378 (2015).

<sup>212</sup> *Id.* at 1386 n \*, quoting *Gonzaga*, 536 US at 283.

<sup>213</sup> *Armstrong*, 135 S Ct at 1385 (stating that the “sole remedy Congress provided for a State’s failure to comply with Medicaid’s requirements . . . is the withholding of Medicaid funds by the Secretary of Health and Human Services”).

<sup>214</sup> See, for example, *Planned Parenthood of Kansas v Andersen*, 882 F3d 1205, 1229 (10th Cir 2018).

<sup>215</sup> See note 293 and accompanying text.

<sup>216</sup> *Planned Parenthood of Kansas*, 882 F3d at 1229. See also *BT Bourbonnais Care, LLC v Norwood*, 866 F3d 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. . . . [H]ad that been the Court’s intent, . . . [a] simple ‘no’ would have sufficed.”).

<sup>217</sup> See, for example, *Planned Parenthood of Kansas*, 882 F3d at 1229 (“*Wilder* still is [binding.]”); *BT Bourbonnais Care*, 866 F3d at 820 (noting that “the Supreme Court has never overruled its decision in *Wilder*”); *Briggs v Bremby*, 792 F3d 239, 244 (2d Cir 2015) (noting that *Gonzaga* does not “undercut the applicability of *Wright* and *Wilder* to the case before us” because “[n]one of the three factors that the Supreme Court used to distinguish

the Third Circuit has noted that the *Gonzaga* Court “carefully avoided disturbing, much less overruling, *Wright* and *Wilder*,” stressing that “the Court relied on those cases in crafting *Gonzaga*.”<sup>218</sup> In addition, the Second Circuit has drawn on several factors that the Court highlighted in *Gonzaga* to distinguish the FERPA provision from the provisions in *Wright* and *Wilder*, including a focus on entities “being regulated rather than on the interests of” individuals, as well as a focus on regulating a “general ‘policy or practice’ . . . rather than focusing on specific instances of” state action.<sup>219</sup> The Second Circuit concluded that, as long as these distinguishing factors are absent in a given statute, *Gonzaga* does not “undercut the applicability of *Wright* and *Wilder*.”<sup>220</sup>

Despite the changes in the Court’s § 1983 doctrine since *Wright* and *Wilder*, the statutes in both cases still provide helpful examples of the type of statutory language that would pass the *Blessing* test after *Gonzaga*. This Section posits that the text and structure of the CWA’s foster care maintenance payment provisions are more similar to the text and structure of the *Wright* and *Wilder* provisions than the FERPA provision in *Gonzaga*. The foster care maintenance payment provisions convey an “individual focus” and employ “rights-creating language.” But these two aspects frequently overlap, for provisions that contain “rights-creating language” also tend to convey an “individual focus”—and vice versa. According to *Gonzaga*, to contain rights-creating language, a statutory provision must include “individually focused terminology” such that the statute’s focus is not “removed from the interests of [the] individual[s]” claiming an enforceable

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the statute in *Gonzaga* from those in *Wright* and *Wilder* apply to the provisions here”); *Romano v Greenstein*, 721 F3d 373, 378–79 (5th Cir 2013) (relying extensively on *Wilder* and *Gonzaga* and holding that 42 USC § 1396a(a)(8) provides a private right of action under § 1983 to ensure that Medicaid assistance be provided with “reasonable promptness” to eligible individuals); *Bontrager v Indiana Family and Social Services Administration*, 697 F3d 604, 607 (7th Cir 2012) (“Although we have acknowledged that *Gonzaga* may have taken a new analytical approach, . . . *Wilder* has not been overruled.”) (quotation marks omitted); *Sabree v Richman*, 367 F3d 180, 184 (3d Cir 2004) (“*Gonzaga* 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].’”), quoting *Gonzaga*, 536 US at 280–81. But see *Does v Gillespie*, 867 F3d 1034, 1040 (8th Cir 2017) (concluding that *Gonzaga* *sub silentio* overruled *Wilder*).

<sup>218</sup> *Sabree*, 367 F3d at 184.

<sup>219</sup> *Briggs*, 792 F3d at 244.

<sup>220</sup> *Id.*

right.<sup>221</sup> Similarly, to convey an “individual focus,” a statutory provision must pertain to the protection of individual rights and entitlements, not to policies and practices, which would instead convey an “aggregate focus.”<sup>222</sup>

1. The structure of the CWA addresses individual foster caregivers and state compliance separately.

The structure of the CWA divides the requirement that states make foster care maintenance payments into two interlocking sections. The first provision addressing foster care maintenance payments is in § 671, which provides that, “[i]n order for a State to be eligible for payments under this part, it shall have a plan”<sup>223</sup> that, among many other things, “provides for foster care maintenance payments in accordance with section 672.”<sup>224</sup> Section 672 mandates that each state “shall make foster care maintenance payments on behalf of each child,” and it provides greater detail about which foster caregivers are entitled to receive assistance.<sup>225</sup>

By analyzing § 671 and § 672 side by side, it becomes apparent that each section has a distinct focus. Section 671 has an aggregate focus because it enumerates the practices and policies that states must incorporate into the plans that they submit to the federal government for approval and funding. All of the conditions in § 671(a) are referenced in the context of describing what would trigger a funding prohibition. One could argue that none of these conditions alone is enforceable because of the tension between *Pennhurst* and *Gonzaga* over the relationship between enforceable rights and federal funding in Spending Clause legislation.<sup>226</sup> On the one hand, *Pennhurst* instructed that an enforceable right must be located in a statutory provision that imposes a mandatory condition on states to receive funding. If a provision of Spending Clause legislation lacks language suggesting that it is a “‘condition’ for the receipt of federal funding,” then the provision

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<sup>221</sup> *Gonzaga*, 536 US at 287.

<sup>222</sup> *Id.* at 288.

<sup>223</sup> 42 USC § 671(a).

<sup>224</sup> 42 USC § 671(a)(1).

<sup>225</sup> 42 USC § 672(a)(1).

<sup>226</sup> See *Section 1983 and the Spending Power: Enforcement of Federal “Laws”* \*9–10 (Congressional Research Service, Sept 12, 2002), archived at <http://perma.cc/K55M-JS2J> (describing this tension). But see *BT Bourbonnais Care*, 866 F3d at 820–21 (finding that “nothing 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”).



does not create a right that is enforceable under § 1983.<sup>227</sup> On the other hand, *Gonzaga* cautioned that, if the right asserted by the plaintiff is referenced *only* in the context of describing the type of state actions required for a state to receive funding, then the asserted right is not enforceable under § 1983 because it is intended only to direct state compliance.<sup>228</sup>

Taking these statements from *Pennhurst* and *Gonzaga* together, we can conclude that, in order to be enforceable under § 1983, an asserted right must: (1) be located in a statutory provision that constitutes a condition on states to receive federal funding to satisfy *Pennhurst*<sup>229</sup> and (2) be located in a statutory provision that is not connected to federal funding to satisfy *Gonzaga*.<sup>230</sup> All of the state plan requirements in § 671(a) satisfy the first requirement above because all of the provisions are tied to federal funding, but they do not satisfy the second based on the text of § 671(a) alone. Indeed, something more is needed for a plaintiff to enforce any of the provisions in § 671(a).

Some of the conditions that appear in § 671(a), such as the “reasonable efforts” provision found unenforceable in *Suter*,<sup>231</sup> are not mentioned anywhere else in the CWA. However, some conditions, such as the foster care maintenance provision in § 671(a)(1), are addressed in greater detail in other sections of the CWA—outside of the context of federal funding and state compliance that permeates § 671. Section 672 speaks directly to foster caregivers who are entitled to receive payment on behalf of eligible foster children. Thus, it contains an individualized focus that stands in contrast to the more general focus on state compliance in § 671. The focal shift between § 671 and § 672 supports the conclusion that § 672 provides an enforceable right to foster care maintenance payments under § 1983.

*a) Section 671(a) contains an aggregate focus.* As a whole, Spending Clause legislation functions as a contract between the

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<sup>227</sup> *Pennhurst*, 451 US at 13.

<sup>228</sup> *Gonzaga*, 536 US at 288–89 (“In each provision the reference to [the asserted right] is in the context of describing the type of [state action] that triggers a funding prohibition. . . . [S]uch provisions cannot make out the requisite congressional intent to confer individual rights enforceable by § 1983.”).

<sup>229</sup> See *Section 1983 and the Spending Power* at \*9 (“‘Rights’ not connected to terms and conditions of a state’s spending program may be viewed as free-floating and merely precatory, as in *Pennhurst*.”).

<sup>230</sup> See *id.* (“[I]f protecting a ‘right’ is included as a requirement of a state plan that must be approved by a federal official in order for the state to qualify for funding, . . . then the Court may . . . rule that additional remedies are inappropriate.”).

<sup>231</sup> *Suter*, 503 US at 364. See also notes 118–36.

federal government and the states, and the text of the statute conveys the conditions states must satisfy to receive federal funding.<sup>232</sup> However, this does not necessarily mean that every section and provision of such legislation is specifically about federal funding of state programs and thus unenforceable. The Supreme Court has never taken this position, and Congress's *Suter* fix implies that Spending Clause legislation can still give rise to enforceable rights under § 1983.

However, the clear statement in § 671(a) tying the conditions to federal funding is vital because it gives notice to states of what they must do in order to receive federal funding.<sup>233</sup> Recall *Pennhurst's* instruction that the "legitimacy" of Spending Clause legislation "rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'"<sup>234</sup> Section 671(a) establishes the legitimacy of the CWA by making clear to states what they are agreeing to in return for federal funds. Section 671(a) establishes the overall framework of the CWA, and without it, none of the CWA's provisions could possibly be enforceable. For there can "be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it."<sup>235</sup> Such a foundation is indeed necessary for the creation of an enforceable right. However, it is not sufficient because, when viewed in isolation, § 671(a) does not explicitly identify the individuals these policies are designed to serve. Something more—a provision with an individualized focus on the CWA's intended beneficiaries—is needed to confer upon foster caregivers an enforceable right to foster care maintenance payments.

b) *Section 671 versus § 672.* The CWA's structure separates out the relationship between the federal government and states from the relationship between states and foster caregivers. Congress carved out § 672 of the CWA as a separate section from § 671 to address foster care maintenance payments more fully. Section 672 provides that "[e]ach State with a plan approved under this part shall make foster care maintenance payments on behalf of each child"<sup>236</sup> to the child's foster caregiver, whether that

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<sup>232</sup> See *Pennhurst*, 451 US at 17.

<sup>233</sup> 42 USC § 671(a) ("In order for a State to be eligible for payments. . .").

<sup>234</sup> See *Pennhurst*, 451 US at 17.

<sup>235</sup> *Id.*

<sup>236</sup> 42 USC § 672(a)(1).

is a “foster family”<sup>237</sup> or a “child-care institution.”<sup>238</sup> Notably, § 672(a) addresses only states and the foster caregivers of foster children on whose behalf foster care maintenance payments must be provided to cover certain costs. Whereas § 671 contains an aggregate focus on the contractual relationship between the federal government and states, § 672 contains a distinctly individualized focus on the quasicontractual relationship between states and foster caregivers. Section 672 provides an important additional layer to the CWA’s framework in which the right to foster care maintenance payments is divorced from the aggregate focus that permeates § 671(a).

In contrast, the structure of the FERPA provision in *Gonzaga* collapsed the relationships between the federal government, state institutions, and students and their parents. The respondent, a former student at Gonzaga University, claimed that students were the intended beneficiaries of FERPA and that the statute created an enforceable right to student privacy.<sup>239</sup> The statute provided that “[n]o funds shall be made available . . . to any educational agency or institution which has a policy or practice of permitting the release of education records . . . of students without the written consent of their parents.”<sup>240</sup> The provision addressed *both* the relationship between the state actors and the federal government *and* the relationship between state actors and students and their parents—all in one sentence. Thus, the provision conveyed both an aggregate focus on state compliance and federal funding and an individual focus on student privacy. Ultimately, the Court found that the FERPA provision’s overall emphasis on state policies precluded the inference that Congress intended for the provision to be privately enforceable under § 1983.<sup>241</sup> By blending together the relationships between the federal government, state actors, and individuals, the integrated structure of the FERPA provision is markedly different from the divided structure of the CWA, which addresses these relationships separately in § 671(a) and § 672(a).

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<sup>237</sup> 42 USC § 672(b)(1).

<sup>238</sup> 42 USC § 672(b)(2). See 42 USC § 672(c) for the CWA’s definitions of “foster family home” and “child-care institution.”

<sup>239</sup> *Gonzaga*, 536 US at 277.

<sup>240</sup> 20 USC § 1232g(b)(1).

<sup>241</sup> *Gonzaga*, 536 US at 290.

c) *The design of § 672 speaks directly to the rights of foster caregivers.* The title of § 672(a)(1), “Eligibility,” refers to individual foster children eligible to have foster care maintenance payments provided on their behalf to their caregivers. Only the Eighth Circuit noted the section’s title, and the court interprets the section as “set[ting] forth limitations on when a foster care maintenance payment is eligible for partial federal reimbursement.”<sup>242</sup> However, the Eighth Circuit ignored the CWA’s divided structure by conflating the use and application of “[e]ligibility” in § 672(a)(1) with that of “eligible” in § 671(a). Whereas § 671(a) addresses the conditions and limitations placed upon states to be “eligible” for federal reimbursements,<sup>243</sup> § 672(a)(1) speaks directly to the individual foster children who are eligible to have foster care maintenance payments made on their behalf.

In § 672(a)(1), eligibility is linked to whether a foster child would have been eligible for assistance under the AFDC-FC program, which preceded the passage of the CWA.<sup>244</sup> Under the AFDC-FC program,<sup>245</sup> there were four requirements for a child to be eligible to have financial assistance provided to his or her caregiver: (1) the child must have been removed from his or her home only after a determination by the state that remaining in the home was “contrary to the welfare” of the child; (2) in the month prior to removal, the child must have been eligible for assistance under the AFDC program, and the child’s parent(s) or guardian(s) must have been receiving payments at the time of removal; (3) the child must have been removed by the state agency tasked with providing AFDC assistance; and (4) the child must be placed in a foster home that has been approved by the state.<sup>246</sup>

Congress literally wrote the continuity between the AFDC-FC program and the CWA into § 672, which accounts for all four of these eligibility requirements. First, a child’s foster caregiver

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<sup>242</sup> *Midwest Foster Care*, 712 F3d at 1199.

<sup>243</sup> 42 USC § 671(a).

<sup>244</sup> See *2011 Green Book* at \*2 (cited in note 60).

<sup>245</sup> See notes 32–35 and accompanying text for a brief discussion of the historical origins of AFDC-FC programs in the early 1960s.

<sup>246</sup> *2011 Green Book* at \*2–3 (cited in note 60). Under the AFDC program, states were required “to provide cash assistance to *all* eligible families. Working within federal limitations, the states administered the program, established the income level below which families qualified for assistance in that state, and set the level of benefits that eligible families would receive there.” Stephen B. Page and Mary B. Lerner, *Introduction to the AFDC Program*, 7 *The Future of Children* 20, 21 (1997). See also notes 28–34 and accompanying text for a brief discussion of the growth of the AFDC and AFDC-FC programs during the 1960–1970s.

is eligible for foster care maintenance payments only if the foster child’s parents voluntarily agreed to removal or if there has been a judicial determination that continuing in the home “would be contrary to the welfare of the child.”<sup>247</sup> Second, a foster child’s caregiver is eligible for foster care maintenance payments if “the child, while in the home, would have met the AFDC eligibility requirement.”<sup>248</sup> Third, the state agency that submits state plans for federal assistance must also be the agency responsible for the child’s placement.<sup>249</sup> Fourth, a child must be placed in a “foster family home or child-care institution”<sup>250</sup> as defined by the statute,<sup>251</sup> and only foster families and childcare institutions are entitled to receive foster care maintenance payments from the state.<sup>252</sup> Thus, the CWA incorporated and preserved the AFDC-FC program’s four eligibility requirements for foster children whose caregivers are entitled to receive payments.

Other structural features of § 672 also indicate that the title of § 672(a)(1) refers to children whose foster caregivers are entitled to receive foster care maintenance payments. For example, § 672(a)(4) is titled “Eligibility of certain alien children,”<sup>253</sup> and § 672(i) is titled “Administrative costs associated with otherwise eligible children not in licensed foster care settings.”<sup>254</sup> Each of these titles reinforces the conclusion that § 672(a)(1) is “phrased in terms benefiting” foster children and their caregivers,<sup>255</sup> with the CWA identifying foster parents and foster care institutions as the direct recipients of payments. The right to foster care maintenance payments is inextricably linked to the eligibility of foster children.

The Brook Amendment provision, which the *Wright* Court held conferred an enforceable right under § 1983, had a similar

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<sup>247</sup> 42 USC § 672(a)(2)(A)(i)–(ii).

<sup>248</sup> 42 USC § 672(a)(1)(B). See also notes 59–61 for a discussion of the eligibility requirements for foster care maintenance payments under the CWA.

<sup>249</sup> 42 USC § 672(a)(2)(B)(i). Alternatively, the state agency that submits state plans under § 671 may enter into agreement with another state agency or an “Indian tribe or a tribal organization” for the purposes of managing foster child placement. See 42 USC § 672(a)(2)(B)(ii)–(iii).

<sup>250</sup> 42 USC § 672(a)(2)(C).

<sup>251</sup> See 42 USC § 672(c) (defining “foster family home” and “child-care institution”).

<sup>252</sup> See 42 USC § 672(b) (identifying the recipients of foster care maintenance payments on behalf of children who are eligible under § 672(a)).

<sup>253</sup> 42 USC § 672(a)(4).

<sup>254</sup> 42 USC § 672(i).

<sup>255</sup> See *Wilder*, 496 US at 510.

structure that identified the eligible beneficiaries under the statute. The original title of that provision was “Families included; amount,”<sup>256</sup> and at the time *Wright* was decided, the statute included eligibility requirements for a family to qualify for public housing at rents with hard-capped rates.<sup>257</sup> The Court held that the statute conferred an enforceable right because the provision unambiguously identified which families were eligible for public housing at reduced rates.<sup>258</sup> The Court found that it “could not be clearer” who was entitled to public housing and how the rates should be calculated and that Congress’s “intent to benefit tenants was undeniable.”<sup>259</sup>

The most noticeable difference between the structure of the CWA and that of the statutory provisions at issue in *Wright* and *Wilder* is that the CWA’s definition for foster care maintenance payments—a term that is vague on its own—is found not in § 672(a) but rather in § 675(4)(A).<sup>260</sup> The Eighth Circuit took issue with the fact that this statutory provision is found in a definitional section, and citing an Eleventh Circuit case, it maintained that “an enforceable right [located] solely within a purely definitional section is antithetical to requiring unambiguous congressional intent.”<sup>261</sup> This contention is misplaced for two reasons. First, the Eleventh Circuit case, *31 Foster Children v Bush*,<sup>262</sup> cited *Gonzaga* and two district court cases to support the asserted rule that statutory provisions that are definitional in nature cannot on their own create enforceable rights under § 1983.<sup>263</sup> But *Gonzaga* asserted no such rule, and the Eleventh Circuit cited a

<sup>256</sup> 42 USC § 1437a(a) (1988).

<sup>257</sup> 42 USC § 1437a(a) (1988).

<sup>258</sup> *Wright*, 479 US at 430.

<sup>259</sup> *Id.*

<sup>260</sup> Section 675 is titled “Definitions,” and it defines “foster care maintenance payments” as payments covering “food, clothing, shelter, daily supervision, school supplies, a child’s personal incidentals, liability insurance with respect to a child, reasonable travel to the child’s home for visitation, and reasonable travel for the child to remain in the school in which the child is enrolled at the time of placement.” 42 USC § 675(4)(A).

<sup>261</sup> *Midwest Foster Care*, 712 F3d at 1197, citing *31 Foster Children v Bush*, 329 F3d 1255, 1271 (11th Cir 2003).

<sup>262</sup> 329 F3d 1255 (11th Cir 2003).

<sup>263</sup> See *31 Foster Children*, 329 F3d at 1271, citing *Gonzaga*, 536 US at 280 (finding that, because the statutory provisions at issue “are definitional in nature, they alone cannot and do not supply a basis for conferring rights enforceable under § 1983”). See also *Charlie H. v Whitman*, 83 F Supp 2d 476, 490 (D NJ 2000) (finding that § 675(5), standing alone, does not confer a right enforceable under § 1983); *B.H. v Johnson*, 715 F Supp 1387, 1401 (ND Ill 1989) (“It would be strange for Congress to create enforceable rights in the definitional section of a statute.”).

page of the *Gonzaga* opinion that contains no language about the ability to enforce a statutory right that is located solely in a definitional section of a statute.<sup>264</sup> Moreover, the word “definition” is not found anywhere in the *Gonzaga* opinion.<sup>265</sup> Thus, there is no Supreme Court precedent for the Eighth and Eleventh Circuits’ asserted rule that is binding on the present analysis.

But suppose, for a moment, that the asserted rule were binding on the present analysis. The rule still would not foreclose enforcement of the right to foster care maintenance payments because the statutory right is not located solely within the definitional section of the CWA. Rather, the statutory right arises from the language of § 672(a)(1) *in conjunction with* the definition provided by § 675(4)(A). Whereas § 672(a) places a binding obligation on states to make foster care maintenance payments and identifies the individuals entitled to such payments, § 675(4)(A) provides the content of right by defining what the payments must cover. Far from being solely located in § 675(4)(A), the statutory language addressing the right to foster care maintenance payments is instead primarily located in § 672(a), which is not a definitional section. However, § 675(4)(A) provides helpful clarity as to what the right to foster care maintenance payments entails. And without the specific definition in § 675(4)(A), the right to foster care maintenance payments would possibly be too vague and amorphous for enforcement under § 1983.<sup>266</sup>

Furthermore, the Eleventh Circuit suggested that a right that is located in a definitional section may be enforceable if the right is also referenced elsewhere in the statute. In *31 Foster Children*, the plaintiffs asserted a right to particular procedures under a case review system that is compliant with the CWA.<sup>267</sup> At the time the case was decided, § 671(a)(16) required state plans to incorporate a case review system that “meets the requirements described in” § 675(5)(B).<sup>268</sup> The plaintiffs argued that states must also comply with § 675(5)(D)–(E), the definitional provisions that included the specific language regarding the right asserted by the

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<sup>264</sup> The Eleventh Circuit opinion cited to page 280 of *Gonzaga* for support of the rule that a definitional statute “alone cannot and do[es] not supply a basis for conferring rights enforceable under § 1983.” *31 Foster Children*, 329 F3d at 1271.

<sup>265</sup> See generally *Gonzaga*, 536 US 273.

<sup>266</sup> Recall that the second factor of the *Blessing* test is whether “the right assertedly protected by the statute is not so ‘vague and amorphous’ that its enforcement would strain judicial competence.” *Blessing*, 520 US at 340–41. See text accompanying notes 181–82.

<sup>267</sup> See *31 Foster Children*, 329 F3d at 1271.

<sup>268</sup> See *id.*

plaintiffs.<sup>269</sup> But the Eleventh Circuit found that § 671(a)(16) plainly required compliance only with § 675(5)(B) and not with § 675(5)(D)–(E).<sup>270</sup> Nevertheless, the court implied that the plaintiffs may have had a stronger case if § 671(a)(16) conditioned federal funding on a state’s compliance with all of § 675(5).<sup>271</sup> In contrast, § 671(a)(1) requires state plans to provide for foster care maintenance payments as a condition for receiving federal funding, and states must do so “in accordance with” § 672 in its entirety. Section 672 is not a definitional section, and it incorporates the definition of foster care maintenance payments provided by § 675(4)(A).<sup>272</sup>

## 2. The text of § 672 employs rights-creating language.

Section 672 contains rights-creating language because it is “phrased in terms of the persons benefited” rather than the entity regulated.<sup>273</sup> The rights-creating language within § 672 comprises three elements: (1) the statutory right being created (“foster care maintenance payments on behalf of each child” who qualifies<sup>274</sup>); (2) the source providing and protecting the right (“[e]ach State with a plan approved under this part”<sup>275</sup>); and (3) the individuals entitled to the right (each “foster family”<sup>276</sup> and “child-care institution”<sup>277</sup> caring for an eligible child). Viewed as a whole, these three elements clarify what right is being created, who is responsible for providing and protecting the right, and who is entitled to the right.

In comparing § 672 to provisions at issue in other Supreme Court cases, the circuit courts did not break down the provisions into these three constituent parts. However, the provision of the

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<sup>269</sup> See *id.*

<sup>270</sup> See *id.* (“[The plaintiffs] argue that we should not interpret § 671(a)(16) to require compliance only with § 675(5)(B) in order for states to receive federal funds, but we think that is the most logical interpretation.”).

<sup>271</sup> See *31 Foster Children*, 329 F3d at 1271 (finding that, because § 671(a)(16) “does not go beyond” requiring compliance with § 675(5)(B) and “explicitly require[s] a plan to meet the requirements described in §§ 675(5)(D) and (E),” the latter provisions are not required conditions for federal funding and thus not enforceable on their own).

<sup>272</sup> See 42 USC § 672(b)(2) (noting that the term “foster care maintenance payments” is defined in § 675(4)(A)).

<sup>273</sup> See *Gonzaga*, 536 US at 284, quoting *Cannon v University of Chicago*, 441 US 677, 692 n 13 (1979).

<sup>274</sup> 42 USC § 672(a)(1).

<sup>275</sup> 42 USC § 672(a)(1).

<sup>276</sup> 42 USC § 672(b)(1).

<sup>277</sup> 42 USC § 672(b)(2).



Boren Amendment to the Medicaid Act, which the *Wilder* Court found enforceable under § 1983, consisted of the same three elements. First, the asserted right was “rates” that would yield “reasonable and adequate” reimbursements for medical services.<sup>278</sup> Second, the entity tasked with providing the right was any state that submitted “a State plan for medical assistance.”<sup>279</sup> To receive approval, state plans were required to include rates for calculating reimbursements, “which the State finds, and makes assurances satisfactory to the Secretary, are reasonable and adequate.”<sup>280</sup> Third, the beneficiaries of the right were medical providers offering “inpatient hospital services” to “individuals [who are] eligible” for Medicaid.<sup>281</sup> The states, not the federal government, were responsible for protecting medical providers’ right to reimbursements at reasonable rates, and medical providers could sue under § 1983 to enforce that right.

Breaking down the statutory provision’s language is helpful to distinguish between statutes in which Congress intended to create an enforceable right and statutes that merely have the effect of benefitting certain groups.<sup>282</sup> First, plaintiffs seeking to enforce a right under § 1983 must cite specific statutory text entitling them to a right rather than a statute conferring some generalized benefit or set of undefined rights.<sup>283</sup> For example, in *Blessing*, the Court found that it is “incumbent” upon plaintiffs “to identify with particularity the rights they [have] claimed.”<sup>284</sup> There, the plaintiffs sued their state for failing to comply with Title IV-D of the SSA, which governs state payments to qualifying families under the AFDC program. However, the plaintiffs did not identify any specific provisions within Title IV-D entitling them to particular rights, and thus the Court refused to allow the plaintiffs to force their state to provide any of the benefits contained within the law.<sup>285</sup>

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<sup>278</sup> See 42 USC § 1396a(a)(13)(A) (1988).

<sup>279</sup> See 42 USC § 1396a(a)(13)(A) (1988).

<sup>280</sup> See 42 USC § 1396a(a)(13)(A) (1988).

<sup>281</sup> See 42 USC § 1396a(a)(13)(A) (1988).

<sup>282</sup> See *Blessing*, 520 US at 342 (“Only when [a] complaint is broken down into manageable analytic bites can a court ascertain whether each separate claim satisfies the various criteria we have set forth for determining whether a federal statute creates rights.”).

<sup>283</sup> See *id.* (noting that “it is impossible [for courts] to determine whether [an entire statute], as an undifferentiated whole, gives rise to undefined ‘rights’”).

<sup>284</sup> See *id.*

<sup>285</sup> See *id.*

After identifying the statutory provision containing the asserted right, plaintiffs must show that the language of the statute directly addresses the individuals entitled to the right. The statutory provision must require that states take certain actions to provide or protect the right in *all* circumstances. Thus, an asserted right must be more than a system-wide policy that produces certain benefits.<sup>286</sup> In *Gonzaga*, the Court found that students could not enforce a right to privacy under the provision in question because the provision did not prohibit individual disclosure of student records. Instead, the provision prohibited states from having a “policy or practice” of disclosing educational records of students without consent or else risk losing funding.<sup>287</sup> If the statute had explicitly said that state educational institutions would lose funding if they disclosed an individual student’s records, then the plaintiff would have likely had a stronger claim for being able to sue under § 1983. However, the plaintiff in *Gonzaga* failed to show that the FERPA provision entitled each individual student to a right to privacy in all instances.

The Eighth Circuit compared the language of § 672(a) to that of the FERPA provision in *Gonzaga*, and the court “[a]dmittedly” stated that § 672(a) “do[es] not explicitly proclaim ‘no funds shall be made available to match a state’s foster care maintenance payments if the state has certain reimbursement policies or practices,’ as the exact analogue of the statute at issue in *Gonzaga* would.”<sup>288</sup> The Eighth Circuit nevertheless viewed the differences between the actual text of the CWA and its hypothetical “analogue” to be immaterial; however, in doing so, it glossed over at least three reasons for why the CWA’s language tips the scale in favor of a focus on individual rights, not on state compliance.

First, the Eighth Circuit’s analogue distorted the focus of the actual text of § 672(a) because it omits the intended beneficiaries of the provision: foster caregivers whose foster children meet the eligibility criteria. By not explicitly identifying the intended beneficiaries of the provision and the interests of children, the Eighth Circuit’s analogue stripped a key element from the CWA’s rights-creating language, and thus the focus was “two steps

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<sup>286</sup> See *Gonzaga*, 536 US at 300 (Stevens dissenting) (noting that the Court has held that “generalized,” “systemwide” duties on States do not create enforceable rights under § 1983).

<sup>287</sup> See 20 USC § 1232g(b)(1).

<sup>288</sup> See *Midwest Foster Care*, 712 F3d at 1202, citing *Gonzaga*, 536 US at 279.

removed from the interests of individual”<sup>289</sup> foster children and foster caregivers.

Second, by invoking federal funding, the Eighth Circuit’s analogue replaced § 672’s individualized focus on the relationship between states and foster caregivers with an aggregate focus on the relationship between the federal government and state compliance.

Third, unlike the actual text of § 672, the Eighth Circuit’s analogue did not require states to make foster care maintenance payments to each child’s foster caregiver. Instead, it requires states to refrain only from certain, undefined “reimbursement policies.” A state could have a policy of making foster care maintenance payments on behalf of each child yet fail to comply by its own policy in all instances and still maintain “substantial conformity” with the CWA. The Eighth Circuit’s analogue would not prohibit federal funding as long as a state does not adopt a restricted policy. However, the plain text of § 672 does not require states to choose or refrain from certain policies. It affords no such discretion, for it requires full compliance with respect to each individual child. Therefore, the focus of the text is on state action vis-à-vis each child—not on a state’s general policies regarding foster caregivers and children in the aggregate.

#### B. Contextualizing the CWA

The legislative history and purpose of the CWA provide evidence that Congress intended for foster caregivers to be able to enforce their right to foster care maintenance payments. Section 1983 enforcement is crucial for ensuring that states uphold their obligations to foster caregivers and foster children under the CWA. If § 1983 enforcement of the right to foster care maintenance payments were to become entirely unavailable, foster caregivers would have very few other options for remedying a state’s noncompliance. Because showing that Congress intended a statute to confer an enforceable right is also a requisite element of establishing that a statute contains an implied right of action, the foreclosure of § 1983 enforcement would likely also preclude enforcement through an implied right of action.<sup>290</sup>

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<sup>289</sup> *Gonzaga*, 536 US at 287.

<sup>290</sup> See notes 146–47 and accompanying text. See also Ashish Prasad, Comment, *Rights without Remedies: Section 1983 Enforcement of Title IV-D of the Social Security Act*, 60 U Chi L Rev 197, 198 (1993) (arguing that “the Supreme Court has adopted a strong presumption against implied rights of action”).

Section 1983 enforcement is the most appropriate mechanism for protecting the rights of foster caregivers in a way that best promotes the interests of foster children. When private enforcement is unavailable, *Pennhurst* and *Gonzaga* instruct that “the typical remedy for state noncompliance” with Spending Clause legislation is not a private cause of action for noncompliance but rather terminating a state’s federal funding.<sup>291</sup> Accordingly, because the Eighth Circuit found that § 1983 actions were not available to foster caregivers, the court advised the plaintiffs that their federal remedy was to ask the federal government to stop providing reimbursements to their state for foster care maintenance payments.<sup>292</sup> However, for a foster caregiver to ask the Secretary of Health and Human Services to terminate funding to her state for failing to comply with the CWA would not protect her right to foster care maintenance payments or serve the interests of the foster child in her care. In fact, such a “remedy” would only make matters worse for foster children living in her state.

This Section argues that the legislative history and purpose of the CWA provide further evidence that Congress intended for foster caregivers to have an enforceable right to foster care maintenance payments under § 1983. Part III.B.1 examines how § 1983 actions to enforce the right to foster care maintenance payments appropriately further the legislative purpose of the CWA. Part III.B.2 responds to courts and legal scholars who oppose expanding the scope of § 1983 actions by showing that § 1983 enforcement of foster care maintenance payments does not pose the federalism and separation of powers concerns these critics raise. Finally, Part III.B.3 posits that the context of the CWA’s enactment and subsequent legislative history support the conclusion that Congress intended the right to foster care maintenance payments to be enforceable under § 1983.

1. Foster care maintenance payments and the CWA’s purpose.

The CWA provides no remedy for foster caregivers to enforce the right to foster care maintenance payments, and arguing that Congress intended to create a remedy through an implied right of

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<sup>291</sup> *Pennhurst*, 451 US at 28; *Gonzaga*, 536 US at 280.

<sup>292</sup> See *Midwest Foster Care*, 712 F3d at 1202–03 (instructing the “[foster] [p]roviders [that their] federal remedy [was] to seek termination of matching funds as a consequence for [their] state’s shortcomings”).

action is incredibly difficult.<sup>293</sup> Unlike plaintiffs suing under an implied cause of action, plaintiffs “suing under § 1983 do not have the burden of showing an intent to create a private remedy because § 1983 generally supplies a remedy for the vindication of rights secured by federal statutes.”<sup>294</sup> Given that there is no federal review mechanism within the CWA through which foster caregivers can submit claims, suing under § 1983 is the most viable and efficient option for foster caregivers to force their state to make adequate foster care maintenance payments in accordance with the CWA.

Because foster care maintenance payments occur after a child has been removed from his or her home, they do not directly bear on the CWA’s purpose of preserving families and preventing unnecessary removals. However, they do indirectly further the CWA’s purpose of reunifying families by covering the costs of “reasonable travel to the child’s home for visitation.”<sup>295</sup> Section 675a(b) includes a “List of rights” for foster children, and one of these rights is “visitation” with a child’s parent(s) or guardian(s).<sup>296</sup> Ensuring children receive their right to routine visitations with their families is critical for preserving familial bonds between foster children and their parents, and adequate foster care maintenance payments further this goal by covering the costs of travel and time expended. Moreover, by enabling periodic visitations between a foster child and her parents, foster care maintenance payments may increase the likelihood that reunification will occur more quickly, thereby avoiding the harms caused by foster care drift<sup>297</sup> and “perpetual states of familial uncertainty.”<sup>298</sup>

The phenomenon of foster care drift—in which foster children are shuffled between multiple foster homes for indefinite periods of time—was one of the pivotal forces that motivated Congress to enact the CWA.<sup>299</sup> Child welfare advocates and many members of Congress were worried in the late 1970s that too many children

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<sup>293</sup> See *Alexander v Sandoval*, 532 US 275, 286 (2001) (“The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right *but also* a private remedy. . . . Statutory intent on this latter point is determinative.”) (emphasis added).

<sup>294</sup> *Gonzaga*, 536 US at 284.

<sup>295</sup> 42 USC § 675(4)(A).

<sup>296</sup> 42 USC § 675a(4)(1).

<sup>297</sup> See Bailie, 66 Fordham L Rev at 2289 (cited in note 39). See also *Smith v Organization of Foster Families for Equality and Reform*, 431 US 816, 838 n 41 (1977) (describing harms in the foster care system).

<sup>298</sup> See Sanders, 29 J of Legis at 61 (cited in note 36).

<sup>299</sup> See text accompanying notes 42–54.

were being moved into foster care and being floated between multiple homes. Despite the noble ambitions of the CWA in tackling foster care drift, this problem continues to plague the foster care system today, and lack of funding is a persistent obstacle to realizing the full potential of the CWA.<sup>300</sup> The effects of this problem are often dire and irreversible. According to a report by the American Academy of Pediatrics (AAP), foster care has profound effects on a child's cognitive and social development,<sup>301</sup> and subjecting a foster child to multiple placements can be especially "injurious" to a child's psychological development.<sup>302</sup> Thus, the AAP emphasizes that foster children "need continuity, consistency, and predictability from their caregiver."<sup>303</sup>

Professors Brian Duncan and Laura Arys advise policymakers that foster care drift and multiple placements can be reduced in part by ensuring that foster caregivers are equipped with the proper resources to meet the needs of the foster children entrusted to their care.<sup>304</sup> In a 2007 empirical study, Duncan and Arys investigated "whether more generous foster care payments lead to more stable placements."<sup>305</sup> The study found that "the financial compensation paid by states can have a significant impact on the experiences of children in foster homes" by promoting stability and ensuring that a foster child has adequate resources.<sup>306</sup> According to the study, a \$100 increase in foster care maintenance payments would "decrease the number of times the average child is moved from one foster placement to another by 20%."<sup>307</sup> Finally, the study also concluded that the size of foster care

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<sup>300</sup> See Elisa Kawam, *Revisiting the Adoption Assistance and Child Welfare Act of 1980: Analysis, Critique, and Recommendations*, 1 *World J Soc Science Rsrch* 23, 35 (2014) (suggesting that, in the years following the passage of the CWA, "the argument over funding and implementation took center stage [in Congress and in public policy debates] instead of prioritizing the needs of the families and children who are served by the child welfare system").

<sup>301</sup> According to the AAP, foster care "experiences are critical in the short- and long-term development of a child's brain and the ability to subsequently participate fully in society." In addition, foster children "have disproportionately high rates of physical, developmental, and mental health problems." See American Academy of Pediatrics, Committee on Early Childhood, Adoption and Dependent Care, *Developmental Issues for Young Children in Foster Care*, 106 *Pediatrics* 1145, 1145 (2000).

<sup>302</sup> See *id.* at 1149.

<sup>303</sup> See *id.*

<sup>304</sup> Brian Duncan and Laura Argys, *Economic Incentives and Foster Care Placement*, 74 *S Econ J* 114, 135, 139–40 (2007).

<sup>305</sup> *Id.* at 135.

<sup>306</sup> *Id.* at 140.

<sup>307</sup> *Id.* at 11.

maintenance payments has a “statistically significant effect on a family’s willingness to take in a foster child.”<sup>308</sup> Thus, forcing states to make adequate foster care maintenance payments directly confronts the problem of foster care drift. Active private enforcement deters underpayment of foster care maintenance payments, enabling more individuals to become and remain foster caregivers throughout the entire duration of their foster child’s placement. By reducing the likelihood of multiple placements, adequate foster care maintenance payments also minimize the potentially detrimental effects that removal and prolonged placement in foster care can have on a child’s psychological development and well-being.

## 2. Criticisms of expansive § 1983 enforcement.

By expanding the scope of § 1983 to include enforcement of statutory rights, *Thiboutot* represented a major turning point for § 1983 litigation.<sup>309</sup> The Court’s holding faced forceful criticism almost immediately.<sup>310</sup> Indeed, in his dissent, Justice Lewis Powell warned that the Court’s decision “create[d] a major new intrusion into state sovereignty under our federal system.”<sup>311</sup> However, § 1983 actions to enforce federal statutes were far from uncommon when *Thiboutot* was decided, and some commentators have argued that the “conclusion in *Thiboutot* conformed to the majority position in the lower federal courts.”<sup>312</sup>

Criticism of expansive § 1983 enforcement of statutory rights has taken a variety of forms, including pragmatic concerns and critiques based on federalism and separation of powers.<sup>313</sup> Critics

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<sup>308</sup> Duncan and Argys, 74 S Econ J at 139 (cited in note 304).

<sup>309</sup> See Daniel P. Tokaji, *Public Rights and Private Rights of Action: The Enforcement of Federal Election Laws*, 44 Ind L Rev 113, 133 (2010) (describing *Thiboutot* as the “seminal case for private plaintiffs suing under § 1983 for statutory violations”). See also notes 82–87 and accompanying text.

<sup>310</sup> See, for example, John R. Bartels, *Recent Expansion in Federal Jurisdiction: A Call for Restraint*, 55 St John’s L Rev 219, 229 (1981) (“*Thiboutot*’s expansive interpretation of section 1983 poses a threat to the balance of federal/state relations.”).

<sup>311</sup> *Thiboutot*, 448 US at 33 (Powell dissenting).

<sup>312</sup> Sunstein, 49 U Chi L Rev at 397 n 17 (cited in note 21).

<sup>313</sup> See, for example, Linnet Davis-Stermitz, Comment, *Stigma plus Whom? Evaluating Causation in Multiple-Actor Stigma-Plus Claims*, 84 U Chi L Rev 1883, 1894–95 (2017) (arguing that “[t]he modern § 1983 has been a lightning rod for criticism,” with objections pointing to an “outsized impact on federal dockets,” a reduction of “collegiality and predictability,” and a host of federalism concerns).

have pointed to the “litigation explosion”<sup>314</sup> following *Thiboutot* and the resulting “burdens on federal courts”<sup>315</sup> and “financial burden[s] on [ ] states” defending against § 1983 actions.<sup>316</sup> Moreover, critics have highlighted a host of “federalism concerns that arise when plaintiffs . . . procure a federal injunction that will compel changes in the operation of a state institution.”<sup>317</sup> Under-scoring much of the criticism is a discomfort that § 1983 actions may “interfere[ ] with the states’ ability to manage their own governmental activities” and transfer greater power to federal courts to shape federal laws and policies.<sup>318</sup> Justice Harry Blackmun, however, argued that the “so-called federalism ‘problem’ . . . is largely an illusory one.”<sup>319</sup> This is because § 1983 is “only a vehicle for substantive claims that have their base elsewhere. It is not an independent source of constitutional or statutory rights.”<sup>320</sup>

But in the context of Spending Clause legislation, the federal government also has the option to cut off the statute’s entire funding stream for a state’s noncompliance. Imagine if the plaintiffs who lost in *Midwest Foster Care* followed the Eighth Circuit’s advice and asked the Secretary of Health and Human Services to stop providing federal funding under the CWA to their state. If successful, the effects of such a remedy would be widely felt by foster caregivers and foster children throughout the entire state. In addition, the capacity of state agencies to provide foster care and adoptive services would be severely crippled. Compared to such a drastic measure, § 1983 actions are far less intrusive on a state’s autonomy. A plaintiff who successfully sues under § 1983 to force her state to pay adequate foster care maintenance payments would simply force the state to pay damages. The § 1983 remedy protects the rights of the foster caregiver without destabilizing state agencies or interfering with the rights and interests

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<sup>314</sup> See Eric Harbrook Cottrell, Note, *Civil Rights Plaintiffs, Clogged Courts, and the Federal Rules of Civil Procedure: The Supreme Court Takes a Look at Heightened Pleading Standards in Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 72 NC L Rev 1085, 1085 (1994).

<sup>315</sup> See Taylor Van Hove, Comment, *Fraud, Mistake, and Section 1983 Prison Claims: Why the Federal Rules of Civil Procedure Should Be Amended to Require Heightened Pleading for Section 1983 Inmate Litigation*, 65 DePaul L Rev 213, 233 (2015).

<sup>316</sup> Bartels, 55 St John’s L Rev at 229–30 (cited in note 310).

<sup>317</sup> Christina B. Whitman, *Constitutional Torts*, 79 Mich L Rev 5, 30 (1980).

<sup>318</sup> *Id.* at 36.

<sup>319</sup> Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 NYU L Rev 1, 22 (1985).

<sup>320</sup> *Id.*



of other foster caregivers and foster children in a state.<sup>321</sup> Thus, it makes little sense to deny families a § 1983 remedy based on an assumption that private enforcement might somehow burden state autonomy more than a full-scale funding prohibition would.

Federalism concerns are less pronounced when a plaintiff sues for damages than when a plaintiff sues for equitable relief.<sup>322</sup> In the former instance, “section 1983 damage suits require no conclusion that the state process is improper.”<sup>323</sup> The Court’s § 1983 jurisprudence suggests a greater willingness to uphold the enforceability of monetary entitlements when a federal law is specific and lacks any review mechanism.<sup>324</sup> In contrast, suits in equity “involve a specific request to enjoin a state act.”<sup>325</sup> When a statutory provision is vague, a plaintiff’s request for an injunction may result in federal judges supplanting the authority of state agencies tasked with implementation of a federal law with their own personal judgments about how the law should be implemented.

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<sup>321</sup> The likelihood that litigation would deter unlawful conduct by states was also a “key factor” for courts determining if Congress intended a statute to contain an implied right of action. See Frankel, 67 Va L Rev at 556 (cited in note 71) (analyzing the deterrent effect of implied causes of action on states under the securities laws). But see *Bivens v Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 US 388, 407–08 (1971) (Harlan concurring) (citations omitted):

[T]he appropriateness of according [the plaintiff] compensatory relief does not turn simply on the deterrent effect liability will have on federal official conduct. Damages as a traditional form of compensation for invasion of a legally protected interest may be entirely appropriate even if no substantial deterrent effects on future official lawlessness might be thought to result. [The plaintiff], after all, has invoked judicial processes claiming entitlement to compensation for injuries resulting from allegedly lawless official behavior, if those injuries are properly compensable in money damages.

<sup>322</sup> See Whitman, 79 Mich L Rev at 7 n 20 (cited in note 317) (“The federalism problems created by civil rights litigation are raised most dramatically by suits in equity, which seek direct interference by federal judges in state activities.”). While plaintiffs may bring § 1983 actions to seek damages or equitable relief for violations of Spending Clause legislation, the Supreme Court’s small track record suggests a greater willingness to authorize § 1983 actions seeking damages. In *Pennhurst*, *Suter*, and *Blessing*, the plaintiffs sued for equitable relief, while in *Wright*, *Wilder*, and *Gonzaga*, the plaintiffs sued for damages. The Court allowed only the plaintiffs in *Wright* and *Wilder* to proceed.

<sup>323</sup> Whitman, 79 Mich L Rev at 30 (cited in note 317).

<sup>324</sup> See text accompanying notes 208–10.

<sup>325</sup> Whitman, 79 Mich L Rev at 30 (cited in note 317). See also Note, *Developments in the Law*, 90 Harv L Rev at 1185 (cited in note 78) (“Th[e] traditional model of federal-state relations in the context of federal court adjudication . . . begins to break down when one considers those actions which are most often thought to threaten the functioning of the state—the modern injunctive suit.”).

Section 1983 enforcement of the CWA's foster care maintenance payment provisions does not curtail the flexibility of each state to administer foster care services in the way it views most proper.<sup>326</sup> Foster caregivers suing for inadequate foster care maintenance payments are not asking federal courts to usurp the authority of state agencies to design their own foster care plans<sup>327</sup>—they are simply asking that foster care maintenance payments cover the costs they are supposed to cover. Although litigation is limited only to the parties in a given case,<sup>328</sup> § 1983 actions to enforce foster care maintenance payments may lead states “to take steps to reduce injuries whenever the steps appear less costly than the injuries they prevent.”<sup>329</sup> Thus, the prospect of costly litigation would likely motivate states to ensure that the foster care maintenance payments they provide to foster caregivers are adequate and in accordance with the law. While compliance may require states to expend greater resources to increase the size of foster care maintenance payments, these financial burdens are largely overstated because the federal government reimburses states for the majority of its expenditures on foster care maintenance payments.<sup>330</sup>

As for separation of powers concerns, § 1983 enforcement of the foster care maintenance payments provision does not supplant the authority of the Department of Health and Human Services because there is no federal mechanism through which the agency can review individual claims. Moreover, the Department of Health and Human Services still retains the authority to revoke funding due to a state's noncompliance.<sup>331</sup> In addition, § 1983 does

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<sup>326</sup> See Note, *Developments in the Law*, 90 Harv L Rev at 1190 (cited in note 78) (arguing that, “at least in the damage action context, the federal intrusion into state affairs is a narrow one, limited to adjudicating the claim of the particular plaintiff and leaving plenary operational authority to the existing state and local agencies”).

<sup>327</sup> See *id.* at 1189–90 (arguing that “the principle of assuring state and local effectiveness in performing the functions those units of government have assumed is not necessarily impaired by section 1983 suits”).

<sup>328</sup> See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv L Rev 1281, 1282–83 (1976) (explaining that “the lawsuit is a vehicle for settling disputes between private parties about private rights” and listing five “defining features of . . . civil adjudication”).

<sup>329</sup> Note, *Developments in the Law*, 90 Harv L Rev at 1218 (cited in note 78) (arguing that “[d]amage remedies imposed on governmental entities could serve to prevent injuries to individuals by the system as a whole”).

<sup>330</sup> See 42 USC § 674(a). The rate of federal reimbursement for a state “shall in no case be less than 50 per centum or more than 83 per centum.” 42 USC § 1396d(b).

<sup>331</sup> See 42 USC § 1320a-2a.

not greatly interfere with the domain of state agencies because suing for damages under § 1983 requires a court only to determine whether the plaintiff's asserted right has been violated and to award damages when necessary. Monetary damages do not require state agencies to forfeit autonomy in how they design and administer child welfare services; however, equitable relief, such as an injunction, likely would. As mentioned above, § 1983 actions solve underenforcement problems that stem from the lack of a robust review mechanism, and the deterrent effect of potentially costly litigation encourages state agencies to design and implement foster care systems that are more faithful to the requirements imposed by the CWA.<sup>332</sup> In sum, § 1983 enforcement merely ensures that the CWA does what Congress designed it to do.

### 3. The CWA's enactment in the context of § 1983 cases and the CWA's legislative history.

Even before the CWA was enacted, foster caregivers had brought § 1983 actions to enforce foster payments to which they were entitled under the previous AFDC-FC program. Although the CWA does not include an explicit private right of action to enforce foster care maintenance payments, Congress was likely aware of increasingly common § 1983 litigation when it enacted the law.<sup>333</sup> Based on the legal context of the CWA's enactment and later legislative history, this Section argues that Congress intended for foster caregivers to be able to bring § 1983 actions to enforce their right to foster care maintenance payments.

One year before the enactment of the CWA, in *Miller v Youakim*,<sup>334</sup> the Supreme Court authorized a foster parent to bring constitutional and statutory claims under § 1983 in order to enforce her right to foster care assistance in accordance with the

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<sup>332</sup> See notes 321, 329–40, and accompanying text.

<sup>333</sup> See Victoria F. Nourse and Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 NYU L Rev 575, 597–605 (2002) (discussing the extent to which members of Congress draft laws with an awareness of the “range of legal sources that courts typically consult in construing statutes, such as case law”); *Cannon v University of Chicago*, 441 US 677, 699 (1979) (“In sum, it is not only appropriate but also realistic to presume that Congress was thoroughly familiar with these unusually important precedents from this and other federal courts and that it expected its enactment to be interpreted in conformity with them.”). The Court had held that SSA provisions were properly enforced through § 1983 actions. See, for example, *Edelman v Jordan*, 415 US 651, 675 (1974) (noting that “suits in federal court under § 1983 are proper to secure compliance with the provisions of the Social Security Act on the part of participating States”).

<sup>334</sup> 440 US 125 (1979).

AFDC-FC program.<sup>335</sup> The Court observed that, under the AFDC-FC program, “[a] participating State may not deny assistance to persons who meet eligibility standards defined in the Social Security Act.”<sup>336</sup> The following year, Congress transferred the AFDC-FC program, which was previously located in Title IV-A of the Social Security Act, to the CWA.<sup>337</sup> The eligibility requirements for payments under the AFDC-FC program were imported into § 672(a) and became the eligibility requirements for foster care maintenance payments.<sup>338</sup> Although the CWA provided more specific language for what foster care maintenance payments must cover,<sup>339</sup> the statutory provisions regarding eligibility for foster care maintenance payments did not change significantly when the CWA became law.

The continuity between the AFDC-FC program and the CWA and the fact that foster caregivers had already sued under § 1983 to enforce foster payments suggest that Congress likely anticipated that § 1983 actions to enforce foster care maintenance payments would continue.<sup>340</sup> Although Congress did not explicitly state that private actions were available under the CWA, it did not explicitly foreclose them either.

The legislative history of the CWA’s enactment is also of little help on the question of private enforcement. However, only one year before the CWA passed, the Court acknowledged in *Cannon v University of Chicago*<sup>341</sup> that it was “not necessary” for a plaintiff to show congressional intent to create a private right of action so long as a statute confers a class of citizens with a right and does not expressly foreclose private enforcement of the right.<sup>342</sup> After a

<sup>335</sup> See *id.* at 146.

<sup>336</sup> See *id.* at 133–34.

<sup>337</sup> *Adoption Assistance and Child Welfare Act of 1980*, HR 3434, 96th Cong., 1st Sess. in 126 Cong. Rec. S 14766 (June 13, 1980) (“[The CWA] transfer[s] the existing foster care maintenance program from title IV-A to the new title IV-E.”). Recall that the CWA created Title IV-E of the SSA.

<sup>338</sup> See notes 244–52 and accompanying text.

<sup>339</sup> See text accompanying note 182.

<sup>340</sup> See note 333 and accompanying text.

<sup>341</sup> 441 US 677 (1979).

<sup>342</sup> See *id.* at 694 (“[I]n situations . . . in which it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intention to *create* a private cause of action, although an explicit purpose to *deny* such cause of action would be controlling.”), quoting *Cort v Ash*, 422 US 66, 82 (1975). See also *Chapman v Houston Welfare Rights Organization*, 441 US 600, 672 (1979) (White concurring in the judgment) (stating that statutory rights may be “protected and vindicated under § 1983 . . . unless there is clear indication in a particular statute that its remedial provisions are exclusive or that for various other reasons a § 1983 action is inconsistent with congressional intention”).

plaintiff shows that a statute creates a right, the burden shifts to the state to show that Congress did not intend for the right to be privately enforceable under § 1983.<sup>343</sup> *Gonzaga* affirmed this burden-shifting rule.<sup>344</sup> This context is significant because it implies that Congress was aware that private actions under § 1983 were commonly initiated to enforce the SSA’s provisions and, in particular, the provisions of the AFDC-FC program. Nothing in the text or legislative history of the CWA’s enactment indicates that Congress intended for the right to such payments to no longer be enforceable after passing the CWA.

Postenactment legislative history further supports the view that Congress intended for foster families to be able to enforce the CWA’s provisions. Just three years after Congress passed the CWA, Senator Alan Cranston, one of the law’s chief architects, lamented that many of the CWA’s provisions were not being forcefully implemented by states. The senator insisted that the CWA’s provisions are privately enforceable, arguing that

the authority granted to the Secretary of Health and Human Services to withhold or reduce funding to a State for noncompliance was not intended to be an exclusive remedy. . . . [A]s my statements on the Senate floor during the several years that this legislation was being developed made clear, the intended beneficiaries of [the CWA] were and continue to be the children who are in foster care or are in danger of being placed in foster care.<sup>345</sup>

Foster children are dependent on foster caregivers to use these payments to meet their basic needs.<sup>346</sup> In most circumstances, because of the dependent status of children, enforcing any provision of the CWA in court requires that a foster child’s

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<sup>343</sup> See note 342. See also *Middlesex County Sewage Authority v National Sea Clammers Association*, 453 US 1, 20 n 31 (1981) (“[W]e do not suggest that the burden is on a plaintiff to demonstrate congressional intent to preserve § 1983 remedies.”).

<sup>344</sup> See *Gonzaga*, 536 US at 284 (“Once a plaintiff demonstrates that a statute confers an individual right, the right is presumptively enforceable by § 1983.”); *id.* at 284 n 4 (“The State may rebut this presumption by showing that Congress specifically foreclosed a remedy under § 1983.”) (quotation marks and citations omitted).

<sup>345</sup> *Implementation of the Adoption Assistance and Child Welfare Act of 1980*, 98th Cong. 1st Sess. in 129 Cong Rec S 10282–83 (daily ed Apr 28, 1983) (“1983 CWA Implementation”) (letter from Senator Cranston).

<sup>346</sup> See Pamela Laufer-Ukeles, *The Case against Separating the Care from the Caregiver: Reuniting Caregivers’ Rights and Children’s Rights*, 15 Nevada L J 236, 242 (2014) (“[The] relationships that are necessitated by children’s dependency are fundamental to children’s needs.”).

caregiver sue on behalf of the child under § 1983.<sup>347</sup> Senator Cranston stressed that

[t]here should be no question that these children have standing to seek enforcement of this law in order to secure the benefits and protections that Congress intended they receive. . . . It is sad that it takes a court order to bring that about, but that appears to be the only way to achieve faithful execution of this law under the [current administration].<sup>348</sup>

This postenactment legislative history supports the inference that Congress intended for the CWA to create statutory rights that are privately enforceable, either directly by foster children or, more likely in most cases, by parents and caregivers on behalf of children.<sup>349</sup>

Because the Court in *Suter* held the “reasonable efforts” provision to be unenforceable under § 1983,<sup>350</sup> the CWA’s goal of preventing and de-incentivizing unnecessary removals likely cannot be fully realized unless Congress decides to act. However, the foster care maintenance payment provisions should still be enforceable to serve the needs of foster children, to combat the problems of multiple placements and foster care drift, and to further the CWA’s goal of timely reunification of foster children with their families.<sup>351</sup> When Congress passed the *Suter* fix, it did not express outright that all provisions of the CWA were privately enforceable, but it did imply that at least some, or perhaps most, provisions were enforceable through § 1983 actions.<sup>352</sup> The

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<sup>347</sup> See *id.* at 242 (2014) (arguing that “judges and legislators should focus on supporting [] caregiver-child relationships. The child and his or her custodians have an inseparable interdependent relationship and this relational nature of children’s lives cannot be ignored; the caregiver and the care that a child needs cannot be completely separated.”). See also Martha Minow, *Rights for the Next Generation: A Feminist Approach to Children’s Rights*, 9 Harv Women’s L J 1, 5, 16 (1986):

Legal rules that imply that only independent people may enjoy rights fictionalize the actual grant of rights to people who remain dependent in many ways.

. . .

[For people who are dependent on others,] legal rules foster relationships: relationships of care, protection, and perhaps, at times, chosen affiliation.

<sup>348</sup> *1983 CWA Implementation Letter*, 129 Cong Rec S at 10282–83 (letter from Senator Cranston) (cited in note 345).

<sup>349</sup> See Laufer-Ukeles, 15 Nevada L J at 253 (cited in note 346) (arguing that “it is the parents who struggle for [children’s] rights against the state, and children are the beneficiaries”).

<sup>350</sup> See notes 132–36 and accompanying text.

<sup>351</sup> See notes 295–308 and accompanying text.

<sup>352</sup> See 42 USC § 1320a-2.

legislative history of the *Suter* fix explains that, “in establishing ‘State plan’ programs under the Social Security Act, Congress meant . . . to permit those injured by State officials’ failure to [comply with federal statutory standards] . . . to challenge, through appropriate judicial actions, that failure.”<sup>353</sup> Ultimately, the goal of the *Suter* fix was “to assure that individuals who have been injured by a state’s failure to comply with the state plan requirements are able to seek redress in the federal courts.”<sup>354</sup> This strongly indicates that Congress intended provisions of the CWA to be enforceable under § 1983.

### CONCLUSION

While the CWA gives states considerable flexibility to implement their own foster care systems, it also places firm obligations on states. There is no question that the CWA requires states to make foster care maintenance payments because § 671(a)(1) conditions federal funding on compliance with § 672 in its entirety. Although states are required only to maintain “substantial conformity” with the CWA’s provisions to avoid a loss of funding, the individually tailored language in § 672(a)(1) suggests that state compliance is not the focus of the foster care provision. The language in § 675(4)(A) is specific about the costs that foster care maintenance payments must cover, and states that receive federal funding under the CWA must ensure that the payments they provide to foster caregivers cover all of these costs. Moreover, states are not free to decide which foster caregivers can receive foster care maintenance payments. Taken together, § 672(a)(1) and § 675(4)(A) go to great lengths to instruct states on the specific duties they must fulfill “on behalf of each child” eligible for assistance.

Section 1983 enforcement of the CWA’s right to foster care maintenance payments is crucial for preventing § 672(a)(1) from becoming a “dead letter.”<sup>355</sup> The CWA does not explicitly provide aggrieved parties with a private right of action to enforce its provisions, and there is no federal review mechanism to fill this gap. Asking the federal government to terminate funding to a state for its failure to make adequate foster care maintenance payments

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<sup>353</sup> *Conference Report on HR 11*, Revenue Act of 1992, HR Rep 102-631, 102d Cong, 2d Sess 366 (1992).

<sup>354</sup> *Id.*

<sup>355</sup> See *Wilder*, 496 US at 514 (refusing “to adopt an interpretation of the Boren Amendment that would render it a dead letter”).

would most likely exacerbate the problem that foster caregivers are trying to remedy. Thus, § 1983 actions are the most sensible avenue for foster caregivers to enforce their right to adequate foster care maintenance payments and to ensure that the CWA protects the interests of children.

It is important not to lose sight of the lives that are affected when states fail to comply with provisions of the CWA. Like any other Spending Clause legislation that creates a federal-state cooperative program, the CWA surely regulates states by tying funding to state compliance. But to reduce the entire statute to a mere regulatory regime misses the point. As the name of the law suggests, the overarching goal of the CWA is to improve the welfare of some of the most vulnerable children in the United States. Foster children are undeniably the ones who suffer most when a state fails to make adequate foster care maintenance payments, and foster caregivers should be permitted to sue under § 1983 to prevent this suffering. “[A]fter all,” Justice Blackmun admonished in his *Suter* dissent, “we are dealing here with children.”<sup>356</sup>

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<sup>356</sup> *Suter*, 503 US at 377 (Blackmun dissenting).