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## NOTES

### ENFORCING RIGHTS: A CASE FOR PRIVATE RIGHTS OF ACTION UNDER SECTION 253 OF THE FEDERAL TELECOMMUNICATIONS ACT OF 1996

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#### INTRODUCTION

When entering a new market, telecommunications companies spend millions of dollars investing in infrastructure and related market-entry costs.<sup>1</sup> Sometimes these companies utilize city-owned rights-of-way in order to provide their services.<sup>2</sup> Although section 253 of the Federal Telecommunications Act of 1996 (“FTA”) allows state or local governments to manage or seek compensation for the use of rights-of-way, they may not do so in a discriminatory or unreasonable manner.<sup>3</sup> Yet the power of the federal government to enforce these terms is in doubt.<sup>4</sup> Also, section 253 does not explicitly grant telecommunications companies a right to sue in federal court.<sup>5</sup> Therefore, after investing millions of dollars, telecommunications providers can be essentially held hostage by state and local governments. Such “hold-ups” will cause fewer companies to invest in telecommunications services, which in turn, means higher prices and lower quality services for the

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<sup>1</sup> Brief of Plaintiff-Appellant at 76, *Cablevision of Boston, Inc. v. Pub. Improvement Comm'n of Boston*, 184 F.3d 88 (1st Cir. 1999) (No. 99-1222).

<sup>2</sup> See, e.g., *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1262 (10th Cir. 2004).

<sup>3</sup> See 47 U.S.C. § 253(c) (2006).

<sup>4</sup> See *BellSouth Telecomms., Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1190–91 (11th Cir. 2001).

<sup>5</sup> See 47 U.S.C. § 253(d).

millions of people who rely on their services.<sup>6</sup> Thus, it is essential for the functioning of our society that telecommunications providers have a right to sue in federal court.

Section 253 of the FTA prohibits any state or local government from interfering with a telecommunications provider's ability to provide service, unless the state's regulation falls within one of the two safe harbor provisions.<sup>7</sup> The first safe harbor provision allows state and local governments to "regulate telecommunications in the public interest, as long as such regulations are competitively neutral."<sup>8</sup> The second safe harbor provision allows state and local "regulations relating to right-of-way management and compensation which are competitively neutral and nondiscriminatory."<sup>9</sup> The FTA explicitly grants the Federal Communications Commission ("FCC") enforcement power over most of section 253.<sup>10</sup> Yet the FCC is not explicitly granted authority to enforce the second safe harbor provision.<sup>11</sup> As a result, the burden of enforcement rests with the telecommunications providers. Thus, in order to enforce these laws, telecommunications providers must have a private right of action.

Two private rights of action are available to telecommunications providers seeking to enforce section 253: (1) an implied cause of action or (2) a section 1983 claim.<sup>12</sup> The result of a successful claim based on either theory is the same: the court creates a private right of action even though the statute did not expressly authorize a private suit.<sup>13</sup> There are, however, differences between the two claims. For example, section 1983 is

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<sup>6</sup> See Telecommunications Act of 1996, Pub. L. No. 104-104, Preamble, 110 Stat. 56, 56 (stating that increased competition and decreased regulation will result in lower prices and higher quality services).

<sup>7</sup> See 47 U.S.C. § 253(a)-(c).

<sup>8</sup> MCI Telecomms. Corp. v. Pub. Serv. Comm'n of Utah, 216 F.3d 929, 939 n.6 (10th Cir. 2000).

<sup>9</sup> Qwest Corp. v. City of Santa Fe, 380 F.3d 1258, 1272 (10th Cir. 2004).

<sup>10</sup> See 47 U.S.C. § 253(d).

<sup>11</sup> See *id.* § 253(c)-(d).

<sup>12</sup> See Susan J. Stabile, *The Role of Congressional Intent in Determining the Existence of Implied Private Rights of Action*, 71 NOTRE DAME L. REV. 861, 872 n.64 (1996).

<sup>13</sup> See 42 U.S.C. § 1983 (2006); Stabile, *supra* note 12, at 861.

statutorily based,<sup>14</sup> while an implied cause of action derives from the common law.<sup>15</sup> More importantly, however, the standard of proof traditionally required under a section 1983 claim “is far less stringent than what is required to establish an implied [cause] of action.”<sup>16</sup>

Yet the recent case of *Gonzaga University v. Doe*<sup>17</sup> has led some courts to believe that a private right of action is not available under any provision of section 253.<sup>18</sup> In part, this view stems from the mistaken belief that there are no longer significant differences between an implied cause of action and a section 1983 claim.<sup>19</sup> Moreover, some argue that the *Gonzaga* decision has created an entirely new, and more stringent, standard for private rights of action.<sup>20</sup> Relying on such arguments, some courts have mistakenly denied telecommunications providers a private right of action under section 253.<sup>21</sup> This approach, however, misinterprets *Gonzaga*. Part I of this Note provides background on the meaning of section 253 and the current law regarding private rights of action. It also briefly discusses the unique problems presented for private rights of action where the underlying legislation is passed pursuant to the Spending Clause—which was at issue in *Gonzaga*. Part II discusses whether the circuit courts allow telecommunications providers a private right of action under section 253. Some pre-*Gonzaga* courts granted a private right of action for telecommunications providers when a state or local government exceeded its safe harbor to manage a public right-of-way under section 253(c). These courts held that, under the traditional standard for implied causes of action, the text and structure of section 253 and its legislative history, in addition to

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<sup>14</sup> See Sasha Samberg-Champion, *How To Read Gonzaga: Laying the Seeds of a Coherent Section 1983 Jurisprudence*, 103 COLUM. L. REV. 1838, 1841–42 (2003).

<sup>15</sup> See Stabile, *supra* note 12, at 864.

<sup>16</sup> *Furtick v. Medford Hous. Auth.*, 963 F. Supp. 64, 71 n.18 (D. Mass. 1997).

<sup>17</sup> 536 U.S. 273 (2002).

<sup>18</sup> See, e.g., *Sw. Bell Tel., LP v. City of Houston*, 529 F.3d 257, 262 (5th Cir. 2008).

<sup>19</sup> See Erwin Chemerinsky, *Limiting Suits To Enforce Federal Laws*, 39 SUP. CT. REV. 70, 71 (2003).

<sup>20</sup> See *id.*

<sup>21</sup> See, e.g., *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1266–67 (10th Cir. 2004).

the purpose of the FTA as a whole and other analogous sections of the FTA, indicates the availability of an implied cause of action. For all that, many post-*Gonzaga* courts have denied a private right of action under any subsection of section 253. These courts held that the *Gonzaga* decision was controlling and, in light of that decision, the telecommunications providers' claims must fail. Part III argues that telecommunications providers should have a private right of action where a state or local government exceeds its safe harbor under section 253(c), which allows for the management of a public right-of-way.<sup>22</sup> First, it argues that the *Gonzaga* decision only controls where the underlying statute was passed pursuant to the Spending Clause. Since the FTA was passed pursuant to the Interstate Commerce Clause, the *Gonzaga* decision is not controlling. Next, Part III argues that, properly limited, the *Gonzaga* decision allows a private right of action under section 253 for telecommunication providers. In doing so, this Part concludes that a telecommunications provider has an implied cause of action under section 253(c). Moreover, since the telecommunications provider succeeds on the more difficult implied cause of action claim, then courts should also allow the telecommunications providers to prevail on the easier claim to prove—a section 1983 claim. Finally, this Part concludes that there are significant policy reasons favoring a private right of action under section 253(c) of the FTA.

#### I. NEITHER THE LAW REGARDING PRIVATE RIGHTS OF ACTION NOR SECTION 253 IS SETTLED

The history of section 1983 and implied causes of action is both independent and intertwined,<sup>23</sup> which has created confusion

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<sup>22</sup> For example, one way a state or local government may exceed its safe-harbor is when a state or local government charges discriminatory or unreasonable rates against a telecommunications provider under the guise of managing a public right-of-way. *See, e.g.*, TCG Detroit v. City of Dearborn, 206 F.3d 618, 624 (6th Cir. 2000).

<sup>23</sup> Compare *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283–85 (2002) (arguing that implied causes of action and section 1983 claims involve the same initial inquiry), and *Cort v. Ash*, 422 U.S. 66, 78 (1975) (judging an implied cause of action claim by looking to whether the statute was passed to protect the plaintiff by creating a remedy for a violation of the statutory right that is consistent with the statute and whether there was an obligation on the state), with *Blessing v. Freestone*, 520 U.S. 329, 329–30 (1997) (judging a section 1983 claim by asking whether the plaintiff was

in the courts. Similarly, the courts criticized section 253 as the product of poor legislative drafting.<sup>24</sup> As a result, there is confusion and disagreement among both federal circuit and district courts as to the meaning of section 253.<sup>25</sup> Since private rights of action and section 253 claims are difficult to understand on their own, there is immense confusion when they interact.<sup>26</sup>

A. *Confused Courts and Section 253 of the Federal Telecommunications Act of 1996*

In passing the FTA as a whole, Congress sought to advance two objectives.<sup>27</sup> First, Congress wanted to “end the monopolies in local telephone services . . . by fostering competition between telephone companies.”<sup>28</sup> Second, Congress hoped “to benefit consumers by fostering competition between telephone companies in cities throughout the United States.”<sup>29</sup> Therefore, Congress thought that by decreasing regulation, the resulting competition would spur innovation and reduce the cost, as well as

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an intended recipient of a right, and whether there was an obligation on the state), and Samberg-Champion, *supra* note 14, at 1870–73 (arguing that section 1983 and implied causes of action are, and always have been, judged differently by the courts).

<sup>24</sup> *Qwest Commc'ns Corp. v. City of Greensboro*, 440 F. Supp. 2d 480, 488 (M.D.N.C. 2006) (“To be sure, the structure of section 253 is confusing, and courts have struggled with its interpretation.”); *Qwest Commc'ns Corp. v. City of Berkeley*, 202 F. Supp. 2d 1085, 1089 (N.D. Cal. 2001) (“[I]t is worth noting that § 253 is not a model of clarity. Courts that have sought to interpret the section have noted the questions raised by its wording and structure.”).

<sup>25</sup> See *City of Greensboro*, 440 F. Supp. 2d at 488.

<sup>26</sup> Compare, e.g., *TCG Detroit*, 206 F.3d at 624 (holding that a private right of action lies under section 253), with *City of Santa Fe*, 380 F.3d at 1266–67 (holding that a section 1983 claim does not lie under section 253).

<sup>27</sup> Cf. John Paul Stevens, *The Shakespeare Canon of Statutory Construction*, 140 U. PA. L. REV. 1373, 1376 (1992) (stating that, when employing statutory interpretation, it is important to “[r]ead the entire statute”).

<sup>28</sup> *AT&T Commc'ns of the Sw., Inc. v. City of Dallas*, 8 F. Supp. 2d 582, 585 (N.D. Tex. 1998); see Telecommunications Act of 1996, Pub. L. No. 104-104, Preamble, 110 Stat. 56, 56. Prior to the FTA, telecommunications services were provided by state-sponsored monopolies with legislative bars to market entry. See *AT&T*, 8 F. Supp. 2d at 586. Thus, the purpose of the act was to allow new telecommunications carriers entry into the market. See *id.*; see also *City of Greensboro*, 440 F. Supp. 2d at 487 (“Thus, in passing the FTA, Congress intended that market competition, rather than state or local regulations, would primarily determine which companies would provide the telecommunications services demanded by consumers.”).

<sup>29</sup> *AT&T*, 8 F. Supp. 2d at 585.

increase the quality, of telecommunications services.<sup>30</sup>

The courts have formed two distinct interpretations of section 253 of the FTA: (1) the “deliberate omission” interpretation; and (2) the “overriding purpose” interpretation.<sup>31</sup> The courts that follow the “deliberate omission” interpretation believe that Congress intended to allow for a private right of action under 253(c)—the safe harbor which gives the state the

<sup>30</sup> Telecommunications Act of 1996 Preamble.

<sup>31</sup> Section 253 entitled “Removal of Barriers to Entry” provides in part the following:

(a) In general

No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

(b) State regulatory authority

Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

(c) State and local government authority

Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

(d) Preemption

If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

47 U.S.C. § 253(a)–(d) (2006). The reason the courts have interpreted the section differently is due in part to the fact that section 253 is not a “model of clarity.” *Qwest Commc'ns Corp. v. City of Berkeley*, 202 F. Supp. 2d 1085, 1089 (N.D. Cal. 2001). In fact, this confusion caused the FCC to offer its own interpretation of section 253. *See generally* FEDERAL COMMUNICATIONS COMMISSION, FCC NO. 98-295, SUGGESTED GUIDELINES FOR PETITIONS FOR RULING UNDER SECTION 253 OF THE COMMUNICATIONS ACT (1998), *available at* [http://www.fcc.gov/Bureaus/Common\\_Carrier/Public\\_Notices/1998](http://www.fcc.gov/Bureaus/Common_Carrier/Public_Notices/1998) (scroll down and click on fcc98295.wp or fcc98295.txt [hereinafter FCC NOTICE]).

power to manage public rights-of-way.<sup>32</sup> They base their understanding of the statute in subsection (d), which is the “enforcement provision” of the statute.<sup>33</sup> That provision explicitly gives the FCC enforcement power over the general prohibition in subsection (a) and the safe harbor for regulation in the public interest found in subsection (b).<sup>34</sup> Yet subsection (c) was not included in the text of subsection (d); thus, the FCC does not have enforcement power when a state exceeds its safe harbor to manage public rights-of-way.<sup>35</sup> Therefore, a private right of action is necessary to enforce subsection (c).<sup>36</sup>

Although “deliberate omission” theorists ultimately base their conclusion in subsection (d), they start with the general prohibition found in subsection (a).<sup>37</sup> Subsection (a) is a general proscription against interference with telecommunication services by state or local governments.<sup>38</sup> To this end, the “deliberate omission” followers believe that subsection (a) provides substantive limits “on the authority of state and local governments to regulate telecommunications.”<sup>39</sup> That is, subsection (a) functions as a limitation on the power of any state to pass any law that interferes with telecommunication services.

Yet the other subsections of section 253 provide safe harbors from the general prohibition found in subsection (a),<sup>40</sup> as these subsections “are couched not in terms of limitation, but of exception to the general rule set forth in (a).”<sup>41</sup> For instance, subsection (b) allows state and local governments to “regulate telecommunications in the public interest, as long as such regulations are competitively neutral.”<sup>42</sup> Furthermore,

<sup>32</sup> See, e.g., *BellSouth Telecomms., Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1187–88 (11th Cir. 2001).

<sup>33</sup> See *id.* at 1189.

<sup>34</sup> 47 U.S.C. § 253(d); see *BellSouth Telecomms.*, 252 F.3d at 1189.

<sup>35</sup> 47 U.S.C. § 253(d); see *BellSouth Telecomms.*, 252 F.3d at 1189.

<sup>36</sup> See, e.g., *BellSouth Telecomms.*, 252 F.3d at 1191.

<sup>37</sup> See *id.* at 1186; see also Stevens, *supra* note 27, at 1374 (“[W]hen federal judges are required to interpret acts of Congress, they must begin by reading the text of the statute.”).

<sup>38</sup> See 47 U.S.C. § 253(a).

<sup>39</sup> *BellSouth Telecomms.*, 252 F.3d at 1186.

<sup>40</sup> See *id.* at 1186–87.

<sup>41</sup> See *id.* at 1187.

<sup>42</sup> *MCI Telecomms. Corp. v. Pub. Serv. Comm’n of Utah*, 216 F.3d 929, 939 n.6 (10th Cir. 2000). For example, a state will violate subsection (a) if it charges a



subsection (c) allows state and local “regulations relating to right-of-way management and compensation which are competitively neutral and nondiscriminatory.”<sup>43</sup> Thus, these two subsections operate as exceptions to the general prohibition found in subsection (a).

Finally, “deliberate subscribers” reach subsection (d). This subsection is the “enforcement provision” of section 253, and provides that if “a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) . . . the Commission shall preempt the enforcement of such statute, regulation or legal requirement . . . to correct such violation or inconsistency.”<sup>44</sup> In light of this language, “deliberate omission” subscribers conclude that the FCC has enforcement authority over subsections (a) and (b).<sup>45</sup> As such, the FCC can enforce the general requirement that a state not interfere with telecommunications, and determine if the state action is within the safe harbor for nondiscriminatory regulation in the public’s interest. For all that, any reference to subsection (c) is notably absent from this provision.<sup>46</sup> Therefore, these courts conclude that this is a deliberate omission, and that the FCC does not have enforcement power over “regulations relating to right-of-way management and compensation which are competitively neutral and nondiscriminatory.”<sup>47</sup> As a result, the only way to enforce the limits of this safe harbor is through a private right of action.

The “deliberate omission” theorists also find support for their interpretation in other sections of the FTA.<sup>48</sup> Specifically, these courts look to section 255, which explicitly prohibits a private

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telecommunication provider money to lay wires inside its state. Subsection (c), however, provides the state with an affirmative defense. That is, although subsection (a) is violated by this conduct, a state can argue that subsection (c) allows for such fees. Likewise, if a state requires that the company only lay wire that meet certain safety specifications, that would violate subsection (a). Yet the state could assert an affirmative defense that this conduct is allowed under subsection (b). Thus subsection (a) provides substantive limits, and subsection (b) and (c) provide affirmative defenses to a violation of subsection (a).

<sup>43</sup> *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1272 (10th Cir. 2004).

<sup>44</sup> 47 U.S.C. § 253(d) (2006).

<sup>45</sup> *See BellSouth Telecomms.*, 252 F.3d at 1189–91.

<sup>46</sup> *See id.* at 1191.

<sup>47</sup> *City of Santa Fe*, 380 F.3d at 1272.

<sup>48</sup> *See Stevens, supra* note 27, at 1376 (“‘Read the *entire* statute.’”).

right of action.<sup>49</sup> Since the FTA explicitly grants a private right of action in some sections of the FTA, sound statutory analysis dictates that silence in other sections should be interpreted as an implicit grant of a private right of action in that subsection.<sup>50</sup> Since there is no explicit prohibitory language in section 253, a private right of action is implied.

The second approach to section 253 is the “overriding purpose” view.<sup>51</sup> As in any sound statutory interpretation, “overriding purpose” theorists start at the beginning of the section.<sup>52</sup> They first decide whether a state action “falls within the proscription of section 253(a).”<sup>53</sup> That is, whether the state or local government has illegally interfered with telecommunications services.<sup>54</sup> Next, the “overriding purpose” subscribers argue that certain state actions are allowed under subsections (b) and (c), even though they are prohibited by subsection (a).<sup>55</sup> For example, although managing a public right-of-way is prohibited under subsection (a), it is explicitly allowed under subsection (c).<sup>56</sup> Thus, “overriding purpose” subscribers, much like “deliberate omission” subscribers, recognize a safe harbor provision within the statute.<sup>57</sup> Still, the two schools of thought differ with regard to subsection (d). “Deliberate omission” theorists argue that if Congress wanted to grant the FCC enforcement power over subsection (c), that subsection would have been listed within subsection (d).<sup>58</sup> “Overriding

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<sup>49</sup> 47 U.S.C. § 255(f) (2006) (“Nothing in this section shall be construed to authorize any private right of action to enforce any requirement of this section or any regulation thereunder. The Commission shall have exclusive jurisdiction with respect to any complaint under this section.”).

<sup>50</sup> See *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 624 (6th Cir. 2000).

<sup>51</sup> See *Qwest Commc'ns Corp. v. City of Greensboro*, 440 F. Supp. 2d 480, 489–90 (M.D.N.C. 2006).

<sup>52</sup> See *Stevens*, *supra* note 27, at 1374 (stating that it is important to “read the statute”).

<sup>53</sup> See *City of Greensboro*, 440 F. Supp. 2d at 488 (quoting FCC NOTICE, *supra* note 31).

<sup>54</sup> See 47 U.S.C. § 253(a) (2006).

<sup>55</sup> See FCC NOTICE, *supra* note 31.

<sup>56</sup> Compare 47 U.S.C. § 253(a), with 47 U.S.C. § 253(c).

<sup>57</sup> Compare, e.g., *City of Greensboro*, 440 F. Supp. 2d at 488 (finding a “safe harbor”), with *BellSouth Telecomms., Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1187 (11th Cir. 2001) (finding a “safe harbor[ ]”).

<sup>58</sup> See *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1265–66 (10th Cir. 2004); *BellSouth Telecomms., Inc.*, 252 F.3d at 1189, 1191.

purpose” advocates, however, argue that the FCC must have enforcement power over all subsections of 253 in order to fulfill the FTA’s overriding purpose, which is to “regulate interstate and foreign commerce and provide safe and efficient services, to

be executed and enforced by the FCC.”<sup>59</sup> Therefore, Congress must have intended for the FCC to have enforcement power over subsection (c), even though it is not explicitly conferred.<sup>60</sup>

Moreover, these “overriding purpose” subscribers believe that the FTA is always explicit when it grants a private right of action. For example, sections 252,<sup>61</sup> 258,<sup>62</sup> and 274<sup>63</sup> of the FTA all explicitly provide for a private right of action to enforce their mandates.<sup>64</sup> This is important because the FTA’s explicitness in

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<sup>59</sup> *City of Greensboro*, 440 F. Supp. 2d at 490 (citing 47 U.S.C. § 151 (2006)). Such subscribers find further support for their theory in another section of the FTA. Specifically, section 257(a), which provides:

Within 15 months after February 8, 1996, the Commission shall complete a proceeding for the purpose of identifying and eliminating, by regulations pursuant to its authority under this chapter (other than this section), market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services, or in the provision of parts or services to providers of telecommunications services and information services.

47 U.S.C. § 257(a) (2006).

<sup>60</sup> *City of Greensboro*, 440 F. Supp. 2d at 490. Although such an interpretation seems to rebut sound statutory analysis, *see Stevens, supra* note 27, at 1374, some courts have held that this is not the case where the plain meaning of a statute “will produce a result ‘demonstrably at odds with the intention of its drafters.’” *Clark v. Capital Credit & Collection Servs., Inc.*, 460 F.3d 1162, 1169 (9th Cir. 2006).

<sup>61</sup> 47 U.S.C. § 252 (2006).

<sup>62</sup> *Id.* § 258.

<sup>63</sup> *Id.* § 274.

<sup>64</sup> *See Cablevision of Boston, Inc. v. Pub. Improvement Comm’n of Boston*, 184 F.3d 88, 107–08 (1st Cir. 1999) (Noonan, J., concurring). Section 252(e)(6), for example, governs agreements between telecommunications carriers and the states, and a state’s ability to accept or reject such agreements. *See* 47 U.S.C. § 252(e)(6). There, the FTA specifically provides that: “In a case in which a State . . . makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court . . .” *Id.* Likewise, Congress was explicit in creating a private right of action in section 258(b). *See Cablevision*, 184 F.3d at 107. If a carrier violated the procedures of the FCC under section 258, the statute specifically provides that the carrier is not shielded from “any other remedies available at law.” 47 U.S.C. § 258(b). In other words, the aggrieved party may sue under other theories of law—for example, fraud or misrepresentation. *Cf. Valdes v. Qwest Commc’ns Int’l, Inc.*, 147 F. Supp. 2d 116, 121–22, 123–25 (D. Conn. 2001) (finding that the plaintiffs could pursue a private right of action claim under section 258 for slamming, which is similar to, but not preemptive of, common law

granting a private right of action in other sections of the FTA indicates that silence in section 253 should be interpreted as denying a private right of action.<sup>65</sup> Therefore, these courts believe that section 253 does not allow for a private right of action.

### B. A Confusing Clarification of Implied Causes of Action

In recent years, the Supreme Court, despite its attempt to clarify the law,<sup>66</sup> has created great confusion with regards to private rights of action. Traditionally, the courts looked to *Cort v. Ash*<sup>67</sup> and its progeny to judge the existence of an implied cause of action.<sup>68</sup> The *Cort* decision analyzed four factors to determine if an implied cause of action existed<sup>69</sup>: (1) “[I]s the plaintiff ‘one of the class for whose especial benefit the statute was enacted[?]’ ”<sup>70</sup> (2) “[I]s there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one?”<sup>71</sup> (3) “[I]s it consistent with the underlying purposes

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fraud or fraudulent misrepresentation). Similarly, section 274(e) is also explicit when creating a private right of action. *See Cablevision*, 184 F.3d at 107 (Noonan, J., concurring). That section, essentially limiting the ability of carriers to engage in electronic publishing, specifically provides that “[a]ny person” can bring a private right of action under the FTA. 47 U.S.C. §§ 207, 274(e). Conversely, however, some sections of the FTA are explicit when a private right of action *should not* be granted. *See TCG Detroit v. City of Dearborn*, 206 F.3d 618, 624 (6th Cir. 2000).

<sup>65</sup> *See City of Greensboro*, 440 F. Supp. 2d at 490.

<sup>66</sup> *See Gonzaga Univ. v. Doe*, 536 U.S. 273, 278 (2002). It is worth noting, however, that during the early years of the country, the courts were very sympathetic to a plaintiff's injury. *See Stabile*, *supra* note 12, at 864. That is, the theory was that “an individual is entitled to an adequate remedy for any legal wrong.” *Id.* This was true “whether [it was a] common law wrong or statutory wrong.” *Id.* For these early American courts, it did not matter whether Congress had intended a remedy. *Id.*

<sup>67</sup> 422 U.S. 66 (1975).

<sup>68</sup> *See, e.g., TCG Detroit*, 206 F.3d at 623; *see also, e.g., Bradford C. Mank, Suing Under § 1983: The Future After Gonzaga University v. Doe*, 39 HOUS. L. REV. 1417, 1424 (2003); *Stabile*, *supra* note 12, at 866–67.

<sup>69</sup> *See, e.g., Stabile*, *supra* note 12, at 867.

<sup>70</sup> *Cort*, 422 U.S. at 78 (quoting *Tex. & Pac. Ry. Co. v. Rigsby*, 241 U.S. 33, 39 (1916) (asking, in other words, “does the statute create a federal right in favor of the plaintiff?”)).

<sup>71</sup> *Id.* Unlike the first factor, however, whose origin can be traced back to 1916, this second prong appeared to be relatively new factor. *Compare Tex. & Pac. Ry. Co.*, 241 U.S. at 33 (decided in 1916), *with Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974). In fact, as early as 1803, congressional

of the legislative scheme to imply such a remedy for the plaintiff?"<sup>72</sup> (4) "[I]s the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?"<sup>73</sup> Notably, in *Cort*, only two of the four factors focused on legislative intent,<sup>74</sup> and those two factors were not outcome determinative.<sup>75</sup> Therefore, the *Cort* factors were neither designed, nor originally interpreted, to be applied rigidly.<sup>76</sup> Rather, they were designed to be flexible.<sup>77</sup> As such, courts were free to balance a deficiency with one factor against the oversatisfaction of another.<sup>78</sup> But soon thereafter, the factors were applied more rigidly by the Court, focusing mainly on legislative intent—factors (1) and (2).<sup>79</sup> This was done because the courts thought the flexible standard permitted too many private rights of action.<sup>80</sup> Some members of the Court felt that this lax standard caused an explosion of litigation in the federal courts.<sup>81</sup> Thus, these justices thought that more rigid standards would reduce the number of federal suits.<sup>82</sup> Despite these alterations, *Cort* was still the controlling decision for an implied cause of action, only with greater emphasis given to congressional intent.<sup>83</sup>

Then the Supreme Court attempted to clarify implied cause of action jurisprudence in *Gonzaga University v. Doe*.<sup>84</sup> In that case, the Court had to determine if a statute, enacted pursuant to the Spending Clause of the U.S. Constitution, conferred a remedy

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intent was of little or no value to courts in deciding private rights of action. See *Stabile*, *supra* note 12, at 864.

<sup>72</sup> *Cort*, 422 U.S. at 78.

<sup>73</sup> *Id.*

<sup>74</sup> See *Stabile*, *supra* note 12, at 867–68.

<sup>75</sup> See *id.* at 868.

<sup>76</sup> See *id.*

<sup>77</sup> See *id.*

<sup>78</sup> See *id.* at 868 & n.41 (noting that originally, the factors were applied flexibly).

<sup>79</sup> See *id.* at 868; see also *BellSouth Telecomms., Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1189 (11th Cir. 2001); *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 623–24 (6th Cir. 2000).

<sup>80</sup> *Samberg-Champion*, *supra* note 14, at 1867.

<sup>81</sup> See *id.*

<sup>82</sup> See *id.*

<sup>83</sup> See *BellSouth Telecomms.*, 252 F.3d at 1189; *TCG Detroit*, 206 F.3d at 623–24.

<sup>84</sup> 536 U.S. 273, 278 (2002) (finding that the Court's decisions have not been "models of clarity").

available under 42 U.S.C. § 1983.<sup>85</sup> At first, the Court recognized that a section 1983 claim and an implied cause of action claim involve different inquiries.<sup>86</sup> According to the Court, however, both claims begin with the same inquiry: “whether Congress intended to create a federal right.”<sup>87</sup> To make such a finding, there must be “clear and unambiguous . . . rights-creating language.”<sup>88</sup> Moreover, this “rights-creating language” must “confer individual rights upon a class of beneficiaries.”<sup>89</sup> But after an intention to create a federal right is demonstrated, the Court recognized that the necessary inquiries for the two private rights of action diverge.<sup>90</sup> After a section 1983 plaintiff establishes congressional intent to create a federal right, the plaintiff is entitled to a rebuttable presumption that the right is enforceable.<sup>91</sup> Conversely, an implied cause of action plaintiff has the burden of showing that “the statute manifests an intent ‘to create not just a private *right* but also a private *remedy*.’”<sup>92</sup> Although the Court never explicitly overruled *Cort* in its opinion, there is no doubt that *Gonzaga* overruled *Cort* where the underlying legislation was passed pursuant to the Spending

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<sup>85</sup> *Id.* at 276. Although *Gonzaga* involved a section 1983 claim, discussed *infra*, the Court felt the need to address implied causes of action too. *Id.* at 283 (rejecting “the notion that our implied right of action cases are separate and distinct from our § 1983 cases”).

<sup>86</sup> *See id.* at 283.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 290.

<sup>89</sup> *See id.* at 285.

<sup>90</sup> *Id.* at 284–85.

<sup>91</sup> *See infra* note 103 and accompanying text.

<sup>92</sup> *Gonzaga*, 536 U.S. at 284 (quoting *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001)). Admittedly, this concept is difficult to understand, but it again focuses on congressional intent. *See* Sital Kalantry, *The Intent-to-Benefit: Individually Enforceable Rights Under International Treaties*, 44 STAN. J. INT’L L. 63, 70 (2008). That is, although there is congressional intent to create an individual right, there is no intent to give the plaintiff the power to enforce that right. *See id.* Normally, in these instances, enforcement power is given to a regulatory agency. *See, e.g.*, *Wright v. Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 426 (1987). Yet where there is no agency or the agency cannot effectively enforce the act, the Court will find that Congress must have intended to create a private remedy. *See Gonzaga*, 536 U.S. at 280 (citing *Wright*, 479 U.S. at 426). But a plaintiff who brings a section 1983 claim does not need to go this extra step because “§ 1983 generally supplies a remedy for the vindication of rights secured by federal statutes.” *Id.* at 284.

Clause.<sup>93</sup> Because of the Court's focus on the Spending Clause, however, it is unclear if the decision is controlling where the underlying legislation was not passed pursuant to the Spending

Clause. Yet it makes sense to limit the *Gonzaga* decision to cases involving the Spending Clause because of the unique problems presented by Spending Clause legislation.

### C. A Confusing Clarification of Section 1983 Claims

Section 1983 and implied causes of action have similar histories.<sup>94</sup> As a result, the standard for determining a section 1983 claim was similar to the pre-*Gonzaga Cort* factors.<sup>95</sup> Still, the consensus among the courts was that if a plaintiff could show an implied cause of action, then the plaintiff could show a section 1983 claim, as the section 1983 standard was less stringent.<sup>96</sup> Traditionally, there were three principle factors in determining if a section 1983 remedy was available under a statutory provision<sup>97</sup>: (1) whether "Congress . . . intended that the provision in question benefit the plaintiff,"<sup>98</sup> (2) whether "the plaintiff[s] [asserted interests are] not so 'vague and amorphous' that its enforcement would strain judicial competence,"<sup>99</sup> and (3) whether the statute "impose[s] a binding obligation on the States."<sup>100</sup> This three-factor analysis, however, did not end the inquiry—it only established a right and a "rebuttable presumption that [it was]

<sup>93</sup> See *infra* Parts I.C and III. Yet some scholars, judges, and members of the Court argue that *Cort* had already been overruled. See Samberg-Champion, *supra* note 14, at 1870–71 (citing Justice Scalia's *concurring* opinion in *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 77 (1992), as affirmative evidence that the Court had already overruled *Cort*. But see *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 624 (6th Cir. 2000) ("[A] majority of the Court has not gone so far as to hold that *Cort v. Ash* has been 'effectively overruled.'" (quoting *Thompson v. Thompson*, 484 U.S. 174, 188 (1988) (Scalia, J., concurring))).

<sup>94</sup> See *supra* note 23.

<sup>95</sup> See *infra* notes 104–06 and accompanying text.

<sup>96</sup> *Furtick v. Medford Hous. Auth.*, 963 F. Supp. 64, 71 n.18 (D. Mass. 1997) ("The standard for determining whether a plaintiff may enforce a statute against state and local officials via section 1983 . . . is far less stringent than what is required to establish an implied private right of action.").

<sup>97</sup> See *Blessing v. Freestone*, 520 U.S. 329, 340 (1997).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 340–41.

<sup>100</sup> *Id.* at 341.

enforceable under § 1983.”<sup>101</sup> This presumption was rebutted, for example, if Congress explicitly or impliedly foreclosed a section 1983 remedy.<sup>102</sup> That is, Congress could explicitly allow for a private right of action, or, in the absence of an explicit statement, it could be so clear from the text of the statute that a private right of action is necessary to enforce the provision. Therefore, despite this subtle difference, the law regarding section 1983 claims was similar to implied causes of action.

But the *Gonzaga* Court changed this standard—at least with regards to statutes passed under the Spending Clause.<sup>103</sup> Thus, the new standard for section 1983 claims is similar to the test for implied causes of action.<sup>104</sup> First, the court must find evidence of “an unambiguously conferred right,”<sup>105</sup> directed “upon a class of beneficiaries.”<sup>106</sup> The plaintiff, however, is still presumed to have a remedy after the right is established;<sup>107</sup> this presumption is still rebutted “by showing that Congress ‘specifically foreclosed a remedy under [section] 1983.’”<sup>108</sup> For example, if there is a comprehensive enforcement scheme in the statute, this is evidence of an implied foreclosure of a private remedy. Thus, the *Gonzaga* decision altered the standard by which section 1983 claims are measured, much like the Court altered the implied cause of action standard. Nevertheless, because of the Court’s obvious concerns with Spending Clause legislation, it is unclear whether this reasoning extends to cases where the underlying legislation is not passed pursuant to the Spending Clause.

#### D. *The Contractual Analogy of the Spending Clause*

The Court is skeptical about inferring a private right of action where the legislation was passed pursuant to the Spending Clause because it would force the states to abide by conditions that they did not consider when accepting the federal

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<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *See Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002).

<sup>104</sup> *See id.*

<sup>105</sup> *See id.*

<sup>106</sup> *Id.* at 285.

<sup>107</sup> *See id.* at 284.

<sup>108</sup> *See id.* at 284 n.4 (quoting *Smith v. Robinson*, 468 U.S. 992, 1005 n.9 (1984)).



funds.<sup>109</sup> That is, unlike most federal legislation, the states are under no obligation to comply with legislation passed pursuant to Congress's power to spend.<sup>110</sup> Therefore, the federal government attempts to entice compliance by offering them federal funds.<sup>111</sup> In exchange for the federal funds, however, the state must agree to implement or comply with the federal legislation.<sup>112</sup> Accordingly, the Court analogized Spending Clause legislation to a contract between the states and the federal government.<sup>113</sup> As such, the Court attempts to remain consistent with contractual theory.<sup>114</sup> For example, when interpreting the legislation between the state and the federal government, the Court always tries to preserve the reasonable expectations of the parties.<sup>115</sup> As such, the Court has held that if Congress attaches conditions to the conferral of money, "it must do so in clear and unambiguous terms."<sup>116</sup> Therefore, when a court reads a private right of action into Spending Clause legislation, it is adding terms to the contract, thereby altering the reasonable expectations of the parties.<sup>117</sup>

In keeping with the contractual analogy, the claimants in a private right of action are considered third-party beneficiaries under a contract.<sup>118</sup> Third-party beneficiaries are parties that are related to a contract, but not one of the parties to the contract.<sup>119</sup> Thus, not all third-party beneficiaries have an enforceable right under the contract.<sup>120</sup> Rather, the third-party beneficiary must

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<sup>109</sup> See *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

<sup>110</sup> See Fermeen Fazal, *Is Actual Notice an Actual Remedy? A Critique of Gebser v. Lago Vista Independent School District*, 36 HOUS. L. REV. 1033, 1077 (1999) (stating that Spending Clause legislation is voluntary).

<sup>111</sup> See *West Virginia v. U.S. Dep't of Health & Human Servs.*, 289 F.3d 281, 286 (4th Cir. 2002).

<sup>112</sup> See *id.*

<sup>113</sup> See *Pennhurst*, 451 U.S. at 17.

<sup>114</sup> See *id.*

<sup>115</sup> *Stabile*, *supra* note 12, at 908.

<sup>116</sup> *Gonzaga Univ. v. Doe*, 536 U.S. 273, 290 (2002).

<sup>117</sup> *Cf. Stabile*, *supra* note 12, at 908 (stating that courts should consider the reasonable expectations of the parties when deciding whether to grant an implied cause of action).

<sup>118</sup> See *Samberg-Champion*, *supra* note 14, at 1852.

<sup>119</sup> E. ALLAN FARNSWORTH ET AL., *CONTRACTS* 880–81 (7th ed. 2008).

<sup>120</sup> See *id.* at 881.

demonstrate a legally protected interest in the contract to have an enforceable right.<sup>121</sup>

A private right of action claimant is not a party to the contract between the state and federal government. Instead, the claimant enjoys a relationship similar to that of a third-party beneficiary. Thus, if the claimant wants to affect the terms of the contract between the state and the federal government by inferring a private right of action, the court has to determine whether that third-party beneficiary should have a legally protected interest in the contract.<sup>122</sup> Consequently, one interpretation of *Gonzaga* is that it determines whether a plaintiff seeking a private right of action has a legally protected interest in the contract between the state and federal government.<sup>123</sup> Yet such an interpretation would limit the reach of the *Gonzaga* decision to private rights of action involving the Spending Clause, as outside of that context there is no need for contractual analogy, or to determine if a plaintiff is a third-party beneficiary.

## II. WHETHER A PLAINTIFF CAN BRING AN IMPLIED CAUSE OF ACTION OR A SECTION 1983 CLAIM UNDER SECTION 253 OF THE FTA HAS CAUSED A SPLIT IN THE CIRCUITS

There is uncertainty regarding the correct interpretation of section 253 and the proper standard by which to judge a private right of action under that section.<sup>124</sup> Cases dealing with this uncertainty can be divided into two categories: those cases which were decided before *Gonzaga* and those cases decided after *Gonzaga*. Those cases decided pre-*Gonzaga* were argued on an implied cause of action theory and held that section 253(c) allowed for an implied cause of action.<sup>125</sup> On the other hand, those cases decided post-*Gonzaga* were argued on a section 1983 theory,<sup>126</sup> and they held that there was no section 1983 claim

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<sup>121</sup> See *id.* at 881–82.

<sup>122</sup> See Samberg-Champion, *supra* note 14, at 1852.

<sup>123</sup> See *infra* Part III.A.2.

<sup>124</sup> See *supra* Part I.A.

<sup>125</sup> See *infra* Part II.A.

<sup>126</sup> Since these post-*Gonzaga* cases followed the Court's decision in *Gonzaga*, it would not matter if these cases were argued on a section 1983 or an implied cause of action basis because none of the courts found the creation of a federal right and, thus, did not reach the part where the claims diverge. See *infra* Part II.B.

under section 253 of the FTA.<sup>127</sup> Yet the fact that the pre-*Gonzaga* cases were presented as implied causes of action and those after *Gonzaga* as a section 1983 claim is pure happenstance.<sup>128</sup>

A. *Pre-Gonzaga—Section 253(c) of the FTA Confers an Implied Cause of Action.*

These pre-*Gonzaga* courts held that there was an implied cause of action under section 253(c) of the FTA when a state or local government exceeded its safe harbor to manage or seek compensation for the use of a public right-of-way.<sup>129</sup> They reached this conclusion by looking to the purpose behind the FTA as a whole, the text and structure of section 253, that section's legislative history, and, by analogy, to other relevant sections of the FTA.<sup>130</sup> Thereafter, they held that those sources indicated that the telecommunications providers were "one of the class for whose *especial* benefit the statute was enacted,"<sup>131</sup> and that there was evidence of legislative intent to create a private remedy.<sup>132</sup> Thus, the telecommunications providers satisfied the first two factors of the *Cort* analysis. Moreover, these courts held that the telecommunications providers satisfied the remaining two *Cort* factors.<sup>133</sup> That is, an implied cause of action was consistent with the underlying legislative scheme, and the cause of action was not one traditionally relegated to the states.<sup>134</sup>

First, these courts held that the text and structure of section 253 indicated an implied cause of action under section 253(c).<sup>135</sup> They noted that although subsection (d) grants the FCC enforcement over subsections (a) and (b), it does not explicitly do

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<sup>127</sup> See *infra* Part II.B.

<sup>128</sup> After all, prior to *Gonzaga*, it was clear that the section 1983 factors were less stringent. See *Furtick v. Medford Hous. Auth.*, 963 F. Supp. 64, 71 n.18 (D. Mass. 1997).

<sup>129</sup> See *BellSouth Telecomms., Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1189 (11th Cir. 2001); *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 624 (6th Cir. 2000).

<sup>130</sup> See, e.g., *TCG Detroit*, 206 F.3d at 623–24.

<sup>131</sup> *BellSouth Telecomms.*, 252 F.3d at 1189 n.12 (quoting *Cort v. Ash*, 422 U.S. 66, 78 (1975)).

<sup>132</sup> See, e.g., *TCG Detroit*, 206 F.3d at 624.

<sup>133</sup> See, e.g., *id.* at 623.

<sup>134</sup> See, e.g., *id.* at 624.

<sup>135</sup> See, e.g., *id.*

so for subsection (c).<sup>136</sup> Therefore, these courts held that the FCC does not have enforcement power over subsection (c) when a state exceeded its safe harbor to manage a public right-of-way.<sup>137</sup> Thus, there must be an implied cause of action under section 253(c) because, if there is not, then no one could enforce the limits of that safe harbor.<sup>138</sup> Therefore, there is both textual and structural support for an implied cause of action under section 253(c).

Second, the courts found further support for an implied cause of action after consulting other parts of the FTA.<sup>139</sup> They noted that section 255 expressly foreclosed any private right of action under that section.<sup>140</sup> These courts concluded that when Congress wanted to foreclose an implied cause of action under the FTA, they did so explicitly.<sup>141</sup> Since Congress did not expressly exclude a private right of action under section 253, this silence demonstrated congressional intent to allow for implied causes of action where a state or local government exceeded its safe harbor to regulate public rights-of-way.<sup>142</sup>

Nevertheless, these courts acknowledged that other parts of the FTA are explicit when they allow for private rights of action.<sup>143</sup> Specifically, they noted that sections 252, 258, and 274 all explicitly allow for a private right of action.<sup>144</sup> These courts held that these provisions allow for remedies “over and above [the] procedures or remedies available from the [FCC]”<sup>145</sup> and do not apply to ordinary private rights of action.<sup>146</sup> Therefore, the FTA only explicitly grants implied causes of action when it provides remedies *in addition to* enforcement by the FCC. Since

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<sup>136</sup> See *BellSouth Telecomms.*, 252 F.3d at 1189; *TCG Detroit*, 206 F.3d at 623.

<sup>137</sup> See *BellSouth Telecomms.*, 252 F.3d at 1189; *TCG Detroit*, 206 F.3d at 623.

<sup>138</sup> See *BellSouth Telecomms.*, 252 F.3d at 1191; *TCG Detroit*, 206 F.3d at 624.

<sup>139</sup> See *TCG Detroit*, 206 F.3d at 624; see also Stevens, *supra* note 27 (“Read the entire statute.”).

<sup>140</sup> See *TCG Detroit*, 206 F.3d at 624.

<sup>141</sup> See *id.*

<sup>142</sup> See *id.*

<sup>143</sup> See *id.*

<sup>144</sup> See *id.*

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

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

the FCC does not have enforcement power over subsection (c),<sup>147</sup> sections 252, 258, and 274 are of no guidance.<sup>148</sup>

Third, these courts found further evidence for an implied cause of action by consulting legislative history.<sup>149</sup> Specifically, they looked to Senator Slade Gorton's statements during the Senate debate on subsection (d).<sup>150</sup> First, Senator Gorton noted that, even if his amendment was not passed, the FCC did not have enforcement power under subsection (c).<sup>151</sup> He stated, however, that his amendment would stand for the proposition "*that any challenge [under subsection (c)] take place in the Federal district court in that locality and that the Federal Communications Commission not be able to preempt such actions.*"<sup>152</sup> Thus, by explicitly noting that any challenge must take place in federal court and that the FCC does not have jurisdiction, the intended remedy must be a private right of action.<sup>153</sup> If not, then there would be no way to enforce the confines of the safe harbor.

Thus, these courts held that the telecommunications providers had satisfied the *Cort* factors and granted them an implied cause of action under section 253(c).<sup>154</sup> On the most important factors, those focusing on legislative intent, these courts concluded that the telecommunications providers had shown they were one in a class of protected beneficiaries, and that Congress sought to create a remedy for them under subsection (c) of the FTA.<sup>155</sup> Moreover, they went on to hold that the telecommunications providers satisfied the remaining two

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<sup>147</sup> See *id.*

<sup>148</sup> See *id.*

<sup>149</sup> See *BellSouth Telecomms., Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1189–91 (11th Cir. 2001); *TCG Detroit*, 206 F.3d at 623.

<sup>150</sup> See *BellSouth Telecomms.*, 252 F.3d at 1190–91; *TCG Detroit*, 206 F.3d at 623.

<sup>151</sup> See 141 CONG. REC. S8213 (daily ed. June 13, 1995) (statement of Sen. Gorton) ("There is no preemption . . . for subsection (c)."); *TCG Detroit*, 206 F.3d at 623.

<sup>152</sup> See *TCG Detroit v. City of Dearborn*, 977 F. Supp. 836, 840 (E.D. Mich. 1997) (quoting 141 CONG. REC. S8213 (statement of Sen. Gorton)).

<sup>153</sup> See *BellSouth Telecomms.*, 252 F.3d at 1191; *TCG Detroit*, 206 F.3d at 624.

<sup>154</sup> See, e.g., *TCG Detroit*, 206 F.3d at 623.

<sup>155</sup> See *id.* at 623–24.

*Cort* factors.<sup>156</sup> Therefore, these courts allowed for an implied cause of action under section 253(c).

*B. Post-Gonzaga—Section 1983 Is Not Enforceable Under Section 253 of the FTA*

After determining that the *Gonzaga* decision controls, these courts held that a section 1983 claim cannot be commenced under section 253 of the FTA.<sup>157</sup> In reaching this conclusion, these courts first asked “‘whether Congress *intended to create a federal right.*’”<sup>158</sup> The answer to that turned on “‘whether or not Congress intended to confer individual rights upon a class of beneficiaries.’”<sup>159</sup> And that was “‘answered in the negative where a statute ‘grants no private rights to any identifiable class.’”<sup>160</sup>

These courts held that the focus of section 253’s language was on prohibiting state and local activities, not on granting rights to telecommunications providers.<sup>161</sup> That is, the language of subsection (a) is couched entirely in terms of a prohibition on state conduct.<sup>162</sup> Moreover, although the safe harbors do, in some manner, grant benefits, these benefits are directed at the state and local governments.<sup>163</sup> There are, however, no benefits directed at the telecommunications providers.<sup>164</sup> Therefore, Congress did not intend to create a federal right and to confer such right on telecommunications companies.

Furthermore, these courts rejected the notion that the absence of subsection (c) in the language of subsection (d) is

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<sup>156</sup> See, e.g., *id.* at 623.

<sup>157</sup> See *Sw. Bell Tel., LP v. City of Houston*, 529 F.3d 257, 260–61 (5th Cir. 2008); *NextG Networks of N.Y., Inc. v. City of New York*, 513 F.3d 49, 52 (2d Cir. 2008); *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1265 (10th Cir. 2004).

<sup>158</sup> *Sw. Bell Tel.*, 529 F.3d at 260 (quoting *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002)).

<sup>159</sup> *NextG Networks of N.Y.*, 513 F.3d at 52 (quoting *Gonzaga*, 535 U.S. at 285).

<sup>160</sup> *City of Santa Fe*, 380 F.3d at 1265 (quoting *Gonzaga*, 536 U.S. at 284). But even if there was a private right, and, thus, a presumption that there was a remedy, this presumption is overcome by the presence of a comprehensive enforcement scheme.

<sup>161</sup> See *Sw. Bell Tel.*, 529 F.3d at 261; *NextG Networks of N.Y.*, 513 F.3d at 53; *City of Santa Fe*, 380 F.3d at 1265.

<sup>162</sup> See 47 U.S.C. § 253 (2006).

<sup>163</sup> See *id.* § 253 (b)–(c).

<sup>164</sup> *Sw. Bell Tel.*, 529 F.3d at 262.

indicative of legislative intent to provide for a section 1983 claim.<sup>165</sup> This was rejected,<sup>166</sup> in part, because it would defeat the overriding purpose of the FTA, which is to “regulate interstate and foreign commerce and provide safe and efficient services, to be executed and enforced by the FCC.”<sup>167</sup> Moreover, these courts held that granting a private right of action based on this absence was the product of a misunderstanding of the legislative history behind section 253.<sup>168</sup> These courts argued that Senator Gorton’s statements should not be interpreted to allow for section 1983 claims.<sup>169</sup> Rather, his statements concerned where the federal government may bring a *preemption* challenge against a state for a violation of section 253.<sup>170</sup> As such, the Senator’s statements in no way reflect intent to allow for a private right of action.<sup>171</sup> This is evidenced by his use of the word “preemption” and not “private

right of action.”<sup>172</sup> Therefore, these courts held that the FCC must have exclusive control over violations of subsection (c), even though it is not explicitly mentioned in the text of section 253.<sup>173</sup>

Moreover, at least one court rejected the notion that the FTA is always explicit when it wants to prevent a section 1983 claim.<sup>174</sup> While this court noted that section 255 explicitly denies a private right of action, it further noted that section 274 explicitly creates a private right of action.<sup>175</sup> Therefore, the court argued, it is improper to conclude that silence in subsection (c)

<sup>165</sup> *See id.*; *City of Santa Fe*, 380 F.3d at 1265–66.

<sup>166</sup> *See, e.g., id.* at 262.

<sup>167</sup> *Qwest Commc'ns Corp. v. City of Greensboro*, 440 F. Supp. 2d 480, 490 (M.D.N.C. 2006) (citing 47 U.S.C. § 151 (2006)).

<sup>168</sup> *See id.*; *City of Santa Fe*, 380 F.3d at 1266.

<sup>169</sup> *See, e.g., City of Santa Fe*, 380 F.3d at 1266.

<sup>170</sup> *See, e.g., id.*

<sup>171</sup> *See, e.g., id.*

<sup>172</sup> *See, e.g., id.*

<sup>173</sup> *See, e.g., id.* As such, these courts held that even if the telecommunications companies were given a private right, Congress rebutted the presumption of a private remedy. For example, if the FCC has authority over subsection (c), then it has authority over the entirety of section 253. If this is the case, then there is a comprehensive enforcement scheme. As such, the presumption of a private remedy is negated because Congress has impliedly foreclosed a private remedy by creating a statutory remedy.

<sup>174</sup> *See id.*

<sup>175</sup> *See id.*

allows for a section 1983 claim because when the FTA creates a private right of action, it does so explicitly.<sup>176</sup> Based on this evidence, these courts held that Congress did not intend to confer a right on telecommunications companies under section 253 of the FTA.<sup>177</sup> Therefore, since Congress did not intend to confer a right on telecommunications companies, they could not sustain a section 1983 claim under any part of section 253.

### III. WHEN FACED WITH A SECTION 1983 OR AN IMPLIED CAUSE OF ACTION CLAIM UNDER SECTION 253 OF THE FTA, COURTS SHOULD NOT CONSIDER *GONZAGA* CONTROLLING PRECEDENT

The pre-*Gonzaga* courts correctly applied the *Cort* factors, and concluded that there was an implied cause of action under section 253(c) of the FTA for three reasons.<sup>178</sup> First, it was erroneous for the post-*Gonzaga* courts to hold that *Gonzaga* was controlling because that case should be limited to legislation passed pursuant to Congress's power to spend under Article I, Section 8, Clause 1 of the United States Constitution. Since the FTA was passed pursuant to the Interstate Commerce Clause,<sup>179</sup> *Gonzaga* is not controlling.<sup>180</sup> Second, since the pre-*Gonzaga* courts correctly concluded that there was an implied cause of action, which is the more stringent standard, then those courts should also permit a section 1983 claim under section 253(c) of the FTA. Third, private rights of action are justified under section 253(c) because they advance significant policy goals. For these reasons, the courts should allow for an implied cause of action and a section 1983 claim where a state or local government exceeds its safe harbor to manage a public right-of-way under section 253(c) of the FTA.

#### A. *The Gonzaga Decision Should Be Limited to Spending Clause Cases*

The Court has a long history of skepticism when dealing with private right of action claims brought under Spending

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<sup>176</sup> See *id.* at 1266–67.

<sup>177</sup> See, e.g., *id.*

<sup>178</sup> See *supra* Part II.A.

<sup>179</sup> See U.S. CONST. art. I, § 8, cl. 3.

<sup>180</sup> See *infra* Part III.B.



Clause legislation because of its contractual nature and the availability of other remedies.<sup>181</sup> For example, the Court attempts to preserve the reasonable expectations of the state and federal government.<sup>182</sup> Thus, a claimant that brings a private right of action under Spending Clause legislation shares the same attenuated status as a third-party beneficiary.<sup>183</sup> On another note, the typical remedy under Spending Clause legislation for state noncompliance is for the federal government to withhold funds, not enforcement via a private right of action.<sup>184</sup> For these reasons, it is common for courts to spurn private rights of actions under Spending Clause legislation.

### 1. Spending Clause Legislation Is Unique Because of Its Contractual Nature

The Court is often reluctant to grant a private right of action under Spending Clause legislation because it would alter the reasonable expectations of the state and federal government. The arrangement between the state and federal government in Spending Clause legislation is like that of two private parties engaged in a private contract.<sup>185</sup> There is clearly consideration because both parties are subject to a benefit and a legal detriment.<sup>186</sup> For example, the state receives federal funding, but in return, must abide by the terms of the legislation.<sup>187</sup> Likewise, the federal government receives a benefit and suffers a legal detriment.<sup>188</sup> That is, the states will advance the federal government's policy—the benefit—in exchange for federal money—the legal detriment.<sup>189</sup> Moreover, there is also at least

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<sup>181</sup> See *Samberg-Champion*, *supra* note 14, at 1855–56. In fact, many of the precedents the Court relied on in *Gonzaga* are primarily cases in which the underlying legislation was passed pursuant to the Spending Clause. *See id.*; *see also* *Gonzaga Univ. v. Doe*, 536 U.S. 273, 279–82 (2002) (citing, *e.g.*, *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981)).

<sup>182</sup> *See infra* Part III.A.1.

<sup>183</sup> *See infra* Part III.A.2.

<sup>184</sup> *See infra* Part III.A.3.

<sup>185</sup> *Pennhurst*, 451 U.S. at 17.

<sup>186</sup> *See* *Blum v. Gen. Elec. Co.*, 536 F. Supp. 2d 720, 728 (W.D. Tex. 2008) (“Consideration consists of benefits and detriments to the contracting parties.”).

<sup>187</sup> *See Pennhurst*, 451 U.S. at 17.

<sup>188</sup> *See id.*

<sup>189</sup> *See id.*

the semblance of a bargain.<sup>190</sup> Therefore, even though it appears that Spending Clause legislation is little more than a contract of adhesion, with the federal government offering a “take-it-or-leave-it” proposition,<sup>191</sup> some states do “leave” certain federal funding.<sup>192</sup> But when the states do “take” the money, the Court wants to make sure the states are informed of the conditions.<sup>193</sup> Thus, if Congress wants to allow for private rights of action in legislation passed pursuant to its spending power, it must do so explicitly.<sup>194</sup> If courts later allow a plaintiff to bring a private right of action claim under such legislation, then the court has effectively “alter[ed] the terms of [the] contract[ ] between [the] state[ ] and the federal government.”<sup>195</sup> Such a result, however, would be inconsistent with contract theory because it would not mirror the reasonable expectations of the parties at the time of the bargain.<sup>196</sup>

## 2. Private Right of Action Claimants in Spending Clause Legislation Are Akin to Third-Party Beneficiaries

The Court in *Gonzaga* limited private rights of action under Spending Clause legislation by treating claimants as third-party

<sup>190</sup> *See id.*

<sup>191</sup> *Compare id.* (finding that Spending Clause legislation is in the nature of a contract), *and* *United States v. Butler*, 297 U.S. 1, 71 (1936) (holding that it is an unconstitutional exercise under the Spending Clause if the legislation is tantamount to coercion by the federal government), *and* *Jim C. v. United States*, 235 F.3d 1079, 1082 (8th Cir. 2000) (holding that the legislation passed pursuant to the Spending Clause was not coercive because it presented a “take-it-or-leave-it” opportunity to the states), *with* IAN AYERS & RICHARD E. SPEIDEL, *STUDIES IN CONTRACT LAW* 575 (7th ed. 2008) (“Standard form contracts presented on a take-it-or-leave-it basis are often referred to as ‘contracts of adhesion.’”). *But see* Peter J. Smith, Pennhurst, Chevron, *and the Spending Power*, 110 *YALE L.J.* 1187, 1239 n.197 (2001) (doubting that Spending Clause legislation is invalid as a contract of adhesion).

<sup>192</sup> *See, e.g.*, Jennifer Medina, *New York Just Says No to Abstinence Funding*, *N.Y. TIMES*, Sept. 21, 2007, at B3.

<sup>193</sup> *See* *Gonzaga Univ. v. Doe*, 536 U.S. 273, 280 (2002). This is very similar to what courts consider when determining if a contract is unconscionable. *See* *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965) (holding that one relevant question in determining whether a contract is unconscionable is whether the party had “a reasonable opportunity to understand the terms of the contract, or were the important terms hidden.”).

<sup>194</sup> *See* *Gonzaga*, 536 U.S. at 280.

<sup>195</sup> *Samberg-Champion*, *supra* note 14, at 1875.

<sup>196</sup> ARTHUR LINTON CORBIN, *CORBIN ON CONTRACTS* 2 (Joseph M. Perillo ed., Yale University rev. ed. 1993).

beneficiaries. That is, if the state is akin to a promisor and the federal government is akin to the promisee, then it stands to reason that a claimant bringing a private right of action claim pursuant to Spending Clause legislation is, at best, a third-party beneficiary.<sup>197</sup> Under contract theory, however, not all third-party beneficiaries enjoy enforceable rights under a contract.<sup>198</sup> Rather, a third-party beneficiary must have a legally protected interest in the contractual relationship in order to have a claim under the contract.<sup>199</sup> Thus, the Court in *Gonzaga* treats claimants in a private right of action as third-party beneficiaries: that is, not automatically bestowed enforceable rights. As such, not every claimant will have a legally protected interest in the “contract” between the state and the federal government. Therefore, the Court is only willing to create a private right of action when “Congress intended to confer individual rights upon a class of *beneficiaries*.”<sup>200</sup> Thus, the *Gonzaga* decision was an attempt to reign in the rights of third-party beneficiaries to Spending Clause legislation: that is, claimants seeking to enforce Spending Clause legislation via a private right of action. For all that, this contractual analogy is unique to Spending Clause

legislation. Therefore, if the underlying legislation is not passed pursuant to the Spending Clause, the standard developed in *Gonzaga* for third-party beneficiaries should not be applied.

### 3. Termination of Funds Is the Preferred Enforcement Mechanism

Another reason to limit the *Gonzaga* decision is due to an inherent and preferred enforcement mechanism in all Spending Clause legislation. The Court held in *Gonzaga* that there must be evidence of both an intention to create a private right and a

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<sup>197</sup> See Samberg-Champion, *supra* note 14, at 1852–53.

<sup>198</sup> See FARNSWORTH ET AL., *supra* note 119.

<sup>199</sup> See *id.*

<sup>200</sup> *Gonzaga Univ. v. Doe*, 536 U.S. 273, 285 (2002) (emphasis added). Although under the implied cause of action theory, the courts have always weighed heavily on the presence of or absence of legislative intent, see *supra* notes 87–93 and accompanying text, the *Gonzaga* court wanted the same treatment for third-party beneficiaries proceeding under section 1983. *Gonzaga*, 536 U.S. at 280.

private remedy.<sup>201</sup> But as the Court notes, “[i]n legislation enacted pursuant to [Congress’s] spending power, the typical remedy for state noncompliance with federally imposed conditions is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the State.’”<sup>202</sup> Thus, in all Spending Clause legislation, there is arguably evidence that Congress has “‘specifically foreclosed a remedy.’”<sup>203</sup> If the underlying remedy in Spending Clause legislation is for the federal government to withhold funding, it follows that there is no private remedy. Thus, it is easy to understand why the Court has only twice in twenty-seven years found a section 1983 action where the underlying legislation was passed pursuant to Congress’s power to spend.<sup>204</sup> But legislation that is not passed pursuant to the Spending Clause will not always have a comprehensive enforcement scheme. As such, it does not make sense to expand the *Gonzaga* decision outside of Spending Clause legislation.

*B. The FTA Was Not Passed Pursuant to the Spending Clause*

Since the FTA was passed pursuant to Congress’s power to regulate interstate commerce, and not pursuant to the Spending Clause, the *Gonzaga* decision should not apply to section 253 of the FTA.<sup>205</sup> Many of the concerns involving private rights of action under Spending Clause legislation are simply not present where the underlying legislation is passed pursuant to Congress’s power to regulate interstate commerce. For example, there is no contractual relationship between the state and the

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<sup>201</sup> *Id.* at 284–85. For example, with regards to implied causes of action, the plaintiff must show that Congress intended to create a private remedy. See *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). Likewise, although the plaintiff in a section 1983 claim is entitled to a rebuttable presumption that a private remedy is created, the presumption is rebutted if the state can show that Congress foreclosed that remedial avenue. See *Smith v. Robinson*, 468 U.S. 992, 1004 & n.9 (1984).

<sup>202</sup> *Gonzaga*, 536 U.S. at 280 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 28 (1981)).

<sup>203</sup> *Id.* at 284 n.4 (quoting *Smith*, 468 U.S. at 1004 n.9).

<sup>204</sup> *Samberg-Champion*, *supra* note 14, at 1875.

<sup>205</sup> See U.S. CONST. art. I, § 8, cl. 3 (giving Congress the power to regulate commerce among the states); 47 U.S.C. § 253 (2006) (prohibiting states from interfering with interstate telecommunications providers).

federal government.<sup>206</sup> Rather, states do not have the opportunity to opt-out of legislation passed pursuant to the Commerce Clause.<sup>207</sup> As such, there is no bargain or legal detriment to the federal government. If there is no bargain or legal determinant, then there is an absence of a relationship akin to a contract.<sup>208</sup> Therefore, the courts are not concerned with altering the reasonable expectations of the parties. Moreover, since there is no contractual relationship, a private right of action claimant is not akin to a third party. Thus, contractual analogy does not prevent these claimants from seeking enforcement.

Additionally, unlike Spending Clause legislation, there is no inherent enforcement scheme in Commerce Clause legislation.<sup>209</sup> It is true that the FCC does act as an enforcement mechanism in the FTA, and, thus, Congress must have considered at least a partial enforcement mechanism.<sup>210</sup> Yet, unlike withholding funds in Spending Clause legislation, the FCC is not an overriding enforcement mechanism.<sup>211</sup> This is why the circuit courts had to engage in in-depth statutory analysis to determine the reach of the FCC under subsection (d).<sup>212</sup> At least some of the courts held that the FCC did not even enforce all of section 253.<sup>213</sup> Therefore, an overriding enforcement mechanism is absent from the FTA. Thus, the post-*Gonzaga* courts should not have applied the *Gonzaga* standard. Instead, they should have followed the lead of the pre-*Gonzaga* courts and applied the *Cort* factors.

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<sup>206</sup> See *Houston, E. & W. Tex. Ry. v. United States (Shreveport Rate Case)*, 234 U.S. 342, 351 (1914) (holding that when Congress has legislated in interstate commerce, that legislation dominates).

<sup>207</sup> See *id.* at 351–52.

<sup>208</sup> See *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (noting that in Spending Clause legislation, there is a relationship akin to a contract).

<sup>209</sup> Compare *Smith v. Robinson*, 468 U.S. 992, 1004–05 (1984) (noting that in Spending Clause litigation, the typical remedy is to withhold the money), *with, e.g., Dickerson v. Bailey*, 336 F.3d 388, 409 (5th Cir. 2003) (finding that the appropriate remedy under this Commerce Clause legislation was an injunction of the offending statute).

<sup>210</sup> See 47 U.S.C. § 253(d).

<sup>211</sup> See *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 624 (6th Cir. 2000) (finding that section 253(c) is not subject to enforcement by the FCC but, rather, by an implied cause of action).

<sup>212</sup> See, e.g., *id.* at 623.

<sup>213</sup> See *id.* at 624.

C. *The Cort Factors Mandate a Private Right of Action*

Since *Gonzaga* is not controlling, the correct approach is to apply the *Cort* factors to see if there is an implied cause of action under section 253 of the FTA. The *Cort* factors may be summarized as follows: (1) “[I]s the plaintiff ‘one of the class for whose especial benefit the statute was enacted[?]’ ”<sup>214</sup> (2) “[I]s there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one?”<sup>215</sup> (3) “[I]s it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?”<sup>216</sup> (4) “[I]s the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?”<sup>217</sup> Still, emphasis should be placed on factors one and two—those factors pertaining to legislative intent.<sup>218</sup>

Under the first *Cort* factor, it is clear that the FTA was passed to benefit telecommunications providers. As stated in the preamble to the FTA, the goal of Congress was to reduce regulation and increase competition.<sup>219</sup> This benefited telecommunications providers in two ways: existing providers were no longer burdened by stringent regulations<sup>220</sup> and potential telecommunications providers were no longer excluded from the market.<sup>221</sup>

Moreover, section 253 of the FTA itself demonstrates that Congress intended to benefit telecommunications providers. For example, subsection (a) provides that “any entity” is to be free from attempts by state or local governments to interrupt or interfere with their services.<sup>222</sup> Further, although subsection (c)

<sup>214</sup> *Cort v. Ash*, 422 U.S. 66, 78 (1975) (quoting *Tex. & Pac. Ry. Co. v. Rigsby*, 241 U.S. 33, 39 (1916)).

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> See *supra* note 79 and accompanying text.

<sup>219</sup> See Telecommunications Act of 1996, Pub. L. No. 104-104, Preamble, 110 Stat. 56, 56.

<sup>220</sup> See *id.* (stating that one goal was deregulation).

<sup>221</sup> See *id.* (stating that one goal was to increase competition).

<sup>222</sup> See 47 U.S.C. § 253(a) (2006); see also Brief of Plaintiff-Appellant at 36, *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258 (10th Cir. 2003) (Nos. 02-2258, 02-2269).

creates a safe harbor for state and local governments,<sup>223</sup> it still operates within a right of the telecommunications provider.<sup>224</sup> That is, even though section 253(c) is a safe harbor for governmental activity, once the government operates outside that safe harbor, it is interfering with the rights granted to telecommunications providers. Therefore, even within the safe harbor of subsection (c), Congress still intended to protect the telecommunications providers.<sup>225</sup>

Under the second *Cort* factor, it is clear that Congress intended to create a private remedy under section 253(c). Section 253(c) supports an implied cause of action because subsection (c) is notably absent from the “enforcement provision” of section 253.<sup>226</sup> This indicates that Congress did not want the FCC to have enforcement power over subsection (c).<sup>227</sup> It does not make sense to argue that the FCC does not have enforcement power and that telecommunications providers have no private right of action. Although one can assume that certain statutes are to be under-enforced,<sup>228</sup> such a reading would result in almost no enforcement when a state or local government exceeded its safe harbor under subsection (c).<sup>229</sup> For example, a state or local government could simply flaunt the law and say that their activity was within subsection (c)—the management of a right-of-way. But if the FCC does not have jurisdiction and there is no private right of action, then no one could determine whether they exceeded the scope of the safe harbor. Therefore, since Congress

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<sup>223</sup> See *Sw. Bell Tel., LP v. City of Houston*, 529 F.3d 257, 262 (5th Cir. 2008).

<sup>224</sup> See *BellSouth Telecomms., Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1187 (11th Cir. 2001) (stating that subsection (a) confers the substantive right and (b) and (c) act as safe-harbors).

<sup>225</sup> See *Cablevision of Boston, Inc. v. Pub. Improvement Comm'n*, 38 F. Supp. 2d 46, 56 (D. Mass. 1999).

<sup>226</sup> 47 U.S.C. § 253(d).

<sup>227</sup> See *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 624 (6th Cir. 2000).

<sup>228</sup> See *Samberg-Champion*, *supra* note 14, at 1859–62.

<sup>229</sup> It appears that the only possible enforcement would be implied cause of action cases by consumers. 47 U.S.C. § 207 (2006). But this seems to be the very attenuated type of suits that concerned the Court in *Gonzaga*. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002); *Samberg-Champion*, *supra* note 14, at 1878–81. Therefore, it is likely that a post-*Gonzaga* court would reject this claim, even though the FTA is not passed pursuant to the Spending Clause. A suit by telecommunications providers, however, would not be attenuated and, thus would not raise such concerns.

specifically foreclosed FCC enforcement, there must be an implied cause of action for telecommunications providers.

Furthermore, since the FTA is always explicit when it prohibits an implied cause of action, silence in section 253 should be understood as approval of such claims.<sup>230</sup> For example, the language of section 255 clearly prohibits a private right of action.<sup>231</sup> There is, however, no prohibitive language in section 253.<sup>232</sup> Although certain other provisions of the FTA are explicit when they allow for implied causes of action, this only occurs when Congress wants to allow for suits “over and above” the FCC.<sup>233</sup> For instance, section 258 allows for a private right of action if a telecommunication provider is dissatisfied *with an FCC ruling* regarding that section.<sup>234</sup> Since there is no FCC enforcement of subsection (c), these other sections are unpersuasive.

Likewise, the legislative history indicates that Congress intended to create a private remedy under section 253(c) for telecommunications providers.<sup>235</sup> For example, Senator Gorton noted that subsection (c) was noticeably absent from subsection (d); thus, the FCC could not enforce subsection (c).<sup>236</sup> Moreover, the Senator contemplated that suits would take place outside of the FCC, and that such cases should be held in district courts.<sup>237</sup> Although it is plausible that the Senator was simply referring to preemption claims,<sup>238</sup> this alone, even under the strictest interpretation of the *Cort* factors, is not enough to overcome the overwhelming evidence in favor of an implied cause of action.<sup>239</sup>

The third *Cort* factor is satisfied because a private right of action is consistent with the underlying legislative purposes of the FTA. The preamble states that the FTA was passed “[t]o

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<sup>230</sup> See *TCG Detroit*, 206 F.3d at 624.

<sup>231</sup> See 47 U.S.C. § 255 (2006).

<sup>232</sup> See *id.*

<sup>233</sup> See *TCG Detroit*, 206 F.3d at 624.

<sup>234</sup> See 47 U.S.C. § 258 (2006).

<sup>235</sup> See Stevens, *supra* note 27, at 1381 (“[C]onsult the legislative history.”).

<sup>236</sup> See 141 CONG. REC. S8213 (daily ed. June 13, 1995) (statement of Sen. Gorton).

<sup>237</sup> See *id.*

<sup>238</sup> See *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1266 (10th Cir. 2004).

<sup>239</sup> See *Cannon v. Univ. of Chi.*, 441 U.S. 677, 688 (1979) (stating that the *Cort* factors are used only to judge legislative intent).



promote competition and reduce regulation in order to secure lower prices and higher quality services for . . . consumers.”<sup>240</sup> In other words, the purpose of the legislation was to promote competition in the telecommunications market in the hopes of ultimately providing higher quality service to consumers at a lower cost.<sup>241</sup> There is no reason why an implied cause of action would be inconsistent with this end. Although at times Congress did intend for enforcement to be done solely by the FCC, at others it was content to allow for enforcement by other means.<sup>242</sup> For example, Congress deliberately excluded from the language of subsection (d) any mention that the FCC should have enforcement power over subsection (c). If Congress wanted the FCC to have sole jurisdiction, it would have included subsection (c) within the language of (d).<sup>243</sup> Such a reading is supported by Senator Gorton’s statements in which he notes that subsection (c) is being deliberately omitted from subsection (d).<sup>244</sup> Moreover, the FTA is always explicit when it wants to prohibit an implied cause of action.<sup>245</sup> Therefore, when Congress thought that an implied cause of action was inconsistent with the FTA, such suits were prohibited. Yet Congress does not explicitly prohibit an implied cause of action in section 253.<sup>246</sup> Thus, the legislative history and the text and structure of section 253 demonstrate that an implied cause of action would not hamper the underlying purpose of the FTA.

The fourth *Cort* factor is satisfied because the cause of action is not “one traditionally relegated to state law.”<sup>247</sup> The FTA was passed pursuant to Congress’s power to regulate interstate commerce.<sup>248</sup> Interstate commerce is not an area traditionally regulated by the states.<sup>249</sup> Rather, the whole point of the

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<sup>240</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, Preamble, 110 Stat. 56, 56.

<sup>241</sup> *See id.*

<sup>242</sup> *See* TCG Detroit v. City of Dearborn, 206 F.3d 618, 624 (6th Cir. 2000).

<sup>243</sup> *See id.* at 624.

<sup>244</sup> *See* 141 CONG. REC. S8213 (daily ed. June 13, 1995) (statement of Sen. Gorton).

<sup>245</sup> *See* TCG Detroit, 206 F.3d at 624.

<sup>246</sup> *See* 47 U.S.C. § 253(c) (2006).

<sup>247</sup> *Cort v. Ash*, 422 U.S. 66, 78 (1975).

<sup>248</sup> *See supra* note 205 and accompanying text.

<sup>249</sup> *See generally, e.g.*, *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 197–200 (1824).

Commerce Clause was to prevent the states from interfering with goods shipped in interstate commerce.<sup>250</sup> Thus, section 253 explicitly prohibits states from disrupting the “ability of any entity to provide . . . telecommunications service”<sup>251</sup> unless such state activity falls within one of the safe harbors.<sup>252</sup> Therefore, the activities governed by section 253 are clearly not those activities normally left to the state, and, thus, the fourth *Cort* factor is undoubtedly satisfied.

Accordingly, the *Cort* factors allow for a private action under section 253(c) of the FTA. The text and structure of section 253, along with the FTA as a whole and section 253’s legislative history all lend credence to this claim. They indicate that section 253 is not generally regulated by the states and that an implied cause of action is consistent with the underlying purpose of the FTA. More importantly, however, they indicate that Congress intended to create an implied cause of action for the telecommunications carriers.

Since an implied cause of action claim would succeed under section 253(c) of the FTA, it stands to reason that a section 1983 claim would also succeed. This result follows because the *Cort* factors are considered to be more stringent than the factors governing section 1983 claims.<sup>253</sup> Therefore, any court that allows an implied cause of action will also allow for a section 1983 claim.

#### *D. Policy Reasons Support a Private Right of Action*

Although subsections (a) and (b) of section 253 of the FTA are enforced by the FCC, this agency does not have enforcement

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<sup>250</sup> See *Island Silver & Spice, Inc. v. Islamorada, Village of Islands*, 475 F. Supp. 2d 1281, 1289 (S.D. Fla. 2007) (“[I]n order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among . . . the States under the Articles of Confederation.” (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979))). Moreover, under the dormant commerce clause, the Court has held that states cannot regulate interstate commerce, even if Congress has yet to legislate in that area. See *Yamaha Motor Corp., U.S.A. v. Jim’s Motorcycle, Inc.*, 401 F.3d 560, 567 (4th Cir. 2005).

<sup>251</sup> 47 U.S.C. § 253(a).

<sup>252</sup> See *BellSouth Telecomms., Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1187 (11th Cir. 2001).

<sup>253</sup> *Furtick v. Medford Hous. Auth.*, 963 F. Supp. 64, 71 n.18 (D. Mass. 1997).

power over subsection (c).<sup>254</sup> If the FCC does not enforce the limits of the safe harbor for state and local governments to manage a public right-of-way, and there is no private right of action, then a state or local government can abuse this safe harbor provision. For example, even though subsection (a) prohibits a state or local government from interfering with telecommunication services, a state or local government could manage a public right-of-way in discriminatory way. Although this is prohibited under subsection (c),<sup>255</sup> the FCC would not have enforcement power over that subsection.<sup>256</sup> Moreover, even though such action would violate subsection (a) because it interfered with telecommunications services,<sup>257</sup> a state or local government could escape liability by claiming they were acting within the confines of subsection (c). Since the FCC does not have enforcement authority under subsection (c), the FCC would be powerless to prohibit this activity.<sup>258</sup> Allowing a state or local government to circumvent the law in this way would hamper Congress's goal of "end[ing] the monopolies in local telephone services and . . . benefit[ing] consumers by fostering competition between telephone companies in cities throughout the United States."<sup>259</sup> Therefore, a private right of action is needed under subsection (c) to insure that the overriding purpose of the FTA is implemented. After all, "[l]aws have little meaning unless they can be enforced."<sup>260</sup>

Another reason to allow private rights of action under section 253 is to protect the reasonable expectations of the

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<sup>254</sup> See 47 U.S.C. § 253(d).

<sup>255</sup> See *id.* § 253(c).

<sup>256</sup> See *BellSouth Telecomms.*, 252 F.3d at 1189–91 (holding that "enforcement of (c) is left to private parties").

<sup>257</sup> See 47 U.S.C. § 253(a).

<sup>258</sup> See *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 624 (6th Cir. 2000).

<sup>259</sup> *AT&T Commc'ns of the Sw., Inc. v. City of Dallas*, 8 F. Supp. 2d 582, 585 (N.D. Tex. 1998).

<sup>260</sup> Chemerinsky, *supra* note 19, at 71; see also Response & Reply Brief of Plaintiff-Appellant at 31, *Sprint Telephony PCS, L.P. v. Cnty. of San Diego*, 543 F.3d 571 (9th Cir. 2006) (Nos. 05-56076 (L), 05-56435) (stating that without a private right of action the local government had, for four years, "steadfastly refuse[d] to abide by [s]ection 253's proscriptions").

parties.<sup>261</sup> Undoubtedly, telecommunications companies make huge investments when they install equipment to provide telecommunications services.<sup>262</sup> Although telecommunications providers expect to pay reasonable compensation for the use of public right-of-ways, they do not expect state or local governments to charge discriminatory or unreasonable fees in violation of federal law.<sup>263</sup> Moreover, if they did charge discriminatory fees, a telecommunications provider would expect a legal remedy.<sup>264</sup> Furthermore, it is unreasonable for state or local governments to expect that they could openly flaunt federal law.<sup>265</sup> Therefore, since the FCC does not have enforcement power over subsection (c), a private right of action protects the reasonable expectations of the telecommunications providers and state and local governments by enforcing the limits of the safe harbor in subsection (c).

Finally, a private right of action for telecommunications companies under section 253 does not present “a special risk of vexatious litigation”<sup>266</sup> that would “swell[] our already overburdened federal court system beyond capacity.”<sup>267</sup> The primary purpose of a corporation is to maximize profits.<sup>268</sup> Litigation, however, is costly and inefficient.<sup>269</sup> Therefore, corporations often settle lawsuits even if they will prevail at

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<sup>261</sup> See Stabile, *supra* note 12, at 908 (stating that one policy reason for not enforcing an implied cause of action is where it will disrupt the reasonable expectations of the parties).

<sup>262</sup> See Brief of Plaintiff-Appellant at 34, *Cablevision of Boston v. Pub. Improvement Comm'n*, 184 F.3d 88 (1st Cir. 1999) (No. 99-1222) (stating that the telecommunications provider had invested millions in infrastructure in order to provide services).

<sup>263</sup> See, e.g., 47 U.S.C. § 253(c) (2006).

<sup>264</sup> See generally, e.g., *TCG Detroit v. City of Dearborn*, 206 F.3d 618 (6th Cir. 2000).

<sup>265</sup> And “if the law supposes that . . . the law is a ass—a idiot.” CHARLES DICKENS, *OLIVER TWIST* 394 (Everyman Library ed., 1940).

<sup>266</sup> See *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 86 (2006).

<sup>267</sup> See *Yale Auto Parts, Inc. v. Johnson*, 758 F.2d 54, 58 (2d Cir. 1985).

<sup>268</sup> See MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 133 (1962).

<sup>269</sup> See Alexandra Anne Hui, Note, *Equitable Estoppel and the Compulsion of Arbitration*, 60 VAND. L. REV. 711, 717 (2007).

trial.<sup>270</sup> Thus, it is extremely unlikely that corporations will commence a private right of action under section 253 merely to annoy state or local governments. Instead, a corporation is likely to screen out the less-than-meritorious claims and only bring suit when there is substantial evidence that section 253 was violated. Therefore, most private rights of action brought under section 253 by a telecommunications provider will be worthy of a court's time and consideration.

#### IV. CONCLUSION

Telecommunications providers must have access to the courts under section 253 because only then will Congress's goal be achieved—deregulation which leads to lower costs and higher quality to consumers. To apply the *Gonzaga* decision to this area of the law would effectively eliminate Congress's purpose in passing section 253 of the FTA. Thus, courts should allow for a private right of action under section 253 for three reasons. First, the *Gonzaga* decision should be limited only to Spending Clause legislation. Such a result is justified by the availability of other remedies and the unique relationship between all parties to Spending Clause legislation. Second, if the *Gonzaga* decision is not applied, the *Cort* factors should be applied, and the *Cort* factors mandate an implied cause of action under section 253(c) of the FTA. Since the *Cort* factors mandate an implied cause of action, the less stringent section 1983 claim must also be allowed. Third, several important policy reasons dictate that there should be a private right of action under section 253(c) of the FTA. Therefore, the pre-*Gonzaga* courts correctly applied the law by allowing a private right of action.

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<sup>270</sup> Cf. CHARLES R.T. O'KELLEY & ROBERT B. THOMPSON, CORPORATIONS AND OTHER BUSINESS ASSOCIATIONS 367–68 (5th ed. 2006) (stating that directors will only bring litigation when it is in the corporations best interest).