SOUTHWESTERN BELL TELEPHONE, L.P. V. CITY OF HOUSTON: HAS THE FIFTH CIRCUIT BARRED THE USE OF A § 1983 CLAIM TO ENFORCE SECTION 253 OF THE TELECOMMUNICATIONS ACT OF 1996?

ABSTRACT

This comment examines the recent line of federal circuit court of appeals cases that unanimously bar telecommunications companies from enforcing section 253 of the Telecommunications Act of 1996 (the Act) through suits brought under 42 U.S.C. § 1983. It begins by analyzing the cases preceding these holdings that seemed to clear the way for § 1983 suits in this context. It continues by explaining how a controversial United States Supreme Court decision, Gonzaga University v. Doe, *steered courts away from finding a private right of action for telecommunications service providers in the Act. The comment goes on to describe how the Fifth Circuit's decision in* Southwestern Bell Telephone, L.P. v. City of Houston *has failed to systematically preclude § 1983 claims in this context and how an undecided circuit could be convinced to allow them. Finally, it concludes by arguing that public policy should prevent telecommunications providers from bringing § 1983 claims against state governments and recommends that Congress amend the Act accordingly.*

I. INTRODUCTION

Congress passed the Telecommunications Act of 1996[1] (the Act) to deregulate the telecommunications industry and to foster competition among the numerous telecommunications service providers.[2] When the Act took effect, telecommunications providers and federal courts struggled to interpret its meaning.[3] One point of contention that quickly emerged between the states and the telecommunications providers was whether section 253 of the Act created a private right of action for the telecommunications providers

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[1]Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

[2]The preamble to the Act states the intent of the legislation: "To promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." *Id.*

[3]*See* Richard E. Wiley, *"A New Telecom Act"—Remarks*, 31 S. ILL. U. L.J. 17, 20-21 (2006) (explaining that the sheer size and complexity of the Act spawned a great deal of litigation over its meaning).

against state and local governments in federal court.[4] Before the Sixth and Eleventh Circuits, the telecommunications providers argued that section 253 gave them a legal remedy to discriminatory right-of-way practices by state and local governments.[5] The Sixth and Eleventh Circuits agreed with the telecommunications providers and found a private right of action within section 253.[6]

These circuits were very close, arguably, to finding that section 253 also gave the telecommunications providers a substantive personal right that was enforceable against the states by suits brought under 42 U.S.C. § 1983.[7] The Supreme Court's holding in *Gonzaga University v. Doe*,[8] however, casts a negative light on § 1983 claims brought under federal statutes.[9] The Second, Ninth, and Tenth Circuits have followed the lead of *Gonzaga* and found that there are no federal rights granted to telecommunications providers under section 253.[10] Each circuit, however, offered a slightly different interpretation of *Gonzaga* as it applied the holding in this context.

When the Fifth Circuit decided *Southwestern Bell Telephone, L.P. v. City of Houston*,[11] it was the fourth consecutive circuit to hold that § 1983 claims were impermissible under section 253 of the Act.[12] The Fifth Circuit's reading of *Gonzaga*, however, has opened the door to a different interpretation of the holdings of the Sixth and Eleventh Circuits, which may lend credence to permitting § 1983 claims in those circuits.[13]

This comment disagrees with the Fifth Circuit's implication that § 1983 claims have been completely precluded under section 253 of the Act by *Gonzaga*. Several viable arguments exist that could convince an

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[4]*See, e.g.*, BellSouth Telecomm., Inc. v. Town of Palm Beach, 252 F.3d 1169 (11th Cir. 2001); TCG Detroit v. City of Dearborn, 206 F.3d 618, 623 (6th Cir. 2000).

[5]*BellSouth*, 252 F.3d at 1191-92; *TCG Detroit*, 206 F.3d at 623.

[6]*BellSouth*, 252 F.3d at 1192; *TCG Detroit*, 206 F.3d at 624.

[7]*See* 42 U.S.C. § 1983 (2005). Section 1983 states, in pertinent part:

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

Id.

[8]536 U.S. 273 (2002).

[9]*Id.* at 282.

[10]NextG Networks of NY, Inc. v. City of N.Y., 513 F.3d 49, 53 (2d Cir. 2008); Sprint Telephony PCS, L.P. v. County of San Diego, 490 F.3d 700, 717 (9th Cir. 2007); Qwest Corp. v. City of Santa Fe, N.M., 380 F.3d 1258, 1265 (10th Cir. 2004).

[11]529 F.3d 257 (5th Cir. 2008).

[12]*Id.* at 260-62.

[13]*See id.*

undecided circuit to permit § 1983 claims in this context. As a matter of public policy, however, § 1983 claims are not an efficient way to further the intent of the Act. Therefore, Congressional intervention may be necessary to save the telecommunications industry from inconsistencies with respect to § 1983 jurisprudence.

II. 1996 TO 2002: CONGRESS PASSES THE ACT AND THE FEDERAL CIRCUIT COURTS OF APPEALS BEGIN TO INTERPRET THE MEANING OF SECTION 253

A. *History of the Telecommunications Act of 1996*

American Telephone and Telegraph (AT&T), the company known for decades as "Ma Bell," was virtually the only provider of domestic phone service in the United States throughout most of the twentieth century.[14] The federal government spent decades unsuccessfully attempting to end AT&T's monopoly, but failed to make any real progress until the parties agreed to end the litigation by requesting a consent decree from a federal court in 1982.[15] Judge Harold Greene's decision in *United States v. AT&T*[16] successfully stimulated competition in the long distance telephone market, but simply handed AT&T's existing monopoly of the local markets to a series of smaller companies called "incumbent local exchange carriers" or "baby bells."[17]

Congress quickly became frustrated with the new state of the telecommunications industry and expressed a desire to further deregulate the baby bells.[18] As a result, Congress passed the Act with the purpose "to

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[14]*See generally* George J. Alexander, *Antitrust and the Telephone Industry After the Telecommunications Act of 1996*, 12 SANTA CLARA COMPUTER & HIGH TECH. L.J. 227, 231-32 (1996) (describing AT&T's dominance during the twentieth century); Ettie Ward, *The After-Shocks of* Twombly*: Will We "Notice" Pleading Changes?*, 82 ST. JOHN'S L. REV. 893, 902 (2008) (arguing that AT&T had a "natural monopoly") (citing Peter Passell, *Economic Scene; Turning the Baby Bells Loose on the Long-Distance Market*, N.Y. TIMES, June 8, 1995, at D2).

[15]*See* United States v. AT&T, 552 F. Supp. 131, 135-43, 226 (D.D.C. 1982) (summarizing a lengthy history of lawsuits and negotiations between AT&T and the federal government beginning in 1949 and ending when the court accepted a consent decree to bring closure to the dispute in 1982).

[16]552 F. Supp. 131 (D.D.C. 1982).

[17]*Id.* at 226-27 (accepting the agreement between AT&T and the federal government to divide AT&T into smaller companies); *see also* Ward, *supra* note 14, at 902 (explaining the effects of the *AT&T* decision).

[18]*See* Alexander, *supra* note 14, at 232-33 (assessing the mood of Congress toward telecommunications regulation after the *AT&T* decision); Wiley, *supra* note 3, at 18-19 (describing the regulatory environment of the telecommunications industry leading up to the Act). Congress was

promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."[19] In furtherance of this purpose, the Act broadly redefined the relationships between telecommunications providers and set forth rules to encourage competition between telecommunications providers throughout the industry.[20]

B. *Section 253 of the Act Creates a Dual System of Regulation*

Section 253 of the Act, entitled "Removal of barriers to entry," set forth the new roles of state and local governments in the telecommunications industry.[21] This section began by broadly prohibiting state and local governments from passing rules or statutes that prohibited telecommunications entities from entering the market.[22] After subsection 253(a) boldly announces this sweeping restriction of state power, subsections 253(b) and (c) soften the constraint by reserving certain powers to state and local governments.[23]

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also wary of the power concentrated in the hands of Judge Greene since he was neither elected nor accountable to the general public. *See id.* at 19. Despite their reservations, some members of Congress still felt that Judge Greene was doing a good job. *Id.*

[19]BellSouth Telecomm., Inc. v. Town of Palm Beach, 252 F.3d 1169, 1175 (11th Cir. 2001) (quoting the preamble of the Telecommunications Act of 1996 to glean Congress's purpose for passing the Act).

[20]*See* Wiley, *supra* note 3, at 19-21 (summarizing certain aspects of the Act and the complexity of its provisions).

[21]47 U.S.C. § 253 (2000).

[22]"No State or local statute or regulation, or other State or local requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." *Id.* § 253(a).

[23]Subsections 253(b) and (c) state:

> (b) State regulatory authority
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> 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
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> 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, if the compensation required is publicly disclosed by such government.

Id. § 253(b)-(c).

Taken together, subsections 253(a)-(c) create two separate spheres of government influence over telecommunications providers. The federal government controls and monitors issues relating to competition between the telecommunications providers, and the state and local governments retain their traditional powers to protect the health and welfare of their citizens as those duties intersect with the interests of the telecommunications industry.[24] The state and local governments also retain their right to manage the local rights-of-way provided that their rules and statutes remain competitively neutral to telecommunications providers.[25] This division of power seems relatively straightforward and easy to understand. Congress, however, was less than clear in defining the remedies for breaches of these provisions. Subsection 253(d) interrupts the relative continuity of subsections 253(a)-(c) by expressly granting the Federal Communications Commission (FCC) the power to enforce subsections 253(a) and (b), but remains silent as to the enforcement of subsection 253(c).[26]

This peculiar statutory construction opened the door to many questions. Who did Congress intend to enforce subsection 253(c)?[27] Did Congress articulate a clear intent to create a private right of action for claims arising out of section 253?[28] Did Congress intend section 253 to create individual rights for telecommunications providers?

C. *The Sixth and Eleventh Circuits Find a Private Right of Action in Section 253*

The first two federal appellate courts to interpret the enforcement scheme of section 253 were the Sixth Circuit in *TCG Detroit v. City of Dearborn*[29] and the Eleventh Circuit in *BellSouth Telecommunications, Inc.*

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[24] *Id.* § 253(a)-(b).

[25] 47 U.S.C. § 253(c) (2000).

[26] Subsection 253(d), entitled "Preemption," states:

> 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.

Id. § 253(d).

[27] *See, e.g.*, TCG Detroit v. City of Dearborn, 206 F.3d 618, 623 (6th Cir. 2000) (identifying questions that illustrate ambiguities in the plain meaning of section 253). The court did not expressly address the question of whether private *substantive* rights exist within section 253. *Id.*

[28] *Id.*

[29] 206 F.3d 618 (6th Cir. 2000).

v. Town of Palm Beach.[30] Both circuits recognized that section 253 did not expressly create a private right of action for telecommunications providers against state and local governments in federal court.[31] Yet, the courts turned to the balancing test set forth by the Supreme Court in *Cort v. Ash*[32] to determine whether section 253 created an *implied* private right of action for telecommunications providers.[33] Consequently, the central issue in these cases became the courts' answer to the question set forth by the second factor of the *Cort* test: whether the legislature *intended* to create an implied right of action in section 253.[34]

The Eleventh Circuit began its analysis by asking whether Congress intended subsections 253(b) and (c) to be exceptions from the substantive provisions of subsection 253(a).[35] If so, the court reasoned, a private right of action could not exist within subsection 253(c) because the section would merely provide an affirmative defense to the actions taken by the FCC under subsection 253(a).[36] The court pointed out, *inter alia*, that subsections 253(b) and (c) both use comparable language and look like safe harbors from subsection 253(a).[37] Yet, if subsection 253(b) was merely an affirmative

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[30]252 F.3d 1169 (11th Cir. 2001).

[31]*Id.* at 1186 (discussing the statutory construction of section 253); *TCG Detroit*, 206 F.3d at 623 (noting that "there is no express authority in . . . section [253] for a private right of action").

[32]422 U.S. 66 (1975).

[33]*Id.* at 78. The Court articulated the balancing test in the following manner:

> In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted,"—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is 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?

Id. (citations omitted).

[34]*BellSouth*, 252 F.3d at 1189 (identifying the second factor of the *Cort* test as "the focal point of the inquiry"); *TCG Detroit*, 206 F.3d at 623 ("The question is then whether such a right is implied.").

[35]*BellSouth*, 252 F.3d at 1187. Subsection 253(a) explicitly forbids state and local governments from passing laws or regulations that prohibit telecommunications providers from entering a market. 47 U.S.C. § 253(a) (2000). Both subsections 253(b) and (c), however, reserve the rights of state and local governments to perform certain functions that would be prohibited by the language of subsection 253(a). *Id.* § 253(a)-(c). This raises the question as to whether Congress meant for subsections 253(b) and (c) to confer any substantive rights upon telecommunications providers or whether Congress merely intended that these subsections be exceptions to subsection 253(a).

[36]*BellSouth*, 252 F.3d at 1187.

[37]*Id.*

defense to the provisions of subsection 253(a), then subsection 253(d) could not give the FCC the power to enforce it.[38] Therefore, the court concluded that the plain language of the statute was illogical and turned to the legislative history of the Act to glean Congress's intent.[39]

In searching to resolve this paradox, both circuits found the remarks made by Senator Gorton during the Senate debate concerning section 253 to be determinative.[40] Both circuits concluded that Congress intended subsection 253(c) to allow telecommunications providers to bring suit against state and local governments in federal court over issues relating to the management of public rights-of-way.[41] To further prove that subsection 253(c) contained an independent substantive right of action, the Sixth Circuit noted that discriminatory action by states could violate subsection 253(c) without violating subsection 253(a).[42] As a result, both circuits held that Congress intended to create an implied right of action for telecommunications providers under subsection 253(c) of the Act.[43]

D. *The Federal Circuits Seemed Poised to Allow Telecommunications Providers to Sue Under 42 U.S.C. § 1983*

Beginning in 1980, the Supreme Court expanded the ability of private actors to use § 1983 to sue for damages in federal court.[44] The Court's

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[38] *Id.* at 1189. Subsection 253(d) expressly grants the FCC the power to enforce subsections 253(a) and (b) by preempting state and local laws. 47 U.S.C. § 253(d) (2000). If subsection 253(b) is a safe harbor from subsection 253(a), the FCC would not be able to enforce subsection 253(b) because that subsection would contain no substantive rights. The court determined that since the FCC is empowered to enforce subsection 253(b), subsection 253(b) must contain substantive rights. *BellSouth*, 252 F.3d at 1187. Therefore, since subsection 253(c) is very similar to subsection 253(b), subsection 253(c) must contain substantive rights as well. *Id.*

[39] *BellSouth*, 252 F.3d at 1189.

[40] *Id.* at 1191 ("With the benefit of Senator Gorton's remarks, it is clear that subsection (d), despite its less-than-clear language, serves a single purpose—it establishes different forums based on the subject matter of the challenged statute or ordinance."); TCG Detroit v. City of Dearborn, 206 F.3d 618, 623 (6th Cir. 2000) (noting that during the senate debates Senator Gorton stated "that any challenge to [state or local laws brought by telecommunications providers under subsection 253(c)] take place in the Federal district court in that locality and that the Federal Communications Commission not be able to preempt such actions") (emphasis omitted).

[41] *BellSouth*, 252 F.3d at 1191; *TCG Detroit*, 206 F.3d at 618, 624.

[42] *TCG Detroit*, 206 F.3d at 624. The court observed that if subsection 253(c) could be violated without implicating subsection 253(a), then subsection 253(c) must contain a substantive right. *Id.*

[43] *See supra* note 6.

[44] Maine v. Thiboutot, 448 U.S. 1, 4 (1980). Prior to *Thiboutot*, the Court interpreted § 1983 to create a remedy in federal court for private actors who were deprived of constitutional rights under the color of state law. *Id.* at 12-15 (Powell, J., dissenting). After *Thiboutot*, however, private actors could bring suits against individuals acting under the color of state law for *any* violation of a

decision in *Maine v. Thiboutot* triggered a flood of litigation during the 1980s and offered private actors an expansive ability to sue persons acting under the color of state law in federal court.[45] The Court, however, quickly retreated from this position by mandating that private actors could only seek redress under § 1983 for violations of a federal *right*, and not merely the violation of federal *law*.[46]

Shortly after the Act became law, the Supreme Court ended its expansive period of § 1983 jurisprudence through its holding in *Blessing v. Freestone*[47] by adopting a three-part balancing test to determine if a federal statute created a private right.[48] The Court further required that the statutory section, *as a whole*, must give rise to personal rights and obligated federal courts to methodically analyze the individual components of private claims to see if they violated personal rights, as opposed to system-wide requirements.[49]

After *TCG Detroit* and *BellSouth*, one could make a strong argument that the Sixth and Eleventh Circuits were on the verge of allowing telecommunications providers to bring § 1983 claims to enforce section 253. An analysis of section 253 under the *Blessing* test seems to produce a favorable result for finding a private right. The remarks by Senator Gorton could be construed to indicate that Congress wanted to benefit telecommunications providers by allowing them to bring suit in federal court; the right to be free from discriminatory state practices seemed neither

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federal statute. *Id.* at 4.

[45]*Id.* at 19-20, 22 (Powell, J., dissenting); *see* Sasha Samberg-Champion, *How to Read* Gonzaga*: Laying the Seeds of a Coherent Section 1983 Jurisprudence*, 103 COLUM. L. REV. 1838, 1848-49 (2003).

[46]*See, e.g.*, Blessing v. Freestone, 520 U.S. 329, 340 (1997); Golden State Transit Corp. v. City of L.A., 493 U.S. 103, 106 (1989).

[47]520 U.S. 329 (1997).

[48]*Id.* at 340-41. The Supreme Court articulated the three factors as follows:

> First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so "vague and amorphous" that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms.

Id. (citations omitted). The Court synthesized this rule from a series of cases that had previously set limits on the abilities of private actors to bring a lawsuit under § 1983. *See* Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 509 (1990) (holding that a right cannot be so "vague and amorphous" that it is "beyond the competence of the judiciary to enforce"); *Golden State Transit Corp.*, 493 U.S. at 106-07 (holding that an enforceable right cannot be found in a federal statute unless the right is consistent with Congress's "carefully tailored scheme"); Wright v. City of Roanoke Redevelopment & Hous. Auth., 479 U.S. 418, 430 (1987) (holding that Congress must have intended the statute to benefit the plaintiff); Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981) (holding that the statute must impose a mandatory obligation on the state to create a federal right).

[49]*Blessing*, 520 U.S. at 342-46.

vague nor amorphous, and there were no terms in section 253 that indicated the requirements were permissive rather than mandatory.[50] Despite the favorable rulings in those circuits, however, the Sixth Circuit observed that the Supreme Court had become increasingly reluctant to find implied private rights of action in federal statutes.[51] This observation proved to be an ominous foreshadowing for the future primacy of these holdings.

III. THE SUPREME COURT OFFERS A DIFFERENT ANALYSIS OF § 1983 CLAIMS AND INFLUENCES THREE FEDERAL CIRCUIT COURTS IN THEIR INTERPRETATIONS OF THE TELECOMMUNICATIONS ACT

A. Gonzaga University v. Doe *Narrows the Ability of Aggrieved Parties to File § 1983 Claims in Federal Court*

In 2002, the Supreme Court once again considered the applicability of the *Blessing* test to determine when a federal statute creates a right that is enforceable under § 1983. In *Gonzaga*, the Court felt that lower courts were misinterpreting its holding in *Blessing*.[52] In order to clear up the confusion, the majority rejected the notion that a statute could be enforced by a private actor under § 1983 merely because the plaintiff existed within the zone of interest of a federal statute.[53] The Court refused to allow "anything short of an unambiguously conferred right to support a cause of action brought under § 1983."[54]

The Court continued this theme by distinguishing the narrower term "rights" from the broader terms "benefits" or "interests."[55] The *Gonzaga* Court emphasized this difference because it believed that only the latter are exclusively enforceable by the group or entity who is responsible for administering the statute.[56] Finally, the Court applied the standards for discerning whether personal rights existed in an implied right of action

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[50]For the *Blessing* factors, see *supra* note 48.

[51]TCG Detroit v. City of Dearborn, 206 F.3d 618, 623-24 (6th Cir. 2000). In applying the *Cort* test, the Sixth Circuit acknowledged that the Supreme Court had "become more restrained in its willingness to find an implied private right of action" through decisions such as *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979). *TCG Detroit*, 206 F.3d at 623-24. But the Sixth Circuit was satisfied that the *Cort* test was still good law at the time of its decision. *Id.* (citing Thompson v. Thompson, 484 U.S. 174, 188 (1988) (Scalia, J., concurring)).

[52]Gonzaga Univ. v. Doe, 536 U.S. 273, 282-83 (2002).

[53]*Id.* at 283.

[54]*Id.*

[55]*Id.*

[56]*Gonzaga*, 536 U.S. at 283.

context to the test for finding personal rights in a federal statute under § 1983.[57]

The tone of *Gonzaga* clearly indicated the Court's disdain for the use of § 1983 as a mechanism to enforce federal statutes.[58] The Court's judgment, however, failed to effectuate a substantial change in the law. While *Gonzaga* arguably imposed more conditions on the *Blessing* test, it conspicuously failed to overrule *Blessing* or change the analytical paradigm.[59] Furthermore, the Court fused the implied right of action doctrine with the personal rights doctrine without reconciling the *Blessing* test with the *Cort* test.[60] The *Gonzaga* Court went on to explicitly apply the new rule to statutes enacted under the Spending Clause of the Constitution, but the Court failed to provide direction on how the rule works for statutes that are empowered by other provisions of the Constitution.[61] For these reasons, *Gonzaga* quickly became a controversial decision and provided little guidance to the circuits.[62]

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[57] *Id.* at 285.

[58] *See* Samberg-Champion, *supra* note 45, at 1855-58 (describing the holding of the Court as a "mood" rather than an explicit change in the law).

[59] *Gonzaga*, 536 U.S. at 282-83. The *Gonzaga* Court said that the purpose of the holding was to clarify its prior opinions; accordingly, it declined the opportunity to alter the *Blessing* factors. *Id.*

[60] *Id.* at 285. Prior to *Gonzaga*, the balancing test set forth in *Cort* was used to determine if a private right of action exists within a federal statute. *See* Cort v. Ash, 422 U.S. 66, 78 (1975). Alternatively, courts use the balancing test set forth in *Blessing v. Freestone* to determine if a personal right exists within a federal statute that could sustain a § 1983 claim. Blessing v. Freestone, 520 U.S. 329, 340-41 (1997). The *Gonzaga* Court clearly announced its intention to use the same test for finding both implied rights of action and personal rights within a statute. *Gonzaga*, 536 U.S. at 285. But the Court failed to state explicitly whether or not the *Blessing* test replaced the *Cort* test in implied rights of action cases. Furthermore, since the *Gonzaga* holding requires the same test for both situations, a court using the *Cort* test to find that a private right of action exists within a statute must also find that a private right actionable under § 1983 exists as well without applying the *Blessing* test. In this way, *Gonzaga* has arguably fused the *Blessing* and *Cort* tests into a single requirement.

[61] *Gonzaga*, 536 U.S. at 287 (holding that Family Education Rights and Privacy Act (FERPA), a Spending Clause statute, grants no private rights enforceable under § 1983). The Court explicitly described the intent of its holding in terms of the Spending Clause throughout the opinion. *See id.* at 279 ("But we have never before held, and decline to do so here, that *spending legislation* drafted in terms resembling those of FERPA can confer enforceable rights.") (emphasis added); *id.* at 280 ("'In legislation enacted pursuant to the 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.'") (quoting Pennhurst State Sch. & Hosp. v. Haldermann, 451 U.S. 1, 28 (1981)); *id.* ("Since *Pennhurst*, only twice have we found spending legislation to give rise to enforceable rights."); *id.* at 281 ("Our more recent decisions, however, have rejected attempts to infer enforceable rights from Spending Clause statutes.").

[62] *See* Samberg-Champion, *supra* note 45, at 1855-57 (describing the ambiguities of the

B. *After* Gonzaga, *the Second, Ninth, and Tenth Circuits Addressed Whether Section 253 of the Act Created a Private Right for Telecommunications Providers Enforceable under § 1983*

The Tenth Circuit was the first federal circuit court to squarely address the issue of whether section 253 created a private right that was enforceable under § 1983. In *Qwest Corp. v. City of Santa Fe, New Mexico*,[63] the Tenth Circuit began its analysis by citing to *Gonzaga*.[64] The court, however, quickly noted that *Gonzaga* articulated the Supreme Court's reluctance to find a private right in a statute enacted under the *Spending Clause* of the Constitution.[65] Since both parties to the *Qwest* litigation conceded that *Gonzaga* was the correct test, the court applied *Gonzaga* to the facts of the case but specifically declined to decide whether *Gonzaga* was correctly applied to questions concerning the Act.[66]

Using *Gonzaga* conditionally, the *Qwest* court found that Congress did not manifest a clear intent to grant a private right to telecommunications providers under section 253.[67] The court pointed out that the language of the Act focused on restricting *local authority* and did not address the telecommunications providers as individuals.[68] Furthermore, the court reasoned that the Sixth and Eleventh Circuits incorrectly analyzed the legislative history of the Act.[69] The *Qwest* court believed that Congress intended subsection 253(c) to be a mechanism to decide the forum for preemption challenges to state and local laws, not to create a personal right for telecommunications providers.[70] Therefore, since the court found no clear and unambiguous Congressional intent, it affirmed the district court's ruling that no private right existed under section 253.[71]

Gonzaga holding).

[63] 380 F.3d 1258 (10th Cir. 2004).

[64] *Id.* at 1265.

[65] *Id.* at 1265 n.2.

[66] *Id.*

[67] *Qwest*, 380 F.3d at 1266.

[68] *Id.* at 1265. The court looked to the *Gonzaga* holding for an example of language that conferred a right. *Id.* The court wanted to see language similar to title IX of the Education Amendment of 1972. *Id.* ("No person in the United States . . . ." (quoting 20 U.S.C. § 1681(a) (2005))); *see also* Ball v. Rodgers, 492 F.3d 1094, 1106 (9th Cir. 2007) (finding that the court was not looking for precise phrases, but "[n]o person shall" phrases provided strong evidence of Congressional intent).

[69] *Qwest*, 380 F.3d at 1265-66.

[70] *Id.* at 1266. The Tenth Circuit rejected the argument that denying the FCC enforcement of subsection 253(c) created a private right of action. *Id.* at 1265-66. Rather, the court held that the intent of the subsection was to create a remedy through preemption claims, not personal claims for damages against the states. *Id.* at 1266.

[71] *Id.* at 1266.

The dissent in *Qwest* used a different analytical approach. Judge Hartz harkened back to the test from *Cannon v. University of Chicago*[72] to find that the language of subsection 253(a) had an "'unmistakable focus on the benefited class.'"[73] The dissent distinguished this case from *Gonzaga* by observing that the plaintiff in *Qwest* was not a "merely incidental beneficiar[y]; [Qwest] receive[d] unconditional protection against injurious state or local governmental action."[74] Accordingly, the *Qwest* court found no private right in section 253, but the court did open the door to future arguments about the applicability of the *Gonzaga* test to this issue.

Three years later, the Ninth Circuit addressed the same question in *Sprint Telephony PCS, L.P. v. County of San Diego*.[75] The *Sprint* court explicitly announced that it would follow the Tenth Circuit's position.[76] Interestingly, the court announced that the *Cort* test remained the proper test for private right of action claims.[77] Therefore, even though the Ninth Circuit followed *Gonzaga*'s interpretation of *Blessing*, the court declined to merge the analyses of private right of action claims and § 1983 claims as set forth in *Gonzaga*.[78] The court concluded by holding that the beneficiaries of the Act are the consumers, not the telecommunications providers.[79]

A few months later, the Second Circuit came to the same conclusion in *NextG Networks of NY, Inc. v. City of New York*.[80] Unlike the Ninth Circuit, the Second Circuit had to overrule the district court's holding that a private right existed in section 253.[81] While discussing the relevant legal precedents, the Second Circuit noted that the lower court felt *TCG Detroit* and *BellSouth* expressed a contrary view to the holdings of the Ninth and Tenth Circuits on this issue.[82] The court countered this assertion by noting that *TCG Detroit* and *BellSouth* were decided *before* the *Gonzaga* ruling.[83] Therefore, the Second Circuit believed that *Gonzaga* was determinative in

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[72]441 U.S. 677 (1979).

[73]*Qwest*, 380 F.3d at 1275 (quoting *Cannon*, 441 U.S. at 691).

[74]*Id.*

[75]490 F.3d 700 (9th Cir. 2007).

[76]*Id.* at 716. The court continued by applying the *Blessing* factors to section 253 and followed the lead of *Gonzaga* in analyzing the first factor. *Id.* at 717.

[77]*Id.* at 717.

[78]*Id.*

[79]*Sprint*, 490 F.3d at 717 (citing the preamble to the Act as proof of Congressional intent); *see* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

[80]513 F.3d 49, 53 (2d Cir. 2008).

[81]*Id.* at 53-54.

[82]*Id.* at 53.

[83]*Id.*

all three of the circuit holdings that failed to find a private right in section 253. This holding appeared to be a strong message to the other circuits that § 1983 claims were precluded in the section 253 context because of the *Gonzaga* holding.

IV. DID THE FIFTH CIRCUIT FINALLY MANAGE TO SHUT THE DOOR ON TELECOMMUNICATIONS COMPANIES WISHING TO ENFORCE SECTION 253 OF THE ACT THROUGH § 1983 CLAIMS?

A. *The Fifth Circuit Provides the Fourth Consecutive Circuit Court Decision Denying § 1983 Relief Under Section 253 of the Act*

The Fifth Circuit provided the most recent decision among the federal circuit courts considering the interplay between § 1983 and section 253 of the Act. In *Southwestern Bell Telephone, L.P. v. City of Houston*,[84] the court relied heavily on the *Gonzaga* holding and found that section 253 created no private right for the telecommunications providers.[85] The court, however, departed from the other circuits by holding that *Gonzaga* merged the tests for determining whether a statute created new individual rights or an implied right of action.[86] Therefore, under the Fifth Circuit's holding, the holdings of the Sixth and Eleventh Circuits should be read to find a private right in section 253 enforceable by § 1983 even though the cases never explicitly addressed that issue.[87] The court continued by observing that these two cases were decided before *Gonzaga* and joined the other three circuits in deciding that *Gonzaga* precluded the application of § 1983 in this line of cases.[88] To summarize this argument, the court noted that "'[t]he [Supreme] Court's approach to § 1983 enforcement of federal statutes has been increasingly restrictive . . . .'"[89]

The Fifth Circuit's scrutiny of this issue, however, concluded in a different manner than the preceding cases. The court followed the *Gonzaga* model to analyze the overall structure of section 253 and concluded that

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[84]529 F.3d 257 (5th Cir. 2008).

[85]*Id.* at 260-62.

[86]*Id.* at 260.

[87]*Southwestern Bell* held that *Gonzaga* mandated the use of the same standard for both an implied private right of action claim and a § 1983 claim. *Id.* Therefore, since the Sixth and Eleventh Circuits found a private right of action in section 253, the Fifth Circuit's holding could be used to argue that the Sixth and Eleventh Circuits also found an action under § 1983, even though those courts never explicitly decided the issue.

[88]*Southwestern Bell*, 529 F.3d at 261.

[89]*Id.* (quoting Johnson v. Hous. Auth. of Jefferson Parish, 442 F.3d 356, 360 (5th Cir. 2006) (alteration in original)).

since subsection 253(d) created a comprehensive enforcement scheme by empowering the FCC to enforce subsection 253(a), no private right existed within this section of the statute.[90] The only other post-*Gonzaga* opinion in this line of cases to mention a comprehensive enforcement scheme came from the Tenth Circuit.[91] Much unlike the Tenth Circuit, however, the Fifth Circuit did not analyze the intent of the whole statute, just the intent of subsection 253(d).[92] Therefore, the Fifth Circuit's conclusion seemingly excludes subsection 253(c) from the enforcement scheme since subsection 253(d) only applies to subsections 253(a) and (b).[93] Confusingly, the Fifth Circuit's reasoning seems similar to the reasoning of the Sixth and Eleventh Circuits, which found that a right *did* exist within section 253 because the enforcement scheme of the section did not include subsection 253(c).[94] Notwithstanding the rationale, the tone of the Fifth Circuit's holding was clear—the court intended to strictly follow *Gonzaga* and preclude a finding of a private right in section 253.

B. *Can the Theory of a § 1983 Claim in this Context Be Sustained after* Southwestern Bell*?*

Despite the Fifth Circuit's efforts to quash § 1983 claims relating to section 253 in the post-*Gonzaga* judicial environment, ambiguities continue to surround the logic and application of the rules. Therefore, even though the four most recent circuit court decisions addressing this issue have completely rejected the concept that a private right exists within section 253, the notion of a § 1983 claim in this context is far from dead. Several viable arguments exist that could convince an undecided circuit to recognize an individual right for the telecommunications providers within the statute.

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[90] *Id.* at 262.

[91] *See* Qwest Corp. v. City of Santa Fe, N.M., 380 F.3d 1258, 1276 (10th Cir. 2004).

[92] *Southwestern Bell*, 529 F.3d at 262. In finding no Congressional intent to create a right, the Tenth Circuit in *Qwest* erroneously stated that subsection 253(c) made no mention of telecommunications providers. *Id.* at 1267 n.6. In dicta, the court went on to state that finding enforceable rights is a matter of statutory construction, one factor being whether the statute contains a remedial scheme. *Id.* The court did not decide this issue because the case was decided on other grounds. *Id.* The court did note that the intent of the statute was *to benefit the public* and that finding a private right within section 253 for the telecommunications providers through § 1983 seemed inconsistent with this goal. *Id.*

[93] *See* 47 U.S.C. § 253(d) (2000).

[94] *See supra* notes 34-42 and accompanying text.

1. *Gonzaga* Can Be Read Narrowly or Broadly

First, each circuit that did not find the necessary Congressional intent to create a private right within section 253 based its decision on the *Gonzaga* test, but each circuit interpreted *Gonzaga* differently. Therefore, the determination of whether a private right exists within section 253 may depend on a judicial interpretation of whether all, part, or none of the *Gonzaga* holding applies in this context.

One possible *Gonzaga* interpretation is to limit the holding exclusively to Spending Clause legislation. The *Gonzaga* opinion speaks directly to statutes enacted under the Spending Clause and cites Spending Clause cases for support.[95] Under this interpretation of *Gonzaga*, the holding would not apply to section 253, which would undermine the judgments rendered by the four circuit courts that relied on that interpretation of *Gonzaga*. The Tenth Circuit recognized this possibility in *Qwest*, the case forming the foundation for the subsequent holdings of the Ninth, Second, and Fifth Circuits. Without *Gonzaga*, the holdings of the Sixth and Eleventh Circuits would carry much more weight.

Another way to read *Gonzaga* is to treat the holding as a ratification of the *Blessing* factors. *Gonzaga* appears to limit the first *Blessing* factor, but does not expressly overrule *Blessing*'s holding.[96] Therefore, a court could reasonably conclude that *Gonzaga* adds very little to the analysis and could find a private right within section 253 using the *Blessing* factors.

Yet another way to read *Gonzaga* would be to distinguish the enforcement scheme of the Family Educational Rights and Privacy Act (FERPA) from the enforcement scheme of section 253.[97] The *Gonzaga* Court could not find a way to reconcile a private right in FERPA with the regulatory scheme of that statute since the Secretary of Education had the power to enforce all aspects of FERPA.[98] Unlike FERPA, the FCC has no power to enforce subsection 253(c).[99] Hence, subsection 253(c) must rely on *private actors* to bring suits for preemption issues. Therefore, a viable

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[95] *See supra* note 61.

[96] *See supra* note 60 and accompanying text.

[97] FERPA was the statute at issue in *Gonzaga* and was enacted under the Spending Clause of the Constitution. *See supra* note 61 and accompanying text.

[98] Gonzaga Univ. v. Doe, 536 U.S. 273, 287 (2002).

[99] 47 U.S.C. § 253(d) (2000) (limiting the FCC's authority to the enforcement of subsections 253(a) and (b)). Furthermore, *Gonzaga* held that benefits or interests may only be enforced under the authority appointed to administer the statute. *Gonzaga*, 536 U.S. at 283. Since the "authority" of subsection 253(c) is a private actor, the analysis of the section does not logically follow the same lines as a statute enacted under the Spending Clause. Spending Clause statutes *must* be enforced through government action, namely the withholding of government funds by a government agency.

argument exists that *Gonzaga* does not provide the correct test for an issue concerning an interpretation of subsection 253(c).

Finally, a different reading of *Gonzaga* yields the observation that the Court's holding intended to fuse the *Cort* test with the *Blessing* test.[100] But only the Fifth Circuit has accepted this mandate.[101] Furthermore, the Fifth Circuit has failed to effectively eliminate the ambiguity left by *Gonzaga* in applying the *Cort* test.[102] Under this analytical framework, cases finding a private right of action using the *Cort* test for a telecommunications provider under section 253 would automatically confer a private right upon that telecommunications provider.[103] Consequently, the law in the Sixth and Eleventh Circuits would seemingly default to a condition that allows telecommunications providers to bring § 1983 claims to enforce rights under subsection 253(c) of the Act.

The different interpretations of *Gonzaga* present a viable legal theory for an undecided circuit to hold that a § 1983 claim could be used by telecommunications providers to enforce section 253 of the Act against state and local actors.

2. The Analysis Does Not Provide a Bright Line Test

Next, the question of whether a private right exists for telecommunications providers within section 253 is a matter of statutory interpretation that requires a judicial determination.[104] Even if a court accepts the

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[100] *Gonzaga*, 536 U.S. at 286; *see also supra* note 60 and accompanying text.

[101] Sw. Bell Tel., L.P. v. City of Houston, 529 F.3d 257, 260 (5th Cir. 2008). The language in *Gonzaga* reads as if it were intended to be a clear directive to lower courts (in other words, a "mandate"). This directive, however, ultimately proved to be ambiguous. *See supra* note 60 and accompanying text.

[102] *Id.* at 261 (stating that "[a]lthough obviously not determinative for deciding whether a privately enforceable right is created, neither [*TCG Detroit* nor *BellSouth*] incorporated § 1983"). Interestingly, this quote can be read in concert with the surrounding text to imply either: (1) *Gonzaga*'s new test may cause the circuits to reconsider the holdings of *TCG Detroit* and *BellSouth*; or (2) *TCG Detroit* and *BellSouth* failed to find a private right in section 253 because *Gonzaga* had not yet been decided.

[103] To illustrate this paradox, consider the situation in the Ninth Circuit. In *Pacific Bell Telephone Co. v. City of Hawthorne*, a district court found that subsection 253(c) created a private right of action for telecommunications providers in federal court. Pac. Bell Tel. Co. v. City of Hawthorne, 188 F. Supp. 2d 1169, 1175 (C.D. Cal. 2001). The Fifth Circuit's rule would conclude that this case also found a private *right*. The Ninth Circuit, however, does not recognize § 1983 claims under subsection 253(c). Sprint Telephony PCS, L.P. v. County of San Diego, 490 F.3d 700, 717 (9th Cir. 2007). Interestingly, *Pacific Bell* has not been overruled.

[104] For example, of the six circuits to address this issue, the courts identified three different groups as the "benefited class" of section 253. *See* NextG Networks of NY, Inc. v. City of N.Y., 513 F.3d 49, 53 (2d Cir. 2008) (finding state and local governments to be the benefited class);

requirement that Congressional intent must be clear and unambiguous, a reasonable legal mind might conclude that section 253 provides a private right.[105] Since the Act is lengthy and addresses many issues, Congress did not spread a single, clear intent throughout its pages. Each section arguably carries a unique intent. Therefore, the individual statutory pieces that a court chooses to use to construct its global picture of Congressional intent will have an impact on that court's ruling.

3. The Language of Section 253 Supports a § 1983 Claim

Finally, the plain language of section 253 is relevant to Congressional intent. Subsection 253(a) sets forth the general intent of the section and is followed by subsections 253(b) and (c), which presumably limit the authority of subsection 253(a).[106] Both subsections 253(b) and (c) use similar language to address the same general issue of identifying nonfederal governmental authority that is immune from subsection 253(a).[107] Two key differences exist between the subsections. First, as discussed previously, subsection 253(d) expressly empowers the FCC to enforce subsection 253(b) but not subsection 253(c).[108] Second, the language that Congress chose to use in prohibiting nonfederal authority from interfering in competition between the telecommunications providers is different in each subsection. Subsection 253(b) requires states to impose requirements on "a competitively neutral basis."[109] Subsection 253(c), however, requires compensation to be provided "on a competitively neutral and nondiscriminatory basis."[110]

This choice of language is important. Why would Congress phrase two nearly identical clauses so differently if the difference had no meaning? Even though the word "discriminatory" is not determinative by itself when it appears in a statute, the context of subsection 253(c) gives it meaning in this situation.[111] Congress's language seems to indicate a conscious choice to

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Sprint, 490 F.3d at 717 (finding American telecommunications consumers to be the benefited class); TCG Detroit v. City of Dearborn, 206 F.3d 618, 624 (6th Cir. 2000) (finding that telecommunications providers were the benefited class). The courts relied upon a variety of different materials in deciding this issue. The courts considered language from other sections of the Act, legislative history, other cases, and the history and interpretations of § 1983 itself. Where a court chooses to look for guidance and how much weight the court assigns to each source of information makes a significant difference in the court's judgment.

[105] *Compare TCG Detroit*, 206 F.3d at 623-24 (finding a private right within section 253), *with Southwestern Bell*, 529 F.3d at 261 (finding no private right within section 253).

[106] 47 U.S.C. § 253(a)-(c) (2000).

[107] *Id.*

[108] *Id.* § 253(d).

[109] *Id.* § 253(b).

[110] 47 U.S.C. § 253(c) (2000).

[111] *See* Ball v. Rogers, 492 F.3d 1094, 1106 (9th Cir. 2007) (holding that the court is not

delegate issues concerning neutral competition to the FCC and issues concerning discrimination to the federal courts. If the word "discriminatory" had not appeared in subsection 253(c), the Second Circuit's reasoning that subsection 253(c) merely provides a forum for preemption would be much stronger. The word "discriminatory" in this context, however, does not indicate a right to bring a preemption suit; it indicates a right to be free from oppressive actions brought under the color of state law.[112]

Finally, as *TCG Detroit* points out, states can violate subsection 253(c) without violating subsection 253(a).[113] This condition provides a strong argument that a substantive right exists within subsection 253(c).

C. *Should the Act Create a Private Right as a Matter of Policy?*

If a circuit court were to find a private right within section 253, telecommunications providers would have a much easier time bringing suit in federal court.[114] If Congress had really intended subsection 253(c) to protect state and local governments from Washington, it may have done so by exposing them to armies of attorneys from corporate giants brandishing a new weapon to extract damages from the owners and regulators of the public rights-of-way.[115] Even though the Act is relatively new, it may already be outdated due to modern technology.[116] Since Congress has good reason to amend the Act, it should take the opportunity to do so and to close the loophole that arguably exists within section 253. Congress should not leave the procedure for settling billions of dollars in right-of-way disputes up to the whims of an unsettled doctrine that hinges on a controversial Supreme Court decision. Too much time and money has already been spent litigating

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looking for precise phrases but citing phrases with the word "discrimination" as examples of phrases that demonstrated the Congressional intent to find a private right in a federal statute).

[112]42 U.S.C. § 1983 (2000).

[113]TCG Detroit v. City of Dearborn, 206 F.3d 618, 624 (6th Cir. 2000).

[114]If a private right were to exist in section 253, the Act would create a rebuttable presumption that the state would have to overcome. *See* Sw. Bell Tel., L.P. v. City of Houston, 529 F.3d 257, 262 (5th Cir. 2008). A rebuttable presumption is a favorable standard for the telecommunications providers and would therefore encourage them to bring more suits under § 1983 than under the current rules. Furthermore, § 1983 claims grant the courts discretion to award attorney's fees to successful plaintiffs, giving telecommunications providers an additional incentive to file suits. 42 U.S.C. § 1988(b) (2000).

[115]*See* Wiley, *supra* note 3, at 20-21 (acknowledging the excessive expenses and resulting windfall for attorneys that result from section 253 litigation). In jurisdictions that find a private cause of action under subsection 253(c), entities within the telecommunications industry will likely continue to bring these types of expensive lawsuits under subsection 253(c) just as they have brought suits concerning other issues in the Act.

[116]*See id.* at 25 (describing how the current Telecommunications Act will have a difficult time keeping up with new technology and suggesting a Congressional revision of the Act).

the meaning of the Act.[117] That money could be better spent on improved telecommunications infrastructure, lowering the rates for telecommunications services, or reducing taxes.

V. CONCLUSION

Despite the initial indication that the Sixth and Eleventh Circuits were likely to find a privately enforceable right within section 253, the Supreme Court's controversial decision in *Gonzaga* has steered federal circuits away from finding such a right. Even though the only four federal circuit courts to expressly decide the issue have unanimously agreed that there is no private right within section 253, the issue is far from settled.

In trying to strike a death blow to § 1983 claims in this context, the Fifth Circuit has embraced a doctrine that seems to indicate that § 1983 claims are currently viable in at least two other federal circuits. Furthermore, subsequent court decisions have failed to follow the analytical framework set forth by the nascent decision in this line of cases. Consequently, several viable arguments exist that could persuade undecided circuits to allow § 1983 claims in this context. Congress should have the opportunity to amend the Act in the near future and it should take that opportunity to rewrite section 253 to preclude such claims.

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[117] *Id.* at 20-21 (describing that litigation over the initial meaning of the Act involved billions of dollars).