Journal of College and University Law
2003

Article

***655** GONZAGA UNIVERSITY v. DOE AND ITS IMPLICATIONS: NO RIGHT TO ENFORCE STUDENT PRIVACY RIGHTS UNDER FERPA

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The Family Educational Rights & Privacy Act of 1974 ("FERPA") [FN1] has spawned significant debate in academic, political and judicial circles since its inception. [FN2] But on June 20, 2002, the United States Supreme Court in Gonzaga University v. Doe [FN3] foreclosed the possibility that FERPA may be privately enforced. Specifically, the Court held that a person whose records were disclosed in violation of FERPA has no right to sue the institution for its violation of FERPA. [FN4] Although the majority of the Court's opinion focuses on whether an individual may utilize 42 U.S.C. § 1983 to enforce FERPA, the practical effect is that an individual whose records were released without authorization has no available claim or remedy -- injunctive or monetary -- to enforce FERPA. [FN5]

This Article discusses the Supreme Court's recent opinion in Gonzaga University v. Doe and its effect of precluding private enforcement of FERPA. ***656** Part I discusses the relevant background and legislative history of FERPA, as well as § 1983 and its interplay with the enforcement of federal laws. Part II traces the background and procedural history of Gonzaga University v. Doe and thoroughly discusses the Supreme Court's opinion. Part III explores the ramifications of the decision, including the applicable regulatory provisions, the Secretary of Education's role in monitoring compliance, and alternative remedies available to a student whose records are released without authorization.

I. STATUTORY BACKGROUND AND FRAMEWORK

Gonzaga University v. Doe focuses on two primary issues: (1) whether FERPA contains a private cause of action that allows a student to sue an institution for violation of its provisions, and if not, (2) whether a student may sue an institution under § 1983 for violating the provisions of FERPA. [FN6] Because Gonzaga University v. Doe involves the interpretation and application of FERPA and § 1983, the relevant portions of each statute will be examined below.

A. The Family Educational Rights & Privacy Act of 1974

In 1974, Senator James Buckley introduced FERPA to the Senate as a floor amendment extension to the Elementary and Secondary Education Amendments of 1965. [FN7] FERPA was promulgated to control the careless release of educational information because of "the growing evidence of the abuse of student records across the nation." [FN8] FERPA was also enacted to provide parents and students with access to the student's educational records. [FN9] There is scant legislative history associated with FERPA; it was adopted with minimal floor debate and discussion and without public hearings or committee study or reports. [FN10]

FERPA applies only to educational institutions that receive federal funding and, in effect, prohibits those educational institutions from disclosing a student's "educational records" to unauthorized third parties. [FN11] Congress enacted ***657** FERPA under its spending power. [FN12] FERPA does not expressly provide a private cause of action for students whose educational records were released without authorization. [FN13] Further, FERPA does not affirmatively prohibit institutions from releasing educational records to third parties. [FN14] Instead, FERPA is conditional in that an institution must comply with FERPA's provisions in order to receive federal funding. [FN15] Specifically, FERPA provides that: "[n]o funds shall be made available ... to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein ...) of students without the written consent of their parents to any individual, agency, or organization ...." [FN16]

Thus, the language of the statute suggests that FERPA does not impose a per se prohibition on the disclosure of educational records to third parties but merely imposes a funding precondition such that an institution will not receive federal funding if the institution has a "policy or practice of permitting the release of education records." [FN17] An institution, therefore, stands to lose all or a portion of its federal funding if it has a policy or practice of disclosing its students' educational records to unauthorized third parties. [FN18]

As previously noted, FERPA contains no language establishing a private cause of action. [FN19] With respect to enforcement, the text of FERPA addresses only the Secretary of Education's role in compliance and mandates that the Secretary "take appropriate actions" to "deal with" violations of FERPA. [FN20] FERPA requires that the Secretary of Education establish a centralized office and review board for "investigating, processing, reviewing, and adjudicating violations." [FN21] An institution will lose federal funding only if the Secretary "finds [that] there has been a failure to comply with [FERPA], and he has determined that compliance cannot be secured by voluntary means." [FN22]

***658** B. Section 1983

Section 1983 provides for private actions against state actors for "deprivation of any rights, privileges, or immunities secured by the Constitution and laws." [FN23] The Supreme Court has held that § 1983 actions may be brought against a state and a state actor to enforce both constitutional rights and rights granted by federal statutes. [FN24] In order to enforce a federal statute under § 1983, a plaintiff must allege a deprivation of a federal right, "not merely a violation of federal law." [FN25] In Pennhurst State School & Hospital v. Halderman, [FN26] the Supreme Court "recognized two exceptions to the application of § 1983 to statutory violations." [FN27] Specifically, a § 1983 action is improper where the particular federal statute does not confer "enforceable rights" under § 1983 or where the particular statute contains an enforcement provision that is "incompatible with individual enforcement under § 1983." [FN28]

With respect to federal legislation that is grounded in the Spending Clause of the U.S. Constitution, the Supreme Court has stated that "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." [FN29] The question that often arises in § 1983 cases involving spending power legislation is whether Congress intended to confer individual rights enforceable under § 1983 when it imposed conditions for the receipt of federal funds. [FN30] Thus, the question of whether a Spending Clause-based statute may be privately enforced under § 1983 depends on whether Congress "unambiguously confer[red] upon the ... beneficiaries of the [statute] a right to enforce [the particular statute.]" [FN31] To determine whether a statute unambiguously confers individual rights that are enforceable under § 1983, the Supreme Court has "traditionally looked at three factors." [FN32] These factors include (1) whether the particular statute was intended to benefit the putative plaintiff, (2) whether the entitlement claimed by the plaintiff is so "vague and amorphous" that "its enforcement would strain judicial competence" and ***659** (3) whether the statute "unambiguously impose[s] a binding obligation on the

States." [FN33]

C. The Intersection of FERPA and § 1983

With this framework in mind, a number of courts have considered whether an institution's noncompliance with FERPA's disclosure provisions violates a student's federally granted rights or merely violates a federal law. [FN34] Quite astoundingly, "all of the Federal Courts of Appeals expressly deciding the question [prior to the Gonzaga decision] concluded that FERPA creates federal rights enforceable under § 1983." [FN35] Although three federal appellate courts rejected the notion that FERPA itself contains a private cause of action, these courts nonetheless held that FERPA grants federal rights that are enforceable under § 1983. [FN36] In Falvo v. Owasso Independent School District Number I-011, [FN37] the Tenth Circuit held that FERPA "create[d] an enforceable right within the meaning of § 1983." [FN38] Similarly, in Brown v. City of Oneonta, [FN39] the Second Circuit reached the same conclusion insofar as an individual may sue an institution under § 1983 to enforce FERPA. [FN40] Likewise, in Tarka v. Cunningham, [FN41] the Fifth Circuit held that FERPA may be privately enforced under § 1983. [FN42] Although a scant amount of case law exists where state and federal courts have held that FERPA is not enforceable under § 1983, [FN43] the overwhelming majority of lower courts have also held that FERPA can be enforced under § 1983. [FN44] Moreover, not a single federal circuit or state high court has reached a result to the contrary. [FN45]

***660** Notwithstanding what would appear to be "settled law," the Supreme Court granted certiorari on January 11, 2002, to address this issue. [FN46] Before addressing the Supreme Court's treatment of this issue, it is important to first trace the factual underpinnings and procedural history of Gonzaga University v. Doe.

II. Gonzaga University v. Doe

A. Factual Background

John Doe [FN47] is a former undergraduate student in the School of Education at Gonzaga University (hereinafter "Gonzaga"), a private Jesuit university in Spokane, Washington. [FN48] While John Doe was an undergraduate at Gonzaga, he had sexually intimate relations with another Gonzaga education student, Jane Doe. [FN49] Roberta League, the education certification specialist at Gonzaga, overheard a discussion between Julia Lynch and another student in which Lynch expressed her dissatisfaction with the way that Gonzaga had dealt with an accusation of date rape against John Doe. [FN50] League overheard Lynch say that she had "observed Jane Doe in obvious physical pain, which Jane Doe said was the result of having sex with 'John."' [FN51] During the course of the discussion between Lynch and the other student, John Doe's real name was mentioned, and League recognized the name and was aware that John Doe was a student teacher in the education school at Gonzaga. [FN52] League reported what she had overheard to Dr. Susan Kyle, the director of field experience for student teachers at Gonzaga, and League and Kyle approached Jane Doe to further investigate the matter. [FN53] Although Jane Doe refused to make a formal statement, League and Kyle contacted Adelle Nore, an investigator for the Office of the Superintendent of Public Instruction, which is the Washington agency that certifies teachers. [FN54] League and other Gonzaga officials spoke with Nore about the allegations against John Doe. [FN55] During these discussions, Gonzaga officials specifically identified John Doe by his real name. [FN56]

At the time of the incident, Washington State Board of Education regulations required a designated official in the particular school to consult faculty members who knew the student. [FN57] Specifically, the school official and faculty ***661** members were required to swear that they had "no knowledge that the applicant has been convicted of any crime and ha[d] no knowledge that the applicant has a history of any serious behavioral problems." [FN58]

As a result of these investigations and discussions, Dr. Corrine McGuigan, dean of the school of education, determined that "there was sufficient evidence of a serious behavioral problem to preclude her from signing the moral character affidavit supporting John Doe's application for teacher certification." [FN59] Accordingly, Gonzaga refused to submit a character affidavit to the Office of the Superintendent of Public Instruction. [FN60] After John Doe learned that Gonzaga refused to attest to his moral character, which would preclude him from obtaining his teacher certification in Washington, he brought suit against Gonzaga and Roberta League, alleging a number of claims, including violation of FERPA, arising from League and Kyle's discussions of the incidents in question with Nore and the release of information regarding those allegations. [FN61]

B. Procedural and Substantive History

In June 1994, John Doe brought suit against Jane Doe for defamation and Gonzaga for defamation, negligence, and breach of educational contract. [FN62] He subsequently amended his complaint to add League as a defendant and to add a state law claim for invasion of privacy and a § 1983 claim alleging that the defendants violated FERPA through their release of his name and related information to the Office of the Superintendent of Public Instruction. [FN63]

A trial was held in the Spokane County Superior Court from March 17, 1997 until April 1, 1997. [FN64] The jury returned a verdict on all five counts of John Doe's complaint against Gonzaga. [FN65]

Gonzaga appealed the judgment arguing, inter alia, that FERPA does not contain a private cause of action that is enforceable under § 1983. [FN66] The Washington Court of Appeals reversed the trial court's judgment on all five of John Doe's claims and specifically held that "FERPA does not create individual ***662** rights privately enforceable under 42 U.S.C. § 1983." [FN67] The court of appeals based its decision on FERPA's language that "[n]o funds shall be made available ... to any educational agency or institution which has a policy or practice of permitting the release of education records ... or personally identifiable information contained therein ...." [FN68] The court of appeals recognized that FERPA merely requires participating institutions to "have in place a system-wide plan," but that FERPA "is not intended to ensure that 'the needs of any particular person have been satisfied."' [FN69]

John Doe petitioned the Washington Supreme Court for review of the court of appeals decision, and the Washington Supreme Court granted John Doe's petition with respect to all five claims. [FN70] The Washington Supreme Court ultimately affirmed the trial court's verdict on the claims for defamation, invasion of privacy, violation of FERPA, and breach of contract but dismissed John Doe's claim for negligence. [FN71] With respect to the FERPA claim, [FN72] the Washington Supreme Court framed the issue as "[w]hether FERPA creates any right or privilege which can be enforced by individuals under 42 U.S.C. § 1983." [FN73]

The Washington Supreme Court began its analysis by recognizing that FERPA itself does not contain a private cause of action. [FN74] Instead, the court analyzed John Doe's FERPA claim "as the basis for a claim under [§] 1983, which provides a remedy for violation of federally conferred rights." [FN75] Thus, to determine whether violation of FERPA "gives rise to a federal right" under § 1983, the court analyzed John Doe's FERPA claim under the three-factor framework set forth in Blessing v. Freestone. [FN76] Hence, the court asked "(1) whether Congress intended the provision in question to benefit the plaintiff; (2) whether the right protected by the statute is so 'vague and amorphous' that its enforcement would strain judicial competence; and (3) whether the statute imposes a binding obligation on the states." [FN77]

First, the court concluded that FERPA "is intended to benefit students" based on language contained in the joint statement explanation that ***663** FERPA's purpose is to protect student privacy rights. [FN78] As to the second factor, the court concluded that "the right is not so 'vague and amorphous' that the court cannot

enforce it." [FN79] The court's only basis for this conclusion was its statement that "[c]ourts routinely review the policies and practices of entities and individuals for statutory compliance." [FN80] With respect to the third factor, the court concluded that, because FERPA expressly provides that no funds shall be available to an educational institution that has a policy or practice of releasing students' education records without their consent, "the FERPA provision provides a binding obligation." [FN81] Thus, the court held that FERPA gives rise to a private cause of action under § 1983. [FN82]

A close reading of the Washington Supreme Court's cursory analysis of the Blessing factors reveals that the court was perhaps guided less by the Blessing factors and more by the stream of precedent where all federal appellate courts confronting the issue have held that claims for the violation of FERPA are actionable under § 1983. [FN83] The court ultimately held that "FERPA does create individual rights privately enforceable under [§] 1983." [FN84]

Next, the court considered the question of whether John Doe had established the elements to prevail under a § 1983 claim. [FN85] That is, to prevail on a § 1983 claim, "(1) the plaintiff must show that some person deprived ... [him or her] of a federal constitutional or statutory right; and (2) that person must have been acting under color of state law." [FN86] With respect to the "acting under color of state law" prong, although Gonzaga argued that its alleged conduct was not "under color of state law," the court concluded that Gonzaga had acted as "an agent of the State in the [teacher] certification process." [FN87] The court, therefore, reversed the judgment of the Washington Court of Appeals on the FERPA claim and remanded to reinstate the judgment on all claims, except for the negligence claim. [FN88]

***664** C. U.S. Supreme Court Treatment

In response to the Washington Supreme Court's decision, Gonzaga petitioned the United States Supreme Court for certiorari on two issues: (1) whether a student may sue a private institution for damages under § 1983 to enforce FERPA and (2) whether a private institution acts under color of state law when it provides information to a state official in connection with state certification requirements. [FN89] The Supreme Court granted certiorari only to the first issue. [FN90]

The Supreme Court heard oral arguments on April 24, 2002, [FN91] and issued an opinion on June 20, 2002. [FN92] Chief Justice Rehnquist wrote the majority opinion and was joined by Justices O'Connor, Scalia, Kennedy, and Thomas. [FN93] The concurring opinion was written by Justice Breyer and joined by Justice Souter. [FN94] The dissenting opinion was written by Justice Stevens and joined by Justice Ginsburg. [FN95]

1. Majority Opinion

The Court framed the issue as "whether a student may sue a private university for damages under [section 1983] to enforce provisions of [FERPA] ...." [FN96] The Court began the opinion by noting that "state and federal courts have divided on the question of FERPA's enforceability under § 1983." [FN97] To support this assertion, the Court cited opinions from one federal district court and one state appellate court for the proposition that courts have held that FERPA may not be enforced under § 1983 [FN98] against two federal appellate courts that allowed private enforcement of FERPA under § 1983. [FN99]

The Court began its analysis by noting that FERPA was enacted under Congress' spending power "to condition the receipt of federal funds on certain requirements relating to the access and disclosure of student educational records." [FN100] The Court then outlined FERPA's spending conditions. [FN101] After ***665** characterizing FERPA as spending clause legislation, the Court noted that it has never before held, and declines to hold now, that spending clause legislation, containing provisions similar to FERPA, can confer enforceable rights under § 1983. [FN102] That is, "the

typical remedy for state noncompliance with" spending clause legislation "is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the State." [FN103] Thus, the Court recognized that spending clause legislation generally does not provide a basis for private enforcement under § 1983 unless Congress "manifests an 'unambiguous' intent to confer individual rights ...." [FN104] The Court noted that, since its decision in Pennhurst State School and Hospital, it has only twice found spending clause legislation to be enforceable under § 1983. [FN105] In Wright v. Roanoke Redevelopment and Housing Authority, [FN106] the Supreme Court allowed a § 1983 claim brought by tenants under the Public Housing Act because the Act focused on the "individual family" and because the Act did not provide a procedure through which tenants could seek recourse for violations of the Act. [FN107] Similarly, in Wilder v. Virginia Hospital Association, [FN108] the Supreme Court "allowed a § 1983 suit brought by health care providers to enforce a ... provision of the Medicaid Act [because the particular] provision explicitly conferred specific [and 'objective'] monetary entitlements upon the plaintiffs." [FN109]

The Court noted that its more recent decisions "have rejected attempts to infer enforceable rights from Spending Clause statutes." [FN110] Specifically, in Suter v. Artist M., [FN111] the Court rejected a claim by a class of parents and children that sought to enforce the Adoption Assistance and Child Welfare Act of 1980 under § 1983 because the Act "did not unambiguously confer an enforceable right upon the Act's beneficiaries." [FN112] The Court interpreted the term "reasonable efforts" contained in the Act to impose only a generalized duty on the State and to be enforced only by the Secretary rather than by private individuals. [FN113]

Similarly, in Blessing, five Arizona mothers sought to invoke § 1983 based on the State's failure to make timely child support payments. [FN114] Because the ***666** provision at issue in the Social Security Act requires States to "substantially comply" with its provisions, the Court held that the funding precondition only required "systemwide performance" rather than "an individual entitlement." [FN115] Thus, because the provision at issue focused on "the aggregate services provided by the State," as opposed to "the needs of any particular person," the Court held that the provision at issue could not be enforced under § 1983 because it conferred no individual rights. [FN116] Indeed, the Court emphatically stated that, "[t]o seek redress through § 1983, ... a plaintiff must assert the violation of a federal right, not merely a violation of federal law." [FN117]

Next, the Court emphasized that, in order for a federal law to be enforceable under § 1983, the particular statute must "unambiguously confer" a particular federal right. [FN118] Notably, the Court indicated that "[s]ome language in our opinions might be read to suggest that something less than an unambiguously conferred right is enforceable by § 1983." [FN119] The Court recognized that "Blessing, for example, set forth three 'factors' to guide judicial inquiry into whether or not a statute confers a right ...." [FN120] The "factors," which were previously stated in Blessing, require that:

> [(1)] "Congress must have intended that the provision in question benefit the plaintiff," [(2)] "the plaintiff must demonstrate that the right assertedly protected by the statute is not so 'vague and amorphous' that its enforcement would strain judicial resources," and [(3)] "the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms." [FN121]

Notwithstanding the three-factor test set forth in Blessing, the Court apparently abandoned these factors and instead emphasized that the determination of whether a federal statute is enforceable under § 1983 depends on whether there was a violation of a federal right, not merely a violation of a federal law. [FN122] Accordingly, the Court rejected the application of the three-factor test set forth in Blessing by expressly "reject[ing] the notion that [Supreme Court] cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983." [FN123] The Court held that § 1983 applies only where a plaintiff alleges a deprivation of "'rights, privileges, or immunities secured by the Constitution and laws' of the United States." [FN124]

***667** The Court then shifted its discussion to address implied right of action

cases and held that such cases should "guide the determination of whether a statute confers rights enforceable under § 1983." [FN125] The Court concluded that the analysis of whether a statutory violation may be enforced under § 1983 "overlap[s] in one meaningful respect" with the determination of whether a private right of action can be implied from a particular statute. [FN126] In both analyses, a court must first determine whether Congress "intended to create a federal right." [FN127] Thus, the Court restated its previous holding inasmuch as "[t]he question whether Congress ... intended to create a private right of action [is] definitively answered in the negative" if the particular statute does not expressly grant private rights to an "identifiable class." [FN128] Put differently, the Court stated that the text of a statute must be "phrased in terms of the persons benefited" in order for the statute to confer such private rights. [FN129] The Court cautioned, however, that where a plaintiff brings suit under an implied right of action, the plaintiff must nevertheless show that the statute "manifests an intent 'to create not just a private right but also a private remedy."' [FN130] Thus, the Court noted that, although a plaintiff bringing suit under § 1983 need not show that the statute contains a private remedy because § 1983 supplies such a remedy, the initial inquiry, which is the determination of whether a statute confers any right whatsoever, is the same inquiry as in implied right of action cases. [FN131] That is, the initial inquiry is to determine whether a statute "'confer[s] rights on a particular class of persons."' [FN132]

A close reading of the Court's opinion reveals that the Court went to great lengths to justify its distinction between federal rights and federal laws and clarify that, unless a plaintiff can establish a violation of a federal right, § 1983 "by itself does not protect anyone against anything." [FN133] The Court concluded its discussion between the similarity of implied right of action cases and § 1983 cases by holding that "where the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit, whether under § 1983 or under an implied right of action." [FN134]

***668** With these principles in mind, the Court then turned to the text of FERPA and held that "there is no question that FERPA's nondisclosure provisions fail to confer enforceable rights." [FN135] First, the Court concluded that FERPA does not contain any "rights-creating" language to suggest any congressional intent to confer private rights. [FN136] Particularly, the Court drew a distinction between the individually focused language contained in Title VI and Title IX of the Civil Rights Act in which the statutes clearly state that "no person shall be subjected to discrimination" and FERPA's language that speaks only to the Secretary of Education. [FN137] The Court concluded that the focus of FERPA is not on "individual entitlement," which must exist in order for a statute to be enforceable under § 1983. [FN138] The Court found support for its "rights-creating" dichotomy in Cannon v. University of Chicago [FN139] where the Court stated:

> There would be far less reason to infer a private remedy in favor of individual persons if Congress, instead of drafting Title IX with an unmistakable focus on the benefited class, had written it simply as a ban on discriminatory conduct by recipients of federal funds or as a prohibition against the disbursement of public funds to educational institutions engaged in discriminatory practices. [FN140]

Further, the Court found no "rights-creating" language in FERPA's nondisclosure provisions, which address only institutional policies and practices, not individual instances of disclosure. [FN141] FERPA authorizes the Secretary of Education to withhold funds from "any educational agency or institution which has a policy or practice of permitting the release of education records." [FN142] Thus, the Court held that FERPA is similar to the statute at issue in Blessing insofar as both statutes have an "aggregate" focus but do not speak in terms of "whether the needs of any particular person have been satisfied." [FN143] The Court pointed out that recipient institutions will not lose their federal funding for individual violations of FERPA as long as they "comply substantially." [FN144] FERPA is also similar to the statute at issue in Blessing inasmuch as both statutes require only "substantial compliance" with federal regulations. [FN145]

Although John Doe contended that subsection (b)(2) of FERPA speaks to individual

consent and such consent implies the conferral of a right, the ***669** Court dismissed John Doe's argument because the reference to individual consent is placed in the context of describing whether the institution has a policy or practice of releasing records for the purpose of determining whether the institution will lose federal funding. [FN146] Thus, although John Doe argued that a student's "individualized right to withhold consent and prevent the unauthorized release of personally identifiable information" establishes the necessary "rights-creating" language necessary to trigger § 1983, the Court dismissed this argument as a "far cry from the sort of individualized, concrete monetary entitlement" [FN147] found to be enforceable in the Court's earlier decisions. [FN148]

The Court provided additional support for its conclusion that FERPA does not confer enforceable rights by pointing to Congress' express intent to enforce FERPA's provisions through the Department of Education. [FN149] That is, FERPA expressly provides that the Secretary of Education should "deal with violations" of FERPA. [FN150] Furthermore, FERPA directs the Secretary of Education to "establish or designate [a] review board" to investigate and adjudicate any violations of FERPA. [FN151] The Secretary of Education created the Family Policy Compliance Office ("FPCO") to serve as a centralized review board to investigate and enforce FERPA's provisions. [FN152] The Code of Federal Regulations sets forth specific internal administrative procedures to guide students, parents, and the Department of Education with respect to the procedures for investigating and enforcing violations of FERPA. [FN153]

Because FERPA contains internal administrative procedures, the Court distinguished FERPA from the statutes at issue in Wright and Wilder because those statutes "lacked any federal review mechanism." [FN154] The Court seems to conclude that, where a federal statute contains internal administrative procedures, this weighs in favor of finding that Congress did not intend to create individually enforceable private rights. [FN155] Finally, because FERPA provides that, "except for the conduct of hearings, none of the functions of the Secretary ... shall be carried out in any of the regional offices," the Court acknowledged that such a "centralized review" process exists to alleviate any "concern that regionalizing the enforcement of [FERPA] may lead to multiple ***670** interpretations of it ...." [FN156] The Court concluded that, because Congress presumably intended to centralize all administrative procedures, it follows that Congress feared that private enforcement of FERPA would result in inconsistent and "multiple interpretations" of FERPA. [FN157]

The majority concluded that the current structure of FERPA does not contain "rights-creating language," but instead contains an aggregate, as opposed to individual, focus, as well as internal compliance mechanisms for enforcement. [FN158] The Court summarized its holding by stating that, "if Congress wishes to create new rights enforceable under § 1983, it must do so in clear and unambiguous terms -- no less and no more than what is required for Congress to create new rights enforceable under an implied private right of action." [FN159] For these reasons, the Court reversed the judgment of the Washington Supreme Court and held that FERPA may not be privately enforced under § 1983. [FN160]

2. Concurring Opinion

The concurring opinion, written by Justice Breyer and joined by Justice Souter, agreed with the majority opinion insofar as the question of "whether private individuals may bring a lawsuit to enforce a federal statute ... is a question of congressional intent." [FN161] However, Justice Breyer seemed to disagree with the majority's dismissal of the three Blessing factors used for determining whether a violation of federal law is enforceable under § 1983. [FN162] In any event, Justice Breyer concluded that under either test -- the three Blessing factors or the inquiry of whether a statute unambiguously confers a federal right -- "Congress did not intend private judicial enforcement" of FERPA. [FN163]

Justice Breyer, however, advanced an additional basis for concluding that Congress did not intend FERPA to create rights enforceable under § 1983. [FN164]

Specifically, Justice Breyer noted that the "key language [contained in FERPA] is broad and non-specific." [FN165] That is, the broad and non- specific language creates uncertainty as to whether and to what extent an institution may disclose "education[al] records." [FN166] Justice Breyer seems to advance the position that allowing courts to interpret the "broad and nonspecific" language contained in FERPA will necessarily lead to inconsistent and conflicting ***671** interpretations. [FN167] Thus, Justice Breyer opined that Congress intended for the Department of Education to act as both a centralized and exclusive enforcement mechanism. [FN168] Justice Breyer concluded that, in addition to the factors set forth in the majority opinion, the fact that FERPA implicitly requires that the Department of Education act as an exclusive agency to investigate violations of FERPA further supports the finding that Congress did not intend for FERPA to be privately enforced under § 1983. [FN169]

3. Dissenting Opinion

The dissent, written by Justice Stevens and joined by Justice Ginsburg, characterized the majority's decision as a "now you see it, now you don't" form of reasoning. [FN170] The dissent criticizes the majority's opinion as setting forth inconsistent propositions. [FN171] For example, the dissent noted that the majority opinion seems to suggest that FERPA does, in fact, create both rights of access and rights of privacy, but that "those federal rights are of a lesser value because Congress did not intend them to be enforceable by their owners." [FN172] Thus, the dissent advanced the position that FERPA does, indeed, create federal rights, but that the Court's approach is misguided because it creates a "category of second-class statutory rights." [FN173]

Justice Stevens begins his analysis by pointing out that numerous provisions contained in FERPA "create rights for both students and their parents." [FN174] In light of the numerous references to rights contained in the text of FERPA, Justice Stevens concluded that FERPA does, in fact, confer certain rights on students and their parents. [FN175] The dissent points out that the Court fails to acknowledge the substantial number of references to internal "rights" contained in FERPA notwithstanding the fact that prior § 1983 cases have examined "the entire legislative enactment." [FN176] Because of these references to rights, the dissent concluded that FERPA "plainly meets the standards we articulated in Blessing for establishing a federal right." [FN177] That is, the dissent ***672** appears to place greater weight on the application of the three Blessing factors than the majority. [FN178] Particularly, the dissent noted that FERPA was enacted to benefit individual students and parents; FERPA is binding on States through its mandatory, rather than precatory, terms; and the rights enumerated in FERPA are far from "vague and amorphous." [FN179]

The dissent then turned to the question of whether FERPA contains the necessary rights-creating language to create a private cause of action enforceable under § 1983. [FN180] Although the majority gave considerable weight to the use of "no person shall" language as set forth in Cannon, [FN181] the dissent explained that the statutes at issue in the most recent Supreme Court opinions addressing the issue of whether a Spending Clause statute created rights enforceable under § 1983 did not involve any type of "no person shall" rights-creating language. [FN182] As the dissent explained, the statutes at issue in Wright and Wilder did not contain the "no person shall" rights-creating language, but the Court nonetheless concluded that those statutes conferred individual rights that are enforceable under § 1983. [FN183] Thus, the dissent seems to suggest that something less than "no person shall" rights-creating language is necessary for a federal statute to confer individual rights that are enforceable under § 1983. [FN184]

The dissent noted that Congress can rebut any presumption of private enforcement of a federal statute under § 1983 by either express language in the statute precluding the use of § 1983 to enforce the statute, or impliedly "by creating a comprehensive enforcement scheme that is incompatible with individual enforcement [actions]." [FN185] The question, therefore, becomes whether the administrative enforcement mechanisms contained in FERPA are "comprehensive" and "incompatible"

with a private claim under § 1983. [FN186] The dissent answered this question in the negative by concluding that FERPA's internal administrative procedures "fall far short of what is necessary to overcome the presumption of enforceability." [FN187] As the dissent pointed out, only in two cases has the Court found a comprehensive administrative scheme that is incompatible with enforcement under § 1983. [FN188] In one of those cases, the statute at issue contained a provision for "carefully tailored" administrative review and subsequent federal judicial review. [FN189] The dissent concluded that, unlike the statutes at issue in Middlesex County Sewerage Authority v. National ***673** Sea Clammers Association [FN190] and Smith v. Robinson, [FN191] FERPA does not guarantee access to any form of administrative proceeding or to any federal type of judicial review. [FN192] Indeed, it is entirely within the discretion of the Secretary of Education to determine whether to investigate an individual complaint. [FN193]

In the second portion of the dissent, Justice Stevens criticizes the majority for "depart[ing] from over a quarter century of settled law" that has established that FERPA does create federal rights enforceable under § 1983. [FN194] The dissent raises the issue of the Court's departure from "settled law" to illustrate the Court's "novel use" of previous Supreme Court implied right of action cases to now determine whether a federal right exists for purposes of § 1983. [FN195] The dissent argued that, by applying the framework set forth in implied right of action cases to § 1983 cases, the Court has "place[d] a more exacting standard on plaintiffs." [FN196] That is, the dissent advances the position that the Court appears to place a heightened standard on plaintiffs seeking to invoke § 1983. [FN197] Put differently, because the Court is now requiring § 1983 plaintiffs to show that Congress intended to create new rights enforceable under § 1983 through a particular statute's clear and unambiguous terms, the Court appears to now require a § 1983 plaintiff to show congressional intent to make the particular statute enforceable under section 1983. [FN198] Furthermore, the dissent cautioned that, because Cannon and its progeny do not clearly distinguish between rights and causes of action, it is problematic and inappropriate to borrow these cases for purposes of determining whether a federal statute creates rights enforceable under § 1983. [FN199]

Because the majority opinion minimizes the application of the Blessing factors and ignores the numerous instances of rights-creating language contained in FERPA, the dissent posits that the Court, in effect, has created a hierarchy of rights such that the distinction between rights and remedies no longer exists. [FN200]

***674** III. Ramifications of Gonzaga

The effect of Gonzaga appears to be two-fold: an analytical effect and a practical effect. Although the scope of this Article focuses primarily on the practical effect of Gonzaga insofar as it directly relates to FERPA, the analytical effect warrants some discussion. As discussed above, the analytical effect of Gonzaga is that the Court conflated the implied right-of-action analysis with a § 1983 right-of-action analysis. [FN201] As a result, the analytical framework from implied right-of-action cases will now be applied to a § 1983 right-of-action analysis. [FN202] The reasoning underlying this conflation is problematic for at least two reasons. First, the majority held that the existence of a privately enforceable right creates a presumption that a cause of action exists under § 1983. [FN203] The Court did not hold, however, that the existence of a privately enforceable right creates a presumption for an implied cause of action under the statute itself. [FN204] That is, for purposes of the presumption, the Court "formally preserved the divergent" implied right-of-action and § 1983 right-of-action inquiries. [FN205] The Court did not provide any basis or justification for this distinction.

The second problematic feature in the majority's reasoning was outlined by Justice Stevens in his dissent. [FN206] As noted above, the analytical framework from implied right-of-action cases will now be applied to a § 1983 right-of-action analysis. [FN207] By relying on the implied right-of-action cases, which focus on both rights and remedies, "the Court essentially preclude[d] a § 1983 cause of action unless it finds affirmative congressional intent to create an implied cause

of action under the statute itself." [FN208] Consequently, § 1983 may be available only when the plaintiff could enforce the statute itself.

With respect to the practical effect, Gonzaga might be characterized as a victory for colleges and universities insofar as an institution's violation of FERPA will not give rise to a private cause of action under FERPA or § 1983. [FN209] That is, even if an institution discloses a student's "educational ***675** records" to a third party without authorization, the institution cannot be sued for its violation of FERPA. [FN210] Indeed, an institution that discloses a student's educational records or personal information without consent is, in effect, immunized from liability. Further, the institution will not lose its federal funding as long as it "complies substantially" with FERPA. [FN211] But the question that remains after Gonzaga is what, if any, alternatives are available to a student whose records or personal information were disclosed without authorization.

Although some institutions may have comfort in knowing that they are immune from liability for individual violations of FERPA, Gonzaga does not per se immunize colleges and universities from liability for wrongful disclosure of student records. In some instances, alternative legal theories are available to litigants for wrongful disclosure of student records. For example, in addition to his FERPA claim, John Doe brought and prevailed on state law claims against Gonzaga for invasion of privacy, breach of contract, and defamation. [FN212] Although the applicability of such defamation and breach of contract claims are fact specific and vary according to state law, aggrieved students or their parents might find applicable causes of action under a state law-based tort claim of invasion of privacy. [FN213] Although Gonzaga precludes claims for violation of FERPA, students and institutions alike should be cognizant that other laws affecting student privacy have, in some cases, provided, and may continue to provide, a limited alternative mechanism to enforce privacy rights. [FN214] Such state law claims, however, are not the functional equivalent of FERPA. That is, the subject matter protected by FERPA -- educational records -- is broader than the subject matter and level of harm protected by tort law and contract law. [FN215] It is not difficult to imagine instances where an institution discloses "educational records" in violation of FERPA, but the potential plaintiff's harm or the nature of the subject matter disclosed does not give rise to a tort or contract claim. [FN216] State law alternative causes of action will, therefore, provide only a limited alternative to FERPA.

***676** In addition to the alternative state law causes of action set forth above, FERPA, as previously noted, provides for internal administrative and investigative procedures. [FN217] FERPA expressly directs the Secretary of Education to "deal with violations" of FERPA [FN218] and to "establish or designate [a] review board" for investigating and adjudicating such violations. [FN219] The Secretary of Education created the FPCO "to act as a [r]eview [b]oard ... to enforce [FERPA]." [FN220]

If students or their parents suspect a violation of FERPA, they may file an individual written complaint in the FPCO. [FN221] If a complaint is filed within 180 days of the alleged violation [FN222] and contains "specific allegations of fact giving reasonable cause to believe that a violation of [FERPA] has occurred," [FN223] the FPCO will initiate an investigation, [FN224] notify the particular institution of the charge, [FN225] and request that the institution provide a written response to the charge. [FN226] Following its investigation, the FPCO will provide written notice of its findings to the complainant and the institution. [FN227] If the FPCO determines that the institution has violated FERPA, it will provide a "statement of the specific steps that the agency or institution must take to comply" with FERPA [FN228] and will require compliance within a specified period of time. [FN229] If the institution fails to comply within the specified period of time, the Secretary may (1) withhold further payment of federal funding, (2) issue an order to compel compliance, or (3) terminate eligibility to receive federal funding. [FN230] It is significant to note that FPCO regulations do not contain any procedural mechanism for appeal or judicial review.

Thus, although students or parents who suspect a violation of FERPA may utilize the FPCO procedures to compel compliance with FERPA, they have no assurance that the Secretary will, in fact, investigate the claim. [FN231] Put differently, the

Secretary of Education has broad discretion in determining whether to investigate a complaint and whether to impose a sanction upon finding that the institution has failed to comply with FERPA. [FN232] Furthermore, ***677** no individual remedy is available to a complainant for a particular institution's violation of FERPA. [FN233]

Although Congress has recognized that a centralized and internal investigative and adjudicative procedure is more desirable than allowing courts to interpret FERPA, [FN234] it is questionable whether the FPCO serves as a "comprehensive enforcement scheme that is incompatible with individual enforcement." [FN235]

IV. CONCLUSION

As a result of Gonzaga, individuals may not sue to enforce FERPA under § 1983 because Congress did not unambiguously intend to confer such rights on individuals. [FN236] Although proponents of student privacy may lobby to amend FERPA to provide for a private cause of action under FERPA or an enforcement mechanism under § 1983, it is questionable whether such an amendment would be a desirable course of action. [FN237]

As set forth above, however, a student is not left without judicial redress for wrongful disclosure of records. In some circumstances, a number of alternative causes of action are available to a student whose records were wrongfully disclosed. Thus, in light of Gonzaga, colleges and universities must thoughtfully and carefully protect student privacy rights in order to avoid institutional liability.

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[FN1]. See 20 U.S.C. § 1232g (2000).

[FN2]. For recent academic commentary on FERPA, see Lynn M. Daggett, Bucking Up Buckley I: Making the Federal Student Records Statute Work, 46 CATH. U. L. REV. 617 (1997) [hereinafter Daggett I]; Lynn M. Daggett, Bucking Up Buckley II: Using Civil Rights Claims to Enforce the Federal Student Records Statute, 21 SEATTLE U. L. REV. 29 (1997) [hereinafter Daggett II]; Lynn M. Daggett & Dixie Snow Huefner, Recognizing Schools' Legitimate Educational Interests: Rethinking FERPA's Approach to the Confidentiality of Student Discipline and Classroom Records, 51 AM. U. L. REV. 1 (2001); Thomas A. Mayes & Perry A. Zirkel, Disclosure of Special Education Students' Records: Do the 1999 IDEA Regulations Mandate that Schools Comply with FERPA?, 8 J.L. & POL'Y 455 (2000); Sandra L. Macklin, Note, Students' Rights in Indiana: Wrongful Distribution of Student Records and Potential Remedies, 74 IND. L.J. 1321 (1999); Maureen P. Rada, Note, The Buckley Conspiracy: How Congress Authorized the Cover-Up of Campus Crime and How it Can be Undone, 59 OHIO ST. L.J. 1799 (1998); Benjamin F. Sidbury, Note, The Disclosure of Campus Crime: How Colleges and Universities Continue to Hide Behind the 1998 Amendment to FERPA and How Congress Can Eliminate the Loophole, 26 J.C. & U.L. 755 (2000).

[FN3]. 536 U.S. 273, 122 S. Ct. 2268 (2002) (pagination is to the preliminary print of the U.S. Reports).

[FN4]. Id. at 276, Id. at 2271.

[FN5]. See id.

[FN6]. See id.

[FN7]. See Education Amendments of 1974, Pub. L. No. 93-380, § 513, 88 Stat. 484, 571 (1974); see also S. Conf. Rep. No. 93-1026 (1974). See generally Daggett I, supra note 2, at 620; Macklin, supra note 2, at 1326; Sidbury, supra note 2, at 757.

[FN8]. 121 CONG. REC. S13,990 (1975) (statement of Sen. Buckley). Senator Buckley recognized that schools had inconsistent policies regarding student privacy and information disclosure, and that many students' records were being disclosed to third parties without the parent or student's consent. See id.

[FN9]. See 120 CONG. REC. S39,863 (1974) (statement of Sen. Buckley).

[FN10]. See Daggett I, supra note 2, at 620; Sidbury, supra note 2, at 757.

[FN11]. See 20 U.S.C. § 1232g(b)(1) (2000). FERPA defines educational records as "those records, files, documents, and other materials which ... contain information directly related to a student ...." 20 U.S.C. § 1232g(a)(4)(A) (2000). Notwithstanding the statutory definition of "educational records," there has nevertheless "been substantial debate, confusion, and litigation over what constitutes 'educational records."' Sidbury, supra note 2, at 759. See also Red & Black Publ'g Co., Inc. v. Bd. of Regents, 427 S.E.2d 257, 261 (Ga. 1993) (holding that educational records are "those relating to individual student academic performance, financial aid, or scholastic probation"); United States v. Miami Univ., 91 F. Supp. 2d 1132 (S.D. Ohio 2000). In 1998, FERPA was amended to expressly exempt certain disciplinary records from the scope of "educational records." See generally 20 U.S.C. § 1232g (2000). Specifically, FERPA was amended to expressly provide that nothing "prohibit[s]" a school from releasing the "final results" of a student disciplinary proceeding regarding the commission of a violent crime or "nonforcible sex offense" to third parties. 20 U.S.C. § 1232g(b)(6)(B) (2000).

[FN12]. See Gonzaga, 536 U.S. at 278, 122 S. Ct. at 2272; see also U.S. Const. art. I., § 8, cl. 1.

[FN13]. See 20 U.S.C. § 1232g(b)(1) (2000).

[FN14]. See id.

[FN15]. See id.

[FN16]. Id.

[FN17]. See id. See also Bauer v. Kincaid, 759 F. Supp. 575, 589 (W.D. Mo. 1991) (holding that an institution may lose its funding only if there is a finding that the institution failed to comply with the provisions of FERPA); Student Bar Ass'n v. Byrd, 239 S.E.2d 415, 419 (N.C. 1977).

[FN18]. See Byrd, 239 S.E.2d at 419.

[FN19]. See supra note 13 and accompanying text.

[FN20]. 20 U.S.C. § 1232g(f) (2000).

[FN21]. 20 U.S.C. § 1232g(g) (2000).

[FN22]. 20 U.S.C. § 1232g(f) (2000).

[FN23]. 42 U.S.C. § 1983 (2000). Section 1983 provides in pertinent part that:
[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States ... 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.

[FN24]. Maine v. Thiboutot, 448 U.S. 1, 4 (1980).

[FN25]. Blessing v. Freestone, 520 U.S. 329, 340 (1997) (citing Golden State Transit Corp. v. Los Angeles, 493 U.S. 103, 106 (1989)) (emphasis omitted).

[FN26]. 451 U.S. 1 (1981).

[FN27]. Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 19 (1981) (citing Pennhurst State Sch. & Hosp., 451 U.S. at 28).

[FN28]. Blessing, 520 U.S. at 341 (internal citation omitted); See also Sea Clammers, 453 U.S. at 19; Pennhurst, 451 U.S. at 28.

[FN29]. Suter v. Artist M., 503 U.S. 347, 356 (1992) (quoting Pennhurst, 451 U.S. at 17).

[FN30]. Id. at 357.

[FN31]. Id. Cf. Wilder v. Va. Hosp. Ass'n, 496 U.S. 498 (1990) (holding that Congress created rights enforceable under § 1983 when it required States participating in Medicaid to reimburse health care providers).

[FN32]. Blessing, 520 U.S. at 340.

[FN33]. Id. at 340-41.

[FN34]. See supra notes 25-28 and accompanying text.

[FN35]. Gonzaga, 536 U.S. at 299, 112 S. Ct. at 2283 (Stevens, J., dissenting).

[FN36]. See Falvo v. Owasso Indep. Sch. Dist. No. I-011, 233 F.3d 1203, 1211-12 (10th Cir. 2000), rev'd on other grounds, 534 U.S. 426 (2002); Brown v. City of Oneonta, 106 F.3d 1124, 1131 (2d Cir. 1997) (citing Fay v. S. Colonie Cent. Sch. Dist., 802 F.2d 21, 33 (2d Cir. 1986)); Tarka v. Cunningham, 917 F.2d 890, 891 (5th Cir. 1990).

[FN37]. 233 F.3d 1203 (10th Cir. 2000).

[FN38]. Id. at 1211.

[FN39]. 106 F.3d 1124 (2d Cir. 2000).

[FN40]. Id. at 1131.

[FN41]. 917 F.2d 890 (5th Cir. 2000).

[FN42]. Id. at 891.

[FN43]. In fact, only two federal district courts have held that FERPA does not contain a private cause of action enforceable under § 1983. See Gundlach v. Reinstein, 924 F. Supp. 684 (E.D. Pa. 1996), aff'd, 114 F.3d 1172 (3d Cir. 1997); Norris v. Bd. of Ed. of Greenwood Cmty. Sch. Corp., 797 F. Supp. 1452 (S.D. Ind. 1992).

[FN44]. See Belanger v. Nashua, 856 F. Supp. 40 (D.N.H. 1994); Doe v. Knox County Bd. of Educ., 918 F. Supp. 181 (E.D. Ky. 1996); Francois v. Univ. of the D.C., 788 F. Supp. 31 (D.D.C. 1992); Goodreau v. Rector and Visitors of the Univ. of Va., 116 F. Supp. 2d 694 (W.D. Va. 2000); Krebs v. Rutgers Univ., 797 F. Supp. 1246 (D.N.J. 1992); Lewin v. Med. Coll. of Hampton Rds., 931 F. Supp. 443 (E.D. Va. 1996), aff'd, 131 F.3d 135 (4th Cir. 1997); Maynard v. Greater Hoyt Sch. Dist., 876 F. Supp. 1104 (D.S.D. 1995); Norwood v. Slammons, 788 F. Supp. 1020 (W.D. Ark. 1991).

[FN45]. Gonzaga, 536 U.S. at 299 n. 6, 112 S. Ct. at 2284 n.7 (Stevens, J., dissenting).

[FN46]. Gonzaga Univ. v. Doe, 534 U.S. 1103 (2002) (order granting certiorari).

[FN47]. Although John Doe is obviously a fictitious name used to keep the respondent's identity confidential, the respondent's name was identified at different times throughout the proceedings.

[FN48]. Doe v. Gonzaga Univ., 24 P.3d 390, 393 (Wash. 2001), rev'd, 536 U.S. 273 (2002).

[FN49]. Id.

[FN50]. Id.

[FN51]. Id.

[FN52]. Id.

[FN53]. Id.

[FN54]. Id. at 394.

[FN55]. Id.

[FN56]. Id.

[FN57]. Id. at 395.

[FN58]. Wash. Admin. Code 180-75-082(3) (1997) (repealed effective Mar. 8, 1997), repealed by Wash. Admin. Code 180-79A-155(3) (1997). The regulations now require a teacher certification applicant's school to submit an affidavit describing the applicant's character or fitness. See id.

[FN59]. Gonzaga, 24 P.3d at 396.

[FN60]. Id. at 395.

[FN61]. Id.

[FN62]. Id. Jane Doe cross-claimed against Gonzaga, alleging defamation and negligence. Additionally, Jane Doe set forth a counterclaim against John Doe for sexual assault. In September, 1996, however, Jane Doe and John Doe agreed to dismiss their claims against each other. Additionally, Jane Doe subsequently dismissed her claims against Gonzaga. See id.

[FN63]. Id.

[FN64]. Id. at 396.

[FN65]. Id. With respect to the FERPA claim, the jury awarded to John Doe $150,000 in compensatory damages and $300,000 in punitive damages. See also Doe v. Gonzaga Univ., No. 94-2-03120-6, slip op. at 2-4 (Spokane County Superior Ct. May 31, 2001).

[FN66]. Doe v. Gonzaga Univ., 992 P.2d 545, 549 (Wash. Ct. App. 2000).

[FN67]. Id. at 556. Additionally, the court of appeals reversed the negligence, invasion of privacy, and breach of contract claims, and remanded the case for a new trial on the defamation claim. Id. at 549.

[FN68]. Id. at 556 (quoting 20 U.S.C. § 1232g(b) (2000)).

[FN69]. Id. (quoting Blessing, 520 U.S. at 343).

[FN70]. Doe v. Gonzaga Univ., 10 P.3d 1075 (Wash. 2000).

[FN71]. Gonzaga, 24 P.3d at 396.

[FN72]. Because the United States Supreme Court's opinion is limited only to the FERPA claim, it would be beyond the scope of this Article to discuss the Washington Supreme Court's treatment of the state law claims. See infra notes 205-07 and accompanying text for a discussion of alternative enforcement mechanisms available to students seeking to safeguard their privacy rights.

[FN73]. Gonzaga, 24 P.3d at 397.

[FN74]. Id. at 400. (citing Fay v. Soyton Colonie Cent. Sch. Dist., 802 F.2d 21, 33 (2d Cir. 1986)).

[FN75]. Id. (citing Wilder, 496 U.S. at 509).

[FN76]. Id. See also Blessing, 520 U.S. at 329-30.

[FN77]. Gonzaga, 24 P.3d at 400 (citing Blessing, 520 U.S. at 329-30).

[FN78]. Id. See also 120 CONG. REC. 39,862 (1974) ("The purpose of the Act is two-fold -- to assure parents of students, and students themselves if they are over the age of 18 or attending an institution o[f] postsecondary education, access to their education records and to protect such individuals' rights to privacy by limiting the transferability of their records without their consent").

[FN79]. Gonzaga, 24 P.3d at 400.

[FN80]. Id. at 401.

[FN81]. Id. (citing 20 U.S.C. § 1232g(b)(1) (2000)).

[FN82]. Id.

[FN83]. Id. (citing Falvo, 233 F.3d 1203; Brown, 106 F.3d 1125; Lewin, 931 F. Supp. 443; Tarka, 917 F.2d 890; Tarka v. Franklin, 891 F.2d 102 (5th Cir. 1989)).

[FN84]. Id.

[FN85]. Id.

[FN86]. Id. (citing Sintra, Inc. v. City of Seattle, 829 P.2d 765, 771 (Wash. 1992)). See also 42 U.S.C. § 1983 (2000).

[FN87]. Gonzaga, 24 P.3d at 401.

[FN88]. Id. at 402. The Washington Supreme Court also reversed the court of appeals finding that "a teacher certification candidate waives [his or her privacy] rights when he or she applies for teacher certification." Gonzaga, 992 P.2d at 556. That is, the Court found no such waiver by John Doe and dismissed the court of appeals' finding of waiver as a basis for reversing the trial court. Gonzaga, 24 P.3d at 402.

[FN89]. Gonzaga, 534 U.S. at 1103 (order granting certiorari).

[FN90]. Id.

[FN91]. See Gonzaga Univ. v. Doe, No. 01-679, oral argument transcript (Apr. 24, 2002), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts.html (last visited Feb. 21, 2003).

[FN92]. Gonzaga, 536 U.S. at 273, 122 S. Ct. 2268.

[FN93]. Id. at 276, Id. at 2271.

[FN94]. Id. at 291, Id. at 2279 (Breyer, J., concurring).

[FN95]. Id. at 293, Id. at 2280 (Stevens, J., dissenting).

[FN96]. Id. at 276, Id. at 2271.

[FN97]. Id. at 278, Id. at 2272.

[FN98]. Id. at 278 n. 2, Id. at 2272 n.2 (citing Gundlach, 924 F. Supp. at 692; and Meury v. Eagle-Union Cmty. Sch. Corp., 714 N.E.2d 233, 239 (Ind. Ct. App. 1999)).

[FN99]. Id. (citing Falvo, 233 F.3d at 1210; Brown, 106 F.3d at 1131-32).

[FN100]. Id. at 278, Id. at 2272-73.

[FN101]. Id. at 279, Id. at 2273. For example, FERPA directs the Secretary of Education to enforce FERPA and its spending conditions. See 20 U.S.C. § 1232g(f) (2000). Furthermore, FERPA requires the Secretary of Education to establish an office and review board within the Department of Education for "investigating, processing, reviewing, and adjudicating violations of [FERPA]." 20 U.S.C. § 1232g(g) (2000). An institution will only lose its federal funding if the Secretary of Education determines that the particular institution "is failing to comply substantially with any requirement of [FERPA]" and that such compliance "cannot be secured by voluntary means." 20 U.S.C. § § 1234c(a), 1232g(f) (2000).

[FN102]. Gonzaga, 536 U.S. at 279, 122 S. Ct. at 2273.

[FN103]. Id. at 280, Id. at 2273 (citing Pennhurst, 451 U.S. at 28).

[FN104]. Id. (quoting Pennhurst, 451 U.S. at 17, 28, and n.21).

[FN105]. Id.

[FN106]. 479 U.S. 418 (1987).

[FN107]. Id. at 426, 430.

[FN108]. 496 U.S. 498 (1990).

[FN109]. Gonzaga, 536 U.S. at 280, 122 S. Ct. at 2274 (citing Wilder, 496 U.S. at 522-23).

[FN110]. Id. at 281, Id. at 2274.

[FN111]. 503 U.S. 347 (1992).

[FN112]. Id. at 363.

[FN113]. Id.

[FN114]. Blessing, 520 U.S. at 337.

[FN115]. Id. at 343.

[FN116]. Id. at 343-44.

[FN117]. Id. at 340.

[FN118]. Gonzaga, 536 U.S. at 282, 122 S. Ct. at 2275.

[FN119]. Id.

[FN120]. Id.

[FN121]. Id. (quoting Blessing, 520 U.S. at 340-41).

[FN122]. Id. at 283, Id. at 2275 (citing Blessing, 520 U.S. at 340).

[FN123]. Id.

[FN124]. Id. (quoting 42 U.S.C. § 1983 (2000)).

[FN125]. Id.

[FN126]. Id. (citing Wilder, 496 U.S. at 508 n.9).

[FN127]. Id. (emphasis omitted).

[FN128]. Id. at 283-84, Id. at 2275 (quoting Touche Ross & Co. v. Redington, 442 U.S. 560, 576 (1979)).

[FN129]. Id. at 284, Id. at 2275 (quoting Cannon v. Univ. of Chicago, 441 U.S. 677, 692 n.13 (1979)) (holding that Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972 create such individual rights because the statutes contain "an unmistakable focus on the benefited class"); see also id. at 692 n.13, 691).

[FN130]. Id. at 284, Id. at 2276 (quoting Alexander v. Sandoval, 532 U.S. 275, 286 (2001)) (emphasis omitted).

[FN131]. Id.

[FN132]. Id. at 285, Id. at 2276 (quoting California v. Sierra Club, 451 U.S. 287, 294 (1981)).

[FN133]. Id. (quoting Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 617 (1979)).

[FN134]. Id. at 286, Id. at 2277.

[FN135]. Id. at 287, Id. at 2277.

[FN136]. Id. (citing Alexander v. Sandoval, 532 U.S. 275, 288-89 (2001)).

[FN137]. Id. See also 42 U.S.C. § 2000(d) (2000); 20 U.S.C. § 1681(a) (2000).

[FN138]. Gonzaga, 536 U.S. at 287, 122 S. Ct. at 2277 (quoting Blessing, 520 U.S. at 343 (emphasis omitted)).

[FN139]. 441 U.S. 677 (1979).

[FN140]. Gonzaga, 536 U.S. at 287, 122 S. Ct. at 2277 (quoting Cannon, 441 U.S. at 690-93).

[FN141]. Id. at 288, Id. at 2278. See also 20 U.S.C. § 1232g(b)(1)- (2) (2000).

[FN142]. Gonzaga, 536 U.S. at 288, 122 S. Ct. at 2278 (quoting 20 U.S.C. § 1232g(b)(1)-(2) (2000)).

[FN143]. Id. (quoting Blessing, 520 U.S. at 343).

[FN144]. Id. (quoting 20 U.S.C. § 1234c(a) (2000)).

[FN145]. Id. (citing Blessing, 520 U.S. at 335, 343).

[FN146]. Id. See also 20 U.S.C. § 1232g(d)(2)(A) (2000).

[FN147]. Gonzaga, 536 U.S. at 288 n. 6, 122 S. Ct. at 2278 n.6 (quoting Brief for Respondent at 14, Gonzaga Univ. v. Doe, 536 U.S. 273, 122 S. Ct. 2268 (2002) (No. 01-679)).

[FN148]. Id. See also Thiboutot, 448 U.S. 1; Wright v. City of Roanoke Redev. & Hous. Auth., 479 U.S. 418 (1987); Wilder, 496 U.S. 498.

[FN149]. Gonzaga, 536 U.S. at 289, 122 S. Ct. at 2278. See also 20 U.S.C. § 1232g(f) (2000).

[FN150]. Gonzaga, 536 U.S. at 289, 122 S. Ct. at 2278 (quoting 20 U.S.C. § 1232g(f) (2000)).

[FN151]. Id. (quoting 20 U.S.C. § 1232g(g) (2000)). See also 20 U.S.C. § 1232g(g) (2000).

[FN152]. Id. See also 34 C.F.R. § 99.60(a) and (b) (2002).

[FN153]. Id. at 290, 122 S. Ct. at 2279. See also 34 C.F.R. 99.6- .7(a) (2002). These internal administrative regulations will be thoroughly discussed at infra at notes 207-225 and accompanying text.

[FN154]. Gonzaga, 536 U.S. at 290, 122 S. Ct. at 2279.

[FN155]. See id.

[FN156]. Id. (quoting 120 CONG. REC. 39863 (1974) (joint statement). See also 20 U.S.C. § 1232g(g) (2000); 120 CONG. REC. 39863 (1974) (joint statement).

[FN157]. Gonzaga, 536 U.S. at 290, 122 S. Ct. at 2279.

[FN158]. Id.

[FN159]. Id.

[FN160]. See id.

[FN161]. Id. (Breyer, J., concurring).

[FN162]. See id.; see also Blessing, 520 U.S. at 340-41.

[FN163]. Gonzaga, 536 U.S. at 292, 122 S. Ct. at 2279-80 (Breyer, J., concurring).

[FN164]. Id. at 292, 122 S. Ct. at 2280.

[FN165]. Id.

[FN166]. Id. (quoting 20 U.S.C. § 1232g(a)(4)(A) (2000)). See also Sidbury, supra note 2, at 759 (noting that the meaning of "educational records" has produced "substantial debate, confusion, and litigation").

[FN167]. See Gonzaga, 536 U.S. at 292, 122 S. Ct. at 2280 (Breyer, J., concurring).

[FN168]. Id.

[FN169]. Id.

[FN170]. Id. (Stevens, J., dissenting).

[FN171]. See id.

[FN172]. Id.

[FN173]. Id.

[FN174]. Id. at 293-94, 122 S. Ct. at 2281. Particularly, FERPA provides parents "the right to inspect and review the education[al] records of their children." 20 U.S.C. § 1232g(a)(1)(A) (2000). Additionally, FERPA provides that students or persons applying for admission may waive their "right of access" to certain confidential records. 20 U.S.C. § 1232g(a)(1)(D) (2000). Additionally, two separate provisions specifically refer to "privacy rights." See 20 U.S.C. § § 1232g(a)(2), 1232g(c) (2000). Moreover, another provision of FERPA addresses how "the rights" afforded to parents pass to the student after the student reaches the age of 18. 20 U.S.C. § 1232g(d) (2000). Finally, the title of FERPA, The Family Educational Rights and Privacy Act, is suggestive of rights. See generally 20 U.S.C. § 1232g (2000) (emphasis added).

[FN175]. See Gonzaga, 536 U.S. at 294, 122 S. Ct. at 2281 (Stevens, J., dissenting).

[FN176]. Id. at 296, 122 S. Ct. at 2282 (quoting Suter, 503 U.S. at 357).

[FN177]. Id. at 295, 122 S. Ct. at 2281.

[FN178]. See id.

[FN179]. See id. (quoting Blessing, 520 U.S. at 340-41).

[FN180]. See id.

[FN181]. See id at 2277 (Cannon, 441 U.S. at 690 n.13).

[FN182]. Id., 536 U.S. at 295, 122 S. Ct. at 2282. See also Blessing, 520 U.S. 329; Suter, 503 U.S. 347; Wilder, 496 U.S. 498; and Wright, 479 U.S. 418.

[FN183]. Gonzaga, 536 U.S. at 297, 122 S. Ct. at 2282 (Stevens, J., dissenting).

[FN184]. See id.

[FN185]. Id. at 297, Id. at 2283 (quoting Blessing, 520 U.S. at 341.)

[FN186]. Id. (internal citations omitted).

[FN187]. Id.

[FN188]. Id. at 298, Id. at 2283 (citing Smith v. Robinson, 468 U.S. 992 (1984); Sea Clammers, 453 U.S. 1).

[FN189]. Id. (citing Smith, 468 U.S. at 1009 (internal citations omitted)).

[FN190]. 453 U.S. 1 (1981).

[FN191]. 468 U.S. 992 (1984).

[FN192]. Gonzaga, 536 U.S. at 298, 122 S. Ct. at 2283.

[FN193]. See id.

[FN194]. Id. at 299, 122 S. Ct. at 2283-84. Interestingly, the dissent points out that every federal circuit or state high court expressly deciding the question in the instant case has concluded that FERPA creates federal rights enforceable under § 1983. See Falvo, 233 F.3d at 1210; Tarka, 917 F.2d at 891; Brown, 106 F.3d at 1131. Furthermore, the dissent points out that the majority is only able to cite two cases "disagreeing with the overwhelming majority position of courts reaching the issue." Gonzaga, 536 U.S. at 299 n.7, 122 S. Ct. at 2284 n.6. The majority only points to Gundlach v. Reinstein, 924 F. Supp. 684 (E.D. Pa. 1996), aff'd, 114 F.3d 1172 (3d Cir. 1997); and Meury v. Eagle-Union Committee School Corporation, 714 N.E.2d 233, 239 (Ind. Ct. App. 1999).

[FN195]. Gonzaga, 536 U.S. at 299, 122 S. Ct. at 2284 (Stevens, J., dissenting).

[FN196]. Id.

[FN197]. Id.

[FN198]. Id. at 299-300, Id. at 2284-85.

[FN199]. Id. at 301, Id. at 2285.

[FN200]. Id. at 302-03, Id. at 2285-86.

[FN201]. See supra notes 126-33 and accompanying text.

[FN202]. See Survey, Leading Cases: III. Federal Statutes and Regulations: Family Educational Rights And Privacy Act, 116 HARV. L. REV. 372, 381-82 (2002) (proposing a sufficient inquiry under either right-of-action analysis that asks whether "the applicable statutory provision entitle[s] a plaintiff to the remedy he or she seeks?") [hereinafter Gonzaga Survey].

[FN203]. Gonzaga, 536 U.S. at 282, 122 S. Ct. at 2275.

[FN204]. See id. See also Gonzaga Survey, supra note 202, at 378.

[FN205]. See Gonzaga Survey, supra note 202, at 378.

[FN206]. See Gonzaga, 536 U.S. at 300-01, 122 S. Ct. at 2284-85 (Stevens, J., dissenting).

[FN207]. See infra note 210 and accompanying text.

[FN208]. Gonzaga Survey, supra note 202, at 381.

[FN209]. As a further result of Gonzaga, some might conclude that Gonzaga will substantially reduce (or eliminate) the number of lawsuits brought against colleges and universities for disclosing a student's personal information without consent. In fact, during oral arguments, the Court alluded to the issue of whether a finding that FERPA may be enforced under § 1983 would open the floodgates of litigation. See Oral Argument Transcript at 42- 43, Gonzaga Univ. v. Doe, 536 U.S 273 (Apr. 24, 2002) (No. 01-679), available at http://www.supremecourtus.gov/oral_arguments/argument_ transcripts.html (last visited Feb. 21, 2002). As a practical matter, even after every federal appellate court to confront the issue held that FERPA is enforceable under § 1983, relatively few individuals sought to enforce FERPA under § 1983. See Falvo, 233 F.3d at 1210; Tarka, 917 F.2d at 891; Brown, 106 F.3d at 1131; see also supra note 44 and accompanying text.

[FN210]. See 20 U.S.C. § 1232g(b)(1) (2000).

[FN211]. 20 U.S.C. § § 1234c(a), 1232g(f).

[FN212]. See Doe v. Gonzaga Univ., 24 P.3d 390 (Wash. 2001).

[FN213]. See Restatement (Second) of Torts § 652B. In most jurisdictions, invasion of privacy encompasses four distinct torts: (1) intrusion upon the seclusion of another; (2) public disclosure of private facts; (3) false light in the public eye; and (4) misappropriation of a plaintiff's name or likeness. W. Page Keeton, Prosser and Keeton on the Law of Torts § 117, at 851-65 (5th ed. 1993). Particularly, the common law invasion of privacy torts of intrusion upon the seclusion of another and public disclosure of private facts about the plaintiff appear to be most applicable to cases where an institution discloses a student's records without authorization. See id.

[FN214]. See, e.g., Doe v. Gonzaga Univ., 24 P.3d 390 (Wash. 2001).

[FN215]. See generally 20 U.S.C. § 1232g (2000).

[FN216]. See, e.g., Falvo, 233 F.3d at 1211-12.

[FN217]. See 34 C.F.R. § 99.60-.7(a) (2002).

[FN218]. 20 U.S.C. § 1232g(f) (2000).

[FN219]. 20 U.S.C. § 1232g(g) (2000).

[FN220]. 34 C.F.R. § 99.60(c) (2002).

[FN221]. 34 C.F.R. § 99.63 (2002).

[FN222]. 34 C.F.R. § 99.64(c) (2002).

[FN223]. 34 C.F.R. § 99.64(a) (2002).

[FN224]. 34 C.F.R. § 99.64(b) (2002).

[FN225]. 34 C.F.R. § 99.65(a) (2002).

[FN226]. 34 C.F.R. § 99.65(a)(2) (2002).

[FN227]. 34 C.F.R. § 99.66(b) (2002).

[FN228]. 34 C.F.R. § 99.66(c)(1) (2002).

[FN229]. 34 C.F.R. § 99.66(c)(2) (2002).

[FN230]. 34 C.F.R. § 99.67(a) (2002).

[FN231]. 34 C.F.R. § 99.64(a) (2002). Furthermore, complainants must file a complaint, if at all, within 180 days after the alleged violation. 34 C.F.R. § 99.64(c) (2002). It is axiomatic that this 180-day "limitations period" is a substantially shorter time period than a limitation of actions period available to litigants in state and federal court.

[FN232]. See id.

[FN233]. 34 C.F.R. § 99.67(a) (2002).

[FN234]. See 120 CONG. REC. 39863 (1974) (joint statement).

[FN235]. Gonzaga, 536 U.S. at 297, 122 S. Ct. at 2283 (quoting Blessing, 520 U.S. at 341). Particularly, the FPCO procedures should provide for a mandatory review of

complaints and a mechanism for appeal or judicial review.

[FN236]. See id. at 290, See id. at 2279.

[FN237]. See supra notes 150-60 and accompanying text. Because Congress intended a centralized administrative agency to investigate violations of FERPA, the most desirable course of action, if any, lies in rethinking the regulations governing the FPCO. As previously noted, these amendments would ideally provide for mandatory and more stringent investigations by the Secretary of Education, as well as a mechanism for appeal or judicial review.

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