2015

The Long-Term Implications of Gonzaga v. Doe

Bradford Mank
University of Cincinnati College of Law, brad.mank@uc.edu

The Long-Term Implications of *Gonzaga v. Doe*

By Bradford C. Mank

State and local governments are often responsible for disbursing federal medical, educational, and welfare benefits. What happens when they deny or revoke them unfairly? Some recipients have used 42 U.S.C. § 1983 as a way to enforce the underlying statutes. The Supreme Court decision in *Gonzaga University v. Doe,* 536 U.S. 273 (2002), made this more difficult. In doing so, the Court adopted stringent rules for the use of § 1983 to enforce any federal laws, including the nation's civil rights laws.

In *Gonzaga*, John Doe sued his university for disclosing embarrassing disciplinary records to unauthorized third parties in violation of the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g. He sought to enforce FERPA through § 1983. The Supreme Court rejected the suit, holding that FERPA did not establish an individual right enforceable through § 1983. The majority opinion adopted a rule that spending legislation that provides federal funding to various state actors does not ordinarily create individual enforceable rights under § 1983 unless Congress demonstrates through "clear and unambiguous terms" that it intends to provide individual rights against a state actor that accepts federal funding." While previous cases had distinguished between implied-right-of-action cases, where evidence of congressional intent to provide a private remedy is required, and § 1983 cases, where a remedy is generally presumed, the majority essentially treated these two types of statutes as similarly requiring evidence of congressional intent. In doing so, the majority applied the stricter standard of implied right of action cases to § 1983, thus weakening the power of § 1983.

Gonzaga is better understood in light of prior decisions defining implied rights of action and § 1983 suits. From 1964 until the late 1970s, the Supreme Court and lower courts found implied private causes of action under several statutes. However, more recent Supreme Court decisions have made it more difficult for courts to infer that a statute establishes an implied private right by requiring significant evidence of congressional intent to create a private right of action. For instance, the Court in *Alexander v. Sandoval*, 532 U.S. 275 (2001) held that there is no private right of action to enforce disparate impact regulations promulgated under § 602 of Title VI of the 1964 Civil Rights Act because neither § 602's language nor subsequent amendments to Title VI demonstrated congressional intent to establish a private cause of action to enforce § 602. Because the Court increasingly rejected implied private rights of action, plaintiffs instead turned to § 1983 suits to enforce statutory rights that do not contain explicit remedies.

Before 1980, the Supreme Court had only clearly allowed § 1983 suits in cases alleging violations of constitutional rights. During the 1960s and 1970s, Congress enacted statutes establishing federal grant-in-aid programs to states and also used these state programs to provide funds to individual welfare beneficiaries. In 1980, the Supreme Court in *Maine v. Thiboutot*, 448 U.S. 1 (1980), held that the plain meaning of the term "and laws" in § 1983 referred to federal statutory rights and allowed private individuals who were beneficiaries of those rights to bring suit. However, judges concerned with protecting states' rights against what they perceived as intrusive federal suits sought to limit *Thiboutot*'s scope. Additionally, some judges may have been concerned that § 1983 suits allowed plaintiffs to evade the Court's increasingly narrow view of implied rights of action. Until the *Gonzaga* decision, the Court's decisions wavered between broad and narrow readings of *Thiboutot*.

The *Gonzaga* decision adopted a restrictive approach to use of § 1983 suits to require states to provide welfare benefits and other rights to individuals pursuant to federal funding statutes. The Court emphasized that § 1983 suits may only enforce clear statutory rights and may not be used to enforce vaguer benefits or interests, even if some earlier Court decisions had suggested otherwise. The majority argued that the test for determining whether rights are enforceable in § 1983 suits is whether there is clear and unambiguous evidence of a right—an inquiry similar to the one in private rights suits but without the requirement for evidence of congressional intent to create a private remedy. The Court stated that Congress must clearly establish its intent to create individual rights if it wishes to alter the balance between states and the federal government. The assumption of deference to state and local officials in the absence of

clear congressional intent to confer individual rights arguably shifts the burden of showing whether a remedy or cause of action exists from the defendant in § 1983 suits to plaintiffs.

On the merits, the Court concluded that Congress, in enacting FERPA, only intended to establish aggregate duties that educational institutions owe to the Secretary of Education. Any provisions in the statute for administrative review of individual complaints reinforced the Court's view that Congress wanted the Secretary of Education to resolve any institutional failures, and not the courts through § 1983 suits.

In dissent, Justice Stevens, joined by Justice Ginsburg, argued that the majority's requirement of clear textual evidence that Congress intended to establish an individual right inappropriately adopted the test used in implied-right-of-action cases, namely, whether Congress intended to establish a private remedy. He contended that the majority had acknowledged that this requirement was unnecessary in § 1983 cases because that statute allows private enforcement of any statute creating a distinct federal right, even if there is no private right of action under the substantive statute. Although the majority opinion asserted that it was not importing the entire implied-right-of-action framework into the § 1983 arena, Justice Stevens argued that the majority's approach effectively did just that and undermined the "presumptive enforceability of rights under § 1983."

Despite not explicitly changing the existing three-part enforcement test for § 1983, the *Gonzaga* decision imposes a significant burden of proof on plaintiffs by requiring unambiguous and explicit evidence that Congress intended to create an individual right benefiting a class including the plaintiff. Although proposing to determine only whether Congress intended to create an individual right, the majority in fact blurred the distinction between rights and remedies by improperly considering in a § 1983 case whether Congress intended to create a cause of action. Chief Justice Rehnquist's majority opinion in *Gonzaga* arguably weakened civil liberties by undermining the principle that federal statutory rights are presumptively enforceable through § 1983's express provision for enforcement of statutory rights. In exceptional cases, a defendant can rebut the presumption that all federal rights are enforceable through § 1983. However, a defendant has the burden of demonstrating that Congress has specifically foreclosed enforcement under § 1983 or that a statute provides comprehensive remedies incompatible with § 1983. By blurring the line between rights and remedies, the majority effectively shifted the burden of proof from the defendant to the plaintiff to demonstrate that § 1983 may be used to enforce and provide a remedy for a federal statutory right.

The *Gonzaga* case claims to clarify when federal statutory rights may be enforced by § 1983. However, the majority opinion actually did not clarify how courts should determine what is "clear" and "unambiguous" evidence of congressional intent to establish an individual right. It is unclear whether the majority's test requires a textualist approach or allows consideration of legislative history. Chief Justice Rehnquist's majority opinion in *Gonzaga* largely focused on the "text and structure" of the FERPA provisions directly at issue, although the Court briefly considered one aspect of the statute's legislative history. Despite agreeing with the *Gonzaga* majority that whether private individuals may enforce a federal statute through § 1983 is "a question of congressional intent," Justice Breyer, with whom Justice Souter joined, concurred in the judgment but disagreed with the "majority's presumption that a right is conferred only if set forth 'unambiguously' in the statute's 'text and structure.'" The majority opinion never responded to Justice Breyer's claim that its approach was textualist. The *Gonzaga* decision provides little guidance on which types of evidence may be considered in determining congressional intent to confer an individual right to sue.

The strict approach to demonstrating congressional intent in *Gonzaga* would be less harmful to plaintiffs if they may introduce evidence about a statute's legislative history because that history often contains important evidence regarding congressional intent or purpose. Additionally, as is demonstrated by the Court's decision in *Wright v. City of Roanoke Redevelopment & Housing Authority*, 479 U.S. 418, 430–32 (1987), courts should consider agency regulations that define the scope of a right as long as there is sufficient evidence that Congress intended to establish an individual right in a statute. By rejecting a strict textualist interpretation of congressional intent, courts can partially protect the enforcement of statutory rights under § 1983 despite the *Gonzaga* decision's overly restrictive test.

Despite *Gonzaga*'s rigorous "clear and unambiguous terms" test, lower courts have divided over whether § 1983 suits may be brought by individual beneficiaries under several federal statutes addressing a wide range of issues. Lower courts have considered claims by Medicaid patients, foster care children in state care under the Adoption Assistance and Child Welfare Act, nursing home residents under the Nursing Home Reform Amendments, patients under the Protection and Advocacy for Individuals with Mental Illnesses Act, and foster parents under the Child Welfare Act. On the other hand, lower court judges who are not sympathetic to using § 1983 suits to enforce possible individual welfare rights in federal spending statutes against states can readily rely on the strict test in the *Gonzaga* decision to reject such suits. There is not enough space in this article to discuss each federal spending statute potentially enforceable through § 1983 suits. However, lower courts

continued on page 10

The Supreme Court unanimously reversed. Justice Alito wrote for the Court and held that there was no Fourth Amendment violation. The Court said that the driver's conduct posed a "grave public safety risk," and the police were justified in shooting at the car to stop it. The Court said, "the officers need not stop shooting until the threat has ended." Moreover, the Court said that even if there were a Fourth Amendment violation, the officers were protected by qualified immunity because the law was not clearly established that the conduct violated the Fourth Amendment.

This is a disturbing holding. The Supreme Court now has said that whenever there is a high-speed chase that officers perceive could injure others—and that would seem to be true of virtually all high-speed chases—the police can shoot at the vehicle and keep shooting until it stops. This car was stopped for having only one working headlight. If the driver refused to stop, why not just let the car go and track the driver down later? Why should death be the punishment for making the extremely poor choice to begin a high-speed chase?

Finally, in *Wood v. Moss*, 134 S. Ct. 2056 (2014), the Court found that Secret Service agents were protected by qualified immunity when they engaged in viewpoint discrimination with regard to speakers. In Oregon, Secret Service agents allowed supporters of President George W. Bush to be closer to him and pushed his opponents further away. The law under the First Amendment is clear that the government cannot discriminate among speakers based on their views unless strict scrutiny is met.

Nonetheless, the Court, in a unanimous decision with the majority opinion written by Justice Ginsburg, found that the Secret Service agents were protected by qualified immunity because there were no cases on point concerning when Secret Service agents violate the First Amendment. But why must there be cases that specific when the law is clearly established that viewpoint discrimination violates the First Amendment?

All of these cases were unanimous. All found qualified immunity because of the absence of a case on point. Together, they show a Court that is very protective of government officials who are sued for money damages and that has made it very difficult for victims of constitutional violations to recover.

CONCLUSION

Decisions about absolute and qualified immunity receive little media attention. But these are enormously important doctrines that keep injured individuals from recovering. The promise of *Marbury v. Madison*—that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury"—is rendered empty when absolute or qualified immunity precludes any remedy. The Roberts Court has expanded both absolute and qualified immunity and thus has undermined government accountability.

Erwin Chemerinsky is dean, Distinguished Professor of Law, and the Raymond Pryke Professor of First Amendment Law at University of California, Irvine School of Law.

Introduction, from page 4

difficult to protect children than adults. As Fatima Goss Graves and Adaku Onyeka-Crawford explain in their article, employers are responsible if supervisors sexually harass employees. They are responsible if co-workers harass each other if the employer "knew or should have known" about the sexual harassment. Employers can't put their heads in the sand to avoid liability. Yet, that is exactly what schools can do under Title IX after *Gebser* and *Davis*.

Under the new test, a school is not responsible for sexual harassment or even assault against children unless the children provide the right authority figure with notice of the specific harassment and the school responds with deliberate indifference, a high standard that lower courts are quick to find does not exist even in the most egregious situations. Students must also explain how enduring the harassment denied them equal access to education. Why would the Court make it more difficult for children to demand protection and accountability in schools than adults receive in the workplace? Would the outcome have been different if more women had heard the cases?

Many commentators have written about how the Court has revived Jim Crow and even pre–Civil War legal theories to continue its assault on civil rights. But Yolanda Rondon's article explains how the Court has revived *Korematsu* in all but name after 9/11.

American jurisprudence has historically expanded civil rights and access to justice, but the articles in this issue show that we are sliding backward. Forces on this Court are engaged in a steady assault on our rights and remedies. They are limiting our access to the courts and thus to justice itself. The assault continues outside the headlines. It continues in the cases we aren't watching . . . in the cases lurking in the shadows.

Kristen Galles is a civil rights lawyer in Alexandria, Virginia. She focuses her practice on cases concerning discrimination in education and employment and is a member of the IRR Council.

The Supreme Court unanimously reversed. Justice Alito wrote for the Court and held that there was no Fourth Amendment violation. The Court said that the driver's conduct posed a "grave public safety risk," and the police were justified in shooting at the car to stop it. The Court said, "the officers need not stop shooting until the threat has ended." Moreover, the Court said that even if there were a Fourth Amendment violation, the officers were protected by qualified immunity because the law was not clearly established that the conduct violated the Fourth Amendment.

This is a disturbing holding. The Supreme Court now has said that whenever there is a high-speed chase that officers perceive could injure others—and that would seem to be true of virtually all high-speed chases—the police can shoot at the vehicle and keep shooting until it stops. This car was stopped for having only one working headlight. If the driver refused to stop, why not just let the car go and track the driver down later? Why should death be the punishment for making the extremely poor choice to begin a high-speed chase?

Finally, in *Wood v. Moss*, 134 S. Ct. 2056 (2014), the Court found that Secret Service agents were protected by qualified immunity when they engaged in viewpoint discrimination with regard to speakers. In Oregon, Secret Service agents allowed supporters of President George W. Bush to be closer to him and pushed his opponents further away. The law under the First Amendment is clear that the government cannot discriminate among speakers based on their views unless strict scrutiny is met.

Nonetheless, the Court, in a unanimous decision with the majority opinion written by Justice Ginsburg, found that the Secret Service agents were protected by qualified immunity because there were no cases on point concerning when Secret Service agents violate the First Amendment. But why must there be cases that specific when the law is clearly established that viewpoint discrimination violates the First Amendment?

All of these cases were unanimous. All found qualified immunity because of the absence of a case on point. Together, they show a Court that is very protective of government officials who are sued for money damages and that has made it very difficult for victims of constitutional violations to recover.

CONCLUSION

Decisions about absolute and qualified immunity receive little media attention. But these are enormously important doctrines that keep injured individuals from recovering. The promise of *Marbury v. Madison*—that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury"—is rendered empty when absolute or qualified immunity precludes any remedy. The Roberts Court has expanded both absolute and qualified immunity and thus has undermined government accountability.

Erwin Chemerinsky is dean, Distinguished Professor of Law, and the Raymond Pryke Professor of First Amendment Law at University of California, Irvine School of Law.

Introduction, from page 4

difficult to protect children than adults. As Fatima Goss Graves and Adaku Onyeka-Crawford explain in their article, employers are responsible if supervisors sexually harass employees. They are responsible if co-workers harass each other if the employer "knew or should have known" about the sexual harassment. Employers can't put their heads in the sand to avoid liability. Yet, that is exactly what schools can do under Title IX after *Gebser* and *Davis*.

Under the new test, a school is not responsible for sexual harassment or even assault against children unless the children provide the right authority figure with notice of the specific harassment and the school responds with deliberate indifference, a high standard that lower courts are quick to find does not exist even in the most egregious situations. Students must also explain how enduring the harassment denied them equal access to education. Why would the Court make it more difficult for children to demand protection and accountability in schools than adults receive in the workplace? Would the outcome have been different if more women had heard the cases?

Many commentators have written about how the Court has revived Jim Crow and even pre–Civil War legal theories to continue its assault on civil rights. But Yolanda Rondon's article explains how the Court has revived *Korematsu* in all but name after 9/11.

American jurisprudence has historically expanded civil rights and access to justice, but the articles in this issue show that we are sliding backward. Forces on this Court are engaged in a steady assault on our rights and remedies. They are limiting our access to the courts and thus to justice itself. The assault continues outside the headlines. It continues in the cases we aren't watching . . . in the cases lurking in the shadows.

Kristen Galles is a civil rights lawyer in Alexandria, Virginia. She focuses her practice on cases concerning discrimination in education and employment and is a member of the IRR Council.

> democracy, these are important cases, and the judiciary has a valid and vital role in our society's response. The importance of the issues raised in this appeal should weigh heavily in favor of our consideration of them on the merits.

Id. at 1172–73 (Holloway, J., dissenting). Indeed, Justices Ginsburg and Sotomayor dissented from the Supreme Court's denial of certiorari in this case on the ground that the defendants had committed a clear violation of the First Amendment. *Weise v. Casper*, 562 U.S. 976, 976–77 (2010) (Ginsburg, J., dissenting from denial of certiorari).

In addition to qualified immunity's broad impact on the development of constitutional law, it has introduced a high level of complexity into civil rights litigation. For instance, there is a great deal of confusion about procedural standards governing such claims, including questions about which party bears the burden of persuasion on disputed facts on the immunity claim. Teressa E. Ravenell, *Hammering in Screws: Why the Court Should Look Beyond Summary Judgment When Resolving § 1983 Qualified Immunity Disputes*, 52 Vill. L. Rev. 135, 136 (2007). Moreover, because of the factual complexity associated with most constitutional tort suits, litigation costs may actually be *exacerbated* by the proliferation of qualified immunity claims. Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law*, 47 Am. U. L. Rev. 1, 101 (1997).

A final critique of qualified immunity is one that is difficult to prove empirically. Because of the many costs associated with this defense that I have identified above, plaintiffs and their attorneys may find that the game is not worth the candle. To prevail on a constitutional tort claim, which may not necessarily involve a large monetary recovery, the plaintiff must navigate the difficult path that the qualified immunity doctrine has hewn. They may be tied down for years litigating qualified immunity and defending multiple interlocutory appeals should they initially prevail on the qualified immunity claim in the trial court. Even with the incentive of attorney fee shifting under 42 U.S.C. § 1988, many plaintiffs may simply be discouraged from ever filing a constitutional tort claim because they anticipate that they will be drawn into a protracted and time-consuming dispute. The suppression of potentially meritorious civil rights claims is a cost of qualified immunity that impedes access to justice in profound and troubling ways.

The author would like to thank Ellen Giarratana, J.D. candidate, University of Denver Sturm College of Law, for helpful research assistance.

Alan K. Chen is the William M. Beaney Memorial Research Chair and professor of law at the University of Denver Sturm College of Law, where he teaches courses in constitutional law, federal courts, and public interest law. An experienced civil rights litigator and former ACLU staff attorney, Professor Chen continues to do pro bono work in constitutional rights cases.

Gonzaga v. Doe, from page 3

have disagreed, for example, about whether *Gonzaga* suggests individual nursing home residents have enforceable rights under the Nursing Home Reform Amendments (NHRA), 42 U.S.C. § 1396r et seq. *Compare Grammar v. John J. Kane Regional Centers*, 570 F.3d 520, 529–32 (3d Cir. 2009) (allowing enforcement of NHRA through § 1983 using *Gonzaga*'s test) (2–1 decision with one judge dissenting), *with Schwerdtfeger v. Alden Long Grove Rehabilitation & Health Care Center, Inc.*, 2014 WL 1884471, at *5–6 & n.3 (N.D. Ill. May 12, 2014) (Durkin, J.) (denying enforcement of NHRA through § 1983 and arguing that *Grammar* is inconsistent with *Gonzaga*). Courts applying *Gonzaga*'s test have recognized that a court must analyze each statute's language to determine if Congress intended to establish individual rights enforceable through § 1983, and that no absolute rule bars the use of § 1983 suits to enforce such rights in spending power statutes. *See, e.g., Indiana Protection & Advocacy Services v. Indiana Family & Social Services Administration*, 603 F.3d 365, 378 (7th Cir. 2010) (en banc).

Thus, *Gonzaga's* test made it more difficult, but not impossible, for lower courts to hold that § 1983 suits allow individual beneficiaries to sue various state or local governments under various federal spending statutes. It is unlikely that the current Supreme Court will modify the strict *Gonzaga* framework for using § 1983 suits to enforce individual beneficiary rights. However, there is enough play in *Gonzaga*'s approach to allow lower courts to interpret some statutes in favor of § 1983 plaintiff-beneficiaries. Any significant revision in the *Gonzaga* framework will require a changed Supreme Court membership that is more sympathetic to § 1983 suits.

Bradford C. Mank, James B. Helmer Jr. Professor of Law, University of Cincinnati College of Law, teaches and writes about environmental and administrative law. He has discussed Gonzaga *issues in greater depth in 39* Houston Law Review *1417 (2003) and 32* Florida State Law Review *843 (2005).*

> democracy, these are important cases, and the judiciary has a valid and vital role in our society's response. The importance of the issues raised in this appeal should weigh heavily in favor of our consideration of them on the merits.

Id. at 1172–73 (Holloway, J., dissenting). Indeed, Justices Ginsburg and Sotomayor dissented from the Supreme Court's denial of certiorari in this case on the ground that the defendants had committed a clear violation of the First Amendment. *Weise v. Casper*, 562 U.S. 976, 976–77 (2010) (Ginsburg, J., dissenting from denial of certiorari).

In addition to qualified immunity's broad impact on the development of constitutional law, it has introduced a high level of complexity into civil rights litigation. For instance, there is a great deal of confusion about procedural standards governing such claims, including questions about which party bears the burden of persuasion on disputed facts on the immunity claim. Teressa E. Ravenell, *Hammering in Screws: Why the Court Should Look Beyond Summary Judgment When Resolving § 1983 Qualified Immunity Disputes*, 52 Vill. L. Rev. 135, 136 (2007). Moreover, because of the factual complexity associated with most constitutional tort suits, litigation costs may actually be *exacerbated* by the proliferation of qualified immunity claims. Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law*, 47 Am. U. L. Rev. 1, 101 (1997).

A final critique of qualified immunity is one that is difficult to prove empirically. Because of the many costs associated with this defense that I have identified above, plaintiffs and their attorneys may find that the game is not worth the candle. To prevail on a constitutional tort claim, which may not necessarily involve a large monetary recovery, the plaintiff must navigate the difficult path that the qualified immunity doctrine has hewn. They may be tied down for years litigating qualified immunity and defending multiple interlocutory appeals should they initially prevail on the qualified immunity claim in the trial court. Even with the incentive of attorney fee shifting under 42 U.S.C. § 1988, many plaintiffs may simply be discouraged from ever filing a constitutional tort claim because they anticipate that they will be drawn into a protracted and time-consuming dispute. The suppression of potentially meritorious civil rights claims is a cost of qualified immunity that impedes access to justice in profound and troubling ways.

The author would like to thank Ellen Giarratana, J.D. candidate, University of Denver Sturm College of Law, for helpful research assistance.

Alan K. Chen is the William M. Beaney Memorial Research Chair and professor of law at the University of Denver Sturm College of Law, where he teaches courses in constitutional law, federal courts, and public interest law. An experienced civil rights litigator and former ACLU staff attorney, Professor Chen continues to do pro bono work in constitutional rights cases.

Gonzaga v. Doe, from page 3

have disagreed, for example, about whether *Gonzaga* suggests individual nursing home residents have enforceable rights under the Nursing Home Reform Amendments (NHRA), 42 U.S.C. § 1396r et seq. *Compare Grammar v. John J. Kane Regional Centers*, 570 F.3d 520, 529–32 (3d Cir. 2009) (allowing enforcement of NHRA through § 1983 using *Gonzaga*'s test) (2–1 decision with one judge dissenting), *with Schwerdtfeger v. Alden Long Grove Rehabilitation & Health Care Center, Inc.*, 2014 WL 1884471, at *5–6 & n.3 (N.D. Ill. May 12, 2014) (Durkin, J.) (denying enforcement of NHRA through § 1983 and arguing that *Grammar* is inconsistent with *Gonzaga*). Courts applying *Gonzaga*'s test have recognized that a court must analyze each statute's language to determine if Congress intended to establish individual rights enforceable through § 1983, and that no absolute rule bars the use of § 1983 suits to enforce such rights in spending power statutes. *See, e.g., Indiana Protection & Advocacy Services v. Indiana Family & Social Services Administration*, 603 F.3d 365, 378 (7th Cir. 2010) (en banc).

Thus, *Gonzaga's* test made it more difficult, but not impossible, for lower courts to hold that § 1983 suits allow individual beneficiaries to sue various state or local governments under various federal spending statutes. It is unlikely that the current Supreme Court will modify the strict *Gonzaga* framework for using § 1983 suits to enforce individual beneficiary rights. However, there is enough play in *Gonzaga*'s approach to allow lower courts to interpret some statutes in favor of § 1983 plaintiff-beneficiaries. Any significant revision in the *Gonzaga* framework will require a changed Supreme Court membership that is more sympathetic to § 1983 suits.

Bradford C. Mank, James B. Helmer Jr. Professor of Law, University of Cincinnati College of Law, teaches and writes about environmental and administrative law. He has discussed Gonzaga *issues in greater depth in 39* Houston Law Review *1417 (2003) and 32* Florida State Law Review *843 (2005).*