

COMMENTS

ENFORCEABLE RIGHTS, NO CHILD LEFT BEHIND, AND POLITICAL PATRIOTISM: A CASE FOR OPEN-MINDED SECTION 1983 JURISPRUDENCE

SARAH D. GREENBERGER[†]

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[†] B.A. 1996, Williams College; J.D. Candidate 2005, University of Pennsylvania. I am grateful to my parents, Marcia and Michael, whose example inspires and whose encouragement and assistance in this effort—as in all my endeavors—has been invaluable. Thanks to Professor Frank Goodman whose insight greatly improved this Comment; to Professor Edward Rubin, Len Rieser, and William Taylor on whose advice I relied; and to Patrick Davidson, William Burgess, and the other editors of the *University of Pennsylvania Law Review*, whose editing and eye for detail more than made up for my own deficits in those areas. All errors are my own.

INTRODUCTION

There exists yet another patriotism more rational than [fervent beliefs resting on an ancient order]: it is less generous, less passionate perhaps but more creative and lasting; it springs from education, develops with the help of laws, increases with the exercise of rights and in the end blends in a sense with personal interest.

-Alexis de Tocqueville¹

An educated populace creates an environment for innovation, accelerated economic growth, a more responsible electorate that institutes wiser policy,² and, as Alexis de Tocqueville noted, a wellspring for a more creative and lasting patriotism.³ Education's centrality to the success of individuals and society is beyond dispute.⁴ The longer children stay in school, the more likely they are to earn a decent wage and be independent of the state, reflecting a "growing economic premium on education and skills."⁵ Nor can the undereducated exert as much influence on the political dialogue in this democratic society, undermining the uniquely compelling ideal that "government of the people by the people for the people"⁶ can flourish.

If education is the wellspring of the most stable patriotism, then there is one more reason our failed public education system has become a national priority. The failure of public education is more extreme for poor⁷ and minority children.⁸ The 2000 National Assessment of Educational Progress (NAEP) for fourth graders found 63% of African Americans, 58% of Hispanic Americans, and 47% of all

¹ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 275 (Gerald E. Bevan trans., Penguin Books 2003) (1835).

² See, e.g., FRANK LEVY, *THE NEW DOLLARS AND DREAMS: AMERICAN INCOMES AND ECONOMIC CHANGE* 4, 190, 191, 197 (1998) (arguing that equalizing institutions, such as education, are necessary to maintain popular democratic support for pro-growth economic policies).

³ DE TOCQUEVILLE, *supra* note 1, at 275.

⁴ See, e.g., Charles S. Benson, *Economics of Education: The U.S. Experience*, in *HANDBOOK OF RESEARCH ON EDUCATIONAL ADMINISTRATION* 355-72 (Norman J. Boyan ed., 1988) (analyzing the economic benefits of education).

⁵ LEVY, *supra* note 2, at 62, 125.

⁶ Abraham Lincoln, Gettysburg Address (Nov. 19, 1863) (transcript of the "Nicoll Draft" available at <http://www.loc.gov/exhibits/gadd/gatr1.html>).

⁷ NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., *NCES 97-981, THE SOCIAL CONTEXT OF EDUCATION 1* (July 1997) [hereinafter *SOCIAL CONTEXT*], available at <http://nces.ed.gov/pubs97/97981.pdf>.

⁸ NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., *NCES 2001-061, EDUCATIONAL ACHIEVEMENT AND BLACK-WHITE INEQUALITY 1* (July 2001) [hereinafter *BLACK-WHITE INEQUALITY*], available at <http://nces.ed.gov/pubs2001/2001061.pdf>.

children in urban schools reading below a basic level.⁹ The largest and most ambitious federal effort to address the ramifications of inadequate public education is Title I of the Elementary and Secondary Education Act of 1965 (ESEA).¹⁰ Initially structured without enforcement mechanisms and unsuccessful in achieving educational equity,¹¹ Congress has repeatedly revised Title I, introducing a system of standards and accountability that formed the basis of the 2001 version of the Act, entitled No Child Left Behind (NCLB).¹² NCLB included stricter testing requirements, increased accountability to parents, and required for the first time that *all children* reach proficiency in state educational standards.¹³

This Comment examines the rights parents and other aggrieved parties have or should have under NCLB to hold a state accountable if its programs do not meet the requirements of the Act. This Comment contends that without private enforcement under section 1983,¹⁴ the promise of NCLB will go unfulfilled. Although under NCLB the Secretary of Education may enforce state compliance with its obligations under the Act through his power to terminate state funds,¹⁵ Title I, unlike many Spending Clause statutes, does not provide an administrative process or an explicit private cause of action for individuals to

⁹ NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T. OF EDUC., NCES 2001-499, THE NATION'S REPORT CARD: FOURTH GRADE READING 2000, at 30-31, 38 (Apr. 2001) [hereinafter NATION'S REPORT CARD], available at <http://nces.ed.gov/nationsreportcard/pdf/main2000/2001499.pdf>.

¹⁰ Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (1965) (current version at 20 U.S.C. §§ 6301-8962 (2000 & Supp. I 2001)). Title I is a Spending Clause program, providing funds to local educational agencies in return for state programs that redress deficits in the education of poor children.

¹¹ See Peter Zamora, Note, *In Recognition of the Special Needs of Low-Income Families?: Ideological Discord and Its Effects upon Title I of the Elementary and Secondary Education Acts of 1965 and 2001*, 10 GEO. J. ON POVERTY L. & POL'Y 413, 424 (2003) (stating that Title I's initial requirements for programs were vague and lacked an evaluation component and an effective enforcement mechanism). For further indications of failure, see *infra* note 27.

¹² No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified at 20 U.S.C. §§ 6301-7941 (Supp. I 2001)).

¹³ 20 U.S.C. § 6301 (Supp. I 2001).

¹⁴ 42 U.S.C. § 1983 (2000).

¹⁵ 20 U.S.C. § 6311(g) (Supp. I 2001). Fund termination is a dramatic step that is rarely taken under any Spending Clause program. Lisa E. Key, *Private Enforcement of Federal Funding Conditions Under § 1983: The Supreme Court's Failure to Adhere to the Doctrine of Separation of Powers*, 29 U.C. DAVIS L. REV. 283, 292-93 (1996). In the case of Title I there is concern, however, that the continuing achievement gap is due partially to a lack of federal enforcement of Title I and the states' belief that fund termination is an empty threat. Zamora, *supra* note 11, at 431-32.

bring claims and enforce compliance with state or local obligations. Moreover, federal funding termination is a very limited remedy. Should intended beneficiaries be able to surmount the absence of an individual administrative enforcement process, they would have to ask the Secretary of Education to financially cripple the program they are trying to improve, an unsatisfactory and unlikely avenue of relief.

Absent express statutory avenues for individual enforcement, an implied cause of action or an implied right of action under section 1983 become the only possible tools for private enforcement of state obligations under the Act. In recent opinions, the Supreme Court, sensitive to separation of powers concerns, has limited the ability of individuals to bring enforcement actions by an implied cause of action in the absence of express rights-creating language indicating congressional intent to create remedies.¹⁶ Moreover, in 2002 the Court issued *Gonzaga University v. Doe*, in which it cited to its implied cause of action analysis to determine the existence of a substantive right to be enforced under section 1983.¹⁷ This reference has caused some to question whether this remaining avenue for the vindication of federal statutory rights has also been narrowed.¹⁸

This Comment argues that *Gonzaga*'s references to implied cause of action analysis should not be read as conflating the two avenues of rights enforcement, or as justifying the notion that there are no enforceable rights in NCLB. To use as narrow an approach to imply rights as to imply remedies would defy clear congressional intent both in creating section 1983 as a separate cause of action for enforcing substantive rights and in passing NCLB to solve a problem of national concern. This Comment contends that a better interpretation of *Gonzaga* would focus on congressional intent to create rights—as in implied cause of action cases—but would look to a wider category of indicia to show intent. While the Court has made clear that it will no longer imply causes of action simply to further statutory purpose,¹⁹ it

¹⁶ The Court found in *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001), that the power to create remedies is a legislative one and that judges violate separation of powers principles and infringe on congressional lawmaking authority when they imply private rights of action to enforce statutes. The Court demanded “rights-creating” language not solely as evidence to create rights, since in this case the right against disparate impact discrimination was assumed, but as evidence of intent to create a remedy. *Id.* at 286.

¹⁷ 536 U.S. 273, 279-87 (2002).

¹⁸ See *infra* text accompanying notes 73-80 (examining the evolution of this doctrine and questioning its current status).

¹⁹ *Sandoval*, 532 U.S. at 287.

can and should include statutory purpose and scheme as indicators of congressional intent to create rights.²⁰ A court using this approach would find that NCLB meets the requirements for rights creation under section 1983, especially because of NCLB's individually focused language and inclusion of the contextual factors considered in traditional implied cause of action analysis. Any finding to the contrary is inconsistent with congressional intent, vitiates NCLB enforcement, and undermines section 1983 jurisprudence in general.

Part I of this Comment examines the history of Title I, emphasizing the current statute's dependence on individual action and enforcement. Part II briefly describes the doctrinal development in two relevant areas: a) the Supreme Court's reluctance to imply rights and remedies in statutes that do not expressly provide for them and b) its uncertain approach to implying substantive rights enforceable under section 1983, which does expressly provide a remedy for such rights. Although congressional intent is the touchstone in both inquiries, this Comment argues that the test for intent is broader and more flexible in the latter than the former, and that the Court's most recent precedent, *Gonzaga*, supports this conclusion. Part III analyzes whether, in light of the legislative language, purpose and context as well as Supreme Court precedent including *Gonzaga*, NCLB gives rise to enforceable rights. This question is addressed by examining one potential claim: whether parents can bring a section 1983 action against State Educational Agency (SEA) officials to enforce state level obligations under section 6311(b)(8) of NCLB.²¹ Part IV suggests that not only does respect for congressional intent argue for a broad reading of *Gonzaga*, federalism concerns do not justify narrowing the scope of section 1983 enforcement but, on the contrary, support a reading of *Gonzaga* that favors finding enforceable rights under the statute.

²⁰ See Sasha Samberg-Champion, Note, *How to Read Gonzaga: Laying the Seeds of a Coherent Section 1983 Jurisprudence*, 103 COLUM. L. REV. 1838, 1873-75 (2003) (advocating the importation of the analysis from *Cort v. Ash*, 422 U.S. 66, 78 (1975), into section 1983 jurisprudence to address the concerns expressed in *Gonzaga*). What I am arguing is different: the Court should not use statutory purpose as a reason for implying rights as in the *Cort v. Ash* analysis, but as an indication of congressional intent for private enforcement. The Court has indicated its willingness to read the third prong of the *Cort v. Ash* test in this manner. See, e.g., *Thompson v. Thompson*, 484 U.S. 174, 179 (1988) (indicating that the four factors in *Cort v. Ash* are all concerned with congressional intent).

²¹ 20 U.S.C. § 6311 (b)(8) (Supp. I 2001).

I. FROM ESEA TO NCLB: CREATION AND
EVOLUTION OF TITLE I

President Johnson first sought to address the failures of the public education system in 1965 by introducing and pressing for Title I of the Elementary and Secondary Education Act of 1965. Title I established an annual block grant to state educational agencies (SEAs) in return for a commitment to provide programs benefiting educationally disadvantaged students. ESEA was aimed at “the effects of the conditions of group poverty upon the individual student.”²² Title I is still the federal government’s largest investment in education,²³ as well as the bedrock of its commitment to equality of opportunity.²⁴

Title I was passed amid great controversy between those who thought education should be under local control and those who believed effective education was a national interest that should be addressed by the national government.²⁵ As a result, Title I stated a bold goal but was concerned almost solely with the equity of funding. The requirements for programs were vague, and ESEA lacked an evaluation component or an effective enforcement mechanism.²⁶ Scholars and advocates have offered several reasons for the failure of Title I to achieve educational parity, but it is agreed that the lack of evaluation and enforcement created significant barriers to Title I’s effectiveness.²⁷

²² Zamora, *supra* note 11, at 419.

²³ *See id.* at 415 (citing Heritage Statistics).

²⁴ John F. Jennings, *Title I: Its Legislative History and Its Promise*, in TITLE I: COMPENSATORY EDUCATION AT THE CROSSROADS 1, 6 (Geoffrey D. Borman et al. eds., 2001).

²⁵ For an analysis of the ideological conflict at the heart of the creation and evolution of ESEA, see Zamora, *supra* note 11, at 420-35.

²⁶ *Id.* at 424.

²⁷ *Id.* at 427-34. The General Accounting Office recently found that most states were out of compliance with the 1994 accountability and assessment requirements, and determined that the Department of Education needs to monitor states’ scoring of assessments. GEN. ACCOUNTING OFFICE, TITLE I: EDUCATION NEEDS TO MONITOR STATES’ SCORING OF ASSESSMENTS: GAO REPORT TO THE SECRETARY OF EDUCATION 19 (2002) [hereinafter GENERAL ACCOUNTING OFFICE] (“Specifically, [the Department of] Education should include in its new compliance reviews a check on the controls states have in place to ensure proper test scoring and the effective implementation of these controls by states.”), available at <http://www.gao.gov/new.items/d02393.pdf>. The Citizens’ Commission on Civil Rights concluded in 1998 that “the federal government’s failure to take the actions needed to implement and enforce the [1994 requirements of] Title I has . . . retarded educational progress.” Zamora *supra* note 11, at 431-32 (quoting CITIZEN’S COMM’N ON CIVIL RIGHTS TITLE I AT MID-STREAM: THE FIGHT TO IMPROVE SCHOOLS FOR POOR KIDS 2 (Corrine M. Yu & William L. Taylor eds., 1998)).

In 2001, both Congress and the President, in a clear statement that educational parity—not state promises—was the goal of Title I, overhauled NCLB to address the program’s shortcomings.²⁸ As a result, districts and states have specific obligations under NCLB to the Department of Education, schools, parents, and students to ensure that the goal of 100% proficiency is met.²⁹ The new parental notification and choice provisions implement a market-based reform strategy.³⁰ As explained by John E. Chubb, giving parents a choice among public schools while removing guaranteed financial support for existing schools will force underachieving institutions to improve in response to competitive pressure.³¹ That Congress attempted to implement this educational reform by using competition is made clear by the structure of the Act and its legislative history, as well as from administrative statements concerning the Act.³² The success of the effort is premised on parental knowledge and action as well as fulfillment of the SEAs’ commitment to contribute the funding and support required to provide both necessary information and viable choices.

²⁸ The White House described these failings as: (1) its failure to address the achievement gap between rich and poor students, minority and white students; (2) a lack of flexibility at state and district levels to address unique concerns; (3) continued investment in programs that had not ever been proven effective; and (4) a lack of choice for parents whose children are stuck in failing or dangerous schools. White House Fact Sheet, *No Child Left Behind*, available at <http://www.whitehouse.gov/news/releases/2002/01/20020108.html>. To implement improvement, NCLB specifies that each child in each school in grades 3-8 must meet rigorous state standards, defined as 100% proficiency within twelve years. No Child Left Behind Act, 20 U.S.C. § 6311(b)(3)(C) (2002).

²⁹ See, e.g., 20 U.S.C. § 6311(b)(8) (Supp. I 2001) (listing requirements for state educational authorities); *id.* § 6312(c) (listing requirements for local educational authorities). NCLB demands many specific steps to assure that states reach the lofty goal of 100% proficiency. These problems are addressed by increasing accountability and choice. *Id.* Each child in these grades must be tested at grade level and the scores are disaggregated by economic disadvantage, race and ethnicity, disability, and limited English proficiency. *Id.* § 6311(b)(2)(C)(v). Schools must directly provide parents with results and make results public. See, e.g., *id.* § 6311(h). In addition, they must make adequate yearly progress with each group to avoid a failing label. *Id.* § 6311(b)(2). Schools that fail for two consecutive years must use Title I funds to allow students to transfer to a better performing public or charter school. *Id.* § 6316(b)(1)(E). Schools that fail to make adequate yearly progress for three years must use Title I funds to provide “supplemental services” to students, such as tutoring or summer programs. *Id.* § 6316(b)(5). Schools that continue to fail to make progress face restructuring and other corrective measures. *Id.* § 6316(b)(7)-(8).

³⁰ See *infra* discussion accompanying notes 152-54.

³¹ See JOHN E. CHUBB, *POLITICS, MARKETS, AND AMERICA’S SCHOOLS* 206-15 (1990) (arguing for market-based school reform).

³² See *infra* text accompanying notes 152-57.

II. IMPLIED PRIVATE CAUSE OF ACTION & SECTION 1983 ENFORCEMENT

The existence of section 1983, an independent statute that creates remedies without creating rights, has forced the Court to employ separate inquiries when looking to imply remedies in private cause of action cases and substantive rights enforceable under section 1983. Although *Gonzaga* made clear that courts should employ a congressional intent-based inquiry in both instances,³³ differences in the concerns underlying each inquiry require a broader and more flexible approach when determining congressional intent to create rights. When implying remedies, courts may view the existence of other statutory remedies as creating a presumption against congressional intent to provide further avenues of recourse.³⁴ To imply remedies in this situation, in the absence of clear statements to do so, would not only be overreaching on the part of a court, but may encourage Congress to avoid these difficult questions of remediation in abdication of their Article I responsibilities.³⁵ To deal with these separation of powers concerns, the Supreme Court has instituted a strict clear statement rule for courts looking for congressional intent to create enforceable rights.

In suits against state officials acting under color of federal funding statutes, however, Congress has created an independent remedy. The Court has found that section 1983 overcomes the negative presumption against private enforceability in implied remedy cases.³⁶ In this instance, courts must still look to congressional intent before implying substantive rights enforceable under section 1983, but that test should not have to meet the burden that exists in the implied remedy context. Courts can achieve this balance by looking to a wider variety of indicia of congressional intent when implying substantive rights. Significant frustration of statutory purpose in the absence of private enforceability, the creation of accountability to individuals, and clear statements requiring universal attainment of statutory goals should be

³³ *Gonzaga Univ. v. Doe*, 536 U.S. 273, 285 (2002) (“Both inquiries . . . require a determination as to whether Congress intended to confer individual rights upon a class of beneficiaries.”).

³⁴ *Id.* at 285-86.

³⁵ *See Wilder v. Va. Hosp. Ass’n*, 496 U.S. 498, 508 n.9 (1990) (asserting that the existence of section 1983 as an express remedy negates the separation of powers concerns that exist in implied remedy cases).

³⁶ *Id.*

considered indicators of intent along with the linguistic considerations employed in the implied remedies cases.

A. *Implied Private Cause of Action: Implying Private Remedies*

Statutes that either explicitly or implicitly create rights and remedies provide authority for individuals to bring private lawsuits for statutory violations. By providing a statutory cause of action for individuals who have been denied the services or treatment to which they are entitled, Congress creates “private attorney generals” who have the power to vindicate important national policy goals.³⁷ While courts have always permitted private rights of action where there is explicit statutory authority for them, it was not until 1964 that the Supreme Court first *implied* a right of action.³⁸ Initially, the Court considered several factors in determining congressional intent to create rights and remedies, and it was often willing to find implied causes of action. These factors, solidified in the *Cort v. Ash* test, were:

First, is the plaintiff one of the class for whose especial benefit the statute was enacted—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?³⁹

Lower courts used the test to find implied rights of action in several statutes, relying especially on the third prong of the *Cort v. Ash* test, the furtherance of statutory purpose.⁴⁰ In 1979, in *Cannon v. University of Chicago*,⁴¹ the Court recognized an implied cause of action

³⁷ Judge Jerome Frank of the Second Circuit Court of Appeals introduced the term “private Attorney Generals [sic]” to describe individuals bringing proceedings “to vindicate the public interest.” *Associated Indus. of N.Y. State, Inc. v. Ickes*, 134 F.2d 694, 704 (2d. Cir. 1943).

³⁸ See *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964) (implying a right of action under the Securities Exchange Act of 1934).

³⁹ *Cort v. Ash*, 422 U.S. 66, 78 (1975) (citations and internal quotation marks omitted).

⁴⁰ Bradford C. Mank, *Is There a Private Cause of Action Under EPA's Title VI Regulations?: The Need to Empower Environmental Justice Plaintiffs*, 24 COLUM. J. ENVTL. L. 1, 31 (1999).

⁴¹ 441 U.S. 677 (1979).

under Title IX of the 1972 Education Act Amendments.⁴² In his dissenting opinion, however, Justice Powell expressed his concern that judges infringe on congressional lawmaking authority, in violation of separation of powers principles, by implying private rights of action to enforce a statute.⁴³ Justice Powell argued that reliance only on *Cort's* second prong—whether Congress intended to create a private right of action—was the appropriate measure of whether such a right should be implied.⁴⁴

While the Court has never overruled *Cort v. Ash*, subsequent implied cause of action cases have accepted Justice Powell's argument. Not only have they rejected courts' ability to imply remedies to further statutory purpose, but they have focused exclusively on congressional intent to create an individual remedy, and gone even further by looking solely for specific linguistic formulations in statutes as evidence of that intent.⁴⁵ The most notable example of this modern analysis is *Alexander v. Sandoval*.⁴⁶ Although assuming a right existed,⁴⁷ Justice Scalia, writing for the majority, looked at the language of and subsequent amendments to section 602 of Title VI of the 1964 Civil Rights Act and found no evidence of intent to establish a private cause of action.⁴⁸ The Court explained that since the text provided no evidence

⁴² *Id.* at 680, 688-89 (finding an implied right of action for individuals suing educational institutions under section 901(a) of Title IX of the 1972 Education Act Amendments); see also Bradford C. Mank, *Suing Under § 1983: The Future After Gonzaga University v. Doe*, 39 HOUS. L. REV. 1417, 1424 (2003) (summarizing *Cannon*).

⁴³ *Cannon*, 441 U.S. at 730-31 (Powell, J., dissenting) ("Absent the most compelling evidence of affirmative congressional intent, a federal court should not infer a private cause of action.").

⁴⁴ See Key, *supra* note 15, at 298-99 (explaining Justice Powell's view that only Congress should have the right to determine whether lower federal courts have jurisdiction over particular causes of action).

⁴⁵ See, e.g., *Cent. Bank of Denver v. First Interstate Bank*, 511 U.S. 164, 178-80 (1994) (focusing on congressional intent in the absence of an express provision); *Suter v. Artist M.*, 503 U.S. 347, 363-64 (1992) (stating that the *Cort* test puts the burden of proof on plaintiffs to show congressional intent to establish a private remedy); *Karahalios v. Nat'l Fed'n of Fed. Employees, Local 1263*, 489 U.S. 527, 536 (1989) (asserting that courts should focus on evidence of congressional intent in determining whether to imply a private cause of action); *Thompson v. Thompson*, 484 U.S. 174, 179 (1988) (indicating that the four factors in *Cort v. Ash* are all concerned with congressional intent); Key, *supra* note 15 at 285, 297 (discussing these cases).

⁴⁶ 532 U.S. 275 (2001).

⁴⁷ *Id.* at 286 ("[W]e assume . . . that [the statute] confers authority to promulgate disparate-impact regulations . . .").

⁴⁸ See *id.* at 289-93 (holding, in a five-to-four decision, that while there is an implied cause of action under section 601 of Title VI of the 1964 Civil Rights Act, there is no private right of action to enforce disparate impact regulations promulgated under

of intent, “[w]e therefore hold that no such right exists.”⁴⁹ Due to the emphasis on clear textual evidence of intent, courts have been exceedingly hesitant to imply rights of action under the new analysis.⁵⁰ As a result, plaintiffs have turned to section 1983 to vindicate rights in statutes that do not contain explicit remedies.⁵¹

B. *Section 1983 as a Remedy for Federal Statutory Violations: Implying Substantive Rights*

Section 1983 was enacted in 1871 pursuant to section 5 of the Fourteenth Amendment to protect rights “secured by the Constitution and laws” against infringement by the states.⁵² When these rights are violated, section 1983 provides an action to claim damages or injunctive relief against those responsible for the violations.⁵³ A federal statute is presumed enforceable unless Congress did not intend to create a right, a presumption that is defeated if private enforceability is precluded by a comprehensive enforcement scheme.⁵⁴ While the second prong of this inquiry remains unchanged, a debate has emerged over how willing a court should be to find congressional intent to create individual rights, and by what methods courts should find such an intent.⁵⁵

section 602).

⁴⁹ *Id.* at 293.

⁵⁰ *Thompson v. Thompson*, 484 U.S. 174, 190 (1988) (Scalia, J., concurring in the judgment) (observing that the Court rejected claims of implied right of action in nine of eleven recent cases); *see also* Donald H. Zeigler, *Rights, Rights of Action, and Remedies: An Integrated Approach*, 76 WASH. L. REV. 67, 91 (2001) (noting that a requirement of clear evidence of congressional intent ensures that few private actions will be found).

⁵¹ Mank, *supra* note 40, at 1427.

⁵² 42 U.S.C. § 1983 (2000).

⁵³ SHELDON H. NAHMOD, *CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983*, at 1-3 (4th ed. 2000).

⁵⁴ *See, e.g., Wilder v. Va. Hosp. Ass’n*, 496 U.S. 498, 508 (1990) (noting the two instances in which section 1983 does not provide a cause of action in response to a violation of a federal statute); *Middlesex County Sewerage Auth. v. Nat’l Sea Clammers Ass’n*, 453 U.S. 1, 17-21 (1981) (finding for the first time that the presumption in favor of enforceability is rebutted by a comprehensive statutory enforcement scheme).

⁵⁵ In his treatise on section 1983 litigation, Martin Schwartz noted that many decisions in this area have been five-to-four votes along essentially liberal-conservative lines and that the vacillating approach to this jurisprudence may reflect the changing composition of the Court since *Maine v. Thiboutot* was decided in 1980, in that “a vote for enforceability is a vote in furtherance of individual rights and a vote against enforceability is a vote in favor of federalism and states’ rights.” MARTIN A. SCHWARTZ, *SECTION 1983 LITIGATION: CLAIMS AND DEFENSES* § 4.01 (2004).

In *Maine v. Thiboutot*,⁵⁶ the Supreme Court ruled broadly that section 1983 encompasses all statutory violations of federal law, and has been interpreted by the Court to create a presumption in favor of enforceability of substantive rights.⁵⁷ This decision came in the wake of dramatic cutbacks in the Court's willingness to find implied remedies in federal statutes due to separation of powers concerns. Many saw *Thiboutot* as the Court's way of allowing individuals to vindicate federal rights previously enforced by private rights of action with a tool that did not raise the same constitutional concerns.⁵⁸

Although *Thiboutot* did not proscribe a standard for implying substantive rights under section 1983, the Court began that endeavor the next year. In *Pennhurst State School & Hospital v. Halderman*, then-Justice Rehnquist wrote for the six-to-three majority that "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously."⁵⁹ The Court distinguished between statutes that speak in "precatory terms," meant only to convey preferences for certain kinds of treatment and assist the states to improve services, versus those statutes that explicitly impose "obligations" on a state to fund certain rights.⁶⁰ Under the test that emerged, the Court would

⁵⁶ 448 U.S. 1 (1980).

⁵⁷ See *Wilder*, 496 U.S. at 508 n.9 (referring to the presumption in favor of enforceability of substantive rights under section 1983 and distinguishing the inquiry from that involved in implied rights of action cases). Justice Brennan's six-to-three decision in *Thiboutot* was accompanied by an adamant dissent written by Justice Powell and joined by then-Justice Rehnquist. The dissent argued that the Court's decision would unreasonably and "dramatically expand the liability of state and local officials" by subjecting them to liability for all sorts of federal statutory violations. *Thiboutot*, 448 U.S. at 12 (Powell, J., dissenting). Additionally, Powell contended that the interpretation of "and laws" in section 1983 should be limited to civil rights statutes. *Id.* at 22.

⁵⁸ See Samberg-Champion, *supra* note 20, at 1846.

⁵⁹ 451 U.S. 1, 17 (1981).

⁶⁰ *Id.* at 18-19. While the majority found intent only to encourage state policy rather than to create rights, the three dissenting Justices (White, Brennan, and Marshall), reading the same statutory language and legislative history, did find congressional intent to create enforceable rights under section 1983. *Id.* at 53 (White, J., dissenting). The views reflected in the *Pennhurst* dissent had held the majority in the two previous cases before the Court. In *Wright v. City of Roanoke Redevelopment & Housing Authority*, 479 U.S. 418 (1987), in a five-to-four vote, the Court reinforced its unwillingness to preclude section 1983 actions under *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981), especially since there was no other avenue of private judicial remedy. *Wright*, 479 U.S. at 427. In *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498 (1990), the Court applied the approach set out in earlier cases and in a five-to-four vote found enforceable rights in the statute at hand. The dissent, written by Chief Justice Rehnquist (who was joined by Justices O'Connor, Scalia, and Kennedy) disagreed and argued that, at most, the plaintiffs had procedural rights to have the state follow the procedure set out in the provision, but not to hold the state ac-

only imply rights when the text and structure of the act at issue clearly imposed mandatory funding obligations.

Eleven years later in *Suter v. Artist M.*, the Court narrowed this test, confusing the standard for implying substantive rights and the standard for implying enforceable rights at work in implied remedies cases.⁶¹ The Court in *Pennhurst* had called for signs of an unambiguous intent for a statute to create a binding obligation on the state. The Court in *Suter* rephrased the inquiry, stating that it was looking for language to “unambiguously confer upon the child beneficiaries of the Act a right to enforce the requirement.”⁶² This new phrasing is analogous to the more rigorous standard required in the implied remedies cases where plaintiffs have the burden of showing congressional intent to create a right and a remedy. The dissent argued that this new standard violated the presumption in favor of private enforceability once the substantive right is determined.⁶³

The change in approach in *Suter* elicited concern from Congress,⁶⁴ and led to confusion in lower courts.⁶⁵ When the Court decided its next two important section 1983 cases, *Livadas v. Bradshaw*⁶⁶ and *Blessing v. Freestone*,⁶⁷ it did not employ the *Suter* reasoning.⁶⁸ In *Livadas*, the Court affirmed its presumption in favor of enforceability of substantive rights under section 1983.⁶⁹ In *Blessing*, the Court refined the test for determining congressional intent to create rights:

countable to adequate results. *Id.* at 527-28.

⁶¹ The majority found that the term “reasonable efforts” does not unambiguously confer an enforceable right upon [its] beneficiaries.” *Suter v. Artist M.*, 503 U.S. 347, 363 (1992). This was the first decision to find no enforceable rights under section 1983 after lenient interpretations in *Wright* and *Wilder*. Many commentators note that the approach in *Suter* in fact reflects the triumph of Rehnquist’s reasoning in his *Wilder* dissent, and that it was made possible by the ascension of Justice Souter and Justice Thomas to the Court. See, e.g., SCHWARTZ, *supra* note 55, § 4.03.

⁶² 503 U.S. at 357 (emphasis added).

⁶³ In the dissent, Justices Stevens and Blackmun accused the majority of failing to apply the test as applied in *Wilder*, *id.* at 371, and of inverting the established presumption that a private remedy is available under section 1983 unless Congress has affirmatively withdrawn the remedy in the statutory provision itself, either through vague language or a comprehensive enforcement scheme. *Id.* at 377.

⁶⁴ See *infra* text accompanying note 222 (describing Congress’s amendment to the Social Security Act to repudiate the reasoning of the decision).

⁶⁵ See *infra* note 223 (detailing lower courts’ approaches to the *Suter* decision).

⁶⁶ 512 U.S. 107 (1994).

⁶⁷ 520 U.S. 329 (1997).

⁶⁸ See Samberg-Champion, *supra* note 20, at 1851 (“So as the Court took up *Blessing v. Freestone*, it faced a virtual repudiation of *Suter*’s principles from both lower courts and Congress, and chose not to defend them with another divisive opinion.”).

⁶⁹ *Livadas*, 512 U.S. at 133 (stating that, apart from “exceptional cases” where

We have traditionally looked at three factors when determining whether a particular statutory provision gives rise to a federal right. First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so “vague and amorphous” that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States.⁷⁰

Suter became part of the third prong⁷¹ of this test. The *Blessing* decision equated this requirement with the *Pennhurst* standard of “mandatory rather than precatory terms.”⁷² The Court seemed to recognize that the implication of substantive rights for which a remedy already exists requires a different and more relaxed standard. To employ the same standard would vitiate congressional intent in creating section 1983 and reaffirmed the difference in the wake of the *Suter* decision.

In *Gonzaga University v. Doe*, the Court, purporting to clarify its section 1983 jurisprudence, introduced new elements into its analysis without specifying their relationship to the *Blessing* test.⁷³ Falling short of *Suter*’s demand for an unambiguous right to *enforce*, the majority called for the statute to provide an “unambiguously conferred right,”⁷⁴ which would be determined based on an inquiry “no different from the initial inquiry in an implied right of action case.”⁷⁵ The inquiry is “whether or not Congress intended to confer individual rights upon a class of beneficiaries.”⁷⁶ It is not enough that petitioners are in the “zone of interest that the statute is intended to protect,”⁷⁷ courts should look for “rights-creating language” with “individually focused terminology,” such as that found in Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972.⁷⁸ Rather

Congress either did not create an enforceable right or created a complete remedial scheme, “§ 1983 remains a generally and presumptively available remedy for claimed violations of federal law”).

⁷⁰ *Blessing*, 520 U.S. at 340-41 (citations omitted).

⁷¹ *Samberg-Champion*, *supra* note 20, at 1851.

⁷² *Id.* at 1852. The Court refers to the requirement that provisions create obligations rather than state congressional policy preferences.

⁷³ *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002). The Court did find that the provision of FERPA at issue in the case would not have met the *Blessing* standard because its nondisclosure provisions have an aggregate rather than an individual focus. *Id.* at 288.

⁷⁴ *Id.* at 282.

⁷⁵ *Id.* at 285.

⁷⁶ *Id.*

⁷⁷ *Id.* at 283.

⁷⁸ *Id.* at 287. These are the classic examples of statutes that provide for private rights of action. They both include the phrase “no person . . . shall . . . be subjected

than reserving consideration of the statutory enforcement mechanism until after the determination of rights creation, the majority considered the enforcement mechanism as part of its initial inquiry. The Court found that an enforcement scheme that provided a centralized administrative avenue to hear individual complaints was not sufficient to satisfy the *Sea Clammers* test,⁷⁹ but buttressed their understanding that the statutory language did not confer individual rights.⁸⁰

Gonzaga clearly directs courts to adopt the implied right of action approach with its focus on congressional intent. What is unclear is whether the Court meant to adopt the singular focus on language exemplified by *Sandoval*, where the right was assumed and the Court only sought to determine intent for private enforceability, or to allow more varied indicators of intent in recognition of section 1983 as a congressionally created remedy. In his *Gonzaga* dissent, Justice Stevens feared a shift to the former and explained why this restrictive implied right of action standard is unnecessary:

[O]ur implied right of action cases “reflec[t] a concern, grounded in separation of powers, that Congress rather than the courts controls the availability of remedies for violations of statutes.” However, imposing the implied right of action framework upon the § 1983 inquiry . . . is not necessary: The separation-of-powers concerns present in the implied right of action context “are not present in a § 1983 case,” because Congress expressly authorized private suits in § 1983 itself.⁸¹

Justice Stevens argued that the *Sandoval* standard contradicted the majority’s assertion that a section 1983 plaintiff should not shoulder the burden of demonstrating congressional intent for enforceability.⁸² Implied remedies cases, he asserted, focus on individual “rights-creating language” because the Court needed a level of certainty required to find an implied remedy in the statute.⁸³ Since the Court does not have to make that same determination in section 1983 cases,

to.” 20 U.S.C. § 1681(a) (2000); 42 U.S.C. § 2000d (2000). FERPA, the statute at issue in *Gonzaga*, commanded that “no funds shall be made available” to institutions that have prohibited policies, a mandate two steps removed from the individual interests that Doe was trying to vindicate in court. *Gonzaga*, 536 U.S. at 287.

⁷⁹ *Gonzaga*, 536 U.S. at 289-90.

⁸⁰ *Id.* at 290 n.8.

⁸¹ *Id.* at 300 (quoting *Wilder v. Va. Hosp. Ass’n*, 496 U.S. 498, 509 n.9 (1990)) (Stevens, J., dissenting).

⁸² *See id.* at 301 (citing the majority investigation of whether “Congress . . . intended private suits to be brought”).

⁸³ *Id.*

the test for determining rights creation should not be based on the same criteria.⁸⁴

While statutory language is an important consideration in *Gonzaga*, unlike the Court's analysis in *Sandoval*, it is not the only factor examined. The reasoning in *Gonzaga* is akin to the older approach found in the *Cort v. Ash* test.⁸⁵ The *Cort v. Ash* approach directs attention to the statutory purpose and context, as did the Court in *Gonzaga*. While requiring that the Act "especially benefit," rather than just "benefit," the plaintiff,⁸⁶ it does not require the same singular focus on language that the Court has demanded in recent implied cause of action cases.⁸⁷ While applying the new cause of action analysis to section 1983 cases would be devastating to individuals seeking private enforcement, an inquiry that includes legislative purpose and context as indicators of congressional intent to create rights would limit, but not end, section 1983 enforcement actions.

Since the *Gonzaga* majority does not claim to overrule any former precedent, it does not explain whether it intends for courts to follow the *Sandoval* implied right of action approach and look solely for individually focused rights-creating language, to merely indicate that lower courts should be more sparing in finding rights,⁸⁸ or to retain the *Blessing* approach to imply substantive rights and the *Thiboutot* presumption of enforceability, but with greater focus on indications of congressional intent to create substantive rights.⁸⁹ This Comment applies, and then argues for, the latter reading of *Gonzaga*, but with inclusion of a broader spectrum of indicia of intent than allowed under

⁸⁴ *Id.* at 301-303.

⁸⁵ See *supra* text accompanying notes 38-44 (describing the *Cort v. Ash* test). While the second prong refers to intent to create a remedy, it can easily be relevant to section 1983 by replacing "remedy" with "right." While courts are no longer willing to imply a remedy to further the purpose of an act, as suggested by the third prong, courts should be willing to examine statutory purpose and context in the determination of congressional intent to create individual rights. It is arguably harder to make the fourth prong relevant to rights creation without infringing on congressional legislative power.

⁸⁶ "Benefit" is the standard under the first prong of the *Blessing* test. See *Blessing v. Freestone*, 520 U.S. 329, 340 (1997) ("Congress must have intended that the provision in question benefit the plaintiff.").

⁸⁷ See Mank, *supra* note 42, at 1426, 1469-82 (discussing the Court's willingness to look at legislative history in determining intent in implied right of action cases and advocating for the continued use of legislative history in section 1983 analysis).

⁸⁸ *Gonzaga*, 536 U.S. at 281; see also Samberg-Champion *supra* note 20, at 1856 (noting questions raised by the reasoning in *Gonzaga*).

⁸⁹ Samberg-Champion, *supra* note 20, at 1885-86 (advocating that courts adopt a similar interpretation of the decision).

Sandoval.⁹⁰ As of this writing, the Supreme Court has not offered clarification about what interpretation it intended.

III. AN ENFORCEABLE RIGHT IN NO CHILD LEFT BEHIND

To frame the argument that NCLB contains enforceable rights even under the *Gonzaga* standard, this Comment focuses only upon one potential section 1983 claim: whether parents or other aggrieved parties can, in order to enforce state level obligations under 20 U.S.C. § 6311(b)(8), bring an action against SEA officials under *Ex parte Young*⁹¹ for prospective injunctive relief.⁹² While there are other NCLB provisions that likely create enforceable rights, the purpose here is to demonstrate the efficacy of one, not all, possible claims.⁹³

⁹⁰ In a recent decision, the Third Circuit followed this latter interpretation of *Gonzaga* in order to find a private right of action in three provisions of the Medicaid Act. *Sabree v. Richman*, 367 F.3d 180, 189-93 (3d Cir. 2004). To determine whether the statute created rights, the Court applied the *Blessing* test to determine whether the plaintiffs fell in the zone of interest that the statute was meant to protect and then looked to make sure that the language was individually focused in a way necessary to create rights. *Id.* at 189-90. In a second inquiry the Court examined the rest of the statute to make sure that rights created under the specific provisions furthered the purpose of the Act as a whole. *Id.* at 190-93.

⁹¹ 209 U.S. 123 (1908). In *Hans v. Louisiana*, 134 U.S. 1, 17 (1890), the Court held that the Eleventh Amendment bars citizens from suing their state government. In *Ex parte Young*, 209 U.S. at 159-60, however, the Court found that the Eleventh Amendment does not act as a bar to federal suits naming a state official as a defendant if the relief sought is prospective injunctive relief even if the judgment would have a negative impact on the state treasury. *Edelman v. Jordan*, 415 U.S. 651, 660-72 (1974), allows official capacity actions against individual state agents for prospective injunctive relief. The Court specifically found in *Will v. Michigan Department of State Police*, 491 U.S. 58, 71 n.10 (1989), that a state official can be a defendant “person” within the meaning of section 1983 even when sued for injunctive relief in her official capacity, to the extent the relief sought is prospective.

⁹² The Court has characterized spending of state funds on compensatory educational programs as prospective relief because the funds were “a necessary consequence of compliance *in the future*” with the plan at issue. *Milliken v. Bradley*, 433 U.S. 267, 289 (1977) (quoting *Edelman*, 415 U.S. at 668).

⁹³ The one section 1983 case that has been brought under NCLB was dismissed. *See Ass’n of Cmty. Orgs. for Reform Now v. N.Y. City Dep’t. of Educ.*, 269 F. Supp. 2d 338, 344-47 (S.D.N.Y. 2003) (holding that Congress did not intend to create individually enforceable rights with respect to the notice, transfer, or supplemental educational services (SES) provisions contained in NCLB). The claim in this case was brought against school districts based on the provisions of the NCLB regarding transfer, SES, and parental notification provisions triggered when a school has been identified for improvement or restructuring for failing to meet the Adequate Yearly Progress (AYP) benchmarks for improvement. *Id.* at 340-43. The provisions of NCLB addressed in this case present different issues from the ones addressed in this Comment, including the appropriateness of a suit against the school districts and the binding nature of the

Even with the more stringent considerations added to the *Blessing* analysis by *Gonzaga*, the text, purpose, structure, and history of NCLB demonstrate that Congress intended to create an individualized right for parents to enforce state level commitments under 20 U.S.C. 6311(b)(8) to provide an equal and effective education to each and every child.

A. *Intended Beneficiaries?*

Under the first prong of the *Blessing* test, Congress must intend that the provision in question benefit the plaintiff.⁹⁴ In *Gonzaga*, the Court stipulated that it is “rights, not the broader or vaguer ‘benefits’ or ‘interests,’ that may be enforced under the authority of that section.”⁹⁵ The purpose of NCLB is to create an individual right to an equal opportunity for an effective education. Section 6301 provides, “the purpose of this subchapter . . . is to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and State academic assessments.”⁹⁶ This language makes clear that the statute creates a right to the same extent required by implied cause of action cases and not a benefit to a group of people within the “zone of interest that the statute is intended to protect.”⁹⁷

The statute is both “phrased in terms of the persons benefited,” and has “an *unmistakable focus* on the benefited class.”⁹⁸ The phrasing mirrors the statutes held up by the Court as examples of rights creating language. Title VI and Title IX seek to ensure that “[n]o person . . . [shall] be subjected to discrimination.”⁹⁹ In the same vein,

choice and SES provisions against districts. For that reason, detailed analysis of that court’s treatment of those provisions is beyond the purview of this Comment. The decision, however, was problematic because it did not consider the context of the provision within the Act. It failed to analyze the purpose of the statute when looking for rights-creating language or the centrality of parental action to the market-based improvement mechanism at work in the Act. In addition, the court did not address the completeness of the centralized enforcement mechanism. For a more detailed critique, see Melanie Natasha Henry, Comment, *No Child Left Behind?: Educational Malpractice Litigation for the 21st Century*, 92 CAL. L. REV. 1117, 1158-66 (2004).

⁹⁴ *Blessing*, 520 U.S. at 340.

⁹⁵ *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002).

⁹⁶ 20 U.S.C. § 6301 (Supp. I 2001).

⁹⁷ *Gonzaga*, 536 U.S. at 283.

⁹⁸ *Id.* at 284 (citation omitted).

⁹⁹ *Id.* at 287 (citation omitted).

NCLB seeks to ensure that “all children have a fair, equal, and significant opportunity.”¹⁰⁰ The focus is not “two steps removed,”¹⁰¹ as in FERPA,¹⁰² which focused on the Secretary of Education’s distribution of funds. Like the civil rights statutes mentioned above, NCLB is an affirmative grant of rights to children, not a prohibition against fund disbursement to institutions engaged in disfavored practices.

While some might argue that the term “all children,” unlike “person,” has an “‘aggregate’ focus” of the type ruled out in *Gonzaga*,¹⁰³ several factors demonstrate that this language was intended to create an individual right to an opportunity for an effective education for each and every child in America’s public schools. In *Gonzaga*, the Court contrasted FERPA’s aggregate language, prohibiting the funding of “any educational agency or institution which has a policy or practice of permitting the release of education records,”¹⁰⁴ with language in Title VI and IX stating that “[n]o person . . . [shall] be subjected to discrimination.”¹⁰⁵ FERPA refers to a “policy or practice,” not an intended class of beneficiaries.¹⁰⁶ Language that refers to a class of individuals, however, is not considered aggregate language according to standards mentioned elsewhere in the case.¹⁰⁷

Even if the reference to a class was cause for concern, there is evidence of congressional intent for the language to create an individual right. Congress changed the title of the Act from 1994’s “Improving America’s Schools Act,”¹⁰⁸ focusing on schools, to “No *Child Left Behind*,”¹⁰⁹ which focuses on individual children.¹¹⁰ This shift mirrors a

¹⁰⁰ 20 U.S.C. § 6301 (Supp. I 2001).

¹⁰¹ *Gonzaga*, 536 U.S. at 287.

¹⁰² Family Educational Rights and Privacy Act of 1974 (FERPA), 20 U.S.C. § 1232g. The relevant portion of the FERPA provides, “[n]o funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records . . . of students without the written consent of their parents to any individual, agency, or organization.” *Id.* § 1232g(b)(1).

¹⁰³ *Gonzaga*, 536 U.S. at 288.

¹⁰⁴ *Id.* (quoting 20 U.S.C. § 1232g(b)(1)-(2)).

¹⁰⁵ *Id.* at 287.

¹⁰⁶ 20 U.S.C. § 1232g(b)(1).

¹⁰⁷ *Gonzaga*, 536 U.S. at 283-84 (approving rights-creating language that confers benefits on an intended class).

¹⁰⁸ Improving America’s Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518 (1994) (current version at 20 U.S.C. §§ 6301-6514 (2000 & Supp. I 2001)).

¹⁰⁹ Emphasis added.

¹¹⁰ The Court has not been willing to presume that a statute creates enforceable rights because it “speaks in terms of rights.” *Gonzaga*, 536 U.S. at 289 n.7 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 18-20 (1981), and rejecting

change in the Act's structure to require, in addition to greater accountability to individual parents, that 100% of children reach proficiency on state achievement tests by 2014.¹¹¹ That Congress conceived of NCLB in the mold of historic civil rights laws is reflected in the title of a press release by Representative John Boehner, Chairman of the House Committee on Education and the Workforce, upon submitting the bill: "H.R.1 Reflects President Bush's Plan to Make Literacy 'the New Civil Right.'"¹¹² In light of this understanding of the Act's purpose, "all children" must be understood to mean "each and every child."

This textual interpretation is bolstered by both the statute's legislative history and litigation brought under the Act. The introduction to the 1994 Act, in which the fundamental accountability procedures were first implemented, begins with the following policy statement:

The Congress declares it to be the policy of the United States that a high-quality education for all individuals and a fair and equal opportunity to obtain that education are a societal good, are a moral imperative, and improve the life of every individual, because the quality of our individual lives ultimately depends on the quality of the lives of others.¹¹³

Other legislative history echoes the individual focus and suggests that Congress intended individuals to have a privately enforceable right under NCLB. Since the initial passage of Title I in 1965, more than thirty lawsuits have been brought by parents or other private parties to enforce provisions of Title I. Federal courts have decided these cases on the merits, seeming to assume, without directly addressing, an implied right of action or enforceable rights under section 1983.¹¹⁴ While these cases were brought mostly in the 1970s before the doctrinal restrictions on finding enforceable rights laid out in *Pennhurst*, *Suter*, and *Gonzaga*, a Senate report accompanying the 1994 Act also evinces the intent to create a privately enforceable right, stating that

Justice Stevens' attempt to use the reference to "rights" in the title of FERPA to reach a conclusion of enforceability under § 1983). The title is used here to refine the meaning of the language, not to make a presumption of enforceability based on the use of a word.

¹¹¹ 20 U.S.C. § 6311(b)(2)(F) (Supp. I 2001).

¹¹² Press Release, U.S. Rep. John Boehner (R-OH), Chairman, Committee on Education and the Workforce, Disappointing Scores Highlight Urgent Need for President's Reading First Initiative (Apr. 6, 2001), available at <http://edworkforce.house.gov/press/press107/readfirst4601.htm>.

¹¹³ Pub. L. No. 103-382 § 1001(a)(1).

¹¹⁴ See, e.g., *Nicholson v. Pittenger*, 364 F. Supp. 669, 671 (E.D. Pa. 1973) (finding for parents who brought an action to enforce provisions of Title I).

“the new ‘procedures and remedies’ were ‘designed to supplement and not replace other existing procedures and remedies’ in the statute.”¹¹⁵ This language, which post-dates the cases, demonstrates Congress’s intent to preserve the rights accepted in these decisions.¹¹⁶

B. *Too Vague to be Enforced?*

The second prong of the *Blessing* test asks whether the plaintiff’s asserted interests are not so vague and amorphous as to be beyond the competence of the judiciary to enforce.¹¹⁷ While NCLB’s reference to “fair, equal, and significant opportunity to obtain a high-quality education”¹¹⁸ is in itself ambiguous, the Act requires the participating states to define these terms and section 6311(b)(8) specifically requires states to detail the actions they will take to meet them.¹¹⁹ Under this provision states must articulate how the state will assist the local educational authority (LEA) in providing educational assistance to individual students assessed as needing help to meet state standards and how the SEA will “ensure that poor and minority children are not taught at higher rates than other children by inexperienced, unqualified, or out-of-field teachers.”¹²⁰ It is these more specific provisions that parents and children would bring section 1983 actions to enforce.

The Civil Rights statutes that the Court held up as models for rights creation follow this same procedure for establishing and enforcing rights.¹²¹ “Discrimination” is a vague and general term that has been defined by laws, administrative regulations, and case law. In the same way, “fair, equal and significant opportunity” is no more of a

¹¹⁵ See William L. Taylor, *Title I as an Instrument for Achieving Desegregation and Equal Educational Opportunity*, 81 N.C. L. REV. 1751, 1767 n.77 (2003) (quoting S. REP. NO. 103-292, at 9 (1994)).

¹¹⁶ In *Cannon v. University of Chicago*, 441 U.S. 677 (1979), the Court found a private right of action in Title IX because the statute was modeled on Title VI, which was being enforced by private suits. While the Court did not say whether these suits were proper under Title VI, the fact that Congress passed the statute with the same language, knowing that courts allowed private suits, was evidence of intent to create a private right of action. *Id.* at 694-703. Similarly, Congress included this language in the Senate report, evincing awareness and support of private enforceability. Courts should be as willing as the *Cannon* Court to see this inclusion as evidence of intent.

¹¹⁷ *Blessing v. Freestone*, 520 U.S. 329, 340-41 (1997).

¹¹⁸ 20 U.S.C. § 6301 (Supp. I 2001).

¹¹⁹ *Id.* § 6311(b)(8).

¹²⁰ *Id.* § 6311(b)(8)(C).

¹²¹ See *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 n.3 (citing 42 U.S.C. § 2000d and 20 U.S.C. § 1681(a) as examples of legislation containing explicit rights-creating language).

vague term that has been and will be defined in the same way. The exact nature of an institution's obligation to prevent discrimination is also not clear in the language quoted by Chief Justice Rehnquist.¹²² It is only clear that the nature of the state's obligation is absolute, just as in the language in NCLB. The provisions in § 6311(b)(8) force the state to define specific and unambiguous steps to make sure children receive the educational opportunities promised.¹²³

In *Blessing*, the Court criticized the Ninth Circuit for finding that "Title IV-D creates enforceable rights in families in need of Title IV-D services" without ever specifying "exactly which 'rights' it was purporting to recognize."¹²⁴ Instead, the Ninth Circuit found "that federal law gave respondents the right to have the State substantially comply with Title IV-D in all respects."¹²⁵ Finding a right created in the purpose statement of the NCLB might seem to apply this "blanket approach" that was negated in *Blessing*,¹²⁶ but none of the faults the Court found in the Ninth Circuit's approach to the statute at issue in that case are present in NCLB.

When a claim is brought against an SEA official under § 6311(b)(8), it will be brought for specific failures of the state to comply with its commitments under one of these five sections.¹²⁷ Parties would not bring a general complaint that the state had substantially failed to enforce NCLB. Instead of claiming "undefined rights," a claimant would break the action into "manageable analytic bites."¹²⁸ Their claims

¹²² See *id.* ("No person in the United States shall . . . be subjected to discrimination' on the basis of race, color, national origin, or sex" (omission and emphasis in original) (quoting 42 U.S.C. § 2000d (1994)).

¹²³ In *Alexander v. Sandoval*, 532 U.S. 275, 285-86 (2001), the Court held that the rights created against discrimination in § 601 of Title VI of the Civil Rights Act of 1964, § 2000d (1994), did not extend to those regulations authorized under § 602 that went beyond the scope of § 601. *Id.* at 285-86. In NCLB, none of the provisions in 20 U.S.C. § 6311(b)(8) go beyond the scope of the right created in § 6301. The text of § 6301 creates a right that the provisions under § 6311(b)(8) clearly serve to effectuate.

¹²⁴ *Blessing v. Freestone*, 520 U.S. 329, 342 (1997).

¹²⁵ *Id.*

¹²⁶ See *id.* at 343-44 (declining to find a general right to substantial compliance with the Social Security Act).

¹²⁷ Examples would be a failure to "provide additional educational assistance to individual students assessed as needing help to achieve the state's challenging academic achievement standards," 20 U.S.C. § 6311(b)(8)(B) (Supp. I 2001), or a failure to implement "the specific steps the State educational agency will take to ensure that both schoolwide programs and targeted assistance schools provide instruction by highly qualified instructional staff." *Id.* § 6311(b)(8)(C).

¹²⁸ See *Blessing*, 520 U.S. at 342 ("Only when the complaint is broken down into manageable analytic bites can a court ascertain whether each separate claim satisfies

would enumerate specific failures to take steps the state has defined as essential to providing “a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and state academic assessments.”¹²⁹

C. A Binding Obligation?

The *Blessing* test’s third prong asks whether the statute imposes a binding obligation on the state: Is the language couched in “mandatory rather than precatory terms?”¹³⁰ In enunciating this requirement, the *Blessing* Court cites the discussion in *Pennhurst* of congressionally created obligations that meet the mandatory requirement and give rise to an implied cause of action.¹³¹

the various criteria we have set forth for determining whether a federal statute creates rights.”).

¹²⁹ 20 U.S.C. § 6301 (Supp. I 2001). These particular types of claims have been considered in a number of Supreme Court cases. See, e.g., *Livadas v. Bradshaw*, 512 U.S. 107 (1994) (holding that an employee had a private right under the National Labor Relations Act to sue the State Labor Commissioner based on the Commissioner’s policy of refusing to enforce her right to prompt payment upon discharge); *Suter v. Artist M.*, 503 U.S. 347 (1992) (holding that the provision of the Adoption Assistance and Child Welfare Act of 1980 providing that a state will be reimbursed by the federal government for certain expenses incurred in administering foster care and adoption services does not confer on its beneficiaries a private right enforceable in a section 1983 action); *Wilder v. Va. Hosp. Ass’n*, 496 U.S. 498 (1990) (granting hospital management a cause of action under section 1983 to challenge the state’s compliance with the Medicaid Act provision that obliges states to adopt reasonable and adequate hospital reimbursement rates); *Wright v. City of Roanoke Redev. & Hous. Auth.*, 479 U.S. 418 (1987) (holding that tenants living in low-income housing projects owned by the City of Roanoke Redevelopment and Housing Authority had a cause of action under section 1983 to enforce the Brooke Amendment to the United States Housing Act of 1937, which created a rent ceiling for public housing units). While the Court in *Blessing* analyzed provisions that on their own do not create rights in the FERPA statute, the provisions were never attached to any broader right. Although it is unlikely that “Congress meant to give each and every Arizonan who is eligible for Title IV-D the right to have the State Department of Economic Security staffed at a ‘sufficient’ level,” *Blessing*, 520 U.S. at 345, it is clear that Congress intended that each child in a school funded under Title I of NCLB be taught by a highly qualified teacher. In fact, achieving this goal was one of the primary purposes of the Act, which sets a firm deadline for reaching this result. See 20 U.S.C. § 6601 (goal of having highly qualified teachers); *id.* § 6677 (deadline). Furthermore, the definition of highly-qualified is reached through a combination of state and federal regulations and it would not be any strain to judicial competence to determine, unlike the requirements apparent in *Suter* and *Livadas*.

¹³⁰ *Blessing*, 520 U.S. at 341.

¹³¹ *Id.* (citing *Wilder*, 496 U.S. at 510-11; *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)).

Unlike legislation enacted under § 5, however, legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepted the terms of the "contract."¹³²

The *Pennhurst* Court found that the statute in question¹³³ merely expressed a congressional preference for the systematic improvement of care for mentally disabled individuals by encouraging better planning, coordination, and demonstration projects.¹³⁴ For evidence, the Court cited the failure of the statute to condition funding on the state's agreement to meet provisions, as well as Congress's dramatic underfunding of the program.¹³⁵ The Court found it inconceivable that participating states were aware of the binding force of the statutory obligations when there was no conditional language and even those administering the statute did not understand it to impose binding obligations.¹³⁶

The terms of section 6311(b)(8) are mandatory components of the plan the state must submit to receive funding. The section is titled "Requirement" and it details the ongoing responsibilities of the SEA to individual districts, schools, and students.¹³⁷ Unlike the statute in *Pennhurst*, NCLB is clear that funding rests on state compliance with these responsibilities: "If a State fails to meet any of the requirements of this section, other than the requirements described in paragraph

¹³² *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

¹³³ Developmentally Disabled Assistance and Bill of Rights Act, Pub. L. No. 94-103, 89 Stat. 496 (1975) (codified at 42 U.S.C. §§ 6000-6081 (2000)).

¹³⁴ *Pennhurst*, 451 U.S. at 22.

¹³⁵ *See id.* at 23-24 (finding that the implementing regulations stated that the purpose of the Act was to improve and coordinate the provision of services to persons with developmental disabilities and did not empower the Secretary to cut off funds for a failure to deliver the rights claimed under the provisions at issue in the case).

¹³⁶ The *Pennhurst* Court explained its rationale by asserting:

In this case, Congress fell well short of providing clear notice to the States that they, by accepting funds under the Act, would indeed be obligated to comply with § 6010. Not only does § 6010 lack conditional language, but it strains credulity to argue that participating States should have known of their "obligations" under § 6010 when the Secretary of HHS, the governmental agency responsible for the administration of the Act and the agency with which the participating states have the most contact, has never understood § 6010 to impose conditions on participating States.

Id. at 25.

¹³⁷ 20 U.S.C. § 6311(b)(8) (Supp. I 2001). These provisions will be even more concrete once the state writes and submits its plan to the Secretary.

(1), then the Secretary may withhold funds for State administration under this part until the Secretary determines that the State has fulfilled those requirements.”¹³⁸

Further evidence of Congressional intent for section 6311(b)(8) to create binding obligations lies in the evolution of that section from the 1994 legislation to the 2001 Act. The 1994 version of Title I was the first to include a version of section 6311(b)(8), making states accountable for providing economically disadvantaged schools and districts with the educational resources necessary to meet the performance standards also created in that act.¹³⁹ In 2001 Congress added four other provisions to this section, making state obligations even more clear.¹⁴⁰ While there are still abstract terms, section 6311(b) requires regulations that make the provisions more specific and delineate the steps that states will take to achieve NCLB’s goals. Thus, NCLB can be distinguished from the statutes discussed in *Pennhurst*,¹⁴¹ *Suter*,¹⁴² and *Blessing*,¹⁴³ each of which was found to be too vague to create rights. Given these specific implementing regulations, courts will not find it beyond their ability to hold states accountable to these steps.

The states were certainly aware of the magnitude of their commitment under NCLB, and expected to be bound by it. Most states have made changes to comply with the Act.¹⁴⁴ Some have considered

¹³⁸ *Id.* § 6311(g)(2).

¹³⁹ Improving America’s Schools Act of 1994, Pub. L. No. 103-382, 1111(b)(8)(A), 108 Stat. 3518, 3527 (1994) (codified as amended at 20 U.S.C. § 6311(b)(8)(A) (Supp. I 2001)). For a description of the evolution of the State accountability provisions, see Taylor, *supra* note 115, at 1764-66.

¹⁴⁰ 20 U.S.C. § 6311(b)(8)(B)–(E) (Supp. I 2001).

¹⁴¹ See *supra* text accompanying notes 59-60 (discussing the *Pennhurst* Court’s distinction between statutes that speak in precatory terms and those that impose specific obligations).

¹⁴² See *supra* text accompanying notes 61-62 (discussing the *Suter* Court’s holding that the term “‘reasonable efforts’ did not unambiguously confer an enforceable right upon [its] beneficiaries”).

¹⁴³ See *supra* text accompanying notes 70-72 (noting that the *Blessing* Court concurred with the distinction between mandatory and precatory terms discussed in *Pennhurst*).

¹⁴⁴ See *States’ Grades on Education Mixed*, WASH. POST, July 15, 2004, at A07 (“Most states have met or are on the way to meeting 75 percent of the major requirements of the No Child Left Behind law, according to the nonpartisan Education Commission of the States. That level of compliance has more than doubled over the past year.”); Education Commission of the States, *Recent State Activities/Policies: No Child Left Behind*, at <http://www.ecs.org/html/offsite.asp?document=%2fecscat.nsf%2fWebTopicView%3fOpenView%26RestrictToCategory%3dNo%2bChild%2bLeft%2bBehind> (last visited Dec. 31, 2004) (detailing recent legislation enacted or proposed by various

refusing Title I funding in order to avoid NCLB obligations, further indicating that the extent and binding nature of NCLB's requirements are clear.¹⁴⁵

D. *Context?*

Chief Justice Rehnquist explained in *Pennhurst* that “[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.”¹⁴⁶ In *Gonzaga*, the Court followed this approach and looked to the context of the provision in question—its relationship to other clauses and the enforcement mechanisms provided—in determining whether a private right was created.¹⁴⁷ The *Gonzaga* Court found that the individual rights asserted by the plaintiff, when viewed in the context of the section of FERPA at issue, referred only to the type of “policy or practice” that triggers a funding prohibition.¹⁴⁸ This conclusion, stated the *Gonzaga* majority, is buttressed by the centralized enforcement mechanism.¹⁴⁹ The Secretary was designated to deal with violations by establishing a compliance office that would review individual complaints and a provision was added to centralize enforcement in order to standardize interpretation of and responsibilities under the Act.¹⁵⁰ The Court then drew a

states to comply with NCLB) (last visited Dec. 17, 2004).

¹⁴⁵ Sam Dillon, *Some School Districts Challenge Bush's Signature Education Law*, N.Y. TIMES, Jan. 2, 2004, at A1:

[T]hree Connecticut school districts have rejected federal money rather than comply with the red tape that accompanies the law, and several Vermont districts have shifted federal poverty money away from schools to shield them from sanctions A Republican legislator has introduced a bill that would prohibit Utah authorities from complying with the law or accepting the \$100 million it would bring the state. Half a dozen other state legislatures have voted to study similar action.

See also William Tucker, *No Critics Left Behind*, N.Y. SUN, Jan. 7, 2004, at 11 (“Cheshire, Conn. recently turned down \$80,000 in federal school funding tied to NCLB, arguing that the bureaucracy and paperwork involved in dividing students into racial and ethnic groupings and testing their abilities wasn’t worth it.”).

¹⁴⁶ *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 19 (1981) (quoting *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975)).

¹⁴⁷ See *Gonzaga Univ. v. Doe*, 536 U.S. 273, 285-86 (“[W]here 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 . . . under § 1983 . . .”).

¹⁴⁸ *Id.* at 288-89.

¹⁴⁹ *Id.* at 289-90.

¹⁵⁰ See *id.* at 290 (noting that Congress added a provision centralizing all enforcement proceedings except for hearings).

comparison to *Wright v. City of Roanoke Redevelopment & Housing Authority*, where they found that congressional intent to decentralize enforcement supported a right of action.¹⁵¹

NCLB's focus on school accountability to parents demonstrates congressional intent that parental action be a central part of the enforcement scheme. The Act repeatedly calls for parents to be informed of the status of the school, their child's teacher, and their options for choice.¹⁵² These notification provisions are designed to stimulate a market-reform model where informed parents become consumers able to force the improvement of not only their own child's school, but of the system as a whole, as schools compete for their children.¹⁵³ That Congress intended for parents to be the agents of reform is highlighted by congressional statements about the design of the Act. The same week NCLB was introduced into the House of Representatives, Representative John Boehner made the following statement:

We can give parents the ability to transfer their children out of failing schools—and we must, through private school choice and other means—but even that power is greatly diminished if parents don't know which schools are failing and which are succeeding. Testing produces data—and in the hands of concerned, involved parents, data equals power.¹⁵⁴

It is clear from this statement that Congress intended to empower parents to take action, not just to be informed, and that these individual actions would lead to systemic improvements.

¹⁵¹ 479 U.S. 418, 426 (1987) (“Congress’ aim was to provide a decentralized . . . administrative process.”).

¹⁵² See, e.g., 20 U.S.C. § 6311(h)(1) (Supp. I 2001) (requiring that the annual state report card be presented in an understandable and uniform format and, to the extent practicable, provided in a language that the parents can understand); *id.* § 6311(h)(2)(E) (requiring the same for annual local educational agency report cards); *id.* § 6311(h)(6) (highlighting, in the “Parents right-to-know” section, the LEA’s duty to the parents of each student to inform them of the status of their child’s teacher and their child’s performance on the state academic assessment); see also Henry, *supra* note 93, at 1165 (noting that “parental empowerment is part of the very purpose of [NCLB]” and that “[s]chool choice is the heart of this educational reform”).

¹⁵³ For an explanation of how choice-fed competition could lead to better schools, see CHUBB, *supra* note 31, at 206-15 (arguing that by giving parents choice among public schools while removing guaranteed financial support, schools will improve in response to competitive pressure).

¹⁵⁴ Press Release, U.S. Rep. John Boehner (R-OH), Chairman, House Committee on Education and the Workforce, Testing & Accountability: Empowering Parents at Bureaucracy’s Expense (May 21, 2001), available at <http://edworkforce.house.gov/press/press107/jaboped52201.htm>.

It was equally clear to Congress, however, that if states are not accountable to parents to produce the information as well as the academic and financial support to the parents that create choice, the reform model would not succeed. Representative Boehner further evidenced congressional intent to make state educational systems accountable to parents by stating:

This week, the House of Representatives will vote on President George W. Bush's plan to inject real accountability into federal education spending. In doing so, we'll have an opportunity to shift a meaningful degree of authority back to parents and communities for the first time since Washington got involved with education policy a generation ago.¹⁵⁵

Congress's vision of improvement through state accountability and parental action is reinforced by the Secretary of Education, who is charged with implementing the Act. In an introduction to a Department of Education NCLB workbook for parents Secretary Rod Paige says, "[n]o one cares more about your child's future than you do, and no one is better positioned to hold schools accountable for performance than you are."¹⁵⁶ The workbook also asserts that "assessments will allow parents and officials to hold schools accountable for ensuring that every child learns."¹⁵⁷

For this model of institutional improvement to succeed, parents must be empowered not only through information, but through the ability to put pressure on the state if it fails to provide the financial and academic support to students and schools promised in section 6311(b)(8). Without the ability to hold states to their promise to provide the information and resources that produce choice, parents are powerless to create the change envisioned by Congress.

While there are provisions for central enforcement, that method of enforcement is of limited utility. Centralized oversight of Title I has been of limited effect in the past and is likely to be so in the future.¹⁵⁸ The only penalty that the Department of Education can impose is a denial of funding, a remedy out of proportion to the nature

¹⁵⁵ *Id.*

¹⁵⁶ Rod Paige, *Letter From the Secretary*, in BACK TO SCHOOL, MOVING FORWARD: WHAT "NO CHILD LEFT BEHIND" MEANS FOR AMERICA'S FAMILIES 5, 5 available at <http://www.ed.gov/inits/backtoschool/families/families.pdf>.

¹⁵⁷ *Id.* at 6-7.

¹⁵⁸ See GENERAL ACCOUNTING OFFICE, *supra* note 27, at 9-13 (finding most states out of compliance with the 1994 accountability and assessment requirements of Title I); see also Zamora, *supra* note 11, at 431-32 (describing the historic and continued lack of departmental enforcement of Title I).

of most infractions, as well as counterproductive to the goal of creating additional resources or options in a district or at a school. Accordingly, this remedy is rarely used.¹⁵⁹ It is clear that Congress and the Department of Education envisioned that parents, as well as Department officials, would hold schools and the state educational agencies accountable for the promises they have made. A private right of parental enforcement, therefore, is necessary for achieving the goal of the Act, an opportunity for an effective education for all children.

E. *An Exclusive Enforcement Scheme?*

While the scope of the statutory enforcement scheme must be an element considered in determining whether a private right exists, it must be considered once again when a right is found. As Justice O'Connor explained in *Blessing v. Freestone*:

[E]ven if a plaintiff demonstrates that a federal statute creates an individual right, there is only a rebuttable presumption that the right is enforceable under § 1983. Because our inquiry focuses on congressional intent, dismissal is proper if Congress specifically foreclosed a remedy under § 1983. Congress may do so expressly, by forbidding recourse to § 1983 in the statute itself, or impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983.¹⁶⁰

When there is no direct prohibition of section 1983 actions, a state has to “make the difficult showing that allowing § 1983 actions to go forward in these circumstances would be inconsistent with Congress’ carefully tailored scheme.”¹⁶¹ In *Blessing*, the Court acknowledged that it has only twice found a scheme to be this comprehensive.¹⁶²

There is no persuasive argument that the enforcement scheme in NCLB is comprehensive. In *Gonzaga*, the Court found that the centralized enforcement scheme of the Family Educational Rights and

¹⁵⁹ Cf. Samberg-Champion, *supra* note 20, at 1858-59 (discussing the problems of exclusive central enforcement).

¹⁶⁰ *Blessing v. Freestone*, 520 U.S. 329, 341 (1997) (citations and internal quotation marks omitted).

¹⁶¹ *Id.* at 346 (citations and internal quotation marks omitted).

¹⁶² *Id.* at 347 (citing *Middlesex County Sewerage Auth. v. Nat’l Sea Clammers Ass’n*, 453 U.S. 1, 20 (1981) (finding that the “unusually elaborate enforcement provisions” of the Federal Water Pollution Control Act, including several provisions authorizing private suits, precluded enforcement under section 1983); and *Smith v. Robinson*, 468 U.S. 992, 1009-12 (1984) (concluding that the “carefully tailored” local administrative procedures created by the Education of the Handicapped Act precluded enforcement under section 1983)).

Privacy Act created evidence against finding a right in the first instance.¹⁶³ Since the Court found no right, there was no consideration of whether, on its own, the scheme was so comprehensive as to preclude section 1983 actions. FERPA, however, specifically stated that “[e]xcept for the conduct of hearings, none of the functions of the Secretary under this section shall be carried out in any of the regional offices.”¹⁶⁴ This provision was added in reaction to fear “that regionalizing the enforcement of [FERPA] may lead to multiple interpretations of it, and possibly work a hardship on parents, students, and institutions.”¹⁶⁵ Accordingly, that enforcement scheme included an administrative system specifically designed to provide individualized administrative enforcement.¹⁶⁶ NCLB contains no provisions restricting decentralized enforcement nor does it create any individualized administrative processes. Moreover, in the only two cases where the Court found enforcement schemes so comprehensive as to preclude private enforcement, the statutes in question included substantial administrative adjudicatory procedures to process and deal with individual complaints.¹⁶⁷

Not only has the Court never found an enforcement comprehensive that lacks any kind of individual process, it has also been hesitant to allow statutes to remain without this characteristic. In *Blessing*, the Court found it significant that

[t]he enforcement scheme that Congress created in Title IV-D is far more limited than those in *Sea Clammers* and *Smith*. Unlike the federal programs at issue in those cases, Title IV-D contains no private remedy—either judicial or administrative—through which aggrieved persons can seek redress. The only way that Title IV-D assures that States live up to their child support plans is through the Secretary’s oversight.¹⁶⁸

In addition, “no private actor would have standing to force the Secretary to bring suit for specific performance. To the extent that Title IV-D may give rise to individual rights, therefore, we agree . . . the Secretary’s oversight powers are not comprehensive enough to close the

¹⁶³ *Gonzaga*, 536 U.S. at 289-90.

¹⁶⁴ 20 U.S.C. § 1232g(g) (2000).

¹⁶⁵ *Gonzaga*, 536 U.S. at 290 (quoting 120 CONG. REC. 39,863 (1974)).

¹⁶⁶ The Secretary created the Family Policy Compliance Office “to act as the Review Board required under the Act and to enforce the Act with respect to all applicable programs.” *Id.* at 289.

¹⁶⁷ *Blessing*, 520 U.S. at 347.

¹⁶⁸ *Id.* at 348.

door on § 1983 liability.”¹⁶⁹ The Court was uncomfortable finding a right with no private remedy at all.¹⁷⁰ For NCLB to be the first statute granting critically important rights, but no corresponding remedy, would be an unfortunate irony given that the effectiveness of the Act relies principally on individual participation and action.

NCLB is clearly intended to benefit children by providing a right to “a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and [S]tate academic assessments.”¹⁷¹ This right is not too imprecise to enforce, because the specific steps a state must take are enunciated clearly in provisions such as section 6311(b)(8). It is also clear that the federal government intended these obligations to be binding. Not only do the language and structure of the Act make that clear, but state failure to live up to Title I obligations was the very impetus for restructuring the law to create greater accountability and add more specific assessment provisions to section 6311(b)(8).¹⁷² In addition, the improvement mechanism at

¹⁶⁹ *Id.* Similarly, it is unlikely that individuals would have standing to sue the Secretary to force compliance. The appropriate action would be to force the Secretary to cut off funding to the State, which is not the compliance remedy parents would seek. *See Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976) (finding that to have standing, the plaintiff must show “an injury to himself that is likely to be redressed by a favorable decision”).

¹⁷⁰ Where the statute provides no private remedy and there is no enforcement of rights by a supervisory federal agency, the parties may bring actions against the agency under the Administrative Procedure Act, 5 U.S.C. § 704 (2000). The D.C. Circuit has found, however, that where private action is allowed, APA enforcement is precluded. *See Council of & for the Blind v. Regan*, 709 F.2d 1521, 1531-33 (D.C. Cir. 1983) (stating that section 124 of the Revenue Sharing Act provides parties with an adequate remedy and precludes enforcement under the APA). The D.C. Circuit has also found congressional preference for individual actions against the offending party, rather than suits demanding federal enforcement. *See, e.g., Women’s Equity Action League v. Cavazos*, 906 F.2d 742, 750 (D.C. Cir. 1990) (finding that “[t]he *Cannon [v. Univ. of Chicago]*, 441 U.S. 677 (1979) opinion contrasts two private remedies: suit against a discriminatory fund recipient to terminate the offending discrimination; and suit against the government to terminate federal funding. The Court found strong support in legislative history for the former, but resistance on the part of lawmakers toward the latter”). Then-Judge Ginsburg, author of the opinion, noted “the *Cannon* Court observed that an APA suit to compel investigation and fund termination, although available if no private remedy exists, is far more disruptive of HEW’s efforts efficiently to allocate its enforcement resources . . . than a private suit against the recipient of federal aid.” *Id.* at 751 (internal citations omitted). By finding that Congress intended a centralized enforcement scheme, and ruling out any form of private administrative or judicial remedy against the specific offender, a court would leave a far less favored form of remedy as the only remaining option.

¹⁷¹ 20 U.S.C. § 6301 (Supp. I 2001).

¹⁷² *See, e.g.,* Press Release, *supra* note 154 (blaming Washington’s reluctance to

work in the Act requires parental action to force school and district competition. If states were able to prevent parental enforcement actions without repercussion, the entire market mechanism for improvement would fail. Departmental sanctions do not further this kind of choice-based scheme. For these reasons, a court should find that NCLB creates federally enforceable rights under section 6311(b)(8).

IV. REASONS FOR OPEN-MINDED SECTION 1983 JURISPRUDENCE

Since the success of the statutory scheme requires private rights, and Congress clearly intended to create them, there is ample precedent for a court to find enforceable rights under NCLB even given the reluctance toward rights creation evinced in *Gonzaga*. There is a possibility, however, that language in *Gonzaga* expressing a general disinclination to imply rights might drown out the decision's precise language suggesting situations when courts can and should find rights.¹⁷³ Again, the rights-creating language as well as the purpose and statutory scheme clearly point to an intent to create a private right of action in NCLB. Failing to find such a right within NCLB would reinforce an over-reading of *Gonzaga* and push rights enforcement law in an unfortunate direction, undermining congressional intent and other values at work in whatever statute is at hand.¹⁷⁴ To avoid that result, *Gonzaga* should be interpreted by courts as a reaffirmation of the *Blessing* test for creating rights and the *Thiboutot* presumption for their enforcement under section 1983. In addition, there are both consti-

hold states accountable for a lack of improvement in education, despite increased Title I spending).

¹⁷³ It was this tendency that the Third Circuit addressed and corrected in overruling a district court failure to find a private right of action in three provisions of the Medicaid Act, stating that

The District Court, relying heavily on *Gonzaga University*, concluded that Congress had not unambiguously conferred the rights that plaintiffs sought to vindicate under § 1983, and dismissed the suit. At first blush, language in *Gonzaga University* would appear to support that conclusion. . . .

The Court, no doubt, has set a high bar for plaintiffs. Nonetheless, after having considered the relevant provisions of the Medicaid Act against the backdrop of *Gonzaga University*, we are convinced that Congress unambiguously conferred the rights which plaintiffs here seek to enforce. Accordingly, we will reverse the order of the District Court.

Sabree v. Richman, 367 F.3d 180, 181-82 (3d Cir. 2004) (internal citations omitted).

¹⁷⁴ Cf. *Samberg-Champion*, *supra* note 20, at 1872 n.219, 1873-74 & n.230 (citing cases where courts have misconstrued *Gonzaga*).

tutional and normative reasons why the courts should keep an open mind toward section 1983 suits seeking to enforce state obligations accepted under federal grant-in-aid statutes.

A. *Respect for Congressional Intent*

A narrow reading of *Gonzaga*, conflating the implied remedy and the implied rights doctrines, would undermine congressional intent by rendering “[s]ection 1983 meaningless as an independent source of authority.”¹⁷⁵ The Supreme Court risks substantially undercutting Congress’s lawmaking power by imposing the same restrictive test on section 1983 plaintiffs as is used when implying a remedy under the statute itself.¹⁷⁶ First, the Court will have ignored congressional intent not only in creating an independent remedy for enforcing statutory rights but in reaffirming the meaning of the “and laws” language in section 1983. When, in *Thiboutot*, the Court first assumed that Congress intended all rights-creating statutes to be so enforced,¹⁷⁷ Congress refused to adopt amendments to limit section 1983 to civil rights statutes.¹⁷⁸ If the same test were applied in section 1983 and implied remedies cases, section 1983 would become redundant because petitioners would have rights directly under the statute in question and would never need to resort to the section 1983 remedy. Second, allu-

¹⁷⁵ *Id.* at 1882 (internal citations omitted).

¹⁷⁶ See Key, *supra* note 15, at 286 (arguing that the Court’s restrictions violate the requirement of separation of powers). The issue was also addressed in Pamela S. Karlan, *David C. Baum Memorial Lecture: Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183 (2003), in which Karlan argued:

There is an important class of cases in which the legislature and the executive must depend on the judiciary for the efficacy of *their* judgments. In these cases, it is judicial refusals to act that pose a danger “to the political rights of the Constitution.”

Marbury itself recognized this threat, when Chief Justice Marshall observed that the government of the United States could no longer be “termed a government of laws, and not of men . . . if the laws furnish no remedy for the violation of a vested legal right.”

Id. at 184 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803)).

¹⁷⁷ *Maine v. Thiboutot*, 448 U.S. 1, 6-7 (1980).

¹⁷⁸ Lisa E. Key described this refusal to limit the scope of section 1983:

In 1981, 1985, and again in 1987, Senator Hatch proposed an amendment to § 1983 that would explicitly limit the term “laws” to civil rights laws. The proposed amendment did not pass on any of these occasions. Although this is not evidence of the original intent of the drafters of § 1983, it is evidence of the intent of more recent Congresses to not limit the scope of § 1983 statutory actions to cases arising under civil rights laws.

Key, *supra* note 15, at 313 (footnote omitted).

sions in *Gonzaga* to the *Cort v. Ash* test, whose fourth prong evinces federalism concerns, suggests that the Court is engaging in political judgments as to the wisdom of federalizing traditional state tasks.¹⁷⁹ In *Rosado v. Wyman*,¹⁸⁰ Justice Harlan stated the appropriate role of the Court in interpreting federal funding statutes: “It is, of course, no part of the business of this Court to evaluate, apart from federal constitutional or statutory challenge, the merits or wisdom of any welfare programs, whether state or federal, in the large or in the particular.”¹⁸¹ By imposing judgments as to the appropriateness, rather than legality, of federal policy, the Court impinges on legislative authority and disrespects the separation of powers boundaries discussed by Justice Harlan.

Since there are no constitutional principles mandating a narrow interpretation of rights in spending statutes as in implied remedies cases, the Court has not overturned its *Thiboutot* and *Blessing* precedents indicating a separate and more flexible approach to implied rights cases. As the Court impinges on Congress’s power and express intent to preserve an independent remedy against state officials for violations of federal statutory rights, it should retain a broader approach to evaluating congressional intent to allocate individual rights. This objective can be realized by maintaining the *Blessing* test and by allowing Congress to articulate its “unambiguous” intent to benefit a certain class through a wider variety of means than the specific language demanded by *Sandoval* in implied remedies cases.

B. *Undermines Principles of Responsive Government and Individual Participation*

Since section 1983 is express evidence of congressional intent to create a remedy, Congress cannot rely on separation of powers grounds to adopt the *Sandoval* presumption against enforceability or the narrow intent-based test that implements it. The Court’s invocation in *Gonzaga* of cases that employ the *Cort v. Ash* test,¹⁸² whose

¹⁷⁹ Whether or not this political judgment is appropriate in light of both the separation of powers concerns specific to implied right of action cases and in light of *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), relegating federalism concerns to the political process is beyond the scope of this Comment.

¹⁸⁰ 397 U.S. 397, 422-23 (1970).

¹⁸¹ *Id.* at 422-23.

¹⁸² 536 U.S. 273, 284-85 (2002) (citing *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979), *Cannon v. University of Chicago*, 441 U.S. 677 (1979), and *California v. Sierra Club*, 451 U.S. 287 (1981), all of which employed the *Cort v. Ash* test to explain the

fourth prong demands respect for areas of traditional state concern, suggests that the Court's desire to protect the states from unreasonable federal demands motivates their more sparing reading of federal rights.¹⁸³ A number of members of the current Court have strongly endorsed this view in their opinions.¹⁸⁴ The only overt statement expressing federalism concerns in the section 1983 context came in Chief Justice Rehnquist's *Wilder* dissent. There he took umbrage at "the Court's suggestion that the States would deliberately disregard the requirements of the statute" which "does less than justice to the States."¹⁸⁵

Federalism as a principle of political organization is meant to protect and promote individual liberty by protecting the autonomy of state government against the accumulation of centralized power and thereby providing increased control over one's personal environment.¹⁸⁶ However, as Wechsler argued,¹⁸⁷ and the Supreme Court ruled in *Garcia v. San Antonio Metropolitan Transit Authority*,¹⁸⁸ state participation and influence in the federal legislative process "ensures that laws that unduly burden the States will not be promulgated,"¹⁸⁹ and that "State sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power."¹⁹⁰

relevance of implied cause of action analysis to implied rights doctrine).

¹⁸³ See Key, *supra* note 15, at 350 (arguing that similar restrictions in *Suter* reflect federalism concerns of the politically conservative justices).

¹⁸⁴ See *id.* at 347 n.353 (providing a demonstrative summary of Chief Justice Rehnquist's federalist ideology as well as some of Justices O'Connor, Kennedy, and Thomas's federalist decisions).

¹⁸⁵ *Wilder v. Va. Hosp. Ass'n.*, 496 U.S. 498, 528 (1990) (Rehnquist, C.J., dissenting).

¹⁸⁶ See Lynn A. Baker & Ernest Á. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 134-43 (2001) (discussing how federalism allows local communities to make their own political decisions).

¹⁸⁷ Herbert Wechsler has argued that federalism protects states, not individuals, and therefore:

The judicial function in relation to federalism thus differs markedly from that performed in the application of those constitutional restraints on Congress or the states that are designed to safeguard individuals. In this latter area of the constitutional protection of the individual against government, both federal and state, subordination of the Court to Congress would defeat the purpose of judicial mediation. For this is where the political processes cannot be relied upon to introduce their own correctives . . .

Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 560 n.59 (1954).

¹⁸⁸ 469 U.S. 528 (1985).

¹⁸⁹ *Id.* at 556.

¹⁹⁰ *Id.* at 552.

The Court found in *Gregory v. Ashcroft*, however, that when “[t]he constitutionally mandated balance of power between the States and the Federal Government” is altered, Congress “must make its intention to do so unmistakably clear in the language of the statute” for an Act to be enforced against the states.¹⁹¹ Yet in *Gregory*, the Court was clear that the presumption against enforcement was justified because the ADEA¹⁹² provision at issue in that case, limiting Missouri’s ability to prescribe age limits for their state judges, went beyond regulating “an area traditionally regulated by the States” to affect decisions “of the most fundamental sort for a sovereign entity.”¹⁹³ Interpreting *Gonzaga* as imposing a similar presumption against enforceability does not respect the distinction drawn in the Court’s federalism decisions in general, and *Garcia* and *Gregory* in particular, between infringing on the policy versus the structural decisions of state governments,¹⁹⁴ and is in direct contradiction with *Thiboutot*.¹⁹⁵ Implied rights enforceable under section 1983 do not create the kind of structural threat that warrants judicial protection of state interests. Therefore, a presumption against enforcement cannot rest on protection of state autonomy.

In addition to the deontological value of federalism, at least four members of the Court have cited its practical benefits in decisions resisting federal authority over the states. Justice O’Connor’s descriptions of these purposes in many of her decisions are aptly summarized by Professors Rubin and Feeley:¹⁹⁶

Federalism, Justice O’Connor states “increases opportunity for citizen involvement in democratic processes,” it “makes government more re-

¹⁹¹ 501 U.S. 452, 458-60 (1991) (internal quotation marks omitted).

¹⁹² Age Discrimination in Employment Act of 1967 (ADEA) Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621-34 (1988)).

¹⁹³ *Gregory*, 501 U.S. at 460 (internal citations omitted).

¹⁹⁴ In addition, where there is no Eleventh Amendment issue, as there is not in the case of NCLB, the Supreme Court has not found judicial enforcement of statutes in general to be as invasive of state autonomy as enforcement by federal administrative agents. See *Printz v. United States*, 521 U.S. 898, 925 (1997) (placing administrative and legislative enforcement on a different footing from court enforcement of federal regulatory programs, with the former being more intrusive).

¹⁹⁵ See Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 904 (1994) (arguing that Justice O’Connor’s decision in *Gregory* was dictated by “principles of federalism [that] created a presumption against the Act’s coverage of the state’s ‘important government officials’—a presumption that could be overcome only by clear, unambiguous language”).

¹⁹⁶ *Id.* at 906 (stating that members of the Court confuse normative principles of federalism with managerial principles of decentralization—if the benefits attributed to federalism exist, they result from the latter).

sponsive by putting States in competition for a mobile citizenry,” and “it allows for more innovation and experimentation in government.”¹⁹⁷

Not only are restrictions on Spending Clause legislation to further values the Court finds more important a possible violation of the separation of powers principle laid out in *Garcia*, but a restrictive view of implied rights of action also does not further the values articulated by Justice O’Connor.

1. Experimentation

Many Spending Clause statutes do not curtail the state’s ability to engage in policy experimentation. As in *NCLB*, the federal government often enunciates a broad objective and invites each state to develop its own methods and policies for attaining the goal. While the issue of whether *NCLB* grants enough state autonomy has certainly been a matter of debate,¹⁹⁸ these policy questions are political, not judicial, since the federal government is allowed to condition funds on compliance with specific requirements.¹⁹⁹

2. Responsive Government

The assumption that governments at the state level will be more responsive to all citizens because they will want to develop policies that attract resident taxpayers is fundamentally flawed in at least one respect. Poor residents may not be taxpayers and may require more resources from the state than wealthier citizens.²⁰⁰ Under this market

¹⁹⁷ *Id.* at 907 (quoting *Gregory*, 501 U.S. at 458).

¹⁹⁸ See, e.g., Jo Becker & Rosalind S. Helderman, *Va. Seeks to Leave Bush Law Behind: Republicans Fight School Mandates*, WASH. POST, Jan. 24, 2004, at A01 (reporting the frustration of Republican Virginia state legislators at having to rework their accountability system to meet No Child Left Behind requirements).

¹⁹⁹ No Child Left Behind is attracting a substantial degree of political attention and was at the center of the 2004 presidential campaign. A search of the Lexis-Nexis database for all news sources over the past ninety days performed on January 24, 2004, found 233 articles with “No Child Left Behind” in the title and more than 3000 mentioning the Act in their text. For examples of the centrality of the issue to the presidential campaign, see Janet Hook, *No Politics Left Behind in Education Debate*, L.A. TIMES, Jan. 25, 2004, at A1 (“The education improvement law has become a hot political issue”); Erik W. Robelen, *“No Child” Law Faulted in Democratic Race*, EDUC. WEEK, Jan. 14, 2004, at 1 (“The No Child Left Behind Act took center stage for a prolonged discussion when Democratic presidential candidates gathered in Iowa last week for their ninth debate.”).

²⁰⁰ See James M. Buchanan, *Principles of Urban Fiscal Strategy*, 11 PUB. CHOICE 1, 13-16 (1971) (arguing that city policies favor the upper-middle class in order to retain taxing citizens and are a rational fiscal strategy for cities).

theory of government,²⁰¹ the state is not likely to develop policies that address the needs of poor or even lower-middle class citizens and, in fact, may develop policies to their detriment in an effort to repel rather than attract such residents.²⁰² Not only are policy decisions made to attract wealthy tax-paying residents, but politicians are politically more responsive to wealthy constituents who can contribute more resources toward their reelection.²⁰³ While unequal influence or access is not unconstitutional, there are potentially adverse social and economic ramifications resulting from these inequalities. Policies conceived to attract wealthy residents may benefit the state and local budgets as well as state and local politicians in the short-run, but create long-term local, regional, and national problems that many grant-in-aid statutes address.²⁰⁴ Title I of NCLB is a clear example of this type of legislation. It was created to remedy the economic and social ramifications of states' inability to provide an adequate education for poor students.²⁰⁵

Assuming that one goal of federalism is to make government responsive to the people, private rights enforcement can serve an important role in allowing individuals without political or economic power to demand state government action on their own.²⁰⁶ This kind of responsiveness, as well as being necessary to facilitate the social ideal of equity, is economically necessary where traditional political

²⁰¹ See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418-420 (1956) (articulating the theory that citizens are consumers, communities are like goods, and community leaders have an inherent incentive to develop an attractive set of services).

²⁰² See Frank I. Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J. 145, 148-157 (1978) (describing two models of local government legitimacy). See generally ROSCOE C. MARTIN, *THE CITIES AND THE FEDERAL SYSTEM* (1965) (observing that state governments have failed to address urban problems).

²⁰³ See Rubin & Feeley, *supra* note 195, at 915 (noting that local political participation tends to be the province of the wealthy and powerful and works to exclude or disadvantage less fortunate citizens).

²⁰⁴ See Alan N. Greenspan, *The Constitutional Exercise of the Federal Police Power: A Functional Approach to Federalism*, 41 VAND. L. REV. 1019, 1047-48 (1988) (asserting that federal intervention is necessary when competition among states forces them to neglect the "welfare, safety, or morality" of their citizens); Jerry L. Mashaw & Susan Rose-Ackerman, *Federalism and Regulation*, in *THE REAGAN REGULATORY STRATEGY: AN ASSESSMENT* 111, 117-18 (George C. Eads & Michael Fix eds., 1984) (suggesting that competition among states discourages social welfare programs).

²⁰⁵ See *supra* Part I.

²⁰⁶ Non-profit legal organizations dedicated to rectifying social problems such as inadequate education bring suits on behalf of people who are too poor to afford an attorney.

incentives are not effective. To weaken Congress's ability to remedy this failure is to undermine rather than strengthen the ideal of governmental responsiveness.

3. Participation

Participation is the aspect of federalism most jeopardized by overreading a presumption against enforceability of federal rights into *Gonzaga*. Granting citizens effective political participation through private rights of action where traditional political mechanisms have failed has local social and economic ramifications that go beyond the adoption of effective policy. When Alexis de Tocqueville sought to explain the value of local democracy in America, he did not speak in terms of efficiency. In fact, he believed that local democratic government was far more inefficient than centralized monarchy.²⁰⁷ But by allowing individuals an opportunity to shape the policies of their community according to their self-interest, empowered individuals take that spirit of innovation and carry it into their social and economic life:

Aristocracy thinks more about preservation than improvement.

On the contrary, when public authority is in the hands of the people, they, as the sovereign power, seek out improvements in every quarter because of their own discontent.

The spirit of improvement then infiltrates a thousand different areas; it delves into endless detail and above all advocates those sorts of improvements which cannot be achieved without payment; for its concern is to better the condition of the poor who cannot help themselves.

Furthermore, an aimless restlessness permeates democratic societies where a kind of everlasting excitement stimulates all sorts of innovations which almost always involve expense.²⁰⁸

De Tocqueville saw a direct connection between individualized political power, notably for the poor, and the spirit of involvement and in-

²⁰⁷ According to de Tocqueville:

Government by one man alone is more consistent in his rule than a crowd would be, supposing equal enlightenment in both both these parties. He displays more persistence, more overall vision, more attention to detail, a better judgment of men. Anyone who refutes these things has either never seen a democratic republic at work or bases his assessment on very few examples.

DE TOCQUEVILLE, *supra* note 1, at 285

²⁰⁸ DE TOCQUEVILLE, *supra* note 1, at 246.

novation that has distinguished this country and been central to its achievements.

Commentators equate this vision of local democracy and individual political participation with debate in town hall meetings, political rallies, and meetings with local or state representatives.²⁰⁹ This method of placing pressure on representatives is appealing in a way that does not hold true for going to the local federal courthouse to demand state action. There is no difference, however, in the motivation of the individual or in the result for the individual or the community. Where effective political action is denied because of wealth, individual rights enforcement provides the same type of political participation with the same benefits for the individual and the community as a whole.

The school improvement scheme in NCLB is an instance where Congress has sought to create alternative forms of power for the poor to attain congressional reform goals. NCLB seeks to improve failing public schools by instituting competition through accountability and choice. Schools in affluent areas succeed because parents in these communities have the resources to create competition through the option of private school and have the political clout to assure higher levels of funding and attention to problems should the school system fail to respond.²¹⁰ The belief in a "Town Hall" solution is flawed be-

²⁰⁹ Cf. Rubin & Feeley, *supra* note 195, at 906 (noting the feelings of nostalgia and idealism that accompany federalism, stating that it "conjures up images of Fourth of July parades down Main Street, drugstore soda fountains, and family farms with tire swings in the front yard").

²¹⁰ See Taylor, *supra* note 115, at 1752-53 (discussing the factors that make schools in wealthy districts more successful than those in poorer districts). In addition, nearly every state has been through at least one round of litigation challenging the constitutionality of state funding formulas under state constitutions. The latest successes include Arkansas and New York. For a comprehensive listing of the relevant cases, see Kelly Cochran, Comment, *Beyond School Financing: Defining the Constitutional Right to an Adequate Education*, 78 N.C. L. REV. 399, 402 n.22 (2000). The Supreme Court has found that there is no right to an adequate education under the federal Constitution. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) (holding that education is not explicitly or implicitly protected by the Constitution); see also, Rubin & Feeley, *supra* note 195, at 919 (noting both the ironic and erroneous use of the rhetoric of local autonomy to defend state policies that undermine local interests); Joan C. Williams, *The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law*, 1986 WIS. L. REV. 83, 104-113, 118-119 (making the same observation specifically about the Court's decisions against equitable funding in *San Antonio* and desegregation orders in *Milliken v. Bradley*, 418 U.S. 717 (1974)); cf. WILLIAM A. FIRESTONE ET AL., FROM CASHBOX TO CLASSROOM: THE STRUGGLE FOR FISCAL REFORM AND EDUCATIONAL CHANGE IN NEW JERSEY 44-49 (1997) (describing the impact of community wealth on the quality of school districts in New Jersey); *id.* at 40

cause even if poor parents are informed (which they would have to be to take judicial action under NCLB), they do not have the resources or political influence to create options or force governmental attention. Even if their motivation is self-interest,²¹¹ allowing parents access to courts to enforce standards that have been set by the localities and states themselves is a way of encouraging citizens to be involved in the future and success of their community by redressing imbalances in political power.²¹²

Where Congress has constitutionally decided that a national policy is necessary, the democratic goal of local participation is well served through private statutory enforcement. Private action allows each locality to voice the extent to which policies should be enforced and forces citizens to become engaged in policy. If a majority of citizens are unhappy, if the state feels too much financial pressure, or if Congress finds decentralized enforcement too disruptive, each has political and legislative tools at their disposal to correct the situation.

By allowing citizens the authority to hold governments accountable, private rights of action encourage an innovative and entrepreneurial spirit. Professor Karlan, criticizing the Court's growing reluctance to grant private rights of action and the resulting rights-remedies gap, stated:

Presumably, that [gap] will increase the number of uncorrected violations, leaving the right less completely protected. Just as "[t]o the extent that a citizen's right to vote is debased, he is that much less a citizen," so too, to the extent that the ability to enforce a right is debased, it is that much less a right.²¹³

Not only does the inability to vindicate rights undermine the value of the right, it undermines the value of the citizen who is left without judicial or political recourse. This situation does damage not just to our self-conception as a country that places a premium on equality, but also to our reliance on each individual's belief in access and opportunity to fuel a productive and innovative society.

For defenders of federalism, the value of state and local government does not lie solely in the institutions themselves, but in their

(highlighting the disparity between low and high wealth districts in New Jersey).

²¹¹ See DE TOCQUEVILLE, *supra* note 1, at 279 ("If . . . you fail to link the idea of rights to individual self-interest, which is the only fixed point in the human heart, what else have you got to rule the world except fear?").

²¹² See *supra* text accompanying note 206.

²¹³ Karlan, *supra* note 176, at 195 (quoting *Reynolds v. Sims*, 377 U.S. 533, 567 (1964)).

ability to safeguard liberty and produce desirable results such as innovation, participation, and responsiveness. Where governments fail to produce these benefits through traditional political methods, other means are necessary. When evaluating a statute, courts should keep in mind the benefits private enforcement can bring not only to an individual, but to the spirit of a community. And when evaluating congressional intent, it should be remembered that federal statutes often address national needs created by an imbalance of political power that makes private enforcement necessary. Statutes must be interpreted in light of larger principles, but the Supreme Court has explicitly stated that the appropriate balance of power between federal and state governments in shaping public policy is one principle that is left to political, not judicial, judgment.²¹⁴

C. *A Damaging Presumption Against Effectiveness*

In his *Wilder* dissent, Chief Justice Rehnquist criticized what he felt was the majority's unfair assumption that states would not voluntarily live up to the obligations agreed to in exchange for federal funds.²¹⁵ The Court's "assumption" in *Wilder*, however, is supported in that case by evidence of congressional unhappiness with state compliance and evidence of states' failure to comply. On the other hand, to interpret *Gonzaga* narrowly would have the Court engage in its own "unfair assumption" that Congress has no interest in accomplishing the purposes laid out in its legislation. Should the Court render section 1983 meaningless and reverse the *Thiboutot* presumption in favor of rights enforcement, the switch would reflect an assumption that if Congress actually wanted to accomplish its goals, lawmakers would say so "unambiguously."²¹⁶

Legislative language is often ambiguous due to the necessities of compromise. Moreover, ambiguity may be a purposeful tactic necessary to get majority support.²¹⁷ Ambiguity of this sort does not change

²¹⁴ See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 556 (1985) ("The political process ensures that laws that unduly burden the States will not be promulgated.").

²¹⁵ *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 528 (1990) (Rehnquist, C.J., dissenting).

²¹⁶ See Samberg-Champion, *supra* note 20, at 1858-63 (discussing whether Spending Clause statutes are meant to be underenforced and concluding that Congress has become increasingly sophisticated in articulating when it means for statutes to be underenforced).

²¹⁷ Joseph A. Grundfest & A.C. Pritchard, *Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, 54 STAN. L. REV., 627, 640-42

the fact that Congress has unambiguously passed legislation addressing a problem, and the successful passage of the legislation demonstrates that it is a problem with national resonance. State acceptance of federal money unambiguously expresses its recognition of the problem, and acknowledges that the state has not resolved the issue on its own.²¹⁸ The purpose of grant-in-aid legislation is not to give money for a promise, but to give money for results. The evolution of Title I reflects the developing awareness that a promise is not sufficient.

Congressional revision of perennially ignored mandates such as Title I demonstrates an intent to demand compliance. Federal agency enforcement has repeatedly proven insufficient for realizing this intent,²¹⁹ and as a result many modern grant-in-aid statutes rely heavily on private enforcement. As Professor Karlan has observed, “[t]he idea behind the ‘private attorney general’ can be stated relatively simply: Congress can vindicate important public policy goals by empowering private individuals to bring suit.”²²⁰

(2002) (outlining the legislative incentives for ambiguous language, including the need to compromise in order to accumulate enough votes for enactment).

²¹⁸ This is the notion of cooperative federalism, a system which has long been employed by Congress:

In 1887, Congress enacted the first program pursuant to which cash grants were available to the states from the federal government on an annual basis. It was not until 1932, however, in the midst of the Great Depression, that federal grant-in-aid programs began to play a significant role in the relationship between the federal government and the states. . . . These programs, which included the Social Security Act of 1935 and the National Housing Act of 1934, were seen as a way to blend the powers of the state and federal governments—a concept known as cooperative federalism—to provide greater benefits for all.

Key, *supra* note 15 at 287-88.

²¹⁹ See Samberg-Champion, *supra* note 20, at 1858-63 (describing the limited nature of agency enforcement of Spending Clause laws).

²²⁰ Karlan, *supra* note 176, at 186. The Supreme Court further expressed the value of private enforcement in the voting rights case *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969):

The achievement of the [Voting Rights] Act’s laudable goal could be severely hampered, however, if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General. . . . The Attorney General has a limited staff and often might be unable to uncover quickly new regulations and enactments passed at the varying levels of state government. It is consistent with the broad purpose of the Act to allow the individual citizen standing to insure that his city or county government complies with the [Act].

Id. at 556-57.

Congress has taken action to demonstrate that it intends to attain its policy goals through private enforcement,²²¹ and that the Supreme Court's prior denials of a private right of action violated this intent. Most importantly, Congress amended the Social Security Act after the Court found no unenforceable rights in *Suter*, demonstrating that the Court's narrow interpretation misconstrued congressional intent.²²² The amendment was also construed by many lower courts not only as a repudiation of the Court's interpretation of the statute, but of the Court's restrictive reasoning.²²³

Aside from the apparent incorrectness of a presumption against enforceability, there is a danger that the presumption would damage the authority of Congress and ultimately the Court. Scholars recognize that the impartial enforcement of laws is as important for garnering obedience as their substantive content, and is critical to a government's maintenance of practical authority.²²⁴ It is common knowledge in teaching that to retain authority over a classroom, it is not enough for a teacher to have fair rules—those rules must also be fairly and consistently enforced.²²⁵ To do so is a matter of maintaining respect, but more importantly, it is a matter of maintaining control. Similarly, the history of Title I demonstrates that, where Congress has not provided for effective enforcement mechanisms, states have not respected the authority of Congress. This situation damages the realization of national interests and the political culture of the country.

²²¹ See *supra* note 116.

²²² 42 U.S.C. § 1320a-2 (2000).

²²³ See *Stanberry v. Sherman*, 75 F.3d. 581, 583-84 (10th Cir. 1996) (turning back the clock to pre-*Suter* reasoning and looking only to whether the federal statutory provisions were sufficiently definite to create enforceable rights and not evince an intent to preclude enforcement under § 1983); *Jeanine B. v. Thompson*, 877 F. Supp. 1268, 1283 (E.D. Wis. 1995) (finding that the “amendment overrules the general theory in *Suter* that the only private right of action available under a statute requiring a state plan is an action against the state for not having that plan”).

²²⁴ Scholars have found that people obey laws when they believe that the lawmaker is legitimate. *E.g.*, Tom R. Tyler & John M. Darley, *Building a Law-Abiding Society: Taking Public Views About Morality and the Legitimacy of Legal Authorities Into Account When Formulating Substantive Law*, 28 HOFSTRA L. REV. 707, 716 (2000). This sense of legitimacy stems from fairness. See TOM R. TYLER, WHY PEOPLE OBEY THE LAW 137-38 (1990) (describing the subjective value of procedural fairness); HARRY K. WONG & ROSEMARY T. WONG, HOW TO BE AN EFFECTIVE TEACHER: THE FIRST DAYS OF SCHOOL 151 (2nd ed. 1998) (explaining the necessity of fair classroom rules); Raymond Paternoster et al., *Do Fair Procedures Matter?: The Effect of Procedural Justice on Spouse Assault*, 31 LAW & SOC'Y REV. 163, 167-68 (1997) (summarizing the aspects of procedural justice that lead to fairness and compliance).

²²⁵ WONG & WONG, *supra* note 224.

It can be argued that if these decisions violate the political will of their constituents, there will be political repercussions. But flaws in political representation and a failure to address issues of national significance created the necessity of national legislation in the first place.²²⁶ By making it more difficult to find and enforce rights in federal statutes, the Court makes that political decision not by limiting Congressional power in a way that respects the construct of the Constitution, but by making it ineffective in a way that undermines the authority and potential of the nation.²²⁷

CONCLUSION

It would be a mistake for lower courts now, and the Supreme Court ultimately, to construe *Gonzaga* as importing the current stringent *Sandoval* analysis into section 1983 doctrine. Such an interpretation, by reversing the presumption in favor of enforceability created in *Thiboutot* and restricting section 1983 analysis to the search for the specific rights-creating language contained in Titles VI and IX, would render section 1983 meaningless.²²⁸ Instead, the Court should adhere to the *Blessing* test to determine the clarity with which obligations are imposed on the state.²²⁹ Courts should be willing to accept a wide variety of statutory formulations as indicative of “unambiguous” intent to create rights. As stated by Justice Breyer in his *Gonzaga* concurrence, “the statute books are too many, the laws too diverse, and their purposes too complex [to] predetermine an outcome through the use of a presumption—such as the majority’s presumption that a right is conferred only if set forth ‘unambiguously’ in the statute’s ‘text and structure.’”²³⁰ While the text and structure of NCLB meet this rigorous standard, the costs of such a stringent test far outweigh any of the potential benefits suggested by the Court’s opinions.

²²⁶ See *supra* text accompanying notes 22-24.

²²⁷ Cf. Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 935 (1999) (arguing that the motivation behind restricting remedies rather than rights is that the curtailment of remedies is much less visible to the public and remedies are assumed to evolve over time, therefore changes to remedies do not have the same impact on the Court’s legitimacy).

²²⁸ Samberg-Champion, *supra* note 20, at 1883-85.

²²⁹ “[T]he test we have ‘traditionally’ used, as articulated in *Blessing*: whether Congress intended to benefit individual plaintiffs, whether the right asserted is not ‘vague and amorphous,’ and whether Congress has placed a binding obligation on the State with respect to the right asserted.” *Gonzaga*, 536 U.S. at 302 (Stevens, J., dissenting) (citing *Blessing*, 520 U.S. at 340-41).

²³⁰ *Id.* at 291 (Breyer, J., concurring).

Courts asking whether a statute conveys a benefit on individuals should be willing to look at the overall purpose of the act, the creation of accountability to individuals, or clear statements aspiring to universal attainment of statutory goals, not only to confirm a judgment based on statutory text but as unambiguous statements in themselves. Merging the second and third prong of *Cort v. Ash*, requiring consideration of the context and purpose of the act as further indicators of intent, allows for courts to honor the Court's invocation of implied right of action analysis while still honoring congressional intent in creating section 1983 and in defining national goals in the statute at hand. Under the second and third prongs of *Blessing*, state plan requirements that ask for descriptions of state action to meet statutory goals should be read as binding obligations and not procedural rights. This reading would reflect an appropriate presumption in favor of, rather than against, congressional effectiveness. Where Congress has indicated through its enforcement provisions that it does not intend full enforcement, or that individual enforcement would inhibit a comprehensive enforcement scheme, the Court can find against a private right of action under the second part of the *Wright* test.

This Comment is not an endorsement of any of the policy decisions made in NCLB. Instead, it uses NCLB to demonstrate how the Court's increasingly sparing willingness to find a right could lead it to undermine congressional intent and frustrate the principles of responsive government and participation that several members of the Court have asserted are central to their judicial decision-making. As stated by de Tocqueville, the benefits of democracy are not in the institutions themselves but in the society they create:

Democracy . . . ensures what the most skillful administration is often too powerless to create, namely to spread through the whole social community a restless activity, an overabundant force, an energy which never exists without it and which, however unfavorable the circumstances, can perform wonders. Therein lies its real advantages.²³¹

We weaken these advantages when we undermine the creativity of Congress to address national problems, improve political participation, promote governmental responsiveness, and even to encourage that most stable patriotism that begins with education and grows through the enforcement of rights.

²³¹ DE TOCQUEVILLE, *supra* note 1, at 285-86.