

THE POWER BEHIND THE PROMISE: ENFORCING NO CHILD LEFT BEHIND TO IMPROVE EDUCATION

Abstract: Despite the U.S. Supreme Court's recognition in 1954, in *Brown v. Board of Education*, that education is of paramount importance, six million middle and high school students are still in danger of being left behind. Less than seventy-five percent of eighth graders, fifty percent in urban schools, are graduating from high school within five years. Advocates for educational equity have appealed to the courts, achieving limited success. They have also turned to the legislature, which most recently enacted the No Child Left Behind Act of 2001 ("NCLB"). Thus far, however, the federal government has not enforced NCLB adequately. This Note argues that to protect the benefits NCLB confers upon them, parents of children attending failing schools must explore their options for private enforcement. Given the Court's decisions within the past three years narrowing implied private right of action and § 1983, the most promising theory for enforcement of NCLB is third-party beneficiary theory.

INTRODUCTION

Education is perhaps the most important function of state and local governments. . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.¹

Despite the U.S. Supreme Court's recognition in 1954, in *Brown v. Board of Education*, that education is of paramount importance, six million middle and high school students are still in danger of being left behind.² This problem is particularly pronounced for students attending high-poverty schools.³ Approximately twenty-five percent of

¹ *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

² See *id.*; SCOTT JOFTUS, ALLIANCE FOR EXCELLENT EDUC., EVERY CHILD A GRADUATE: A FRAMEWORK FOR AN EXCELLENT EDUCATION FOR ALL MIDDLE AND HIGH SCHOOL STUDENTS 1 (Sept. 2002), available at <http://www.all4ed.org/publications/EveryChildA-Graduate/every.pdf>. The number of children at risk may actually be higher. See 148 CONG. REC. H6780 (daily ed. Sept. 30, 2002) (statement of Rep. Visclosky).

³ See JOFTUS, *supra* note 2, at 1.

high school students are reading at "below basic" levels; in high-poverty schools, this number may rise to over seventy percent.⁴ Although standardized test scores of fourth and eighth graders have increased in mathematics, geography, and U.S. history, scores of twelfth graders are either declining or showing little change.⁵ Improvement in test scores in the lower grades is not enough; over sixty percent of students in high-poverty schools are scoring below basic levels in math, and almost seventy percent are scoring below basic levels in science.⁶ Less than seventy-five percent of eighth graders are graduating from high school within five years.⁷ This percentage falls to fifty percent in urban schools.⁸ Racial or ethnic minority status and poverty place students at heightened risk of poor educational outcomes at a time when these students are increasing in number.⁹

Disparities in test scores between students of different races and different socioeconomic classes are only one indication that all students are not receiving the same opportunities to learn and achieve.¹⁰ Another indication of lack of educational opportunity is the inequality in per-pupil spending across the country, skewed across race and class lines.¹¹ Spending is particularly important because inequality of educational resources has been linked to inequality of educational achievement.¹² Despite the Supreme Court's promise in *Brown* that once a state has undertaken to provide its children with an education,

⁴ See 146 CONG. REC. S3232 (daily ed. May 2, 2000) (statement of Sen. Gregg); JOFTUS, *supra* note 2, at 1.

⁵ See 146 CONG. REC. S3235 (daily ed. May 2, 2000) (statement of Sen. Hutchinson); NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., *THE CONDITION OF EDUCATION 2003* IN BRIEF 8-10 (Andrea Livingston & John Wirt eds., 2003) [hereinafter *CONDITION*], available at <http://nces.ed.gov/pubs2003/2003068.pdf>.

⁶ 146 CONG. REC. S3232 (statement of Rep. Gregg).

⁷ JOFTUS, *supra* note 2, at 1.

⁸ *Id.*

⁹ See 148 CONG. REC. S6050 (daily ed. June 26, 2002) (statement of Sen. Kennedy); NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., *STATUS AND TRENDS IN THE EDUCATION OF BLACKS* 48 (Sept. 2003), available at <http://nces.ed.gov/pubs2003/2003034.pdf>; NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., *THE SOCIAL CONTEXT OF EDUCATION 1* (July 1997) [hereinafter *SOCIAL CONTEXT*], available at <http://nces.ed.gov/pubs97/97981.pdf>.

¹⁰ See JOFTUS, *supra* note 2, at 1-2 (recognizing that many teachers in low-performing schools are underqualified). See *Campaign for Fiscal Equity v. State*, 655 N.E.2d 611, 666-67 (N.Y. 1995), *rev'd on other grounds*, 801 N.E.2d 326 (N.Y. 2003), for further elaboration of the term "educational opportunity."

¹¹ Molly McUsic, *The Law's Role in the Distribution of Education: The Promises and Pitfalls of School Finance Litigation*, in *LAW AND SCHOOL REFORM: SIX STRATEGIES FOR PROMOTING EDUCATIONAL EQUITY* 88, 88 (Jay P. Heubert ed., 1999).

¹² See *id.* at 89.

it must do so on equal terms, significant inequalities persist between high-poverty and low-poverty schools.¹³ Differences in indicators of educational opportunity such as test scores, graduation rates, physical facilities, curricular and extra-curricular offerings, access to qualified teachers, and funding exemplify these inequalities.¹⁴

Advocates for educational equity have appealed to the courts, where they have achieved limited success.¹⁵ They have also turned to Congress, which responded by enacting Title I of the Elementary and Secondary Education Act (the "ESEA") in 1965.¹⁶ The most recent enactment of the ESEA is the No Child Left Behind Act of 2001 ("NCLB" or "the Act").¹⁷ NCLB proposes that setting standards and monitoring students, schools, and states in the achievement of these standards will improve the quality of education for all students.¹⁸

Part I of this Note discusses several legal theories that plaintiffs have advanced in order to press courts to mandate a certain quality of education.¹⁹ Part II introduces NCLB, including its legislative history, and focuses on several provisions of the Act that provide benefits for students and their parents.²⁰ Part III outlines several theories for private enforcement that plaintiffs have used successfully to secure benefits conferred by other public programs.²¹ Part IV explores the potential of NCLB for improving education.²² It applies the legal theories discussed in Part III to the context of NCLB and concludes that third-party beneficiary theory is most likely to succeed in enforcing the statute.²³

¹³ See 347 U.S. at 493. See generally SOCIAL CONTEXT, *supra* note 9 (examining differences between high- and low-poverty schools).

¹⁴ See generally SOCIAL CONTEXT, *supra* note 9. For the purposes of this Note, "educational opportunity" refers to these indicators, and "educational equity" refers to equal access to educational opportunity. See generally McUsic, *supra* note 11 (providing a more detailed discussion of these topics).

¹⁵ See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973); *Peter W. v. San Francisco*, 131 Cal. Rptr. 854, 855 (Ct. App. 1976).

¹⁶ Pub. L. No. 89-10, 79 Stat. 27 (1965) (current version at 20 U.S.C. § 6301 (2002)).

¹⁷ Pub. L. No. 107-110, 115 Stat. 1425 (2001) (codified at 20 U.S.C. § 6301).

¹⁸ See GEORGE W. BUSH, NO CHILD LEFT BEHIND 3, available at <http://www.whitehouse.gov/news/reports/no-child-left-behind.pdf> (last visited Apr. 6, 2004).

¹⁹ See *infra* notes 24–51 and accompanying text.

²⁰ See *infra* notes 52–114 and accompanying text.

²¹ See *infra* notes 115–214 and accompanying text.

²² See *infra* notes 215–309 and accompanying text.

²³ See *infra* notes 215–309 and accompanying text.

I. USING THE COURTS TO ENFORCE EQUITY IN EDUCATION

Faced with the contradiction between the U.S. Supreme Court's pronouncement that education must be available to all students on equal terms and the reality that many urban students face, advocates for educational equity have turned to the court system for assistance.²⁴ The pursuit of quality education for all students has taken the form of lawsuits premised on several different theories, including constitutional law and educational malpractice.²⁵ Constitutional law claims have succeeded to some degree, but educational malpractice plaintiffs have not been successful in the public school context.²⁶

A. *The Limited Success of Constitutional Claims in Achieving Educational Equity*

Since the 1970s, many lawsuits for educational equity have focused on funding disparities among school districts as indicative of lack of equal educational opportunity.²⁷ Animating these lawsuits is the theory that without sufficient funding, high-poverty schools cannot educate students adequately.²⁸ Early lawsuits for educational equity succeeded in challenging the constitutionality of state education-financing systems, in state courts, under the Federal Equal Protection

²⁴ See Kevin P. McJessey, *Contract Law: The Proper Framework for Litigating Educational Liability Claims*, 89 Nw. U. L. Rev. 1768, 1773 (1995).

²⁵ See *infra* notes 27-49 and accompanying text for further discussion of constitutional claims and educational malpractice claims. Plaintiffs have also advanced common-law theories of recovery under misrepresentation and breach of contract. See, e.g., *Brown v. Compton Unified Sch. Dist.*, 80 Cal. Rptr. 2d 171, 171 (Ct. App. 1998); *Paladino v. Adelphi Univ.*, 454 N.Y.S.2d 868, 869-70 (App. Div. 1982). A detailed discussion of these claims is beyond the scope of this Note, but readers may consult John G. Culhane, *Reinvigorating Educational Malpractice Claims: A Representational Focus*, 67 WASH. L. REV. 349 (1992) or Todd A. DeMitchell & Terri A. DeMitchell, *Statutes and Standards: Has the Door to Educational Malpractice Been Opened?*, 2003 BYU EDUC. & L.J. 485 (2003) for further information. Frequently, claims brought under state constitutions or statutes have been denied for the same policy reasons as have common-law claims. See, e.g., *D.S.W. v. Fairbanks No. Star Borough Sch. Dist.*, 628 P.2d 554, 556 (Alaska 1981); *Peter W. v. San Francisco*, 131 Cal. Rptr. 854, 860-61 (Ct. App. 1976). But see *B.M. v. State*, 649 P.2d 425, 427 (Mont. 1982) (allowing educational malpractice claims to go forward based on state statutory duty of care).

²⁶ See *supra* note 25 and accompanying text. See *infra* notes 29-49 and accompanying text for further discussion.

²⁷ See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 4-5 (1973); *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 725 (Tex. 1995); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 190 (Ky. 1989).

²⁸ See, e.g., *Rodriguez*, 411 U.S. at 4-5; *Edgewood*, 917 S.W.2d at 725; *Rose*, 790 S.W.2d at 190; see also McUsic, *supra* note 11, at 89.

Clause of the Fourteenth Amendment.²⁹ In 1973, however, in *San Antonio Independent School District v. Rodriguez*, the U.S. Supreme Court declined to find a federal constitutional right to education protected under the Equal Protection Clause.³⁰ In *Rodriguez*, parents of children attending schools in an urban district brought a class action lawsuit on behalf of minority and poor students residing in school districts with low property tax bases.³¹ The Court applied rational basis scrutiny in upholding the Texas system of financing education, finding that no fundamental right existed to justify application of strict scrutiny.³²

No claimant since *Rodriguez* has asserted a federal constitutional right to education successfully.³³ As a result, plaintiffs have challenged school financing under education and equal protection clauses of state constitutions.³⁴ Despite several court decisions in plaintiffs' favor, in most states a district's property wealth continues to be linked to per-student spending.³⁵ Districts with little property wealth have lower tax bases, and therefore, less money to spend on schools.³⁶ This inequality of educational resources corresponds to inequality of educational achievement.³⁷ Given current gaps in performance on many measures of adequacy, it is clear that even successful lawsuits premised on state constitutional guarantees have not resulted in equitable education.³⁸

²⁹ See *Rodriguez v. San Antonio Indep. Sch. Dist.*, 337 F. Supp. 280, 285 (W.D. Tex. 1971), *rev'd*, 411 U.S. at 1; *Serrano v. Priest*, 487 P.2d 1241, 1244 (Cal. 1971).

³⁰ 411 U.S. at 35.

³¹ *Id.* at 4-5.

³² See *id.* at 35.

³³ See, e.g., *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (stating that education is not a right guaranteed by the U.S. Constitution). *But cf.* *Kardmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 466 n.1 (1988) (Marshall, J., dissenting) (referring to *Rodriguez* as having left open the question of whether a deprivation of access to a minimally adequate education would violate a fundamental constitutional right); *Papasan v. Allain*, 478 U.S. 265, 285 (1986) (observing that the Court has not determined definitively that a minimally adequate education is not a fundamental right).

³⁴ See, e.g., *Edgewood*, 917 S.W.2d at 726; *Abbot v. Burke*, 575 A.2d 359, 363 (N.J. 1990); *Rose*, 790 S.W.2d at 215. A detailed discussion of school finance litigation is beyond the scope of this Note, but readers may want to consult *Campaign for Fiscal Equity v. State*, 719 N.Y.S.2d 475 (App. Div. 2001) for further discussion.

³⁵ See *Edgewood*, 917 S.W.2d at 726; 148 CONG. REC. S6050 (daily ed. June 26, 2002) (statement of Sen. Kennedy); see also WILLIAM HUSSAR & WILLIAM SONNENBERG, TRENDS IN DISPARITIES IN SCHOOL DISTRICT EXPENDITURES PER PUPIL 31 (Jan. 2000), available at <http://nces.ed.gov/pubs2000/2000020.pdf>.

³⁶ See *McUsic*, *supra* note 11, at 88.

³⁷ *Id.* at 89.

³⁸ See *Campaign for Fiscal Equity*, 655 N.E.2d at 667; *Rose*, 790 S.W.2d at 218; JORTUS, *supra* note 2, at 1. *Campaign for Fiscal Equity* and *Rose* provide detailed examples of how courts have defined adequate education. See *Campaign for Fiscal Equity*, 655 N.E.2d at 661, 667; *Rose*, 790 S.W.2d at 212 & n.22.

B. *The Failure of Educational Malpractice to Achieve Educational Equity*

In addition to constitutional claims, plaintiffs have alleged educational malpractice.³⁹ Generally, professional malpractice has been defined as failure to exercise the skills required for one's job.⁴⁰ A successful malpractice suit requires plaintiffs to show that the defendants owed them a duty of care, that the defendants breached this duty of care, and that they suffered injury from this breach of duty.⁴¹ For the most part, educational malpractice plaintiffs have not succeeded in recovering under this theory.⁴²

The failure of educational malpractice as a tort is due largely to the absence of agreement on whether educators owe students a duty of care, and if so, how to measure whether educators have met this duty.⁴³ This concern arose in the first adjudication of an educational malpractice case.⁴⁴ In 1976, in *Peter W. v. San Francisco Unified School District*, the California Court of Appeals held that a public school student may not sue school administrators for providing an inadequate education.⁴⁵ The plaintiff, who graduated from high school unable to read above the fifth-grade level, asserted that he had not been educated adequately because of the negligence of the defendant school district, its agents, and employees.⁴⁶ The court denied recovery based on the plaintiff's inability to demonstrate that defendants owed him a duty of care.⁴⁷ The court also noted that because of conflicting theories of pedagogy, the absence of acceptable standards of care, and the potential for burdensome litigation, it would abstain from imposing liability on public policy grounds.⁴⁸ The court's holding in *Peter W.*, that educators owe no duty of care to students, as well as its decision

³⁹ See, e.g., *Ross v. Creighton Univ.*, 957 F.2d 410, 412 (7th Cir. 1992); *Fairbanks*, 628 P.2d at 555; *Peter W.*, 131 Cal. Rptr. at 855.

⁴⁰ *Culhane*, *supra* note 25, at 371.

⁴¹ See PROSSER AND KEETON ON THE LAW OF TORTS § 30 (W. Page Keeton ed., 5th ed. 1984).

⁴² See, e.g., *Ross v. Creighton Univ.*, 740 F. Supp. 1319, 1327 (N.D. Ill. 1990) ("Educational malpractice is a tort theory beloved of commentators, but not of courts."), *overruled on other grounds*, 957 F.2d at 417; *Compton Unified Sch. Dist.*, 80 Cal. Rptr. 2d at 172; *Peter W.*, 131 Cal. Rptr. at 861.

⁴³ See *Hunter v. Bd. of Educ.*, 439 A.2d 582, 584 (Md. 1982); *Fairbanks*, 628 P.2d at 556; *Peter W.*, 131 Cal. Rptr. at 861.

⁴⁴ See *Peter W.*, 131 Cal. Rptr. at 861.

⁴⁵ *Id.* at 855.

⁴⁶ *Id.* at 856.

⁴⁷ See *id.* at 858.

⁴⁸ See *id.* at 860-61.

to abstain from imposing liability for public policy reasons, has been widely followed to deny recovery for educational malpractice.⁴⁹

Because lawsuits have failed to realize equal educational opportunity for all students, advocates have explored other avenues to achieve this goal.⁵⁰ In particular, advocates have turned to the federal legislative process to achieve educational equity.⁵¹

II. THE NO CHILD LEFT BEHIND ACT OF 2001

*From this day forward, all students will have a better chance to learn, to excel, and to live out their dreams.*⁵²

Despite efforts to achieve equity in education through lawsuits alleging constitutional violations and educational malpractice, schools have failed to improve.⁵³ Poor minority students in large urban districts continue to bear the brunt of this failure.⁵⁴ At the same time that advocates were appealing to the courts to improve education, they were pushing the federal government to enact legislation to accomplish this goal.⁵⁵ The No Child Left Behind Act of 2001 ("NCLB" or "the Act") is the most recent federal legislative effort to improve educational equity.⁵⁶

⁴⁹ See *Peter W.*, 131 Cal. Rptr. at 861; see, e.g., *Fairbanks*, 628 P.2d at 556; *Donohue v. Copiague Union Free Sch. Dist.*, 391 N.E.2d 1352, 1354 (N.Y. 1979).

⁵⁰ See *infra* notes 52–114 and accompanying text.

⁵¹ See *infra* notes 52–114 and accompanying text.

⁵² Statement by President of the United States (Jan. 8, 2002), 2002 U.S.C.C.A.N. 1614, 1615 [hereinafter *Statement*].

⁵³ See *JOFIUS*, *supra* note 2, at 7–11; HOUSE EDUC. & THE WORKFORCE COMM., H.R.1 CONFERENCE REPORT SUMMARY: PRESIDENT BUSH'S NO CHILD LEFT BEHIND EDUCATION REFORM BILL, at <http://edworkforce.house.gov/issues/107th/education/nclb/confrepisum.hun> (Dec. 10, 2001, updated Oct. 2002) [hereinafter *CONFERENCE REPORT SUMMARY*]; INDEP. REVIEW PANEL (IRP), IMPROVING THE ODDS: A REPORT ON TITLE I FROM THE INDEPENDENT REVIEW PANEL 2 (2001), available at http://www.ctredpol.org/pubs/unprovingodds_reporttitlei_irp/improvingoddsreporttitleipanel.pdf.

⁵⁴ See *CONFERENCE REPORT SUMMARY*, *supra* note 53; Judith A. Winston, *Achieving Excellence and Equal Opportunity in Education: No Conflict of Laws*, 53 ADMIN. L. REV. 997, 1014 (2001); *The Achievement Gap*, EDUC. WEEK, Jan. 21, 2004, at 16, available at <http://www.edweek.org/ew/ewstory.cfm?slug=19Brown-b1.h23&keywords=The%20Achievement%20Gap>.

⁵⁵ See *infra* notes 56–62 and accompanying text for further discussion of legislation aimed at improving educational opportunity for disadvantaged students.

⁵⁶ Pub. L. No. 107-110, 115 Stat. 1425 (2001) (codified at 20 U.S.C. § 6301 (2002)). The final regulations were issued by the Department of Education and published on December 2, 2002, 34 C.F.R. § 200 (2002).

A. NCLB and Its Provisions

Title I of the Elementary and Secondary Education Act (the "ESEA") was adopted in 1965 to aid disadvantaged students.⁵⁷ Title I provided federal funds as supplementary aid tied directly to eligible students, who were selected based on test scores.⁵⁸ In its first thirty years, Title I aimed to bring economically disadvantaged children up to basic levels of achievement and did not achieve even that modest objective.⁵⁹ In 1994, Congress revised the ESEA by passing the Improving America's Schools Act of 1994.⁶⁰ Improving America's Schools revised the ESEA's focus on the attainment of basic skills for poor children and imposed a requirement of high standards for all students.⁶¹ By 2001, however, the academic gap between rich and poor, white and non-white students, not only existed, but was growing wider.⁶²

When President George W. Bush signed NCLB on January 8, 2002, he touted it as the beginning of a new era.⁶³ NCLB aims to ensure excellence and equity in educational achievement for all students by narrowing the achievement gap between disadvantaged students and their affluent peers.⁶⁴ Its main provisions seek to increase flexibility for states and school districts, fund research-based programs and practices, empower parents, and increase accountability for student performance by rewarding and sanctioning districts and schools based on students' academic achievement.⁶⁵

⁵⁷ See Pub. L. No. 89-10, 79 Stat. 27 (1965) (current version at 20 U.S.C. § 6301); Peter Zamora, Note, *In Recognition of the Special Educational Needs of Low-Income Families?: Ideological Discard 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).

⁵⁸ See Pub. L. No. 89-10 § 201, 79 Stat. 27; IRP, *supra* note 53, at 2.

⁵⁹ See 146 CONG. REC. S3232 (daily ed. May 2, 2000) (statement of Sen. Gregg); IRP, *supra* note 53, at 2-3.

⁶⁰ Improving America's Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518 (current version at 20 U.S.C. § 6301); see also IRP, *supra* note 53, at 3.

⁶¹ See S. Rep. No. 103-292 (1994), LEXIS, 103 S. Rpt. 292; see also IRP, *supra* note 53, at 4.

⁶² See *Leave No Child Behind: Hearing Before the House Committee on Education and the Workforce*, 107th Cong. 2 (2001) (statement of Rep. John Boehner, Chair, Committee on Education and the Workforce), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_house_hearings&docid=f:77901.pdf; 147 CONG. REC. E437 (daily ed. Mar. 22, 2001) (statement of Rep. Boehner).

⁶³ See Statement, *supra* note 52, at 1614 ("America's schools will be on a new path of reform and a new path of results.").

⁶⁴ See 20 U.S.C. § 6301; 147 CONG. REC. H2188 (daily ed. May 16, 2001) (statement of Rep. Ballenger).

⁶⁵ See BUSH, *supra* note 18, at 2. This Note focuses on several of the many provisions of the Act. See *infra* notes 67-85 and accompanying text. Throughout this Note, the term

NCLB emphasizes stronger accountability.⁶⁶ The Act requires, for example, that each state develop a single statewide system of challenging academic content and achievement standards that is consistent with professionally recognized standards.⁶⁷ Each state's educational agency must then implement annual testing designed to measure all students' achievement of the standards.⁶⁸ The tests must be aligned with the state's standards and may be used only for purposes for which they are valid and reliable.⁶⁹ States must then report test results annually to the public, disaggregated within every state, district, and school by gender, race, ethnicity, English proficiency, and migrant status, to enable comparisons among these groups.⁷⁰ The Act requires that by the end of the 2013–2014 school year, all students in each group meet proficiency on academic achievement, as defined by the state and determined by performance on the state assessment.⁷¹ To meet this goal, school-wide programs must include activities to assist students who are experiencing difficulty mastering the proficient or advanced levels of academic achievement standards.⁷²

In order to hold schools accountable, NCLB provides that students will not be trapped in schools that fail to make progress toward the goal of proficiency for all students.⁷³ States are required to establish statewide proficiency and progress objectives that will enable all students to reach proficiency by the target date of 2014.⁷⁴ States must sanction schools that fail to meet targets by imposing increasing de-

"school district" includes "local educational agency," as used in NCLB. *See, e.g.*, 20 U.S.C. § 6301.

⁶⁶ *See infra* notes 67–85 and accompanying text for further discussion.

⁶⁷ 20 U.S.C. § 6311(b)(3)(C)(i)–(ii).

⁶⁸ *See id.* Students are to be assessed at least once per period during grades 3 through 5, 6 through 9, and 10 through 12, in mathematics and reading/language arts and, beginning in 2007–2008, in science. *Id.* § 6311(b)(3)(C)(v).

⁶⁹ *Id.* § 6311(b)(3)(C)(ii)–(iii).

⁷⁰ *Id.* § 6311(b)(3)(C)(xiii), (h)(1)(C)(i)–(ii).

⁷¹ *Id.* § 6311(b)(2)(F).

⁷² *See* 20 U.S.C. § 6314(b)(1)(I) (providing that effective, timely additional assistance to struggling students shall include identification of the difficulties and sufficient information on which to base effective assistance).

⁷³ *See* 147 CONG. REC. H1179 (daily ed. Mar. 27, 2001) (statement of Rep. Keller) (characterizing transfer and supplemental services options as a "safety valve" for students trapped in "persistently failing schools"); BUSII, *supra* note 18, at 7.

⁷⁴ 20 U.S.C. § 6311(b)(2)(E)–(H). NCLB defines Adequate Yearly Progress ("AYP") as targeted increments that a school or school district must reach on a yearly basis in order to demonstrate by 2014 that one-hundred percent of all students participating in assessments have achieved proficiency. *See id.*

grees of corrective action.⁷⁵ After a school has failed to make adequate yearly progress ("AYP") for two consecutive years, parents have the unqualified right to transfer their children to another district school that is not in need of improvement.⁷⁶ If the district does not have an acceptable school, parents have a qualified right to transfer children to schools run by other local educational agencies in the area.⁷⁷ Parents must be informed of this right no later than the first day of the school year following such identification, and priority is given to the lowest-achieving students from low-income families.⁷⁸ If the school fails to make AYP the following year, parents must again be notified, and they may continue to transfer their children as above, or they may, instead, receive supplemental services free of charge.⁷⁹ Taken together, these provisions give students the right to attend a school that is making AYP.⁸⁰

Students and parents receive additional rights under NCLB.⁸¹ Students who attend a "persistently dangerous" school or become victims of violent crime on school grounds are permitted to transfer to a safe school within the school district.⁸² Under NCLB, parents also have the right to be involved meaningfully in planning and implementing all programs assisted by NCLB.⁸³ The Act contains additional notice provisions to keep parents apprised of how well their children's schools are meeting the requirements imposed by NCLB.⁸⁴ States must also make

⁷⁵ See *id.* § 6316.

⁷⁶ *Id.* § 6316(b)(1)(E).

⁷⁷ *Id.* § 6316(b)(11). This right is qualified in that NCLB directs school districts in this situation, to the extent practicable, to establish a cooperative agreement with other local educational agencies. *Id.* If school districts are unable to establish such an agreement, students may not be able to transfer. See *id.*

⁷⁸ *Id.* § 6316(b)(6), (b)(1)(E)(ii).

⁷⁹ 20 U.S.C. § 6316(b)(6), (b)(8)–(10), (e). If the school fails to make adequate progress for a fourth year, the district must implement corrective actions, such as replacing staff or changing the curriculum, and after a fifth year, the school would be identified for reconstitution, and required to alter its governance structure. See *id.*; Erik Robelen, *An ESEA Primer*, EDUC. WEEK, Jan. 9, 2002, at 28, available at <http://www.edweek.org/ew/printstory.cfm?slug=16geseabox.h21>.

⁸⁰ See 20 U.S.C. §§ 6311(b)(2)(E)–(H), 6316; 147 CONG. REC. H1179 (daily ed. Mar. 27, 2001) (statement of Rep. Keller).

⁸¹ See *infra* notes 82–85 and accompanying text.

⁸² See 20 U.S.C. § 7912.

⁸³ See *id.* § 6318(a)(2), (c)–(e); see also Paul Weckstein, *Enforceable Rights to Quality Education*, in *LAW AND SCHOOL REFORM: SIX STRATEGIES FOR PROMOTING EDUCATIONAL EQUITY* 306, 330 (Jay P. Heubert ed., 1999) (characterizing parent involvement requirements of Title I as "substantial, detailed rights").

⁸⁴ 20 U.S.C. § 6311(h)(1)(B)(ii), (h)(1)(C)(vii)–(viii), (h)(2)(B), (h)(2)(E) (requiring states and school districts to keep parents informed of their progress toward requirements

available to the public, through annual report cards, information on their progress toward NCLB objectives.⁸⁵

B. *Legislative History and Public Perceptions of NCLB*

The legislative history of NCLB, as well as the publicity that surrounded its passage, emphasizes a new federal role in education, one which places children at the center.⁸⁶ Its purpose is to ensure educational opportunity for all children.⁸⁷ Donald Payne, who worked on NCLB as a member of the House Committee on Education and the Workforce in the 107th Congress, wrote an article about the process.⁸⁸ Payne describes the Act as targeting federal funds to needy communities and empowering parents by requiring that they be informed about school quality and be involved with school plans.⁸⁹

The White House and members of Congress assert that NCLB contains several important provisions for the improvement of education.⁹⁰ It increases the amount of resources available and targets disadvantaged areas.⁹¹ NCLB makes schools accountable by establishing

including AYP and the requirement imposed by § 6319(a)(3) that all public school teachers be highly qualified by the end of the 2005–2006 school year). Section 6312(g)(1)(A) requires that parents be notified if a child has been identified as limited English proficient and will be placed in a language instruction education program, and § 6312(g)(1)(A)(viii)(aa) gives parents the right to remove their child from this program, once informed. *See id.* § 6312(g)(1)(A).

⁸⁵ *See id.* § 6311(h)(2)(E).

⁸⁶ *See* 147 CONG. REC. E929 (daily ed. May 24, 2001) (statement of Rep. Rogers); 146 CONG. REC. S3233 (daily ed. May 2, 2000) (statement of Sen. Gregg) ("[This] is a debate over the fundamental question of how we improve education for our children, and specifically for our low-income children."); BUSH, *supra* note 18 ("The federal role in education is not to serve the system. It is to serve the children[.]"). *But see* 147 CONG. REC. E976 (daily ed. May 25, 2001) (statement of Rep. Rangel) (suggesting that the focus of the bill is America's economic growth and linking the education of America's poor to the country's economic future).

⁸⁷ 20 U.S.C. § 6301; *see* 149 CONG. REC. S194 (daily ed. Jan. 10, 2003) (statement of Sen. Gregg) ("[T]he purpose of the bill is to make sure kids learn. . . . They now have a law they can follow which allows them to make sure that kids do learn."); Press Release, Committee on Education and the Workforce, House Speaker J. Dennis Hastert (R-IL) Praises Passage of Education Reform (Dec. 13, 2001), <http://edworkforce.house.gov/press/press107/hastert121301.htm> ("This common-sense education plan is designed to give our children every possible opportunity to learn, succeed in school and go on to college.").

⁸⁸ *See generally* Donald Payne, *Reauthorization of the Elementary and Secondary Education Act: Challenges Throughout the Legislative Process*, 26 SETON HALL LEGIS. J. 315 (2002).

⁸⁹ *Id.* at 321–22.

⁹⁰ *See supra* notes 65–85 and accompanying text and *infra* notes 91–97 and accompanying text for further discussion of these provisions.

⁹¹ *See* H.R. REP. NO. 107-063, pt. 1, at 1242 (2001), [http://www.congress.gov/cgi-bin/cpquery/R?cp107:FLD010:@1\(hr063\)](http://www.congress.gov/cgi-bin/cpquery/R?cp107:FLD010:@1(hr063)).

timelines for achievement of objectives and consequences for failure to meet these objectives.⁹² Schools and school districts also become more accountable because of NCLB's requirements of parent notification and publication of annual report cards demonstrating progress, or lack thereof.⁹³ NCLB offers parents educational options, freeing their children from persistently failing schools.⁹⁴ NCLB helps to focus attention on the achievement gap between disadvantaged groups and their more advantaged peers by requiring collection of disaggregated data and reporting that enables comparisons.⁹⁵ It enhances local control over education by giving states the flexibility to transfer up to fifty percent of federal Title I funding within Title I programs, as well as the ability to design their own standards and systems of assessment.⁹⁶ Finally, it represents a significant commitment of federal dollars to education.⁹⁷

⁹² See 147 CONG. REC. E2327 (daily ed. Dec. 19, 2001) (statement of Rep. Frelinghuysen); BUSH, *supra* note 18, at 3.

⁹³ See 147 CONG. REC. E2327; BUSH, *supra* note 18, at 2-3; see also Ellen R. Delisio, *Paige Kennedy on No Child Left Behind Act*, Educ. World, at http://www.educationworld.com/a_issues/issues309.shtml (May 2, 2002) (explaining that NCLB provides more educational and financial accountability because it provides parents with more information about schools).

⁹⁴ See, e.g., WHITE HOUSE, FACT SHEET: NO CHILD LEFT BEHIND ACT, at <http://www.whitehouse.gov/news/releases/2002/01/20020108.html> (Jan. 2002) [hereinafter FACT SHEET]. For further elaboration of parents' rights, see JOHN BOEHNER & JUDG GREGG, TITLE I RESOURCES FOR REFORM: NEW HOPE FOR AMERICA'S MOST DISADVANTAGED PUBLIC SCHOOLS 6 (July 9, 2002), available at <http://edworkforce.house.gov/issues/107th/education/nclb/boehnerggreggreport.pdf>.

⁹⁵ See H.R. REP. NO. 107-063, *supra* note 91, at 1242; Press Release, House-Senate Education Conference Report: *No Child Left Behind* (revised Dec. 12, 2001), <http://www.ed.gov/news/pressreleases/2001/12/12112001b.html>. But see Thomas Toch, *Bush's Big Test*, WASH. MONTHLY, Nov. 2001, at 12, 16 (stating that the smaller size of these subgroups exacerbates problems in the use of testing to determine which schools are in need of improvement, because of regular fluctuations in test scores from year to year).

⁹⁶ See, e.g., 147 CONG. REC. E2329-30 (daily ed. Dec. 19, 2001) (statement of Rep. Petri); BOEHNER & GREGG, *supra* note 94, at 5-6; FACT SHEET, *supra* note 94.

⁹⁷ See HOUSE EDUC. & THE WORKFORCE COMMITTEE, FACT SHEET: FY 2004 APPROPRIATIONS, KEEPING EDUCATION AMONG THE HIGHEST PRIORITIES, EVEN IN A TIME OF ECONOMIC UNCERTAINTY AND FISCAL RESTRAINT (July 23, 2003), at <http://edworkforce.house.gov/issues/108th/education/nclb/factsheet072303.htm>; HOUSE EDUC. & THE WORKFORCE COMMITTEE, FACT SHEET: NO CHILD LEFT BEHIND: SPENDING MORE THAN EVER—AND EXPECTING MORE THAN EVER (July 23, 2003), at <http://edworkforce.house.gov/issues/108th/education/nclb/factsheet072303.htm> [hereinafter SPENDING]. But see 149 CONG. REC. S100 (daily ed. Jan. 9, 2003) (statement of Sen. Durbin) (stating that President Bush proposed only a 3.6% increase in funding of the ESEA, which Congress increased to 20%).

Not everyone, however, believes that NCLB represents a positive step toward educational equity.⁹⁸ The Act has garnered much criticism, particularly for its overemphasis on testing.⁹⁹ Numerous educators and politicians have attacked NCLB's focus on testing as the primary assessment of schools' progress, asserting that testing does not tell the whole story, that it prompts teachers to "teach to the test," thereby giving other aspects of the curriculum short shrift, and that it leads to the loss of time that could be spent on other educational activities.¹⁰⁰ Opponents contend that NCLB is structured to provide incentives for states to create lower standards and easier tests so that it is easier to show progress.¹⁰¹ Furthermore, they suggest it provides incentives for schools to allow underperforming students to drop out of school, rather than expend resources attempting to educate them.¹⁰²

Finally, the major criticism leveled at NCLB is that it is an unfunded mandate.¹⁰³ It requires that states participate in annual testing

⁹⁸ See *infra* notes 99–107 and accompanying text for further discussion of criticism of NCLB.

⁹⁹ See *infra* notes 100–102 and accompanying text for further discussion of criticism of NCLB's focus on testing.

¹⁰⁰ See, e.g., H.R. REP. NO. 107-063, *supra* note 91, at 1240 ("[W]e remain concerned that the bill goes too far in its reliance on standardized testing."); 147 CONG. REC. H137 (daily ed. Jan. 31, 2001) (statement of Rep. Underwood) ("I am concerned about the overreliance of testing as the only measure of educational successes. . . . [W]e must think about other ways to measure the school environment . . ."); Toch, *supra* note 95, at 14. *But cf.* SPENDING, *supra* note 97 (quoting President Bush as saying that "if you're teaching to the test, and the test is designed to confirm that children are making progress in reading and math, that's the whole idea.").

¹⁰¹ See SPENDING, *supra* note 97 (asserting that NCLB provides states with enough money to administer the required federal testing, but acknowledging that testing costs could be higher if states choose to design and implement more intricate testing systems than those required under the bill); Toch, *supra* note 95, at 15; Press Release, Committee on Education and the Workforce, Boehner Backs Secretary Paige's Strong Stand on State Education Standards (Oct. 23, 2002), <http://edworkforce.house.gov/press/press107/paigeletter102302.htm> (noting that some states have lowered standards and expectations to hide the low performance of their schools or to remove schools from lists of low performers).

¹⁰² See Nat'l Educ. Ass'n (NEA), *No Child Left Behind?*, NEA TODAY, May 2003, http://www.nea.org/nea_today/0305/cover.html. NCLB has also been charged with leaving behind bilingual students. See, e.g., 147 CONG. REC. E1143 (daily ed. June 19, 2001) (statement of Rep. Rodriguez); 147 CONG. REC. E992 (daily ed. May 25, 2001) (statement of Rep. Pastor). Many critics also claim that NCLB is only the first step in privatizing public education, a goal they believe is at the heart of the bill, because of its transfer and mandated corrective-action provisions. See, e.g., 148 CONG. REC. S8151 (daily ed. Sept. 4, 2002) (statement of Sen. Kennedy).

¹⁰³ See 149 CONG. REC. S100 (daily ed. Jan. 9, 2003) (statement of Sen. Durbin). *But see* SPENDING, *supra* note 97 (asserting that NCLB is neither unfunded, nor a mandate; the bill did not promise a particular amount of money, and states are free to opt out of receiving federal education funds).

using the federally designed National Assessment of Educational Progress, as well as design their own standards and testing systems, without appropriating sufficient money for these tasks.¹⁰⁴ Although President Bush cites increased spending on education, critics assert that the money promised has never been delivered.¹⁰⁵ Members of the 107th Congress expressed their concern regularly over passing NCLB, then underfunding it.¹⁰⁶ Concern has continued into the 108th Congress, where bills have been introduced to forestall requirements that schools and states comply with NCLB until it is fully funded.¹⁰⁷

C. The Future of NCLB

Despite NCLB's alleged shortcomings and one commentator's claim that the Act is unconstitutional, it appears that NCLB is here to stay.¹⁰⁸ In 2003, in *Kegerreis v. United States*, the Federal District Court for the District of Kansas declined to hold NCLB unconstitutional.¹⁰⁹ The court dismissed the lawsuit, finding that sovereign immunity prevented the plaintiff, a public school teacher, from suing the United States.¹¹⁰ The court declined to substitute the Secretary of the Department of Education as the defendant, finding that the plaintiff had not articulated how NCLB violated his constitutional rights.¹¹¹

¹⁰⁴ See 147 CONG. REC. E1143 ("In the name of accountability, more testing will be mandated with little financial support from the federal government."). But see SPENDING, *supra* note 97 (stating that several studies show the federal government is giving states more than enough money to pay for the testing required by NCLB).

¹⁰⁵ See NEA, *supra* note 102; David E. Sanger, *Bush, at School, Promotes Education Bill*, N.Y. TIMES, May 7, 2002, at A18. But see SPENDING, *supra* note 97 (asserting that NCLB does not impose any overall funding levels for fiscal year 2003 or beyond; it only authorizes Congress to spend "such sums as may be required" overall to implement education reforms authorized or promised by NCLB). Where there are specific funding levels, they are only spending caps, not promises. See *id.*

¹⁰⁶ See, e.g., 148 CONG. REC. E1561 (daily ed. Sept. 12, 2002) (statement of Rep. Moore); 148 CONG. REC. S4341 (daily ed. May 15, 2002) (statement of Sen. Durbin). Senator Kennedy, initially a sponsor of the bill, has expressed concern repeatedly with continued failures to fund it at acceptable levels. See, e.g., 148 CONG. REC. S8151.

¹⁰⁷ See, e.g., 149 CONG. REC. E2448 (daily ed. Nov. 23, 2003) (statement of Rep. Schiff); 149 CONG. REC. H3766 (daily ed. May 8, 2003) (statement of Rep. Etheridge).

¹⁰⁸ See *Kegerreis v. United States*, No. 02-2232, 2003 U.S. Dist. LEXIS 18012, at *8 (D. Kan. Oct. 9, 2003); Ronald D. Wenkart, *The No Child Left Behind Act and Congress' Power to Regulate Under the Spending Clause*, 174 EDUC. LAW REP. 589, 597 (2003) (suggesting that several provisions of NCLB exceed Congress's Spending Clause powers).

¹⁰⁹ 2003 U.S. Dist. LEXIS 18012, at *8.

¹¹⁰ *Id.* at *3-6, *8.

¹¹¹ *Id.* at *7.

Assuming NCLB is constitutional, it may mirror the ESEA in failing to attain its intended beneficial effects because it provides for relatively weak federal oversight.¹¹² It remains to be seen how firm the federal government will be in requiring states and school districts to adhere to NCLB.¹¹³ For this reason, the students and parents for whom NCLB provides benefits may need to explore options for private enforcement of the Act.¹¹⁴

III. THEORIES FOR ENFORCEMENT OF BENEFITS CONFERRED BY PUBLIC PROGRAMS

In light of the failures of lawsuits premised on constitutional violations and educational malpractice to achieve educational equity, plaintiffs and their advocates may consider using legislation, such as NCLB, to achieve this end.¹¹⁵ NCLB aims to improve educational opportunity

¹¹² See S. REP. NO. 107-7, at 151 (2001), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_reports&docid=f:sr007.107.pdf (stating that there is no federal oversight of the quality of tests chosen by states); Bush, *supra* note 18, at 8 (explaining that states select and design their own assessments).

¹¹³ See William L. Taylor, *Title I as an Instrument for Achieving Desegregation and Equal Educational Opportunity*, 81 N.C. L. REV. 1751, 1759-60 (2003) (discussing the Department of Education's "culture of nonenforcement"); Catherine Gewertz, *Tutoring Aid Falling Short of Mandate*, EDUC. WEEK, Feb. 25, 2004, at 1 (stating that many students eligible for tutoring services are not receiving them); Mary Leonard, *Schools Reported Lagging New Law*, BOSTON GLOBE, Jan. 4, 2003, at A3 (noting that states are moving slowly in providing parents of students in underperforming schools with supplemental educational services or school choice); Lynn Olson, *Data Doubts Plague States, Federal Law*, EDUC. WEEK, Jan. 7, 2004, at 1 (indicating that many states have given schools leeway in meeting progress goals). Many states have failed to meet even the less demanding requirements of the Improving America's Schools Act of 1994, yet no state has lost federal funding as a result of this failure. See 147 CONG. REC. E989 (daily ed. May 25, 2001) (statement of Rep. Jones); Toch, *supra* note 95, at 15 (noting that only seventeen states have implemented the tests required by the Improving America's Schools Act of 1994).

¹¹⁴ See Taylor, *supra* note 113, at 1759-60; Leonard, *supra* note 113, at A3; Toch, *supra* note 95, at 15. The ESEA, NCLB's predecessor, was enforced privately in 1973. See *Nicholson v. Pittenger*, 364 F. Supp. 669, 676 (E.D. Pa. 1973). In 1973, in *Nicholson v. Pittenger*, the Federal District Court for the Eastern District of Pennsylvania enjoined the Secretary of the Pennsylvania Department of Education from granting ESEA Title I funds to the School District of Philadelphia for the 1973-1974 school year, unless the School District could demonstrate that it had met the statute's requirements. *Id.* The plaintiffs, poor parents of children attending School District of Philadelphia schools, alleged that the state had approved Philadelphia's applications for funding without making several determinations required by the statute as conditions of funding. *Id.* at 671. Although the court granted plaintiffs' requests for declaratory judgment and an injunction, it did not explicitly state the legal theory under which it granted relief. *Id.* at 673-76.

¹¹⁵ See, e.g., *Peter W. v. San Francisco*, 131 Cal. Rptr. 854, 855 (Ct. App. 1976); *The Achievement Gap*, *supra* note 54, at 16; *CONDITION*, *supra* note 5, at 8-10. See *supra* notes

by emphasizing accountability.¹¹⁶ Thus far, however, the federal government has not enforced NCLB against states and schools that have failed to meet its mandates.¹¹⁷ If the government continues to give money to states and schools under NCLB without holding them accountable for complying with the Act's provisions, the government may fail to accomplish NCLB's stated objectives.¹¹⁸ Rather than rely on federal enforcement of NCLB to accomplish these objectives, educational equity plaintiffs may consider private enforcement, looking to legal theories that have been successful in enforcing other public programs.¹¹⁹

In the United States, federal grant-in-aid programs grew significantly in the 1960s and 1970s, resulting in an increasing number of beneficiaries who received funds through several different state agencies.¹²⁰ The federal agencies that provide grants under federal grant-in-aid programs are usually responsible for ensuring a state's compliance with conditions attached to these grants.¹²¹ In fact, where the federal government provides financial aid, it may enforce attached conditions in several ways, such as denying funds in the future, demanding restitution of sums already paid, or obtaining a judicial mandate that the recipient comply with conditions it has accepted.¹²² Nevertheless, federal agencies' emphases on the preservation of good relationships with state administrators and the maintenance of popular programs often outweigh their concern for individual beneficiaries.¹²³ Because of these concerns, agencies often do not impose sanctions for failure to meet conditions.¹²⁴

For the benefits secured under grant-in-aid programs to be meaningful, they must be enforceable.¹²⁵ Litigants have advanced sev-

27-49, 63-65 and accompanying text for further discussion of these legal theories and their failure to achieve educational equity.

¹¹⁶ See 147 CONG. REC. E437 (daily ed. Mar. 22, 2001) (statement of Rep. Boehner); Delisio, *supra* note 93.

¹¹⁷ See 147 CONG. REC. E989 (daily ed. May 25, 2001) (statement of Rep. Jones); Leonard, *supra* note 113, at A3; Toch, *supra* note 95, at 15.

¹¹⁸ See 147 CONG. REC. E989; Leonard, *supra* note 113, at A3; Toch, *supra* note 95, at 15.

¹¹⁹ See *supra* notes 65-85 and accompanying text for discussion of the benefits provided by NCLB.

¹²⁰ Bradford C. Mank, *Suing Under § 1983: The Future After Gonzaga University v. Doe*, 39 Hous. L. Rev. 1417, 1428 (2003).

¹²¹ *Id.* at 1431.

¹²² David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1, 93 (1994).

¹²³ Mank, *supra* note 120, at 1432.

¹²⁴ *Id.* at 1431-32.

¹²⁵ See *infra* notes 129-214 for discussion of efforts to enforce benefits secured under grant-in-aid programs.

eral theories to accomplish this end, including implied private right of action, the application of § 1983, and third-party beneficiary theory.¹²⁶ Because the courts have limited recovery significantly under implied private right of action and § 1983 theories over the past few years, interest has grown in the enforcement of rights through contract analysis.¹²⁷

*A. The Emergence of Private Right of Action Theory to
Enforce Federal Statutes*

Prior to 1964, the U.S. Supreme Court generally refused to enforce a federal statute through a lawsuit if the statute did not authorize private enforcement expressly.¹²⁸ In 1964, in *J.I. Case Co. v. Borak*, the Court held that private parties had a cause of action under the Securities Exchange Act for rescission or damages.¹²⁹ In *Borak*, a stockholder of J.I. Case Company alleged that a merger effected through the circulation of a misleading proxy statement violated the Securities Exchange Act.¹³⁰ Because the statute did not authorize private lawsuits explicitly, the Court's holding recognized an implied cause of action.¹³¹ Between 1964 and 1975, the Court recognized implied private rights of action

¹²⁶ See *Bossier Parish Sch. Bd. v. Lemon*, 370 F.2d 847, 852 (5th Cir. 1967); Mank, *supra* note 120, at 1481. Implied private right of action is characterized as the idea that a court may "find" legislative intent to permit an individual to enforce a federal statute in the absence of express language to that effect. See *infra* notes 129–145 for further discussion of this cause of action. Section 1983 provides the following:

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

42 U.S.C. § 1983 (2000).

¹²⁷ See Mank, *supra* note 120, at 1426–27, 1450 (suggesting that the U.S. Supreme Court has increasingly narrowed its interpretation of implied private rights of action and enforceability of federal statutes through § 1983); Anthony John Waters, *The Property in the Promise: A Study of the Third Party Beneficiary Rule*, 98 HARV. L. REV. 1109, 1173 (1985). See *infra* notes 129–214 for further discussion of the use and development of these causes of action.

¹²⁸ See *Cannon v. Univ. of Chi.*, 441 U.S. 677, 735 (1979) (Powell, J., dissenting); Mank, *supra* note 120, at 1423.

¹²⁹ See 377 U.S. 426, 430–31 (1964); Mank, *supra* note 120, at 1423.

¹³⁰ See 377 U.S. at 427.

¹³¹ See *id.* at 432; Mank, *supra* note 120, at 1423.

under a number of statutes, enabling private parties to bring lawsuits to enforce them.¹³²

In 1975, in *Cort v. Ash*, the U.S. Supreme Court held that there is no private right of action under 18 U.S.C. § 610, and in doing so, refined implied right of action jurisprudence.¹³³ The plaintiff, a corporate stockholder, brought an action for damages against corporate directors under this criminal statute.¹³⁴ In its opinion, the Court outlined a four-part test for determining whether a private remedy is implicit in a statute: (1) Is the plaintiff part of a class to which the statute intends to provide special status or benefits?; (2) Is there implicit or explicit evidence that Congress intended to create or deny the proposed right of action?; (3) Is allowing a private right of action as an implied remedy for the plaintiff consistent with the underlying purpose of the legislative scheme?; (4) Is the cause of action one traditionally relegated to state law and, thus, in an area where a federal action would intrude on important state concerns?¹³⁵ Since 1975, courts have followed this test to decide whether a statute creates an implied private right of action.¹³⁶

In applying the *Cort* test, courts have focused on its second prong—whether significant evidence demonstrates congressional intent to create a private right of action.¹³⁷ To prevail under this test, even where a statute creates rights, a plaintiff must also demonstrate intent to create a private remedy.¹³⁸ Recently, the Court further narrowed implied private rights of action.¹³⁹ In 2001, in *Alexander v. Sandoval*, the Court held that there is no private right of action to enforce

¹³² See *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 25 (1976) (reviewing use of implied private right of action theory); Mank, *supra* note 120, at 1423.

¹³³ See 422 U.S. 66, 68–69 (1975).

¹³⁴ See *id.* at 68.

¹³⁵ *Id.* at 78.

¹³⁶ See, e.g., *Alexander v. Sandoval*, 532 U.S. 275, 286–87 (2001); *Suter v. Artist M.*, 503 U.S. 347, 363 (1992); *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 17 (1981).

¹³⁷ See, e.g., *Alexander*, 532 U.S. at 286, 293 (focusing on Congress's intent and finding no implied private right of action to enforce disparate-impact regulations promulgated under § 602 of Title VI); *Sea Clammers*, 453 U.S. at 13, 14 (focusing on legislative intent and finding no private right of action to enforce violations of the Federal Water Protection Control Act or the Marine Protection, Research, and Sanctuaries Act of 1972); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 18 (1981) (finding no private right of action to enforce the Developmentally Disabled Assistance and Bill of Rights Act because Congress only intended it to be a funding statute).

¹³⁸ See *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15–16 (1979); Mank, *supra* note 120, at 1425.

¹³⁹ See *Alexander*, 532 U.S. at 288.

disparate-impact regulations promulgated under Title VI.¹⁴⁰ The plaintiff challenged, under § 602 of Title VI, the Alabama Department of Public Safety's policy of administering driver's license exams only in English.¹⁴¹ The Court found for the defendant, ruling that the plaintiff had not established congressional intent to create a private right of action.¹⁴² In *Alexander*, the Court narrowed its implied private right of action jurisprudence by limiting its search for Congress's intent to the text and structure of the statute.¹⁴³ After *Alexander*, to enforce a federal statute under an implied private right of action theory, a court would have to find from its text and structure that Congress intended to create both a private right and a private remedy.¹⁴⁴ Because of this narrowing construction of implied private rights of action, plaintiffs seeking to enforce statutory rights have increasingly brought actions under § 1983.¹⁴⁵

B. *The Rise and Fall of § 1983 as a Tool for Enforcing Federal Statutes*

Congress enacted the predecessor of § 1983 in 1871 to protect the civil rights of African-Americans in the South.¹⁴⁶ Section 1983 permits U.S. citizens to bring suit against state action that deprives them of "rights, privileges, or immunities secured by the Constitution and laws" ¹⁴⁷ For over one hundred years, the Court permitted only plaintiffs alleging violations of their constitutional rights to bring § 1983 lawsuits.¹⁴⁸ In 1980, however, in *Maine v. Thiboutot*, the U.S. Supreme Court held that plaintiffs deprived of welfare benefits to which they were entitled under the federal Social Security Act could recover under § 1983.¹⁴⁹ In *Thiboutot*, a family with eight children brought a class action lawsuit challenging Maine's interpretation of the Social Security Act, which decreased their Aid to Families with Dependent Children benefits.¹⁵⁰ In allowing recovery, the Court held that the § 1983 remedy

¹⁴⁰ *Id.* at 293.

¹⁴¹ *Id.* at 279.

¹⁴² See *id.* at 288–89, 293 (noting that statutes focusing on the party regulated rather than the party protected create no private right of action, and finding none under this statute).

¹⁴³ See *id.* at 288.

¹⁴⁴ See 532 U.S. at 288, 293.

¹⁴⁵ See Mank, *supra* note 120, at 1426–27.

¹⁴⁶ See Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (1871) (current version at 42 U.S.C. § 1983 (2000)); Mank, *supra* note 120, at 1427.

¹⁴⁷ See 42 U.S.C. § 1983. See *supra* note 126 for additional text of § 1983.

¹⁴⁸ See Mank, *supra* note 120, at 1428.

¹⁴⁹ See 448 U.S. 1, 3–4 (1980).

¹⁵⁰ *Id.* at 2–3.

applied to violations of federal statutes as well as constitutional law.¹⁵¹ After *Thiboutot*, courts allowed private individuals who were beneficiaries of federal statutory rights to bring suit under § 1983.¹⁵²

In 1981, in *Pennhurst State School & Hospital v. Halderman*, the U.S. Supreme Court found no enforceable private cause of action under § 6010 of the Developmentally Disabled Assistance and Bill of Rights Act.¹⁵³ In *Pennhurst*, a resident of a hospital for the care and treatment of the mentally retarded brought a class action lawsuit claiming that her conditions of confinement violated the Developmentally Disabled Assistance and Bill of Rights Act.¹⁵⁴ The Court ruled that this Act did not create individually enforceable rights.¹⁵⁵ The Court's holding limited the ability of beneficiaries of federal grant-in-aid programs to bring a private cause of action against states that allegedly had violated conditions in their grants.¹⁵⁶ In this case, then-Justice William Rehnquist characterized legislation enacted pursuant to the spending power as similar to a contract.¹⁵⁷ In return for a promise to comply with specified conditions, states receive federal funds.¹⁵⁸ Like enforcement of a contract, which requires that the parties have accepted its terms voluntarily and knowingly, enforcement of conditions against a state requires that the state has accepted the conditions voluntarily and knowingly.¹⁵⁹ Justice Rehnquist's opinion, in remanding the case to the Third Circuit for consideration of § 1983, imposed a second requirement that would have to be met before a beneficiary could use § 1983 to enforce conditions in a grant-in-aid statute against a state.¹⁶⁰ Congress must "speak with a clear voice" and manifest an unambiguous intent to create individually enforceable rights.¹⁶¹

In a line of cases from *Pennhurst* in 1981 to its 2002 decision in *Gonzaga University v. Doe*, the U.S. Supreme Court clarified, and further narrowed, its approach to determining which types of rights are enforceable under § 1983.¹⁶² In 2002, in *Gonzaga*, the Court resolved a

¹⁵¹ See *id.* at 4.

¹⁵² See *id.*; Mank, *supra* note 120, at 1430.

¹⁵³ See 451 U.S. at 31-32 (1981); Mank, *supra* note 120, at 1434.

¹⁵⁴ 451 U.S. at 6.

¹⁵⁵ See *id.* at 18.

¹⁵⁶ See *id.* at 17-18.

¹⁵⁷ *Id.* at 17.

¹⁵⁸ *Id.*

¹⁵⁹ See *Pennhurst*, 451 U.S. at 17.

¹⁶⁰ See *id.*

¹⁶¹ See *id.*

¹⁶² See, e.g., *Gonzaga Univ. v. Doe*, 536 U.S. 273, 290 (2002); *Blessing v. Freestone*, 520 U.S. 329, 340-41 (1997).

circuit split in holding that the Family Education Rights and Privacy Act ("FERPA") does not establish individual rights enforceable under § 1983.¹⁶³ Writing for the Court, Chief Justice Rehnquist noted that a cause of action under § 1983 requires an unambiguously conferred statutory right, not a vague benefit or interest.¹⁶⁴ He emphasized that previously, the Court had disallowed attempts to infer enforceable rights from Spending Clause statutes.¹⁶⁵ He maintained that the issue of congressional intent controls in both implied right of action and § 1983 cases.¹⁶⁶ Having established a restrictive test for enforceability of federal statutes through § 1983, the *Gonzaga* Court found that FERPA does not establish individual rights.¹⁶⁷ The Court's focus on the absence of rights-creating language, and the requirement, stated in *Alexander*, that there be evidence in the statute of congressional intent to create both a private right and a private remedy, resulted in the conflation of tests for enforceability under implied private right of action and § 1983.¹⁶⁸

Plaintiffs recently tried to enforce NCLB under § 1983.¹⁶⁹ In June of 2003, in *Association of Community Organizations for Reform Now v. New York City Department of Education*, the Federal District Court for the Southern District of New York ruled that, by the standards articulated in *Gonzaga*, plaintiffs cannot use § 1983 to enforce NCLB.¹⁷⁰ In *Reform Now*, community organizations and parents brought a class action lawsuit charging that two local school districts and their superintendents had violated NCLB's notice, transfer, and supplemental services provisions.¹⁷¹ The court in *Reform Now* stated that in *Gonzaga*, the U.S. Supreme Court determined that the first step of the inquiry for deciding whether a statute creates an implied private right of action is the same as the analysis for determining whether the statute is enforceable under

¹⁶³ 536 U.S. at 276, 278. This decision limited use of § 1983 to instances where plaintiffs can demonstrate that there is clear and unambiguous evidence of Congress's intent to establish individual rights on behalf of the plaintiff and those similarly situated. See Mank, *supra* note 120, at 1421.

¹⁶⁴ See *Gonzaga*, 536 U.S. at 280.

¹⁶⁵ *Id.* at 281.

¹⁶⁶ See *id.* at 283 (asserting that implied private right of action and § 1983 cases are not distinct from each other).

¹⁶⁷ See *id.* at 287.

¹⁶⁸ See *id.* at 283, 284, 285-86; *Alexander*, 532 U.S. at 286; see also *Gonzaga*, 536 U.S. at 297 (Stevens, J., dissenting) (indicating that the rights-creating language required by the Court for a § 1983 claim has previously been used only for implied private rights of action cases).

¹⁶⁹ See Ass'n of Cmty. Orgs. for Reform Now v. New York City Dep't of Educ., 269 F. Supp. 2d 338, 339 (S.D.N.Y. 2003).

¹⁷⁰ See *id.* at 347.

¹⁷¹ See *id.* at 342.

§ 1983.¹⁷² Finding no explicit rights-creating language and no clear and unambiguous congressional intent in NCLB to create individually enforceable rights with respect to the notice, transfer, or supplemental educational service provisions of the Act, the court granted the defendants' motion to dismiss.¹⁷³ In light of this decision, plaintiffs seeking to enforce the provisions of NCLB may have to explore other legal theories.¹⁷⁴

C. *The Evolution and Use of Third-Party Beneficiary Theory*

The Court's characterization in 1981 in *Pennhurst* of legislation enacted pursuant to Congress's spending power as similar to a contract has important ramifications for beneficiaries who attempt to enforce the conditions of these statutes.¹⁷⁵ The Court in *Pennhurst* stated that Congress may establish conditions when it disburses federal money to the states.¹⁷⁶ As long as these conditions are clear so that states know the consequences of their commitment, they may be bound by their voluntary assent to comply with these terms, rather than forgo the benefits of federal funding.¹⁷⁷ The legitimacy of Congress's spending power legislation, which imposes conditions on grants of federal money, thus depends on whether the state assents voluntarily and knowingly to the terms of the "contract."¹⁷⁸ Applying its reasoning to the facts of the case, the Court held that the Disabled Assistance and Bill of Rights Act does not impose such a binding obligation on the states.¹⁷⁹ The Court found that the plain language of the statute emphasized a purpose to assist the states rather than to create new substantive rights.¹⁸⁰ It also found that because Congress did not appear to grant sufficient money to defray the costs of the obligations imposed by the statute, it must have had a limited purpose in enacting it.¹⁸¹

¹⁷² *Id.* at 343.

¹⁷³ *See id.* at 344, 347.

¹⁷⁴ *See infra* notes 233-309 for further discussion of the application of legal theories for private enforcement of NCLB.

¹⁷⁵ *See Pennhurst*, 451 U.S. at 17; Engdahl, *supra* note 122, at 71-72 (asserting that *Pennhurst's* characterization of spending conditions as a contract has been affirmed).

¹⁷⁶ 451 U.S. at 17.

¹⁷⁷ *See id.*; *see also* Engdahl, *supra* note 122, at 78-79.

¹⁷⁸ *Pennhurst*, 451 U.S. at 17.

¹⁷⁹ *See id.* at 18.

¹⁸⁰ *See id.*

¹⁸¹ *See id.* at 24 (noting that when Congress imposes an affirmative obligation on the states, it usually makes a more substantial contribution to defray costs, and noting that for a state to be bound by the conditions imposed by a statute, its potential obligations may not be indeterminate).

In addition to establishing that the parties have entered into a contract voluntarily and knowingly, plaintiffs must establish that they have standing to enforce its terms.¹⁸² Traditionally, only the parties to a contract had the right to enforce it, but contract law has evolved to provide a cause of action for third-party beneficiaries.¹⁸³ Because they are not parties to the agreement, those benefited by conditions on federal funding agreements must establish that they are third-party beneficiaries in order to enforce the conditions.¹⁸⁴ Under the *Restatement (Second) of Contracts*, to establish standing as a third-party beneficiary, a party must be an intended beneficiary.¹⁸⁵ The *Second Restatement's* formulation provides that a party is an intended beneficiary, and thus has rights under a contract, if

(1) Unless otherwise agreed between promisor and promisee . . . recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either

(a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or

(b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.¹⁸⁶

This formulation has had far-reaching consequences for the development of the third-party beneficiary rule because it has accommodated beneficiaries of federal funding contracts.¹⁸⁷ Beginning with the Civil Rights Act of 1964, the recipient's compliance with a federal statute has often been a condition for federal funding of public pro-

¹⁸² See Waters, *supra* note 127, at 1188.

¹⁸³ See *Lawrence v. Fox*, 20 N.Y. 268, 275 (1859). *Fox* was the first case to hold that a third party may enforce a contractual obligation made for the plaintiff's benefit. See Waters, *supra* note 127, at 1115. Waters describes the third-party rule as a merger between contract and quasi-contract. See *id.*

¹⁸⁴ See Waters, *supra* note 127, at 1176, 1187-88.

¹⁸⁵ See RESTATEMENT (SECOND) OF CONTRACTS § 302 (1979).

¹⁸⁶ RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 185, § 302 (also defining an incidental beneficiary, who does not have rights under a contract, as "a beneficiary who is not an intended beneficiary"). The *Second Restatement* modified the *First Restatement's* formulation of the third-party beneficiary rule, which had defined "donee" and "creditor" beneficiaries, and prohibited recovery under a contract by incidental beneficiaries—those who were neither donee nor creditor beneficiaries. See *id.*; RESTATEMENT (FIRST) OF CONTRACTS § 133 (1932).

¹⁸⁷ See Waters, *supra* note 127, at 1172, 1206-07 (characterizing accommodation of these beneficiaries as consonant with the broad equitable principles informing the rule).

grams.¹⁸⁸ Because each statute defines the class that the program intends to benefit, where federal funding calls for compliance with a statute, the class of intended beneficiaries appears to be the same as the intended beneficiaries of the contract.¹⁸⁹ This is so whether or not they have a right to enforce the statute directly.¹⁹⁰

The *Second Restatement* contains a rule dealing with third-party beneficiary claims based on government contracts.¹⁹¹ According to subsection 313(1), the third-party beneficiary rule applies to contracts with the government or government agencies, except where applying the rule to such contracts is inconsistent with the policy of the law creating the contract.¹⁹² The comment to section 313 suggests that this formulation "leaves room for the weighing of considerations peculiar to particular situations."¹⁹³ Subsection 313(2) provides that a promisor who contracts with the government to render a public service is protected from contractual liability to the general public for consequential damages unless the terms of the promise provide for such liability or a direct action is consistent with the terms of the contract and the policy behind it.¹⁹⁴ Illustrations of contracts between promisors and the government include contracts to carry mail and to maintain a certain water pressure at hydrants on city streets.¹⁹⁵ Despite the existence of section 313 governing contracts with a government or governmental agency, many courts allowing recovery by third-party beneficiaries of public programs have not discussed it.¹⁹⁶ This may be because the comments and examples accompanying the text of section 313, as well as the policy behind it, appear to deal with commer-

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ See *RESTATEMENT (SECOND) OF CONTRACTS*, *supra* note 185, § 313 (applying the third-party beneficiary rule to contracts with a government or governmental agency). See the text accompanying *supra* note 186 for the language of the third-party beneficiary rule.

¹⁹² *RESTATEMENT (SECOND) OF CONTRACTS*, *supra* note 185, § 313(1).

¹⁹³ *Id.* § 313 cmt. a.

¹⁹⁴ See *id.* § 313(2).

¹⁹⁵ See *id.* § 313 cmt. a, illus. 1-2. Beneficiaries of these types of contracts frequently seek to recover damages for harm caused by their reliance on a promise. *Waters*, *supra* note 127, at 1198-99, 1204-05; see also *H.R. Moch Co. v. Rensselaer Water Co.*, 159 N.E. 896, 897-98 (N.Y. 1928) (concluding that in a lawsuit brought by resident of City of Rensselaer against owner of company that had promised to supply water to fire hydrants at a specified pressure, plaintiff was not an intended beneficiary, in part because use of the third-party beneficiary doctrine in this context could have imposed a crushing financial burden).

¹⁹⁶ See *Waters*, *supra* note 127, at 1201.

cial contracts with the government.¹⁹⁷ Benefits conferred on third parties by statutory schemes, in contrast, are outside of the commercial realm.¹⁹⁸

Third-party beneficiary claims have succeeded in the courts to enforce conditions of federal funding statutes.¹⁹⁹ In 1967, in *Bossier Parish School Board v. Lemon*, the Fifth Circuit Court of Appeals invoked third-party beneficiary theory to hold a school board accountable for a promise it had made in exchange for federal funding.²⁰⁰ The court held that where a school board had made assurances under the Civil Rights Act of 1964 that it would admit both African-American and white children on equal terms to schools for children of military base personnel, these assurances constituted a contractual agreement.²⁰¹ By agreeing to abide by the terms of the Civil Rights Act, the defendants had assured these children rights as third-party beneficiaries.²⁰² By accepting the contract and the federal funds it brought, the school board was thus estopped from denying the plaintiffs, African-American children, attendance at these schools.²⁰³

In 1977, in *Fuzie v. Manor Care, Inc.*, the Federal District Court for the Northern District of Ohio denied the defendant's motion to dismiss the plaintiff's third-party beneficiary claim under the Medicaid Act.²⁰⁴ The plaintiff, a Medicaid recipient living at a private nursing home operated by the defendant, brought suit to enforce the provisions of Medicaid regulations.²⁰⁵ Although she could invoke neither an implied private right of action nor § 1983 to enforce her rights, as a Medicaid recipient, she was nevertheless a third-party beneficiary of the statute.²⁰⁶

¹⁹⁷ See RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 185, § 313; Waters, *supra* note 127, at 1201.

¹⁹⁸ See Waters, *supra* note 127, at 1201-02, 1204-05.

¹⁹⁹ See *Bossier Parish*, 370 F.2d at 852; *Fuzie v. Manor Care, Inc.*, 461 F. Supp. 689, 697, 701 (N.D. Ohio 1977).

²⁰⁰ See 370 F.2d at 850.

²⁰¹ See *id.*

²⁰² See *id.* (characterizing acceptance of funds as further ratification of the contract).

²⁰³ See *id.*; see also Waters, *supra* note 127, at 1184 (characterizing *Bossier Parish* as an early civil rights case that vindicated both statutory and constitutional rights through the use of the third-party beneficiary rule).

²⁰⁴ See 461 F. Supp. at 701.

²⁰⁵ *Id.* at 691.

²⁰⁶ See *id.* at 697, 701. Waters asserts that third-party beneficiary claims are equivalent to the first prong of the *Cort* test that the Court uses in evaluating implied private right of action claims. See Waters, *supra* note 127, at 1174. Unlike a private right of action plaintiff, a third-party beneficiary claimant need only establish membership in the class for whose special benefit Congress enacted the federal statute. *Id.*

In the past, when plaintiffs brought lawsuits alleging both implied private rights of action and third-party beneficiary contract claims, courts did not often reach the latter because they allowed recovery under the former.²⁰⁷ In evaluating claims under implied private right and § 1983 causes of action, the U.S. Supreme Court has indicated frequently that plaintiffs are intended beneficiaries of statutory schemes.²⁰⁸ In 1990, in *Wilder v. Virginia Hospital Ass'n*, the Court determined that plaintiff hospitals had a private right of action to enforce benefits conferred by the Medicaid program.²⁰⁹ In its holding, the Court noted that healthcare providers are undoubtedly intended beneficiaries of the Boren Amendment because it is phrased in terms of benefiting them.²¹⁰

In 1997, in *Blessing v. Freestone*, the Court determined that custodial mothers do not have an enforceable right under § 1983 to have the state's program achieve "substantial compliance" with the requirements of Title IV-D of the Social Security Act.²¹¹ In its decision, the Court left open the possibility that some provisions of Title IV-D might give rise to individual rights.²¹² It found only that the plaintiffs had not articulated—and lower courts had not evaluated—a well-defined right.²¹³ Although the Court did not address explicitly a third-party beneficiary contract claim in *Wilder* or in *Blessing*, its language may provide guidance for plaintiffs seeking to bring such claims as beneficiaries of public programs.²¹⁴

²⁰⁷ See Waters, *supra* note 127, at 1181.

²⁰⁸ See, e.g., *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 510 (1990); *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 104, 109 (1989) (finding that applicant for renewal of taxicab franchise was intended beneficiary of statutory scheme under National Labor Relations Act).

²⁰⁹ See *Wilder*, 496 U.S. at 510.

²¹⁰ See *id.* The Court also noted that (1) Medicaid is a voluntary program in which states may choose to participate; (2) Congress enacted the Medicaid Act in 1965 and passed the Boren Amendment in response to problems it perceived; and (3) there is a right enforceable by healthcare providers under § 1983. See *id.* at 502, 505–06, 509.

²¹¹ See *Blessing*, 520 U.S. at 332–33.

²¹² See *id.* at 345. Cf. *Wright v. Roanoke Redev. & Hous. Auth.*, 479 U.S. 418, 419, 421–22, 430 (1987) (holding that tenants of public housing projects had a right to have utility costs included within a rental payment capped by federal housing legislation).

²¹³ See *Blessing*, 520 U.S. at 342–43.

²¹⁴ See *id.* at 345; *Wilder*, 496 U.S. at 509–10.

IV. THE IMPACT OF NO CHILD LEFT BEHIND ON EDUCATIONAL EQUITY

This Part of the Note explores the various ways in which NCLB holds promise for advocates of educational equity.²¹⁵ First, section IV.A discusses the use of NCLB to strengthen existing constitutional and common-law causes of action.²¹⁶ Second, section IV.B analyzes the viability of various tools for enforcement of NCLB.²¹⁷ Subsections IV.B.1 and IV.B.2 suggest that it is unlikely that a court will allow beneficiaries of NCLB to enforce the Act under an implied private right of action or a § 1983 theory.²¹⁸ Finally, subsection IV.B.3 argues that third-party beneficiary theory is the most promising tool for enforcement of NCLB and lays out the framework required to bring such a claim.²¹⁹

A. Using No Child Left Behind to Strengthen Existing Causes of Action

Plaintiffs may be able to use NCLB to fill in the gaps that have prevented their constitutional and common-law claims from succeeding thus far.²²⁰ For example, the NCLB requirement that all students in all schools meet proficiency on state assessments by 2014 may strengthen constitutional claims premised on state guarantees of adequate education.²²¹ States must determine whether schools are making adequate yearly progress ("AYP") toward this goal, and identify schools failing to do so.²²² Such identification strengthens claims by students attending these schools that they are being deprived of an adequate education.²²³ Educational malpractice plaintiffs may be able to overcome courts' resistance to find a duty of care owed to students by focusing on the requirements NCLB imposes on districts and states.²²⁴ Courts could rely on the standards established by NCLB, as well as the statute's focus on

²¹⁵ See *infra* notes 221–225, 259–309, and accompanying text for further discussion of the ways in which NCLB may improve education.

²¹⁶ See *infra* notes 220–225 and accompanying text.

²¹⁷ See *infra* notes 226–309 and accompanying text.

²¹⁸ See *infra* notes 233–257 and accompanying text.

²¹⁹ See *infra* notes 258–309 and accompanying text.

²²⁰ See *infra* notes 221–225 and accompanying text.

²²¹ See 20 U.S.C. § 6311(b)(2)(F) (2002). See *supra* notes 27–38 and accompanying text for discussion of constitutional claims.

²²² See 20 U.S.C. § 6316(b)(1)(A).

²²³ See *id.* See *supra* notes 27–38 and accompanying text for discussion of constitutional claims. A detailed exploration of this theory is beyond the scope of this Note.

²²⁴ See *supra* notes 39–49 and accompanying text for a discussion of educational malpractice claims and *supra* notes 66–85 for a discussion of the relevant provisions of NCLB. One provision that establishes school districts' duty to students is the requirement that schools provide activities to assist students experiencing difficulty in mastering academic achievement standards. See 20 U.S.C. § 6314(b)(1)(I).

accountability, to overcome public policy objections to imposing liability on schools that fail to improve.²²⁵

B. *Enforcing No Child Left Behind to Improve Education*

NCLB contains several important provisions to improve educational opportunity for at-risk students.²²⁶ The Act reflects the Bush Administration's attempt to hold all school districts and states to high standards.²²⁷ The federal government, however, has not enforced NCLB adequately in the two years since its enactment.²²⁸ Schools that have not met NCLB targets, such as AYP, are not providing the services, such as transfer options and supplemental services, that the Act mandates.²²⁹ States have failed to meet U.S. Department of Education deadlines for submitting lists of underperforming schools.²³⁰ Because the federal government has not yet penalized a state for failing to meet NCLB requirements, advocates for educational equity must prepare for the eventuality that the government will continue not to enforce the Act.²³¹ To ensure that its intended beneficiaries actually benefit from NCLB, it is important to explore the merits of pursuing private enforcement under each of the theories discussed above as an alternative to federal enforcement.²³²

1. Attempts to Enforce NCLB Under Implied Private Right of Action Theory Will Not Succeed

Under *Cort v. Ash* and its progeny, the U.S. Supreme Court looks for significant evidence that Congress intended to create a private right of action to determine whether a private remedy is implicit in a stat-

²²⁵ See *supra* notes 52-97 for discussion of NCLB and the policies informing the Act. See *supra* notes 42-49 and accompanying text for discussion of policy reasons cited by courts denying recovery for educational malpractice.

²²⁶ See, e.g., 20 U.S.C. §§ 6311(b)(2)(E)-(H), 6311(b)(3)(C), 6314(b)(1)(I), 6316(b)(1)(E). See *supra* notes 66-85 and accompanying text for further discussion of NCLB's provisions.

²²⁷ See 20 U.S.C. § 6301; Statement, *supra* note 52, at 1615. See *supra* notes 52, 63-97 and accompanying text for further discussion of the goals of NCLB.

²²⁸ See Leonard, *supra* note 113, at A3; Olson, *supra* note 113, at 1; Toch *supra* note 95, at 15.

²²⁹ See Gewertz, *supra* note 113, at 1; Leonard, *supra* note 113, at A3.

²³⁰ See Olson, *supra* note 113, at 1.

²³¹ See *id.*; Toch, *supra* note 95, at 15.

²³² See Olson, *supra* note 113, at 1.

ute.²³³ In 2001, in *Alexander v. Sandoval*, the Court limited its search for Congress's intent to the text and structure of the statute.²³⁴ To enforce NCLB under an implied private right of action theory, therefore, a court would have to find from a statute's text and structure that Congress intended to create both a private right and a private remedy.²³⁵

NCLB provides options for parents of children attending persistently failing schools.²³⁶ They may, for example, transfer their children out of these schools or opt for free supplemental services.²³⁷ These and other provisions may be seen as creating rights or benefits, but it is unlikely that a court would find that the text and structure of NCLB demonstrate a congressional intent to create a private remedy.²³⁸ In *Alexander*, the Court stated that Congress has not demonstrated an intent to create a private remedy where a statute's language is directed to the federal agencies distributing federal funds, and the statute empowers agencies to enforce their regulations by terminating funding.²³⁹ Under this test, NCLB fails to demonstrate a congressional intent to create a private remedy.²⁴⁰ In the wake of *Alexander*, advocates for educational equity would not be able to enforce the benefits conferred by NCLB under an implied right of action theory.²⁴¹

2. Attempts to Enforce NCLB Under § 1983 Will Not Succeed

Between 1980 and 2002, a number of plaintiffs used § 1983 successfully to enforce benefits conferred by statutes.²⁴² The U.S. Supreme

²³³ See 422 U.S. 66, 78 (1975); see, e.g., *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 13, 14 (1981); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 18 (1981). See *supra* notes 128–145 and accompanying text for further discussion of implied private right of action.

²³⁴ See 532 U.S. 275, 288 (2001).

²³⁵ See *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15 (1979). See *supra* notes 128–145 and accompanying text for further discussion of implied private right of action analysis.

²³⁶ See, e.g., 20 U.S.C. § 6316(b)(1)(E), (b)(6), (e) (2002).

²³⁷ See, e.g., *id.* § 6316(b)(1)(E), (b)(8)–(10), (e). See *supra* notes 67–85 and accompanying text for additional provisions of NCLB that may be interpreted as providing rights to children and their parents.

²³⁸ See, e.g., *Alexander*, 532 U.S. at 286, 293; *Sea Clammers*, 453 U.S. at 13, 14; *Pennhurst*, 451 U.S. at 18.

²³⁹ See 532 U.S. at 289.

²⁴⁰ See *id.*

²⁴¹ See *id.* at 288–89. See *infra* notes 242–257 and accompanying text for further discussion of NCLB's failure to meet *Alexander's* narrow test as adopted in *Gonzaga University v. Doe*, 536 U.S. 273, 286 (2002).

²⁴² See, e.g., *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 524 (1990); *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980). See *supra* notes 149–162 and accompanying text for discussion of the

Court's 2002 decision in *Gonzaga University v. Doe*, however, made recovery under § 1983 more difficult.²⁴³ The Court in *Gonzaga* focused on rights-creating language and required that there be evidence in the statute of congressional intent to create both a private right and a private remedy.²⁴⁴ In doing so, the *Gonzaga* decision conflated the tests for enforceability under implied right of action and § 1983.²⁴⁵

It is unlikely that a § 1983 action to enforce NCLB would succeed under the Court's current analytical framework, as refined in *Gonzaga*.²⁴⁶ One court has already ruled that NCLB is not enforceable under § 1983.²⁴⁷ In 2003, in *Association of Community Organizations for Reform Now v. New York City Department of Education*, the Federal District Court for the Southern District of New York granted the defendants' motion to dismiss the plaintiffs' § 1983 claim.²⁴⁸ Utilizing the *Gonzaga* standard, the court found that NCLB contains no explicit rights-creating language and no clear and unambiguous congressional intent to create individually enforceable rights.²⁴⁹ *Reform Now* addressed the notice, transfer, and supplemental educational service provisions of NCLB.²⁵⁰ The court did not discuss NCLB's legislative history, but instead based its decision on the text and structure of the Act.²⁵¹ This

Court's use of this theory. During this time, NCLB plaintiffs probably would have been able to meet the Court's § 1983 test by showing that Congress intended that specific NCLB provisions benefit them, that their right was neither too vague nor too amorphous to be judicially enforceable, and that the statute unambiguously imposed a binding obligation on the states. See *Blessing v. Freestone*, 520 U.S. 329, 340-41 (1997).

²⁴³ See 536 U.S. at 286. See *supra* notes 163-168 and accompanying text, and *infra* notes 244-257 and accompanying text, for further discussion of this case and its impact on § 1983 jurisprudence.

²⁴⁴ See 536 U.S. at 283, 284, 286.

²⁴⁵ See *id.* at 297 (Stevens, J., dissenting).

²⁴⁶ See *id.* at 286; *Ass'n of Cmty. Orgs. for Reform Now v. New York City Dep't of Educ.*, 269 F. Supp. 2d 338, 347 (S.D.N.Y. 2003). See *supra* notes 162-168 for further discussion of the Court's narrowing interpretation of § 1983.

²⁴⁷ *Reform Now*, 269 F. Supp. 2d at 347.

²⁴⁸ See *id.*

²⁴⁹ See *id.* at 343, 347 (stating that after *Gonzaga*, the first step of the inquiry for deciding whether a statute creates an implied private right of action is the same as the analysis for determining whether the statute is enforceable through § 1983).

²⁵⁰ See *id.* at 342. See *supra* notes 76-79 and accompanying text for further discussion of these provisions.

²⁵¹ See *Reform Now*, 269 F. Supp. 2d at 347. The Court in *Gonzaga* stated that the focus of the inquiry is whether Congress intended to confer individual rights upon a class of beneficiaries. 536 U.S. at 285-86. After citing several cases, and without explicitly holding that the § 1983 inquiry necessarily is confined to the text and structure of a statute, the Court indicated that where the text and structure of a statute do not demonstrate that Congress intends to create new individual rights, there is no basis for a private suit under implied private right of action or § 1983. See *id.*

approach is consistent with the U.S. Supreme Court's holding in *Alexander* that a court must limit its search for congressional intent to the text and structure of a statute.²⁵² Therefore, it is unlikely that future plaintiffs would be able to rely on the legislative history of NCLB for evidence of clear and unambiguous congressional intent to create individually enforceable rights.²⁵³

Like *Alexander*, *Gonzaga* harms the intended beneficiaries of federal grant-in-aid programs.²⁵⁴ By demanding proof of Congress's intent to provide both a right and a remedy to individuals, and by focusing narrowly on the text and structure of the statute as evidence of intent, the U.S. Supreme Court has made it difficult to succeed in an implied private cause of action.²⁵⁵ *Gonzaga*'s requirement that plaintiffs demonstrate congressional intent to create both a right and a remedy similarly limits the potential for success of intended beneficiaries of statutes suing under § 1983.²⁵⁶ NCLB plaintiffs will have to look to other legal theories to ensure that they receive the benefits conferred by the statute.²⁵⁷

3. Plaintiffs Should Seek to Enforce NCLB Under Third-Party Beneficiary Theory

The most promising theory of enforcement for NCLB is third-party beneficiary theory.²⁵⁸ To recover under this theory, a plaintiff must demonstrate that a contract exists between the parties and that the promisee intended that the contract benefit the plaintiff.²⁵⁹ Where, as here, one party to the contract is a government, the plaintiff also must establish that allowing recovery would not contravene the policy of the law authorizing the contract.²⁶⁰

²⁵² See 532 U.S. at 288.

²⁵³ See *id.* See *supra* notes 86–107 for a discussion of NCLB's legislative history.

²⁵⁴ See *Gonzaga*, 536 U.S. at 286; *Alexander*, 532 U.S. at 288; Mank, *supra* note 120, at 1480.

²⁵⁵ See *Alexander*, 532 U.S. at 288; *Reform Now*, 269 F. Supp. 2d at 343, 347; Mank, *supra* note 120, at 1481.

²⁵⁶ See *Gonzaga*, 536 U.S. at 286; *Reform Now*, 269 F. Supp. 2d at 343, 347; Mank, *supra* note 120, at 1481.

²⁵⁷ See *supra* notes 233–256 for further discussion of the likely failure of both private right of action and § 1983 as theories of enforcement.

²⁵⁸ See *infra* notes 259–309 and accompanying text.

²⁵⁹ See RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 185, § 302. See *supra* notes 183–214 and accompanying text for further discussion of this theory and its application to federal funding contracts.

²⁶⁰ See RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 185, § 313.

a. *Establishing the Existence of a Contract*

To argue that this theory applies to a statute that Congress passed under its spending power, plaintiffs should emphasize the words of the U.S. Supreme Court in the 1981 case, *Pennhurst State School & Hospital v. Halderman*.²⁶¹ In *Pennhurst*, then-Justice Rehnquist stated that legislation enacted pursuant to Congress's spending power is similar to a contract.²⁶² Like the terms of a contract, conditions imposed by acceptance of federal funding will only bind a state if it accepts them voluntarily and knowingly.²⁶³ In *Pennhurst*, the Court held that the terms of the Disabled Assistance and Bill of Rights Act do not meet this test.²⁶⁴ The statute's plain language emphasizes a purpose to assist the states, rather than the disabled, and Congress did not appear to grant sufficient money to defray the costs of imposing a significant obligation on the states.²⁶⁵ The terms of the statute could not bind the states because the states were unaware of the scope of their obligations.²⁶⁶

The plain language of NCLB, unlike that of the statute in *Pennhurst*, states a purpose to provide benefits in that it aims to ensure educational opportunity for all children.²⁶⁷ The terms of NCLB specify, in detail, the obligations that states must assume in exchange for federal funding.²⁶⁸ Although some opponents of NCLB argue that Congress has not funded the statute at levels to enable the states to meet all of the obligations imposed by the statute, others, including the President, have proclaimed publicly that sufficient federal dollars are attached to NCLB's mandates.²⁶⁹ Furthermore, when Congress passed NCLB and states agreed to its conditions in exchange for federal funding, they

²⁶¹ See 451 U.S. at 17.

²⁶² See *id.*

²⁶³ See *id.*; see also Engdahl, *supra* note 122, at 78.

²⁶⁴ See 451 U.S. at 17-18.

²⁶⁵ See *id.* at 17-18, 24.

²⁶⁶ See *id.* See *supra* note 181 and accompanying text for further discussion of the Court's decision in *Pennhurst* regarding requirements that statutory conditions must meet in order to bind a state.

²⁶⁷ Compare 20 U.S.C. § 6301 (2002), with *Pennhurst*, 451 U.S. at 18. See *supra* notes 63-65, 86-89 and accompanying text for further discussion of NCLB's purpose clause.

²⁶⁸ See, e.g., 20 U.S.C. §§ 6311(b)(3)(A)-(C), 6311(b)(2)(E)-(H), 6316. See *supra* notes 66-85 and accompanying text for further discussion of NCLB's provisions.

²⁶⁹ Compare 149 CONG. REC. H3766 (daily ed. May 8, 2003) (statement of Rep. Etheridge), and NEA, *supra* note 102 (asserting that the bill is continually being underfunded), with H.R. REP. NO. 107-063, *supra* note 91, at 1242, and SPENDING, *supra* note 97 (asserting that NCLB is adequately funded and represents a significant increase in federal funding of education reform).

were well aware of the obligations the Act imposes.²⁷⁰ For example, provisions of the Act such as the requirement that schools make adequate yearly progress, and the obligation to provide parents of students at schools that have failed to do so with notice and the option to transfer or to receive supplemental services, are stated in clear language.²⁷¹ These provisions do not pose an indeterminate obligation on a school that fails to make adequate yearly progress nor a state, which must ensure that the school complies.²⁷² NCLB appears to meet the guidelines imposed by the *Pennhurst* Court.²⁷³ The Court in *Pennhurst*, however, did not address a third-party beneficiary claim directly.²⁷⁴

b. Establishing Standing

In addition to meeting the *Pennhurst* guidelines, to enforce a federal funding agreement under a third-party beneficiary theory, plaintiffs must establish standing as third-party beneficiaries.²⁷⁵ Under the *Second Restatement*, in order to establish standing, third-party beneficiaries must be intended beneficiaries, that is, the funding program must be intended to benefit them.²⁷⁶ Plaintiffs seeking to recover as third-party beneficiaries of a contract with the government must also demonstrate that application of the third-party beneficiary rule does not contravene the policy of the law authorizing the contract, as provided by section 313 of the *Second Restatement of Contracts*.²⁷⁷ It has been suggested that section 313 applies only to commercial claims because it specifically mentions consequential damages, rather than injunctions, and because its illustrations all refer to commercial contracts.²⁷⁸ Beneficiaries of commercial contracts frequently seek to recover dam-

²⁷⁰ See *supra* notes 66–85 and accompanying text for evidence that NCLB describes, in detail, the obligations of states under the Act.

²⁷¹ See, e.g., 20 U.S.C. § 6316(b)(1)(E), (b)(6), (b)(8)(ii), (e). See *supra* notes 76–79 and accompanying text for further discussion of these provisions.

²⁷² See 20 U.S.C. § 6316(b)(1)(E), (b)(6), (b)(8)(ii), (e). See *supra* notes 76–79 and accompanying text for further discussion of these provisions.

²⁷³ See 451 U.S. at 17–18. See *supra* notes 176–181 and accompanying text for further discussion of the *Pennhurst* guidelines.

²⁷⁴ See 451 U.S. at 17–18, 32.

²⁷⁵ See *Waters*, *supra* note 127, at 1176, 1187–88.

²⁷⁶ See RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 185, § 302. See *supra* note 186 and accompanying text for further discussion of the *Second Restatement's* intended beneficiary formulation.

²⁷⁷ See RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 185, § 313(1).

²⁷⁸ See *id.* § 313; *Waters*, *supra* note 127, at 1201.

ages based on harm caused by their reliance on a promise.²⁷⁹ The remedy sought in cases involving beneficiaries of public programs, in comparison, seeks to achieve the objective of the statute through an injunction, frequently resembling specific performance.²⁸⁰ In contrast to potential claims by members of the general public in the commercial context, statutes define an identifiable group for whose benefit the federal government has imposed an obligation on the defendant.²⁸¹

Because it does not contravene the policy behind a statute conferring benefits upon a particular group to permit members of that group to seek enforcement of the statute, section 313 does not preclude application of the third-party beneficiary rule to public programs established by a contract with the government.²⁸² Furthermore, this use of the third-party beneficiary rule is consonant with broad, equitable principles allowing recovery by individuals who were not parties to the contract, but for whose benefit the contract was enacted.²⁸³ Where defendants receive federal funds intended to be used for plaintiffs' benefit but fail to provide the intended benefits, the third-party beneficiary rule should be invoked to prohibit unjust enrichment.²⁸⁴ Unlike implied private right of action theory, which limits consideration of intent to benefit to the text and structure of a statute, third-party beneficiary theory is consistent with a broader reading of statutory intent.²⁸⁵ From its origins, as demonstrated by its focus on the party intended to benefit from a contract, this theory is premised on equitable principles and aims to prohibit unjust enrichment.²⁸⁶ Consistent with this purpose, a court would be able to look to a statute's legislative history to determine congressional intent.²⁸⁷

²⁷⁹ See *Waters*, *supra* note 127, at 1204-05; see also *H.R. Moch Co. v. Rensselaer Water Co.*, 159 N.E. 896, 899 (N.Y. 1928).

²⁸⁰ See *Waters*, *supra* note 127, at 1204-05.

²⁸¹ See *RESTATEMENT (SECOND) OF CONTRACTS*, *supra* note 185, § 313; *Waters*, *supra* note 127, at 1204-05.

²⁸² See *RESTATEMENT (SECOND) OF CONTRACTS*, *supra* note 185, § 313; *Waters*, *supra* note 127, at 1204-05.

²⁸³ See *Waters*, *supra* note 127, at 1206-07.

²⁸⁴ See *id.*

²⁸⁵ See *id.*

²⁸⁶ See *id.* (discussing *Lawrence v. Fox*, 20 N.Y. 268 (1859)).

²⁸⁷ See *id.*

c. Establishing Intent to Benefit a Particular Class

The legislative history of NCLB reveals that its purpose is to improve educational opportunity for all children.²⁸⁸ NCLB aims to target funds to needy communities.²⁸⁹ It aims to inform parents about the quality of their local schools as well as about their options to transfer their children out of failing schools or to receive supplemental services.²⁹⁰ NCLB requires that parents be involved in a meaningful way in planning and implementing all programs assisted by the Act.²⁹¹ Under NCLB, schools must identify and assist struggling students.²⁹² The text and legislative history of the statute reveal that NCLB confers these benefits—and others—upon students and their parents, consistent with the broader purpose of the statute to improve educational opportunity for the neediest students.²⁹³

Although the Federal District Court for the Southern District of New York in *Reform Now* found that the text and structure of NCLB did not evince congressional intent to create individually enforceable rights, a court evaluating a third-party beneficiary claim would not be limited, as was the *Reform Now* court, by the U.S. Supreme Court's § 1983 jurisprudence.²⁹⁴ Third-party beneficiary theory aims to effectuate the intentions of the parties.²⁹⁵ Inquiry into parties' intentions is not limited to the text and structure of the agreement, but rather focuses on what the circumstances indicate about the promisee's intentions.²⁹⁶ The legislative history of NCLB would assist a court in determining that the federal government intended that the neediest students benefit from NCLB.²⁹⁷

²⁸⁸ See 20 U.S.C. § 6301 (2002); 149 CONG. REC. S194 (daily ed. Jan. 10, 2003) (statement of Sen. Gregg); Press Release, *supra* note 87.

²⁸⁹ See 20 U.S.C. § 6301; Payne, *supra* note 88, at 315–16.

²⁹⁰ See 20 U.S.C. § 6316(b)(1)(E), (b)(6), (b)(8)(ii); Payne, *supra* note 88, at 321; BOEINER & GREGG, *supra* note 94, at 6.

²⁹¹ See 20 U.S.C. § 6318(a)(2)–(d); see also Payne, *supra* note 88, at 322; BOEINER & GREGG, *supra* note 94, at 6.

²⁹² 20 U.S.C. § 6314(b)(1)(I).

²⁹³ See, e.g., *id.* §§ 6301, 6314(b)(1)(I), 6316(b)(1)(E), 6316(b)(6), 6316(b)(11), 6316(b)(8)(ii), 6316(e). See *supra* notes 63–97 and accompanying text for further discussion of NCLB's purpose.

²⁹⁴ See 269 F. Supp. 2d at 344.

²⁹⁵ See RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 185, § 302.

²⁹⁶ See *id.*

²⁹⁷ See *supra* notes 63–65, 86–97 and accompanying text for further discussion of the ways in which the White House and members of Congress have characterized the purposes of NCLB. The *Second Restatement of Contracts* provides that a party is an intended beneficiary, and can therefore recover as a third-party beneficiary, if recognition of the beneficiary's right to performance is appropriate to effectuate the parties' intention and

Once a court establishes that the parties to the agreement intended to give a particular class of people the benefit of the agreement, the inquiry need go no further.²⁹⁸ It would be easier for the beneficiaries of NCLB—disadvantaged children and their parents—to recover under this theory than under implied private right of action or § 1983.²⁹⁹ Not much case law exists to guide plaintiffs or courts, as third-party beneficiary theory remains largely untested as a theory of recovery for the beneficiaries of statutory schemes.³⁰⁰ This is largely because, where plaintiffs have included contract claims, courts often have allowed recovery under implied private rights of action and, hence, have not reached the contract claims.³⁰¹

d. *Drawing on Precedent*

Two cases that courts decided before plaintiffs first succeeded in using § 1983 to enforce statutory rights suggest that beneficiaries of conditions on federal funding may use third-party beneficiary theory to ensure that they receive promised benefits.³⁰² In 1967, in *Bossier Parish School Board v. Lemon*, the Fifth Circuit Court of Appeals held a school board accountable for providing African-American children with the benefits it had assured them by accepting funds under the Civil Rights Act of 1964.³⁰³ In 1977, in *Fuzie v. Manor Care, Inc.*, the Federal District Court for the Northern District of Ohio ruled that a plaintiff who could invoke neither implied private right of action nor § 1983 to enforce her rights under the Medicaid Act was nevertheless a third-party beneficiary of the statute.³⁰⁴ Furthermore, even where courts have not addressed third-party beneficiary claims directly, dicta

circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance. See RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 185, § 302.

²⁹⁸ See Waters, *supra* note 127, at 1174. See *supra* note 206 and accompanying text for discussion of Waters's assertion that a third-party beneficiary claimant need only establish membership in the class for whose special benefit Congress enacted the federal statute.

²⁹⁹ Compare *supra* note 185 and accompanying text (outlining requirements of third-party beneficiary standing), with *supra* notes 137-144 (outlining current requirements of implied private right of action), and *supra* notes 166-168 (discussing current requirements of § 1983).

³⁰⁰ See Waters, *supra* note 127, at 1181.

³⁰¹ See *id.*

³⁰² See *Bossier Parish Sch. Bd. v. Lemon*, 370 F.2d 847, 850 (5th Cir. 1967); *Fuzie v. Manor Care, Inc.*, 461 F. Supp. 689, 701 (N.D. Ohio 1977).

³⁰³ See 370 F.2d at 850.

³⁰⁴ See 461 F. Supp. at 701.

in some cases suggest that courts might consider this theory to vindicate rights that are well defined, such as those in NCLB.³⁰⁵

Plaintiffs seeking to enforce NCLB to receive the benefits that the Act confers upon them can build upon precedent to bring third-party beneficiary claims to court.³⁰⁶ They can rely on earlier cases that address third-party beneficiary claims directly, such as *Bossier Parish* and *Fuzie*.³⁰⁷ They can rely also on cases that address elements of third-party beneficiary claims in decisions based on implied private right of action or § 1983.³⁰⁸ Given the broad purpose of third-party beneficiary theory, which is informed by equitable principles and aims to prohibit unjust enrichment, this theory holds promise for plaintiffs seeking to enforce NCLB to promote educational equity.³⁰⁹

CONCLUSION

Fifty years after *Brown v. Board of Education*, poor and minority children still are deprived of educational opportunity. Years of both litigation and legislation have not accomplished educational equity. The passage of the No Child Left Behind Act of 2001 holds promise in that it provides important benefits for children. Thus far, however, the federal government has not acted adequately to enforce NCLB. Schools and states that fail to make adequate yearly progress continue to receive money under NCLB, but they fail to meet the obligations to children and parents that the Act imposes. To protect the benefits NCLB confers upon them, it is essential that parents of children attending these failing schools explore their options for private enforcement. Given the U.S. Supreme Court's decisions within the past three years narrowing implied private right of action and § 1983, neither will be available to plaintiffs pursuing educational adequacy. The most promising theory for enforcement of NCLB is third-party beneficiary theory.

To succeed in enforcing NCLB under a third-party beneficiary theory, plaintiffs should focus on similarities between federal funding agreements and contracts, the text and legislative history of NCLB

³⁰⁵ See *Blessing*, 520 U.S. at 345 (declining to foreclose the possibility that a well-defined right might be enforceable); *Pennhurst*, 451 U.S. at 17 (characterizing funding agreements as similar to contracts and specifying requirements they must meet to bind states).

³⁰⁶ See *Bossier Parish*, 370 F.2d at 852; *Fuzie*, 461 F. Supp. at 701.

³⁰⁷ See *Bossier Parish*, 370 F.2d at 850; *Fuzie*, 461 F. Supp. at 701.

³⁰⁸ See, e.g., *Blessing*, 520 U.S. at 345; *Wilder*, 496 U.S. at 502, 509-510; *Pennhurst*, 451 U.S. at 17.

³⁰⁹ See 20 U.S.C. § 6301 (2002); RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 185, § 302; Waters, *supra* note 127, at 1206-07.

that demonstrate an intent to benefit children by providing them with opportunities to obtain a high-quality education, and the equitable principles informing third-party beneficiary theory. Advocates for educational equity must prepare to challenge states to provide the quality education for all students that they agreed to when they began accepting NCLB funds two years ago.

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