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Title IX and Title VII: Parallel Remedies in Combatting Sex Discrimination in Educational Employment

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TITLE IX AND TITLE VII: PARALLEL REMEDIES IN COMBATTING SEX DISCRIMINATION IN EDUCATIONAL EMPLOYMENT

LYNN RIDGEWAY ZEHRT*

The federal circuit courts of appeals are divided over the proper relationship between Title IX of the Higher Education Amendments Act of 1972 and Title VII of the Civil Rights Act of 1964. Specifically, the federal courts disagree over whether an employee of an educational institution may sue her employer for employment discrimination under either Title IX or Title VII. Some courts have concluded that these employees may not bring employment discrimination claims under Title IX, holding that Title VII provides the sole avenue for obtaining monetary relief for employment discrimination against educational institutions. Other courts have reached the opposite conclusion, holding that Title IX and Title VII constitute parallel remedies, thus permitting claimants to recover monetary damages against educational institutions by pursuing only a Title IX claim for employment discrimination. Claimants proceeding under the parallel approach have a distinct advantage because by proceeding solely under Title IX, they may avoid the administrative process required by Title VII, as well as Title VII's cap on compensatory and punitive damages.

*The Article concludes that only the parallel approach is consistent with Title IX's legislative history and purpose. In reaching this conclusion, the Article closely examines the 1970 hearings held in the House Subcommittee of Education. The Supreme Court acknowledged in *North Haven Board of Education v. Bell*, 456 U.S. 512 (1982), that the origins of Title IX grew out of these hearings. This legislative history is crucial in understanding the purpose of Title IX, but it has not been fully explored in previous scholarship.*

These 1970 hearings were historical for many reasons, including that they are widely acknowledged to be the first congressional hearings held on the education and employment of women in educational institutions. They

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documented systemic employment discrimination by educational institutions against women, including widespread discrimination in hiring, promotions, and salaries. Given the pervasiveness of this employment discrimination and the recognized inefficiency of the administrative process available at that time, this Article concludes that Congress intended Title IX to provide an additional remedy for combatting sex discrimination for these employees.

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I. INTRODUCTION

Title IX of the Higher Education Amendments Acts of 1972 broadly and boldly prohibits sex discrimination in any federally funded educational program.¹ Although its core antidiscrimination provisions consist of less than forty words, the interpretation of these words has been the source of eight Supreme Court decisions² and multiple administrative interpretations through formal regulations³ and less formal guidance manuals.⁴ The text of Title IX

1. Title IX of the Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 235 (1972) (codified as amended at 20 U.S.C. § 1681 *et seq.* (2012)).

2. *Cannon v. Univ. of Chi.*, 441 U.S. 677 (1979); *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512 (1982); *Grove City Coll. v. Bell*, 465 U.S. 555 (1984); *Franklin v. Gwinnett Cty. Pub. Schs.*, 503 U.S. 60 (1992); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998); *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005); *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246 (2009).

3. *See, e.g.*, 34 C.F.R. § 106.51(a)(1) (2018) (regulations issued by the Office for Civil Rights, Dep't of Educ.); 45 C.F.R. § 86.51(a)(1) (2018) (regulations issued by the Dep't of Health & Human Servs.); 7 C.F.R. §§ 15a.500–50 (2018) (regulations issued by the Dep't of Agric.); 13 C.F.R. § 113.3 (2018) (regulations issued by the Small Bus. Admin.).

4. *See Title IX Legal Manual*, § IV.B.2, U.S. DEP'T JUST. (last visited Aug. 6, 2016), <https://www.justice.gov/crt/title-ix> [<https://perma.cc/6TNZ-GLTT>].

contains only one express remedy: the denial of federal funding to any educational institution that violates its provisions.⁵ The Supreme Court expanded the effectiveness of Title IX significantly in 1979 when it read an implied private right of action into the statute,⁶ thus placing enforcement power into the hands of aggrieved individuals. Thirteen years later, when the Court interpreted Title IX to authorize the recovery of compensatory damages for intentional discrimination,⁷ the statute was transformed yet again into a more powerful weapon for individuals challenging sex discrimination. Not only have these interpretations of Title IX expanded the power of the statute, but they also have incentivized the filing of Title IX claims not just in the traditional context of student athletics but also in the field of employment discrimination. The application of Title IX into the field of employment discrimination has created, in turn, the present controversial judicial task of defining the relationship between Title IX and Title VII of the Civil Rights Act of 1964.⁸

The majority of federal circuit courts view Title IX as an independent remedy to Title VII in combatting sex discrimination in educational employment.⁹ In *Doe v. Mercy Catholic Medical Center*,¹⁰ the Third Circuit recently considered whether an employee of an educational institution receiving federal funds can sue this employer to recover damages for sex discrimination under Title IX of the Education Amendments of 1972.¹¹ The Third Circuit broadly construed the statute, concluding that Title IX prohibits employment discrimination on the basis of sex,¹² and thereby joined with the First,¹³ Fourth,¹⁴ and Sixth¹⁵ Circuits in concluding that Title IX encompassed such claims. By interpreting Title IX as an additional and independent remedy to Title VII, these courts further broadened Title IX's enforcement power by

5. 20 U.S.C. § 1682 (2012).

6. See *Cannon*, 441 U.S. at 699 (permitting a female student to bring an enforcement action under Title IX by recognizing an implied private right of action into the statute).

7. See *Franklin*, 503 U.S. at 76.

8. See generally Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(a), 78 Stat. 241, 255 (1964) (codified as amended at 42 U.S.C. § 2000e *et seq.* (2012)).

9. See *Doe v. Mercy Catholic Med. Ctr.*, 850 F.3d 545 (3rd Cir. 2017); *Ivan v. Kent State Univ.*, 92 F.3d 1185 (6th Cir. 1996); *Preston v. Virginia ex rel. New River Cmty. Coll.*, 31 F.3d 203 (4th Cir. 1994); *Lipsett v. Univ. of P.R.*, 864 F.2d 881 (1st Cir. 1988).

10. 850 F.3d at 545.

11. 20 U.S.C. § 1681 (2012).

12. *Doe*, 850 F.3d at 560.

13. *Lipsett*, 864 F.2d at 881.

14. *Preston*, 31 F.3d at 203.

15. *Ivan v. Kent State Univ.*, 92 F.3d 1185 (6th Cir. 1996).

placing it in the hands of teachers and other employees of educational institutions who seek monetary recovery for more than just retaliation.¹⁶

The Fifth Circuit¹⁷ and Seventh Circuit¹⁸ have taken a much narrower view of Title IX, holding that Title IX does not provide a private right of action to employees of qualifying educational institutions when these employees seek damages for intentional sex discrimination committed in the employment context. Instead, these Circuits have held that Title VII of the Civil Rights Act of 1964¹⁹ provides the “exclusive avenue of relief” for damages to these employees.²⁰ Emphasizing the comprehensive nature of the statutory scheme Congress created when enacting Title VII,²¹ including filing deadlines, exhaustion of administrative requirements as prerequisites to individual suits, and limitations placed on the recovery of compensatory and punitive damages, these courts have concluded that Title IX may not be used as a vehicle to bypass Title VII’s requirements.²² A majority of the federal district courts find this view persuasive, and for more than twenty years, these courts have effectively dismissed parallel claims brought under Title IX on the ground that these claims are preempted by Title VII.²³

16. See *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 178 (2005) (interpreting Title IX’s prohibition of intentional discrimination to include a claim for retaliation brought by a former high school basketball coach).

17. *Lakoski v. James*, 66 F.3d 751, 753 (5th Cir. 1995).

18. *Waid v. Merrill Area Pub. Schs.*, 91 F.3d 857, 862 (7th Cir. 1996), *abrogated on other grounds by Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246 (2009).

19. 42 U.S.C. § 2000e (2012).

20. *Lakoski*, 66 F.3d at 753; *accord Waid*, 91 F.3d at 862 (concluding that “Title VII provided the only way by which [plaintiff] could obtain make-whole relief.”).

21. *Waid*, 91 F.3d at 861–62; *Lakoski*, 66 F.3d at 754.

22. *Waid*, 91 F.3d at 862; *Lakoski*, 66 F.3d at 753.

23. The following 12 district courts have concluded that Title VII is the exclusive remedy for employees seeking monetary relief for sex discrimination from their educational employers. *Drisin v. Fla. Int’l Univ. Bd. of Trs.*, No. 1:16-cv-24939-WILLIAMS/TORRES, 2017 WL 3505299 (S.D. Fla. June 27, 2017); *Torres v. Sch. Dist. of Manatee Cty.*, No. 8:14-cv-1021-T-33TBM, 2014 WL 4185364 (M.D. Fla. Aug. 22, 2014); *Ludlow v. Nw. Univ.*, 79 F. Supp. 3d 824 (N.D. Ill. 2015); *Vandiver v. Little Rock Sch. Dist.*, No. 4:03-CV-00834 GTE, 2007 WL 2973463 (E.D. Ark. Oct. 9, 2007); *Schultz v. Bd. of Trs. of the Univ. of W. Fla.*, No. 3:06cv442-RS-MD, 2007 WL 1490714 (N.D. Fla. May 21, 2007); *Hankinson v. Thomas Cty. Sch. Dist.*, No. 6:04-CV-71 (HL), 2005 WL 6802243 (M.D. Ga. Oct. 28, 2005); *Urie v. Yale Univ.*, 331 F. Supp. 2d 94 (D. Conn. 2004); *Morris v. Wallace Cmty. Coll.–Selma*, 125 F. Supp. 2d 1315 (S.D. Ala. 2001); *Kemether v. Pa. Interscholastic Athletic Ass’n, Inc.*, 15 F. Supp. 2d 740 (E.D. Pa. 1998); *Burrell v. City Univ. of N.Y.*, 995 F. Supp. 398 (S.D.N.Y. 1998); *Cooper v. Gustavus Adolphus Coll.*, 957 F. Supp. 191 (D. Minn. 1997); *Storey v. Bd. of Regents of the Univ. of Wis. Sys.*, 604 F. Supp. 1200 (W.D. Wis. 1985). The following 6 district courts have reached the opposite conclusion, holding that Title IX and Title VII function as parallel remedies. *Fox v. Pittsburg State Univ.*, 257 F. Supp. 3d 1112 (D. Kan. 2017); *Winter v. Pa. State Univ.*, 172 F.

This Article concludes that the expansive approach adopted most recently by the Third Circuit is the one most faithful to the legislative history and purpose of Title IX, as well as the Supreme Court's prior interpretations of Title IX. Part I of this Article provides a brief discussion of the legislative enactment, scope, and purpose of Title VII and Title IX. Although the Supreme Court has not directly addressed the issue explored in this Article, the Supreme Court has issued several prior decisions interpreting Title IX, and the relevant decisions also are discussed in Part I of this Article as instructive interpretative history. The Article then turns in Part II to an analysis of the circuit split regarding whether an employee has a private right of action under Title IX for employment discrimination. It concludes in Part III by relying on legislative history for the conclusion that Congress intended Title IX to serve as a parallel remedy for eradicating the pervasive sex discrimination that existed throughout educational institutions at the time of its enactment.

II. A BRIEF HISTORICAL PERSPECTIVE OF TITLE VII AND TITLE IX

A. *Title VII's Origin and Structure*

The Civil Rights Act of 1964 was enacted as a comprehensive civil rights package consisting of eleven separate titles.²⁴ It was enacted pursuant to Congress' power under the Commerce Clause and § 5 of the Fourteenth Amendment,²⁵ and the initial intended beneficiaries of this legislation were African-Americans.²⁶ Specifically, the economic conditions of African-Americans had declined significantly in the late 1950s due to increasingly high unemployment rates, and there were growing concerns about the increasing number of violent racial riots in the South.²⁷ Therefore, one of the legislative objectives of the Civil Rights Act was to assure "equality of . . . opportunities and remove [existing] barriers" for African-Americans,²⁸ and this goal is reflected in the statutory structure of this Civil Rights Act. Title II of the Civil

Supp. 3d 756 (M.D. Pa. 2016); *AB v. Rhinebeck Cent. Sch. Dist.*, 224 F.R.D. 144 (S.D.N.Y. 2004); *Bedard v. Roger Williams Univ.*, 989 F. Supp. 94 (D.R.I. 1997); *Henschke v. N.Y. Hosp.-Cornell Med. Ctr.*, 821 F. Supp. 166 (S.D.N.Y. 1993); *Broussard v. Bd. of Trs. for State Colls. & Univs.*, No. 92-581, 1993 WL 70203 (E.D. La. Mar 8, 1993).

24. Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(a), 78 Stat. 241, 255 (1964) (codified as amended at 42 U.S.C. § 2000e *et seq.* (2012)).

25. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 367 (1978).

26. See *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 202 (1979).

27. Lynn Ridgeway Zehrt, *Twenty Years of Compromise: How the Caps on Damages in the Civil Rights Act of 1991 Codified Sex Discrimination*, 25 YALE J.L. & FEMINISM 249, 255-56 (2014).

28. *Griggs v. Duke Power Co.*, 401 U.S. 424, 429 (1971).

Rights Act of 1964 prohibited racial discrimination in commercial establishments open to the public,²⁹ whereas Title IV promoted the desegregation of public schools,³⁰ and Title VI prohibited discrimination on the basis of race, color, and national origin in programs and activities receiving federal funding.³¹

The provisions of Title VII of the Civil Rights Act of 1964 were even more ambitious as they broadly strove to eliminate employment discrimination among private employers.³² Moreover, Congress expanded the protected characteristics of Title VII well beyond race and color discrimination to also offer protection on the basis of national origin, religion, and sex.³³ With the addition of sex as a protected characteristic under Title VII, it became the first major piece of federal legislation to offer civil rights protection to women.³⁴

Despite the monumental accomplishment in enacting Title VII, the original text of the statute contained several significant limitations that were enacted to achieve the compromise necessary to secure its passage. Two of these limitations provide important historical context to the current debate. First, although the text of Title VII prohibited both public and private employers from committing employment discrimination, the statute contained a significant exemption excusing educational institutions completely from compliance.³⁵ This provision, found in Section 702, stated in its original form, that “[t]his title shall not apply to . . . an educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution.”³⁶ Thus, employees of educational institutions were not protected from discrimination and educational institutions were “free, as far as Title VII was concerned, to discriminate in [their] employment practices.”³⁷

Second, Section 705 of Title VII created the Equal Employment Opportunity Commission and charged it with the responsibility of preventing

29. 42 U.S.C. § 2000a (2012).

30. *Id.* § 2000c.

31. *See id.* § 2000d *et seq.*

32. *See id.* § 2000e *et seq.*

33. *Id.*

34. *See Zehrt, supra* note 27, at 256.

35. Civil Rights Act of 1964, Pub. L. No. 88-352, § 702, 78 Stat. 241, 255 (1964).

36. *Id.*

37. *See, e.g., Weise v. Syracuse Univ.*, 522 F.2d 397, 410 (2nd Cir. 1975) (evaluating the Title VII claims brought by two female faculty members and describing the individual effectiveness of the Equal Employment Opportunity Act for these plaintiffs); *EEOC v. Tufts Inst. of Learning*, 421 F. Supp. 152, 157 (D. Mass. 1975) (discussing the claims for injunctive relief and reinstatement brought by the EEOC on behalf of two female faculty members who were fired and the protections now afforded by the 1972 amendments to Title VII).

unlawful employment practices, but the original statute gave the EEOC no enforcement power,³⁸ essentially asking the commission “to kill an elephant with a fly gun.”³⁹ One of the goals of the original statutory design was for the EEOC to achieve prompt conciliation of employment disputes through “persuasion,” thereby ensuring the prompt return of workers to the workforce.⁴⁰ Thus, Title VII required all claimants to first file a charge of discrimination with the EEOC, or an equivalent state agency, within either 90 or 210 days of the alleged unlawful employment practice.⁴¹ This administrative process provided the EEOC with an opportunity to investigate the charges and resolve them through negotiation.⁴² Congress later amended Title VII and expanded these deadlines slightly to 180 and 300 days depending on the existence of a state agency, again ratifying the original ideal of encouraging prompt resolution of claims.⁴³ This opportunity for the EEOC to attempt prompt conciliation was so integral to the statutory design of Title VII that the Supreme Court later deemed it a prerequisite to filing a private lawsuit, and a claimant’s failure to satisfy these administrative requirements of Title VII precluded subsequent litigation.⁴⁴ Moreover, if the EEOC failed to achieve conciliation, the remedies

38. See *Hackley v. Roudebush*, 520 F.2d 108, 123 (D.C. Cir. 1975) (detailing the legislative history of the Equal Employment Opportunity Act including the different proposals to provide the EEOC with enforcement power).

39. See Herbert Hill, *The Equal Employment Opportunity Acts of 1964 and 1972: A Critical Analysis of the Legislative History and Administration of the Law*, 2 BERKELEY J. EMP. & LAB. L. 1, 32 (1977) (quoting Wall St. J., Apr. 12, 1967, at 1, col. 6 (statement of Stephen N. Shulman, Chairman, EEOC)).

40. *Great Am. Fed. Sav. & Loan Ass’n v. Novotny*, 442 U.S. 366, 372–74 (1979) (discussing that “[u]nder Title VII, cases of alleged employment discrimination are subject to a detailed administrative and judicial process designed to provide an opportunity for nonjudicial and non-adversary resolution of claims. . . . At several different points, the statutory plan prevents immediate filing of judicial proceedings in order to encourage voluntary conciliation.”); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974) (explaining that “Congress enacted Title VII of the Civil Rights Act of 1964 . . . to assure equality of employment opportunities. . . . Cooperation and voluntary compliance were selected as the preferred means for achieving this goal. To this end, Congress created the Equal Employment Opportunity Commission and established a procedure whereby existing state and local equal employment opportunity agencies, as well as the Commission, would have an opportunity to settle disputes through conference, conciliation, and persuasion before the aggrieved party was permitted to file a lawsuit.”); Civil Rights Act of 1964 § 706(a).

41. Civil Rights Act of 1964 § 706(d); see also 110 CONG. REC. 12,724–25 (1964) (statement of Sen. Humphrey) (explaining that the deferral to state agencies is based on federalism concerns, namely, to preserve states’ historical control over employment relationships).

42. Civil Rights Act of 1964 § 706(a) *et seq.*

43. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 4(a), 86 Stat. 103, 105 (1972).

44. See *Brown v. Gen. Servs. Admin.*, 425 U.S. 820, 832 (1976).

available to the plaintiff in federal court were minimal, limited to equitable relief, including reinstatement and backpay,⁴⁵ and attorney's fees,⁴⁶ and thus provided little financial incentive to litigate the action after the conclusion of the administrative process.

Congress attempted to remedy both of these limitations in Title VII through the passage of the Equal Employment Opportunity Act of 1972.⁴⁷ This statute, enacted on March 24, 1972, amended Title VII by providing the EEOC with the authority to enforce Title VII through increased investigative power⁴⁸ and the ability to institute civil actions against employers named in the charge of discrimination.⁴⁹

Additionally, the Equal Employment Opportunity Act of 1972 substantially revised Section 702 of Title VII by eliminating the exemption for educational institutions.⁵⁰ Senator Cranston, one of the co-sponsors of the bill in the Senate, explained the necessity for this revision to Title VII:

The existing exemption for employers of educational institutions is also eliminated by S. 2515. There are at present over 120,000 educational institutions, with approximately 2.8 million teachers and professional staff members and another 1.5 million nonprofessional staff members. Yet all of these employees are, at present, without an effective Federal remedy in the area of employment discrimination. As in other areas of employment, statistics for educational institutions indicate that minorities, and particularly women, are precluded from the more prestigious and higher paying positions and are relegated to the more menial and lower paying positions. I believe it is essential that these employees be given the same opportunity to redress their grievances as are available to other employees in the private sector.⁵¹

Southern opposition to this portion of the Equal Opportunity Act centered around a desire to remove religious institutions entirely from Title VII's provisions.⁵² When efforts to achieve complete exemption for religious employers failed, their strategy shifted to negotiating a compromise that

45. Civil Rights Act of 1964 § 706(g).

46. *Id.* § 706(k).

47. Equal Employment Opportunity Act of 1972 §§ 3–5.

48. *Id.* § 5 (amending Civil Rights Act of 1964 § 707(e)).

49. *Id.* § 4(a) (amending Civil Rights Act of 1964 § 706(f)(1)).

50. *Id.* § 3.

51. 118 CONG. REC. S4,931 (daily ed. Feb. 22, 1972) (statement of Sen. Cranston).

52. See George P. Sape & Thomas J. Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824, 860 (1972).

permitted qualifying religious employers, including religious educational institutions, to give employment preferences to members of their own religion, thereby permitting them to discriminate only on the basis of religious preference.⁵³ The Equal Employment Opportunity Act codified this narrow exemption for religious employers by amending Section 702.⁵⁴

Not only did the Equal Employment Opportunity Act's amendment of Section 702 ensure that most employees of educational institutions were protected by Title VII, but it also significantly expanded the coverage of Title VII to two additional groups of employers. First, it modified Title VII's definition of the term employer to include all state and local governmental employers.⁵⁵ The result of this amendment was estimated at that time to extend coverage of Title VII to approximately ten million additional employees.⁵⁶ Second, it modified the small business exception by lowering the number of employees from twenty-five to fifteen that an employer needed to be exempt from compliance,⁵⁷ adding an "estimated six million private industry employees to [the] EEOC's jurisdiction."⁵⁸ Thus, the Equal Employment Opportunity Act strove to improve the effectiveness of Title VII by not only giving the EEOC enforcement power, but also by simultaneously increasing the number of employees protected from discrimination.

As it stands today, Title VII currently allows a victim of intentional discrimination to recover both compensatory and punitive damages from her employer, although these damages are capped collectively in accordance with the employer's size.⁵⁹ The addition of damages as an available remedy to victims of discrimination pursuing claims under Title VII was achieved through

53. The Joint Conference Report to the Equal Employment Opportunity Act of 1972 explained the history behind the amendment to Section 702: "The Senate Amendment eliminated the present exemption from Title VII for educational institutions. Also, the Senate provision expanded the exemption for religious organizations from coverage under this title with respect to the employment of individuals of a particular religion in all their activities instead of the present limitation to religious activities. The House bill did not change the existing exemptions. The House receded." S. REP. NO. 92-681, at 16 (1972) (Conf. Rep.).

54. See, e.g., *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1166-67 (4th Cir. 1985); *EEOC v. Pac. Press Publ'g Ass'n*, 676 F.2d 1272, 1276-78 (9th Cir. 1982); *McClure v. Salvation Army*, 460 F.2d 553, 558 (5th Cir. 1972).

55. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2, 86 Stat. 103, 103 (codified at 42 U.S.C. § 2000e(a),(f) (2012)).

56. See Hill, *supra* note 39, at 52.

57. Equal Employment Opportunity Act of 1972 § 2 (codified at 42 U.S.C. § 2000e(b),(d) (2012)).

58. Hill, *supra* note 39, at 52.

59. See 42 U.S.C. § 1981(a) (2012).

the enactment of the Civil Rights Act of 1991.⁶⁰ This was a substantial modification to Title VII, both imposing financial consequences to employers who failed to comply with its antidiscrimination mandate and providing victims of discrimination with financial compensation to make them more fully whole.⁶¹

B. Title IX's General Language and Judicial Expansion

Approximately three months after Congress passed the Equal Employment Opportunity Act of 1972, Congress enacted Title IX of the Education Amendments of 1972.⁶² Although both Title IX and Title VII prohibit discrimination, the statutes differ significantly in scope, source of Congressional power, remedies, and structure.

First, whereas Title VII “aim[ed] broadly to eradicate discrimination throughout the economy” by comprehensively prohibiting discrimination on the basis of a number of characteristics,⁶³ the scope of Title IX was limited to eradicating sex discrimination in education.⁶⁴ This narrower scope is understandable given the impetus for the enactment of Title IX. Specifically, Title IX was enacted in response to “extensive hearings held in 1970 by the House Special Subcommittee on Education” that raised awareness of “pervasive discrimination against women with respect to educational

60. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (damages provisions codified at 42 U.S.C. § 1981(a) (2012)).

61. See Zehrt, *supra* note 27, at 251.

62. Title IX was enacted on June 23, 1972, via the Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 235 (1972).

63. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 286 (1998) (internal quotations and citations omitted).

64. See 118 CONG. REC. S5,803 (daily ed. Feb. 28, 1972) (statement of Sen. Bayh) (“Mr. President, one of the great failings of the American educational system is the continuation of corrosive and unjustified discrimination against women. It is clear to me that sex discrimination reaches into all facets of education—admissions, scholarship programs, faculty hiring and promotion, professional staffing, and pay scales. Indeed, the recent ‘Report on Higher Education’ funded by the Ford Foundation concluded: Discrimination against women, in contrast to that against minorities, is still overt and socially acceptable within the academic community. The only antidote is a comprehensive amendment such as the one now before the Senate. [This Amendment] is broad but basically it closes loopholes in existing legislation relating to general education programs and employment resulting from those programs. . . . [T]he heart of this amendment is a provision banning sex discrimination in educational programs receiving Federal funds. The amendment would cover such crucial aspects as admissions procedures, scholarships, and faculty employment, with limited exceptions.”).

opportunities.”⁶⁵ Moreover, since the sole focus of these hearings concerned sex discrimination in education, Congress applied Title IX’s provisions only to educational recipients of federal funding.⁶⁶

Title IX and Title VII also differ in their source of Congressional power, and the Supreme Court has indicated this difference is a significant one.⁶⁷ Congress enacted Title IX pursuant to its powers under the Spending Clause.⁶⁸ This Spending Clause legislation is made in the form of a “contract: in return for federal funds, the States agree to comply with federally imposed conditions.”⁶⁹ Whereas Title VII is “framed in terms of an outright prohibition” given its grounding under the Commerce Clause and § 5 of the Fourteenth Amendment; in contrast, Title IX “is framed in terms of a condition.”⁷⁰ During the debate in the House of Representatives regarding the Education Amendments Act, Representative Mink explained the rationale for enacting Title IX under the Spending Clause:

Any college or university which has [a] . . . policy which discriminates against women applicants, . . . is free to do so under [Title IX] but such institutions should not be asking the taxpayers of this country to pay for this kind of discrimination. Millions of women pay taxes into the Federal treasury and we collectively resent that these funds should be used for the support of institutions to which we are denied equal access.⁷¹

Accordingly, the Supreme Court explained that Congress had the following two purposes in enacting Title IX: “to prevent the use of federal dollars to support discriminatory practices . . . [and] ‘to provide individual citizens effective protection against those practices.’”⁷²

65. *Cohen v. Brown Univ.*, 101 F.3d 155, 165 (1st Cir. 1996) (citing 118 CONG. REC. S5,804 (daily ed. Feb. 28, 1972) (statement of Sen. Bayh)); *accord* *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 523 n.13 (1982).

66. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 (1979).

67. *Gebser*, 524 U.S. at 286–87.

68. Congress subsequently enacted other antidiscrimination statutes under its Spending Clause powers, including the Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (codified as amended at 29 U.S.C. § 794 (2012)), and the Age Discrimination Act of 1975, Pub. L. No. 94-135, § 303, 89 Stat. 728–29 (codified as amended at 42 U.S.C. § 6102 (2012)). See Charles F. Abernathy, *Title VI and the Constitution: A Regulatory Model for Defining “Discrimination,”* 70 GEO. L.J. 1, 36 (1981).

69. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 182 (2005).

70. *Gebser*, 524 U.S. at 286.

71. 117 CONG. REC. 39,252 (1971).

72. *Jackson*, 544 U.S. at 180 (quoting *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 (1979)).

Moreover, Title VII and Title IX provide different statutory remedies. Title VII expressly provides an individual with a private right of action against their employer,⁷³ but Title IX does not.⁷⁴ In the event an educational institution is found in violation of Title IX, the only express remedy provided in the statute is an administrative one: the termination of federal funding.⁷⁵

Despite the narrower scope of Title IX, the Supreme Court has frequently declared that Congress chose broad language in prohibiting sex discrimination⁷⁶ and that courts must interpret the statute with “a sweep as broad as its language.”⁷⁷ The core of Title IX’s prohibition of sex discrimination is found in Section 901(a) and states: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance”⁷⁸

This portion of Title IX was modelled after Title VI of the Civil Rights Act of 1964, with the word “sex” substituted in Title IX for the word “race” that was written into Title VI.⁷⁹ The similarities between Title VI and Title IX do not end with the antidiscrimination provision, however. Specifically, neither statute expressly includes a private right of action. Instead, both provide the termination of federal funding as the only stated remedy.⁸⁰

Based on the similarities in statutory design and structure, the Court has often interpreted Title IX as consistent with Title VI.⁸¹ For instance, the Court has implied a private right of action into both statutes.⁸² This implied right of action breathed new life and expansion into Title IX, as it expanded the statute’s sole enforcement power from federal agencies and placed part of it into the

73. See 42 U.S.C. § 2000e-5(f)(1) (2012).

74. *Cannon*, 441 U.S. at 680–83.

75. 20 U.S.C. § 1682 (2012).

76. *Jackson*, 544 U.S. at 173 (observing that in “all of these [previous] cases, we relied on the text of Title IX, which . . . broadly prohibits a funding recipient from subjecting any person to discrimination on the basis of sex”) (internal quotations omitted).

77. *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982) (internal quotations and citations omitted).

78. 20 U.S.C. § 1681(a) (2012).

79. 42 U.S.C. § 2000d (2012); see *Cannon*, 441 U.S. at 694–95, 694 n.16.

80. *Cannon*, 441 U.S. at 695–96.

81. *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 258–59 (2009); *N. Haven*, 456 U.S. at 528–29.

82. *Cannon*, 441 U.S. at 716–17 (interpreting Title IX to include a private right of action); *Guardians Ass’n v. Civil Serv. Comm’n of N.Y.*, 463 U.S. 582, 597 (1983) (observing that a private cause of action under Title VI was “implied by the judiciary rather than expressly created by Congress”).

hands of individuals.⁸³ Scholars have speculated that the Court's recognition of an implied right of action was partially a practical one, shaped by the reality that agency enforcement had proven ineffective.⁸⁴ Specifically, the government "ha[d] never cut off . . . funding to punish an educational institution for violating Title IX."⁸⁵ Moreover, even if it had terminated funding, there were serious concerns about whether this extreme remedy would advance the statutory purposes of achieving gender equality in education or would instead cause harm to victims of sex discrimination.⁸⁶

The original private right of action permitted by the Court in *Cannon v. University of Chicago* provided fairly limited remedies, however, and allowed the plaintiff to request only injunctive and equitable relief.⁸⁷ Undoubtedly, this relief provided greater protection to an individual victim than the termination of funding because the court could order the educational institution to cease its discriminatory conduct or policy.⁸⁸ However, the Court's creation of this implied right of action generated additional questions. For instance, just as Title IX did not expressly provide for a private right of action, it also was silent as to whether other remedies were available to victims of discrimination.⁸⁹

The Supreme Court again expansively interpreted Title IX in *Franklin v. Gwinnett County Public Schools* by unanimously reaching two holdings. First, the Court construed Title IX to include a cause of action for sexual

83. *Cannon*, 441 U.S. at 703.

84. R. SHEP MELNICK, *THE TRANSFORMATION OF TITLE IX: REGULATING GENDER EQUALITY IN EDUCATION* 15 (Brookings Institution Press, 2018); accord *Implied Rights of Action to Enforce Civil Rights: The Case for a Sympathetic View*, 87 YALE L.J. 1378, 1404 (1978).

85. MELNICK, *supra* note 84, at 47.

86. See *Cannon*, 441 U.S. at 704–05 (commenting that the termination of funding is “severe and often may not provide an appropriate means of accomplishing the . . . purpose if merely an isolated violation has occurred”); *N. Haven*, 456 U.S. at 552 (Powell, J., dissenting) (observing that the “cutoff of funds, at the expense of innocent beneficiaries of the funded program, will *not* remedy the injustice”); accord U.S. COMM’N ON CIVIL RIGHTS, *FEDERAL TITLE VI ENFORCEMENT TO ENSURE NONDISCRIMINATION IN FEDERALLY ASSISTED PROGRAMS* 40 (1996) (observing that “[a]lthough fund termination may serve as an effective deterrent to recipients, it may leave the victim of discrimination without a remedy. Fund termination may eliminate entirely the benefit[s] sought by the victim.”).

87. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287 (1998) (citing *Cannon*, 441 U.S. at 705 n.38, 710 n.44, 711) (clarifying that “when the Court first recognized the implied right under Title IX in *Cannon*, the opinion referred to injunctive or equitable relief in a private action . . . but not to a damages remedy”).

88. *N. Haven*, 456 U.S. at 552–53 (Powell, J., dissenting) (acknowledging that the “cutoff of funds, at the expense of innocent beneficiaries of the funded program, will *not* remedy the injustice to the employee.”).

89. *Gebser*, 524 U.S. at 284.

harassment.⁹⁰ The sexual harassment claim in *Franklin* was not brought by an employee, however. Instead, the plaintiff in *Franklin* was a high school student who alleged that a teacher and coach created a hostile work environment for her during school.⁹¹ Second, the Court held that Title IX's implied cause of action included the availability of compensatory damages for intentional sex discrimination.⁹² Acknowledging that the text of Title IX was silent with regard to the specific remedies available, the Court examined the general "state of the law when the Legislature passed Title IX"⁹³ and concluded that the common law at that time "regarded the denial of a remedy as the exception rather than the rule."⁹⁴

Finally, while Title IX and Title VI share many similarities, they are not identical.⁹⁵ One of these differences warrants discussion here. Specifically, Title VI contains the following important exception that is absent from Title IX: "Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary object of the Federal financial assistance is to provide employment."⁹⁶

This provision in Title VI has been construed consistently to mean that Title VI regulates "employment only in limited circumstances."⁹⁷

Given that this exception is absent from Title IX, the Department of Health, Education, and Welfare relied on this statutory distinction when it promulgated the following formal regulations in 1975 that prohibited sex discrimination in employment:

No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to

90. 503 U.S. 60, 75 (1992); see *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 174 (2005) (acknowledging that Title IX "does not mention sexual harassment" but citing *Franklin* for the proposition that "we have held that sexual harassment is intentional discrimination encompassed by Title IX's private right of action").

91. *Franklin*, 503 U.S. at 63.

92. *Id.* at 74.

93. *Id.* at 71; see also *Jackson*, 544 U.S. at 173.

94. *Franklin*, 503 U.S. at 71; accord *Gebser*, 524 U.S. at 284 (conceding that this approach to remedies "entails a degree of speculation" but explained that "[b]ecause the private right of action under Title IX is judicially implied, we have a measure of latitude to shape a sensible remedial scheme that best comports with the statute.").

95. Compare 20 U.S.C. § 1681(a)(1)–(9) (2012) (identifying nine programs and organizations that are exempt from Title IX), with 42 U.S.C. § 2000d (2012) (containing no exemptions).

96. 42 U.S.C. § 2000d-3 (2012).

97. *Title IX Legal Manual*, *supra* note 4, at § I.

discrimination in employment, or recruitment, consideration, or selection therefor, whether full-time or part-time, under any education program or activity operated by a recipient which receives or benefits from Federal financial assistance.⁹⁸

Moreover, the Supreme Court upheld these regulations as a valid interpretation of Title IX in *North Haven Board of Education v. Bell*.⁹⁹ In reaching this decision, the Court expansively interpreted the text of Title IX yet again, concluding that employees constitute persons within the meaning of its prohibition that “no person may be discriminated against on the basis of gender.”¹⁰⁰ Although the *North Haven* case is instructive regarding whether employees fall within the protected class under Title IX, the Court did not discuss whether private judicial actions were available to these plaintiffs.¹⁰¹ Specifically, the plaintiffs in *North Haven* complained administratively of sex discrimination in educational employment, by filing complaints under Section 1682 of Title IX with the Department of Education, rather than filing complaints in judicial proceedings.¹⁰² Therefore, the Court did not consider the specific issue of whether these plaintiffs could recover damages under Title IX from their educational employers by pursuing private litigation.

Thirteen years later, the Court interpreted the scope of Title IX to permit at least some employees to pursue a judicial proceeding for damages.¹⁰³ In *Jackson v. Birmingham Board of Education*, the Court allowed a high school basketball coach to pursue a retaliation claim.¹⁰⁴ The plaintiff in *Jackson* did not contend that he had been the victim of disparate treatment on the basis of his gender. Instead, he claimed that he had been stripped of his coaching duties because he complained of sex discrimination on behalf of the girls’ basketball team.¹⁰⁵ Writing for the majority in a 5–4 decision, Justice O’Connor acknowledged that the text of Title IX did not expressly mention retaliation, yet the Court found this omission immaterial.¹⁰⁶ The Court interpreted the prohibition of sex discrimination in Title IX to encompass retaliation, even

98. 34 C.F.R. § 106.51(a)(1) (1975).

99. 456 U.S. 512, 538 (1982).

100. *Id.* at 520.

101. *Id.* at 518 (explaining that the lawsuits involved in this case were brought by the employers who sought declaratory and injunctive relief that the regulations issued by HEW were invalid).

102. *Id.* at 517–18 (explaining that Elaine Dove, a tenured teacher, and Linda Potz, a guidance counselor, both filed complaints with HEW).

103. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 182 (2005).

104. *Id.* at 178.

105. *Id.* at 171–72 (complaining about the girls’ basketball team not receiving equal funding or access to athletic equipment and facilities).

106. *Id.* at 175.

when “the victim of the retaliation [is not] . . . the victim of the discrimination that is the subject of the original complaint.”¹⁰⁷

The Court explained the importance of teachers and coaches being protected from retaliation, declaring that they were uniquely situated to identify and report certain types of discrimination and observing that if their reports were not protected under Title IX, “the teacher would have no recourse if he were subsequently fired for speaking out.”¹⁰⁸ In other words, the plaintiff’s conduct presumably was not protected by other statutes, such as Title VII, because the underlying discrimination was committed against students and not employees.¹⁰⁹ Therefore, in the *Jackson* case, Title IX was the sole avenue of relief rather than an alternative remedy.

The dissent in *Jackson* emphasized that Congress expressly included separate retaliation provisions in other discrimination statutes and concluded that “[a] claim of retaliation is not a claim of discrimination on the basis of sex.”¹¹⁰ The majority responded to this argument with a sweeping statement that has implications in the context of employment discrimination: “Title IX’s beneficiaries plainly include all those who are subjected to ‘discrimination’ on the basis of sex.”¹¹¹

Finally, the language of Title IX is silent with regard to whether private individuals are required to exhaust an administrative process as litigants must do before filing a lawsuit under Title VII.¹¹² The Supreme Court has briefly addressed this issue twice but, admittedly, both cases involved only claims brought by students.¹¹³ In both cases, however, the Court implied that

107. *Id.* at 179.

108. *Id.* at 180–81.

109. See *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 178 (2011) (holding that “the term ‘aggrieved’ in Title VII incorporates [the zone of interests] test, enabling suit by any plaintiff with an interest arguably sought to be protected by the statutes, while excluding plaintiffs who might technically be injured in an Article III sense but whose interests are unrelated to the statutory prohibitions in Title VII.”) (internal quotations and citations omitted).

110. *Jackson*, 544 U.S. at 185, 187 (Thomas, J., dissenting).

111. *Id.* at 179 n.3.

112. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 707 n.41 (1979) (“[W]e are not persuaded that individual suits are inappropriate in advance of exhaustion of administrative remedies.”); *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 255 (2009) (“Title IX has no administrative exhaustion requirement. . . . Plaintiffs can file directly in court under its implied private right of action and can obtain the full range of remedies.”).

113. *Cannon*, 441 U.S. at 680 (involving a plaintiff who was denied admission to medical school and claimed the denials was based on her sex); *Fitzgerald*, 555 U.S. at 250 (allegations brought by female student and her parents contesting inadequate response by school to reports of student on student harassment).

administrative exhaustion was not required under Title IX. First, in *Cannon*, the Court stated in a footnote that “we are not persuaded that individual suits are inappropriate in advance of exhaustion of administrative remedies.”¹¹⁴ Thirty years later, in *Fitzgerald v. Barnstable School Committee*, the Court observed that “Title IX has no administrative exhaustion requirement Plaintiffs can file directly in court [under Title IX’s implied private right of action], and can obtain the full range of remedies.”¹¹⁵

Thus, the Court’s expansive judicial interpretations in *Cannon*, *North Haven*, and *Jackson*, and its conclusion that claimants do not have an administrative exhaustion requirement under Title IX, have paved the way for the current disagreement over the relationship between Title VII and Title IX. Given the Court’s decision in *North Haven* that Title IX prohibits sex discrimination in educational employment, can an employee of an educational institution elect to sue her employer for compensatory damages solely under Title IX and thus avoid the conciliatory administrative process in Title VII? Alternatively, did Congress intend that Title VII would preempt these monetary claims and, therefore, serve as the sole avenue for employment discrimination claims against educational institutions? It is to this disagreement that this Article now turns.

III. THE UNSETTLED DEBATE OVER THE RELATIONSHIP BETWEEN TITLE IX AND TITLE VII

In four federal circuits, employees of academic institutions may sue their employers for sex discrimination in employment under either Title VII or Title IX.¹¹⁶ As previously discussed, both statutes prohibit sex discrimination in employment, so an employee of a qualifying educational institution may bring parallel claims for sex discrimination under both statutes, or may elect to litigate under only one of them. In these circuits, proceeding solely under Title IX has its advantages. These litigants have a more direct route to the courthouse because they need not satisfy Title VII’s administrative procedures with the EEOC or a possible deferral to a state agency.¹¹⁷ Moreover, these litigants also have the potential to recover greater compensatory damages under Title IX

114. *Cannon*, 441 U.S. at 707 n.41.

115. *Fitzgerald*, 555 U.S. at 255.

116. See *Doe v. Mercy Catholic Med. Ctr.*, 850 F.3d 545 (3rd Cir. 2017); *Ivan v. Kent State Univ.*, 92 F.3d 1185 (6th Cir. 1996); *Preston v. Virginia ex rel. New River Cmty. Coll.* 31 F.3d 203 (4th Cir. 1994); *Lipsett v. Univ. of P.R.*, 864 F.2d 881 (1st Cir. 1988).

117. See *supra* note 41 and accompanying text.

given these awards are not subject to caps as are awards under Title VII.¹¹⁸ On the other hand, in two circuits, employees of educational institutions are forced to bring their employment discrimination claims under Title VII, because these courts have declared that Title VII is the “exclusive avenue of relief” for a monetary recovery.¹¹⁹ This Article now will explore the justifications and legal authority supporting each approach.

A. Title VII is the Exclusive Remedy

Two circuit courts of appeals have concluded that Title VII “provides the exclusive remedy for individuals alleging employment discrimination on the basis of sex in federally funded educational institutions.”¹²⁰ Although these initial decisions by the Fifth and Seventh Circuits were issued over twenty years ago, numerous district courts outside these jurisdictions have found their legal justifications persuasive.¹²¹

The first decision, issued by the Fifth Circuit in *Lakoski v. James*, involved a female professor who sued her former employer, a university, for sex discrimination after her tenure application had been rejected for the third time and her teaching contract was not renewed.¹²² This plaintiff neither filed a charge of discrimination with the EEOC, nor included a Title VII claim in her complaint.¹²³ Instead, she challenged her adverse employment actions under Title IX, state tort law, and 42 U.S.C. § 1983.¹²⁴ The primary relief requested by the plaintiff in her complaint was compensatory and punitive damages; the plaintiff did not pursue an administrative claim for the termination of funding.¹²⁵ Therefore, the sole issue before the court was whether the plaintiff had a private right of action under Title IX to recover damages for employment discrimination.

118. See *supra* note 59 and accompanying text; *Franklin v. Gwinnett Cty. Pub. Schs.*, 503 U.S. 60, 74 (1992).

119. *Lakoski v. James*, 66 F.3d 751, 753 (5th Cir. 1995); *Waid v. Merrill Area Pub. Schs.*, 91 F.3d 857, 862 (7th Cir. 1996).

120. *Lakoski*, 66 F.3d at 753; accord *Waid*, 91 F.3d at 862 (7th Cir. 1996) (concluding that “Title VII provided the only way by which Waid could obtain make-whole relief.”).

121. See cases cited *supra* note 23.

122. 66 F.3d at 752.

123. *Id.* at 753.

124. *Id.* at 752.

125. See *id.* at 752–53.

The Fifth Circuit concluded that the plaintiff was foreclosed from receiving any monetary recovery for employment discrimination under Title IX¹²⁶ and the court offered three primary justifications for its conclusions that Title VII preempts claims for money damages under Title IX. First, the Fifth Circuit emphasized the difference in statutory structure between Title IX and Title VII. The court noted that Congress established a comprehensive administrative scheme when it enacted Title VII.¹²⁷ Yet, the court observed, Congress provided no express private right of action when it subsequently enacted Title IX.¹²⁸ While acknowledging that the Supreme Court implied a cause of action into Title IX in its decision in *Cannon v. University of Chicago*, the Fifth Circuit distinguished that decision by noting it involved a claim by a “student” and not “a claim of employment discrimination by an employee.”¹²⁹ Thus, the Fifth Circuit reasoned that the Supreme Court’s prior Title IX decisions did not answer the question of whether an employee could bring a private cause of action under for sex discrimination in the employment context.¹³⁰

Second, the differences in statutory structure were especially significant, according to the Fifth Circuit, given the legislative history surrounding the enactment of Title IX.¹³¹ Specifically, the amendments to Title VII, adopted through the Equal Employment Opportunity Act of 1972, occurred just three months before the enactment of Title IX, and this provided strong evidence of Congressional intent to preclude a private right of action under Title IX for employment discrimination.¹³² The Fifth Circuit explained that an earlier version of Title IX, H.R. 7248, which was the original bill proposed in the House, included a provision to remove the education exemption from Title VII.¹³³ Once Congress passed the Equal Employment Opportunity Act of 1972, the court reasoned that this enactment “obviated the need for [Title IX] to close [this] loophole in Title VII. The final bill enacted by Congress omitted the language amending Title VII but left the provision prohibiting sex discrimination in federally funded educational institutions.”¹³⁴

126. *Id.* at 753 (noting that “[w]e limit our holding to individuals seeking money damages under Title IX . . . for employment practices for which Title VII provides a remedy, expressing no opinion whether Title VII excludes suits seeking only declaratory or injunctive relief.”).

127. *Id.* at 754.

128. *Id.* at 755.

129. *Id.* at 754.

130. *Id.* at 754–55.

131. *Id.* at 756–57.

132. *Id.* at 756.

133. *Id.* at 756–57.

134. *Id.* at 757.

Thus, the Fifth Circuit concluded after examining both the statutory design and legislative history that Congress did not intend to “[offer] . . . Title IX to employees of federally funded educational institutions so as to provide a bypass to Title VII’s administrative procedures.”¹³⁵ Instead, the court reasoned:

Congress chose two remedies for the same right, not two rights addressing the same problem. Title VII provided individuals with administrative and judicial redress for employment discrimination, while Title IX empowered federal agencies that provided funds to educational institutions to terminate that funding upon the finding of employment discrimination. In other words, Congress intended to bolster the enforcement of the pre-existing Title VII prohibition of sex discrimination in federally funded educational institutions; Congress did not intend Title IX to create a mechanism by which individuals could circumvent the pre-existing Title VII remedies.¹³⁶

Third, the Fifth Circuit concluded that its interpretation of Title VII in this case was compelled by two prior decisions of the Supreme Court, *Great American Federal Savings & Loan Ass’n v. Novotny*,¹³⁷ and *Brown v. General Services Administration*.¹³⁸ In *Novotny*, the Supreme Court held that the deprivation of a right created by Title VII could not form the basis of a claim brought under 42 U.S.C. § 1985(3).¹³⁹ The Court in *Novotny* discussed Title VII’s “comprehensive plan,” the requirement that claimants file a charge of discrimination with the EEOC, and the underlying Congressional purpose “to encourage voluntary conciliation.”¹⁴⁰ If plaintiffs could bring these claims through § 1985(3) rather than Title VII, the Supreme Court observed that the “complainant could avoid most if not all of these detailed and specific [requirements]” of Title VII, and “completely bypass the administrative process, which plays such a crucial role in the scheme established by Congress in Title VII.”¹⁴¹ Similarly, in *Brown*, the Supreme Court concluded that a federal employee could not bring a claim against the United States under 42

135. *Id.* at 758.

136. *Id.* at 757; *accord* *Ludlow v. Nw. Univ.*, 79 F. Supp. 3d 824, 835 (N.D. Ill. 2015) (finding persuasive “the Fifth Circuit’s legislative history analysis showing that Title IX was intended to be a supplemental remedy in the educational setting—i.e. a ‘big stick’ that federal agencies could use against allegations of sex discrimination, separate and apart from an individual’s right to sue under Title VII.”).

137. 442 U.S. 366 (1979).

138. 425 U.S. 820, 835 (1976).

139. *Novotny*, 442 U.S. at 378.

140. *Id.* at 373–74.

141. *Id.* at 375–76.

U.S.C. § 1981 for race discrimination in his employment.¹⁴² Instead, the Supreme Court concluded that Section 717 of Title VII provided the exclusive avenue of relief to federal employees complaining of employment discrimination.¹⁴³ Thus, the Fifth Circuit relied on the Supreme Court's reasoning in *Novotny* and *Brown* to conclude that Title VII likewise provides the exclusive remedy for monetary damages to employees of federally funded educational institutions complaining of sex discrimination.¹⁴⁴ Given its conclusion that Title IX did not provide monetary damages for employment discrimination, and that the plaintiff chose not to pursue a remedy under Title VII, the Fifth Circuit concluded that judgment should be entered in favor of the plaintiff's employer.¹⁴⁵

Numerous district courts were persuaded by the Fifth Circuit's reasoning in *Lakoski* and, accordingly, these courts rejected similar monetary claims for employment discrimination made by employees of federally funded educational institutions under Title IX.¹⁴⁶ These courts were careful to limit the scope of their holdings by observing "that Title VII does not preempt all Title IX claims of employment discrimination, but only those claims that seek relief available under Title VII (i.e, claims for money damages would be preempted while claims for injunctive relief related to federal funding, as not provided for by Title VII, would not)."¹⁴⁷ They also advanced additional policy concerns about permitting employment discrimination claims to proceed under Title IX.

142. *Brown*, 425 U.S. at 828 n.10.

143. *Id.* at 834.

144. *Lakoski v. James*, 66 F.3d 751, 755 (5th Cir. 1995).

145. *Id.* at 758.

146. See *Waid v. Merrill Area Pub. Schs.*, 91 F.3d 857, 862 (7th Cir. 1996) (following *Lakoski* and holding that "Title VII provided the only way" plaintiff could recover); see also *Schultz v. Bd. of Trs. of the Univ. of W. Fla.*, No. 3:06cv442-RS-MD, 2007 WL 1490714, at *3 (N.D. Fla. May 21, 2007) (concluding "consistent with the weight of authority, that the 'precisely drawn, detailed enforcement structure' and 'comprehensive remedial scheme' that is Title VII preempts the more general remedy under Title IX."); *Urie v. Yale Univ.*, 331 F. Supp. 2d 94, 97–98 (D. Conn. 2004) (observing that "[m]ost courts that have taken up the issue agree that Title IX was not intended to enable employees of educational institutions complaining of gender discrimination to bypass the remedial scheme Congress established in Title VII."); *Cooper v. Gustavus Adolphus Coll.*, 957 F. Supp. 191, 193 (D. Minn. 1997) (declaring that "most courts have rejected" these types of claims under Title IX and concluding that this court agrees "that there is no private action for damages available to a college employee under Title IX for sex discrimination").

147. *Gibson v. Hickman*, 2 F. Supp. 2d 1481, 1484 (M.D. Ga. 1998); accord *Kemether v. Pa. Interscholastic Athletic Ass'n, Inc.*, 15 F. Supp. 2d 740, 768 (E.D. Pa. 1998) (noting that the Third Circuit has not addressed this issue, but following *Lakoski* and concluding that plaintiff's employment discrimination claims under Title IX are barred "to the extent that [those] claims could have been brought under Title VII").

If employment discrimination suits for monetary damages were permitted under Title IX, these suits would circumvent Title VII's statutory cap on damages, as well as Title VII's administrative requirements.¹⁴⁸ This would allow "plaintiffs who work at federally funded [educational] institutions unfettered ability to bring what are in reality Title VII sexual discrimination [suits] without adhering to the same rules required of every other employment discrimination plaintiff in the country."¹⁴⁹

In more recent decisions, district courts following the exclusive remedy approach also have distinguished the Supreme Court's decision in *Jackson v. Birmingham Board of Education*,¹⁵⁰ and determined that it does not compel a different result when analyzing whether Title IX provides a monetary remedy to employees who are victims of sex discrimination.¹⁵¹ Concluding that the Supreme Court has not addressed the specific question of whether Title VII preempts Title IX when employees seek monetary relief for sex discrimination,¹⁵² these courts limit the scope of the Court's decision in *Jackson* to recognizing only a private cause of action under Title IX for retaliation.¹⁵³ It is true, these courts concede, that the plaintiff in *Jackson* was a high school employee.¹⁵⁴ Nonetheless, it is significant that the Supreme Court reached this result after observing that the plaintiff in *Jackson* had "no recourse" for retaliation except under Title IX.¹⁵⁵ On the other hand, plaintiffs who sue their

148. See, e.g., *Drisin v. Fla. Int'l Univ. Bd. of Trs.*, No. 1:16-cv-24939-WILLIAMS/TORRES, 2017 WL 3505299, at *7 (S.D. Fla. June 27, 2017); *Torres v. Sch. Dist. of Manatee Cty.*, No. 8:14-cv-1021-T-33TBM, 2014 WL 4185364, at *6 (M.D. Fla. Aug. 22, 2014); *Gibson*, 2 F. Supp. 2d at 1484; *Burrell v. City Univ. of N.Y.*, 995 F. Supp. 398, 410 (S.D.N.Y. 1998).

149. See, e.g., *Gibson*, 2 F. Supp. 2d at 1484; *Drisin*, 2017 WL 3505299, at *7.

150. 544 U.S. 167, 180 (2005).

151. *Vandiver v. Little Rock Sch. Dist.*, No. 4:03-CV-00834 GTE, 2007 WL 2973463, at *15 (E.D. Ark. Oct. 9, 2007) (agreeing that "*Jackson* should not be read to expand private rights of action under Title IX to include claims of employment discrimination which have no connection to the rights of students, as the Supreme Court's seminal cases regarding Title IX private rights of action relate to claims by students against funding recipients."); accord *Drisin*, 2017 WL 3505299, at *5 (conceding that "[c]entral to the split among the federal courts is a disagreement over the parameters of Title IX in connection with [several] Supreme Court cases.").

152. *Drisin*, 2017 WL 3505299, at *4; *Torres*, 2014 WL 4185364, at *5; *Schultz v. Bd. of Trs. of the Univ. of W. Fla.*, No. 3:06cv442-RS-MD, 2007 WL 1490714, at *2 (N.D. Fla. May 21, 2007).

153. *Vandiver*, 2007 WL 2973463, at *15.

154. *Ludlow v. Nw. Univ.*, 79 F. Supp. 3d 824, 832 (N.D. Ill. 2015).

155. *Jackson*, 544 U.S. at 180–81 (observing that "if Title IX's private right of action [did] not encompass retaliation claims, the teacher would have no recourse if he were subsequently fired for speaking out" and therefore "the underlying discrimination would go unremedied"); accord Lauren Stewart, *Circumventing Congress's Comprehensive Schemes: The Third Circuit Allows Employees of Educational Institutions to Bypass Title VII and Bring Claims under Title IX in Doe v. Mercy Catholic Medical Center*, 59 B.C. L. REV. E-SUPPLEMENT 168, 186 (2018) (distinguishing *Jackson* on the

educational employers for sex discrimination under Title IX have full recourse under Title VII, and thus no need “to look beyond the comprehensive scope of remedies and actions available . . . under Title VII.”¹⁵⁶

For approximately ten years, the interpretation that Title VII provides the exclusive monetary remedy to these educational employees seemed to be the prevailing view and it remains the majority view among district courts.¹⁵⁷ As set forth below, the alternate view, that Title IX and Title VII are parallel remedies, has gained momentum in recent years.

B. Title IX and Title VII are Parallel Remedies

Four different Circuit Courts of Appeals and numerous federal district courts have permitted employees of federally funded educational institutions to bring employment discrimination claims under Title IX by adopting a much broader view of the relationship between Title IX and Title VII.¹⁵⁸ In these courts, Title IX and Title VII are analogous but parallel remedies, and Title IX functions as an additional safeguard for preventing sex discrimination.¹⁵⁹

grounds that “plaintiff was not the direct victim of sex-based discrimination and therefore likely did not have a claim under Title VII.”).

156. *Ludlow*, 79 F. Supp. 3d at 833.

157. *See, e.g., Schultz*, 2007 WL 1490714, at *3 (concluding that “the weight of authority” has concluded that “Title VII preempts the more general remedy under Title IX”); *Urie v. Yale Univ.*, 331 F. Supp. 2d 94, 97–98 (D. Conn. 2004) (observing that “[m]ost courts that have taken up the issue agree that Title IX was not intended to enable employees of educational institutions complaining of gender discrimination to bypass the remedial scheme Congress established in Title VII.”); *Cooper v. Gustavus Adolphus Coll.*, 957 F. Supp. 191, 193 (D. Minn. 1997) (declaring that “most courts have rejected the theory that employees of an educational institution have an implied cause of action for damages under Title IX.”).

158. *See Doe v. Mercy Catholic Med. Ctr.*, 850 F.3d 545 (3rd Cir. 2017); *Ivan v. Kent State Univ.*, 92 F.3d 1185 (6th Cir. 1996); *Preston v. Virginia ex rel. New River Cmty. Coll.*, 31 F.3d 203 (4th Cir. 1994); *Lipsett v. Univ. of P.R.*, 864 F.2d 881 (1st Cir. 1988); *see also Fox v. Pittsburg State Univ.*, 257 F. Supp. 3d 1112 (D. Kan. 2017); *Winter v. Pa. State Univ.*, 172 F. Supp. 3d 756 (M.D. Pa. 2016); *Kohlhausen v. SUNY Rockland Cmty. Coll.*, No. 7:10-CV-3168, 2011 WL 1404934 (S.D.N.Y. Feb. 9, 2011); *AB v. Rhinebeck Cent. Sch. Dist.*, 224 F.R.D. 144 (S.D.N.Y. 2004); *Bedard v. Roger Williams Univ.*, 989 F. Supp. 94 (D.R.I. 1997); *Broussard v. Bd. of Trs. for State Colls. & Univs.*, No. 92-581, 1993 WL 70203 (E.D. La. Mar. 8, 1993).

159. *See, e.g., Winter*, 172 F. Supp. 3d at 775 (concluding “that Title VII is not the exclusive remedy for gender-based employment discrimination claims and that ‘Title IX . . . function[s] as an additional safeguard against gender-based discrimination. . . .’”); *AB*, 224 F.R.D. at 153 (finding “that Title IX was intended by Congress to function as an additional safeguard against gender-based discrimination in the context of federally funded education programs; notwithstanding the possibility of other available remedies, including without limitation those available under Title VII.”); *accord Henschke v. N.Y. Hosp.–Cornell Med. Ctr.*, 821 F. Supp. 166, 172 (S.D.N.Y. 1993) (holding that “Title IX demonstrates an intent on the part of Congress to have Title IX serve as an additional protection against gender-based discrimination.”).

Under this interpretation, an employee of an educational institution may either file a lawsuit under both statutes for the same violation, or they may elect to sue their educational employer under only one of them and this solitary claim may consist solely of Title IX. These courts have offered three primary justifications for their view that Title IX is a parallel remedy: the text of Title IX; guidance from three Supreme Court decisions interpreting Title IX; and the Court's preemption analysis in *Johnson v. Railway Express Agency, Inc.*,¹⁶⁰ which explores the relationship between Title VII and another civil rights statute, 28 U.S.C. § 1981.¹⁶¹

First, these courts have emphasized that the text of Title IX broadly declares that “no person” shall be discriminated against on the basis of sex.¹⁶² Thus, these courts have concluded that employees are persons, within the protection of Title IX, in accordance with the Supreme Court's decision in *North Haven*.¹⁶³ Given the statute's expansive language, these courts also have relied on the Supreme Court's repeated instruction that the scope of Title IX must “sweep as broad as its language.”¹⁶⁴

These courts also have relied upon the silence in the text of Title IX, namely, that Title IX does not explicitly define its relationship with other statutes.¹⁶⁵ These courts have construed the silence to weigh against preemption, explaining “that if Congress intended for Title VII to preempt employment discrimination claims under Title IX, it could have drafted Title IX, which was enacted *after* Title VII, to state as much.”¹⁶⁶

160. See 421 U.S. 454 (1975).

161. 42 U.S.C. § 1981 (2012).

162. *Doe*, 850 F.3d at 561; *Lipsett*, 864 F.2d at 896; *Preston*, 31 F.3d at 205; *Winter*, 172 F. Supp. 3d at 775.

163. See, e.g., *Fox*, 257 F. Supp. 3d at 1125 (D. Kan. 2017) (citing *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982)).

164. *Doe*, 850 F.3d at 555 (citing *N. Haven*, 456 U.S. at 521); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005) (quoting *N. Haven*, 456 U.S. at 521); *Lipsett*, 864 F.2d at 896 (quoting *N. Haven*, 456 U.S. at 521); see also *Bedard v. Roger Williams Univ.*, 989 F. Supp. 94, 97 (D.R.I. 1997).

165. *Winter*, 172 F. Supp. 3d at 775; *Kohlhausen v. SUNY Rockland Cmty. Coll.*, No. 7:10-CV-3168, 2011 WL 1404934, at *12 (S.D.N.Y. Feb. 9, 2011).

166. *Winter*, 172 F. Supp. 3d at 775; accord *Kohlhausen*, 2011 WL 1404934, at *12 (explaining that “[j]ust as Congress could have said that it intended Title IX to supplement remedies available under Title VII, Congress could also have explicitly indicated that the 1972 Amendments would secure Title VII as the exclusive remedy for employment discrimination. Congress said neither. Thus, given the broad scope of Title IX, and the Supreme Court's recognition that multiple, often overlapping, remedies exist for employment discrimination, this Court concludes that Title IX is not preempted where a plaintiff also brings a claim under Title VII.”).

Second, courts following the parallel remedy approach assert that this approach is more faithful to several Title IX decisions issued by the Supreme Court, namely the *Cannon*, *North Haven* and *Jackson* decisions.¹⁶⁷ Although these courts acknowledge that the Supreme Court has not answered the precise question of whether Title IX and Title VII have concurrent applicability,¹⁶⁸ these courts conclude that that “the Supreme Court’s ‘next logical step’” is “to recognize a private cause of action under Title IX for employment discrimination.”¹⁶⁹

For instance, these courts emphasize that in *Cannon*, the Supreme Court recognized a private remedy “not explicitly limited to . . . student[s]” but instead spoke in more general terms, articulating a remedy “‘in favor of individual persons’ or ‘persons discriminated against on the basis of sex.’”¹⁷⁰ Twenty-five years later, these courts reiterate, the Supreme Court in *Jackson* extended Title IX’s private right of action to include an employee complaining of retaliation.¹⁷¹ These courts observe that the Supreme Court in *Jackson* specifically recognized that “Title VII is a vastly different statute” than Title IX, yet “the Supreme Court did not indicate that Title VII displaced relief under Title IX.”¹⁷² Thus, these courts have declared, that “*Jackson* and the decisions before it make plain: When a funding recipient retaliates against a ‘person,’ including an employee, because she complains of sex discrimination, that’s

167. See, e.g., *AB v. Rhinebeck Cent. Sch. Dist.*, 224 F.R.D. 144, 151–52 (S.D.N.Y. 2004) (identifying a circuit split and explaining that “central to this split is a disagreement over the degree to which the parameters of Title IX have been established by three Supreme Court cases.”); *accord Winter*, 172 F. Supp. 3d at 773 (describing that the “disagreement over the scope of Title IX . . . has been established by three (3) Supreme Court cases.”).

168. See, e.g., *Fox*, 257 F. Supp. 3d at 1119 (recently characterizing as “unsettled” the issue of whether Title VII displaces relief under Title IX and stating that the Court has not yet concluded whether “title VII displaces relief under Title IX”).

169. *Bedard*, 989 F. Supp. at 97; *accord Doe*, 850 F.3d at 559 (deciding whether “*Cannon* extends” to plaintiff’s sexual harassment claims).

170. *Kohlhausen*, 2011 WL 1404934, at *11 (quoting *Cannon v. Univ. of Chi.*, 441 U.S. 677, 691, 694 (1979)); *accord Broussard v. Bd. of Trs. for State Colls. & Univs.*, No. 92-581, 1993 WL 70203, at *3 (E.D. La. Mar. 8, 1993) (concluding that “Defendants’ attempt to limit the holding of *Franklin* to its facts (i.e., a claim by a student as compared to an employee in this case) is without merit. No such distinction was relied on by the *Franklin* Court in reaching its decision.”).

171. *Doe*, 850 F.3d at 562 (stating the Supreme Court in *Jackson* “allowed the employee’s retaliation claim to proceed under *Cannon*.”); *accord Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 184 (2005) (Thomas, J., dissenting) (indicating that the majority “holds that the private right of action under Title IX . . . for sex discrimination that it implied in *Cannon* . . . extends to claims of retaliation.”).

172. *Fox*, 257 F. Supp. 3d at 1120 (quoting *Jackson*, 544 U.S. at 175).

‘intentional discrimination’ based on sex, violative of Title IX and actionable under *Cannon*’s implied cause of action.”¹⁷³

The Court’s decision in *North Haven* is “particularly illuminating” to this legal issue,¹⁷⁴ these courts posit, because in this case, the Supreme Court “effectively expanded the meaning of the words ‘no person’ found in section 1681(a) to include employees of the institution receiving federal funds.”¹⁷⁵ Additionally, they emphasize that the Court in *North Haven* specifically addressed the issue of the availability of overlapping remedies for employment discrimination, but dismissed those objections:

The Court rejected the argument that Title IX shouldn’t extend to private employment because employees “have remedies other than those available under Title IX,” like Title VII. Even if “alternate remedies are available and their existence is relevant,” it rejoined, “Congress has provided a variety of remedies, at times overlapping, to eradicate employment discrimination.”¹⁷⁶

The courts also have observed that the *North Haven* decision identified several examples of employment decisions that constitute sex discrimination prohibited by Title IX.¹⁷⁷ These examples, although dicta, provide supporting evidence that the Supreme Court would likely extend *Cannon*’s “private right of action [to] employees and students alike.”¹⁷⁸

Finally, courts adopting the parallel remedy approach often rely on the Supreme Court’s decision in *Johnson v. Railway Express Agency, Inc.*, for the proposition that the Court “has already rejected the argument that Title VII is

173. *Doe*, 850 F.3d at 563–64.

174. *Id.* at 562.

175. *Bedard v. Roger Williams Univ.*, 989 F. Supp. 94, 97 (D.R.I. 1997).

176. *Doe*, 850 F.3d at 561 (quoting *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 535 n.26 (1982)); *accord Kohlhausen v. SUNY Rockland Cmty. Coll.*, No. 7:10-CV-3168, 2011 WL 1404934, at *10 (S.D.N.Y. Feb. 9, 2011).

177. *Bedard*, 989 F. Supp. at 97 (explaining that “a female employee who works in a federally funded education program is ‘subjected to discrimination under’ that program if she is paid a lower salary for like work, given less opportunity for promotion, or forced to work under more adverse conditions than are her male colleagues.”) (quoting *N. Haven*, 456 U.S. at 521).

178. *Kohlhausen*, 2011 WL 1404934, at *11; *accord Bedard*, 989 F. Supp. at 97 (stating that “this court agrees with those courts which predictively view the Supreme Court’s ‘next logical step’ as being to recognize a private cause of action under Title IX for employment discrimination against a federally funded education program.”) (quoting *Bowers v. Baylor Univ.*, 862 F. Supp. 142, 145 (W.D. Tex. 1994)).

the exclusive remedy for employment discrimination.”¹⁷⁹ In *Johnson*, the plaintiff sued his employer for race discrimination under both Title VII and 42 U.S.C. § 1981.¹⁸⁰ Section 1981, like Title IX, has no administrative requirement prior to filing suit, yet the Supreme Court held in *Johnson* that it was possible for a claimant to file suit under both Title VII and Section 1981.¹⁸¹ The Supreme Court observed that these two statutory claims were “related, . . . directed to most of the same ends, [and] are separate, distinct, and independent.”¹⁸² Moreover, similar arguments were made in *Johnson* that allowing an independent claim under Section 1981 would permit the circumvention of Title VII’s administrative requirements.¹⁸³ Nonetheless, the Supreme Court dismissed these concerns, acknowledging that Title VII was “design[ed] as a comprehensive solution for the problem of invidious discrimination in employment” but holding that such design clearly does “not deprive[.]” the individual “of other remedies he possesses and [he] is not limited to Title VII in his search for relief.”¹⁸⁴

Not only has the parallel remedy approach been increasingly favored by courts, but it also has been adopted by the Department of Justice.¹⁸⁵ In its Title IX Legal Manual, the Department of Justice states that it “takes the position that Title IX and Title VII are separate enforcement mechanisms. Individuals can use both statutes to attack the same violations.”¹⁸⁶ As justification for this position, the Department of Justice explains that this interpretation is “consistent with the Supreme Court’s decisions on Title IX.”¹⁸⁷

The argument that the Supreme Court’s Title IX decisions support the parallel remedy approach is a persuasive one, not only for the holdings and explanations given by the Court in these decisions, but also for the Court’s approach when implying a private right of action into a civil rights statute such as Title IX. As the Supreme Court has explained numerous times, when

179. *Fox v. Pittsburg State Univ.*, 257 F. Supp. 3d 1112, 1123 (D. Kan. 2017); *accord Doe*, 850 F.3d at 560; *Kazar v. Slippery Rock Univ. of Pa.*, 679 F. App’x 156, 164–65 (3d Cir. 2017) (Shwartz, J., concurring).

180. *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 456 (1975).

181. *Id.* at 460.

182. *Id.* at 460–61.

183. *See Doe*, 850 F.3d at 560; *Fox*, 257 F. Supp. 3d at 1123; *Kazar*, 679 F. App’x at 164–65 (Shwartz, J., concurring).

184. *Johnson*, 421 U.S. at 459.

185. *See* Brief for the United States as Amicus Curiae Supporting Plaintiff-Appellant and Urging Reversal at 26–27, *Doe v. Mercy Catholic Med. Ctr.*, 850 F.3d 545 (2016) (No. 16-1247), 2016 WL 3227568.

186. *Title IX Legal Manual*, *supra* note 4, at § IV.B.2.

187. *Id.*

“determining whether to infer a private [right] of action from a federal statute, our focal point is Congress’ intent in enacting the statute.”¹⁸⁸ In both the *Cannon* and *North Haven* decisions, the Supreme Court considered the legislative history of Title IX as part of its determination of Congressional intent. Therefore, it is appropriate to examine the legislative history here for any insight into whether Congress intended Title IX to provide a private remedy for employment discrimination. As explained below, the legislative history shows that Congress intended Title IX to prohibit sex discrimination in employment, and there is no indication that Congress intended that Title IX employment discrimination claims would be preempted by Title VII.

IV. AN ANALYSIS OF CONGRESSIONAL INTENT SUPPORTS THE VIEW THAT CONGRESS INTENDED TITLE IX TO SERVE AS A PARALLEL REMEDY FOR EMPLOYMENT CLAIMS UNDER TITLE IX

In the 1960s and 1970s, Congress enacted several civil rights statutes that did not expressly include a private remedy.¹⁸⁹ Both Title IX and Title VI are examples of civil rights statutes without express private rights of action, and the Supreme Court has found implied private rights of action under both.¹⁹⁰ Given the prevalence of civil rights statutes enacted during these years,¹⁹¹ in *Cort v. Ash* the Supreme Court articulated a test involving the consideration of four factors *which* were “relevant” to the question of whether courts should imply a right of action from a federal statute.¹⁹² In its decision, the Court did not

188. *Thompson v. Thompson*, 484 U.S. 174, 179 (1988); *accord* *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 252 (2009) (explaining that “[t]hese cases establish that ‘[t]he crucial consideration is what Congress intended.’”) (quoting *Smith v. Robinson*, 468 U.S. 992, 1012).

189. See Title VI, 42 U.S.C. § 2000d (2012); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.); Title IX, 20 U.S.C. § 1681 (2012); Rehabilitation Act of 1973, Pub. L. No. 93-112, § 794, 87 Stat. 355, 394 (codified as amended at 29 U.S.C. § 794 *et. seq.* (2012)).

190. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 688–89 (1979) (implying a private right of action for the petitioner, a student, under Title IX); *Barnes v. Gorman*, 536 U.S. 181, 185 (2002) (observing that it is “beyond dispute that private individuals may sue” under Title VI to address allegations of intentional discrimination).

191. *Cort v. Ash*, 422 U.S. 66, 78 (1975); *See generally Implied Rights of Action to Enforce Civil Rights: The Case for a Sympathetic View*, *supra* note 84 (explaining that “the Supreme Court made no explicit attempt to summarize the criteria for implying private rights [of action] until its 1975 decision in *Cort v. Ash*” and demonstrating that each of the factors “were based on principles drawn from the dominant strand of Supreme Court precedent dealing with implication”).

192. In *Cort v. Ash*, the Court held that four factors were “relevant” when “determining whether a private remedy is implicit in a statute not expressly providing one.” 422 U.S. at 78. These factors were: “[f]irst, is the plaintiff ‘one of the class for whose especial benefit the statute was enacted’—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of

indicate whether all factors were required or whether any of them carry more significance than others.¹⁹³

Four years later, the Supreme Court clarified that an analysis of all four factors was not necessary in every case, and declared that “[t]he central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action.”¹⁹⁴ Accordingly, scholars have concluded that the Court in later decisions “shift[ed] away from the multi-factored *Cort* test used in *Cannon*” and replaced it with a congressional intent analysis.¹⁹⁵

In *Thompson v. Thompson*, Justice Marshall, writing for the Court, reiterated that the “focal point is Congress’ intent in enacting the statute” and the four factors were merely “guides” to be used “along with other tools of statutory construction.”¹⁹⁶ Justice Marshall also explained the necessary evidence required to support a finding of congressional intent, as follows:

Our focus on congressional intent does not mean that we

legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?” *Id.* (internal citations omitted).

193. See, e.g., *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 23 (1979) (rejecting the argument that it must consider each of the factors articulated in *Cort*); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575–76 (1979) (acknowledging that the decision in *Cort* “did not decide that each of these factors is entitled to equal weight” and concluding that the Court’s analysis may end after an examination of the text and legislative history).

194. *Transamerica*, 444 U.S. at 23–24; *Touche Ross*, 442 U.S. at 575–76; accord *California v. Sierra Club*, 451 U.S. 287, 293 (1981) (stating that “[c]ases subsequent to *Cort* have explained that the ultimate issue is whether Congress intended to create a private right of action.”); accord *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 252 (2009) (instructing courts that when deciding whether a statute is an exclusive remedy, the proper inquiry is whether “Congress intended a statute’s remedial scheme to be the exclusive avenue through which a plaintiff may assert the claim[s]”).

195. Douglas P. Ruth, *Title VII & Title IX = ? : Is Title IX the Exclusive Remedy for Employment Discrimination in the Educational Sector?*, 5 CORNELL J.L. & PUB. POL’Y 185, 208 (1996); accord Donald H. Zeigler, *Rights, Rights of Action, and Remedies: An Integrated Approach*, 76 WASH. L. REV. 67, 87–88 (2001) (analyzing the Court’s decisions interpreting *Cort v. Ash*, and concluding that even “the Justices bickered about whether *Cort v. Ash* retained any vitality”); H. Miles Foy, III, *Some Reflections on Legislation, Adjudication, and Implied Private Actions in the State and Federal Courts*, 71 CORNELL L. REV. 501, 565 (1986) (observing that “[i]n several decisions in the late 1970s and early 1980s the Court rearranged, restated, or simply ignored the other three factors of the *Cort v. Ash* analysis. Congressional intent became the primary, and the ultimate, concern.”) (footnotes omitted).

196. 484 U.S. 174, 179 (1988); see also *id.* at 189 (Scalia, J., concurring) (observing that “[i]t could not be plainer that we effectively overruled the *Cort v. Ash* analysis in *Touche Ross & Co. v. Redington*, and *Transamerica Mortgage Advisors, Inc. v. Lewis*, converting one of its four factors (congressional intent) into the determinative factor.”).

require evidence that Members of Congress, in enacting the statute, actually had in mind the creation of a private cause of action. The implied cause of action doctrine would be a virtual dead letter were it limited to correcting drafting errors when Congress simply forgot to codify its evident intention to provide a cause of action. Rather, as an implied cause of action doctrine suggests, “the legislative history of a statute that does not expressly create or deny a private remedy will typically be equally silent or ambiguous on the question.” We therefore have recognized that Congress’ “intent may appear implicitly in the language or structure of the statute, or in the circumstances of its enactment.” The intent of Congress remains the ultimate issue, however, and “unless this congressional intent can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist.”¹⁹⁷

In accordance with these decisions, it is appropriate, therefore, to analyze whether Congress *intended* Title IX to serve as an additional remedy for employment discrimination. As set forth below, the language of the statute, as well as the legislative history and circumstances surrounding the enactment of Title IX, support the view that Congress so intended.

First, Congressional intent to provide a private cause of action may be gleaned from the text of Title IX.¹⁹⁸ The text of Title IX “broadly prohibits a funding recipient from subjecting any person to ‘discrimination’ ‘on the basis of sex.’”¹⁹⁹ The textual analysis regarding the meaning of the word “person” in Title IX need not be extensive or novel because the Supreme Court held in *North Haven* that an employee qualifies as a “person” within the meaning of the statute.²⁰⁰ The Court observed that “Congress easily could have substituted ‘student’ or ‘beneficiary’ . . . if it had wished to restrict the scope of” Title IX, and yet Congress chose the word “person” instead.²⁰¹ Therefore, the language of Title IX supports the conclusion that Title IX protects employees from discrimination on the basis of sex.²⁰²

197. *Id.* at 179 (internal citations and emphasis omitted).

198. *See Touche Ross*, 442 U.S. at 568 (explaining that “our analysis must begin with the language of the statute itself”) (citing *Cannon v. Univ. of Chi.*, 441 U.S. 677, 689 (1979)).

199. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173 (2005).

200. *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 520 (1982).

201. *Id.* at 521.

202. *Id.* at 522.

The next task is to analyze “the Act’s legislative history for evidence as to whether Congress meant somehow to limit the expansive language” of Title IX.²⁰³ An examination of the legislative history of Title IX shows, however, that from the very beginning, Title IX was viewed as a parallel remedy, intended to strengthen the powers of the EEOC to eradicate sex discrimination.

Title IX was the product of over six years of legislative effort designed to bolster the prohibitions of sex discrimination in Title VII.²⁰⁴ As previously discussed, when Title VII was enacted in 1964, it contained significant limitations; two are particularly relevant to the current discussion. First, Title VII contained an Educational Exemption found in Section 701, which rendered all employees of educational institutions unprotected from employment discrimination.²⁰⁵ Second, even for those employees who were protected by Title VII, the protection had limited benefit because Congress did not give the EEOC any enforcement power, preferring instead to require the EEOC to investigate and attempt conciliation of all charges of discrimination.²⁰⁶

Following the enactment of Title VII, the EEOC was overwhelmed with investigating and processing the number of charges that were filed.²⁰⁷ Specifically, the anticipated number of charges “had been vastly underestimated; it was predicted to receive about two thousand charges in its first year, but the actual figure was 8,852” including an “unexpectedly high number of sexual discrimination charges.”²⁰⁸ Given the EEOC’s lack of enforcement power, heavy caseload, limited personnel, and small budget, scholars have observed that the results obtained by “the EEOC [were] mixed . . . and the enthusiasm that initially greeted the enactment of Title VII and the creation of the EEOC waned.”²⁰⁹

In 1965, President Johnson signed Executive Order 11,246 which prohibited federal contractors from discriminating on the basis of race, color, religion, or national origin.²¹⁰ Several women’s advocacy groups, including the National Organization for Women, subsequently urged President Johnson to

203. *Id.*

204. *See id.* at 523.

205. Civil Rights Act of 1964, Pub. L. No. 88-352, § 702, 78 Stat. 241, 255 (1964).

206. *See supra* notes 38–44 and accompanying text.

207. *See* Anne Noel Occhialino & Daniel Vail, *Why the EEOC (Still) Matters*, 22 HOFSTRA LAB. & EMP. L.J. 671, 674 (2005).

208. *See id.* at 674–75.

209. *See id.* at 676.

210. *See* Exec. Order No. 11,246, 30 Fed. Reg. 12319 (Sept. 28, 1965).

extend similar protection to women.²¹¹ President Johnson amended this Executive Order effective October 13, 1968, to include discrimination based on sex, and renamed it as Executive Order 11,375.²¹²

Dr. Bernice R. Sandler, who was then employed as a part-time professor at the University of Maryland, is largely credited as the first person to utilize Executive Order 11,375 for the benefit of women in educational institutions.²¹³ Despite the existence of seven vacancies for full time faculty in her department at the University of Maryland, Dr. Sandler was rejected for consideration because she was female, and she knew that the employment discrimination she had experienced within academic institutions was not unusual.²¹⁴ Dr. Sandler thus began researching ways to achieve change and when she discovered the executive order, she “made the connection that[,] since most universities and colleges had federal contracts[,] they were forbidden from discriminating in employment on the basis of sex.”²¹⁵ She recently had joined a women’s advocacy group, the Women’s Equity Action League (WEAL), and she approached them about using Executive Order 11,375 to improve conditions for women in educational institutions.²¹⁶ Thereafter, Dr. Sandler was named Chair of WEAL’s Federal Action Contract Compliance Committee, and in that capacity, she filed administrative charges of sex discrimination against over 250 universities and colleges with the Department of Health, Education, and Welfare.²¹⁷

Representative Edith Green (D., Ohio) served on WEAL’s Advisory Board and, thus, she was aware of the complaints filed by WEAL.²¹⁸ She also knew very little action had been taken by the Department of Health, Education, and Welfare to investigate those complaints,²¹⁹ and she believed that more permanent protection against sex discrimination in education was needed given how easily executive orders may be revoked by subsequent presidents.²²⁰

211. Max Frankel, *Johnson Signs Order to Protect Women in U.S. Jobs from Bias*, N.Y. TIMES, Oct. 14, 1967, at 11.

212. See Exec. Order No. 11,375, 32 Fed. Reg. 14303 (Oct. 17, 1967).

213. Bernice R. Sandler, *Title IX: How We Got it and What a Difference it Made*, 55 CLEV. ST. L. REV. 473, 474 (2007).

214. *Id.* at 474.

215. See Bernice R. Sandler, “*Too Strong for a Woman*”—the Five Words That Created Title IX, BERNICE SANDLER (1997), <http://www.berniceandler.com/id44.htm> [https://perma.cc/5S53-MSTA].

216. See Sandler, *supra* note 213, at 475.

217. See *id.* at 475–76.

218. See *id.* at 476–77.

219. See *id.* at 476.

220. See Sandler, “*Too Strong for a Woman*,” *supra* note 215.

Therefore, she proposed H.R. 16098 on February 19, 1970.²²¹ Section 805 of H.R. 16098 is largely considered the precursor to Title IX, and it ambitiously aimed to eradicate all sex discrimination in educational institutions.²²² The original version of Section 805 proposed to attack sex discrimination in the following three ways. First, Section 805(a) would amend Title VI by adding the word “sex” to Section 601.²²³ Second, Section 805(b) would amend Title VII by removing the exemption for educational institutions found in Section 702.²²⁴ Third, Section 805(d) would remove the exemption found in the Equal Pay Act for executive, administrative, and professional employees.²²⁵ The goal of these statutory amendments was to eliminate widespread sex discrimination in three interrelated areas of higher education: admissions, employment, and salary.

After its initial proposal, H.R. 16098 was referred to the House Committee on Education and Labor.²²⁶ Representative Green chaired the Subcommittee on Education, and in this capacity, she organized seven days of congressional hearings throughout June and July of 1970.²²⁷ These historical hearings are largely considered the first congressional hearings on education and employment of women.²²⁸

Much of the testimony documented widespread sex discrimination in the employment of women in educational institutions. In her initial remarks at the hearings, Representative Green provided statistical evidence documenting a disparity among women in professional occupations, as well as a disparity in salary and rank among faculty at universities.²²⁹ These disparities in educational employment were confirmed by numerous witnesses throughout the hearings.²³⁰ For instance, Jean Ross, Chair of the Legislative Committee of the American Association of University Women, stated that her organization

221. H.R. 16098, 91st Cong. § 805 (1970).

222. *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 523 n.13 (1982); *id.* at 544 (Powell, J., dissenting).

223. H.R. 16098 § 805(a).

224. *Id.* § 805(b).

225. *Id.* § 805(d).

226. *See Discrimination Against Women: Hearings on Section 805 of H.R. 16098 Before the Spec. Subcomm. on Educ. of the H. Comm. on Educ. and Labor*, 91st Cong. 1 (1970) [hereinafter *Hearings*].

227. *See id.* at I (documenting that the hearings were held on June 17, 19, 26, 29, and 30, and July 1 and 31, 1970).

228. *See Sandler, supra* note 213, at 477.

229. *See Hearings, supra* note 226, at 2–3 (statement of Rep. Edith Green); *accord Sandler, supra* note 213, at 477.

230. *See Hearings, supra* note 226, at 19, 131–32, 153, 614, 646.

was “particularly aware of a situation in which proportionately few [women] occupy top positions in either administration or teaching” and she further complained that “the percentage of women on faculties has dropped seriously in recent years from 30 percent in 1940 to 19 percent in 1969.”²³¹ Similarly, Wilma Scott Heide, Commissioner of the Pennsylvania Human Relations Committee, shared statistics showing a disparity in rank among the few women hired in educational institutions, namely that women faculty were employed in mostly lower paying, non-tenured positions such as instructors and “only 4.7% of the Full Professors” were women.²³² Commissioner Heide also shared her societal concerns that these figures suggest “to children that the teaching of younger children is for women[,] but that leadership in education and training of older youth and adults is for men.”²³³ Likewise, Dr. Ann Scott testified on behalf of the National Organization of Women and shared the results of a recent employment survey conducted specifically regarding the distribution of women in faculty at the University of Buffalo.²³⁴ She testified the survey revealed that “women comprise [only] 14 percent of the faculty, [and] . . . only 5 percent of the full professors.”²³⁵

Additionally, there was considerable testimony about the EEOC’s lack of enforcement power²³⁶ and how modifications to all portions of the bill were “urgently” needed “to broaden the present scope of guarantees of nondiscrimination in programs and activities assisted by Federal moneys.”²³⁷ For instance, Myra Ruth Harmon, President of the National Federation of Business and Professional Women’s Clubs, Inc., explained that her organization supported HR 16098 in large part due to proposed changes to the Fair Labor Standards Act. She explained her organization’s view that the Department of Labor, which enforced the equal pay provisions of the Fair Labor Standards Act, had more enforcement power and authority to achieve change than the EEOC. In other words, her testimony supported the view that Title VII was merely one potential option for combatting sex discrimination in

231. *Id.* at 21 (statement of Jean Ross, Chairman, Legislative Committee, American Association of University Women).

232. *Id.* at 131 (statement of Wilma Scott Heide, Comm’r, Pennsylvania Human Relations Committee).

233. *Id.* at 132 (statement of Comm’r Heide).

234. *See id.* at 148–153 (statement of Dr. Ann Scott, Chairman, Campus Coordinating Committee, National Organization for Women).

235. *Id.* at 153.

236. *See id.* at 621, 629 (statement of Rep. Shirley Chisholm) (confirming the ineffectiveness of the EEOC and stating that “unless [federal agencies] have enforcement powers, they are ignored and impotent”).

237. *See id.* at 8 (statement of Ms. Myra Ruth Harmon, President, National Federation of Business and Professional Women’s Clubs, Inc.).

employment and was not as effective as other statutory remedies, including the Fair Labor Standards Act. In pertinent part, she testified:

At present, Title VII, section 703(a)(1), of the Civil Rights Act of 1964 prohibits employment discrimination in hiring, discharging, terms, conditions, or privileges of employment, including that of compensation.

However, the EEOC, which is burdened with administering Title VII has an overload of casework. Moreover, the EEOC has very little power

The EEOC's authority is limited to conciliation efforts.

On the other hand, the Equal Pay Act is administered by the Wage and Hour Division of the U.S. Department of Labor. This agency is generally able to obtain compliance.

If there is a refusal to comply or deliberate violation of the law, the Secretary of Labor may obtain a court injunction to restrain [a] continued violation or withholding of back wages legally due.

The Secretary of Labor may also bring suit for the back wages upon written request of an aggrieved employee. . . .

Indeed, the strength and effectiveness of enforcement proceedings under the Fair Labor Standards Act was one of the compelling reasons for BPW's support for attaching the equal pay bill to the Fair Labor Standards Act.²³⁸

The EEOC Chairman, William H. Brown, III, testified that Title VII's current statutory scheme was "seriously deficient" in a number of ways.²³⁹ First, he confirmed the ineffectiveness of the EEOC and attributed this ineffectiveness to heavy caseloads and lack of enforcement power.²⁴⁰ For instance, he documented that "[i]n its four years of existence, the Commission has received over 44 thousand charges."²⁴¹ He further explained that "25

238. *Id.* at 10.

239. *Id.* at 623 (statement of William H. Brown, III, Chairman, EEOC).

240. *See id.* at 629.

241. *Id.* (explaining that "27 thousand charges . . . were recommended for investigation, reasonable cause was found in 63% of the cases that completed the decision process, but in less than

percent, approximately, of complaints coming into the Commission are complaints based on sex.”²⁴² Mr. Brown also testified that the numbers of charges alleging sex discrimination were increasing, stating that “[o]ver 12,000 charges received by the commission since its inception have alleged disparate treatment based on sex, and lately that percentage has risen. During the first 10 months of fiscal year 1970, 2,887 charges received were based on sex with no letup in sight.”²⁴³ Mr. Brown noted that these numbers would have been even higher without the exemption in Title VII for educational institutions because “it seems clear that little progress has been made in the [last] 12 years” and it was likely “that the situation has gotten worse.”²⁴⁴

Second, Mr. Brown testified Title VII had also proven ineffective in combatting sex discrimination through enforcement litigation brought by the Justice Department. Specifically, Mr. Brown confirmed that the EEOC had referred numerous claims of egregious sex discrimination to the Justice Department “with a recommendation from our Commission that suits be instituted.”²⁴⁵ Mr. Brown testified, however, that “[i]t was never done.”²⁴⁶ He explained that these “cases would languish over at Justice, and many times we would get them back 2 or 3 years later with nothing being done.”²⁴⁷ He attempted to defend the Justice Department’s actions, stating their office was “very limited in the number” of personnel.²⁴⁸ When asked, however, by Representative Green if the Department of Justice had instituted actions based on other classifications such as race discrimination, Mr. Brown confirmed that they had, estimating that number to be approximately 50 during the previous few years.²⁴⁹ Chairman Green expressed outrage at the Justice Department’s

half of these cases were we able to achieve either a partially or totally successful conciliation. [Thus, i]t can readily be seen that the existing law is seriously deficient.”).

242. *Id.* at 638.

243. *Id.* at 624, 638.

244. *Id.* at 625.

245. *Id.* at 634.

246. *Id.*

247. *Id.* at 635.

248. *Id.* at 636.

249. *See id.* (statement of Chairman Brown in response to questions by Rep. Green). The following exchange occurred about the number of actions instituted involving classifications other than sex:

Mrs. Green: How many cases are there on the basis of race discrimination?

Mr. Brown: I don’t have the exact figures, over the years, I imagine more than 50 cases have been instituted.

Mrs. Green: Based on race discrimination?

Mr. Brown: That would be race and everything else. There may be national origin in there.

refusal to institute lawsuits to enforce Title VII's prohibition of sex discrimination stating "that history is going to record this as the biggest cop-out of the century. They assert themselves in other cases of discrimination but not in sex discrimination cases. It seems to me since they are required by the law to enforce equally, when they choose to ignore the enforcement of the law based on sex discrimination, they themselves can be accurately accused of discrimination."²⁵⁰

This ineffectiveness in litigating sex discrimination cases is particularly meaningful when considered along with the Department of Justice's position on H.R. 16098.²⁵¹ Mr. Jerris Leonard, Assistant Attorney General with the Department of Justice, testified before the subcommittee and confirmed the nonexistence of enforcement lawsuits to combat sex discrimination.²⁵² Mr. Leonard also explained that the Department of Justice did not support H.R. 16098, and he proposed an alternative solution.²⁵³ That proposal rejected Subsection 805(a) of H.R. 16098, which would amend Title VI by adding the word "sex" to the text of the statute, instead preferring to enact separate legislation that prohibited only sex discrimination in educational programs.²⁵⁴ He explained that the new legislation would be "patterned after . . . Title VI" and he discussed that this proposed design included similar enforcement provisions:

The means of enforcement would be identical to those provided in section 602 of title VI—(1) administrative proceedings leading to possible termination of Federal assistance, or (2) other means authorized by law, including court suits. All of the procedural and other safeguards contained in section 602 would be incorporated into the new statute.²⁵⁵

Mrs. Green: But not a single one on sex discrimination?

Mr. Brown: Not to my knowledge.

Mrs. Green: It seems to me that their preference for pursuing cases involving race or national origin can't be interpreted as anything except discrimination on the part of the Justice Department. *Id.*

250. *Id.* at 621, 636 (statement of Chairman Brown); *accord id.* at 64 (Report of the President's Task Force on Women's Rights & Responsibilities).

251. *See id.* at 677–92 (statement of Jerris Leonard, Assistant Att'y Gen., Civil Rights Division, Department of Justice).

252. *See id.* at 682.

253. *See id.* at 677.

254. *Id.* at 678.

255. *Id.*

Moreover, Mr. Leonard declared that the proposal also had other similarities to Title VI as it would “cover virtually all colleges, universities, and public school systems” and that the Department of Health, Education, and Welfare would have primary enforcement authority.²⁵⁶

Mr. Leonard also disclosed, however, that there was a key distinction between Title VI and this proposal, namely, that the new proposal would not contain Title VI’s exemption, found in Section 604, for employment practices. Mr. Leonard explained:

Unlike Title VI, the measure we propose would not contain an exemption for employment practices. Considering the record established before this subcommittee, such coverage of employment practices by our proposal seems appropriate. Again, it should be noted that this legislation would apply to almost all of the institutions of higher education, both public and private, and to almost all public elementary and secondary school systems.²⁵⁷

Further, Mr. Leonard explained that the proposal would prohibit a wide variety of sex discrimination, including employment discrimination. He testified:

Among the areas in which sex discrimination would be forbidden are the following: availability of scholarship and fellowships; admission to graduate programs; *and hiring, compensation, and promotion of faculty and staff members.*²⁵⁸

Moreover, Mr. Leonard agreed, during questioning by Representative Brademas (D., Indiana), that one of the benefits of enacting a separate bill to prohibit sex discrimination was that such a bill “would more clearly cover” employment practices of educational institutions.

Mr. Brademas: Now, you also said that unlike title VI, your proposal of a separate bill would not exempt employment practices. Do I assume that one of the justifications of your wanting a separate bill rather than an amending of title VI is you are contending that your proposal is thereby stronger in that it would cover employment practices? I do not want to put words in your mouth; I am just trying to understand why you prefer one rather than the other.

Mr. Leonard: I think that what we are really trying to say is that our suggestion is more directly responsive to the record that this subcommittee has made. . . . I think that what we are

256. *Id.*

257. *Id.*

258. *Id.* (emphasis added).

really saying is that a separate bill which would include not only the prohibitions as to the programs themselves, but also as to the employment activities that are associated with those programs, would more clearly cover the kind of problems brought out in testimony and evidence which you have developed.²⁵⁹

Finally, and perhaps most significantly, Mr. Leonard's testimony offered conclusive evidence of how the Department of Justice viewed the relationship between Title VII and the EEOC's role in combatting sex discrimination in educational employment. Specifically, the Department of Justice strongly opposed Subsection 805(b) of H.R. 16098, the provision that would amend Title VII to remove the exemption for educational institutions.²⁶⁰ Mr. Leonard explained that this statutory revision to Title VII was now unnecessary:

[O]ur proposal to prohibit sex discrimination in all federally assisted education programs would apply to sex discrimination in employment. Accordingly, at this time, I see no need for amending title VII.²⁶¹

In other words, the Department of Justice's proposal did not grant exclusive power to the EEOC over claims of sex discrimination in educational employment. Rather, the objective of this proposal was just the opposite: it was to place exclusive authority in the hands of the Department of Health, Education, and Welfare, who would solely enforce the prohibition of sex discrimination in educational institutions. Therefore, the sole remedy for claims of employment discrimination based on sex against educational institutions would come from the Department of Health, Education, and Welfare under the Department of Justice's proposal, and not the EEOC.

The Department of Justice was not the only organization that objected to the amendment of Title VII as a way to solve the problem of sex discrimination by educational institutions. Dr. Peter Muirhead, Deputy Assistant Secretary for the Department of Health, Education, and Welfare, also "question[ed] whether these provisions [the proposed amendments to Title VI and Title VII] are the very best vehicle for expanding existing law in this area."²⁶² Dr. Muirhead felt that neither amendment was necessary, because authority to enforce Executive Order 11,246, as amended by Executive Order 11,375, had been delegated to the Department of Health, Education, and Welfare and this included the

259. *Id.* at 686 (statement of Mr. Leonard in response to questions from Rep. Brademas).

260. *See id.* at 677.

261. *Id.* at 679.

262. *Id.* at 648 (statement of Dr. Peter Muirhead, Deputy Assistant Secretary, HEW).

responsibility to investigate and remedy allegations of sex discrimination in educational institutions.²⁶³ He explained:

Mr. Muirhead: By way of explanation on the matter of amending Title VII, we might again call to the attention of the chairman that Executive Order 11,246 does cover almost the whole universe of higher education since the order covers those institutions that are under Federal contracts. So that in dealing with the employment practices of colleges and universities, the Executive Order 11,246, as amended, would reach almost all of the colleges and universities.

Mrs. Green: Do you feel that that Executive order gives you authority to go in when an institution blatantly practices discrimination in terms of hiring faculty members, and awarding promotions?

Mr. Muirhead: We now have that authority, because it applies to any college or university having a contract with the Federal Government. If they are discriminating against women in any part of their employment practices they would then be liable to the provisions of this Executive Order.²⁶⁴

Here again, the Department of Health, Education and Welfare officially opposed giving the EEOC exclusive authority over claims of sex discrimination in educational institutions, and specifically wanted to retain the power to resolve those claims, including employment discrimination claims.

Yet, Representative Green and other witnesses testifying before the Subcommittee expressed concern about granting the Department of Health, Education, and Welfare exclusive authority over these claims.²⁶⁵ Representative Green questioned Dr. Muirhead and Mr. Kiely, one of his colleagues from HEW, about HEW's tenacity in investigating colleges and universities suspected of violating the executive order. Mr. Kiely conceded that since the amendment of the executive order in 1967, HEW had only opened four investigations.²⁶⁶

HEW's lack of tenacity in investigating complaints was confirmed by Dr. Sandler, in her testimony as Chair of the Action Committee for WEAL, when discussing the extensive complaints filed by WEAL against approximately 250

263. *Id.* at 646-47.

264. *Id.* at 648 (statement of Dr. Muirhead in response to questioning from Rep. Green).

265. *Id.*

266. *See id.* at 649.

colleges and universities.²⁶⁷ Dr. Sandler explained that WEAL had requested a class action because the sex discrimination was so widespread within educational institutions, and she submitted a copy detailing all of the individual educational institutions that were specifically charged in WEAL's complaints.²⁶⁸ In Dr. Sandler's opinion, HEW was not serious about enforcing the executive order given that it had largely ignored all of these complaints.²⁶⁹ Moreover, although the executive order forbade sex discrimination in most educational institutions, Dr. Sandler advocated against merely relying on the executive order, explaining that it "does not have the status of law" because "[i]t can be amended or suspended at the pleasure of a particular administration."²⁷⁰

This testimony from the 1970 hearings is crucial, contextual information when viewing the actual enactment of Title IX and the ultimate amendments Congress adopted to Title VII. This is particularly true here given the Supreme Court's designation of the "sparse" nature of the legislative history of the bill actually enacted as Title IX.²⁷¹ Senator Birch Bayh (D., IN) also served on WEAL's advisory board, and he introduced the language Congress enacted as Title IX as a floor amendment to the larger 1972 education bill.²⁷² Given the language's origins as a floor amendment, there were no formal committee hearings or committee reports in the Senate related to this amendment.²⁷³ Under these unique circumstances, the Supreme Court instructed in *North Haven* that statements made by Senator Bayh, as "the sponsor of the language ultimately enacted, are an authoritative guide to the statute's construction."²⁷⁴

Despite the sparse nature of the legislative history, Senator Bayh makes numerous, supportive references to the 1970 hearings held in the House Subcommittee on Education by Representative Green.²⁷⁵ During Senator Bayh's remarks on the Senate floor, he specifically relied on testimony given

267. See *id.* at 308–10, 321 (statement of Dr. Bernice R. Sandler, Chairman, Action Committee for Federal Contract Compliance in Education, WEAL).

268. See *id.* at 299, 308–10.

269. See *id.* at 303. WEAL subsequently filed an action in federal court against HEW seeking enforcement of Title IX and Executive Order 11,375. See *Women's Equity Action League v. Cavazos*, 879 F.2d 880, 882 (D.C. Cir. 1989).

270. *Hearings*, *supra* note 226, at 303.

271. *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 527 (1982).

272. *Id.* at 524; see 118 CONG. REC. S5,804 (daily ed. Feb. 28, 1972) (statement of Sen. Bayh).

273. See *Cohen v. Brown Univ.*, 991 F.2d 888, 893–94 (1st Cir. 1993) (noting the relative lack of legislative history).

274. *N. Haven*, 456 U.S. at 526–27.

275. See, e.g., 118 CONG. REC. S5,804–05, S5,809–12 (daily ed. Feb. 28, 1972).

at the 1970 hearings by Dr. Muirhead as well as Dr. Ann Scott.²⁷⁶ Further, in support of his floor amendment, he submitted a paper written by Dr. Bernice Sandler, entitled *The Status of Women: Employment and Admissions*, detailing the number of charges of sex discrimination filed by the Women's Equity League with the Department of Health, Education, and Welfare against colleges and universities.²⁷⁷ Dr. Sandler had given similar testimony during the 1970 hearings and referenced those hearings throughout her paper.²⁷⁸ Therefore, the 1970 hearings clearly influenced not only Senator Bayh's remarks made in support of his proposed amendment, but also the language proposed in the amendment itself.

Specifically, two aspects of Title IX's statutory language were influenced directly by the 1970 hearings. First, as the Supreme Court explained in *North Haven*, the final bill adopted by the Conference Committee did not contain an exemption for educational institutions.²⁷⁹ The Court found the removal of this exemption from Title IX to be significant, declaring that this action was "[e]xpressly a conscious choice [and] . . . suggests that Congress intended that § 901 prohibit gender discrimination in employment."²⁸⁰ The testimony of Mr. Leonard from the 1970 hearings confirms this conclusion from the Court.

Second, it is not just the removal of the exemption from Title IX that is indicative of Congress' intent to prohibit employment discrimination, but also the codification of sex prohibitions into a statute separate from Title VI. The language included in Senator Bayh's floor amendment, which is the language enacted by Congress, did not amend Title VI to add the word "sex" to the statutory provisions, but instead enacted Title IX as an independent statute prohibiting sex discrimination.²⁸¹ Given that the Department of Justice submitted the first proposal to codify the sex discrimination provisions into a separate statute, its interpretation of the implications of such separate codification should be considered persuasive. Mr. Leonard's testimony demonstrates that he believed that the proposal submitted by the Department of Justice would cover employment claims. Mr. Leonard provided examples of sex discrimination that would violate its provisions and these included "hiring, compensation, and promotion of faculty and staff members."²⁸² When Mr.

276. *Id.* at S5,805.

277. *Id.* at S5,809–10.

278. *Id.* at S5,810.

279. *N. Haven*, 456 U.S. at 528.

280. *Id.*

281. 118 CONG. REC. S5,803, S5,808 (daily ed. Feb. 28, 1972); accord *N. Haven*, 456 U.S. at 524.

282. *Hearings*, supra note 226, at 678 (statement of Mr. Leonard).

Leonard advocated for his proposal over the amendment of Title VI, he explained that the proposal of a separate statute was “more directly responsive” to the testimony given at the hearings and addressed “the[se] kind[s] of problems.”²⁸³ The subcommittee had listened to days of testimony primarily about widespread employment discrimination in educational institutions and a proposal that failed to cover employment claims would not have been responsive to the testimony at all.

Moreover, the testimony from the 1970 hearings also demonstrates that the statutory scheme Congress ultimately enacted was intended to offer parallel remedies for combatting sex discrimination. First, testimony at the hearings from Dr. Muirhead indicated that the Department of Health, Education and Welfare already was investigating charges of sex discrimination within educational institutions pursuant to Executive Order 11,375, with the authority to provide remedies to victims, including back pay.²⁸⁴ There is no indication anywhere during the 1970 hearings that Congress intended to remove this authority from HEW.

To the contrary, the testimony from Mr. Leonard, of the Department of Justice, establishes just the opposite, and he proposed that additional authority be granted to the Department of Health, Education and Welfare through the enactment of a statute separate from Title VI forbidding sex discrimination.²⁸⁵ This statute would provide the Department of Health, Education, and Welfare with the additional authority to terminate federal funding and, thus, strengthened this department’s ability to increase compliance. Therefore, it was not necessary, according to Mr. Leonard, to amend Title VII to remove the educational exemption if the Department of Health, Education and Welfare was investigating such claims.²⁸⁶

There simply are no statements or testimony throughout the hearings from the Department of Justice, the EEOC, or any witness or committee member suggesting that the EEOC be given exclusive authority over the investigation of claims against educational institutions.²⁸⁷ Moreover, the Justice

283. *Id.* at 686.

284. *Id.*

285. *See supra* notes 243–44 and accompanying text.

286. *See supra* note 250 and accompanying text.

287. Indeed, Senator Bayh attempted in 1971 to address the problem of sex discrimination in educational institutions by proposing an earlier amendment, Amendment 398 to S. 659, the Education Amendments of 1971. Senator Bayh’s 1971 Amendment also did not include a proposal to amend Title VII. 117 CONG. REC. 30155, 30399, 30404 (1971). Instead, Amendment 398 proposed amending Title VI to add several separate sections, prohibiting sex discrimination by recipients of federal funding, and Senator Bayh explained that enforcement, implementation, and judicial review of these

Department's proposal to shift responsibility to the Department of Health, Education, and Welfare sounds reasonable given the concerns expressed throughout the 1970 hearings about the EEOC. Witnesses, including Mr. Brown as Chairman of the EEOC, expressed frustration about the EEOC's inefficiency with processing and achieving conciliation with the volume of charges that had been filed in its first four years.²⁸⁸ If the EEOC was overwhelmed with the number of charges being filed at that time, and those numbers would only increase if the educational exemption was removed, it seems unlikely that Congress intended to place exclusive responsibility with the EEOC for investigating these additional charges against educational institutions.

Congress ultimately chose global and consistent reform in the area of sex discrimination when it amended Title VII in 1972 to remove the exemption for educational institutions, and three months later, enacted as Title IX as a statute modeled after, but separate from, Title VI. These two statutes granted authority respectively to the EEOC and HEW to investigate sex discrimination in educational institutions, thereby ensuring that two agencies, rather than merely one, would have a greater capacity to investigate the systemic sex discrimination that was rampant in the 1960s and 1970s throughout educational institutions. Given the testimony about pervasive employment discrimination against women in educational institutions offered during the 1970 hearings before the House Subcommittee on Education, and Senator Bayh's frequent reliance on this testimony in 1972 during his remarks in the Senate, there should be no remaining doubt that Congress intended to extend protection for sex discrimination to these employees. That Congress chose to extend parallel protection under both Title VII and Title IX to these employees only increased the probability of eradicating sex discrimination in educational institutions.

V. CONCLUSION

More than forty years have passed since the enactment of Title IX. Despite numerous Supreme Court decisions broadly interpreting its prohibition of sex discrimination, federal courts remain divided over the proper application of Title IX in the employment context. To resolve this conflict, this Article closely

new provisions was intended to be "identical to those provided under title VI." 117 CONG. REC. 30156, 30404 (1971). Although this amendment did not pass, the proposal provides additional evidence that Senator Bayh initially intended to give the Department of Education, Health and Welfare primary authority in enforcing the sex discrimination provisions, and in a similar manner to its authority to enforce the then existing race discrimination provisions under Title VI. *See generally* N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 523–25 n.13, n.14 (1982) (discussing Sen. Bayh's 1971 proposal and declaring that it "plainly was meant to proscribe discrimination in employment").

288. *See supra* notes 230–32 and accompanying text.

examined the legislative history of Title IX, in particular the 1970 hearings held in the House Subcommittee on Education. Congress could have simply amended Title VII to remove the exemption for educational institutions because this provided employees of educational institutions with protection from discrimination. Instead, Congress did more. Given the systemic employment discrimination exposed by the hearings, Congress subsequently enacted Title IX, thereby creating an independent and parallel remedy to Title VII that imposed greater penalties on educational institutions committing intentional sex discrimination. Accordingly, federal courts should allow claimants to recover monetary damages against educational institutions by pursuing a Title IX claim for employment discrimination.