

## Are Anti-Retaliation Regulations in Title VI or Title IX Enforceable in a Private Right of Action: Does *Sandoval* or *Sullivan* Control This Question?

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### INTRODUCTION

Recently, the federal circuit courts of appeals have divided in addressing to what extent either Title VI of the Civil Rights Act of 1964<sup>1</sup> (hereinafter “Title VI”) or Title IX of the Education Amendments of 1972<sup>2</sup> (hereinafter “Title IX”) protects those who complain about racial or gender discrimination from retaliation by their employers or schools.<sup>3</sup> Title VI prohibits federal agencies from providing funding to any person, organization, or governmental agency that discriminates on the basis of race.<sup>4</sup> Similarly, Title IX

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<sup>1</sup> 42 U.S.C. §§ 2000d–2000d-4a (2000 & Supp. I 2001).

<sup>2</sup> 20 U.S.C. §§ 1681-88 (2000 & Supp. I 2001). Title IX provides that “[n]o 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.” *Id.* § 1681(a); see Derek Black, Comment, *Picking up the Pieces After Alexander v. Sandoval: Resurrecting a Private Cause of Action for Disparate Impact*, 81 N.C. L. REV. 356, 377 n.148 (2002).

<sup>3</sup> Compare *Peters v. Jenney*, 327 F.3d 307 (4th Cir. 2003) (holding that a plaintiff can sue for retaliation under Title VI), with *Jackson v. Birmingham Bd. of Educ.*, 309 F.3d 1333 (11th Cir. 2002) (holding that a claim for retaliation does not lie under Title IX), *cert. granted*, 124 S. Ct. 2834 (June 14, 2004). See *Petition for a Writ of Certiorari, On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit, Jackson v. Birmingham Bd. of Educ.*, No. 02-1672, 2003 WL 22428035 (S. Ct. May 13, 2003) [hereinafter “Cert. Petition”] (arguing that there is a split in circuits requiring Supreme Court review of *Jackson*); *infra* notes 16-27 and accompanying text, and Part IV.

<sup>4</sup> Section 601 of the statute provides that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 42 U.S.C. § 2000d; see generally Bradford C. Mank, *Title VI*, in *THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS* 23-25 (Michael B. Gerrard ed., 1999); James H. Colopy, Note, *The Road Less Traveled: Pursuing Environmental Justice Through Title VI of the Civil Rights Act of 1964*, 13 STAN. ENVTL. L.J. 125, 152-55 (1994).

prohibits gender discrimination in federally funded educational programs and activities. Title IX “was modeled after Title VI . . . which is parallel to Title IX except that it prohibits race discrimination, not sex discrimination, and applies in all programs receiving federal funds, not only in education programs.”<sup>5</sup> Because of the similarities between these two statutes, federal courts have often examined them together when interpreting their respective meanings.<sup>6</sup>

Neither Title VI nor Title IX explicitly provides for a private right of action,<sup>7</sup> but courts have interpreted both statutes to authorize private suits for plaintiffs alleging intentional discrimination.<sup>8</sup> In

Unlike the Equal Protection Clause, which is limited to government actors, Title VI reaches private actors who are recipients of federal funds. Pamela S. Karlen, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 196 n.83 (2003). In its Title VI Manual, the Department of Justice (“DOJ”) provides helpful definitions of the terms “recipient” and “beneficiary.” A recipient receives grants or funding from a federal funding agency. The recipient usually is a state or local government agency that serves as an intermediary for receiving monies from the federal government that it then ultimately provides to individual beneficiaries. See CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, TITLE VI LEGAL MANUAL 20-28 (Jan. 11, 2001), available at <http://www.usdoj.gov/crt/cor/coord/vimanual.pdf> [hereinafter “Title VI Manual”]; Jonathan M.H. Short, “*Something of a Sport: The Effect of Sandoval on Title IX Disparate Impact Discrimination Suits*,” 9 WM. & MARY J. WOMEN & L. 119, 119 n.5 (2002); Colopy, *supra*, at 154; The ultimate individual beneficiaries are exempt from Title VI. See *id.*

<sup>5</sup> *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998); *Cannon v. Univ. of Chicago*, 441 U.S. 677, 694-96 (1979) (stating that Title IX was modeled after Title VI); *Neighborhood Action Coalition v. City of Canton*, 882 F.2d 1012, 1015 (6th Cir. 1989) (same); *Mabry v. State Bd. of Cmty. Colls. & Occupational Educ.*, 813 F.2d 311, 317 (10th Cir. 1987) (same); *Chowdbury v. Reading Hosp. & Med. Ctr.*, 677 F.2d 317, 319 n.2 (3d Cir. 1982) (“[C]ourts have consistently held the [Title IX] language of *Cannon* to be applicable in discussions of Title VI.”); 118 CONG. REC. 5807 (1972) (remarks of Sen. Bayh); Black, *supra* note 2, at 377 n.151, 381 n.184; Colopy, *supra* note 4, at 156-57 nn.140-41; Bradford C. Mank, *Is There a Private Cause of Action Under EPA’s Title VI Regulations?*, 24 COLUM. J. ENVTL. L. 1, 28-29 (1999) (discussing *Cannon*’s explicit reliance on Title VI cases to interpret Title IX) [hereinafter Mank, *Private Cause*]; Short, *supra* note 4, at 119-20 (observing that Title IX and Title VI share many similarities, but some differences as well); see also *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001) (using Title IX case, *Cannon*, to interpret Title VI); *Grove City Coll. v. Bell*, 465 U.S. 555, 566 (1984) (stating that the congressional intent behind Title VI and Title IX was the same); *infra* notes 10, 75-81, 112, 121-26, 249 and accompanying text.

<sup>6</sup> See *infra* notes 10, 75-81, 89-90, 112, 121-26, 128-30, 139, 249 and accompanying text.

<sup>7</sup> See 42 U.S.C. § 2000d; 20 U.S.C. § 1681-88; Diane Heckman, *The Glass Sneaker: Thirty Years of Victories and Defeats Involving Title IX and Sex Discrimination in Athletics*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 551, 554 (2003).

<sup>8</sup> See, e.g., *Sandoval*, 532 U.S. at 280 (recognizing that Title VI provides private right of action for intentional discrimination); *Gebser*, 524 U.S. at 288-92 (stating that, in Title IX cases, monetary damages are appropriate under either Title VI or Title IX where recipient of federal funding has knowledge of intentional discrimination by

*Cannon v. University of Chicago*,<sup>9</sup> the United States Supreme Court stated that “[w]e have no doubt that Congress intended to create Title IX remedies comparable to those available under Title VI and that it understood Title VI as authorizing an implied private cause of action for victims of the prohibited discrimination.”<sup>10</sup> However, in *Alexander v. Sandoval*,<sup>11</sup> the Supreme Court in 2001 held that there is no implied private right of action to enforce Title VI regulations prohibiting recipients from engaging in disparate impact discrimination.<sup>12</sup>

An important question left unanswered by *Sandoval* is whether a plaintiff may bring a private lawsuit alleging that he or she is the victim of retaliation for complaining about discrimination under Title VI or Title IX. It is now common for employees or students filing Title VI or Title IX suits to allege that their employers or schools have retaliated against them for complaining of discrimination.<sup>13</sup> Neither Title VI nor Title IX explicitly prohibits retaliation by recipients of federal funds.<sup>14</sup> However, various federal agencies have issued specific Title VI or Title IX regulations that explicitly prohibit retaliation by recipients.<sup>15</sup>

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employee, but fails to correct problem); *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 74-75 (1992) (stating that compensatory damages are appropriate in Title IX private right of action where school district has knowledge that teacher is engaging in sexual harassment, but fails to take action); *Guardians Ass’n v. Civil Serv. Comm’n of N.Y.*, 463 U.S. 582, 598-99 (1983) (opinion of White, J.) (stating that private damages are available where recipient has notice it is engaging in intentional discrimination); *Peters v. Jenney*, 327 F.3d 307, 315 (4th Cir. 2003) (recognizing that Title VI provides private right of action for intentional discrimination); *Horner v. Ky. High Sch. Ass’n*, 206 F.3d 685, 689-93 (6th Cir. 2000) (concluding that Supreme Court’s Title VI and Title IX cases agree that plaintiff must establish intentional discrimination to receive compensatory damages).

<sup>9</sup> 441 U.S. 677 (1979).

<sup>10</sup> *Id.* at 703 (holding that a private right of action exists under Title IX and suggesting that one might also exist with respect to Title VI because Congress modeled Title IX after Title VI).

<sup>11</sup> 532 U.S. 275 (2001).

<sup>12</sup> *Id.* at 280-91.

<sup>13</sup> See, e.g., *Peters*, 327 F.3d 307; *Jackson v. Birmingham Bd. of Educ.*, 309 F.3d 1333 (11th Cir. 2002), cert. granted, 124 S. Ct. 2834 (June 14, 2004); *Lowrey v. Tex. A&M Univ. Sys.*, 117 F.3d 242 (5th Cir. 1997); *Litman v. George Mason Univ.*, 156 F. Supp. 2d 579, 582-83 (E.D. Va. 2001); Heckman, *supra* note 7, at 595-610 (discussing Title IX retaliation cases) & n.314 (listing Title IX retaliation cases); *infra* notes 295, 316-17, 331-35, 339, 366-72 and accompanying text.

<sup>14</sup> See 42 U.S.C. § 2000d; 20 U.S.C. § 1681-88; *Jackson*, 309 F.3d at 1344.

<sup>15</sup> For example, the Department of Education’s regulations under Title VI provide:

Intimidatory or retaliatory acts prohibited. No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege

The federal circuit courts of appeals have recently divided regarding whether a private right of action for retaliation exists under either Title VI or Title IX.<sup>16</sup> In 2003, in *Peters v. Jenney*,<sup>17</sup> the United States Court of Appeals for the Fourth Circuit held that the absence of an explicit prohibition against retaliation in Title VI does not “lead to an inference that Congress did not mean to prohibit retaliation in § 601” because “relevant precedent interpreting similarly worded antidiscrimination statutes” construed “discrimination” to include “retaliation.”<sup>18</sup> Furthermore, the Supreme Court, in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,<sup>19</sup> held that if a statute is silent or ambiguous about the particular issue in question courts should defer to an agency’s reasonable interpretation of that statute if it is issued as part of a valid rule, because it is presumed that Congress delegated interpretive power to an agency with the authority to issue rules having the “force of law.”<sup>20</sup> Pursuant to *Chevron*, the *Peters* court deferred to the

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secured by section 601 of the Act or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this part. The identity of complainants shall be kept confidential except to the extent necessary to carry out the purposes of this part, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.

34 C.F.R. § 100.7(e) (2004); see 34 C.F.R. § 106.51 (2004) (Department of Education Title IX regulation); 28 C.F.R. § 42.108(e) (2004) (Department of Justice Title VI regulation); see also *Preston v. Virginia ex rel. New River Cmty. Coll.*, 31 F.3d 203, 206 (4th Cir. 1994) (discussing Department of Education regulation 34 C.F.R. § 100.7); *Litman v. George Mason Univ.*, 156 F. Supp. 2d 579, 582-83 (E.D. Va. 2001) (“The Fourth Circuit has recognized that the prohibition against retaliation is a product of a regulation, not contained in the statute itself.”) (citing *Preston*, 31 F.3d 203); *Nelson v. Univ. of Maine*, 923 F. Supp. 275, 278-79 (D. Me. 1996) (“In the context of retaliatory discrimination, at issue in this case, Title IX protects employees who either participate in a Title IX investigation, or who oppose unlawful employment practices prohibited by Title IX.”).

<sup>16</sup> Compare *Peters*, 327 F.3d 307 (holding that a plaintiff can sue for retaliation under Title VI), with *Jackson*, 309 F.3d 1333 (holding that a claim for retaliation does not lie under Title IX); see Brienne J. Gorod, Case Comment, *The Sorcerer’s Apprentice: Sandoval, Chevron, and Agency Power to Define Private Rights of Action*; *Peters v. Jenney*, 327 F.3d 307 (4th Cir. 2003); *Jackson v. Birmingham Board of Education*, 309 F.3d 1333 (11th Cir. 2002), *Petition for Cert. Filed*, 71 U.S.L.W. 3736 (U.S. May 13, 2003) (NO. 02-1672), 113 YALE L.J. 939 (2004).

<sup>17</sup> 327 F.3d 307 (4th Cir. 2003).

<sup>18</sup> *Id.* at 316-19.

<sup>19</sup> 467 U.S. 837 (1984).

<sup>20</sup> See *id.* at 842-43 (stating courts should defer to agency’s interpretation of ambiguous statutory language if interpretation is reasonable), 865-66 (stressing that executive agencies have more appropriate role in defining ambiguous statutory language because they possess greater substantive expertise than courts, and agencies are politically accountable through elections, unlike courts); see also *United States v. Mead Corp.*, 533 U.S. 218, 221-30 (2001) (explaining that *Chevron* doctrine requires

Department of Education's anti-retaliation provision (34 C.F.R. § 100.7(e)) as an indication of how to interpret the statute.<sup>21</sup> In light of *Sandoval's* holding that Congress intended Title VI to prohibit only intentional discrimination, the *Peters* decision recognized a private cause of action only for those who allege that a recipient retaliated against them for complaining about intentional discrimination.<sup>22</sup> It did not recognize a private right of action for retaliation by those complaining that a recipient had engaged in practices causing disparate impacts that are forbidden by various agency regulations.<sup>23</sup>

By contrast, in *Jackson v. Birmingham Board of Education*,<sup>24</sup> the United States Court of Appeals for the Eleventh Circuit in 2002 rejected any private right of action against retaliation because the text of § 901 of Title IX does not explicitly provide for such a private cause of action for retaliation.<sup>25</sup> Assuming *arguendo* that a private right of action existed to sue recipients for retaliation, the Eleventh Circuit observed that it would limit any such right to plaintiffs who are the victims of gender discrimination and would not allow those who merely allege that others have suffered gender discrimination, such as the male plaintiff in that case, to pursue a retaliation claim.<sup>26</sup> The Eleventh Circuit concluded that the text of § 901 only identifies victims of gender discrimination as the class it aims to benefit, but the court did not believe that the text of the statute even went that far.<sup>27</sup>

The *Jackson* decision relied heavily on the Supreme Court's 2001 *Sandoval* decision.<sup>28</sup> In concluding that there was no implied private

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courts to defer to agency's reasonable interpretation of ambiguous statute or fill "gap" in a silent statute where Congress has delegated to agency authority to issue regulations carrying "force of law"); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 625-26 (1996) (describing presumption established in *Chevron* that silence in statute shows intent of Congress to leave act of interpretation in hands of agency in charge of administering act); Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 833-34 & *passim* (2001) (explaining that *Chevron* fundamentally expanded deference of courts to agency interpretations of statutes by presuming gaps or ambiguities in statute reflected implicit congressional intent to delegate interpretive authority to agency); *infra* notes 315, 333, 354-58 and accompanying text. Conversely, if a statute's language is clear and specific, a court must reject an agency interpretation that is contrary to that language. *Chevron*, 467 U.S. at 842-43.

<sup>21</sup> See *Peters*, 327 F.3d at 315-16, 318-19.

<sup>22</sup> See *id.* at 319 & n.11.

<sup>23</sup> See *id.*

<sup>24</sup> 309 F.3d 1333 (11th Cir. 2002), *cert. granted*, 124 S. Ct. 2834 (June 14, 2004).

<sup>25</sup> *Id.* at 1346.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> 532 U.S. 275 (2001).

right of action to enforce Title VI disparate impact regulations,<sup>29</sup> the *Jackson* court followed dicta in *Sandoval* suggesting that only express statutory language may establish a private right of action.<sup>30</sup> However, to the extent that the *Sandoval* decision suggested in dicta that rights of action must be express, its reasoning is contrary to the Court's precedent and prior reasoning.<sup>31</sup> The *Sandoval* decision itself acknowledged that "regulations applying § 601's ban on intentional discrimination are covered by the cause of action to enforce that section."<sup>32</sup> For example, the Court has recognized a cause of action under Title IX for sexual harassment, even though the statute does not explicitly prohibit such conduct, because such suits are consistent with the statute's core prohibition against intentional sex discrimination.<sup>33</sup> Additionally, the Court has held that under Title IX a student may sue school officials for deliberate indifference concerning her complaints of sexual harassment by other students even though the statute contains no explicit provision authorizing such a private right of action.<sup>34</sup>

This Article argues that both Title VI and Title IX implicitly authorize plaintiffs to file retaliation claims against recipients of federal funds. Since the 1969 decision in *Sullivan v. Little Hunting Park, Inc.*,<sup>35</sup> the Supreme Court has consistently recognized retaliation claims as vindicating the central antidiscrimination principles of comparable civil rights statutes, and therefore, such suits are permissible even after *Sandoval*.<sup>36</sup> Retaliation claims are rooted in both Title VI's and Title IX's central purpose of prohibiting

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<sup>29</sup> See *id.* at 280-87.

<sup>30</sup> *Jackson*, 309 F.3d at 1341 (stating that *Sandoval* Court relied "exclusively on the text and structure of Title VI" in determining that "Title VI implies no private right to sue for actions not motivated by discriminatory intent that result in a disparate impact.") (citing *Sandoval*, 532 U.S. at 293).

<sup>31</sup> See Sara Rosenbaum & Joel Teitelbaum, *Civil Rights Enforcement in the Modern Healthcare System: Reinventing the Role of the Federal Government in the Aftermath of Alexander v. Sandoval*, 3 YALE J. HEALTH POL'Y L. & ETHICS 215, 244 (2003) (arguing that *Sandoval* implies private right of action must be based on explicit statutory language, but contending that view is contrary to precedent).

<sup>32</sup> *Sandoval*, 532 U.S. at 284; see also *Peters*, 327 F.3d at 315 (citing *Sandoval*); *infra* notes 189, 212-14 and accompanying text.

<sup>33</sup> See *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 639-49 (1999); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 277 (1998); Black, *supra* note 2, at 362-63 (discussing *Davis* and *Gebser*).

<sup>34</sup> See *Davis*, 526 U.S. at 639-49; *Gebser*, 524 U.S. at 277.

<sup>35</sup> 396 U.S. 229 (1969).

<sup>36</sup> See *Petition for a Writ of Certiorari*, *supra* note 3, at 13-15; *infra* notes 240-45 and accompanying text.

intentional discrimination.<sup>37</sup> Additionally, following the *Chevron* doctrine, the Fourth Circuit in *Peters* appropriately deferred to agency regulations interpreting Title VI and Title IX to prohibit retaliation.<sup>38</sup> Although holding that Title VI regulations could not authorize a private right of action to enforce regulations prohibiting disparate impact discrimination,<sup>39</sup> the *Sandoval* Court recognized that these agency regulations were effective to the extent they vindicated Title VI's core prohibition against intentional discrimination.<sup>40</sup> Thus, courts may conclude that Title VI and Title IX implicitly allow plaintiffs to bring retaliation claims if their employer or school retaliates against them for complaining about intentional racial or gender discrimination, because such suits are strongly consistent with the statutes primary purpose of prohibiting recipients from engaging in intentional discrimination.<sup>41</sup>

Part I of this Article summarizes Title VI and Title IX. Part II discusses the Supreme Court's initially broad implication of private rights of action for both statutes, and the Court's subsequent limitation of such suits. Part III examines the Supreme Court's inference of anti-retaliation principles in various civil statutes, and whether the existence of an explicit anti-retaliation provision in Title VII weighs against inferring an implicit right against retaliation under Title VI and Title IX. Part IV then discusses the split between the Fourth and Eleventh Circuits regarding whether Title VI and Title IX imply a private right of action for retaliation. The Article concludes in Part V that courts should find that Title VI and Title IX establish an implied private right of action for retaliation because such suits serve both statutes' shared core prohibition against intentional discrimination.

## I. TITLE VI AND TITLE IX

### A. Introduction to Title VI

Section 601 of Title VI states that “[n]o person shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal

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<sup>37</sup> See *infra* Parts IV.B.1 and IV.B.3.

<sup>38</sup> See *Peters*, 327 F.3d at 316-21, 323-24.

<sup>39</sup> See *infra* notes 209-11 and accompanying text.

<sup>40</sup> See *infra* notes 189, 212-13 and accompanying text.

<sup>41</sup> See *infra* text accompanying notes 334-40, 360-63, 404, 409-10.

financial assistance.”<sup>42</sup> The statute does not specify whether the term “discrimination” prohibits only intentional discrimination or also reaches unintentional, disparate impact discrimination.<sup>43</sup> The statute’s legislative history contains statements supporting both interpretations.<sup>44</sup> In 1974, in *Lau v. Nichols*,<sup>45</sup> the Supreme Court at least implied and arguably held that both § 601 and § 602 of Title VI prohibited disparate impact discrimination, stating that “[d]iscrimination is barred which has that effect even though no purposeful design is present.”<sup>46</sup> However, since the 1978 decision of *Regents of University of California v. Bakke*,<sup>47</sup> the Court has consistently interpreted § 601 to forbid only intentional discrimination by programs or activities receiving federal financial assistance, but not to prohibit disparate impact discrimination.<sup>48</sup>

The Supreme Court has recognized that private plaintiffs may file a private right of action under § 601 of Title VI alleging that a recipient has committed intentional discrimination.<sup>49</sup> Congress has

<sup>42</sup> 42 U.S.C. § 2000d; see Mank, *Title VI*, *supra* note 4, at 23-25; *supra* note 4 and *infra* notes 43-48, 159, 161, 168-73, 176, 195, 212-13 and accompanying text.

<sup>43</sup> See *Guardians Ass’n v. Civil Serv. Comm’n of N.Y.*, 463 U.S. 582, 592 (1983) (“The language of Title VI on its face is ambiguous; the word ‘discrimination’ is inherently so.”); *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022 (9th Cir. 1998) (“[T]he term ‘discrimination’ as used in Title VI is, of course, notoriously ambiguous, generating more than thirty years of litigation over its precise meaning.”); Charles F. Abernathy, *Title VI and the Constitution: A Regulatory Model for Defining ‘Discrimination,’* 70 GEO. L.J. 1, 21-23, 25-27 (1981) (arguing that 1964 legislative history of Title VI suggests Congress did not precisely define term “discrimination,” and instead left difficult question of defining discrimination to executive branch); Bradford C. Mank, *Are Title VI’s Disparate Impact Regulations Valid?*, 71 U. CIN. L. REV. 517, 517 (2002) (observing that term “discrimination” in Title VI is ambiguous); [hereinafter Mank, *Title VI Regulations*]; Michael Mello, *Defunding Death*, 32 AM. CRIM. L. REV. 933, 959 (1995) (same); Rosenbaum & Teitelbaum, *supra* note 31, at 221 (same); David J. Galalis, Note, *Environmental Justice and Title VI in the Wake of Alexander v. Sandoval: Disparate-Impact Regulations Still Valid Under Chevron*, 31 B.C. ENVTL. AFF. L. REV. 61, 92-98 (2004) (same).

<sup>44</sup> See Abernathy, *supra* note 43, at 21-23, 25-27; Mello, *supra* note 43, at 959.

<sup>45</sup> 414 U.S. 563 (1974).

<sup>46</sup> *Id.* at 568; see Mank, *Title VI Regulations*, *supra* note 43, at 521-22.

<sup>47</sup> 438 U.S. 265 (1978).

<sup>48</sup> See *id.* at 287 (Section 601 “proscribes only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment”) (opinion of Powell, J.); see also *Sandoval*, 532 U.S. at 280-82; *Guardians*, 463 U.S. at 610-11; Karlen, *supra* note 4, at 196; Mank, *Title VI*, *supra* note 4, at 23-25. *But see* Abernathy, *supra* note 43, at 21-23, 25-27 (arguing that 1964 legislative history of Title VI suggests Congress left difficult question of defining discrimination to executive branch); Mello, *supra* note 43, at 959 (same).

<sup>49</sup> See *Sandoval*, 532 U.S. at 280 (stating that it is “beyond dispute that private individuals may sue to enforce” § 601’s prohibition against intentional discrimination); *Cannon*, 441 U.S. at 699 (holding private right of action exists under Title IX and suggesting that private right of action also exists with respect to Title VI

implicitly recognized such private suits by abrogating state sovereign immunity against Title VI suits, which would not be necessary if the United States was the only possible plaintiff.<sup>50</sup> Furthermore, Congress has explicitly authorized attorneys' fees for prevailing plaintiffs in Title VI cases.<sup>51</sup>

Additionally, § 602 of Title VI "authorize[s] and direct[s]" federal funding agencies to "effectuate the provisions of section 601" by issuing and enforcing "rules, regulations or orders of general applicability" that prohibit recipients from engaging in discrimination and that establish a process for investigating and assessing complaints of racial discrimination filed with the agency.<sup>52</sup> Section 602 also requires those regulations to be approved by the President, who has delegated that authority to the Attorney General.<sup>53</sup> In 1964, a presidential task force developed standard Title VI

because Congress modeled Title IX after Title VI); Karlen, *supra* note 4, at 196; Mank, *Title VI*, *supra* note 4, at 31-32; Note, *After Sandoval: Judicial Challenges and Administrative Possibilities in Title VI Enforcement*, 116 HARV. L. REV. 1774, 1776 (2003).

<sup>50</sup> 42 U.S.C. § 2000d-7 (2000); Karlen, *supra* note 4, at 196.

<sup>51</sup> 42 U.S.C. § 1988(b) (2000); Karlen, *supra* note 4, at 196.

<sup>52</sup> 42 U.S.C. § 2000d-1(2000 & Supp. I 2001); see Colopy, *supra* note 4, at 155; Mank, *Private Cause*, *supra* note 5, at 12; Mank, *Title VI*, *supra* note 4, at 25; Rosenbaum & Teitelbaum, *supra* note 31, at 221; Note, *supra* note 49, at 1776.

<sup>53</sup> Section 602 of Title VI states in part:

Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with the achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President.

42 U.S.C. § 2000d-1; see Mank, *Private Cause*, *supra* note 5, at 12; Mank, *Title VI*, *supra* note 4, at 25. To facilitate the enforcement of the various § 602 regulations issued by various agencies, the DOJ has issued regulations concerning the implementation of Title VI requirements, including a requirement that agencies adopt procedures for monitoring a recipient's pre- and post-award compliance. See 28 C.F.R. § 42.405 (2004) (DOJ Regulations); 40 C.F.R. §§ 7.110 & 7.115 (2004) (EPA regulations); Michael Fisher, *Environmental Racism Claims Brought Under Title VI of the Civil Rights Act*, 25 ENVTL. L. 285, 313 (1995); Mello, *supra* note 43, at 961 n.143. If it finds a recipient has engaged in discriminatory actions, an agency may refuse to award or continue assistance, or refer the matter to the Department of Justice for prosecution. See 40 C.F.R. § 7.130 (2004) (Environmental Protection Agency regulations); Fisher, *supra*, at 313; Colopy, *supra* note 4, at 176-80. However, if a recipient is found to have engaged in discriminatory practices, federal agencies almost always reach a settlement with a recipient to prevent such conduct in the future, but continue to provide funding. See Mank, *Private Cause*, *supra* note 5, at 13; Mank, *Title VI*, *supra* note 4, at 25.

regulations prohibiting recipients from using “criteria or methods of administration which have the effect of subjecting individuals to discrimination.”<sup>54</sup> Soon thereafter, all cabinet agencies and approximately forty federal agencies adopted similar regulations to prohibit recipients from engaging in practices having discriminatory impacts.<sup>55</sup> At least twenty-six agencies currently maintain such regulations.<sup>56</sup> For example, the Department of Justice (hereinafter “DOJ”) has promulgated regulations stating that a recipient of federal financial assistance shall neither “directly [n]or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin,” or which “have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin.”<sup>57</sup> Similarly, the Department of Education’s Title VI regulations forbid recipients to engage in either intentional discrimination or practices causing disparate impacts with respect to protected minority groups.<sup>58</sup>

Furthermore, the DOJ and many other federal agencies have adopted regulations prohibiting retaliation by Title VI recipients

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<sup>54</sup> 45 C.F.R. § 80.3(b)(2) (2004) (emphasis added); see *Guardians Ass’n v. Civil Serv. Comm’n of N.Y.*, 463 U.S. 582, 618 (1983) (Marshall, J., dissenting); see also Mank, *Private Cause*, *supra* note 5, at 13; Mank, *Title VI*, *supra* note 4, at 25; Sidney D. Watson, *Reinvigorating Title VI: Defending Health Care Discrimination—It Shouldn’t Be So Easy*, 58 *FORDHAM L. REV.* 939, 947-48 (1990) (noting presidential task force in 1964 helped federal agencies promulgate comparable disparate impact regulations under Title VI); Comment, *Title VI of the Civil Rights Act of 1964: Implementation and Impact*, 36 *GEO. WASH. L. REV.* 824, 846 (1968); Note, *supra* note 49, at 1776. The task force included representatives from the White House, DOJ, the Civil Rights Commission, and Bureau of the Budget. Comment, *supra*, at 846 n.19.

<sup>55</sup> See *Guardians*, 463 U.S. at 592 n.13 (opinion of White, J.) (observing that “every Cabinet department and about forty agencies adopted Title VI regulations prohibiting disparate-impact discrimination”); Karlen, *supra* note 4, at 196 (stating that approximately forty agencies adopted § 602 regulations); Mank, *Private Cause*, *supra* note 5, at 13; Mank, *Title VI*, *supra* note 4, at 25; Watson, *supra* note 54, at 947-48; Paul K. Sonn, Note, *Fighting Minority Underrepresentation in Publicly Funded Construction Projects After Croson: A Title VI Litigation Strategy*, 101 *YALE L.J.* 1577, 1581 n.25 (1992) (listing Title VI regulations for several federal agencies); Note, *supra* note 49, at 1776.

<sup>56</sup> See, e.g., 28 C.F.R. § 42.104(b)(2) (2004) (DOJ regulation); 34 C.F.R. § 100.3(b)(2) (2004) (Department of Education regulation); 40 C.F.R. § 7.35(b) (2004) (EPA regulation); 49 C.F.R. § 21.5(b)(2) (2004) (Department of Transportation regulation); Karlen, *supra* note 4, at 196 (stating that at least forty-four agencies have adopted § 602 regulations); Note, *supra* note 49, at 1776 (stating that as of 2001, twenty-six agencies had disparate impact regulations).

<sup>57</sup> 28 C.F.R. § 42.104(b)(2) (2004); see Short, *supra* note 4, at 119.

<sup>58</sup> 34 C.F.R. § 100.3 (2004); see *Peters v. Jenney*, 327 F.3d 307, 314-15 (4th Cir. 2003).

against those who file Title VI complaints.<sup>59</sup> For instance, the Department of Education has issued a regulation, 34 C.F.R. § 100.7(e), that prohibits retaliation:

*Intimidatory or retaliatory acts prohibited.* No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act *or this part* [§ 602 regulations], or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this part.<sup>60</sup>

Under § 602's administrative regulations, individuals who file an administrative complaint with a federal agency alleging that a recipient of federal funds has committed discrimination have only limited procedural rights.<sup>61</sup> If an individual files an administrative complaint, federal funding agencies will normally investigate the complaint, but have virtually total discretion evaluating the complaint and what actions they may take.<sup>62</sup> Private complainants have no right to participate in the agency's administrative investigation or to receive any direct compensation.<sup>63</sup> This lack of procedural or compensatory rights explains why many potential complainants would prefer to file a private right of action in federal court, where they will have the right to participate and potentially receive damages for intentional discrimination.<sup>64</sup>

By contrast, a recipient enjoys elaborate procedural rights to contest any finding of discrimination against it, especially if the funding agency seeks to terminate the recipient's funding. If a funding agency uses its internal administrative processes to make a finding of discrimination, a recipient has a right to contest any such findings against it.<sup>65</sup> A recipient may initially request a hearing before

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<sup>59</sup> 28 C.F.R. § 42.108(e) (2004) (DOJ Title VI regulation).

<sup>60</sup> 34 C.F.R. § 100.7(e) (2004) (emphasis added); *see Peters*, 327 F.3d at 314.

<sup>61</sup> *See Mank, Private Cause, supra* note 5, at 12-13, 20-21 (discussing requirement in § 602 that funding agency investigate private complaints of discrimination against funding recipients).

<sup>62</sup> *See id.*

<sup>63</sup> *See id.* at 21-23 (discussing limited procedural and substantive rights of Title VI complainants).

<sup>64</sup> *See id.* at 23-24 (discussing advantages of private right of action compared to Title VI administrative procedures).

<sup>65</sup> *See* 42 U.S.C. § 2000d-1 (providing procedural protections for recipients of federal funding); 40 C.F.R. § 7.130(b)(1)-(3) (providing procedural protections for recipients in form of EPA regulations to obtain compliance); *Mank, Private Cause, supra* note 5, at 21-23; *Note, supra* note 49, at 1777 (discussing complex administrative enforcement process for determining whether recipient has failed to comply with Title VI).

an administrative law judge, then may appeal to the agency head, and ultimately the federal courts if the agency seeks to terminate the recipient's funding.<sup>66</sup> Funding agencies may not file suit directly against allegedly discriminating recipients, but must refer any suit to the Attorney General and DOJ, but such suits are relatively rare.<sup>67</sup> A federal funding agency must provide thirty days notice to relevant congressional committees before it may terminate funding to a recipient.<sup>68</sup> Because of these procedural guarantees for recipients and the practical reality that an agency's termination of funding to a recipient often would harm many innocent beneficiaries, federal funding agencies almost never impose the draconian remedy of terminating funding. Instead, agencies usually require a recipient found guilty of discrimination to sign a binding settlement in which it agrees to end any discriminatory practices.<sup>69</sup>

### B. Introduction to Title IX

In § 901 of Title IX, Congress declared that “[n]o 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.”<sup>70</sup> In *North Haven Board of Education v. Bell*,<sup>71</sup> the Supreme Court read Title IX's antidiscrimination mandate broadly to address discrimination not expressly prohibited by the statute, stating that “[t]here is no doubt that ‘if we are to give [Title

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<sup>66</sup> See *supra* note 65.

<sup>67</sup> See 42 U.S.C. §§ 2000d-1 & 2000d-2; Note, *supra* note 49, at 1777.

<sup>68</sup> See Lisa E. Key, *Private Enforcement of Federal Funding Conditions Under § 1983: The Supreme Court's Failure to Adhere to the Doctrine of Separation of Powers*, 29 U.C. DAVIS L. REV. 283, 292-93 (1996) (observing that termination of funds to recipient is generally an ineffective administrative enforcement mechanism because federal funding agencies are reluctant to terminate aid to recipients and face procedural barriers even if they wish to do so); Mank, *Private Cause*, *supra* note 5, at 21-23 (observing that funding agencies frequently settle Title VI discrimination complaints against recipients of federal aid because termination is procedurally difficult and innocent beneficiaries would be hurt); Bradford C. Mank, *Suing Under § 1983: The Future After Gonzaga v. Doe*, 39 HOUS. L. REV. 1417, 1431-32 (2003) (same) [hereinafter Mank, *Gonzaga*]; Edward A. Tomlinson & Jerry L. Mashaw, *The Enforcement of Federal Standards in Grant-in-Aid Programs: Suggestions for Beneficiary Involvement*, 58 VA. L. REV. 600, 619-23 (1972) (concluding that federal government has difficult time forcing states to comply with federal grant-in-aid requirements because of procedural barriers and negative consequences of funding termination); Note, *supra* note 49, at 1777 (stating agencies rarely use draconian authority to terminate funding to recipient because of need to notify Congress).

<sup>69</sup> See *supra* note 68.

<sup>70</sup> 20 U.S.C. § 1681(a) (2000).

<sup>71</sup> 456 U.S. 512 (1982).

IX] the scope that its origins dictate, we must accord it a sweep as broad as its language.”<sup>72</sup> For instance, the Court interpreted Title IX to allow for money damages in a private cause of action, although the statute does not expressly provide for such damages.<sup>73</sup> Additionally, the Court implied a right in cases of sexual harassment, including student-on-student sexual harassment that is deliberately ignored by school officials.<sup>74</sup>

Congress modeled Title IX of the Education Amendments of 1972<sup>75</sup> after Title VI.<sup>76</sup> Congress enacted both Title VI and Title IX pursuant to its Spending Clause authority and used a similar statutory structure.<sup>77</sup> Additionally, the Department of Education looked to its Title VI regulations as a primary source for its Title IX regulations.<sup>78</sup>

Because Title IX “was patterned after Title VI,”<sup>79</sup> the Supreme Court in *Cannon* and subsequent decisions has by and large interpreted the two statutes similarly.<sup>80</sup> In *Cannon*, the Court examined Title IX’s legislative history and concluded that the statute had two primary goals: “[f]irst, Congress wanted to avoid the use of federal resources to support discriminatory practices; [and] second, it wanted to provide individual citizens effective protection against those practices.”<sup>81</sup> Although Congress modeled Title IX’s statutory language after that of Title VI, Congress also intended Title IX to close at least some gaps in Title VII’s prohibition against sex discrimination in employment cases.<sup>82</sup>

<sup>72</sup> *Id.* at 521 (quoting *United States v. Price*, 383 U.S. 787, 801 (1976)) (second alteration in original).

<sup>73</sup> *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60 (1992).

<sup>74</sup> *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999).

<sup>75</sup> 20 U.S.C. § 1681-88 (2000 & Supp. I 2001).

<sup>76</sup> See *infra* notes 79-82, 112, 121-26, 130 and accompanying text.

<sup>77</sup> See *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286-88 (1998); *Litman v. George Mason Univ.*, 156 F. Supp. 2d 579, 582 (E.D. Va. 2001).

<sup>78</sup> See 34 C.F.R. § 106.71 (2004); *Litman*, 156 F. Supp. 2d at 582; Short, *supra* note 4, at 121.

<sup>79</sup> *Cannon*, 441 U.S. at 694-95 (“Title IX was patterned after Title VI . . . . Except for the substitution of the word ‘sex’ in Title IX to replace the words ‘race, color, or national origin’ in Title VI, the two statutes use identical language to describe the benefitted class.”).

<sup>80</sup> See, e.g., *Jackson v. Birmingham Bd. of Educ.*, 309 F.3d 1333, 1339 (11th Cir. 2002) (stating that courts should construe Title VI and Title IX *in pari materia*); *Chandamuri v. Georgetown Univ.*, 274 F. Supp. 2d 71 (D.D.C. 2003).

<sup>81</sup> *Cannon*, 441 U.S. at 704; see also Mank, *Private Cause*, *supra* note 5, at 29, 48-49, 59-60 (discussing Title VI and Title IX’s dual purposes).

<sup>82</sup> See Julie Carroll Fay, Note, *Gebser v. Lago Vista Independent School District: Is It Really the Final Word on School Liability for Teacher-to-Student Sexual Harassment?*, 31 CONN. L. REV. 1485, 1490 (1999); The Supreme Court 1997 Term Leading Cases, 112 HARV. L. REV. 335, 341-42 (1998) [hereinafter *The Supreme Court 1997 Term*].

In the statute's legislative history, the primary congressional drafter of Title IX, Senator Bayh, stated that the "heart" of Title IX was to "cover such crucial aspects as admissions procedures, scholarships, and faculty employment, with limited exceptions," to address issues not covered by Title VI or Title VII of the 1964 Civil Rights Act.<sup>83</sup> Additionally, Senator Bayh stated that Title IX seeks to eliminate "loopholes in existing legislation relating to general education programs and employment resulting from those programs."<sup>84</sup> The statute applies to virtually all public and private educational institutions, and includes all institutional operations such as academic programs or athletics.<sup>85</sup>

Pursuant to § 902 of the statute, any federal department or agency that "is empowered to extend [f]ederal financial assistance to any education program or activity" is "authorized and directed to effectuate the provisions of" § 901.<sup>86</sup> Like § 602 of Title VI, § 902 of Title IX requires agencies to "issue rules, regulations, or orders of general applicability" that may not "become effective unless and until approved by the President."<sup>87</sup> Similarly, § 902 provides that federal funding agencies may enforce "compliance with any requirement adopted pursuant to this section . . . by the termination of or refusal to grant or to continue assistance . . . ."<sup>88</sup>

The Department of Education used its Title VI regulations as a primary source for its regulations under § 902 of Title IX by declaring that,<sup>89</sup> "[t]he procedural provisions applicable to Title VI of the Civil Rights Act of 1964 are hereby adopted and incorporated herein by reference."<sup>90</sup> Additionally, the Department of Education regulations

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<sup>83</sup> 118 CONG. REC. 5,803 (1972) (statement of Sen. Bayh), *cited in* Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006, 1014 (5th Cir. 1996); *see also* Fay, *supra* note 82, at 1490.

<sup>84</sup> 118 CONG. REC. 5,803 (1972) (statement of Sen. Bayh); *see also* Fay, *supra* note 82, at 1490; Emmalena K. Quesada, *Innocent Kiss or Potential Legal Nightmare: Peer Sexual Harassment and the Standard for School Liability Under Title IX*, 83 CORNELL L. REV. 1014, 1021 (1998).

<sup>85</sup> *See* Nancy Hogshead-Makar & Sheldon Elliot Steinbach, *Intercollegiate Athletics' Unique Environment for Sexual Harassment Claims: Balancing the Realities of Athletics with Preventing Potential Claims*, 13 MARQ. SPORTS L.J. 173, 183 (2003); *see also* Fay, *supra* note 82, at 1489.

<sup>86</sup> 20 U.S.C. § 1682 (2000); *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 638-39 (1999); *Jackson v. Birmingham Bd. of Educ.*, 309 F.3d 1333, 1336-37 (11th Cir. 2002).

<sup>87</sup> 20 U.S.C. § 1682; *Davis*, 526 U.S. at 638-39; *Jackson*, 309 F.3d at 1337.

<sup>88</sup> *See supra* note 87.

<sup>89</sup> *See* 34 C.F.R. § 106.71 (2004); *Litman v. George Mason Univ.*, 156 F. Supp. 2d 579, 582 (E.D. Va. 2001); Short, *supra* note 4, at 121.

<sup>90</sup> *See supra* note 89.

address the particular characteristics of educational institutions by specifying that a recipient of federal financial assistance shall not “administer or operate any test or other criterion for admission which has a disproportionately adverse effect on persons on the basis of sex.”<sup>91</sup> Like the parallel regulations under § 602 of Title VI, § 902 and its regulations set forth extensive administrative procedures for investigations and hearings of complaints of discrimination against recipients.<sup>92</sup> The Department of Education’s Office of Civil Rights (hereinafter “OCR”) is a party to all proceedings and takes the lead in the process.<sup>93</sup>

Complainants enjoy few rights under the Department of Education’s § 902 regulations. Although the regulations give “[a]ny person who believes himself or any specific class of individuals to be subjected to discrimination” by a recipient the right to file a complaint,<sup>94</sup> the regulations also state that Title IX complainants are not parties to the proceedings, but may only become *amici curiae*.<sup>95</sup> Under the Department of Education regulations, individuals have no right to a judgment for damages.<sup>96</sup>

By contrast, Title IX recipients (like Title VI recipients)<sup>97</sup> are parties to the investigation and possess extensive due process rights if OCR conducts hearings to consider the termination of a recipient’s funding.<sup>98</sup> Section 902 explicitly requires agencies to seek voluntary compliance from recipients before the agency may terminate funding,<sup>99</sup> and requires that the agency provide the recipient with an

<sup>91</sup> 34 C.F.R. § 106.21(b) (2004); *see also* Short, *supra* note 4, at 120.

<sup>92</sup> *See* 34 C.F.R. § 101 (2004); *see also* Fay, *supra* note 82, at 1492; Short, *supra* note 4, at 123.

<sup>93</sup> *See* 34 C.F.R. § 101.21 (2004); *see also* Short, *supra* note 4, at 122.

<sup>94</sup> 34 C.F.R. § 100.7(b) (2004).

<sup>95</sup> 34 C.F.R. § 101.23 (2004); *see also* Short, *supra* note 4, at 122.

<sup>96</sup> Fay, *supra* note 82, at 1492-93.

<sup>97</sup> *See* 42 U.S.C. § 2000d-1 (2000 & Supp. I 2001) (providing procedural protections for recipients of federal funding); 40 § C.F.R. 7.130(b)(1)-(3) (2004) (EPA regulations providing procedural protections for recipients); Mank, *Private Cause*, *supra* note 5, at 21-23; Note, *supra* note 49, at 1777 (discussing complex administrative enforcement process for determining whether recipient has failed to comply with Title VI).

<sup>98</sup> The regulations only mention two sides, the recipient (or grant applicant) and the Department of Education: “(a) The term party shall include an applicant or recipient or other person to whom a notice of hearing or opportunity for hearing has been mailed naming him a respondent. (b) The Assistant Secretary for Civil Rights of the Department of Education, shall be deemed a party to all proceedings.” 34 C.F.R. § 101.21 (2004); *see also* Short, *supra* note 4, at 122.

<sup>99</sup> 20 U.S.C. § 1682(2) (2000); *see also* Jackson v. Birmingham Bd. of Educ., 309 F.3d 1333, 1337 (11th Cir. 2002).

opportunity for a hearing before any funding termination.<sup>100</sup> Additionally, after it makes an “express finding” of noncompliance, an agency may not terminate funding to a recipient until the agency files “a full written report” to “the committees of the House and Senate having legislative jurisdiction over the program or activity involved” and waits “until thirty days have elapsed after the filing of such report.”<sup>101</sup> Finally, § 903 guarantees recipients the right of judicial review to challenge any termination or other decision an agency makes pursuant to § 902.<sup>102</sup> The OCR does not normally recommend termination of funding, but instead usually enters into binding settlements with recipients, which specify measures to avoid discriminatory practices in the future.<sup>103</sup> This routine outcome is in part a result of Title IX’s extensive procedural protections with respect to recipients (which are similar to the protections under Title VI).<sup>104</sup>

## II. TITLE VI, TITLE IX, AND PRIVATE RIGHTS OF ACTION

Because the Title VI and Title IX administrative processes provide limited procedural rights and no right of compensation to complainants, a number of plaintiffs have attempted to enforce either Title VI or Title IX as a private right of action in federal court, where plaintiffs potentially have the full panoply of procedural rights, including discovery, the right to a trial, and equitable or compensatory remedies.<sup>105</sup> Like most statutes enacted during the 1960s,<sup>106</sup> Title VI is silent regarding whether private individuals who allege that a recipient has discriminated against them may bring a private right of action.<sup>107</sup> In 1964, when Congress enacted Title VI, the Supreme Court had recently adopted a liberal approach to implied private rights of action in its seminal decision, *J.I. Case Co. v. Borak*,<sup>108</sup> which allowed private investors to bring private suits for securities fraud because it would advance the general purposes of the

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<sup>100</sup> 20 U.S.C. § 1682(1) (2000); *see also Jackson*, 309 F.3d at 1337.

<sup>101</sup> 20 U.S.C. § 1682 (2000); *see also Jackson*, 309 F.3d at 1337.

<sup>102</sup> 20 U.S.C. § 1683 (2000); *see also Jackson*, 309 F.3d at 1337.

<sup>103</sup> *See Short*, *supra* note 4, at 123.

<sup>104</sup> *See supra* note 97.

<sup>105</sup> *See Mank, Private Cause*, *supra* note 5, at 23-24 (discussing advantages of private right of action compared to Title VI administrative procedures).

<sup>106</sup> Bradford C. Mank, *Legal Context: Reading Statutes in Light of Prevailing Legal Precedent*, 34 ARIZ. ST. L.J. 815, 816, 846-47 (2002) [hereinafter Mank, *Context*]; Rosenbaum & Teitelbaum, *supra* note 31, at 225.

<sup>107</sup> Rosenbaum & Teitelbaum, *supra* note 31, at 225.

<sup>108</sup> 377 U.S. 426 (1964).

statute despite the absence of any explicit textual support in the statute.<sup>109</sup> Until the middle 1970s, the Supreme Court and lower courts liberally construed the *Borak* holding to allow private plaintiffs to file statutory suits even if a statute did not contain an explicit remedy for individual suits. Often, such statutes only explicitly allowed, for instance, suits by federal administrative agencies.<sup>110</sup> During the 1960s and 1970s, several lower court decisions concluded that Title VI established a private cause of action.<sup>111</sup> When it enacted Title IX in 1972, Congress was aware of these decisions implying a private right of action under Title VI.<sup>112</sup>

However, in 1975, the Supreme Court, in *Cort v. Ash*,<sup>113</sup> adopted a four-part test for determining whether a private right of action was implied in a statute, with congressional intent being one factor.<sup>114</sup>

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<sup>109</sup> *Id.* at 431-33 (stating that “it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose” expressed by a statute); Mank, *Context*, *supra* note 106, at 845.

<sup>110</sup> *See, e.g.*, *Rosado v. Wyman*, 397 U.S. 397 (1970) (Social Security Act of 1935, as amended in 1967); *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969) (Voting Rights Act of 1965); *Wyandotte Co. v. United States*, 389 U.S. 191 (1967) (Rivers and Harbors Act of 1899); *J.I. Case Co. v. Borak*, 377 U.S. 426, 433-34 (1964); *see also* *Jackson v. Birmingham Bd. of Educ.* 309 F.3d 1333, 1339 n.5 (11th Cir. 2002) (“The Supreme Court implied private rights of action with a relatively free hand until its decision in *Cort v. Ash*.”) (citations omitted), *cert. granted*, 124 S. Ct. 1832 (June 14, 2004); Key, *supra* note 68, at 294 (describing the effect of *Borak* on private rights of action); Mank, *Gonzaga*, *supra* note 68, at 1423; Mank, *Private Cause*, *supra* note 5, at 25-27 (discussing Supreme Court and lower court cases from 1964 until late 1970s that found implied private right of action in federal statutes); Michael A. Mazzuchi, Note, *Section 1983 and Implied Rights of Action: Rights, Remedies, and Realism*, 90 MICH. L. REV. 1062, 1073-74 (1992) (observing that between 1964 and 1975 the Supreme Court took an expansive approach to private rights of action). *But see* Susan J. Stabile, *The Role of Congressional Intent in Determining the Existence of Implied Rights of Action*, 71 NOTRE DAME L. REV. 861, 866, 867 & nn.32 & 34 (1996) (arguing that courts were reluctant before 1975 to imply private rights of action, except perhaps in securities area).

<sup>111</sup> *See* *Cannon v. Univ. of Chicago*, 441 U.S. 677, 696 n.20 (1979) (citing *Bossier Parish Sch. Bd. v. Lemon*, 370 F.2d 847, 852 (5th Cir. 1967); *S. Christian Leadership Conference, Inc. v. Connolly*, 331 F. Supp. 940, 942-43 (E.D. Mich. 1971); *Gautreaux v. Chicago Hous. Auth.*, 265 F. Supp. 582, 584 (N.D. Ill. 1967)); *see also* Mank, *Context*, *supra* note 106, at 848 n.213; Stabile, *supra* note 110, at 891 n.165.

<sup>112</sup> *Cannon*, 441 U.S. at 696-98 (presuming both that Congress was aware of cases interpreting Title VI and intended to follow that interpretation for Title IX); Courtney G. Joslin, *Recognizing a Cause of Action Under Title IX for Student-Student Sexual Harassment*, 34 HARV. C.R.-C.L. L. REV. 201, 207 (1999); *infra* notes 121-26, 130 and accompanying text.

<sup>113</sup> 422 U.S. 66 (1975).

<sup>114</sup> *Id.* at 78 (stating four-part test: (1) is plaintiff part of a class that statute intends to provide with special status or benefits?; (2) is there implicit or explicit evidence that Congress intended to create or deny the proposed private right of action?; (3) is such a private right of action consistent with underlying purposes of the legislative scheme to imply such a remedy for plaintiff?; and (4) is the cause of action one

Although the Court likely intended the *Cort* four-part test to limit the creation of new implied private rights of action, the courts of appeals continued to create them in at least twenty instances from 1975 until 1979.<sup>115</sup> A key question was whether the Court would affirm lower court decisions creating a private right of action under Title VI or Title IX in light of the *Cort* test.

A. *Cannon v. University of Chicago: Recognizing a Private Right of Action Under Title IX and Title VI*

1. *Cannon* Recognizes a Private Right of Action Under Title IX

The Supreme Court's *Cannon* decision recognized a private right to bring an action in federal court against various educational institutions receiving federal funds under § 901(a) of Title IX.<sup>116</sup> *Cannon* was the Court's last major case to adopt a broad interpretation of implied private rights of action under the *Cort* four-part test.<sup>117</sup> Under *Cort*'s first prong,<sup>118</sup> the Court found that the plaintiff was a member of the class that the statute was intended to benefit—namely, students.<sup>119</sup>

Under *Cort*'s second prong, whether Congress intended to establish a private right of action,<sup>120</sup> the Court found that Congress had intended that there be a right of action under Title IX, because

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traditionally relegated to state law, and thus in an area where a federal cause of action would intrude on important state concerns?); see also Mank, *Private Cause*, *supra* note 5, at 26-27 & n.159; Bradford C. Mank, *Using § 1983 to Enforce Title VI's Section 602 Regulations*, 49 U. KAN. L. REV. 321, 354-551 (2000) [hereinafter Mank, *Section 1983*]; Stabile, *supra* note 110, at 867 & n.38.

<sup>115</sup> See *Cannon*, 441 U.S. at 741-42 (Powell, J., dissenting) (citing cases); Mank, *Gonzaga*, *supra* note 68, at 1424; Mank, *Private Cause*, *supra* note 5, at 27 & n.159.

<sup>116</sup> 441 U.S. 677 (1979); see also Mank, *Private Cause*, *supra* note 5, at 28-30; Fay, *supra* note 82, at 1494-95.

<sup>117</sup> *Cannon*, 441 U.S. at 709 (finding that all factors in *Cort*'s four-part test favor conclusion that Title IX creates private right of action); see also Fay, *supra* note 82, at 1494-95 (discussing *Cannon*'s use of the *Cort* four-part test); Joslin, *supra* note 112, at 219-20 (same); Mank, *Private Cause*, *supra* note 5, at 28 (same). The first three prongs are discussed in the text of this Article. *Cort*'s fourth prong, whether the cause of action is one traditionally relegated to state law, and thus in an area where a federal cause of action would intrude on important state concerns, was easily addressed because the federal government since the Civil War has taken the leading role in combating discrimination. *Cannon*, 441 U.S. at 708-09; Fay, *supra* note 82, at 1495; Joslin, *supra* note 112, at 207.

<sup>118</sup> *Cort*'s first prong is whether the plaintiff is part of a class that the statute intends to benefit. *Cort*, 422 U.S. at 78.

<sup>119</sup> See *Cannon*, 441 U.S. at 694.

<sup>120</sup> *Cort*, 422 U.S. at 78.

it had patterned the statute after Title VI, while being aware that courts had already recognized such a right under Title VI.<sup>121</sup> Because Congress patterned Title IX after Title VI, including the use of virtually identical statutory language and the same procedures for termination of funding, the *Cannon* decision relied on prior interpretation of Title VI's language, legislative history, and regulations as strong indicators of Congress' intent to create a private right of action under Title IX.<sup>122</sup> Accordingly, courts and commentators have interpreted *Cannon* to recognize a private right of action under both statutes.<sup>123</sup> Justice Stevens' majority opinion first observed, "[t]he drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been during the preceding eight years."<sup>124</sup> The Justice then noted that "[i]n 1972 when Title IX was enacted, the critical language in Title VI had already been construed as creating a private remedy."<sup>125</sup> The Court stated that it was appropriate to assume that Congress was aware of the numerous lower federal court decisions interpreting Title VI as creating a private right of action when it enacted Title IX, and hence, that the legislature assumed that Title IX likewise created a private right of action.<sup>126</sup>

Additionally, acknowledging that *Cort* and other recent decisions by the Court had begun to apply a "strict approach" in deciding whether to create a private right of action, the *Cannon* Court determined that its "evaluation of congressional action in 1972 must take into account its contemporary legal context"; that is, the more liberal standard used in deciding whether Congress, when it enacted Title IX, intended to create such a private right of action.<sup>127</sup> Because the Court had in six cases from 1964 to 1972 recognized a private cause of action in statutes that included no specific reference to these

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<sup>121</sup> *Cannon*, 441 U.S. at 694-96.

<sup>122</sup> See *Cannon*, 441 U.S. at 694-703; see also Mank, *Private Cause*, *supra* note 5, at 28.

<sup>123</sup> See *Cannon*, 441 U.S. at 694-703; *Neighborhood Action Coalition v. City of Canton*, 882 F.2d 1012, 1015 (6th Cir. 1989); *Mabry v. State Bd. of Cmty. Colls. & Occupational Educ.*, 813 F.2d 311, 317 (10th Cir. 1987); *Chowdbury v. Reading Hosp. & Med. Ctr.*, 677 F.2d 317, 319 n.2 (3d Cir. 1982) ("[C]ourts have consistently held the [Title IX] language of *Cannon* to be applicable in discussions of Title VI."); 118 CONG. REC. 5,803 (1972) (remarks of Sen. Bayh); Colopy, *supra* note 4, at 156-57 nn.140-41.

<sup>124</sup> *Cannon*, 441 U.S. at 696 n.16; see also *United States v. Alabama*, 828 F.2d 1532, 1548 (11th Cir. 1987) (per curiam); Fisher, *supra* note 53, at 318, 329.

<sup>125</sup> *Cannon*, 441 U.S. at 696; see also *id.* at nn.20-21 (citing cases); *Bossier Parish Sch. Bd. v. Lemon*, 370 F.2d 847, 852 (5th Cir. 1967).

<sup>126</sup> See *Cannon*, 441 U.S. at 696-703, 710-11.

<sup>127</sup> *Cannon*, 441 U.S. at 696-99; Mank, *Context*, *supra* note 106, at 847-49.

remedies, the *Cannon* Court held that there was an implied private right of action under Title IX and, by implication, under Title VI, because the former statute was modeled upon the latter one.<sup>128</sup> In his concurring opinion, then-Justice Rehnquist, who has generally opposed implied private causes of action,<sup>129</sup> conceded that Congress had probably assumed when it enacted Titles VI and IX that courts would decide whether a civil rights statute contained an implied private right of action. Justice Rehnquist observed:

We do not write on an entirely clean slate, however, and the Court's opinion demonstrates that Congress, at least during the period of the enactment of the several Titles of the Civil Rights Act tended to rely to a large extent on the courts to decide whether there should be a private right of action, rather than determining this question for itself. Cases such as *J. I. Case Co. v. Borak*, and numerous cases from other federal courts, gave Congress good reason to think that the federal judiciary would undertake this task.<sup>130</sup>

In addressing *Cort's* third prong, whether a private right of action would serve the statute's purposes,<sup>131</sup> the *Cannon* court concluded that Titles IX and VI "sought to accomplish two related, but nevertheless somewhat different, objectives."<sup>132</sup> First, Congress intended to prohibit the use of federal funds to support recipients' discriminatory practices.<sup>133</sup> The Court observed that private litigation is not essential in serving this purpose because the federal funding agency can deter discriminatory practices by using the statutory procedure for termination of federal financial support to a recipient engaged in such behavior.<sup>134</sup> Additionally, however, the *Cannon* decision concluded that Congress had intended the statute not only to prevent the use of federal funds to support discriminatory programs, but also to "provide individual citizens effective protection

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<sup>128</sup> *Cannon*, 441 U.S. at 698 n.23; Mank, *Context*, *supra* note 106, at 848 (discussing Title VI implied right of action cases relied upon by *Cannon* court); Mank, *Private Cause*, *supra* note 5, at 28-29.

<sup>129</sup> Mank, *Context*, *supra* note 106, at 849-50 (stating that Chief Justice Rehnquist has usually opposed courts finding implied private right of action absent evidence of clear congressional intent to create such a remedy); Stabile, *supra*, note 110, at 884-85 n.131 (observing that Justice Rehnquist in his *Cannon* concurrence stated his general opposition to judicially implied private right of action absent evidence of clear congressional intent to create such a remedy).

<sup>130</sup> *Cannon*, 441 U.S. at 718 (Rehnquist, J., concurring); *see also* Mank, *Context*, *supra* note 106, at 849-50.

<sup>131</sup> *Cort*, 422 U.S. at 78.

<sup>132</sup> *Cannon*, 441 U.S. at 704; *see also* Fay, *supra* note 82, at 1494-95.

<sup>133</sup> *Cannon*, 441 U.S. at 704.

<sup>134</sup> *Id.*

against these practices.”<sup>135</sup> The Court determined that only private remedies could secure the statute’s interest in protecting individuals. The Court also noted that a complainant could not participate in the administrative process.<sup>136</sup> Moreover, the Court observed that the administrative process provided no assurance that a finding of a violation would result in relief for the complainant.<sup>137</sup> Accordingly, the Court concluded that a private remedy was consistent with the underlying purposes of the legislative scheme and would not interfere with the agency’s administrative enforcement process.<sup>138</sup> Furthermore, the Court’s reasoning implied that there should be a private right of action under both Title VI and Title IX because both failed to provide direct remedies for complainants and allowed the funding agency only the indirect remedy of terminating a recipient’s funding.<sup>139</sup> *Cannon* did not explicitly address whether there is a private right of action under either Title VI or Title IX’s regulations prohibiting disparate impact discrimination.<sup>140</sup>

Although the *Cannon* decision did not explicitly hold that there was an implied right of action under Title VI, commentators and courts have overwhelmingly interpreted *Cannon* as clearly implying such a right.<sup>141</sup> In *Guardians Ass’n v. Civil Service Commission*, Justice White observed, “it was the unmistakable thrust of the *Cannon* Court’s opinion that the congressional view was correct as to the availability of private actions to enforce Title VI.”<sup>142</sup> In 1992, the Court reaffirmed *Cannon*’s private right of action, unanimously holding in *Franklin v. Gwinnett County Public Schools*,<sup>143</sup> that plaintiffs in a Title IX case may receive compensatory damages from a school district for intentional discrimination, including sexual harassment by a teacher against a student, when a student notified the district about the

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<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 706-07 n.41.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 704-08.

<sup>139</sup> See *Cannon*, 441 U.S. at 707 n.41.

<sup>140</sup> See Mank, *Private Cause*, *supra* note 5, at 30.

<sup>141</sup> See *supra* note 123. Because § 504 of the Rehabilitation Act, 29 U.S.C. § 794, was also modeled on Title VI and contains nearly identical language to both Titles VI and IX, most courts interpret Title VI in light of Title IX and § 504 case law. See *United States Dep’t of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597, 600 (1986); *Alexander v. Choate*, 469 U.S. 287, 295 (1985) (noting that § 504 was originally proposed as an amendment to Title VI); *Colopy*, *supra* note 4, at 156-57 n.140. *But see* *Consol. Rail Corp. v. Darrone*, 465 U.S. 624, 632-33 n.13 (1984) (recognizing differences between Title VI and § 504).

<sup>142</sup> *Guardians*, 463 U.S. at 594.

<sup>143</sup> 503 U.S. 60 (1992).

harassment, but the district failed to stop the harassment.<sup>144</sup> The Court stated, “the point of not permitting monetary damages for an unintentional violation is that the receiving entity of federal funds lacks notice that it will be liable for a monetary award. This notice problem does not arise in a case such as this, in which intentional discrimination is alleged.”<sup>145</sup> Thus, under both Titles VI and IX, plaintiffs may receive monetary damages if they can prove a recipient engaged in intentionally discriminatory practices that harmed them.<sup>146</sup>

## 2. After *Cannon*, the Supreme Court Restricts Private Rights of Action

In his dissenting opinion in *Cannon*, Justice Powell argued that courts should recognize an implied private right of action only where there is clear evidence in the statute that Congress intended such a right.<sup>147</sup> The Supreme Court has never overruled *Cannon*'s holding that there is an implied right of action under Title IX.<sup>148</sup> However, since 1979, the Court has increasingly curtailed its recognition of implied private rights of action, as evinced by the Court's requiring plaintiffs to prove that Congress intended to authorize remedies for private litigants.<sup>149</sup> The Court has considered the remaining three *Cort* factors only to the extent that they help courts understand such

<sup>144</sup> *Id.* at 63-65, 74-75; see also Joslin, *supra* note 112, at 207-09 (discussing *Franklin*).

<sup>145</sup> *Franklin*, 503 U.S. at 74-75 (citation omitted); see also Joslin, *supra* note 112, at 208-09 (discussing *Franklin*).

<sup>146</sup> See Fay, *supra* note 82, at 1501.

<sup>147</sup> 441 U.S. 748 (Powell, J., dissenting).

<sup>148</sup> In *Jackson*, the court stated:

The Supreme Court has plainly receded from the four-part *Cort* analysis that animated *Cannon*, focusing instead only on congressional intent to create a private right of action . . . . But the Court has not overturned the specific holding of *Cannon*, and so a direct victim of gender discrimination still may pursue a private right of action under Title IX to remedy the discrimination she has suffered.

*Jackson v. Birmingham Bd. of Educ.*, 309 F.3d 1333, 1344 (11th Cir. 2002).

<sup>149</sup> The *Jackson* court stated:

Since the late 1970's, the Court has gradually receded from reliance on three of these four factors, focusing more and more exclusively on legislative intent alone [citing cases]. *Sandoval* is the culmination of this trend, announcing that “statutory intent . . . is determinative.” The other three *Cort* factors remain relevant only insofar as they provide evidence of Congress's intent.

*Id.* at 1339 n.5 (citations omitted); see also Karlen, *supra* note 4, at 197; Key, *supra* note 68, at 294-96; Mank, *Gonzaga*, *supra* note 68, at 1423-25; Mank, *Private Right*, *supra* note 5, at 31-32, 44-46; Stabile, *supra* note 110, at 868-71.

legislative intent.<sup>150</sup> Justice Scalia, who in *Sandoval* and other decisions has sought to restrict judicially implied private rights of action, subsequently described *Cannon* as “exemplifi[ng]” an “expansive rights-creating approach” to inferring private rights of action from statutes that lack any explicit textual support for such remedies and indicated that the Court would not use that approach in addressing any new private rights claims.<sup>151</sup>

For instance, in 2001, in *Correctional Services Corp. v. Malesko*,<sup>152</sup> the Court rejected an implied right of action for even constitutional violations.<sup>153</sup> The *Malesko* Court limited its decision in *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*,<sup>154</sup> which had recognized an implied right of action for illegal governmental searches in violation of the Fourth Amendment.<sup>155</sup> In a concurring opinion in *Malesko*, Justice Scalia declared, “the heady days in which this Court assumed common-law powers to create causes of action—decreeing them to be ‘implied’ by the mere existence of a statutory or constitutional prohibition” are gone.<sup>156</sup> Some plaintiffs have filed § 1983 suits for alleged statutory violations in order to avoid these limitations, but the Court has begun to close off that alternative avenue of litigation as well.<sup>157</sup>

#### B. Guardians: A Muddy Title VI Decision

In 1983, in *Guardians Ass’n v. Civil Service Commission*,<sup>158</sup> a deeply divided Supreme Court issued a complex opinion which held that proof of intentional discrimination is required under § 601 of Title VI, but also indicated that an agency implementing regulations under § 602 may prohibit disparate impact discrimination.<sup>159</sup> The *Guardians*

<sup>150</sup> See *supra* note 149.

<sup>151</sup> *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 77 (Scalia, J., concurring in judgment).

<sup>152</sup> 534 U.S. 61 (2001).

<sup>153</sup> *Id.* at 66-69; see also Karlen, *supra* note 4, at 197 (discussing *Malesko*).

<sup>154</sup> 403 U.S. 388 (1971).

<sup>155</sup> See Karlen, *supra* note 4, at 197-98 (discussing *Bivens*).

<sup>156</sup> *Malesko*, 534 U.S. at 75 (Scalia, J., concurring); see also Karlen, *supra* note 4, at 197.

<sup>157</sup> See *Gonzaga Univ. v. Doe*, 536 U.S. 273, 290 (2002) (limiting enforcement of rights under § 1983 to statutes in which there is “clear” and “unambiguous” evidence that Congress intended to create an individual right); see also Mank, *Gonzaga*, *supra* note 68, at 1420-21, 1446-51, 1480-82 (discussing to what extent *Gonzaga* limited § 1983 suits); Sasha Samberg-Champion, Note, *How to Read Gonzaga: Laying the Seeds of a Coherent Section 1983 Jurisprudence*, 103 COLUM. L. REV. 1838, 1838-41, 1854-58, 1881-87 (2003) (same); *infra* notes 231-37 and accompanying text.

<sup>158</sup> 463 U.S. 582 (1983).

<sup>159</sup> See *id.* at 584 n.2; see also Mank, *Private Cause*, *supra* note 5, at 13-15; Mank, *Title*

Court looked both back to its liberal approach to private rights of action in its recent *Cannon* opinion as well as forward to its increasingly narrow jurisprudence limiting such rights of action.<sup>160</sup> The decision involved two difficult but interrelated questions: first, the substantive standard for defining “discrimination” under Title VI and second, the remedies available to private plaintiffs who proved discrimination in violation of the statute.<sup>161</sup>

In *Guardians*, the plaintiffs were black and Hispanic members of the New York City Police Department who alleged that the department had violated the Department of Labor’s Title VI regulations, which barred recipients from engaging in practices having racially disparate impacts,<sup>162</sup> by using biased written examinations to make initial hiring decisions and to decide layoffs among officers with equal seniority.<sup>163</sup> The United States District Court for the Southern District of New York found sufficient evidence of disparate impacts as a result of the examinations to establish a violation of Title VI, and awarded the plaintiffs compensatory relief.<sup>164</sup> The United States Court of Appeals for the Second Circuit, however, reversed the district court’s decision, concluding that Title VI required proof of discriminatory intent rather than simply a disparate impact.<sup>165</sup> The Supreme Court affirmed the Second Circuit, determining that a plaintiff must prove intentional discrimination to obtain compensatory relief under Title VI.<sup>166</sup> However, five justices arguably concluded, or at least implied, that Title VI plaintiffs who

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*VI Regulations*, *supra* note 43, at 523-27.

<sup>160</sup> See *supra* notes 117, 142, 149-50 and accompanying text & *infra* notes 169-76, 218-20, 227 and accompanying text (discussing conflicting interpretations of whether *Guardians*’s majority adopted narrow or broad approach to private rights of action under Title VI).

<sup>161</sup> See Mank, *Title VI Regulations*, *supra* note 43, at 524; Mello, *supra* note 43, at 965.

<sup>162</sup> See 29 C.F.R. § 31.3(c)(1) (2004); Mank, *Title VI Regulations*, *supra* note 43, at 524.

<sup>163</sup> *Guardians*, 463 U.S. at 582; See also Mank, *Private Cause*, *supra* note 5, at 14; Mank, *Title VI Regulations*, *supra* note 43, at 524.

<sup>164</sup> *Guardians*, 463 U.S. at 582; *Guardians Ass’n of the N.Y. City Police Dep’t, Inc. v. Civil Serv. Comm’n of N.Y.*, 466 F. Supp. 1273, 1285-87 (S.D.N.Y. 1979); see also Mank, *Private Cause*, *supra* note 5, at 14; Mank, *Title VI Regulations*, *supra* note 43, at 524.

<sup>165</sup> *Guardians*, 463 U.S. at 582; see also *Guardians Ass’n of the N.Y. City Police Dep’t, Inc. v. Civil Serv. Comm’n of N. Y.*, 633 F.2d 232, 270 (2d Cir. 1980) (Kelleher, J., concurring); *id.* at 274 (Coffin, J., concurring); Mank, *Private Cause*, *supra* note 5, at 14; Mank, *Title VI Regulations*, *supra* note 43, at 524.

<sup>166</sup> See *Guardians*, 463 U.S. at 610-11 (Powell, J., concurring in judgment); *id.* at 612, 615 (O’Connor, J., concurring in judgment); *id.* at 642-45 (Stevens, J., dissenting); see also Colopy, *supra* note 4, at 159; Mank, *Private Cause*, *supra* note 5, at 14; Mank, *Title VI Regulations*, *supra* note 43, at 524.

proved that a recipient's practices caused disparate impacts were entitled to declaratory or injunctive relief.<sup>167</sup>

In *Guardians*, a majority concluded that § 601 prohibited only intentional discrimination.<sup>168</sup> The opinion by Justice White suggested that the recipient must have knowledge of the intentional conduct, stating that it was not "uncommon in the law for the extent of a defendant's liability to turn on the extent of his knowledge."<sup>169</sup> By contrast, Justices White and Marshall argued in separate concurring and dissenting opinions that § 601's definition of "discrimination" included a prohibition against practices that result in disparate impacts on protected minority groups.<sup>170</sup>

Nonetheless, even though the Court concluded that § 601 only bars intentional discrimination, five members of the *Guardians* Court stated or strongly implied that § 602 authorizes federal agencies to issue regulations prohibiting recipient practices that result in disparate impact discrimination.<sup>171</sup> For instance, Justice Stevens, in his dissenting opinion (joined by Justices Brennan and Blackmun), argued that § 601 prohibits intentional discrimination, and that § 602 authorizes disparate impact regulations: "[A]lthough petitioners had to prove that the respondents' actions were motivated by an invidious intent in order to prove a violation of [Title VI], they only had to show that the respondents' actions were producing discriminatory

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<sup>167</sup> See *Guardians*, 463 U.S. at 607 (opinion of White, J.) (stating that only declaratory and injunctive relief was appropriate); *id.* at 644 (Stevens, J., dissenting, joined by Brennan & Blackmun, JJ.); *id.* at 624 (Marshall, J., dissenting) (would allow full compensation); see also Mank, *Title VI Regulations*, *supra* note 43, at 524; Mello, *supra* note 43, at 965.

<sup>168</sup> See *Guardians*, 463 U.S. at 610-11 (Powell, J., concurring in judgment, joined by Burger, C.J. & Rehnquist, J.); *id.* at 612, 615 (O'Connor, J., concurring in judgment); *id.* at 642-45 (Stevens, J., dissenting, joined by Brennan & Blackmun, JJ.); see also *Sandoval*, 532 U.S. at 280; Colopy, *supra* note 4, at 159; Mank, *Private Cause*, *supra* note 5, at 14; Mank, *Title VI Regulations*, *supra* note 43, at 524.

<sup>169</sup> *Guardians*, 463 U.S. at 597 n.20 (opinion of White, J.); see also Anne D. Byrne, Casenote and Comment, *School District Liability Under Title IX for Sexual Abuse of a Student by a Teacher*, 22 HAMLINE L. REV. 587, 600 (1999).

<sup>170</sup> See *Guardians*, 463 U.S. at 584 & n.2, 589-93 (opinion of White, J.); *id.* at 615, 623 (Marshall, J., dissenting); see also Mank, *Private Cause*, *supra* note 5, at 14, 33; Mank, *Title VI Regulations*, *supra* note 43, at 524-25; Mello, *supra* note 43, at 965.

<sup>171</sup> See *Guardians*, 463 U.S. at 584 & n.2, 591-95 (opinion of White, J.) ("The threshold issue before the Court is whether the private plaintiffs in this case need to prove discriminatory intent to establish a violation of Title VI . . . and administrative implementing regulations promulgated thereunder. I conclude, as do four other Justices, in separate opinions, that the Court of Appeals erred in requiring proof of discriminatory intent."); *id.* at 635-39, 642-45 (Stevens, J., dissenting, joined by Brennan & Blackmun, JJ.); *id.* at 623, 625-26, 634 (Marshall, J., dissenting); see also Colopy, *supra* note 4, at 159; Mank, *Private Cause*, *supra* note 5, at 14, 33-34; Mank, *Title VI Regulations*, *supra* note 43, at 525-27; Mello, *supra* note 43, at 965-68.

effects in order to prove a violation of [the regulations].”<sup>172</sup> Justice Stevens argued that prior precedent, including *Lau*, supported the authority of federal agencies to issue disparate impact regulations pursuant to § 602.<sup>173</sup> Additionally, the Justice contended that the plaintiffs could enforce and receive compensation for violations of § 602 disparate impact regulations under 42 U.S.C. § 1983, because the regulations were reasonably related to the purposes of the statute and therefore had the “force of law” under § 1983.<sup>174</sup> Justices White and Marshall each would have allowed disparate impact suits under either § 601 or § 602.<sup>175</sup> Accordingly, five members of the *Guardians* Court—Justices Brennan, White, Marshall, Blackmun, and Stevens—suggested or averred that plaintiffs could enforce § 602 disparate impact regulations, either directly as an implied right of action or indirectly through § 1983.<sup>176</sup>

In 1985, in *Alexander v. Choate*,<sup>177</sup> the Supreme Court addressed whether plaintiffs can establish a prima facie case under § 504 of the Rehabilitation Act of 1973<sup>178</sup> by proving disparate impact discrimination.<sup>179</sup> Because Congress modeled § 504 of the Rehabilitation Act on Title VI and used nearly identical language, *Choate* relied on the Court’s Title VI jurisprudence, especially the *Guardians* decision.<sup>180</sup> The Court conceded that “Title VI itself

<sup>172</sup> *Guardians*, 463 U.S. at 645 (Stevens, J., dissenting); see also Mank, *Private Cause*, *supra* note 5, at 14-15, 34; Mank, *Title VI Regulations*, *supra* note 43, at 525.

<sup>173</sup> *Guardians*, 463 U.S. at 642-45 (Stevens, J., dissenting); see also Mank, *Title VI Regulations*, *supra* note 43, at 525.

<sup>174</sup> *Guardians*, 463 U.S. at 642-45 (Stevens, J., dissenting); see also Mank, *Section 1983*, *supra* note 114, at 341 (discussing Justice Stevens’ argument that Title VI’s disparate impact regulations are enforceable through § 1983); Mank, *Title VI Regulations*, *supra* note 43, at 525-26 Mello, *supra* note 43, at 965, 967-68.

<sup>175</sup> See *Guardians*, 463 U.S. at 584 & n.2, 589-93 (opinion of White, J.); *id.* at 615, 623 (Marshall, J., dissenting); see also Mank, *Private Cause*, *supra* note 5, at 15, 33-34; Mank, *Title VI Regulations*, *supra* note 43, at 526-27.

<sup>176</sup> See *Guardians*, 463 U.S. at 584 & n.2, 589-93 (opinion of White, J.); *id.* at 635-45 (Stevens, J., dissenting, joined by Brennan & Blackmun, JJ.); *id.* at 615, 623-26, 634 (Marshall, J., dissenting); see also Chester Residents Concerned for Quality Living v. Seif, 132 F.3d 925, 930 (3d Cir. 1997) (summarizing *Guardians* and concluding that five justices determined that plaintiffs could enforce § 602 disparate impact regulations), *vacated as moot*, 524 U.S. 974 (1998); Mank, *Title VI Regulations*, *supra* note 43, at 525-27.

<sup>177</sup> 469 U.S. 287 (1985).

<sup>178</sup> 29 U.S.C. § 794 (2000 & Supp. I 2001).

<sup>179</sup> *Choate*, 469 U.S. at 290-91; see also Mank, *Title VI Regulations*, *supra* note 43, at 527.

<sup>180</sup> *Choate*, 469 U.S. at 295 n.13 (explaining that § 504 was originally proposed as an amendment to Title VI); see also United States Dep’t of Transp. v. Paralyzed Veterans of Am., 477 U.S. 597, 600 (1986) (stating that § 504 and its regulations were modeled after Title VI); see also Mank, *Title VI Regulations*, *supra* note 43, at 527;

directly reach[es] only instances of intentional discrimination.”<sup>181</sup> However, the *Choate* decision unanimously read *Guardians* to authorize federal agencies to issue § 602 regulations forbidding recipient practices resulting in disparate impact discrimination, stating that “[t]he [*Guardians*] Court held that actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI.”<sup>182</sup> Additionally, the *Choate* Court indicated in dicta that *Guardians* had suggested that there was an implied private right of action to enforce § 602 disparate impact regulations: “*Guardians* suggests that the regulations implementing § 504, upon which respondents in part rely, could make actionable the disparate impact challenged in this case.”<sup>183</sup>

C. *Sandoval: Rejecting Private Rights of Action for Disparate Impact Regulations*

1. Justice Scalia’s Majority Opinion: No Private Right of Action Under Title VI for Disparate Impact Discrimination

Although neither *Guardians* nor *Choate* clearly decided whether a private right of action exists to enforce § 602 disparate impact regulations, these decisions arguably implied such a result. Every federal court of appeals that addressed this question before *Sandoval* concluded that private plaintiffs may bring a private right of action to enforce § 602 disparate impact regulations.<sup>184</sup> However, in *Sandoval*,

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Colopy, *supra* note 4, at 156-57 n.140. *But see* *Consol. Rail Corp. v. Darrone*, 465 U.S. 624, 632-33 n.13 (1984) (recognizing differences between Title VI and § 504).

<sup>181</sup> *Choate*, 469 U.S. at 293; *see also* Mank, *Title VI Regulations*, *supra* note 43, at 527.

<sup>182</sup> *Choate*, 469 U.S. at 293; *see also* Mank, *Title VI Regulations*, *supra* note 43, at 527.

<sup>183</sup> *Choate*, 469 U.S. at 294 (footnote omitted); *see also* Mank, *Title VI Regulations*, *supra* note 43, at 527-28.

<sup>184</sup> *See, e.g.*, *Sandoval v. Hagan*, 197 F.3d 484, 501-07 (11th Cir. 1999), *rev’d sub nom.* *Alexander v. Sandoval*, 532 U.S. 275 (2001); *Powell v. Ridge*, 189 F.3d 387, 397-400 (3d Cir. 1999); *Ferguson v. Charleston*, 186 F.3d 469 (4th Cir. 1999), *rev’d on other grounds*, 532 U.S. 67 (2001); *Villanueva v. Carere*, 85 F.3d 481, 486 (10th Cir. 1996); *N.Y. Urban League, Inc. v. New York*, 71 F.3d 1031, 1036 (2d Cir. 1995); *City of Chicago v. Lindley*, 66 F.3d 819, 827-29 (7th Cir. 1995); *David K. v. Lane*, 839 F.2d 1265, 1274 (7th Cir. 1988); *Larry P. v. Riles*, 793 F.2d 969, 982 n.9 (9th Cir. 1984); *see also* *Buchanan v. Bolivar*, 99 F.3d 1352, 1356 n.5 (6th Cir. 1996) (dictum); *Latinos Unidos de Chelsea en Accion v. Secretary of HUD*, 799 F.2d 774, 785 n.20 (1st Cir. 1986) (dictum); *Castaneda v. Pickard*, 781 F.2d 456, 465-66 n.11 (5th Cir. 1986) (dictum); Mank, *Private Cause*, *supra* note 5, at 35-36 n.209; *Rosenbaum & Teitelbaum*, *supra* note 31, at 225 n.53. One decision, *New York City Envtl. Justice Alliance v. Giuliani*, 214 F.3d 65 (2d Cir. 2000), questioned but did not decide whether there is a private right of action to enforce § 602 disparate impact

the Supreme Court held that § 602 regulations prohibiting disparate impact practices do not create a federal private right of action.<sup>185</sup> The *Sandoval* plaintiffs claimed that the § 602 disparate impact regulations established a private right of action.<sup>186</sup> They contended that the Alabama Department of Public Safety's policy of administering its driver's license examination only in English established a prima facie case of disparate impact discrimination in violation of the relevant § 602 regulations.<sup>187</sup>

To determine the meaning of § 602, the *Sandoval* Court emphasized that its purpose was "to effectuate the provisions of [§ 601] . . . by issuing rules, regulations, or orders of general applicability."<sup>188</sup> Acknowledging that *Guardians* and *Choate* had established that § 601 creates an implied private right of action against intentional discrimination, the *Sandoval* Court observed that "private individuals may sue to enforce § 601 of Title VI and obtain both injunctive relief and damages."<sup>189</sup> Concluding that *Guardians* and *Choate* were not controlling precedent, Justice Scalia, writing the majority opinion, determined that the present case raised the different question of whether there is a private right of action to enforce § 602 regulations prohibiting disparate impact discrimination.<sup>190</sup> Rejecting Justice Stevens' argument that the *Cannon* decision had implicitly recognized a private right of action to enforce disparate impact regulations,<sup>191</sup> the Court concluded that although *Cannon* had held "that Title IX created a private right of action to enforce its ban on intentional discrimination," that decision did not "consider whether the right reached regulations barring disparate-impact discrimination."<sup>192</sup> Similarly, rejecting any argument that the *Guardians* decision had held or implied that there was a private right of action to enforce § 602 regulations prohibiting disparate impact discrimination, the *Sandoval* Court determined that *Guardians* merely "held that private individuals could not recover compensatory damages under Title VI except for intentional

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regulations. *See id.* at 69-72.

<sup>185</sup> *Sandoval*, 532 U.S. at 293.

<sup>186</sup> *Id.* at 278-79.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 278 (citing 42 U.S.C. § 2000d-1) (alterations in original) (internal quotation marks omitted); *see also* Short, *supra* note 4, at 126.

<sup>189</sup> *Sandoval*, 532 U.S. at 279-81 (citing *Choate*, 469 U.S. at 293; *Guardians*, 463 U.S. at 610-11); *see also* Short, *supra* note 4, at 125-26.

<sup>190</sup> *Sandoval*, 532 U.S. at 279-81; *see also* Short, *supra* note 4, at 125-26.

<sup>191</sup> *See infra* notes 223-24 and accompanying text.

<sup>192</sup> *Sandoval*, 532 U.S. at 282; *see also* Short, *supra* note 4, at 126.

discrimination.”<sup>193</sup> Moreover, the Court concluded that Justice Stevens’ *Guardians* opinion had not addressed the “question of a direct private right of action to enforce the regulations,” because it was not an issue presented in the case.<sup>194</sup>

The *Sandoval* Court determined that plaintiffs may not file a private right of action to enforce § 602 regulations prohibiting disparate impact discrimination because those regulations go beyond the core prohibition against intentional discrimination in § 601. Although the Court’s 1974 *Lau* decision had implied that both § 601 and § 602 prohibited disparate impact discrimination, subsequent decisions had made it “clear now that the disparate-impact regulations do not simply apply § 601—since they indeed forbid conduct that § 601 permits—and therefore clear that the private right of action to enforce § 601 does not include a private right to enforce these regulations.”<sup>195</sup> Furthermore, “assum[ing] for purposes of this decision that § 602 confers the authority to promulgate disparate-impact regulations,” the *Sandoval* Court stated, “the question remains whether it confers a private right of action to enforce them. If not, we must conclude that a failure to comply with regulations promulgated under § 602 that is not also a failure to comply with § 601 is not actionable.”<sup>196</sup>

In determining whether § 602 disparate impact regulations establish a private right of action, the *Sandoval* Court used its post-*Cort* principle that “private rights of action to enforce federal law must be created by Congress.”<sup>197</sup> With respect to statutory intent, the *Sandoval* Court refused to consider whether a private right of action would serve Title VI’s purposes or even whether Congress in 1964 assumed that courts would imply a private right of action. The Court observed that, since *Cort v. Ash*, it had consistently rejected *Borak*’s view that “it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose’ expressed by a statute,” even when the Court reviewed statutes enacted before *Cort v. Ash* was decided.<sup>198</sup> Rejecting the respondents’ argument that it should apply *Borak*’s approach to a statute enacted just after that decision, the *Sandoval* Court declared,

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<sup>193</sup> *Sandoval*, 532 U.S. at 282-83; see also Short, *supra* note 4, at 126.

<sup>194</sup> *Sandoval*, 532 U.S. at 283 n.3. *But see id.* at 300 n.6 (Stevens, J., dissenting) (taking issue with the Court’s reading of his statement in *Guardians*).

<sup>195</sup> *Id.* at 284.

<sup>196</sup> *Id.* at 286; see also Mank, *Context*, *supra* note 106, at 859; Short, *supra* note 4, at 127.

<sup>197</sup> *Sandoval*, 532 U.S. at 286.

<sup>198</sup> *Sandoval*, 532 U.S. at 287 (quoting *Borak*, 377 U.S. at 433).

“[h]aving sworn off the habit of venturing beyond Congress’s intent, we will not accept respondents’ invitation to have one last drink.”<sup>199</sup>

## 2. A Textualist Approach to Private Rights of Action

The *Sandoval* Court focused on the text of § 602 in deciding whether Congress intended to create a private right of action to enforce regulations promulgated under § 602. Applying a textualist approach to statutory interpretation, the Court observed that “[t]he judicial task is to interpret *the statute Congress has passed* to determine whether *it* displays an intent to create not just a private right but also a private remedy. *Statutory intent* on this latter point is determinative.”<sup>200</sup> The Court concluded that “[w]e therefore begin (and find that we can end) our search for Congress’s intent with the text and structure of Title VI.”<sup>201</sup> The Court’s focus on the statute’s text in determining whether a statute established a private right of action led it to reject the respondents’ argument that rights might arise from agency regulations.<sup>202</sup> The Court announced that “[l]anguage in a regulation may invoke a private right of action that *Congress through statutory text* created, but it may not create a right that Congress has not.”<sup>203</sup> The Court emphasized that regulations alone may not create individual rights, stating that “it is most certainly incorrect to say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress. Agencies may play the sorcerer’s apprentice but not the sorcerer himself.”<sup>204</sup>

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<sup>199</sup> *Id.*; see also Mank, *Context, supra* note 106, at 859-60; Short, *supra* note 4, at 128.

<sup>200</sup> *Sandoval*, 532 U.S. at 286-87 (emphasis added) (citation omitted).

<sup>201</sup> *Id.* at 288; see also Mank, *Context, supra* note 106, at 860; Short, *supra* note 4, at 128-29.

<sup>202</sup> *Sandoval*, 532 U.S. at 291; see also Mank, *Context, supra* note 106, at 860; Short, *supra* note 4, at 129.

<sup>203</sup> *Sandoval*, 532 U.S. at 291 (emphasis added); see also Mank, *Context, supra* note 106, at 860; Short, *supra* note 4, at 129.

<sup>204</sup> *Sandoval*, 532 U.S. at 291. Lower courts have disagreed as to what extent agency regulations may guide courts in defining statutory rights. Compare *Save Our Valley v. Sound Transit*, 335 F.3d 932 (9th Cir. 2003) (holding valid agency regulations such as Title VI disparate impact regulations could not establish individual rights enforceable through § 1983 because only Congress may establish enforceable rights through statutes and Title VI only prohibited intentional discrimination), and *Charles Davant IV, Sorcerer or Sorcerer’s Apprentice?: Federal Agencies and the Creation of Individual Rights*, 2003 Wis. L. REV. 613 (arguing that Title VI regulations do not establish right enforceable under § 1983), with *Langlois v. Abington Hous. Auth.*, 234 F. Supp. 2d 33, 50-53 (D. Mass. 2002) (concluding that valid agency regulations may establish individual rights enforceable through § 1983, and holding that certain HUD regulations under Title VIII, Fair Housing Act of 1968, are enforceable through § 1983, and also suggesting in dicta that Title VI disparate impact regulations are enforceable through § 1983), and *Recent Case, Save*

Because of its textualist approach, the *Sandoval* Court refused to apply the approach it had used in *Cannon*; namely, considering the contemporary legal context of liberal implication of private rights of action in *Borak* and other decisions at the time Congress enacted Title VI in 1964.<sup>205</sup> The *Sandoval* majority went on to disagree “with the Government that our cases interpreting statutes enacted prior to *Cort v. Ash* have given dispositive weight to the expectations that the enacting Congress had formed in light of the contemporary legal context.”<sup>206</sup> The Court responded that “legal context matters only to the extent it clarifies text.”<sup>207</sup> A strong argument can be made, however, that courts should consider the contemporary legal context in which Congress enacted a statute to understand the text of the statute.<sup>208</sup>

Because the text of § 602 does not include any explicit provision authorizing private remedies, the *Sandoval* decision concluded that there is no private right of action to enforce disparate impact regulations promulgated under § 602 of Title VI.<sup>209</sup> The Court also determined that subsequent amendments to Title VI did not provide sufficient evidence that Congress intended to create a private right of action to enforce § 602’s regulations, because those amendments did not explicitly recognize such remedies, even if many members of Congress tacitly assumed that they existed because of numerous lower court decisions implying such rights.<sup>210</sup> Accordingly, the *Sandoval* decision held that “[n]either as originally enacted nor as later amended does Title VI display an intent to create a freestanding private right of action to enforce regulations promulgated under § 602. We therefore hold that no such right of action exists.”<sup>211</sup>

However, *Sandoval* acknowledged that plaintiffs could still bring a private action against recipients by alleging that they had

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Our Valley v. Sound Transit, 335 F.3d 932 (9th Cir. 2003), 117 HARV. L. REV. 735 (2003) (criticizing Ninth Circuit’s holding in *Save Our Valley* that Title VI regulations do not establish right enforceable under § 1983).

<sup>205</sup> *Sandoval*, 532 U.S. at 286; see also Mank, *Context*, *supra* note 106, at 817, 859-60, 866-70 (arguing that *Sandoval* decision was wrong in failing to consider contemporary legal context of liberal implication of private rights of action when Congress enacted Title VI in 1964); Short, *supra* note 4, at 128 (discussing *Sandoval* decision’s rejection of contemporary legal context doctrine).

<sup>206</sup> *Sandoval*, 532 U.S. at 287-88 (internal quotation marks omitted).

<sup>207</sup> *Id.* at 286.

<sup>208</sup> See *supra* note 205.

<sup>209</sup> *Sandoval*, 532 U.S. at 288-92; see also Mank, *Context*, *supra* note 106, at 860.

<sup>210</sup> *Sandoval*, 532 U.S. at 291-92; see also Mank, *Context*, *supra* note 106, at 860-61; Short, *supra* note 4, at 129.

<sup>211</sup> *Sandoval*, 532 U.S. at 293.

committed intentional discrimination in violation of either § 601 or “regulations applying § 601’s ban on intentional discrimination.”<sup>212</sup> Citing *Chevron*, the Court stated that regulations, including those promulgated under § 602, were enforceable to the extent that they effectuated § 601’s core prohibition against intentional discrimination:

We do not doubt that regulations applying § 601’s ban on intentional discrimination are covered by the cause of action to enforce that section. Such regulations, if valid and reasonable, authoritatively construe the statute itself . . . . A Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute to be so enforced as well.<sup>213</sup>

As discussed in Parts IV.B.3 and V.C, *infra*, according to this reasoning, anti-retaliation regulations under Title VI or Title IX would be enforceable if they addressed § 601 or § 901’s ban on intentional discrimination, rather than practices causing disparate impacts.<sup>214</sup>

Furthermore, the *Sandoval* Court in dicta questioned the validity of the § 602 disparate impact regulations, although it did not decide the issue because the petitioners had not challenged the regulations, but only whether they were enforceable through a private right of action.<sup>215</sup> Questioning whether § 602’s disparate impact regulations were consistent with its precedent holding that § 601 prohibits only intentional discrimination,<sup>216</sup> the Court “observ[ed] . . . how strange it is to say that disparate-impact regulations are ‘inspired by, at the service of, and inseparably intertwined with’ § 601, when § 601

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<sup>212</sup> *Id.* at 284.

<sup>213</sup> *Id.* (citing *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 257 (1995); *Chevron*, 467 U.S. at 843-44).

<sup>214</sup> See *infra* text accompanying notes 334-40, 360-63, 404, 409-10.

<sup>215</sup> See *Sandoval*, 532 U.S. at 281-82.

<sup>216</sup> See *Sandoval*, 532 U.S. at 281-82. But see Mank, *Title VI Regulations*, *supra* note 43, at 519-20 (arguing that Justice Scalia’s *Sandoval* decision was wrong to question the validity of Title VI’s § 602 disparate impact regulations because the statute’s legislative history and subsequent related amendments support their validity); Galalis, *supra* note 43, at 65, 92-101 (arguing that Justice Scalia’s *Sandoval* decision was wrong to question the validity of Title VI’s § 602 disparate impact regulations because they are entitled to deference under *Chevron*, because term “discrimination” in § 602 is ambiguous, and disparate impact regulations are reasonable interpretations of statute); Note, *supra* note 49, at 1781 (arguing that Justice Scalia’s *Sandoval* decision was wrong to question the validity of Title VI’s § 602 disparate impact regulations because they deserve deference under *Chevron*, § 602 is ambiguous, and disparate impact regulations are reasonable interpretations and means to effectuate § 601’s antidiscrimination requirement).

permits the very behavior that the regulations forbid.”<sup>217</sup> Justice Scalia conceded that prior decisions of the Court had suggested that § 602’s disparate impact regulations were valid. The justice stated that “[t]hough no opinion of this Court has held that, five Justices in *Guardians* voiced that view of the law at least as alternative grounds for their decisions,”<sup>218</sup> and that “dictum in *Alexander v. Choate* is to the same effect.”<sup>219</sup> Despite this precedent, Justice Scalia argued that *Guardians*’ and *Choate*’s approval of disparate impact regulations under § 602 was “in considerable tension with the rule of *Bakke* and *Guardians* that § 601 forbids only intentional discrimination.”<sup>220</sup>

### 3. Justice Stevens’ Dissenting Opinion

In a dissenting opinion in *Sandoval*, Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, argued that the Court should consider the contemporary legal context at the time Congress enacted the statute in 1964<sup>221</sup> and, therefore, interpret Title VI to create an implied right of action for enforcing § 602 regulations because “[a]t the time of the promulgation of these regulations, prevailing principles of statutory construction assumed that Congress intended a private right of action whenever such a cause of action was necessary to protect individual rights granted by valid federal law.”<sup>222</sup> Additionally, while acknowledging that *Cannon* did not directly address whether there was a private cause of action for § 602 disparate impact regulations, Justice Stevens argued that the *Cannon* decision supported recognizing such a right because the Court had not distinguished between intentional and unintentional discrimination when it concluded that Congress had assumed that there would be an implied right of action under Title IX in the face of judicial decisions that had already recognized such a right under Title VI.<sup>223</sup> Justice Stevens stated:

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<sup>217</sup> *Sandoval*, 532 U.S. at 286 n.6 (quoting *id.* at 306-07 (Stevens, J., dissenting)) (internal cross reference omitted).

<sup>218</sup> *Id.* at 281-82 (citing *Guardians*, 463 U.S. at 591-52 (opinion of White, J.); *id.* at 623 n.15 (Marshall, J., dissenting); *id.* at 643-645 (Stevens, J., dissenting,)).

<sup>219</sup> *Id.* at 282 (citing *Choate*, 469 U.S. at 293, 295 n.11).

<sup>220</sup> *Id.* (citing *Guardians*, 463 U.S. at 612-13 (O’Connor, J., concurring in judgment)). *But see supra* note 216.

<sup>221</sup> *Sandoval*, 532 U.S. at 294, 312-17 (Stevens, J., dissenting); *see also* Mank, *Context, supra* note 106, at 861-67; Short, *supra* note 4, at 130.

<sup>222</sup> *Sandoval*, 532 U.S. at 294 (Stevens, J., dissenting); *see also* Mank, *Context, supra* note 106, at 861-67; Short, *supra* note 4, at 130.

<sup>223</sup> *Sandoval*, 532 U.S. at 297-99, 312-13 (Stevens, J., dissenting); *see also* Mank, *Context, supra* note 106, at 862-63, 867. However, Justice Stevens conceded that reasonable jurists could disagree as to whether *Cannon* had resolved whether Title IX

The opinion in *Cannon* . . . does not draw any distinctions between the various types of discrimination outlawed by the operation of those statutes. . . . [I]t could hardly have been more clear as to the scope of its holding: A private right of action exists for “victims of *the* prohibited discrimination.” Not some of the prohibited discrimination, but all of it.<sup>224</sup>

Furthermore, Justice Stevens maintained that the statute and regulations were so interconnected that it was reasonable to assume that if Congress had intended to allow a private cause of action under § 601, then it was also reasonable to assume there would be a cause of action under § 602.<sup>225</sup> The dissent contended that “[s]ection 601 does not stand in isolation, but rather as part of an integrated remedial scheme. Section 602 exists for the sole purpose of forwarding the antidiscrimination ideals laid out in § 601.”<sup>226</sup> Justice Stevens also argued that the Court in *Lau*, *Guardians*, and *Choate*, as well as numerous lower courts, had for over thirty years consistently approved § 602 disparate impact regulations as advancing § 601’s antidiscrimination prohibition, even if § 602 regulations were broader in some ways than those promulgated under § 601.<sup>227</sup>

Justice Stevens further argued that the majority’s refusal to defer to the agency’s § 602 regulations was contrary to the *Chevron* doctrine, which requires courts to defer to an appropriate agency’s reasonable interpretation of an ambiguous statutory term such as “discrimination.”<sup>228</sup> Justice Stevens argued, “[i]n most other contexts, when the agencies charged with administering a broadly-worded statute offer regulations interpreting that statute or giving concrete guidance as to its implementation, we treat their interpretation of the statute’s breadth as controlling unless it presents an unreasonable construction of the statutory text.”<sup>229</sup> Under *Chevron*, there is a good

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contained an implied right of action for disparate impact discrimination. *Sandoval*, 532 U.S. at 313 (Stevens, J., dissenting); see also Mank, *Context*, *supra* note 106, at 859 n.277.

<sup>224</sup> *Sandoval*, 532 U.S. at 297-99, 312-13 (Stevens, J., dissenting) (citation omitted); see also Mank, *Context*, *supra* note 106, at 862-67; Short, *supra* note 4, at 131.

<sup>225</sup> *Sandoval*, 532 U.S. at 304 (Stevens, J., dissenting); see also Mank, *Context*, *supra* note 106, at 861-65; Rosenbaum & Teitelbaum, *supra* note 31, at 242; Short, *supra* note 4, at 131-32.

<sup>226</sup> *Sandoval*, 532 U.S. at 304 (Stevens, J., dissenting).

<sup>227</sup> *Id.* at 301-02, 305 (Stevens, J., dissenting); see also Mank, *Context*, *supra* note 106, at 861-65; Short, *supra* note 4, at 132.

<sup>228</sup> *Sandoval*, 532 U.S. at 309 (Stevens, J., dissenting) (citing *Chevron*, 467 U.S. 837); see also Mank, *Title VI Regulations*, *supra* note 43, at 530 (arguing that majority opinion in *Sandoval* ignored *Chevron* deference principle); Short, *supra* note 4, at 133.

<sup>229</sup> *Sandoval*, 532 U.S. at 309 (Stevens, J., dissenting) (citing *Chevron*, 467 U.S.

argument that courts should defer to agency interpretations of Title VI and Title IX, because the term “discrimination” in these statutes is ambiguous.<sup>230</sup>

Justice Stevens contended that the majority opinion might have little significance because, even if there was no private right of action available to enforce § 602 regulations, a suit under § 1983 could enforce those same regulations indirectly because of its broader standards for enforcing federal rights.<sup>231</sup> However, in 2002, the Supreme Court in *Gonzaga University v. Doe*<sup>232</sup> held that the Family Educational Rights and Privacy Act was not privately enforceable through § 1983.<sup>233</sup> The Court in *Gonzaga* concluded that whether individual rights are enforceable through either § 1983 or an implied private right of action depends on “whether Congress *intended to create a federal right.*”<sup>234</sup> Justice Stevens wrote a vigorous dissent in *Gonzaga*, which was joined by Justice Ginsburg, disagreeing with the majority’s premise that enforceable § 1983 rights are as limited as those in an implied private right of action.<sup>235</sup> Because the Court had held in *Sandoval* that only Congress can create implied rights of action, some lower courts have interpreted *Gonzaga* as foreclosing § 1983 suits to enforce Title VI regulations,<sup>236</sup> although other lower courts have

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837).

<sup>230</sup> See Black, *supra* note 2, at 361-62 (arguing that agency interpretations of Title VI deserve deference because agencies such as Department of Education possess significant experience and expertise in applying statute); Galalis, *supra* note 43, at 65, 92-101 (arguing that Title VI’s § 602 disparate impact regulations are entitled to deference under *Chevron* because term “discrimination” in § 602 is ambiguous and disparate impact regulations are reasonable interpretations of statute); Note, *supra* note 49, at 1781 (arguing that Justice Scalia’s *Sandoval* decision was wrong to question the validity of Title VI’s § 602 disparate impact regulations because they deserve deference under *Chevron*, § 602 is ambiguous, and disparate impact regulations are reasonable interpretations and means to effectuate § 601’s antidiscrimination requirement).

<sup>231</sup> See *Sandoval*, 532 U.S. at 299-300 (Stevens, J., dissenting); see generally Mank, *Section 1983*, *supra* note 114, at 348-53, 367-82 (arguing that Title VI disparate impact regulations may be enforced through § 1983).

<sup>232</sup> 536 U.S. 273 (2002).

<sup>233</sup> *Id.* at 287-91; see also Mank, *Gonzaga*, *supra* note 68, at 1450-52.

<sup>234</sup> *Gonzaga*, 536 U.S. at 283; see also Mank, *Gonzaga*, *supra* note 68, at 1448-51.

<sup>235</sup> *Gonzaga*, 536 U.S. at 293-303 (Stevens, J., dissenting); see also Mank, *Gonzaga*, *supra* note 68, at 1453-55, 1457-58.

<sup>236</sup> See *Save Our Valley v. Sound Transit*, 335 F.3d 932, 939 (9th Cir. 2003) (holding that § 602 regulations are not enforceable through § 1983 and stating, “[w]e believe the Supreme Court’s *Sandoval* and *Gonzaga* decisions, taken together, compel the conclusion we reach today: that agency regulations cannot independently create rights enforceable through § 1983”); *South Camden Citizens in Action v. N.J. Dep’t. of Envtl. Prot.*, 274 F.3d 771, 784-90 (3d Cir. 2001) (holding that § 602 regulations are not enforceable through § 1983); see also Mank, *Gonzaga*, *supra*

disagreed.<sup>237</sup> Accordingly, Justice Stevens' hope that § 1983 suits might allow victims of discrimination to enforce § 602 disparate impact regulations may be lost.

*Sandoval* did not address the disparate impact regulations issued by agencies pursuant to § 902 of Title IX. However, given the similarities between § 602 and § 902, it is likely that *Sandoval* forecloses the possibility of a private right of action under § 902 for disparate impacts.<sup>238</sup> A more difficult question is whether a suit alleging retaliation by a school or employer is an intentional discrimination claim consistent with § 601 or § 901, or more analogous to a disparate impact claim pursuant to § 602 or § 902.

### III. RETALIATION

#### A. *Sullivan and Its Progeny Imply a Private Right of Action Against Retaliation*

The Supreme Court has consistently treated retaliation against civil rights complainants as a form of intentional discrimination. The Court has held that “retaliation offends the Constitution [because] it threatens to inhibit exercise of the protected right” and “is thus akin to an unconstitutional condition demanded for the receipt of a government-provided benefit.”<sup>239</sup> Additionally, the Court has observed that it will recognize whatever remedies are necessary to effectuate a statutory right, because “the existence of a statutory right implies the existence of all necessary and appropriate remedies.”<sup>240</sup> Specifically, the Court has interpreted 42 U.S.C. §§ 1982 and 1983 to bar retaliation against complainants or litigants even though these

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note 68, at 1467 (“In light of *Gonzaga*, the argument that regulations alone may create rights enforceable through 1983 is probably untenable because a regulation alone normally cannot provide ‘clear’ and ‘unambiguous’ evidence that Congress intended to establish an individual right.”).

<sup>237</sup> *Robinson v. Kansas*, 295 F.3d 1183, 1187 (10th Cir. 2002) (holding Title VI regulation enforceable through § 1983); *Langlois v. Abington Hous. Auth.*, 234 F. Supp. 2d 33, 47-54 (D. Mass. 2002) (holding that properly promulgated regulations are enforceable through § 1983, although recognizing First Circuit had never decided issue); see also *Mank, Gonzaga, supra* note 68, at 1467-69.

<sup>238</sup> See *Short, supra* note 4, at 133-43 (discussing whether *Sandoval* forecloses possibility of private right of action under § 902).

<sup>239</sup> *Crawford-El v. Britton*, 523 U.S. 574, 588 n.10 (1998) (citations and internal quotation marks omitted); see also *Chandamuri v. Georgetown Univ.*, 274 F. Supp. 2d 71, 81 (D.D.C. 2003) (discussing Court’s approach to retaliation in *Crawford-El*).

<sup>240</sup> *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 69 (1992) (quoting *Carey v. Phipus*, 435 U.S. 247, 255 (1978)); see also *Chandamuri*, 274 F. Supp. 2d at 81 (discussing Supreme Court’s *Franklin* decision as supporting view that courts should provide remedies in retaliation cases).

statutes do not contain explicit prohibitions against retaliation.<sup>241</sup> In 1969, the Supreme Court in *Sullivan v. Little Hunting Park*,<sup>242</sup> held that § 1982 implicitly prohibits retaliation.<sup>243</sup> Applying similar reasoning, the Court in *Perry v. Sindermann*<sup>244</sup> held that the First Amendment implicitly prohibits retaliation by the government against a person for exercising his constitutional right of free speech, even if the plaintiff would otherwise have no right to the benefit at issue, because the government “may not deny a benefit to a person on a basis that

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<sup>241</sup> See *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 277-87 (1977) (stating that court has jurisdiction to consider plaintiff’s claim that board of education violated his First and Fourteenth Amendment rights by discharging him for exercise of free speech, even if he does not have tenure, and that plaintiff may use § 1983 to enforce alleged constitutional right against retaliation for exercise of free speech, but vacating and remanding to allow board of education to prove it would have discharged plaintiff for valid reasons, even absent protected conduct by teacher); *Perry v. Sindermann*, 408 U.S. 593 (1972) (determining that First Amendment prohibits government from penalizing employee for exercising right of free speech even if government could otherwise have denied benefits to plaintiff); *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969) (concluding that § 1982 prohibits retaliation even though text of § 1982 does not mention retaliation); see also *Chandamuri*, 274 F. Supp. 2d at 81 (discussing Supreme Court’s *Sullivan* and *Perry* decisions as supporting view that courts should interpret antidiscrimination statutes to imply private right of action against retaliation); *infra* notes 242-45 and accompanying text).

<sup>242</sup> 396 U.S. 229 (1969).

<sup>243</sup> *Id.*; see also *Chandamuri*, 274 F. Supp. 2d at 81 (discussing Supreme Court’s *Sullivan* decision as supporting view that courts should interpret antidiscrimination statutes to imply private right of action against retaliation).

<sup>244</sup> 408 U.S. 593, 597 (1972) (holding that First Amendment, as made enforceable by Fourteenth Amendment’s due process clause, implicitly prohibits retaliation by government to protect rights secured by statute). Several courts have applied *Perry*’s anti-retaliation principles to, *inter alia*, § 1983, which protects both individual constitutional rights, including First Amendment rights such as those at issue in *Perry*, as well as certain federal statutory rights. See, e.g., *Mt. Healthy*, 429 U.S. 274 (determining that plaintiff may use § 1983 to enforce constitutional right against retaliation for exercise of free speech); *Thaddeus-X v. Blatter*, 175 F.3d 378 (6th Cir. 1999) (retaliation claim under, *inter alia*, § 1983 and First Amendment); *ACLU of Md. v. Wicomico County*, 999 F.2d 780, 785 (4th Cir. 1993) (“Retaliation by a public official for the exercise of a constitutional right is actionable under 42 U.S.C. § 1983, even if the act, when taken for different reasons, would have been proper.”) (citing *Mt. Healthy*, 429 U.S. 274); *Soranno’s Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1314 (9th Cir. 1989) (stating that alleged First Amendment violation, if proved, would entitle plaintiffs to relief under § 1983); *Estrada v. Gomez*, No. C 96-1490 S1 (PR), 1998 WL 514068, at \*3 (N.D. Cal. Aug. 13, 1998) (“Retaliation by a state actor for the exercise of a constitutional right is actionable under 42 U.S.C. § 1983 because retaliatory actions may tend to chill individuals’ exercise of constitutional rights.”) (citing *Perry*, 408 U.S. at 597); *Kohl v. Smythe*, 25 F. Supp. 2d 1124, 1128-29 (D. Haw. 1998) (citing *Perry* for the principle that retaliation in violation of First Amendment is actionable under § 1983); *Wimer v. Holzapfel*, 868 F. Supp. 844, 849-50 (E.D. Tex. 1994) (same); *Di Giovanni v. Clyde Park Dist.*, No. 84 C 4809, 1986 WL 12596, at \*1 (N.D. Ill. Nov. 3, 1986) (same).

infringes his constitutionally protected interests—especially, his interest in freedom of speech,” which right against retaliation subsequent lower court cases have held enforceable through § 1983. Several lower court decisions have read *Sullivan* and its progeny as implying the broader proposition that other antidiscrimination statutes should be interpreted to create an “[i]mplicit . . . cause of action protecting people from private retaliation for refusing to violate other people’s rights under § 1981 or for exercising their own § 1981 rights.”<sup>245</sup>

*B. Do Title VII’s Express Retaliation Provisions Preclude an Implicit Right of Action Under Title VI or Title IX?*

Title VII of the Civil Rights Act of 1964 (“Title VII”)<sup>246</sup> explicitly prohibits retaliation against individuals who complain about employment discrimination.<sup>247</sup> By contrast, neither Title VI nor Title IX includes an explicit anti-retaliation provision. Because Congress initially enacted Title VI and Title VII as parts of the same act, some courts have suggested or concluded that the absence of an explicit anti-retaliation provision in Title VI demonstrates that Congress did not intend to protect Title VI complainants from retaliation because it knew how to do so by including an explicit right, as it did in Title VII.<sup>248</sup> Because Title IX was modeled on Title VI and also because

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<sup>245</sup> *Fair Employment Council v. BMC Mktg. Corp.*, 28 F.3d 1268, 1280 (D.C. Cir. 1994) (interpreting 42 U.S.C. § 1981 to create implied private right of action against retaliation); *see also* *Foley v. Univ. of Houston Sys.*, 324 F.3d 310, 315 (5th Cir. 2003) (stating that § 1981 “clearly established” anti-retaliation implied right of action for purposes of qualified immunity); *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 576 (6th Cir. 2000) (holding, citing *Sullivan*, that anti-retaliation claim is appropriate under § 1981); *Andrews v. Lakeshore Rehab. Hosp.*, 140 F.3d 1405, 1411-13 (11th Cir. 1998) (approving anti-retaliation claim under § 1981); *Phelps v. Wichita Eagle-Beacon*, 886 F.2d 1262, 1266-67 (10th Cir. 1989) (concluding that plaintiff, a white attorney, may bring anti-retaliation action under § 1981); *Skinner v. Total Petroleum, Inc.*, 859 F.2d 1439, 1447 (10th Cir. 1988) (concluding white employee could bring an anti-retaliation action under § 1981); *Fiedler v. Marumscos Christian Sch.*, 631 F.2d 1144, 1149 n.7 (4th Cir. 1980) (citing *Sullivan* in concluding that § 1981 created implied private right of action against retaliation); *Chandamuri v. Georgetown Univ.*, 274 F. Supp. 2d 71, 81 (D.D.C. 2003) (concluding that courts should generally interpret antidiscrimination statutes to imply private right of action against retaliation).

<sup>246</sup> 42 U.S.C. §§ 2000e–2000e-4 (2000).

<sup>247</sup> The anti-retaliation provision of Title VII states in relevant part that it shall be an unlawful employment practice for any employer to retaliate against an employee or an applicant for employment “because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.” 42 U.S.C. § 2000e-3(a).

<sup>248</sup> *See infra* notes 258, 283, 297, 299, 378-79 and accompanying text.

Congress sought to address gaps in Title VII when it enacted Title IX, the absence of an express anti-retaliation provision in Title IX may arguably suggest that Congress did not intend such a right of action for victims of retaliation.<sup>249</sup> On the other hand, the Supreme Court has recently stated that the same term or word may have different meanings even within different parts of a complex statute such as Title VII,<sup>250</sup> and therefore that it is necessary to examine the context in which a word is used before assuming that it has the same meaning in different parts of the same act.<sup>251</sup>

Although a word such as “retaliation” would seem to mean the same thing when used in different statutes, because of the differences between Title VII and Title VI or Title IX, courts should be cautious in drawing parallels between these statutes.<sup>252</sup> Despite Title VII’s explicit anti-retaliation provision, courts might still be able to construe an implied right under Title VI or Title IX because recipients of federal aid have voluntarily accepted financial assistance in exchange for accepting the conditions of Title VI or Title IX’s regulations, including regulations prohibiting retaliation.<sup>253</sup> Additionally, courts have interpreted Title VII itself to include an implied right of federal workers to bring an action for retaliation, even though the section that covers their employment does not include an express provision.<sup>254</sup> Thus, even to the extent that courts should construe Title VI or Title IX in light of Title VII, there is a strong argument in favor of implied rights of action against retaliation.<sup>255</sup>

*C. Title VII’s Mandatory Statutory Scheme Under the Commerce Power Is Different from Spending Clause Legislation Such as Title VI or Title IX*

To answer whether the courts should look to Title VII’s anti-retaliation provision in interpreting whether Title VI or Title IX establishes an implied right of action against retaliation, one must first examine the broader relationship between Title VII and Titles VI and IX. Before 1998, courts in Title VI and Title IX cases often relied

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<sup>249</sup> See *infra* notes 258, 283, 297, 299, 378-79 and accompanying text.

<sup>250</sup> *Gen. Dynamics Land Sys., Inc. v. Cline*, 124 S. Ct. 1236, 1245-46 (2004); see also *Robinson v. Shell Oil Co.*, 519 U.S. 337, 343-44 (1997) (stating that term “employee” has different meanings in different parts of Title VII).

<sup>251</sup> *General Dynamics*, 124 S. Ct. at 1246-47.

<sup>252</sup> See *infra* text accompanying notes 253-55, 264-90, 298, 300, 380-82.

<sup>253</sup> See *supra* notes 59-60 and *infra* notes 264-65 and accompanying text.

<sup>254</sup> See *infra* notes 384-85 and accompanying text.

<sup>255</sup> See *infra* notes 384-87 and accompanying text.

on Title VII decisions in interpreting these somewhat different statutes, especially in cases involving employment discrimination issues.<sup>256</sup> In part, courts in Title VI and Title IX cases examined Title VII decisions for guidance, because traditionally there have been more Title VII cases and hence more potential decisions addressing various procedural or substantive issues.<sup>257</sup> In particular, several Title VI and Title IX cases involving retaliation claims cited or relied on Title VII decisions.<sup>258</sup>

However, in 1998, the Supreme Court in *Gebser v. Lago Vista Independent School District*,<sup>259</sup> emphasized the significant differences between Title VII and Title IX.<sup>260</sup> In *Gebser*, the Court first held that a school could be held liable for sexual harassment not directly committed by the institution or its officers where it had notice of alleged sexual harassment by one student against another, but failed to exercise its authority to stop the harassment.<sup>261</sup> Because the student in *Gebser* had not informed the school district that she was

<sup>256</sup> *Nelson v. Univ. of Maine*, 923 F. Supp. 275, 279 (D. Me. 1996) (“Courts generally look to Title VII, 42 U.S.C. § 2000e, to supply the legal standards for both Title IX discrimination and retaliation claims.”); *see also* *Brine v. Univ. of Iowa*, 90 F.3d 271, 276 (8th Cir. 1996) (concluding that Title VII standards are applicable in Title IX employment discrimination cases); *Fay*, *supra* note 82, at 1504-05 (“Many courts instead looked to Title VII principles in an effort to evaluate Title IX claims of sexual harassment within schools.”); *see generally* Bradford C. Mank, *Environmental Justice and Title VI: Making Recipient Agencies Justify Their Siting Decisions*, 73 TUL. L. REV. 787, 799-809, 815-17 (1999) (discussing similarities and differences between Title VI and Title VII) [hereinafter Mank, *Recipient Agencies*].

<sup>257</sup> *See, e.g.*, *Brown v. Hot, Sexy and Safer Prods., Inc.*, 68 F.3d 525, 540 (1st Cir. 1995) (“Because the relevant case law under Title IX is relatively sparse, we apply Title VII case law by analogy.”); *Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881, 896 (1st Cir. 1988) (stating that court “can draw upon the substantial body of case law developed under Title VII to assess the plaintiff’s [Title IX claim]”).

<sup>258</sup> *See, e.g.*, *Murray v. N.Y. Univ. Coll. of Dentistry*, 57 F.3d 243, 248-50 (2d Cir. 1995) (discrimination and retaliation claims); *Preston v. Virginia ex rel. New River Cmty. Coll.*, 31 F.3d 203, 206-07 (4th Cir. 1994) (retaliation claim); *Nelson*, 923 F. Supp. 275 (discrimination and retaliation claims).

<sup>259</sup> 524 U.S. 274 (1998).

<sup>260</sup> *Id.* at 283-87 (discussing differences among Title VII, Title VI, and Title IX); *Jackson v. Birmingham Bd. Of Educ.*, 309 F.3d 1333, 1345 n.12 (11th Cir. 2002) (discussing *Gebser*); *Byrne*, *supra* note 169, at 595, 620-32 (criticizing *Gebser* for refusing to apply Title VII sexual harassment principles to Title IX, but acknowledging *Gebser* will limit use of Title VII analogies in Title IX cases); Julie Davis, *Assessing Institutional Responsibility for Sexual Harassment in Education*, 77 TUL. L. REV. 387, 401-08 (2002) (same); *Fay*, *supra* note 82, at 1524-28 (agreeing with *Gebser*’s distinction between Title VII and Title IX); Fermeen Fazal, Note, *Is Actual Notice an Actual Remedy? A Critique of Gebser v. Lago Vista Independent School District*, 36 HOUS. L. REV. 1033, 1042-43, 1062-90 (1999) (acknowledging that *Gebser* will limit use of Title VII analogies in Title IX cases).

<sup>261</sup> *Gebser*, 524 U.S. at 288-92; *see also* Black, *supra* note 2, at 362.

being harassed, the Court concluded that she was not entitled to damages from the district.<sup>262</sup>

In requiring actual knowledge of discrimination by a recipient,<sup>263</sup> the *Gebser* Court emphasized that Congress enacted both Title VI and Title IX pursuant to its Spending Clause power.<sup>264</sup> A Spending Clause statute like Title VI or Title IX creates a contract between the government and the grant recipient that requires the federal funding agency to provide adequate notice to the recipient before terminating funding so that the recipient can be given an opportunity to comply.<sup>265</sup> By contrast, Congress enacted Title VII pursuant to its general constitutional authority under the Commerce Clause, and, therefore, Title VII applies to all covered employers without any need for notice before a plaintiff or government agency commences an employment discrimination suit.<sup>266</sup> Thus, the *Gebser* Court concluded that a school district must have notice and an opportunity to stop the alleged sexual harassment before it may be held liable.<sup>267</sup> The Supreme Court held that a school district can be found liable for sexual harassment by an employee such as a teacher or coach only if it is deliberately indifferent after a student or someone else notifies it of ongoing sexual harassment.<sup>268</sup> This notice requirement and “deliberate indifference” standard is far more stringent for Title IX plaintiffs than the proof requirements for Title VII plaintiffs.<sup>269</sup> After *Gebser*, courts are likely to be more cautious in making analogies between Title VII and Titles VI and IX.<sup>270</sup>

Some of the distinctions the *Gebser* Court made between Title VII

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<sup>262</sup> *Gebser*, 524 U.S. at 277-78, 285; *see also* Joslin, *supra* note 112, at 209.

<sup>263</sup> *Gebser*, 524 U.S. at 290.

<sup>264</sup> The Spending Clause states in part: “The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States . . . .” U.S. CONST. art. I, § 8, cl. 1; *see Gebser*, 524 U.S. at 283-86; *Jackson*, 309 F.3d at 1345 n.12; Fay, *supra* note 82, at 1491-92 (discussing *Gebser*’s conclusion that Title IX is different from Title VII because former statute is based on Spending Clause); Fazal, *supra* note 260, at 1042-43, 1069, 1073-74 (same).

<sup>265</sup> *See Gebser*, 524 U.S. at 286-90; Byrne, *supra* note 169, at 599, 603-04 (discussing *Gebser*’s description of Title IX as based on contract similar to Title VI); Fay, *supra* note 82, at 1491 (same).

<sup>266</sup> *See Gebser*, 524 U.S. at 286-90; Fay, *supra* note 82, at 1491-92.

<sup>267</sup> *See Gebser*, 524 U.S. at 286-90.

<sup>268</sup> *Id.* at 290.

<sup>269</sup> *See* Byrne, *supra* note 169, at 618-32 (discussing and criticizing *Gebser*’s use of actual notice and deliberate indifference standards because they will make it more difficult for plaintiffs to sue and arguing that court should have applied Title VII standards instead); Fazal, *supra* note 260, at 1053-71 (same).

<sup>270</sup> *See* Byrne, *supra* note 169, at 595, 620-32; Fay, *supra* note 82, at 1524-28.

and Title IX may help Title VI or Title IX plaintiffs argue that courts should recognize a private right of action in cases of retaliation. For example, the *Gebser* Court observed that the text and structure of Title VII are markedly different than the provisions in Title IX.<sup>271</sup> These differences arguably justify a more liberal inference of private rights of action under Title VI or Title IX. For example, Title VII contains an express cause of action,<sup>272</sup> and explicitly provides for a damages remedy,<sup>273</sup> but courts have recognized a private right of action and remedies against intentional discrimination under both Title VI and Title IX despite the absence of any express statutory language.<sup>274</sup> Thus, the fact that Title VII contains an express anti-retaliation provision does not necessarily preclude courts from enforcing a private right under Title VI and Title IX. Additionally, although Congress enacted Title VI and Title VII in the same Act,<sup>275</sup> it has subsequently amended Title VII, as well as Titles VI and IX, in ways that accentuate their differences. For instance, when Congress enacted Title IX in 1972, Title VII did not provide for recovery of monetary damages, but allowed only injunctive and equitable relief.<sup>276</sup> In 1991, Congress amended Title VII to provide for a damages remedy, but did not similarly amend Title VI or Title IX.<sup>277</sup>

In some, but not all respects, Title VI and Title IX are arguably broader in coverage than Title VII, as to which Congress has adopted a number of limitations. In a dissenting opinion in *Gebser*, Justice Stevens observed that “the use of passive verbs in Title IX, focusing on the victim of the discrimination rather than the particular wrongdoer, gives this statute broader coverage than Title VII.”<sup>278</sup> Additionally, there are good policy arguments for interpreting Title VII more narrowly than Title VI or Title IX, because Title VII applies to a wider range of entities than the latter statutes. Title VII applies

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<sup>271</sup> See *Gebser*, 524 U.S. at 283-86; *Jackson*, 309 F.3d at 1345 n.12; see generally Mank, *Recipient Agencies*, *supra* note 256, at 799-809, 815-17 (discussing similarities and differences between Title VI and Title VII).

<sup>272</sup> 42 U.S.C. § 2000e-5(f) (2000); see also *Gebser*, 524 U.S. at 283.

<sup>273</sup> 42 U.S.C. § 1981a (2000); see also *Gebser*, 524 U.S. at 283.

<sup>274</sup> See *Gebser*, 524 U.S. at 283-84; *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 68-73 (1992) (implying Title IX damages remedy); *Cannon*, 441 U.S. at 717 (finding implied private right of action for Title IX and suggesting similar right of action for Title VI).

<sup>275</sup> See *supra* text accompanying note 248; *infra* notes 297, 299, 378-79 and accompanying text.

<sup>276</sup> See *Gebser*, 524 U.S. at 285-86 (discussing 42 U.S.C. § 2000a-3(a) (1970), § 2000e-5(e), (g) (Supp. II 1970)).

<sup>277</sup> See *Gebser*, 524 U.S. at 286 (discussing 42 U.S.C. § 1981a(b)(3)).

<sup>278</sup> *Id.* at 296 (Stevens, J., dissenting) (citing *Smith v. Metro. Sch. Dist. Perry Twp.*, 128 F.3d 1014, 1047 (7th Cir. 1997) (Rovner, J., dissenting)).

to all firms above a certain size in the private labor market.<sup>279</sup> By contrast, Title VI and Title IX are binding on only those parties who voluntarily accept federal aid.<sup>280</sup> Perhaps because Title VII is mandatory, while Titles VI and IX are voluntary, only Title VII explicitly acknowledges that defendants have affirmative defenses that may justify disparate impacts, and that employers are not required to hire either women or minorities to precisely reflect their percentage of the population.<sup>281</sup>

*D. Title IX's Anti-Retaliation Provision Differs from Title VII's*

Because there are significant differences between Titles VI and IX and Title VII,<sup>282</sup> one must be cautious in applying Title VII's anti-retaliation provision to either Title VI or Title IX retaliation complaints. Before the *Gebser* decision in 1998, lower courts had divided about whether retaliation allegations by Title VI or Title IX plaintiffs should be analyzed under Title VII or under the antidiscrimination principles of Title VI or Title IX.<sup>283</sup> Several courts had applied Title VII principles to Title IX retaliation cases because courts had found Title VII to be a useful model in other types of Title VI and Title IX cases.<sup>284</sup> Those decisions are now questionable.

Even before the Court decided *Gebser*, in *Lowrey v. Texas A&M University System*,<sup>285</sup> the United States Court of Appeals for the Fifth Circuit had determined that the explicit anti-retaliation provision of Title VII was different and separate from the anti-retaliation

<sup>279</sup> See Fisher, *supra* note 53, at 320; Mank, *Recipient Agencies*, *supra* note 256, at 816; Watson, *supra* note 54, at 971-73; Sonn, *supra* note 55, at 1596; see generally *Gebser*, 524 U.S. at 286-87 (discussing difference between Title VII generally applying to all employment relationships, if employer is above certain size, and Title IX applying only where recipient has voluntarily accepted funds from federal government).

<sup>280</sup> See *supra* note 279.

<sup>281</sup> See 42 U.S.C. § 2000e-2(j) (2000); Mank, *Recipient Agencies*, *supra* note 256, at 816.

<sup>282</sup> See *Gebser*, 524 U.S. at 283-86 (concluding explicit remedies in Title VII are different from arguably implicit remedies in Title VI); *Jackson*, 309 F.3d at 1345 n.12 (same); see generally *Franklin*, 911 F.2d at 622 (rejecting the application of Title VII standards to a Title IX claim concluding, "[w]e do not believe applying Title VII to Title IX would result in the kind of orderly analysis so necessary in this confusing area of law."), *rev'd on other grounds*, 503 U.S. 60 (1992); Mank, *Recipient Agencies*, *supra* note 258, at 799-809, 815-17 (discussing similarities and differences between Titles VI and VII). *But see Nelson*, 923 F. Supp. at 279-80 (concluding that retaliation claims are similar under Titles VII and IX).

<sup>283</sup> See Heckman, *supra* note 7, at 595-610 (discussing Title IX retaliation cases) & n.314 (listing Title IX retaliation cases); *infra* notes 284-89 and accompanying text.

<sup>284</sup> See *supra* note 258 and cases cited therein.

<sup>285</sup> 117 F.3d 242 (5th Cir. 1997).

principles implicit in Title IX.<sup>286</sup> The court first concluded that the express anti-retaliation provision in Title VII prohibited retaliation against only those individuals who have complained of employment discrimination as defined by that statute.<sup>287</sup> The Fifth Circuit then determined that Title VII's anti-retaliation provision did not preempt retaliation claims resulting from complaints about discrimination as defined by Title IX, which has a significantly different definition of discrimination than Title VII.<sup>288</sup> Thus, the plaintiff's contention that she was denied a promotion because she complained that the defendant had misallocated resources between male and female athletes was within the realm of Title IX's anti-retaliation provision, not Title VII's anti-retaliation provision.<sup>289</sup>

Although it concluded that Title IX did not establish a private cause of action for employment discrimination,<sup>290</sup> the Fifth Circuit held that the statute did implicitly authorize a private action for retaliation claims under the Department of Education's Title IX anti-retaliation regulation, 34 C.F.R. § 100.7(e). At the time, in 1997, the Fifth Circuit recognized that it was appropriate to infer a private right of action from administrative regulations as long as the underlying statute itself contained an implied right of action.<sup>291</sup> Applying the four-part *Cort* test,<sup>292</sup> the Fifth Circuit held that the regulation implied a private right of action narrowly tailored to those employees who suffer retaliation solely as a result of a Title IX complaint.<sup>293</sup> The Fifth Circuit remanded the claim to the district court, which subsequently concluded that the plaintiff had failed to prove retaliation.<sup>294</sup> The *Gebser* decision's emphasis on the differences between Titles VII and IX supports the reasoning in *Lowrey*, which treats the two statutes differently. After *Sandoval*, however, *Lowrey*'s use of the regulations

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<sup>286</sup> *Lowrey*, 117 F.3d at 249 (“[T]he anti-retaliation provisions of titles VII and IX are *not* identical, and title VII provides no remedy for retaliation against individuals who raise charges of noncompliance with the substantive provisions of title IX.”).

<sup>287</sup> *Lowrey*, 117 F.3d at 247-49.

<sup>288</sup> *Id.* at 248-49.

<sup>289</sup> *Id.* at 244, 247-49; *see also* Heckman, *supra* note 7, at 596-98.

<sup>290</sup> *Id.* at 247 (“In *Lakoski*, we held that title VII provides the exclusive remedy for individuals alleging employment discrimination on the basis of sex in federally funded educational institutions. . . . Title IX does not afford a private right of action for employment discrimination on the basis of sex in federally funded educational institutions.”).

<sup>291</sup> *Id.* at 250 n.10.

<sup>292</sup> *See supra* note 114.

<sup>293</sup> *Lowrey*, 117 F.3d at 250-54.

<sup>294</sup> *See* *Lowrey v. Tex. A&M Univ. Sys.*, 11 F. Supp. 2d 895, 910 (S.D. Tex. 1998).

alone to establish a private right of action may be untenable.<sup>295</sup>

#### IV. THE SPLIT IN THE CIRCUITS OVER RETALIATION

##### A. *The Eleventh Circuit Holds Title IX Does Not Authorize a Private Right of Action for Retaliation Claims*

###### 1. *Jackson* Follows *Sandoval's* Textualist Approach

In *Jackson v. Birmingham Board of Education*, the Eleventh Circuit interpreted the fact that Congress had expressly prohibited retaliation in the text of Title VII, but had not done so in either Title VI or Title IX, as an indication that Congress may not have intended the term “discrimination” in Title VI or Title IX to include a private right of action in cases of retaliation.<sup>296</sup> In light of *Gebser*, the *Jackson* decision acknowledged that there are significant differences between Title VII and Title IX:

We recognize that Title VII is of limited usefulness in interpreting Title IX, both because Title VII was enacted pursuant to Congress’s Commerce power, while both Title VI and IX were enacted pursuant to Congress’s Spending Clause power, and because the text and structure of Title VII are markedly different than that of Title IX.<sup>297</sup>

Despite these differences, the Eleventh Circuit cautiously concluded that “the fact that Congress felt required to prohibit retaliation expressly under Title VII *may indicate* that Congress did not intend the concept of ‘discrimination’ in Title IX to be read sufficiently broadly to cover retaliation.”<sup>298</sup> By using the phrase “may indicate,” the *Jackson* court implicitly acknowledged that the presence of an explicit anti-retaliation provision in Title VII does not necessarily preclude an inferred right against retaliation under Title IX.<sup>299</sup>

The *Jackson* court relied on *Sandoval's* textualist approach to analyzing private rights of action in deciding whether Title IX implies a private right of action against retaliation.<sup>300</sup> The Eleventh Circuit emphasized the lack of any textual support for such a right of action under Title IX. As the court stated, “[o]ur task, as *Sandoval* makes

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<sup>295</sup> See *supra* notes 200-04 and *infra* notes 306-07, 310-11 and accompanying text.

<sup>296</sup> *Jackson*, 309 F.3d at 1345 n.12.

<sup>297</sup> *Id.* (citing *Gebser*, 524 U.S. at 286).

<sup>298</sup> *Id.* (emphasis added).

<sup>299</sup> See *infra* notes 378-79 and accompanying text.

<sup>300</sup> See *infra* notes 302-03, 322 and accompanying text.

clear, is to interpret what Congress actually said, not to guess from congressional silence what it might have meant. The absence of any mention of retaliation in Title IX therefore weighs powerfully against a finding that Congress intended Title IX to reach retaliatory conduct.”<sup>301</sup> Applying a textualist approach, the Eleventh Circuit determined that “[b]ecause the text thus evinces no concern with retaliation, we are not free to imply a private right of action to redress it.”<sup>302</sup> Yet the *Cannon* decision had recognized an implied private right of action at least for intentional discrimination under both Title VI and Title IX. And more recently, in *Gebser* and *Davis*, the Supreme Court has recognized a limited right to sue school districts if they are deliberately indifferent to sexual harassment.<sup>303</sup> Thus, the Court has sometimes recognized a private right of action despite the absence of any textual support.<sup>304</sup>

Additionally, following *Sandoval*'s conclusion that § 602 regulations do not create a private right of action because they are “concerned exclusively with the power of federal agencies to regulate recipients of federal funds,” the Eleventh Circuit concluded that “[s]ection 902 plainly does not disclose any congressional intent to imply a private right of action of any kind, let alone against retaliation.”<sup>305</sup> According to the *Jackson* court, the anti-retaliation regulations issued pursuant to § 902 could not establish a private right of action because “§ 902, like its twin § 602, is devoid of ‘rights-creating’ language of any kind—whether against gender discrimination, retaliation, or any other kind of harm.”<sup>306</sup> The focus of § 902 is exclusively on the role of federal agencies in enforcing the antidiscrimination principles in § 901.<sup>307</sup> Furthermore, because Congress explicitly established § 902's administrative enforcement mechanism and § 903's judicial review provisions for recipients, but provided no similar express statutory remedies for retaliation victims, the *Jackson* court concluded that it was unlikely that Congress had intended to create a private right of action in cases of retaliation because “the express provision of one method of enforcing a

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<sup>301</sup> *Jackson*, 309 F.3d at 1344-45.

<sup>302</sup> *Id.* at 1346.

<sup>303</sup> See *Davis v. Monroe County Bd. Of Educ.*, 526 U.S. 629, 639-49 (1999); *Gebser*, 524 U.S. at 277, 288-92; see also Black, *supra* note 2, at 362-63; *supra* notes 268-69 and *infra* notes 312-14, 405-08 and accompanying text.

<sup>304</sup> See *supra* text accompanying notes 128, 274, 300 and *infra* text accompanying notes 388, 405-08.

<sup>305</sup> *Jackson*, 309 F.3d at 1345.

<sup>306</sup> *Id.*

<sup>307</sup> *Id.*

substantive rule suggests that Congress intended to preclude others.”<sup>308</sup>

Moreover, the *Jackson* court concluded that the regulation’s prohibition against retaliation does not create a private right of action because, as *Sandoval* had determined, “language in a regulation . . . may not create a right that Congress has not.”<sup>309</sup> From *Sandoval*’s reasoning that only Congress may create a private right of action and that an agency may not establish such a right through a regulation, the Eleventh Circuit determined that “[b]ecause Congress has not created a right through Title IX to redress harms resulting from retaliation, 34 C.F.R. § 100.7(e) may not be read to create one either.”<sup>310</sup> However, as discussed below, in two important Title IX cases, *Gebser*<sup>311</sup> and *Davis*,<sup>312</sup> the Court did consider agency regulations when interpreting Title IX in holding that schools receiving federal funds were liable if they were deliberately indifferent to student complaints of sexual harassment.<sup>313</sup> Even if agency regulations may not establish new rights, the Fourth Circuit in *Peters v. Jenney* appropriately observed that agency regulations interpreting a statute deserve some deference under *Chevron*.<sup>314</sup>

## 2. *Jackson* Holds That Title IX Only Protects Direct Victims of Discrimination from Retaliation

Even if Title IX created a private right of action against retaliation, the *Jackson* court concluded that Title IX only protects direct victims of gender discrimination from retaliation, and, therefore, does not authorize a private right of action by a person who alleges retaliation by his employer because he complained about gender discrimination against another.<sup>315</sup> Accordingly, the Eleventh Circuit determined that the plaintiff, Roderick Jackson, was “not within the class meant to be protected by Title IX.”<sup>316</sup> The *Jackson* court observed that the text of § 901 only “identifies victims of

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<sup>308</sup> *Id.* (quoting *Sandoval*, 532 U.S. at 290) (internal quotation marks omitted).

<sup>309</sup> *Id.* at 1346 (quoting *Sandoval*, 532 U.S. at 291) (internal quotation marks omitted).

<sup>310</sup> *Id.*

<sup>311</sup> 524 U.S. 274 (1998).

<sup>312</sup> 526 U.S. 629 (1999).

<sup>313</sup> See *Davis*, 526 U.S. at 639-49; *Gebser*, 524 U.S. at 277, 288-92; see also Black, *supra* note 2, at 362-63; *supra* notes 268-69 and accompanying text; *infra* text accompanying notes 388, 405-08.

<sup>314</sup> See *Peters v. Jenney*, 327 F.3d 307, 315-16, 318-19 (4th Cir. 2003).

<sup>315</sup> *Jackson*, 309 F.3d at 1346.

<sup>316</sup> *Id.*

gender discrimination as the class it aims to benefit.”<sup>317</sup> The court acknowledged that “[g]ender discrimination affects not only its direct victims, but also those who care for, instruct, or are affiliated with them—parents, teachers, coaches, friends, significant others, and coworkers.”<sup>318</sup> Because Congress had not expressly provided to protect indirect victims of gender discrimination from retaliation, the *Jackson* court concluded that such indirect victims have no right to complain against retaliation.<sup>319</sup> The Eleventh Circuit determined that “[w]e are not free to extend the scope of Title IX protection beyond the boundaries Congress meant to establish, and we thus may not read Title IX so broadly as to cover anyone other than direct victims of gender discrimination.”<sup>320</sup> Relying exclusively on a textualist analysis, the court held that there is no private right of action against retaliation, especially for a person such as the plaintiff: “[O]ur review of both the text and structure of Title IX yields no congressional intent to create a cause of action for retaliation, particularly for a plaintiff who is not a direct victim of gender discrimination.”<sup>321</sup>

*Jackson*’s limitation of retaliation actions to actual victims of discrimination is contrary to *Sullivan* and its progeny.<sup>322</sup> Furthermore, Title VII’s anti-retaliation provision protects anyone who complains of discrimination and not just those who assert that they are the victims of discrimination.<sup>323</sup> Additionally, several other antidiscrimination statutes also protect all persons from retaliation, and not just those who are victims of discrimination.<sup>324</sup> Although

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<sup>317</sup> *Id.*

<sup>318</sup> *Id.*

<sup>319</sup> *Id.* at 1346-47.

<sup>320</sup> *Id.* at 1347.

<sup>321</sup> *Jackson*, 309 F.3d at 1347-48.

<sup>322</sup> See *supra* notes 35-36, 239-45 and *infra* notes 328, 332, 342-45, 347-54, 366-71, 374-77, 389-93 and accompanying text.

<sup>323</sup> See, e.g., 42 U.S.C. § 2000e-3(a) (2000) (Title VII); *Hazel v. U.S. Postmaster Gen.*, 7 F.3d 1, 3 (1st Cir. 1993) (explaining that Title VII’s anti-retaliation provision protects all who complain of discrimination, not just victims); Reply to Brief in Opposition, On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit, *Jackson v. Birmingham Bd. of Educ.*, No. 02-1672, 2003 WL 22428037 (S. Ct. July 25, 2003) [hereinafter “Reply Brief”].

<sup>324</sup> Some statutes contain anti-retaliation provisions expressly protecting all persons from retaliation. See, e.g., Americans with Disabilities Act, 42 U.S.C. § 12203(a), (b) (2000); Age Discrimination in Employment Act, 29 U.S.C. § 623(d) (2000); Family and Medical Leave Act, 29 U.S.C. § 2615(a) (2000); see also Reply Brief, *supra* note 323, at 6 n.3. Several lower court decisions have interpreted the anti-retaliation provision of the Fair Labor Standards Act, 29 U.S.C. § 215(a)(3) (2000), to protect all complainants and not just those with a substantive claim. See, e.g., *Lambert v. Ackerley*, 180 F.3d 997, 1004 (9th Cir. 1999) (en banc); *EEOC v. Romeo Cmty. Schs.*, 976 F.2d 985, 989 (6th Cir. 1992); *EEOC v. White & Son Enters.*,

neither Title VII's anti-retaliation provision,<sup>325</sup> the anti-retaliation provisions in other antidiscrimination statutes,<sup>326</sup> nor *Sullivan*<sup>327</sup> directly controls the meaning of any similar protections judicially implied under Title VI or Title IX, the fact that Title VII and other antidiscrimination statutes protect all persons from retaliation suggests, but admittedly is not conclusive, that Congress intended comparable protections for Title VI or Title IX.<sup>328</sup>

*B. Cases Holding There Is a Private Right of Action Under Title VI or Title IX for Retaliation*

1. The Fourth Circuit Recognizes a Private Right of Action for Retaliation under Title VI and Rejects *Jackson*

In *Peters v. Jenney*,<sup>329</sup> the Fourth Circuit Court of Appeals held that the absence of an explicit prohibition against retaliation in Title VI does not “lead to an inference that Congress did not mean to prohibit retaliation in § 601” because “relevant precedent interpreting similarly worded antidiscrimination statutes” construed “discrimination” to include “retaliation.”<sup>330</sup> The *Peters* decision interpreted the text of Title VI in light of how courts have interpreted similar antidiscrimination statutes, especially in *Sullivan* and its progeny.<sup>331</sup> Additionally, pursuant to *Chevron*, the Fourth Circuit deferred to agency regulations interpreting the statute as prohibiting retaliation.<sup>332</sup> In light of *Sandoval*'s holding that Congress intended Title VI to prohibit only intentional discrimination, the *Peters* decision recognized a private cause of action only for those who allege that a recipient retaliated against them for complaining about intentional discrimination.<sup>333</sup> *Peters* did not recognize a private right of action for retaliation on behalf of those complaining that a recipient had engaged in practices causing disparate impacts that are forbidden by

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881 F.2d 1006, 1011 (11th Cir. 1989); see also Reply Brief, *supra* note 323, at 6 n.3.

<sup>325</sup> See *supra* notes 247-90, 298-300 and *infra* notes 378-83 and accompanying text.

<sup>326</sup> See *supra* notes 239-45 and *infra* notes 345-54, 368 and accompanying text.

<sup>327</sup> See *supra* notes 35-36, 239-45 and accompanying text; *infra* Parts IV.B & C.

<sup>328</sup> See Reply Brief, *supra* note 323, at 6; *supra* text accompanying notes 254-55, 323-28; *infra* text accompanying notes 384-88.

<sup>329</sup> 327 F.3d 307 (4th Cir. 2003).

<sup>330</sup> *Id.* at 316-17. The Fourth Circuit also held that the plaintiff could pursue a First Amendment retaliation claim. *Id.* at 319-24. The First Amendment issues are beyond the scope of this article.

<sup>331</sup> See *id.* at 316-19.

<sup>332</sup> *Id.* at 315-16, 318-19.

<sup>333</sup> *Id.* at 319 & n.11.

various agency regulations.<sup>334</sup>

Because *Sandoval* rejected private rights of action to enforce an agency's disparate impact regulations under § 602, the *Peters* court recognized that a key question was whether regulations prohibiting retaliation, such as 34 C.F.R. § 100.7(e), are "an interpretation of § 601's core antidiscrimination mandate" or § 602 regulations that go beyond § 601.<sup>335</sup> The *Sandoval* Court, acknowledging that the § 602 regulations would establish a private right of action to the extent that they effectuated § 601's prohibition against intentional discrimination, stated that "[w]e do not doubt that regulations applying § 601's ban on intentional discrimination are covered by the cause of action to enforce that section. Such regulations, if valid and reasonable, authoritatively construe the statute itself . . . ."<sup>336</sup> According to the Fourth Circuit, "[i]f § 100.7(e) is an interpretation of § 601 that is valid under *Chevron*, it commands deference and may be enforced via an implied private right of action."<sup>337</sup> On the other hand, if § 100.7(e) is a § 602 regulation that prohibits non-intentional conduct, then courts may not allow plaintiffs to file an implied private right of action to enforce the regulation.<sup>338</sup>

The Fourth Circuit concluded that § 100.7(e) serves § 601's prohibition against intentional discrimination.<sup>339</sup> The *Peters* court determined that other decisions interpreting similarly worded antidiscrimination statutes had construed "discrimination" to include "retaliation."<sup>340</sup> For example, in the 1969 *Sullivan* decision, the Supreme Court determined that § 1982, which grants to all citizens the same rights to buy or sell property "as is enjoyed by white citizens," implicitly prohibited retaliation against a white man who was expelled from a neighborhood board for attempting to sell property to a black man.<sup>341</sup> Section 1982 is similar to § 601 in that it does not contain an explicit anti-retaliation provision. The *Sullivan* Court concluded that the white plaintiff who was expelled "for the advocacy of [a black man's] cause" could bring a private right of

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<sup>334</sup> *Id.*

<sup>335</sup> *Peters*, 327 F.3d at 316.

<sup>336</sup> *Sandoval*, 532 U.S. at 284.

<sup>337</sup> *Peters*, 327 F.3d at 316.

<sup>338</sup> *Id.* In a footnote, the Fourth Circuit stated that "[t]o the extent that [plaintiff] cannot show an implied right of action to enforce the retaliation regulations, § 1983 does not provide [her] with a cause of action." *Id.* n.9.

<sup>339</sup> *Id.* at 316-19.

<sup>340</sup> *Id.*

<sup>341</sup> *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 236 (1969).

action under § 1982.<sup>342</sup> The Supreme Court stated that “[i]f that sanction, backed by a state court judgment, can be imposed, then [the plaintiff] is punished for trying to vindicate the rights of minorities protected by § 1982. . . . [T]here can be no question but that [the plaintiff]” may maintain an action under § 1982.<sup>343</sup> The Fourth Circuit interpreted *Sullivan* as authorizing courts to read antidiscrimination statutes as generally implying a prohibition against retaliation on behalf of those who oppose the prohibited discrimination. Additionally, applying *Sullivan*’s reasoning, the Fourth Circuit held that § 1981, which like § 601 prohibits only intentional discrimination and does not explicitly prohibit retaliation, establishes an implied right of action against retaliation.<sup>344</sup>

2. The Fourth Circuit Declines to Limit the Right of Action to Direct Victims of Discrimination, Rejecting *Jackson*

In dissent, Judge Widener agreed with the Eleventh Circuit’s reasoning in *Jackson*. Judge Widener argued that, even if § 601 contains an implicit right of action against retaliation, the plaintiff in *Peters*, who was not a direct victim of discrimination, but rather reported such discrimination against others, could not file a private action because she was not a member of the class for whose benefit Congress had enacted § 601.<sup>345</sup> The majority disagreed, because *Sullivan* and Fourth Circuit precedent<sup>346</sup> had allowed persons who were not members of the protected class to file retaliation claims in both § 1981 and § 1982 cases if they suffered retaliation for actions opposing discrimination prohibited by the statute.<sup>347</sup> The *Peters* court cited decisions from the Sixth and Tenth Circuits that had followed *Sullivan* in allowing plaintiffs who are not direct victims of discrimination to bring retaliation claims under § 1981.<sup>348</sup> In a

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<sup>342</sup> *Id.*

<sup>343</sup> *Id.* at 237.

<sup>344</sup> *Peters*, 327 F.3d at 317 (citing *Fiedler v. Marumsc Christian Sch.*, 631 F.2d 1144, 1149 n.7 (4th Cir. 1980) and *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 576 (6th Cir. 2000) (holding, based on *Sullivan*, that retaliation is a viable theory under § 1981)).

<sup>345</sup> *Id.* at 324-26 (Widener, J., dissenting).

<sup>346</sup> *Id.* at 317 (citing *Fiedler*, 631 F.2d at 1149 n.7; *Johnson*, 215 F.3d at 576 (holding, based on *Sullivan*, that retaliation is a viable theory under § 1981)).

<sup>347</sup> *Id.*

<sup>348</sup> *Id.* at 317-18 (citing *Johnson*, 215 F.3d at 576 (Sixth Circuit holding that white plaintiff allegedly retaliated against for opposing discrimination of others may bring suit under § 1981); *Phelps v. Wichita Eagle-Beacon*, 886 F.2d 1262, 1266-67 (10th Cir. 1989) (ruling that plaintiff, a white attorney, who was allegedly subjected to adverse

footnote, the court observed that the *Jackson* decision had not addressed *Sullivan* and its progeny in deciding that only persons who were victims of prohibited discrimination may file retaliation claims.<sup>349</sup>

The Fourth Circuit acknowledged that § 601, like § 1981 and § 1982, did not contain an express provision allowing retaliation claims.<sup>350</sup> The *Sullivan* line of cases, however, had allowed implied retaliation claims under §§ 1981 and 1982.<sup>351</sup> Additionally, agencies had interpreted § 601 to prohibit retaliation.<sup>352</sup> Under the *Chevron* deference principle and in light of *Sullivan*, the Fourth Circuit concluded that it should defer to the agency regulations interpreting § 601 to prohibit retaliation because they served the statute's "core prohibition" against "intentional racial discrimination," and "[r]etaliation of this sort bears such a symbiotic and inseparable relationship to intentional racial discrimination that an agency could reasonably conclude that Congress meant to prohibit both, and to provide a remedy for victims of either."<sup>353</sup>

One weakness in the Fourth Circuit's *Chevron* analysis is the distinction between a regulation that merely interprets a statutory right and one that creates or "effectuates" rights based on the general goals of a statute.<sup>354</sup> Although the Supreme Court's view is not completely clear on this point, a narrow view of the *Chevron* doctrine is that the deference principle applies to agency interpretations of statutory rights, but arguably not agency regulations that go beyond a statute to effectuate the statute's general goals.<sup>355</sup> The Department of Education has explicitly stated that the purpose of the anti-retaliation regulation is "to effectuate the provisions of Title VI."<sup>356</sup> The *Peters* court, however, appropriately recognized that the anti-retaliation

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action because of his representation of black clients, may maintain action under § 1981 if he can show that he was deprived of an interest protected by § 1981); *Skinner v. Total Petroleum, Inc.*, 859 F.2d 1439, 1447 (10th Cir. 1988) (finding that white employee allegedly terminated for assisting a discriminated-against black employee could maintain an action under § 1981)).

<sup>349</sup> *Id.* at 318 n.10.

<sup>350</sup> *Peters*, 327 F.3d at 317-18; *see also supra* Part III.B and notes 7, 14, 18, 330-31 and accompanying text.

<sup>351</sup> *See Peters*, 327 F.3d at 317-18; *supra* text accompanying notes 35-36, 239-45, 328, 332, 342-45, 347-50, and *infra* Part IV.B.4 and text accompanying notes 353-54, 374-77, 389-93.

<sup>352</sup> *Peters*, 327 F.3d at 318; *see also supra* notes 15, 21, 59-60, 289, 291 and *infra* note 357 and accompanying text.

<sup>353</sup> *Peters*, 327 F.3d at 318-19 (citation omitted).

<sup>354</sup> *See Gorod, supra* note 16, at 943 n.30, 945-46 nn.40-42.

<sup>355</sup> *Id.* at 946 n.42.

<sup>356</sup> 34 C.F.R. § 100.1 (2004); *see also Gorod, supra* note 16, at 946 n.42.

regulation, at least implicitly, can be used to interpret Title IX. The court was thus ultimately correct that the regulation deserves *Chevron* deference.<sup>357</sup>

### 3. In Light of *Sandoval*, *Peters* Limits Retaliation Claims to Intentional Discrimination

Although the plaintiff contended that all retaliation is inherently intentional, the Fourth Circuit concluded “that ‘retaliation’ exists conceptually only by reference to the acts which form the basis for it. Terminating an employee because she opposes practices which have nothing to do with Title VI is not Title VI retaliation.”<sup>358</sup> In light of *Sandoval*’s holding that there is no implied right of action to enforce § 602’s disparate impact regulations,<sup>359</sup> the *Peters* court concluded that Title VI authorizes an implied right of action for retaliation in favor of only those who claim they have suffered because they opposed the type of intentional discrimination that is at the core of § 601’s antidiscrimination purpose.<sup>360</sup> After *Sandoval*, there is no implied right of action for those who allege disparate impact discrimination, or, by implication, those who are retaliated against for complaining of such discrimination.<sup>361</sup> The Fourth Circuit stated, “Insofar as they forbid retaliation for opposing disparate impact practices not actionable under § 601, the regulations may not be enforced either via the § 601 private right of action or § 1983.”<sup>362</sup>

Because the district court had simply dismissed the plaintiff’s retaliation claims without deciding whether the alleged retaliation resulted from her opposition to intentional or unintentional discrimination, the Fourth Circuit remanded the case to the district court for a determination of whether the plaintiff had a valid retaliation case.<sup>363</sup> The *Peters* court summarized the standard that the district court should apply as requiring the plaintiff to “show that she believed, in good faith and with objective reasonableness, that she was opposing intentional discrimination of the sort that § 601 forbids.”<sup>364</sup>

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<sup>357</sup> See Gorod, *supra* note 16, at 946 n.42.

<sup>358</sup> *Peters*, 327 F.3d at 319 n.11.

<sup>359</sup> See *supra* text accompanying notes 12, 39, 185, 195-211.

<sup>360</sup> *Peters*, 327 F.3d at 319.

<sup>361</sup> *Id.*

<sup>362</sup> *Id.*

<sup>363</sup> *Id.* at 319-20, 323-24.

<sup>364</sup> *Id.* at 323-24. The court had earlier explained the standard as follows:

To make a claim for Title VI retaliation, [plaintiff] must show (1) that she engaged in protected activity; (2) that [defendants] took a material

#### 4. District Court Decisions Agreeing with *Peters*

After the *Peters* decision, federal district court decisions from the District of Columbia and the Western District of Kentucky agreed with *Peters* that *Sullivan* and its progeny were the most relevant and appropriate precedent concerning whether § 601 or § 901 prohibits retaliation.<sup>365</sup> In *Johnson v. Galen Health Institutes, Inc.*,<sup>366</sup> the United States District Court for the Western District of Kentucky observed that “both *Sullivan* and *Perry* involved antidiscrimination statutes [42 U.S.C. §§ 1981 and 1983, respectively], written at the same level of generality as Title IX.”<sup>367</sup> The *Galen* court concluded that there was an implicit right against retaliation in Title IX because such protection is necessary to effectuate the statute’s ban on intentional discrimination.<sup>368</sup> Likewise, in *Chandamuri v. Georgetown University*,<sup>369</sup> the United States District Court for the District of Columbia followed *Peters* and *Sullivan* in holding that § 601 contains an implied right against retaliation.<sup>370</sup>

#### C. *Mock v. South Dakota Board of Trustees*: The Case Against *Peters* and For *Jackson*

In *Mock v. South Dakota Board of Regents*,<sup>371</sup> the United States District Court for the District of South Dakota agreed with the

adverse employment action against her, and (3) that a causal connection existed between the protected activity and the adverse action. . . . As in other civil rights contexts, to show “protected activity,” the plaintiff in a Title VI retaliation case need “only . . . prove that he opposed an unlawful employment practice which he reasonably believed had occurred or was occurring.” The inquiry is therefore (1) whether [plaintiff] “*subjectively* (that is, in good faith) believed” that the district had engaged in a practice violative of § 601, and (2) whether this belief “was *objectively* reasonable in light of the facts,” a standard which we will refer to as one of “reasonable belief.”

*Id.* at 320 (citations and footnotes omitted).

<sup>365</sup> *Chandamuri v. Georgetown Univ.*, 274 F. Supp. 2d 71, 83 (D.D.C. 2003); *Johnson v. Galen Health Insts., Inc.*, 267 F. Supp. 2d 679, 695-98 (W.D. Ky. 2003).

<sup>366</sup> 267 F. Supp. 2d 679 (W.D. Ky. 2003).

<sup>367</sup> *Galen*, 267 F. Supp. 2d at 696 (discussing *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)). *Perry* involved the First Amendment, but subsequent cases concluded it logically applied to § 1983. See *supra* note 244 and accompanying text.

<sup>368</sup> *Galen*, 267 F. Supp. 2d at 697. Because prohibiting retaliation is strongly consistent with Title IX’s antidiscrimination purpose, the *Galen* decision agreed with the Fourth Circuit’s *Peters* decision that the Department of Education’s regulation prohibiting retaliation, 34 C.F.R. § 100.7(e), deserved deference under *Chevron*. *Galen*, 267 F. Supp. 2d at 697-98.

<sup>369</sup> 274 F. Supp. 2d 71 (D.D.C. 2003).

<sup>370</sup> *Id.* at 83.

<sup>371</sup> 267 F. Supp. 2d 1017 (D.S.D. 2003).

Eleventh Circuit in *Jackson* that Title IX does not establish a private right of action for retaliatory acts.<sup>372</sup> The *Mock* decision raised four difficulties with the reasoning in *Peters*. It is useful to examine these four arguments to gain a better understanding of whether the *Peters* or *Jackson* decision makes a stronger case for recognizing or denying an implied right of action for retaliation under Title VI or Title IX.

The first argument in *Mock* is that when Congress enacted Title VI in 1964 it could not have assumed that the courts would find an implied private right of action for retaliation because the *Sullivan* case had not yet been decided. The *Mock* court argued that “it cannot be said that in enacting Title VI, Congress had in mind that courts would imply a cause of action for retaliation under Title VI based upon the Supreme Court’s interpretation in *Sullivan* of a similarly worded antidiscrimination statute, 42 U.S.C. § 1982.”<sup>373</sup> Although it is true that *Sullivan* had not yet been decided in 1964, the Court had recently decided *Borak* when Congress enacted Title VI. If the contemporary legal context in which Congress enacted a statute matters, then that argument strongly cuts in favor of reading implied rights of action broadly in statutes enacted from the time of *Borak* in 1964 until *Cort* was decided in 1975.<sup>374</sup> Thus, applying a contemporary context approach to statutory interpretation, courts should liberally construe private rights of action under both Title VI and Title IX.<sup>375</sup> On the other hand, the *Sandoval* Court refused to apply the contemporary context approach to statutory interpretation and instead focused on Title VI’s text in interpreting the statute.<sup>376</sup> Following *Sandoval*’s textualist reasoning, the fact that *Sullivan* had not yet been decided is less important than the meaning of Title VI’s language.

Applying Justice Scalia’s textualist approach in *Sandoval*, the key issue is whether Title VI’s antidiscrimination language prohibiting intentional discrimination reasonably implies a right of action on behalf of those who allegedly suffer retaliation because they complain about intentional discrimination by a recipient of federal funding. If Title VI’s text supports a private right of action against retaliation, then the fact that the Court decided *Sullivan* after the enactment of Title VI is irrelevant. Under either a contemporary context approach to interpretation or a textualist approach, *Mock*’s first objection, that

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<sup>372</sup> *Id.* at 1020-22.

<sup>373</sup> *Id.* at 1020.

<sup>374</sup> See *supra* notes 108-12, 127-30, 221-22 and accompanying text.

<sup>375</sup> See *supra* notes 108-12, 127-30, 221-22 and accompanying text.

<sup>376</sup> See *supra* notes 205-07 and accompanying text.

*Sullivan* came after Title VI, is not very persuasive. Of course, Congress did enact Title IX in 1972, three years after the Court decided *Sullivan*. Therefore, under the *Mock* court's reasoning, there is a stronger case for implying an anti-retaliation right of action under Title IX.

The second argument in *Mock* is that the *Peters* decision failed to address the [negative] inference of Congress' intent that can be drawn from Congress' explicit grant of a cause of action for retaliation in Title VII, and Congress' failure to explicitly grant a cause of action for retaliation in Title VI, when both Title VII and Title VI were enacted as part of the same act, the Civil Rights Act of 1964.<sup>377</sup>

Conversely, the *Mock* court argued that the Eleventh Circuit in *Jackson* had appropriately drawn a negative inference from the absence of explicit anti-retaliation language in Title IX or Title VI, despite acknowledging the differences between these statutes and Title VII.<sup>378</sup>

In light of the Supreme Court's emphasizing in *Gebser* that there are substantial differences between the "text and structure" of Title VII and Title IX,<sup>379</sup> the Eleventh Circuit in *Jackson* acknowledged that the absence of an explicit retaliation provision in Title VI or Title IX was not conclusive evidence, but merely "may indicate" that Congress did not intend to allow retaliation suits.<sup>380</sup> The *Mock* court's argument that courts should not imply a private right of action in Title VI because there is an explicit right of action in Title VII is inconsistent with the rationale of *Cannon* and *Guardians*, which recognized that Title VI, as well as Title IX, created an implied private right of action at least for plaintiffs alleging intentional discrimination.<sup>381</sup> Because *Cannon* and *Guardians* recognized that an implied right of action was appropriate under Title VI and Title IX to enable plaintiffs to challenge intentional discrimination,<sup>382</sup> it is also appropriate to acknowledge a private right of action for plaintiffs alleging retaliation, as long as retaliation is considered a type of intentional discrimination at the core of the antidiscrimination principles of §§ 601 and 901.

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<sup>377</sup> *Mock*, 267 F. Supp. 2d at 1020 (citations omitted).

<sup>378</sup> *Id.*

<sup>379</sup> See *supra* notes 259-60, 264-77, 282 and accompanying text.

<sup>380</sup> See *supra* notes 298-300 and accompanying text.

<sup>381</sup> See *supra* notes 10, 116, 123-26, 135-39, 141-46, 159, 166, 168-69, 172 and accompanying text.

<sup>382</sup> See *supra* notes 10, 116, 123-26, 135-39, 141-46, 159, 166, 168-69, 172 and accompanying text.

Courts have interpreted Title VII to prohibit retaliation even where it does not expressly do so. In 1972, Congress amended Title VII to include federal employees, but did not expressly incorporate the statute's anti-retaliation provision into its new section.<sup>383</sup> Nevertheless, even without express language, lower courts have consistently held that Title VII protects federal workers from retaliation.<sup>384</sup> Furthermore, courts have interpreted the Age Discrimination in Employment Act<sup>385</sup> to protect federal employees from retaliation despite the absence of an express provision.<sup>386</sup> Accordingly, the *Mock* court's argument based on Title VII is not decisive in light of how courts have sometimes recognized implied rights in Title VII despite the absence of explicit statutory language and also because the Supreme Court in *Gebser* treated Title IX, and thus implicitly Title VI in some respects, as quite different in this regard from Title VII.<sup>387</sup>

According to the *Mock* court, the remaining flaws in the reasoning of *Peters* were, on the one hand, the court's failure to follow the approach for determining implied private rights of action used in *Sandoval*, and, on the other hand, the *Peters* court's reliance on the outdated *Borak* analysis applied in *Sullivan* and its progeny.<sup>388</sup> The *Mock* court argued that *Sandoval*'s intent-based analysis of implied rights of action had implicitly rejected *Sullivan*'s approach, which was based on *Borak*'s out-dated assumption that remedies are implied whenever they serve a statute's purposes.<sup>389</sup>

The *Peters* court had criticized the *Jackson* court for failing to address *Sullivan* and its progeny. The *Mock* court, however, asserted that in *Jackson* the Eleventh Circuit had appropriately discussed the Supreme Court's shift to an almost exclusive focus on whether Congress intended to create a private right of action.<sup>390</sup> The *Mock* court concluded that *Peters* had inappropriately relied on *Sullivan* and that the Eleventh Circuit had instead correctly followed *Sandoval*.<sup>391</sup>

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<sup>383</sup> See Pub. L. No. 88-352, § 717, as added Pub. L. No. 92-261, § 11, 86 Stat. 111 (1972) (now codified at 42 U.S.C. § 2000e-16 (2000)).

<sup>384</sup> See, e.g., *Aronberg v. Walters*, 755 F.2d 1114, 1115-16 (4th Cir. 1985); *Canino v. EEOC*, 707 F.2d 468, 471-72 (11th Cir. 1983); Cert. Petition, *supra* note 3, at 15; see also *supra* note 254 and accompanying text.

<sup>385</sup> 29 U.S.C. § 621 (2000).

<sup>386</sup> See, e.g., *Forman v. Small*, 271 F.3d 285, 298 (D.C. Cir. 2001), cert. denied, 536 U.S. 958 (2002); Cert. Petition, *supra* note 3, at 14.

<sup>387</sup> See *supra* text accompanying notes 259-60, 264-77, 282, 380.

<sup>388</sup> *Mock*, 267 F. Supp. 2d at 1021 (citing *Sandoval*, 532 U.S. at 286-91).

<sup>389</sup> *Id.* (citations omitted).

<sup>390</sup> *Id.*

<sup>391</sup> *Id.* at 1020-22.

V. CONCLUSION: *PETERS*' RELIANCE ON *SULLIVAN* AND ITS PROGENY IS MORE PERSUASIVE THAN *JACKSON*'S READING OF *SANDOVAL*'S DICTA

A. *Sandoval Did Not Overrule the Anti-Retaliation Principles in Sullivan and Its Progeny*

Contrary to the *Mock* court's analysis, the *Sullivan* decision survives *Sandoval* to the extent that the former case recognizes a private right of action for plaintiffs who suffer retaliation for protesting intentional discrimination, but not for those who suffer retaliation for criticizing disparate impact discrimination. Even if the *Sullivan* decision was based in part on the now discredited "purposive approach" to implied private rights of action of *Borak*, the core principle in *Sullivan*'s analysis that Congress, when it enacts antidiscrimination statutes, generally intends to prohibit retaliation against all those who complain about discrimination, remains valid.<sup>392</sup> Hence, the *Jackson* and *Mock* decisions erred in reading *Sandoval* too broadly and in reaching the erroneous conclusion that there cannot be an implied right to sue for retaliatory conduct.

In dicta, the *Sandoval* decision suggested the view that only Congress may establish individual rights, and hence, that only explicit statutory language can create a private right of action.<sup>393</sup> However, any implication in *Sandoval* that only express statutory language may establish a private right of action is contrary to the Court's precedent and *Sandoval* never purported to overrule that precedent.<sup>394</sup> The *Sandoval* decision did not reject implied rights of action in all circumstances, but held only that Title VI disparate impact regulations that exceed § 601's prohibition against intentional discrimination may not establish such a right.<sup>395</sup> Even though § 601 does not explicitly provide for a private right of action, the *Sandoval* decision recognized that, in light of *Cannon* and *Guardians*, § 601 creates an implied right of action for victims of intentional discrimination.<sup>396</sup> Thus, *Sandoval* did not hold that a private right of action must always be explicit in the text of a statute and implicitly acknowledged that the Court would recognize implied rights of

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<sup>392</sup> See Reply Brief, *supra* note 323, at 4.

<sup>393</sup> See *supra* notes 30-31, and accompanying text; see also Mank, *Gonzaga*, *supra* note 68, at 1461.

<sup>394</sup> See Rosenbaum & Teitelbaum, *supra* note 31, at 244.

<sup>395</sup> See Black, *supra* note 2, at 363 & n.42; *supra* notes 30-32, 189, 195, 209-14 and accompanying text.

<sup>396</sup> *Sandoval*, 532 U.S. at 279-81 (citing *Alexander v. Choate*, 469 U.S. 287, 293 (1985)); *Guardians*, 463 U.S. at 610-11); see also Short, *supra* note 4, at 125-26.

action if there was sufficient evidence in the statute that Congress intended to create a private right.<sup>397</sup>

*B. The Chevron Deference Doctrine Supports Peters*

Pursuant to the *Chevron* doctrine, the Fourth Circuit in *Peters* appropriately deferred to the Department of Education's anti-retaliation provision in 34 C.F.R. § 100.7(e), as an indication of how to interpret the statute.<sup>398</sup> Agency regulations interpreting a statute deserve some *Chevron* deference, and courts should defer to an agency's interpretation of an ambiguous statute, unless the regulations establish new rights not provided by the statute. Several lower court decisions have applied *Chevron* deference to Title VI and Title IX regulations.<sup>399</sup> *Chevron* deference to agency regulations is limited, however, if a statute is unambiguous.<sup>400</sup> Accordingly, the *Sandoval* decision did not defer to the agency's § 602 disparate impact regulations in interpreting whether Title VI authorizes a private right of action because the Court had unambiguously interpreted § 601 to prohibit only intentional discrimination.<sup>401</sup> Because § 602 regulations effectuate the antidiscrimination purposes of § 601, the *Sandoval* Court concluded that the § 602 regulations could not establish a right broader than the prohibition in § 601.<sup>402</sup> Similarly, *Peters* recognized an implied right against retaliation only for those who suffer retaliation because they have challenged intentional discrimination prohibited by § 601.<sup>403</sup>

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<sup>397</sup> *Sandoval*, 532 U.S. at 280-87; see also *supra* notes 31-34, 212-13, 394-96 and accompanying text.

<sup>398</sup> See *supra* notes 21, 38, 315, 333, 338-42, 354-58 and accompanying text.

<sup>399</sup> *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1032-34 (9th Cir. 1998) ("We are aware of no reported decision addressing the circumstances under which a school district's failure to respond to racial harassment . . . by other students constitutes a violation of Title VI. However, the Department of Education in 1994 interpreted Title VI as prohibiting student-to-student racial harassment . . ."); *Canutillo Indep. Sch. Dist. v. Leija*, 101 F.3d 393, 406 (5th Cir. 1996) ("Although [the Department] [of Education] is not a party to this appeal, we must accord its interpretation of Title IX appreciable deference [under *Chevron*].") (first alteration in original); *Rowinsky v. Bryan PSD*, 80 F.3d 1006, 1015 n.20 (5th Cir. 1996) ("[W]hen interpreting title IX, we accord the OCR's [Office of Civil Rights of the Department of Education] interpretations appreciable deference."); *Cohen v. Brown Univ.*, 991 F.2d 888, 895 (1st Cir. 1993) ("We treat [the Department of Education], acting through its OCR, as the administrative agency charged with administering Title IX."); see also Black, *supra* note 2, at 361-62, 377 (discussing Ninth Circuit's use of *Chevron* doctrine in *Monteiro*).

<sup>400</sup> See *supra* notes 20, 356 and accompanying text.

<sup>401</sup> See *supra* notes 195-211 and accompanying text.

<sup>402</sup> See *supra* notes 195-211 and accompanying text.

<sup>403</sup> See *supra* notes 22-23, 334-35, 361-63 and accompanying text.

In other cases, the Supreme Court has deferred to Title VI or Title IX agency regulations, although without necessarily citing *Chevron*. For instance, the *Gebser* Court examined and relied on Department of Education regulations mandating that school districts should be subject to funding termination only when they have clear notice of inappropriate harassing behavior, but fail to take action to correct that behavior.<sup>404</sup> Similarly, in *Davis v. Monroe County Board of Education*, the Court positively cited OCR guidelines that notified school districts when they could be liable for certain types of behavior, including sexual harassment under Title IX.<sup>405</sup> The Court observed that the OCR guidelines placed school districts on notice that they might incur liability if they ignored student-on-student harassment.<sup>406</sup> Although neither case cited *Chevron*, both *Gebser* and *Davis* implied that an agency's interpretation of Title IX or Title VI deserves some deference when defining actionable forms of discrimination.<sup>407</sup>

C. *The Core Antidiscrimination Principles in Both Title VI and Title IX Support a Private Right of Action Against Retaliation Based on Allegations of Intentional Discrimination*

To effectuate § 601 and § 901's core prohibitions against intentional discrimination, courts should recognize an implied right of action for plaintiffs who allege that their employer or school has retaliated against them for protesting intentional discrimination. Such a right of action is consistent with Congress' central purpose of barring intentional discrimination under both Title VI and Title IX.<sup>408</sup> Accordingly, courts may find that Titles VI and IX implicitly allow plaintiffs who complain about intentional discrimination to bring retaliation claims because such suits are substantially consistent with those statutes' primary purpose of prohibiting recipients from

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<sup>404</sup> *Gebser*, 524 U.S. at 277, 288-92 ("The administrative regulations . . . prohibit[ ] commencement of enforcement proceedings until the agency has determined that voluntary compliance is unobtainable and the recipient . . . has been notified of its failure to comply and of the action to be taken to effect compliance.") (internal quotation marks omitted); see also Black, *supra* note 2, at 362; Joslin, *supra* note 112, at 209-10.

<sup>405</sup> *Davis*, 526 U.S. at 633, 643-44, 647-48 (citing OFFICE FOR CIVIL RIGHTS, DEP'T OF EDUC., SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES, 62 Fed. Reg. 12,034, 12,039-40 (Mar. 13, 1997)); see also Black, *supra* note 2, at 362-63.

<sup>406</sup> See *Davis*, 526 U.S. at 643-44, 647-48; see also Black, *supra* note 2, at 363.

<sup>407</sup> See *Davis*, 526 U.S. at 643-44, 647-48; *Gebser*, 524 U.S. at 277, 288-92; see also Black, *supra* note 2, at 362-63; Joslin, *supra* note 112, at 209-10.

<sup>408</sup> See *supra* notes 22-23, 334-35, 361-63 and accompanying text.

engaging in intentional discrimination.<sup>409</sup>

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<sup>409</sup> See *supra* text accompanying notes 22-23, 32-34, 40-41, 213, 334-45, 354, 361-63, 393.