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Franklin v. Gwinnett County "Public Schools": The Supreme Court Implies a Damages Remedy for Title IX Sex Discrimination

Susan L. Wright

Franklin v. Gwinnett County Public Schools: The Supreme Court Implies a Damages Remedy for Title IX Sex Discrimination

I. INTRODUCTION

Congress enacted Title IX of the Education Amendments of 1972 (Title IX)[1] to address the widespread existence of sex discrimination in educational institutions.[2] Twenty years later, in *Franklin v. Gwinnett County Public Schools*,[3] a unanimous Supreme Court put teeth into the statute by finding that Title IX relief includes compensatory damages.[4]

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1. 20 U.S.C. §§ 1681-1688 (1988). 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).

2. 118 Cong. Rec. 5804-07 (Feb. 28, 1972) (statements of Sen. Bayh).

3. 112 S. Ct. 1028 (1992).

4. Id. Previously, courts had only awarded back pay and injunctive relief for violations of Title IX. Civil rights leaders have praised the *Franklin* decision for making Title IX a more effective weapon against sex discrimination. See, for example, Linda Greenhouse, *Court Opens Path for*

The Supreme Court's decision resolved a split of authority between the Third Circuit[5] and the Seventh[6] and Eleventh Circuits.[7] The Court agreed with the Third Circuit, which had recently become the first court of appeals to find a right to compensatory relief under Title IX.[8]

Congress had two main objectives in enacting Title IX: (1) to restrict the disbursement of federal funds to institutions maintaining sexually discriminatory practices and (2) to protect individuals against such practices.[9] Congress explicitly granted the power to enforce Title IX to federal agencies and departments that have the capacity to extend federal financial assistance to education programs or activities.[10] Pursuant to this delegation, the Department of Education is primarily responsible for enforcing the statute.[11] The Department also has the authority to terminate federal funding to institutions in violation of the statute.[12] Before such a termination, however, Title IX requires that the Department of Education give an institution notice of its violation and an opportunity for voluntary compliance.[13]

Title IX makes no explicit reference to the availability of compensatory damages.[14] Before the Supreme Court concluded that compensatory damages are available under Title IX, the absence of express private remedies forced lower courts to use statutory interpretation and case precedent concerning similar statutes to determine this issue.[15] The *Franklin* decision resolves the confusion created by the lower courts' inconsistent decisions. *Franklin* also makes Title IX—a statute that had previously been ineffective and seldom used—a powerful

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Student Suits in Sex-Bias Cases, N.Y. Times at A1 (Feb. 27, 1992) (Final ed.); Paul M. Barrett, *Students May Seek Cash in Sex-Bias Cases*, Wall St. J. at B8 (Feb. 27, 1992).

5. See *Pfeiffer v. Marion Center Area Sch. Dist.*, 917 F.2d 779 (3d Cir. 1990).

6. See *Lieberman v. University of Chicago*, 660 F.2d 1185 (7th Cir. 1981).

7. See *Franklin v. Gwinnett County Public Schools*, 911 F.2d 617 (11th Cir. 1990).

8. See *Pfeiffer*, 917 F.2d at 788.

9. *Cannon v. University of Chicago*, 441 U.S. 677, 704 (1979).

10. 20 U.S.C. § 1682 (1988).

11. The Department of Education is responsible for granting most of the federal financial assistance to education. The Department of Health, Education and Welfare had responsibility for administering federal funding to education programs and enforcing Title IX provisions until the Department of Education Organization Act transferred such functions to the Department of Education. *Grove City College v. Bell*, 687 F.2d 684, 688 & n.3 (3d Cir. 1982), aff'd, 465 U.S. 555 (1984).

12. 20 U.S.C. § 1682 (1988).

13. Id.

14. Id. §§ 1681-1688.

15. See notes 28-61 and accompanying text. Courts agree that because Congress modeled Title IX after Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d to 2000d-5 (1988), the two statutes deserve similar interpretation. Therefore, courts often rely on analyses from Title VI cases when considering claims under Title IX. See Ronna Greff Schneider, *Sexual Harassment and Higher Education*, 65 Tex. L. Rev. 525, 559 (1987).

weapon against sex discrimination.[16] In addition, the decision permits courts to read the availability of remedies for which Congress has made no explicit provision into other federal antidiscrimination statutes.

This Recent Development examines the potential effects of the *Franklin* decision and forecasts possible limitations of the Supreme Court's holding. Part II discusses the legal background that set the foundation for the *Franklin* decision. Part III examines the majority and concurring opinions in *Franklin.* Part IV discusses the implications of the decision, including its effects on educational institutions, its protection of sex discrimination victims, and its potential impact on future court interpretations of other civil rights statutes. Part V suggests possible ways in which lower courts may limit this broad decision in future cases. Despite the possible negative consequences for educational institutions that may arise from the *Franklin* decision, Part VI concludes that the decision will have a positive impact in its furtherance of Title IX's purposes and its progressive effects on the state of civil rights law.

II. LEGAL BACKGROUND

A. *Judicial Implication of a Private Cause of Action Under Title IX*

In *Cannon v. University of Chicago*[17] the Supreme Court implied a private cause of action under Title IX.[18] Relying upon the four factors set forth in *Cort v. Ash*,[19] the Court found that Congress intended to make a remedy available to a special class of litigants.[20] First, it determined that the plaintiff, a person discriminated against on the basis of her sex, was a member of the class for whose benefit Congress designed the statute.[21] Second, the legislative history of Title IX and the fact that Congress patterned the statute after Title VI of the Civil Rights

16. Greenhouse, N.Y. Times at A1 (cited in note 4).

17. 441 U.S. 677 (1979).

18. Id. at 717.

19. 422 U.S. 66 (1975). In determining whether to imply a private remedy into a statute not expressly providing one, the Court looked to four factors:

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

Id. at 78 (citations omitted).

20. *Cannon*, 441 U.S. at 688-89. The Court has recognized that the ultimate determination in implying a cause of action is whether Congress intended to create a private remedy. See, for example, *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 15-16 (1979).

21. *Cannon*, 441 U.S. at 694.

Act of 1964 (Title VI),[22] under which federal courts had implied a private remedy by the time Congress enacted Title IX, indicated that Congress intended to create a private cause of action.[23] Third, implication of a private remedy furthered Title IX's purpose of protecting individuals against discriminatory practices.[24] Finally, the Court reasoned that the federal government had conditioned the receipt of federal funds on the prohibition against sexual discrimination in its role of protecting its citizens from invidious discrimination.[25]

Having determined that private remedies are available under Title IX, the Court ended its analysis and refrained from addressing the specific types of private remedies available.[26] Following *Cannon*, lower courts granted declaratory and injunctive relief to private litigants in Title IX actions.[27] The availability of compensatory damages, however, remained an open question until the *Franklin* decision.

B. Judicial Implication of a Damages Remedy Under Title IX

The Seventh Circuit refused to imply a damages remedy in *Lieberman v. University of Chicago*,[28] the first case to consider the availability of compensatory damages under Title IX.[29] The *Lieberman* court began its analysis by characterizing Title IX as legislation that Con-

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22. 42 U.S.C. § 2000d to 2000d-5 (1988). Title VI 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." Id. § 2000d. The *Cannon* Court noted that Title IX uses identical language to describe its benefitted class, except that it substitutes the word "sex" for the words "race, color, or national origin." *Cannon*, 441 U.S. at 694-96. The Court also noted that Title VI and Title IX provide for the same administrative termination of federal funding in the event that an institution violates one of the statutes. Id.

23. *Cannon*, 441 U.S. at 694, 696-98. See note 76 and accompanying text. Between 1967 and 1972 at least 12 federal courts found that Title VI gives rise to a private right of action. Id. at 696. See, for example, *Bossier Parish Sch. Bd. v. Lemon*, 370 F.2d 847, 852 (5th Cir. 1967).

24. *Cannon*, 441 U.S. at 706-08.

25. Id. at 708-09.

26. See id. at 709, 717.

27. See, for example, *Sharif By Salahuddin v. New York State Educ. Dept.*, 709 F. Supp. 345 (S.D.N.Y. 1989).

28. 660 F.2d 1185, 1186-88 (7th Cir. 1981). The plaintiff claimed that a medical school denied her admission based on her gender. She alleged that this action constituted sex discrimination in violation of Title IX. The plaintiff was forced to relocate in order to attend another medical school. She sought compensatory damages for moving expenses, pain and suffering, and loss of consortium resulting from her relocation. Id. at 1186. For discussions of *Lieberman*, see generally Note, Lieberman v. University of Chicago: *Refusal to Imply a Damages Remedy Under Title IX of the Education Amendments of 1972*, 1983 Wis. L. Rev. 181; Comment, *Implied Private Rights of Action for Damages Under Title IX*—Lieberman v. University of Chicago, 16 Ga. L. Rev. 511 (1982).

29. The Court has noted that "the question whether a litigant has a 'cause of action' is analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive." *Davis v. Passman*, 442 U.S. 228, 239 (1979).

gress passed pursuant to its constitutional spending power.[30] In the case of spending clause legislation the Supreme Court has held that Congress must state any terms or conditions of funding in unambiguous terms.[31] The Supreme Court has declined to impose additional financial obligations on recipients of federal funds without evidence in the spending clause legislation of Congress' intent to impose such obligations.[32] Thus, after classifying Title IX as spending clause legislation, the *Lieberman* court concluded as a matter of statutory construction that Congress must create an explicit damages remedy in Title IX if Congress wants one to exist.[33] A damages remedy fashioned by Congress, rather than the courts, would give institutions ample notice of the full extent of their potential Title IX liability and an opportunity to reconsider their acceptance of federal funds.[34]

The *Lieberman* court also noted that Title IX was part of a bill enacted to assist institutions of higher education during a period of "acute financial distress."[35] Implying a damages remedy, the court reasoned, would interfere with this purpose by burdening educational institutions that were unaware of their Title IX liability with potentially massive financial liability.[36] Therefore, the *Lieberman* court concluded that injunctive and administrative relief, along with attorney's fees, are the only remedies available under Title IX.[37]

In its consideration of *Franklin v. Gwinnett County Public Schools*,[38] the Eleventh Circuit also held that compensatory relief is not

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30. *Lieberman*, 660 F.2d at 1187. The Court deemed Title IX an exercise of Congress' spending power since it was part of a bill designed to help educational institutions during a period of "acute financial distress" through increased federal funding. Thus, the expenditure of federal funds justified the imposition of the statutory prohibition against sex discrimination. Id.

31. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). In *Pennhurst* the Court stated that:

> [L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'

Id.

32. Id. at 24-25.

33. *Lieberman*, 660 F.2d at 1188. The *Lieberman* court acknowledged that two other theories of statutory interpretation exist in damages analysis: (1) negative implication or strict interpretation theory provides that when a statute expressly provides a particular remedy, courts may not imply the existence of alternate remedies; (2) statutory purpose theory provides that a statutory right implies the existence of all necessary and appropriate remedies. See id. at 1187 n.4. The court did not attempt to resolve the inconsistency between these two theories since it found that the *Pennhurst* analysis governed the case at bar. Id.

34. Id. at 1188.

35. Id. at 1187 (citation omitted).

36. Id. at 1188.

37. Id.

38. 911 F.2d 617 (11th Cir. 1990).

available under Title IX.[39] The Eleventh Circuit relied upon *Drayden v. Needville Independent School District*[40] in reaching this conclusion. In *Drayden* the Fifth Circuit held that compensatory relief is not available under Title VI.[41] Since Congress patterned Title IX after Title VI, using nearly identical language to describe the benefitted class and providing for the same administrative termination of federal funding to institutions engaged in the prohibited discrimination,[42] the Eleventh Circuit found that courts should use a substantially similar analysis to interpret both statutes.[43] The court thus adopted the *Drayden* court's denial of compensatory relief and extended it to cases brought under Title IX.[44]

The Eleventh Circuit found that the Supreme Court's decision in *Guardians Association v. Civil Service Commission*[45] did not overrule *Drayden*.[46] In *Guardians*, the Court determined that Title VI did not authorize the award of compensatory damages for unintentional discrimination.[47] The Eleventh Circuit noted that the justices in *Guardians* did not form a majority regarding the issue of whether a court could award damages in a case of intentional discrimination.[48]

The Eleventh Circuit further found that Congress passed Title IX pursuant to its spending power.[49] Therefore, based on the Supreme

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39. Id. at 622.

40. 642 F.2d 129 (5th Cir. 1981).

41. Id. at 133. The *Drayden* decision represented binding precedent for the *Franklin* court since the Fifth Circuit rendered the decision prior to its division on October 1, 1981. *Franklin*, 911 F.2d at 620.

42. *Cannon*, 441 U.S. at 694-96. See note 22 and accompanying text.

43. *Franklin*, 911 F.2d at 619. The court noted that it is the settled position of the courts to treat Titles VI and IX similarly. Id.

44. Id. at 622.

45. 463 U.S. 582 (1983).

46. *Franklin*, 911 F.2d at 622.

47. *Guardians*, 463 U.S. at 607. This Title VI case concerned unintentional discrimination that resulted from the disproportionate impact of examinations used to make entry-level appointments to the New York City Police Department on racial minorities. The Court denied compensatory relief to the plaintiffs. Id. at 584-85. The justices wrote multiple opinions setting forth varying reasons for their conclusions. Justices White and Rehnquist concluded that Title VI does not afford compensatory relief in cases of unintentional discrimination, but explicitly left open the question of the availability of compensatory damages in cases of intentional discrimination. Id. at 593, 597. Justice Powell and Chief Justice Burger concurred, but stated that no private right of action, and thus no form of private relief, should exist under Title VI regardless of the circumstances. Id. at 608 (Powell concurring). Justice O'Connor, also concurring, would not allow compensatory relief absent a showing of discriminatory intent, but explicitly declined to address the question of whether intentional discrimination should implicate compensatory relief. Id. at 612 n.1 (O'Connor concurring). The four dissenting justices believed that Title VI entitles plaintiffs to compensatory relief even in the absence of proof of discriminatory intent. Id. at 615 (Marshall dissenting), 645 (Stevens dissenting).

48. *Franklin*, 911 F.2d at 621.

49. Id. at 622. See notes 31-32 and accompanying text.

Court's reasoning in *Pennhurst*, the court concluded that Title IX's remedy provisions should include only equitable relief.[50] The court then suggested that an educational institution should retain the option of terminating its acceptance of federal funding if it does not wish to comply with a Title IX injunction.[51]

Shortly after the Eleventh Circuit decided *Franklin*, the Third Circuit reached a contrary holding in *Pfeiffer v. Marion Center Area School District*,[52] the first court of appeals decision to find a right to compensatory damages under Title IX. In *Pfeiffer* a former student brought an action for compensatory damages against her school district. She alleged that the school district had violated Title IX by dismissing her from the National Honor Society when she became pregnant.[53] Since Pfeiffer's Title IX claim alleged intentional discrimination, the court found it unnecessary to address the availability of compensatory damages in cases concerning unintentional discrimination or discriminatory effect.[54]

The *Pfeiffer* court looked to the Supreme Court's decision in *Guardians* for guidance.[55] Unlike the Eleventh Circuit, however, the Third Circuit read *Guardians* as authorizing compensatory relief for intentional discrimination in violation of Title VI.[56] The *Pfeiffer* court found that a majority of the *Guardians* Court, in their various opinions, recognized the availability of damages for intentional discrimination.[57] The *Pfeiffer* court applied the Supreme Court justices' opinions in *Guardians* to Title IX claims and held that compensatory relief is available when a plaintiff alleges and establishes intentional discrimination in violation of Title IX.[58]

Therefore, when the Supreme Court implied a private cause of action under Title IX in *Cannon*, it did not specify the remedies available to a litigant alleging a Title IX violation.[59] Since the *Cannon* decision,

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50. Id. at 621.

51. Id. at 621.

52. 917 F.2d 779 (3d Cir. 1990). At least one district court has also found that compensatory relief is available under Title IX. See *Beehler v. Jeffes*, 664 F. Supp. 931, 940 (M.D. Pa. 1986).

53. *Pfeiffer*, 917 F.2d at 782-83. The district court made a factual finding that the faculty council of the National Honor Society did not dismiss Pfeiffer because of her pregnancy, but rather because of her failure to uphold the standards of the Society by engaging in premarital sexual intercourse. The district court, therefore, held that the faculty council and school board did not violate Title IX. Id. at 784.

54. Id. at 788.

55. Id.

56. Id. For a discussion of the Eleventh Circuit's contrary interpretation of *Guardians*, see notes 45-48 and accompanying text.

57. *Pfeiffer*, 917 F.2d at 788.

58. Id. at 788-89.

59. See notes 17-27 and accompanying text.

lower courts have reached differing results on the question of the availability of compensatory relief under Title IX.[60] The Supreme Court did not address the remedies question directly until the *Franklin* case.[61]

III. Recent Development: The Supreme Court's Decision In *Franklin v. Gwinnett County Public Schools*

In 1988 Christine Franklin, a former student at North Gwinnett High School in Georgia, brought a Title IX action claiming sexual harassment by Andrew Hill, a teacher and coach at her school. Franklin sought compensatory relief for the school's alleged Title IX violations. In her complaint she alleged that Hill engaged her in sexually-oriented conversations, forcibly kissed her on the mouth once in the school parking lot, telephoned her at home to ask if she would meet him socially, and on three occasions subjected her to coercive sexual intercourse in a private office at the school. Franklin further averred that although teachers and administrators became aware of Hill's actions toward Franklin and other female students, they made no attempt to stop his conduct, but rather discouraged Franklin from bringing charges against Hill. When Hill resigned, the school closed its investigation of the allegations.[62]

The district court dismissed the action on the ground that compensatory damages are not available for Title IX violations.[63] The Eleventh Circuit affirmed on the same basis.[64] Because the Eleventh Circuit's holding conflicted with the Third Circuit's decision in *Pfeiffer*, the Supreme Court granted certiorari.[65]

A. Majority Opinion

In its reversal of the Eleventh Circuit's decision, the Supreme Court relied heavily upon *Bell v. Hood.*[66] In *Bell,* the Supreme Court held that courts may award any available relief to one whose legal rights have been invaded in violation of a federal statute containing a cause of action.[67] The *Franklin* Court stated that it would presume that all appropriate remedies are available under Title IX since Congress

60. Contrast *Lieberman v. University of Chicago*, 660 F.2d 1185 (7th Cir. 1981) (holding that compensatory relief is not available under Title IX) with *Pfeiffer v. Marion Center Area Sch. D.*, 917 F.2d 779 (3d Cir. 1990) (reaching a contrary result).

61. See Schneider, 65 Tex. L. Rev. at 559 (cited in note 15).

62. *Franklin*, 112 S. Ct. at 1031. Hill resigned on the condition that the school drop any and all charges against him. Id.

63. Id. at 1031-32.

64. *Franklin*, 911 F.2d at 622. See notes 38-51 and accompanying text.

65. *Franklin*, 112 S. Ct. at 1032.

66. 327 U.S. 678 (1946).

67. Id. at 684.

had not specifically expressed a contrary intent.[68] The majority rejected the contention that subsequent Court decisions have eroded the long-standing *Bell* principle.[69]

The majority found support for its decision in *Guardians*.[70] Despite the multiple opinions in the *Guardians* case, the *Franklin* Court believed that the *Guardians* decision represented a clear majority view of the Court that damages are available in an intentional discrimination action under Title VI.[71] In addition, the Court observed that no Justice in *Guardians* challenged the presumption that a court may award all appropriate relief in a cognizable cause of action.[72]

In declining to treat its inquiry as one of pure statutory construction, the Court looked to the state of the law at the time of Title IX's enactment to determine whether Congress intended to limit the remedies available for Title IX violations.[73] In 1972 courts strictly followed the traditional presumption in favor of all appropriate remedies.[74] At that time, the Supreme Court had recently implied causes of action in six cases and found damage remedies to exist in three of them.[75] Although the status of the law must have been clear to legislators when they passed Title IX, they expressed no intent to abandon the traditional rule.[76] In fact, as the *Franklin* Court noted, Congress eventually passed two amendments to Title IX which evidenced congressional support for the *Cannon* decision without any hint of rejecting the traditional presumption in favor of all appropriate relief.[77]

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68. *Franklin*, 112 S. Ct. at 1032.

69. Id. at 1034. The Court cited three cases in support of this proposition: *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964) (holding that the Securities Exchange Act authorizes a private right of action for recission or damages to a corporate stockholder with respect to a consummated merger that is authorized pursuant to the use of a proxy statement alleged to contain false and misleading statements); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969) (holding that compensatory damages are available under 42 U.S.C. § 1982); and *Carey v. Piphus*, 435 U.S. 247 (1978) (holding that students bringing actions against school officials under 42 U.S.C. § 1983 are entitled to recover only nominal damages absent proof of actual injury).

70. *Franklin*, 112 S. Ct. at 1035.

71. Id. The Supreme Court also recognized this majority belief in *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624 (1984).

72. *Franklin*, 112 S. Ct. at 1035.

73. Id. at 1035-36. Courts should assume that Congress knows the law and should interpret legislative enactments in conformity with precedent. *Cannon*, 441 U.S. at 696-99.

74. *Franklin*, 112 S. Ct. at 1036.

75. Id. The six cases were *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964) (approving a damages remedy); *Wyandotte Transportation Co. v. United States*, 389 U.S. 191 (1967) (approving a damages remedy); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969) (approving a damages remedy); and *Superintendent of Ins. v. Bankers Life & Casualty Co.*, 404 U.S. 6 (1971).

76. See *Franklin*, 112 S. Ct. at 1036.

77. Id. The first amendment to Title IX was the Civil Rights Remedies Equalization Amendment of 1986, 42 U.S.C. § 2000d-7 (1988 & Supp. 1991), which abrogated the States' Eleventh

The *Franklin* majority stated that the silence of the legislative history and the statutory text on the issue of private remedies did not mean that Congress did not intend to create any such remedies.[78] Since Title IX did not even expressly create a private cause of action, the *Franklin* majority noted that it was hardly surprising that the statute did not include express remedies.[79]

The Court rejected all three of the respondents' arguments that the Court should deviate from the traditional rule of awarding any appropriate relief.[80] First, the Court disagreed with the contention that awarding monetary relief would interfere with the separation of powers by expanding the judiciary's reach into areas usually reserved to the executive and legislative branches.[81] Second, the majority flatly rejected the argument that the traditional presumption should not apply to legislation passed pursuant to the spending clause.[82] The Court noted that its rejection of the spending clause exception was consistent with its unanimous decision in *Consolidated Rail Corp. v. Darrone*,[83] which allowed monetary awards of back pay under a spending clause statute.[84] Because the *Franklin* case involved intentional discrimination, the Court deemed the *Pennhurst* decision's concern with giving fund recipients notice of their liability irrelevant.[85] Finally, the Court dismissed the assertion that any remedies allowed under Title IX should be lim-

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Amendment immunity under Title IX. This law states that in a suit against a State, "remedies (including remedies both at law and equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State." Id. § 2000d-7(a)(2). The Court read this statute as a clear validation of the *Cannon* holding. *Franklin*, 112 S. Ct. at 1036. The second amendment was the Civil Rights Restoration Act of 1987, Pub. L. 100-259, 102 Stat. 28 (1988), codified at 20 U.S.C. §§ 1681, 1687, 1688; 29 U.S.C. §§ 706, 794; 42 U.S.C. §§ 2000d-4a, 6107 (1988), which broadened the coverage of the antidiscrimination provisions of Title IX.

78. *Franklin*, 112 S. Ct. at 1035.

79. Id.

80. Id. at 1037-38. The United States joined in respondents' arguments as amicus curiae. Id.

81. Id. at 1037. The Court stated that the discretion to award appropriate relief involves no increase in judicial power, unlike the finding of a cause of action, which authorizes a court to hear a case or controversy. The Court believed that the respondents misconceived the difference between a cause of action and a remedy. Id.

82. Id.

83. 465 U.S. 624 (1984).

84. *Franklin*, 112 S. Ct. at 1037-38.

85. Id. Although an institution engaged in intentional discrimination is aware that it is violating its duty not to discriminate on the basis of sex, the Court did not explain how such an institution could have been on notice of its monetary liability prior to the *Franklin* holding. See id.

In its discussion the Court pointed out that *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), supports treating the sexual harassment and abuse of a student by a teacher as a form of sex discrimination prohibited by Title IX. Id. at 64 (stating that "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex").

ited to back pay and prospective relief.[86] The Court found that when, as here, the victim is a student who no longer attends the educational institution, such remedies provide no meaningful relief.[87] In any case, the Court noted that courts generally decide as a threshold matter whether monetary damages are adequate before even considering the availability of equitable relief.[88]

Based on this reasoning, the Supreme Court unanimously held that remedies for Title IX violations include monetary damages.[89] The Court also announced the general rule that in the absence of clear congressional intent to the contrary, federal courts may award any appropriate relief in a cognizable cause of action brought under a federal statute.[90]

B. Concurring Opinion

Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, wrote a concurring opinion in *Franklin*.[91] Though agreeing with the majority's holding, the concurring justices based their conclusion on much narrower reasoning. Justice Scalia believed that since the private right of action under Title IX had been implied by the judiciary, rather than expressly created by Congress, the courts should also have the power to limit the particular remedies available.[92] Scalia suggested that he would have taken such an approach in this case, and denied compensatory relief, if Congress had not subsequently enacted the Civil Rights Remedies Equalization Amendment of 1986, which appeared to recognize the availability of damages under Title IX.[93] Justice Scalia further suggested that the judiciary should abandon the implication of private causes of action altogether.[94] In support of this proposi-

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86. *Franklin*, 112 S. Ct. at 1038.

87. Id.

88. Id.

89. Id. The Court did not, however, decide whether to award damages to Christine Franklin. The Court remanded the case for further proceedings consistent with its holding. Id.

90. Id. at 1035.

91. *Franklin*, 112 S. Ct. at 1038 (Scalia concurring).

92. Id. at 1039 (Scalia concurring). Justice Scalia reasoned that "[t]o require, with respect to a right that is not consciously and intentionally created, that any limitation of remedies must be express, is to provide, in effect, that the most questionable of private rights will also be the most expansively remediable." Id. Scalia agreed with the United States' position that "[w]hatever the merits of 'implying' rights of action may be, there is no justification for treating [congressional] silence as the equivalent of the broadest imaginable grant of remedial authority." Id. (quoting Brief for United States as Amicus Curiae Supporting Respondents at 12-13, *Franklin v. Gwinnett County Public Schools*, 112 S. Ct. 1028 (1992) (No. 90-918)).

93. *Franklin*, 112 S. Ct. at 1039 (Scalia concurring).

94. Id. (Scalia concurring). Justice Scalia also discussed this notion in his concurrence in *Thompson v. Thompson*, 484 U.S. 174, 191 (1988).

tion, he pointed to recent Supreme Court cases that have drifted away from *Cannon*'s expansive rights-creating approach.[95]

IV. Potential Effects of the *Franklin* Decision

A. *Effects on Educational Institutions*

The Supreme Court's decision in *Franklin* will affect educational institutions and the state of civil rights law, while furthering the purposes of Title IX. The decision will have its most direct, and perhaps most negative, impact on educational institutions that receive federal funding. The availability of compensatory damages under Title IX may subject these institutions to massive financial liability.[96] The *Lieberman* court recognized that the costs of compensatory damage awards could be significant to institutional defendants.[97] The court claimed that one of the purposes of Title IX was to help institutions of higher learning adjust to a situation of acute financial distress.[98] Making educational institutions liable for unpredictable compensatory damage awards would frustrate that purpose.

The purpose stated by the *Lieberman* court, however, was not one of the two main purposes set forth in *Cannon*.[99] In fact, the Supreme Court actually rejected the notion that Congress intended to insulate educational institutions from the costs of litigation.[100] In reality, a termination of federal funds may often be as severe as the imposition of liability for compensatory damages.[101] In any event, the requirement of proving intentional discrimination will help limit the number of actions brought for damages and the resulting costs to educational institutions.[102] In order to minimize the liability of educational institutions, courts should also make monetary awards only when the discrimination

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95. *Franklin*, 112 S. Ct. at 1039 (Scalia concurring). Justice Scalia's discussion referred to *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575-76 (1979) (refusing to imply a private cause of action for damages under § 17(a) of the Securities Exchange Act of 1934), and *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 18, 23-24 (1979) (implying a private cause of action for damages under § 215 of the Investment Advisers Act of 1940, but refusing to imply such a private cause of action under § 206 of the Act, which only proscribed certain conduct and did not create or alter any civil liabilities).

96. *Lieberman*, 660 F.2d at 1188.

97. Id. The court stated that "[t]heoretically, this liability could exceed the amount of the federal funds received." Id. According to news reports, Christine Franklin is seeking six million dollars for her claim of sex discrimination under Title IX. See Linda P. Campbell, *Women Hail Ruling to Sue Schools in Sex Bias Cases*, Chicago Tribune at C1 (Feb. 27, 1992).

98. *Lieberman*, 660 F.2d at 1188 (quoting 2 U.S. Code Cong. & Admin. News 1972 at 2463).

99. See note 9 and accompanying text.

100. See *Cannon*, 441 U.S. at 709-10.

101. Commentary, *Compensatory Relief Under Title IX of the Education Amendments of 1972*, 68 Educ. L. Rptr. 557, 570 (1991).

102. See id. at 571. See also notes 139-46 and accompanying text.

caused actual and apparent harm to the victim.[103]

The creation of liability for damages under Title IX will take institutions by surprise. Title IX expressly provides that an institution's failure to comply with the statute's nondiscrimination requirement may result in the termination of federal funding or other action authorized by law.[104] The statutory text does not, however, mention liability for monetary damages as a consequence of Title IX violations.[105] Title IX clearly provides that no federal department or agency may take enforcement action before both giving notice to the institution of its failure to comply with the statute and determining that compliance with the statute cannot be secured by voluntary means.[106] Thus, the enacting Congress expressly intended to put institutions on notice of their Title IX violations before administrative agencies or departments proceeded to take punitive action.[107] Similarly, Congress would have wanted institutions to be on notice of their Title IX violations before subjecting them to liability for monetary damages. Holding institutions liable for monetary damages places a significant penalty on institutions that may have voluntarily altered their conduct had they known they were in violation of Title IX.[108] If subsequent court decisions adopt the requirement that a plaintiff must prove intentional discrimination in order to receive compensatory relief;[109] however, institutions cannot argue that they were unaware or without notice of their violations. They can only argue that they were unaware of their liability for monetary damages.

The Supreme Court indicated in *Guardians* that "make whole" remedies may not be appropriate for causes of action contained in legislation passed pursuant to Congress' spending power.[110] Some courts have found that Title IX is such a statute.[111] An institution's acceptance of federal funding under spending clause legislation is optional.[112] An institution that receives federal funds under the spending clause must be aware of the obligations attached to the grant from the beginning. Such awareness enables the institution to weigh accurately the costs and benefits of accepting the funds and complying with their con-

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103. See *Pfeiffer v. Marion Center Area Sch. Dist.*, 917 F.2d 779, 786 (3d Cir. 1990); Commentary, 68 Educ. L. Rptr. at 572.

104. See 20 U.S.C. § 1682 (1988).

105. See id.

106. Id.

107. See Commentary, 68 Educ. L. Rptr. at 570.

108. See id.

109. See notes 139-46 and accompanying text.

110. *Guardians*, 463 U.S. at 596.

111. See, for example, *Lieberman*, 660 F.2d at 1187.

112. *Guardians*, 463 U.S. at 596.

ditions.[113] If a court declares that a recipient must assume further unanticipated obligations and duties in order to comply with the funding conditions, the recipient should be able to withdraw and terminate its receipt of federal funds.[114] As a result of the *Franklin* decision, some institutions may opt to discontinue their receipt of federal funds in order to avoid the nondiscrimination requirement and the newly created potential liability for monetary damages.[115] If institutions reject federal funds, the decrease in financial resources may harm students of the institution, the very individuals that Title IX was designed to benefit. In the final analysis, however, the availability of compensatory damages will work more to the benefit than to the detriment of students.

B. Furtherance of the Purposes of Title IX

The availability of compensatory damages in Title IX actions will further the two primary objectives of the statute as set forth by the *Cannon* Court.[116] The *Cannon* Court recognized that the express administrative remedy of fund termination serves the first purpose of avoiding federal funding of discriminatory practices.[117] The Court noted, though, that such a remedy often may not further Title IX's second purpose of providing individuals with protection against sex discrimination.[118] The availability of damage awards will serve the Court's second purpose by deterring discriminatory practices and by compensating individuals harmed by such practices.[119]

The availability of compensatory damages will increase the likelihood that victims of discrimination will bring private actions against institutions in order to obtain such relief.[120] Because of the high costs and long duration of private damage actions, the threat of such actions will be an effective deterrent against sex discrimination. The availability of compensatory damages will also further the purposes of Title IX by affording meaningful compensation to victims of sex discrimination. As the *Cannon* Court made clear, Title IX's drafters focused specifically on the benefitted class and its rights; the drafters did not simply

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113. Id.

114. Id. at 597. See also *Grove City College v. Bell*, 687 F.2d 684, 702 (3d Cir. 1982), aff'd, 465 U.S. 555 (1984).

115. Negative effects may occur particularly in schools' sports programs. In order to provide equal opportunities for men and women, athletic departments may cut mens' programs due to their financial inability to add sports for women. See Tom Weir, *All Must Face Cold Facts of Title IX*, USA Today at 3C (March 13, 1992).

116. See note 9 and accompanying text.

117. *Cannon*, 441 U.S. at 704.

118. Id. at 704-05.

119. See Note, 1983 Wis. L. Rev. at 207 (cited in note 28).

120. See Commentary, 68 Educ. L. Rptr. at 571 (cited in note 101).

ban sex discrimination by federally funded institutions or prohibit the disbursement of federal funds to those institutions engaging in discrimination.[121] Indeed, injunctive relief or the termination of federal funding will often be meaningless to a student-plaintiff.[122] Since students are by nature transient, the direct value to them of any institutional reform is minimal.[123] An award of compensatory damages, therefore, is the most meaningful type of relief for a student harmed by sex discrimination.

C. *Effects on Civil Rights Law*

Following the *Franklin* decision, all courts may consider compensatory damage awards, as well as other relief, for victims of sex discrimination. In addition to resolving the disagreement among courts as to the types of relief available under Title IX,[124] the *Franklin* Court also expanded the possible types of Title IX claims to include sexual harassment.[125] In prior cases, courts had been reluctant to allow student claims of sexual harassment by teachers, particularly claims of environmental harassment.[126] The *Franklin* majority, however, did not hesitate to recognize Christine Franklin's claim of sexual harassment as a cognizable action under Title IX.[127]

In addition to its direct impact on the types of claims and remedies allowed under Title IX, the *Franklin* decision also has general implications for other civil rights laws. Legal commentators have recognized that the Supreme Court, with its current conservative majority, has begun to restrict the Court's prior broad interpretations of civil rights and antidiscrimination statutes.[128] These commentators have predicted that the Court's recent decisions will discourage private civil rights actions.[129] The *Franklin* decision, however, with its broad reading of the

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121. *Cannon*, 441 U.S. at 690-93.

122. See notes 86-87 and accompanying text.

123. Schneider, 65 Tex. L. Rev. at 527 (cited in note 15).

124. For a discussion of the confusion surrounding the types of relief available under Title IX prior to the Supreme Court decision in *Franklin*, see Comment, *The Harms of Asking: Towards a Comprehensive Treatment of Sexual Harassment*, 55 U. Chi. L. Rev. 328, 352 (1988).

125. See *Franklin*, 112 S. Ct. at 1037.

126. See Comment, *Students Versus Professors: Combatting Sexual Harassment Under Title IX of the Education Amendments of 1972*, 23 Conn. L. Rev. 355, 400-07 (1991).

127. See note 85 and accompanying text.

128. See, for example, Samuel A. Marcosson and Charles A. Shanor, *Battleground for a Divided Court: Employment Discrimination in the Supreme Court, 1988-89*, 6 Labor Law. 145, 145-46 (1990); William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 Cal. L. Rev. 613, 680-83 (1991) (setting forth a game theory analysis of the Court/Congress/President interaction).

129. Marcosson and Shanor, 6 Labor Law. at 146. Commentators have concluded that recent civil rights "decisions will shift enforcement of employment discrimination cases away from private litigation toward governmental enforcement, that they will move the locus of policy making in the civil rights field from the courts to the Congress, and that they will lead courts interpreting stat-

remedies and types of claims included under Title IX, signals a halt to the Court's narrowing interpretations of civil rights legislation.[130] Lower courts may use the *Franklin* holding as precedent for establishing the availability of compensatory relief under two similar antidiscrimination statutes—Title VI, which prohibits racial discrimination in federally funded programs, and Section 504 of the Rehabilitation Act of 1973 (Section 504),[131] which prohibits discrimination against handicapped individuals in federally funded programs.[132]

Another important aspect of the *Franklin* decision is the Court's recognition that the only congressional intent relevant to the Court's decision is the congressional intent at the time of the statute's enactments.[133] The Court should extend this focus on Congress' original intent to the Court's considerations of other statutes. Although the Court has previously recognized the importance of Congress' intent at the time it enacted a given statute,[134] legal scholars have suggested that the Court tends to favor preferences of the current Congress over preferences of the enacting Congress.[135] Professor William Eskridge, Jr. believes that the Court practices judicial activism when it refuses to follow the traditional approach to statutory interpretation, which is grounded upon original intent theory.[136] The Court's disregard of congressional intent explains the necessity of Congress' recent legislation reversing Court decisions concerning civil rights matters.[137]

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utes to focus increasingly on the statutory text rather than legislative history and administrative interpretations." Id. at 146-47.

130. Lawyers for civil rights' groups expressed surprise over the *Franklin* outcome, in light of several recent narrow interpretations of federal civil rights laws by the Supreme Court. See Greenhouse, N.Y. Times at A1 (cited in note 4).

131. 29 U.S.C. § 794 (1988).

132. Note, 1983 Wis. L. Rev. at 183-85 & nn. 16-17 (cited in note 28). Courts agree that an implied private cause of action exists under Title VI. See id. at 184 n.16. Currently, however, in the absence of a Supreme Court decision directly addressing the availability of compensatory damages for intentional discrimination in violation of Title VI, lower courts are divided on the availability of remedies other than declaratory or injunctive relief for such discrimination. See id. Although the justices discussed the issue in their various opinions in *Guardians*, a decision denying compensatory damages for unintentional discrimination, their respective views on the availability of compensatory damages for intentional discrimination were unclear. Thus, lower courts are not in agreement as to whether or not a majority of the *Guardians* Court supported awarding damages for intentional discrimination. See notes 47-48, 55-58 and accompanying text.

Similarly, while recognizing an implied private cause of action under Section 504, courts disagree on the availability of damages remedies thereunder. See Note, 1983 Wis. L. Rev. at 185 n. 17.

133. See *Franklin*, 112 S. Ct. at 1035-36 (majority opinion), 1039 (Scalia concurring). See also notes 73-76 and accompanying text.

134. See *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 378 (1982).

135. Eskridge, 79 Cal. L. Rev. at 617 (cited in note 128).

136. Id. at 617, 664-66. Eskridge has argued that the Rehnquist Court is particularly activist since it slights even current congressional preferences. Id. at 617.

137. Id. See, for example, Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988 (1988) (providing for the shifting of attorney's fees in favor of civil rights plaintiffs and overriding the

An important question for the future is whether the Court will retain its activist approach by continuing to disregard the intent of the enacting Congress.[138] The *Franklin* decision suggests a negative answer to this question. The Court appears to have recognized from Congress' overrides of Court decisions that it must abide by congressional intent more closely than in the past if it wants its decisions to stand. The *Franklin* decision reflects the Court's new reluctance to replace Congress' intentions with the Court's own values in civil rights matters. The impact of the Court's new attitude, if it continues, will be significant to future Court considerations of civil rights statutes.

V. Possible Limitations On *Franklin* In Future Court Applications

A. Requirement of Intent

Although the *Franklin* decision is undeniably broad, the Supreme Court's treatment, or nontreatment, of certain issues leaves opportunities open for lower courts to limit the *Franklin* holding in the future. The *Franklin* Court did not address the availability of damages in cases of unintentional discrimination or discriminatory impact since Christine Franklin alleged intentional discrimination.[139] In order to mitigate the decision's negative impact on educational institutions, lower courts should not extend the *Franklin* holding to cases of unintentional discrimination. Rather, courts should award monetary damages only in cases that clearly involve intentional discrimination. The Supreme Court's holding in *Guardians* supports the disallowance of compensatory damages as a form of relief for unintentional discrimination.[140] Although the *Guardians* decision concerned a Title VI claim, courts

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Supreme Court's decision to the contrary in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975)); Civil Rights Remedies Equalization Amendment of 1986, 42 U.S.C. § 2000d-7 (1988 & Supp. 1991) (abrogating the sovereign immunity of States under the Eleventh Amendment in various civil rights statutes and reversing the Court's decision in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985)); Civil Rights Restoration Act of 1987, Pub. L. 100-259, 102 Stat. 28 (1988), codified at 20 U.S.C. §§ 1681, 1687, 1688; 29 U.S.C. §§ 706, 794; 42 U.S.C. §§ 2000d-4a, 6107 (1988) (overriding *Grove City College v. Bell*, 465 U.S. 555 (1984), which narrowly interpreted the "program or activity" language of Title IX and limited the application of Title IX to Grove City's federally funded programs, for example, its financial aid department, rather than applying it to all departments of the school). For a more complete discussion of the *Grove City* decision, see generally Comment, Grove City College v. Bell: *The Weakening of Title IX*, 20 New Eng. L. Rev. 805 (1986).

138. Eskridge, 79 Cal. L. Rev. at 617.

139. See note 85 and accompanying text. Claims of intentional discrimination or disparate treatment require a showing of intent to discriminate, while unintentional or disparate impact cases require only that a "facially neutral policy have a suhstantially disproportionate adverse impact upon a protected group." Schneider, 65 Tex. L. Rev. at 553 (cited in note 15).

140. For a discussion of *Guardians*, see note 47 and accompanying text.

should interpret Title IX similarly[141] and should, therefore, extend the *Guardians* Court's denial of compensatory relief for unintentional discrimination to Title IX claims. The intent requirement also furthers Congress' desire to give educational institutions notice of their Title IX violations before imposing severe penalties on them.[142] Furthermore, the intent requirement will reduce the number of Title IX suits brought and thus protect educational institutions from unlimited financial liability.[143]

The question of whether Title IX has any application whatsoever in cases of unintentional discrimination remains unsettled.[144] The *Guardians* opinions suggest that intent is in fact a required element of any Title IX action.[145] Other courts, however, have found that Title IX covers unintentional discrimination as well.[146] Any courts that decide to apply Title IX to cases of unintentional discrimination should grant liberal injunctive and equitable relief, but should refrain from awarding compensatory relief.

B. Limitations of the Bell *Principle*

In *Franklin,* the Supreme Court adhered to the presumption that courts may grant all appropriate relief when Congress has not expressly limited their ability to do so.[147] The Court dismissed the argument that its decisions since *Bell v. Hood* have eroded this presumption.[148] The *Franklin* Court, however, may have underestimated the merit of this argument. The Court's decisions since *Bell* have in fact eroded the presumption of any appropriate relief. The *Guardians* Court recognized that the traditional rule must yield in cases in which its application would frustrate the intent of Congress or the purposes of the statute involved.[149] In *Transamerica Mortgage Advisors, Inc. v. Lewis,*[150] the Court stated that courts must be cautious when reading additional remedies into statutes that already expressly provide for particular remedies.[151] The Court reasoned that only strong evidence of congressional

141. See note 22 and accompanying text.

142. See notes 110-15 and accompanying text.

143. See Note, 1983 Wis. L. Rev. at 208 (cited in note 28).

144. See Schneider, 65 Tex. L. Rev. at 557 (cited in note 15).

145. Id. at 558. Agencies may be able to override this intent requirement, however, by issuing regulations that allow an impact standard for sex discrimination. Id. at 559.

146. See, for example, *Sharif By Salahuddin v. New York State Educ. Dept.*, 709 F. Supp. 345, 361 (S.D.N.Y. 1989) (holding that plaintiffs who showed disparate impact on women could prevail under Title IX even without proving intentional discrimination).

147. See notes 67-69 and accompanying text.

148. *Franklin,* 112 S. Ct. at 1034.

149. *Guardians,* 463 U.S. at 595.

150. 444 U.S. 11 (1979).

151. Id. at 19.

intent could override such a basic tenet of statutory construction.[152] Since Congress has shown that it knows how to provide expressly for a private damages remedy in its legislation, the Court found that the absence of such an express remedy strongly suggests that one was not intended.[153]

Title IX includes no express private remedies.[154] The limits on the *Bell* decision created by the Court in *Transamerica* thus have no relevance to the implication of a damages remedy under Title IX. Once the *Cannon* Court implied a private right of action under the statute, it had to imply particular remedies in order to make any available.[155] In statutes providing express private remedies, however, the *Franklin* Court's reaffirmation of the *Bell* principle may not control. Rather, the Court's analyses from other recent decisions such as *Guardians* and *Transamerica* may apply to override the *Bell* presumption.

C. *Reconsideration of* Cannon

The *Franklin* concurrence suggested that the Court should never imply private causes of action.[156] The concurring justices' concern over the implication of private rights of action challenges the *Cannon* decision and may threaten future court attempts to imply causes of action into statutes. The Court has recognized its application of a stricter standard for implying causes of action in recent years.[157] Formerly, the Court rarely refused to imply a private remedy when Congress enacted a statute to benefit a special class.[158] The Court did not view Congress' failure to provide certain remedies as dispositive.[159] With the *Cort* decision in 1975, the Court modified its approach by concentrating on legislative intent in deciding whether to imply a private right of action.[160] The *Franklin* concurrence warns that the refusal to imply a private

152. Id. at 20. The Court stated that "[t]he dispositive question remains whether Congress intended to create any such remedy [of damages]." Id. at 24.

153. Id. at 21.

154. Title IX only provides expressly for an administrative remedy of fund termination to an institution violating the statute. See 20 U.S.C. § 1682 (1988).

155. Note, 1983 Wis. L. Rev. at 204-05 (cited in note 28). Title VI and Section 504 also contain no express private remedies. Thus, courts may apply the *Bell* principle liberally in interpreting available remedies under these statutes.

156. See *Franklin*, 112 S. Ct. at 1039 (Scalia concurring). Some civil rights groups found the concurrence disturbing. See Nancy E. Roman, *School Sex-Bias Law Allows for Damages, Justices Rule*, Wash. Times at A5 (Feb. 27, 1992) (Final ed.) (attorney for NOW Legal Defense Fund stating that "[e]ven in this victory for civil rights, they [the concurring justices] take an opportunity to indicate again that without clear legislative mandate, they would be willing to limit civil rights").

157. *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979).

158. *Merrill Lynch*, 456 U.S. at 374-75; Note, 1983 Wis. L. Rev. at 205 (cited in note 28).

159. *Merrill Lynch*, 456 U.S. at 377; Note, 1983 Wis. L. Rev. at 205.

160. *Merrill Lynch*, 456 U.S. at 377.

right of action could become the rule rather than the exception in future decisions if the view of Justices Scalia, Thomas and Rehnquist prevails.[161]

VI. CONCLUSION

The Supreme Court's decision in *Franklin* will undoubtedly have significant ramifications. The decision will have its most visible effects on educational institutions that receive federal funding and on victims of Title IX sex discrimination. Although court awards of monetary damages will be costly to institutions, such remedies represent the most effective means of compensating individual victims of sex discrimination and of deterring such discriminatory conduct by institutions. Courts should limit the dangers of placing potentially massive financial liability on educational institutions by requiring that victims prove discriminatory intent in order to receive damages and by awarding monetary damages only when the victim suffers actual and apparent harm. Judges and juries[162] should award damages in amounts commensurate with the harm suffered by the plaintiff.

The *Franklin* decision clarifies the state of the law with respect to the specific remedies available under Title IX. The holding will also affect future court interpretations of similar antidiscrimination statutes. Legal commentators must reexamine the direction of the Supreme Court in light of its unusually broad reading of this piece of civil rights legislation. Further, the full impact of the *Franklin* decision must be reevaluated in light of future lower court applications, and possible limitations, of the decision.[163] Ultimately, however, the positive consequences of the decision should outweigh any potential negative effects on educational institutions. The decision represents a clear, though surprising, victory for civil rights groups.

Susan L. Wright

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161. The Court's approach to implying private remedies has evolved over the years along with the sophistication of federal legislation. The original test of implying a private remedy if the statute benefitted a special class was appropriate when legislation was less comprehensive than it is today. See id. at 374.

162. Juries may now hear Title IX cases since a constitutional right to a jury trial exists in actions enforcing statutory rights when the rights and remedies under the statute are enforceable in an action for damages. *Curtis v. Loether*, 415 U.S. 189, 194 (1974).

163. Issues such as retroactivity and the appropriate calculation of damages were not resolved by the *Franklin* Court.