University of Richmond Law Review

Volume 27 | Issue 1 Article 7

1992

Franklin v. Gwinnett County Public Schools: The Implication of Remedies for an Implied Cause of Action

Ellen F. Firsching
University of Richmond

CASENOTES

FRANKLIN v. GWINNETT COUNTY PUBLIC SCHOOLS: THE IMPLICATION OF REMEDIES FOR AN IMPLIED CAUSE OF ACTION

I. INTRODUCTION

According to the common law doctrine of *ubi jus, ibi remedium*, where there is a right, there is a remedy.[1] The United States Supreme Court has long recognized the validity of this doctrine.[2] Traditionally, the Court was very liberal in recognizing private rights of action, and granting injunctive and monetary relief for violations of constitutional and statutory rights in the absence of explicit congressional authorization.[3] In *Bell v. Hood*, the Supreme Court stated: "[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief . . . . [F]ederal courts may use any available remedy to make good the wrong done."[4]

---

1. G.R.C., Case Comment, *Implied Private Rights of Action for Damages Under Title IX — Lieberman v. University of Chicago*, 16 GA. L. REV. 511, 511 (1982); *see also* BLACK'S LAW DICTIONARY 1520 (6th ed. 1990).

2. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). In this case, the Court stated:

> [t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. . . . "[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded."

Id. at 163 (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES 23).

3. *See* City of Mitchell v. Dakota Cent. Tel. Co., 246 U.S. 396 (1918); Philadelphia Co. v. Stimson, 223 U.S. 605 (1912); Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226 (1897); Pennoyer v. McConnaughy, 140 U.S. 1 (1891).

The Warren Court was particularly amenable to acknowledging implied causes of action. Stephen E. Ronfeldt, *Implying Rights of Action For Minorities and the Poor Through Presumptions of Legislative Intent*, 34 HASTINGS L.J. 969, 970 (1983); *see, e.g.*, J.I. Case Co. v. Borak, 377 U.S. 426, 433 (1964) ("[I]t is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose.").

4. 327 U.S. 678, 684 (1946); *see also* Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) (granting money damages for the violation of an individual's Fourth Amendment rights).

The Burger Court introduced an era of judicial restraint during which the Court began to take a much more restrictive approach to implying rights of action in statutes where Congress did not manifest any intent.[5] In *Cort v. Ash*, the Court created a four-prong test for determining when a private cause of action will be inferred from a statute. The test examines whether: (1) the statute created a federal right in favor of the plaintiff; (2) there is any explicit or implicit indication of legislative intent to create or deny such a remedy; (3) the remedy would be consistent with the underlying purposes of the legislative scheme; and (4) the cause of action has traditionally been relegated to state law.[6] "*Cort* implied that the mere existence of a right was not enough to enable the plaintiff to sue, and that courts would not enforce rights absent congressional intent to create remedy."[7]

As applied to Title IX of the Education Amendments of 1972,[8] the *ubi jus, ibi remedium* doctrine has significantly impacted the ability of plaintiffs suing under Title IX to combat sexual discrimination by federally funded educational programs.[9] Most importantly, the recent Supreme Court decision of *Franklin v. Gwinnett County Public Schools*[10] established that compensatory damages are an available remedy in private lawsuits brought to enforce Title IX despite the absence of statutory authorization.[11]

This Casenote explores the *Franklin* Court's recognition of compensatory damages under Title IX and the effect this decision will have on victims and perpetrators of intentional sexual discrimination in federally

---

5. Ronfeldt, *supra* note 3, at 970; *see, e.g.*, Securities Investor Protection Corp. v. Barbour, 421 U.S. 412 (1975); National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453 (1974).

6. 422 U.S. 66, 78 (1975).

7. Michael A. Mazzuchi, Note, *Section 1983 and Implied Rights of Action: Rights, Remedies, and Realism*, 90 MICH. L. REV. 1062, 1075 (1992).

8. 20 U.S.C. § 1681 (1988). The text of the statute provides: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." *Id.* § 1681(a).

9. In Cannon v. University of Chicago, 441 U.S. 677 (1979), for example, the Supreme Court held that a private right of action exists for plaintiffs alleging sexual discrimination by a federally funded academic institution. For a more detailed discussion of *Cannon*, see *infra* notes 38-58 and accompanying text.

10. 112 S. Ct. 1028 (1992).

11. Prior to *Franklin*, the lower federal courts were irreconcilably divided on the issue of whether monetary damages were an appropriate remedy to be implied under Title IX. *Compare* Pfeiffer v. Marion Ctr. Area Sch. Dist., 917 F.2d 779 (3d Cir. 1990) (holding that compensatory relief is available under Title IX) *with* Franklin v. Gwinnett County Pub. Sch., 911 F.2d 617 (11th Cir. 1990) (holding that compensatory damages are not recoverable under Title IX), *rev'd*, 112 S. Ct. 1028 (1992) *and* Lieberman v. University of Chicago, 660 F.2d 1185 (7th Cir. 1981) (holding that injunctive and declaratory relief are the only remedies available under Title IX), *cert. denied*, 456 U.S. 937 (1982).

funded educational institutions. Section II describes the legislative history and analyzes the relevant statutory language of Title IX. Section III discusses case law addressing the availability of damages under Title IX prior to the *Franklin* decision. Section IV reviews and analyzes the Supreme Court's opinion in *Franklin*. Finally, Section V predicts the effect *Franklin* will have on discrimination in all federally funded programs and on the interpretation of other statutes that do not provide a private right of action for compensatory damages.

II. TITLE IX OF THE EDUCATION AMENDMENTS OF 1972

Congress passed Title IX of the Education Amendments of 1972[12] in response to growing awareness of gender based discrimination in federally funded educational programs.[13] Originally, Congress considered amending Title VI of the Civil Rights Act of 1964[14] through a bill[15] which simply added the word "sex" to the list of discriminations already prohibited by section 601 of Title VI.[16] However, Congress determined that the problem of gender discrimination in education possessed issues worthy of a separate comprehensive measure.[17] For example, discrimination by academic institutions was considered particularly destructive because education provides access to jobs and financial security.[18] Furthermore, "[d]iscrimination against women, in contrast to that against minorities, [was] still overt and socially acceptable within the academic commu-

12. Pub. L. No. 92-318, § 901, 86 Stat. 235, 373 (codified as amended at 20 U.S.C. § 1681 (1988)).

13. *See* 118 CONG. REC. 5803-15 (1972).

14. Pub. L. No. 88-352, § 601, 78 Stat. 252 (codified as amended at 42 U.S.C. § 2000d (1988)). The statute states: "No 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.*

15. H.R. 16098, 91st Cong., 2d Sess. (1970).

16. Although Congress never passed this bill, the supporting evidence was reconsidered during the next legislative session when Title IX was proposed.

17. 118 CONG. REC. 5803-06 (1972) (statement of Sen. Bayh). Even though Congress found Title IX was worthy of a separate provision, the language of Title VI differs from Title IX in only two respects. First, the grounds of discrimination prohibited under Title VI are "race, color, or national origin," whereas "sex" is the only protected classification under Title IX. Additionally, where Title VI prohibits discrimination in "any program or activity receiving Federal financial assistance," Title IX focuses exclusively on discrimination in only education programs receiving Federal financial assistance.

18. *Id.* at 5804. For analysis of the unique issues relating specifically to sex discrimination in post-secondary education see Christine Maitland, *The Inequitable Treatment of Women Faculty in Higher Education, in* WOMEN IN HIGHER EDUCATION: CHANGES AND CHALLENGES 246 (Lynne B. Welch ed., 1990) and BETTY RICHARDSON, SEXISM IN HIGHER EDUCATION (1979).

nity."[19] Consequently, Congress created Title IX to cover situations unique to the educational arena, such as admissions procedures, scholarships, and faculty employment.[20]

Although Congress never questioned the necessity for legislation to combat sex discrimination in federally funded academic institutions, "vigorous debate ensued over what exemptions should be allowed, particularly over the admissions policies of religious, military, secondary, and private undergraduate institutions."[21] As a result, the current version of Title IX incorporates a list of exempt organizations,[22] including religious organizations if application of Title IX would be inconsistent with the tenets of such organizations,[23] military schools,[24] certain single sex institutions,[25] social fraternities and sororities or voluntary youth organizations,[26] Boys State and Girls State conferences,[27] father/son or mother/daughter activities,[28] and scholarships for beauty pageants.[29] Despite these limitations, Title IX represents a broad ban on sex discrimination in federally funded educational programs.[30]

Congress designed Title IX to achieve two specific objectives: to prevent the distribution of federal funds to educational institutions engaging in sexual discrimination; and to protect individuals from such practices.[31] The drafters of Title IX applied the same enforcement mechanisms used in Title VI to pursue these goals.[32] Any student, employee or job applicant having a complaint of sexual discrimination or harassment[33] has two

---

19. 118 CONG. REC. at 5804 (quoting a study by an independent task force formed by the Ford Foundation, reported in March 1971).

20. *Id.* at 5803.

21. Roak J. Parker, *Compensatory Relief Under Title IX of the Education Amendments of 1972*, 68 EDUC. L. REP. 557, 559 (West 1991).

22. No similar list exists under Title VI which applies to all federally funded programs and activities.

23. 20 U.S.C. § 1681(a)(3) (1988).

24. *Id.* § 1681(a)(4).

25. *Id.* § 1681(a)(5).

26. *Id.* § 1681(a)(6).

27. *Id.* § 1681(a)(7).

28. *Id.* § 1681(a)(8).

29. *Id.* § 1681(a)(9).

30. Parker, *supra* note 21, at 559.

31. Cannon v. University of Chicago, 441 U.S. 677, 704 (1979); *see also* Pamela W. Kernie, *Protecting Individuals From Sex Discrimination: Compensatory Relief Under Title IX of the Education Amendments of 1972*, 67 WASH. L. REV. 155, 156-57 (1992).

32. *Compare* 42 U.S.C. § 2000d-1 (1988) *with* 20 U.S.C. § 1682 (1988). Congress also applied the same language to statutory provisions addressing discrimination on the bases of age and handicap by federal grant recipients. *See* Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 394 (codified as amended at 29 U.S.C. § 794 (1988)); Age Discrimination Act of 1975, Pub. L. No. 94-135, § 303, 89 Stat. 728 (codified at 42 U.S.C. § 6102 (1988)).

33. Sexual discrimination has been interpreted in several forums to include sexual harassment which creates a hostile environment. Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986);

options. First, the victim may utilize specific grievance procedures required of programs receiving federal financial assistance.[34] Alternatively, the regulations provide a grievance procedure with the Office for Civil Rights (OCR) whereby OCR investigates the complaint and terminates funding if "compliance with [Title IX] cannot be secured by voluntary means."[35]

Although both of these mechanisms work toward achieving the goals of Title IX, neither remedy is sufficient to meet these goals. The reality is that the OCR is unlikely to withdraw federal funding from any educational institution. The legislative history manifests an expectation that funding will be withdrawn only in the most extreme cases,[36] and the regulations specifically require that all investigations be settled by "informal means whenever possible."[37] Therefore, in most instances, the OCR only requires assurances of future compliance with Title IX.

Under these options, the most a victim can hope for is that school officials will work to correct the behavior in question. At worst, the victim suffers discrimination without relief and the program loses federal funding. These administrative procedures provide little protection to a victim of sexual discrimination because they fail to guarantee any remedy, including immediate official intervention or compensation for damages.

Franklin v. Gwinnett County Pub. Sch., 112 S. Ct. 1028, 1037 (1992); EEOC Sexual Harassment Guidelines, 29 C.F.R. § 1604.11(a)(3) (1991). *Contra* Bougher v. University of Pittsburgh, 713 F. Supp. 139, 145 (W.D. Pa. 1989), *aff'd*, 882 F.2d 74 (1989) ("Title IX simply does not permit a 'hostile environment' claim as described for the workplace by 29 C.F.R. § 1604.11(a)(3).").

34. Each recipient institution must appoint at least one employee to organize and effectuate compliance with Title IX, including establishing grievance procedures for "the prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by [Title IX]." 34 C.F.R. § 106.8 (1991).

35. 34 C.F.R. § 106.71 (1991) (incorporating by reference the procedural provisions applicable to Title VI of the Civil Rights Act of 1964); *see* 34 C.F.R. § 100.7(b)-(d) (1991); *cf.* 20 U.S.C. § 1682 (1988). *See generally* Ronna G. Schneider, *Sexual Harassment and Higher Education*, 65 TEX. L. REV. 525 (1987).

36. In reference to Title VI, Senator Ribicoff stated:

> I think it would be a rare case when funds would actually be cut off. In most cases alternative remedies, principally lawsuits to end discrimination, would be the preferable and more effective remedy. If a Negro child were kept out of a school receiving Federal funds, I think it would be better to get the Negro child into school than to cut off funds and impair the education of the white children.

110 CONG. REC. 7067 (1964) (statement of Sen. Ribicoff).

37. 34 C.F.R. § 100.7(d) (1991) (applies to enforcement of Title IX pursuant to 34 C.F.R. § 106.71 (1991)).

III. Judicial Expansion of Rights and Remedies Under Title IX

A. Cannon v. University of Chicago

Although Congress did not expressly authorize a private right of action for victims alleging discrimination in the language of Title IX, the Supreme Court has implied one. In *Cannon v. University of Chicago*,[38] the plaintiff alleged that she was denied admission to medical school because of her sex.[39] The Seventh Circuit refused to imply a private right of action, stating that Congress intended the administrative remedies to be the exclusive means of enforcement of Title IX.[40] The Supreme Court reversed, holding that the petitioner did have a right under Title IX to pursue her claim of sexual discrimination in the courts.[41]

The Court applied the four-part test created in *Cort v. Ash*[42] to determine whether a private cause of action could be inferred from a statute. First, the Court examined the plain language of Title IX to determine whether the statute was enacted for the benefit of a special class of which the plaintiff was a member.[43] Distinguishing between statutes enacted for the protection of the general public, such as criminal statutes, and those which expressly identify the class Congress intended to benefit, the Court concluded that Title IX explicitly conferred a benefit on persons discriminated against on the basis of sex.[44]

Second, the Court considered the legislative history of Title IX to determine whether Congress intended to create a private right of action.[45] In particular, the Court acknowledged that the drafters of Title IX had directly patterned Title IX after Title VI of the Civil Rights Act of

---

38. 44 U.S. 677 (1979), *rev'g* 559 F.2d 1063 (7th Cir. 1976).

39. Plaintiff was denied admission to the University of Chicago and Northwestern University even though she satisfied the criteria for admission to both universities. She alleged that policies against admitting students over 30 years old were discriminatory against women because a greater percentage of women have their higher education interrupted, and age is not a valid indication of success in the medical field. *Id.* at 680 nn.1-2. Plaintiff also submitted statistics showing that both schools "accepted a far smaller percentage of women than their percentage in the general population and in the class of persons with bachelor's degrees." *Id.* n.2.

Note, however, that the defense submitted evidence that at least 2,000 applicants who were more qualified than the plaintiff had been denied admission. *Cannon*, 559 F.2d at 1067.

40. 559 F.2d at 1073.

41. 441 U.S. at 689.

42. 422 U.S. 66 (1975). For a description of the *Cort* analysis see *supra* note 6-7 and accompanying text.

43. 441 U.S. at 689-94.

44. *Id.* at 690-94.

45. *Id.* at 694-703.

1964,[46] included the same enforcement mechanisms,[47] and explicitly recognized that it would be interpreted and applied in the same manner as Title VI.[48] The Court assumed that the lawmakers were aware of the current state of the law, thereby knowing that the relevant language in Title VI had already been interpreted to include a private remedy when Title IX was enacted.[49] The Court also noted the liberal approach the courts took regarding implied causes of action during the years immediately preceding the passage of Title IX.[50] The majority stated that Title IX was passed prior to the decision in *Cort*, which called for stricter scrutiny when implying private rights of action.[51]

Third, the Court considered whether a private cause of action would hinder or advance the objectives of Title IX.[52] Although the statutorily authorized removal of federal funds does prevent the use of federal funds to support discriminatory practices, the Court recognized that this practice does little to protect victims from these practices. It stated that "[t]he award of individual relief to a private litigant who has prosecuted her own suit is not only sensible but is also fully consistent with — and in some cases even necessary to — the orderly enforcement of the statute."[53]

The Court concluded the *Cort* analysis by stating that the implication of a federal right was not improper on grounds that it conflicted with an area of particular concern to the states.[54] The Court noted that "[s]ince the Civil War, the Federal Government and the federal courts have been

---

46. The Court noted that Congress originally considered amending Title VI to prohibit gender based discrimination in federally funded educational institutions. *Id.* at 694-95 n.16 (referring to H.R. 16098, 91st Cong., 2d Sess. (1970)).

47. *See supra* notes 32-35 and accompanying text.

48. 441 U.S. at 696. The Court noted that during the debates on the Senate Floor, Sen. Bayh stated that " '[t]he same [enforcement] procedure that was set up and has operated with great success under the 1964 Civil Rights Act, and the regulations thereunder[,] would be equally applicable to discrimination [prohibited by Title IX].' " *Id.* n.19 (quoting 117 CONG. REC. 30408 (1971) (statement of Sen. Bayh)) (alteration in original).

49. *Id.* at 696-97 (relying primarily on the Fifth Circuit opinion in Bossier Parish Sch. Bd. v. Lemon, 370 F.2d 847, 852 (5th Cir.), *cert. denied*, 388 U.S. 911 (1967)). The Court also noted that at least three other district courts had explicitly relied on Title VI as the basis for a private right of action for victims of discrimination, specifically: Blackshear Residents Org. v. Housing Auth. of Austin, 347 F. Supp. 1138, 1146 (W.D. Tex. 1972); Hawthorne v. Kenbridge Recreation Ass'n, 341 F. Supp. 1382, 1383-84 (E.D. Va. 1972); Gautreaux v. Chicago Hous. Auth., 265 F. Supp. 582 (N.D. Ill. 1967). *Cannon*, 441 U.S. at 696 n.21.

50. *See supra* note 3 and accompanying text.

51. 441 U.S. at 698-99 ("We, of course, adhere to the strict approach followed in our recent cases, but our evaluation of congressional action in 1972 must take into account its contemporary legal context.").

52. *Id.* at 703-08.

53. *Id.* at 705-06.

54. *Id.* at 708.

the '*primary* and powerful reliances' in protecting citizens against [invidious] discrimination" of any sort.[55]

Each factor of the *Cort* analysis supported the implication of a private right of action. Indeed, the Court concluded that "[n]ot only the words and history of Title IX, but also its subject matter and underlying purposes, counsel implication of a cause of action in favor of private victims of discrimination."[56] By recognizing an implied right of action for the enforcement of Title IX, the Supreme Court provided victims of discrimination with an alternative to the federal administrative enforcement scheme.

Although *Cannon* authorized a private right of action for injunctive relief and Congress recently had granted prevailing parties the right to attorneys' fees under Title IX,[57] no authority had recognized a victim's right to receive compensation for damages from discrimination.[58]

B. Lieberman v. University of Chicago

In *Lieberman v. University of Chicago*,[59] the Seventh Circuit Court of Appeals again addressed alleged discriminatory practices by the University of Chicago. The plaintiff, a resident of the Chicago area, was forced to relocate in order to attend medical school when denied admission to the university. In addition to declaratory and injunctive relief, she sought compensatory damages for moving expenses, pain and suffering and loss of consortium.[60] The court interpreted *Cannon* very narrowly and held that damages were not available.

Specifically, the majority relied on the Supreme Court's decision in *Pennhurst State School and Hospital v. Halderman*[61] which mandated a

---

55. *Id.* at 708 (quoting Steffel v. Thompson, 415 U.S. 452, 464 (1974)) (emphasis in original).

56. *Id.* at 709. The Court stated that the lower court's application of the *Cort* test yielded an incorrect answer. It is interesting to note that when the court of appeals analyzed the legislative history of Title IX, it found that "none of the Congressmen envisioned the rather drastic remedy of individual lawsuits." Cannon v. University of Chicago, 559 F.2d 1063, 1063 (7th Cir. 1976). The Supreme Court, on the other hand, made extensive reference to comments made in Congress which indicated an expectation that a private remedy would be available. 441 U.S. at 696-705.

57. Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (codified as amended at 42 U.S.C. § 1988 (1988)) ("In any action or proceeding to enforce a provision of . . . Title IX . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.").

58. The availability of relief and the nature of relief available are separate issues. Davis v. Passman, 442 U.S. 228, 239 (1979).

59. 660 F.2d 1185 (7th Cir. 1981), *cert. denied*, 456 U.S. 937 (1982).

60. *Id.* at 1186.

61. 451 U.S. 1 (1981).

narrow interpretation of remedies under Spending Clause statutes, such as Title IX.[62] The *Lieberman* court explained 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."[63]

Therefore, unless the recipient knew it might be exposed to liability, it did not "knowingly" accept the terms of the "contract." Consequently, the *Lieberman* court stated that the remedies available under a *Cannon* right of action should be narrowly construed. The court wrote that "[i]f a damages remedy is to be created, it should be fashioned by Congress and not by the Courts, thus providing the institutions with ample notice and an opportunity to reconsider their acceptance of financial aid."[64] Thus, according to the Seventh Circuit, the only remedies available under Title IX are injunctive and declaratory relief.

C. Guardians Association v. Civil Service Commission

In *Guardians Ass'n v. Civil Service Comm'n*,[65] the Supreme Court addressed the issue of availability of damages under Title VI of the Civil Rights Act of 1964.[66] Black and Hispanic police officers brought a class action suit in federal court alleging violations of their rights under Title VI. The complaint centered on examinations administered by the New York City Police Department that were used to determine appointments to the police force and the order in which appointments were made. Because Blacks and Hispanics typically earned the lowest scores on the test, they were the last hired and the first laid-off.[67] Acknowledging that the examinations had a discriminatory impact on the appellants, a plurality of the Court held that plaintiffs alleging unintentional discrimination under Title VI and Title IX are limited solely to prospective relief.[68]

Like the Seventh Circuit in *Lieberman*, the Supreme Court in *Guardians* declined to find a damages remedy for an implied cause of action

---

62. *Id.* at 29-30.

63. 660 F.2d at 1187 (quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)).

64. *Id.* at 1188.

65. 463 U.S. 582 (1983).

66. Although the case dealt with violations of Title VI rather than Title IX, the Title VI analysis automatically applies to Title IX because the Supreme Court has determined that Congress "explicitly assumed" the two statutes would be interpreted the same way. *See* Cannon v. University of Chicago, 441 U.S. 677, 697 (1979).

67. *Guardians*, 463 U.S. at 585.

68. *Id.* at 593.

under a Spending Clause statute,[69] especially where the Court had already determined that the statute "does not of its own force proscribe unintentional racial discrimination."[70] Still, the *Guardians* decision failed to clarify precisely the remedies available under Title VI or Title IX.[71] Although a majority of the justices recognized the availability of compensatory relief for intentional violations of Title VI, Justices White and Rehnquist did only in dictum.[72] Three others, Justices Brennan, Blackmun, and Marshall, addressed this issue in dissents.[73] "Thus a restrictive reading of *Guardians* does not allow for compensatory relief, even given a showing of intent."[74] Subsequent interpretations of the *Guardians* decision resulted in conflicting decisions by the Third and Eleventh Circuits on the availability of damages to plaintiffs proving intentional discrimination.[75]

D. *The* Pfeiffer — Franklin *Split*

In *Pfeiffer v. Marion Center Area School District*,[76] a former student sued the school board and members of the faculty council of the local chapter of the National Honor Society (NHS) alleging sexual discrimination in her dismissal from the NHS.[77] The plaintiff sought an injunction

---

69. *See supra* notes 63-64 and accompanying text.

70. *Guardians*, 463 U.S. at 590 (citing University of California Regents v. Bakke, 438 U.S. 265 (1978)).

71. Parker, *supra* note 21, at 558. The Supreme Court clarified the issue somewhat in Consolidated Rail Corp. v. Darrone, 465 U.S. 624 (1984), by holding that the respondent could recover back pay as a remedy for a suit under § 504 of the Rehabilitation Act of 1973.

72. Justice White noted:

> In cases where intentional discrimination has been shown, there can be no question as to what the recipient's obligation under the program was and so no question that the recipient was aware of that obligation. In such situations, it may be that the victim of the intentional discrimination should be entitled to a compensatory award, as well as to prospective relief in the event the State continues with the program.

Guardians, 463 U.S. at 597.

73. Justice Stevens argued that intent is a necessary element of a valid Title VI claim, but that there is no justification for limiting victims of intentional discrimination to prospective relief. *Id.* at 635-42 (Stevens, J., dissenting). Justice Marshall contended that intent is not an essential component for a Title VI violation and that compensatory relief is available for both intentional and unintentional violations of Title VI. *Id.* at 615-34 (Marshall, J., dissenting).

74. Parker, *supra* note 21, at 564.

75. *Cf.* Pfeiffer v. Marion Ctr. Area Sch. Dist., 917 F.2d 779 (3d Cir. 1990); Franklin v. Gwinnett County Pub. Sch., 911 F.2d 617 (11th Cir. 1990), *rev'd*, 112 S. Ct. 1028 (1992). *See generally infra* notes 76-91 and accompanying text.

76. 917 F.2d 779 (3d Cir. 1990).

77. Plaintiff, an unmarried student, was a member in good standing of the National Honor Society. Upon discovering that she was pregnant, the faculty council of the local chapter unanimously voted to dismiss Pfeiffer for failing "to uphold the high standards of leadership and character required for admission and maintenance of membership." *Id.* at 782. Appellant based her claim of discrimination on the grounds that no male member had

reinstating her to the NHS, a correction of school records, and compensatory and punitive damages.[78] Though most of her demands became moot when the NHS local chapter disbanded and was removed as a party to the suit, the court still considered the availability of damages. Relying primarily on *Cannon* and *Lieberman*, the district court denied plaintiff compensatory damages, holding that victims of discrimination under Title IX are entitled only to injunctive and declaratory relief.[79] The Third Circuit reversed, relying on the *Guardians* Court's interpretation of Title VI,[80] and concluded that compensatory relief was available when a plaintiff alleges and establishes discriminatory intent.[81]

The *Pfeiffer* court admitted that it reached this decision "not without some difficulty"[82] and recognized that its decision was contrary to decisions reached by the Seventh[83] and Eleventh Circuits.[84] Although the contradiction with the Seventh Circuit is distinguishable on the grounds that the Seventh Circuit decisions were made prior to the Supreme Court's ruling in *Guardians*, the Eleventh Circuit in *Franklin v. Gwinnett County Public Schools*,[85] presented an irreconcilable contradiction between the federal circuits.

In *Franklin v. Gwinnett County Public Schools*,[86] a high school student reported allegations of prolonged sexual harassment and abuse by one of her teachers to school board officials. She also complained that the school band director knew of the situation but failed to intervene and "tried to discourage her from pursuing the matter by talking to her about the negative publicity which could result."[87] After the school board began to investigate Franklin's allegations, the teacher resigned and the band direc-

---

ever been dismissed for premarital sexual activity, including a member who impregnated his girlfriend two years after Pfeiffer's dismissal. After excluding the evidence of the male student's treatment, the district court made a factual finding, undisturbed on appeal, that appellant had been dismissed for failure to uphold the standards of the NHS by engaging in premarital sexual intercourse, not for becoming pregnant. *Id.* at 783.

78. *Id.* at 783.

79. *Id.* at 787.

80. "In *Cannon*, the Supreme Court indicated that Congress intended to create remedies in Title IX comparable to those available under Title VI. We thus look to guidance from the Supreme Court in cases involving Title IX and its statutory predecessor, Title VI." *Id.*

81. *Id.* at 788-89. See Kernie, *supra* note 31, at 164 nn.70-72 for similar holdings by other courts. Note that "[t]he court stopped short of defining what types of damages the plaintiff might be entitled to if she prevailed in her suit." *Id.*

82. 917 F.2d at 788.

83. *See* Cannon v. University of Health Sciences/The Chicago Medical Sch., 710 F.2d 351 (7th Cir. 1983); Lieberman v. University of Chicago, 660 F.2d 1185 (7th Cir. 1981), *cert. denied*, 456 U.S. 937 (1982).

84. *See* Franklin v. Gwinnett County Pub. Sch., 911 F.2d 617 (11th Cir. 1990), *rev'd*, 112 S. Ct. 1028 (1992).

85. *Id.*

86. *Id.* at 617.

87. *Id.* at 618-19.

tor retired. Nevertheless, Franklin filed a complaint against Gwinnett County Public Schools (Gwinnett) with the Office of Civil Rights (OCR) of the United States Department of Education. Although Gwinnett was found guilty of sexually discriminating against Franklin in violation of Title IX, OCR closed the file upon assurances by Gwinnett that it had taken affirmative action to prevent any future violations.[88] Franklin then filed a private action under Title IX seeking damages for intentional discrimination.

The Eleventh Circuit Court of Appeals affirmed the district court's dismissal of the case, stating that damages are unavailable under both Title VI and Title IX.[89] While accepting the Supreme Court's ruling in *Cannon* that a private cause of action exists under Title IX, the court looked to local precedent for determining the nature of available remedies and found that the " 'private right of action allowed under Title VI [and Title IX] encompasses *no more* than an attempt to have any discriminatory activity ceased.' "[90] Rejecting Franklin's argument that the Supreme Court decision in *Guardians* implicitly overruled this position, the court held that the issue of whether compensatory damages are available for intentional discrimination was left open by the plurality opinion in *Guardians*. The court concluded that "the inferior courts are free, checked only by the constraints within their respective spheres of authority, to act as they deem appropriate."[91]

IV. The Supreme Court Takes a Stand

The Supreme Court granted *certiorari* from the Eleventh Circuit decision in *Franklin v. Gwinnett County Public Schools* to resolve the conflict between the Seventh and Eleventh Circuits.[92] Applying the general rule that "all appropriate relief is available in an action brought to vindicate a federal right when Congress has given no indication of its purpose with respect to remedies,"[93] the Court reversed and concluded that damages are an available remedy for intentional violations of Title IX.

In analyzing congressional intent concerning any limitations on the available remedies under Title IX, the Court looked solely to post-*Can-*

88. *Id.* at 619.

89. *Id.* at 619-22.

90. *Id.* at 620 (quoting Drayden v. Needville Indep. Sch. Dist., 642 F.2d 129, 133 (5th Cir. Unit A April 1981)). Note that on October 1, 1981, the Fifth Circuit was divided to create the new Fifth and Eleventh Circuits. Therefore, all pre-October 1981 Fifth Circuit decisions are precedent for the Eleventh Circuit.

91. *Id.* at 621.

92. 112 S. Ct. 1028, 1032 (1992).

93. *Id.* at 1034. The Court could not be persuaded that this presumption had eroded since the decision in Bell v. Hood, 327 U.S. 678 (1946). *See supra* notes 4-5 and accompanying text.

non legislative history.[94] It noted that although Congress did not explicitly recognize a remedy for damages under Title IX when originally enacted, Congress amended Title IX subsequent to the *Cannon v. University of Chicago* decision.[95] Congress abrogated the states' Eleventh Amendment immunity under Title IX in the Civil Rights Remedies Equalization Amendment of 1986.[96] Congress also expanded the coverage of the anti-discrimination provisions under Title IX in the Civil Rights Restoration Act of 1987.[97] Significantly, the Restoration Act provision directly controverted an earlier Supreme Court decision.[98] In the absence of a similar restriction on the *Cannon* holding or on the traditional rule implying all appropriate remedies, the *Franklin* Court found it reasonable to assume that congressional intent was not contrary to the implication of reasonable remedies.[99]

The Court was not persuaded by argument that the award of damages under Title IX would violate separation of powers principles by "unduly" expanding the judicial authority into an area reserved to the other branches.[100] Taking this argument to its logical conclusion, the Court found that this analysis was an unfounded challenge to the longstanding doctrine of *ubi jus, ibi remedium.*[101] The Court went a step further and stated that a failure to provide a remedy in this case would actually violate the separation of powers doctrine by "giving judges the power to render inutile causes of action authorized by Congress."[102]

The Court acknowledged the *Pennhurst* presumption which states that remedies under Spending Clause legislation are limited when an alleged violation is unintentional.[103] The Court explained that when a violation is unintentional, the entity receiving the federal funding may lack notice

---

94. 112 S. Ct. at 1035-36. "Because the cause of action was inferred by the Court in *Cannon*, the usual recourse to statutory text and legislative history in the period prior to that decision necessarily will not enlighten our analysis." *Id.* at 1035.

95. *Id.* at 1036.

96. Pub. L. No. 99-506, § 1003, 100 Stat. 1845 (codified at 42 U.S.C. § 2000d-7 (1988)).

97. Pub. L. No. 100-259, 102 Stat. 28 (1988).

98. *See* Grove City College v. Bell, 465 U.S. 555 (1984).

99. 112 S. Ct. at 1036-37. "The Civil Rights Remedies Equalization Amendments of 1986 must be read . . . not only 'as a validation of *Cannon*'s holding' but also as an implicit acknowledgement that damages are available." *Id.* at 1039 (Scalia, J., concurring) (citations omitted).

100. *Id.* at 1037 ("Unlike finding a cause of action which authorizes a court to hear a case or controversy, the discretion to award appropriate relief involves no such increase in judicial power.").

101. The Court stated that "properly understood, respondents' position invites us to *abdicate* our historic judicial authority to award appropriate relief in cases brought in our court system." *Id.* (emphasis in original).

102. *Id.*

103. *Id.*; *see supra* notes 61-64 and accompanying text.

that it will be liable for a monetary judgment.[104] However, the Court declined to apply the same presumption to intentional violations of a Spending Clause legislation where notice to the recipient is not an issue. The Court stated that "[u]nquestionably, Title IX placed on the Gwinnett County Schools the duty not to discriminate on the basis of sex. . . . Congress surely did not intend for federal monies to be expended to support the intentional actions it sought by statute to proscribe."[105]

Finally, the Court refused to hold that the remedies available under Title IX should be limited to the equitable remedies of back pay and prospective relief.[106] First, to require equitable remedies automatically, without considering the adequacy of legal remedies, contradicts the traditional approach in determining the appropriate remedy for the violation of a federal right.[107] Second, and more importantly, although back pay and prospective relief may be adequate remedies for a victimized employee, the Court noted that neither remedy afforded relief to Franklin, a student at the time of the discrimination. As a student, she is not eligible to receive any back pay, and because Franklin and both of the offending individuals had already left the school system, prospective relief could not provide her any remedy.[108]

The concurring opinion expressed concern about the expansive language used in the majority's opinion. The concurring Justices did not dispute the traditional presumption implying appropriate remedies when Congress expressly creates a cause of action or when Congress creates a cause of action "by clear textual implication."[109] However, when the Court derives a private right of action from mere "contextual evidence," the concurring opinion stated that the Court cannot automatically assume the availability of all appropriate remedies in the absence of con-

---

104. 112 S. Ct. at 1037. Note that the Court did not refer to its decision in *Guardians* as authority for this proposition.

105. *Id.* ("[M]oreover, the notion that Spending Clause statutes do not authorize monetary awards for intentional violations is belied by our unanimous holding in *Darrone*.").

106. *Id.* at 1038.

107. *Id.* (referring to Whitehead v. Shattuck, 138 U.S. 146 (1891)).

108. *Id.* The Court noted that "[t]he government's answer that administrative action helps other similarly-situated students in effect acknowledges that its approach would leave petitioner remediless." *Id.* Although injunctive relief would not have been beneficial to Franklin, the Court failed to mention that Franklin could have pursued other alternatives. Though Franklin did not have a right under Title IX to proceed against an individual guilty of the sexual discrimination, Franklin v. Gwinnett County Pub. Sch., 911 F.2d 617, 622 n.9 (11th Cir. 1990), *cert. denied*, 112 S. Ct. 1028 (1992) (citing Leake v. University of Cincinnati, 605 F.2d 255, 259-60 (6th Cir. 1979)), she was able to seek alternate remedies under state law. In fact, Franklin and her mother have brought an action in state court against the teacher for "seduction." *See* Franklin v. Hill, 417 S.E.2d 721 (Ga. Ct. App. 1992). Another suit was filed in federal court against Gwinnett County Public Schools and the band director. *See* Franklin v. Gwinnett County Pub. Sch., No. 1:88-cv-2922-ODE.

109. 112 S. Ct. at 1038 (Scalia, J., concurring).

gressional limitation. "To 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."[110] Nevertheless, the concurring Justices agreed that the presumption of all available remedies under Title IX was appropriate in light of the extensive legislative history demonstrating an implicit acknowledgement that Congress intended a damages remedy to be available.[111]

V. THE IMPLICATIONS OF *FRANKLIN*

According to *Franklin v. Gwinnett County Public Schools*, a damages remedy is available to plaintiffs bringing suit to enforce Title IX of the Education Amendments of 1972. On a very specific level, the holding is expected to enhance the effectiveness of Title IX and other civil rights legislation.[112] On a more general level, the broad language of the majority opinion creates concern that *Franklin* signals that the Court will take a liberal approach in approving remedies for implied rights of action.

A. *The Impact of* Franklin *on Intentional Discrimination by Federally Funded Education Programs*

Congress drafted Title IX to promote the two interrelated objectives of preventing the distribution of federal funds to educational programs engaging in gender discrimination and protecting individuals against such discrimination.[113] Congress bolstered these objectives by imposing a disincentive to discriminatory behavior by threatening withdrawal of federal funding and by requiring the offending institution to create grievance procedures.[114] These enforcement mechanisms are insufficient because they fail to provide any real threat to institutions and they do little to protect victims from discrimination. For example, enforcement by the OCR may be limited depending on the resources available to the agency, or according to the incumbent administration's willingness to actively protect civil rights. Also, the required grievance procedures may be equivalent to the fox guarding the hen house. Administrative or injunctive remedies rarely offer victims incentive to take the risks associated with filing discrimination claims.[115] Furthermore, as the Supreme Court

110. *Id.* at 1039.

111. *Id.* ("[I]t is too late in the day to address whether a judicially implied exclusion of damages under Title IX would be appropriate.").

112. Kernie, *supra* note 31, at 156.

113. *See supra* note 31 and accompanying text.

114. *See supra* notes 34-35 and accompanying text.

115. Plaintiffs bringing a discrimination case under Title IX may face negative pressures from within their academic community if the lawsuit threatens to ruin the careers of respected persons or may result in the educational program losing federal funding. Addi-

noted in *Cannon*, there are situations in which "it makes little sense to impose on an individual, whose only interest is in obtaining a benefit for herself, or on HEW, the burden of demonstrating that an institution's practices are so pervasively discriminatory that a complete cutoff of federal funding is appropriate."[116]

However, allowing plaintiffs to sue for compensatory damages furthers the goals of Title IX by increasing the likelihood that violations of Title IX are more diligently investigated and by discouraging future violations. A damages remedy allows victims to "bring a private suit in hopes of redressing wrongs done to them as individuals."[117] Compensation prevents plaintiffs from being left remediless in the event that prescriptive relief would be of no value.[118] Allowing victims to pursue their own actions as private attorneys general ensures that their concerns will be actively addressed.[119]

Providing plaintiffs with damages should also have a chilling effect on the willingness of these programs to practice discrimination. Offering victims an incentive to pursue violations of their rights increases the likelihood that violations will be reported, thus warning programs that such activity will not be tolerated. If discriminatory institutions face monetary liability for their actions, they will be more likely to take their responsibilities seriously.[120]

Although *Franklin* has the potential to increase the number of Title IX suits filed, the decision should not be criticized on the grounds that it unjustifiably or unnecessarily threatens school budgets or opens the federal courts to unsanctioned litigation.[121] After all, the practical impact of

---

tionally, at trial, victims "may be forced to air their dirty laundry and to relive embarrassing or painful moments." Kernie, *supra* note 31, at 166.

116. Cannon v. University of Chicago, 441 U.S. 677, 705 (1979).

117. Kernie, *supra* note 31, at 160.

118. *Id.* at 167. Due to the highly transitory nature of students and faculty in the educational setting, injunctive relief alone can rarely redress the injury.

119. In *Cannon*, the Court responded at length to allegations that private litigation will interfere with the enforcement of Title IX. 441 U.S. at 706 n.41. The Court stated that under the facts of that case there was no such threat, but "if the possibility of interference arises in another case, appropriate action can be taken by the relevant court at that time." *Id.* In analyzing congressional intent on this issue, the Court determined that Congress was not concerned with such interference when it enacted Title IX. Likewise, the Court was not "persuaded that individual suits are inappropriate in advance of exhaustion of remedies. Because the individual complainants cannot assure themselves that the administrative process will reach a decision on their complaints within reasonable time, it makes little sense to require exhaustion." *Id.* at 707-08 n.41.

120. Kernie, *supra* note 31, at 168-69.

121. For example, concerned with the dangers of exposing schools to "massive financial liability," the Bush administration pressured the Court not to allow damages in the *Franklin* decision. Geoffrey A. Campbell, *Around the Nation*, BOND BUYER, Mar. 3, 1992, at 28; *see also* Franklin v. Gwinnett County Public Schools, NAT'L L.J., Mar. 9, 1992, at 38.

the decision can be avoided simply by increasing liability insurance premiums or by abolishing gender-based discrimination. Moreover, a perceived susceptibility to unwarranted litigation should not be grounds for refusing to remedy violations of a right.[122] The courts have long recognized the validity of remedying injuries though they are easy to allege and difficult to prove.[123]

In any event, the *Franklin* decision is not likely to encourage unjustified litigation. Although a damages remedy offers victims the incentive to come forward with complaints of sexual discrimination, it does not provide litigious individuals the incentive to falsify allegations. *Franklin* only recognized the availability of compensatory damages;[124] it did not guarantee this remedy to every victim claiming discrimination. In order to receive damages a plaintiff must be able to prove intentional discrimination, demonstrate the appropriateness of a damages remedy, and prove that the damages were caused by the discrimination. For instance, in *Franklin*, compensatory damages were appropriate because plaintiff was a student who could not be compensated in any other way. A sagacious interpretation of the *Franklin* approach, therefore, requires a substantial showing that the remedy sought is appropriate.

Furthermore, the *Franklin* Court only discussed compensatory damages. It did not recognize the availability of future or punitive damages or compensation for pain and suffering. Admittedly, however, the *Franklin* analysis portended that these types of damages will be available upon a showing of their appropriateness.[125] Finally, the decision did nothing to

---

122. The burden on judicial resources should have been considered by Congress when passing the legislation. As Justice Harlan wrote in his concurring opinion in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics:

> Judicial resources, I am well aware, are increasingly scarce these days. Nonetheless, when we automatically close the courthouse door solely on this basis, we implicitly express a value judgment on the comparative importance of classes of legally protected interests. And current limitations upon the effective functioning of the courts arising from budgetary inadequacies should not be permitted to stand in the way of the recognition of otherwise sound constitutional principles.

403 U.S. 388, 411 (1971).

123. *See, e.g.*, 22 AM. JUR. 2D *Damages* § 239 (1988) ("While there is some theoretical difficulty in awarding dollars for pain and suffering . . . the law is clear that an award for pain and suffering is a proper element in plaintiff's recovery for personal physical injuries tortiously inflicted.").

124. The Court in *Franklin* remanded the case back to the district court for determination of the factual issues. Franklin v. Gwinnett County Pub. Sch., 112 S. Ct. 1028, 1038 (1992).

125. *But see* Tanberg v. Weld County Sheriff, 787 F. Supp. 970 (D. Colo. 1992). In applying *Franklin* to the Rehabilitation Act, the court made only a cursory examination of whether compensatory damages for loss of professional opportunity, mental anguish and pain and suffering were appropriate for an employee. *Tanberg* failed to note that in *Franklin*, remedies available to employees were not appropriate for Franklin, a student.

alleviate the negative ramifications of bringing such a suit; it only provided the incentive to pursue a claim despite negative consequences.

B. *Future Application of the* Franklin *Approach*

Franklin certainly will have implications for the enforcement of other anti-discrimination statutes.[126] In fact, the decision has already served as the basis for an award of compensatory damages under the Rehabilitation Act.[127] However, it is unclear whether *Franklin* stands for the proposition that compensatory damages are available under all implied rights of action when Congress failed to express a limitation on the remedies available.

Applying the traditional approach of implying remedies,[128] the *Franklin* majority presumed the availability of all appropriate remedies in the absence of contrary congressional intent.[129] Title IX's particular legislative history made application of the traditional presumption appropriate. Title IX is part of the distinct group of anti-discrimination statutes that have a rather peculiar legislative history. As the *Franklin* Court noted, Congress passed the legislation when the judiciary was liberally interpreting statutory rights, and Congress did not take advantage of subsequent opportunities to limit or alter Supreme Court interpretation of the statute.[130] Consequently, there was little doubt that Congress approved of the implied right of action and the availability of appropriate remedies, including damages.

Although applying the traditional presumption was appropriate in light of the distinct legislative history of Title IX, there may be some question as to whether the same is true of other statutes from which courts have implied private rights of action. As the United States argued in *Franklin*, "there is no justification for treating [congressional] silence as the equivalent of the broadest imaginable grant of remedial authority."[131] Arguably, where Congress did not explicitly confer a private right of action it cannot be assumed Congress approves of all remedies under a private right of action inferred after the statute was enacted. The concurring opinion in *Franklin* stated that to argue otherwise is the equivalent of stating that "unless Congress expressly legislates a more limited remedial policy with respect to rights of action it does not know it is creating, it intends the full gamut of remedies to be applied."[132] Therefore, a con-

126. *See supra* notes 32, 66 and accompanying text.
127. Tanberg v. Weld County Sheriff, 787 F. Supp. 970 (D. Colo. 1992).
128. *See supra* notes 3-5 and accompanying text.
129. Franklin v. Gwinnett County Pub. Sch., 112 S. Ct. 1028, 1032 (1992).
130. *Id.* at 1036.
131. *Id.* at 1039 (Scalia, J., concurring) (quoting Brief for United States as Amicus Curiae).
132. *Id.* at 1039.

servative reading of *Franklin* would require some showing of congressional intent[133] before the courts will automatically presume the availability of all appropriate remedies for implied rights of action.[134]

The first decision to rely on *Franklin* for the implication of remedies demonstrates that the decision will perhaps be read more liberally than the above analysis suggests. In *Tanberg v. Weld County Sheriff*,[135] the court relied on *Franklin* to find that compensatory damages are available under the Rehabilitation Act.[136] Rather than relying on the well-established fact that interpretations of Title IX apply automatically to the Rehabilitation Act,[137] the *Tanberg* court instead relied on *Franklin* for the general proposition that if Congress did not specify the relief obtainable or expressly disallow compensatory damages, any appropriate relief is available.[138] Therefore, while correct in finding that damages are available under the Rehabilitation Act, the *Tanberg* decision offers a misleading interpretation of the *Franklin* decision. When applying *Franklin* to statutes without this distinct legislative history surrounding the anti-discrimination statutes, courts must make a more detailed analysis of legislative history than undertaken by the *Tanberg* court.

VI. Conclusion

The Supreme Court's decision in *Franklin* stands for the proposition that programs receiving federal funding now face liability for intentionally discriminatory practices. Nevertheless, because the *Franklin* decision is based on a narrow fact pattern, it should not necessarily be interpreted to mean that the Supreme Court is conciliatory to the liberal implication of damages for every implied right of action where Congress has failed to provide limitations on the remedies available.

Ellen F. Firsching

---

133. The precise showing required is not answered by the opinion, and will likely be the source of considerable argument.

134. *But see* Hornsby v. St. Louis, Southwestern Ry., 963 F.2d 1130, 1136 (8th Cir. 1992) (Arnold, C.J., dissenting) (interpreting *Franklin* to mean that compensatory damages are automatically available under 45 U.S.C. § 60 (1988) without analysis of legislative history, congressional intent or the sufficiency of other remedies).

135. 787 F. Supp. 970 (D. Colo. 1992).

136. *Id.*

137. The court only made fleeting reference to the unique legislative history which surrounds Title IX, Title VI and the Rehabilitation Act.

138. *Tanberg*, 787 F. Supp. at 972.