THREE

Title IX: The Complexities of a Simple Statute

Title IX is often described as a simple law—the historian Susan Ware has described it as "thirty-seven words that changed American sports."[1] But it is longer (nearly 1,500 words), more complex, and more ambiguous than this common description suggests. Like many statutes, it combines ill-defined substantive mandates with multiple constraints, exceptions, and procedures. These features have made interpretation of the law controversial and enforcement cumbersome. With only one exception (the 1988 Grove City Bill), Congress has failed to amend the law either to clarify its intent or to address the serious implementation problems that have arisen. Instead, this has been done by federal judges and administrators, who have not just filled in statutory gaps, but devised end runs around the constraints placed on them by the law's lesser known provisions.

Virtually all civil rights laws require judges and administrators to determine what constitutes adequate proof of discrimination. Must there be convincing evidence of differential treatment or intent to discriminate? Or is it enough to show that a particular practice has a "disparate impact" on a protected group? To this vexing problem Title IX adds two others. First, although Title IX was modeled on Title VI of the 1964 Civil Rights Act, it acknowledges that race and sex differ in important respects. That is why Title IX includes exemptions that no one but an unreconstructed segregationist would apply to Title VI. The most

obvious example is separate male and female athletic teams. Second, Title IX's central enforcement mechanism, the termination of federal funds, has proved unworkable in practice. As this became evident, courts invented an alternative enforcement tool, the "implied private right of action." This means that when federal judges defer to OCR's interpretation of the statute, the agency can use the threat of legal action to negotiate agreements with educational institutions. When judges refuse to defer, though, OCR must scramble to devise new penalties short of termination of funding.

Three controversial legal issues have dogged implementation of Title IX from the start: (1) the meaning of the key term "discrimination" as it applies to sex; (2) the rulemaking authority of the Office for Civil Rights (OCR); and (3) the enforcement authority of OCR and the courts. One might think that, after forty-five years, most questions about how to interpret Title IX would have been resolved. As we will see, that is not the case. The resulting uncertainty adds yet another level of complexity to this allegedly simple statute.

A Mandate with Multiple Exceptions

Congresswoman Edith Green, the principal sponsor of Title IX, initially intended to address the problem of sex discrimination simply by adding the word "sex" to the nondiscrimination mandate contained in Title VI of the Civil Rights Act. That strategy had worked in 1964, when a House floor amendment added the word to Title VII, the employment discrimination section of that law. Southern opponents thought this "poison pill" might help them sink the entire legislation. Instead, prohibiting sex discrimination in employment gained widespread support. Adding "sex" to Title VI would have prohibited gender discrimination not just in educational programs, but in all activities funded in part by the federal government.

In 1970–71 Congresswoman Green shifted gears, largely because civil rights leaders did not dare open Title VI to amendment. Busing had become such a volatile political issue that they feared (with good reason) that opponents would use the opportunity to limit the federal government's authority to use busing to achieve racial balance in public schools. Green instead used her position on the House Committee on Education and Labor to add Title IX to an omnibus education bill then wending its way through Congress. Debate on the House provision was minimal. According to Bernice Sandler, who worked closely with Green on the legislation, "Mrs. Green's advice was 'Don't lobby for this bill.' She was absolutely right. She said, 'if you lobby, people are going to oppose it. Leave it. The opposition is not there right now so don't call attention to it.' "[2]

In the Senate this short section of the omnibus education bill did not go through the regular committee process, but was added on the floor by Senator

Birch Bayh. The chief Senate sponsor of the Equal Rights Amendment to the Constitution, Bayh had proposed a similar floor amendment the previous year only to see it ruled out of order. In 1972 he offered a brief defense of his amendment, assuring his colleagues that it would not require coed football or locker rooms. It passed by a voice vote. In both houses, Title IX's sponsors made the same basic argument: denying women and girls equal educational opportunity is no more acceptable than denying such opportunity to racial minorities. After a conference committee resolved differences between the House and Senate versions, the sprawling bill was signed by President Nixon. His signing statement made no mention of Title IX. As a result, Title IX's truncated legislative history provides little evidence of what members of Congress had in mind when they voted for it.[3]

Despite the extensive borrowing of language from Title VI, from the beginning it was clear that the race analogy was not always apposite. In the House, Congresswoman Green was forced to accept an exemption for the admissions policies of all private undergraduate schools as well as traditionally single-sex public undergraduate institutions. The latter provision was modified in conference, but the former remained. Title IX also grants a blanket exemption to religious schools and military academies. It gave schools that chose to shift from single-sex to coeducational seven years to comply with its requirements. It explained that "nothing contained herein shall be construed to prohibit" schools from "maintaining separate living facilities for the different sexes." In 1974 and 1976 Congress added exemptions for fraternities and sororities, the YMCA and YWCA, Girl Scouts and Boy Scouts, Boys State and Girls State, father–son and mother–daughter events, and scholarships for beauty pageants. Such provisions would have been unthinkable in a statute dealing with race. What was the rationale for deciding when the racial analogy should apply and when policymakers should acknowledge differences between race and sex? In 1972 no one in Congress made an effort to answer this pivotal question. Nor has Congress addressed the issue since.

That tricky task was left first to federal administrators, and then to judges. As John Skrentny has pointed out, "The similarities of race and sex discrimination had a compelling logic on the surface" that made Title IX "easy to pass." But administrators soon "discovered that women and blacks were not so similar after all." The "superficial" analogy between race and sex, Skrentny concludes, "made the *formal* inclusion of women easy. But getting the implementing regulations to make the right a reality was difficult."[4]

Nor did Congress provide much guidance on the key question of how to determine whether a school has engaged in sex discrimination. Just as Title VI explicitly stated that it should not be interpreted to require racial balance, Title IX provides that "nothing contained" in it should be interpreted to require schools "to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any

federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area." On its face, this seems to prohibit the rules OCR later established for intercollegiate athletics. But Title IX also explains that this provision should "not be construed to prevent the consideration" of "statistical evidence tending to show that such an imbalance exists with respect to the participation" in federally funded programs "by the members of one sex." Thus, while OCR cannot demand that female students receive "preferential treatment" in order to create gender balance in athletic programs, it can use "statistical evidence" showing that "such an imbalance exists" to place a heavy burden of proof on schools to demonstrate that they have not shortchanged female athletes. In practice there is little difference between the two. What Title IX takes away with one hand, it arguably gives back with the other.

Administrative Rulemaking

Realizing that educational institutions would need far more guidance than Title IX itself provided, Congress granted rulemaking authority to federal agencies that dispense funds to educational institutions. Here, again, Title IX followed Title VI nearly word for word. All such agencies were "authorized and directed" to "issue rules, regulations, or orders of general applicability which shall be consistent with the achievement of the objectives" of Title IX. Like all other federal agencies, civil rights offices are subject to the Administrative Procedure Act (APA), which, as the name suggests, establishes procedures for rulemaking, adjudication, and judicial review.

Recognizing the politically sensitive nature of termination of federal funding, Congress added two unusual procedural demands. First, it insisted that the president take responsibility for all rules issued under Title IX: "No such rule, regulation, or order shall become effective unless and until approved by the President." The second unusual requirement was the congressional veto provision Congress added in 1974. Enacted at the height of Watergate, this empowered Congress to invalidate by concurrent resolution (which means without the approval of the president) any administrative regulation promulgated under an education statute.

Only once did OCR jump through all these hoops. That was in the initial Title IX rulemaking that stretched from 1972 to 1975. The agency issued a lengthy proposal with a detailed explanation; held hearings across the country; received and responded to 10,000 comments; negotiated with the Department of Health, Education, and Welfare (HEW) policy office and the White House staff; and made numerous changes in response to criticisms from all these sources. HEW secretary Weinberger made several additional alterations before

sending the regulations to President Ford for his signature. In 1975 a bipartisan group of House members introduced a resolution of disapproval of the regulations, and the House held contentious hearings on intercollegiate athletics. Despite heavy lobbying by football coaches, the resolution never reached the floor. The regulations went into effect as written.

In 1983 the Supreme Court declared all legislative vetoes unconstitutional.[5] That did not end congressional efforts to block or modify Title IX rules. On several occasions, members of Congress have tried to use appropriations riders to block enforcement of Title IX rules. Although these riders were never enacted, they served as a reminder that Congress has a variety of ways to make administrators' lives difficult, and that executive branch officials ignore informal "signals from the Hill" at their peril.[6]

The year 1975 was also the last time OCR sent a major Title IX regulation to the president for his signature. None of the post-1975 rules on athletics, sexual harassment, or transgender rights discussed in subsequent chapters of this book were signed by the president. Few of those rules went through either the standard notice-and-comment rulemaking procedure outlined by the APA or interagency review.[7] OCR has evaded these requirements by labeling its commands "interpretations," "clarifications," and "guidance" rather than "rules," and denying—quite unconvincingly—that they add anything new. In recent years it has announced major policy decisions in Dear Colleague Letters (DCLs), inverting standard rulemaking procedures by asking for comments only after it has established its position.[8]

Soon after the Obama OCR issued its second set of guidelines on sexual harassment, Molly Corbett Broad, president of the American Council on Education, complained to a Senate committee about OCR's failure to follow APA procedures when it issues what it labels "significant guidance documents": "This means no affected party—advocacy groups, colleges and universities, civil liberties organizations, the public, policy makers, students and parents—has the opportunity to raise questions and ask for clarifications."[9] As a result, she warned, "Those who must comply with the law are far less likely to understand what they are expected to do." Her claim that "this serves no one's interest" was belied by OCR's adamant refusal to change its practices. Clearly, the agency believed that avoiding APA rulemaking served its bureaucratic interests in moving quickly before opponents can mobilize.

Are these "interpretations" and Dear Colleague Letters legally binding? During the Obama administration this became a contentious issue. Lawyers in the Department of Education and Department of Justice (DOJ) have been reluctant to give a definitive answer. On the one hand, DOJ lawyers insist that such "guidance documents" are "merely expressions of the agencies' views as to what the law requires," are "not legally binding," expose schools "to no new liability or legal requirements," and "do not create or confer any rights for or on

any person."[10] Because these documents do not constitute "final agency action," DOJ has insisted that they should not be subject to judicial review. On the other hand, OCR officials have repeatedly warned schools that they will face serious sanctions if they fail to comply with the mandates contained in these documents.

In hearings before the Senate Committee on Health, Education, Labor, and Pensions (HELP), Senator Lamar Alexander (R-Tenn.) asked Catherine Lhamon, then the assistant secretary of education for civil rights, and two other Department of Education officials whether the standards announced in DCLs are legally binding. He received two answers: "yes" from Lhamon and "no" from Undersecretary Theodore Marshall and Deputy Assistant Secretary Amy McIntosh.[11] When asked why they are binding, Lhamon claimed it was because the Senate had confirmed her nomination. Senator Alexander obviously did not consider this an adequate response.[12]

Neither did Senators James Lankford (R-Okla.), chair of the HELP subcommittee on Regulatory Affairs and Federal Management. He wrote to Secretary John King to ask why the Department of Education regularly added important new regulatory requirements without following APA procedures. Perhaps, Lankford suggested, OCR has "sought to avoid notice-and-comment procedures, fearing that education officials and other interested groups would have voiced substantive objections to the letters' policies if given an opportunity." If so, he continued, "this fear would have been well-placed: Legal scholars and academics across the political spectrum have decried the Dear Colleague letters as offensive to First and Fourth Amendment protections."[13] Lhamon responded that her agency's DCLs on sexual harassment added nothing new to federal requirements, but "simply [serve] to advise the public of the construction of the regulations it administers and enforces."[14] This "failed to assuage" Lankford's concerns about the agency's "improper use of guidance documents that, while purporting to merely interpret existing law, fundamentally alters the regulatory landscape."[15]

A few months later the National Women's Law Center and eighty-five other advocacy organizations wrote to Secretary King defending OCR's practices, claiming that its 2011 and 2014 guidance documents are "simply clarifications of existing rights under Title IX" that "spurred schools to address cultures that for too long have contributed to hostile environments which deprive many students of equal educational opportunity."[16] Meanwhile, Lankford sent yet another letter to Secretary King complaining about OCR's failure to use notice-and-comment rulemaking for its controversial policy on the rights of transgender students.[17] In 2017 Secretary of Education Betsy DeVos announced that "the era of 'rule by letter' is over," and initiated a notice-and-comment rulemaking process to replace the Obama administration's sexual harassment guidance.[18] If the department carries through on this promise, it will constitute a major change in its regulatory practices.

As we will see in subsequent chapters, the argument that OCR's many interpretations and Dear Colleague Letters have added nothing new to Title IX regulation is, to put it mildly, unconvincing. Most of them announced substantial policy shifts. According to OCR, its policies have not changed for more than forty years—despite the fact that its 1975 regulations contain not one word about either sexual harassment or transgender issues. Nor did they include the "three-part test" that has become the centerpiece of its regulation of athletics. For years OCR has sought to obscure its innovations to avoid the procedural hurdles established by the APA and Title IX itself.[19]

Does this mean, then, that the agency's guidance documents are not legally binding? In practice, this comes down to two issues. First, will federal judges defer to these pronouncements as authoritative interpretations by an expert agency? Courts frequently do so—but not always. Second, will a school somehow put itself at risk by refusing to follow OCR's rules? Losing in court is only one form of risk that schools must consider. Going through a lengthy investigation can be costly to an institution both financially and in terms of its reputation. That is why many colleges have agreed to follow OCR sexual harassment guidance even when it differs substantially from the Supreme Court's interpretation of Title IX. In other words, the legal status of OCR's rules is closely connected to its enforcement authority, the topic to which we now turn.

The Enforcement Conundrum

Title IX states that compliance with its requirements "may be effected" either by "the termination of or refusal to grant or to continue" federal financial assistance or "by any other means authorized by law." The meaning of the latter phrase is unclear, but has generally been interpreted to mean enforcement through court suits brought by the Department of Justice under other jurisdictional statutes. OCR rarely refers Title IX cases to Justice, and Justice has almost never used such "other means" to enforce Title IX. From the beginning, termination of federal funding was designed to be the central enforcement mechanism for Title IX, much as it had been for Title VI. One of the most persuasive arguments put forth by the bill's sponsors was that the federal government should not be subsidizing educational institutions that engage in discrimination.

Terminators I: The Legal Hurdles

Congress is famous for protecting its "power of the purse," particularly when funding decisions affect the flow of federal dollars to members' states and districts. So it is not surprising that Congress imposed several constraints on agencies' power to cut off federal funds. First, termination must be based on an

"express finding on the record, after opportunity for hearing, of a failure to comply" with Title IX's requirements. This means that OCR must present its evidence to an independent administrative law judge who will also hear the arguments presented by the educational institution and produce a written justification for her decision. This time-consuming hearing process is governed by the extensive case law developed by federal courts under the Administrative Procedure Act's provisions on adjudication.

Second, "no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means." In practice, this means that before federal administrators can initiate a termination hearing, they must enter into negotiations with the educational institution on how it might come into compliance. Such negotiations can last for months or even years.

Third, "any person aggrieved" by the termination can seek judicial review. Although the statute is silent on the issue, it is likely that a reviewing court will stay termination of funding while it is reviewing the federal agency's action. Fourth, before terminating funds, federal administrators must send to the House and Senate committees with jurisdiction over the program "a full written report of the circumstances and the grounds for such action," and "No such action shall become effective until thirty days have elapsed after the filing of such report." In other words, congressional committees must have sufficient time to complain and to convince the agency to reverse its position.

Finally, according to Title IX as enacted in 1972, any termination of funding "shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found." The "pinpoint" provision had been added to Title VI as part of the compromise engineered to produce a filibuster-proof majority for the 1964 Civil Rights Act. Assistant Attorney General Burke Marshall, the Johnson administration's lead negotiator, at the time wrote that this language "makes clear that any termination of federal payment must be limited precisely to the part of the program in which discrimination has been expressly found to be practiced."[20] It was carried over into Title IX without explanation.

What does "particular program, or part thereof" mean in practice? From the beginning, OCR and HEW insisted that it meant an entire school district or college. They had strong practical reasons for taking this position: not only does federal financial assistance to one part of an institution free up money for other parts, but tracing the flow of federal money within an institution can be difficult and time-consuming. But this interpretation seems to reduce the statutory language to a nullity. The issue came to a head when the Supreme Court issued its 1984 decision in *Grove City College v. Bell*. Writing for the majority, Justice Byron White maintained that federal agencies could terminate funding to an entire educational institution "only by ignoring Title IX's program-specific lan-

guage." He found in the statute and its legislative history "no persuasive evidence suggesting that Congress intended that the Department's regulatory authority follow federally aided students from classroom to classroom, building to building, or activity to activity."[21]

Justice William Brennan's dissenting opinion pointed out that for nearly a decade Congress had expressed no opposition to OCR's broader definition. He argued that Title IX's enforcement provisions should be interpreted so as to further the "broad congressional purposes underlying enactment of the statute."[22] Although Brennan lost in the Supreme Court, his position eventually prevailed. After more than three years of fighting between the Reagan administration and congressional Democrats, Congress enacted, over the president's veto, the Grove City Bill, which stated that under Title IX "program or activity" shall include "all of the operations" of a college, university, corporation, or local educational agency that receives federal money.[23]

Terminators II: Practical Obstacles

Given the frequency with which OCR has threatened to revoke funding to schools that fail to comply with its guidelines, it is surprising to learn that the federal government has *never* cut off federal funding to punish an educational institution for violating Title IX. For a while, the mere threat of this draconian sanction might have been enough to induce schools to comply with OCR's demands. But eventually it became clear to almost everyone that the threat was an empty one. OCR desperately needed additional enforcement tools.

In the early days of southern school desegregation federal officials used Title VI's funding cutoff to force recalcitrant school districts to admit black students to previously all-white schools. Between 1964 and 1970, the period in which OCR was most aggressive and most successful in attacking southern school segregation, it initiated administrative proceedings against 600 of the more than 4,000 school districts in the South. Although funding was temporarily terminated in 200 of these schools, Beryl Radin found that "in all but four of these 200 districts, federal aid was subsequently restored, often without a change in local procedures."[24] And this was in circumstances most favorable to the use of the funding cutoff: those school districts had thumbed their nose at the Supreme Court and Constitution for years. Moreover, the federal funding in question was new, a product of the 1965 Elementary and Secondary Education Act; it had not yet become a virtual entitlement for school districts. The second half of the 1960s was the high-water mark for using the funding cutoff, but even then the water was barely ankle deep.

Why have federal administrators been so reluctant to terminate federal funding under either Title VI or Title IX? Most obviously, given the extent to which the colleges and local school districts have come to depend on federal money,

termination is generally considered a "nuclear option": too extreme a sanction for a violation of an administrative guideline by one part of the school. HEW secretary Joseph Califano likened it to "opting for decapitation instead of plastic surgery to eliminate facial disfiguration."[25] To make matters worse, it would usually hurt the very students federal officials are trying to help. In a report critical of federal agencies' lax enforcement of Title VI, the U.S. Commission on Civil Rights identified the central dilemma: "Although funding termination may serve as an effective deterrent to recipients, it may leave the victim of discrimination without a remedy. Funding termination may eliminate the benefits sought by the victim."[26] On top of this, the funding cutoff threatens to damage relations between the federal agency and those state and local officials with whom they worked on a regular basis—not to mention antagonizing members of Congress upon whom administrators rely for appropriations.[27]

Originally sold as a swift administrative alternative to lengthy litigation, the funding cutoff proved much more time-consuming and troublesome in practice. As Judge John Sirica (of Watergate fame) explained in a 1978 decision: "The fund termination procedure involves a tedious series of notice, hearing and review steps at the various levels within HEW's hierarchy followed by separate review in the courts." Litigation, in contrast, "bypasses the most cumbersome of the administrative steps" and promises "greater promptness in limiting aid to deserving recipients."[28]

"Implied Private Rights of Action" to the Rescue

Federal administrators first confronted this enforcement problem when they used Title VI to attack southern school segregation. Here they had a crucial advantage: even without this law it was illegal to use federal money in a racially discriminatory manner. Moreover, racial discrimination by public schools violates the Equal Protection clause even when no federal money is involved. As a result, both the Department of Justice and private litigants had clear legal authority to file suit against public schools that engage in such discrimination or even against federal administrators who provide financial support to private schools. On the surface, Title VI added no new prohibitions, but only a new and possibly quicker enforcement process, one running parallel to litigation-based enforcement. But if that were so, what good was Title VI once funding termination had become a dead letter? This allegedly potent alternative to litigation seemed to offer no alternative in practice.

In fact, though, Title VI did add something of great significance: the authority of federal agencies to write rules that courts could then enforce. During the intense battle over the desegregation of southern schools, federal courts relied heavily on numerical guidelines issued by OCR. In a key case, Fifth Circuit judge John Minor Wisdom explained that HEW's desegregation guidelines "offer,

for the first time, the prospect that the transition from a de jure segregated dual school system to a unitary integrated system may be carried out effectively, promptly, and in an orderly manner," thus rescuing the project from "the bog in which it had been trapped for ten years."[29] "Prepared in detail by experts in education and school administration," Judge Wisdom claimed, these guidelines were "intended by Congress and the executive to be part of a coordinated national program."[30] He promised that the Fifth Circuit would regularly update its requirements to match those of HEW. His colleague (and future U.S. attorney general) Judge Griffin Bell noted that since "HEW has the carrot in the form of federal funds but no stick," the Fifth Circuit aimed "to make a stick out of the federal courts." He questioned whether the federal courts should be willing to wield "any stick that HEW may formulate" in the future.[31] But he lost; Judge Wisdom's approach prevailed.

The rulemaking authority of federal administrators under Title VI took on even more significance a few years later when, in *Lau v. Nichols*, the Supreme Court recognized as legally binding—and enforceable by private suit—guidelines on bilingual education announced in an OCR memo.[32] No one claimed that this was a constitutional requirement; it was based solely on the statute, not the Equal Protection clause. Nor had there been any effort to use the rulemaking procedures mandated by the APA and Title VI itself. Originally seen as a way to enforce constitutional norms without litigation, Title VI had been transformed, with virtually no explanation, into a generator of judicially enforceable federal guidelines that reach far beyond constitutional mandates.[33]

Would the federal courts recognize a similar "implied private right of action" under Title IX and thus transform it, too, into a font of administrative guidelines enforced by federal judges? Although the Supreme Court was inclined to apply the same rules to Title IX that it had applied to Title VI, there were two competing considerations. First and most important, under the Equal Protection clause, race is a "suspect classification," which means that racial discrimination is almost always unconstitutional. Sex, in contrast, is *not* a suspect classification. In the early 1970s the Court had begun to invalidate some sex classifications, but regulations issued under Title IX simply could not claim the same constitutional status as the desegregation guidelines issued by OCR a decade earlier.

Second, when Title IX cases first came before federal judges in the late 1970s, the Supreme Court was shifting its position on when to recognize "implied private rights of action" in federal statutes. During its heyday, the Warren Court had created a strong presumption in favor of judicial enforcement of federal laws, even if Congress had vested enforcement authority in a federal agency and made no provision for enforcement through private suits.[34] The Burger Court began to reverse that presumption: private litigation could supplement administrative action only if Congress had explicitly authorized such suits or very strongly hinted that it had intended to do so.[35]

The Supreme Court resolved this tangled legal issue with its 1979 ruling in *Cannon v. University of Chicago*, the most important decision it has ever handed down on Title IX.[36] Justice John Paul Stevens's opinion for the six-member majority argued that since Congress had modeled Title IX on Title VI and since in 1972 many lower courts had recognized a private right of action to enforce Title VI, Congress must have intended that enforcement option to be available under Title IX as well.

Stevens added a practical reason: because the funding cutoff is so "severe" a punishment, it "may not provide an appropriate means" for protecting individuals from "isolated" incidents of discrimination. When a court finds that the recipient of federal funds has discriminated against a particular individual—for example, an applicant denied admission, as was the case in *Cannon*—"the violation might be remedied more efficiently by an order requiring an institution to accept an applicant who has been improperly excluded." According to Justice Stevens, "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." Injunctive relief that offers a plaintiff admission to an educational program (or the opportunity to play on a volleyball team) "is not only sensible but is also fully consistent with—and in some cases even necessary to—the orderly enforcement of the statute."[37] In other words, Title IX should be interpreted to provide judicially crafted remedies for those individuals harmed by particular instances of discrimination, not just blunt administrative remedies for systematic discrimination.

The three dissenters, in contrast, argued that the Court had not only ignored its recent jurisprudence on private rights of action, but distorted the regulatory scheme created by Congress. When Congress creates an explicit enforcement mechanism in a statute, the dissenters argued, that should remain the only one available. Listing a number of cases in which lower courts had discovered "implied" private rights of action in federal statutes, Justice Lewis Powell wrote sarcastically, "It defies reason to believe that in each of these statutes Congress absentmindedly forgot to mention an intended private action." To the argument that Title IX should follow Title VI, the dissenters responded, "An erroneous interpretation of Title VI should not be compounded through importation into Title IX under the guise of effectuating legislative intent." According to Justice White's dissenting opinion, "There is not one statement in the legislative history indicating that the Congress that enacted Title IX was aware" of the Title VI case law that the majority claimed it had tacitly incorporated into Title IX.[38] Justice Powell warned that this "self-aggrandizement" by the judiciary would lead to a flood of litigation and unnecessarily limit "the authority of the academic community to govern itself."[39] On this score, he was clearly prophetic.

Although the Court continued its assault on "implied private rights of action" in the 1980s and 1990s, it never reconsidered its decision in *Cannon*.[40]

In fact, thirteen years later, the Court unexpectedly expanded the enforcement authority of federal judges and increased plaintiffs' incentives to file suit under Title IX. In *Franklin v. Gwinnett County Public Schools* (1992), it ruled that in private Title IX suits, judges could not only issue injunctions but also award monetary damages to successful plaintiffs. Over the objection of the solicitor general (and the deputy solicitor general who handled the case, John Roberts, the future chief justice), a unanimous Court held that a student who had been subjected to serious and repeated sexual misconduct by a teacher deserved compensation from the school district that had done nothing to prevent it. Oddly enough, the Court's opinion was written by Justice White, a dissenter in *Cannon*. He maintained that whenever the judiciary finds an "implied" private right of action, it must infer that Congress intended to create an effective judicial remedy. If Congress had meant to prohibit monetary damages, it could have said so. As Justice Antonin Scalia pointed out, "To require, with respect to a right that is not consciously and intentionally created, that any limitation of remedy not be expressed, is to provide, in effect that the most questionable private rights will also be the most expansively remediable."[41] Yet he concurred in the judgment.[42]

The End of the Ancien Régime?

For private suits to provide federal administrators with the enforcement sanctions they otherwise lack, judges must defer to their regulations, guidelines, and Dear Colleague Letters. In *Lau v. Nichols*, the Supreme Court had rather cavalierly endorsed judicial enforcement of an OCR memo issued without regard for any of the procedures described above.[43] Almost all circuit court judges have followed OCR's various "interpretations" and "clarifications" of Title IX's requirements on athletics (see chapter 7). But judges do not always accept OCR's reading of the act (see chapters 10 and 12).

In 2001 the Supreme Court heard a case very similar to *Lau v. Nichols*, and came to a much different conclusion. In *Alexander v. Sandoval*, a closely divided Court ruled that although private suits can be used to enforce the statutory language of Titles VI and IX, they cannot be used to enforce the *administrative regulation* issued under them. Unless federal administrators can demonstrate that their guidelines are very closely linked to the explicit nondiscrimination mandates of those statutes, they cannot expect judges to enforce them. In effect, this means no deference to agency rules, even if the agency has followed all the procedural requirements contained in those laws. Justice Scalia's majority opinion acknowledged that this undermined practices first established in the 1960s and 1970s. But he described those practices as part of an "ancien régime" subsequently abandoned by the

Supreme Court: "Having sworn off the habit of venturing beyond Congress's intent, we will not accept respondents' invitation to have one last drink."[44]

This drew an impassioned defense of this "ancien régime" from Justice Stevens. He argued that the "integrated remedial scheme" that had emerged under Title VI and Title IX constituted "a reasonable—indeed inspired—model for attacking the often-intractable problem" of discrimination. To address "subtle forms of discrimination" such as "ostensibly race-neutral" rules that "have the predictable and perhaps intended consequence of materially benefiting some races at the expense of others," judges should eschew a "static approach" and instead empower civil rights agencies to "evaluate social circumstances to determine whether there is a need for stronger measures." This institutional arrangement "builds into the law flexibility, an ability to make nuanced assessments of complex social realities, and an admirable willingness to credit the possibility of progress."[45] In short, private rights of action combined with judicial deference to administrative rules are essential for producing aggressive regulation that goes beyond prohibiting intentional discrimination to address subtle forms of bias not contemplated by the enacting Congress.

As applied to Title IX, the Court's decision in *Alexander v. Sandoval* could be interpreted in either of two ways. It could be read broadly to mean that private rights of action can be used only to enforce prohibitions clearly laid out in the text of that statute. Since the text says so little, under this interpretation, private rights of action would be of little use to plaintiffs. Alternatively, it might mean only that the Supreme Court looks upon disparate-impact rules with a jaundiced eye, and will limit private rights of action to cases of intentional discrimination.

Four years later the second interpretation prevailed. In *Jackson v. Birmingham Board of Education*, a closely divided Court held that a male coach of a girls' team who had been penalized for complaining about unequal treatment of female athletes could sue the school district for damages. The circuit courts had split over whether Title IX's implied private right of action extends to such retaliation suits. Some followed the broader interpretation of *Sandoval*, ruling that because the statute itself fails to mention retaliation, such private rights of action are not permitted. Others followed the narrower interpretation, arguing that retaliation is an intentional action designed to undermine rights established by Title IX. Justice Sandra Day O'Connor's majority opinion sided with the latter: "Retaliation against a person . . . [who] has complained of sexual discrimination is another form of intentional sex discrimination encompassed by Title IX's private right of action."[46] Although retaliation is not mentioned in the statute, "Reporting incidents of discrimination is integral to Title IX enforcement." "Indeed, if retaliation were not prohibited," Justice O'Connor warned, "Title IX's enforcement scheme would unravel."[47]

Justice Clarence Thomas's dissenting opinion charged that this constituted a rejection of the main holding of *Sandoval*: "By crafting its own additional en-

forcement mechanism, the majority returns this Court to the days in which it created remedies out of whole cloth to effectuate its vision of congressional purpose. In doing so, the majority substitutes its policy judgments for the bargains struck by Congress, as reflected in the statute's text." The only question the Court should have addressed, the four dissenters insisted, is "whether Title IX prohibits retaliation, not whether prohibiting it is good policy."[48]

The *Jackson* decision made it clear that the Court would not limit the federal judiciary to enforcing the bare words of Title IX. But on the crucial question of how much deference judges should pay to administrative guidelines, the Court remained noticeably silent. In arriving at its decision, the majority explained, it "did not rely on the Department of Education's regulation at all, because the statute itself contains the necessary prohibition."[49] Yet once the courts take on the task of determining what is required to create an *effective* regulatory structure, it is hard to see how they can avoid seeking guidance from the agency that deals with these issues on a daily basis.

Conclusion

When a statute's substantive mandates are ambiguous—as is certainly the case with Title IX—the institutional arrangements established to interpret and enforce the law become especially important. Who establishes the authority of judges and agencies? To some extent that is done by Congress. But with Title IX the central enforcement mechanism created by Congress, the funding cutoff, proved unworkable in practice. Moreover, the rulemaking process established in the law has long been evaded by OCR. The federal judiciary responded to the former by inventing an alternative enforcement practice. The latter met with virtually no protest from the courts.

Justices on the U.S. Supreme Court have disagreed not just about the meaning of the word "discrimination" but also about the legitimacy of the regulatory regime that evolved after 1972. To Justice Stevens and his allies, this "integrated remedial scheme" constitutes an "inspired model" that "builds into the law flexibility, an ability to make nuanced assessments of complex social realities, and an admirable willingness to credit the possibility of progress." For Justices Scalia and Thomas and their allies, when the judiciary creates "remedies out of whole cloth to effectuate its vision of congressional purpose," it usurps the authority of Congress to make the law. Thus, behind judicial interpretations of Title IX lie competing understandings not just of equality, but of the proper operation of the separation of powers under our Constitution.