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Civil Rights—Sex Discrimination in Education—Compensatory Damages Available in a Title IX Sexual Harassment Claim. Franklin v. Gwinnett County Public Schools.

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NOTES

CIVIL RIGHTS—SEX DISCRIMINATION IN EDUCATION —COMPENSATORY DAMAGES AVAILABLE IN A TITLE IX SEXUAL HARASSMENT CLAIM. *Franklin v. Gwinnett County Public Schools*, 112 S. Ct. 1028 (1992).

I. FACTS

In December 1988, Christine Franklin filed an action for damages against Gwinnett Public Schools in the Federal District Court for the Northern District of Georgia.[1] Franklin claimed that the school district had violated Title IX of the Education Amendments of 1972, which prohibits schools that receive federal support from discriminating on the basis of gender.[2] Franklin alleged that from the fall of 1986 (her tenth grade year at North Gwinnett High School) through the spring of 1988 (her eleventh grade year), she was sexually harassed by a coach and economics teacher, Andrew Hill.[3] Starting with flirtatious, sexually-oriented discussions, Hill progressed to telephoning Franklin at home, kissing her "forcibly" on the mouth in a school parking lot, and "on three occasions in her junior year, . . . interrupt[ing] a class, request[ing] that the teacher excuse Franklin, and t[aking] her to a private office where he subjected her to coercive sexual intercourse."[4]

Additionally, Franklin alleged that even when teachers and administrators at Gwinnett High School were informed of Hill's conduct, they "took no action to halt it and discouraged [her] from pressing charges against Hill."[5] In particular, when the school's band director,

1. Franklin v. Gwinnett County Pub. Schs., 112 S. Ct. 1028, 1031 (1992).

2. *Id.* at 1031. Title IX provides, in pertinent part, that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a) (1988).

3. 112 S. Ct. at 1031.

4. *Id.*

5. *Id.* For example, some time during the fall of 1987, Franklin's boyfriend, Douglas Kreeft,

Dr. Prescott, was informed of the conduct some time during the fall of 1987, he discouraged both Franklin and her boyfriend from pursuing the matter because of possible "negative publicity."[6]

Not until early or mid-March 1988 did the school district begin a month-long investigation of the matter.[7] On April 14, 1988, Hill resigned on the condition that the investigation cease;[8] meanwhile, Dr. Prescott retired and the school dropped its investigation.[9]

In August 1988, Franklin filed a complaint against Gwinnett County with the United States Department of Education's Office of Civil Rights ("OCR"), which is charged with promulgating and enforcing Title IX regulations.[10] After a six-month investigation, the OCR determined that the school district, in failing to protect Franklin from Hill's sexual harassment and in ignoring her complaints, had violated Franklin's rights by subjecting her to sexual harassment, a form of sex discrimination. It also determined, however, that with the resignation of Hill and Prescott, the school was in compliance with Title IX.[11] Franklin then filed her claim for damages in federal court.

The district court dismissed Franklin's claim, asserting that Title IX did not support a claim for damages,[12] and the Eleventh Circuit Court of Appeals affirmed.[13] The court of appeals cited as binding precedent the Fifth Circuit's decision in *Drayden v. Needville Independent School District*,[14] where a Title VI action for damages for racial discrimination was dismissed because the "private right of action allowed under Title VI encompasses no more than an attempt to have any discriminatory activity ceased."[15] The court of appeals then held that title

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had informed the school's band director, Dr. William Prescott, of the events, and in October 1987, a student had informed an assistant principal, who "admonished" the student. Also during this time, several students had informed teachers and a guidance counselor that Hill had engaged in sexual discussions with other students in addition to Franklin. Finally, on February 29, 1988, the school's principal had been informed of the circumstances between Franklin and Hill. Franklin v. Gwinnett County Pub. Schs., 911 F.2d 617, 618 (11th Cir. 1990).

6. 911 F.2d at 618-19.

7. *Id.* at 619.

8. 112 S. Ct. at 1031.

9. 911 F.2d at 619.

10. *Id. See* 34 C.F.R. §§ 106.1 to 106.71 (1992).

11. 112 S. Ct. at 1031 n.3.

12. No. 1:88-cv-2922-ODE (N.D. Ga.) (Orinda D. Evans, J.).

13. 911 F.2d at 618.

14. 642 F.2d 129 (5th Cir. Unit A April 1981). Decisions of the former Fifth Circuit prior to October 1, 1981 (such as *Drayden*) are binding precedent in the Eleventh Circuit. Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

15. *Franklin*, 911 F.2d at 620 (quoting *Drayden*, 642 F.2d at 133). Title VI provides, in

IX also failed to support an action for damages.[16] The court reasoned that the holding in *Drayden* with regard to Title VI should apply to a Title IX action as well, since the statutes were virtually identical and since "it is well settled that analysis of the two statutes is substantially the same."[17]

The court of appeals also analyzed the Supreme Court's decision in another Title VI case, *Guardians Ass'n v. Civil Service Commission*,[18] concluding that its "fragmented" opinions did not overrule *Drayden* since at least five members of the Court either (1) denied or did not consider the existence of compensatory relief for intentional discrimination under Title VI or (2) denied that Title VI created a private right of action at all.[19] Additionally, the court of appeals, again purportedly relying on *Guardians*, reasoned that, as a statute enacted pursuant to Congress' Spending Clause powers (one in which federal funds were conditioned on regulatory compliance), Title IX afforded only equitable, not compensatory, relief.[20]

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pertinent part, that "[n]o person in the United States shall, on the basis of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (1988).

16. 911 F.2d at 622.

17. *Id.* at 619.

18. 463 U.S. 582 (1983). There was no majority opinion in *Guardians*, a 5-4 decision in which six opinions were filed. Justice White announced the judgment of the Court to which Justice Rehnquist joined in part. Justices Powell (joined by Chief Justice Burger and Justice Rehnquist in part), Justice Rehnquist, and Justice O'Connor each wrote concurring opinions, while Justices Marshall and Stevens (joined by Justices Brennan and Blackmun) dissented. The holding in *Guardians* denied compensatory damages to a group of black and Hispanic New York City police officers in their Title VI class action suit because the discrimination they had suffered due to layoffs was of the disproportionate impact type and not intentional. In *Franklin* the Eleventh Circuit stated that *Guardians* "leaves open the question whether compensatory damages for intentional discrimination may be sought." 911 F.2d at 621. However, Justice White's opinion in *Guardians* strongly implied that in situations where there is intentional discrimination, and where therefore the federal program has notice of this discrimination and of its obligation to halt it, compensatory damages may in fact be available. 463 U.S. at 597.

19. 911 F.2d at 620-21.

20. *Id.* at 621-22. This limitation on remedies for Spending Clause legislation was developed in Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981). In *Guardians*, the Court stated that *Pennhurst* required that "[r]emedies to enforce spending power statutes must respect the privilege of the recipient of federal funds to withdraw and terminate its receipt of federal money rather than assume the further obligations and duties that a court has declared are necessary for compliance." *Guardians*, 463 U.S. at 597. The court of appeals' analysis in *Franklin* again ignored Justice White's assertion in *Guardians* that the remedy limitation on Spending Clause legislation applied only to *unintentional* discrimination: summarizing his survey of the history of Title VI, he said, "there is no legislative history [of Title VI] that in any way rebuts the *Pennhurst* presumption that only limited injunctive relief should be granted as a remedy for *unin-*

Because the Eleventh Circuit's decision denying compensatory damages in a Title IX action conflicted with a Third Circuit decision permitting them,[21] the Supreme Court granted certiorari.[22] The Court reversed, holding that compensatory damages were available in a private right of action under Title IX.[23] *Franklin v. Gwinnett County Public Schools*, 112 S. Ct. 1028 (1992).

II. HISTORICAL DEVELOPMENT

Title IX was enacted as one of the Education Amendments of 1972.[24] Modeled after Title VI of the Civil Rights Act of 1964,[25] Title IX, like its model, does not expressly create a private right of action; rather, it simply prohibits sex discrimination in any educational institution that receives federal funds.[26]

However, in the 1979 case *Cannon v. University of Chicago*,[27] the Supreme Court held that Title IX created an implied right of action for an individual's claim of sex discrimination in education.[28] Using the four-factor test developed in *Cort v. Ash*[29] for determining "whether a private remedy is implicit in a statute not expressly providing one,"[30]

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tended violations of statutes passed pursuant to the spending power." 463 U.S. at 602 (emphasis added).

21. Pfeiffer v. Marion Ctr. Area Sch. Dist., 917 F.2d 779, 788 (3rd Cir. 1990) (holding that damages under Title IX would be available to a female student dismissed because of pregnancy from her public high school's National Honor Society if, on remand, she proved intentional sex discrimination contrary to Title IX).

22. 111 S. Ct. 2795 (1991).

23. 112 S. Ct. at 1038.

24. Education Amendments of 1972, Pub. L. No. 92-318, title IX, § 901, 86 Stat. 373 (codified at 20 U.S.C. §§ 1681-1688 (1988)).

25. *See supra* note 15. Senator Bayh introduced Title IX on the Senate floor on February 28, 1972, with the comment that "my amendment sets forth prohibition and enforcement provisions which generally parallel the provisions of Title VI." 118 Cong. Rec. 5807 (1972).

26. 20 U.S.C. § 1681(a) (1988). *See supra* note 2.

27. 441 U.S. 677 (1979). Geraldine Cannon alleged she was discriminated against under Title IX when she was denied admission to the medical schools of the University of Chicago and Northwestern University because of her age and sex. Both schools received federal funds. *Id.* at 680.

28. *Id.* at 716. A 6-3 decision, the *Cannon* opinion was written by Justice Stevens. Justice Rehnquist, joined by Justice Stewart, concurred. Justice White, joined by Justice Blackmun, dissented, as did Justice Powell.

29. 422 U.S. 66 (1975). In *Cort*, the Court held there was no implied right of action for damages in a suit by a corporation stockholder alleging violations of 18 U.S.C. § 610, the Federal Elections Campaign Act. This Act prohibited corporations from making presidential and congressional campaign contributions. 422 U.S. at 68-69, 85.

30. 422 U.S. at 78.

the Court in *Cannon* held that Title IX created an implied private right of action.[31] In addition, the Court reasoned that fears of excessive litigation and restrictions on academic freedom were unsubstantiated, as was the argument that, had Congress intended to create a private right of action under Title IX, it would have.[32]

While the *Cannon* decision, along with the entire implied right of action approach, has not been without its critics,[33] it was essentially ratified by Congress in subsequent legislation. The 1986 Civil Rights Remedies Equalization Amendment abrogated states' Eleventh Amendment immunity under Title IX and other civil rights statutes.[34] In the following year, the 1987 Civil Rights Restoration Act expressly sought to "restore"—after the Supreme Court's decision in *Grove City College v. Bell*[35]—what Congress had intended as the "broad" scope of Title IX.[36] In neither Act did Congress take issue with the *Cannon*

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31. 441 U.S. at 717. In its application of the four-factor *Cort* test, the Court in *Cannon* reasoned that Title IX created an implied right of action because:

> 1) Title IX explicitly conferred a benefit on persons discriminated against on the basis of sex;
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> 2) Congress intended with Title IX to create a private cause of action (by patterning it on Title VI, which by 1972 had already been construed by lower courts to confer a private right of action);
>
> 3) The underlying purpose of Title IX was consistent with allowing a private right of action; and
>
> 4) Protecting civil rights was appropriately a matter for the federal government and courts rather than the states.

Id. at 689-709.

32. *Id.* at 709-16.

33. See, for example, the dissents in *Cannon* by Justices White, 441 U.S. at 718, and Powell, *id.* at 730. Justice Scalia has particularly critiqued the implied rights approach. *See, e.g.*, Thompson v. Thompson, 484 U.S. 174 (1988) (Scalia, J., concurring) (holding that the Parental Kidnapping Prevention Act did not create an implied cause of action). *See also* Touche Ross & Co. v. Redington, 442 U.S. 560 (1979) (holding that the Securities Exchange Act did not create a private cause of action in favor of anyone); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979) (a 5-4 decision holding that there exists only a limited private remedy under the Investment Advisers Act of 1940).

34. 42 U.S.C. § 2000d-7 (1988). In addition to Title IX, the 1986 Amendment applied to Title VI, to § 504 of the Rehabilitation Act of 1973, and to the Age Discrimination Act of 1975. *Id.*

35. 465 U.S. 555 (1984).

36. 20 U.S.C. § 1687 (1988). In *Grove City*, the Court held that federal funds would be denied to an educational institution only if the specific program that discriminated received federal funds. 465 U.S. at 573. The Restoration Act, however, overturned *Grove City*, providing that funds would be denied if *any* program within an educational institution discriminated, regardless of whether that program received federal funds:

> The Congress finds that . . . (1) certain aspects of recent decisions and opinions of the Supreme Court have unduly narrowed or cast doubt upon the broad application of Title

decision allowing a private right of action under Title IX. Even the *Cannon* critics concede that the 1986 and 1987 acts ratified *Cannon*'s holding.[37]

Title IX prohibits sex discrimination in education; it does not explicitly refer to sexual harassment.[38] But the analogy with Title VII of the Civil Rights Act of 1964, which prohibits sex discrimination in employment, led courts faced with the issue prior to *Franklin* to find that sexual harassment is actionable sex discrimination under Title IX.[39] In the employment context, sexual harassment has been viewed as actionable sex discrimination under Title VII by both the Equal Employment Opportunity Commission (EEOC)[40] and the federal courts.[41] In 1986, the Supreme Court held in *Meritor Savings Bank v. Vinson*[42] that sex-

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> IX of the Education Amendments of 1972 . . . and (2) legislative action is necessary to restore the prior consistent and long-standing executive branch interpretation and broad, institution-wide application of those laws as previously administered.

Act of Mar. 22, 1988, Pub. L. No. 100-259, § 2, 1988 U.S.C.C.A.N. (102 Stat.) 28.

37. Justice Scalia, a long-time critic of the private right of action approach, reasons in his concurring opinion to *Franklin* that "[b]ecause of legislation enacted subsequent to *Cannon*, it is too late in the day to address whether a judicially implied exclusion of damages under Title IX would be appropriate. The Civil Rights Remedies Equalization Amendment of 1986 . . . must be read . . . 'as a validation of *Cannon*'s holding'. . . ." 112 S. Ct. at 1039 (quoting the majority opinion in *Franklin*, 112 S. Ct. at 1036).

38. 20 U.S.C. §§ 1681-1688.

39. 42 U.S.C. § 2000e-17 (1985). Title VII prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin. On the analogy between sexual harassment under Title IX and under Title VII, see Ronna G. Schneider, *Sexual Harassment and Higher Education*, 65 TEX. L. REV. 525, 526-27, 543-50 (1987). *See also* Kimberly A. Mango, Note, *Students versus Professors: Combating Sexual Harassment under Title IX of the Education Amendments of 1972*, 23 CONN. L. REV. 355, 363-66, 384-85 (1991); NATIONAL WOMEN'S LAW CENTER, SEX DISCRIMINATION IN EDUCATION: LEGAL RIGHTS AND REMEDIES 37-49 (1983).

40. Regulations promulgated by the EEOC identify sexual harassment as a violation of § 703 of Title VII (42 U.S.C. § 2000e-2 (1985)). These regulations define sexual harassment as:

> [u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."

29 C.F.R. § 1604.11(a) (1992).

41. It was not until 1977, however, that a court recognized sexual harassment as actionable sex discrimination under Title VII. Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977). Prior to that point, sexual harassment was seen in the federal courts "as a 'personal' phenomenon that did not rise to the level of sex discrimination." Walter B. Connelly, Jr., and Alison B. Marshall, *Sexual Harassment of University or College Students by Faculty Members*. 15 J.C. & U.L. 381, 383 (1989).

42. 477 U.S. 57 (1986).

ual harassment is a form of sex discrimination prohibited under Title VII.[43] *Meritor* also held that both types of sexual harassment—"*quid pro quo*" and "hostile environment"—are actionable under Title VII.[44]

In the education context, however, there have been few decisions involving the sexual harassment of students,[45] and the Office of Civil Rights (OCR), which is the Department of Education office charged with enforcing Title IX, has issued no regulations pertaining to sexual harassment. The OCR maintains, however, that sexual harassment is actionable sex discrimination under Title IX.[46] Moreover, several lower courts after *Cannon* have held that sexual harassment, at least of the

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43. *Id.* at 64. Citing the EEOC guidelines established pursuant to Title VII, 29 C.F.R. § 1604.11(a) (1992), the Court held that sexual harassment under Title VII may include "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature." 477 U.S. at 65.

44. 477 U.S. at 67. *Quid pro quo* sexual harassment involves conduct in which a benefit is conditioned upon sexual favors, while environmental harassment involves any conduct based on sex that, in the words of the EEOC regulations, "unreasonably interfer[es] with an individual's work performance or creat[es] an intimidating, hostile, or offensive working environment." 29 C.F.R. § 1604.11(a)(3) (1992).

45. The paucity of decisions is probably not because of the lack of harassment but rather because of the institutions' desire to avoid publicity and the students' desire to pursue their educations rather than vindicate their legal rights. *See* Connelly and Marshall, *supra* note 41, at 392. Additionally, litigation is not always necessary when educational institutions dismiss faculty in response to charges of harassment. *See, e.g.*, Korf v. Ball State Univ., 726 F.2d 1222 (7th Cir. 1984) (upholding faculty discharge as a result of sexual advances made upon male students); Naragon v. Wharton, 572 F. Supp. 1117 (M.D. La. 1983) (upholding university decision to remove teaching assistantship from female graduate student who became romantically involved with a female freshman student), *aff'd*, 737 F.2d 1403 (5th Cir. 1984); Dewey v. Univ. of New Hampshire, 694 F.2d 1 (1st Cir. 1982) (upholding faculty dismissal as a result of harassment claim lodged against him by student), *cert denied*, 461 U.S. 944 (1983).

There are also few reported decisions considered Title IX sexual harassment claims made by faculty. To date, few faculty members have succeeded in their claims, perhaps because many courts defer to academic discretion in tenure decisions. *See, e.g.*, King v. Board of Regents, 898 F.2d 533, 539-40 (7th Cir. 1990) (upholding university's refusal to grant tenure to female professor despite clear evidence of sexual harassment by fellow professor); Lieberman v. Gant, 474 F. Supp. 848 (D. Conn. 1979) (upholding University of Connecticut's dismissal of feminist professor on job-related grounds), *aff'd*, 630 F.2d 60 (2d Cir. 1979). *But see* Jew v. University of Iowa, 749 F. Supp. 946, 963 (S.D. Iowa 1990) (ordering promotion to full professor with back pay for female associate professor subjected to thirteen-year pattern of environmental harassment that led to denial of promotion); Gutzwiller v. Fenik, 860 F.2d 1317 (6th Cir. 1988) (remanding to determine appropriate equitable remedies, including backpay, reinstatement, and front pay, for female professor denied tenure as result of sexual harassment).

On the courts' deference to academic decisions, see Mary Gray, *Academic Freedom and Nondiscrimination: Enemies or Allies?*, 66 TEX. L. REV. 1591, 1595-1612 (1988).

46. Schneider, *supra* note 39, at 527, n.11 (citing OCR Policy Memorandum from Antonio J. Califa, Director for Litigation, Enforcement, and Policy Service, to Regional Civil Rights Directors (Aug. 31, 1981)).

quid pro quo variety, is actionable under Title IX. These courts, along with commentators, consistently agree that the EEOC's guidelines on sexual harassment should apply in the educational context as well.[47]

All four of the federal decisions on sexual harassment in education during the time between *Cannon* and *Franklin* establish that *quid pro quo* sexual harassment is actionable under Title IX. Only one of these decisions, however, unequivocally establishes that environmental harassment is actionable.

In *Alexander v. Yale University*,[48] one of two federal decisions prior to *Meritor* on sexual harassment in education, the Connecticut District Court held that *quid pro quo* sexual harassment was actionable sex discrimination under Title IX.[49] One of the plaintiffs, Pamela Price, alleged she had received a C in a course after she had rejected her "professor's outright proposition 'to give her a grade of "A" in the course in exchange for her compliance with his sexual demands."[50] Holding that Price had stated a cause of action under Title IX, the district court refused to dismiss, stating:

> [I]t is perfectly reasonable to maintain that academic advancement conditioned upon submission to sexual demands constitutes sex discrimination in education, just as questions of job retention or promotion tied to sexual demands from supervisors have become increasingly recognized as potential violations of Title VII's ban against sex discrimination in employment.[51]

Although Price lost at trial (because she failed to prove her case) and in her subsequent appeal (because of mootness since she had already graduated),[52] *Alexander* is significant in that it established a student's right to sue under Title IX for sexual harassment by a teacher. Also, as a result of the suit, Yale established a sexual harassment policy, which was exactly what the plaintiffs had sought as a remedy and which the court had refused to order. By the time of Alexander's appeal, Yale

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47. *See, e.g.*, Carolyn E. Staton, *Sex Discrimination in Public Education*, 58 MISS. L.J. 323, 337 (1988).

48. 459 F. Supp. 1 (D.C. Conn. 1977), *aff'd on other grounds*, 631 F.2d 178 (2d Cir. 1980).

49. 459 F. Supp. at 4. Five students and a male professor alleged that Yale University had discriminated against them by allowing a male professor to sexually harass one of the students, thus creating an "atmosphere of distrust." *Id.* at 3. The district court dismissed the other professor and four of the students for lack of standing and/or mootness. *Id.* at 3-4.

50. *Id.* at 3-4.

51. *Id.* at 4.

52. Alexander v. Yale Univ., 631 F.2d 178, 183, 185 (2d Cir. 1980).

had in place a policy that was the result of a year-long study by students, faculty, and administrators.[53] "In effect, the plaintiffs achieved what they had sought: recognition of the problem by the university."[54] Nevertheless, the *Alexander* decision may also be viewed as limited in its refusal to recognize environmental harassment as a legitimate cause of action under Title IX.[55]

The holding in another pre-*Meritor* case involving sexual harassment in education was not so limited. In *Moire v. Temple University School of Medicine*,[56] the Eastern District of Pennsylvania held (and the Third Circuit affirmed) that Title IX created a private right of action for environmental sexual harassment "in an educational program or activity receiving federal funds."[57] The plaintiff, Laura Moire, alleged that her medical school failure was caused by a clinical supervisor's conduct in certain private meetings, which created a hostile environment that affected her ability to learn and perform.[58] Although she failed to prove her case, Moire was allowed to plead a hostile environment cause of action.[59] The court said that "[t]he issue [was] whether plaintiff because of her sex was in a harassing or abusive environment. . . ."[60] A significant fact in *Moire* is that, as in *Alexander*, the student-plaintiff was unable to convince a judge of her credibility.[61] According to one commentator, this inability makes *Moire* a "victory"

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53. *Id.* at 184-85.

54. Elaine D. Ingulli, *Sexual Harassment in Education*, 18 RUTGERS L.J. 281, 290 (1987).

55. *See, e.g.*, Schneider, *supra* note 39, at 539-41 (arguing that "[t]he court's refusal to recognize maintenance of an offensive educational environment as sexual harassment under Title IX ignores a critical element of learning in any academic institution—the creation and fostering of an environment conducive to intellectual growth. The academic environment at an educational institution is extremely important in determining the benefit that a student receives from attending that institution." *Id.* at 540. *See also* Mango, *supra* note 39, at 393-94 (discussing the difficulties imposed by graduation if a student plaintiff does not obtain class certification).

56. 613 F. Supp. 1360 (E.D. Pa. 1985), *aff'd*, 800 F.2d 1136 (3rd Cir. 1986).

57. 613 F. Supp. at 1366. In fact, the court held the discrimination violated 42 U.S.C. § 1983 (1988) rather than Title IX because Temple University, as a private institution, did not have to comply with Title IX. *Id.* at 1366. The court cited the previous year's decision in *Grove City College v. Bell*, 465 U.S. 555 (1984), for the proposition that federal aid to some programs of a private educational institution would not subject the entire institution to Title IX. 613 F. Supp. at 1366 n.1. However, as discussed *supra* note 36, Congress reversed *Grove City* with the Restoration Act of 1987; thus, Moire would have been able to state a cause of action under Title IX as well as under § 1983.

58. 613 F. Supp. at 1362.

59. *Id.*

60. *Id.* at 1367.

61. Mango, *supra* note 39, at 404.

with a "shadow."[62]

Since *Meritor's* decision to permit hostile environment claims under Title VII, two federal courts of appeal have dealt with the issue of whether Title IX permitted hostile environment claims as well.[63] Both courts treated *quid pro quo* sexual harassment as actionable sex discrimination, but they either did not reach the environmental issue or declined to treat it as actionable.[64]

In *Lipsett v. University of Puerto Rico,*[65] the First Circuit held in 1988 that a medical student's environmental harassment by her residency supervisor was actionable sex discrimination under Title IX with respect to her role as an employee, but not with respect to her role as a student.[66] On remand, a jury awarded Lipsett backpay and compensatory damages of $525,000.[67]

In the following year, the Third Circuit affirmed the Western District of Pennsylvania's denial of an environmental harassment claim in *Bougher v. University of Pittsburgh.*[68] *Bougher* involved a "consensual relationship" between a student and her teacher that had "gone

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62. Mango, *supra* note 39, at 405 (adding that "[i]f credibility of the plaintiff will result in the favoring of the harassing professor, then the legitimation of a legal structure is of little consolation").

63. Bougher v. University of Pittsburgh, 882 F.2d 74 (3rd Cir. 1989); *aff'g on other grounds*, 713 F. Supp. 139 (W.D. Pa. 1989); Lipsett v. University of Puerto Rico, 864 F.2d 881 (1st Cir. 1988).

64. Mango, *supra* note 39, at 407-11.

65. 864 F.2d 881 (1st Cir. 1988). The district court had failed to find evidence of sexual harassment despite the existence of a fully developed record. Lipsett v. Rive-Mora, 669 F. Supp. 1188, 1197, 1200-04 (D.P.R. 1987). Among the incidents Lipsett recounted were the use of sexually charged nicknames for herself and other female residents, along with the display of *Playboy* centerfolds in the common dining room and a sexually explicit drawing of her body in the male doctors' lounge. 864 F.2d at 905. Additionally, the senior resident, Dr. Novoa, repeatedly made sexually explicit comments about women while treating patients in Lipsett's presence and "would often mention that women were not fit to be surgeons, stating that women could not be relied on when they were menstruating or, as he said, 'in heat.'" 669 F. Supp. at 1197. See Mango, *supra* note 39, at 405-07 for a further discussion.

66. 864 F.2d at 897. The court gave no reason for denying Lipsett's claim as a student and limited its holding to the employment context of Title IX:

> We therefore hold, following *Meritor*, that in a Title IX case, an educational institution is liable upon a finding of hostile environment sexual harassment perpetrated by its supervisors upon employees *if* an official representing that institution knew, or in the exercise of reasonable care, should have known of the harassment's occurrence, *unless* that official can show that he or she took appropriate steps to halt it.

Id. at 901.

67. Lipsett v. University of Puerto Rico, 759 F. Supp. 40, 41 (D.P.R. 1991).

68. 882 F.2d 74 (3rd Cir. 1989), *aff'g on other grounds*, 713 F. Supp. 139 (W.D. Pa. 1989).

sour."[69] The district court in *Bougher* held in a strongly worded opinion that environmental harassment was not actionable:

> [T]o suggest, as plaintiff must, that unwelcome sexual advances, from *whatever* source, official or unofficial, constitute Title IX violations is a leap into the unknown which, whatever its wisdom, is the duty of Congress or an administrative agency to take. Title IX simply does not permit a "hostile environment" claim as described for the workplace by [the EEOC guidelines].[70]

The Third Circuit Court of Appeals affirmed the decision but on other grounds, refusing to reach the environmental harassment issue because the plaintiff's action was time-barred by the statute of limitations: "[W]e decline to adopt [the lower court's] reasoning in toto and we find it unnecessary to reach the question, important though it may be, whether evidence of a hostile environment is sufficient to sustain a claim of sexual discrimination in education in violation of Title IX."[71]

Because the plaintiff in *Cannon* sought only injunctive relief—admission to medical school—the Court did not have to reach the issue of whether a damage remedy would be available for the private right of action implied by Title IX. And because none of the plaintiffs in *Alexander, Moire, Lipsett*, or *Bougher* succeeded in proving her case, the courts did not have to reach the more specific issue of remedies for sexual harassment under Title IX. However, in other Title IX cases, the lower courts have struggled with the issue of what remedies are available if a person succeeds in establishing her Title IX claim. While establishing sex discrimination under Title IX may be similar to establishing sex discrimination under Title VII, the issue of remedies is not, particularly for a student. The traditional remedies in an employment context, reinstatement and backpay,[72] are inappropriate for stu-

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69. 713 F. Supp. at 144. On the problems and issues of consensual relations between students and teachers, see BILLIE W. DZIECH & LINDA WEINER, THE LECHEROUS PROFESSOR: SEXUAL HARASSMENT ON CAMPUS 74-77 (2d ed. 1990); Elisabeth A. Keller, *Consensual Amorous Relationships Between Faculty and Students: The Constitutional Right To Privacy*, 15 J.C. & U.L. 21 (1988); Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 835-61 (1988).

70. 713 F. Supp. at 145. As dicta, the district court also said that even if the student plaintiff had a cause of action under Title IX, she would not be able to obtain damages: "we decline plaintiff's invitation to legislate a damages remedy into existence. Plaintiff cannot state a damages claim for her 'lost employment opportunities' under Title IX, even if she had set forth a scintilla of evidence to support her allegations of loss." *Id.* at 143 n.2.

71. *Bougher*, 882 F.2d at 77.

72. These may be the usual remedies in the employment context, but Congress recently determined they should not be the only remedies. In the fall preceding the *Franklin* decision,

dents; and in many situations, by the time a student has pursued her claim through the judicial process, she has graduated and her cause is moot.

The Eleventh Circuit's decision in *Franklin* was the third federal court of appeals' decision regarding remedies under Title IX since *Cannon*. In 1981, the Seventh Circuit held, in *Lieberman v. University of Chicago*,[73] that Title IX did not support an award for compensatory damages.[74] Nine years later, however, the Third Circuit held, in *Pfeiffer v. Marion Center Area School District*,[75] that Title IX *did* support an award for compensatory damages.[76]

The 1981 *Lieberman* decision relied on the Supreme Court decision that same year in *Pennhurst State School & Hospital v. Halderman*.[77] *Pennhurst* held that in Spending Clause legislation, conditions must be made explicit: "[I]f Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation."[78]

Applying *Pennhurst* to determine whether Title IX permitted a damage remedy, the Seventh Circuit in *Lieberman* reasoned that it would be unfair to impose "a potentially massive financial liability" of damages on institutions without their having "exercised their choice 'knowingly, cognizant of the consequences of their participation.' "[79] The court therefore refused to presume such a remedy: "[I]f Congress

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Congress passed the Civil Rights Act of 1991, which provides for damages in Title VII cases of intentional discrimination in employment. Act of Nov. 21, 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended at 42 U.S.C. § 1981 (1988)).

73. 660 F.2d 1185 (7th Cir. 1981).

74. *Id.* at 1188. Plaintiff Judith Lieberman sought a damage remedy for her sex discrimination claim against the University of Chicago because obtaining injunctive relief was moot since she was then attending Harvard Medical School. *Id.* at 1186.

75. 917 F.2d 779 (3rd Cir. 1990).

76. *Id.* at 788. Plaintiff Arlene Pfeiffer sought compensatory damages for sex discrimination when she was dismissed from an honor society for her pregnancy. Injunctive relief would have been moot since the honor society no longer existed and since she had already graduated. The court remanded to consider testimony regarding a boy who had not been dismissed from the honor society for premarital sex. *Id.* at 785-86.

77. 451 U.S. 1 (1981). *Pennhurst* involved the question of whether § 6010 of the Developmentally Disabled Assistance Act of 1975 created a condition for receipt of federal funding. The Court determined that § 6010's "bill of rights" was not a condition but rather "no more than [an expression of] congressional preference for certain kinds of treatment." *Id.* at 19.

78. 451 U.S. at 17 (citation and footnote omitted).

79. 660 F.2d at 1188 (citation omitted).

had intended to create a remedy for damages it would have done so explicitly."[80]

The 1990 Third Circuit decision in *Pfeiffer*[81] relied on a different Supreme Court decision, *Guardians Ass'n v. Civil Service Commission*,[82] where the Court held that Title VI supported a claim for compensatory damages in cases of intentional discrimination.[83] The Third Circuit in *Pfeiffer* admitted that it "would have been more comfortable had [*Guardians* offered], if not clear guidance, at least some guidance as to the quantum of proof required;" nevertheless, the court determined that "the standard adopted for Title VI actions in *Guardians Ass'n* should be required in Title IX cases."[84] Thus, the Third Circuit held it would "allow a remedy of compensatory damages when a plaintiff alleges and then establishes discriminatory intent."[85]

Guardians, a 5-4 decision in which six separate opinions were filed,[86] led to much confusion in the lower courts, several of which interpreted its denial of a damage remedy for unintentional Title VI violations to apply to intentional violations as well.[87] Although its holding

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80. *Id.* At least one commentator pointed out, following the decision, that the "potentially massive financial liability" involved in *Pennhurst* was of a different type than that involved in *Lieberman*. *See* Nancy Peterson, Note, Lieberman v. University of Chicago: *Refusal to Imply a Damages Remedy Under Title IX of the Education Amendments of 1972*, 1983 WISC. L. REV. 181 (1983). The financial burden in *Pennhurst* was the cost of providing certain treatment for the disabled, *i.e.*, the cost of complying with the statute. The financial burden in *Lieberman*, however, was not the cost of complying but the cost of *not* complying, *i.e.*, of paying damages as a result of a lawsuit. 660 F.2d at 200.

81. 917 F.2d at 788. The *Pfeiffer* court also relied on two Pennsylvania district court decisions awarding damage remedies for Title IX violations: Haffer v. Temple Univ., 678 F. Supp. 517 (E.D. Pa. 1987) (holding that sex discrimination in athletic programs and academic and other facilities supported a damage remedy under Title IX); Beehler v. Jeffes, 664 F. Supp. 931 (M.D. Pa. 1986) (holding that sex discrimination in a prison supported a damage remedy).

82. 463 U.S. 582 (1983).

83. *Id.* at 607. *Guardians* was a class action suit by a group of black and Hispanic New York City police officers who alleged racial discrimination because of the disproportionate impact on blacks and Hispanics as a result of layoffs by the city to eliminate costs. The Court denied compensatory damages because the discrimination the plaintiffs had suffered was unintentional but held that intentional discrimination would have supported damage awards. *Id.* at 603-07.

84. 917 F.2d at 788.

85. *Id.* at 789.

86. *See* 463 U.S. at 583. Justice White announced the opinion of the court with which Justice Rehnquist joined in part. Justices Powell (joined by Chief Justice Burger and Justice Rehnquist in part), Justice Rehnquist, and Justice O'Connor each wrote concurring opinions, while Justices Marshall and Stevens (joined by Justices Brennan and Blackmun) dissented. *See supra* notes 18-20 and accompanying text.

87. *See, e.g.*, Bougher v. University of Pittsburgh, 713 F. Supp. 139, 144 (W.D. Pa. 1989) (citing *Guardians* as precedent for "the inappropriate nature of a damages remedy" in Spending

pertained only to unintentional violations, Justice White's majority opinion indicated that damages would be available for intentional discrimination in violation of Title VI because in such situations, the institution would have notice of the discrimination and of its liability should it fail to halt it:

> Because [in *Guardians*] it was found that there was no proof of intentional discrimination by respondents, I put aside for present purposes those situations involving a private plaintiff who is entitled to the benefits of a federal program but who has been intentionally discriminated against by the administrators of the program. 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 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.[88]

Similarly, Justice O'Connor, in her concurring opinion, indicated that she would have approved the equitable relief of backpay had the petitioners proven intentional discrimination.[89]

These discussions could be viewed as dicta. But one year after *Guardians*, the Court formalized its view in *Consolidated Rail Corp. v. Darrone*,[90] where a unanimous Court held that section 504 of the Rehabilitation Act of 1973 supported an award of backpay for intentional discrimination.[91] Speaking for the Court in *Darrone*, Justice Powell re-

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Clause legislation such as Title IX); and Drayden v. Needville Indep. Sch. Dist., 642 F.2d 129 (5th Cir. Unit A April 1981) (refusing to imply a right of action under Title VI for racially discriminatory dismissal). See also the Eleventh Circuit's reasoning in Franklin v. Gwinnett County Pub. Schs. where the court declined to interpret *Guardians* as allowing damages for intentional discrimination. 911 F.2d at 620. Calling Justice White's opinion in *Guardians* "concocted," the Eleventh Circuit reasoned that

> the various opinions of a majority of the justices [in *Guardians*] simply leaves [sic] open the question whether compensatory damages for intentional discrimination may be sought. We do not read *Guardians Association* to hold that because no damages may be sought for unintentional discrimination, this necessarily leads to the inevitable conclusion that where intentional discrimination is shown, a damages remedy is possible. The question is simply open, and thus the inferior courts are free, checked only by the constraints within their respective spheres of authority, to act as they deem appropriate.

911 F.2d at 621.

88. *Guardians*, 463 U.S. at 597.

89. *Id.* at 612 n.1 (O'Connor, J., concurring).

90. 465 U.S. 624 (1984).

91. *Id.* at 630. Section 504 of the 1973 Rehabilitation Act provides that "[n]o otherwise qualified individual with handicaps . . . shall, solely by reason of her or his handicap, . . . be

viewed the *Guardians* decision, where, he stated, "a majority of the Court expressed the view that a private plaintiff under Title VI could recover backpay; and no Member of the Court contended that backpay was unavailable, at least as a remedy for intentional discrimination."[92] Reading *Guardians* in light of *Darrone*, therefore, leads to the conclusion that remedies, in addition to injunctions, may be available for intentional violations of statutes like Title VI or the Rehabilitation Act, in which receipt of federal funds is conditioned on non-discrimination.

This conclusion may also be traced in the line of cases—from *Marbury v. Madison*,[93] through *Bell v. Hood*,[94] to *Davis v. Passman*[95]—regarding remedies available when an individual's federally protected right is violated.

Bell v. Hood reaffirmed the *Marbury* principle that the courts have the authority to adjust remedies when federally protected rights are violated.[96] The plaintiff in *Bell*, a member of "Mankind United," alleged his Fourth and Fifth Amendment rights were violated when the FBI subjected him to an illegal search and seizure, illegal arrest, and false imprisonment.[97] After holding that Bell had stated a cause of action arising under the Constitution or laws of the United States,[98] the Court held that "where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."[99]

In the decades following *Bell v. Hood*, the Supreme Court affirmed its presumption in favor of all available remedies.[100] In *J. I.*

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subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794 (1988).

92. 465 U.S. at 630.

93. 5 U.S. (1 Cranch) 137 (1803).

94. 327 U.S. 678 (1946).

95. 442 U.S. 228 (1979).

96. *Bell*, 327 U.S. at 684. In *Marbury v. Madison*, the Court reasoned that our government "has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested right." 5 U.S. (1 Cranch) at 163.

97. 327 U.S. at 679.

98. *Id.* at 681.

99. *Id.* at 684.

100. For historical surveys of the Court's decisions during this period, see Michael A. Mazzuchi, Note, *Section 1983 and Implied Rights of Action: Rights, Remedies, and Realism*, 90 MICH. L. REV. 1062, 1073-75 (1992); Linda S. Greene, *Judicial Implication of Remedies for Federal Statutory Violations: The Separation of Powers Concerns*, 53 TEMP. L.Q. 469, 471-83 (1980).

Case Co. v. Borak,[101] for example, the court held that all remedies were available for violations of the Securities Act of 1934.[102] And in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*[103] and *Butz v. Economou*,[104] the Court held that monetary damages were available for violations of the Fourth Amendment.[105]

Finally, in *Davis v. Passman*,[106] a wrongful dismissal suit against a former U.S. Congressman, the Court held that monetary damages in the form of backpay were available for violations of the Fifth Amendment.[107] In *Davis*, the Court further clarified the remedies issue by pointing out that the issue of remedies was separate from the issue of rights: "the question whether a litigant has a 'cause of action' is analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive."[108] In other words, there might be situations in which there is a federally protected right but no remedy.[109] Nevertheless, the Court held that, "in the absence of 'a textually demonstrable constitutional commitment of [an] issue to a coordinate political department,' . . . justiciable constitutional rights are to be enforced through the courts."[110] In other words, once a right was established, all remedies were available so long as it was determined that Congress had not intended otherwise.

Since 1979, however, the Supreme Court has shown an increasing reluctance to create new implied rights of action under either the Constitution or federal statutes.[111] In *Touche Ross & Co. v. Redington*,[112]

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101. 377 U.S. 426 (1964).

102. *Id.* at 432-34.

103. 403 U.S. 388 (1971).

104. 438 U.S. 478 (1978).

105. *See also* Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969) (holding that 42 U.S.C. § 1982 created a private right of action for a renter denied membership in a residential property association because of race); and Wyandotte Transp. Co. v. U.S., 389 U.S. 191 (1967) (holding that § 15 of the Rivers and Harbors Act of 1899 created a private right of action for the negligent sinking of a ship).

106. 442 U.S. 228 (1979).

107. *Id.* at 248-49. *Davis* was a 5-4 decision written by Justice Brennan. Chief Justice Burger, along with Justices Powell, Stewart, and Rehnquist, dissented. Shirley Davis sought backpay for wrongful dismissal because of her sex from her position as deputy administrative assistant to Louisiana Congressman Otto Passman. *Id.* at 231. Congressman Passman had written Davis that "it was essential that [the Deputy] Administrative Assistant be a man." *Id.* at 228.

108. *Id.* at 239.

109. *Id.* But see Mazzuchi, *supra* note 100, for a discussion of the problem of establishing such "unenforceable rights."

110. 442 U.S. at 242 (quoting Baker v. Carr, 369 U.S. 186, 217 (1962)).

111. See Mazzuchi, *supra* note 100, at 1074-90, and Greene, *supra* note 100, at 478-88, for discussions of this trend, which reflects the Court's reluctance to make law, preferring to leave

Transamerica Mortgage Advisors, Inc. v. Lewis,[113] and *Thompson v. Thompson*,[114] for example, the Court declined to imply individual rights of action under various statutes because it viewed such implication as policy-making.[115] In these cases, where the Court found no evidence of Congress' intention to create individual rights of action, it therefore allowed individuals no remedy.[116]

In *Cannon, Guardians,* and *Darrone*, of course, where the Court *did* find evidence of congressional intent to imply private rights of action, the Court allowed appropriate remedies.[117] Moreover, these remedies included compensatory relief when such relief would not involve policy-making and was the most fair way to achieve congressional intent.[118]

III. THE COURT'S REASONING IN *FRANKLIN*

In *Franklin v. Gwinnett Public Schools*,[119] the Supreme Court held unanimously that, since there was evidence of congressional intent to imply a private right of action under Title IX, all remedies for Title IX violations were available, including compensatory damages.[120]

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that role to Congress.

112. 442 U.S. 560, 575-76 (1979) (holding that the lack of congressional intent was dispositive in determining that the Securities Exchange Act did not create a private cause of action in favor of anyone).

113. 444 U.S. 11, 24 (1979) (a 5-4 decision holding there existed only a limited private remedy under the Investment Advisers Act of 1940).

114. 484 U.S. 174, 187 (1988) (holding that the Parental Kidnapping Prevention Act did not create an implied cause of action to determine which of two conflicting state custody decrees were valid).

115. Mazzuchi, *supra* note 100, at 1081-83, points out that the Court was particularly reluctant to imply rights of action in these cases because the plaintiffs were asking for damage remedies. Mazzuchi views the Court as "rejecting the proposition [that] the federal courts possessed the discretionary policymaking authority to supplement a statutory scheme by creating damage remedies." *Id.* at 1081.

116. See, for example, Northwest Airlines Inc. v. Transport Workers Union of Am., 451 U.S. 77 (1981), where the Court reasoned that "unless . . . congressional intent [to create an individual right of action] can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist." *Id.* at 94. *Northwest* held that the Equal Pay Act and Title VII did *not* support an airline's implied right to contribution from unions.

117. *See supra* notes 18-20, 27-33, 82-92 and supporting text.

118. *See, e.g.*, McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18 (1990) (holding that compensatory relief was available for a discriminatory tax that violated the Commerce Clause). *See generally* Mazzuchi, *supra* note 100, at 1082-83.

119. 112 S. Ct. 1028 (1992).

120. *Id.* at 1038.

Speaking through Justice White, the Court first reaffirmed *Cannon's* implication of a private right of action under Title IX and then determined that the sole issue in this case was "what remedies [were] available in a suit brought pursuant to this implied right."[121]

The Court then reviewed its previous decisions about remedies, reaffirming the *Bell v. Hood* presumption that, unless Congress has indicated otherwise, a court may employ any available remedy to redress a violation of a federally protected right.[122] Tracing that proposition back to *Marbury v. Madison*,[123] the Court confirmed its continued validity since 1946, when *Bell v. Hood* was decided.[124]

Turning to other cases involving implied rights under federal statutes, the Court explained how its decisions in *Guardians* and *Darrone* supported the *Bell v. Hood* presumption in favor of all available remedies.[125] The Court pointed out that, however obtuse the *Guardians* collection of opinions might be, a clear majority of the *Guardians* Court would have allowed damages for an intentional Title VI violation and that no Justice challenged the traditional *Bell v. Hood* presumption.[126] The Court further explained that *Darrone*'s unanimous decision the following term had clarified *Guardians* when *Darrone* allowed damages for a claim brought pursuant to the Rehabilitation Act.[127] The Court concluded its discussion of the precedent establishing its power to remedy violations of implied rights by stating this general rule: "[A]bsent

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121. *Id.* at 1032.

122. *Id.* at 1033. The Court pointed out that "[t]he *Bell* Court's reliance on this rule was hardly revolutionary." *Id.*

123. 5 U.S. (1 Cranch) 137 (1903). The Court also cited Kendall v. United States, 37 U.S. (12 Pet.) 524 (1838) (holding that Congress' Act for mail carriers created an implied right of action to sue for money damages); Dooley v. United States, 182 U.S. 222, 229 (1901) (stating the principle that "a liability created by statute without a remedy may be enforced by a common-law action"); and Texas & Pacific Ry. Co. v. Rigsby, 241 U.S. 33 (1916) (holding that the Federal Safety Appliance Act of 1893 created an implied right of action).

124. 112 S. Ct. at 1034. In discussing Davis v. Passman, 442 U.S. 228 (1979), for example, the Court determined that *Davis* "did nothing to interrupt the long line of cases in which the Court has held that if a right of action exists to enforce a federal right and Congress is silent on the question of remedies, a federal court may order any appropriate relief." 112 S. Ct. at 1034. The Court therefore rejected the Government's argument that *Davis* abandoned the *Bell v. Hood* presumption and asserted that "[t]he Government's position . . . mirrors the very misunderstanding over the difference between a cause of action and the relief afforded under it that sparked the confusion we attempted to clarify in *Davis*. Whether Congress may limit the class of persons who have a right of action under Title IX is irrelevant to the issue in this lawsuit." *Id.*

125. 112 S. Ct. at 1035. *See supra* notes 18-20, 82-92 and the accompanying text for a discussion of *Guardians* and *Darrone*.

126. *Id.*

127. *Id. See supra* notes 90-92 and the supporting text on the *Darrone* decision.

clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute."[128]

The Court next considered whether Congress had indicated any desire to limit the remedies available to enforce Title IX. To determine Congress' intent, the Court examined the context in which Title IX was passed, pointing out that a traditional statutory analysis would be unenlightening since Title IX's right of action was implied rather than express.[129] Instead, for the years before *Cannon*, at least, the Court used an analysis that considered the context of congressional deliberations and Supreme Court decisions both before and after passage of Title IX.[130]

In the years after *Cannon*, however, the Court pointed out that more traditional statutory analysis was possible to determine Congress' intentions in Title IX "because Congress was legislating with full cognizance of that decision."[131] In the Civil Rights Remedies Equalization Amendment of 1986 and the Civil Rights Restoration Act of 1987, Congress had the opportunity to respond to *Cannon*. Its refusal in these Acts to restrict *Cannon* must be read, according to the Court, as "validat[ing]" and "ratif[ying]" *Cannon's* holding.[132] Moreover, the Court reasoned, Congress' failure in these Acts to indicate a desire to alter the traditional presumption in favor of all available remedies for violations of federal rights reconfirmed the presumption's continued validity.[133] The Court concluded, therefore, that Congress did not intend to limit the remedies available to an individual pursuing a Title IX claim.[134]

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128. *Id.*

129. *Id.* at 1035-36.

130. *Id.* at 1035-36. Reviewing the context in which Title IX was passed, the Court showed that Supreme Court decisions at that time all revealed a continued acceptance of the *Bell v. Hood* presumption in favor of all available remedies. *Id.* The Court further showed that in the decade prior to *Cannon*, six of its decisions had established implied rights of action, three of them approving a damages remedy. *Id.* The six cases creating implied rights of action were Superintendent of Ins. of New York v. Bankers Life & Casualty Co., 404 U.S. 6 (1971); Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969); Allen v. State Bd. of Elections, 393 U.S. 544 (1969); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968); Wyandotte Transp. Co. v. United States, 389 U.S. 191 (1967); and J. I. Case Co. v. Borak, 377 U.S. 426 (1964). The three cases awarding damages were *Sullivan, Wyandotte,* and *Borak*. 112 S. Ct. at 1036.

131. 112 S. Ct. at 1036.

132. *Id.*

133. *Id.*

134. *Id.* at 1036-37.

The Court then discussed the possible objections to authorizing damage remedies for Title IX violations. First it considered whether making such awards would violate the separation of powers between the legislature and the judiciary.[135] Distinguishing between finding a cause of action and awarding remedies, the Court pointed out that awarding remedies has always been within the scope of the judiciary.[136]

The next possible objection considered by the Court was whether the decision in *Pennhurst State School & Hospital v. Halderman* limited the availability of damage awards under Title IX.[137] The Court distinguished *Pennhurst* by explaining that its reasoning only applied to cases of *unintentional* violations of Spending Clause statutes when the institution receiving funds had no notice of its noncompliance.[138] In situations of intentional discrimination, however, the Court reasoned that the institution had notice. The Court stated that Title IX created an affirmative duty on the Gwinnett County School District not to discriminate if it wished to receive federal funds. Then, drawing an analogy with the Title VII situation in *Meritor Savings Bank v. Vinson*,[139] the Court held that the duty not to discriminate included the duty not to allow a teacher to sexually harass and abuse a student.[140]

The final objection considered by the Court was whether Title IX remedies should be limited to the equitable remedies of backpay and prospective relief. Normally courts only award equitable remedies when legal remedies are found to be inadequate. Here, the Court determined that to deny legal remedies would "conflict[ ] with sound logic."[141] Moreover, as the Court pointed out, equitable remedies were themselves inadequate in this situation: Backpay was inappropriate for a student, and prospective relief was inappropriate in this situation since Hill no longer taught at Gwinnett and Franklin was no longer a student there.[142] The Court therefore concluded that a damage remedy was and should be available under Title IX.[143]

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135. *Id.* at 1037.

136. *Id.* On the separation of powers issue, see generally Greene, *supra* note 100.

137. 112 S. Ct. at 1037. For further discussion of *Pennhurst*, 451 U.S. 1, see *supra* notes 78-80 and accompanying text.

138. 112 S. Ct. at 1037.

139. 477 U.S. 57 (1986). See *supra* notes 42-44 and accompanying text for a discussion of *Meritor*, which held that sexual harassment, including both *quid pro quo* and environmental harassment, was actionable sex discrimination under Title VII. 477 U.S. at 73.

140. 112 S. Ct. at 1037.

141. *Id.* at 1038.

142. *Id.*

143. *Id.*

In his concurring opinion, Justice Scalia agreed that, because of the 1986 Equalization Amendment and the 1987 Restoration Act, "it was too late in the day" not to agree that Congress had intended to create an implied right of action under Title IX with all available remedies.[144] But Scalia also warned that the Court should be very cautious in imposing a "full gamut of remedies" for causes of action that were implied rather than express.[145] He criticized the majority's reasoning that the absence of an express limitation of remedies with regard to Title IX was evidence of an intention to allow all remedies, finding that such reasoning was "question-begging" and that "[t]o require, with respect to a right that is not consciously and intentionally created, that any limitation of remedies must be express, is to provide, in effect, that the most questionable of private rights will also be the most expansively remediable."[146] Approving the Court's trend to "abandon[ ] the expansive rights-creating approach exemplified by *Cannon*," Scalia concluded by arguing that implied rights should have limited remedies.[147]

IV. SIGNIFICANCE

Franklin is an extremely important decision with regard to two issues, the awarding of remedies for implied rights of action[148] and the protection of students from sex discrimination in federally funded programs. In the words of one commentator, the decision assures "there are real teeth in the federal law that prohibits sex discrimination in schools."[149] Perhaps what is most significant about the decision, however, is what it does not say.

With regard to the issue of remedies, the Court makes clear that, if a cause of action exists, then it is within the scope of the federal

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144. *Id.* at 1039 (Scalia, J., concurring). Chief Justice Rehnquist and Justice Thomas joined Justice Scalia.

145. *Id.* at 1038.

146. *Id.* at 1039.

147. *Id.* Scalia cited the Court's decisions in Touche Ross & Co. v. Redington, 442 U.S. 560 (1979), and Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979), as representative of the Court's trend to abandon the implied rights approach, along with his own concurring opinion in Thompson v. Thompson, 484 U.S. 174 (1988). *Franklin*, 112 S. Ct. at 1039.

148. The decision will probably be construed as permitting damage remedies under other implied rights of action, in particular those established by Title VI and § 504 of the Rehabilitation Act of 1975. Indeed, in March 1992, a Colorado federal court held that *Franklin* established the availability of damages under § 504 of the Rehabilitation Act of 1974 (codified at 29 U.S.C. § 794). Tanberg v. Weld County Sheriff, 787 F. Supp. 970 (D.C. Colo. 1992).

149. Marcia Greenberger, Women's Law Center, interviewed on *All Things Considered* (National Public Radio broadcast, Feb. 26, 1992).

judiciary to award appropriate remedies so long as these remedies are consistent with congressional intentions and purposes. Additionally, the Court makes clear that these remedies may include damage awards when less drastic types of remedies are inappropriate. The reasoning in *Franklin* reflects the Court's trend since the 1970s to defer to Congress for anything that might be considered making policy or law.[150] Only because of its finding of clear evidence of congressional intent is the Court in *Franklin* willing to award damage remedies under Title IX.[151] This deference to congressional intent may be viewed as a limitation on judicial power and as a restrictive approach to the doctrine of separation of powers.[152]

But the reasoning in *Franklin* also reflects the Court's continued willingness to use its power to fashion remedies that are fair—so long as it can do so without making policy.[153] Here, the *Franklin* opinion may be less than clear to the lower courts implementing its holding. The decision does not provide any standard to help courts determine appropriate remedies; nor does it address whether its holding is tied to the specific facts of the case, in which a student who had already graduated was harassed by a teacher who was no longer employed. Because of the facts in *Franklin*, equitable remedies were inappropriate. It is

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150. On this trend, see generally Mazzuchi, *supra* note 100, and Greene, *supra* note 100. Both commentators trace this trend with respect to the implied right issue to Cort v. Ash, 422 U.S. 66 (1975), where the Court included congressional intent within its four-part test for determining whether to imply a private right of action. *See supra* notes 29-31, and accompanying text, for a discussion of *Cort*.

151. The Court might have mentioned, as further evidence of congressional intent, the Civil Rights Act of 1991, passed by Congress only three months prior to the *Franklin* decision. *See supra* note 72. The 1991 law permits damages in Title VII employment discrimination cases.

152. Greene, *supra* note 100, at 488-94, for example, argues that the separation of powers doctrine was intended by the framers to be flexible, permitting a much broader scope for judicial powers than is acknowledged by the current Court. Greene argues that the judiciary does not always need express indications of congressional intent since Congress always retains the ultimate power to foreclose judicial remedies by passing laws, as it did in response to the *Grove City* decision with the Restoration Act of 1987. Greene, *supra* note 100, at 505. On *Grove City* and the Restoration Act, see *supra* notes 35-37 and accompanying text.

153. See Mazzuchi, *supra* note 100, at 1081-83, for a discussion of this issue. Mazzuchi argues that the Court's willingness to award compensatory relief in *McKesson*, 496 U.S. 18 (1990), *supra* note 118, a situation in which prospective relief would have been irrelevant, indicates the Court's continued willingness to use its power to fashion remedies. Mazzuchi, *supra* note 100, at 1082. According to Mazzuchi,

> [t]he rejection of a common law role in creating damage remedies, however, need not imply a wholesale rejection of the courts' power to administer such remedies where they are necessary to uphold the rule of law . . . [T]here is . . . a difference between the creation of a damages remedy as a matter of policy, and as a matter of fairness.

Id. at 1081-82.

not completely clear whether the damage remedy would still have been available if an equitable remedy had been appropriate. One interpretation of *Franklin* might be that a damage remedy would be available for Title IX only when less drastic, equitable remedies were exhausted.[154] A less restrictive interpretation, however, might permit damage remedies for all Title IX actions.[155]

With regard to the issue of sex discrimination, and in particular with regard to the issue of sexual harassment, the opinion is remarkable for its brevity and its almost casual tone. Although sexual harassment in education is an issue of first impression for the Court, the Court limits its treatment of the issue to two sentences, which are embedded in the discussion of whether institutions have sufficient notice to justify imposing damage remedies on them for Title IX violations:

> Unquestionably, Title IX placed on the Gwinnett County Schools the duty not to discriminate on the basis of sex, and "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." *Meritor Savings Bank v. Vinson.* We believe the same rule should apply when a teacher sexually harasses and abuses a student.[156]

Franklin is the first decision reported in the federal courts in which a student has won a claim of sexual harassment under Title IX. Nevertheless, its only unambiguous statement in this regard is that sexual harassment is actionable sex discrimination under Title IX. The Court states that *Meritor*[157] should apply to students, but it fails to clarify which aspects of *Meritor* it means.

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154. This approach, of course, would reverse the traditional rule that remedies in equity are available only after exhausting all remedies at law.

155. Commentators on both sides of the issue have foreseen this potential result of the *Franklin* decision. Women's rights lawyers, such as Marcia Greenberger of the Women's Law Center, *supra* note 149, responded to the ruling by saying it would permit damages for any gender discrimination in education, including unequal athletic programs.

On the other side, school board representatives also acknowledged the potential breadth of the decision. For example, Gwinnett County's attorney, Albert Pearson, stated that the decision increased "by a good measure" a school board's "potential for damages liability," adding that "now it is possible for any employee of [a] school system to engage in activity that will make the school system itself directly liable in damages." *Schools Can Be Sued for Sex Bias*, STAR TRIBUNE, (Minneapolis) Feb. 27, 1992, at 1A (quoting Albert Pearson).

See also David Savage, *Student Sex Bias Damage Suits OK'd*, LOS ANGELES TIMES, Feb. 27, 1992, at A1.

156. 112 S. Ct. at 1037 (citations omitted).

157. 477 U.S. 57 (1986). See *supra* notes 42-44 and accompanying text for a discussion of *Meritor*.

The Court is unclear, for example, on whether *Franklin* upholds the environmental harassment ruling in *Meritor*, where the Court held that environmental harassment as well as *quid pro quo* harassment was actionable sex discrimination in employment under Title VII.[158] The opinions of neither the court of appeals nor the Supreme Court reveal which type of harassment Franklin suffered, although Franklin's brief did allege environmental harassment.[159] Because there is no mention of a bargain between Hill and Franklin ("You have sex with me and I'll give you an A," or "If you don't have sex with me you will not graduate"), an inference can be made that the harassment was environmental.[160] The facts reveal that it meets at least this definition of environmental harassment: "[R]epeated exposure to offensive conduct and/or sanction-free sexual advances."[161] However, in the absence of an express ruling by the Court, lower courts may feel free to deny that environmental harassment is actionable sex discrimination under Title IX, as did the district court in *Bougher v. University of Pittsburgh*.[162]

In its general statement that *Meritor* applied to students, the Court failed to consider differences between the Title VII employment setting and the Title IX education setting. One difference, for example, pertains to the constitutional right to free expression accorded persons

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158. 477 U.S. at 63-69.

159. Greg Henderson, *Court Says Compensatory Damages Available Under Title IX*, PROPRIETARY TO THE UNITED PRESS INTERNATIONAL, Feb. 26, 1992. Franklin claimed the school district, in failing to protect her from Hill's advances, had "unreasonably interfered with [her] ability to attend high school and perform her studies and activities," which led to an "intimidating, hostile, offensive and abusive school environment." *Id.*

160. An argument could be made that it is not helpful to distinguish between *quid pro quo* and environmental harassment in educational settings. Because of the particular vulnerability of students, all sexually-oriented expression or conduct directed at them might be perceived as an implicit threat of negative consequences if they complain or refuse to comply. Perhaps a better definition of sexual harassment in education, then, is this one: "Academic sexual harassment is the use of authority to emphasize sexuality or sexual identity of a student in a manner which prevents or impairs that student's full enjoyment of educational benefits, climates, and opportunities." National Advisory Council on Women's Educational Programs, Sexual Harassment 3 at 7 (1980) (*quoted in* Phyllis L. Crocker & Anne E. Simon, *Sexual Harassment in Education*, 10 CAP. U. L. REV. 541, 541 n.1 (1981)).

The argument that the difference between *quid pro quo* and environmental harassment is not meaningful in education may be particularly appropriate with younger students such as Franklin, who as minors are presumed incapable of consenting. On the difference between sexual harassment in secondary and post-secondary institutions, see Keller, *supra* note 69, at 34-36.

161. Keller, *supra* note 69, at 27.

162. 713 F. Supp. 139 (W.D. Pa. 1989). See *supra* notes 68-71, and supporting text, for a discussion of *Bougher*.

in public as opposed to private institutions.[163] In an educational institution, this right comes under the broad concept of "academic freedom." Any attempt in a school to limit environmental harassment in the form of speech must be balanced against concerns for free expression and academic freedom.[164] *Franklin* fails to clarify whether the application of *Meritor* in schools will accommodate this difference.

Another difference between employment and education not considered in *Franklin* pertains to the constitutional right to privacy afforded participants in public programs.[165] In a public institution, attempts to limit conduct that might constitute sexual harassment may need to be balanced against an individual's right to privacy.[166] This issue particularly arises in "consensual relationships," when the relationship between two parties appears welcome and voluntary.[167] Such relationships, when they occur between a teacher and a student, are particularly problematic, for it might be argued that they are never "consensual," that there is always an element of coercion or duress.[168] Students may be even more vulnerable than employees in asymmetrical relations.[169] Thus, the educational setting poses a paradox with regard to consensual relations: on the one hand, there may be special reasons to prohibit consensual relations in education that do not exist in em-

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163. The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech."

164. *See, e.g.*, Mary Gray, *Academic Freedom and Nondiscrimination: Enemies or Allies?*, 66 TEX. L. REV. 1591, 1613 (1988) (arguing that academic freedom should prevail over concerns for creating a non-discriminatory academic environment).

165. The right to privacy was established in Griswold v. Connecticut, 381 U.S. 479 (1965); extended beyond the right to marital privacy in Eisenstadt v. Baird, 405 U.S. 438 (1972); and applied to a woman's decision to terminate her pregnancy in Roe v. Wade, 410 U.S. 113 (1973). *See generally* Keller, *supra* note 69, at 30-34.

166. Keller, *supra* note 69, at 40-43.

167. In *Meritor*, the Court held that the inquiry in sexual harassment is not whether the recipient of sexual advances responds in a "voluntary" fashion but whether the advances are "unwelcome." 477 U.S. at 68.

168. See, for example, Keller, *supra* note 69, at 40, who states that "[i]ntimate associations between faculty and students arising within the 'zone of instruction' carry the presumption of coercion and render the consensual nature of the relationships suspect." *See also* Chamallas, *supra* note 69, at 843-62, who argues that a truly consensual relationship involves an egalitarian "mutuality of relation," in which the only inducement to the relationship is the desire for intimacy and sexual pleasure. Given this definition, relationships in which one party has "direct authority to affect the working or educational status of the other" pose a high risk of harassment or favoritism. *Id.* at 858. *But see* Crocker and Simon, *supra* note 160, at 544 n.12, suggesting that consensual relationships only constitute sexual harassment when they end.

169. An asymmetrical relationship is one in which there is a power differential between the participants, as when one person is the supervisor or evaluator of the other. *See* Crocker and Simon, *supra* note 160, at 582-83.

ployment; on the other hand, these reasons must be balanced against the right to privacy, which also may not exist in employment. Again, *Franklin* fails to clarify whether its application of *Meritor* will accommodate this paradox.

Another aspect of *Meritor* that the *Franklin* decision fails to address is the extent of institutional liability. *Meritor* held that, absent notice, employers were not strictly liable for the harassing conduct of their employees.[170] Rather, the Court held that agency principles should determine employer liability when the employer did not have notice.[171] An argument could be made that because of the vulnerability of students and the importance of environment in promoting learning, educational institutions *should* be strictly liable for their faculty's conduct.[172] Of course, in Franklin's situation, her school *did* have notice, since both she and her boyfriend had informed several other teachers and administrators of Hill's conduct.[173] But the Court fails to articulate clearly the parameters of institutional liability. Would the school have been liable if Franklin had not told anyone of Hill's conduct? What if administrators had heard of the conduct only through rumors? The Court is silent. Such silence will, no doubt, lead to great confusion in the lower courts.

A final area in which the Court's silence is problematic is its failure to articulate any standards or guidance about what constitutes enough harassment to create a hostile environment. *Franklin* represents the first sexual harassment in education decision in which the courts were willing to find credible the evidence constituting sexual harassment.[174] However, because both the Supreme Court and the court of appeals apparently relied on the OCR findings of harassment, the opinion itself says nothing about the parameters of harassment in education. The Court does not clarify, for example, whether the guidelines for hostile environment established in *Meritor* should apply to educational settings. *Meritor* held that to be actionable environmental harassment, the conduct complained of must be severe and pervasive, and

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170. 106 S. Ct. at 2408.

171. *Id.*

172. See, *e.g.*, Schneider, *supra* note 39, at 567-72, for a discussion of the pros and cons of imposing strict liability on educational institutions. Schneider argues that educational institutions should be strictly liable for *quid pro quo* harassment and for environmental harassment when accompanied by actual or constructive notice. *Id.* at 572.

173. *See supra* notes 5-6 and accompanying text.

174. *See supra* notes 48-71 and accompanying text for a discussion of the other decisions where the plaintiffs have lost their credibility arguments.

it must be unwelcome.[175] But the particular vulnerability of students may make "welcomeness" a different issue in education than in employment.[176] Once again, the lower courts will probably continue to be inconsistent in their treatment of sexual harassment in education.

The Supreme Court's decision, in *Franklin v. Gwinnett County Public Schools*, to award damage remedies for Title IX violations is a significant one. The existence of a damage remedy under Title IX will do much to deter institutions from future discrimination and to compensate victims of past discrimination.[177] However, *Franklin's* impact with respect to the issue of sexual harassment is at this point unclear because of the Court's silence on the application of *Meritor's* rulings on environmental harassment and institutional liability. No doubt this silence will lead to great debate in the lower courts until the Court has another opportunity to address these issues.

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175. 477 U.S. at 67-68.

176. On this issue, see the discussions *supra* notes 160, 168.

177. On the argument that permitting damage remedies is necessary for Title IX to achieve its purposes, see generally Pamela W. Kernie, *Protecting Individuals from Sex Discrimination: Compensatory Relief Under Title IX of the Education Amendments of 1972*, 67 WASH. L. REV. 155, 174 (1992); Peterson, *supra* note 80, at 206-10.