"Something of a Sport:" The Effect of Sandoval on Title IX Disparate Impact Discrimination Suits

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INTRODUCTION

Title VI of the Civil Rights Act of 1964 prohibits "exclusion from participation in, denial of benefits of, and discrimination under federally assisted programs on ground of race, color, or national origin." Through § 601, Congress intended that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." To effectuate this deceptively simple principle Congress created § 602, giving enforcement authority to federal agencies. These federal agencies, such as the Department of Justice (DOJ), created regulations to enforce § 601. According to the DOJ regulations, a recipient of federal financial assistance shall neither "directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin," nor "have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin."

Congress modeled Title IX of the Education Amendments of 1972 in a similar, if not identical, fashion to Title VI. Congress provided, through § 901, that "[n]o person in the United States

2. Id.
3. Id. at § 2000d-1.
4. 28 C.F.R. § 42.104(b)(2) (2001) (this regulation, created by the DOJ, is a primary focus of this Note).
5. The definitions of two important terms are required for this examination. First, a recipient is the entity to which a federal funding agency grants resources. Second, a beneficiary is the party for which the federal government grants those resources. The federal government intends to benefit the beneficiary by granting those resources to the recipient. For a thorough discussion of the definition of recipient and beneficiary under the DOJ regulations, see UNITED STATES DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION, COORDINATION AND REVIEW SECTION, TITLE VI LEGAL MANUAL 20-28 (Jan. 11, 2001), available at http://www.usdoj.gov/crt/cor/coord/vimanual.pdf [hereinafter TITLE VI MANUAL].
6. 28 C.F.R. § 42.104(b)(2).
7. Id.
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. Congress also created § 902, giving enforcement
authority to federal agencies. These federal agencies, such as the
Department of Education (ED), created regulations to enforce §
901. According to the ED regulations, a recipient of federal
financial assistance shall not "administer or operate any test or
other criterion for admission which has a disproportionately adverse
effect on persons on the basis of sex." ED promulgated these
regulations to ensure that Title IX would be effective.

In the recent Supreme Court case Alexander v. Sandoval, the
Court rejected the traditional practice of allowing private parties to
sue for enforcement of § 602 under a disparate impact
discrimination theory. Accordingly, many have questioned
whether the holding in Sandoval will apply to cases brought under
other similar federal regulations; so far, it has. This Note will
focus on the impact of Sandoval on private disparate impact
lawsuits brought to enforce Title IX regulations.

Regulatory protection from disparate impact discrimination
under Title IX is especially important because it even extends to
educational programs that merely receive federal financial aid from
its students. Fittingly, the way in which federal courts deal with
Title IX disparate impact discrimination in light of Sandoval will
have far-reaching consequences.

9. Id. (exceptions omitted).
10. Id. at § 1682 (exceptions omitted).
11. 34 C.F.R. § 106.21(b) (2001).
12. Id.
that there was one addressable issue in the case: "whether there is a private cause of action
to enforce the regulation." Id. at 279).
14. Shannon P. Duffy, 'Environmental Racism' Ruling: Could Have Far-Reaching Impact,
and its Implications for Gender Equity, FINDLAW'S LEGAL COMMENT., May 8, 2001, available
at http://writ.news.findlaw.com/grossman/20010508.html; Edward Lazarus, The Case that
Roared: A Limited "Disparate Impact" Holding That Could Have Large Repercussions,
FINDLAW'S LEGAL COMMENT., May 1, 2001, available at
http://writ.news.findlaw.com/lazarus/20010501.html; Jill Leovy & Henry Weinstein, Bias
15. Shannon P. Duffy, 3rd Circuit Reverses South Camden Case: Section 1983 Claim Not
a Viable Weapon, LEGAL INTELLIGENCER, Dec. 18, 2001; Shannon P. Duffy, Court Will Not
Rehear Camden Cement Plant Case, LEGAL INTELLIGENCER, Jan. 18, 2002 (both articles
concern South Camden Citizens in Action v. New Jersey Department of Environmental
Protection, 274 F.3d 771 (2001)).
Section I of this Note will discuss the background of Title IX enforcement. Sections II and III, will discuss the majority and dissenting opinions of the Sandoval Court respectively. Section IV will apply the current holding in Sandoval to Title IX, focusing on recent cases in federal district courts around the country. Section V will explore the options for plaintiffs in the post-Sandoval era.

SECTION I: BACKGROUND OF TITLE IX ENFORCEMENT

To understand the reasons behind private action suits to enforce the regulations under both Titles VI and IX, it is important to examine the procedural provisions of both. These procedural provisions enable the federal funding agencies to enforce § 602 and § 902 in the absence of a private action. This Section provides a glimpse into the future of civil rights law by showing what will remain for civil rights advocates as the federal courts apply the holding in Sandoval more extensively, including to actions brought to enforce § 902. This Section answers two questions: (1) how do federal granting agencies enforce disparate impact regulations in the absence of a private action; and (2) why did DOJ and ED develop regulations that allowed a private right of action?

The Title IX procedures read as follows: “The procedural provisions applicable to title VI of the Civil Rights Act of 1964 are hereby adopted and incorporated herein by reference. These procedures may be found at 34 CFR 100.6-100.11 and 34 CFR, part 101.” These regulations outline the requirements of the administrative process in terminating the funding of recipients found to have a disparate impact violation. These procedures are, again, what agencies will be required to use when the private right of action to enforce the regulations no longer exists.

17. Due to this Note’s focus on Title IX, the examination will be limited to those Title VI regulations that involve education programs (i.e., discrimination in an education program on the basis of race by a recipient of federal funds).
19. 34 C.F.R. § 106.71.
20. 34 C.F.R. §§ 100.6-100.11, part 101 (2001).
21. This assumes that while the Sandoval case may have settled the Title VI private right of action issue, and by extension the Title IX private right of action issue, there may be other private action options for victims of disparate impact discrimination to enforce the regulations.
procedures include extensive review by the federal funding agency before the agency can enforce § 902 via the termination of funding.\textsuperscript{22}

This examination is concerned only with the enforcement of § 902 after an agency receives a complaint or makes an allegation of discrimination against a recipient. The procedure, as with any other legal or administrative matter, begins by determining the parties to the enforcement hearing. As the following demonstrates, the procedures create two distinct sides: “(a) The term party shall include an applicant or recipient or other person to whom a notice of hearing or opportunity for hearing has been mailed naming him a respondent. (b) The Assistant Secretary for Civil Rights of the Department of Education, shall be deemed a party to all proceedings.”\textsuperscript{23} Those beneficiaries, prospective or otherwise, affected by the disparate impact discrimination are not parties during these hearings.\textsuperscript{24} Instead, ED is a party to § 902 enforcement, but does not technically represent those beneficiaries affected by the discrimination.

There are other ways for affected parties to get involved in the enforcement hearings: “Any interested person or organization may file a petition to participate in a proceeding as an amicus curiae.”\textsuperscript{25} However, \textit{amicus curiae} status is not automatic: “The presiding officer may grant the petition if he finds that the petitioner has a legitimate interest in the proceedings, that such participation will not unduly delay the outcome, and may contribute materially to the proper disposition thereof.”\textsuperscript{26} Furthermore, \textit{amicus curiae} status does not make an individual a party to the enforcement hearing: “An amicus curiae is not a party and may not introduce evidence at a hearing.”\textsuperscript{27} Submitting a complaint under the regulatory scheme does not make one a party to the enforcement proceeding: “A person submitting a complaint pursuant to § 100.7(b) of this title is not a party to the proceedings governed by this part, but may petition, after proceedings are initiated, to become an amicus curiae.”\textsuperscript{28}

\begin{itemize}
\item \textsuperscript{22} See especially 34 C.F.R. pt. 101 (2001). For DOJ guidance on procedures, as provided to federal funding agencies, see \textsc{United States Department of Justice, Civil Rights Division, Coordination and Review Section, Title IX Legal Manual} 131-51 (Jan. 11, 2001), \textit{available at} \url{http://www.usdoj.gov/crt/cor/coord/ixlegal.pdf} [hereinafter \textsc{Title IX Manual}].
\item \textsuperscript{23} 34 C.F.R. § 101.21.
\item \textsuperscript{24} In other words, if the funding agency had made the allegation of disparate impact discrimination in \textit{Sandoval}, instead of the private individuals affected by the discrimination, those private individuals would not have been parties during the enforcement hearings.
\item \textsuperscript{25} 34 C.F.R. § 101.22(a).
\item \textsuperscript{26} Id.
\item \textsuperscript{27} Id.
\item \textsuperscript{28} Id. at § 101.23. Furthermore, 34 C.F.R. § 100.7(b) provides that: "Any person who
The regulatory scheme set out in 34 C.F.R., part 101 is elaborate. There are regulations for filing and service, notice and answers, requests for hearings, consolidation, motions and petitions, determinations of authority, evidence and cross-examinations, objections, decisions and final decisions, reviews and appeals, expeditious treatment, and posttermination proceedings. These rules certainly create a system of adequate administrative procedure for enforcing § 902. That begs the questions, however, of whether such a system provides adequate resources to enforce the § 902 regulations for every incident of reported discrimination and whether providing a private right of action was Congress' answer to the possibility of limited resources.

For example, the Office of Civil Rights (OCR), "the primary agency charged with administering Title IX," is not likely to enforce Title IX regulations. Although OCR "has the authority to terminate the federal funding of an institution that fails to comply with Title IX or its regulations, it has never in its . . . history done so. One suspects that the Bush Administration will not break this precedent." The lack of initiative demonstrated by OCR, which one may attribute to the assumption by the agency that a private right of action existed to enforce Title IX regulations, nonetheless highlights the need for private party enforcement where government enforcement does not exist or is lacking. Allowing private right of action to enforce § 902 enables those affected by discrimination to utilize the legal resources of the private sector and the many courts throughout the country.

believes himself or any specific class of individuals to be subjected to discrimination prohibited by this part may by himself or by a representative file with the responsible Department official or his designee a written complaint."

29. Id. at §§ 101.33-36.
31. Id. at § 101.54.
32. Id. at § 101.55.
33. Id. at §§ 101.56-58.
34. 34 C.F.R. §§ 101.61-63.
35. Id. at §§ 101.72-79.
36. Id. at § 101.81.
37. Id. at §§ 101.92, 101.102, 101.104.
38. Id. at §§ 101.86, 101.105-06.
40. Id. at § 101.121.
42. Id.
SECTION TWO: MAJORITY OPINION IN Sandoval

This Section begins with a background discussion of the three primary, and most disputed, cases at issue in Sandoval. The three Supreme Court cases include Guardians Association v. Civil Service Commission of New York City,43 Cannon v. University of Chicago,44 and Lau v. Nichols.45 The Eleventh Circuit Court of Appeals in Sandoval “found that a reading of Lau, Guardians, and Alexander,46 in pari materia supported the finding of an implied private cause of action under Section 602 of Title VI.”47 However, the Supreme Court majority in Sandoval did not agree. Through a thorough review of the legislative histories of Title VI and Title IX, the Court in Cannon held that the two are virtually identical.48 The Court agreed with this, thereby extending the holding in Sandoval from Title VI to Title IX.49 We will therefore look at the significance of these cases and how the Court in Sandoval dealt with each.

BACKGROUND TO GUARDIANS, CANNON, AND LAU

Guardians involved disparate impact discrimination against black and Hispanic police officers in the hiring and firing process.50 In Guardians, the Court noted that § 602 “empowers agencies providing federal financial assistance to issue ‘rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance . . . .”51 Furthermore, in Lau “Justice Stewart explained that the regulations therefore should be upheld as valid, because they were ‘reasonably related to the purposes of the enabling legislation.’”52 The holding, therefore, appeared to favor

47. TITLE IX MANUAL, supra note 22, at 152 (citing Sandoval v. Hagan, 197 F.3d 484, 507 (11th Cir. 1999) (this holding would be likewise applicable to § 902 of Title IX)).
49. Sandoval, 532 U.S. at 280 (citing Cannon, 441 U.S. at 694).
50. Guardians, 463 U.S. at 582.
the existence of an implied right of action for private parties to enforce § 602.\textsuperscript{53}

_Cannon_ concerned the denial of admission by two private university medical schools of applicants above a certain age.\textsuperscript{54} The plaintiff argued that the schools' practice had a disparate impact upon women applicants and brought an action to enforce § 902.\textsuperscript{55} While the Court did not find an implied private right of action to enforce § 902 in this instance, as it did by implication four years later in _Guardians_, the Court did find that courts should interpret and apply Title IX in the same manner as Title VI.\textsuperscript{56}

_Lau_ involved the “failure of the San Francisco school system to provide English language instruction to approximately 1,800 students of Chinese ancestry who d[id] not speak English."\textsuperscript{57} The Court found that the Department of Health, Education, and Welfare, by § 602, was “authorized to issue rules, regulations, and orders to make sure that recipients of federal aid under its jurisdiction conduct any federally financed projects consistently with § 601."\textsuperscript{58} In other words, the Court held that regulations promulgated under § 602 were legitimate to effectuate § 601.\textsuperscript{59}

**MAJORITY’S FOUNDATION**

We will begin by looking at what the majority took for granted at the outset of its examination of § 602 in _Sandoval_. First, the Court acknowledged that a definite link exists between Title VI and Title IX.\textsuperscript{60} The majority further conceded that “private individuals may sue to enforce § 601 of Title VI and obtain both injunctive relief and damages.”\textsuperscript{61} The majority seemed to raise this point for no

\textsuperscript{53} This included § 902 by implication. See _supra_ text accompanying notes 8-10.
\textsuperscript{54} _Cannon_, 441 U.S. at 677.
\textsuperscript{55} _Id._ at 680-83.
\textsuperscript{56} _Id._ at 694-99.
\textsuperscript{57} _Lau_, 414 U.S. at 563.
\textsuperscript{58} _Id._ at 567.
\textsuperscript{59} The same applies to § 902 by extension of _Cannon_, 441 U.S. at 694-99.
\textsuperscript{60} _Sandoval_, 532 U.S. at 279-80 (citing _Cannon_, 441 U.S. at 694) (While this admission appears on its face to merely link the _Sandoval_ case to the holding in _Cannon_, it is apparent, and likely, that the majority's intent was to extend the holding in _Sandoval_ to cases involving Title IX.).
\textsuperscript{61} _Sandoval_, 532 U.S. at 279-80 (arguing that Section 1003 of the Rehabilitation Act Amendments of 1986, 100 Stat. 1845, 42 U.S.C. § 2000d-7 was a ratification of the holding in _Cannon_, and that the Court validated this reading of § 2000d-7 in _Franklin v. Gwinnett County Public Sch._, 503 U.S. 60 (1992)).
other reason than to highlight the difference in language between § 601 and § 602. 62

Second, the majority stated that § 601 prohibits only intentional discrimination, the intent requirement of which is analogous to § 901. 63 The majority wrote “Section 602 authorizes federal agencies ‘to effectuate the provisions of [§ 601] . . . by issuing rules, regulations, or orders of general applicability.’” 64 Furthermore, the issue in Sandoval arose when “the DOJ in an exercise of this authority promulgated a regulation forbidding funding recipients to ‘utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin . . . .’” 65 This relates directly to the majority’s third point, that “regulations promulgated under § 602 of Title VI may validly proscribe activities that have a disparate impact on racial groups, even though such activities are permissible under § 601.” 66 The language in § 601 only forbids intentional discrimination, therefore the private right of action to enforce § 601 cannot extend to § 602; the Court’s reasoning is that § 602 forbids activity that § 601 allows. 67

The majority quickly addressed the holdings in Cannon, Guardians, and Lau. First, the majority argued that while Cannon held “that Title IX created a private right of action to enforce its ban on intentional discrimination,” 68 Cannon did not “consider whether the [private] right [of action] reached regulations barring disparate-impact discrimination.” 69 Therefore, according to the Court, the holding in Cannon does not address the issues considered in Sandoval, nor any other case considering private right of action to enforce § 602 or § 902.

The majority further argued that Guardians merely “held that private individuals could not recover compensatory damages under Title VI except for intentional discrimination.” 70 Three of the five Justice majority in Guardians withheld judgment on the “question of a direct private right of action to enforce the regulations.” 71

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62. Likewise for § 901 and § 902.
63. Sandoval, 532 U.S. at 280-81 (citing Choate, 469 U.S. at 293; Guardians, 463 U.S. 610-11; Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 272, 287 (1978)).
64. Sandoval, 532 U.S. at 278 (citing 42 U.S.C. § 2000d-1).
65. Id. (citing 28 C.F.R. § 42.104(b)(2)).
66. Id. at 281.
67. Id. at 280-81.
68. Id. at 282.
69. Sandoval, 532 U.S. at 282.
70. Id. at 282-83 (emphasis in original).
71. Id. at 283.
because it was not an issue presented by the case.\footnote{72} Again, it is the Court's contention that the holding in \textit{Guardians} does not reach the issues presented in \textit{Sandoval}.

Finally, the majority believes that after \textit{Central Bank},\footnote{73} \textit{Lau} is no longer the law.\footnote{74} The majority wrote "[i]t is clear now that the disparate-impact regulations do not simply apply \$ 601 — since they indeed forbid conduct that \$ 601 permits — and therefore clear that the private right of action to enforce \$ 601 does not include a private right to enforce these regulations."\footnote{75} Drawing on \textit{Central Bank} to overturn \textit{Lau}, the majority asserted that the right to sue to enforce disparate impact regulations "must come, if at all, from the independent force of \$ 602."\footnote{76} The majority went further, stating that if the Court assumes that \$ 602 grants the "authority to promulgate disparate-impact regulations . . . the question remains whether it confers a private right of action to enforce them. If not, we must conclude that a failure to comply with regulations promulgated under \$ 602 that is not also a failure to comply with \$ 601 is not actionable."\footnote{77} The majority did just that.

\section*{Determining Congressional Intent}

In light of the majority's systematic dismissal of the precedential value of \textit{Cannon}, \textit{Guardians}, and \textit{Lau}, the Court next addressed the issue of where private rights and remedies come from. First, the majority argued that "private rights of action to enforce federal law must be created by Congress."\footnote{78} The Court's point, it seems, was that Congress must create a private right of action to enforce \$ 602 or \$ 902, either explicitly or by authorizing a federal agency. In other words, if Congress did not create a private right of action to enforce \$ 602 or \$ 902, the federal agency could not create that right on its own.

Second, the majority stated that "[t]he judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy."\footnote{79} By this, the majority intended to limit the extent

\footnote{72. \textit{Id.} (citing \textit{Guardians}, 463 U.S. at 645 n.18 (Stevens, J., dissenting)).}
\footnote{74. \textit{Sandoval}, 532 U.S. at 285-86.}
\footnote{75. \textit{Id.} at 285.}
\footnote{76. \textit{Id.} at 286.}
\footnote{77. \textit{Id.} (footnote omitted).}
\footnote{78. \textit{Id.} (citing Touche Ross \& Co. v. Redington, 442 U.S. 560, 578 (1979)).}
\footnote{79. \textit{Sandoval}, 532 U.S. at 286 (citing Transamerica Mortgage Advisors, Inc. v. Lewis, 444}
of the Court's search for intent to a reading of the statute itself. This type of limitation largely negates inquiries into determinations of congressional intent via legislative or judicial histories, and denies a pragmatic approach to determining private rights of action.

Finally, the Court wrote that without a private remedy "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute."\(^{80}\) As is self-evident in that statement, Justice Scalia and the majority have chosen a more narrowly focused path to determine legislated rights. Therefore, using this three-tiered inquiry of determining where those legislated rights come from, it is apparent that the Court opted for an overall limited interpretive scheme.

The majority further addressed the issue of determining Congress's intent by looking at how past Courts have treated the issue. Concerning speculation on Congress' understanding of how the Court would interpret a statute at the time of the statute's passage, the majority looks at two primary cases: \textit{Cort v. Ash}\(^{81}\) and \textit{Blatchford v. Native Village of Noatak}.\(^{82}\) According to the majority in \textit{Sandoval}, the Court, in \textit{Cort},\(^ {83}\) abandoned the \textit{J.I. Case Co. v. Borak}\(^ {84}\) view that to understand the intent of Congress in passing certain legislation, one must understand the judicial environment contemporary to that time.\(^ {85}\) The majority dramatized the Court's position: "Having sworn off the habit of venturing beyond Congress's intent, we will not accept respondents' invitation to have one last drink."\(^ {86}\)

The majority went on to disagree "with the Government that our cases interpreting statutes enacted prior to \textit{Cort v. Ash} have given 'dispositive weight' to the 'expectations' that the enacting Congress had formed 'in light of the contemporary legal context.'"\(^ {87}\) The majority of the Court claims that the "legal context matters only to the extent it clarifies text."\(^ {88}\) The majority, therefore, begins.

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\(^{83}\) Cort, 422 U.S. at 78.

\(^{84}\) J.I. Case Co. v. Borak, 377 U.S. 426, 433 (1964).

\(^{85}\) Sandoval, 532 U.S. at 287.

\(^{86}\) Id.

\(^{87}\) Id. at 287-88 (citing Brief for United States at 14, Alexander v. Sandoval, 532 U.S. 275 (2001)).

\(^{88}\) Id. at 288 (citing Blatchford, 501 U.S. at 784).
and ends its "search for Congress's intent with the text and structure of Title VI."98 One last drink indeed.

STRUCTURE OF TITLE VI

The majority drew three primary conclusions in writing for the Court. First, the Court held that the text of § 602 requires that no enforcement action 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"90 and that "every agency enforcement action is subject to judicial review."91 The majority went on to argue that this elaborate remedial scheme "tend[s] to contradict a congressional intent to create privately enforceable rights through § 602 itself. The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others."92 Therefore, the Court held that because the remedial scheme included in the statute itself is thorough, it is unlikely that Congress would have also intended a private right of remedial action.93

Second, the Court held that while regulations may invoke rights present within a statute, those regulations may not create rights.94 The majority wrote that "[l]anguage in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not."95 The debate in Sandoval, according to the majority, was not whether the statute authorized the regulations, but whether the statute authorized the regulations' creation of a private right of action to enforce § 602.96 Justice Scalia, in writing for the majority, answered resoundingly in the negative.97

Lastly, the Court held that silence on the part of Congress does not equal approval of regulations that, in the majority's opinion, went farther than the statutory text authorized. The majority

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98. Id. (footnote omitted).
100. Id. (citing 42 U.S.C. § 2000d-1).
101. Id. at 290.
103. Sandoval, 532 U.S. at 291.
105. Id. (citing Touche, 442 U.S. at 577 n.18).
106. Id.
wrote, “[i]t is ‘impossible to assert with any degree of assurance that congressional failure to act represents’ affirmative congressional approval of the Court’s statutory interpretation.” The Court, with this holding, has apparently made it increasingly difficult for parties to prove the existence of an implied cause of action, under any statute.

SECTION THREE: MINORITY OPINION IN Sandoval

In writing for the dissent, Justice Stevens began with the presumption that “[a]t the time of the promulgation of these regulations, prevailing principles of statutory construction assumed that Congress intended a private right of action whenever such a cause of action was necessary to protect individual rights granted by valid federal law.” In the first part of that statement, the dissent argued that an implied cause of action exists when a statute does not provide for the protection of a right it creates, such as those guaranteed by Title VI and Title IX. In the second part, the dissent argued that Congress itself intended for the implied cause of action to exist in Congress’ contemplation and ratification, in particular, of Title VI and Title IX. To demonstrate these two points, the dissent turned to the Court’s treatment of this subject in previous cases.

The dissent claimed that the Court had “already considered the question presented today and concluded that a private right of action exists.” The dissent wrote that “[r]elying both on this

100. Id.
101. Id.
102. Id.
103. Id. The dissent argued that:

Just about every Court of Appeals has either explicitly or implicitly held that a private right of action exists to enforce all of the regulations issued pursuant to Title VI, including the disparate-impact regulations. For decisions holding so most explicitly, see, e.g. Powell v. Ridge, 189 F.3d 387, 400 (CA3 1999); Chester Residents Concerned for Quality Living v. Seif, 132 F.3d 925, 936–937 (CA3 1997), summarily dism’d, 524 U.S. 974 (1998); David K. v. Lane, 839 F.2d 1265, 1274 (CA7 1988); Sandoval v. Hogan [sic], 197 F.3d 484 (CA11 1999) (case below). See also Latinos Unidos De Chelsea v. Secretary of Housing and Urban Development, 799 F.2d 774, 785, n.20 (CA1 1986); New York Urban League, Inc. v. New York, 71 F.3d 1031, 1036 (CA2 1995); Ferguson v. Charleston, 186 F.3d 469 (CA4 1999), rev’d on other grounds, 532 U.S. 67 (2001); Castaneda v. Pickard, 781 F.2d 456, 465, n.11 (CA5 1986); Buchanan v. Bolivar, 99 F.3d 1352, 1356, n.5 (CA6 1996); Larry P. [sic] v. Riles, 793 F.2d 969, 981–982 (CA9 1986);
presumption and on independent analysis of Title VI, this Court has repeatedly and consistently affirmed the right of private individuals to bring civil suits to enforce rights guaranteed by Title VI.”

Among the cases to which the dissent referred are the three primaries: *Lau, Cannon, and Guardians.* The dissent argued that “when this Court faced an identical case 27 years ago, all the Justices believed that private parties could bring lawsuits under Title VI and its implementing regulations . . . .” The dissent therefore claimed that the issues in *Lau* were identical to the issues before the Court in *Sandoval,* and that the holding should be the same. The dissent further argues that there was no disagreement in the Court over Justice Stewart’s analysis in *Lau* past the point that *Guardians* was decided. The dissent argued that the holding in *Lau* permitted private actions to enforce regulations promulgated pursuant to § 602 and that the holding was not overturned by *Guardians.* Therefore, in the dissent’s view, case law permitted the same private right of action in *Sandoval* as it did after *Lau* and the majority should not have ignored the precedent.

In *Cannon,* the Court stated that “[w]e have no doubt that Congress intended to create Title IX remedies comparable to those available under Title VI and that it understood Title VI as authorizing an implied private cause of action for victims of the prohibited discrimination.” As the dissent poignantly pointed out, the Court referred to “[n]ot some of the prohibited discrimination, but all of it.” In other words, the dissent suggested that Congress explicitly ratified Title VI, and Title IX by extension, to ban all discrimination, including that which is the most difficult to see: disparate impact. Simply put, “[t]here is but one private action to enforce Title VI, and we already know that such an action exists.”

Along these lines, the dissent believed that an examination of Title VI must begin with a look at the statute as an integrated

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Id. at 285 n.1.


105. See supra notes 43-45.


107. Id. (Stevens, J., dissenting) (writing that according to the principal opinion in *Guardians* there was no disagreement with Stewart’s analysis in *Lau*).

108. Id.


110. *Sandoval,* 532 U.S. at 297 (footnote omitted) (emphasis added).

111. Id. at 310 (footnote omitted).
remedial scheme. The dissent wrote, "Section 601 does not stand in isolation, but rather as part of an integrated remedial scheme. Section 602 exists for the sole purpose of forwarding the antidiscrimination ideals laid out in § 601." In addition, for thirty years the Court has "treated § 602 as granting the responsible agencies the power to issue broad prophylactic rules aimed at realizing the vision laid out in § 601, even if the conduct captured by these rules is at times broader than that which would otherwise be prohibited." In other words, not only did the dissent believe that Congress empowered the aggrieved to sue for any type of discrimination prohibited anywhere in Title VI and Title IX, but also that the issue was a matter of stare decisis.

The dissenting Justices believed that the majority was wrong in three primary ways. First, "the Court provides a muddled account of both the reasoning and the breadth of our prior decisions endorsing a private right of action under Title VI, thereby obscuring the conflict between those opinions and today's decision." Again, the dissent was convinced that the Court should never have granted certiorari in this case because the case law had settled the matter over the thirty years following the passage of the Civil Rights Act. Second, "the Court offers a flawed and unconvincing analysis of the relationship between §§ 601 and 602 . . . ignoring more plausible and persuasive explanations detailed in our prior opinions." The dissent believed that the Court should not have divided the private right of action between intentional and disparate impact discrimination, for Title VI prohibited both forms. In other words, the Court should view Title VI as a single prohibition of discrimination for which there is a single private cause of action. Third, "the Court badly misconstrues the theoretical linchpin of our decision in Cannon . . . mistaking that decision's careful contextual analysis for judicial fiat." Again, the dissent strongly disagreed with the majority's interpretation of the case law and ignorance of precedent.

The dissent further pointed to the Court's reluctance to eliminate the possibility of a plaintiff asserting a private right of

112. Id. at 304 (footnote omitted).
113. Id. at 305 (referring to Lau, Guardians, and Choate).
114. Id. at 301-02 (footnote omitted).
115. Sandoval, 532 U.S. at 295.
116. Id.
117. Id.
118. Id.
119. Id.
action under the auspices of 42 U.S.C. § 1983. Justice Stevens wrote that requiring the use of § 1983 by plaintiffs to enforce the regulations under § 602 is “something of a sport.” Indeed, the ability to sue under § 1983 to enforce the regulations under § 602 and § 902 would reduce this case to a mere procedural clarification; a minor blip on the radar screen of civil rights advocates.

Furthermore, the dissent believed that the Court ignored the importance of the “Chevron doctrine” in its analysis of Title VI. The dissent wrote, “[i]n most other contexts, when the agencies charged with administering a broadly-worded statute offer regulations interpreting that statute or giving concrete guidance as to its implementation, we treat their interpretation of the statute’s breadth as controlling unless it presents an unreasonable construction of the statutory text.” The disagreement, as is obvious, between the majority and the dissent lies in the reasonability of the construction of the statutory text.

SECTION FOUR: APPLICATION OF THE CURRENT HOLDING IN SANDOVAL TO TITLE IX

Currently there is no private right of action to enforce the regulations under § 602. However, there has been much debate as to whether the holding in Sandoval extends to private rights of action to enforce § 902 and various other federal regulations. One of the most recent and significant cases in which a defendant raised the Sandoval holding as a defense to a private suit to enforce § 902 is Communities for Equity v. Michigan High School Athletic Association. In this case:

Plaintiffs bring this suit against the Michigan High School Athletic Association and its Representative Council, alleging that they have been excluded from opportunities to participate in interscholastic athletic programs and have received unequal treatment and benefits in these programs. They contend that this putative exclusion and unequal treatment constitute gender discrimination, in violation of (1) Title IX of the Education Act of 1972.

121. Sandoval, 532 U.S. at 300.
123. Id.
Amendments of 1972; (2) the Equal Protection Clause of the Fourteenth Amendment; and (3) Mich. Comp. Laws §§ 37.2302 and 37.2402. The alleged discrimination is made manifest, according to Plaintiffs, in MHSAA’s: (1) refusing to sanction girls ice hockey and water polo; (2) requiring that the Plaintiff Class play its sports in non-traditional seasons; (3) operating shorter athletic seasons for some girls’ sports than for boys’ sports; (4) scheduling the competitions of the Plaintiff Class on inferior dates; (5) providing, assigning, and operating inferior athletic facilities to the Plaintiff Class in which to play MHSAA-sanctioned games; (6) requiring that the Plaintiff Class play some sports under rules and/or conditions different from those in the NCAA or other governing organizations, unlike boys; and (7) allocating more resources for the support and promotion of male interscholastic athletic programs than for female programs.

The district court in Communities for Equity granted the portion of the motion to dismiss on the ground that a private party can no longer sue to enforce the regulations under § 902 after Sandoval. The court stated that “Plaintiffs’ argument that Sandoval applies only to Title VI is without merit” and that “Sandoval must be applied to the instant case.” The court therefore held that “following Sandoval, a private right of action to enforce the regulations found in § 902 does not exist; that is, Plaintiffs cannot maintain a private right of action insofar as their Amended Complaint contains disparate impact claims.”

The significance of Communities for Equity is that it appears to be the first sign that the federal courts are willing to follow the Sandoval decision in Title IX lawsuits.

Another district court took the holding in Sandoval a step further. In Litman v. George Mason University, the plaintiff brought an action pursuant to Title IX “alleging that a state-controlled university’s administration and faculty retaliated against a student for filing a discrimination complaint.” Prior to the Sandoval decision “this Court upheld Ms. Litman’s private right of

128. Id. at 3.
129. Id. at 5.
130. Id.
132. Id.
action to bring a Title IX retaliation claim."\textsuperscript{133} However, after \textit{Sandoval} the defendant moved to dismiss the Title IX claim.\textsuperscript{134} The court held that "34 C.F.R. § 100.7(e) is a procedural provision detailing how to conduct an investigation, not a valid interpretation of 20 U.S.C. § 1681. Thus, Ms. Litman’s right to enforce the anti-retaliation regulation must come, if at all, from the independent force of section 1682."\textsuperscript{135} The court goes further to state that:

In the aftermath of \textit{Sandoval}, the Court finds that section 1682 conveys no such independent right of action. Section 1682, like section 602 in the Title VI context, merely authorizes the agency to "effectuate" the rights guaranteed by section 1681; the operative language \textit{Sandoval} found not to create a right of action to enforce the challenged Title VI regulation, language which is essentially identical in Title VI and Title IX, likewise does not create a private right of action in this case.\textsuperscript{136}

Therefore, the "implied private right of action to seek redress for harm suffered because of discrimination does not extend to harm suffered because of retaliation, because . . . the anti-retaliation regulation is not merely an interpretation of Section 1681 but expands the scope of prohibited conduct."\textsuperscript{137}

In \textit{Litman}, the court extended the holding in \textit{Sandoval} to the "anti-retaliation" portion of the Title IX regulations.\textsuperscript{138} The court’s conclusion was resounding:

In the wake of \textit{Sandoval}, the private right of action in such cases extends only to the substantive provisions contained in the statutes themselves, or to valid interpretive regulations. Thus, an individual may no longer bring suit to enforce effectuating regulations enacted pursuant to Title IX that expand the scope of prohibited discrimination.\textsuperscript{139}

The significance of this holding is that it appears to be the first sign that federal courts are willing to further the \textit{Sandoval} decision beyond the scope addressed in the decision itself; that is, to eradicate all private right of action under both Title VI and Title IX

\textsuperscript{133} \textit{Id.} at 580.
\textsuperscript{134} The relevant Title IX regulation is 34 C.F.R. § 100.7(e).
\textsuperscript{135} \textit{Litman}, 156 F. Supp. 2d at 585 (citations and footnote omitted) (§§ 1681 and 1682 are analogous to §§ 901 and 902, respectively).
\textsuperscript{136} \textit{Id.} at 585-86 (footnote omitted).
\textsuperscript{137} \textit{Id.} at 586.
\textsuperscript{138} 34 C.F.R. § 100.7(e).
\textsuperscript{139} \textit{Litman}, 156 F. Supp. 2d at 587.
to enforce any regulations, not merely those addressed in *Sandoval*. Furthermore, in allowing recipients to retaliate, which by its nature is an intentional act, against beneficiaries who bring complaints under § 902, the court is effectively allowing recipients to circumvent the prohibition of intentional discrimination under § 901.

The courts in these two cases are constructing decisions directly from the 5-4 holding in *Sandoval*. While the cases paint a grim picture for civil rights advocates, they do not necessarily eradicate all opportunities for the aggrieved to enforce or have enforced the regulations promulgated under Title VI and Title IX for disparate impact discrimination.

**SECTION FIVE: OPTIONS FOR PLAINTIFFS IN THE SANDOVAL ERA**

This section will address two primary means by which the aggrieved can ensure that the effectuating regulations enacted pursuant to Title VI or Title IX are enforced, whether directly or indirectly. The first topic will be the existing procedural process. The second topic will be the use of 42 U.S.C. § 1983.

**THE PROCEDURAL PROCESS**

After *Sandoval*, aggrieved parties still have the ability to file complaints as part of the procedural process. However, this is very taxing on the limited resources of the Civil Rights agencies charged with this task, it is often an extremely slow process, and the process does not provide individual plaintiffs with remedies. Furthermore, there is no private right for the aggrieved party to sue these agencies, as part of the federal government, for failing to enforce Title IX. The case law, as an administrative matter, pushes the aggrieved party further from the enforcement, in which the party is likely to have a stake. Also, the federal government, in pursuing a claim of disparate impact discrimination, is not acting on behalf of the aggrieved party, but is instead acting solely in the interest of the United States and the funding agency.

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140. This section will not address the possibility of congressional action to alter existing statutes to overturn the holding in *Sandoval*, for it is beyond the scope of this Note.


143. The training manual, which is provided by the DOJ, reads:
therefore, are in the unfortunate position of remaining unrepresented in the procedural process.

42 U.S.C. § 1983

Those aggrieved parties that want to pursue a private right of action to enforce the regulations under § 902 may wish to sue under 42 U.S.C. § 1983. Justices Scalia and Stevens each laid down opposing strongholds in Sandoval, but something was missing that could have been an even greater blow to civil rights advocates. The majority barely addressed the possibility that a plaintiff could bring a § 1983 suit to enforce the regulations under § 602, whereas the dissent actively endorsed the idea. Whether this was due in part to pandering by Justice Scalia to secure a majority is unclear, but the unanswered question remains: Can a private party bring a § 1983 action and sue under the regulations to enforce § 602 and § 902?

The Department of Justice has two roles to play in Title IX enforcement: coordination of federal agency implementation and enforcement, and legal representation of the United States and the funding agency. . . . [The DOJ] may seek injunctive relief, specific performance, or other remedies when agencies have referred determinations of noncompliance by recipients to the Department for judicial enforcement. Such litigation will be assigned to the [Justice] Department's Civil Rights Division. Title IX Manual, supra note 22, at 163, 165. See also 34 C.F.R. § 101.21 (defining parties).


§ 1983. Civil action for deprivation of rights
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Id.

145. Sandoval, 532 U.S. at 284.

146. In fact, the dissent notes that:
Litigants who in the future wish to enforce the Title VI regulations against state actors in all likelihood must only reference § 1983 to obtain relief; indeed, the plaintiffs in this case (or other similarly situated individuals) presumably retain the option of rechallenging Alabama's English-only policy in a complaint that invokes § 1983 even after today's decision.

Id. at 300 (Stevens, J., dissenting).

147. See Lisa E. Key, Private Enforcement of Federal Funding Conditions Under § 1983:
One case that was important to the dissent in *Sandoval* was *Powell v. Ridge.*\(^{148}\) *Powell* concerned a suit in which the plaintiffs claimed that the "practices of the Commonwealth of Pennsylvania in funding public education [had] a racially discriminatory effect."\(^{149}\) In *Powell*, the court held "that a § 1983 suit is not incompatible with Title VI and the Title VI regulation."\(^{150}\) The following will help determine how far the holding in *Powell* will go for civil rights advocates.

**ENFORCEMENT OF A STATUTORY RIGHT V. IMPLIED RIGHT OF ACTION**

One debate surrounding the enforcement of Title IX regulations via § 1983 involves the difference between enforcement of § 902 as a statutory right and enforcement through an implied right of action. The Court "has recognized that courts should use a 'different inquiry' in deciding whether a statutory 'right' may be enforced under § 1983 than in determining if there is an implied private right of action based on the same underlying statute and right."\(^{151}\) The question is a matter of burden:

To imply a private right of action, courts place an increasingly difficult burden on a plaintiff to prove that Congress intended to allow private suits under a particular substantive statute. Conversely, once a court recognizes that a federal statute creates a distinct "right" and that the plaintiff is an intended beneficiary of that right, there is a presumption that the right is enforceable under § 1983. The burden is then on the defendant to show that Congress expressly prohibited a suit under § 1983 or implicitly did so by enacting a comprehensive remedial scheme that is incompatible with a § 1983 suit.\(^{152}\)

Therefore, it is easier for a plaintiff to argue and a court to find that (1) Congress did not intend for § 1983 to *not* apply; and (2) the


\(^{149}\) *Id.* at 391.

\(^{150}\) *Id.* at 403.


\(^{152}\) Mank, *supra* note 141, at 323-24 (citations omitted).
regulations were merely an interpretation of the statute, than to imply a private right of action.

Whether a regulation is an interpretation of a statute, and not rights-creating itself, has been a difficult question for courts to deal with.\textsuperscript{153} There is a split amongst the circuit courts: "Some circuits allow § 1983 suits based on rights created by regulations issued by agencies acting under delegated congressional authority. However, in other circuits, regulations may only help define the scope of a statutory right created by Congress, and may not serve as an independent basis for § 1983 suits."\textsuperscript{154} Regardless, to be successful in a § 1983 suit a plaintiff must show that "Congress intended to create a right for the benefit of the plaintiff."\textsuperscript{155} In other words, for there to be a § 1983 action to enforce the regulations under § 902, Congress must have intended to create a "right" for the benefit of the private plaintiff bringing suit when it enacted Title IX.

The "right" operates as the basis for the § 1983 suit; without the "right," there is nothing for the plaintiff to enforce and no basis for the suit.\textsuperscript{156} This is the crux of the § 1983 discourse for two reasons. First, as mentioned, if § 902 does not create a "right" for the plaintiff there is likely no basis for a § 1983 suit. Second, if § 902 does create a "right" that benefits the plaintiff for purposes of § 1983, the courts must determine whether Congress intended for a plaintiff to sue under § 1983 to enforce that right.\textsuperscript{157}

There is a split in the circuits as to whether regulations alone can create rights enforceable under § 1983. The Sixth and Third Circuits both agree that regulations can create § 1983 enforceable rights. The Sixth Circuit has held that "federal regulations may independently create enforceable § 1983 rights if the regulations establish 'rights' under the same three-part test used to determine whether a statute gives rise to a § 1983 cause of action."\textsuperscript{158} The Third Circuit stated in dicta that "valid federal regulations as well as federal statutes may create rights enforceable under section 1983."\textsuperscript{159}

\textsuperscript{153} See Pettys, supra note 147, at 73-82.
\textsuperscript{154} Mank, supra note 141, at 324 (citing Harris v. James, 127 F.3d 993, 1007-12 (11th Cir. 1997); Loschiavo v. City of Dearborn, 33 F.3d 548, 552-53 (6th Cir. 1994)).
\textsuperscript{155} Mank, supra note 141, at 326.
\textsuperscript{156} For a more thorough discussion of the term "right," see Mank, supra note 141, at 330-36.
\textsuperscript{157} It is self-evident that Congress intended for this type of situation to be actionable under a plain reading of § 1983.
\textsuperscript{158} Mank, supra note 141, at 346 (citing Loschiavo, 33 F.3d at 552-53).
The D.C. and Tenth Circuits are still somewhat on the fence but "have suggested that a federal regulation may create a right enforceable under § 1983 if the regulation has the 'force and effect of law' under Chrysler Corp. v. Brown." The D.C. Circuit wrote that "where Congress directs regulatory action, we believe that the substantive federal regulations issued under Congress' mandate constitute 'laws' within the meaning of section 1983. We therefore hold that the plaintiffs state a valid section 1983 claim for the defendants' alleged violation of HUD's grievance procedure regulations." In dicta, the Tenth Circuit court stated "that '[i]n at least some instances, violations of rights provided under federal regulations provide a basis for § 1983 suits.' Both Circuits appear to agree that regulations alone can sometimes create rights enforceable under § 1983, but the tests these Circuits use are more stringent than those the Third and Sixth Circuits employ.

The Fourth and Eleventh Circuits, on the other hand, "have concluded that regulations may not independently establish rights under § 1983." The Fourth Circuit, citing the dissenting opinion in Wright, has declared that "[a]n administrative regulation . . . cannot create an enforceable § 1983 interest not already implicit in the enforcing statute." However, even when they do not allow regulations alone to serve as the sole basis for a § 1983 action, courts often recognize that regulations can play a role in interpreting or explicating rights implicit in an underlying statute.

The Eleventh Circuit, in Harris v. James, stated that to the extent that the Supreme Court "conclude[s] federal rights must ultimately emanate from either explicit or implicit statutory requirements, we would seem to be in agreement with the Fourth Circuit. However, we are uncertain whether the Fourth Circuit would agree with our conclusion that regulations may further define rights imposed by federal statutes." In this case there appears to be be even further

161. Samuels v. District of Columbia, 770 F.2d 184, 199-200 (D.C. Cir. 1985) (citing Guardians, 463 U.S. at 608 n.1, 638 n.6; Polk, 750 F.2d at 259-61; Cunningham v. Toan, 728 F.2d 1101, 1103-05 (8th Cir. 1984) vacated by 469 U.S. 1154 (1985); Billington v. Underwood, 613 F.2d 91, 93-94 (5th Cir. 1980)).
162. Mank, supra note 141, at 348 (citing DeVargas v. Mason & Hanger-Silas Mason Co., 844 F.2d 714, 724 n.19 (10th Cir. 1988); Pettys, supra note 147 at 79 n.177).
163. Mank, supra note 141, at 348.
164. Id. at 348 (citing Smith v. Kirk, 821 F.2d 980, 984 (4th Cir. 1987)).
165. Harris v. James, 127 F.3d 993, 1009 n.21 (11th Cir. 1997).
dissension between the two Circuits. However, the Eleventh Circuit insisted that the "nexus between the regulation and Congressional intent" not be too tenuous. 166

**WHETHER CONGRESS CREATED AN ENFORCEABLE "RIGHT" IN § 902**

Through various decisions, the Court has set up a three-part test to determine whether Congress created an enforceable right. 167 The test reads:

First, a statute must clearly impose a binding obligation. Second, Congress must intend that the statute in question benefit the plaintiff. Third, "[t]he interest the plaintiff asserts must not be 'too vague and amorphous' to be 'beyond the competence of the judiciary to enforce.'" If the plaintiff demonstrates that the statute in question meets the three-part test, then a rebuttable presumption arises that an enforceable statutory "right" exists under § 1983. 168

In applying this three-part test to Title IX, the future of § 902 is not apparent. Certainly, § 902 imposes a binding obligation to satisfy the first part of the test. 169 The third part of the test also seems straightforward: the interest of the beneficiaries does not appear to be vague or amorphous at all, for the statute prohibits the recipient of federal funds from discriminating against those parties. Furthermore, the statute is not "beyond the competence of the judiciary to enforce" because the aggrieved may bring a private action if the discrimination is intentional.

166. *Id.* at 1010 (arguing further that "determining the validity of the regulation would require application of the analysis set out in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, Inc., 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)."").


168. *Id.* at 332-33.


> Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity . . . is authorized and directed to effectuate the provisions of section 901 with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.

*Id.*
The second part of the test, however, poses greater concern. As discussed earlier, the aggrieved are not parties to the procedural process. Does this mean that Congress did not intend Title IX to benefit the aggrieved? If so, the aggrieved would have no claim to the “right” for purposes of §1983. The United States and the funding agencies could be the only parties intended to benefit from the statute for purposes of §1983. On the other hand, it also appears that Congress intended the aggrieved to be beneficiaries of Title IX; they are the individuals Congress intended to protect by the statute.

To further complicate the inquiry, even after the “plaintiff meets the three-part test, a defendant may rebut the presumption that §1983 is available by demonstrating that Congress intended to bar access to §1983 . . . by explicitly foreclosing private enforcement of the statute, or by enacting a comprehensive remedial scheme that is incompatible with separate enforcement under §1983.”170 However, the “Court has emphasized that once a court finds an enforceable right under the three-part test, there is a strong presumption against preclusion and in favor of enforcing those federal rights under §1983.”171

The three-part test is “significantly easier to meet than the four-part test the Court uses to determine whether Congress specifically intended to allow a private cause of action under the same underlying substantive statute.”172 In light of Sandoval, in which the Court held that there is not an implied right of action to enforce §602, the question whether Congress created a “right” in §902 will be determinative for the future of private suits to enforce the regulations under §902.

CONCLUSION

The Supreme Court’s decision in Sandoval delivered a shocking blow to civil rights activists across the country. While the decision was a setback for private litigation of §902 claims, it certainly did not sound the death knell for disparate impact civil rights law. Options remain for aggrieved beneficiaries and there is still room for creative lawyering.

First, the regulations and procedures are still in place. The Court did not dismantle either of these in the Sandoval decision.

170. Id. at 334 (citing Middlesex County Sewerage Auth. v. Nat’l Sea Clammers Ass’n, 453 U.S. 1, 20 (1981)).
171. Id. at 334 (citing Blessing, 520 U.S. at 346; Wilder, 496 U.S. at 520 (1990)).
172. Mank, supra note 141, at 333.
However, the limited resources of the various government agencies charged with reviewing complaints inhibit the agencies' ability to police every instance of a § 902 violation. While not every complaint will lead to proper enforcement, at least a portion of them will.

Second, there is still a private right of action if the discrimination is intentional. Again, this was uncontested in Sandoval. An aggrieved beneficiary will have the opportunity to prosecute a recipient's violation of § 901. However, as mentioned, the court in Litman ruled that intentional retaliation by a recipient against a complainant beneficiary following the filing of a § 902 complaint will not lead to a private right of action for the beneficiary. Unfortunately, this exception, if sustained by higher courts, will provide a way for recipients to circumscribe the § 901 prohibition against intentional discrimination.

Third, the Court has not yet decisively ruled on whether an aggrieved party can sue using § 1983 to enforce the regulations under § 902. The Court left the backdoor open for prospective § 1983 lawsuits by not presenting a holding on the issue. While § 1983 was mentioned in passing by the majority, and in-depth by the dissent, both sides wrote in *dictum*. The Court will determine the future of the private right of action if, and when, it rules on whether § 902 creates an enforceable right, instead of an implied right of action. The Court appears to have answered the latter question of an implied right of action in Sandoval.

The majority's ignorance of precedent as a disservice to law, not merely justice, outweighs the flaws of its strict interpretation of congressional intent. The Court's holding however, not its *dictum*, still allows creative attorneys the ability to bring § 902 lawsuits under the auspices of § 1983. A determination by the Court as to whether § 902 is an enforceable right will largely guide this debate in the future. However, the majority's muffled expressions on the § 1983 issue indicate that there are not five votes for a ruling against the § 1983 option; thus, the sport lives on.