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Tax, Spend, and Prevent Discrimination: Why Title IX's Passage Under the Spending Clause Holds the Answer to a Quarter-Century Long Circuit Split,

Miriam Pysno Solomon

Note

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*Miriam Pysno Solomon**

INTRODUCTION

Title IX of the Education Amendments of 1972 is a well-known, although somewhat misunderstood, federal statute. A huge number of educational institutions across the United States receive funding under Title IX.[1] In fact, the vast majority of people schooled in this country attend Title IX-funded institutions or programs.[2] That trend holds for both public and private education, from primary school through

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1. *See Title IX and Sex Discrimination*, U.S. DEPT. OF EDUC. (Aug. 2021), https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html [https://perma.cc/8P5T-U6AC] (detailing the scope of Title IX).

2. *Id.*; *see infra* note 15 and accompanying text; *cf.* Richard Vedder, *There Are Really Almost No Truly Private Universities*, FORBES (Apr. 8, 2018), https://www.forbes.com/sites/richardvedder/2018/04/08/there-are-really-almost-no-truly-private-universities [https://perma.cc/R3J7-SAUM] (explaining that even so-called "private" post-secondary educational institutions receive federal funding); Dean Clancy, *A List of Colleges That Don't Take Federal Money*, DEAN CLANCY (Aug. 10, 2020), https://deanclancy.com/a-list-of-colleges-that-dont-take-federal-money [https://perma.cc/2R52-H73S] (listing only eighteen colleges that do not receive any federal grant money or participate in any federal financial aid or student loan program); Julia Donheiser, *Chalkbeat Explains: When Can Private Schools Discriminate Against Students?*, CHALKBEAT (Aug. 10, 2017), https://www.chalkbeat.org/2017/8/10/21107283/chalkbeat-explains-when-can-private-schools-discriminate-against-students [https://perma.cc/X5YX-WZNT] (stating that even most private K–12 schools may be subject to Title IX because they accept federal funding, "usually through school breakfast or lunch programs, grants, or funding for low-income students").

higher education.[3] In 2018, federal funding for higher education institutions amounted to $149 billion, totaling 3.6% of federal spending.[4] Annual federal funding for K–12 education totals an estimated $55 billion.[5] Title IX is commonly understood as advancing gender equality in college athletics.[6] In recent years, Title IX has been a hot topic as the Department of Education promulgated new regulations governing the investigation and adjudication of sexual harassment and assault claims by colleges and universities.[7] Less well-known though, is that Title IX protects employees as well as students from discrimination on

3. *See* Donheiser, *supra* note 2; Clancy, *supra* note 2.

4. *Explore the Federal Investment in Your Alma Mater*, DATA LAB https://datalab.usaspending.gov/colleges-and-universities [https://perma.cc/6B8B-SVTF].

5. This does not include funding for early childhood education. David S. Knight, *Federal Spending Covers Only 8% of Public School Budgets*, CONVERSATION (July 14, 2020), https://theconversation.com/federal-spending-covers-only-8-of-public-school-budgets-142348 [https://perma.cc/WF34-7X3G] (citing *2018 Public Elementary-Secondary Education Finance Data*, U.S. CENSUS BUREAU, https://www.census.gov/data/tables/2018/econ/school-finances/secondary-education-finance.html [https://perma.cc/Z4EP-QY42]). In 2011, this figure was closer to $75 billion. Stephen Q. Cornman, Patrick Keaton & Mark Glander, *Revenues and Expenditures for Public Elementary and Secondary School Districts: School Year 2010–2011 (Fiscal Year 2011)*, NAT'L CTR. FOR EDUC. STAT. (Sept. 2013), https://nces.ed.gov/pubs2013/2013344.pdf. [https://perma.cc/34QU-CLQ6].

6. *Title IX Frequently Asked Questions*, NCAA, http://www.ncaa.org/about/resources/inclusion/title-ix-frequently-asked-questions [https://perma.cc/2UEX-8RMK] (stating that "the application of Title IX to athletics that has gained the greatest public visibility").

7. Valerie Strauss, *Betsy DeVos's Controversial New Rule on Campus Sexual Assault Goes into Effect*, WASH. POST (Aug. 14, 2020), https://www.washingtonpost.com/education/2020/08/14/betsy-devoss-controversial-new-rule-campus-sexual-assault-goes-into-effect [https://perma.cc/3T5V-39LB]; Annie Grayer & Veronica Stracqualursi, *DeVos Finalizes Regulations That Give More Rights to Those Accused of Sexual Assault on College Campuses*, CNN (May 6, 2020), https://www.cnn.com/2020/05/06/politics/education-secretary-betsy-devos-title-ix-regulations [https://perma.cc/ZD4Y-SBER]; Erica L. Green, *DeVos's Rules Bolster Rights of Students Accused of Sexual Misconduct*, N.Y. TIMES (Sept. 22, 2020), https://www.nytimes.com/2020/05/06/us/politics/campus-sexual-misconduct-betsy-devos.html [https://perma.cc/7BED-VWYR].

The Biden administration is now walking back the Trump administration's changes. Lauren Camera, *Education Department Begins Sweeping Rewrite of Title IX Sexual Misconduct Rules*, U.S. NEWS & WORLD REP. (June 7, 2021), https://www.usnews.com/news/education-news/articles/2021-06-07/education-department-begins-sweeping-rewrite-of-title-ix-sexual-misconduct-rules; *see also* Tovia Smith, *Biden Begins Process to Undo Trump Administration's Title IX Rules*, NPR (Mar. 10, 2021), https://www.npr.org/2021/03/10/975645192/biden-begins-process-to-undo-trump-administrations-title-ix-rules [https://perma.cc/J6LN-SDES].

the basis of sex in educational institutions.[8] Thus, Title IX demonstrates a clear focus on broadly protecting all people who participate in federally funded educational programs, not just students.

Congress enacted Title VII of the Civil Rights Act of 1964 to eliminate employment discrimination on the basis of sex, religion, and national origin.[9] While its reach is greater than Title IX's, it too aims to eliminate sex discrimination from the country's workplaces, including schools.[10] While both laws strive to accomplish the same end and may in some cases apply to the same conduct, there are fundamental differences between them. These differences provide strategic opportunities for aggrieved parties seeking redress for alleged sex discrimination. For example, litigants may prefer Title VII if they are seeking punitive damages or fear they may not be able to prove discriminatory intent.[11] Alternatively, litigants may prefer Title IX, which does not place a cap on damages and does not require litigants to jump through administrative hoops prior to filing suit in court.[12]

The fact that the statutes' coverages overlap has given rise to conflicts in certain judicial circuits when complainants seeking redress make the "wrong choice" about which law to invoke. For example, if a university professor believes her repeated denial of tenure amounts to sex discrimination, that discrimination would fall under the purview of both Title IX, because she is a university employee, and Title VII, which governs almost all U.S. employers. If the professor chooses to bring her claim under Title IX, mainly because its administrative burden is significantly lower than Title VII's,[13] she risks her claim being thrown out. Despite pleading a prima facie case of discrimination under Title IX, a court may hold that her only avenue for remediation is Title VII. To make matters worse, by the time the court hands down its order, the Title VII statute of limitations may have run, leaving the professor unable to litigate her claim at all.

8. N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 530 (1982) ("[E]mployment discrimination comes within the prohibition of Title IX.").

9. *Infra* Part I.A.

10. Title VII makes it unlawful for "an employer . . . to discriminate against any individual . . . because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1). Title IX makes it unlawful for any "person . . . on the basis of sex" to be "excluded . . . under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a).

11. *Infra* notes 32, 111 and accompanying text.

12. *Infra* notes 83, 85 and accompanying text.

13. *See infra* Part I.B.1.

Such was the case in *Lakoski v. James*, decided by the Fifth Circuit in 1995.[14] There are hundreds of thousands of employees in the United States situated similarly to Joan Lakoski, protected by both Title VII and Title IX. As of 2021, approximately 17,600 school districts, and 5,000 postsecondary institutions, charter schools, for-profit schools, libraries, and museums received funds under Title IX.[15] Each of those institutions employs anywhere from dozens of people to hundreds of thousands of people,[16] and each employee is protected by the provisions contained in Title IX.[17] According to the Fifth Circuit, Title VII's protections prevent those employees from seeking relief under Title IX,[18] despite ample evidence that Title IX was designed to protect school employees against exactly the type of sex discrimination that Lakoski alleged.[19] The Seventh Circuit has agreed with the Fifth that Title VII provides the sole remedy for school employees who allegedly were discriminated against on the basis of sex.[20]

The First, Third, Fourth, and Sixth Circuit Courts of Appeals[21] have diverged from the Fifth and Seventh Circuits. In concluding that

14. 66 F.3d 751 (5th Cir. 1995).

15. *Title IX and Sex Discrimination*, *supra* note 1. There were 13,452 public school districts in the country during the 2018–2019 school year. *Table 214.10. Number of Public School Districts and Public and Private Elementary and Secondary Schools: Selected Years, 1869–70 through 2018–19*, NAT'L CTR. FOR EDUC. STATS., https://nces.ed.gov/programs/digest/d18/tables/dt18_214.10.asp [https://perma.cc/B3MF-ETHJ].

16. For example, the University of Minnesota's faculty and staff totals an estimated 20,000 people. *About Us*, UNIV. OF MINN., https://twin-cities.umn.edu/about-us [https://perma.cc/LV3U-YG8R]. The University of Texas system employs over 100,000 people. *About the University of Texas System*, UNIV. OF TEX. SYS., https://www.utsystem.edu/about [https://perma.cc/Q5CG-6S96]. The University of California system employs upwards of 227,000 people. *The UC System, Overview*, UNIV. OF CAL., https://www.universityofcalifornia.edu/uc-system [https://perma.cc/PJ3M-S8YP].

17. N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 531 (1982) ("[E]mployment discrimination comes within the prohibition of Title IX.").

18. *Lakoski*, 66 F.3d at 757. There is no test for whether Title VII preempts other discrimination coverage and, in fact, courts have reached opposite conclusions to that question in various cases. See Part II for discussion of some such cases, which both sides of the circuit split have relied on in reaching their holdings.

19. *See generally* Lynn Ridgeway Zehrt, *Title IX and Title VII: Parallel Remedies in Combatting Sex Discrimination in Education*, 102 MARQ. L. REV. 701 (2019) (summarizing circuit split and analyzing legislative history to conclude that Congress intended Title IX to act as a parallel remedy to Title VII, providing additional protection against sex discrimination).

20. Waid v. Merrill Area Pub. Schs., 91 F.3d 857, 862 (7th Cir. 1996), *abrogated on other grounds by* Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246 (2009).

21. Lipsett v. Univ. of P.R., 864 F.2d 881 (1st Cir. 1988); Doe v. Mercy Cath. Med.

employees of educational institutions may take their choice of remedial scheme or litigate concurrently under both Title VII and Title IX, these four circuits have it right. As discussed below, Title VII and Title IX differ in important respects. They impose different prerequisites to filing suit, make available different remedies, and were enacted pursuant to different constitutional powers.[22] These distinctions reveal that Title IX claims are fundamentally different in kind from Title VII claims, and lead to the conclusion that the passage of Title VII should not deprive private litigants of the opportunity to enforce Title IX. Importantly, none of the circuits involved in this split have fully addressed the different legal duties each Title creates. Moreover, allowing concurrent claims in view of these statutory distinctions also comports with the Federal Rules of Civil Procedure (FRCP)[23] and Title VII jurisprudence.[24]

Employment discrimination in schools is also hugely harmful not only to the discriminated-against employees but to the students who witness the discrimination. When students witness differing treatment on the basis of sex, those experiences inform the students' understandings of their own abilities, opportunities, and futures.[25] If a society is concerned with gender equality, there is perhaps no more crucial place to start toward that goal than in schools. Importantly, Congress has acknowledged the risks associated with sex discrimination in schools numerous times, both while passing Title IX and in the decades since, citing the harm sex discrimination causes to the employees as well as the students.[26]

Part I of this Note will provide background on the enactment of Title VII and Title IX, with a focus on the fact that Title IX was passed under the Spending Clause, which creates contractual obligations between the government and recipients of federal financial assistance. Part I will also provide an overview of private rights of action under other Spending Clause legislation and the treatment of private individuals as third-party beneficiaries of Spending Clause contracts. It will establish a framework for thinking of Title IX and Title VII as fundamentally different types of claims; Title IX sounding in contract and Title VII in tort. This Note is the first scholarship to address the circuit

Ctr., 850 F.3d 545 (3d Cir. 2017); Preston v. Virginia. *ex rel.* New River Cmty. Coll., 31 F.3d 203 (4th Cir. 1994); Ivan v. Kent State Univ., 92 F.3d 1185 (6th Cir. 1996).

22. *Infra* notes 53, 86 and accompanying text.

23. *Infra* Part I.C.

24. *Infra* Part II.B.

25. *Infra* Part III.D.

26. *Infra* Part III.D.

split through this framework, and courts have largely ignored this distinction as well. Lastly, Part I will describe the legal system's preference for alternative pleading.

Part II will examine the question at issue in the circuit split: Does Title VII preempt Title IX sex discrimination claims brought by educational institution employees? It will explain the reasoning of the leading opinions on each side of this circuit split. Moreover, Part II will detail Congress's repeated acknowledgment of the pervasive problem of sex discrimination in educational institutions.

Part III will argue that because Title VII and Title IX create distinct legal duties, the Supreme Court should hold that eligible plaintiffs should be allowed to bring concurrent claims under each Title or elect to bring a Title IX claim in lieu of a Title VII claim. This outcome is consistent with the long-standing principle that independent tort and contract duties can arise from the same conduct. It also comports with Spending Clause jurisprudence and with the legal system's preference for alternative pleading. In addition, allowing the pursuit of concurrent Title IX and Title VII claims acknowledges Congress's concerns with sex discrimination in schools while also respecting Congress's constitutional grant of authority to tax and spend.

I. TITLE VII AND TITLE IX'S STRUCTURES AND ENFORCEMENT MECHANISMS DIFFER IN KEY RESPECTS

This Part will detail the purposes, protections, and remedies of the two statutory schemes at issue in this circuit split: Title VII and Title IX. It will detail each Titles' enforcement mechanisms and explain that while they may appear similar on their faces, the constitutional power Congress invoked to pass each Title distinguishes the enforcement mechanisms from each other. This Part also explicates the role third-party beneficiaries of Spending Clause contracts play in enforcing those statutes. Lastly, this Part explains the FRCP's preference for alternative pleading.

A. TITLE VII'S EXPLICIT PRIVATE RIGHT OF ACTION PROTECTS EMPLOYEES BY IMPOSING A TORT-LIKE DUTY ON EMPLOYERS

Congress enacted the Civil Rights Act of 1964 to advance "equality of . . . opportunities and remove [existing] barriers" for African Americans.[27] Title VII of the Act expanded beyond race discrimination by "broadly [striving] to eliminate employment discrimination among

27. Griggs v. Duke Power Co., 401 U.S. 424, 429–30 (1971).

private employers . . . . [and expanding] protection on the basis of national origin, religion, and sex."[28] Discrimination on any of those bases may manifest in hiring and firing decisions, in compensation and other terms of employment,[29] or through classifying employees in a way that results in an adverse effect on an employee's status.[30] Under Title VII, even facially neutral practices or procedures are unlawful "if they operate to 'freeze' the status quo of prior discriminatory employment practices."[31] Thus, "both intentional discrimination and policies . . . having a discriminatory effect may run afoul" of the Act.[32] A complainant may recover for harm under Title VII by proving either disparate treatment which evinces discriminatory intent,[33] or disparate impact.[34] Disparate impact cases are adjudicated under a burden-shifting regime wherein the employer may ultimately prevail even if its actions have a disparate impact on a certain protected group so long as those actions were taken for a legitimate, nondiscriminatory reason.[35]

The following Subsections will detail Title VII's private right of action and the administrative prerequisites to filing suit under the Title. They will also establish that Title VII imposes a tort-like duty on employers.

1. Enforcing Title VII Through Its Explicit Private Right of Action

Title VII explicitly created a private right of action and established specific requirements for employees seeking relief.[36] It created the Equal Employment Opportunity Commission (EEOC or Commission).[37] Subsequent executive orders and the Equal Employment Opportunity Act of 1972 transferred to the EEOC various enforcement powers formerly administered by other government agencies.[38] Title

28. Zehrt, s*upra* note 19, at 706 (citing 42 U.S.C. § 2000e *et seq*).

29. 42 U.S.C. § 2000e-2(a)(1).

30. *Id.* § 2000e-2(a)(2).

31. *Griggs*, 401 U.S. at 430.

32. Nashville Gas Co. v. Satty, 434 U.S. 136, 141 (1977) (citing *Griggs*, 401 U.S. at 431).

33. Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

34. *Griggs*, 401 U.S. at 430–31.

35. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–03 (1973); 42 U.S.C. § 2000e-2(k)(1)(A).

36. 42 U.S.C. § 2000e-5 (enforcement provisions).

37. *Id.* § 2000e-4(a).

38. For example, Title VII transferred enforcement and administration of the Fair Labor Standards Act to the EEOC. Reorganization Plan No. 1 of 1978, 3 C.F.R. 321 (1979), *reprinted in* 5 U.S.C. app. at 237, and in 92 Stat. 3781 (1978), Functions relating

VII also consolidated enforcement for private and federal employees.[39] Generally, in order to have standing to file a lawsuit under Title VII, aggrieved employees must file discrimination charges with the Commission within 180 days of the alleged unlawful employment practice.[40] The Commission then serves the employer with notice of the charge[41] and works to reach a conciliation agreement with the employer.[42] If the parties have not reached a conciliation agreement within thirty days, the private employee may commence a civil suit against her employer.[43]

The framework is more burdensome for government employees. In those cases, if no conciliation agreement is reached, the EEOC refers the case to the Attorney General who may commence suit against the government employer.[44] If the Attorney General fails to bring suit within 180 days, the Attorney General must notify the aggrieved employee who then has ninty days to file suit on her own behalf.[45] When Title VII litigants finally reach court, judges may grant a broad range of relief, including back pay, injunctive relief, reinstatement after termination, and other equitable remedies.[46] Punitive damages may be available in cases of intentional discrimination.[47] Caps on damages under Title VII are determined by the size of the employer and range from $50,000 to $300,000.[48]

Title VII claims require proof that the plaintiff:

> (i) belongs to a [protected group]; (ii) that [plaintiff] applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite

to age discrimination enforcement functions were similarly transferred from the Secretary of Labor to the Commission. *Id.* The transfers of authority "reduce[d] . . . the number of Federal agencies having important equal opportunity responsibilities under Title VII" from fifteen down to three. 5 U.S.C. app. at 239.

39. *Id.*

40. 42 U.S.C. § 2000e-5(e)(1).

41. *Id.*

42. *Id.* § 2000e-5(f)(1).

43. *Id.*

44. *Id.* The government employee may intervene on this action. *Id.*

45. *Id.* Similarly, if the Commission rejects an employee charge, the employee has the right to file suit on their own behalf for ninety days from notice of the rejection. *Id.*

46. *Id.* § 2000e-5(g)(1).

47. *Remedies for Employment Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/remedies-employment-discrimination [https://perma.cc/43PX-592L].

48. *Id.*

> [plaintiff's] qualifications, [plaintiff] was rejected; and (iv) that, after [plaintiff's] rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[49]

Implicit in Title VII, and made explicit through caselaw, is that employees must exhaust the Title's administrative remedies in order to bring a suit in federal court.[50] The exhaustion of administrative remedies doctrine is premised on the rule that "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted."[51] In other words, if a party wants relief under Title VII, she *must* engage in each step the administrative framework provides. If she fails to engage in any of the steps, a court must dismiss the claim.

Given this exhaustion requirement, Title VII's administrative scheme requires a considerable amount of work and waiting on the part of the aggrieved employee, whether she is a public or private employee. This burden may be too great for some public employees in particular, especially those seeking reinstatement after termination, since they may not have the resources to make ends meet while they wait up to 180 days for the Attorney General to bring suit. These extra burdens on government employees are particularly important for this discussion, as state universities are often considered arms of the state[52] and their employees are thus treated as government employees, subject to Title VII's extra administrative requirements.

49. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1972). These elements change slightly based on the exact type of Title VII claim implicated, but in general they follow this same framework. *See* Peter Gene Baroni, *Background Circumstances: An Elevated Standard of Necessity in Reverse Discrimination Claims Under Title VII*, 39 HOW. L.J. 797, 799 (1996).

50. *See, e.g.*, Fort Bend Cnty. v. Davis, 139 S. Ct. 1843, 1851 (2019) ("Title VII's charge-filing provisions speak to a party's procedural obligations." (internal quotations, modifications, and citations omitted)); Lakoski v. James, 66 F.3d 751, 754 (5th Cir. 1995) (holding that "[t]he district court erred in submitting [her claim] . . . to the jury" because "Title VII provides an administrative procedure in which an aggrieved individual must first pursue administrative remedies before seeking judicial relief" and "Dr. Lakoski chose to circumvent this procedure.").

51. Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50–51 (1938) (footnote omitted).

52. *See, e.g.*, EEOC v. Bd. of Regents of Univ. of Wisc. Sys., 288 F.3d 296, 299 (7th Cir. 2002) (noting that the Eleventh Amendment bars suit against Wisconsin, "and therefore the Board of Regents of the state university system"); Goodisman v. Lytle, 724 F.2d 818, 819–21 (9th Cir. 1984) (acknowledging the University of Washington's sovereign immunity); Univ. of Minn. v. Raygor, 620 N.W.2d 680, 683 (Minn. 2001) ("[T]here is no dispute that the University is an 'arm' of the State of Minnesota.").

Thus, while Title VII's coverage may be comprehensive in that it covers almost all US employers, its enforcement mechanisms may not always be litigant-friendly.

2. Treating Title VII Violations as Torts

Despite what plaintiffs may view as Title VII's shortcomings, its coverage stems from an important social policy in favor of gender equality. This social policy led Congress to impose a tort-like duty on employers not to discriminate against any employee on the basis of sex. Viewing Title VII this way helps distinguish Title VII and Title IX's mandates from each other.

Title VII was passed under Congress's Commerce power.[53] Congress has relied on this power to implement a broad range of policies, from controlling wheat production[54] to regulating the sale of intrastate marijuana.[55] While the Supreme Court has limited this power in recent years,[56] the Commerce Clause allows for expansive Congressional legislation. Other Commerce Clause statutes include administrative requirements similar to Title VII. For example, the Age Discrimination in Employment Act (ADEA) was passed pursuant to the Commerce Clause[57] and similarly requires that aggrieved parties engage with the EEOC and exhaust administrative remedies before filing suit in court.[58]

Claims arising under both Title VII and the ADEA have been described as "federal torts" and courts thus "adopt[] the background of

53. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 367 (1978) (Brennan, J., concurring in part and dissenting in part) ("Title VII was enacted pursuant to Congress' power under the Commerce Clause."). The Commerce Clause grants Congress the authority "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3.

54. Wickard v. Filburn, 317 U.S. 111 (1942).

55. Gonzales v. Raich, 545 U.S. 1 (2005).

56. *E.g.,* United States v. Lopez, 514 U.S. 549 (1995) (holding that guns on school campuses do not have a "substantial relationship" with an economic activity, despite the sale of firearms across state lines); United States v. Morrison, 529 U.S. 598 (2000) (holding that the connection between gender motivated violence and interstate commerce is too attenuated to fall under Congress's commerce power).

57. *See* Gregory v. Ashcroft, 501 U.S. 452, 464 (1991) (citing EEOC v. Wyoming, 460 U.S. 226 (1983) (noting that Congress's extension of the ADEA to the states was a valid exercise of its commerce power)). A hallmark of Commerce Clause legislation is that Congress explicitly invokes the burdens and effects a practice or problem has on interstate commerce. In the ADEA, Congress noted that "the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, *burdens commerce and the free flow of goods in commerce*." 29 U.S.C. § 621(a)(4) (emphasis added).

58. *See* 29 U.S.C. § 626(d).

general tort law" in assessing those claims.[59] Treating these claims as torts, an analytical posture that has gained prominence over time,[60] comports with the availability of a common law tort claim arising out of a statutory violation.[61] It is also consistent with the common definition of "tort" since it is safe to say that discrimination is a "civil wrong."[62] Title IX violations do not share Title VII's similarity to tort. Instead, as the next Subsection establishes, Title IX claims much more closely resemble breach of contract actions. This difference is meaningful as it suggests two separate and distinct legal duties and that Title VII's duty should not preempt Title IX's.

B. TITLE IX ACTS AS A CONTRACT BETWEEN THE GOVERNMENT AND FUNDED EDUCATIONAL INSTITUTIONS AND AGGRIEVED EMPLOYEE BENEFICIARIES OF THAT CONTRACT MAY ENFORCE ITS TERMS

Similar to Title VII, Title IX of the Education Amendments of 1972 was enacted to combat discrimination. However, Title IX was more limited than Title VII in that it sought to specifically eliminate only *sex discrimination* from the education setting.[63] Whereas Title VII extended to almost all public and private employers,[64] Title IX applies only to recipients of federal education funding.[65]

59. Staub v. Proctor Hosp., 562 U.S. 411, 416 (2011). While *Staub* assessed the Uniformed Services Employment and Reemployment Rights Act (USERRA), lower courts have applied the holding to Title VII litigation "because the Supreme Court emphasized the similarities between USERRA and Title VII in [that] decision." Sandra F. Sperino, *Let's Pretend Discrimination Is a Tort*, 75 OHIO ST. L.J. 1107, 1112 (2014).

60. For a full discussion of the "tortification" of discrimination statutes, see Sperino, *supra* note 59, at 1109–15. While there are arguments against treating violations of discrimination statutes as torts, see, for example, Sandra F. Sperino, *The Tort Label*, 66 FLA. L. REV. 1051 (2014), the Supreme Court has adopted that framework repeatedly over the past decade. Sperino, *supra* note 59.

61. *See* RESTATEMENT (SECOND) OF TORTS § 286 (AM. L. INST. 1965) ("The court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively or in part (a) to protect a class of persons which includes the one whose interest is invaded, and (b) to protect the particular interest which is invaded, and (c) to protect that interest against the kind of harm which has resulted, and (d) to protect that interest against the particular hazard from which the harm results.").

62. *Tort*, BLACK'S LAW DICTIONARY (11th ed. 2019).

63. Zehrt, *supra* note 19, at 710 (citing 118 CONG. REC. 5803).

64. *See* Reorganization Plan No. 1 of 1978, *supra* note 38. In order to be bound by Title VII, employers need employ only fifteen people. *Coverage*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/coverage [https://perma.cc/SUF5-C4BE].

65. 20 U.S.C. § 1681(a).

Title IX is perhaps best known for its guarantees of equality in collegiate sports,[66] but its reach is much greater. The key language in Title IX reads: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[67] Causes of action under Title IX range from sexual harassment to retaliation to deliberate indifference and more.[68]

While sex discrimination in employment is not explicitly listed in the statutory text, courts have consistently held that it falls under Title IX's ambit.[69] The Supreme Court first acknowledged Title IX's protection for employees in *North Haven Board of Education v. Bell*.[70] In that case, the Court analyzed in-depth Title IX's language, legislative history, and purpose in holding that "Congress[] desire[d] to ban employment discrimination in federally financed education programs."[71] The *North Haven* court also highlighted Title IX's similarities to Title VI of

66. *See, e.g.*, *Title IX Frequently Asked Questions*, *supra* note 6; *see also Murray, Slotkin Lead Colleagues in Honoring Anniversary of Title IX, Landmark Civil Rights Law Prohibiting Discrimination on the Basis of Sex in Education*, U.S. SENATE COMM. ON HEALTH, EDUC., LAB. & PENSIONS (June 24, 2019) [hereinafter *Murray, Slotkin Lead Colleagues*], https://www.help.senate.gov/ranking/newsroom/press/murray-slotkin-lead-colleagues-in-honoring-anniversary-of-title-ix-landmark-civil-rights-law-prohibiting-discrimination-on-the-basis-of-sex-in-education [https://perma.cc/WAE5-S7EE] (stating that women and girls' participation in athletics has increased 500% in colleges and 1000% in high schools since 1972); *Title IX: Fast Facts*, NAT'L CTR. FOR EDUC. STAT., https://nces.ed.gov/fastfacts/display.asp?id=93 [https://perma.cc/KJ32-PCY6] (noting that while girls' participation in sports has never reached the same level as boys' participation, athletic opportunities for both boys and girls have increased every year since Title IX's passage).

67. 20 U.S.C. § 1681(a).

68. *See infra* notes 74–84 and accompanying text. For example, a sexual harassment claim consists of four elements: (1) the educational institution receives federal funds; (2) plaintiff faced harassment based on her sex; (3) "the harassment was sufficiently severe or pervasive to create a hostile (or abusive) environment"; and (4) there is a causal link between the harassment and the institution. Feminist Majority Found. v. Hurley, 911 F.3d 674, 686 (4th Cir. 2018) (citing Jennings v. Univ. of N.C., 482 F.3d 686, 695 (4th Cir. 2007) (en banc)).

69. *E.g.*, N. Haven Bd. of Educ. v. Bell, 456 U.S. 512 (1982).

70. *Id.*

71. *Id.* at 531.

the Civil Rights Act of 1964, which courts continue to rely on in analyzing Title IX's meaning and purpose.[72] Since that decision, courts have repeatedly acknowledged Title IX's protection for employees.[73]

1. Enforcing Title IX Through the Department of Education and Implied Private Right of Action

While Title IX, unlike Title VII, contains no explicit private right of action, the Supreme Court recognized an implied private right of action under Title IX in 1979.[74] In *Cannon v. University of Chicago*, a female medical school applicant sued two private universities for sex discrimination alleging she was denied admission on the basis of her sex.[75] Reversing the lower courts, the Supreme Court held that "[n]ot only the words and history of Title IX, but also its subject matter and underlying purposes, counsel implication of a cause of action in favor of private victims of discrimination."[76]

The Court further extended Title IX's reach in *Jackson v. Birmingham Board of Education*.[77] In that case, the Court held that the Title protected against retaliation, even though the statutory language did not address that type of claim.[78] It grounded this holding in its previous Title IX caselaw which the Court said had "defined the contours of

72. *Id.* Title VI was aimed at ending race discrimination in education, and Title IX's statutory design was modeled after Title VI. Zehrt, *supra* note 19, at 712–15. Title IX's text is, in fact, almost identical to Title VI's. While Title VI requires that "[n]o person in the United States shall, on the ground of race, color, or national origin . . . be subjected to discrimination under any program or activity receiving Federal financial assistance," 42 U.S.C. § 2000d, Title IX requires that "[n]o person in the United States shall, on the basis of sex . . . be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). Moreover, because Title VI also explicitly provides for protection from discrimination in the education employment context, the Department of Health, Education, and Welfare acknowledged Title IX's protection for education employees in 1975. Zehrt, *supra* note 19, at 714.

73. *E.g.*, Doe v. Brown Univ., 896 F.3d 127, 130 (1st Cir. 2018) ("[T]he Court has recognized this right of action extends to student employees . . . ."); Le Strange v. Consol. Rail Corp., 687 F.2d 767, 769–70 (3d Cir. 1982) (applying the *North Haven* holding to the Rehabilitation Act in holding that Act also covers employment discrimination); *see also* Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 171 (2005) (extending Title IX protection to a high school teacher/coach).

74. *See* Cannon v. Univ. of Chi., 441 U.S. 677 (1979).

75. *Id.* at 680.

76. *Id.* at 709.

77. 544 U.S. at 171.

78. *Id.* at 183.

[Title IX's] right of action."[79] The Court cited *Cannon*, as well as *Franklin v. Gwinnet County Public Schools*,[80] which authorized monetary damages as a private remedy;[81] *Gebser v. Lago Vista Independent School District*,[82] which acknowledged deliberate indifference as the basis for a cause of action under the Title; and *Davis v. Monroe County Board of Education*,[83] which brought sexual harassment by a student under Title IX's purview.[84] Because this right of action was implied, not explicit, it follows that unlike Title VII, Title IX does not include a requirement that private litigants exhaust administrative remedies before filing a lawsuit in court.[85] Title IX suits are thus friendlier to plaintiffs, who may bring suit in court without jumping through various hoops or withstanding long waiting periods, as required under Title VII.

2. Title IX's Relationship with the Spending Clause

The lack of an explicit private right of action in Title IX's text follows given its passage under Congress's spending power.[86] The Spending Clause provides that "[t]he Congress shall have the Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the Common Defense and general welfare of the United States."[87] While today the spending power is thought of as one of Congress's enumerated powers,[88] the Founders disagreed about whether that was the case. Famous rivals Alexander Hamilton and James Madison disagreed over the limits of Congress's spending power.[89] Madison argued that the power was limited by Congress's

79. *Id.* at 173.

80. 503 U.S. 60 (1992).

81. Punitive damages are generally unavailable under Title IX, consistent with contract damages and Title VI caselaw holding the same. *See* Barnes v. Gorman, 536 U.S. 181, 187–90 (2002).

82. 524 U.S. 274, 277 (1998).

83. 526 U.S. 629, 633 (1999).

84. Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 173 (2005).

85. *E.g.,* Cannon v. Univ. of Chi., 441 U.S. 677, 707 n.41 (1979) ("[I]ndividual suits are [not] inappropriate in advance of exhaustion of administrative remedies."); Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246, 255 (2009) ("Title IX has no administrative exhaustion requirement . . . .").

86. *See Jackson*, 544 U.S. at 181.

87. U.S. CONST. art. I, § 8, cl. 1.

88. *See* David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1, 10, 16 (1994) (detailing the extent of the spending power).

89. *See* David E. Engdahl, *The Contract Thesis of the Federal Spending Power*, 52 S.D. L. REV. 496, 500 (2007) (summarizing Madison and Hamilton's disagreement and citing Congressional testimony, reports, and personal letters).

other enumerated powers, meaning Congress could use its power of the purse only to advance initiatives made possible by some other Constitutional grant of authority.[90] This interpretation would have limited the Spending Clause's leverage considerably. Hamilton, on the other hand, argued the Spending Clause constituted an enumerated power all its own, giving Congress the ability to regulate broadly, so long as it did so through its distribution of federal funding.[91]

Hamilton's position formed the basis for the "contract thesis" of the Spending Clause,[92] a viewpoint that has now been widely adopted.[93] Spending Clause legislation generally conditions the receipt of federal funds on some specific actions or requirements on the part of the funded party.[94] The contract thesis thus posits that this relationship between the government and the funded party is contractual in nature and the Supreme Court has held that "legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions."[95] It further clarified that "Congress may fix terms on which it shall disburse federal money to the States."[96]

The spending power is not unlimited, however. In *South Dakota v. Dole*, the Supreme Court established four requirements for valid Spending Clause legislation[97]: (1) it "must be in pursuit of the general

90. *Id.*

91. *Id.*

92. *Id.*

93. *See e.g.*, Massachusetts v. Mellon, 262 U.S. 447, 480 (1923) (noting that the State of Massachusetts was not harmed by congressional appropriations which states could accept or reject as they pleased); Helvering v. Davis, 301 U.S. 619, 640 (1937) ("The conception of the spending power advocated by Hamilton . . . has prevailed over that of Madison . . . ."); South Dakota v. Dole, 483 U.S. 203, 206 (1987) (holding that Congress could use its spending power to regulate underage alcohol consumption); Barnes v. Gorman, 536 U.S. 181, 186–87 (2002) (summarizing the Court's history of construing Spending Clause legislation as contractual in nature).

94. Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981).

95. *Id.*

96. *Id.*

97. In *Pennhurst*, the court had begun to enumerate limits on Congress's spending power, though the test is now more commonly associated with *South Dakota v. Dole*. *See Pennhurst*, 451 U.S. at 25 ("The crucial inquiry . . . is . . . whether Congress spoke so clearly that we can fairly say that the State could make an informed choice.").

welfare;"[98] (2) its conditions must be unambiguous, so states are "cognizant of the consequences of their participation;"[99] (3) it must be related or "germane" to the federal interest in the program;[100] and (4) it must not be barred by any other constitutional provision.[101] So long as the *Dole* test is met, Congress may create policy broadly for the "objects of government."[102]

Title IX's statutory enforcement mechanism also evidences its contractual nature. Title IX expressly adopted procedural provisions from Title VI, the legislation on which Title IX was based.[103] Those provisions require funded parties to keep certain compliance reports and provide information to Department of Education officials and the Title's beneficiaries.[104] Students and employees may file a charge of discrimination with the Department of Education within 180 days of the alleged discriminatory act.[105] The Department then investigates the charge[106] and attempts to resolve the matter through "informal means."[107] If resolution through informal means is impossible, the Department may suspend or terminate the federal funding.[108] This enforcement mechanism thus resembles the dissolution of a contractual relationship: the funded party has breached the agreement by engaging in prohibited conduct (by discriminating on the basis of sex) and the funding party thus discontinues performance (by withdrawing funding) as well. Title VII's duty does not share these same contract-like conditions—instead the employer *must* abide by Title VII's requirements or be liable to its employees.[109]

Even when suing under the implied private right of action, Title IX's character as a Spending Clause contract is still evident, as courts have interpreted *Dole*'s notice requirement to be relevant to damages

98. Dole, 483 U.S. at 207.

99. *Id.*

100. *Id.*

101. *Id.* The court has also alluded to a fifth requirement: in order to be enforceable, the scheme must not be coercive. *See id.* at 211.

102. *See* Engdahl, *supra* note 88.

103. 34 C.F.R. § 106.81 (2020) ("The procedural provisions applicable to title VI of the Civil Rights Act of 1964 are hereby adopted and incorporated herein by reference.").

104. 34 C.F.R. § 100.6(a)–(d) (2020).

105. *Id.* § 100.7(b).

106. *Id.* § 100.7(c).

107. *Id.* § 100.7(d).

108. *Id.* § 100.8(a).

109. *See* 42 U.S.C. § 2000e-5(b)–(g).

awards for individual litigants.[110] Because a funding recipient understands its obligations under the Act, any violations are considered intentional.[111] The fact that violations are considered intentional opens the door to greater damages awards than are available to private litigants under Title VII.[112] In contrast with Title VII, where a litigant may recover for both intentional discrimination and discrimination caused by disparate impact,[113] monetary recovery for unintentional discrimination is difficult if not impossible under Title IX.[114] And again, because a court has never held that a private Title IX litigant must exhaust her administrative remedies, she could sue prior to the conclusion of the Department of Education investigation, or even prior to filing a charge with the department at all.[115]

3. Third-Party Beneficiaries May Enforce Spending Clause Contracts

As noted above, the Supreme Court has consistently treated Spending Clause statutes as contracts with funded parties.[116] This application of contract doctrine has extended to treating beneficiaries of the federal funding as third-party beneficiaries of those contractual relationships.[117] This acknowledgment demonstrates that the Court

110. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 287 (1998).

111. *Id.* at 287 ("[W]here discrimination is unintentional, 'it is surely not obvious that the grantee was aware that it was administering the program in violation of the [condition].'" (quoting Guardians Ass'n v. Civ. Serv. Comm'n, 463 U.S. 582, 598 (1983))).

112. Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60, 74 (1992) ("[R]emedies were limited under [] Spending Clause statutes when the alleged violation was *unintentional*. Respondents and the United States maintain that this presumption should apply equally to *intentional* violations. We disagree. The point of not permitting monetary damages for an unintentional violation is that the receiving entity of federal funds lacks notice that it will be liable for a monetary award." (citing Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981))).

113. *See supra* notes 32–35 (outlining Title VII's recovery for intentional discrimination and disparate impact).

114. *Franklin*, 503 U.S. at 74 ("The point of not permitting monetary damages for an unintentional violation is that the receiving entity of federal funds lacks notice that it will be liable for a monetary award." (citing *Pennhurst State Sch. & Hosp.*, 451 U.S. at 17)).

115. *Cf.* Cannon v. Univ. of Chi., 441 U.S. 677, 707–08 n.41 (1979) ("[W]e are not persuaded that individual suits are inappropriate in advance of exhaustion of administrative remedies. Because the individual complainants cannot assure themselves that the administrative process will reach a decision on their complaints within a reasonable time, it makes little sense to require exhaustion.").

116. *Supra* notes 89–96.

117. *E.g.*, Miree v. DeKalb Cnty., 433 U.S. 25, 32–33 (1977); *Cannon*, 441 U.S. 677.

sees private enforcement of Spending Clause contracts as integral to their success and third-party beneficiary enforcement of Title IX should be no exception.

The Supreme Court first acknowledged purported third-party beneficiaries' interests in enforcing Spending Clause laws in *Miree v. DeKalb County*.[118] Shortly after that decision, the Court engaged in a robust analysis of whether private litigants may enforce Title IX's contract as third-party beneficiaries in *Cannon v. University of Chicago*.[119] In recognizing Title IX's implied right of action, the *Cannon* Court applied an existing test for whether Congress intended a private remedy.[120] Originating in *Cort v. Ash*, the test asks:

> (1) "whether the statute was enacted for the benefit of a special class of which the plaintiff is a member"[121] (2) whether there is any indication of legislative intent to create a private remedy[122] (3) whether implication of such a remedy is consistent with the underlying purposes of the legislative scheme,[123] and (4) "whether implying a federal remedy is inappropriate because the subject matter involves an area basically of concern to the States."[124]

In applying the test's fourth factor, the Court arguably dispensed with the issue over which Hamilton and Madison had disagreed.[125] The Court held that the factor was satisfied because the federal government had been protecting citizens from discrimination since the Civil War and that this was not a State or extraneous matter because "expenditure of federal funds [] provides the justification for [Title IX].[126] As to the first factor, the Court expressed no doubt that the plaintiff was "clearly a member of that class for whose special benefit the statute was enacted."[127] Critically, this aligns with the common law in most states, which provides that "[t]he test of the third party's rights is [] whether the parties to the contract intended that a third person should receive a benefit enforceable by the courts."[128]

118. 433 U.S. at 32–33.

119. 441 U.S. at 694–99.

120. *Id.* at 677.

121. *Id.* at 689.

122. *Id.* at 694.

123. *Id.* at 703.

124. *Id.* at 708 (citing Cort v. Ash, 422 U.S. 66, 80–85 (1975), *distinguished on other grounds by* Transamerica Mortg. Advisors, Inc. v. Lewis, 44 U.S. 242 (1979)).

125. *See id.* at 708–09; *see also supra* notes 89–92 and accompanying text (explaining the different historical views on the Spending Clause).

126. *Cannon*, 433 U.S. at 678.

127. *Id.* at 694.

128. 16 AM. JUR. 2d *Proof of Facts* § 55 (2020).

Furthermore, the Supreme Court's statement that the plaintiff in *Cannon* was "clearly" a beneficiary of Title IX follows closely from the Title's text which explicitly references the Act's beneficiaries.[129] The procedural safeguards for the Title require funding recipients to "make available to participants, beneficiaries, and other interested persons" information about the funding received."[130] Thus, the funded party and the beneficiary are not necessarily one and the same. Similarly, the key language most often cited explaining Title IX's mandate does not center on the monetary benefit for the funded party. Rather it centers on the protection Title IX affords participants in federally funded education programs or activities.[131]

The Supreme Court further demonstrated the important role of third-party beneficiaries in Spending Clause contracts in *Blessing v. Freestone*.[132] Justice Scalia clarified:

> The State promises to provide certain services to private individuals, in exchange for which the Federal Government promises to give the State funds. In contract law, when such an arrangement is made (A promises to pay B money, in exchange for which B promises to provide services to C), the person who receives the benefit of the exchange of promises between two others (C) is called a third-party beneficiary.[133]

In *Blessing*, the Court addressed whether one section of the Social Security Act gave rise to "individually-enforceable rights," such that a litigant could sue under 42 U.S.C. § 1983 based on deprivation of Social Security benefits.[134] While the Court declined to hold one way or the other in that instance,[135] it highlighted that the focus falls on Congressional intent and suggested it would be difficult to show "that allowing § 1983 actions to go forward . . . would be inconsistent with Congress' carefully tailored scheme."[136]

129. *Cannon*, 433 U.S. at 694; 20 U.S.C. § 1681(a).

130. 34 C.F.R. § 100.6 (2020). Recall that Title IX regulations incorporated Title IV's procedural provisions by reference. *Id*. § 106.81 (2020).

131. 20 U.S.C. § 1681(a).

132. 520 U.S. 329 (1997). *Blessing* concerned the Social Security Act, which was passed pursuant to the spending power. *See id.* at 332–35; Helvering v. Davis, 301 U.S. 619, 640 (1937) (noting that Congress bears the discretion to distinguish between aims under the Spending Clause).

133. *Blessing*, 520 U.S. at 349 (Scalia, J., concurring).

134. *Id.* at 346–48.

135. The Ninth Circuit below held that the provision of the act in question, Title IV-D, created "enforceable right[s]." *See id.* at 338–39 (citing Blessing v. Freestone, 68 F.3d 1141 (1995)). But the Supreme Court explained that such a finding was "paint[ed] with too broad a brush." *Id.* at 342. The Court held that the alleged rights must be "identif[ied] with particularity." *Id.* Based on the Ninth Circuit's lacking analysis and other factors, the Supreme Court vacated the judgment and remanded the case. *Id.* at 349.

136. *Id.* at 346 (internal citations and quotation marks omitted).

Other examples help illustrate this focus on Congressional intent in defining the role of third-party enforcement of Spending Clause funding law. For example, the Medicaid program was passed pursuant to Congress's spending power and includes an enforcement mechanism similar to Title IX's.[137] Although Medicaid's text does not include an explicit private right of action, courts recognize private litigants' right to enforce its compliance through claims brought under 42 U.S.C. § 1983.[138] In assessing whether private enforcement was appropriate, the Sixth Circuit asked whether "the statutory section was intended to benefit the putative plaintiff."[139] Because Medicaid is designed to benefit individuals, the court reasoned that those individuals had a cognizable interest in Medicaid's enforcement and, thus, had standing to sue.[140] While Spending Clause contracts bind only the funded party and the federal government, certain individuals' interests in those contracts are strong enough that they may be considered third-parties to the agreements. Such a vested interest in a contract also justifies those beneficiaries' ability to enforce the contracts.

Given Title IX's clear purpose of protecting all persons in educational institution settings, it follows that those persons should be able to enforce Title IX's provisions, just as Medicaid beneficiaries may enforce its provisions. This status as third-party beneficiaries to Title IX's contract is distinct from any similar protective status educational institution employees enjoy through Title VII's coverage, a difference that none of the courts implicated in the circuit split have adequately analyzed. Given the two separate types of duty owed to those employees, they should be allowed to enforce both duties and hold their employers to account under all Congressionally created and mandated means.

137. 42 U.S.C. § 1396b(a) ("[T]he Secretary . . . shall pay to each State . . . ."). Even though Medicaid legislation was passed as *part* of the Social Security Act, see *id.* § 1396(a), this example still helps to illustrate how courts grapple with the question of third-party beneficiaries.

138. While the Supreme Court in *Blessing* said the Ninth Circuit's general finding of an enforceable right in Title IV-D of the Social Security Act was inadequate, 520 U.S. at 348, in *Wilder v. Virginia Hospital Ass'n*, the Court found a specific enforceable right that the states will "provide reimbursement for the 'reasonable cost' of hospital services actually provided." 496 U.S. 498, 505, 512 (1990) (quoting Medicaid Act, Pub. L. No. 89-97, § 1902(13)(B), 79 Stat. 286, 345–6 (1965)); *see also* Westside Mothers v. Haveman, 289 F.3d 852, 863 (6th Cir. 2002) (finding privately enforceable right).

139. *Westside Mothers*, 289 F.3d at 862 (citing *Blessing*, 520 U.S. at 341).

140. *Id.* at 863 ("First, the provisions were clearly intended to benefit the putative plaintiffs, children who are eligible for the screening and treatment services.").

C. THE LIBERAL RULES OF ALTERNATIVE PLEADING

The Federal Rules of Civil Procedure (FRCP) favor bringing concurrent claims in a single lawsuit,[141] a preference which many states' rules also share.[142] Rule 8(d)(2) states that a plaintiff may state two or more claims alternatively or hypothetically and that if either claim is sufficient, the pleading itself is sufficient.[143] The rule goes on to indicate that the claims may be inconsistent with one another.[144] Rule 8 further makes clear that complaints may seek multiple different types of relief, including alternative relief[145] and U.S. courts have acknowledged the abolition of the election of remedies doctrine.[146]

The FRCP's liberal pleading rules are a departure from historical common law pleading standards, which typically required plaintiffs to proceed on a single theory of recovery.[147] Today's more relaxed standards help promote efficiency since a single lawsuit can address multiple theories, as well as fairness, as plaintiffs do not automatically lose their day in court just because they bring an erroneous legal theory for their claim.[148] Rule 8(d)(2)'s explicit acceptance of both alternative and *hypothetical* pleading also demonstrates the drafters' desire to make the legal system accessible even before a party knows all of the facts required to prevail on a claim.[149]

141. *See infra* notes 143–45 and accompanying text.

142. *See* Roy W. McDonald, *Alternative Pleading in the United States: I*, 52 COLUM. L. REV. 443, 445–47 (1952) (detailing states with similar alternative pleading rules and practices).

143. FED. R. CIV. P. 8(d)(2).

144. *Id.* at 8(d)(3).

145. *Id.* at 8(a)(3).

146. The election of remedies doctrine provided that a party must choose between conflicting remedies, waiving the right to sue for the other. *See Election of Remedies*, BLACK'S LAW DICTIONARY (11th ed. 2019). *See also* sources cited *infra* note 147.

147. *See* 5 ARTHUR R. MILLER, MARY KAY KANE, & A. BENJAMIN SPENCER, FEDERAL PRACTICE AND PROCEDURE § 1282 (3d ed. 2021); Olympia Hotels Corp. v. Johnson Wax Dev. Corp., 908 F.2d 1363, 1371 (7th Cir 1990) ("It was essential [at common law] that a party be forbidden to plead in the alternative, for that would generate two or more issues for trial. He must therefore elect his remedy . . . . Common law pleading was superseded long ago, however—in the federal courts by the Federal Rules of Civil Procedure, which expressly abolish election of remedies." (citing FED. R. CIV. P. 8(e)(2)).

148. MILLER ET AL., *supra* note 147.

149. It follows that where the facts are lacking, claims may be "hypothetical" in that there simply is not enough evidence yet to prove the elements of the claim. *C.H. Robinson Worldwide, Inc. v. Lobrano*, suggests that failing to plead a hypothetical alternative claim may result in claim preclusion later on. 695 F.3d 758, 765 (8th Cir. 2012) ("Federal Rule of Civil Procedure 8(d) explicitly contemplates this type of hypothetical alternative pleading . . . . [Plaintiff] needed to recognize the very real possibility that the

Furthermore, the Supreme Court has explicitly held that "the distinctly separate nature of [] contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence."[150] Allowing each type of claim to be concurrently pursued in the same action comports with the FRCP.[151]

Ultimately, the differences between Title VII and Title IX are significant despite both laws' aiming at similar ends. While Title VII requires exhausting administrative remedies, a process that may take several months for public employees to complete, Title IX includes no such requirement. In addition, Title IX's passage under Congress's spending power sets it apart from Title VII. Title IX's contractual nature provides an important analytical framework to employ when addressing whether Title VII, the foremost employment discrimination law, preempts Title IX's protection of educational institution employees. These differences indicate that eligible employees should be allowed to take advantage of the legal system's preference for alternative pleading and file both claims in a single suit if they choose.

II. THE CIRCUIT SPLIT CAUSES CONFUSION DESPITE CONGRESS'S CLEAR INTENTION TO BROADLY ADDRESS SEX DISCRIMINATION IN EDUCATIONAL INSTITUTIONS

Despite the differences between Title VII and Title IX, the Federal Circuits have split about whether an aggrieved employee of a Title IX-funded institution must remediate her grievance through Title VII or if she may do so through Title IX instead.[152] While the Fifth and Seventh Circuits, covered in Subsection A, have held that her only remedial avenue is a Title VII claim,[153] the First, Third, Fourth, and Sixth

covenants would be declared unenforceable and plead accordingly [at the time of pleading its other claims].").

150. Alexander v. Gardner-Denver Co., 415 U.S. 36, 50 (1974) (addressing a union member's concurrent claims: a contract claim arising under a collective bargaining agreement and a Title VII discrimination claim).

151. *See* FED. R. CIV. P. 8(d)(2); *infra* Part III.A.1.

152. The relevant circuit court cases are Lipsett v. Univ. of P.R., 864 F.2d 881 (1st Cir. 1988); Doe v. Mercy Cath. Med. Ctr., 850 F.3d 545 (3d Cir. 2017); Preston v. Virginia *ex rel.* New River Cmty. Coll., 31 F.3d 203 (4th Cir. 1994); Lakoski v. James, 66 F.3d 751 (5th Cir. 1995); Ivan v. Kent State Univ., No. 93.00779, 1996 WL 422496, at *2 (6th Cir. July 26, 1996); Waid v. Merrill Area Pub. Schs., 91 F.3d 857 (7th Cir. 1996), *abrogated on other grounds by* Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246 (2009).

153. *Lakoski*, 66 F.3d 751; *Waid*, 91 F.3d 857.

Circuits, covered in Subsection B, have each held that such an employee may choose to sue under Title VII, Title IX, or both.[154] Subsection C establishes that this circuit split is particularly consequential because of the huge number of employees who fall under the purview of both Title VII and Title IX,[155] and because Congress has repeatedly acknowledged the importance of ending sex discrimination in education, a problem that has persisted over the decades between Title IX's passage and the present day.[156]

A. CIRCUITS HOLDING THAT TITLE VII PREEMPTS TITLE IX IGNORE IMPORTANT TITLE IX PRECEDENT

The Fifth Circuit was the first to decide that Title VII preempts Title IX in *Lakoski v. James*.[157] As noted earlier, Lakoski alleged that her repeated denial of tenure amounted to sex discrimination, and she sued under Title IX.[158] The Fifth Circuit held that Title VII was Lakoski's only avenue for relief and dismissed her claim.[159] The court based its decision on: (1) Title IX's lack of administrative scheme required for bringing claims; (2) prior Title VII caselaw; and (3) Title VII's legislative history.[160]

The Fifth Circuit attached great weight to the fact that Title VII included detailed administrative requirements for litigants to bring claims under the statute,[161] while Title IX did not.[162] The court reasoned that the lack of such an administrative mechanism indicated that Congress did not create Title IX to remediate private wrongs.[163] Instead, the court found that allowing employment discrimination claims under Title IX "would disrupt a carefully balanced remedial

154. *Lipsett*, 864 F.2d 881; *Mercy Cath.*, 850 F.3d 545; *Preston*, 31 F.3d 203; *Ivan*, 1996 WL 422496.

155. *See supra* notes 15–17 and accompanying text.

156. *See infra* Part II.C.

157. 66 F.3d 751 (5th Cir. 1995).

158. *See supra* note 15 and accompanying text.

159. 66 F.3d at 754–57.

160. *Id.*

161. *Id.* at 753.

162. *Id.*; *see also supra* note 85 and accompanying text. While complainants under Title IX *may* notify the Department of Education of the alleged discrimination, it is not required. *Supra* note 85.

163. *Lakoski*, 66 F.3d at 754–55. While the *Lakoski* court did admit that the Supreme Court had found private rights of action under Title IX, it nevertheless suggested that cases like *Franklin* and *Cannon* were inapposite because those cases do not "add up to an implied private right of action for damages under Title IX for employment discrimination." *Id.* at 754.

scheme for redressing employment discrimination by employers" like the "congressionally mandated procedures of Title VII."[164]

The *Lakoski* court also relied on prior Title VII caselaw in deciding that Congress did not intend for Title IX to provide an avenue for employees to bypass Title VII's administrative requirements.[165] For example, in *Novotny*, the Supreme Court held that Title VII preempted 42 U.S.C. § 1985 claims because "[i]f a violation of Title VII could be asserted through § 1985[], a complainant could . . . bypass the administrative process."[166] The *Lakoski* court found that the same logic dictates that Title VII should preempt Title IX claims in the context of a sex discrimination claim.[167]

The Fifth Circuit also explained that only a few months before Congress passed Title IX, Congress closed a loophole in Title VII which had exempted educational institutions from its coverage.[168] The court thus concluded that because educational institutions were no longer exempt from Title VII by the time Title IX was passed, Title IX was no longer necessary to address sex discrimination against educational institution employees.[169]

Interestingly, the *Lakoski* decision did tacitly acknowledge the difference in the type of claims each Title created.[170] While the court maintained that the rights protected by Titles VII and IX were the same, it acknowledged that the remedies were different, with Title VII providing "administrative and judicial redress for employment discrimination" and Title IX allowing for termination of funding.[171] This suggests the court was at least aware that the Titles bind educational institution employers to two different types of legal duties. Still, the

164. *Id.* at 754.

165. *Id.* at 755–58. The court in *Waid v. Merrill Area Public Schools* relied on similar reasoning in holding that Title VII preempted a Title IX employment discrimination claim. 91 F.3d 857 (7th Cir. 1996), *abrogated on other grounds by* Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246 (2009).

166. *Lakoski*, 66 F.3d at 755 (quoting Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366, 375–76 (1979)); *see also* Brown v. Gen. Servs. Admin., 425 U.S. 820, 828–35 (1976) (holding that Title VII is the exclusive judicial remedy for discrimination claims brought by federal employees).

167. *Lakoski*, 66 F.3d at 755. The Seventh Circuit saw *Novotny* the same way. *Waid*, 91 F.3d at 862.

168. *Lakoski*, 66 F.3d at 757.

169. *Id.* ("The passage of the Equal Employment Opportunity Act of 1972, which removed Title VII's exemption for educational institutions as well as extending Title VII's coverage to state and local government employees, obviated the need for the Education Amendments to close the loophole in Title VII.").

170. *Id.*

171. *Id.*

Lakoski court effectively ignored the large body of Title IX caselaw that established individual enforcement,[172] cases like *Cannon*,[173] *Jackson*,[174] *Franklin*,[175] and *Davis*.[176]

The Seventh Circuit also addressed this question in *Waid v. Merrill Area Public Schools*.[177] The court relied in part on *Lakoski*[178] in holding that "if Congress intended that one of the statutory schemes should be the exclusive way to vindicate a right, then plaintiffs are required to sue only under that statute."[179] The court went on to note that "Title VII provides a comprehensive statutory scheme for protecting rights against discrimination in employment."[180] But the court did not address how "comprehensive" automatically indicates "exclusive."[181] The next Subsection will address the Fifth and Seventh Circuits' opposition on this question, as four sister circuits have disagreed about Title VII's exclusivity.

B. DESPITE REACHING THE CORRECT OUTCOME, CIRCUITS ALLOWING CONCURRENT TITLE VII AND TITLE IX CLAIMS FAIL TO ADDRESS THE WAYS TITLE VII AND TITLE IX CLAIMS DIFFER IN KIND

As noted above, the First, Third, Fourth, and Sixth Circuit Courts have held that Title VII is not the sole remedy available to employees of Title IX-funded institutions complaining of sex discrimination.[182] Those Circuits have held that these employees may choose to bring a Title IX claim instead, or to simultaneously bring claims under both Titles. The Third Circuit's decision in *Mercy Catholic* provides the most

172. *See supra* note 163 and accompanying text.

173. Cannon v. Univ. of Chi., 441 U.S. 677 (1979) (allowing private enforcement of Title IX by a student denied admission on the basis of sex).

174. Jackson v. Birmingham Bd. of Educ., 544 U.S. 167 (2005) (finding individual enforcement of retaliation actionable under Title IX).

175. Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60 (1992) (authorizing monetary damages to private litigants under Title IX).

176. Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629 (1999) (allowing private enforcement of sexual harassment under Title IX).

177. 91 F.3d 857 (7th Cir. 1996), *abrogated on other grounds by* Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246 (2009).

178. *Id.* at 861.

179. *Id.* at 861 (citing Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366, 378 (1979)).

180. *Waid*, 91 F.3d at 861–62.

181. *Id.* at 861. Presumably the *Waid* court believed the same as the *Lakoski* court, namely that Title VII's complicated administrative requirements indicated Congress intended such exclusivity. *See, e.g.*, *Novotny*, 442 U.S. at 372–77.

182. *Supra* note 154 and accompanying text.

robust analysis of this question, relying heavily on caselaw interpreting Title VII and Title IX.[183]

The *Mercy Catholic* decision found that an individual employee may seek redress under Title IX.[184] The court focused on key Title IX Supreme Court cases including *Cannon*, *North Haven*, *Franklin*, and *Jackson* in finding that Title IX covered the defendant teaching hospital[185] and in holding that a private right of action under Title IX claim was available to the plaintiff.[186] Citing *North Haven*, the Third Circuit explained that Congress was silent as to whether Title IX could provide an alternative to Title VII for relief from employment discrimination.[187] Thus, the court concluded private recovery under Title IX was not barred.[188]

The *Mercy Catholic* court argued in addition that Title VII caselaw bolstered this conclusion. In *Johnson v. Railway Express Agency, Inc.*, the Supreme Court held that a plaintiff with a cognizable Title VII claim could likewise bring the claim under 42 U.S.C. § 1981.[189] The *Mercy Catholic* Court stated that "despite Title VII's 'range' and 'design

183. *Doe v. Mercy Catholic Medical Center* provides the best survey of arguments on this side of the circuit split. *See* 850 F.3d 545, 555 (3d Cir. 2017). In *Ivan*, the Sixth Circuit dealt with a slightly different application of the question. Ivan v. Kent State Univ., No. 93.00779, 1996 WL 422496, at *1 (6th Cir. July 26, 1996). There, the plaintiff was a PhD candidate and alleged sex discrimination as an employee under Title VII, and as a student under Title IX. *Id.* It seems the court thus viewed the claims as sufficiently different, despite applying the same substantive standards to the claims, that it did not engage deeply with the real question at issue in this circuit split. *See id.* at *2. The *Lipsett* and *Preston* decisions actually predate the real start of this disagreement among the circuits. *See* Lipsett v. Univ. of P.R., 864 F.2d 881 (1st Cir. 1988); Preston v. Virginia *ex rel.* New River Cmty. Coll., 31 F.3d 203 (4th Cir. 1994). Nevertheless, both decisions are still relevant and cited in discussions of the split because each circuit allowed a Title IX employment discrimination claim in lieu of or in addition to a Title VII claim, tacitly acknowledging that Title VII does not preempt employment claims brought under Title IX. *See Lipsett*, 864 F.2d at 914–15; *Preston*, 31 F.3d at 208.

184. *Mercy Cath.*, 850 F.3d at 560–63.

185. The plaintiff in *Mercy Catholic* was a medical student completing her residency at defendant hospital. *Id.* at 550. Because of medical residents' somewhat unique status as both medical students and employee-doctors, defendant argued that it was not liable under Title IX. *Id.* at 552.

186. *Id.* at 562–63 (citing *North Haven* and *Jackson* in arguing that Title IX covers persons, a broad term that must include employees).

187. *Id.* at 562.

188. *Id.*; N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 536 n.26 (1982) ("[Concurrent enforcement was a] policy consideration [] for Congress to weigh, and we cannot ignore the language and history of Title IX even were we to disagree with the legislative choice.").

189. 421 U.S. 454, 455 (1975).

as a comprehensive solution' for 'invidious discrimination in employment' . . . a private-sector employee 'clearly is not deprived of other remedies' and isn't 'limited to Title VII in his search for relief.'"[190] Similarly, the Court stated that "Title VII 'manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable' federal statutes."[191] Taken as a whole, the court argued that Title VII did not preempt Title IX employment discrimination claims and that courts on the other side of the split had failed to follow governing Title VII and IX caselaw.[192] Still, the court did not fully address the fact that the two Titles differ fundamentally in kind.

While the Third Circuit did discuss Title IX's character as Spending Clause legislation, it did not fully engage with how or whether that authority should impact its analysis.[193] Nevertheless, the court thought it important to mention Title IX's contractual nature and its express enforcement through funding withdrawal or reduction,[194] perhaps to emphasize the evolution of the law to include private enforcement.[195] Thus, while the Fifth and Seventh Circuits thought Title VII was plainly the only remedy for sex discrimination in employment, the *Mercy Catholic* court provided careful analysis to refute that holding. While *Mercy Catholic* included in-depth discussion of Title VII's intent when it came to rights to relief, a closer look at Congress's purpose behind enacting Title IX provides further aid in settling this split and suggests allowing choice of claims or simultaneous claims under both Titles will better achieve Congress's goals.

C. CONGRESSIONAL ACKNOWLEDGMENT OF SEX DISCRIMINATION IN EDUCATIONAL INSTITUTIONS

This circuit split is of particular circumstance both because of the vast numbers of people it affects, but also because Congress has explicitly acknowledged the problem of sex discrimination in educational institutions. Employment discrimination in schools also has

190. *Mercy Cath.*, 850 F.3d at 560 (quoting *Johnson*, 421 U.S. at 459). Note that contrary to the Fifth and Seventh Circuits suggestion that "comprehensive" means "exclusive," *supra* notes 180–81, the *Mercy Catholic* and *Johnson* courts held the opposite way.

191. *See Mercy Cath.*, 850 F.3d at 560 (quoting Alexander v. Gardner-Denver Co., 415 U.S. 36, 48 (1974)).

192. *Id.* at 563.

193. *Id.* at 552.

194. *Id.*

195. *See supra* Part I.B.1 (detailing the expansion of a private right of action in Title IX claims).

snowballing effects, harming both the discriminated-against employee as well as the student bystanders.[196] During Congressional hearings about House Resolution 16098,[197] widely understood to be the precursor to Title IX, "testimony documented widespread sex discrimination in the employment of women in educational institutions."[198] In addition, the testimony included "statistical evidence documenting a disparity among women in professional occupations, as well as a disparity in salary and rank among faculty at universities."[199] The hearings also demonstrated that women tended to hold lower-paying, non-tenured positions, while men tended to hold more prestigious roles.[200] Advocates for sex discrimination legislation feared that this discrepancy would signal "to children that the teaching of younger children is for women, but that leadership in education and training of older youth and adults is for men."[201] This observation is particularly important because it suggests that sex discrimination in education causes multiple harms; harm to the discriminated-against employee, and harm to students' understanding of their place in society. While the legislative history of Title IX itself is relatively scant,[202] the history that does exist similarly demonstrates Congress's concern about sex discrimination in educational settings in particular.[203]

Congress has repeatedly acknowledged Title IX's role in advancing equity in the educational setting while making clear that the problem it was enacted to address is far from solved. In 1997, on the twenty-fifth anniversary of Title IX's passage, sixty-one congresspeople cosponsored a resolution to acknowledge the Title's importance in

196. *Infra* notes 200–01 and accompanying text.

197. H.R. 16098 was introduced as an amendment to Title VI, designed to expand that Title to outlaw sex discrimination in any federally funded program. 143 CONG. REC. 11,874–75 (1997) (statement of Rep. Bonior).

198. Zehrt, *supra* note 19, at 733 (citing *Discrimination Against Women: Hearings on Section 805 of H.R. 16098 Before Spec. Subcomm. on Educ. of the H. Comm. on Educ. and Lab.*, 91st Cong. 1 (1970)).

199. *Id.*

200. *Id.*

201. *Id.* at 734 (internal quotations omitted).

202. Title IX was enacted as a floor amendment to the Education Amendments Act of 1972, and thus produced no committee hearings or reports. See Zehrt, *supra* note 19, at 741. For a detailed discussion of Title IX and H.R. 16098's legislative history, see *Zehrt*, *supra* note 19.

203. *Id.* at 742 (noting Title IX's sponsor's reporting on the number of discrimination claims filed against colleges and universities); *see also* 143 CONG. REC. 11,874–76 (1997) (statement of Rep. Bonior) (detailing the various attempts at sex-discrimination legislation that led to Title IX).

making significant progress toward equity in the educational arena.[204] Representative Bonior's remarks highlighted that Title IX was intended to help "establish a norm" that girls and women knew they could "be doctors and lawyers and Presidents of the United States."[205] Yet despite progress towards this goal, Title IX remains unenforced in some places,[206] and "there is still much work to be done if the promise of [T]itle IX is to be fulfilled."[207]

More than twenty years after that resolution, sex discrimination in education continues. In 2019, thirty-four senators and four congresspeople cosponsored a resolution reaffirming Title IX's importance in ending sex discrimination in federally funded educational institutions.[208] The resolution highlighted numerous disparities in education outcomes, as well as employment-related issues in education including that while "44 percent of all National Collegiate Athletic Association Division I, Division II, and Division III student athletes are women . . . only 11 percent of the athletic directors of Division I sports are women."[209] The resolution seemed to draw on similar concerns raised during committee hearings for H.R. 16098: that sex disparities in educational institutions have some causal relationship with disparities in other fields as well, perhaps because of a lack of role modeling or representation for girls and women. The resolution cited specific disparities in STEM[210] fields, including that "women earn only . . . 19 percent of computing degrees; . . . 20 percent of engineering degrees; and . . . 42 percent of mathematics degrees."[211] It further noted that although women constitute fifty percent of law school graduates since 1998, they account for less than twenty-three percent of partners at major law firms.[212] The resolution flatly stated that "women continue to experience sexual harassment and assault . . . in the workplace."[213]

204. 143 CONG. REC. 11,874 (1997) (statement of Rep. Bonior).

205. *Id.* at 11,869.

206. *Id.*; *see also* Maggie Mertens, *The Title IX Loophole That Hurts NCAA Women's Teams*, ATLANTIC (Apr. 1, 2021), https://www.theatlantic.com/culture/archive/2021/04/march-madness-could-spark-title-ix-reckoning/618483 [https://perma.cc/G572-FTWC] (noting what amounts to a loophole for the NCAA itself to sidestep Title IX's coverage).

207. 143 CONG. REC. 11,876 (1997).

208. *Murray, Slotkin Lead Colleagues*, *supra* note 66.

209. *Id.*

210. STEM stands for Science, Technology, Engineering, and Math. *See Science, Technology, Engineering, and Math, Including Computer Science*, U.S. DEPT. OF EDUC., https://www.ed.gov/stem [https://perma.cc/9ZQ3-85QM].

211. *Murray, Slotkin Lead Colleagues*, *supra* note 66.

212. *Id.*

213. *Id.*

These statistics are not significant merely for their raw numbers, but also for the broader reality that educational environments send all kinds of signals to students about who or what they are capable of being and doing in the future.[214]

The resolution also emphasized a twelve percent increase in reports of sexual harassment and assault between 2017 and 2018,[215] as well as a fifty percent increase in Equal Employment Opportunity Commission (EEOC) lawsuits in 2018.[216] Lastly, the resolution returned to Title IX's original, broad language, repeating that "no federally funded educational institution shall discriminate against *any person* on the basis of sex"[217] again highlighting that Title IX protects students *and* employees, consistent with its goal to reduce sex discrimination in educational environments. Holding that Title VII preempts Title IX's employment coverage is antithetical to Congress's clear concern about the effects of sex discrimination in schools.

The courts implicated in the circuit split have, thus far, failed to fully address Congress's intent behind enacting Title IX. Instead, they have focused more on what Congress intended for Title VII, and in the process have reached contradictory results. This contradiction is troubling because Congress has clearly remained concerned about sex discrimination in the intervening years since Title IX's passage. Yet the *Lakoski* and *Waid* decisions[218] give that concern short shrift, holding that Title VII is sufficient to address it. The following Part will establish why eligible litigants should be able to choose Title IX instead of Title VII, or both concurrently, in seeking redress for sex discrimination. This solution is consistent with the differing legal duties each Title created, the legal system's treatment of multiple claims arising from the same conduct, and it also acknowledges Congress's deep apprehension over sex discrimination in schools.

III. EMPLOYEES OF FEDERALLY FUNDED EDUCATIONAL INSTITUTIONS SHOULD BE ABLE TO FILE SUIT ALLEGING SEX DISCRIMINATION UNDER EITHER TITLE IX, TITLE VII, OR BOTH SIMULTANEOUSLY

214. *Infra* Part III.D.

215. *Murray, Slotkin Lead Colleagues*, *supra* note 66.

216. *Id.*

217. *Id.* (emphasis added).

218. The *Lakoski* and *Waid* courts both held that Title VII preempts Title IX's coverage for educational institution employees. Lakoski v. James, 66 F.3d 751, 755 (5th Cir. 1995); Waid v. Merrill Area Pub. Schs., 91 F.3d 857, 862 (7th Cir. 1996), *abrogated on other grounds by* Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246 (2009).

The Supreme Court should settle this circuit split[219] by holding that Title VII does not preempt Title IX, allowing eligible litigants to choose their preferred remedial avenue or file suit concurrently under both Titles. This solution acknowledges that Title VII and Title IX claims differ significantly in kind, the former sounding in tort, the latter sounding in contract. In addition, the Court has already acknowledged private enforcement of Spending Clause contracts under other statutes, holding that certain parties are third-party beneficiaries of those contracts.[220] Allowing for concurrent claims also aligns with how rules of civil procedure encourage the simultaneous pleading of contract and tort claims arising from the same conduct.

This Part will also argue that allowing suit under Title IX is especially important because of Congress's continued acknowledgement of sex discrimination in educational institutions and the outsized importance that those institutions play in shaping students' visions of themselves.

A. BECAUSE TITLE VII AND TITLE IX CLAIMS DIFFER IN KIND, EDUCATIONAL INSTITUTION EMPLOYEES SHOULD BE ALLOWED TO CHOOSE TO SUE UNDER EITHER TITLE OR BOTH CONCURRENTLY

Title VII and Title IX impose upon federally funded educational institutions two independent legal obligations not to discriminate on the basis of sex. Thus, claims under these statutes arise out of breaches of different legal duties. Consistent with common law tort and contract jurisprudence, as well as Spending Clause jurisprudence, sex discrimination plaintiffs should be allowed to pursue claims under both laws.

219. Notably, the Supreme Court denied certiorari in *Lakoski*. Lakoski v. Univ. Tex. Med. Branch, 519 U.S. 947 (1996). That said, the more frequently this issue arises, and the more circuits are forced to weigh in, the more likely the Court may be to address it. Nevertheless, it seems unlikely that the average litigant would appeal to the Supreme Court given the cost and time associated with doing so. The average litigant looking for recovery is probably more likely to accept a lower court's holding, take whatever relief she can get, and cease further appeals related to this issue. Thus, it may take a special plaintiff, one whose damages are significantly greater than what Title VII's limits allow in recovery, to return this issue to the Court.

Alternatively, while Congress could certainly do away with this circuit split through legislation, Congress has already spoken on this issue numerous times over the decades. See Part II.C., examining Congress's commitment to gender equality in schools. Thus, the Court should settle the split consistent with Congress's clear intentions for Title IX's purpose and scope.

220. *Supra* Part I.B.3.

1. The Statutes Impose Different Legal Duties on Employers, and Thus Plaintiffs Should be Allowed to Enforce Both Duties Consistent with Caselaw Governing Concurrent Contract and Tort Claims

As discussed in Part I, Title VII violations give rise to liability in tort, while Title IX violations amount to breaches of contract.[221] This difference is a key reason why an aggrieved employee of an educational institution should be allowed to bring both claims in the same suit, or to choose between them at her will. The remedies available under each Title also differ. While both schemes may provide compensatory damages, Title VII damages are capped, but Title IX damages are not.[222] The fact that the same conduct might trigger claims under both laws does not indicate they are duplicative. In fact, the texts of each statute are typically not read in concert with one another, indicating their differences.[223] Thus, while the claims may appear similar, Title IX is interpreted as being the progeny of Title VI, not Title VII.[224] The Supreme Court has expressly acknowledged the differences between both Title IX and Title VII,[225] as well as Title VI and Title VII.[226]

The law has long recognized that putative plaintiffs may file both tort and contract actions arising from the same set of facts. The Supreme Court acknowledged that "the remedy upon the contract does not exclude an alternative remedy built upon the tort . . . . [A putative plaintiff] may sue for breach of contract if he will, but also at his election in trespass on the case."[227] The Tenth Circuit acknowledged the

221. *Supra* Parts I.A.2, I.B.2.

222. Moreover, while punitive damages are available for certain types of Title VII claims, they are generally unavailable for Title IX claims. *See supra* note 81; *supra* Parts I.A.1, I.B.1.

223. Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 168 (2005) (referring to Title IX and Title VII as "vastly different statute[s]").

224. *See supra* note 72 and accompanying text; *see also* Cannon v. Univ. of Chi., 441 U.S. 677, 694–95 (1979) ("Title IX was patterned after Title VI of the Civil Rights Act of 1964 . . . . [T]he two statutes use identical language to describe the benefited class.").

225. *Jackson*, 544 U.S. at 168 (referring to Title IX and Title VII as "vastly different statute[s]").

226. United Steelworkers of Am. v. Weber, 443 U.S. 193, 206 n.6 (1979) ("Title VII and Title VI, therefore, cannot be read *in pari materia*.").

227. Cortes v. Balt. Insular Line, Inc., 287 U.S. 367, 372 (1932), *superseded on other grounds by statute*, 41 Stat. 1007, *as recognized in* Miles v. Apex Marine Corp., 498 U.S. 19 (1990). Similarly, in 1893 a New York court addressed a tort case arising out of a contract between plaintiff and defendant, wherein plaintiff paid defendant to build a drainage ditch. Unfortunately for plaintiff, the ditch was poorly constructed and instead of draining water, his property remained flooded with water. Plaintiff brought a tort claim, alleging the work had been completed negligently. Defendant objected, arguing that plaintiff was required to bring a claim sounding in contract. The court held

same in *SCO Group, Inc. v. International Business Machines Corp.*[228] In *SCO*, the court was asked whether the existence of a contract precluded tort actions arising from conduct already contemplated by that contract.[229] The defendant in *SCO* alleged that the tort claim was precluded by the independent tort doctrine, but the Tenth Circuit disagreed.[230] While the independent tort doctrine holds that a breach of contract does not give rise to a tort claim "unless a legal duty independent of the contract itself has been violated,"[231] if a "societal policy or law . . . gives rise to a duty of care," then an independent tort claim is allowed.[232]

In its analysis of this issue, the *SCO* court highlighted other cases wherein a plaintiff was allowed to bring a tort claim even though the wrongful conduct was already covered by a contract provision. One such example, *Sidney Frank Importing Co. v. Beam Inc.*, involved a whiskey distributor who was allowed to bring a tortious interference with business relations claim even though tortious interference was contemplated by an applicable contract.[233] The *Sidney Frank* court plainly stated that "a contracting party may be charged with a separate tort liability arising from a breach of duty distinct from, or in addition to, the breach of contract."[234] The Tenth Circuit also mentioned *Cargill, Inc. v. Sears Petroleum & Transportation Corp.*,[235] wherein "a misappropriation claim survived alongside a breach of contract claim when the breached agreement specifically governed the use of confidentially shared information . . . ."[236]

for plaintiff, stating: "Plaintiff's right of action did not depend on the existence of a contract between himself and the defendant, but upon the fact that the defendant wrongfully and negligently did an act which injured the plaintiff's property. Defendant owed a duty to the plaintiff not to injure his property by any wrongful or negligent act of his, while performing the contract. That duty did not necessarily depend upon or grow out of the contract." Fromm v. Ide, 23 N.Y.S. 56, 58 (N.Y. Gen. Term. 1893) (citations omitted).

228. 879 F.3d 1062, 1077 (10th Cir. 2018).

229. *Id.*

230. *Id.* at 1076–78.

231. *Id.* at 1076 (quoting Clark-Fitzpatrick, Inc. v. Long Island R.R. Co., 516 N.E.2d 190, 193 (1987)).

232. *Id.*

233. Sidney Frank Importing Co. v. Beam Inc., 998 F. Supp. 2d 193, 210 (S.D.N.Y. 2014).

234. *Id.* (quoting Meyers v. Waverly Fabrics, 479 N.E.2d 236, 239 n.2 (1985) (per curiam)).

235. 388 F. Supp. 2d 37, 65 (N.D.N.Y. 2005).

236. *SCO Grp., Inc.*, 879 F.3d at 1077. While the Title IX/Title VII circuit split presents the problem as if a tort action (Title VII claim) *certainly* exists and a contract

In holding that the plaintiff could recover under both contract and tort theories, the *Cargill* court noted that while the two claims were "interrelated and to some degree mutually dependent" they were distinct enough to coexist.[237] The *Cargill* court highlighted that the causes of action each serve to protect different interests: the confidentiality agreement in question protected unauthorized disclosure of information, whereas the misappropriation of trade secrets action protected the company's commercial assets (its trade secrets).[238] The Tenth Circuit stated:

> The focus is not . . . on whether the tortious conduct is separate and distinct from the defendants' breach of contractual duties . . . . Rather, the focus is on whether a noncontractual duty was violated; a duty imposed on individuals as a matter of social policy, as opposed to those imposed consensually as a matter of contractual agreement.[239]

This same logic applies to Title IX and Title VII. While Title IX gives rise to a contractual duty "imposed consensually"[240] to protect its beneficiaries—students *and* employees—from discriminatory practices under the agreement, Title VII gives rise to a tort-like duty, imposed "as a matter of social policy,"[241] generally protecting the population from discriminatory employment practices. The fact that the two claims may be "interrelated" or "mutually dependent,"[242] or that they may be triggered by the same conduct, does not dictate that one should supersede or preempt the other. Unlike the problem contemplated by the independent tort doctrine, a putative plaintiff implicated in this circuit split is not merely "seeking enforcement of the bargain."[243] Instead, she is seeking enforcement of her employer's Title IX contractual duty not to use federal funds to discriminate, *as well as* her employer's Title VII tort duty not to discriminate based on sex as a

action (Title IX claim) *may* exist, these cases present the inverse question: the contract claim is undisputed and the tort claim remains in contention. This makes sense given the relative ease of recovering punitive damages in tort actions compared to doing the same in contract actions, representing a potential advantage to the plaintiff. *See Brown v. Coates*, 253 F.2d 36, 39 (D.C. Cir. 1958) ("For breaches of contract standing alone, punitive damages are generally not recoverable."). Nevertheless, the same reasoning for supporting concurrent contract-*cum*-tort claims supports the opposite as well.

237. *SCO Grp., Inc.*, 879 F.3d at 1077.

238. *Cargill*, 388 F. Supp. 2d at 65.

239. *SCO Grp.*, 879 F.3d at 1076 (emphasis omitted) (quoting Apple Recs., Inc. v. Capitol Recs., Inc., 529 N.Y.S.2d 279, 281–82 (N.Y. App. Div. 1988)).

240. *Id.*; *see also supra* Part I.B.1.

241. *Id.* (emphasis omitted); *supra* Part I.A.2.

242. *Cargill*, 388 F. Supp. 2d at 65.

243. *SCO Grp., Inc.*, 879 F.3d at 1076 (quoting Sommer v. Fed. Signal Corp., 593 N.E.2d 1365, 1369 (N.Y. 1992)).

matter of social policy. Despite their apparent interrelatedness, each cause of action represents a distinct obligation on the part of an educational employer, and plaintiff should not be forced to forego her rights under either law, nor should courts waive employers' legal obligations under those laws merely because they have similar goals and are triggered by similar facts.

Despite the fact that the claims arising under each Title may clearly coexist because they represent two separate legal duties, the courts involved in this circuit split have either only given this a cursory mention or have failed to address it at all. Given enough thought, this difference could indeed be dispositive of the controversy in the split, and courts should resolve it in favor of litigants' ability to bring concurrent claims.

2. Treating the Claims as Different in Kind Is Consistent with Courts' Treatment of Certain Individuals as Third-Party Beneficiaries of Spending Clause Contracts

Treating the claims as different in kind is consistent with existing caselaw. This Note has referenced numerous cases where courts acknowledged the contractual nature of Spending Clause legislation.[244] This is true not only when the government enforces the contracts through withdrawal of funding, but also when third-party beneficiaries of the contracts enforce them in court.[245] Title IX should be no different.

The Family Educational Rights and Privacy Act (FERPA) provides meaningful contrast to Title IX and Medicaid. Medicaid's text, detailed in Part I, focuses on the states' ability to provide medical assistance "on behalf of families."[246] Courts have relied upon that text in holding that third-party beneficiaries (those individuals Medicaid is designed

244. *See, e.g.*, Massachusetts v. Mellon, 262 U.S. 447 (1923) (assessing the Maternity Act); Helvering v. Davis, 301 U.S. 619 (1937) (assessing the Social Security Act); South Dakota v. Dole, 483 U.S. 203 (1987) (assessing National Minimum Drinking Age law); Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981) (assessing the Developmentally Disabled Assistance and Bill of Rights Act of 1975); Barnes v. Gorman, 536 U.S. 181, 185 (2002) (reading the Americans with Disabilities Act's remedies as coextensive of those available under Title VI).

245. *E.g.*, Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 512 (1990) (regarding Medicaid); Westside Mothers v. Haveman, 289 F.3d 852, 864 (6th Cir. 2002) (regarding Medicaid); Cannon v. Univ. of Chi., 441 U.S. 677, 688–89 (1979) (finding a private cause of action in Title IX).

246. 42 U.S.C. § 1396-1 ("For the purpose of enabling each State . . . to furnish (1) medical assistance *on behalf of families* . . . .") (emphasis added).

to support) may enforce Medicaid's mandates.[247] Similarly, Title IX's text focuses on the protected party, not the funded institution.[248] While FERPA was also passed pursuant to the Spending Clause and conditions federal funding on compliance with the Act,[249] its text focuses on the regulated party, rather than the protected individuals.[250] This difference is not merely semantic. Rather, it helps illuminate the reasoning behind why courts have generally disallowed private enforcement of FERPA but have repeatedly allowed private enforcement of Title IX. Because FERPA's language "create[s] 'no implication of an intent to confer rights on a particular class of persons,'"[251] but Title IX's does, private litigants may not enforce the former but may enforce the latter.[252] This focus on protected individuals also comports with Title VI jurisprudence, where the Court has highlighted again and again that the people Title VI seeks to protect are considered third-party beneficiaries of the Title VI contract.[253]

Title IX's text clearly indicates that the educational institution is not the sole beneficiary of the law, and perhaps not even its prime beneficiary.[254] Without recourse for its violation, Title IX cannot protect its beneficiaries as intended. Treating educational institution employees as third-party beneficiaries is consistent not only with the way the Court has treated similarly situated individuals under other spending power legislation, but also with the Court's own Title IX jurisprudence.

It makes little sense for the Court to acknowledge third-party beneficiaries under other Spending Clause contracts,[255] and yet deny

247. *Supra* Part I.B.3.

248. 20 U.S.C. § 1681(a) ("No person in the United States shall, on the basis of sex, be excluded . . . .").

249. Gonzaga Univ. v. Doe, 536 U.S. 273, 278–79 (2002).

250. 20 U.S.C. § 1232(g)(a)(1)(A) ("No funds shall be made available . . . to any educational agency . . . .").

251. *Gonzaga*, 536 U.S. at 287 (quoting California v. Sierra Club, 451 U.S. 287, 294 (1981)).

252. *Cf.* Alexander v. Sandoval, 532 U.S. 275, 289 (2001) (noting that private litigants may enforce Title VI, after which Title IX was patterned).

253. Barnes v. Gorman, 536 U.S. 181, 189 (2002) ("When a federal-funds recipient violates conditions of Spending Clause legislation, the wrong done is the failure to provide what the contractual obligation requires; and that wrong is 'made good' when the recipient compensates the Federal Government or a third-party beneficiary (as in this case) for the loss caused by that failure." (emphasis omitted)); Guardians Ass'n v. Civ. Serv. Comm'n, 463 U.S. 582, 633 (1983) (Marshall, J., dissenting) ("Because Title VI is intended to ensure that 'no person' is subject to discrimination in federally assisted programs, private parties function as third-party beneficiaries to these contracts.").

254. 20 U.S.C. § 1681(a).

255. For example, Medicaid. *See* Part I.B.3.

that same recognition to educational employees under Title IX. This would essentially amount to the Court needlessly overturning some of its own precedent, by removing educational employees from Title IX's purview as acknowledged in *North Haven*,[256] and partially voiding its implied private right of action as acknowledged in *Cannon*.[257] That outcome is neither viable nor just.

Because Title VII and Title IX give rise to distinct legal duties, the Supreme Court should resolve this split by allowing aggrieved educational institution employees to file suit under both schemes. This is consistent with Spending Clause jurisprudence and a long history of allowing concurrent tort and contract claims at common law. Moreover, as discussed in the next Subsection, the Federal Rules of Civil Procedure prefer for litigants to bring concurrent claims in a single suit.

B. THE FEDERAL RULES OF CIVIL PROCEDURE FAVOR ALTERNATIVE AND HYPOTHETICAL PLEADING OF MULTIPLE CLAIMS IN THE SAME SUIT

This Subsection will establish that allowing litigants to plead violation of multiple legal duties is consistent with the Federal Rules of Civil Procedure, which prefer litigants bring concurrent claims in a single suit. In addition, this preference is not merely theoretical or ideological—it appears in lawsuits all the time and courts have no trouble dealing with dual claims arising from the same conduct.

1. Consistent with the FRCP, Aggrieved Employees Should Be Allowed to Sue Under Both Titles in the Same Lawsuit

As discussed in Part I, Rule 8(d)(2) of the FRCP states the rules' preference for alternative and hypothetical pleading.[258] This is particularly important when addressing Titles VII and IX because while each statute may seek to ameliorate the same problem, the elements of the causes of action are different. Because Title IX meets the Spending Clause contract requirements set out in *Dole*,[259] the educational institution is considered to have notice of its obligation not to discriminate.[260] Because of this notice requirement, in order to succeed on a claim for monetary damages under Title IX, litigants may only plead

256. N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 530 (1982).

257. Cannon v. Univ. of Chi., 441 U.S. 677, 680 (1979). This holding could also effectively overturn the body of caselaw interpreting Title IX as consistent with Title VI, a change that could result in further confusion about what Title IX really means. *See supra* note 69–76 and accompanying text.

258. FED. R. CIV. P. 8(d)(2).

259. South Dakota v. Dole, 483 U.S. 203, 206–07 (1987).

260. Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60, 75 (1992).

and prevail on a claim of intentional discrimination.[261] Contrast this with Title VII, where a litigant need not rely on pleading intentional discrimination. Instead, a plaintiff may allege discrimination resulting in a disparate impact.[262]

Thus, Title IX and Title VII may in some situations truly be alternative, in the sense that a plaintiff may not know all of the facts at the pleading stage to be able to determine whether she will prevail on an intentional discrimination theory under Title IX or if she should instead rely on a disparate impact claim[263] arising under Title VII. This situation also ties into Rule 8's requirement that even "hypothetical" claims be pled together.[264] Where facts are still unknown, causes of action may still be hypothetical, given that the pleading stage does not require *proving* all of the elements of a claim, but rather only requires that the facts *plausibly allege* the elements of the claim.[265] It follows that where a plaintiff believes in good faith that her employer has violated the terms of its Title IX contract but does not have the facts needed to prove *Dole*'s notice requirement,[266] she should be allowed to plausibly allege disparate impact, for which she must rely on Title VII instead.[267] Alternative pleading also enhances efficiency, since a litigant is expected to bring all related claims in one suit, cutting down on duplicative lawsuits in the future.[268]

The ability to plead both claims is consistent with the abolition of the election of remedies doctrine. The doctrine was a product of common law pleading rules, which were concerned less with access to the

261. *Id.*

262. *Supra* Part I.A.1. While the Court has never definitively ruled on whether Title IX disparate impact claims may triumph, the court decided in *Alexander v. Sandoval* that private litigants may not sue under § 602 of Title VI based on a disparate impact theory. 532 U.S. 275, 289 (2001). Given Title IX and Title VI's similarities, it seems likely the Court would hold the same when addressing whether disparate impact claims are available under Title IX.

263. *See supra* Part I.A.1.

264. FED. R. CIV. P. 8(d)(2).

265. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007); Ashcroft v. Iqbal, 556 U.S. 662, 679, 685 (2009).

266. South Dakota v. Dole, 483 U.S. 203, 206–07 (1987).

267. The FRCP would allow such a plaintiff to plead the Title IX violation on "information, and belief" even if she does not have sufficient facts to prove the claim at the pleading stage. FED. R. CIV. P. 11(b)(3) ("[The Party] certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: . . .[T]he factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery . . . .").

268. *See generally* McDonald, *supra* note 142.

courts and more with efficiency at trial.[269] This policy change recognizes that different claims should be adjudicated together in order to ensure "settlement of disputes on their merits."[270] Despite the abolition of the doctrine, double recovery for the multiple claims arising from the same conduct is precluded.[271]

This does not, however, suggest that bringing both types of claims concurrently is somehow duplicative or unnecessary. To the contrary, the different types of relief accorded to Title VII and Title IX litigants reduces the likelihood that a court would even need to wrestle with whether they may be running afoul of a rule barring double recovery. For example, punitive damages are generally unavailable under Title IX, in direct contrast to their availability under Title VII.[272] Given Title VII's cap on compensatory damages,[273] it seems feasible that a jury could wish to award a litigant compensatory damages in excess of that threshold. A plaintiff should have the right to pursue those damages under Title IX.

Because of the legal system's preference for alternative and hypothetical pleading, as well as the pleading stage's requirement to only plausibly allege and not prove causes of action, the Supreme Court should resolve this split in favor of educational institution employees' right to choose between Titles or simultaneously plead both claims.

2. Courts Are Capable of Properly Adjudicating Concurrent Tort and Contract Claims

Not only do the rules prefer concurrent claims, but bringing them is also workable, as evidenced by the cases cited in Part III.A.2. In *Cargill*, the issue of whether the misappropriation and breach of contract claims were sufficiently distinct from each other to survive occurred on cross-motions for judgment as a matter of law or a new trial.[274] The

269. *See generally* MILLER ET AL., *supra* note 147.

270. *Id.*

271. *See, e.g.*, Clappier v. Flynn, 605 F.2d 519, 529 (10th Cir. 1979) ("[A] plaintiff is not entitled to a separate compensatory damage award under each legal theory. Rather, he is entitled to only one compensatory damage award should liability be found on any of the three, or more than the three theories involved.").

272. *Supra* notes 47, 81. Note again that this mimics the available remedies for contract and tort claims.

273. *Supra* notes 47–48 and accompanying text.

274. Cargill, Inc. v. Sears Petroleum & Transp. Corp., 388 F. Supp. 2d 37, 45 (N.D.N.Y. 2005).

parties had already received not only numerous rulings from the presiding judge, but also a jury verdict.[275] The case thus demonstrates that when both types of claims arise from the same conduct, adjudication is workable. Looking specifically at the jury verdict, the jury was able to assess each claim, despite their connections and overlap, and award the plaintiff damages for misappropriation of trade secrets[276] as well as a separate award for breach of contract.[277] After trial, the judge found "no basis to disturb" any of the prior holdings.[278]

In *SCO*, the Tenth Circuit reversed a summary judgment grant based on the independent tort doctrine[279] because "a reasonable jury could find here that regardless of whether IBM performed to the letter of the [contract], IBM nonetheless misappropriated *SCO*'s labor, skills, expenditures or good will through fraud or deception."[280] This holding again demonstrates courts' belief in juries' abilities to successfully perform their role despite the close nature of possibly interrelated claims.[281]

In *Westlake Plaza Realty, Inc. v. Leyden*, a California court of appeals addressed claims of breach of contract, breach of fiduciary duty, and fraud, all arising from the same set of facts.[282] After the trial court awarded "aggregate" damages for all three claims, defendants appealed, arguing plaintiffs had essentially triple-recovered for the same conduct.[283] Again, the California court explained that "[t]he same wrongful conduct may constitute both breach of contract and a tort."[284] The court further explained that "the plaintiff is not prevented

275. *Id.*

276. Cargill, Inc. v. Sears Petroleum & Transp. Corp., No. 5:03-CV-0530, 2005 WL 8147597, *1 (N.D.N.Y. Apr. 12, 2005) (awarding Sears $275,608.81 for misappropriation of trade secrets).

277. *Id.* (awarding Sears $500,025.19 for breach of contract and unfair competition).

278. *Cargill*, 388 F. Supp. 2d at 45.

279. SCO Grp., Inc. v. Int'l Bus. Machs. Corp., 879 F.3d 1062, 1076–78 (10th Cir. 2018).

280. *Id.* at 1078 (internal citations, quotation marks, and modifications omitted).

281. By the time of the Tenth Circuit's holding, this litigation had been ongoing for nearly fifteen years. *Id.* at 1074. It appears the parties never sought judgement on remand regarding this issue, suggesting they may have settled, an outcome the legal system favors. *See* Margaret Meriwether Cordray, *Settlement Agreements and the Supreme Court*, 48 HASTINGS L.J. 9, 37–38 (1996) (explaining the various benefits of settling suits out of court, including reduced burden on the courts, decrease in expenses for parties, more flexibility in allowed outcomes, etc.).

282. No. B187590, 2007 WL 2081343 (Cal. Ct. App. July 23, 2007).

283. *Id.* at *3–4.

284. *Id.* at *4.

from pursuing recovery on multiple theories, but may recover compensatory damages only under one theory."[285] The court highlighted the trial court's acknowledgment that plaintiff could not triple recover and that the award did not violate that principle.[286]

Like these cases, a plaintiff alleging sex discrimination in violation of both Title VII and Title IX is bringing claims sounding in both tort and contract, and doing so in a single lawsuit, just as the FRCP contemplate and prefer. Despite the claims arising out of the same circumstances, courts are able to effectively adjudicate them each on the merits even with overlapping facts and theories. Thus, disallowing simultaneous Title IX and Title VII claims would disregard and disrespect a sweeping body of jurisprudence touching each part of this problem: caselaw acknowledging Titles IX's and VII's differences in kind; caselaw acknowledging interrelated contract and tort claims; the FRCP's thoughtful preferences; and courts' ability to acknowledge all of these in effectively adjudicating claims. The Supreme Court should avoid that outcome and instead allow for litigants to bring either type of claim or both concurrently. The following Subsections will further establish that this outcome is preferable because it reflects respect both for Congress's enumerated powers, as well as its intent behind Title IX.

C. DENYING EDUCATIONAL INSTITUTION EMPLOYEES THEIR RIGHT TO SUE UNDER TITLE IX WEAKENS CONGRESS'S RIGHT TO TAX AND SPEND

Despite some dispute among the United States' founding fathers about the true scope of Congress's spending power,[287] decades of caselaw demonstrate the contract thesis reigns.[288] The Supreme Court should decide this split in favor of concurrent claims in order to respect Congress's constitutional grant of authority to tax and spend. As noted earlier, there are huge numbers of employees under Title IX's purview.[289] It should be no surprise that the federal government disburses a similarly large amount of money to educational institutions.[290] Despite the fact that federal funding may amount to a relatively small proportion of an institution's operating budget, the loss of

285. *Id.*

286. *Id.*

287. *Supra* Part I.B.2.

288. *E.g.,* Massachusetts v. Mellon, 262 U.S. 447 (1923); Helvering v. Davis, 301 U.S. 619 (1937); South Dakota v. Dole, 483 U.S. 203 (1987); Barnes v. Gorman, 536 U.S. 181 (2002).

289. *Supra* notes 15–16.

290. *Supra* note 5 and accompanying text. Though, some would argue the amount

any funding for violation of Title IX could present a sufficiently substantial problem for institutions that the threat of that loss serves as a deterrent to unlawful practices. For example, the University of Minnesota's main campus (Twin Cities), received approximately $835 million in federal funds in 2018.[291] The University of Minnesota-Duluth campus received approximately $70 million in 2018.[292] While those figures constitute less than 25% of the University's entire annual operating budget of $4.2 billion,[293] it is still hard to imagine how such a university could replace sums of that size. Thus, federal funding is a very important carrot at the end of an equally important stick—a framework that mimics years of Congress's accepted flexing of its spending power. Denying educational employees the ability to enforce that arrangement merely because they are protected similarly under another statute neuters Congress's enumerated power[294] and the Supreme Court should avoid that outcome.

D. PRIVATE ENFORCEMENT OF TITLE IX BY EMPLOYEES IS WARRANTED BECAUSE OF EDUCATIONAL INSTITUTIONS' IMPORTANCE IN SHAPING SOCIETAL VALUES AND CONGRESS'S REPEATED ACKNOWLEDGEMENT OF SEX DISCRIMINATION IN EDUCATION SETTINGS

In addition to holding covered institutions to two distinct legal duties, one arising out of a contract and the other arising out of a social policy against discrimination, allowing educational institution employees to enforce Title IX is appropriate because sex discrimination continues to plague educational institutions.[295] This is particularly grievous because of schools' role in shaping gender-related ideas about future ability and achievement. Various studies indicate that a

disbursed actually pales in comparison to what is needed for the United States' education system. *See, e.g.*, Diane Ravitch & Tom Loveless, *Broken Promises: What the Federal Government Can Do to Improve American Education*, BROOKINGS (Mar. 1, 2000), https://www.brookings.edu/articles/broken-promises-what-the-federal-government-can-do-to-improve-american-education [https://perma.cc/RXN5-KH9E]; Knight, *supra* note 5.

291. *Explore the Federal Investment in Your Alma Mater*, *supra* note 4 (scroll down to "My Alma Mater"; click on map; zoom in on Minneapolis, MN; select University of Minnesota-Twin Cities).

292. *Id.* (scroll down to "My Alma Mater"; click on map; zoom in on Duluth, MN; select University of Minnesota-Duluth).

293. *About U Budget*, UNIV. OF MINN., https://finance.umn.edu/budget.html [https://perma.cc/76SD-YS8A].

294. *Supra* Part I.B.2.

295. *See* Zehrt, *supra* note 19, at 733 (citing *Discrimination Against Women: Hearings on Section 805 of H.R. 16098 Before Spec. Subcomm. on Educ. of the H. Comm. on Educ. and Lab.*, 91st Cong. 1 (1970)).

teacher's gender may influence a student's performance. "Assignment to a same-gender teacher improves performance for both girls and boys . . . ."[296] One study found a correlation between women who took introductory-level university classes from woman instructors and those students' later choices of major: "Female students that are assigned to female professors for their introductory math and science classes not only perform better in those classes but are also much more likely to major in science, math, or engineering . . . ."[297] Another study found that the math achievement gap between boys and girls lessens or disappears in societies with more gender equality.[298] Further research suggests that "[f]emale students may avoid male-dominated fields due to biases against women, and the presence of female faculty may mitigate these effects."[299]

Taken together, these studies suggest the very outcome the framers of Title IX and its precursor legislation were afraid of: that sex discrimination in educational institutions would result in harm not only to the victim of the discrimination, but also the students who witness discriminatory treatment and use it inform their understanding of their own roles or future opportunities.[300] When women are excluded from certain roles and departments (like STEM fields) based on their gender, women and girls studying in those departments learn that they are similarly unwelcome. Women role models across departments and specialties may have a positive impact on the net number of women who pursue fields typically dominated by men.[301]

296. Marianne Bertrand, *New Perspectives on Gender*, *in* 4B HANDBOOK OF LABOR ECONOMICS 1543, 1567 (David Card & Orley Ashenfelter eds., 2011).

297. *Id.* (citing Scott E. Carrell, Marianne E. Page & James E. West, *Sex and Science: How Professor Gender Perpetuates the Gender Gap*, 125 Q.J. OF ECON. 1101 (2010)).

298. Luigi Guiso, Ferdinando Monte, Paolo Sapienza & Luigi Zingales, *Culture, Gender, and Math*, 320 SCIENCE 1164 (2008).

299. Eric P. Bettinger & Bridget Terry Long, *Do Faculty Serve as Role Models? The Impact of Instructor Gender on Female Students*, 95 AM. ECON. REV. 152, 152 (2005) (citations omitted).

300. *Supra* notes 198–200.

301. *See* Bettinger, *supra* note 299, at 152–53. Teacher role modeling has also been shown to have an impact on students in other ways not related to the gender of the instructor or student. *See* Anthony Amalba, Francis A. Abantanga, Albert J.J.A. Scherpbier & Walther N.K.A. van Mook, *Community-Based Education: The Influence of Role Modeling on Career Choice and Practice Location*, 39 MED. TCHR. 174 (2016); *see also* Frederick M. Hess & David L. Leal, *Minority Teachers, Minority Students, and College Matriculation: A New Look at the Role-Modeling Hypothesis*, 25 POL'Y STUD. J. 235, 235 (1997) ("[T]he percentage of minority faculty has a significant positive relationship with overall college matriculation rates in urban school districts across the nation.").

Congress's repeated acknowledgment of both ongoing discrimination in education settings, and the fact that the fear of snowballing impacts of that discrimination animated the original enactment of this legislation, are reason enough to ensure eligible employees are not denied their Title IX rights.

While an educational institution employee may sue under Title VII to address these same harms, that choice is particularly difficult and time-consuming because of Title VII's administrative exhaustion requirement, which is especially burdensome for public employees.[302] The lack of an exhaustion requirement under Title IX and, thus, the relative ease with which a plaintiff may sue under the Title, enhances Title IX's ability to address Congress's intended aims. Making it easier for private parties to enforce Congress's goals allows for more expedient improvement of the problems that underscore Title IX's existence—reducing sex discrimination for the benefit of *all persons* in educational institutions.

While Title VII and Title IX seek to right the same wrong, they do so by imposing distinct and independent legal duties on employers, one sounding in tort and the other in contract. Thus, aggrieved employees should be allowed to seek redress for breach of either duty or both duties in the same lawsuit. This outcome comports with the way courts treat concurrent contract and tort claims generally, and importantly, also comports with the fact that courts treat Spending Clause legislation as contracts. Allowing for concurrent Title IX and Title VII claims also respects Congress's various enumerated powers, which it has used at its discretion to address interrelated problems—sex discrimination in workplaces and educational institutions. By allowing a plaintiff to bring her choice of claims, courts respect the issues animating both Titles, as well as the full body of caselaw and legal tradition that allow for simultaneous claims. For these reasons, if presented with this circuit split, the Supreme Court should hold that eligible plaintiffs should be allowed to choose between Title IX and Title VII or file suit under both Titles to remediate the harm sex discrimination causes.

CONCLUSION

Title IX's passage under the Spending Clause makes it significantly different from Title VII, passed under the Commerce Clause, despite the similarities in their end goals. The Supreme Court should treat them as different in settling this circuit split. By looking to its

302. *Supra* Part I.B.1.

own Spending Clause jurisprudence, as well as courts' general treatment of concurrent contract and tort claims, the Court should acknowledge the distinct legal duties each Title imposes on covered entities. Furthermore, acknowledging Title IX's character as Spending Clause legislation helps maintain one of Congress's enumerated powers after significant debate about that power's scope. This outcome also upholds the Federal Rules of Civil Procedure's preference for alternative pleading and is consistent with the reasons behind that preference. Moreover, because schools play a large role in developing students' own self-image, ending sex discrimination in that environment serves society as a whole, while also helping individual victims of discrimination.