Finding a Cure in the Courts: A Private Right of Action for Disparate Impact in Health Care

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FINDING A CURE IN THE COURTS:
A PRIVATE RIGHT OF ACTION FOR
DISPARATE IMPACT IN HEALTH CARE

Sarah G. Steege*

There is no comprehensive civil rights statute in health care comparable to the Fair Housing Act, Title VII, and similar laws that have made other aspects of society more equal. After Congress passed the Civil Rights Act of 1964, Title VI served this purpose for suits based on race, color, and national origin for almost four decades. Since the Supreme Court's 2001 ruling in Alexander v. Sandoval,1 however, there has been no private right of action for disparate impact claims under Title VI, and civil rights enforcement in health care has suffered as a result. Congress has passed new legislation in response to past Supreme Court decisions that read civil rights law too narrowly. In that tradition, this Note argues that courts may interpret § 1557 of the Patient Protection and Affordable Care Act of 2010 as creating a private right of action for disparate impact in health care that is available to diverse protected classes.

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INTRODUCTION

Health reform is one of the key achievements of President Obama's administration, but as often happens, some aspects of this landmark legislation have received relatively little attention. While the Patient Protection and Affordable Care Act\(^2\) prohibits insurance companies from denying coverage based on preexisting conditions, imposing excessive waiting periods, and increasing premiums based on certain factors, including gender and disability,\(^3\) most of these anti-discrimination provisions will not take effect until 2014 and do not include independent means of enforcement.\(^4\) Section 1557 of the bill, simply titled "Nondiscrimination,"\(^5\) may provide a...

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5. PPACA § 1557, 42 U.S.C. § 18116 (2011), provides:
SEC. 1557. NONDISCRIMINATION.
(a) IN GENERAL.—Except as otherwise provided for in this title (or an amendment made by this title), an individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), or section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments). The enforcement mechanisms provided for and available under such title VI, title IX, section 504, or such Age Discrimination Act shall apply for purposes of violations of this subsection.
(b) CONTINUED APPLICATION OF LAWS.—Nothing in this title (or an amendment made by this title) shall be construed to invalidate or limit the rights, remedies, procedures, or legal standards available to individuals aggrieved under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), or the Age Discrimination Act of 1975 (42 U.S.C. 611 et seq.), or to supersede State laws that provide additional protections against discrimination on any basis described in subsection (a).
means of redress for these and other rights guaranteed by the bill. In addition, courts may find that § 1557 confers a private right of action upon individuals who experience disparate impact discrimination in health care on the basis of race, color, national origin, sex, age, or disability. Decades of segregated health services led to widespread racial disparities in access to quality care and in treatment outcomes, and these inequalities continue in the absence of sufficient oversight. This right of action may ameliorate these differences in access by strengthening civil rights enforcement in health care.

When enacting the Civil Rights Act of 1964 and related legislation, Congress envisioned that civil rights enforcement would be conducted as a joint effort by federal agencies and private litigants. Over the years, however, the Office for Civil Rights (OCR) at the Department of Health and Human Services (HHS) has been consistently underfunded and understaffed. HHS OCR is charged with investigating violations of health-related civil rights and privacy laws

(c) REGULATIONS.—The Secretary may promulgate regulations to implement this section.

10. Vence L. Bonham, Race, Ethnicity, and Pain Treatment: Striving to Understand the Causes and Solutions to the Disparities in Pain Treatment, 29 J. L. MED. & ETHICS 52, 52 (2001) (citing "[n]umerous studies [that] have revealed that racial and ethnic minority groups often receive different and less optimal management of their health care than white Americans" and finding such disparities to be "the legacy of a racially divided health system"). See also Marianne Engelman Lado, Unfinished Agenda: The Need for Civil Rights Litigation to Address Race Discrimination and Inequalities in Health Care Delivery, 6 TEXT. F. ON C.L. & C.R. 1, 1-8 (2010).
13. "HHS OCR" will be used to denote the Office for Civil Rights at HHS.
and reviewing providers’ applications to join the Medicare program.¹⁴
Given such a broad statutory mandate and the ever-increasing number of
entities subject to its jurisdiction, the office has had difficulty ensuring
compliance.¹⁵  This trend reflects a failure to emphasize HHS OCR’s
mission by HHS leadership and by Congress, as both entities are
responsible for the office’s budget.¹⁶  Due to its resource constraints, HHS
OCR’s performance in monitoring discrimination against individual
patients and providers has suffered: the office prioritizes reforming
companies’ business practices and states’ administration of health programs
over responding to private complaints,¹⁷ which slows the processing of
such complaints.¹⁸  Moreover, in the past HHS OCR employees have been
inadequately trained to perform investigations, especially disparate impact
analyses.¹⁹

The Supreme Court’s ruling in Alexander v. Sandoval further
impaired civil rights enforcement: the Court held that the private right of

¹⁴.  See generally Office for Civil Rights, U.S. Dep’t of Health & Human Serv.,
nine identified key priorities in FY 2009 and FY 2010, only one is directly related to
enforcing federal civil rights laws.  Fiscal Year 2010 Budget in Brief, Office of the
Sec’y, Office for Civil Rights, U.S. Dep’t of Health & Human Serv.,
2011).

¹⁵.  HHS OCR must monitor more than 500,000 FFA recipients, but in FY 2009
(the most recent year for which complete data are available), only 3,562 covered entities
took corrective action, and 2,314 made substantive policy changes as a result of HHS
OCR intervention.  FY 2011 Online Performance (Appendix 2), Office for Civil Rights,
U.S. Dep’t of Health & Human Serv., http://www.dhhs.gov/asfr/ob/docbudget/
HHS OCR reports that these numbers are low because the office received funding under
a continuing resolution for the first five months of FY 2009 and had to delay hiring new
investigators.  Id.  at 7.  Since Alexander v. Sandoval, HHS OCR has been the only entity
authorized to take action against disparate impact discrimination in health care.  The fact
that vital civil rights enforcement depends so much on Congress’ unpredictable budget
process is troubling.  See Ruqaijah Yearby, Litigation, Integration, and Transformation: Using
Medicaid to Address Racial Inequities in Health Care, 13 J. Health Care L. & Pol’y 325, 352
(2010).

¹⁶.  Yearby, supra note 15, at 332 n.30 (finding that even when HHS is well funded,
the agency has sometimes decreased OCR’s funding).

¹⁷.  See Budget in Brief, supra note 12, at 95 (regarding a recent agreement with
Georgia: “[s]uch statewide agreements provide a cost effective way to ensure that the states
are in compliance with the law with respect to how they administer HHS-funded pro-
grams impacting the lives of tens of millions of citizens”).

¹⁸.  In FY 2009, 31% of civil rights complaints requiring formal investigation were

¹⁹.  Rosenbaum & Teitelbaum, supra note 12, at 231 (finding HHS OCR staff
unable to “identify a ‘nexus’ between existing disparities and a [facially neutral] health
care practice or policy”).
action under Title VI was not available for disparate impact claims.\textsuperscript{20} Although the decision did not affect plaintiffs' ability to sue based on intentionally discriminatory treatment, HHS OCR became the only entity empowered to address disparate impact discrimination in health care following \textit{Sandoval}. This unique authority makes the office's lack of resources and marginalization even more problematic.\textsuperscript{21}

Together, these limits on Title VI litigation and HHS OCR's weaknesses leave many practices that contribute to inequality in health care outside the bounds of civil rights enforcement. Many facially neutral policies and practices may have an impermissible disparate impact on certain communities. For example, a hospital's decision to limit its number of Medicaid beds, to relocate to a wealthier neighborhood, or to refuse to participate in the Medicaid program may often have a disparate impact on communities of color.\textsuperscript{22} Hospitals may close or relocate certain services believed to attract low-income patients, such as emergency care or obstetrics.\textsuperscript{23} Conversion of public and non-profit health facilities to for-profit status may also have a disparate adverse effect on low-income and minority communities in their service areas.\textsuperscript{24} Managed care companies have used race-neutral criteria such as a neighborhood's socioeconomic profile in establishing plan networks so that physicians of color are less able to join.\textsuperscript{25} Finally, physicians may design office hours based on insurance status in a way that discriminates against minority patients.\textsuperscript{26} A private right of action under § 1557 could provide a remedy for members of protected classes affected by such discrimination and by conduct

\textsuperscript{20} \textit{Sandoval}, 532 U.S. at 288–89. Since the provision of Title VI giving rise to its right of action (§ 601) reached only discriminatory treatment, and its regulations (promulgated under § 602) reached disparate impact, the statutory private right of action could not be used against conduct proscribed only by the regulations.

\textsuperscript{21} Rosenbaum & Teitelbaum, \textit{supra} note 12, at 217 & n.11 (commenting on HHS OCR's lack of public or private response to \textit{Sandoval}'s dramatic increase in its responsibilities).

\textsuperscript{22} \textit{Id.} at 227. Authors note that, given the difficulties of the disparate impact burden-shifting regime, claims challenging practices within the same geographic market are more likely to defeat the legitimate business reason defense. \textit{Id.} at 229. See discussion of this regime, \textit{infra} at note 116.


\textsuperscript{24} Lado, \textit{supra} note 10, at 10–11 (citation omitted) ("[T]he result of this process is that '[c]ommunities with high proportions of Black and Hispanic residents [are] four times as likely as others to have a shortage of physicians, regardless of community income.' ").

\textsuperscript{25} \textit{Id.} at 41–42 (citing Sara Rosenbaum et al., \textit{Civil Rights in a Changing Health Care System}, 16 HEALTH AFFAIRS 90, 92 (1997)).

\textsuperscript{26} Rosenbaum & Teitelbaum, \textit{supra} note 12, at 227 n.59 (noting that physicians may give Medicaid beneficiaries access to the office only during certain periods of time).
proscribed by other antidiscrimination sections of the health care bill that lack their own enforcement mechanisms.\textsuperscript{27}

This Note argues that courts should find a private right of action available under § 1557 for disparate impact claims, which would neutralize the effect of \textit{Alexander v. Sandoval} and rejuvenate civil rights enforcement in health care. Part I grounds this argument in the existing jurisprudence governing when courts find private rights of action, particularly for disparate impact. Part II applies this method of analysis to § 1557, finding a private right of action under § 1557 in Part II.A and evaluating its application to instances of disparate impact discrimination in Part II.B. In keeping with modern courts' dominant approach, Part II.B.1 begins with a strict textual interpretation of § 1557; then Part II.B.2 places § 1557 in context and evaluates the Patient Protection and Affordable Care Act's legislative history and the bill as a whole; and Part II.B.3 analyzes § 1557 as a new addition to Spending Clause doctrine. Part III examines counterarguments and limitations to this right of action, but concludes that courts are likely to find it available to plaintiffs in at least some circumstances.

\section{Availability of Private Rights of Action for Disparate Impact Claims Under Existing Civil Rights Laws}

\subsection{Private Rights of Action}

At the time Congress passed the Civil Rights Act of 1964, courts took an expansive view of plaintiffs' need to access justice and courts' capacity to facilitate that process.\textsuperscript{28} Early cases finding such rights of action proceeded from English and American common law governing the availability of legal redress: legal rights and remedies were considered one and the same, not separate inquiries,\textsuperscript{29} and judges were flexible in finding rights of action where the legislature had created statutory rights and

\textsuperscript{27} See supra notes 3--4. See also PPACA § 1001, 42 U.S.C. § 300gg-12 (2011) (prohibiting insurance companies from rescinding coverage without specifying consequences).

\textsuperscript{28} E.g., \textit{J. I. Case Co. v. Borak}, 377 U.S. 426, 433 (1964) ("When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted.") (citation omitted). See also \textit{Alexander v. Sandoval}, 532 U.S. 275, 287 (2001) (finding \textit{Borak} to represent "the understanding of private causes of action that held sway 40 years ago when Title VI was enacted").

\textsuperscript{29} See \textit{Franklin v. Gwinnett Cnty. Pub. Sch.}, 503 U.S. 60, 66--69 (1992) (quoting 3 \textit{William Blackstone, Commentaries} 23 (9th ed. 1783), and tracing the development of this common law doctrine through Supreme Court cases in the 19th and early 20th Centuries).
duties. Courts followed this doctrine in the early to mid-twentieth century to infer private rights of action under many statutes and to make both equitable and financial remedies available when plaintiffs so required. Just three weeks before the Civil Rights Act was enacted, Justice Clark epitomized this doctrine: “it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose.” Given this legal regime, Congress passed the Civil Rights Act assuming that courts would apply these methods of analysis to the new law. Legislators intended a public-private nexus of enforcement: administrative action and litigation by the relevant federal agency, supplemented by private plaintiffs’ suits. This combination would be the most effective way to enforce these statutes, given the government’s limited resources and the potential for politicized underenforcement.

Private litigation was also valued on its own merits as an efficient method of achieving Congress’ goal of combating discrimination. Empowering individuals to litigate afforded injured parties some compensation for their grievances, while forcing the discriminatory entity to change its practices. In bringing a civil rights suit and obtaining an injunction, the plaintiff was seen to act “not for himself alone but also as a ‘private attorney general,’ vindicating a policy that Congress considered of the highest priority.” The suit would address behavior that no doubt infringed upon others’ civil rights as well. Such litigation was necessary to

30. Donald H. Zeigler, Rights, Rights of Action, and Remedies: An Integrated Approach, 76 Wash. L. Rev. 67, 68 (2001) (Courts often “filled the void” when legislatures did not provide enforcement mechanisms for such statutes, without asking whether the statute had a right of action: “[v]iolation of the right alone required a remedy.”). The author differentiates between these three concepts: a legal right “imposes a correlative duty on another to act or refrain from acting for the benefit of the person holding the right”; a right or cause of action is “the right ‘to seek judicial relief from injuries caused by another’s violation of a legal requirement’” (citation omitted); and a remedy is the relief granted by a court, such as damages or an injunction. Id. at 68 n.3. “A cause of action thus connects a right and a remedy. It is an essential link between a right and a remedy that enables the right to be enforced. Plainly, if you have no cause of action, you have no right and no remedy.” Id. at 108.

34. Id.
35. See also Michael Waterstone, A New Vision of Public Enforcement, 92 Minn. L. Rev. 434, 450–51 (2007); Juliet Stumpf & Bruce Friedman, Advancing Civil Rights Through Immigration Law: One Step Forward, Two Steps Back?, 6 N.Y.U. J. LEGIS. & PUB. POL’y 131, 135 (2003) (finding that private actions are particularly important when the government is “less likely to exercise its power on behalf of those who, lacking a majority in a democratic society, have less influence on the political process”).
37. Id.
achieve adequate civil rights enforcement, particularly for statutes where Congress intended this blend of public and private action. 38

Although the Civil Rights Act did not explicitly provide for a private right of action, courts soon inferred such rights of action under the Act and related statutes. Reasoning from Title VI precedent, the Supreme Court in Cannon v. University of Chicago evaluated a female applicant's claim that she was denied admission to the university based on her sex and found an implied private right of action available to enforce Title IX. 39 Cannon exemplifies courts' tendency to analogize among similar civil rights statutes and infer both Congressional intent and correspondingly similar legal interpretations from parallel texts. 40

The private right of action under § 504 is also the product of judicial analogy. Like the Cannon Court, the Seventh Circuit—the first to be faced with the question—began its analysis of § 504's text and regulations using the Supreme Court's standard for finding private rights of action as elucidated only two years before in Cort v. Ash. 43 As part of its analysis, the


39. Cannon v. Univ. of Chi., 441 U.S. 677, 696 (1979) (finding that the existence of a Title VI right of action had already been "squarely decided" in "an opinion that was repeatedly cited with approval and never questioned" between the time it was handed down and Title IX's enactment five years later (citing Bossier Parish Sch. Bd. v. Lemon, 370 F2d 847, 852 (5th Cir. 1967))).

40. Congress used Title VI as the model in drafting § 1557's other listed statutes. See 42 U.S.C. § 2000d (2011) ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."). Title IX and the Age Discrimination Act substitute their own protected classes with otherwise identical language. Section 504 uses the same text with a few modifications for the disability context: "No otherwise qualified individual with a disability in the United States ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination ... ." 29 U.S.C. § 794(a) (2011).

41. Days, supra note 33, at 984 & n.27 (Congress "may have found ... some sense of security in adopting and altering, only slightly, provisions that had already received legislative blessing and favorable judicial interpretation.").

42. See Lloyd v. Reg'l Transp. Auth., 548 F2d 1277 (7th Cir. 1977). The court evaluated disabled plaintiffs' claim that municipal defendants' failure to make their public transportation systems accessible constituted discrimination and held that § 504 established affirmative rights, implying a private cause of action under the statute to vindicate such rights.

43. Cort v. Ash, 422 U.S. 66, 78 (1975) ("First, is the plaintiff 'one of the class for whose especial benefit the statute was enacted,' that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basical-
court used legislative intent as evidence of affirmative rights under § 504. For example, the court found that Congress enacted § 504 after the Supreme Court had held unanimously that Title VI conferred a private right of action.44 Looking at the parallel language of Title VI, Title IX, and § 504, the court found that this "near identity" in phrasing among the statutes meant that § 504 had been "patterned after" the other two statutes.45 At least for that purpose, existing jurisprudence on Title VI's right of action therefore controlled the court's evaluation of § 504.46 The court then applied the Cort test and found an implied private right of action under § 504.47

Since Cort, courts have grown significantly more exacting in finding a right of action to be available to plaintiffs. While Cort elucidated four factors to guide judicial analyses, the Court did not require that those factors be given equal weight.48 Instead, "[t]he ultimate question, in respect to whether private individuals may bring a lawsuit to enforce a federal statute . . . is a question of congressional intent."49 Without finding such specific intent, courts may not imply a right of action, regardless of its compatibility with the statute or its policy merit more generally.50 Perhaps reflecting this straitened standard, the Age Discrimination Act speaks more directly to the question than the other civil rights statutes listed in § 1557, referring specifically to federal district court actions by "any interested person."51 Recent cases demonstrate plaintiffs' ability to obtain injunctive relief against FFA recipients after exhausting their administrative remedies, as required by the statute.52

44. Lloyd, 548 F.2d at 1280 (citing Lau v. Nichols, 414 U.S. 563 (1974); Bossier Parish Sch. Bd. v. Lemon, 370 F.2d 847 (5th Cir. 1967)).

45. Lloyd, 548 F.2d at 1281, 1285.

46. Id. Other circuit courts soon followed suit in recognizing § 504 cases brought under such an implied right of action. See Baker v. Bell, 630 F.2d 1046, 1055 & n.21 (5th Cir. 1980) (collecting cases from that and other circuits).

47. Lloyd, 548 F.2d at 1284.


52. 42 U.S.C. § 6104(f) (2011). See, e.g., Sindram v. Fox, 374 Fed. App'x 302 (3d Cir. 2010). Plaintiffs are unable to sue the agency itself where an adequate remedy is available against the private defendant. See Smith v. Dep't of Educ., 158 Fed. App'x 821, 823 (9th Cir. 2005). See also Krauskopf et al., supra note 51 (citing Stephanidis v. Yale Univ., 652 F.
The Sandoval Court further clarified that courts do not find a right of action based on the prevailing legal standards from the time the relevant statute was enacted. No matter when a given statute was enacted, a court would evaluate Congressional intent based on the current Supreme Court's dominant approach to statutory interpretation: interpreting the statutory language and using legislative history for clarification.

B. Disparate Impact

As outlined in Part I.A, courts have recognized private rights of action under all four statutes listed in § 1557. Since Sandoval, § 504 is the only one of § 1557's four listed statutes with a private right of action that has been explicitly acknowledged as reaching claims of disparate impact.

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53. When the Sandoval respondents made this argument, the Court famously replied: "Having sworn off the habit of venturing beyond Congress's intent, we will not accept respondents' invitation to have one last drink." Sandoval, 532 U.S. at 287. If the goal of statutory construction is to ascertain Congress' intent in passing a statute, however, it would seem to follow that Congress drafts its language with contemporaneous legal standards in the background. See, e.g., Rosenbaum & Teitelbaum, supra note 12, at 240-41 & n.115 (characterizing this remark as "one of the more insulting passages in any Court decision in recent memory" and citing cases where the Court took legal context into account when interpreting legislation).

54. See Zeigler, supra note 30, at 126 & nn.328-29 (finding that courts often begin statutory construction by analyzing the text both as a general approach and in implied right of action cases).

55. WILLIAM N. ESKRIDGE, JR., ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 849, 941-50 (4th ed. 2007) [hereinafter ESKRIDGE, CASES & MATERIALS] (excerpting Karl Llewellyn, Remarks on the Theory of Appellate Decisions and the Rules or Canons About How Statutes Are To Be Construed, 3 VAND. L. REV. 395, 401-06 (1950) (listing this approach among other canons of construction, each with its counterpoint); outlining the arguments made by legal realists, critical scholars, economists, linguists, and those who find canons of construction to be a way to draw "public values" from other sources into interpreting the text (internal citations omitted)). But see ESKRIDGE, CASES & MATERIALS, supra at 989 (Justice Scalia has criticized this use of legislative history, calling the text "the alpha and the omega of statutory interpretation" since only the statute itself was enacted as "authoritative law" under the Constitution. This critique has pushed the Court to be more cautious in its evaluation of legislative history and motivated those who argue before it to "lead with their textual arguments and use legislative history to back up these contentions rather than as the touchstone of statutory meaning."). Nonetheless, many commentators still find legislative history helpful, id. at 990 n.1, and Justice Scalia seems to be an outlier on the Court in his broad rejection of legislative history, id. at 990-91.
Finding a Cure in the Courts

The Supreme Court recognized plaintiffs' claims under § 504 for the purposes of proceeding to the merits in Alexander v. Choate, analyzing whether Tennessee’s reduction in the number of annual inpatient hospital days covered by Medicaid was an actionable disparate impact under the § 504 statute or regulations. The Court held two years earlier in Guardians Association v. Civil Service Commission of New York City that Title VI proscribed only intentional discrimination, and the relevant language in § 504 was similar to that in Title VI. In Choate, Tennessee argued that § 504 had the same limited scope. The Choate Court agreed with the state's premise—that since § 504 was “modeled in part” on Title VI, “the evolution of Title VI regulatory and judicial law is therefore relevant to ascertaining the intended scope of § 504”—but also cautioned against “too facile an assimilation of Title VI law to § 504.” Moreover, the Court found that, to the extent that Guardians was relevant in interpreting § 504, Guardians suggested that § 504’s regulations “could make actionable the disparate impact challenged in this case.”

56. The Sandoval Court clarified that the private right of action under Title VI is limited to intentional discrimination. No court has yet ruled on whether the right of action under the Age Discrimination Act is available for disparate impact claims, but actions with “disproportional effect on persons of different ages” are permissible in certain circumstances. 45 C.F.R. § 91.14 (2011). The Supreme Court has not addressed the question of whether the implied private right of action under Title IX encompasses disparate impact, and lower courts have split on the issue. David S. Cohen, Title IX: Beyond Equal Protection, 28 Harv. J. L. & Gender 217, 250–51 nn.247–48 (2005) (citing against disparate impact Horner v. Ky. High Sch. Athletic Ass’n, 206 F.3d 685, 689 (6th Cir. 2000); Cannon v. Univ. of Chi., 648 F.2d 1104, 1109 (7th Cir. 1981); Weser v. Glen, 190 F. Supp. 2d 384, 395 (E.D.N.Y. 2002); citing in support of disparate impact Cohen v. Brown Univ., 991 F.2d 888, 895 (1st Cir. 1993); Mabry v. State Bd. of Cmty. Coll. & Occupational Educ., 813 F.2d 311, 316 n.6 (10th Cir. 1987); Mehus v. Emporia State Univ., 295 F. Supp. 2d 1258, 1271 (D. Kan. 2004); Sharif v. N.Y. State Educ. Dep’t, 709 F. Supp. 345 (S.D.N.Y. 1989)). Some courts, though, have used standards of intent in Title IX sexual harassment cases that were significantly more lax than intent is construed under the Equal Protection Clause. Cohen, supra at 252–53, 253 n.262. Despite their parallel text, the Supreme Court has also interpreted Title IX and Title VI differently “when their distinct histories require.” Id. at 276–77, 277 n.390 (citing N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 529 (1982)). Finally, the Title IX disparate impact regulations, like those under § 504, were debated in Congress but not disapproved, id. at 246–47, which may also give rise to the presumption that they reflect Congress’ intent. See infra notes 106–107 and accompanying text.


58. Guardians Ass’n v. Civil Serv. Comm’n, 463 U.S. 582, 584 (1983). Despite this limit on Title VI itself, the Court also held that agencies’ Title VI regulations defining actions with impermissible disparate impacts were valid. Id. at 584 & n.2.


60. Choate, 469 U.S. at 292–94.

61. Id. at 293 n.7.

62. Id. at 294.
The Choate Court recognized two other considerations that would motivate analyzing § 504 more independently from Title VI: the influence of Title VI-specific interpretations on the Court's ruling in Guardians63 and the distinct legislative history of § 504. The antidiscrimination provisions of Titles VI and VII of the Civil Rights Act had been in effect for several years when the Rehabilitation Act of 1973 was enacted, and Congress was aware that agencies' regulations under those statutes included a disparate-impact standard.64 When Congress later adopted language in § 504 similar to that of Title VI, the members were aware that the Title VI language "consistently had been interpreted to reach disparate-impact discrimination."65 By refusing to limit § 504 to intentional discrimination, "Congress could be thought to have approved a disparate-impact standard for § 504."66 Distinguishing Title VI based on these factors enabled the Court to find a private right of action for disparate impact claims under § 504.

In finding that § 504's private right of action was available for at least some cases of disparate impact, the Choate Court also relied on the fact that this interpretation was necessary to give effect to Congressional intent.67 When § 504 was passed, Congress perceived such discrimination as "the product, not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect."68 If the language were construed to limit the Act only to intentional discrimination, it would be "difficult if not impossible" to reach much of the conduct Congress hoped to change.69

63. For seven Justices on the Guardians Court, the question of whether Title VI itself reached disparate impact claims had already been answered in University of California Regents v. Bakke, 438 U.S. 265 (1978), and it was unclear how they would have ruled absent the force of stare decisis. Choate, 469 U.S. at 294 n.11. See Guardians, 463 U.S. at 612 (O'Connor, J., concurring in the judgment) ("Were we construing Title VI without the benefit of any prior interpretation from this Court, one might well conclude that the statute was designed to redress more than purposeful discrimination.").
64. A Presidential task force and the Department of Justice drafted model Title VI enforcement regulations, and every Cabinet department and some 40 federal agencies adopted parallel standards. Choate, 469 U.S. at 294–95 n.11 (citing Guardians, 463 U.S. at 629–30 (Marshall, J., dissenting)). These regulations were controversial: in 1966, the House of Representatives considered but rejected an amendment that would have limited Title VI to intentional discrimination. Id.
65. Id. at 295 n.11.
66. Id. at 294 n.11. Although courts are often hesitant to adopt this pattern of reasoning, the inference here is stronger given that this is not simple Congressional inaction: Congress considered but did not overturn the agency's interpretation. See infra notes 106, 107, and 156 and accompanying text.
67. Choate, 469 U.S. at 296–97 (citing senators' descriptions of the problems that they hoped to fix with the bill and concluding that "[t]hese statements would ring hollow if the resulting legislation could not rectify the harms resulting from action that discriminated by effect as well as by design.").
68. Id. at 295 (citing floor statements by members of Congress who sponsored § 504 or were otherwise pivotal in ensuring its inclusion in the Rehabilitation Act).
69. Id. at 296–97.
But evaluating the impermissible impact of otherwise neutral policies and practices on individuals with disabilities is difficult, since they are not “similarly situated” to those without disabilities. The Court did not want to impose such a burden absent a clear statement of Congress’ intent to that effect. The Court therefore “assume[d] without deciding that § 504 reaches at least some conduct that has an unjustifiable disparate impact,” without further defining the scope of cognizable claims.

As Ricci v. DeStefano is the Supreme Court’s most recent interpretation of disparate impact doctrine, a brief discussion of this case is relevant here. In Ricci, the Court held that the city of New Haven could not discard test results that would have led to racially unequal promotions in the fire department. Discarding the results would constitute “race-based action . . . impermissible under Title VII” of the Civil Rights Act unless the city could demonstrate “a strong basis in evidence” that absent that action, it would be liable for disparate impact under Title VII. Ricci marked the first time that the Court found the doctrines of disparate impact and disparate treatment in conflict under Title VII. Although the majority chose not to reach plaintiffs’ claim that the city’s action also violated the Equal Protection Clause, the decision generated significant controversy over the future of disparate impact suits, both in theory and in practice.

70. Id. at 298–99 (finding that a pure disparate-impact model as applied to individuals with disabilities would impose an excessive burden on FFA recipients and require intense administration and enforcement by agencies).
71. Id.
72. Id. at 299.
73. Later, the Sandoval Court included § 504 as an example of a statute whose regulations were an “authoritative interpretation”: given its unique history, the Sandoval Court found it reasonable that agencies had interpreted § 504 to cover disparate impact discrimination and, accordingly, respected the Choate Court’s finding of a disparate impact right of action under § 504. Alexander v. Sandoval, 532 U.S. 275, 285 (2001) (citing Choate, 469 U.S. at 299, 309).
75. Id. at 2664–65.
78. See Richard A. Primus, The Future of Disparate Impact, 108 Mich. L. Rev. 1341, 1344 (2010) (“Ricci portrayed disparate impact doctrine as creating an exception to Title VII’s prohibition on formal or intentional discrimination. The view that disparate impact doctrine constitutes an exception to disparate treatment doctrine entails the view that the two doctrines are conceptually in conflict—or, more precisely, that they would be in conflict if one were unable to carve itself out of the other.”).
80. See, e.g., Primus, supra note 78, at 1344 (“A conflict between disparate impact and disparate treatment is also a conflict between disparate impact and equal protection. And that makes things look bleak for the disparate impact standard.”); Girardeau A. Spann, Disparate Impact, 98 Geo. L.J. 1133, 1147 (2010) (expressing doubt that the “strong basis in evidence” standard could ever be satisfied); Charles A. Sullivan, Ricci v. DeStefano: End of the Line or Just Another Turn on the Disparate Impact Road?, 104 Nw. U.
It is unclear how the Ricci Court's questions about disparate impact will affect cases brought outside the Title VII context. However, lower courts may read the ruling as a statutory decision that is not even relevant to all Title VII cases. The Supreme Court also seems reticent to address the Constitutional question: in a Title VII disparate impact case decided eleven months after Ricci, the Court confined its holding to "the only question presented[:]...whether the claim petitioners brought us is cognizable. Because we conclude that it is, our inquiry is at an end." Furthermore, all of the decisions applying Ricci to date concerned claims that were brought under Title VII. Finally, of several potential readings of the Ricci premise, only one—that ameliorating disparate impact requires actions that are "per se in conceptual conflict" with disparate treatment and, therefore, equal protection—is fatal to the future of disparate impact more generally. Despite the uncertainty that Ricci may have injected into disparate impact doctrine, courts are likely to analyze § 1557 in keeping with its predecessor civil rights statutes—Title VI, Title IX, § 504, and the Age Discrimination Act—rather than Title VII.

II. SECTION 1557'S PRIVATE RIGHT OF ACTION FOR DISPARATE IMPACT

This Part applies to § 1557 the standards that modern courts use to analyze whether a private right of action exists under a given statute and whether such a right extends to disparate impact. Courts may find that Congress intended to incorporate the listed statutes' existing rights of action within § 1557's enforcement mechanisms. Based on a review of § 1557's text, legislative history, and context within PPACA and Spending Clause jurisprudence, the right of action under § 1557 should extend to disparate impact claims.

L. Rev. 411, 426 (2010) (finding that although Ricci "at least theoretically ... made things more complicated," employers may still have room to maneuver in taking actions that would have disparate impact on non-minority employees).

81. See, e.g., United States v. Vulcan Soc'y, 637 F. Supp. 2d 77, 83 (E.D.N.Y. 2009) (distinguishing Ricci on the grounds that Ricci evaluated a potential disparate impact violation of Title VII, whereas Vulcan Society addressed an actual violation); cf. NAACP v. N. Hudson Reg'l Fire & Rescue, 707 F. Supp. 2d 520, 531 n.8 (D.N.J. 2010) (finding that although Vulcan Society reached the "correct Ricci result, ... by its terms [Ricci] applies not just to its unique facts, but to any situation when the demands of Title VII's disparate treatment and disparate impact mandates present conflicting demands").

82. Lewis v. City of Chi., 130 S. Ct. 2191, 2200 (2010).

83. See Primus, supra note 78, at 1344-45 (finding that courts may distinguish between "formally race-neutral actions intended to improve the position of disadvantaged racial groups" (1) that are taken by courts as opposed to those taken by public employers, as in Ricci, and (2) "those that have visible victims [as in Ricci] and those whose costs are more diffuse").
A. Private Right of Action

Courts will likely begin with a plain reading of the statute. Judges will search for textual evidence of Congress’ intent to create both a cognizable right—which usually must be vested in a particular class of people whose interests are entitled to be vindicated—and a private right of action enabling that class of people to bring suit.\(^4\) Section 1557 satisfies both requirements. Courts look first for rights-creating language in the statute at issue.\(^5\) The Supreme Court has explicitly recognized the relevant language in § 1557 as creating such rights when used in other civil rights statutes.\(^6\)

Second, courts should find that Congress intended a private right of action to be available under § 1557 by virtue of its list of statutes. The four laws that give rise to § 1557’s enforcement mechanisms have judicially recognized private rights of action that are also made available for violations of this provision.\(^7\) When Congress has referred to prior civil rights statutes in bill text, courts have both inferred a private right of action and made available a previously implied private right of action under the new statute.\(^8\) In effect, Congress is deemed to have intended the incorporation of contemporaneous legal interpretations into the new statute.\(^9\) This “re-enactment rule” applies when a statute is literally

\(^4\) Gonzaga Univ. v. Doe, 536 U.S. 273, 284 (2002) (citing Alexander v. Sandoval, 532 U.S. 275, 286 (2001)). See also Zeigler, supra note 30, at 68 n.3 (distinguishing the related concepts of a right, a private right of action, and a remedy).

\(^5\) Gonzaga Univ., 536 U.S. at 283–84 ("For a statute to create such private rights [of action], its text must be 'phrased in terms of the persons benefited.'" (citations omitted)). Compare § 1557 text, supra note 5, with Title VI and Title IX text, supra note 40.

\(^6\) Id. (“Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972 create individual rights because those statutes are phrased 'with an unmistakable focus on the benefited class.'” (citations omitted)). Compare § 1557 text, supra note 5, with Title VI and Title IX text, supra note 40.

\(^7\) PPACA § 1557(a), 42 U.S.C. § 18116(a) (2011). Such rights are among the “enforcement mechanisms provided for and available under” those statutes. See text accompanying notes 138–144 for discussion of the phrase “enforcement mechanisms” as including such rights of action.

\(^8\) See, e.g., Barnes v. Gorman, 536 U.S. 181, 185 (2002) (finding that both the Americans with Disabilities Act and § 504 have private rights of action by virtue of statutory allusions to Title VI).

\(^9\) “When a subsequent Congress assumes one interpretation of an earlier statute and acts upon that assumption in enacting a new statute, the Court will consider that as evidence in favor of the assumed interpretation.” Eskridge, Cases & Materials, supra note 55, at 1042. See also id. (Justice Scalia argues “that the Court should generally be reluctant to imply causes of action to enforce federal statutes, but not when Congress has relied on that understanding in subsequent legislation.” (citing Franklin v. Gwinnett Cnty. Pub. Sch., 503 U.S. 60, 77–78 (1992) (Scalia, J., concurring in the judgment))); Three Rivers Ctr. for Indep. Living, Inc. v. Hous. Auth. of Pittsburgh, 382 F.3d 412, 425 (3d Cir. 2004) (“[W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the
re-enacted, when one statute borrows language from another, and when a statute incorporates another by referring to its title. The presumption of Congressional intent is even stronger when, as here, the statutes are within the same jurisdiction (in pari materia) or were modeled after each other. By cross-referencing these statutes and thus incorporating their enforcement mechanisms, Congress intended for the text itself to give rise to this right of action.

B. Disparate Impact

As outlined above, Congress used Title VI as a model in drafting several other civil rights statutes. As a result, courts often rely—at least in part—on the language that is shared by Title VI, Title IX, § 504, and the Age Discrimination Act to construe the subsequent statute consistently with prior judicial interpretations of Title VI. Since Congress used the parallel language of Title VI, Title IX, § 504, and the Age Discrimination Act in drafting § 1557, § 1557 may join this family of related statutes. In keeping with Title VI jurisprudence after Sandoval, courts may find reason to restrict the availability of § 1557's statutory private right of action to intentional discrimination. Notwithstanding this concern, the Supreme Court has cautioned against "too facile an assimilation of Title VI law" into other areas, especially in statutes distinguished by variations in text or Congress' intent. Just as the Choate Court differentiated between incorporated law, at least insofar as it affects the new statute." (quoting Lorillard v. Pons, 434 U.S. 575, 580–81 (1978)).


91. Eskridge, Cases & Materials, supra note 55, at 1076.

92. See Three Rivers Ctr, 382 F3d at 426 ("[A]lthough the remedy available to persons aggrieved by violations of the Rehabilitation Act ... is at root an implied one, [the statute], by cross-referencing Title VI, which already had been interpreted as creating a private right of action, arguably [contains an] explicit provision[] creating a private right of action.").

93. See supra notes 39–41.

94. "An individual shall not, on the grounds [prohibited under the listed statutes] ... be excluded from participation in, be denied the benefits of, or be subjected to discrimination under" certain health programs. PPACA § 1557(a), 42 U.S.C. § 18116(a) (2011). Cf. statutory text for Title VI, Title IX, § 504, and the Age Discrimination Act, supra note 40.


96. Eskridge, Cases & Materials, supra note 55, at 1076 ("As Lorillard [v. Pons] exemplifies, courts routinely assume that, unless there are strong indications to the contrary, the newer statute should be interpreted consistently with the older statutes upon which it was modeled."). Such strong indications could include changing political preferences or priorities: "the new statute may embody policies or compromises subtly different from
between § 504 and Title VI, courts are likely to distinguish § 1557 from Title VI and find § 1557's private right of action available for disparate impact claims.

1. Section 1557's Language

In Sandoval, the Court emphasized the need for symmetry between conduct prohibited by a statute and the right of action arising under that statute. Courts will not recognize a disparate impact claim based on a statutory right of action if regulations promulgated under the statute—as opposed to the statute itself—proscribe disparate impact discrimination. In other words, § 1557 itself must indicate Congress' intent to proscribe disparate impact discrimination in health care for a statutory right of action to apply.

Given the language of § 1557, courts are likely to find such intent. With "the enforcement mechanisms provided for and available under" Title VI, Title IX, § 504, and the Age Discrimination Act, § 1557 invokes the conduct proscribed by these statutes' regulations in addition to the conduct proscribed by the statutes themselves. It would appear that no other legislation enacted to date has used such a phrase, marking a significant departure from previous civil rights statutes. The section already incorporates the text of the other statutes with the phrase "provided for." Since courts assume that legislation avoids redundancy, those in the similar statutes—if for no other reason than the different political context of the later statute.
“available under” must add meaning and likely denotes the regulations promulgated pursuant to those statutes.

As in § 1557, the term “discrimination” is not defined in Title VI, Title IX, § 504, or the Age Discrimination Act; instead, each federal agency included a definition when promulgating regulations under each statute. Title VI’s regulations, which are statutorily required to be “consistent with achievement of the objectives of the statute authorizing the financial assistance,” include a definition of discrimination that proscribes actions with a disparate impact on its protected classes. The regulations under Title IX, § 504, and the Age Discrimination Act follow that lead. Courts have found that Congress’ acquiescence in failing to react to executive agency regulations, whether by striking down the regulation or by changing the statute itself, indicates Congress’ intent for such interpretations to flow from statutory language. This presumption is strongest as applied to “building block interpretations”: authoritative or settled interpretations that have generated reliance interests in the affected parties’ behavior and in decision-makers’ ongoing development of legal rules. Given Congress’ reliance on Title VI jurisprudence and regulations in drafting subsequent statutes, the Title VI regulations’ definition of discrimination is entitled to this presumption. Accordingly, these regulations—prohibiting actions with

provides, in whole or in part, that no person in the United States shall, on the ground of race, color, national origin, handicap, religion, or sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance.” (emphasis added).

102. “It is a ‘cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant.’” ESKIDGE, CASES & MATERIALS, supra note 55, at 865 (quoting Kungys v. United States, 485 U.S. 759, 778 (1988)).

103. See Days, supra note 33, at 1000 (Congress delegated the authority to issue regulations “to reduce the general language of the [Civil Rights Act and subsequent related] statute[s] to practical and operative terms for the guidance of all likely to be affected.”).


105. 45 C.F.R. § 80.3(b)(2) (2011). The twenty-two federal agencies that offer FFA modeled their Title VI rules on those drafted by HHS, which are still valid and have never been significantly amended. Rosenbaum & Teitelbaum, supra note 12, at 221.

106. For HHS regulations defining discrimination under these statutes, see 45 C.F.R. § 86.21(b)(2) (2011) (Title IX regulations on discrimination on the basis of sex in admissions); id. § 84.4(b)(4) (§ 504 regulations); id. § 91.11 (Age Discrimination Act regulations). But see id. §§ 91.13-14 (providing regulatory exceptions to the Age Discrimination Act, including certain actions with permissible disparate impact).

107. “[T]he Court will often find that congressional failure to disapprove of executive department regulations, while ‘not dispositive . . . strongly implies that the regulations accurately reflect congressional intent.’” Eskridge, Inaction, supra note 90, at 74 (quoting Grove City Coll. v. Bell, 465 U.S. 555, 558 (1984)) (citing additional cases). See also ESKIDGE, CASES & MATERIALS, supra note 55, at 1048 (on Congress’ presumed acquiescence to “an authoritative agency or judicial interpretation of a statute” if the statute remains unchanged).

108. ESKIDGE, CASES & MATERIALS, supra note 55, at 110.
a disparate impact as well as those with discriminatory intent—may be presumed to reflect Congressional intent.

In drafting this section of the health care bill, Congress referred simply to "discrimination," which should be deemed to have the same meaning as the listed statutes.\footnote{109} Congress was aware that these statutes’ regulations proscribe disparate impact.\footnote{109} By incorporating the enforcement mechanisms “provided for and available under” such statutes,\footnote{110} it would appear that Congress intended to include their disparate impact standard in § 1557’s text. Section 1557 authorizes the Secretary of HHS to promulgate regulations,\footnote{111} which may be helpful to clarify the provision in other ways.\footnote{112} Still, since § 1557’s text gives rise to its coverage of disparate impact, courts are likely to find that plaintiffs may bring disparate impact suits under § 1557 even absent such regulations.\footnote{113}

2. Section 1557 in Context

In interpreting potentially ambiguous statutory provisions, courts seek to put the disputed language into context by reading the statute as a consistent whole.\footnote{114} Disparate impact cases in health care have often failed due to the data-intensive requirements for such litigation and plaintiffs’ difficulty in meeting their burden of proof.\footnote{115} Plaintiffs frequently lack the

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\footnote{109} Id. at 866 (finding that where a word has a “settled meaning” in related statutes, that meaning is presumed to apply in a new statute).


\footnote{111} PPACA § 1557(a), 42 U.S.C. § 18116(a) (2011).

\footnote{112} PPACA § 1557(c), 42 U.S.C. § 18116(c) (2011).

\footnote{113} For example, Congress probably intended § 1557’s enforcement mechanisms to be available against discrimination that is proscribed more specifically by other sections of PPACA Title I. Section 1557(a) refers to other provisions in Title I: “Except as otherwise provided for in this title” prefaces the ban on discrimination. PPACA’s prohibition on charging discriminatory premium rates based on specific factors (including age and gender) includes a caveat: premiums may vary up to certain ratios. See PPACA § 1201, 42 U.S.C. § 300gg (2011). In other words, § 1557 may afford plaintiffs a remedy for violations of those sections, within limitations imposed by the sections themselves.

\footnote{114} See Dana L. Kaersvang, Note, The Fair Housing Act and Disparate Impact in Homeowners Insurance, 104 MICH. L. REV. 1993, 2006–07 & n.117 (2006) (citing Fair Housing Act cases from every circuit but one where courts recognized disparate impact claims without HUD regulations, by analogizing to Title VII). Both the Fair Housing Act and § 1557 grant permissive rulemaking authority, providing that the Secretaries of HUD and HHS, respectively, “may”—rather than “must” or “shall”—issue rules to implement the statute. See 42 U.S.C. § 3614a (2011); PPACA § 1557(c), 42 U.S.C. § 18116(c) (2011).

\footnote{115} See ESKRIDGE, CASES & MATERIALS, supra note 55, at 862 (presuming legislation to be “internally consistent in its use of language and in the way its provisions work together”).

\footnote{116} Rosenbaum & Teitelbaum, supra note 12, at 226–27. A plaintiff must first make out a prima facie case through statistical evidence of a facially neutral barrier’s disproportionate adverse impact on a protected group. The defendant must then justify the practice
statistical data necessary to make out a strong prima facie case and the requisite analysis and business-specific information to rebut defendants' defenses that their conduct was necessary for business reasons.\textsuperscript{117} PPACA contains another provision, § 4302, which requires extensive, specific collection and public reporting of data on health disparities by all federally conducted or supported health programs, activities, and surveys, as well as by state Medicaid and Children’s Health Insurance Program (CHIP) agencies.\textsuperscript{118} To the extent that such disparities may point to disparate impact discrimination,\textsuperscript{119} § 4302 may alleviate plaintiffs’ difficulties in establishing a prima facie case.

Courts also look to a statute’s legislative history to illumine Congress’ intent. Although the health reform bill’s legislative history never refers specifically to § 1557,\textsuperscript{120} many members of Congress spoke expansively about the impact they hoped PPACA would have in combating discrimination in health care and made no indication that this impact should be limited to cases of intentional discrimination.\textsuperscript{121} as serving a legitimate purpose, frequently using a defense of business necessity. If the defendant succeeds, the plaintiff must rebut the defense by finding an alternative policy with a less discriminatory impact. Id. at 227–28.

\textsuperscript{117} Id. See also Lado, supra note 10, at 36–37 (finding that the need for statistical evidence presents proof problems).


\textsuperscript{119} See Bonham, supra note 10, at 52; Lado, supra note 10, at 1–8.

\textsuperscript{120} Section 1557 was not mentioned in any floor speeches during Congress’ debate on PPACA. See http://thomas.gov/ (follow “Advanced Search” hyperlink; select 111th Congress; search for Bill Number H.R. 3590; then follow “All Congressional Actions with Amendments” hyperlink to access links to the relevant CONGRESSIONAL RECORD pages). See also 156 CONG. REC. S11578, S11826–79, S11888–903, S11907–67, S12462–66, S12524–552, S12565–613, S12648–69, S12745–99, S12836–76, S13131–32, S13205–42, S13280–95, S13477–89, S13558–628, S13640–95, S13714–51, S13796–866, S13890–14132, H1854–2169 (2009–10). This language was not present in any of the bills that passed out of the House and Senate committees of jurisdiction, which is often true of civil rights legislation. See ESKRIDGE, CASES & MATERIALS, supra note 55, at 982. Due to the process by which PPACA was passed, there is also no conference committee report which might have included a section-by-section description of Congress' intent. Id. at 972 n.d (citing OTTO HETZEL ET AL., LEGISLATIVE LAW AND PROCESS CASES AND MATERIALS 589 (3rd ed. 2001)).

\textsuperscript{121} See, e.g., 156 CONG. REC. S11908 (2009) (statement of Sen. Patrick Leahy, Chairman, S. Comm. on the Judiciary) (“Our dear friend, Senator Ted Kennedy, said it so well in the letter about the health reform imperative that President Obama read to a joint meeting of Congress. . . . ‘What we face is above all a moral issue; that at stake are not just the details of policy, but fundamental principles of social justice and the character of our country.' This is such a time. It is my hope and belief the Senate I love will once again rise to the occasion.'"); 156 CONG. REC. S11988 (2009) (statement of Sen. Max Baucus,
Courts evaluating § 1557’s application to disparate impact may also consider the intent of other actors with a staunch commitment to the legislation.\textsuperscript{122} For example, as President Obama and his administration were closely involved in ensuring the legislation passed, they lauded its potential role in helping consumers avoid several kinds of discrimination and ill treatment.\textsuperscript{123} Congress and the President’s plan to address abuses in the health insurance industry is evident in PPACA’s prohibition of several specific types of discrimination.\textsuperscript{124}

Section 1557 also extends the coverage of existing civil rights law. Title VI, Title IX, § 504, and the Age Discrimination Act explicitly do not cover insurance contracts,\textsuperscript{125} which are now included in § 1557’s definition of the federal financial assistance subject to its protections.\textsuperscript{126} Also, the prohibition on sex discrimination under Title IX was previously confined to federally funded education and training programs.\textsuperscript{127} By including Title IX among the statutes whose protected classes are also covered by § 1557, Congress made discrimination on the basis of sex actionable against a variety of entities in health care. These changes indicate the drafters’ intent to expand civil rights law well beyond its previous boundaries.

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Chairman, S. Comm. on Finance) ("[W]omen are discriminated against today in America in various ways. . . . It is another reason this health care reform is going to mean so much for so many Americans.”); 156 CONG. REC. H1855 (2010) (statement of Rep. Steny Hoyer, House Majority Leader) ("It is more control . . . . [f]or consumers, and less for insurance companies. It is the end of discrimination against Americans with preexisting conditions, and the end of medical bankruptcy and caps on benefits.").

122. ESKIDGE, CASES & MATERIALS, supra note 55, at 1020 (citing cases using presidential transmittal letters or speeches advocating legislation as “useful legislative history”).


124. E.g., PPACA § 1201, 42 U.S.C. §§ 300gg-300gg-3 (2011) (adding several consumer protections to the Public Health Service Act). See 156 CONG. REC. S12594 (2009) (statement of Sen. Dick Durbin, Ass’t Majority Leader) (“We have built into the front end of this bill what we call the health care bill of rights. It is about time somebody stood up for families and individuals across America who have been treated very poorly by health insurance companies.” (referencing discrimination against those with preexisting medical conditions)).


127. 20 U.S.C. § 1681(a) (2011) (application of Title IX to “any education program or activity receiving Federal financial assistance”).
Congress passed Title VI, Title IX, § 504, and the Age Discrimination Act pursuant to its authority under the Spending Clause. Courts analyze these statutes in terms of a contract between the federal and state governments: Congress appropriates funding for certain purposes in exchange for states' compliance with certain conditions. Given this shared background, courts have read jurisprudence from one Spending Clause statute into another. Congress has also analyzed the four statutes in tandem, treating them as subject to similar expansions and restrictions of scope when such changes are relevant to their mutual Constitutional derivation.

At times, courts have extended an interpretation of one Spending Clause statute to the others listed in § 1557, and Congress has reacted by clarifying its intent for all four such statutes to have a broader reach. In Grove City College v. Bell, the Supreme Court's Title IX-based ruling resulted in the application of a restrictive definition for "program or activity" to all four Spending Clause statutes. Congress responded with the Civil Rights Restoration Act of 1987. Section 1557 could represent Congress' attempt to respond to the Court once more, this time to Sandoval's deleterious effect on civil rights enforcement.
Finding a Cure in the Courts

Restoring a private right of action for disparate impact claims would help cure the weak enforcement that has exacerbated historical disparities in access to quality health care.

III. COUNTERARGUMENTS AND LIMITATIONS

Part III assesses the difficulties that a court might have in recognizing a plaintiff's § 1557 suit, both in accepting this right of action and in applying it to a claim of disparate impact discrimination by any member of § 1557's protected classes.

A. Counterarguments

As noted earlier, interpreting § 1557 as providing a private right of action for disparate impact discrimination, available to all of its protected classes, would neutralize the effect of Sandoval. Given Sandoval's requirement that a statutory right of action extend only to conduct proscribed by the statute itself, courts may ask why § 1557 does not spell out its coverage of disparate impact more explicitly. Courts may also question how the various statutes' existing enforcement regimes would interact going forward and why Congress' previous failure to pass a statute that would have achieved the same result does not foreclose this interpretation.

1. Inadequate Notice of a Private Right of Action

Since Title VI, Title IX, § 504, and the Age Discrimination Act were passed under the Spending Clause, courts have analyzed their scope and remedies with a contractual metaphor: asking whether states have received adequate notice of their duties as would be required in a traditional contract. Cases finding no private right of action under a Spending Clause statute often do so after finding there was no clear intent to confer the "specific, individually enforceable rights" that would have put the states on notice.

While Congress used language in § 1557 that in other statutes creates such rights, courts may rely on the general requirement of

136. Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981) ("The legitimacy of Congress' power to legislate under the spending power thus rests on whether the state voluntarily and knowingly accepts the terms of the 'contract.' ... Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." (citations omitted)).


138. See supra note 86.
notice to question Congress’ use of the phrase “enforcement mechanisms” instead of words that point more directly to a right or cause of action. Sometimes the phrase denotes administrative action, such as the ability of an agency head to reduce funding to grantees that do not comply with a statutory requirement. But “enforcement mechanism” is not a term of art: courts and Congress also use it in a general way, encompassing litigation that complements agency action in enforcing a given statute. Courts may also use the phrase “administrative enforcement mechanism” to distinguish agency action. Furthermore, there is no indication in § 1557 that each listed statute’s enforcement mechanisms apply only to its own protected classes. In other words, the existence of a right of action under § 504 for disparate impact does not preclude such a right of action from being made available more broadly. Given that the phrase “enforcement mechanism” has often been interpreted as including rights of action, courts are likely to find that § 1557 has provided sufficient notice to its covered entities and construe its private right of action as reaching disparate impact.


140. E.g., Suter v. Artist M., 503 U.S. 347, 360 (1992) (referring to “enforcement mechanisms” under the Adoption Act). The Adoption Act’s enforcement mechanisms include both a private right of action and the Secretary’s authority to reduce or eliminate federal financial assistance to noncompliant recipients. 42 U.S.C. §§ 674(d)(1), (3) (2011).


142. See, e.g., Lloyd v. Reg’l Transp. Auth., 548 F.2d 1277, 1285–86 (7th Cir. 1977) (describing the “enforcement mechanism” intended to result from the parallels between § 504 and related civil rights statutes as including both administrative and private action); Sindram v. Fox, 374 Fed. App’x 302, 305 (3d Cir. 2010) (“The [Age Discrimination Act’s] enforcement mechanism includes federal agency oversight and a private cause of action for injunctive relief against a recipient of federal funds.”).

143. E.g., Guardians Ass’n v. Civil Serv. Comm’n, 463 U.S. 582, 588–89 (1983) (contrasting a “compensatory private remedy” with “the administrative enforcement mechanism expressly provided by § 602 of Title VI”); Cannon v. Univ. of Chi., 441 U.S. 667, 730 (1979) (Powell, J., dissenting) (distinguishing a right of action from Title IX’s “administrative enforcement mechanism”).

144. See Bowers v. Nat’l Collegiate Athletic Ass’n, 346 F.3d 403, 427 (3d Cir. 2003) (finding that by cross-listing statutes without providing further guidance, Congress intended such crossover and wanted courts to define those rights of action more precisely) (citing Musick, Peeler & Garrett v. Employers Ins. of Wausau, 508 U.S. 286, 293–94 (1993)).
2. Existing Enforcement Regimes

Since courts have sometimes found complex administrative enforcement to preclude a private right of action, judges may also express concern regarding these statutes' existing regimes. Federal agencies have promulgated detailed regulations under each of Title VI, Title IX, § 504, and the Age Discrimination Act to govern their administrative enforcement. Subsequent statutes' enforcement regulations largely incorporate those of Title VI, but some aspects of the regulations differ in accordance with unique characteristics of each statute's protected class. Although a right of action could pose complications, the Secretary of HHS has the statutory authority to promulgate regulations clarifying this interaction, and the Department of Justice has developed expertise in coordinating federal agencies' enforcement of these statutes. Since the existing civil rights enforcement regime in health care has proven inadequate, and mechanisms exist for coordination among agencies, § 1557’s private right of action for disparate impact should not hinge on its listed statutes' other enforcement mechanisms.

3. Congress' Previous Inaction

Courts may find that since the House and Senate did not take action on a prior bill that would have made a private right of action explicitly available for disparate impact claims under Title VI, Title IX, and the Age Discrimination Act, Congress did not intend to create one with § 1557. Responding to the Sandoval decision, among others, Senator Edward

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145. See Alexander v. Sandoval, 532 U.S. 275, 290 (2001) ("The express provision of one method of enforcing a substantive rule 'suggests that Congress intended to preclude others.'") (citations omitted). See also Gonzaga Univ. v. Doe, 536 U.S. 273, 289–90 (2002) (finding that the available "administrative procedures" distinguished that case from others where the Court had found a private right of action).

146. Days, supra note 33, at 1000–01.

147. See 45 C.F.R. § 86.71 (2011) (Title IX enforcement regulations provide that "[t]he procedural provisions applicable to [T]itle VI ... are hereby adopted and incorporated herein by reference."); id. § 84.61 (same for § 504); id. § 91.47 (providing that certain HHS Title VI regulations—for hearings, decisions, and post-termination proceedings—apply to HHS enforcement of the Age Discrimination Act).

148. See discussion of § 504 regulations, infra note 170.

149. PPACA § 1557(c), 42 U.S.C. § 18116(c) (2011).


151. See Zeigler, supra note 30, at 142 & n.30 (recognizing that although private actions could conceivably "usurp an agency's responsibility for regulatory implementation," such actions may instead supplement private enforcement, "which is often inadequate because of budget restraints") and discussion of the inadequate enforcement by HHS OCR, supra notes 12–21.
Kennedy and Representatives John Conyers, John Lewis, and George Miller introduced the Fairness and Individual Rights Necessary to Ensure a Stronger Society (FAIRNESS) Act, which in relevant part was intended to clarify the existence of such a right of action for disparate impact discrimination by recipients of federal funding. The bill was introduced in the relevant House and Senate committees in February of 2004 but never received a hearing. Courts sometimes view Congress’ rejection of a prior proposal as disapproval of the underlying bill and therefore refuse to read subsequent enactments broadly. Scholars have frequently questioned this interpretation of Congressional inaction, however, and courts often do not consider it a reliable indication of Congressional intent. Such inaction is disregarded especially when, as here, the bill did not even receive a committee hearing, much less actual debate in either house of Congress.


155. Eskridge, Cases & Materials, supra note 55, at 1026 (Given the many reasons Congress might reject a bill, “[s]imple non-action, being consistent with many explanations in circumstances not calling for consensus, has no probative value for any purpose.”). See also Eskridge, Inaction, supra note 90, at 98–99, 99 n.181 (detailing structural reasons why inaction does not reliably indicate Congress’ intent and providing the Civil Rights Restoration Act of 1988 as an example); John C. Grabow, Congressional Silence and the Search for Legislative Intent: A Venture into “Speculative Unrealities,” 64 B.U. L. REV. 737, 741 (1984) (“[T]here exists no legal or functional justification for the imputation of any meaning to the necessarily frequent and prolonged silences of Congress.”).

156. See, e.g., Rapanos v. United States, 126 S. Ct. 2208 (2006); Solid Waste Agency v. U.S. Army Corps of Eng’rs, 531 U.S. 159, 169–70 (2001). See also Bob Jones Univ. v. United States, 461 U.S. 574, 600 (1983) (“Ordinarily, and quite appropriately, courts are slow to attribute significance to the failure of Congress to act on particular legislation. We have observed that ‘unsuccessful attempts at legislation are not the best of guides to legislative intent.’” (citation omitted)). Bob Jones was an exception to this rule, since thirteen unsuccessful bills in twelve years constituted “overwhelming evidence of acquiescence” to an existing agency interpretation. Solid Waste, 531 U.S. at 169 n.5.

157. See Eskridge, Cases & Materials, supra note 55, at 1049 (citing cases where courts have used the rejected proposal rule when Congress had previously debated a bill in conference committee or on the floor of one house).
B. Limitations

The statutes listed in § 1557 give rise to its disparate impact right of action, yet they have the potential to restrict the reach of this right. Specifically, the scope of the right of action under § 1557 may be limited by § 504 case law interpreting disparate impact in the disability context, and its remedies may be limited by what courts have found available in Spending Clause litigation.

1. Scope of the Right of Action

Even as courts recognize a disparate impact private right of action under § 1557, judges are likely to require a limiting principle. Since § 504 is the only one of § 1557’s listed statutes that currently confers such a right of action, its jurisprudence would provide a readily available source of guidance. The limitations courts have imposed on § 504 suits—seeking to recognize some but not infinite disparate impact claims—may therefore apply to suits brought under § 1557.

Courts evaluate § 504 disparate impact claims with a rather imprecise test that attempts to balance “the need to give effect to the statutory objectives and the desire to keep § 504 within manageable bounds.” In recognizing a private right of action but ruling against the plaintiffs on the merits, the Court in Choate relied on the “balance struck in [Southeastern Community College v.] Davis,” which requires that “an otherwise qualified handicapped individual must be provided with meaningful access to the benefit that the grantee offers.” Although the Court deliberately did not confine the scope of the right of action that it recognized, subsequent courts have interpreted the Choate Court’s reasons for denying relief—responding to the need to balance interests between

158. See supra notes 56–57 and accompanying text.
159. See supra notes 88–91 and accompanying text, regarding re-enactment and the influence of judicial interpretations of civil rights legislation on subsequent, related bills.
161. Southeastern Cnty. Coll. v. Davis, 442 U.S. 397 (1979). In Davis, a plaintiff with a significant hearing disability sought admission to be trained as a registered nurse; the college denied her application, believing that she would not be able to perform safely in the workplace. Id. at 401–02. The Court found that the accommodations requested by the plaintiff constituted “fundamental alteration[s] in the nature of the program” that were “far more than the ‘modification’ the regulation requires;” id. at 409, and held that the college had not violated § 504, id. at 412.
162. Choate, 469 U.S. at 301–02.
163. Id. (Under this test, Tennessee’s reduction in annual Medicaid-covered inpatient coverage was not disparate impact discrimination because (1) the coverage limit did not use criteria that had a “particular exclusionary effect” on people with disabilities; (2) the reduction in covered days was “neutral on its face” and did not determine those whose coverage would be reduced based on a test or trait that the disabled are less likely to meet
grantees and protected classes—as substantive guidance. The Court did, however, note a few incomplete aspects of the record, implying that support on these points could build future arguments.

The effect of § 504 jurisprudence on § 1557's right of action may also be limited by distinguishing this rather ambiguous case law from future claims. As noted above, the Choate Court analyzed Tennessee's obligations under the federal Medicaid Act, which provides uniform benefits for all beneficiaries and grants significant discretion to states in structuring such benefits. To the extent that this limit on successful claims depends on the authorizing statute's scope and purpose, suits against discrimination proscribed by more generous provisions of the health reform legislation may be more successful. Also, in ruling against the plaintiffs the Choate Court relied on the relatively limited harm caused by the state's coverage limitations. Future plaintiffs may experience greater hardship that enables their claim to succeed in court.

or have; (3) the record did not indicate that people with disabilities would be "unable to benefit meaningfully" from the new level of coverage; and (4) the reduction would affect all Medicaid beneficiaries, with and without disabilities).

164. See Cary LaCheen, Using Title II of the Americans With Disabilities Act [ADA] on Behalf of Clients in TANF Programs, 8 GEo. J. ON POVERTy L. & Pol'y 1, 108-09 (2001) (citing disparate impact cases that were brought under or analyze § 504, demonstrating greater success when "challenging program administration or design features that exclude people with disabilities from programs altogether or that adversely affect initial access to services," and less success when "the amount or duration of services provided" is at issue; compare Crowder v. Kitagawa, 81 F.3d 1480, 1483-85 (9th Cir. 1996) (using a § 504 analysis to find defendants liable under the ADA for requiring that blind persons' guide dogs, like all other dogs, be quarantined upon arrival in Hawaii); Burns-Vidlak v. Chandler, 939 F. Supp. 765, 769-73 (D. Haw. 1996) (categorically excluding blind and disabled persons from participating in a pilot health care program constituted disparate impact under both the ADA and § 504); and Coleman v. Zatechka, 824 F. Supp. 1360, 1366-73 (D. Neb. 1993) (university found liable under the ADA and § 504 for a policy precluding a disabled student from having a roommate), with Choate, 469 U.S. 302-04, 309; Doe v. Colautti, 592 F.2d 704, 707-10 (3d Cir. 1979) (limit on Medicaid coverage of private mental health institutions, with no comparable limit on inpatient hospital coverage, was not disparate impact)).

165. Choate, 469 U.S. at 302 n.22 (There was no suggestion that "the illnesses uniquely associated with the handicapped or occurring with greater frequency among them" could not be treated under the new limits. Also, the limit affected all Medicaid patients seeking inpatient care, "regardless of the particular cause of hospitalization.").

166. Id. at 303 (Medicaid guarantees a "particular package of services," not "adequate health care" for each individual, and grants discretion to states' choice of "the proper mix of amount, scope, and duration limitations on coverage, as long as care and services are provided in 'the best interests of the recipients.'" (quoting 42 U.S.C. § 1396a(a)(19) (2011))).

167. For examples of such provisions, see supra notes 3, 27.

168. Choate, 469 U.S. at 303 (finding that since only 5% of Medicaid recipients with disabilities needed more hospital coverage than the new limits would provide, the majority of needs were met).
Finally, courts may follow the lead of the Choate Court in distinguishing § 1557 from Title VI. Although § 504 was modeled on Title VI, which was confined to intentional discrimination, the Choate Court interpreted § 504 as extending to disparate impact by finding significant differences in the statutes’ protected classes and legislative history. Partly due to disability-related legal doctrines that are not relevant to other protected classes, courts have found it necessary to limit what is required of entities that are compelled to make such accommodations. Moreover, in finding that the private right of action under § 504 could be used for disparate impact claims, the Supreme Court relied not only on Congress’ intent for the statute itself to cover such discrimination, but also—significantly—on federal agencies’ regulations to that effect. In recognizing disparate impact claims under § 1557, courts may find that Congress intended for § 1557 to incorporate such regulations into its text.

2. Available Remedies

The remedies available in § 1557 litigation may also be subject to the same limits as other Spending Clause suits, particularly for disparate impact claims. Courts have found that punitive damages are not available for violations of these statutes and have further limited the remedies for disparate impact. Non-economic compensatory damages may still be available in

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169. See supra notes 64–73 and accompanying text.
170. For example, regulations for administrative enforcement of § 504 require a “reasonable accommodation” to the needs of individuals with disabilities unless it would entail an “undue hardship.” 45 C.F.R. § 84.12 (2011). See Days, supra note 33, at 994 (finding that, at least as contemplated by the Americans with Disabilities Act, these requirements “go beyond the concept of ‘equal treatment’ that has been at the core of the earlier civil rights statutes”). See also 45 C.F.R. § 84.4 (2011) (“[A]ids, benefits, and services” under the Rehabilitation Act need not “produce the identical result or level of achievement” for individuals with and without disabilities, but must instead give those with disabilities “equal opportunity” “in the most integrated setting appropriate to the person’s needs.”).
171. Choate, 469 U.S. at 295.
172. Id. at 297 n.17. See Rosenbaum & Teitelbaum, supra note 12, at 221 (finding that federal agencies’ common Title VI regulations, including the disparate impact standard, “remain in force and virtually unchanged”).
173. See Part II.B.1, supra.
174. Barnes v. Gorman, 536 U.S. 181, 189 (2002). See also Days, supra note 33, at 981–94 (explaining that Barnes carried such a limitation from Title VI jurisprudence into consideration of available remedies under the Americans with Disabilities Act and § 504).
175. Sheely v. MRI Radiology Network, 505 F.3d 1173, 1190 (11th Cir. 2007) (finding that “the Court has suggested, without deciding, that victims of unintentional discrimination [under Spending Clause statutes] may be limited to prospective relief preventing future violations...”).
some cases, however, and injunctive relief may afford great benefits to plaintiffs and other members of protected classes by requiring defendants to cease discriminatory actions or by mandating nondiscriminatory ones. Moreover, such limits should apply more to litigation against defendants subject to § 1557 due to their receipt of federal funds than to other covered entities.

CONCLUSION

Although the Supreme Court's ruling in Sandoval hurt plaintiffs' ability to obtain redress for adverse impact discrimination under Title VI, PPACA § 1557 may circumvent such limits by providing a private right of action for disparate impact claims in health care. Even if courts find such a right of action to be limited to the types of cases that have proven most successful under § 504, and even if a suit falters under the remaining burdens of proving disparate impact, litigation may still gain the attention of current and potential defendants and motivate a settlement that changes harmful behavior. Also, § 1557 may reflect Congress' willingness to resuscitate the private attorney general model of enforcement. This paradigm shift may motivate HHS to reexamine the importance of OCR's mission: with plaintiffs better able to get their day in court, the agency may increase OCR's funding to avoid such suits. Effective, strategic administrative action may promote the predictability prized by many agencies in ensuring industry compliance and dramatically decrease the need for private litigation.

176. Id. at 1198 (determining that this is the first appellate court case to consider this question since Barnes).

177. Id. (finding that the Barnes Court's "central reason for turning to the contract metaphor" was to ensure that FFA recipients had adequate notice of the liability incurred by virtue of accepting such funds). In addition to FFA recipients, PPACA § 1557 applies to "any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments)." 42 U.S.C. § 18116(a) (2011). While the health insurance exchanges—which were established under that title—will receive federal funds at first, they must become financially independent after 2014. 42 U.S.C. § 18031(d)(5)(A) (2011). This provision ensures that they will still be subject to § 1557. Courts are unlikely to analyze the exchanges with the Spending Clause contract metaphor after that point.