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# Jackson v. Birmingham Board of Education: Expanding the Class of the Protected, or Protecting the Protectors?

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# CASENOTES

## *JACKSON V. BIRMINGHAM BOARD OF EDUCATION*: EXPANDING THE CLASS OF THE PROTECTED, OR PROTECTING THE PROTECTORS?

### I. INTRODUCTION

Title IX of the Education Amendments of 1972 ("Title IX") prohibits any school receiving federal funds from discriminating on the basis of gender.[1] While best known in the realm of female athletic programs, Title IX offers a broad array of protections to anyone who experiences discriminatory treatment on the basis of sex in a federally funded educational setting.[2] Section 901 of Title IX broadly provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[3]

As written, Title IX does not expressly provide any private cause of action for victims of gender discrimination.[4] Implied private causes of action have long been recognized, however, with the Supreme Court of the United States and the lower federal courts consistently interpreting Title IX and its racial discrimina-

1. Education Amendments of 1972, Pub. L. No. 92-318, tit. IX § 901, 86 Stat. 373 (codified as amended at 20 U.S.C. § 1681 (2000)).

2. *See generally* Diane Heckman, *On the Eve of Title IX's 25th Anniversary: Sex Discrimination in the Gym and Classroom*, 21 NOVA L. REV. 545 (1997).

3. Education Amendments § 901(a) (codified as amended at 20 U.S.C. § 1681(a) (2000)).

4. Cannon v. Univ. of Chicago, 441 U.S. 677, 683 (1979) ("The statute does not . . . expressly authorize a private right of action by a person injured by a violation of § 901.").

tion parallel statute, Title VI of the Civil Rights Act of 1964[5] ("Title VI"), with a broad brush.[6]

The specific class of those protected under Title IX, however, has not previously been clearly delineated by the Supreme Court. Many assume that Title IX only protects females subjected to discriminatory treatment,[7] but cases exist where males have been discriminated against in furtherance of traditional gender stereotypes.[8] Whether Title IX's protection from sex discrimination also includes protection from retaliation has been another problem area.[9] While retaliation has been recognized as a form of discrimination under other civil rights statutes,[10] the Supreme Court had not previously addressed whether Title IX provided an implied cause of action for victims of retaliation, particularly for indirect victims of retaliation, who are not personally subject to discrimination on the basis of their own gender, but are retaliated

5. Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d–2000d-4a (2000); *see, e.g.*, Mock v. S.D. Bd. of Regents, 2003 DSD 11, ¶ 6, 267 F. Supp. 2d 1017, 1019 ("[C]ases interpreting Title VI and Title IX may be used interchangeably in analyzing similar issues under both titles.").

6. *See* N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 521 (1982) ("There is no doubt that 'if we are to give [Title IX] the scope that its origins dictate, we must accord it a sweep as broad as its language.'" (quoting United States v. Price, 383 U.S. 787, 801 (1966) (substitution in original))); *see also* Davis v. Monroe County Bd. of Educ., 526 U.S. 629 (1999) (recognizing a cause of action under Title IX for sexual harassment); Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60 (1992) (allowing for recovery of monetary damages under Title IX).

7. In Justice Thomas's dissent in *Jackson v. Birmingham Board of Education*, he stated that "virtually every case in which this Court has addressed Title IX concerned a claimant who sought to recover for discrimination because of *her* own sex." 125 S. Ct. 1497, 1512 (2005) (Thomas, J., dissenting) (emphasis added). The list of cases referenced to support this statement, however, includes *Mississippi University for Women v. Hogan*, a case involving a male plaintiff suing to gain academic credit at a women-only nursing school. 458 U.S. 718 (1982).

8. *See supra* note 7. *See generally* Note, *Cheering on Women and Girls in Sports: Using Title IX to Fight Gender Role Oppression*, 110 HARV. L. REV. 1627, 1633 n.54 (1996).

9. *See, e.g.*, Bradford C. Mank, *Are Anti-Retaliation Regulations in Title VI or Title IX Enforceable in a Private Right of Action: Does* Sandoval *or* Sullivan *Control This Question?*, 35 SETON HALL L. REV. 47 (2004); Diane Heckman, Lowrey v. Texas A & M University Systems: *Title IX vis-à-vis Title VII Sex Discrimination and Retaliation in Educational Employment*, 124 EDUC. L. REP. 753 (1998).

10. The Supreme Court has interpreted 42 U.S.C. sections 1982 and 1983 as prohibiting retaliation. Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969) (holding that § 1982 implicitly bars retaliatory discrimination); Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977) (holding that § 1983 can be used to enforce freedom against retaliation for exercise of free speech).

against for their complaints about gender discrimination against others.[11]

The Supreme Court's recent decision in *Jackson v. Birmingham Board of Education*[12] has expanded the protections of Title IX to allow this cause of action.[13] Part II of this note discusses the general history of Title IX, implied causes of action under Title IX, and retaliatory discrimination. Part III presents the factual and procedural background of the *Jackson* decision and the holding of the Court. Part IV analyzes the majority and dissenting opinions of *Jackson*. Part V considers the impact that *Jackson* could have on Title IX in particular and implied causes of action in civil rights statutes in general.

## II. HISTORY

### A. *Legislative History and Structure of Title IX*

#### 1. Title IX's Creation and Relationship with Titles VI and VII

Title IX was created to provide equal protection to the sexes in federally funded educational settings and to ensure that victims of gender discrimination would receive "effective protection."[14] Title IX was modeled after Title VI, and its description of the class of intended beneficiaries is identical to that of Title VI, except that it substitutes "sex" for "race, color, or national origin."[15] Titles VI and IX have been held sufficiently parallel such that case interpretation of either one is applicable to the other.[16]

Both Titles VI and IX were created by Congress as an exercise of its spending power, and are therefore in the nature of a contract.[17] The Supreme Court has held that Congress must clearly indicate the conditions of federal funding to recipients, so that

11. *See supra* note 9.
12. 125 S. Ct. 1497 (2005).
13. *Id.* at 1509–10.
14. *Cannon*, 441 U.S. at 704.
15. *Id.* at 694–95.
16. *See supra* note 5.
17. Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981) ("[L]egislation enacted pursuant to the spending power is much in the nature of a contract . . . [and] thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'").

they can enter the contractual relationship with full knowledge of its terms.[18] Title VII of the Civil Rights Act of 1964 ("Title VII"),[19] although frequently implicated in discussions of Titles VI and IX, was created under Congress's commerce clause power and is a significantly different statute.[20]

### 2. Structure and Context of Title IX

Title IX is written broadly, using general terms: only discrimination "on the basis of sex" is prohibited, and no specific examples of discrimination are given.[21] It has therefore been read broadly by the courts to "cover[] a wide range of intentional unequal treatment; by using such a broad term, Congress gave the statute a broad reach."[22]

Title IX was passed in 1972, only three years after the Supreme Court's decision in *Sullivan v. Little Hunting Park, Inc.*[23] In *Sullivan*, the Court held that discrimination included retaliation;[24] this broad reading of discrimination has since been applied to many Title IX cases,[25] and the Court has stated that Congress was presumptively aware of the *Sullivan* decision and its impact when it drafted Title IX.[26]

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18. *Id.* "[I]f Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Id.*

19. 42 U.S.C. §§ 2000e–2000e-4 (2000).

20. *See* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 283–84 (1998) (differentiating protections enumerated in Title VII from those judicially implied under Title IX); Mank, *supra* note 9, at 84–91.

21. 20 U.S.C. § 1681(a) (2000).

22. *Jackson*, 125 S. Ct. at 1505; *see supra* note 6.

23. 396 U.S. 229 (1969). This case involved racial discrimination under 42 U.S.C. § 1982, where a white man assigned his lease in a corporation to a black man and was retaliated against by his fellow shareholders. *Id.* at 234–35. The Court held that "[i]f that sanction [Sullivan's expulsion for speaking out for civil rights] can be imposed, then Sullivan is punished for trying to vindicate the rights of minorities," and therefore a cause of action must be provided for the victim of retaliatory discrimination. *Id.* at 237.

24. *Id.* at 237. *Sullivan* also holds that "[t]he existence of a statutory right implies the existence of all necessary and appropriate remedies." *Id.* at 239.

25. *See supra* note 6.

26. *Cannon*, 441 U.S. at 698–99 (1979) ("[I]t is not only appropriate but also realistic to presume that Congress was thoroughly familiar with these unusually important precedents . . . and that it expected [Title IX's] enactment to be interpreted in conformity with them.").

## B. *Implied Causes of Action under Title IX*

### 1. The Title IX Statute Provides Only Poor Procedural Protections for Victims

The text of Title IX does not provide a private cause of action for victims of discrimination;[27] the courts have therefore implied a cause of action.[28] As the Court explained in *Cannon v. University of Chicago*,[29] the only remedy provided by the text of Title IX is an administrative mechanism for terminating an educational institution's funding if it discriminates on the basis of sex.[30] Under the regulations for Title IX's explicit enforcement mechanism, "[c]omplainants enjoy few rights."[31] In the interest of promoting Congress's intent to protect private individuals from discrimination, therefore, the courts have long implied a cause of action under Title IX.[32]

### 2. Prior Supreme Court Cases Establish a Broad Cause of Action under Titles VI and IX

After determining that Title IX did provide an implied cause of action, the Supreme Court expanded the scope of the statute's protection against discrimination in a series of decisions. In *Franklin v. Gwinnett County Public Schools*,[33] the Court held that Title IX's implied cause of action allowed for monetary damages to the victim of gender-based discrimination.[34] In *Gebser v. Lago Vista Independent School District*,[35] the Court interpreted the discrimination prohibited by Title IX as including sexual harassment of a student by a teacher, so long as the school district had

27. *See supra* note 4.

28. *Cannon*, 441 U.S. at 709 ("Not 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.").

29. 441 U.S. 677 (1979).

30. *Id.* at 695–96.

31. *Jackson*, 125 S. Ct. at 1504.

32. Mank, *supra* note 9, at 61; 34 C.F.R. § 100.7 (2004).

33. 503 U.S. 60 (1992).

34. *Id.* at 76. Franklin, a high school student, brought a Title IX action for damages from alleged sexual harassment by a coach and teacher. *Id.* at 63–64.

35. 524 U.S. 274 (1998).

actual notice of the harassment and acted in "deliberate indifference" to that violation.[36] Finally, in *Davis v. Monroe County Board of Education*,[37] the Court held that student-on-student sexual harassment, provided it rose above the level of "teasing and name-calling," was in violation of Title IX's prohibition on discrimination.[38]

### C. *Protection Against Retaliatory Discrimination in Title IX and Other Civil Rights Statutes*

#### 1. Other Civil Rights Statutes Recognize a Cause of Action for Retaliation

Title VII expressly includes retaliation in the conduct prohibited as discrimination.[39] While it could be argued that Congress could have included retaliation specifically in other civil rights statutes if it had meant it to be prohibited as discrimination, the Court has generally implied a cause of action for retaliatory discrimination under other civil rights statutes.[40] In broad terms, the Court has held that "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."[41]

#### 2. Title IX Regulations Prohibit Retaliation

The Department of Education's regulations interpreting Title IX expressly prohibit retaliation, stating clearly that "[n]o recipient or other person shall intimidate, threaten, coerce, or dis-

36. *Id.* at 292–93. Gebser was subjected to sexual harassment by a teacher, but there was no evidence that school officials knew of the ongoing harassment. *Id.* at 277–79.

37. 526 U.S. 629 (1999).

38. *Id.* at 652. Davis's minor daughter, a fifth-grade student, was subject to significant student-on-student sexual harassment which affected her school performance; school officials knew of the situation but took no disciplinary action against the offending student. *Id.* at 633–36. The Court specifically held that damages for student-on-student sexual harassment were available "only where the behavior is so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect." *Id.* at 652.

39. 42 U.S.C. § 2000e-3(a) (2000).

40. *See supra* note 10.

41. Bell v. Hood, 327 U.S. 678, 684 (1946).

criminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act."[42] This prohibition on retaliatory discrimination would seem to include both direct and indirect victims, because it is written to protect "any individual" protesting the interference of another with "any right or privilege."[43]

Courts generally give great deference to interpretive regulations from the agencies charged with implementing statutes.[44] The Supreme Court's decision in *Alexander v. Sandoval*,[45] however, established that regulations cannot create a right beyond that which Congress intended to create in drafting the underlying statute.[46] Prior to the *Jackson* decision, then, it was unclear whether the Court would interpret Title IX as including a prohibition on retaliation, or whether the Court would find that the Department of Education's regulations attempted to expand the protections of the statute impermissibly.

### 3. The Eleventh Circuit Decision in *Jackson* Marked a Circuit Split

Prior to the Eleventh Circuit's decision in *Jackson*, the Circuit Courts of Appeals were in basic agreement that Title IX provided an implied cause of action for retaliatory discrimination, at least for direct victims of gender discrimination and retaliation.[47] The

42. 34 C.F.R. § 100.7(e) (2004).

43. *Id.*

44. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer. . . .").

45. 532 U.S. 275 (2001).

46. *Id.* This case involved Title VI regulations that prohibited disparate impact discrimination, while the text of Title VI only prohibits intentional discrimination. *Id.* at 280–82. The Court held that "[l]anguage in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not." *Id.* at 291.

47. *Compare* Jackson v. Birmingham Bd. Of Educ., 309 F.3d 1333 (11th Cir. 2002), *with* Lowrey v. Tex. A & M Univ. Sys., 117 F.3d 242, 252 (5th Cir. 1997) ("[E]very federal court to consider this issue has held that teachers may state claims for retaliation under title IX. We join these courts in concluding that title IX affords an implied cause of action for retaliation.") (internal citations omitted), *and* Preston v. Virginia *ex rel.* New River Cmty. Coll., 31 F.3d 203, 206 (4th Cir. 1994) ("Retaliation against an employee for filing a claim of gender discrimination is prohibited under Title IX.").

federal district courts, however, were not so clearly decided on the issue.[48]

The Fourth Circuit's decision in *Preston v. Virginia ex rel. New River Community College*[49] considered whether a cause of action existed for an individual who had allegedly been discriminated against, had filed a claim under Title IX, and was then not hired for another position, apparently in retaliation for the Title IX claim.[50] The Fourth Circuit held that a cause of action was available under Title IX for retaliatory discrimination.[51] The recent Fourth Circuit case of *Peters v. Jenney*[52] is in accord with *Preston*, holding that Title VI's prohibition of intentional discrimination implies a cause of action for retaliation.[53]

Similarly, the Fifth Circuit's decision in *Lowrey v. Texas A & M University System*[54] held that a direct victim of retaliation had an implied cause of action under Title IX.[55] Each of these decisions, however, referred to the Department of Education's Title IX regulations (and predated the decision in *Alexander v. Sandoval*[56]), and each dealt with a direct victim of retaliatory discrimination who had already been subject to gender discrimination.[57]

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48. *Compare* Johnson v. Galen Health Insts., Inc., 267 F. Supp. 2d 679 (W.D. Ky. 2003), *and* Chandamuri v. Georgetown Univ., 274 F. Supp. 2d 71 (D.D.C. 2003), *with* Mock v. S.D. Bd. of Regents, 2003 DSD 11, 267 F. Supp. 2d 1017.

49. 31 F.3d 203 (4th Cir. 1994).

50. *Id.* Preston was employed as a counselor for student support services, and filed a Title IX suit alleging that the College had discriminated against her through its hiring practices. *Id.* at 205. Preston later applied for two other counselor positions, but was not awarded either one. *Id.*

51. *Id.* at 206 ("Retaliation against an employee for filing a claim of gender discrimination is prohibited under Title IX."). However, the court also found that Preston would not have been hired "even if she had not filed the discrimination claim," and therefore, the College had not violated Title IX. *Id.* at 208.

52. 327 F.3d 307 (4th Cir. 2003).

53. *Id.* at 318 ("Retaliation of this sort bears such a symbiotic and inseparable relationship to intentional racial discrimination that an agency could reasonably conclude that Congress meant to prohibit both, and to provide a remedy for victims of either.").

54. 117 F.3d 242 (5th Cir. 1997).

55. *Id.* at 252. Lowrey, after participating in Title IX complaints and investigations against the university where she was employed, was passed over for a promotion and subsequently removed from her position as Women's Athletic Coordinator. *Id.* at 244. The court concluded "only that the employees of federally funded educational institutions who raise complaints, or participate in investigations, concerning compliance with the substantive provisions of title IX are protected from retaliation." *Id.* at 254.

56. 532 U.S. 275 (2001); *see supra* note 46.

57. *See supra* notes 49–55 and accompanying text.

## III. BACKGROUND OF THE *JACKSON* DECISION

Roderick Jackson was hired by the Birmingham Board of Education ("the Board") in 1993 as a physical education teacher and coach for the girls' basketball team.[58] After being transferred to Ensley High School in August 1999, Jackson learned that the girls' team was inadequately funded and lacked equal access to athletic facilities.[59] Beginning in December 2000, Jackson complained to his supervisors about this inequality, but rather than addressing the alleged discrimination, in May 2001 the Board removed Jackson as the girls' basketball coach.[60]

Jackson brought suit against the Board in the United States District Court for the Northern District of Alabama under Title IX, claiming that his dismissal as coach was in retaliation for his complaints about sex discrimination in the high school's sports.[61] The district court dismissed the complaint, finding that Title IX does not prohibit retaliation and does not provide a cause of action for victims of retaliatory discrimination.[62] The Eleventh Circuit affirmed the district court's decision that Title IX did not provide an implied cause of action for retaliation, in contradiction to decisions from several other circuits.[63] The Eleventh Circuit held that, under *Sandoval*, the Department of Education's regulations prohibiting retaliation did not create a cause of action, and certainly did not protect Jackson, as he is outside the class of persons intended to be protected by the statute—direct victims of gender discrimination.[64]

The Supreme Court of the United States granted certiorari to resolve the conflict between the circuits and to clarify Title IX's

58. *Jackson*, 125 S. Ct. at 1503.

59. *Id.*

60. *Id.* Jackson was retained as a teacher, but no longer received the supplemental coaching pay. *Id.* Because the district court dismissed Jackson's suit under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief could be granted without considering the facts of the case, the Supreme Court assumed the truth of Jackson's allegations—that he was relieved as the girls' basketball coach in retaliation for his complaints about gender discrimination. *Id.* (citing Summit Health, Ltd. v. Pinhas, 500 U.S. 322, 325 (1991)).

61. *Id.* The district court's decision was not published.

62. *Id.*; *see supra* notes 10 and 40 and accompanying text.

63. *Jackson*, 125 S. Ct. at 1503 (citing *Jackson*, 309 F.3d at 1333).

64. *Id.* (citing *Sandoval*, 532 U.S. at 275).

protections against gender discrimination.[65] In a five-to-four decision written by Justice O'Connor, the Court reversed the Eleventh Circuit, holding that retaliation for complaints of gender discrimination is itself intentional discrimination on the basis of sex, and therefore is protected by Title IX's implied private cause of action.[66] Justice Thomas's dissenting opinion argued instead that the plain language of Title IX did not meet the requirements for imposing a cause of action for retaliation.[67]

## IV. ANALYSIS OF *JACKSON*'S MAJORITY AND DISSENTING OPINIONS

### A. *Majority Opinion*[68]

#### 1. The Broad Language and Legislative History of Title IX Establish that Discrimination Should Be Read Broadly to Include Retaliation

The majority held that retaliation due to complaints of gender discrimination "constitutes intentional 'discrimination' 'on the basis of sex,'" and is therefore prohibited by Title IX.[69] Justice O'Connor reasoned that Congress wrote Title IX in broad, sweeping terms, and "by using such a broad term [as discrimination], Congress gave the statute a broad reach."[70] While Title VII, for example, mentions retaliation specifically,[71] the majority distinguished Title VII as "a vastly different statute from Title IX."[72] Title VII lists specific practices that constitute discrimination, whereas Title IX simply prohibits discrimination.[73] Consequently, the Supreme Court has consistently interpreted Title IX broadly to recognize that Congress intended to prohibit all forms of gender discrimination.[74]

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65. *Id.*

66. *Id.* at 1502, 1507.

67. *Id.* at 1510 (Thomas, J., dissenting).

68. The majority opinion was written by Justice O'Connor, who was joined by Justices Stevens, Souter, Ginsburg, and Breyer. *Id.* at 1502.

69. *Id.* at 1504.

70. *Id.* at 1505.

71. 42 U.S.C. § 2000e-3(a) (2000).

72. *Jackson*, 125 S. Ct. at 1505.

73. *See supra* note 20.

74. *See Jackson*, 125 S. Ct. at 1504–05; *see supra* note 6.

Further, the majority discussed the legislative context in which Title IX was drafted, only three years after the Supreme Court's decision in *Sullivan v. Little Hunting Park*,[75] where "[the Court] interpreted a general prohibition on racial discrimination to cover retaliation."[76] Congress was aware of the *Sullivan* decision at the time it created Title IX, and the Supreme Court has held that Congress presumably intended discrimination to have the broad meaning then in use, including a prohibition on retaliatory discrimination.[77]

### 2. The Department of Education's Regulations Prohibiting Retaliation Are Unnecessary for the Court's Decision

Justice O'Connor disagreed with the Board's argument that the *Sandoval* decision controlled this case.[78] Under *Sandoval*, the Court found that regulations could not create a cause of action beyond that intended by Congress in drafting a statute.[79] The Board argued that the Department of Education regulations[80] prohibiting retaliation under Title IX could not create this cause of action for retaliatory discrimination, because this would violate *Sandoval*.[81] The majority, however, found it unnecessary to consider the regulations to reach the conclusion that Title IX prohibits retaliation.[82] The majority's holding that retaliation violates Title IX did "not rely on the Department of Education's regulation at all, because the statute *itself* contains the necessary prohibition," and is thus in accord with *Sandoval*.[83]

### 3. Protection for All Victims of Retaliation Is Necessary to Enforce Title IX

Justice O'Connor, having found that "retaliation falls within the statute's prohibition of intentional discrimination on the basis

75. 396 U.S. 229 (1969).
76. *Jackson*, 125 S. Ct. at 1505.
77. *Id.* at 1506; *see supra* note 6.
78. *See Jackson*, 125 S. Ct. at 1506.
79. *Sandoval*, 532 U.S. at 291; *see supra* note 46.
80. 34 C.F.R. § 100.7(e) (2004).
81. *Jackson*, 125 S. Ct. at 1506.
82. *Id.* at 1506–07.
83. *Id.* at 1507 (emphasis in original).

of sex," next considered whether this protection applies to an indirect victim such as Jackson.[84] Contrasting Title IX's "on the basis of sex" with Title VII's "on the basis of such individual's sex," the majority concluded that, had Congress meant to limit the protections of Title IX to direct victims, it could have used this specific language.[85] As written, the statute's broad wording does not require that the victim of retaliation also have been a direct victim of the original gender discrimination.[86]

Justice O'Connor also considered Congress's purpose in drafting Title IX, to protect individuals from sex discrimination in the educational setting.[87] Finding that, "if retaliation were not prohibited, Title IX's enforcement scheme would unravel," the majority held that Congress must have intended for Title IX to include protection against retaliation.[88] Bolstering the conclusion that indirect victims of retaliatory discrimination should also be allowed a cause of action, Justice O'Connor pointed out that "teachers and coaches such as Jackson are often in the best position to vindicate the rights of their students."[89]

### 4. The Board Had Notice that Retaliation Was Prohibited under Title IX

Finally, the majority considered the Board's argument that Title IX, as an exercise of Congress's spending power, must clearly impose conditions for receipt of funds, and that the Board did not have notice that retaliation was prohibited under Title IX.[90] Justice O'Connor clearly agreed that notice of conditions is essential for funding recipients under Title IX, but disagreed with the Board's assertion that retaliatory discrimination was not clearly prohibited as a condition for the receipt of federal funds.[91] Be-

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 1508; *see also Cannon*, 441 U.S. at 704 ("[Congress] wanted [Title IX] to provide individual citizens effective protection against [discriminatory] practices." (internal quotations and citation omitted)).

88. *Jackson*, 125 S. Ct. at 1508. The Court further asserted, "We should not assume that Congress left such a gap in its scheme." *Id.*

89. *Id.*

90. *Id.* at 1508–09; *see also supra* note 17 and accompanying text.

91. *Jackson*, 125 S. Ct. at 1509.

cause retaliation is necessarily an intentional action, and Title IX clearly prohibits intentional discrimination on the basis of sex, "Title IX itself therefore supplied sufficient notice to the Board that it could not retaliate against Jackson."[92] The majority also cited to the Supreme Court's consistently broad interpretation of discrimination and the Department of Education regulations in concluding that the Board should have known that retaliation was prohibited under Title IX.[93]

### B. *Justice Thomas's Dissent*[94]

Justice Thomas argued that Section 901 of Title IX does not meet the three requirements for implying a cause of action for retaliation: first, that under the plain meaning of the statute, retaliation is not discrimination on the basis of sex; second, that Congress's conditions on funding recipients must be unambiguously imposed; and third, that the statute must "evince a plain intent to provide such a cause of action."[95]

Justice Thomas rejected the majority's holding that retaliation is intentional discrimination on the basis of sex, arguing that discrimination in violation of Title IX must be on the basis of the plaintiff's sex, "not the sex of some other person."[96] Justice Thomas asserted that both Congress and the Supreme Court "used the phrase 'on the basis of sex' as a shorthand for discrimination 'on the basis of such individual's sex.'"[97] Further, the dissent correctly pointed out that the elements for satisfaction of a retaliation claim do *not* require that discrimination has actually occurred;[98] therefore, a retaliation claim may succeed in the absence of any Title IX-prohibited discrimination.[99] Justice Thomas argued that protection against retaliation is therefore a "separate and distinct right," not to be confused with the right to be free of

92. *Id.* at 1510.

93. *Id.*

94. Justice Thomas's dissent was joined by Chief Justice Rehnquist and Justices Scalia and Kennedy. *Id.* at 1510.

95. *Id.* (Thomas, J., dissenting).

96. *Id.* at 1511 (Thomas, J., dissenting).

97. *Id.* (Thomas, J., dissenting).

98. *Id.* at 1512 (Thomas, J., dissenting).

99. *Id.* (Thomas, J., dissenting).

gender discrimination under Title IX.[100] Because Title IX fails to specifically mention retaliation, whereas other civil rights statutes expressly prohibit retaliation, the dissent asserted that Title IX does not provide protection from retaliation.[101]

Whereas the majority held that notice was adequately provided to funding recipients that retaliation for complaints of gender discrimination would be in violation of Title IX's protections, Justice Thomas argued that conduct such as retaliation which is not clearly discrimination on the basis of sex is not prohibited by Title IX; funding recipients therefore cannot have had notice that their funds were conditioned on avoiding the appearance of retaliation.[102] Justice Thomas went on to state that "[t]he Board, and other Title IX recipients, must now assume that if conduct can be linked to sex discrimination—no matter how attenuated that link—this Court will impose liability under Title IX."[103]

Finally, in order for the Court to imply a cause of action, the statute must clearly create such a right, and the plaintiff must be included in the intended class of beneficiaries.[104] Justice Thomas argued that Title IX does not clearly demonstrate Congress's intent to create a private right of action for retaliation, and implied that Jackson, as an indirect victim of gender discrimination, would be outside the intended class of beneficiaries even if Title IX included retaliation.[105] Further, Justice Thomas asserted that the majority misinterpreted *Sullivan*, and consequently the legislative history surrounding the drafting of Title IX.[106] Under Justice Thomas's narrow interpretation of *Sullivan*, the legislative context of Title IX is not such that discrimination would clearly

100. *Id.* at 1513 (Thomas, J., dissenting).

101. *Id.* at 1513–14 (Thomas, J., dissenting).

102. *Id.* at 1514–15 (Thomas, J., dissenting). Justice Thomas interpreted *Gebser* and *Davis* more narrowly than the majority, arguing that these cases merely included sexual harassment as a form of discrimination, rather than compelling a "broad" reading of the statute. *Id.* at 1514 (Thomas, J., dissenting) (citing Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 633 (1999); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 277 (1998)).

103. *Id.* at 1515 (Thomas, J., dissenting).

104. Gonzaga Univ. v. Doe, 536 U.S. 273, 283–84 (2002) (citing Touche Ross & Co. v. Redington, 442 U.S. 560, 576 (1979); Cannon v. Univ. of Chicago, 441 U.S. 677, 691–92 & n.13 (1979)).

105. *See Jackson*, 125 S. Ct. at 1515–16 (Thomas, J., dissenting).

106. *Id.* at 1516 (Thomas, J., dissenting) ("The majority's reliance on *Sullivan* . . . is wholly misplaced."). The dissent argues that, rather than expanding the definition of discrimination to include retaliatory discrimination, *Sullivan* established only that the plaintiff had standing to bring a suit on behalf of one subject to racial discrimination. *Id.* (Thomas, J., dissenting) (citing Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 237 (1969)).

include retaliation, and no congressional intent to include retaliatory claims in Title IX is evident.[107]

## V. POTENTIAL IMPACTS OF THE *JACKSON* DECISION

### A. *Implied Private Rights of Action under Civil Rights Statutes*

Many civil rights statutes already include retaliation in their anti-discrimination mandates, either expressly or impliedly through by the judiciary.[108] Because protection against retaliation is potentially critical to protection from discrimination in the first place,[109] it seems logical that retaliation would be interpreted as another form of discrimination. Thus, the *Jackson* decision could be viewed as bringing Title IX into line with other statutes, rather than as creating a new cause of action or a new interpretation of discrimination.

Some have already attempted, unsuccessfully, to use *Jackson*'s holding to expand other civil rights statutes, as in the recent case *Jones v. United Parcel Service*,[110] where a disabled individual sought a private cause of action for his employer's alleged violation of the Rehabilitation Act of 1973.[111] The plaintiff argued that an implied private right of action should be created for the Rehabilitation Act in light of the expansion of these rights under *Jackson*.[112] The district court refused to allow this cause of action, finding that *Jackson* had not in fact extended the Title IX statute, but rather had upheld its broad interpretation of discrimination.[113]

Justice Thomas is clearly concerned that such judicially implied causes of action stand to trample Congress's legislative power, stating that "the majority substitutes its policy judgments for the bargains struck by Congress, as reflected in the statute's text."[114] At least in *Jackson*, however, the majority makes the bet-

107. *See id.* (Thomas, J., dissenting).
108. *See supra* note 10 and accompanying text; *see also* text accompanying note 34.
109. *See supra* notes 22, 46, and 80 and accompanying text.
110. 378 F. Supp. 2d 1312 (D. Kan. 2005).
111. 29 U.S.C. § 793(a) (2000).
112. *Jones*, 378 F. Supp. 2d at 1314.
113. *Id.*
114. *Jackson*, 125 S. Ct. at 1517 (Thomas, J., dissenting).

ter argument. It seems, by the context of Title IX's enactment,[115] the broad, non-specific terms used in the statute,[116] the Department of Education's regulations interpreting Title IX,[117] and the overall direction of the Supreme Court's holdings interpreting civil rights statutes,[118] that Congress intended for Title IX to be broadly interpreted and has approved of the executive and judicial branches' interpretations of the statute.

### B. *Expanding the Class of the Protected, or Upholding the Definition of Discrimination?*

The impact of the *Jackson* decision may very well not be significant, as it was a close five-to-four decision. *Sandoval* was also a five-to-four decision, and the Justices have clearly differed in how it should be interpreted.[119] Only Justice O'Connor has changed her position for the *Jackson* decision; otherwise the Justices have held to their positions supporting or opposing the expansion of implied causes of action for Titles VI and IX.[120]

By holding that retaliation is part of Title IX's definition of discrimination, however, the Court did not actually expand the class of intended beneficiaries under Title IX; it merely included all victims of retaliation under the umbrella of those "discriminated" against "on the basis of sex."[121] While the Court could narrow its definition of discrimination in the future to exclude indirect victims of discrimination, it need not interpret *Jackson* as expanding the class of the protected under Title IX. *Jackson* upheld the purpose of ensuring equal treatment for the sexes in the educational setting by guaranteeing an enforcement mechanism and protection for those protectors of civil rights who seek to enforce gender equality; the decision does not necessarily create any imaginable

115. *See supra* note 6 and accompanying text.

116. *See supra* note 20 and accompanying text.

117. *See supra* note 37 and accompanying text.

118. *See supra* note 6 and accompanying text.

119. *See generally* Mank, *supra* note 9.

120. Compare the Justices' positions in *Jackson*, 125 S. Ct. 1497, with their positions in *Sandoval*, 532 U.S. 275.

121. *Jackson*, 125 S. Ct. at 1507 ("The complainant is himself a victim of discriminatory retaliation, regardless of whether he was the subject of the original complaint.").

cause of action for any victim of alleged discrimination that has anything to do with gender, as the dissent would argue.[122]

Practically, even the dissent's slippery slope argument that discrimination on the basis of sex could now include any conduct remotely related to gender falls flat.[123] Institutions, as we all do, will seek to correct a problem using the path of least resistance. If a particular individual is creating a problem for the school by complaining about sex discrimination, and the school finds it easier to fire the individual than to fix the underlying discrimination, further discrimination has occurred and will continue to occur.[124] On the other hand, a school that investigates claims of gender discrimination and documents its findings before reprimanding a complainant will not need to fear claims of retaliation under Title IX. In the absence of discrimination, presumably the courts would find no rational basis for a claim of retaliation. While the elements of a retaliation claim require only a reasonable belief that discrimination has occurred,[125] open communication and proactive avoidance of gender discrimination should preclude any reasonable person from suspecting discrimination where none is in fact occurring; this proactive approach may be just what Congress envisioned when it drafted Title IX.

## VI. CONCLUSION

The *Jackson* decision will likely be interpreted only as including retaliation within the Title IX definition of discrimination, rather than as greatly expanding the class of the protected for other civil rights statutes. While the Court did include indirect victims of retaliatory discrimination in the protected class by defining discrimination broadly,[126] this close five-to-four decision in a heavily contested area may not stand the test of time, and will almost certainly be construed as narrowly as possible. At least one subsequent decision has held to this narrow interpretation, construing the *Jackson* case as only expanding the definition of

122. *See supra* text accompanying note 95.

123. *Jackson*, 125 S. Ct. at 1515 (Thomas, J., dissenting); *see supra* text accompanying note 95.

124. *Jackson*, at 1504 (concluding that retaliation is an intentional act and a form of discrimination because the complainant is being subjected to differential treatment).

125. *Id.* at 1512–13 & n.1 (Thomas, J., dissenting).

126. *Id.* at 1508.

discrimination within Title IX, rather than as expanding causes of action for other civil rights statutes.[127] Whether the Court will allow private rights of action for any indirect victim of retaliatory discrimination in other civil rights statutes, or whether the class of the protected will be expanded even further, as the dissent predicted,[128] remains to be seen.

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127. *Jones*, 378 F. Supp. 2d at 1314.

128. *Jackson*, 125 S. Ct. at 1516 (Thomas, J., dissenting). "By crafting its own additional enforcement mechanism, the majority returns this Court to the days in which it created remedies out of whole cloth to effectuate its vision of congressional purpose." *Id.* at 1517 (Thomas, J., dissenting).