CONSTITUTIONAL DEVELOPMENT

JACKSON V. BIRMINGHAM BOARD OF EDUCATION: TITLE IX'S IMPLIED PRIVATE RIGHT OF ACTION FOR RETALIATION

The Supreme Court has penned countless words about the sound of statutory silence. On March 29, 2005, the Court once again grappled with the meaning of silence in a statute, splitting along familiar 5-4 lines in Jackson v. Birmingham Board of Education. When the dust cleared, a male coach of a high school girls' basketball team, who was fired in retaliation for protecting his players' Title IX rights, possessed a private right of action arising from the statute itself. Although the Court has retreated from its high-water mark of implying

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1 See, e.g., Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 13 (1981) (addressing "the recurring question whether Congress intended to create a private right of action under a federal statute without saying so explicitly"); Cannon v. Univ. of Chi., 441 U.S. 677, 730 (1979) (Powell, J., dissenting) ("The time has come to reappraise our standards for the judicial implication of private causes of action."); NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 130-31 (1944) ("Undoubtedly questions of statutory interpretation, especially when arising in the first instance in judicial proceedings, are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty is to administer the questioned statute. But where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited.") (citations omitted); S. Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting) ("The only authority available is the common law or statutes of the state. . . . [T]he natural inference is that, in the silence of Congress, this court has believed the very limited law of the sea to be supplemented here as in England by the common law . . . ."); The Amiable Isabella, 19 U.S. (6 Wheat.) 1, 71 (1821) ("[T]o alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty. Neither can this Court supply a casus omissus in a treaty, any more than in a law. We are to find out the intention of the parties by just rules of interpretation applied to the subject matter; and having found that, our duty is to follow it as far as it goes, and to stop where that stops—whatever may be the imperfections or difficulties which it leaves behind."); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is. . . . and interpret that rule."); Stephen Breyer, On the Uses of Legislative History in Interpreting Statutes, 65 S. CAL. L. REV. 845, 847 (1992) (discussing the need for courts to continue using legislative history in interpreting statutory law as such interpretations "tend to make the law itself more coherent, workable, or fair . . . .").

2 125 S. Ct. 1497 (2005).


4 Jackson, 125 S. Ct. at 1507 (reasoning that "the text of Title IX prohibits a funding recipient from retaliating against a person who speaks out against sex discrimination," therefore the Court need not rely on regulations promulgated under that statute because "the statute itself contains the necessary prohibition" against retaliation).
private rights of action, in the Jackson decision it advanced private rights that had been previously implied.

While the majority and dissent agreed "that plaintiffs may not assert claims under Title IX for conduct not prohibited by that statute," the two opinions "part[ed] ways with regard to [their] reading of the statute." Title IX prohibits federally-funded education programs from discriminating based on sex. The majority interpreted Title IX's text "to clearly prohibit retaliation for complaints about sex discrimination," even if such complaints were made by an individual not personally subjected to the discrimination. The dissent refused to find a private right of action for retaliation in the statute.

Justice O'Connor delivered the majority opinion, joined by Justices Stevens, Souter, Ginsburg, and Breyer. In one of her final five opinions for the Court before announcing her resignation, Justice O'Connor engaged in classic statutory interpretation: assuming a judicial role of effectuating congressional intent by gleaning meaning from Title IX. The majority held that "Title IX's private right of action encompasses suits for retaliation, because retaliation falls within the statute's prohibition of intentional discrimination on the basis of sex." Justice Thomas's dissenting opinion was embraced by the remainder of the Court, who found their collective hands tied by congressional silence, leaving them unwilling to join the majority in a structural and contextual reading of the statute. The dissenting justices intimated that separation of powers requires judicial abdication to prevent judicial usurpation of Congress's exclusive power to au-

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5 See, e.g., J.I. Case Co. v. Borak, 377 U.S. 426, 432 (1964) (implying a private right of action based on a statute's protective purpose despite that its "language makes no specific reference to a private right of action").
6 Jackson, 125 S. Ct. at 1507 n.2 ("[T]he private plaintiff may not bring a 10b-5 suit against a defendant for acts not prohibited by the text of § 10(b)." (citing Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 173 (1994))).
8 Id.
9 Id. at 1507.
12 Jackson, 125 S. Ct. at 1507 (finding that "the text of Title IX prohibits a funding recipient from retaliating against a person who speaks out against sex discrimination, because such retaliation is intentional "discrimination" on the basis of sex").
13 Id.
14 Id. at 1513 (Thomas, J., dissenting) ("[T]hat the text of Title IX does not mention retaliation is significant.... Congress' failure to include [separate provisions directly addressing retaliation] in Title IX shows that it did not authorize private retaliation actions.").
authorize rights of action.\textsuperscript{15} The O'Connor team, however, did not view silence as evidence of hostility\textsuperscript{16} and assumed the judicial role of effectuating congressional intent,\textsuperscript{17} rather than abdicating its interpretive power.

Petitioner's complaint alleged these facts: Respondent, the Board of Education of Birmingham, Alabama—a recipient of federal funds—hired Petitioner Roderick Jackson as a girls' basketball coach in 1993.\textsuperscript{18} In 1999, he became coach of the Ensley High School girls' basketball team. As coach, Jackson noticed that the girls' team received less funding than the boys' program and, unlike the boys' team, was denied a key to access the practice facilities.\textsuperscript{19} When Jackson complained to his supervisors in 2000 about this Title IX discrimination, his protests fell on deaf ears.\textsuperscript{20} Instead of corrective action, Jackson's supervisors were moved to reaction, issuing negative evaluations of his work and removing him from the coaching position in May of 2001.\textsuperscript{21}

Jackson's case raised issues of what conduct "discrimination" encompasses, as well as who may bring suit to redress such discrimination "on the basis of sex" under Title IX. The United States District Court for the Northern District of Alabama dismissed his complaint for failure to state a claim upon which relief could be granted, holding that Title IX did not authorize retaliation claims.\textsuperscript{22} A unanimous panel of the United States Court of Appeals for the Eleventh Circuit affirmed the dismissal, holding that the private right of action under the United States Department of Education's anti-retaliation regulation\textsuperscript{23} was unenforceable because it exceeded Title IX's language.\textsuperscript{24}

\textsuperscript{15} Id. at 1517 (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. In doing so, the majority substitutes its policy judgments for the bargains struck by Congress, as reflected in the statute's text. The question before us is only whether Title IX prohibits retaliation, not whether prohibiting it is good policy." (citation omitted)).

\textsuperscript{16} Id. at 1505 ("Because Congress did not list any specific discriminatory practices when it wrote Title IX, its failure to mention one such practice does not tell us anything about whether it intended that practice to be covered [by the statute].").

\textsuperscript{17} Id. at 1507-08 (examining "the backdrop against which Congress enacted Title IX" and why Congress enacted the statute, as well as highlighting what "Congress intended Title IX's private right of action to encompass").

\textsuperscript{18} Brief of the Petitioner at 4, Jackson, 125 S. Ct. 1497 (No. 02-1672).

\textsuperscript{19} Id. at 4-5.

\textsuperscript{20} Id. at 5.

\textsuperscript{21} Id.

\textsuperscript{22} Jackson v. Birmingham Bd. of Educ., No. CV-01-TMP-1866-S, 2002 WL 32668124, at *2 (N.D. Ala. Feb. 25, 2002). Because this case did not survive a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss, the facts alleged in the petitioner's complaint are assumed true for purposes of Supreme Court review, but they must be proven over the respondent's affirmative defenses on remand. Jackson, 125 S. Ct. at 1502-03.

\textsuperscript{23} 34 C.F.R. § 106.71 (2004).
The case presented the Court with several narrow questions regarding the scope of Title IX: Does Title IX prohibit retaliatory discrimination against those who bring complaints for its enforcement?\(^{25}\) If so, does the statute also protect whistle-blowers who were not personally subjected to the underlying discrimination?\(^{26}\) The majority answered "yes" to both questions.\(^{27}\) For the dissenters, the absence of explicit reference to retaliation in the statute meant "no."\(^{28}\)

The case also presented more existential, overarching questions: What do words mean? How do we proceed in the presence of ambiguity? What did Congress want in 1970? What should we do about it today? What types of interaction should we promote between statute and regulation, between private and public entities, and between the three branches of government? Which mode will prevail in the battle over statutory interpretation?

The decision in *Jackson* substantially raised the stakes for many players. For the Justices, both the role of the Court in the constitutional scheme, as well as the proper method of interpreting federal statutes were at issue. The United States government and its agencies saw their ability to delegate enforcement of important rights-creating statutes and conditional spending programs at stake.\(^{29}\) For local school boards, the decision would affect liability for alleged retaliatory employment actions.\(^{30}\) Teachers, professors, women's sports coaches, and civil rights activists saw the effective enforcement of Ti-

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\(^{25}\) *Jackson* v. Birmingham Bd. of Educ., 309 F.3d 1333, 1346 (11th Cir. 2002) (stating that neither Title IX, nor the corresponding sections of the Code of Federal Regulations implies a private right of action for retaliation).

\(^{26}\) *Jackson*, 125 S. Ct. at 1502 ("We consider here whether the private right of action implied by Title IX encompasses claims of retaliation.").

\(^{27}\) *Id.* at 1507 ("Nor are we convinced by the [Respondent's] argument that, even if Title IX's private right of action encompasses discrimination, [Petitioner] is not entitled to invoke it because he is an 'indirect vic[i]m' of sex discrimination." (citation omitted)).

\(^{28}\) *Id.* at 1502 ("We hold that [the statute] does [encompass claims of retaliation] where the funding recipient retaliates against an individual because he has complained about sex discrimination.").

\(^{29}\) *See id.* at 1510 (Thomas, J., dissenting) ("[Title IX] prohibits [retaliation] only if it falls within § 901's prohibition against discrimination 'on the basis of sex.' It does not."); *Id.* at 1512 ("A victim of sexual harassment suffers discrimination because of her own sex, not someone else's. . . . *Jackson*'s retaliation claim lacks the connection to actual sex discrimination that the statute requires.").

\(^{30}\) *See Brief for the United States as Amicus Curiae Supporting Petitioner at 1, Jackson*, 125 S. Ct. 1497 (No. 02-1672) (submitted at the Court's request).

\(^{31}\) *See Brief of Amici Curiae National School Boards Ass'n, Alabama Ass'n of School Boards, American Ass'n of School Administrators, American Ass'n of Presidents of Independent Colleges & Universities, & Ass'n of Southern Baptist Colleges & Schools in Support of Respondent at 2, Jackson*, 125 S. Ct. 1497 (No. 02-1672) (participating to further their "critical interest in reducing wasteful litigation against public schools and other institutions").
tle IX and other civil rights hanging in the balance. Those who perceived zealous enforcement of Title IX as overly detrimental to men’s sports saw the potential for further harm in the outcome of the case. For proponents of Title IX rights, the decision’s outcome threatened the statute’s continued vitality and enforcement. For Jackson and other educators and coaches, protection of their livelihood from retaliatory actions was at issue. For the Ensley High School girls’ basketball team, the Court held the keys to equal equipment and playing time. For other interested observers, the quantity and quality of precedent in the heated federalism debate could be tipped by the decision.

In the end, the Court vindicated rights against discrimination, recognized the profound threat retaliation posed to Title IX en-

31 See Brief Amicus Curiae of the National Education Ass’n, American Ass’n of University Professors, American Volleyball Coaches Ass’n, National Fastpitch Coaches Ass’n, Intercollegiate Women’s Lacrosse Coaches Ass’n, & Women’s Basketball Coaches Ass’n in Support of Petitioner at 2, Jackson, 125 S. Ct. 1497 (No. 02-1672) (participating to illustrate why enforcement of Title IX “depends on ensuring that teachers, professors, coaches, school administrators and students are protected from retaliation for reporting Title IX violations or for supporting Title IX claims”); see also Amicus Curiae Brief of College Sports Council in Support of Neither Party at 1, Jackson, 125 S. Ct. 1497 (No. 02-1672) (participating neutrally on the important questions of “whether the law should protect coaches and other educators who champion the rights of the students in their charge” and “whether litigation is the best, or at least the first, way to resolve disputes”); Brief of Amicus Curiae Leadership Conference on Civil Rights in Support of Petitioner at 2, Jackson, 125 S. Ct. 1497 (No. 02-1672) (participating to voice its “unequivocal judgment... that a remedy for reprisal discrimination is indispensable to the efficient, effective enforcement of Title IX, and of federal anti-discrimination laws generally”).

32 See Amicus Curiae Brief of National Wrestling Coaches Ass’n in Support of Respondent at 1, Jackson, 125 S. Ct. 1497 (No. 02-1672) (participating to “support its campaign to bring balance back to Title IX implementation and enforcement” and to address the perceived risks of “driving schools out of athletics altogether” if a private right of action for retaliation is implied under Title IX).

33 See Brief Amicus Curiae of Birch Bayh in Support of the Petitioner at 1, Jackson, 125 S. Ct. 1497 (No. 02-1672) (participating in his capacity as former Indiana Senator, author and sponsor of Title IX, and amicus curiae in previous Title IX cases to further his “life long commitment to... equal rights for women”); Amicus Curiae Brief of the National Partnership for Women & Families & 31 Other Organizations and Individuals in Support of Petitioner at 2, Jackson, 125 S. Ct. 1497 (No. 02-1672) (participating to serve their “vital interest in effectuating Title IX’s original intent of broad and effective protection against gender discrimination in education” and to illuminate the intent behind Title IX).

34 See Brief of Amicus Curiae Eagle Forum Education & Legal Defense Fund in Support of Respondent at 1–2, Jackson, 125 S. Ct. 1497 (No. 02-1672) (participating to “protect educational opportunity against government interference,” to advocate for “enhancing opportunities for men and women without ignoring important differences between the genders,” and to espouse “limiting the power of the federal government and promoting individual liberty and free enterprise”); Brief Amicus Curiae of Pacific Legal Foundation in Support of Respondent at 1–2, Jackson, 125 S. Ct. 1497 (No. 02-1672) (participating to “provide an additional viewpoint” on the issues raised from the perspective of its purported clientele including “mainstream Americans who believe in limited government, private property rights, individual freedom, and free enterprise”).
forcement, and produced an opinion with a depth of statutory interpretation rarely seen in the past decade of its jurisprudence.

I

The \textit{Jackson} Court initially addressed whistle-blowing under anti-discrimination statutes and regulations. Title IX and Department of Education regulation 34 C.F.R. § 106.71 apply to the complaint and alleged retaliation at issue in \textit{Jackson}. Title IX states 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." Title IX also empowers the federal agencies providing the financial assistance to "effectuate" the statute, by authorizing them to issue and enforce "rules, regulations, or orders of general applicability." The Department of Education’s regulation prohibits retaliation for attempts to enforce Title IX, providing that:

No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this part.

Congress enacted Title IX pursuant to its Spending Clause power. "The national spending power is probably the most important of all Art. I, § 8 powers in its impact on the actual functioning of the federal system." Although somewhat restricted in its scope, the

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\item \textsuperscript{35} 34 C.F.R. § 106.71 (2004) (incorporating 34 C.F.R. § 100.7(e) (2004), the procedural regulations applicable to Title VI of the Civil Rights Act of 1964).
\item \textsuperscript{36} 20 U.S.C. § 1681(a) (2000).
\item \textsuperscript{37} 20 U.S.C. § 1682 (2000).
\item \textsuperscript{38} 34 C.F.R. § 100.7(e) (2004) (incorporated into Title IX regulations by 34 C.F.R. § 106.71 (2004)).
\item \textsuperscript{39} U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes ... to ... provide for the ... general Welfare of the United States ... ").
\item \textsuperscript{40} KATHLEEN M. SULLIVAN & GERALD GUNTHER, \textsc{Constitutional Law} 210 (4th ed. 2001); cf. Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981) (describing Spending Clause legislation as "in the nature of a contract" between the federal, state, and local governments so that state and local recipients' acceptance of the contract's terms and liabilities must be both voluntary and knowing to be valid); Barnes v. Gorman, 536 U.S. 181, 186 (2002) (reiterating the same).
\item \textsuperscript{41} See, e.g., Printz v. United States, 521 U.S. 898 (1997) (holding that Congress may not use its spending powers to compel state officers to execute federal laws); United States v. Lopez, 514 U.S. 549 (1995) (rejecting Congress's use of its spending powers to regulate intrastate activity when that activity has no substantial impact on intrastate commerce); New York v. United States, 505 U.S. 144 (1992) (holding that, in order for Congress to validly exercise its spending power, the conditions attached to the distribution of federal funds must bear some relationship to the purpose of federal spending); South Dakota v. Dole, 483 U.S. 203 (1987) (limiting Congress's spending power with the caveat that power must be exercised for the general welfare,
Spending Clause contains far-reaching powers to coerce state and individual behavior through conditional grants.\(^{42}\) The *Jackson* majority and the United States' amicus brief both focus on this functioning and the role that a private right of action for retaliation (from the text of the statute and from the administrative regulations) will play in that functioning.\(^{43}\)

Access to the purse generated by the Taxation Clause\(^{44}\) comes with purse strings authorized by the Spending Clause. Thus, an institution which receives federal funds may not intentionally discriminate on the basis of sex. The broadly-drafted statutory prohibition on "discrimination . . . on the basis of sex" has found equally broad interpretations by the Supreme Court's Title IX jurisprudence defining discrimination and the proper remedies for that discrimination.\(^{45}\)

the condition must be stated unambiguously, and the grant must not be barred by other constitutional provisions); United States v. Butler, 297 U.S. 1 (1936) (invalidating the Agricultural Adjustment Act of 1933 because the statute conditionally appropriated federal money to indirectly induce compliance in an area of conduct within state control); see also Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911 (1995) (discussing the impact of *Lopez*’s rational basis requirement on the types of actions upon which Congress may condition grants); cf. *Dole*, 483 U.S. at 216 (O'Connor, J., dissenting) (arguing that the judiciary should inquire whether the requirement is indeed a condition or whether it is a regulation, because Congress's conditions must relate to the expenditure of federal funds).

\(^{42}\) See, e.g., *Dole*, 483 U.S. at 207, 211 (holding that Congress may not only attach conditions on the receipt of federal funds, but that it may also condition funds to achieve goals it could not achieve directly, as long as the conditions are not so coercive as to turn into compulsion); *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (abdicating the decision about what spending grants will promote the general welfare to Congress in upholding the Federal Election Campaign Act); *Helvering* v. *Davis*, 301 U.S. 619 (1937) (upholding the Social Security Act's age benefits provisions); Chas. C. Steward Mach. Co. v. *Davis*, 301 U.S. 548 (1937) (upholding the Spending Clause constitutionality of the Social Security Act's unemployment compensation provisions); see also Albert J. Rosenthal, *Conditional Spending and the Constitution*, 39 STAN. L. REV. 1103 (1987) (tracking the growth in federal conditional grant programs and the detail of the conditions accompanying grants).

\(^{43}\) E.g., *Jackson* v. *Birmingham Bd. of Educ.*, 125 S. Ct. 1497, 1508 (2005) (agreeing that achieving the objective of preventing federal money from supporting discrimination "would be difficult, if not impossible" without a private right of action for retaliation (quoting Brief for the United States as Amicus Curiae Supporting Petitioner, *supra* note 29, at 13)); Brief for the United States as Amicus Curiae Supporting Petitioner, *supra* note 29, at 1 (describing the "[i]nterest of the United States" as pigged by the Department of Justice's role in coordinating and implementing enforcement of Title IX); *Id.* at 13–14 ("Effective protection against retaliation is particularly important because of Title IX's enforcement structure" which "necessarily depends on . . . agencies and recipients receiving actual knowledge of the underlying discrimination.").

\(^{44}\) U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes... to... provide for the... general Welfare of the United States...").

The Supreme Court first recognized an implied private right of action under Title IX in its 1979 case, *Cannon v. University of Chicago*.\(^{46}\) In the years since Title IX’s enactment, however, the Court has developed an extreme reluctance to imply a right of action without clearly expressed congressional intent to create one.\(^{47}\) *Cannon* opened the door to private rights of action under Title IX before the Court escalated to its highly restrictive approach, which follows the ascension of federalism and separation of powers arguments.\(^{48}\) Those who wished to sue under Title IX did not have to depend solely on fortuitous timing to receive an implied private right of action from the Supreme Court. The statute also possesses attributes the Court relies upon to infer congressional intent to create a remedy: strong support from the contemporaneous legal context and overlap with an area in which common law or legislation already recognized a private remedy.\(^{49}\)

After finding the right of action, the *Jackson* Court subsequently defined the “contours of that right of action.”\(^{50}\) Private parties may seek monetary damages under Title IX, as well as enforcement

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47 Compare J.I. Case Co. v. Borak, 377 U.S. 426, 431 (1964) (creating a private right of action in the absence of express congressional authorization if private damages suits would aid in accomplishing legislative purpose), with Alexander v. Sandoval, 532 U.S. 275, 287 (2001) (“Having sworn off the habit of venturing beyond Congress’s intent, we will not accept respondents’ invitation to have one last drink,” and therefore denying a private right of action for violation of administrative regulations beyond the statute’s ambit), and Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 645-46 (1981) (refusing to imply a private cause of action without clear congressional authorization in the Sherman Antitrust Act, a statute effectuated by federal common law), and Cannon v. Univ. of Chi., 441 U.S. 677, 731 (1979) (Powell, J., dissenting) (advocating for an approach even more restrictive than the majority’s which would deny a right of action absent “the most compelling evidence of affirmative congressional intent”), and Touche Ross & Co. v. Redington, 442 U.S. 560, 576 (1979) (requiring affirmative evidence of congressional intent to create a private remedy, and, finding none, admonishing that “the inquiry ends there”), and Cort v. Ash, 422 U.S. 66, 78 (1975) (dictating detailed inquiry into congressional intent before implying a right of action, and determining whether the implied cause of action is one traditionally relegated to state law).

48 Touche Ross, 442 U.S. at 578 (“[I]n a series of cases since Borak we have adhered to a stricter standard for the implication of private causes of action, and we follow that stricter standard today. The ultimate question is one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law.” (internal citation omitted)).

49 See, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 381–82 (1982) (assuming Congress intended the statute to preserve, rather than foreclose, a remedy which existed at the time of enactment); Cort, 422 U.S. at 78 (requiring analysis of four contemporaneous factors to determine congressional intent to imply a private right of action: whether the statute creates a federal right in plaintiff’s favor, whether Congress provided any indication of its intent regarding remedies, whether implying a remedy would accord with the legislation’s purpose, and whether the remedy is one traditionally governed by state law).

through equitable relief.\(^{51}\) Impermissible discrimination includes not only overt discrimination, but also an institution's deliberate indifference to sexual harassment perpetrated by its employees\(^ {52}\) or its students.\(^ {53}\)

The Department of Education and Department of Justice both promulgated regulations prohibiting retaliation for complaints of Title IX discrimination as many as thirty years ago.\(^ {54}\) In *Alexander v. Sandoval*, the Supreme Court denied enforcement of Title VI regulations because they went beyond the statutory proscription.\(^ {55}\) Seven years before *Sandoval*, the Fourth Circuit upheld enforcement of anti-retaliation regulations under Title IX in *Preston v. Virginia ex rel. New River Community College*.\(^ {56}\) The Fifth Circuit agreed in *Lowrey v. Texas A & M University System*.\(^ {57}\) After *Sandoval*, however, two federal district courts refused to recognize a private right of action following its reasoning regarding the interaction of regulation and statute.\(^ {58}\)

Against this backdrop of precedent, Roderick Jackson filed his complaint alleging that his employer, the Birmingham Board of Education, had retaliated against him in violation of Title IX. His case raised issues of what conduct "discrimination" encompasses, as well as who may bring suit to redress such discrimination "on the basis of sex." The district court dismissed his complaint for failure to state a claim upon which relief could be granted, holding that Title IX did not authorize retaliation claims.\(^ {59}\) The Eleventh Circuit affirmed the dismissal, relying on *Sandoval* for their holding that the private right of action under the anti-retaliation regulation was unenforceable because it exceeded Title IX's language.\(^ {60}\) The Eleventh Circuit's decision created a circuit split.

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51 Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 76 (1992) (finding that limiting Title IX remedies to backpay and prospective relief "conflicts with sound logic").
54 See, e.g., 34 C.F.R. § 100.7(e) (2004) (Dept. of Educ.); see also Jackson, 125 S. Ct. at 1510 ("The regulations implementing Title IX clearly prohibit retaliation and have been on the books for nearly 30 years.").
55 532 U.S. 275 (2001). The Court issued the *Sandoval* decision just weeks before Jackson was fired from his coaching job.
56 31 F.3d 203, 206 (4th Cir. 1994).
57 117 F.3d 242, 253 (5th Cir. 1997).
60 Jackson v. Birmingham Bd. of Educ., 309 F.3d 1333, 1339 (11th Cir. 2002).
The Department of Education’s anti-retaliation regulation and the Court’s 2001 Title VI decision in Sandoval convinced the district court and the Eleventh Circuit to seek rights of action in the regulation, rather than the text and interpretation of the Title IX statute itself. Justice O’Connor criticized the court of appeals’ dismissive conclusion that retaliation does not fall within Title IX’s ambit simply because “the statute makes no mention of retaliation.” Illustrating how the court of appeals ignored the momentum of the Supreme Court’s Title IX interpretations, Justice O’Connor catalogued the Court’s line of precedent that construes Title IX discrimination broadly in congruence with the statute’s language.

Based on a rigorous comparison with Title VI and Title VII, as well as precedent construing private rights of action, Justice O’Connor for the Court held that “when a funding recipient retaliates against a person because he complains of sex discrimination, this constitutes intentional ‘discrimination’ ‘on the basis of sex,’ in violation of Title IX.” Although it acknowledged Sandoval’s relevance, the Court found that a much earlier case, Sullivan v. Little Hunting Park, Inc., provided a closer analogy to Jackson.

The Court and advocates before it have long sought analogy to, and distinction from, the other civil rights statutes in interpreting

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61 34 C.F.R. § 100.7(e) (2004) ("No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by [this Act]." (incorporated into Title IX regulations by 34 C.F.R. § 106.71 (2004))).
63 Id. at 1504–05. For the line of precedent discussed, see Davis v. Monroe County Board of Education, 526 U.S. 629, 642 (1999) (allowing private Title IX actions in cases of severe student-on-student sexual harassment where the funding recipient acts with deliberate indifference to known acts and the harasser is under the school's disciplinary authority); Gebser v. Lago Vista Independent School District, 524 U.S. 274, 290–91 (1998) (holding that a school district could be liable for damages where it remained deliberately indifferent to teacher-student harassment of which it had actual knowledge); Franklin v. Gwinnett County Public Schools, 503 U.S. 60, 74–75 (1992) (allowing all appropriate remedies, including monetary awards, for teacher-student sexual harassment actionable under Title IX); North Haven Board of Education 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))).
64 Jackson, 125 S. Ct. at 1504.
65 Id. at 1507 (“In step with Sandoval, we hold that Title IX’s private right of action encompasses suits for retaliation, because retaliation falls within the statute’s prohibition of intentional discrimination on the basis of sex.”).
67 See Jackson, 125 S. Ct. at 1505 (describing Sullivan’s relevance); see also 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) (arguing that Sullivan, rather than Sandoval, controls this question, therefore indicating that Title IX requires an implied right of action for retaliation).
each statute's individual language. The Court has frequently used the civil rights statutes to interpret one another, especially drawing parallels between Titles VI and IX.\textsuperscript{68} Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of "race, color, or national origin" under "any program or activity receiving Federal financial assistance."\textsuperscript{69} Congress modeled Title IX after Title VI, and the Court therefore infers similar intent guided Title IX's drafting.\textsuperscript{70}

Although neither statute's text mentions retaliation, both agencies administering the laws enacted anti-retaliation regulations.\textsuperscript{71} The Court measured the weight of statute and regulation for judicial interpretation in the oft-cited \textit{Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.} decision.\textsuperscript{72} At the intersection of statutory ambiguity, clarifying regulation, and legal challenge, courts must afford deference to the agency's reasonable interpretation of statutory language.\textsuperscript{73} The Department of Justice, as amicus curiae supporting Jackson, argued for deference to the Department of Education's anti-retaliation regulation, as well as to its own identical regulation.\textsuperscript{74} The Department of Justice proposed that the interpretation of these regulations receive \textit{Chevron} deference because that agency "has primary responsibility for enforcing Title IX."\textsuperscript{75} Because the Justice Department "is responsible for coordinating the enforcement of Title IX by federal agencies,"\textsuperscript{76} it acts much like the coach of the Title IX en-

\textsuperscript{68} See, e.g., Gebser, 524 U.S. at 286 (noting that because Congress modeled Title IX after Title VI, the two statutes operate in the same manner); Grove City Coll. v. Bell, 465 U.S. 555, 566 (1984) ("Title IX was patterned after Title VI... The drafters of Title VI envisioned that the receipt of student aid funds would trigger coverage, and, since they approved identical language, we discern no reason to believe that the Congressmen who voted for Title IX intended a different result." (citations omitted)); Cannon v. Univ. of Chi., 441 U.S. 677, 694-96 (1979) (highlighting Titles VI and IX's similarities while using the statutes to aid in interpreting each other).


\textsuperscript{70} See Cannon, 441 U.S. at 694-99 (discussing Title VI and IX's similarities).

\textsuperscript{71} 34 C.F.R. § 100.7(e) (2004) (Department of Education regulation under Title VI); 28 C.F.R. § 42.108(e) (2004) (Department of Justice regulation under Title VI); 34 C.F.R. § 106.51 (2004) (Department of Education regulation under Title IX).


\textsuperscript{73} \textit{Chevron}, 467 U.S. at 842-43. The agency must also have authority to issue regulations with the "force of law" to receive \textit{Chevron} deference from a reviewing court. United States v. Mead Corp., 533 U.S. 218, 221-30 (2001).

\textsuperscript{74} Brief for the United States as Amicus Curiae Supporting Petitioner, \textit{supra} note 29, at 16.

\textsuperscript{75} Id. at 17.

forensnce team. Therefore, the Department reasoned, the Court should defer to the Justice Department's regulations, which mirror those promulgated by the Department of Education. Although the Department argued for deference to appropriate regulation, it put forth an alternative argument based on the statute itself:

There is no need in this case, however, to rely on agency regulations or principles of deference to resolve the question presented. The text, background, and purposes of Title IX all point to the conclusion that Title IX's prohibition against discrimination on the basis of sex incorporates protection against retaliation. The relevant agency regulations simply reinforce that conclusion.

Frank H. Easterbrook posited that textual ambiguity in statutes invites litigation, as well as administrative agency clarification via regulation. Both of these phenomena are at work in the Jackson case. If the agency promulgates a clarifying regulation before litigation on the point commences, the executive branch has beaten the judicial branch in the race to interpretation. Because agencies operate under different pressures, constraints, and processes, their interpretation of the statute in promulgating regulations may diverge from the judiciary's interpretation of the statute. The possible list of statutory interpreters includes agency employees, political officials, and judges. Chevron instructs judges to give deference to agencies. In this com-

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77 Brief for the United States as Amicus Curiae Supporting Petitioner, supra note 29, at 17 ("Because the Department of Justice has responsibility for coordinating the enforcement of Title IX by federal agencies, its view is likewise entitled to deference"); see also, U.S. DEP’T OF JUSTICE, TITLE IX LEGAL MANUAL 23-24 (2001), http://www.usdoj.gov/crt/cor/coord/ixlegal.pdf. (tracking how "[i]n the Title IX [pan-agency] common rule, the substantive non-discrimination obligations of recipients, for the most part, are identical to those established by the Department of Education under Title IX").

78 Brief for the United States as Amicus Curiae Supporting Petitioner, supra note 29, at 18.

79 See Frank H. Easterbrook, Judicial Discretion in Statutory Interpretation, 57 Okla. L. Rev. 1 (2004) [hereinafter Easterbrook, Discretion] (discussing methods of interpretation and exercise of discretion in adjudicating the validity of administrative regulations and extending to the statutory context his earlier discussion about levels of generality in constitutional interpretation); see also Frank H. Easterbrook, Abstraction and Authority, 59 U. Chi. L. Rev. 349 (1992) (discussing desirable levels of generality in constitutional interpretation); Frank H. Easterbrook, Text, History and Structure in Statutory Interpretation, 17 Harv. J.L. & Pub. Pol’y 61, 63-64 (1994) [hereinafter Easterbrook, Statutory Interpretation] (concluding that statutory text and structure are the proper foundations for finding meaning, as opposed to legislative history and intent).

80 Easterbrook, Discretion, supra note 79, at 2.

81 Id. at 5 (contrasting the interpretive methodologies of “a judge with tenure” versus “an ‘expert’ at an agency, or a political official serving at the President’s pleasure” to highlight that “[j]udges in their own work forswear the methods that agencies employ.”).

82 Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984) (“If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissive construction of the statute.”).
plex interplay of statute, regulation, and separation of powers, Easterbrook sees the choice not as "who does the interpretation," but rather as "what methods of interpretation will be applied." Judges arrive at interpretation by traversing the statute's text, legislative history, and contemporaneous case law. Agencies reach their interpretation by a more politically charged and accountable route. Therefore, by deferring to agency determinations, judges effectively employ the administrative process in legal interpretation.

Checked and balanced, the legislative branch may create a private right of action by statute, an executive agency may promulgate rules under that statute, and the judicial branch will defer to agencies' reasonable interpretations of Congress—which do not include creation of extra-legislative rights of action. In Sandoval, Justice Scalia removed from agencies' legitimate powers the ability to enact regulations creating private rights of action. The regulation at issue in Sandoval created a right of action for more conduct than the enabling statute covered. "Agencies may play the sorcerer's apprentice but not the sorcerer himself" and the Court will supervise that role-play.

With the Supreme Court's fresh treatment of statutory versus regulatory rights of action in mind, the Eleventh Circuit and the Birmingham Board of Education maintained that the Court's interpretation of Title VI's language and regulations in Sandoval controlled the Title IX analysis before it in Jackson. The Eleventh Cir-

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83 Easterbrook, Discretion, supra note 79, at 3.
84 See id. at 8 ("Congress and the President can control bureaucrats..., but if a judge strays, the only remedy is more legislation—which in political terms is much more costly.")(emphasis added))
85 Id.
86 See Alexander v. Sandoval, 532 U.S. 275, 291 (2001) ("[R]egulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not.")
87 Compare 28 C.F.R. § 42.104(b) (2) (2004) (invoking a right of action for unintentional discrimination via disparate impact in Department of Justice Title VI regulation), with Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (finding a right of action only for intentional discrimination via disparate treatment under Title VI itself), and Note, After Sandoval: Judicial Challenges and Administrative Possibilities in Title VI Enforcement, 116 HARV. L. REV. 1774 (2003) (discussing Sandoval's denial of a private right of action for disparate impact and its implications on administrative agencies and civil rights enforcement litigation).
88 Sandoval, 532 U.S. at 291.
89 Sandoval was decided just three years before Jackson came before the Eleventh Circuit. Justice O'Connor and the United States as Amicus Curiae both presumed that a Supreme Court case decided "just three years before" was profoundly present in the drafter's consciousness. See Brief for the United States as Amicus Curiae Supporting Petitioner, supra note 29, at 5, 11.
90 Jackson v. Birmingham Bd. of Educ., 309 F.3d 1333, 1338 (11th Cir. 2002) ("Our analysis of Jackson's claim is governed in substantial measure by the Supreme Court's recent decision in Alexander v. Sandoval..."). Although the district court did not mention Sandoval, the Eleventh Circuit relied heavily on that case to affirm the district court's decision. The Eleventh Circuit invoked Sandoval for three purposes: to determine whether to imply a right of action, to
cuit construed Title IX in pari materia with Title VI to determine whether the statute’s language was plain enough to imply a right of action, deciding it was not. 91

Justice O’Connor’s decision, however, avoids the mire of *Chevron* deference and *Sandoval* disregard by initially interpreting the statute independent from the regulations it engendered. 92 The Board’s *Sandoval* argument that the regulation prohibiting retaliation is an “impermissible extension of the statute” 93 “entirely misses the point,” 94 according to the majority. The *Jackson* majority “d[id] not rely on regulations extending Title IX’s protection beyond its statutory limits; indeed [it did] not rely on . . . regulation at all” in recognizing a private right of action “because the statute itself contains the necessary prohibition.” 95

Justice Thomas’s dissent argues that implied private rights of action are, or should be, rarities under the doctrines of textualism animating recent decisions. 96 He contends that no private right of action exists for retaliation because Congress has not unambiguously imposed that condition on funding recipients and that Title IX does not “evidence a plain intent to provide such a cause of action.” 97 The dissent suggests that, because the Court has been saying since *Touche Ross & Co. v. Redington* in 1979 98 that it will no longer imply a right of action without clear statutory authorization, the Court must disregard the chronology of the statute’s enactment. 99

Under the reasoning of Justice Thomas and the textualists, implying remedies absent explicit textual authorization is never proper, 100 even if the legislative body which drafted the statute could have rea-

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91 Id. at 1339. See generally RUPERT CROS, STATUTORY INTERPRETATION 128 (John Bell & Sir George Engle eds., 2d ed. 1987) (discussing, inter alia, the jurisprudential tactic of examining similar statutes for clues on how to interpret a statute in question).
92 Jackson v. Birmingham Bd. of Educ., 125 S. Ct. 1497, 1507 (2005) (holding that Title IX prohibits funding recipients from retaliating against the whistle-blower who speaks out against sex discrimination based on the statute’s text).
93 Brief for the Respondent at 45, *Jackson*, 125 S. Ct. 1497 (No. 02-1672).
94 *Jackson*, 125 S. Ct. at 1501.
95 Id. at 1506-07.
96 Id. at 1514 (Thomas, J., dissenting) (arguing that the Court’s jurisprudence requires that the statute at issue in *Jackson* clearly authorize retaliation claims).
97 Id. at 1510 (Thomas, J., dissenting).
99 *Jackson*, 125 S. Ct. at 1515 (Thomas, J., dissenting).
100 Id. at 1514; see also Antonin Scalia, Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws, in A MATTER OF INTERPRETATION 3, 13-14 (Amy Gutmann ed., 1997) (explaining the theory of textualism and noting that “[b]y far the greatest part of what I and all federal judges do is to interpret the meaning of federal statutes and federal agency regulations” and referring to statutory interpretation as “the principal business of judges and (hence) lawyers”).
sonably relied on then-existing precedent. The majority, however, recognized that the congressional consciousness which drafted Title IX in 1970 did not include *Touche Ross’s* extreme admonition against implying remedies. Instead, the Congress who enacted Title IX was working from the assumption that the Court would follow its own permissively interpretive precedent set in the 1964 decision *J.L. Case Co. v. Borak* and its reading of Title VI as authorizing rights of action against retaliation in *Sullivan v. Little Hunting Park, Inc.* Whereas *Touche Ross* requires that the “inquiry ends[]” with the text itself, the Court at the time of Title IX inquired beyond, asking whether a proposed right of action would help accomplish legislative purpose. The chronological fact that “Congress enacted Title IX just three years after *Sullivan*” provided the majority with “valuable context for understanding the statute.”

Because the majority did not feel *Touche Ross* forbade it from examining the legislative context, it explored and found Title IX’s legislative history persuasive on the arguments that the statute intended to protect against retaliation, and that protection from retaliation was necessary to effectuate the statute’s purpose. The dissent criticizes the majority for offering “nothing to demonstrate that its prophylactic rule is necessary to effectuate the statutory scheme” because students and their parents remain free to complain.

Copious evidence demonstrating that protection from retaliation is essential to Title IX existed in the Court’s docket, though it is not

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101 See *Jackson*, 125 S. Ct. at 1506 (“Congress enacted Title IX just three years after Sullivan [in 1969], and accordingly that decision provides a valuable context for understanding the statute. . . . Retaliation for Jackson’s advocacy of the rights of the girls’ basketball team in this case is ‘discrimination’ ‘on the basis of sex,’ just as retaliation for advocacy on behalf of a black lessee in *Sullivan* was discrimination on the basis of race.”).


104 *Touche Ross & Co. v. Redington*, 442 U.S. 560, 576 (1979) (requiring affirmative evidence of congressional intent to create a private remedy, and, finding none, admonishing that “the inquiry ends there”).

105 See *Borak*, 377 U.S. at 431 (creating a private right of action in the absence of express congressional authorization if private damages suits would aid in accomplishing legislative purpose).

106 *Jackson*, 125 S. Ct. at 1506; see also Brief for the United States as Amicus Curiae Supporting Petitioner, supra note 29, at 5, 11 (reiterating that congressional intent may be inferred from the fact that Title IX was enacted “just three years” after *Sullivan*).

107 *Jackson*, 125 S. Ct. at 1506-08.

108 *Jackson*, 125 S. Ct. at 1516 (Thomas, J., dissenting).

109 See, e.g., Brief Amicus Curiae of the National Education Ass’n, American Ass’n of University Professors, American Volleyball Coaches Ass’n, National Fastpitch Coaches Ass’n, Intercollegiate Women’s Lacrosse Coaches Ass’n, & Women’s Basketball Coaches Ass’n in Support of Petitioner, supra note 31, at 18 (“[E]ducators bring the vast majority of Title IX retaliation cases . . . . These cases prove the point that educators put their very livelihoods at risk by standing up for Title IX enforcement.”); Brief for the Petitioner, supra note 18, at 40 (citing *Sullivan*
directly cited by the majority. The United States' amicus brief catalogues some of the extensive documentation and testimony about the widespread practice of retaliation, and its chilling effect on opposition to sex discrimination presented before Congress while it considered Title IX. While the majority opinion does not cite this legislative history, it does acknowledge the conclusion that "[i]f recipients were permitted to retaliate freely, individuals who witness discrimination would be loath to report it, and all manner of Title IX violations might go unremedied as a result."

Although neither Title IX nor Title VI mention retaliation, Title VII lists retaliation in its catalogue of prohibited forms of employment discrimination. Title VII of the Civil Rights Act of 1964 expressly prohibits employers from retaliating against an employee because, among other reasons, she has "opposed any practice made an unlawful...practice by [Title VII]..."

The Birmingham Board of Education urged that the Court deny a private right of action under Title IX based on Title VII's list of prohibited employment actions. Applying the maxim of interpretation

for the proposition that "the only effective adversary of discrimination is someone who is not its direct target," in order to justify extending protection against retaliation to educators (quoting Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 237 (1969)); Brief for the United States as Amicus Curiae Supporting Petitioner, supra note 29, at 14-16 (asserting that retaliation against educators was a problem prior to the enactment of Title IX and quoting testimony before Congress on the issue); Brief of Amicus Curiae Leadership Conference on Civil Rights in Support of Petitioner, supra note 31, at 18-26 (discussing the judicial history of finding implied rights of action under the various civil rights statutes); see also NATIONAL COALITION FOR WOMEN AND GIRLS IN EDUCATION, TITLE IX AT THIRTY: REPORT CARD ON GENDER EQUITY, 4 (2002) (warning that a Supreme Court decision allowing retaliation would "significantly hamper efforts to enforce Title IX"); Sarah L. Stafford, Progress Toward Title IX Compliance: The Effect of Formal and Informal Enforcement Mechanisms, 85 SOC. SCI. Q. 1469 (2004) (focusing on compliance in intercollegiate athletic programs).

Jackson, 125 S. Ct. at 1508 (discussing generally the need for protection against retaliation in order to have effective protection against the discrimination proscribed by Title IX).

Brief for the United States as Amicus Curiae Supporting Petitioner, supra note 29, at 14-16; see also Discrimination Against Women: Hearings Before the Spec. Subcomm. on Education of the H. Comm. on Education and Labor, 91st Cong. 302, 1051 (1970) (recounting the experiences of several women, who after seeking promotion to "upper-echelon, 'male only' jobs" in governmental agencies, experienced retaliatory treatment as a result); 118 CONG. REC. S312 (1972) (discussing the prevalence of retaliation against women who challenge acts of sex discrimination on college campuses (cited in Brief for the United States as Amicus Curiae Supporting Petitioner, supra note 29, at 15-16)).

Jackson, 125 S. Ct. at 1508 (citing Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 237 (1969), as support for the proposition that unchecked retaliation helps perpetuate discrimination).


Brief in Opposition to Petition for Writ of Certiorari at 8-9, Jackson, 125 S. Ct. 1497 (No. 02-1672) ("The absence of any mention of retaliation in Title IX...weighs powerfully against a finding that Congress intended Title IX to reach retaliatory conduct. This conclusion is reinforced by the contrast between Title IX and Title VII, which contains an express prohibition against retaliation." (internal citation omitted)).
expressio unius est exclusio alterius, Title VII would not cover any discrimination not included on its list. The Board urged an inter-statutory application of this maxim: because the Title VII Congress listed retaliation in the prohibited forms of discrimination, the Title IX Congress must have intended to exclude retaliation by failing to list it in the statute. The Eleventh Circuit agreed and relied on Sandoval’s reasoning regarding Title VII’s text and the regulations promulgated from that text to draw its conclusion regarding Title IX’s rights of action.

The majority also contrasted the two statutes, but they did not agree. Justice O’Connor highlighted the relevant distinction between the statutory construction underlying the two laws. Her opinion pointed to “vast[ ]” differences in construction between Title VII and Title IX. She focused on opposing content and constructions in the statutes, which require distinction rather than analogy in interpretation. The most profound difference was Title VII’s express right of action and detailed description of prohibited discriminatory conduct, versus Title IX’s implied right of action and broad proscription of discrimination followed by “specific, narrow exceptions.” The majority reasoned that congressional silence as to which specific practices the statute covers does not mean that a specific practice not mentioned is not covered. The analogy to Title VI controlled. The Title IX statute had an implied right of action for retaliation.

II

After crossing the interpretive threshold by finding a private right of action for retaliation in Title IX itself, the Court addressed the matter of who acquires this private right of action. Whistleblowers are protected under Title IX, but who can blow the whistle—coaches, players, parents, or all of the above?

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115 “Expression of one thing is exclusion of another.” CROSS, supra note 91, at 138.
116 Brief for the Respondent, supra note 93, at 9 (contrasting Title IX with Title VII to reinforce its conclusion that their different constructions “militat[e] against an implied prohibition” on retaliation in Title IX because “[c]learly Congress knew how to prohibit retaliation when it . . . chose” not to mention retaliation in Title IX).
118 Jackson, 125 S. Ct. at 1505.
119 Id. at 1505; see also Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 283–84 (1998) (highlighting that Title VII’s cause of action is express, while Title IX’s is implied).
120 Jackson, 125 S. Ct. at 1505.
121 Id. (“Because Congress did not list any specific discriminatory practices when it wrote Title IX, its failure to mention one such practice does not tell us anything about whether it intended that practice to be covered.”).
122 Id. at 1507.
Jackson himself is male. He complained that the female students on his girls’ basketball team received insufficient funding and access. The Board did not discriminate against him by under-funding girls’ basketball in comparison with the boys’ team. After his complaint, however, Jackson received negative work evaluations and was fired from his coaching position. The Board discriminated against him on the basis of his invocation of others’ Title IX rights.

Rather than limiting the right of action to those private parties who directly suffered the underlying discrimination, the Jackson Court extends Title IX’s protection from the root of discrimination to its branches. Agency doctrine, principles of statutory interpretation, and precedent counsel that retaliation is “on the basis of sex” if it punishes an actor for lodging a Title IX complaint. Not only is the coach a proper agent for his players, but he is in the “best position” to recognize and address violations of their Title IX rights. It fulfills congressional intent to enlist those in the “best position” to enforce its statute by protecting them in their efforts. In that way, the Court showed that by protecting Title IX rights against retaliation, Jackson conforms with statute and case law.

Precedent speaks to Jackson’s ability to enforce others’ civil rights, and it also speaks to Congress’s intent to continue that practice under Title IX. The Court first addressed the issue of retaliation under civil rights statutes in the 1969 decision Sullivan v. Little Hunting Park, Inc. The § 1982 civil rights statute at issue protected a white landlord who complained of discrimination against his black tenant and who suffered retaliation as a result of his complaints. The extent of Sullivan’s protection draws one of the dividing lines between the ma-

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123 Id. at 1503.
124 Id.
125 Id. at 1506-07.
126 Id. at 1508.
127 Id.
128 See Mank, supra note 67, at 106 (advocating that an implied right of action for employees who protest intentional discrimination and suffer retaliation as a result would “effectuate § 601 and § 901’s core prohibitions against intentional discrimination”); Brief for the United States as Amicus Curiae Supporting Petitioner, supra note 29, at 16 (No. 02-1672) (“A recipient of federal assistance certainly can have no legitimate interest in retaliating against persons who complain about unlawful discrimination. Accordingly, Title IX’s bar on discrimination is best understood to encompass protection against retaliation.”). Despite the Department of Justice’s assertion that there is no legitimate interest in retaliatory employment practices funded by federal money, the number of amici curiae for Respondent suggests otherwise.
130 Jackson, 125 S. Ct. at 1505 (“[I]n Sullivan we interpreted a general prohibition on racial discrimination to cover retaliation against those who advocate the rights of groups protected by that prohibition.”); see also 42 U.S.C. § 1982 (1866) (“All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.”).
jority and dissenting opinions in *Jackson*. While Justice Thomas, in his dissent, characterizes the *Sullivan* holding as deciding only that the white landlord had standing to enforce rights of his black tenants, the majority points to the opinion's stated holding that the landlord had his own § 1982 cause of action to redress punishment "for trying to vindicate the rights of minorities."

The *Sullivan* decision prominently factors into the majority's interpretation of Title IX's construction, as well. Noting that Congress enacted Title IX in 1972 ("just three years after *Sullivan*"), the majority proceeds upon the "realistic" assumption that the statute comprehends and conforms with the *Sullivan* decision.

*Sullivan*’s reasoning remains powerfully relevant in the Title IX context at issue thirty-six years later in *Jackson*. Just as *Sullivan* recognized that the white property owner "is at times 'the only effective adversary'" of racially discriminatory restrictive covenants, *Jackson* recognized that "sometimes adult employees are 'the only effective adversaries' of discrimination in schools." Even if they are not the only effective adversaries, teachers and coaches may be the most effective adversaries. Jackson and others—regardless of whether they personally suffer underlying discrimination—are "often in the best position to vindicate the rights of their students because they are better able to identify discrimination and bring it to the attention of administrators." The *Jackson* decision enlists victims of discrimination, as well as their agents who are in the best position to fight discrimination. The majority’s decision ensures that those of chivalrous good intentions need not subject themselves to punishment for protecting others’ rights.

Distinctions from Title VII and precedent also led to the inclusion of "indirect victim[s]" in Title IX’s protection from retaliation. Title VII focuses on the underlying victim, barring only discrimination

131 *Jackson*, 125 S. Ct. at 1516 (Thomas, J., dissenting) ("Rather than holding that a general prohibition against discrimination permitted a claim of retaliation, *Sullivan* held that a white lessor had standing to assert the right of a black lessee to be free from racial discrimination pursuant to [§ 1982]."). The magistrate judge in the case dismissed on a misreading of *Sullivan* similar to Thomas’s. *Jackson v. Birmingham Bd. of Educ.*, No. CV-01-TMP-1866-S, 2002 WL 32668124, at *2 (N.D. Ala. Feb. 25, 2002) ("[T]he court agrees that plaintiff has no standing to assert the claims of the female members of the Ensley High School girls’ basketball team for the substantive violations of their right to equal educational opportunities under Title IX."). The district court opinion did not cite or discuss *Sullivan*.


133 *Id.* at 1506.

134 *Id.* (quoting *Cannon v. Univ. of Chi.*, 441 U.S. 677, 699 (1979)).


136 *Jackson*, 125 S. Ct. at 1508 (citing *Sullivan*, 396 U.S. at 237).

137 *Id.*

against a person "because of such individual's . . . sex." Title IX, by contrast, focuses on the perpetrator's motivation, barring "discrimination . . . on the basis of sex." Because of this difference in statutory language, the majority did not apply the Title VII cases' requirement that a claim of intentional discrimination prove the claimant's sex "actually played a role in that process and had a determinative influence on the outcome." "

III

Spending Clause grant recipients must have notice that certain conduct will subject them to liability under the funding statute. Because the Spending Clause acts as a contract between the federal and state or local governments, the Supreme Court requires clarity in the contract terms before it will enforce the contract against the recipient. "By insisting that Congress speak with a clear voice" about liability under the statute, the Court "enable[s] the States to exercise their choice knowingly, cognizant of the consequences of their participation." The notice requirement for liability prevents recipients from being unfairly caught in the maw of statutory interpretation—if a judicial interpretation of the statute catches it unawares, the recipient will not be liable for acts completed before the court issued its in-

141 Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993); see also Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) (defining disparate treatment as less favorable treatment because of victims' sex, etc.), cited in Jackson, 125 S. Ct. at 1511 (Thomas, J., dissenting).
142 See 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: in return for federal funds, the States agree to comply with federally imposed conditions. 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.'").
143 Id.; accord Barnes v. Gorman, 536 U.S. 181, 186 (2002) ("[A state who is a] recipient [of federal funds conditioned on compliance with or enforcement of a statute] may be held liable to third-party beneficiaries for intentional conduct that violates the clear terms of the relevant statute, but not for its failure to comply with vague language describing the objectives of the statute[.]"); Gonzaga Univ. v. Doe, 536 U.S. 273, 280 (2002) ("We made clear that unless Congress 'speak[s] with a clear voice,' and manifests an 'unambiguous' intent to confer individual rights, federal funding provisions provide no basis for private enforcement by § 1983." (quoting Pennhurst State Sch. & Hosp., 451 U.S. at 17)); New York v. United States, 505 U.S. 144, 167 (1992) ("[W]here Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress' power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation."); South Dakota v. Dole, 483 U.S. 203, 208 (1987) ("[I]f Congress desires to condition the States' receipt of federal funds, it 'must do so unambiguously . . ., enabling] the States to exercise their choice knowingly, cognizant of the consequences of their participation." (quoting Pennhurst State Sch. & Hosp., 451 U.S. at 17)).
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interpretation. Congressional ambiguity and judicial unpredictability should not punish state and local governments' good faith efforts to comply with the statute.

The Birmingham Board tried to avoid liability for the alleged retaliation by maintaining that, even if Title IX and the Department of Education regulation do permit a private cause of action, the Board did not have notice that acceptance of Title IX funds would prohibit them from such retaliation. The majority dispensed with this argument by tracking twenty-five years of Title IX jurisprudence: "[T]he Board should have been put on notice by the fact that our cases since Cannon, such as Gebser and Davis, have consistently interpreted Title IX's private cause of action broadly to encompass diverse forms of intentional sex discrimination." The Board had even more specific notice that retaliation incurs liability because, at the time it fired Jackson, all "the Courts of Appeals that had considered the question...had already interpreted Title IX to cover retaliao-
tion." In light of broad statutory interpretation from the Supreme Court, specific rulings from sister circuit courts, a precise federal regulation, and the intentional nature of the act itself, any "reasonable school board would realize" that it "cannot cover up" Title IX violations "by means of discriminatory retaliation." The majority combined actual notice with the principles of good faith to apply its Title IX interpretation to the Board’s past conduct.

Justice Thomas lamented that this "rationale untethers notice from the statute," requiring "clairvoyance from funding recipients" rather than "clarity from Congress." He would require notice specifically written in the statute or case law from the mandatory jurisdiction, reading the Spending Clause as literally "in the nature of a contract," without reliance on a reasonableness standard.

Regardless, the Jackson decision itself now provides clear and specific notice to institutions in every federal circuit who receive Title IX funds that they may not retaliate against anyone who tries to enforce the statute. The decision also posts notice that interpretation of statutory intent has not been entirely eclipsed by textualism, and that the Court will bolster private rights of action it has previously implied.

—Elizabeth Y. McCuskey

\[147\] Id. at 1510 (citing Lowrey v. Texas A & M Univ. Sys., 117 F.3d 242, 252 (5th Cir. 1997), and Preston v. Virginia ex rel. New River Cmty. Coll., 31 F.3d 203, 206 (4th Cir. 1994)).

\[148\] Id.; see also Brief for the United States as Amicus Curiae Supporting Petitioner, supra note 29, at 16 ("A recipient of federal assistance certainly can have no legitimate interest in retaliating against [Title IX complainants].").

\[149\] Jackson, 125 S. Ct. at 1515 (Thomas, J., dissenting).


\[151\] Jackson, 125 S. Ct. at 1515–16 (Thomas, J., dissenting).

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