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CIVIL RIGHTS—No Hitting Back: Schools Have to Play by the Title IX Rules; *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005).

*Elisa M. Butler**

INTRODUCTION

The Birmingham Board of Education hired Roderick Jackson in 1993 to teach physical education and to coach a girls basketball team.¹ Six years later, in 1999, Jackson transferred to Ensley High School.² Not long after his transfer, Jackson identified disparate treatment between the boys and girls basketball teams in terms of access to equipment and facilities.³ He also alleged that the girls team was receiving less funding than the boys.⁴ In December 2000, Jackson complained to his superior about the unequal treatment, but did not receive a response, and the disparity in treatment continued.⁵ Jackson persisted in advocating for the equal treatment of the girls basketball team, but his complaints went unheeded.⁶ Subsequently, Jackson received negative work evaluations, and was ultimately dismissed as the girls basketball coach in May 2001.⁷ At that time in his career, Jackson had taught and coached for the Birmingham School District for eight years.⁸ Although he was dismissed from coaching, Jackson continued to teach physical education for the duration of his case.⁹

After dismissal from his coaching duties, Jackson filed suit in the United States District Court for the Northern District of Alabama claiming a violation of his civil rights based on Title IX of the Education Amendments of 1972.¹⁰ He claimed that the school board violated Title IX by retaliating against him for protesting the unequal treatment of the girls basketball teams.¹¹ The school board, however, argued that there was no Title IX private cause of action for third-party

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¹ *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 171 (2005).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Jackson*, 544 U.S. at 171.

⁷ *Id.* at 171-72.

⁸ *See id.* at 171.

⁹ *Id.* at 172.

¹⁰ *Id.*; *see also* Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 (2006).

¹¹ *Jackson*, 544 U.S. at 172.

retaliation claims.¹² The district court agreed and granted the board's motion to dismiss.¹³

Jackson appealed to the Court of Appeals for the Eleventh Circuit, which also sided with the school board.¹⁴ It reasoned that Congress did not expressly create a private right of action when it enacted the statute, and the court would not imply one.¹⁵ The U.S. Supreme Court granted certiorari to settle the question and, in a 5-4 decision, reversed the Eleventh Circuit's holding.¹⁶

This note will generally examine private rights of action implied by the courts, and contend that the Supreme Court correctly decided *Jackson v. Birmingham Board of Education* when it held that Title IX implies a private cause of action for third-party retaliation claims. This note will scrutinize the Court's decision in *Jackson*, and after extensive analysis, illustrate that the Court's holding in *Jackson* was ultimately correct. Furthermore, this note will consider some of implications that this decision has on Title IX as well as other statutes.

BACKGROUND

Title IX states, in pertinent part, 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.”¹⁷ Congress enacted Title IX pursuant to its Spending Clause power, and “patterned [it] after Title VI of the Civil Rights Act of 1964.”¹⁸ Title IX's purpose is to address issues involving discrimination on the basis of sex that are not covered by Title VI or VII of the Civil Rights Act of 1964.¹⁹ Title IX is pervasive in its application “appl[ying] to virtually all public and private educational institutions, and includ[ing] all institutional operations such as academic programs or athletics.”²⁰

¹² *Id.*

¹³ *Id.*

¹⁴ *Jackson v. Birmingham Bd. of Educ.*, 309 F.3d 1333 (11th Cir. 2002).

¹⁵ *Id.* at 1345.

¹⁶ *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 171, 184 (2005).

¹⁷ Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (2006).

¹⁸ *Cannon v. Univ. of Chicago*, 441 U.S. 677, 694 (1979); 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, 59 (2004).

¹⁹ See Mank, *supra* note 18, at 60.

²⁰ *Id.* at 60.

Title IX was introduced to Congress for debate in 1972.²¹ While this was the first time this bill was introduced, the idea of equality in education dates back to the late 1960s.²² By the summer of 1970, Congress began focusing on sex bias in education with hearings before a special House subcommittee.²³ Subsequently, Senator Birch Bayh of Indiana introduced Title IX in 1972.²⁴ Senator Bayh stated that the bill's purpose was to battle "the continuation of corrosive and unjustified discrimination against women in the American educational system."²⁵ He stressed that inequities in education often lead to inequities in employment opportunities.²⁶ Although the House and the Senate seemed to agree that there was a need for change, there were difficulties in passing this bill.²⁷ Many members of Congress feared that passage of the statute would lead to reverse discrimination and quotas.²⁸ Senator Bayh stressed, however, that "the amendment is not designed to require specific quotas. The thrust of the amendment is to do away with every quota."²⁹ Congress finally agreed when the House attached a floor amendment to the bill stipulating that quotas would not be required.³⁰ The newly-clarified legislation was enacted as Title IX of the Education Amendments of 1972.³¹

The result of the debate in Congress over the specifics of Title IX was a broadly worded statute patterned after Title VI of the Civil Rights Act of 1964.³² Because this statute was worded so broadly, Congress left the task of interpreting the statute and creating regulations to the Department of Health, Education, and Welfare

²¹ U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., TITLE IX LEGAL MANUAL 17 (Jan. 11, 2001), available at <http://www.usdoj.gov/crt/cor/coord/ixlegal.htm> [hereinafter TITLE IX LEGAL MANUAL].

²² *Id.* at 16-17. The emphasis on sex discrimination occurred during the civil rights movement. *Id.* at 16. During this time, people began noticing the disparate treatment and earning gaps occurring between males and females. *Id.* Consequently, the focus shifted toward inequities in education, which had inhibited the progress of women. *Id.* Advocacy groups began speaking out and filed class action lawsuits because of an "industry-wide pattern of sex bias against women who worked in colleges and universities." *Id.*

²³ TITLE IX LEGAL MANUAL, *supra* note 21, at 16; see also *Sex Discrimination Regulations: Hearings Before the Subcomm. on the Postsecondary Educ. of the H. Comm. on Educ. and Labor*, 94th Cong. (1975).

²⁴ TITLE IX LEGAL MANUAL, *supra* note 21, at 17.

²⁵ 118 CONG. REC. 5803 (1972) (statement of Sen. Bayh).

²⁶ TITLE IX LEGAL MANUAL, *supra* note 21, at 17.

²⁷ *Id.* at 18.

²⁸ *Id.*

²⁹ 117 CONG. REC. 30,409 (1971) (statement of Sen. Bayh).

³⁰ TITLE IX LEGAL MANUAL, *supra* note 21, at 18.

³¹ *Id.* at 19.

³² See *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 65 Fed. Reg. 52,858 (Aug. 30, 2000) (to be codified at 28 C.F.R. part 54); see also TITLE IX LEGAL MANUAL, *supra* note 21, at 8.

(HEW).³³ The HEW subsequently adopted a multitude of guidelines to create a framework for the application of Title IX to education programs.³⁴ Following the agency adoption of these regulations, Congress was given the opportunity to review them to determine whether they were consistent with Congress' intent in enacting Title IX.³⁵ Although there were some disputes in Congress as to whether the regulations should be disapproved in whole or in part, ultimately Congress opted not to disapprove the regulations at all.³⁶

In 1980, the HEW split into two distinct departments, the Department of Education and the Department of Health and Human Services.³⁷ The regulations of the HEW were adopted by both departments.³⁸ As additional protection, in 1980, President Jimmy Carter enacted Executive Order 12,250 which created power in the Attorney General to provide leadership for the "consistent and effective implementation" of various civil rights statutes, including Title IX.³⁹ Because the Attorney General is the head of the U.S. Department of Justice, the agency was also charged with enacting rules for the application of Title IX.⁴⁰ The Department of Justice did not use this power until 1999 when it published a Notice of Proposed Rulemaking to implement Title IX.⁴¹ The rules eventually adopted by the Department of Justice are virtually identical to both HEW and Department of Education regulations.⁴² The only changes made to the old

³³ TITLE IX LEGAL MANUAL, *supra* note 21, at 23; *see also* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 65 Fed. Reg. at 52,859.

³⁴ *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 45 C.F.R. § 86 (2006); *see also* TITLE IX LEGAL MANUAL, *supra* note 21, at 23; *and* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 65 Fed. Reg. at 52,859.

³⁵ David S. Cohen, *Title IX, Beyond Equal Protection*, 28 HARV. J. L. & GENDER 217, 246-47 (2005). The case of *INS v. Chadha* creates questions as to whether this process is constitutional. *See* *INS v. Chadha*, 462 U.S. 919 (1983). But this process is important, in this case, because it illustrates legislative intent.

³⁶ *See* Cohen, *supra* note 35, at 247. These regulations, approved by Congress included a regulation against retaliation. *See* 34 C.F.R. § 106.71 (2006) (incorporating Title VI regulation prohibiting retaliation, 34 C.F.R. § 100.7(e) (2006)).

³⁷ TITLE IX LEGAL MANUAL, *supra* note 21, at 23; *see also* Melanie J. Perez, Note, *Protecting All Victims? The Rise of Retaliation Claims Under Title IX of the Education Amendments of 1972*, 57 RUTGERS L. REV. 1145, 1150-51 (2005).

³⁸ *See* 34 C.F.R. §§ 106-106.71 (2006) *and* 45 C.F.R. §§ 86-86.71 (2006); *see also* TITLE IX LEGAL MANUAL, *supra* note 21, at 23. Some of the regulations adopted by the HEW include prohibitions of discrimination on the basis of sex in housing, facilities, access to course offerings, counseling, financial assistance, health insurance benefits, athletics, etc. *See* 45 C.F.R. §§ 86.32-86.41 (2006).

³⁹ Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (Nov. 2, 1980).

⁴⁰ *See id.*

⁴¹ *See* TITLE IX LEGAL MANUAL, *supra* note 21, at 23.

⁴² *Id.* at 23-24; *see also* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 65 Fed. Reg. 52,859 (Aug. 30, 2000).

regulations reflect statutory revisions and “modifications to ensure consistency with Supreme Court precedent.”⁴³

Title IX’s application is quite broad.⁴⁴ This breadth is shown by the regulations promulgated by the agencies charged with its interpretation: they “appl[y] to all aspects of education programs or activities operated by recipients of federal financial assistance.”⁴⁵ Title IX also applies to a broad spectrum of activities occurring within educational programs.⁴⁶ It prohibits discrimination on the basis of sex in housing, access to course offerings, access to schools, counseling, financial assistance, health and insurance benefits, and athletics.⁴⁷ Title IX also prohibits educational programs from discriminating in employment practices.⁴⁸

Not only is Title IX broadly applied to activities within education programs, but it also broadly defines educational programs receiving federal financial assistance.⁴⁹ Title IX applies to educational programs that receive federal financial aid through direct means, such as grants or loans applied directly to the institution.⁵⁰ It also applies to educational programs that receive financial assistance indirectly, such as through federal grants and loans given to students who, in turn, use these to pay the institution that they attend.⁵¹ Although the agencies did not explicitly spell out that educational programs would be forced to comply with Title IX if they received federal financial assistance through indirect means, the Supreme Court ruled that this was the case in 1984.⁵² In *Grove City College v. Bell*, the

⁴³ TITLE IX LEGAL MANUAL, *supra* note 21, at 24; *see also* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 65 Fed. Reg. at 52,859.

⁴⁴ *See, e.g.*, TITLE IX LEGAL MANUAL, *supra* note 21, at 25-55.

⁴⁵ *Id.* at 7.

⁴⁶ *Id.* at 7-8.

⁴⁷ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 65 Fed. Reg. at 52,871-72; *see also* TITLE IX LEGAL MANUAL, *supra* note 21, at 85-93.

⁴⁸ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 65 Fed. Reg. at 52,873-74; *see also* TITLE IX LEGAL MANUAL, *supra* note 21, at 73-75.

⁴⁹ *See, e.g.*, TITLE IX LEGAL MANUAL, *supra* note 21, at 25.

⁵⁰ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 65 Fed. Reg. at 52,866; *see also* TITLE IX LEGAL MANUAL, *supra* note 21, at 26.

⁵¹ TITLE IX LEGAL MANUAL, *supra* note 21, at 30.

⁵² *Grove City Coll. v. Bell*, 465 U.S. 555, 564 (1984) (overruled on another point of law by the Civil Rights Restoration Act of 1987). The Court looked at the legislative history of Title IX and determined that Congress intended for the statute to cover those institutions that receive assistance indirectly. *Id.* at 569-70.

Court ruled that it did not matter that the college did not receive federal financial aid directly from the government; it would still be required to comply with Title IX because it received funds indirectly.⁵³

In *Grove City College*, the Court determined that Congress intended educational programs that receive federal financial assistance, either directly or indirectly, to be under Title IX's thumb. The Court, however, tempered this ruling by finding that the entire educational institution could not be sanctioned for refusing to follow Title IX—only the part of the institution that was receiving federal financial assistance was required to comply.⁵⁴ This ruling seemed to narrow the scope of Title IX and how it could be applied to educational programs.

Congress, however, again widened the scope of Title IX by amending the statute with the Civil Rights Restoration Act of 1987 ("CRRA") after the Court's *Grove City* decision.⁵⁵ Congress intended the CRRA to establish the "principle of institution-wide coverage" for Title IX.⁵⁶ Therefore, if part of an educational institution receives federal financial assistance either directly or indirectly, it will be required to follow Title IX throughout the entire institution. This statute directly overruled the Court's holding in *Grove City College*.⁵⁷ Although this widened the scope of Title IX once again, it is important to note that Title IX only reaches educational programs.⁵⁸ Therefore, if part of an institution is educational and part is not, sanctions for violating Title IX could not be applied to the non-educational portion of the institution.⁵⁹ While Title IX only applies to educational programs, its reach is broad within this area. As shown, this is exactly what Congress intended.⁶⁰ Title IX was deliberately enacted to reach into the farthest corner of education to remedy discrimination on the basis of sex.⁶¹

⁵³ *Id.* at 563-70. The college was receiving federal financial assistance indirectly because students who attended the college were given federal grants which were used to pay tuition, fees, and room and board. *Id.* at 559.

⁵⁴ *Id.* at 573.

⁵⁵ TITLE IX LEGAL MANUAL, *supra* note 21, at 49; *see also* Civil Rights Restoration Act of 1987, 29 U.S.C. § 794 (2006).

⁵⁶ TITLE IX LEGAL MANUAL, *supra* note 21, at 49.

⁵⁷ If this case were decided after the CRRA was enacted the Court would be required to find that the entire college would be subject to sanctions because part of the college was receiving federal financial assistance indirectly. *See* *Grove City Coll. v. Bell*, 465 U.S. 555 (1984); *see also* Civil Rights Restoration Act of 1987, 29 U.S.C. § 794(b) (2006).

⁵⁸ TITLE IX LEGAL MANUAL, *supra* note 21, at 49.

⁵⁹ *Id.*

⁶⁰ *See supra* notes 21-57 and accompanying text.

⁶¹ *See supra* notes 21-57 and accompanying text.

As a result of congressional intent to continually broaden Title IX, courts have consistently interpreted the statute very broadly.⁶² In fact, the Supreme Court stated that “[t]here 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.’”⁶³ As part of this broad scope, the Court interpreted Title IX to imply private rights of actions.⁶⁴ It also broadly interpreted Title IX to apply to employees as well as students.⁶⁵ Finally, the Court allowed monetary awards when intentional discrimination occurs in violation of Title IX.⁶⁶ The Court’s history illustrates the broad reach extended in this statute.

Because *Jackson v. Birmingham Board of Education* rests on the question of whether a private right of action should be implied for claims of third-party retaliation under Title IX, *Sullivan v. Little Hunting Park, Inc.* is an important case to discuss. *Sullivan* signaled the first time the Court implied a private right of action for retaliation.⁶⁷ Sullivan was a white man who leased his home to Freeman, an African-American man.⁶⁸ Along with the rental, Sullivan assigned Freeman the right to use the community recreational facilities.⁶⁹ The community park board of directors rejected Sullivan’s assignment because Freeman was African-American.⁷⁰ Subsequently, Sullivan protested the board’s refusal.⁷¹ The board then told Sullivan that it was expelling him from the corporation.⁷² Sullivan sued the board, claiming that it illegally retaliated against him.⁷³ The Supreme Court reasoned that if this retaliation were allowed to stand, it would “give impetus to the perpetuation of racial restrictions on property.”⁷⁴ Sullivan, therefore, had a private right of action

⁶² See *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979); see also *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992); and *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512 (1982).

⁶³ *North Haven*, 456 U.S. at 521 (quoting *United States v. Price*, 383 U.S. 787, 801 (1966)).

⁶⁴ *Cannon v. Univ. of Chicago*, 441 U.S. 677, 709 (1979) (holding that there is a private right of action for Title IX violations).

⁶⁵ *North Haven*, 456 U.S. at 520 (holding that Title IX applies to employees as well as students).

⁶⁶ *Franklin v. Gwinnett County Public Sch.*, 503 U.S. 60, 76 (1992) (holding that monetary damages are available for intentional Title IX violations).

⁶⁷ *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969). This case was not a Title IX case. It is similar to *Jackson*, however, because it was based on a statute protecting a certain class of people. See *id.* at 234-35. Similar to *Jackson*, Sullivan was a member of the non-protected class advocating for the rights of a person in the protected class, and was subsequently retaliated against. See *id.*

⁶⁸ *Id.* at 235.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Sullivan*, 396 U.S. at 235.

⁷³ *Id.* Sullivan sued the board under 42 U.S.C. § 1982 which provides, “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.” *Id.*

⁷⁴ *Id.* at 237.

because “the white owner is at times ‘the only adversary’ of the unlawful restrictive covenant.”⁷⁵ This is an important case because it provides the legal context in which Title IX was passed.⁷⁶

Not only is the legal context in which the statute was passed important to understand, it is also important to explore established Supreme Court tests that deal with similar issues. *Cort v. Ash* provided just such a test. This case established a four-part test to determine whether courts should imply a private right of action when Congress has not explicitly provided for one.⁷⁷ A corporate director had misused corporate funds.⁷⁸ Ash, a shareholder, sued under a federal statute that “provide[d] only for a criminal penalty.”⁷⁹ The Court was compelled to determine whether to imply a private cause of action under the statute.⁸⁰ The Court pronounced four relevant factors: (1) whether “the plaintiff [is] one of the class for whose especial benefit the statute was enacted;” (2) whether “there [is] any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one;” (3) whether “it [is] consistent with the underlying purpose of the legislative scheme to imply such a remedy for the plaintiff;” and (4) whether “the cause of action [is] one traditionally relegated to state law . . . so that it would be inappropriate to infer a cause of action based solely on federal law.”⁸¹ While it articulated these factors, the Court refused to imply a private right of action in *Cort* because that would mean intruding “into an area traditionally committed to state law.”⁸² Although Ash failed in this case, courts continue to use this test to find that private rights of action exist under other statutes.⁸³

While the Court articulated a test concerning private rights of action, it was not until *Cannon v. University of Chicago* that it was applied to Title IX.⁸⁴ The

⁷⁵ *Id.* (quoting *Barrows v. Jackson*, 346 U.S. 249, 259 (1953) (holding a restrictive covenant preventing African-Americans from buying property in a neighborhood valid as long as it was agreed to voluntarily)).

⁷⁶ *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969); *Jackson*, 544 U.S. at 176-77.

⁷⁷ *Cort v. Ash*, 422 U.S. 66 (1975).

⁷⁸ *Id.* at 70-73.

⁷⁹ *Id.* at 71; *see also* Hatch Act Reform Amendments of 1993, 18 U.S.C. § 610 (2006).

⁸⁰ *Cort*, 422 U.S. at 74.

⁸¹ *Id.* at 77-78 (quoting *Tex. & Pac. Ry. v. Rigsby*, 241 U.S. 33, 39 (1916)).

⁸² *Cort*, 422 U.S. at 85. With this factor, the Court is inquiring as to whether a federalism problem would arise if a private right of action were implied. *See id.*

⁸³ *See, e.g.*, *California v. Sierra Club*, 451 U.S. 287, 293-95 (1981) (holding that a private right of action should not be implied because the plaintiff failed the first factor of the *Cort* test); *see also* *Cannon v. Univ. of Chicago*, 441 U.S. 677, 688-709 (1979) (holding that a private right of action exists because the plaintiff met all four factors of the *Cort* test); *and* *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 37-41 (1977) (holding that a private right of action should not be implied because the plaintiff failed the first factor of the *Cort* test); *and* *Reeves v. Cont'l Equities Corp. of America*, 912 F.2d 37, 40 (1990) (holding that a private right of action should not be implied because the plaintiff failed the first two factors of the *Cort* test).

⁸⁴ *Cannon v. Univ. of Chicago*, 441 U.S. 677, 688-709 (1979).

University of Chicago Medical School denied admission to Geraldine Cannon.⁸⁵ She maintained the University's rejection was based on her sex and sued, claiming that the school's denial violated her rights under Title IX.⁸⁶ In allowing a private action, the Court relied heavily on the four-part test articulated in *Cort v. Ash*.⁸⁷ Cannon satisfied the first prong because the statute protects those participating in or attempting to participate in federally-funded education programs, and the University of Chicago Medical School was a federally-funded educational program.⁸⁸

For the second prong, the Court analogized Title IX to Title VI claims, in which it had already implied a private right of action for racial discrimination.⁸⁹ Title IX was "patterned after Title VI of the Civil Rights Act of 1964" and, at the time, the federal courts had already developed a private right of action under Title VI.⁹⁰ Therefore, Congress would assume Title IX would be "interpreted and applied as Title VI had been during the previous eight years."⁹¹

Cannon satisfied the third prong, as well.⁹² Title IX has two purposes. The first is to "avoid the use of federal resources to support discriminatory practices."⁹³ The second is to "provide individual citizens effective protection against those practices."⁹⁴ The first purpose is satisfied by federal procedures which may terminate funds if institutions discriminate.⁹⁵ But this protection does not completely fulfill the second purpose of the statute.⁹⁶ Terminating federal funding is often a punishment that is too severe.⁹⁷ Therefore, a more appropriate remedy for discrimination on an individual basis would be a private right of action against the institution.⁹⁸ According to the Court, "it makes little sense to impose on an

⁸⁵ *Id.* at 680.

⁸⁶ *Id.*

⁸⁷ *Cort v. Ash*, 422 U.S. 66 (1975).

⁸⁸ *Cannon*, 441 U.S. at 693-94.

⁸⁹ *Id.* at 694-95; Title VI is identical to Title IX except instead of "on the basis of sex" in Title IX, Title VI uses the language "on ground of race, color, or national origin." Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (2006). The second prong of the *Cort* test considers whether there is a legislative intent to create the remedy in question. *Cort v. Ash*, 422 U.S. 66, 78 (1975).

⁹⁰ *Cannon*, 441 U.S. at 694-96; *see also* *Bossier Parish Sch. v. Lemon*, 370 F.2d 847, 852 (5th Cir. 1967) (implying a private right of action for Title VI claims).

⁹¹ *Cannon*, 441 U.S. at 696.

⁹² *Id.* at 704-05. The third prong of the *Cort* test considers whether the remedy in question is consistent with the purpose of the legislative scheme. *Cort v. Ash*, 422 U.S. 66, 78 (1975).

⁹³ *Cannon*, 441 U.S. at 704.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 705.

⁹⁷ *Id.*

⁹⁸ *Cannon*, 441 U.S. at 705.

individual, whose only interest is in obtaining a benefit for herself, . . . the burden of demonstrating that an institution's practices are so pervasively discriminatory that a complete cut-off of federal funding is appropriate."⁹⁹ Requiring individuals to prove this level of discrimination would create an enormous burden on both the individual and the institution.¹⁰⁰

Cannon also satisfied the final prong.¹⁰¹ Since the Civil War, the federal government has traditionally been the shield against discrimination.¹⁰² Protecting citizens against discrimination is not a "subject matter [that] involves an area basically of concern to the States."¹⁰³ Therefore, a federalism problem did not arise from implying a private right of action in federal anti-discrimination statutes.¹⁰⁴ Since all four elements weighed in favor of implying a private right of action under Title IX, the Court implied a private right of action for Cannon.¹⁰⁵

By implying a private right of action in *Cannon v. University of Chicago*, the Court gave individuals an opportunity to challenge institutions' discriminatory practices.¹⁰⁶ The Court provided this remedy without burdening victims with the responsibility of proving such pervasive discrimination that it warranted terminating federal funds.¹⁰⁷ This decision also allowed individuals an opportunity to protect themselves from discrimination rather than relying on the federal government to threaten refusal of funding to educational institutions to gain protection.¹⁰⁸

The Court went further in broadening the scope of Title IX with its decision in *Franklin v. Gwinnett County Public Schools*.¹⁰⁹ This was the first case authorizing monetary damages for private Title IX actions.¹¹⁰ The Court, however, limited monetary recovery to individuals experiencing intentional Title IX violations.¹¹¹

⁹⁹ *Id.*

¹⁰⁰ *See id.*

¹⁰¹ *Id.* at 708-09. The fourth prong of the *Cort* test considers whether the cause of action is "traditionally relegated to state law." *Cort v. Ash*, 422 U.S. 66, 78 (1975).

¹⁰² *Cannon*, 441 U.S. at 708.

¹⁰³ *Id.* at 708.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 709.

¹⁰⁶ *Id.* at 705.

¹⁰⁷ *Cannon*, 441 U.S. at 705.

¹⁰⁸ *Id.*

¹⁰⁹ *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992). *Franklin* involved a student's allegation that she had been sexually harassed by a teacher. *Id.* at 63. The student reported the harassment, but no action was taken against the teacher. *Id.* at 63-64.

¹¹⁰ *Id.* at 76.

¹¹¹ *Id.* at 74-75.

First, the *Franklin* Court reiterated the *Cannon* private right of action for Title IX violations.¹¹² If a private action is available, the Court reasoned, a remedy to cure the injustice must also be available.¹¹³ Without a remedy there would be no reason to bring suit.¹¹⁴ Although this reasoning alone was sufficient, the Court buttressed its position with numerous cases finding a remedy available when a right of action exists “under the Constitution or laws of the United States.”¹¹⁵

While the Supreme Court allowed monetary damages, it qualified its holding by allowing recovery only in cases of intentional discrimination.¹¹⁶ The Court reasoned that when Congress enacts a statute under its spending power, as with Title IX, the statute is “much in the nature of a contract.”¹¹⁷ This means that federal funds are distributed to institutions in consideration for their agreement to the statutory conditions.¹¹⁸ In the case of Title IX, the federal government agreed to distribute federal funds to educational institutions on the condition that these institutions not discriminate on the basis of sex.¹¹⁹ Because this arrangement is “much in the nature of a contract,” Congress must clearly define the conditions with which an institution must comply.¹²⁰ An institution must be aware of the funding conditions, so the Court cannot allow individuals to recover monetary damages for unintentional discrimination.¹²¹ If discrimination is unintentional, the receiving institution is not aware of the discrimination or of the fact that its funding may be in jeopardy.¹²² There is no notice problem, however, when the

¹¹² *Id.* at 65.

¹¹³ *Id.* at 66.

¹¹⁴ *See Franklin*, 503 U.S. at 66.

¹¹⁵ *Id.* at 66-67 (citing *Bell v. Hood*, 327 U.S. 678, 684 (1946) (finding that when there is a right to sue, “federal courts may use any available remedy to make good the wrong done”); *Dooley v. United States*, 182 U.S. 222, 229 (1901) (reiterating “the principle that a liability created by statute without a remedy may be enforced by common-law action”); *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 624 (1838) (stating that it is a “monstrous absurdity in a well organized government, that there should be no remedy although a clear and undeniable right should be shown to exist”); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (finding that laws should “furnish [a] remedy for the violation of a vested legal right”); *Ashby v. White*, 1 Salk. 19, 87 Eng. Rep. 808, 816 (Q.B. 1702) (“If a statute gives a right, the common law will give a remedy to maintain that right . . .”)).

¹¹⁶ *Franklin*, 503 U.S. at 75-76.

¹¹⁷ *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) *cited in Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 74 (1992).

¹¹⁸ *Franklin*, 503 U.S. at 74-75.

¹¹⁹ *Id.* at 75; *see also Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 640 (1999).

¹²⁰ *Pennhurst*, 451 U.S. at 17 (“There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it.”).

¹²¹ *Franklin*, 503 U.S. at 74; *see also Alexander v. Sandoval*, 532 U.S. 275, 280 (2001); *and Mank*, *supra* note 18, at 68.

¹²² *Franklin*, 503 U.S. at 74.

discrimination is intentional because the discriminating entity is aware, and even intends to discriminate.¹²³ Because entities receiving federal funds know that they are prohibited from discriminating on the basis of sex, and because intentional discrimination occurs when the entity knows that it is discriminating, the entity cannot then say that it was not on notice that it could lose federal funding.¹²⁴

While both *Cannon* and *Franklin* broadened Title IX protection and its remedies, the Court narrowed these protections in the case of *Gebser v. Lago Vista Independent School District*.¹²⁵ *Gebser*, like *Franklin*, was based on a high school student's allegations that a teacher had sexually harassed her.¹²⁶ Unlike *Franklin*, this student failed to report the harassment, though other students complained that the teacher had acted similarly toward them.¹²⁷ As a result, the principal apologized to the complaining students and parents for the teacher's behavior.¹²⁸ The principal did not, however, report the incident to the superintendent of the school district.¹²⁹

The Court held that the plaintiff was not entitled to monetary damages under Title IX because the school district did not have actual notice of the plaintiff's harassment, and the district should not be held liable for something it was not aware of.¹³⁰ Again, the Court relied on the premise that congressional legislation passed under the Spending Clause is a contract between the federal government and funding recipients.¹³¹ Because this is a contract, Congress must be unambiguous about the conditions placed upon these recipients.¹³² The school district, ignorant of the harassment, did not have adequate notice that it would be liable for a Title IX action brought by this student.¹³³ The Court asserted that because Title IX focused on protection rather than compensation, institutions are not liable when they are not given the opportunity to remedy the situation.¹³⁴ In *Gebser*, the school did not have an adequate opportunity to remedy the harassment

¹²³ See Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 48-49 (2005) for a discussion of intentional discrimination.

¹²⁴ *Franklin*, 503 U.S. at 74-75.

¹²⁵ *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998).

¹²⁶ *Id.* at 277-78.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* at 278.

¹³⁰ *Gebser*, 524 U.S. at 285; see also 14 C.J.S. *Civil Rights* § 168 (2006).

¹³¹ *Gebser*, 524 U.S. at 286.

¹³² *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

¹³³ *Gebser*, 524 U.S. at 287.

¹³⁴ *Id.* The Court stated that "Title IX focuses more on 'protecting' individuals from discriminatory practices carried out by recipients of federal funds." *Id.*

because it did not have notice of the incidents so it could not be held financially responsible.¹³⁵

Although some of the previous cases explain how the Court has interpreted Title IX, it is also important to understand how the Court has interpreted Title VI because these statutes mirror one another.¹³⁶ *Alexander v. Sandoval* involved an extensive analysis of Title VI regulations promulgated by the Department of Justice that prohibited disparate-impact discrimination.¹³⁷ This case began in Alabama, which had recently declared its official language as English.¹³⁸ Because of this, the Department of Public Safety administered driver's license tests only in English.¹³⁹ Sandoval, as a representative of the class opposing the regulation, argued that this provision violated Title VI because it had the effect of discriminating against a class of people based on their national origin.¹⁴⁰ The district court agreed with Sandoval and enjoined the state from administering the tests in English only.¹⁴¹ The Court of Appeals for the Eleventh Circuit upheld the injunction.¹⁴²

The Supreme Court reversed the Eleventh Circuit, reasoning that the Department of Justice regulations forbade conduct that Title VI itself permitted.¹⁴³ Since Title VI permitted the conduct, the regulations were irrelevant to determining whether a Title VI private cause of action should be implied in this case.¹⁴⁴ The Court further stated that Congress is responsible for creating private rights of action.¹⁴⁵ Therefore, if Congress does not establish a private right of action when writing a statute, "courts may not create one."¹⁴⁶

¹³⁵ *Id.*

¹³⁶ See *Cannon v. Univ. of Chicago*, 441 U.S. 677, 695 (1979).

¹³⁷ *Alexander v. Sandoval*, 532 U.S. 275, 278 (2001). Title VI prohibits institutions receiving federal funding from discriminating against individuals based on race, color, or national origin. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (2006).

¹³⁸ *Sandoval*, 532 U.S. at 278-79.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 279. Sandoval represented a class of people who could not take the driver's license test because they did not speak the English language. *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Sandoval*, 532 U.S. at 285. The Court stated that if a statute allows certain conduct, the administrative agency charged with making rules under that statute cannot forbid the same conduct. *Id.* In this case, the regulation forbade disparate treatment that resulted in discrimination on the basis of race. Title VI, however, allowed such conduct. *Id.*

¹⁴⁴ *Id.* at 285.

¹⁴⁵ *Id.* at 286.

¹⁴⁶ *Id.* at 286-87.

The Court further analyzed whether section 602 of Title VI implies a private right of action to enforce regulations promulgated under the agency's authority.¹⁴⁷ The Court maintained that individuals could not sue to enforce regulations promulgated under section 602 because the statute's language did not display a "congressional intent to create new rights."¹⁴⁸ In contrast with allowing individuals to sue, the agency already had an express provision provided in section 602 to terminate funding in discrimination cases.¹⁴⁹ Because Congress had already provided the agency with a method to enforce the statute, this suggested that Congress intended to exclude others.¹⁵⁰ In Justice Scalia's most famous line from this case he stated, "it is almost certainly incorrect to say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress. Agencies may play the sorcerer's apprentice but not the sorcerer himself."¹⁵¹

The preceding cases referred to the protections provided under Title IX and similar statutes. Looking solely at these statutes, however, does not provide a complete background. Agency regulations are vital to understanding Title IX and how it applies to third-party retaliation claims. Under Title IX, the responsibility of "effectuat[ing]" the statute falls on the federal agencies providing the financial funds.¹⁵² The agencies charged with providing financial funds carried out this task, adopting a multitude of regulations to effectuate Title IX.¹⁵³ These regulations include a prohibition on retaliation.¹⁵⁴ Specifically, the regulation states that "[n]o 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 [Title IX], or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this part."¹⁵⁵

Important to the analysis of any agency regulation is the case of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* This case established the principle that courts must defer to agency rules when interpreting an ambigu-

¹⁴⁷ *Id.* at 288; see also Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-1 (2006).

¹⁴⁸ *Sandoval*, 532 U.S. at 289.

¹⁴⁹ *Id.* at 289-90.

¹⁵⁰ *Id.* at 290-91.

¹⁵¹ *Id.* at 291.

¹⁵² Title IX of the Education Amendments of 1972, 20 U.S.C. § 1682 (2006); see also Elizabeth Y. McCuskey, Jackson v. Birmingham Board of Education: *Title IX's Implied Private Right of Action for Retaliation*, 8 U. PA. J. CONST. L. 143, 148 (2006).

¹⁵³ See 34 C.F.R. §§ 106-106.71 (2006).

¹⁵⁴ See *id.* at § 106.71 (incorporating Title VI regulation against retaliation 34 C.F.R. § 100.7(e)).

¹⁵⁵ 34 C.F.R. § 100.7(e) (2006).

ous statute.¹⁵⁶ It established a two-part analysis to determine whether a court should defer to an agency regulation.¹⁵⁷ The first question that a court must ask is whether Congress has clearly spoken on the issue.¹⁵⁸ If it has, that is “the end of the matter.”¹⁵⁹ If Congress has not addressed the issue, or the statute is ambiguous, the court does not “impose its own construction on the statute.”¹⁶⁰ Rather, the court must determine whether the agency’s solution is “based on a permissible construction of the statute.”¹⁶¹ The Court held that statutes enacted by Congress create agency power, and agencies have the responsibility of filling any gaps—through rules and regulations—that Congress has left.¹⁶² If a gap is explicitly left in a statute for an agency to fill, the agency regulations are “given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.”¹⁶³ In *Chevron*, the Court deferred to the EPA’s interpretation of the Clean Air Act because the statute was ambiguous and the agency’s interpretation and subsequent rules were a “permissible construction of the statute.”¹⁶⁴

Title IX is an expansive statute that the Court has, with limited exceptions, continually interpreted broadly.¹⁶⁵ Although these cases assist in determining the outcome in *Jackson v. Birmingham Board of Education*, agency regulations also play a role in determining whether Title IX implies a private right of action for third-party retaliation claims. Understanding Title IX’s background is critical in understanding the reasoning of both the majority and the dissent in *Jackson*.

PRINCIPAL CASE

The Supreme Court decided *Jackson v. Birmingham Board of Education* in a 5-4 decision. It held that Title IX implies a private cause of action for third-party retaliation, and allowed Jackson’s claim against the school board to proceed.¹⁶⁶ Justice O’Connor wrote the majority opinion, and Justice Thomas wrote the dissent joined by Chief Justice Rehnquist and justices Scalia and Kennedy.¹⁶⁷

¹⁵⁶ *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). This case was based on Environmental Protection Agency regulations under the Clean Air Act. *Id.* at 839-40.

¹⁵⁷ *Id.* at 842-43.

¹⁵⁸ *Id.* at 842.

¹⁵⁹ *Id.* at 842-43.

¹⁶⁰ *Id.*

¹⁶¹ *Chevron*, 467 U.S. at 843.

¹⁶² *Id.*

¹⁶³ *Id.* at 843-44.

¹⁶⁴ *Id.* at 866.

¹⁶⁵ See *supra* notes 84-135 and accompanying text; see also *supra* notes 62-66 and accompanying text.

¹⁶⁶ *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 171, 184 (2005).

¹⁶⁷ *Id.*

The *Jackson* Court articulated three major reasons for its decision. The first was that Title IX's text explicitly prohibits retaliation against those who complain of sex discrimination.¹⁶⁸ It held that retaliation against a person based on complaints of sex discrimination is a form of "intentional sex discrimination."¹⁶⁹ Explaining this theory, the majority expressed that "[r]etaliation is, by definition, an intentional act. It is a form of 'discrimination' because the complainant is being subjected to differential treatment."¹⁷⁰ Therefore, retaliation is a form of sex discrimination because "it is an intentional response to the nature of the complaint: an allegation of sex discrimination."¹⁷¹

The majority next asserted that *Sullivan v. Little Hunting Park, Inc.* provided the legal context for Title IX.¹⁷² The Court decided *Sullivan* shortly before Congress enacted Title IX.¹⁷³ Congress was, therefore, aware of the Court's decision to interpret "a general prohibition on racial discrimination to cover retaliation against those who advocate the rights of groups protected by that prohibition."¹⁷⁴ Just as the Court explained in *Cannon v. University of Chicago*, the legislature expected the courts to interpret statutes prohibiting racial discrimination in the same way that *Sullivan* was decided.¹⁷⁵ This meant interpreting these statutes to prohibit retaliation based on third-party complaints of discrimination.¹⁷⁶

The Court based its final contention on policy: Title IX would become unenforceable if it allowed retaliation against those who complain about violations.¹⁷⁷ If retaliation were not prohibited, those who witness discrimination would be less likely to report it.¹⁷⁸ "Reporting incidents of discrimination is integral to Title IX enforcement"¹⁷⁹ If people in a position to report such abuse are discouraged from doing so, the entire "enforcement scheme" of Title IX would be undermined.¹⁸⁰ The Court pointed out that without embracing prohibitions on retaliation, Congress' intent would be subverted.¹⁸¹ Congress could not have

¹⁶⁸ *Id.* at 173-78.

¹⁶⁹ *Id.* at 173.

¹⁷⁰ *Id.*

¹⁷¹ *Jackson*, 544 U.S. at 174.

¹⁷² *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969); *Jackson*, 544 U.S. at 176-77.

¹⁷³ *Jackson*, 544 U.S. at 176.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*; see also *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979).

¹⁷⁶ *Jackson*, 544 U.S. at 176-77.

¹⁷⁷ *Id.* at 180-81.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 181.

¹⁸¹ *Jackson*, 544 U.S. at 181.

intended to allow retaliation against those trying to protect the integrity of Title IX.¹⁸²

Contrary to the majority, the dissent was adamant that a private right of action should not be implied when Congress has not explicitly provided for one. The dissent's first contention was that Title IX's text does not prohibit claims based solely on retaliation.¹⁸³ Title IX claims are permitted only when sex discrimination occurs.¹⁸⁴ Justice Thomas reasoned that Title IX prohibits discrimination "on the basis of the plaintiff's sex, not the sex of some other person."¹⁸⁵ Because Jackson was not discriminated against because of his own sex, the dissent reasoned, he should not be permitted to bring a retaliation action.¹⁸⁶

Justice Thomas's second contention was that institutions receiving federal funds were not on notice that they may be liable for acts of retaliation against complaining employees.¹⁸⁷ The Board agreed to comply with statutory conditions in exchange for federal funding, but the contract was ambiguous about whether the Board would be subject to liability based on retaliation.¹⁸⁸ Therefore, the district should not be held liable without notice.¹⁸⁹

Finally, the dissent contended that Title IX does not clearly show Congress' intent to create a private right of action for third-party retaliation claims.¹⁹⁰ By imposing liability on entities for retaliation, the statute would be expanded beyond its scope.¹⁹¹ It was persuasive, stated Justice Thomas, that Title IX does not explicitly provide for retaliation claims when similar statutes do.¹⁹²

ANALYSIS

Ultimately, the Court accurately concluded that Title IX includes private rights of action for third-party retaliation claims. But the majority could have employed additional persuasive arguments. One of the majority's most convincing lines of reasoning was its comparison of *Jackson v. Birmingham Board of Education*

¹⁸² *Id.*

¹⁸³ *Jackson*, 544 U.S. at 185 (Thomas, J., dissenting).

¹⁸⁴ *Id.* (Thomas, J., dissenting).

¹⁸⁵ *Id.* (Thomas, J., dissenting).

¹⁸⁶ *Id.* at 187 (Thomas, J., dissenting).

¹⁸⁷ *Id.* at 190-92 (Thomas, J., dissenting).

¹⁸⁸ *Jackson*, 544 U.S. at 191 (Thomas, J., dissenting).

¹⁸⁹ *Id.* at 191 (Thomas, J., dissenting).

¹⁹⁰ *Id.* at 193 (Thomas, J., dissenting).

¹⁹¹ *Id.* at 194-95 (Thomas, J., dissenting).

¹⁹² *Id.* at 194 (Thomas, J., dissenting).

to *Sullivan v. Little Hunting Park, Inc.*¹⁹³ The majority's policy reasoning was also persuasive.¹⁹⁴ There were three key arguments that the majority could have used, however, that would have created a more compelling opinion. The first of these was included in the dissent. The dissent compared Title IX to Title VII and ultimately used this as a reason why retaliation should not be included in the Title IX prohibitions.¹⁹⁵ This was an erroneous contention. Second, the majority also refrained from using agency regulations to strengthen its opinion.¹⁹⁶ Third, the Court neglected to use the four-part *Cort* test to determine whether a private right of action should be implied.¹⁹⁷ The Court declined to utilize these three important arguments. Had the majority done so, it would have created a more comprehensive opinion.

The Plain Text of Title IX Does Not Include Prohibitions on Retaliation

The majority began its opinion by asserting that the text of Title IX included prohibitions on retaliation.¹⁹⁸ On this point, however, the dissent had the stronger argument.¹⁹⁹ Justice Thomas pointed out that prohibitions on retaliation are not explicitly stated in the text of Title IX.²⁰⁰ Title IX prohibits discrimination only on the "basis of sex."²⁰¹ The majority attempted to cajole this small phrase to encompass those who complain about discrimination that occurred on the basis of another person's sex.²⁰² The majority also pointed to *Franklin v. Gwinnett County Public Schools*, which held that Title IX covered forms of "intentional discrimination."²⁰³ Although Jackson was subjected to "intentional discrimination," the Court stretched the language of the Title IX too far when it claimed that

¹⁹³ See *infra* notes 220-229 and accompanying text for an analysis of *Sullivan* and how it compares to *Jackson*.

¹⁹⁴ See *infra* notes 209-219 and accompanying text for a discussion of policy reasons behind this decision.

¹⁹⁵ See *infra* notes 230-243 and accompanying text for a comparison of Title IX and Title VII.

¹⁹⁶ See *infra* notes 244-261 and accompanying text for a discussion of the anti-retaliation regulations adopted by the Department of Education and the Department of Justice.

¹⁹⁷ See *infra* notes 262-273 and accompanying text for a discussion of the four-part *Cort* test and how it applies in this case.

¹⁹⁸ *Jackson*, 544 U.S. at 173-78.

¹⁹⁹ See *id.* at 185-90 (Thomas, J., dissenting); see also Charles J. Russo & William E. Thro, *The Meaning of Sex: Jackson v. Birmingham School Board and its Potential Implications*, 198 W. EDUC. L. REP. 777, 792.

²⁰⁰ *Jackson*, 544 U.S. at 185.

²⁰¹ Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (2006).

²⁰² *Jackson*, 544 U.S. at 173-74.

²⁰³ *Id.* at 173-74; see also *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 74-75 (1992). An intentional act is defined as "[a]n act [that] is foreseen and desired by the doer, and this foresight and desire resulted in the act through the operation of will." BLACK'S LAW DICTIONARY 26 (8th ed. 2004). Retaliatory acts are "foreseen and desired by the doer." *Id.* When an entity such as the school district acts in retaliation of another, it is "foreseen and desired" because this entity is attempting to "repay an injury" that has been paid upon it possibly through complaints of sex discrimination. *Id.*

Jackson was discriminated against “on the basis of sex.”²⁰⁴ The majority based this assertion on the fact that retaliation “is an intentional response to the nature of the complaint: an allegation of sex discrimination.”²⁰⁵ Jackson, however, did not experience discrimination on the basis of his sex.²⁰⁶ Rather, the Board retaliated against him because he complained of discrimination that occurred because of his basketball players’ sex.²⁰⁷ It was not imperative, and may have been damaging, for the majority to include this reasoning.²⁰⁸

The Policy Considerations of Title IX Call for Protection Against Retaliation

The majority also reasoned that if retaliation were not covered under Title IX, the statute would become ineffective.²⁰⁹ As pointed out, “if retaliation were not prohibited, Title IX’s enforcement scheme would unravel.”²¹⁰ The dissent reasoned that students and parents are also able to report incidents of Title IX violations without the risk of retaliation.²¹¹ But this is not entirely true. Often students subjected to discrimination are reluctant to report abuse because of a fear that retaliation will occur.²¹² Contrary to the dissent’s argument, students who experience violations of Title IX are not in a position of power when it comes to reporting these violations.²¹³ In fact, research has shown that “low-power persons are particularly susceptible to retaliation.”²¹⁴ In the hierarchy of a school, students are at the bottom when it comes to power.²¹⁵ This means that students are the

²⁰⁴ *Jackson*, 544 U.S. at 173-74; see also Russo & Thro, *supra* note 199, at 792; and Reply Brief of Petitioner at 6-7, *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005) (No. 02-1672).

²⁰⁵ *Jackson*, 544 U.S. at 173-74; see also Reply Brief of Petitioner, *supra* note 204, at 6-7.

²⁰⁶ *Jackson*, 544 U.S. at 171.

²⁰⁷ *Id.*

²⁰⁸ See, e.g., Russo & Thro, *supra* note 199, at 792.

²⁰⁹ *Jackson*, 544 U.S. at 180-81; see also Cassandra M. Hausrath, Note, *Jackson v. Birmingham Board of Education: Expanding the Class of the Protected, or Protecting the Protectors?*, 40 U. RICH. L. REV. 613, 627 (2006) (“[P]rotection against retaliation is potentially critical to protection from discrimination in the first place.”).

²¹⁰ *Jackson*, 544 U.S. at 180.

²¹¹ *Jackson*, 544 U.S. at 195 (Thomas, J., dissenting).

²¹² See, e.g., Brake, *supra* note 123, at 26 (“Research in social psychology has documented a marked reluctance among the targets of discrimination to label and confront their experiences as such.”) This is especially true when students are sexually harassed. See, e.g., *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 278 (1998) (concluding student did not report sexual harassment by a teacher because “she was uncertain how to react”).

²¹³ See, e.g., *Gebser*, 524 U.S. at 278 (even students who reported sexual harassment were not taken seriously, and steps were never taken to remedy the abuses committed by the teacher); see also Brief of the National Education Association et al. as Amicus Curiae in Support of Petitioner at 4, *Jackson v. Birmingham Bd. of Educ.*, No. 02-1672 (Aug. 19, 2004).

²¹⁴ See Brake, *supra* note 123, at 39-40.

²¹⁵ See, e.g., Brief of the National Education Association et al., *supra* note 213, at 4.

most likely to be retaliated against when reporting discrimination.²¹⁶ Simply reviewing the evidence shows that the dissent's contention that students are powerful enough to report discrimination and avoid retaliation is entirely incorrect.²¹⁷ Because students are considered inferior in the school setting, teachers are in the best position to report abuse because they have more power.²¹⁸ Therefore, they must be protected from retaliation for taking steps to remedy the violations.²¹⁹

The Legal Context of Title IX Calls for Protection Against Retaliation

Also important to the majority's opinion was the case of *Sullivan v. Little Hunting Park, Inc.* which provided the legal context of Title IX.²²⁰ Because this case provided the legal context of Title IX, it also created a strong precedent for *Jackson*.²²¹ When stripped to their most elemental, *Jackson* and *Sullivan* are virtually identical.²²² Because these cases' facts are so similar the outcome should be equally similar.²²³ In *Sullivan*, a white man was retaliated against for protesting statutory violations made against a black man.²²⁴ Similarly, in *Jackson*, a male basketball coach was retaliated against for protesting illegal discrimination against a girls basketball team.²²⁵ In both cases, the people who were retaliated against complained of violations of anti-discrimination statutes designed to protect a certain class of people.²²⁶ Although these cases are very similar, there are also differences that must be addressed. Most noteworthy is the fact that these are two different statutes that call for prohibitions on two different forms of discrimination.²²⁷ Title

²¹⁶ *See id.*

²¹⁷ *See id.* at 4.

²¹⁸ *See* McCuskey, *supra* note 152, at 160; *see also* Brief of Women's Sports Foundation as Amicus Curiae in Support of Petitioner at 17-18, *Jackson v. Birmingham Bd. of Educ.*, No. 02-1672 (Aug. 19, 2004).

²¹⁹ *Jackson*, 544 U.S. at 181.

²²⁰ *Id.* at 176. *Sullivan v. Little Hunting Park, Inc.* was decided under federal statute § 1982. *See* Civil Rights Act of 1866, 42 U.S.C. § 1982 (2000).

²²¹ Brief of the American Bar Association as Amicus Curiae in Support of Petitioner at 4-5, *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005) (No. 02-1672).

²²² *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969). Both cases involve a third person not protected by the text of the statute advocating for the rights of persons who are part of the protected class. *See Sullivan*, 396 U.S. at 234-37 *and Jackson* 544 U.S. at 171-73. Both cases also involve the advocate being retaliated against because of his complaints on behalf of a person or people protected by an anti-discrimination statute. *See Sullivan*, 396 U.S. at 234-37 *and Jackson*, 544 U.S. at 171-73.

²²³ *Compare Jackson*, 544 U.S. 167 *with Sullivan*, 396 U.S. 229.

²²⁴ *Sullivan*, 396 U.S. at 235.

²²⁵ *Jackson*, 544 U.S. at 171-72.

²²⁶ *Id.* at 173; *Sullivan*, 396 U.S. at 235.

²²⁷ *Compare* Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (2006) (prohibiting discrimination on the basis of sex) *with* Civil Rights Act of 1866, 42 U.S.C. § 1982 (2006) (prohibiting discrimination on the basis of land ownership).

IX calls for a prohibition on sex discrimination committed by federally funded institutions.²²⁸ The statute used in *Sullivan* calls for a prohibition on discrimination based on land ownership.²²⁹ Although these statutes are different, they are both attempting to prohibit the same conduct: discrimination.

The Dissent's Comparison of Title IX and Title VII Was Misplaced

Although some of the majority's reasoning was convincing, there were some key points that could have been utilized to create a more complete opinion. The first of these points is based on one of the dissent's arguments which compared Title VII to Title IX and used this as a reason for denying private rights of action for retaliation claims under Title IX.²³⁰ Justice Thomas was misleading when he reasoned that if Congress wanted a Title IX private right of action for retaliation, it should have explicitly included such a right in the legislation.²³¹ He compared Title VII to Title IX to support his contention.²³² When Congress enacted Title VII, it explicitly provided for a private right of action for retaliation in the statute, but did not in Title IX.²³³ The dissent reasoned that this illustrated Congress' intent, stating that "[i]f a prohibition on 'discrimination' plainly encompasses retaliation, the explicit reference to it in . . . Title VII, would be superfluous—a result we eschew in statutory interpretation. The better explanation is that when Congress intends to include a prohibition against retaliation in a statute, it does so."²³⁴

The Court should be wary, however, when comparing Title VII to Title IX.²³⁵ These statutes were enacted according to two different Congressional powers. Title VII should be narrowly construed while Title IX should have a broader reach.²³⁶ Congress enacted Title VII using "its general constitutional authority under the Commerce Clause."²³⁷ Conversely, Congress enacted Title IX under the

²²⁸ Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (2006).

²²⁹ Civil Rights Act of 1866, 42 U.S.C. § 1982 (2006).

²³⁰ *Jackson*, 544 U.S. at 189-90 (Thomas, J., dissenting).

²³¹ *Id.* at 189 (Thomas, J., dissenting).

²³² *Id.* (Thomas, J., dissenting); see also Kenneth L. Thomas & Ramadanah M. Salaam, *The Face of Title IX: Post-Jackson v. Birmingham Board of Education*, 66 ALA. LAW. 429, 434 (2005).

²³³ Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a) (2006); *Jackson*, 544 U.S. at 189 (Thomas, J., dissenting).

²³⁴ *Jackson*, 544 U.S. at 190 (Thomas, J., dissenting); see also Thomas & Salaam, *supra* note 232, at 434.

²³⁵ Mank, *supra* note 18, at 85.

²³⁶ *Id.* at 88.

²³⁷ *Id.* at 87; see also U.S. CONST. art. 1, § 8, cl. 3 (stating that Congress has the power "[t]o regulate Commerce with foreign nations, and among the several States, and with Indian Tribes").

Spending Clause.²³⁸ Because Title VII was enacted under the Commerce Clause, it applies to all employers affecting interstate commerce.²³⁹ Title VII is not voluntary.²⁴⁰ Instead, if an employer is “above a certain size” and “in the private labor market,” Title VII applies.²⁴¹ Title IX, in contrast, only applies to entities that opt to use federal educational funding.²⁴² Because Title VII applies to a wider range of entities, there is a good policy reason for construing it more narrowly than Title IX.²⁴³

Agency Regulations Prohibit Discrimination under Title IX

The Court also neglected to address agency regulations that prohibit retaliatory conduct under Title IX.²⁴⁴ This reasoning could have lent additional support to the majority opinion. Although the Court previously determined in *Alexander v. Sandoval* that an agency’s power in creating a private right of action was limited, this does not mean that agencies do not have substantial room to define those rights created by congressional statute or interpreted by the courts.²⁴⁵ Indeed, while *Sandoval* “may prevent agencies from creating private rights of action by themselves, they can achieve much the same effect by expansively interpreting the statutory rights of action created by Congress.”²⁴⁶ In *Cannon v. University of Chicago*, the Court determined that private rights of action were available under Title IX for acts of intentional discrimination.²⁴⁷ The majority failed to consider in *Jackson* that the anti-retaliation regulation could be applied under the “intentional discrimination” ban.²⁴⁸ Although the HEW promulgated its rule against retaliation

²³⁸ See Mank, *supra* note 18, at 87; see also U.S. CONST. art. 1, § 8, cl. 1 (stating that Congress has the power to “collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts, and Excises shall be uniform throughout the United States”).

²³⁹ See Mank, *supra* note 18, at 87. “The term ‘employer’ means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person” Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(b) (2006).

²⁴⁰ See Mank, *supra* note 18, at 89.

²⁴¹ *Id.* at 88-89.

²⁴² *Id.* at 89.

²⁴³ *Id.* at 88. Because Title VII applies to a wider range of entities, it is important to narrowly construe the statute to ensure that all entities are aware of the standards to which they will be held. *Id.*

²⁴⁴ *Jackson*, 544 U.S. at 171-84.

²⁴⁵ See *Alexander v. Sandoval*, 532 U.S. 275 (2001); see also Brienne J. Gorod, Comment, *The Sorcerer’s Apprentice: Sandoval, Chevron, and Agency Power to Define Private Rights of Action*, 113 YALE L. J. 939, 940 (2004).

²⁴⁶ See Gorod, *supra* note 245, at 940.

²⁴⁷ *Cannon v. Univ. of Chicago*, 441 U.S. 677, 717 (1979).

²⁴⁸ See Gorod, *supra* note 245, at 943.

before *Cannon*, when the HEW was dismantled the agencies that inherited the responsibility for effectuating Title IX did not adopt the anti-retaliation regulation until after *Cannon*.²⁴⁹ This means that the agencies could have implicitly adopted the anti-retaliation regulation by applying Title IX's prohibition on intentional discrimination.²⁵⁰ If this is the case, then the anti-retaliation regulation did not create a new private right of action, as prohibited by *Sandoval*, rather, the agency was simply interpreting retaliation to be a form of intentional discrimination.²⁵¹ The Court in *Sandoval* stated that “[w]e do not doubt that regulations applying [Title IX’s] ban on intentional discrimination are covered by the cause of action to enforce [Title IX]. Such regulations, if valid and reasonable, authoritatively construe the statute itself.”²⁵²

Given that the agency could have been applying Title IX’s ban on intentional discrimination, the only question left is whether the regulation is valid and reasonable.²⁵³ To determine whether an agency’s regulation is “valid and reasonable,” the Court must use the *Chevron* analysis.²⁵⁴ According to the *Chevron* doctrine courts should defer to an executive agency’s regulations when Congress’s intent is unclear or ambiguous.²⁵⁵ In using *Chevron*’s two-part test, the Court must first determine whether Congress’s intent is clear.²⁵⁶ As here, when Congress’s intent is ambiguous concerning whether retaliation is to be protected under Title IX, *Chevron* requires the Court to determine “whether the agency’s answer is based on a permissible construction of the statute.”²⁵⁷ The agencies’ regulation states that “[n]o recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual . . . because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing.”²⁵⁸

²⁴⁹ See Perez, *supra* note 37, at 1149. In 1979, the HEW was dismantled. *Id.* at 1150. This led to the creation of the Department of Education, which was given the enforcement authority of Title IX. *Id.*

²⁵⁰ See Gorod, *supra* note 245, at 943.

²⁵¹ *Id.* The Court in *Sandoval* prohibited agencies from creating private rights of action under § 602 of Title VI. *Id.* This is the section that empowers the appointed agency to create regulations interpreting Title VI. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-1 (2006). The *Sandoval* decision, however, did not apply to § 601 of Title VI. See Gorod, *supra* note 245, at 943. This section prohibits intentional discrimination based on race, color, or national origin. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (2006).

²⁵² *Sandoval*, 532 U.S. at 284.

²⁵³ See *id.*

²⁵⁴ See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

²⁵⁵ *Id.*; see *supra* notes 156-164 and accompanying text.

²⁵⁶ *Chevron*, 467 U.S. at 842-43.

²⁵⁷ *Id.*

²⁵⁸ 34 C.F.R. § 100.7(e) (2006). This regulation has been adopted by all three agencies (Department of Education, Department of Health and Human Services, and the Department of Justice) given the power to effectuate Title IX by incorporating Title VI’s regulation against retaliation. See 34 C.F.R. § 106.71 (2006).

The interpretation was reasonable when it prohibited retaliation.²⁵⁹ “[I]t is neither inconsistent with the text of [Title IX] nor an unreasonable construction of that section for an agency to construe it to cover those who are purposefully injured for opposing the intentional discrimination Congress made unlawful via [Title IX].”²⁶⁰ Given that the agencies’ regulation is permissible under the statute, the Court should give this regulation the deference that is called for under *Chevron*.²⁶¹ Because the Court neglected to address agency regulations prohibiting retaliatory conduct, an opportunity to expand its opinion was lost.

The Cort Test Calls for a Private Right of Action

Another line of reasoning that the Court clearly neglected to consider is the test pronounced in *Cort v. Ash*.²⁶² The Supreme Court in *Cort v. Ash* established a four-part test to determine when courts should imply a private right of action when it is not explicitly called for by Congress.²⁶³ The Court first utilized this test to determine that a private right of action should be applied to people subjected to discrimination in violation of Title IX.²⁶⁴ Although *Jackson* comes nearly 30 years after the Court determined that a private right of action exists under Title IX, this case created an opportunity for the Court to revisit this test. Although the *Cort* test is a four-part test, the only factor that would be in dispute in this case is the first. Therefore, this is the only factor addressed here.²⁶⁵

The first factor in the *Cort* test is whether the plaintiff is “one of the class for whose especial benefit the statute was enacted.”²⁶⁶ The Court’s analysis in *Cannon v. University of Chicago* is telling on this point, however. In a footnote of that case, the Court asserted, “the right- or duty-creating language of the statute has generally been the most accurate indicator of the propriety of implication of a cause of action.”²⁶⁷ The Court then cited the case of *Sullivan v. Little Hunting Park* to

²⁵⁹ *Johnson v. Galen Health Inst., Inc.*, 267 F. Supp. 2d 679, 698 (2003).

²⁶⁰ *Peters v. Jenney*, 327 F.3d 307, 318 (2003).

²⁶¹ *Chevron*, 467 U.S. 837.

²⁶² See *supra* notes 77-83 and accompanying text; see also *Cort v. Ash*, 422 U.S. 66 (1975).

²⁶³ *Cort*, 422 U.S. at 78.

²⁶⁴ See *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979) (holding that a private right of action should be implied for victims of discrimination that violates Title IX).

²⁶⁵ Congress’s review and approval of administrative regulations against retaliation shows its intent to create a remedy for victims, satisfying the second factor. See *supra* notes 34-36 and accompanying text. For the third factor, protecting those trying to remedy discrimination fulfills Title IX’s purpose. TITLE IX LEGAL MANUAL, *supra* note 21, at 16; see also *Cannon*, 441 U.S. at 704. The Court previously recognized that the federal government has historically been the primary protector “against invidious discrimination of any sort, including that on the basis of sex,” satisfying the fourth factor. *Cannon*, 441 U.S. at 708.

²⁶⁶ *Cort*, 422 U.S. at 67.

²⁶⁷ *Cannon*, 441 U.S. at 691 n.13.

support this statement.²⁶⁸ The facts of *Jackson*, as discussed above, are very similar to the case of *Sullivan v. Little Hunting Park*.²⁶⁹ That the Court used *Sullivan* to illustrate its point supports the contention that Jackson was a member of the class whose especial benefit the statute was designed to protect.²⁷⁰

Even if the reasoning based on *Cannon* is not dispositive to prove the first factor of the *Cort* test, the Court's own reasoning in this case is. As noted earlier, the Court asserted that the retaliation that Jackson experienced was discrimination "on the basis of sex."²⁷¹ However disingenuous this reasoning seemed, the Supreme Court is still the highest court in this country. Therefore, relying on its language is not in fact disingenuous. Because the Court interpreted the retaliation experienced by Jackson as discrimination "on the basis of sex," the first factor of the *Cort* test is fulfilled.

In 1975, the Supreme Court announced that this was the test to be used when determining whether a private right of action exists when Congress does not explicitly provide for one.²⁷² The majority in *Jackson*, however, declined to utilize this test to strengthen its opinion. The reason for this is not clear. Although the first factor would ordinarily be difficult to prove, the majority's opinion that Jackson was discriminated "on the basis of sex" fits perfectly into the argument that Jackson fulfilled the first factor of the *Cort* test.²⁷³ The majority had the opportunity to revisit and reaffirm this test, but ultimately it decided against using a very convincing argument.

Jackson's *Ramifications*

The Court's decision in this case will significantly affect all educational programs. An educational institution receiving federal assistance directly through grants, loans, and even federal property will be subject to private actions if it retaliates against a person reporting Title IX violations.²⁷⁴ Not only will institutions receiving federal assistance directly be subject to this decision, but also educational institutions receiving federal funds indirectly through their students.²⁷⁵ This decision reaches almost every educational institution in the country.

²⁶⁸ *Id.*

²⁶⁹ See *supra* notes 220-29 and accompanying text.

²⁷⁰ See *supra* notes 220-29 and accompanying text.

²⁷¹ See *supra* notes 198-208 and accompanying text.

²⁷² *Cort*, 422 U.S. at 78.

²⁷³ See *supra* notes 198-208 and accompanying text.

²⁷⁴ See *supra* notes 44-48 and accompanying text.

²⁷⁵ See *supra* notes 49-53 and accompanying text.

Not only are the majority of institutions subject to this decision, so is every facet of the educational institution.²⁷⁶ This includes retaliation that occurs for reporting violations of Title IX in housing, access to course offerings, access to schools, counseling, financial assistance, health and insurance benefits and athletics.²⁷⁷ Even the most mundane act of retaliation could subject the entire educational institution to a lawsuit.

The decision in this case affects the application of Title IX in the future, but it will also affect other statutes. As noted earlier, Title IX was patterned after Title VI of the Civil Rights Act of 1964.²⁷⁸ Historically, courts have interpreted these statutes interchangeably.²⁷⁹ Thus, the interpretation of Title IX in the *Jackson* decision is bound to find its way into a Title VI case.

Although Title VI will obviously be affected by this decision, courts have cited *Jackson* favorably when interpreting other statutes as well.²⁸⁰ The *Jackson* decision is now used as a justification for implying private rights of action in third-party retaliation claims for a number of cases.²⁸¹ The astonishing thing about many of these cases is the fact that some of the statutes involved are not even federal.²⁸² States are now using the *Jackson* decision to bolster their opinions when private rights of action are implied under their own laws. Although there are decisions both citing and approving of the decision in *Jackson*, this is still a relatively new case. There is no way to predict what kind of impact *Jackson* will continue to have in courts throughout the country.

CONCLUSION

Ultimately, the U.S. Supreme Court came to the correct conclusion when it decided in *Jackson v. Birmingham Board of Education* that Title IX provides a private right of action for claims of third-party retaliation. The Court asserted three reasons for its decision. First, it concluded that the plain text of Title IX include claims of retaliation because the term “on the basis of sex” covers those who complain about discrimination on the basis of another person’s sex. This line

²⁷⁶ See *supra* notes 44-48 and accompanying text.

²⁷⁷ See *supra* note 47 and accompanying text.

²⁷⁸ See *supra* note 18 and accompanying text.

²⁷⁹ See *Alexander v. Sandoval*, 532 U.S. 275, 278 (2001); and *Gebser v. Lago Vista Independent Sch. Dist.*, 524 U.S. 274, 286 (1998); see also *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 514 (1982) and *Cannon v. Univ. of Chicago*, 441 U.S. 677, 694-96 (1979).

²⁸⁰ See *Humphries v. CBOCS*, No. 05-4047 (U.S. Jan. 10, 2007); see also *Taylor v. City of Los Angeles*, 144 Cal. App. 4th 1216, 1240 (2006) (involving the California Fair Employment and Housing Act) and *Yanowitz v. L’Oreal USA, Inc.*, 36 Cal. 4th 1028, 1043 (2005) (involving the California Fair Employment and Housing Act).

²⁸¹ *Id.*

²⁸² See *Taylor*, 144 Cal. App. 4th at 1240; see also *Yanowitz*, Cal. 4th at 1043.

of reasoning, however, was not convincing. Second, the majority determined that the policy behind Title IX requires private rights of action for third-party retaliation claims. This was an especially persuasive argument. Title IX's protections could not be realized unless the protectors were shielded from retaliation. Finally, the Court reasoned that the legal context in which Title IX was passed provides proof that Congress intended Title IX to cover private third-party retaliation claims.

While the Court's reasoning was convincing in some respects, there were three major—but never articulated—arguments that could have significantly bolstered the opinion. First, the Court should have rebutted the dissent's contention that, because Title VII specifically calls for protection against retaliation and Title IX does not, this means that retaliation is not covered under Title IX. This argument was erroneous and the majority could have pounced on it. Second, the majority neglected to make any arguments based on Title IX regulations. There is a specific regulation that prohibits retaliation that, if used, would have made for a more complete opinion. Finally, the Court overlooked the four-part *Cort* test that it had previously used to determine when to imply rights of action. Given the major ramifications of this decision, a more thorough and convincing analysis was appropriate.

It is still unclear how *Jackson v. Birmingham Board of Education* will impact future litigation. Some see this decision as a form of judicial legislation.²⁸³ Others see this decision as right and natural given Title IX's long history.²⁸⁴ Whether one views this decision as right or wrong, it is now clear that institutions receiving federal funding are on notice that they are at risk of losing federal funding if they retaliate against someone who has reported Title IX violations. No longer can federally-funded institutions claim that Congress did not give proper notice that they may be held liable. It would be prudent for practitioners—especially those representing federally funded institutions—to make clear that the courts will not tolerate retaliation.

²⁸³ See Thomas & Salaam, *supra* note 232, at 434; see also Russo & Thro, *supra* note 199, at 790.

²⁸⁴ See John A. Gray, *Is Whistleblowing Protection Available Under Title IX?: An Hermeneutical Divide and the Role of the Courts*, 12 WM. & MARY J. WOMEN & L. 671, 695-97 (2006); see also Hausrath, *supra* note 209, at 628-30; and McCuskey, *supra* note 152, at 163-64; Perez, *supra* note 37, at 1173; Mank, *supra* note 18, at 106-07.