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IS WHISTLEBLOWING PROTECTION AVAILABLE UNDER TITLE IX?: AN HERMENEUTICAL DIVIDE AND THE ROLE OF COURTS

JOHN A. GRAY*

Our role, then, is not "to provide such remedies as are necessary to make effective the congressional purpose" expressed by a statute," but to examine the text of what Congress enacted into law.¹

Every nomination to the Court can make a tremendous difference in the outcome of real cases affecting real people for decades to come.²

INTRODUCTION

One blows a whistle to get attention and to cause something to stop — as a referee in a sports contest or a person physically threatened by another. Whistleblowing as a metaphor refers to the act of disclosing information concerning conduct within or by an organization that the whistleblower believes to be unethical, illegal, or dangerous with the intent of having the conduct reviewed and stopped.³ Whistleblowing occurs in two contexts; internal whistleblowing involves disclosure to higher authorities within an organization, and external whistleblowing involves disclosure to outside enforcement authorities and/or the press. Legal protection for whistleblowers does not prevent them from suffering adverse employment consequences.⁴ Rather, the law only provides them a

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1. *Jackson v. Birmingham Bd. of Educ.*, 125 S. Ct. 1497, 1515 (2005) (Thomas, J., dissenting) (citing *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001) (quoting *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964))).

2. Press Release, Nat'l Women's Law Center, NWLC Applauds Supreme Court's Decision in Title IX Retaliation Case: Court Rules 5-4 in Favor of Girls' Basketball Coach (Mar. 29, 2005), available at <http://www.nwlc.org/details.cfm?id=2202§ion=newsroom> (quoting Marcia D. Greenberger, NWLC Co-President).

3. See BLACK'S LAW DICTIONARY 1627 (8th ed. 1999) (defining whistleblower as "[a]n employee who reports employer wrongdoing to a governmental or law-enforcement agency").

4. For example, whistleblowers may be shunned by colleagues, lose friends, lose their jobs, get divorced, or attempt suicide. Marlene Winfield, *Whistleblowers as Corporate Safety Net*, in WHISTLEBLOWING — SUBVERSION OR CORPORATE CITIZENSHIP? 21, 21-22 (Gerald Vinten ed., 1994).

remedy for injuries suffered as a result of whistleblowing.⁵ A great variety of laws and enforcement systems exist at both the federal and state levels. Federal statutes that protect whistleblowers in certain circumstances include the False Claims Act,⁶ anti-retaliation provisions of employment discrimination laws⁷ and of worker health⁸ and public health laws,⁹ the executive branch employees' whistleblower act,¹⁰ and most recently, provisions of the Sarbanes-Oxley Act of 2002.¹¹ As an example of the prevalence of state-level whistleblower legislation, Maryland has at least four whistleblower statutes¹² in addition to a ruling by its highest court making the tort of abusive discharge available to individuals who have no other statutory remedy after being discharged for blowing the whistle to a public enforcement authority.¹³

Legislatures and courts provide remedies to whistleblowers for a number of reasons. The foremost rationale is two-fold. Whistleblowers serve to protect public health and safety, but often suffer severe adverse employment and career consequences for following their consciences and acting to protect the public.¹⁴ Thus, whistle-

5. *See, e.g.*, Whistleblower Protection Act of 1989, 5 U.S.C. § 1201 note (2005); False Claims Act, 31 U.S.C. §§ 3729-3733 (2005).

6. 31 U.S.C. §§ 3729-3733 (2005). This post-Civil War statute provides compensation to employees who provide information to the federal government about fraudulent claims for payment that leads to successful legal proceedings against their employers. *Id.* § 3730.

7. *E.g.*, Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (2005); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (2005); Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (2005). Each of these statutes includes an express anti-retaliation provision to protect employees who may not be victims of discriminatory practices in the workplace, but nevertheless oppose or protest them to their employers. 29 U.S.C. § 623(d) (2005); 42 U.S.C. § 2000e-3 (2005); 42 U.S.C. § 12203(a) (2005).

8. Occupational Safety and Health Act, 29 U.S.C. §§ 651 (2005).

9. *E.g.*, Clean Water Act, 33 U.S.C. § 1251 (2005); Atomic Energy Act, 42 U.S.C. § 2011 (2005); Clean Air Act, 42 U.S.C. § 7401 (2005); Nuclear Waste Policy Act, 42 U.S.C. § 10101 (2005).

10. Whistleblower Protection Act of 1989, 5 U.S.C. § 1201 note (2005).

11. Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified in scattered sections of the U.S.C. (2005)). Sarbanes-Oxley provides remedies for both internal and external whistleblowers who work for covered companies and report in good faith what they reasonably believe to be securities law-related violations. *See id.* §§ 806, 1107 (codified at 18 U.S.C. §§ 1513(e), 1514A (2005)).

12. *See, e.g.*, MD. ANN. CODE art. 49b, § 16 (2003); MD. CODE ANN., HEALTH OCC. §§ 1-501 to 1-506 (Supp. 2003); MD. CODE ANN., STATE PERS. & PENS. §§ 5-301 to 5-307 (1997 & Supp. 2003); MD. CODE ANN., LAB. & EMPL. § 5-604 (1999).

13. *Molesworth v. Brandon*, 627 A.2d 608 (Md. 1996); *see generally* John A. Gray, *Scope of Whistleblower Protection in the State of Maryland: A Comprehensive Statute Is Needed*, 33 U. BALT. L. REV. 225 (2004) (providing an overview of Maryland whistleblowing law).

14. *See supra* note 4 and accompanying text.

blower protection alleviates the career and financial risks that may otherwise deter whistleblowing. Other reasons include: (1) that it is unjust to penalize individuals for reporting what they reasonably and in good faith believe to be conduct that is not only unethical and/or illegal but also sufficiently dangerous to others, physically or economically, that it must be stopped; (2) that many, perhaps most, people would be reluctant to jeopardize their own jobs and careers in the absence of legal protection; and (3) that the public would suffer more injuries in the absence of legal protection for whistleblowers.

The issue of the availability of whistleblower protection has recently surfaced, this time with respect to Title IX of the Education Amendments of 1972¹⁵ in the case of *Jackson v. Birmingham Board of Education*.¹⁶ The Supreme Court first recognized a private right of action to enforce Title IX's prohibition against sex discrimination in educational programs receiving federal financial assistance in 1979 in *Cannon v. University of Chicago*.¹⁷ The question before the Court in *Jackson* was whether Title IX includes a prohibition of and a remedy for retaliation against those who complain of discrimination based on sex, including complainers who are not victims of the discrimination that is the subject matter of the complaint.¹⁸ In a closely divided five to four decision on March 29, 2005, the Supreme Court held that Title IX prohibits retaliation against whistleblowers and provides a private right of action in such a situation.¹⁹

The importance of the *Jackson* decision also lies in its clear illustration of the hermeneutical divide between Supreme Court justices on statutory construction and, by implication, the significance of the appointment of judges who are either textualist or contextualist in their approach to statutory construction.

I. HISTORY OF THE CASE

In 1993, the Birmingham Board of Education hired Roderick Jackson as a physical education teacher and girls' basketball coach.²⁰ In August of 1999, Jackson was transferred to Ensley High School where he continued working in both capacities.²¹ Jackson

15. 20 U.S.C. §§ 1681-1688 (2005).

16. 125 S. Ct. 1497 (2005).

17. 441 U.S. 677 (1979).

18. *Jackson*, 125 S. Ct. at 1502.

19. *Id.*

20. *Jackson v. Birmingham Bd. of Educ.*, 309 F.3d 1333, 1335 (11th Cir. 2002), *rev'd*, 125 S. Ct. 1497 (2005).

21. *Id.*

noticed differences in the treatment of the girls' and boys' basketball teams.²² The girls practiced in the old gym with wooden backboards and bent rims, while the boys practiced in the new gym.²³ The girls' junior varsity team was eliminated, while the boys' was not.²⁴ Additionally, the girls did not have access to ice during their practices, although the boys did.²⁵ The boys' team also received all of the revenue generated from admissions and concessions at games, while the girls' team received none of the revenues generated at their games.²⁶ Jackson complained to his high school's authorities.²⁷ Shortly thereafter, he began to receive negative job performance evaluations.²⁸ In May of 2001, he was relieved of his coaching duties, but not of his teaching duties because he had tenure as a physical education teacher.²⁹ Jackson concluded that he was fired as coach in retaliation for voicing his concerns about the unequal treatment of the girls' basketball team at Ensley High School.³⁰

Jackson sued the Birmingham Board of Education for compensation and injunctive relief, claiming that his dismissal was in retaliation for his whistleblowing in violation of Title IX of the Education Amendments of 1972.³¹ Jackson argued that sections 901³² and 902³³ of Title IX, together with an anti-retaliation

22. *Id.*

23. Marcia D. Greenberger, *Don't Penalize Coach for Standing up for Players*, BIRMINGHAM NEWS, Nov. 28, 2004, at 1B.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Jackson*, 309 F.3d at 1335.

28. *Id.*

29. *Id.*

30. *Id.* at 1335-36.

31. *Id.* at 1335.

32. Section 901 of Title IX, in relevant part, provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a) (2005).

33. Section 902 of Title IX states, in relevant part:

Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity . . . is authorized and directed to effectuate the provisions of section 901 with respect to such program or activity by issuing rules, regulations, or orders of general applicability Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding . . . , of a failure to comply with such requirement . . . , or (2) by any other means authorized by law

20 U.S.C. § 1682 (2005).

regulation promulgated by the Department of Education,³⁴ implied a right to a private cause of action and a private remedy.³⁵ In its defense, the School Board argued that Title IX did not provide a private cause of action for someone in Jackson's position because it applied only to individuals who were themselves the victims of the alleged gender discrimination.³⁶ The Board moved to dismiss the case on the ground that Title IX's private cause of action does not include claims of retaliation.³⁷ According to the Board's interpretation of Title IX enforcement, the Office of Civil Rights of the Department of Education could act to remedy any gender discrimination, and the girls could sue under Title IX, but their coach could not.³⁸

34. Using the authority vested in it by section 902, the Department of Education promulgated 34 C.F.R. § 100.7(e), which prohibits retaliation against anyone who complains of a Title IX violation:

No recipient [of federal funds] 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 [901 of Title IX] 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.

34 C.F.R. § 100.7(e) (incorporated to Title IX by 34 C.F.R. § 106.71 (2005)).

35. *Jackson*, 309 F.3d at 1336.

36. *Jackson v. Birmingham Bd. of Educ.*, 2002 U.S. Dist. LEXIS 27596, at *3 (N.D. Ala. Jan. 10, 2002), *aff'd*, 309 F.3d 1333, 1336 (11th Cir. 2002), *rev'd*, 125 S. Ct. 1497 (2005).

37. *Id.*

38. *Id.* at *4. Assuming, for a moment, that Title IX would not provide a private cause of action to Jackson, the question arises whether alternative theories of recovery might be available to Jackson. Possible avenues for recovery to explore include Title VII, the Sarbanes-Oxley Act of 2002, and the tort of abusive discharge.

Title VII would not be available to Jackson because the subject matter of his complaints was not gender discrimination in violation of Title VII either against his students or against himself: the adverse employment action taken against Jackson was not because of his sex, and his students did not face discrimination in employment. See Title VII of the Civil Rights Act of 1964 § 703, 42 U.S.C. § 2000e-2 (2005).

The Sarbanes-Oxley Act of 2002 would apply if Jackson instead had complained to the Office of Civil Rights and then had been fired in retaliation by the School Board because section 1107 criminalizes retaliation against an informant who provided truthful information relating to the commission of any federal offense to a law enforcement officer. Sarbanes-Oxley Act of 2002 § 1107, 18 U.S.C. § 1513(e) (2005). Jackson, however, only complained internally. Sarbanes-Oxley section 806(a), on the other hand, provides a statutory remedy to the victim of a retaliatory employment act only to employees of publicly traded companies and only for reporting securities related offenses. Sarbanes-Oxley Act of 2002 § 806(a), 18 U.S.C. § 1514A (2005). Thus, neither provision of Sarbanes-Oxley would protect Jackson because he was an internal whistleblower and he did not report a securities offense as an employee of a publicly traded company.

In a few jurisdictions, the tort of abusive discharge may be available. See, e.g., *Kovalesky v. A.M.C. Associated Merchandising Corp.*, 551 F. Supp. 544, 547 (S.D.N.Y. 1982) ("New York courts, at least implicitly, have recognized a tort for abusive discharge under the following special circumstances — (1) when the discharge is for reasons contrary to the public policy of the state, and perhaps (2) when the discharge is

Both the District Court for the Northern District of Alabama³⁹ and the Court of Appeals for the Eleventh Circuit⁴⁰ agreed with the School Board's argument. Before both of these courts, Jackson argued his case *pro se*, but the National Women's Law Center⁴¹ joined him in his petition for certiorari to the U.S. Supreme Court.⁴² Because Title IX covers all public and private schools at all educational levels (primary, secondary, and postsecondary) that receive, directly or indirectly, federal financial assistance,⁴³ the case takes on heightened importance as to the issues of whether protection is limited to victims and whether retaliatory acts are covered.

II. CONFLICT AMONG THE CIRCUITS

Prior to the Supreme Court's decision in *Jackson*, two circuits had issued conflicting decisions on the case's central question. The Eleventh Circuit Court of Appeals in *Jackson*⁴⁴ found no protection for retaliation under Title IX, whereas the Fourth Circuit Court of Appeals, in *Peters v. Jenney*,⁴⁵ found that the implied private cause of action found in Title VI of the Civil Rights Act of 1964⁴⁶ included retaliation claims.⁴⁷ Though the cases concerned distinct statutes, they were conflicting because the Court has consistently construed the statutes jointly as Title IX was "explicitly patterned" after Title VI.⁴⁸

unconscionable or (3) when it is solely based on a malicious motive. Kovalesky has made sufficient allegations to bring herself within the protection of this body of the New York tort law."). In other jurisdictions, such as Maryland, the tort is available to provide a remedy only to external whistleblowers. See Gray, *supra* note 13, at 237.

39. *Jackson*, 2002 U.S. Dist. LEXIS 27596 at *3.

40. *Jackson v. Birmingham Bd. of Educ.*, 309 F.3d 1333, 1347 (11th Cir. 2002), *rev'd*, 125 S. Ct. 1497 (2005).

41. The National Women's Law Center's mission is "to protect and advance the progress of women and girls at work, in school, and in virtually every aspect of their lives." National Women's Law Center Homepage, <http://www.nwlc.org> (last visited Mar. 8, 2006).

42. Petition for Writ of Certiorari, *Jackson v. Birmingham Bd. of Educ.*, 125 S. Ct. 1497 (2005) (No. 02-1672).

43. 20 U.S.C. § 1681(c) (2005).

44. 309 F.3d 1333 (11th Cir. 2002).

45. 327 F.3d 307 (4th Cir. 2003).

46. 42 U.S.C. §§ 2000d-2000d-7 (2005). Whereas Title IX prohibits discrimination on the basis of sex in educational programs that receive federal financial assistance, 20 U.S.C. § 1681(a) (2005), Title VI prohibits discrimination "on the ground of race, color, or national origin" in any program or activity that receives federal financial assistance. 42 U.S.C. § 2000d (2005).

47. *Peters*, 327 F.3d at 310.

48. *Cannon v. Univ. of Chi.*, 441 U.S. 667, 693 n.14, 694-98 (1979); see also *Barnes v. Gorman*, 536 U.S. 181, 185 (2002) ("[T]he Court has interpreted Title VI consistently with Title IX . . .").

The Eleventh Circuit decision in *Jackson v. Birmingham Board of Education*⁴⁹ relied on the earlier decision of *Alexander v. Sandoval*,⁵⁰ in which the Supreme Court held that Title VI's private right of action does not extend to private enforcement of the disparate-impact regulations promulgated under the act.⁵¹ The Eleventh Circuit looked to *Sandoval* to resolve the issue of the authoritative-ness of statutory language over regulatory language:

Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress. The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. *Statutory intent on this latter point is determinative.* Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute. Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals.⁵²

The Eleventh Circuit further noted that *Sandoval* "clearly delimits the sources that are relevant to our search for legislative intent" in three steps:⁵³

49. 309 F.3d 1333 (2002).

50. 532 U.S. 275 (2001).

51. *Id.* at 293. The lone circuit decision that addressed this question prior to *Sandoval* is *Lowrey v. Texas A & M University Systems*, 117 F.3d 242 (5th Cir. 1997). The Fifth Circuit held in *Lowrey* that 34 C.F.R. § 100.7(e) can of its own force provide the basis for an implied private right of action for retaliation suffered by individuals not themselves the victims of gender discrimination. *Id.* at 254. To reach this conclusion, it relied on an earlier Fifth Circuit opinion that had observed that "civil remedies may be implied from regulations, as well as statutes." *Gomez v. Fla. State Employment Serv.*, 417 F.2d 569, 576 n.29 (5th Cir. 1969). Ignoring the text contained in sections 901 and 902 of Title IX and focusing exclusively on 34 C.F.R. § 100.7(e), the court in *Lowrey* applied the four-part *Cort* test to reach its conclusion that § 100.7(e) implies a private right of action. *Lowrey*, 117 F.3d at 250 (citing *Cort v. Ash*, 422 U.S. 66 (1975)). The court relied particularly on the third *Cort* factor — finding that "the implication of a private right of action for retaliation would serve the dual purposes of title IX, by creating an incentive for individuals to expose violations of title IX and by protecting such whistleblowers from retaliation." *Id.* at 254 (footnote omitted).

The Eleventh Circuit expressly reviewed and rejected *Lowrey* in *Jackson* when it wrote, "[a]fter *Sandoval*, we believe the reasoning in *Lowrey* is unpersuasive. Accordingly, we do not follow *Lowrey*, either in its exclusive reliance on 34 C.F.R. § 100.7(e) to imply a private right of action, or in its application of the *Cort* factors that gives short shrift to legislative intent." *Jackson*, 309 F.3d at 1348 n.15 (citations omitted).

52. *Id.* at 1340 (citing *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001)).

53. *Jackson*, 309 F.3d at 1340 (citing *Sandoval*, 532 U.S. at 288, and *Tex. & Pac. Ry. Co. v. Rigsby*, 241 U.S. 33, 39 (1916)).

First . . . , we look to the statutory text for “rights-creating” language,” . . . language identifying ‘the class for whose especial benefit the statute was enacted.’ . . .

Second, we examine the statutory structure within which the provision in question is embedded. If the statutory structure provides a discernible enforceable mechanism, *Sandoval* teaches us that we ought not imply a private right of action because “[t]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.”⁵⁴

Third, if (and only if) statutory text and structure have not conclusively resolved [the issue], we turn to the legislative history and context within which a statute was passed. We examine legislative history with a skeptical eye . . . because “[t]he bar for showing legislative intent is high. ‘Congressional intent to create a private right of action will not be presumed. There must be clear evidence of Congress’s intent to create a cause of action.’”⁵⁵

Using this hermeneutical template, the Eleventh Circuit first examined the text of section 901. “Nothing in the text indicates any congressional concern with retaliation Indeed, the statute makes no mention of retaliation at all. . . . The absence of any mention of retaliation in Title IX therefore weighs powerfully against a finding that Congress intended Title IX to reach retaliatory conduct.”⁵⁶ The text of section 902⁵⁷ contains no rights-creating language and instead explicitly focuses on the power of federal agencies to regulate recipients of federal funding and provides an enforcement mechanism subject to judicial review.⁵⁸ “Section 902’s provision of an administrative enforcement mechanism . . . strongly counsels against inferring a private right of action against retaliation, because ‘[t]he express provision of one method . . . suggests that Congress intended to preclude others.’”⁵⁹ The Eleventh Circuit found that neither the text nor the structure of sections 901 and 902 suggested Congressional intent to create a private right of action for retaliation.⁶⁰ The court further concluded that regulating language in 34 C.F.R. § 100.7(c) did not “imply such a private right of action

54. *Id.* (quoting *Sandoval*, 532 U.S. at 290).

55. *Id.* at 1341 (quoting *McDonald v. S. Farm Bureau Life Ins. Co.*, 291 F.3d 718, 723 (11th Cir. 1997)).

56. *Id.* at 1344-45 (citation omitted).

57. 20 U.S.C. § 1682 (2005).

58. *Jackson*, 309 F.3d at 1345.

59. *Id.* at 1345 (quoting *Sandoval*, 532 U.S. at 290).

60. *Id.*

or create a private remedy[.] . . . for the simple reason that '[l]anguage in a regulation . . . may not create a right that Congress has not.'"⁶¹

In direct opposition to the Eleventh Circuit's interpretation, the Fourth Circuit Court of Appeals held in *Peters v. Jenney* that a plaintiff can sue for retaliation under Title VI in certain circumstances.⁶² The Fourth Circuit examined the language of section 601 of Title VI and developed a twofold basis for its conclusion. First, the court relied on an analogy to the interpretations of 42 U.S.C. §§ 1981 and 1982.⁶³ Section 1982 was interpreted in *Sullivan v. Little Huntington Park*,⁶⁴ and § 1981 was interpreted in *Fiedler v. Marumsco Christian School*.⁶⁵ In the Fourth Circuit's view, the language of § 1981 and § 1982 was similar to the language in section 601 because both sets of statutes refer only to intentional discrimination without separately referring to retaliation. The court relied on this precedent, which "stands for the proposition that a prohibition on discrimination should be judicially construed to include an implicit prohibition on retaliation against those who oppose the prohibited discrimination."⁶⁶ Furthermore, the Fourth Circuit cited these interpretations not only as authority for implying a prohibition on retaliation but also for the proposition that a private cause of action is available to those who engage in protected opposition under those statutes.⁶⁷

The Fourth Circuit's second basis for holding that retaliation was prohibited under section 601 was its conclusion that the section 601 regulation⁶⁸ was a reasonable interpretation of the statutory ban against intentional discrimination entitled to *Chevron*⁶⁹ deference.⁷⁰ Therefore, the interpretation is enforceable in a private

61. *Id.* at 1346 (quoting *Sandoval*, 532 U.S. at 291).

62. 327 F.3d 307, 320 (4th Cir. 2003). *But cf.* *Mock v. South Dakota Bd. of Regents*, 267 F. Supp. 3d 1017, 1021-22 (D.S.D. 2003) (critiquing and declining to follow *Peters*).

63. *Peters*, 327 F.3d at 317. The court noted that 42 U.S.C. § 1982 "grant[s] to all citizens . . . the same rights to transact in property 'as enjoyed by white citizens'" and that 42 U.S.C. § 1981 "prohibits only intentional discrimination and makes no separate reference to retaliation." *Id.*

64. 396 U.S. 229 (1969).

65. 631 F.2d 1144 (4th Cir. 1980).

66. *Peters*, 327 F.3d at 317.

67. *Id.*; *see also Sullivan*, 396 U.S. at 237 (holding that "there can be no question" that a white plaintiff subjected to adverse action for attempting to sell property to a black man may bring an action under 42 U.S.C. § 1982); *Fiedler*, 631 F.2d at 1149 (holding that white students who were injured because of association with black students have statutory standing to sue under 42 U.S.C. § 1981).

68. 34 C.F.R. § 100.7(e) (2005); *see also Peters*, 327 F.3d at 319.

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

70. *Peters*, 327 F.3d at 319.

action.⁷¹ The court relied on the *Sandoval* holding⁷² that regulations applying section 601's ban on intentional discrimination, if valid and reasonable under the *Chevron* standard, are enforceable in a private action.⁷³ The Fourth Circuit held that "the retaliation regulations are enforceable via an implied private right of action to the extent that they forbid retaliation for opposing practices that one reasonably believes are made unlawful by § 601."⁷⁴

To assist the district court on remand, the Fourth Circuit reviewed the elements of a Title VI retaliation claim:

To make a claim for Title VI retaliation, Peters must show (1) that she engaged in protected activity; (2) that Appellees took a material adverse employment action against her, and (3) that a causal connection existed between the protected activity and the adverse action. As in other civil rights contexts, to show "protected activity," the plaintiff in a Title VI retaliation case need "only . . . prove that he opposed an unlawful employment practice which he reasonably believed had occurred or was occurring." The inquiry is therefore (1) whether Peters "*subjectively* (that is, in good faith) believed" that the district had engaged in a practice violative of § 601, and (2) whether this belief "*was objectively* reasonable in light of the facts," a standard which we will refer to as one of "reasonable belief."⁷⁵

III. THE SUPREME COURT'S *JACKSON* DECISION

The U.S. Supreme Court granted certiorari to resolve the conflict in the circuits over whether a private cause of action based on a complaint of discrimination encompasses claims of retaliation.⁷⁶

71. *Id.*

72. *Id.*

73. *Alexander v. Sandoval*, 532 U.S. 275, 284 (2001) (citing *Chevron* 467 U.S. at 834-44 (1984)).

74. *Peters*, 327 F.3d at 319 (citation omitted). The Fourth Circuit noted "that the Eleventh Circuit's opinion in [*Jackson*] did not consider the impact of *Sullivan* and its progeny on the question [decided] today." *Id.* at 318 n.10.

75. *Id.* at 320 (citations omitted) (quoting *Weeks v. Harden Mfg. Co.*, 291 F.3d 1307, 1312 (11th Cir. 2002)). Judge Widener dissented on the grounds that plaintiff did not prove that she belonged to the class of persons Congress intended to protect under Title VI. *Id.* at 325 (Widener, J., dissenting). Relying on the Eleventh Circuit's *Jackson* opinion, Judge Widener wrote, "[h]ad Congress intended to extend a private right of action under Title VI to persons other than victims of discrimination it knew how to do so. . . . Unlike Title VII, Title VI . . . protects actual victims . . ." *Id.*

76. *Jackson v. Birmingham Bd. of Educ.*, 125 S. Ct. 1497, 1503 (2005). The fourteen amicus curiae briefs include: Brief of Amici Curiae National School Boards Association et al. in Support of Respondent, *Jackson*, 125 S. Ct. 1497 (No. 02-1672); Brief Amicus Curiae of Pacific Legal Foundation in Support of Respondent, *Jackson*, 125 S. Ct. 1497

The history of Title IX enforcement has had four stages. The first was the agency enforcement scheme created by the Education Amendments of 1972.⁷⁷ The second was the controversy over whether Title IX's prohibition against gender discrimination applied only to specific programs that received federal financial assistance or to the whole institutions of which the recipient programs were a part. This issue was critical to sports programs because they are not direct recipients. Congress resolved this question by expressly applying Title IX to the institution as a whole through its enactment of the Civil Rights Restoration Act of 1987,⁷⁸ in effect overruling the Supreme Court's ruling to the contrary in *Grove City College v. Bell*.⁷⁹ The third stage included both the Court's recognition in *Cannon v. University of Chicago*⁸⁰ of a private cause of action to

(No. 02-1672); Brief of the State of Alabama et al. as Amici Curiae in Support of Respondent, *Jackson*, 125 S. Ct. 1497 (No. 02-1672); Amicus Curiae Brief of National Wrestling Coaches Association in Support of Respondent, *Jackson*, 125 S. Ct. 1497 (No. 02-1672); Brief of Amicus Curiae Eagle Forum Education & Legal Defense Fund in Support of Respondent, *Jackson*, 125 S. Ct. 1497 (No. 02-1672); Amicus Curiae Brief of College Sports Council in Support of Neither Party, *Jackson*, 125 S. Ct. 1497 (No. 02-1672); Brief of the American Bar Association as Amicus Curiae in Support of Petitioner, *Jackson*, 125 S. Ct. 1497 (No. 02-1672); Amici Curiae Brief of Women's Sports Foundation, Myra Sadker Advocates, et al. in Support of the Petitioner, *Jackson*, 125 S. Ct. 1497 (No. 02-1672); Brief Amicus Curiae of the National Education Association et al. in Support of Petitioner, *Jackson*, 125 S. Ct. 1497 (No. 02-1672); Brief of Amicus Curiae Leadership Conference on Civil Rights in Support of Petitioner, *Jackson*, 125 S. Ct. 1497 (No. 02-1672); Brief of Amicus Curiae of Birch Bayh in Support of the Petitioner, *Jackson*, 125 S. Ct. 1497 (No. 02-1672); Brief of Amici Curiae New York Lawyers for the Public Interest et al. Supporting Petitioner, *Jackson*, 125 S. Ct. 1497 (No. 02-1672); Brief for the United States as Amicus Curiae Supporting Petitioner, *Jackson*, 125 S. Ct. 1497 (No. 02-1672); Amicus Curiae Brief of the National Partnership for Women & Families and 31 Other Organizations and Individuals in Support of Petitioner, *Jackson*, 125 S. Ct. 1497 (No. 02-1672).

77. Title IX of the Education Amendments of 1972 § 902, Pub. L. No. 92-318, 86 Stat. 374 (1972) (codified at 20 U.S.C. § 1682 (2005)).

78. Pub. L. No. 100-259, 102 Stat. 28 (1987) (codified at 20 U.S.C. § 1687 (2005)). Passed in response to a Supreme Court interpretation of Title IX, this Act restores the broad scope of coverage and clarifies the application of, inter alia, Title IX of the Education Amendments of 1972. *Id.* It specifies that an institution receiving federal financial assistance is prohibited from discriminating on the basis of sex even in a program or activity that does not directly benefit from such assistance. *Id.*; see also 20 U.S.C. § 1681 (2005).

79. 465 U.S. 555 (1984) (holding that: (1) Title IX applied to the college, even though it accepted no direct assistance because it enrolled students who received federal education grants; (2) for Title IX enforcement purposes, the education program or activity at the college receiving federal financial assistance was the college's financial aid program and not the entire college; and (3) federal assistance to the college's financial aid program could be terminated solely because the college had refused to execute an assurance of compliance with Title IX).

80. 441 U.S. 677 (1979). The Supreme Court also held that Title IX as enacted in 1972 is in pari materia with Title VI as enacted in 1964. *Id.* at 694-96.

enforce Title IX's prohibition of gender discrimination and its holding in *Franklin v. Gwinnett County Public Schools*⁸¹ that private parties could seek monetary damages. The decision in *Jackson* is the fourth stage, extending protection against retaliation to whistleblowers.⁸²

Jackson also illustrates a contest of wills⁸³ between justices who adhere to the textualist approach to statutory interpretation, articulated in *Sandoval*,⁸⁴ and those who follow a contextualist approach. Textualists restrict themselves to interpreting the language of the text and the statutory structure,⁸⁵ whereas the contextualists in an effort to understand the text, also consider the legal context at the time of enactment and the purpose of the statute.⁸⁶

The differences in their respective hermeneutical approaches can be seen in the issues dividing them in *Jackson*, including: (1) the meaning of "discrimination based on sex,"⁸⁷ (2) the appropriateness of reliance on *Sullivan*,⁸⁸ (3) the question of consistency with the method of statutory interpretation and the holding in *Sandoval*,⁸⁹ (4) the inference to be drawn from the differences between Title VII and Title IX,⁹⁰ (5) the extension of protection to "indirect" victims,⁹¹ (6) the appropriateness of relying on the desirability or necessity of private enforcement to effectuate Title IX's purpose,⁹² and (7) the applicability of the Spending Clause's notice requirements to this case.⁹³ Did the two sides consider different sources to assert their

81. 503 U.S. 60 (1992). *Franklin* established the right to a private remedy in addition to the private cause of action recognized in *Cannon*. *Id.* at 76. Before *Franklin*, a plaintiff was only guaranteed a private right to obtain a public remedy.

82. *Jackson v. Birmingham Bd. of Educ.*, 125 S. Ct. 1497 (2005).

83. The phrasing "contest of wills" is appropriate because of the sharp division of the *Sandoval* Court. Justice O'Connor, who voted with the majority of five in *Sandoval*, voted in *Jackson* with the four who had dissented in *Sandoval*.

84. *See, e.g., Alexander v. Sandoval*, 532 U.S. 275, 288 (2001) ("We therefore begin (and find that we can end) our search for Congress's intent with the text and structure of Title VI.").

85. *See, e.g., id.*

86. *See, e.g., Cort v. Ash*, 422 U.S. 66, 78 (1975) (inquiring, to determine if a private right of action existed, "does the statute create a federal right in favor of the plaintiff[,] . . . is there any indication of legislative intent, explicit or implicit, either to create such a remedy or deny one[,] . . . [and] is it consistent with the underlying purposes of the legislative scheme to imply such a remedy . . . [?]").

87. *See infra* notes 161-63 and accompanying text.

88. *See infra* notes 106-08, 157 and accompanying text.

89. *See infra* notes 176-81 and accompanying text.

90. *See infra* notes 164-72 and accompanying text.

91. *See infra* notes 111-12, 130 and accompanying text.

92. *See infra* notes 182-86 and accompanying text.

93. *See infra* notes 173-75 and accompanying text.

choice of meaning or did they interpret the same sources differently? If the latter, what principles of interpretation were applied?

IV. JUSTICE O'CONNOR'S MAJORITY OPINION: THE CONTEXTUALIST APPROACH⁹⁴

Justice O'Connor's majority opinion in *Jackson* concluded that: (1) retaliation is a form of intentional discrimination based on sex;⁹⁵ (2) this holding is "in step with *Sandoval*['s]" prohibition against regulations extending Title IX's protection beyond its statutory limits;⁹⁶ (3) this broadly worded statute does not require that the victim of the retaliation must also be the victim of the discrimination that is the subject matter of the complaint, and its effective enforcement depends on such complaints;⁹⁷ and (4) the Spending Clause's notice requirement is clearly met.⁹⁸

The first and principal issue that divided the Court was whether section 901's prohibition of discrimination "on the basis of sex"⁹⁹ should be interpreted to include a prohibition against retaliation as a form of intentional discrimination, specifically when the complainant is not a possible victim of the discrimination that is the subject matter of the complaint.¹⁰⁰ The majority's position was that the section 901 text of Title IX banning discrimination on the basis of sex should be interpreted broadly to prohibit intentional discrimination in *all* its forms.¹⁰¹ Justice O'Connor wrote:

Retaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination encompassed by Title IX's private cause of action. Retaliation is, by definition, an intentional act. It is a form of "discrimination" because the complainant is being subjected to differential treatment. Moreover, retaliation is discrimination "on the basis of sex" because it is an intentional response to the

94. Justice Stevens, Justice Souter, Justice Ginsburg, and Justice Breyer joined in the majority opinion. *Jackson v. Birmingham Bd. of Educ.*, 125 S. Ct. 1497, 1501-02 (2005).

95. *Id.* at 1504.

96. *Id.* at 1507.

97. *Id.*

98. *Id.* at 1509.

99. Section 901 of Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a) (2005).

100. *Jackson*, 125 S. Ct. at 1502, 1507.

101. *Id.* at 1509.

nature of the complaint: an allegation of sex discrimination. We conclude 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.¹⁰²

Next, Justice O'Connor responded to three objections to this interpretation of the meaning of Title IX's prohibition on sex-based discrimination sex. The first was that "[t]he Court of Appeals' conclusion that Title IX does not prohibit retaliation because the 'statute makes no mention of retaliation' ignores the import of our repeated holdings construing 'discrimination' under Title IX broadly."¹⁰³ In support of this statement, Justice O'Connor cited two Title IX cases that each held that section 901's broad prohibition on discrimination includes sexual harassment, although it also was not expressly mentioned in the statute.¹⁰⁴ Second, as for the contrast with Title VII in the Civil Rights Act of 1964,¹⁰⁵ she noted, "Congress certainly could have mentioned retaliation in Title IX expressly . . . [; however, b]ecause Congress did not list *any* specific discriminatory practices in Title IX, its failure to mention one such practice says nothing about whether it intended that practice to be covered."¹⁰⁶

Third, Justice O'Connor invoked *Sullivan*¹⁰⁷ as the critical historical context for determining whether Congress intended to

102. *Id.* at 1504 (citations omitted).

103. *Id.* (citation omitted).

104. Justice O'Connor wrote, "a recipient's deliberate indifference to a teacher's sexual harassment of a student also 'violate[s] Title IX's plain terms.'" *Id.* (quoting *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 643 (1999) (citing *Gebser v. Lago Vista Independent School Dist.*, 524 U.S. 274, 290-91 (1989))). "Likewise, a recipient's deliberate indifference to sexual harassment of a student by another student also squarely constitutes 'discrimination' 'on the basis of sex.'" *Id.* Justice O'Connor also cited *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992). *Jackson*, 125 S. Ct. at 1504.

105. Section 704 of Title VII of the Civil Rights Act of 1964 expressly prohibits retaliation for opposing discrimination in the workplace. Pub. L. No. 88-352, 78 Stat. 241, 257 (1964) (codified as amended at 42 U.S.C. § 2000e-3 (2005)).

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

107. *Id.* at 1505:

In *Sullivan*, we held that [42 U.S.C. § 1982] . . . protected a white man who spoke out against discrimination toward one of his tenants and who suffered retaliation as a result. . . . [W]e upheld Sullivan's cause of action under 42 U.S.C. § 1982 for "[retaliation] for the advocacy of [the black person's] cause." Thus, in *Sullivan* we interpreted a general prohibition on racial discrimination to cover retaliation against those who advocate the rights of groups protected by that prohibition.

(citing *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969)).

include retaliation within the prohibition of sex discrimination.¹⁰⁸ She reasoned:

Congress enacted Title IX just three years after *Sullivan* was decided, and accordingly that decision provides a valuable context for understanding the statute. As we recognized in *Cannon*, “it is not only appropriate but also realistic to presume that Congress was thoroughly familiar with [*Sullivan*] and that it expected its enactment [of Title IX] to be interpreted in conformity with [it].” 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.¹⁰⁹

In the second part of her majority opinion, Justice O’Connor concluded that the majority’s holding was “in step with” the Court’s holding in *Sandoval* that Congress intended Title IX to prohibit only intentional discrimination, and therefore, its implied private cause of action was not available to enforce disparate-impact regulations adopted by the Department of Education to effectuate Title IX’s purpose.¹¹⁰ Specifically, she wrote, “[w]e do not rely on regulations extending Title IX’s protection beyond its statutory limits; indeed, we do not rely on the Department of Education’s regulation at all, because the statute *itself* contains the necessary prohibition.”¹¹¹

In the third part of her opinion, Justice O’Connor discussed two points. She rejected the contention that Jackson was entitled to invoke the implied cause of action “because he [was] an ‘indirect victi[m]’ of sex discrimination.”¹¹² She noted:

The statute is broadly worded; it does not require that the victim of the retaliation must also be the victim of the discrimination that is the subject of the original complaint. If the statute provided instead that “no person shall be subjected to discrimination on the basis of *such individual’s* sex,” then we would agree with the Board. However, Title IX contains no such limitation. Where the retaliation occurs because the complainant

108. *Id.* at 1506.

109. *Id.* at 1505-06 (quoting *Cannon v. Univ. of Chi.*, 441 U.S. 677, 699 (1979)) (alterations in original).

110. *Id.* at 1507.

111. *Id.* at 1506-07.

112. *Id.* (alteration in original).

speaks out about sex discrimination, the "on the basis of sex" requirement is satisfied.¹¹³

As a second point, Justice O'Connor noted that Congress's objective in enacting Title IX of "provid[ing] individual citizens effective protection against [discriminatory] practices, . . . 'would be difficult, if not impossible, to achieve if persons who complain about sex discrimination did not have effective protection against retaliation.'" ¹¹⁴ She reasoned that third party reporting and complaining to school authorities is an essential part of the public enforcement process and that "if retaliation were not prohibited, Title IX's enforcement scheme would unravel."¹¹⁵ This conclusion was based on the constraint that neither individuals nor agencies may bring suit under Title IX unless the recipient has received "actual notice" of the discrimination.¹¹⁶

If recipients were able to avoid such notice by retaliating against all those who dare complain, the statute's enforcement scheme would be subverted. We should not assume that Congress left such a gap in its scheme.

. . . [S]ometimes adult employees are the "only effective adversar[ies]" of discrimination in schools.¹¹⁷

In the last section of her majority opinion, Justice O'Connor concluded that recipients of federal financial assistance had clear notice about potential retaliation liability since the Court held in *Cannon* in 1979 that an implied private cause of action exists under Title IX to enforce its prohibition against intentional discrimination on the basis of sex.¹¹⁸

113. *Id.*

114. *Id.* at 1508 (quoting Brief for the United States as Amicus Curiae Supporting Petitioner at 13, *Jackson*, 125 S. Ct. 1497 (No. 02-1672)).

115. *Id.*

116. *Id.*

117. *Id.* (quoting *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 237 (1969)). This reasoning ignores the dissent's contention that the students and their parents could protest to school authorities or in the alternative complain to the Office of Civil Rights of the Department of Education and request an investigation.

118. *Id.* at 1509. The reasoning for this conclusion was based upon prior decisions:

[I]n *Davis*, we held that *Pennhurst* did not pose an obstacle to private suits for damages in cases of a recipient's deliberate indifference to one student's sexual harassment of another, because the deliberate indifference constituted intentional discrimination on the basis of sex. Similarly, we held in *Gebser* that a recipient of federal funding could be held liable for damages under Title IX for deliberate indifference to a teacher's harassment of a student. In *Gebser*, as in *Davis*, we acknowledged that federal funding recipients must have notice that they will be held liable for damages.

[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. Indeed, retaliation presents an even easier case than deliberate indifference. It is easily attributable to the funding recipient, and it is always — by definition — intentional. We therefore conclude that retaliation against individuals because they complain of sex discrimination is "intentional conduct that violates the clear terms of the statute," and that Title IX itself therefore supplied sufficient notice to the Board that it could not retaliate against Jackson after he complained of discrimination against the girls' basketball team.¹¹⁹

V. JUSTICE THOMAS'S DISSENT: THE TEXTUALIST APPROACH¹²⁰

Justice Thomas's dissent consists of five principal points: (1) the meaning of "on the basis of sex" refers exclusively to the sex of direct victims and, therefore, the meaning of discrimination does not include retaliation;¹²¹ (2) the precedent on the notice requirement of the Spending Clause requires clarity;¹²² (3) precedent requires evidence of congressional intent in order to find an implied cause of action;¹²³ (4) *Sullivan* does not apply;¹²⁴ and (5) the court's role is limited to examining the text.¹²⁵

First, Justice Thomas argued that the natural meaning of "on the basis of sex" is on the basis of the plaintiff's sex and not the sex of some other person.¹²⁶ "On the basis of sex" [is] shorthand for . . . 'on the basis of such individual's sex.'"¹²⁷ Justice Thomas differentiates the *Jackson* case from the Court's past inclusion of sexual

Id. (citations omitted).

119. *Id.* at 1509-10 (citation omitted).

120. Chief Justice Rehnquist, Justice Kennedy, and Justice Scalia joined the dissent. *Id.* at 1510.

121. *Id.* at 1510-11 (Thomas, J., dissenting).

122. *Id.* at 1515.

123. *Id.* at 1514. In the second part of his dissent, Justice Thomas asserted:

The Court's holding is also inconsistent with two lines of this Court's precedent: Our rule that Congress must speak with a clear voice when it imposes liability on the States through its spending power and our refusal to imply a cause of action when Congress' intent to create a right or remedy is not evident.

Id.

124. *Id.* at 1516.

125. *Id.* at 1515.

126. *Id.* at 1511.

127. *Id.*

harassment cases in the scope of the implied private cause of action.¹²⁸ In the sexual harassment cases, the discrimination complained of was that of the complainants; therefore, those holdings are not inconsistent with Justice Thomas's interpretation of the *Jackson* case.¹²⁹

Jackson's assertion . . . fails to allege sex discrimination in this sense. Jackson does not claim that his own sex played any role . . . in the decision to relieve him of his position. . . .

Jackson's lawsuit therefore differs fundamentally from other examples of sex discrimination, like sexual harassment. A victim of sexual harassment suffers discrimination because of her own sex, not someone else's.¹³⁰

In addition, "Jackson's retaliation claim lacks the connection to actual sex discrimination that the statute requires. Jackson claims that he suffered reprisal because he *complained about* sex discrimination, not that the sex discrimination underlying his complaint occurred."¹³¹ Imposing retaliation liability expands the statute beyond discrimination on the basis of sex to instances in which no discrimination on the basis of sex has occurred, since all that is required is a good faith reasonable belief that sex discrimination has occurred rather than proof that it has.¹³² The complaint was not about discrimination, which may not have ever occurred, but about retaliation, which "is not based on anyone's sex, much less the complainer's sex."¹³³

At bottom, . . . retaliation is a claim that aids in enforcing another separate and distinct right. . . . To describe retaliation as discrimination on the basis of sex is to conflate the enforcement mechanism with the right itself¹³⁴

Thus, Justice Thomas's argument rests on the following reasoning. The language of Title VI, contrasted with that of Title VII, indicates that retaliation is different from discrimination. Neither Title VI nor Title IX mentions retaliation, but Title VII, the Age Discrimination in Employment Act (ADEA), and the Americans

128. *Id.* at 1512.

129. *Id.*

130. *Id.* at 1511-12 (citation omitted).

131. *Id.* at 1512.

132. *Id.* at 1513.

133. *Id.*

134. *Id.*

with Disabilities Act (ADA) all have express anti-retaliation provisions.¹³⁵ That the text of Title IX does not mention retaliation is significant in light of the contrast with Title VII and other discrimination statutes:

Congress' failure to include similar text in Title IX shows that it did not authorize private retaliation actions. . . .

Even apart from Title VII, Congress expressly prohibited retaliation in other discrimination statutes [such as the ADEA and ADA]. If a prohibition on "discrimination" plainly encompasses retaliation, the explicit reference to it in these statutes, as well as 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.¹³⁶

Second, Justice Thomas reasoned that because Title IX is a Spending Clause statute, the language in the statute must provide clear notice as to the recipients' legal obligations:¹³⁷

Congress must speak with a clear voice when it imposes liability on the States through its spending power

. . . Such legislation is "in the nature of a contract" and funding recipients' acceptance of the terms of that contract must be "voluntar[y]" and "knowin[g]." For their acceptance to be voluntary and knowing, funding recipients must "have notice of their potential liability"[.] . . . and a condition must be imposed "unambiguously."¹³⁸

Further, according to Justice Thomas, ambiguity should be resolved in favor of the recipient.

The majority points out that the statute does not say: "[N]o person shall be subject to discrimination on the basis of *such individual's* sex." But this reasoning puts the analysis backwards. The question is not whether Congress clearly excluded retaliation claims under Title IX, but whether it clearly included them. The majority's statement at best points to ambiguity in

135. Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(d) (2005); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a) (2005); Americans with Disabilities Act of 1990, 42 U.S.C. § 12203(a) (2005); *see also Jackson*, 125 S. Ct. at 1513.

136. *Jackson*, 125 S. Ct. at 1513-14 (citations omitted).

137. *Id.* at 1514.

138. *Id.* (citations omitted).

the statute; yet ambiguity is [to be] resolved in favor of the States¹³⁹

Third, Justice Thomas considered "the standard we have set for implying causes of action to enforce federal statutes." To recognize a right created in the statute, the right "must be phrased in terms of the person benefited."¹⁴⁰ Thus, for Justice Thomas the inquiry was whether Jackson was a member of the class of people the statute benefited.¹⁴¹ Elaborating on this point, he wrote:

This Court has held that these principles apply equally when the Court has previously found that the statute in question provides an implied right of action and a party attempts to expand the class of persons or the conduct to which the recognized action applies. More specifically, this Court has rejected the creation of implied causes of action for ancillary claims like retaliation.¹⁴²

Justice Thomas relied on precedent from *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*¹⁴³ to support his opinion. *Central Bank* concerned the statutory interpretation of a provision of the Securities Exchange Act of 1934.¹⁴⁴ The issue was whether the statute allowed for a civil action against aiders and abettors, even though it made no specific reference to aiding and abetting.¹⁴⁵ The Court in *Central Bank* construed the statute to exclude a cause of action against those who aid and abet.¹⁴⁶ Justice Thomas used the same statutory construction approach to construe the *Jackson* case:

The same reasons militate equally against extending the implied cause of action under Title IX to retaliation claims. As in *Central Bank*, imposing retaliation liability expands the statute beyond discrimination "on the basis of sex" to instances in which no discrimination on the basis of sex has occurred. Again, § 901 protects individuals only from discrimination on the basis of their own sex. Thus, extending the implied cause of action under Title IX to claims of retaliation expands the class

139. *Id.* (citation omitted).

140. *Id.* at 1515 (quoting *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 (2002)).

141. *Id.*

142. *Id.* (citations omitted).

143. 511 U.S. 164 (1994).

144. *Id.* at 157.

145. *See id.*

146. *Id.* at 177.

of people the statute protects beyond the specified beneficiaries. . . . And like the aiding and abetting liability in *Central Bank*, prevailing on a claim of retaliation lacks elements necessary to prevailing on a claim of discrimination on the basis of sex, for no sex discrimination need have occurred.¹⁴⁷

Fourth, Justice Thomas contended that the majority's reliance on *Sullivan* was misplaced:

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 [42 U.S.C. § 1982], . . . a statute enacted pursuant to Congress' Thirteenth Amendment enforcement power, not its spending power. *Sullivan* therefore says nothing about whether Title IX clearly conditions States' receipt of federal funds on retaliation liability.¹⁴⁸

Fifth, Justice Thomas argued that Congress's choice of one enforcement method meant that it did not intend another as well.¹⁴⁹ According to his reasoning, Congress creates the right, and Congress provides for the way in which the right will be enforced. He argued:

Our role, then, is not "to provide such remedies as are necessary to make effective the congressional purpose' expressed by a statute," but to examine the text of what Congress enacted into law.

. . . .

Nothing prevents students — or their parents — from complaining about inequality in facilities or treatment. . . .

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 texts. The question before us is only whether Title IX prohibits retaliation, not whether prohibiting is good policy.¹⁵⁰

147. *Jackson*, 125 S. Ct. at 1515-16.

148. *Id.* at 1516 (citations omitted).

149. *See id.* at 1515.

150. *Id.* at 1517.

For the dissent, any necessity to effectuate purpose would not be conclusive about intent to extend a private remedy.¹⁵¹ The Court considered whether Congress's creation of a right automatically implies that Congress intended to create an implicit enforcement mechanism necessary to effectuate that right, particularly when it provided an express public enforcement mechanism.¹⁵² According to the dissent, the public enforcement mechanism may or may not be adequate, but that does not mean that Congress intended to imply a private cause of action.¹⁵³

VI. COMPETING HERMENEUTICAL APPROACHES

On the principal question, the hermeneutical divide is clear. For the majority, the word "discrimination" includes all forms of intentional discrimination, among which is retaliation for protesting against discrimination.¹⁵⁴ The majority relied principally on the 1969 *Sullivan* precedent as authority for this interpretation.¹⁵⁵ In the majority's view, *Sullivan* was relevant and critically important for two reasons. First, the Court in *Sullivan* held that a statutory prohibition against discrimination on the basis of race included the right of a white person to sue for compensation for retaliation for protesting against racial discrimination violative of the statute.¹⁵⁶ Second, *Sullivan* was decided in 1969, only three years before Congress enacted Title IX; thus, it would have led Congress to believe that its language in Title IX would also be interpreted in the same way.¹⁵⁷

For the dissent, *Sullivan* was a Spending Clause case on a standing issue and was, therefore, irrelevant to the Title IX issue before the Court.¹⁵⁸ Retaliation is different from discrimination and, therefore, not implied as a form of discrimination.¹⁵⁹ Retaliation refers to adverse conduct because of advocacy or protest based on a good faith, reasonable belief that illegal discrimination has occurred.¹⁶⁰ Because of this difference, whenever Congress has intended

151. *Id.*

152. *See id.* at 1508 (majority opinion).

153. *See id.* at 1515-16 (Thomas, J., dissenting).

154. *Id.* at 1504 (majority opinion).

155. *Id.* at 1507.

156. *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 237 (1969).

157. *Jackson*, 125 S. Ct. at 1506.

158. *Id.* at 1516 (Thomas, J., dissenting).

159. *See id.* at 1512-13.

160. *Id.* at 1512.

to prohibit retaliation along with discrimination, it has done so expressly.¹⁶¹

The majority broadly interpreted the language “on the basis of sex” to include retaliation where the subject matter of the complaint is sexual discrimination and the complainant’s sex is not part of the issue.¹⁶² The majority relied on the fact that the text does not expressly exclude this meaning, stating “[t]he statute is broadly worded; it does not require that the victim of the retaliation must also be the victim of the discrimination that is the subject of the original complaint.”¹⁶³ The complainant is himself a victim of discriminatory retaliation, regardless of whether he was a victim in the original complaint. The dissent insisted on what it termed “the natural meaning” of this phrase as shorthand for “such individual’s sex,” a “natural meaning” confirmed by the earlier Title IX case on sexual harassment.¹⁶⁴

A second divisive issue was the inference to be drawn from the differences between Title VII and Title IX.¹⁶⁵ Since Title IX is in pari materia with Title VI, this issue relies by analogy on Title VI, which was enacted, like Title VII, as part of the Civil Rights Act of 1964.¹⁶⁶ Congress’s constitutional authority for enacting Title VII is the Commerce Clause,¹⁶⁷ whereas its authority for enacting Title VI and Title IX is the Spending Clause.¹⁶⁸ Title VII specifically describes the prohibited discrimination, whereas Title VI contains a generic description.¹⁶⁹ Their enforcement schemes differ. Title VII contains express anti-retaliation provisions and creates an express private cause of action available to complainants after they have first filed with the Equal Employment Opportunity Commission,¹⁷⁰ whereas

161. *See id.* at 1513.

162. *Id.* at 1509 (majority opinion).

163. *Id.*

164. *See id.* at 1512-13 (Thomas, J., dissenting).

165. *Id.* at 1505 (majority opinion), 1513 (Thomas, J., dissenting).

166. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended in scattered sections of the U.S.C.).

167. Title VII of the Civil Rights Act of 1964 §§ 701 (b), (d), 703, Pub. L. No. 88-352, 78 Stat. 241, 257 (1964) (codified as amended at 42 U.S.C. § 2000e, 2000e-2 (2005)).

168. *Jackson*, 125 S. Ct. at 1508 (“Title IX was enacted as an exercise of Congress’ powers under the Spending Clause . . .”); *Barnes v. Gorman*, 536 U.S. 181, 185 (2002) (“Title VI invokes Congress’s power under the Spending Clause . . .”); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 367 (1978) (“Title VII rests on the Commerce Clause power . . .”).

169. Title VI of the Civil Rights Act of 1964 § 601, Pub. L. No. 88-352, 78 Stat. 241, 252 (1964) (codified as amended at 42 U.S.C. § 2000d (2005)); Title IX of the Education Amendments of 1972 § 901, Pub. L. No. 92-318, 85 Stat. 235, 373 (1972) (codified as amended at 20 U.S.C. § 1681 (2005)).

170. *See Jackson*, 125 S. Ct. at 1505.

Title VI has only an agency enforcement process in the statute.¹⁷¹ The dissent reasoned that because Congress included express anti-retaliation and private cause of action provisions under Title VII and did not include these under Title VI, Congress understood "discrimination" not to include "retaliation" and did not intend to enforce Title VI's prohibition by a private cause of action.¹⁷² The majority argued that "[b]ecause 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."¹⁷³

A third issue was whether the Spending Clause "clear notice" requirement was met.¹⁷⁴ In the majority's view, the statute itself, the regulations implementing it, and the cases decided under it clearly provided the notice required under the Spending Clause.¹⁷⁵ In the dissent's view, at the very least there has been an ambiguity about retaliation liability and that ambiguity should be resolved in favor of the recipients of federal financial assistance.¹⁷⁶

A fourth issue dividing the Court was the relevance of *Sandoval* to the legal issue. Both sides acknowledged that *Sandoval* held that a private right of action is not implied to enforce disparate-impact regulations adopted under Title VI.¹⁷⁷ Both sides also agreed that the *Sandoval* Court's reasons for this outcome were that Title VI prohibits only intentional discrimination, that there is an implied private cause of action created by Title VI's rights-creating language to enforce this prohibition, and that this cause of action does not extend to disparate-impact activities prohibited by the regulation but permissible under the statute.¹⁷⁸ What divided the justices was that, in addition to the above, the *Sandoval* Court also articulated statutory rules of interpretation to determine the existence and the scope of implied private causes of action.¹⁷⁹ The *Jackson* majority focused on the *Sandoval* holding and the reasoning relevant to that outcome.¹⁸⁰ The majority maintained that its holding was "[i]n step with *Sandoval* . . . because retaliation falls within the statute's

171. 42 U.S.C. § 2000d-1 (2005).

172. *See Jackson*, 125 S. Ct. at 1513-14 (Thomas, J., dissenting).

173. *Id.* at 1505 (majority opinion).

174. *See id.* at 1508-09.

175. *Id.*

176. *Id.* at 1514 (Thomas, J., dissenting).

177. *Id.* at 1506 (majority opinion), 1515 (Thomas, J., dissenting).

178. *Id.* at 1506 (majority opinion); *see id.* at 1515 (Thomas, J., dissenting).

179. *Alexander v. Sandoval*, 532 U.S. 275, 288 & n.7 (2001).

180. *Jackson*, 125 S. Ct. at 1506-07.

prohibition of intentional discrimination on the basis of sex.”¹⁸¹ For the dissent, under the approach required by *Sandoval* and *Central Bank*, the text must provide evidence of congressional intent to extend the implied cause of action to claims of retaliation, including to complainants beyond the intended beneficiaries.¹⁸²

A fifth issue was the use of Title IX’s purposes¹⁸³ as a basis for finding the extension of the implied cause of action to include retaliation. For the majority, without effective protection against retaliation, the objectives of the statute would be difficult, if not impossible, to achieve.¹⁸⁴ Because the majority deemed the public enforcement scheme ineffective, it concluded that Congress intended private enforcement, reasoning that Congress would not create a statutory right without a remedy.¹⁸⁵ For the dissent, Congress expressly provided for the public enforcement of Title IX.¹⁸⁶ According to the dissent, the Court itself may or may not prefer alternative ways to enforce Title IX, but its role is to interpret the enforcement scheme provided and not to create one Congress did not provide.¹⁸⁷

VII. IMPLICATIONS

For Jackson and those similarly situated, this decision provides a remedy for retaliation that otherwise might not be available. To succeed in a private cause of action, victims alleging retaliation must show: (1) that they complained about discrimination based on sex to school authorities in a position to remedy it,¹⁸⁸ (2) that their complaint was based on a good faith, reasonable belief,¹⁸⁹ (3) that the authorities took an adverse employment action against them,¹⁹⁰ and (4) that a causal connection exists between their complaint and the adverse employment action.¹⁹¹

181. *Id.* at 1507.

182. *See id.* at 1515 (Thomas, J., dissenting).

183. “Congress enacted Title IX not only to prevent the use of federal dollars to support discriminatory practices, but also ‘to provide individual citizens effective protection against those practices.’” *Id.* at 1508 (majority opinion).

184. *See id.*

185. *See id.*

186. *See id.* at 1510 (Thomas, J., dissenting) (citing 20 U.S.C. § 1681(a) (2005)).

187. *Id.* at 1516-17 (Thomas, J., dissenting).

188. *Id.* at 1502 (majority opinion); *see also Peters v. Jenney*, 327 F.3d 307, 320 (4th Cir. 2003).

189. *See Jackson*, 125 S. Ct. at 1512 & n.1 (Thomas, J., dissenting).

190. *Id.* at 1504 (majority opinion); *see also Peters*, 327 F.3d at 320.

191. *See Jackson*, 125 S. Ct. at 1504; *see also Peters*, 327 F.3d at 320.

The ultimate beneficiaries of this decision are students, particularly at the high school level. "[T]eachers and coaches such as Jackson 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."¹⁹² Not only may the students themselves, who are the direct victims of the discrimination based on sex, complain without fear of retaliation from school authorities, but now their teachers and coaches likewise may complain without fear of retaliation.

All educational programs that are recipients of federal financial assistance under Title IX are now indisputably on notice that they are liable for retaliation against those who complain in good faith about discrimination on the basis of sex. Likewise, under Title VI, in pari materia with Title IX, all recipients, whether educational programs or not, are on identical notice with regard to those who complain in good faith about discrimination on the basis of race, color, or national origin. This decision thus brings these two Spending Clause antidiscrimination statutes in line with the Commerce Clause statutes (Title VII, ADEA, and ADA) and the Reconstruction statutes (42 U.S.C. §§ 1981 and 1982).

This decision may end the debate on the meaning of "discrimination on the basis of sex" but not the division within the courts between textualist and contextualists. Why would a justice choose one interpretation approach rather than the other? Individual justices' positions on the hermeneutical divide are a function of each justice's prior political-economic convictions about the respective roles of the legislative and judicial branches. The textualist position expects more from Congress. When statutes are silent or ambiguous about congressional intent, textualists believe courts should look for intent only in the text and its structure and should not rely on the text's original legal context or on its stated purpose.¹⁹³ Textualists believe courts should interpret what Congress said in terms of its original meaning as the basis for its contemporary application. In contrast, contextualists, exemplified by the *Jackson* majority, clearly rely on the contemporary legal context and the statute's purpose.¹⁹⁴ The contextualist position recognizes the inevitability of lacunae and ambiguity and of the fact that some situations are completely overlooked by the enacting Congress.

192. *Jackson*, 125 S. Ct. at 1508.

193. See *supra* note 80 and accompanying text.

194. E.g., *Jackson*, 125 S. Ct. 1502-10; see also *supra* note 85 and accompanying text.

Intent is and should be determinative. The challenge is to discover intent when the text is ambiguous or silent regarding the enacting legislature's intent. Standard rules of statutory construction have included: the common meaning of the words; prior decisions interpreting the words; the statutory scheme as a whole, including purpose (found in text and legislative history); the interpretation of the enforcing agency (*Chevron* deference); and the contemporary legal context.¹⁹⁵

Finally, "[t]his 5-4 decision also underscores the critical point that the Court [has been] closely divided. . . . Every nomination to the Court can make a tremendous difference in the outcome of real cases affecting real people for decades to come."¹⁹⁶ While the composition of the Court has changed since this decision, it remains to be seen on which side of the hermeneutical divide Justice Roberts and Alito fall. The significance of the composition of the court in terms of textualists or contextualists depends on whether Congress itself is liberal or conservative. A liberal Congress would respect a broad interpretation of statutory intent; a conservative Congress, a narrow one. With a liberal Congress, a textualist majority would mean that Congress would have to exercise greater care in legislating and would have to amend statutes whenever it concluded that the Court was interpreting its intent too narrowly. With a conservative Congress, a contextualist majority would mean the same. In light of the ever-changing composition of the Supreme Court, this hermeneutical divide remains a salient and useful method for understanding the justices who make up the Court.

195. See generally James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning* (USC Law School and California Institute of Technology, Center for the Study of Law and Policy, Working Paper No. CSLP-WP-028, 2004), available at <http://lawweb.usc.edu/cslp/papers/cslp-wp-028.pdf>; see also *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 834-44 (1984).

196. Press Release, Nat'l Women's Law Center, *supra* note 2 (quoting Marcia D. Greenberger, NWLC Co-President).