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Casenote

***Jackson v. Birmingham Board of Education* and the Expansion of Title IX's Judicially Implied Private Right of Action**

In *Jackson v. Birmingham Board of Education*,¹ the United States Supreme Court departed from its current trend of hostility toward implying rights of action in federal statutes. In *Jackson* the Court held that there is an implied private right of action for retaliation under Title IX² when a whistleblower is retaliated against for complaining about sex discrimination.³ As a result, the Court increased the protections to employees and students of funding recipients who report instances of sex discrimination.

I. FACTUAL BACKGROUND

Roderick Jackson was a teacher and a coach of the women's basketball team at Ensley High School in the Birmingham, Alabama School District. Employed by the Birmingham School District since 1993, Jackson took the position at Ensley in 1999. In December 2000 Jackson started to complain to his supervisors that the women's basketball team

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1. 125 S. Ct. 1497 (2005).
 2. 20 U.S.C. §§ 1681-1688 (2000 & Supp. II 2002).
 3. *Jackson*, 125 S. Ct. at 1504.

was not receiving equal treatment. Despite continued complaints, the alleged unequal treatment continued. In addition to the failure of the school board to remedy the situation, Jackson started receiving negative work evaluations. Finally, in 2001 Jackson was fired as the women's basketball coach at Ensley, although he was retained as a teacher.⁴

Jackson brought suit against the Birmingham Board of Education (the "Board") in the United States District Court of Alabama, alleging, *inter alia*, his firing violated Title IX's prohibition against sex discrimination. Asserting that Title IX did not grant a private right of action for retaliation, the Board moved to dismiss the suit and the District Court granted the motion.⁵

The Court of Appeals for the Eleventh Circuit affirmed, holding that Title IX should not be read to grant an implied right of action for retaliation claims.⁶ Observing that a Department of Education regulation promulgated under Title IX prohibited retaliation, the court cited *Alexander v. Sandoval*⁷ for the proposition that regulations cannot create implied rights of action when the regulation proscribes conduct not prohibited in the statute.⁸ Furthermore, even if Title IX did prohibit retaliation, the court held that Jackson was not within the class of persons protected by Title IX.⁹ Jackson sought review in the Supreme Court, which granted certiorari.¹⁰

II. LEGAL BACKGROUND

A. Plain Text of Title IX

Enacted by Congress in 1972, Title IX¹¹ prohibits discrimination on the basis of sex under any education program that receives federal funding.¹² The portion of Title IX that prohibits discrimination provides, "No 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."¹³ Title IX does not contain an express

4. *Jackson v. Birmingham Bd. of Educ.*, 125 S. Ct. 1497, 1503 (2005).

5. *Id.*

6. *Id.* at 1502.

7. 532 U.S. 275 (2001).

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

9. *Id.*

10. *Id.*

11. 20 U.S.C. §§ 1681-1688 (2000 & Supp. II 2002).

12. *Id.* § 1681(a).

13. *Id.*

prohibition against retaliation.¹⁴ In contrast, other contemporary federal anti-discrimination statutes, such as the Americans with Disabilities Act,¹⁵ the Age Discrimination in Employment Act,¹⁶ and Title VII,¹⁷ all contain express prohibitions against retaliation.

B. *Implied Right of Action Cases*

Over time, the Supreme Court has moved away from an approach that is more receptive to implying a right of action in a federal statute and has undertaken an approach that is more reluctant to implying a right of action. The receptive approach was exemplified in *J. I. Case Co. v. Borak*.¹⁸ In *Borak* the Court stated that "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose."¹⁹

Approximately ten years after *Borak*, the Court in *Cort v. Ash*²⁰ signaled a shift to a more restrictive approach to implying rights of action. In *Cort* the Supreme Court developed a four-factor test for determining whether to imply a right of action in a statute:

First, . . . does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?²¹

While the focus in *Borak* was simply on whether an implied remedy would further the legislative purpose, the focus in *Cort* shifted to whether Congress intended to imply a remedy.²²

The Supreme Court applied *Cort's* four-factor test in *Cannon v. University of Chicago*²³ to imply a private right of action under Title

14. *See id.*

15. 42 U.S.C. §§ 12101-12213 (2000 & Supp. II 2002). The Americans with Disabilities Act's express prohibition against retaliation is located at 42 U.S.C. § 12203(a).

16. 29 U.S.C. §§ 621-34 (2000). The Age Discrimination in Employment Act's express prohibition against retaliation is located at 29 U.S.C. § 623(d).

17. 42 U.S.C. §§ 2000e to 2000e-17 (2000 & Supp. II 2002). Title VII's express prohibition against retaliation is located at 42 U.S.C. § 2000e-3(a).

18. 377 U.S. 426 (1964).

19. *Id.* at 433.

20. 422 U.S. 66 (1975).

21. *Id.* at 78 (citations omitted).

22. *See id.*

23. 441 U.S. 677 (1979).

IX.²⁴ In *Cannon* a female applicant who claimed that she was denied admission to medical school because she was a woman filed suit alleging a violation of Title IX. The district court dismissed the suit on the basis that Title IX did not contain an express or implied private right of action.²⁵ The court of appeals affirmed and the Supreme Court granted certiorari.²⁶

Observing that violations of a federal statute do not always give an individual harmed by the violation a private right of action, the Supreme Court applied the four-factor test from *Cort* to determine whether Congress intended to provide a right of action in Title IX.²⁷ After applying each of the *Cort* factors, the Court concluded that each factor weighed in favor of implying a right of action.²⁸

Since *Cannon*, several Supreme Court cases have defined the contours of Title IX's implied right of action. In *Franklin v. Gwinnett County Public Schools*,²⁹ the Court held that individuals could sue for damages under Title IX.³⁰ In *Gebser v. Lago Vista Independent School District*,³¹ the Court held that damages could be recovered for teacher-student sexual harassment when an official of the school district with the authority to institute corrective measures had notice of the misconduct and was deliberately indifferent.³² In *Davis v. Monroe County Board of Education*,³³ the Court held that damages could be recovered from a school district for the failure to correct student-on-student harassment when the school district had actual notice of the harassment, was deliberately indifferent, and the harassment was so severe that it could be said to deprive the victim of educational opportunities and benefits.³⁴

Justice Rehnquist's concurrence in *Cannon* foreshadowed the Court's subsequent resistance to implying rights of action. Rehnquist wrote, "Not only is it 'far better' for Congress to so specify when it intends private litigants to have a cause of action, but for this very reason this Court in the future should be extremely reluctant to imply a cause of

24. *Id.* at 688-709, 717.

25. *Id.* at 680-83.

26. *Id.* at 680.

27. *Id.* at 688-709.

28. *Id.* at 709.

29. 503 U.S. 60 (1992).

30. *Id.* at 76.

31. 524 U.S. 274 (1998).

32. *Id.* at 290.

33. 526 U.S. 629 (1999).

34. *Id.* at 650.

action absent such specificity on the part of the Legislative Branch."³⁵ In two cases decided the same year as *Cannon*, *Touche Ross & Co. v. Redington*³⁶ and *Transamerica Mortgage Advisors, Inc. v. Lewis*,³⁷ the Court implemented its shift to a position more hostile to implying rights of action.

In *Touche Ross & Co. ("Touche Ross")*, the Court held that the inquiry into whether Congress intended to create a private right of action ends when the plain language of the statute, coupled with the legislative history, does not suggest a legislative intent to create a private right of action.³⁸ Thus, in such cases it is not necessary to apply all of the *Cort* factors.³⁹ In *Transamerica Mortgage Advisors, Inc. ("Transamerica")*, decided several months after *Touche Ross*, the Court reinforced *Touche Ross* and the shift away from *Cort* by stating that "[t]he dispositive question remains whether Congress intended to create" a private right of action.⁴⁰ As in *Touche Ross*, this case effectively undermined the analysis proffered in *Cort* by making legislative intent, one of the factors in the four-factor test, dispositive.⁴¹

*Alexander v. Sandoval*⁴² provides a recent example of the Court's current approach to implying rights of action. In *Alexander* the Court addressed whether there was a private right of action to enforce disparate impact regulations promulgated under Title VI of the Civil Rights Act of 1964.⁴³ Under section 601 of Title VI, only intentional discrimination is prohibited,⁴⁴ while activities that have a disparate impact are not.⁴⁵ Under section 602, however, federal agencies are

35. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 718 (1979) (Rehnquist, J., concurring).

36. 442 U.S. 560 (1979).

37. 444 U.S. 11 (1979).

38. *Touche Ross & Co.*, 442 U.S. at 576.

39. *Id.*

40. *Transamerica*, 444 U.S. at 24.

41. In *Thompson v. Thompson*, 484 U.S. 174 (1988), Justice Scalia observed how *Touche Ross* and *Transamerica* "effectively overruled" *Cort*. *Id.* at 189 (Scalia, J., concurring). Scalia wrote, "It could not be plainer that we effectively overruled the *Cort v. Ash* analysis in *Touche Ross & Co. v. Redington* and *Transamerica Mortgage Advisors, Inc. v. Lewis*, converting one of its four factors (congressional intent) into the determinative factor, with the other three merely indicative of its presence or absence." *Id.* (Scalia, J., concurring).

42. 532 U.S. 275 (2001).

43. *Id.* at 278; 42 U.S.C. §§ 2000d to 2000d-7 (2000 & Supp. II 2002).

44. *Alexander*, 532 U.S. at 280, 285. Title VI of the Civil Rights Act of 1964 provides, "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (2000 & Supp. II 2002).

45. *Alexander*, 532 U.S. at 285.

authorized to issue rules, regulations, and orders to effectuate the section 601 provisions.⁴⁶ Using this authority, the Department of Justice ("DOJ") issued a regulation that proscribed the funding recipient from creating "criteria or methods of administration" that had a disparate impact on a group because of race, color, or national origin.⁴⁷

While acknowledging that its prior decisions had implied a private right of action to enforce section 601's ban on intentional discrimination,⁴⁸ the Supreme Court stated that section 601 did not create a private right of action to enforce the disparate impact regulations.⁴⁹ As a result, any right of action to enforce the disparate impact regulations would have to come from section 602 itself.⁵⁰ The Court then analyzed the text and structure of Title VI, section 602 in particular, to determine whether there was a private right of action under section 602.⁵¹

The Court observed that the rights-creating language found in section 601 was not present in section 602.⁵² Because section 602 focused on the agency doing the regulation, and not on the individual protected, the Court stated that section 602 did not reveal a congressional intent to create a private right of action.⁵³ While the regulations did contain rights-creating language, the Court held that such language could not invoke a private right of action because the regulation, which the Court assumed to be valid for administrative enforcement purposes, prohibited conduct that Congress did not prohibit in the statute.⁵⁴ As a result, the Court held that there was not a private right of action under section 602 to enforce the disparate impact regulations.⁵⁵

The Supreme Court subsequently built on the constraints imposed on implying rights of action in *Alexander* in *Gonzaga v. Doe*.⁵⁶ In *Gonzaga* the Court held that the Family Educational Rights and Privacy Act of 1974⁵⁷ ("FERPA") did not create an enforceable right.⁵⁸ Although the issue was whether FERPA was enforceable under 42 U.S.C. § 1983, the Court stated that the analysis was similar to the analysis used to

46. *Id.* at 278.

47. *Id.*

48. *Id.* at 280.

49. *Id.* at 285.

50. *Id.*

51. *Id.* at 288.

52. *Id.* at 288-89.

53. *Id.* at 289.

54. *Id.* at 291.

55. *Id.* at 293.

56. 536 U.S. 273 (2002).

57. 20 U.S.C. § 1232g (2000).

58. *Gonzaga*, U.S. 536 at 276, 290.

determine whether to imply a private right of action in a particular statute—in both instances, the threshold issue is “whether Congress intended to create a federal right.”⁵⁹ In dictum, the Court discussed the standards for implying a right of action in a particular statute.⁶⁰ In this discussion, the Court recognized a two-part test that must be met before a right of action is implied. First, the statute must contain rights-creating language.⁶¹ Second, the statute as a whole must evince Congressional intent to create a private remedy to enforce the statute.⁶²

C. Spending Clause Cases

Another constraint to implying rights of action is the line of authority that counsels against implying rights of action in statutes enacted pursuant to the Spending Clause. In *Pennhurst State School & Hospital v. Halderman*,⁶³ the Supreme Court held that Congress must speak with a “clear voice” when it enacts legislation pursuant to the Spending Clause.⁶⁴ Because Spending Clause legislation is “in the nature of a contract,” any conditions must be imposed unambiguously in order for the states to make an informed choice whether to accept the funding.⁶⁵

The *Pennhurst* principles have implications for constructing remedies under Title IX because it is a Spending Clause statute.⁶⁶ In *Gebser v. Lago Vista Independent School District*,⁶⁷ the Supreme Court recognized these implications. In *Gebser* the Court held that a school district could be held liable under Title IX for damages resulting from teacher-student sexual harassment only when an official of the school district with the authority to institute corrective measures has actual knowledge of such harassment and is deliberately indifferent.⁶⁸ Rejecting petitioner’s argument that the school district could be held liable under constructive notice or *respondeat superior* theories, the Court stated that the primary concern when constructing a remedy under a Spending Clause statute

59. *Id.* at 283.

60. *Id.* at 283-84.

61. *Id.*

62. *Id.* at 284. The Court observed that “[p]laintiffs suing under [section] 1983 do not have the burden of showing an intent to create a private remedy because [section] 1983 generally supplies a remedy for the vindication of rights secured by federal statutes.” *Id.*

63. 451 U.S. 1 (1981).

64. *Id.* at 17.

65. *Id.*

66. See, e.g., *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998). In *Franklin*, discussed in Part II(B), the Supreme Court held that there is a damages remedy in Title IX’s implied private right of action. 503 U.S. at 76.

67. 524 U.S. 274 (1998).

68. *Id.* at 290.

is that the funding recipient have notice that it will be held liable for noncompliance.⁶⁹ As a result, the Court modeled its “actual notice” and “deliberate indifference” standards after Title IX’s express enforcement scheme, which requires that officials of the funding recipient have actual notice of noncompliance and the opportunity to voluntarily comply before an administrative agency takes action.⁷⁰

In *Davis v. Monroe County Board of Education*,⁷¹ the Supreme Court extended the Title IX claim to cases concerning student-on-student sexual harassment. In *Davis* the mother of a fifth-grade student sued the Monroe County Board of Education when her daughter’s school failed to prevent her repeated sexual harassment by a male student.⁷² As in *Gebser*, the Court in *Davis* recognized the Spending Clause implications.⁷³ Citing *Gebser*, the Court stated that *Pennhurst* does not prohibit liability when a funding recipient, after notice to an official with the authority to institute corrective measures, intentionally acts in violation of the terms of the statute.⁷⁴ Accordingly, the Court reasoned that *Pennhurst* did not serve as a bar to liability for the failure to correct student-on-student harassment when a funding recipient’s intentional conduct—the failure to remedy the harassment of which the recipient had notice—violates the terms of the statute.⁷⁵ Therefore, the Court held that school districts could be held liable in cases of student-on-student sexual harassment when the district had actual notice of such harassment, was deliberately indifferent, and the harassment was so severe that it deprived the victim access to the educational opportunities or benefits provided by the funding recipient.⁷⁶

III. COURT’S RATIONALE

In *Jackson v. Birmingham Board of Education*,⁷⁷ Justice O’Connor wrote for the majority in a five-to-four decision, which recognized an implied private right of action for Title IX claims of retaliation.⁷⁸ The Court observed that prior cases interpreting Title IX relied on Title IX’s

69. *Id.* at 287-88.

70. *Id.* at 288-90.

71. 526 U.S. 629 (1999).

72. *Id.* at 633-35.

73. *Id.* at 641-42.

74. *Id.*

75. *Id.* at 643. In addition, the Court stated that Title IX’s administrative regulations, as well as the common law, put schools on notice that they could be held liable for the failure to protect their students from the acts of third parties. *Id.* at 644.

76. *Id.* at 650.

77. 125 S. Ct. 1497 (2005).

78. *Id.* at 1504.

text, which contains a broad prohibition against "discrimination" "on the basis of sex."⁷⁹ For example, in *Gebser v. Lago Vista Independent School District*⁸⁰ and *Davis v. Monroe County Board of Education*,⁸¹ the Court held that Title IX's prohibition against "discrimination" prohibited sexual harassment when perpetrated by an employee of the funding recipient, or even, as in *Davis*, by another student.⁸² The Court stated that retaliation, too, is a form of "discrimination" because the complainant is being subjected to differential treatment.⁸³ Additionally, on the facts of *Jackson*, it was also "on the basis of sex" because it was "an intentional response to the nature of the [underlying] complaint: an allegation of sex discrimination."⁸⁴ As a result, the Court held that retaliation against an individual because that individual complained about sex discrimination of a type prohibited by the statute is "intentional 'discrimination' 'on the basis of sex,' in violation of Title IX."⁸⁵

The majority devoted the rest of its opinion to addressing several of the Board's arguments. First, it rejected the argument that Title IX did not prohibit "retaliation" simply because other federal anti-discrimination statutes expressly prohibit retaliation.⁸⁶ Conceding that Title IX does not prohibit retaliation expressly, the Court observed that Title IX does not prohibit any specific discriminatory practices.⁸⁷ In contrast, while Title VII of the 1964 Civil Rights Act⁸⁸ does expressly prohibit retaliation, it lists specific prohibited discriminatory practices.⁸⁹ Because Title IX does not contain a similar list, the fact that retaliation was not expressly included means little.⁹⁰

The majority cited *Sullivan v. Little Hunting Park, Inc.*⁹¹ to support its position that the broad prohibition against discrimination in Title IX encompasses retaliation.⁹² The majority stated that in *Sullivan* the Court held that a white landlord who was retaliated against for

79. *Id.*

80. 526 U.S. 629 (1999).

81. 524 U.S. 274 (1998).

82. *Jackson*, 125 S. Ct. at 1504-05.

83. *Id.* at 1504.

84. *Id.*

85. *Id.*

86. *Id.* at 1504-06.

87. *Id.* at 1505.

88. 42 U.S.C. §§ 2000e to 2000e-17 (2000 & Supp. II 2002).

89. *Id.*

90. *Id.*

91. 396 U.S. 229 (1969).

92. *Jackson*, 125 S. Ct. at 1505-06.

attempting to vindicate the rights of a black tenant had a cause of action under 42 U.S.C. § 1982.⁹³ The Court stated that because *Sullivan* was decided only three years before Title IX was enacted, Congress expected Title IX “to be interpreted in conformity” with *Sullivan*.⁹⁴

Second, the majority addressed the Board’s argument that *Alexander v. Sandoval*⁹⁵ counseled against an implied right of action for retaliation by distinguishing *Jackson* from *Alexander*.⁹⁶ In *Alexander* the Court held that there is not an implied right of action to enforce a regulation if the regulation proscribes conduct that is not proscribed by the statute.⁹⁷ Although here the Department of Education (the “Department”) had promulgated a Title IX regulation that prohibited retaliation, the Court held that the prohibition against retaliation derived from the statute itself, not the regulation.⁹⁸ Retaliation against a person because they complained of sex discrimination is “discrimination” on “the basis of sex.”⁹⁹ As a result, implying a right of action in the present case complied with *Alexander*’s holding.¹⁰⁰

Third, the majority rejected the Board’s argument that even if Title IX had an implied right of action for retaliation, *Jackson* could not bring it because he was only an indirect victim of sex discrimination.¹⁰¹ The majority concluded that the statute is broadly worded and that the “on the basis of sex” requirement was met in this case because *Jackson* was speaking out about sex discrimination, albeit discrimination directed against female student athletes.¹⁰² The majority again invoked *Sullivan* for the proposition that “retaliation claims extend to those who oppose discrimination against others.”¹⁰³

The Court then discussed the pragmatic reasons for implying a right of action for retaliation.¹⁰⁴ Observing that Title IX’s express and implied enforcement mechanisms, as construed by *Gebser* and *Davis*, require actual notice to the funding recipient that it is not in compliance, the majority concluded that Title IX’s enforcement mechanism would

93. *Id.* at 1505; see 42 U.S.C. § 1982 (2000).

94. *Jackson*, 125 S. Ct. at 1506 (quoting *Cannon v. Univ. of Chicago*, 441 U.S. 677, 699 (1979)).

95. 532 U.S. 275 (2001).

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

97. *Id.* at 1506.

98. *Id.* at 1506-07.

99. *Id.* at 1507.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 1508.

“unravel” if whistleblowers were not protected.¹⁰⁵ The Court reasoned that without such a protection, funding recipients could retaliate against anyone who reported sex discrimination, which would discourage whistleblowers from coming forward, and thus, as a practical matter, allow funding recipients to avoid Title IX’s “actual notice requirement.”¹⁰⁶ In addition, the Court stated that teachers and coaches were in the best position to identify discrimination and to report it when it happens.¹⁰⁷

Last, the majority dealt with the Board’s argument that Title IX did not give school boards the requisite notice demanded by the Spending Clause cases.¹⁰⁸ After conceding that *Pennhurst State School & Hospital v. Halderman*¹⁰⁹ required that funding conditions be unambiguous, the majority observed that in both *Davis* and *Gebser* the Court held that *Pennhurst* did not prevent a claim when “a funding recipient intentionally violates the statute.”¹¹⁰ Because retaliation against an individual for complaining about sex discrimination is “intentional conduct that violates the clear terms of the statute,” *Pennhurst* did not preclude an implied right of action for retaliation.¹¹¹ The Court also concluded that the school board had notice that it could be liable under Title IX for retaliation because of the regulation that prohibited retaliation, as well as the fact that at the time Jackson was retaliated against the Eleventh Circuit had held that Title IX prohibited retaliation.¹¹²

In conclusion, the majority stated that in order for Jackson to prevail on the merits, he would have “to prove that the Board retaliated against him *because* he complained of sex discrimination.”¹¹³

A. *Thomas’s Dissent*

Justice Thomas was joined in dissent by Justices Rehnquist, Scalia, and Kennedy.¹¹⁴ The dissent questioned the majority’s reasoning on three grounds. First, Title IX’s terms do not prohibit retaliation.¹¹⁵ Second, Title IX, as a Spending Clause statute, did not provide the

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 1508-10.

109. 451 U.S. 1 (1981).

110. *Jackson*, 125 S. Ct. at 1508-09 (quoting *Davis*, 526 U.S. at 642).

111. *Id.* at 1509-10 (quoting *Davis*, 526 U.S. at 642).

112. *Id.* at 1510.

113. *Id.*

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

115. *Id.*

school board with the requisite notice that it could be liable for retaliation.¹¹⁶ Last, Title IX lacks the requisite plain Congressional intent to provide a right of action for retaliation.¹¹⁷

Using the plain text argument, the dissent stated that Title IX did not expressly prohibit retaliation.¹¹⁸ Furthermore, the broad prohibition against "discrimination" "on the basis of sex" that the majority cited refers to discrimination on the basis of the claimant's sex.¹¹⁹ Jackson, a male, therefore, had no Title IX claim because he was not discriminated against on the basis of his sex.¹²⁰ In addition, the dissent reasoned that under the majority's approach, a person could complain about alleged discrimination and maintain a resulting retaliation claim without there ever having been any actual sex discrimination to complain about.¹²¹ This reasoning, the dissent argued, would impose liability without ever proving that actual sex discrimination occurred, contrary to the terms of the statute.¹²² The dissent also noted that other contemporary federal anti-discrimination statutes, such as Title VII, the Americans with Disabilities Act, and the Age Discrimination in Employment Act, contain express prohibitions against retaliation.¹²³ If Title IX's broad prohibition against "discrimination" encompassed retaliation claims, then the inclusion of an express prohibition against such claims in other anti-discrimination statutes would be "superfluous."¹²⁴

Next, the dissent relied on the Court's prior Spending Clause cases, which hold that funding conditions must be imposed "unambiguously," to challenge the majority's holding.¹²⁵ The dissent argued that because Title IX did not contain an express prohibition, the majority violated the clear notice principles established in the Spending Clause cases.¹²⁶ The dissent stated that "[t]he question is not whether Congress clearly excluded retaliation claims under Title IX, but whether it clearly included them."¹²⁷ Because Congress did not clearly include a prohibi-

116. *Id.*

117. *Id.*

118. *Id.*

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

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

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

122. *Id.*

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

124. *Id.* at 1513-14 (Thomas, J., dissenting).

125. *Id.* at 1514-15 (Thomas, J., dissenting).

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

127. *Id.*

tion against retaliation in Title IX, the dissent reasoned that such a prohibition should not be implied.¹²⁸

Last, the dissent argued that the majority was not being true to the standard the Court's decisions had recently set for implying rights of action.¹²⁹ Under those decisions, the Court should not imply a right of action unless the statute evinces an intent to create a right for the plaintiff.¹³⁰ Because proving that sex discrimination actually occurred would not be a required element of a Title IX retaliation claim, the dissent stated that permitting such claims via Title IX's implied right of action would expand the statute's prohibited conduct by proscribing conduct when no discrimination may have actually occurred.¹³¹ As a result, the class of people protected by Title IX would be expanded "beyond the specified beneficiaries."¹³² The majority's holding, the dissent argued, created "an entirely new cause of action for a secondary rights holder," which violates the Court's stringent standard that if the text of a statute fails to provide a private right of action expressly, it must contain evidence of congressional intent to create a right in the individual plaintiff.¹³³

In the dissent's conclusion, Thomas challenged the majority's pragmatic argument that an implied right of action for retaliation was necessary to aid in the enforcement of Title IX's prohibition against sex discrimination.¹³⁴ Thomas noted that there is nothing to prevent students or their parents from complaining about unequal treatment because those individuals cannot be effectively retaliated against by school employees.¹³⁵ Because the majority was construing a statute in a manner "to effectuate its vision of congressional purpose," Thomas concluded by stating that the Court was returning to the days when the Court implied rights of action to further a presumed congressional purpose, rather than implying a right of action only when Congress intended to actually create one.¹³⁶

128. *Id.*

129. *Id.* at 1515-16 (Thomas, J., dissenting).

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

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

132. *Id.*

133. *Id.*

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

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

136. *Id.* at 1517 (Thomas, J., dissenting).

IV. IMPLICATIONS

By expanding Title IX's protections to cover claims of retaliation, the Court increased the protections for employees of funding recipients who report instances of sex discrimination. While parents and students have always been able to and still can report Title IX violations without substantial fear of retaliation, employees of funding recipients now have the ability to do the same. The availability of the retaliation claim will most likely make employees of funding recipients who are considering whether to report claims of sex discrimination against students or other employees feel more comfortable reporting such discrimination. Funding recipients may also be less likely to retaliate for fear of liability resulting from a Title IX retaliation claim. As a result, there may be an increased likelihood that sex discrimination will be reported by employees of funding recipients.

Also, now that Title IX has a judicially implied retaliation claim, courts will have to define the contours and limitations of a proper Title IX retaliation claim. Courts will most likely develop the limits of Title IX's retaliation claim by using case law from other anti-discrimination statutes, such as Title VII. Title VII's prohibition against retaliation recognizes a "participation" right and an "opposition" right.¹³⁷ The "participation" right protects employees who participate in an investigation, proceeding, or hearing under Title VII.¹³⁸ The "opposition" right protects employees who informally oppose an unlawful employment practice under Title VII.¹³⁹ While the "participation" right is "virtually unlimited in scope,"¹⁴⁰ case law has limited the scope of the "opposition" right based upon the "lawfulness or reasonableness of the manner and means of opposition."¹⁴¹ If the courts use case law from Title VII to define the limits of a proper Title IX retaliation claim, it is likely that Title IX's newly created "opposition" right will have limitations similar to that of Title VII's "opposition" right.

In conclusion, while the Court's decision represents a departure from the current trend of hostility toward implying rights of action, especially

137. 1 HAROLD S. LEWIS, JR. & ELIZABETH J. NORMAN, LITIGATING EMPLOYMENT DISCRIMINATION AND CIVIL RIGHTS CASES § 4.40, at 445 (2005).

138. *Id.*

139. *Id.*

140. *Id.* at 452.

141. *Id.* at 450. *See, e.g.,* Jennings v. Tinley Park Cmty. Consol. Sch. Dist. No. 146, 864 F.2d 1368, 1375 (7th Cir. 1988) (holding that "an employee may not use legitimate opposition to perceived unlawful employment discrimination as a gratuitous opportunity to embarrass a supervisor or thwart his ability to perform his job.").

in Spending Clause statutes, it is unlikely that this case will signify a return to the days of *J.I. Case Co. v. Borak*,¹⁴² where the Court implied rights of action if doing so would further the congressional purpose. The reason that such a shift is unlikely is because the Court in *Jackson* was simply defining the contours of a right of action that was first recognized in *Cannon*, which was decided before the Court began its current trend of hostility toward implying rights of action in *Touche Ross* and *Transamerica*. Therefore, it is likely that the implications of this case are strictly confined to the expansion of Title IX's protections.

DARL H. CHAMPION, JR.

142. 377 U.S. 426 (1964).
