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Title IX Prohibits Retaliation against Plaintiff Who Complains of Sex Discrimination, Even If Plaintiff Is Not Recipient of Original Discriminatory Treatment: *Jackson v. Birmingham Board of Education*

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Title IX Prohibits Retaliation Against Plaintiff Who Complains of Sex Discrimination, Even if Plaintiff is Not Recipient of Original Discriminatory Treatment: *Jackson v. Birmingham Board of Education*

CIVIL RIGHTS – TITLE IX OF THE EDUCATION AMENDMENTS OF 1972 – PRIVATE CAUSE OF ACTION – RETALIATION – The Supreme Court of the United States held that Title IX does encompass a private cause of action for retaliation as an act of intentional discrimination, even when the plaintiff was not subjected to the original discriminatory treatment.

Jackson v. Birmingham Board of Education, 544 U.S. 167 (2005).

Congress enacted Title IX of the Education Amendments of 1972 in an effort to ensure further equality in education.[1] Title IX specifically deals with discrimination on the basis of sex, mandating that "no person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance."[2] Due to the statute's broad language, confusion has arisen over what exactly constitutes discrimination under Title IX, and who may legitimately pursue a cause of action.[3] The Supreme Court recently clarified the scope and application of Title IX in *Jackson v. Birmingham Board of Education*.[4]

Petitioner Roderick Jackson ("Jackson") brought suit against the School Board of Birmingham, Alabama (the "Board") for violations of Title IX.[5] Specifically, Jackson alleged that the Board violated Title IX by firing him in a retaliatory manner, after he complained that the girls' basketball team was not receiving equal funding and access to athletic equipment and facilities.[6]

1. Gebser v. Lago Vista Independent School District, 524 U.S. 274, 280 (1998).
2. *Gebser*, 524 U.S. at 280. *See also* 20 U.S.C. § 1681(a) (2005).
3. Jackson v. Birmingham Board of Education, 544 U.S. 167, 172 (2005).
4. 544 U.S. 167 (2005).
5. *Jackson*, 544 U.S. at 171.
6. *Id.*

The Birmingham school district employed Jackson for more than ten years.[7] In 1993, Jackson was asked to serve as a physical education teacher as well as the girls' basketball coach.[8] In 1999, he was transferred to Ensley High School.[9] While acting as a coach at Ensley, Jackson discovered that the girls' team was not receiving equal funding and access to equipment and field time, as mandated by Title IX.[10] Jackson found performing his job as coach to be increasingly difficult due to this lack of funding.[11] Beginning in December 2000, Jackson began complaining to supervisors about the unequal treatment of the girls' team.[12] His complaints were ignored, and the situation persisted.[13] Shortly after initiating these complaints, Jackson began to receive negative work evaluations, and he was removed as the girls' coach in May 2001.[14] Even though Jackson retained his position as a physical education teacher, he lost his supplemental coaching salary.[15]

Following his dismissal as the girls' basketball coach, Jackson filed suit in the United States District Court for the Northern District of Alabama, claiming that the Board had violated Title IX by retaliating against him for protesting the discriminatory treatment.[16] Jackson argued that Title IX does recognize a cause of action for retaliation.[17] The Board responded by filing a motion to dismiss for failure to state a claim, asserting that the plaintiff lacked standing under Title IX, and arguing that the claim was preempted by Title VII of the Civil Rights Act.[18] The district court agreed and adopted the chief magistrate's recommendation that Title IX does not encompass a cause of action for retaliation; accordingly, the district court granted the motion to dismiss.[19] In reaching this conclusion, the court relied on *Holt v. Lewis*.[20] Citing the plain language of Title IX, the district court also held that Mr.

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7. *Id.*
8. *Id.*
9. *Id.*
10. *Jackson*, 544 U.S. at 171.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Jackson*, 544 U.S. at 172.
16. *Id.*
17. Jackson v. Birmingham Board of Education, No. CV-01-TMP-1866-S, 2002 WL 32668124, at *1 (N.D. Ala. Feb. 25, 2002).
18. *Jackson*, 2002 WL 32668124, at *1.
19. *Id.* at *2.
20. 955 F. Supp. 1385 (N.D. Al. 1995).

Jackson did not, in fact, have standing under Title IX, as he was neither the recipient of the original discrimination nor a member of the protected class.[21] Finally, the court, relying on *Lowery v. Texas A & M University System*,[22] found that Jackson's claim should rest exclusively under Title VII, as an employment discrimination claim, and not as a Title IX discrimination claim.[23] Jackson appealed to the Court of Appeals for the Eleventh Circuit.[24]

The court of appeals reviewed the district court's decision *de novo*, focusing specifically on whether "Title IX implies a private right of action in favor of individuals, who, although not themselves the victims of gender discrimination, suffer retaliation because they have complained about gender discrimination suffered by others."[25] The Eleventh Circuit, basing its analysis heavily on *Alexander v. Sandoval*,[26] concluded that it could "discern no congressional intent in Title IX to create by implication such a private cause of action," and affirmed the dismissal of Jackson's complaint.[27]

The Supreme Court granted certiorari[28] to "resolve a conflict in the Circuits over whether Title IX's private right of action encompasses claims of retaliation for complaints about sex discrimination."[29]

Justice O'Connor wrote the majority opinion for the closely divided Court.[30] As Jackson's claim was dismissed for failure to state a claim upon which relief can be granted,[31] the Court assumed all material facts as alleged in the complaint as true.[32]

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21. *Jackson*, 2002 WL 32668124, at *2.
22. 117 F.3d 242 (5th Cir. 1997).
23. *Jackson*, 2002 WL 32668124, at *2.
24. Jackson v. Birmingham Board of Education, 309 F.3d 1333 (11th Cir. 2002).
25. *Jackson*, 309 F.3d at 1334.
26. 532 U.S. 275 (2001).
27. *Jackson*, 309 F.3d at 1335.
28. Certiorari is "[a]n extraordinary writ issued by an appellate court, at its discretion, directing a lower court to deliver the record in the case for review." BLACK'S LAW DICTIONARY 220 (7th ed. 1999).
29. *Jackson*, 544 U.S. at 172.
30. The majority opinion included Justices Stevens, Souter, Ginsberg, and Breyer. *Id.* at 169. Justice Thomas wrote a dissenting opinion, in which Chief Justice Rehnquist and Justices Scalia and Kennedy joined. *Id.*
31. FED. R. CIV. P. 12(b)(6).
32. *Jackson*, 544 U.S. at 170-71 (citing Summit Health, Ltd. v. Pinhas, 500 U.S. 322, 325 (1991)).

Part II, Subpart A[33] of the opinion addressed the nature of Title IX generally, and provided an overview of the Court's past treatment and interpretation of Title IX claims.[34]

Justice O'Connor noted the general intentions of Title IX,[35] and further clarified the Court's past applications.[36] In all of the past cases, the Supreme Court relied on the broadness of Title IX itself.[37] The Court further relied on the wording of Title IX in deciding the issue of whether the retaliation experienced by Jackson is "a form of intentional sex discrimination encompassed by Title IX's private cause of action."[38] The majority resolved this issue in favor of Jackson.[39]

According to the Court, "retaliation is, by definition, an intentional act. It is a form of 'discrimination' because the complainant is being subjected to differential treatment."[40] The majority also held that the retaliation against Jackson did fall under Title IX's "discrimination on the basis of sex,"[41] because it was an intentional response to the nature of the complaint made to the school officials, which was one of sex discrimination against the girls's team.[42] The Supreme Court decided that the court of appeals' conclusion regarding this issue was therefore erroneous.[43] As Justice O'Connor explained, concluding that Title IX does not prohibit

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33. *Jackson*, 544 U.S. at 173. Part I of the opinion includes a recitation of the facts and procedural history of Jackson's case. *Id.* at 171-72.

34. *Id.* at 173.

35. Justice O'Connor explained:

> Title IX prohibits sex discrimination by recipients of federal education funding. The statute provides that "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."

Id. at 172-73. *See also* 20 U.S.C. § 1681(a).

36. *Jackson*, 544 U.S. at 173. "Title IX implies a private right of action to enforce its prohibition on intentional sex discrimination." *Id.* (citing Canon v. University of Chicago, 441 U.S. 677, 690-93 (1979)). Title IX also "authorizes private parties to seek monetary damages for intentional violations . . ." *Id.* at 173 (citing Franklin v. Gwinnet County Public Schools, 503 U.S. 60 (1992)). "The private right of action encompasses intentional discrimination in the form of a recipient's deliberate indifference to a teacher's sexual harassment of a student, or to sexual harassment of a student by another student." *Id.* at 1504 (citing *Gebser*, 524 U.S. 274 (1998), and Davis v. Monroe County Bd. of Ed., 526 U.S. 629 (1999)).

37. *Jackson*, 544 U.S. at 172-73.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 173.

42. *Jackson*, 544 U.S. at 173.

43. *Id.*

retaliation merely because the statute makes no mention of it "ignores the import of our repeated holdings construing 'discrimination' under Title IX broadly."[44]

The majority noted that Title IX was enacted in 1972, shortly after the Court's ruling in *Sullivan v. Little Hunting Park, Inc.*[45] *Sullivan* arose as an action under 42 U.S.C. § 1982,[46] and the Court held that a prohibition on racial discrimination covered retaliation against non-class members who advocated for the protected class.[47] The Court stated that Congress would have had familiarity with the ruling in *Sullivan* and would have expected Title IX to be interpreted in conformity with it.[48] Therefore, Congress' failure to specifically list "retaliation" as a form of discrimination in Title IX should not be interpreted to mean Congress excluded "retaliation" as a form of discrimination; indeed, the statute itself is intentionally broad.[49]

In Subpart B of Part II,[50] Justice O'Connor corrected the Board's misinterpretation of *Alexander v. Sandoval*.[51] The Board contended that *Sandoval* compels a holding that there is no right of action for retaliation in Title IX.[52] *Sandoval* involved a Title VI[53] interpretation,[54] and the Court ultimately reiterated its previous

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44. *Id.* Justice O'Connor maintained that "'Discrimination' is a term that covers a wide range of intentional and unequal treatment; by using such a broad term, Congress gave the statute a broad reach." *Id.* The Court further clarified that Title IX, is not Title VII, stating they are "vastly different." *Id.* The Board urged the Court to draw comparisons between Title IX and Title VII; however, the majority determined that this comparison was improper and of little use. *Id.*

45. 396 U.S. 229 (1969).

46. 42 U.S.C. § 1982 (2005). 42 U.S.C. § 1982 provides in relevant part that "[a]ll citizens of the United States shall have the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold and convey real and personal property." *Jackson*, 125 S. Ct. at 1504. The Court in *Sullivan* interpreted this statute to protect a white man who spoke out against discrimination toward a black tenant and suffered retaliation as a result. *Jackson*, 125 S. Ct. at 1504.

47. *Jackson*, 544 U.S. at 176.

48. *Id. See also* Cannon v. University of Chicago, 441 U.S. 677 (1979).

49. *Jackson*, 544 U.S. at 175.

50. *Id.* at 177.

51. *Id.* (discussing *Sandoval*, 523 U.S. 275 (2001)).

52. *Jackson*, 544 U.S. at 167.

53. 42 U.S.C. § 2000(d) (2005). Title VI provides in relevant part that no person 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." *Id.*

54. Sandoval dealt with a disparate impact claim. *Sandoval*, 523 U.S. at 275, 282. Disparate impact refers to the "adverse effect of a facially neutral practice (esp an employment practice) that nonetheless discriminates against persons because of their race, sex, national origin, age, or disability. Discriminatory intent is irrelevant in a disparate-impact claim." BLACK'S LAW DICTIONARY 381 (7th ed. 1999). As Title VI is meant to prohibit in-

holding that "a private plaintiff may not bring [a suit based on a regulation] against a defendant for acts not prohibited by the text [of the statute]."[55] The Board contended that Jackson, like the plaintiffs in *Sandoval*, was attempting to impermissibly extend Title IX by arguing that its private cause of action encompasses retaliation.[56] Although the Board cited a Department of Education regulation that prohibited retaliation against an individual for the purpose of interfering with a right or privilege secured by Title IX, the majority clearly stated it was unnecessary to consider or rely on this regulation.[57] Title IX itself contains the necessary prohibition, as explained in Subpart A of Part II.[58] According to the Court, Jackson's claim was, in fact, consistent with *Sandoval* because a claim for retaliation falls within Title IX's prohibition of intentional discrimination on the basis of sex.[59]

In Subpart C of Part II, the Court turned to an examination of the Board's argument that Jackson was not entitled to protection under Title IX because he is an "indirect victim" of sex discrimination.[60] The majority found this argument to be unconvincing.[61] Relying again on the broad wording of Title IX, the Court maintained that there is no requirement that "the victim of the retaliation must also be the victim of the discrimination that is the subject of the original complaint."[62] Rather, where the retaliation occurs merely because the complainant speaks out against discrimination, the requirements of the statute are satisfied.[63] Such an interpretation is consistent with the Court's holding in *Sullivan*, which made clear that retaliation claims extend to those who oppose discrimination against others.[64]

Furthermore, a narrow construction of Title IX would frustrate the purpose of the statute itself.[65] Justice O'Connor explained that

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tentional discrimination, respondents' claims in Sandoval were denied. *Jackson*, 544 U.S. at 177 (citing *Sandoval*, 523 U.S. at 285).

55. *Jackson*, 544 U.S. at 178 (citing Central Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 173 (1994)).

56. *Jackson*, 544 U.S. at 178.

57. *Id.* In fact, the Court stated that "[t]his argument, however, entirely misses the point." *Id.* at 177.

58. *Id.*

59. *Id.*

60. *Id.* at 179.

61. *Jackson*, 544 U.S. at 179.

62. *Id.*

63. *Id.*

64. *Id.* (citing *Sullivan*, 396 U.S. at 237).

65. *Jackson*, 544 U.S. at 180.

Title IX was not meant not only to prevent the use of federal dollars to support discrimination but also to provide citizens with judicial and legislative protection against discriminatory practices.[66] The Court agreed with the United States' argument in its *Amicus Curiae* brief that achieving both objectives would be "difficult, if not impossible, to achieve if persons who complained about sex discrimination did not have effective protection against retaliation."[67] Justice O'Connor further agreed that enforcement of Title IX depends on reports of violations.[68] By offering legal protection to would-be reporters, individuals would be encouraged to come forward with their claims of discrimination, further promoting the goals of Title IX.[69] For these reasons, Justice O'Connor rejected the Board's second argument.[70]

The Court dealt with the Board's final argument in Subpart D of Part II.[71] The Board contended that, as Title IX was enacted as an exercise of congressional power under the Spending Clause, damages actions are available only when the recipients of the federal funding had adequate notice of their liability for the conduct at issue.[72] The Board therefore argued that the Court should not interpret Title IX to prohibit retaliation because it lacked notice of liability for such retaliation.[73] While the majority agreed with the Board's premise, the Court determined that the Board did have notice.[74] The Court's decisions regarding Title IX since *Cannon v. University of Chicago*[75] have provided notice that recipients could be subjected to private suits for retaliation.[76] The Court maintained that it has consistently interpreted Title IX's private cause of action broadly.[77] The majority concluded that "retaliation against individuals because they complain of sex discrimination is 'intentional conduct that violates the clear terms of the statute,'

66. *Id.*
67. *Id.* (citing Brief for the United States as Amicus Curiae in Support of the Petitioner, 2004 WL 1062111, at *6 (2004)).
68. *Jackson* 544 U.S. at 180.
69. *Id.*
70. *Id.* at 181.
71. *Id.*
72. *Id.* at 181-82
73. *Jackson*, 544 U.S. at 181-82.
74. *Id.*
75. 441 U.S. 677 (1979).
76. *Jackson*, 544 U.S. at 182. *See also Davis*, 526 U.S. 629 (1999); *Gebser*, 524 U.S. 274 (1998); *Franklin*, 503 U.S. 60 (1992); Bennet v. Kentucky Dept. of Ed., 470 U.S. 656 (1985); Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981).
77. *Jackson*, 544 U.S. at 183.

and that Title IX itself therefore supplied sufficient notice to the Board."[78]

Justice O'Connor concluded the majority opinion by noting that, in order to prevail on the merits, Jackson will have to prove that the retaliation occurred *because* he complained of sex discrimination.[79] The judgment of the Court of Appeals for the Eleventh Circuit was reversed, and the case remanded.[80]

Justice Thomas, with whom Chief Justice Rehnquist, Justices Scalia and Kennedy joined, filed a dissenting opinion.[81] Justice Thomas believed the majority's holding to be contrary to the plain terms of Title IX and asserted that retaliatory conduct is not discrimination on the basis of sex.[82] Justice Thomas explained that "retaliation is not based on anyone's sex, much less the complainant's sex," thus Jackson could not have a proper cause of action under Title IX.[83] The dissent further disagreed with the majority's interpretation of *Sullivan*, considering the holding to be much more narrow, and argued that other related Title IX cases did not offer notice to the Board.[84] Justice Thomas concluded by stating that the language of Title IX does not support the majority's holding, and noted that,

> [u]nder the majority's reasoning, courts may expand liability as they, rather than Congress, see fit. This is no idle worry . . . the question before us is only whether Title IX prohibits retaliation, not whether prohibiting it is good policy . . . I would hold that [Title IX] does not encompass private actions for retaliation.[85]

Determining which causes of action are encompassed by Title IX has been a recurring issue for the Supreme Court.[86] Of particular concern has been deciding whether or not a private cause of action was implicitly created by the statute,[87] as the broad language con-

78. *Id.* at 183 (citing *Davis*, 526 U.S. at 642).
79. *Jackson*, 544 U.S. at 184.
80. *Id.*
81. *Id.* at 184 (Thomas, J., dissenting).
82. *Jackson*, 544 U.S. at 184. (Thomas, J., dissenting).
83. *Id.* at 185.
84. *Id.* at 191-92.
85. *Id.* at 195.
86. *See Sandoval*, 532 U.S. 275; *Davis*, 526 U.S. 629; *Gebser*, 524 U.S. 274; *Franklin*, 503 U.S. 60; *North Haven*, 456 U.S. 512; *Cannon*, 441 U.S. 677.
87. *Cannon* is the seminal Title IX case in which the Supreme Court held that Title IX did in fact implicitly contain a private cause of action. *Cannon*, 441 U.S. 677.

tained few express provisions.[88] The Supreme Court has historically used this broadness to define and expand the causes of action encompassed by Title IX and ensure its enforcement.[89]

Interpretations of Title IX have often rested on a case which was decided before Title IX was even enacted.[90] In 1969, Supreme Court held, in *Sullivan v. Little Hunting Park*, that retaliation for advocacy on behalf of a black lessee, even though petitioner was white, constituted discrimination on the basis of race under 42 U.S.C. § 1982.[91]

At issue in *Sullivan* was whether or not a white citizen had standing to advocate for the rights of an African-American citizen under 42 U.S.C. § 1982, and if such advocacy resulted in retaliation, whether the white citizen had a separate cause of action for such retaliation.[92] In reaching its conclusion, the Court looked to the language of the statute itself, and its previous ruling in *Barrows v. Jackson.*[93] The majority first held that a narrow construction of the statute would be inconsistent with the "broad and sweeping nature of the protection meant to be afforded" by the statute.[94] From this holding, the Court declared that punishing Sullivan for "trying to vindicate the rights of minorities protected by § 1982" would only perpetuate the racial restrictions the stat-

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88. *Jackson*, 544 U.S. 167. "Title IX is a broadly written general prohibition on discrimination, followed by specific, narrow exceptions to that broad prohibition." *Id.* at 175.

89. *See Sandoval*, 532 U.S. 275; *Davis*, 526 U.S. 629; *Gebser*, 524 U.S. 274; *Franklin*, 503 U.S. 60; *North Haven*, 456 U.S. 512; *Cannon*, 441 U.S. 677.

90. Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969). Sullivan was a white homeowner who owned a house in Little Hunting Park, Inc., located in Fairfax, Virginia. *Id.* at 235. Little Hunting Park was a nonstock corporation which organized a community park and playground for the benefit of its residents. *Id.* A share in Little Hunting Park entitled the shareholder and shareholder's immediate family to use those recreational facilities. *Id.* The bylaws of the corporation allowed a person who owned a share to assign that share to a tenant if the shareholder rented his house. *Id.* Such assignment was subject to the approval of the board of directors. *Id.* Sullivan wished to assign his share to his tenant, Mr. Freeman, an African-American. *Id.* The board refused this assignment due to Mr. Freeman's race. *Id.* When Mr. Sullivan protested the board's actions, he was notified that he would be expelled if he continued to protest. *Id.* Both Sullivan and Freeman brought suit under 42 U.S.C. § 1982. *Id.* While it was not questioned that Freeman had standing, Little Hunting Park argued that Sullivan, as a white homeowner, did not have a cause of action under the statute. *Id.* at 237.

91. *Sullivan*, 396 U.S. at 235-36. Section 1982 provides, in relevant part, that "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property." *Id.* at 235 n.3; *see* 42 U.S.C. § 1982.

92. *Sullivan*, 396 U.S. at 236.

93. *Id.* at 236 (citing Barrows v. Jackson, 346 U.S. 249 (1953) (holding that the white owner may be the only effective adversary of unlawful restrictive covenants)).

94. *Sullivan*, 396 U.S. at 236.

ute sought to eliminate; therefore, "there can be no question but that Sullivan has standing to maintain this action."[95]

While the above detailed cases provide a background for interpretation of Title IX, the seminal case in the judicial history of Title IX is *Cannon v. University of Chicago*, in which the Supreme Court determined that Title IX did imply a private cause of action.[96] Petitioner Geraldine Cannon alleged that, despite her qualifications, she was denied admittance to medical school.[97] Although the medical schools she applied to had a policy disfavoring candidates over the age of thirty (petitioner was thirty-nine), Cannon argued that, as women are much more likely than men to have interrupted education and thus be older at the time they pursue advanced degrees, such policies were discrimination on the basis of sex.[98] Cannon further alleged that she was not even asked to complete interviews at these schools, which admitted lesser-qualified applicants.[99] Additionally, the schools received federal funding.[100] Based on these facts, Cannon filed a private cause of action for violation of Title IX.[101]

The respondents argued that the lower courts had correctly helt that Title IX did not expressly authorize a private right of action by a person injured by its violation, that no cause of action should be inferred, and that, therefore, Cannon failed to state a cognizable claim under Title IX.[102] Thus, the fundamental issue of whether Title IX contained implied a private right of action for an injured person was squarely presented to the Court.[103] Writing for the majority, Justice Stevens held that there a person injured by a violation of Title XI has an implied private cause of action under the statute.[104]

In arriving at its holding, the Court employed a four step analysis to the question of statutory construction.[105] Determining whether any private remedy is implicit in a statue which does not expressly provide one rests on four main factors: (1) whether the

95. *Id.*
96. *Cannon*, 441 U.S. 677 (1979).
97. *Id.* at 680.
98. *Id.*
99. *Id.*
100. *Id.*
101. *Cannon*, 441 U.S. at 680.
102. *Id.* at 683.
103. *Id.*
104. *Id.* at 699.
105. *Id.* at 688.

plaintiff is part of the class for whose particular benefit the statute was enacted; (2) whether there is any indication of legislative intent to create or deny such a remedy; (3) whether the remedy is consistent with the purpose of the legislative scheme; and (4) whether the cause of action is one usually relegated to state law in an area of state concern, making a federal remedy inappropriate.[106]

In evaluating the first factor, Justice Stevens maintained that earlier cases, which had "recognized the propriety of inferring a federal cause of action for the enforcement of civil rights, even when Congress has spoken in purely declarative terms" were directly applicable to an analysis of Title IX.[107] "[A] statute declarative of a civil right will almost have to be stated in terms of the benefited class . . . [T]he right to be free of discrimination is a 'personal' one," therefore the statute will have to be "phrased in terms of the persons benefited."[108] Title IX, the majority held, is such a statute, and Cannon was clearly of the class meant to be benefited.[109]

In considering the legislative history of Title IX, the majority in *Cannon* recognized that a statute that neither expressly creates nor denies a private remedy is likely to have a legislative history that is equally as silent on the topic.[110] The Court explained that in such situations, the absence of an intention to create such a private cause of action is not necessary for finding such a casue-cause of action; rather, an explicit intention to deny such a cause of action is controlling.[111]

Title IX was modeled after Title VI of the Civil Rights Act, using nearly identical language to describe the benefited class, and the drafters assumed that it would be interpreted and applied as Title VI.[112] In *Cannon*, Justice Stevens reiterated that, in 1972, Title VI had already been interpreted as providing a private remedy.[113] As

106. *Cannon*, 441 U.S. at 689 n.9 (citing Securities Investor Protection Corp. v. Barbour, 421 U.S. 412 (1975); National Railroad Passenger Corp. v. National Ass'n. of Railroad Passengers, 414 U.S. 453 (1974); Wheedlin v. Wheeleer, 373 U.S. 647 (1963); Texas & Pacific R.R. Co. v. Rigsby, 241 U.S. 33 (1916)).

107. *Cannon*, 441 U.S. at 693 (citing Pueblo v. Martinez, 436 U.S. 49, 61 (1978)).

108. *Cannon*, 441 U.S. at 693.

109. *Id.* at 694. "Title IX explicitly confers a benefit on persons discriminated against on the basis of sex, and petitioner is clearly a member of that class for whose special benefit the statute was enacted." *Id.*

110. *Id.*

111. *Id.* at 684.

112. *Id.* at 694-95.

113. *Cannon*, 441 U.S. at 695. "The same [enforcement] procedure that was set up and has operated with great success under the 1964 Civil Rights Act, and the regulations

Title IX was meant to follow Title VI, it is only reasonable, the Court stated, to assume that the drafters were aware of Title VI's interpretation and intended Title IX to mirror it.[114] Moreover, the Court observed that the holding in *Sullivan* provided further support for the belief that Congress was aware of, and approved of, the Court's construction of an implied private cause of action in the several civil rights statutes.[115] Regardless of any presumptions, the Court noted that the "package of statutes of which Title IX is one part also contains a provision whose language and history demonstrate that Congress itself understood Title VI, and thus its companion, Title IX, as creating a private remedy."[116] Thus, a clear legislative intent that a private cause of action exists in Title IX was present.[117]

Closely related to discerning legislative intent is the determination of whether the private remedy would "frustrate the underlying purpose of the legislative scheme."[118] Title IX was enacted to "avoid the use of federal resources to support discriminatory practices" and "to provide individual citizens effective protection against those practices."[119] Justice Stevens explained that serving the first purpose of Title IX may often result in the termination of all federal financial support for institutions that engaged in prohibited practices.[120] That remedy, the majority stated, "is . . . severe and often may not provide an appropriate means of accomplishing the second purpose if merely an isolated violation has occurred."[121] Clearly, the Court noted, the violation would be more efficiently remedied by ordering an institution to accept an indi-

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thereunder[,] would be equally applicable to discrimination [prohibited by Title IX]." *Id.* (citing 117 CONG. REC. 30408 (1971) (Sen. Bayh)). Justice Stevens then refers to the 1967 case of *Bossier Parish School Board v. Lemon*, 370 F.2d 847 (5th Cir. 1967), which "squarely decided this issue [the presence of a private remedy in Title VI] in an opinion that was repeatedly cited with approval and never questioned." *Id.*

114. *Cannon*, 441 U.S. at 697-98.

115. *Id.* at 699.

116. *Id.* "Section 718 of the Education Amendments authorizes federal courts to award attorney's fees to the prevailing parties, other than the United States, in private actions brought against public educational agencies to enforce Title VI in the education context." *Id. See also* 20 U.S.C. § 1617 (2005) (repealed). Such language "explicitly presumes the availability of private suits to enforce Title VI." *Cannon*, 441 U.S. at 699.

117. *Cannon*, 441 U.S. at 703. "We have no doubt that Congress intended to create Title IX remedies comparable to those available under Title VI and that it understood Title VI as authorizing an implied private cause of action." *Id.*

118. *Id.* at 703.

119. *Id.* at 704.

120. *Id.* at 704-05.

121. *Id.* at 705.

vidual who has been improperly excluded.[122] In such an instance, the "award of individual relief to a private litigant who has prosecuted her own suit is not only sensible but is also fully consistent with and in some cases even necessary to the orderly enforcement of the statute."[123]

The majority finally noted that the fourth inquiry as to the statutory construction of Title IX relates to whether implying a federal remedy is inappropriate because the subject area involves a matter of predominantly state concern.[124] The Court noted such a problem was not present in *Cannon*: since the Civil War, the federal government and federal courts have been the primary means of protecting citizens against discrimination, and Title IX involves the expenditure of federal funds to justify its particular prohibitions.[125]

In concluding, the *Cannon* Court definitively identified a private right of action to Title IX:

> In sum, there is no need in this case to weigh the four . . . factors; all of them support the same result. Not only the words and history of Title IX, but also its subject matter and underlying purposes, counsel implication of a cause of action in favor of private victims of discrimination.[126]

While the *Cannon* Court answered the most pivotal question regarding enforcement and interpretation of Title IX, future cases were necessary to further clarify the statute's scope.[127] In the 1982 decision of *North Haven Board of Education v. Bell*,[128] the Court

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122. *Cannon*, 441 U.S. at 705.

123. *Id.* at 705-06. The Court stated:

> The Department of Health, Education and Welfare, which is charged with the responsibility for administering Title IX, perceives no inconsistency between the private remedy and the public remedy. On the contrary, the agency takes the unequivocal position that the individual remedy will provide effective assistance to achieving the statutory purpose. The agency's position is unquestionably correct.

Id. at 706-07.

124. *Id.* at 708.

125. *Id.* at 709.

126. *Id.*

127. *See, e.g.*, *Gebser*, 524 U.S. 275 (1998); *Franklin*, 503 U.S. 60 (1992); *North Haven*, 456 U.S. 512 (1982).

128. 456 U.S. 512 (1982). *North Haven* comprised two cases, the North Haven case, and the Trumbull case. *North Haven*, 456 U.S. at 517-18. Both Boards of Education received federal funding for education programs. *Id.* In the North Haven case, Elaine Dove, a tenured teacher, filed a complaint with the Department of Health, Education and Welfare (HEW) when the school refused to re-hire her after one-year maternity leave. *Id.* at 517.

held that the language of Title IX prohibited employment discrimination.[129] At issue in *North Haven* was the validity of regulations promulgated by the Department of Education pursuant to Title IX, which prohibited federally funded education programs from discriminating on the basis of gender as to employment.[130]

Justice Blackmun's analysis began with the statutory language of Title IX itself.[131] The majority viewed § 901(a) as a "broad directive."[132] Under that provision, employees, like other "persons," cannot be "'excluded from participation in,' 'denied the benefits of,' or 'subjected to discrimination under' education programs receiving federal financial support.'" [133] Therefore, employees who directly participate in federal programs or directly benefit from federal moneys fall within the protective categories of § 901(a).[134] Like previous analyses, the *North Haven* Court maintained that Title IX's origins indicated a broad scope and that the statute must be "accord[ed] a sweep as broad as its language."[135] Title IX "neither expressly nor impliedly excludes employees from its reach," and therefore "person" should be interpreted in the broadest sense of the word.[136]

The Court also found the legislative history of the statue supportive of this analysis; the legislative history clearly indicates

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Linda Potz, an employee of the Trumbull Board, filed a complaint alleging that the Board had discriminated against her on the basis of gender, specifically with respect to job assignments, working conditions, and failure to renew her contract. *Id.* at 518. As to both complaints, HEW believed that Title IX violations had occurred. *Id.* North Haven brought suit in District Court to seek a declaratory judgment that the regulations HEW relied on exceeded the authority conferred by Title IX. *Id.* at 518. The District Court for Connecticut held that Title IX was not intended to apply to employment practices. *Id.* When the Trumbull Board filed suit seeking the same relief, it was granted based on the decision in the original North Haven case. *Id.* The Second Circuit Court of Appeals reversed these decisions, and the Supreme Court granted certiorari to resolve the conflicts. *Id.* at 519.

129. *Id.* at 520. As amended, Title IX contains two core provisions. *Id.* The first, Section 901(a) 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." *Id.* at 514. *See also* § 901(a), 20 U.S.C. § 1681(a). Section 902 relates to enforcement, authorizing each agency awarding federal assistance to an education program to promulgate regulations to ensure compliance. *North Haven*, 456 U.S. at 514. The Department of Education, pursuant to its authority under § 902, promulgated regulations relating to discrimination in employment, and these are the contested regulations. *Id.* at 514.

130. *North Haven*, 456 U.S. at 514.

131. *Id.* at 520.

132. *Id.*

133. *Id.*

134. *Id.*

135. *North Haven*, 456 U.S. at 521.

136. *Id.*

that, even though "employee" was not expressly used in the language, Title IX was meant to protect all persons from discrimination in education.[137] As Senator Bayh stated during congressional debate of Title IX, "the heart of this amendment is a provision banning sex discrimination in educational programs receiving Federal funds. The amendment would cover such crucial aspects as . . . faculty employment."[138] This examination of the statue itself and the legislative intent behind it led the Court to conclude that "[e]mployment discrimination comes within the prohibition of Title IX."[139]

After the initial interpretation of Title IX found in *Cannon* and *North Haven*, the *Franklin* and *Gebser* Courts further interpreted Title IX as to the issues of monetary damages and employer liability.[140]

Franklin v. Gwinnett County Public Schools was the first time the Supreme Court confirmed that damages were available for an action brought to enforce Title IX.[141] Petitioner Christine Franklin was a student in Gwinnett County, and the school district received and used federal funds.[142] While a student in high school, Franklin was subjected to continual sexual harassment by Andrew Hill, a sports coach and teacher employed by the school.[143] As Franklin was no longer a student when the suit was filed, she sought monetary damages from Gwinnett County Public Schools under Title IX.[144]

Justice White stated that the "case present[ed] the question whether the implied right of action under Title IX . . . supports a claim for monetary damages."[145] *Franklin* did not ask the Court to re-examine its decision in *Cannon*, but rather to determine which remedies are available in a suit brought pursuant to an implied private cause of action.[146] While a court may "examine the text

137. *Id.*

138. *Id.* at 524 (citing 118 CONG. REC. 5803 (1972) (Sen. Bayh)).

139. *North Haven*, 456 U.S. at 536.

140. *See Gebser*, 524 U.S. 274; *Franklin*, 503 U.S. 60; *North Haven*, 456 U.S. 512; *Cannon*, 441 U.S. 60.

141. *Franklin*, 503 U.S. at 76.

142. *Id.* at 63.

143. *Id.* Franklin also alleged that she was subject to coercive sexual intercourse on school property by Hill, and that although the school did become aware of Hill's conduct and investigated his treatment of her, the school did nothing the stop his harassment and discouraged Franklin from pressing charges. *Id.* at 63-64.

144. *Id.* at 76.

145. *Id.* at 62-63.

146. *Franklin*, 503 U.S. at 65-66.

and history of a statute to determine whether Congress intended to create a right of action," the Court "presume[s] the availability of all appropriate remedies unless Congress has expressly indicated otherwise."[147] In adhering to the general rule that "federal courts may use any available remedy to make good the wrong done," the Court held that violations of Title IX could be remedied through an award of monetary damages.[148]

The Court noted that the right to a private cause of action under Title IX is a judicially inferred one, and as such, recourse to statutory text or legislative history is not necessarily helpful.[149] Thus, the majority evaluated the state of the law when Title IX was passed, during which time the country followed a "common law tradition [and] regarded the denial of a remedy as an exception rather than the rule."[150] Further, the Supreme Court had found implied rights of action in six cases, and approved a damages remedy in three of those cases even before *Cannon* held that a private right of action existed in Title IX.[151] The majority maintained that this state of the law indicated the lack of "any legislative intent to abandon the traditional presumption in favor of all available remedies."[152] After *Cannon*'s announcement, Justice White noted, it is possible to employ a more traditional method of statutory analysis.[153] The Court looked to the two amendments to Title IX which followed *Cannon*.[154] Neither of these led the majority to conclude that Congress ever intended to limit the remedies available under Title IX.[155]

Although Gwinnett County argued that a damages award would violate separation of powers principles by expanding the federal courts' powers into the legislative and executive spheres, the Court was unconvinced.[156] The majority stated that the respon-

147. *Id.* at 66 (citing Davis v. Passman, 442 U.S. 228, 246-47 (1979)).
148. *Franklin*, 503 U.S. at 76.
149. *Id.* at 71.
150. *Id.* (citing Merrill Lynch v. Curran, 456 U.S. 378 (1982)).
151. *Franklin*, 503 U.S. at 72.
152. *Id.*
153. *Id.* A more traditional statutory analysis is possible because Congress was legislating with complete cognizance of the Court's decision in *Cannon*. *Id.*
154. *Id.* The Rehabilitation Act Amendments of 1986 abrogated the states' Eleventh Amendment immunity under Title IX, and the Civil Rights Restoration Act of 1987 broadened the coverage of antidiscrimination provisions in Title IX and other statutes. *Id.* at 72. Neither can be read except as a validation of *Cannon*. *Id.* *See also* 42 U.S.C. § 2000d-7(a)(2) (2005), and 102 Stat. 28.
155. *Franklin*, 503 U.S. at 73.
156. *Id.* at 73-74.

dents "misconceive[d] the difference between a cause of action and a remedy. Unlike the finding of a cause of action, which authorizes a court to hear a case or controversy, the discretion to award . . . relief involves no . . . increase in judicial power."[157] The Court further recognized that, as the case was one of intentional discrimination, no notice problem arose; thus, the remedy is not limited, as is the case in unintentional violations.[158] The Court concluded that "a damages remedy is available for an action brought to enforce Title IX."[159]

Franklin also indicated that sexual harassment of a student by a teacher would fall under the prohibitions of Title IX,[160] and in the *Franklin* case, it was clear that the school had notice of such harassment.[161] The *Gebser* Court set out various guidelines of how courts should treat cases like *Franklin* when no notice was present.[162]

In *Gebser,* Alida Gebser joined a book club run by a high school teacher, Frank Waldrop.[163] During club meetings, Waldrop made sexually suggestive comments, and Gebser alleged that when she entered high school, Waldrop initiated sexual contact.[164] Gebser and Waldrop had sexual intercourse during the school year.[165] Gebser never reported her encounters with Waldrop to any school officials.[166] While parents of other students later complained about suggestive comments made by Waldrop, the school did not take extensive disciplinary action against him.[167] Later during the school year, a police officer discovered Waldrop and Gebser engaging in intercourse; Waldrop was arrested, and the school then terminated him.[168] Gebser then filed suit against the Lago Vista School District as well as Waldrop.[169] It was her claim against Lago Vista, arising under Title IX, which was of primary concern.[170]

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157. *Id.*
158. *Id.* at 74.
159. *Id.* at 76.
160. *Gebser*, 524 U.S. at 281.
161. *Franklin*, 503 U.S. at 74.
162. *Gebser*, 524 U.S. at 284-88, 290.
163. *Id.* at 277.
164. *Id.* at 278.
165. *Id.*
166. *Id.*
167. *Gebser*, 524 U.S. at 278.
168. *Id.*
169. *Id.* at 278-79.
170. *Id.* at 279.

Gebser focused on the school district's liability for damages under Title IX's implied right of action when the claims involved sexual harassment of a student by a teacher.[171] The Court held that damages may not be recovered "unless an official of the school district who at a minimum has authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately indifferent to, the teacher's misconduct."[172]

The majority had no desire to disturb the holding in *Franklin*, but merely defined the contours of liability under *Franklin*.[173] The petitioners advanced two standards for imposing liability on the Lago Vista School District.[174] The first was an expression of respondeat superior,[175] "under which recovery in damages against a school district would generally follow whenever a teacher's authority over a student facilitates the harassment."[176] The second theory submitted by the petitioners was one of constructive notice,[177] "where the district knew or should have known about harassment but failed to uncover and eliminate it."[178] The petitioners cited favorable cases that interpreted Title VII to allow recovery under such tort theories.[179] However, the Court noted that Title VII makes explicit mention of "agent" and deals primarily with employer/employee relationships.[180] "Title IX contains no comparable references to educational institutions' 'agents,' and so does not expressly call for application of agency principles."[181] However, the majority Justices were most troubled by petitioners' wish to recover damages based on theories of respondeat superior and constructive notice.[182]

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171. *Id.* at 277.

172. *Gebser*, 524 U.S. at 277.

173. *Id.* at 281.

174. *Id.* at 281-82.

175. *Respondeat superior* is "[t]he doctrine holding an employer or principal liable for the employee's or agent's wrongful acts committed within the scope of the employment or agency." BLACK'S LAW DICTIONARY 1053 (7th ed. 1999).

176. *Gebser*, 524 U.S. at 282.

177. Constructive notice is "[n]otice [of some fact or event] arising by presumption of law from the existence of facts and circumstances that a party had a duty to take notice of, . . . [or] notice presumed by law to have been acquired by a person and thus imputed to that person." BLACK'S LAW DICTIONARY 870 (7th ed. 1999).

178. *Gebser*, 524 U.S. at 281-82.

179. *Id.* at 283. Petitioner cited *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986). *See also* 42 U.S.C. § 2000e-2(a) (2005).

180. *Gebser*, 524 U.S. at 283.

181. *Id.*

182. *Id.*

Title VII contains an express cause of action, and specifically provides for relief in the form of monetary damages.[183] The Court found clear congressional intent to not only apply agency law, but also to address damages directly in finding relief under Title VII.[184] Title IX contains no express provisions; instead, the private right of action and monetary damages relief are judicially implied.[185] Therefore, the Court has a "measure of latitude to shape a sensible remedial scheme that best comports with the statute. To guide the analysis, we generally examine the relevant statute to ensure that we do not fashion the scope of an implied right in a manner at odds with the statutory structure and purpose."[186]

In this instance, the Court determined that it would frustrate the purposes of Title IX to permit a damages recovery against a school district for a teacher's sexual harassment under theories of respondeat superior or constructive notice.[187] The majority maintained that the Court's role is to "attempt to infer how Congress would have addressed the issue."[188] The Court concluded that "[a]s a general matter, it does not appear that Congress contemplated unlimited recovery in damages against a funding recipient where the recipient is unaware of discrimination in its programs."[189]

Title IX focuses on protecting the individual from discriminatory practices carried out by the recipients of federal funding.[190] The majority maintained that it is contractual in nature, and this nature, coupled with its express means of enforcement by administrative agencies "operates on an assumption of actual notice to officials of the funding recipient."[191] The Court stated that violators are required to take remedial action in an effort to ameliorate the effects of the discrimination.[192] However, Justice O'Connor wrote that this requirement does not seem to contemplate a condition ordering relief in the form of monetary damages, and payment is not a condition of compliance.[193] Notice of the violation to an appropriate official and an opportunity to voluntarily comply

183. *Id.* at 283-84. *See also* 42 U.S.C. § 2000e-5(f) (express cause of action), and § 1981a (setting out monetary damages).
184. *Gebser*, 524 U.S. at 283-84.
185. *Id.*
186. *Id.* at 284.
187. *Id.* at 285.
188. *Id.*
189. *Gebser*, 524 U.S. at 285.
190. *Id.* at 286.
191. *Id.* at 286-87.
192. *Id.* at 288.
193. *Id.* at 288-89.

with the statue before enforcement proceedings commence is meant to avoid "diverting education funding from beneficial uses where a recipient was unaware of discrimination in its programs and is willing to institute prompt corrective measures."[194] Constructive notice standards and imputed liability through respondeat superior assume that there was no actual knowledge, and therefore, no chance to voluntarily correct the violation.[195] Justice O'Connor stated:

> It would be unsound . . . to . . . permit substantial liability without regard to the recipient's knowledge . . . . Where a statute's express enforcement scheme hinges its most severe sanction on notice and unsuccessful efforts to obtain compliance, we cannot attribute to Congress the intention to have implied an enforcement scheme that allows imposition of greater liability without comparable conditions.[196]

Justice O'Connor concluded that a "damages remedy will not lie under Title IX unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs and fails adequately to respond."[197]

In *Davis v. Monroe County Board of Education*,[198] the Court had the task of determining whether failure to stop student-on-student harassment could be construed as a violation of Title IX.[199] Following the guidelines set out in *Gebser*, the majority held that it could be a violation.[200]

The petitioner in *Davis* was the mother of a minor child, LaShonda, who had been subjected to a "prolonged pattern of sexual harassment by one of her fifth-grade classmates."[201] Incidents of harassment included explicit sexual comments, obscene actions and gestures, and inappropriate and non-consensual touching.[202]

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194. *Gebser*, 524 U.S. at 289.
195. *Id.*
196. *Id.*
197. *Id.* at 290.
198. 526 U.S. 629 (1999).
199. *Davis*, 526 U.S. 629.
200. *Id.* at 633.
201. *Id.* at 634.
202. *Id.* at 634-45.

LaShonda reported each of these incidents to a teacher, and her mother followed up these incidents with phone calls to the school principal.[203] Petitioner alleged that despite this notice, the school failed to discipline the harasser and made no effort to separate him from LaShonda.[204] As a result, LaShonda suffered emotional difficulties, and her school performance dropped dramatically.[205] Davis filed suit, alleging that the school's failure to stop the harassment was a violation of Title IX, as it "interfered with [LaShonda's] ability to attend school and perform her studies and activities."[206] The Supreme Court granted certiorari to determine "whether and under what circumstances, a recipient of federal educational funds can be liable in a private damages action arising from student-on-student sexual harassment."[207] The majority held that such a private damages action may lie against a school board under Title IX, but only where the funding recipient acts with deliberate indifference to the harassment. Additionally, the harassment must be so severe that it effectively bars the victim's access to an educational opportunity or benefit, and the funding recipient exercises substantial control over both the harasser and the context in which the harassment occurs.[208]

In *Davis*, the Court was asked to find not only that student-on-student harassment was a prohibited behavior under Title IX but also that a district's failure to respond to such behavior can support a private suit for monetary damages.[209] While precedent existed to suggest that harassment constituted a form of discrimination under Title IX, and that a private money damages action existed,[210] the respondents argued that under these rulings, a recipient can only be liable in damages for its own misconduct.[211] The Court agreed with this, but maintained that the petitioner was indeed seeking to hold the "Board liable for its *own* decision to remain idle in the face of known student-on-student harassment in its schools."[212] Further, the majority held that *Gebser* is entirely

203. *Id.* at 634.
204. *Davis*, 526 U.S. at 635.
205. *Id.* at 635-36.
206. *Id.* at 636.
207. *Id.*
208. *Id.* at 652-53.
209. *Davis,* 526 U.S. at 639.
210. *See Gebser*, 524 U.S. 274 (1998); *Franklin*, 50 U.S. 60 (1992); *Cannon*, 441 U.S. 677 (1979).
211. *Davis*, 526 U.S. at 640.
212. *Id.* at 641.

applicable to the current case because the high standard of "deliberate indifference" sought to eliminate any risk that a recipient would be held liable in damages for the independent (and unknown) actions of its employees.[213]

Gebser established that an intentional violation of Title IX occurs when a recipient is deliberately indifferent to known acts of discrimination, and this violation may be remedied by an award of money damages.[214] In *Gebser*, the harasser was a teacher, whereas in *Davis* the Court was asked to extend liability when the harasser was another student.[215] The Court did extend liability, but with limitations.[216] The majority stated that Title IX's plain language "confines the scope of prohibited conduct based on the recipient's degree of control over the harasser and the environment in which the harassment occurs."[217] Further, the harassments must occur "under the operations of' a funding recipient."[218] The Court asserted that these factors do limit liability, and only when these factors are met can the recipient be said to "expose its students to harassment or cause them to undergo it under the recipient's programs."[219] While these conditions may be satisfied most easily when the harasser is an agent of the recipient, the Court decided that the term "under" does not require agency.[220]

In Davis' case, the harassment occurred during school hours and on school grounds; thus, it clearly took place under an operation of the funding recipient.[221] Further, as the offender was a student and the violations took place at school, the school had substantial control over the offender and the context in which the harassment occurred.[222] The school, its administrators and its attorneys were all informed that student-on-student harassment could result in liability under Title IX, and were certainly aware of the harassment experienced by LaShonda.[223] The majority held that should

213. *Id.* at 641-43.
214. *Id.* at 643. *See also Gebser*, 524 U.S. 274.
215. *Davis*, 526 U.S. at 643. *See also Gebser*, 524 U.S. 274.
216. *Davis*, 526 U.S. at 643.
217. *Id.* at 644.
218. *Id.* at 645.
219. *Id.*
220. *Id.*
221. *Davis*, 526 U.S. at 646.
222. *Id.* ("We have observed . . . 'that the nature [of the State's] power [over public school children] is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults.'") (quoting Vernonia Sch. Dist. v. Acton, 515 U.S. at 655 (1995)).
223. *Davis*, 526 U.S. at 647.

their response be shown to have been "clearly unreasonable," Davis should prevail.[224] As the Court had previously determined that "sexual harassment" is "discrimination" under Title IX,[225] the majority concluded that a private cause of action

> may lie against the school board in cases of student-on-student harassment . . . where the funding recipient acts with deliberate indifference to known acts of harassment in its programs or activities . . . for harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit.[226]

The Court's holding in *Jackson* is a logical extension of its past interpretations of Title IX, and it is supported by the statute itself. The dissent fundamentally misunderstood the broad reach of the statute's terms. As former Senator Bayh noted in his amicus curiae brief, "[t]he princip[a]l part of Title IX prohibits, in sweeping terms, all acts of discrimination on the basis of sex against any 'person' by an educational institution in any education program . . . that receives federal financial assistance."[227]

The dissent would limit the statute in an impermissible fashion. Under Title IX, "discrimination on the basis of sex" does not limit the implied private action to causes of action stemming from the plaintiff's sex. At the time of Title IX's adoption, Congress had already recognized that retaliation on the basis of a complaint about racial discrimination constituted a form of discrimination prohibited under the civil rights statutes.[228] Further, Congress accepted that such discrimination could be challenged through an implied right of action. It was against this backdrop and in this spirit that Title IX was enacted. The Supreme Court's reliance on and understanding of *Sullivan* as a guide to interpreting Title IX was thus appropriate.

Justice Thomas also sought to compare Title IX to Title VII.[229] He placed much emphasis on the fact that Title VII specifically

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224. *Id.* at 649.

225. *See Gebser*, 524 U.S. 274; *Franklin*, 503 U.S. 60.

226. *Davis*, 526 U.S. at 633.

227. Brief Amicus Curiae of Birch Bayh in Support of the Petitioner, *Jackson*, 544 U.S. 167 (No. 02-1672), 2004 WL 1881769, at *6. Senator Bayh was one of the prime sponsors and architects of Title IX.

228. *Sullivan*, 396 U.S. 229.

229. *Jackson*, 544 U.S. at 186 (Thomas, J., dissenting).

includes a provision to address retaliation. However, Title IX was modeled after Title VI, a wholly different statute. Title VI of the Civil Rights Act of 1964 adopted an implementing regulation (not a specific provision) which prohibited retaliation based on complaints of illegal discrimination. This regulation was adopted at the same time that Title IX was discussed and eventually adopted. The *Cannon* Court accurately held that Title IX was meant to follow Title VI, both in interpretation and in enforcement.

The ruling in *Jackson* was amply supported by Senator Bayh's statements during floor debate over Title IX, during which he clearly indicated "[t]he same [enforcement] procedure that was set up and has operated with great success under the 1964 Civil Rights Act . . . would be equally applicable to discrimination [prohibited by Title IX]."[230] Therefore, the statute's silence on the issue of retaliation is far from dispositive, as the circuit court in *Jackson* held.

While the ultimate conclusion of the Supreme Court in *Jackson* was correct and appropriate, further clarifications may be necessary. The dissent raised an important concern: Will a retaliation claim under Title IX actually require a plaintiff to prove that the original, complained of, discrimination occurred? Such a limitation on retaliation claims under Title IX should be a necessary element for relief, and would serve as an important safeguard, much as the actual notice requirement in sexual harassment cases serves as a safeguard.

It is not disputed by the majority that Title IX contains a cause of action for retaliation and that the sex of a plaintiff in such a retaliation case should be of no consequence. However, as the private right of action under Title IX is implied by the courts, certain judicially imposed requirements are necessary to ensure the most efficient remedy. Recipients who have not actually committed discrimination prohibited by Title IX should not be liable for retaliation against a plaintiff who complains of non-existent discrimination. This result would be nonsensical, resulting in economic harm to recipients who are indeed complying with the terms of and facilitating the goals of Title IX. Denying funding to recipients who are complying with the Title IX provisions would further harm the students and employees of these compliant institutions. Future cases should be careful to clarify limitations on the cause

230. Brief of Amicus Curiae of Birch Bayh in Support of the Petitioner, *supra* note 229, at *9 n.5 (citing 117 CONG. REC. 30408 (1971) (Sen. Bayh)).

of action for retaliation, much as the *Gebser* and *Davis* Courts clarified liability for sexual harassment.

Despite this caveat,

> [t]he context in which Congress enacted Title IX in 1972 demonstrates clearly that (a) Congress intended to prohibit all forms of discrimination in federally funded educational programs, including retaliation; (b) its intent is especially clear with respect to prohibiting all forms of discrimination in employment, . . . and (c) Congress intended the private right of action under Title IX to extend to such retaliation claims.[231]

Provided the appropriate limitations are developed, *Jackson* will serve to advance the original efforts of Title IX, and encourage recipients to further equality in education.

Sarah M. Riley[232]

231. *Id.* at *11.

232. Sarah M. Riley was awarded a 2007 Burton Award for this case note. The Burton Awards, modeled after the Pulitzer Prize, recognize excellence in legal writing and encourage the use of clear language and the avoidance of legalese. Every law school in the nation is invited to submit an entry. Only fifteen students were chosen as winners this year. For more information, see www.burtonawards.com.