

Discrimination, Retaliation, and Implied Private Rights of Action

By
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On Tuesday, November 30, 2004, the U.S. Supreme Court heard oral argument in *Jackson v. Birmingham Board of Education*.¹ The facts giving rise to the case are simply stated: Roderick Jackson, the one-time girls' basketball coach at Ensley High School in Birmingham, Alabama (the author's home town, incidentally) alleged that the school board demoted him in response to—in legal jargon, in “retaliation” for—his complaint to supervisors that his team was being denied equal access to gym facilities in violation of Title IX of the federal Education Amendments of 1972. The question the Supreme Court agreed to decide is “[w]hether the private right of action for violations of Title IX . . . encompasses redress for retaliation for complaints about unlawful sex discrimination.”² On behalf of eight other States, the State of Alabama, through yours truly, intervened and urged the Court—both in a written brief and at the oral argument—to answer that question in the negative.

I. The *Real* Question Presented

This is one of those cases in which the parties could not even quite agree on the appropriate mode of analysis for approaching the case. Jackson, for his part, pitched the case as being fundamentally about the substantive scope of Title IX's prohibition. So long as Title IX can be read to prohibit retaliation, Jackson said, an implied private right of action to enforce that prohibition follows as a matter of course. And that, he claimed, is because the Court recognized an implied right of action covering a Title IX claim in *Cannon v. University of Chicago*.³ So, from Jackson's perspective, the case is just a garden-variety statutory interpretation case; none of the heightened congressional-intent requirements that the Court has developed over the years in dealing with implied-right-of-action issues (culminating in *Alexander v. Sandoval*)⁴ applies.

I disagree. In my view, the implied-right-of-action issue cannot be so easily dispensed with. Indeed, I think that, very arguably, the Court has already rejected the view that the only issue in a case like Jackson's is the substantive scope of the underlying statute. In *Virginia Bankshares, Inc. v. Sandberg*,⁵ for instance, the Court pointedly criticized cases from the implied-right-of-action heyday for having never focused their “probe of the congressional mind” on “private rights of action, as distinct from the substantive objects of the legislation.”⁶ The Court stressed the importance under modern doctrine “of enquiring specifically into intent to authorize a private cause of action.”⁷

Jackson, we argued, cannot side-step this “heightened concern” for congressional intent⁸ simply by citing to *Cannon*. *Cannon* involved a traditional “discrimination”

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claim (the plaintiff there complained of unequal admissions practices for men and women), not a retaliation claim. It had nothing to say—one way or the other—about retaliation. *Cannon* is thus properly read to recognize an implied private right of action for core Title IX discrimination claims; it cannot fairly be understood to create a one-size-fits-all private remedy for any practice that Title IX might plausibly be construed (at some future date) to prohibit.

The separation-of-powers concerns that animate this Court’s implied-right-of-action jurisprudence⁹ require a rigorous showing of congressional intent not only to demonstrate the existence of an implied private remedy as an initial matter, but also to justify its scope. Again, *Virginia Bankshares* is illustrative. There, this Court addressed the question whether a minority shareholder could sue under the implied private right of action for §14(a) of the Securities Exchange Act. The Court acknowledged *J.I. Case Co. v. Borak*,¹⁰ which had recognized an implied remedy in §14(a), but it did not stop there; instead, it went on to detail the showing a plaintiff must make to “extend the scope” of an existing right of action.¹¹

“Assessing the legitimacy of any such extension or expansion,” the Court held, “calls for the application of some fundamental principles governing recognition of a right of action implied by a federal statute”¹² First, the Court emphasized that “recognition of any private right of action for violating a federal statute must ultimately rest on congressional intent to provide a private remedy.”¹³ “From this,” the Court continued, “the corollary follows that the breadth of the right once recognized should not, as a general matter, grow beyond the scope congressionally intended.”¹⁴ Accordingly, even where (as here) the issue is not initial recognition, but expansion, a plaintiff faces a “serious obstacle” where he cannot demonstrate a “manifestation of intent to recognize a cause of action (or class of plaintiffs) as broad as [his] theory” would entail.¹⁵

Accordingly, in my view it seems clear enough that Jackson bears the burden here of showing “affirmative”¹⁶ and “persuasive”¹⁷ evidence of Congress’ intent to create in Title IX a private right of action specifically for retaliation.

II. The Spending Clause Angle

Even setting to one side the debate about whether the case is really about the scope of Title IX’s prohibition—or instead about Congress’ intent to make retaliation privately actionable—there is the fact that Title IX is a Spending Clause statute.¹⁸ Accordingly, Title IX is subject to the clear-statement rule articulated in *Pennhurst State School and Hospital v. Halderman*.¹⁹ That rule, which exists to ensure that a recipient of federal funding exercises its choice to accept funds “knowingly” and “cognizant of the consequences of [its] participation,” requires that any enforceable condition on the receipt of funds be stated “unambiguously” in the statute.²⁰

Here, of course, the condition that Jackson seeks to enforce is a private remedy for (or, in his view, a prohibition of) retaliation. The question, accordingly, is not simply whether Title IX’s generic reference to “discrimination” might, on balance, plausibly be interpreted to reach retaliation. Rather, the question is whether private

liability for retaliation, specifically (or, again, at the very least, a prohibition on retaliation) so plainly arises from “the clear terms of the relevant statute,”²¹ that it can be said to be “unambiguous[]”²² or “obvious.”²³

III. The Sources of Statutory Meaning

Whatever the frame of analysis, the Court will presumably have to sift through the traditional indicia of statutory meaning to determine whether retaliation is privately actionable under Title IX. In my view—admittedly biased—the Court won’t find in any of the usual places any affirmative evidence of a clear congressional intent to reach, let alone remedy, retaliation.

A. The Text

In relevant part, Title IX states that “[n]o person in the United States shall, on the basis of sex . . . be subjected to discrimination under any education program or activity receiving Federal financial assistance.”²⁴ All agree that Title IX makes no specific mention of retaliation. Jackson’s point, though, is that retaliation is “simply one variant” of the “discrimination” to which Title IX does refer.²⁵ But as it turns out, the concepts of “discrimination” and “retaliation” are fundamentally different, both as a matter of plain meaning and as a matter of ordinary legal usage.

First, standard English and legal dictionaries alike make clear that “discrimination” is a comparative term; it refers to the perception or treatment of one person or thing *in relation to others*. (I’ll spare you the string cite.) Second, the case law is to the same effect. The Supreme Court has recognized, for instance, that “[c]onceptually, of course, any notion of discrimination assumes a comparison of substantially similar entities.”²⁶ Third, technical niceties aside, there is a very real sense in the daily give and take (important to the Spending Clause’s “notice” requirement) in which people just know that discrimination and retaliation are distinct concepts. Judge Posner has described them as *quintessentially* distinct. Addressing the question whether a plaintiff’s false-arrest and excessive-force claims were related for attorneys-fees purposes, Judge Posner explained that they were “as different as a claim of discrimination and a claim of retaliation for opposing that discrimination.”²⁷ Indeed, Jackson’s pleadings show that even he appreciates the difference. In its motion to dismiss, the school board, unable to make out the particulars of Jackson’s complaint, assumed that he was attempting to assert both a “discriminat[ion]” claim and a “retaliation” claim. In response, Jackson answered that, no, he was not raising a “discriminat[ion]” claim, only a “retaliation” claim.

The textual problem for Jackson is that he does not claim to have been disadvantaged in a comparative sense—*i.e.*, to have been treated unfairly in relation to someone else. Rather, Jackson’s beef is with the school board’s treatment of him in an absolute sense; specifically, he contends that he was given negative evaluations and was ultimately terminated from his coaching duties. Unlike a typical “discrimination” claim, Jackson’s complaint requires no knowledge of (and thus offers no allegations concerning) others’ circumstances. Assuming the truth of the facts stated in the

complaint, what happened to Jackson was wrong; it was unjustified—but it was not “discrimination.”

B. The Structure

The absence of a specific anti-retaliation provision in Title IX stands in stark contrast to this Nation’s other major gender-discrimination statute, Title VII. In Title VII, Congress dealt with employment discrimination in one statutory section, 42 U.S.C. § 2000e-2, and then addressed retaliation, expressly, in an altogether separate section, 42 U.S.C. § 2000e-3(a). Title VII’s structure indicates two things about Title IX’s meaning. First retaliation is not, as a textual matter, simply one variant of discrimination; if it were, Title VII’s express prohibition of retaliation would be superfluous, having been subsumed under § 2000e-2’s general anti-discrimination provision. Second, when Congress wants to address retaliation, it knows how to do so and does so expressly. “The fact that [Congress] enacted no analogous provisions in the legislation here at issue strongly suggests that Congress was simply unwilling to impose any potential monetary liability on a private suitor” for retaliation.²⁸

The implication that arises from Title VII’s structure—that Title IX does not reach, much less remedy, retaliation—is strengthened by the fact that Title IX “was patterned after Title VI of the Civil Rights Act of 1964.”²⁹ When Congress enacted the Civil Rights Act of 1964, which included both Titles VI and VII, it addressed retaliation only in Title VII. Where, as in that instance, “Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”³⁰ That same presumption—that Congress intentionally omitted any prohibition on retaliation from Title VI—carries over to Title VI’s clone, Title IX. Put simply, Congress was plainly up to something very different when it enacted Titles VI and VII side by side in 1964. Eight years later, in 1972, in choosing the template for Title IX, Congress had a choice of models; it discarded Title VII (which addresses retaliation expressly) in favor of Title VI (which makes no mention of it).

C. The *Sullivan* Decision

Both in his briefs and at oral argument, Jackson relied heavily, as an aspect of contemporary context bearing on Congress’ intent in enacting Title IX, on the Supreme Court’s decision in *Sullivan v. Little Hunting Park, Inc.*,³¹ which dealt, in part, with the claim of a white homeowner that he had been wrongfully expelled from his homeowners’ association for protesting the association’s refusal to permit him to assign his association shares to his black lessee. *Sullivan*, Jackson says, held that 42 U.S.C. § 1982, which prohibits discrimination in property transactions, “also protects from retaliation those who complain about such discrimination,” and thus “established th[e] principle” that statutory bans on discrimination “are construed to include prohibitions on retaliation.”³² From *Sullivan*, Jackson asserted, it can be inferred that Congress “presumably intended” Title IX’s prohibition on “discrimination” to entail an unstated remedy for retaliation, as well.³³

Jackson's reliance on *Sullivan* as proof of Congress' intent is misplaced. Let's start with what *Sullivan* actually says. The paragraph on which Jackson stakes his argument provides as follows:

We turn to Sullivan's expulsion for the advocacy of Freeman's cause. If that sanction, backed by a state court judgment, can be imposed, then Sullivan is punished for trying to vindicate the rights of minorities protected by § 1982. Such a sanction would give impetus to the perpetuation of racial restrictions on property. That is why we said in *Barrows v. Jackson* that the white owner is at times "the only effective adversary" of the unlawful restrictive covenant. Under the terms of our decision in *Barrows*, there can be no question but that Sullivan has standing to maintain this action.³⁴

Now, there are several problems with Jackson's reliance on *Sullivan*. First, the paragraph on which Jackson relied is, to put it mildly, pretty opaque. Far from climaxing—as Jackson suggested—with a resounding affirmation that any statutory prohibition on discrimination necessarily entails a corollary remedy for retaliation, the paragraph concludes (with something of a thud) by stating, cryptically, that *Sullivan* "ha[d] standing to maintain" his lawsuit.³⁵ And, indeed, *Barrows v. Jackson*, which the *Sullivan* Court cited for support, was purely a third-party standing case; it had nothing to do with private rights of action.

Second, and relatedly, there is no evidence that *Sullivan* was understood—let alone universally understood—in the years leading up to Title IX's passage the way that Jackson has characterized it. Indeed, even Justice Harlan, who dissented in *Sullivan*, was left scratching his head; he couldn't make heads or tails of what the Court was trying to do. With respect to the issue of "relief for Sullivan," Justice Harlan called the majority opinion "highly elliptical."³⁶ The opinion, he said, did not in any way "explain[] what legal standard should determine Sullivan's rights under § 1982"; instead, it "simply state[d] that 'Sullivan has standing to maintain this action' under § 1982."³⁷ Given Justice Harlan's own confusion, it is perhaps not surprising that we were unable to find a single lower-court decision during the period preceding Title IX's enactment that construed *Sullivan* to, as Jackson said, "establish[] th[e] principle" that a prohibition on "discrimination" necessarily entails a remedy for retaliation. (Notably, having been essentially dared by us to find one, Jackson offered no such case in his reply brief.)

There is a third and final problem. *Sullivan* dealt with § 1982, which not only uses entirely different language than Title IX (indeed, the word "discrimination" does not even appear in § 1982), but also was enacted pursuant to an altogether different constitutional power. Section 1982 is "authorized by the Enabling Clause of the Thirteenth Amendment"—arguably the most sweeping grant of federal power in the Constitution—and is thus to be given the broadest possible construction.³⁸ As a Spending Clause statute, by contrast, Title IX is subject to the settled rule that its requirements be clear and unambiguous. Thus, even if *Sullivan* had definitively construed § 1982 to reach retaliation, that construction would not necessarily carry over to the Title IX context.

D. The Regulation

Jackson also asked the Court to defer to an administrative regulation promulgated by the Department of Education³⁹ that, he said, definitively “interpret[ed] Title IX’s core prohibition on discrimination” to reach retaliation.⁴⁰ In relying on the regulation, Jackson sought to bring himself within the ambit of the Supreme Court’s statement in *Sandoval* that regulations that “authoritatively construe the statute itself” may be enforced through an implied right of action applicable to that statute, because a “Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute to be so enforced as well.”⁴¹ In *Sandoval*, of course, the Court held that Title VI’s disparate-impact regulations do not qualify because they “forbid conduct that § 601 permits,” namely, unintentional discrimination.⁴² By contrast, Jackson asserted, § 100.7(e) does “not extend the protection of Title IX beyond its terms” but, instead, “reflect[s] an ‘interpretation of the terms of Title IX itself.’”⁴³

With respect, Jackson is just wrong. In order to trigger the permissive treatment outlined in *Sandoval*, Jackson and his amici repeatedly described § 100.7(e) as an authoritative “interpretation,” or “construction,” of § 901’s ban on “discrimination.”⁴⁴ But in fact, § 100.7(e) is not, and does not even purport to be, an authoritative interpretation of the term “discrimination.” It is instead merely a prophylactic procedural rule governing the conduct of official administrative investigations. This case, accordingly, does not concern the kind of regulation posited by the Supreme Court during oral argument in *Sandoval*—that is, “an interpretive regulation which [is] not precluded by [the Court’s] case law” in that it does not “say that you don’t have to have intentional discrimination,” but says instead that “this is what intentional discrimination consists of.” That, as we told the Court then, might be “a harder case.”⁴⁵ But it is not *Jackson’s* case.

In relevant part, the regulation Jackson cited provides that—

No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section [901] of the Act or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this part.⁴⁶

Jackson and his amici correctly pointed out to the Court that subsection (e) is titled “Intimidatory or retaliatory acts prohibited.” What they uniformly failed to acknowledge is the larger context in which subsection (e) is situated.

Section 100.7 itself—of which subsection (e) is a part—is titled “Conduct of investigations.” And the context could not be clearer that it is official, administrative investigations by the Department of Education to which the regulation is addressed. Subsection (a) requires Department officials to perform periodic compliance reviews of fund recipients; subsection (b) authorizes individuals to file administrative complaints with Department personnel; subsection (c) briefly describes the sort of investigation the Department should conduct; and subsection (d) addresses how the

Department will resolve investigations. *It is against that backdrop* that subsection (e) prohibits retaliation against individuals who cooperate in official Department investigations. Section 100.7(e), therefore, is at most a valid prophylactic § 902 regulation aimed at “effectuat[ing]” § 901’s discrimination prohibition.⁴⁷ It is *not* an “authoritative interpretation”⁴⁸ of § 901’s ban on “discrimination” to include retaliation—or, for that matter, even a generally applicable prohibition of retaliation.

IV. The Public Policy Angle

Without any meaningful support (we argued, anyway) in the text, structure, or context of Title IX itself—or, as just shown, in the only Title IX regulation that even mentions retaliation—Jackson’s position boiled down to public policy. At bottom, that is, Jackson’s argument was not so much that retaliation *is* discrimination but, instead, that an additional layer of protection against retaliation would facilitate the operation of Title IX’s anti-discrimination provision. Specifically, Jackson contended that Title IX could not achieve its objectives if recipients of federal funds “felt free to retaliate” against those who complain about prohibited discrimination.⁴⁹

There are two very basic problems with Jackson’s policy arguments. First, they are irrelevant to the Supreme Court’s analysis. As *Sandoval* makes clear, the Court has long since “abandoned th[e] understanding”—once the governing rule for implied-right-of-action cases—that “it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose’ expressed by a statute.”⁵⁰ Under what the *Sandoval* Court called the “*ancien regime*,”⁵¹ a federal court could imply a right of action whenever “that remedy [was] necessary or at least helpful to the accomplishment of the statutory purpose” or, put another way, could provide some “effective assistance to achieving the statutory purposes.”⁵² Under the Court’s current, more restrained approach, it does not “matter how desirable [a cause of action] might be as a policy matter, or how compatible with the statute”; all that matters is “[s]tatutory intent.”⁵³

There is another problem. Jackson and his amici framed the case as offering the Court a binary choice: either (i) it had to recognize an implied right of action for retaliation or (ii) it would leave those who complain about discrimination wholly unprotected. Absent the implication of a private remedy for retaliation, the argument went, recipients of federal funds will feel “free to retaliate”⁵⁴ against and “free to punish”⁵⁵ complainants—who, in turn, will be “without recourse.”⁵⁶ Jackson’s message was clear: without a private cause of action, those who complain about discrimination cannot be “safe from reprisal.”⁵⁷

But the choice is not all or nothing. There remains an intermediate remedial option—namely, the option Congress itself envisioned when it enacted Title IX in the first place. Even absent a private right of action under § 901, the Department of Education retains the power under § 902 to proceed against retaliators administratively. As the Solicitor General acknowledged in its brief in support of Jackson, “[e]ven if Section 1681 did not bar retaliation, federal agencies would still

have rulemaking authority to bar that practice.”⁵⁸ Accordingly, federal agencies may target retaliation under Title IX even where private suitors may not.

Pursuant to its administrative-enforcement authority, the Department may “take such remedial action as [it] deems necessary to overcome the effects” of discrimination.⁵⁹ That remedial action may of course include the ultimate sanction of terminating federal funding. But the Department needn’t go so far every time, as Jackson has tried to suggest. Rather, the regulations make clear that it may first attempt to remedy violations “by informal means” and, failing that, by “the suspension” of funds.⁶⁰ The Department itself touts its “flexible approach” to enforcement, including, *e.g.*, “voluntary resolutions,” “agreements with recipients,” “violation letters,” and “negotiations.”⁶¹ And, indeed, the Court has acknowledged that, while wielding the club of funding termination, the Department may leverage individual relief for victims, including reinstatement.⁶² Finally, as Senator Bayh himself explained during the debate on Title IX, the mere threat of terminating a recipient’s federal funding will often convince it to change its ways: “The civil rights experience . . . indicates that the very possibility of such a sanction has worked wonders.”⁶³

V. Congress’ Duty

We concluded our brief in *Jackson* with the following practical point: Over the years, Congress has proven itself fully capable of legislatively overruling interpretations of Title IX with which it disagrees. In *Grove City College v. Bell*,⁶⁴ for instance, the Court held that that Title IX was “program-specific”—*i.e.*, that the receipt of grants by some students at a federally-funded college did not trigger institution-wide coverage under Title IX, but, instead, imposed Title IX obligations only on the financial aid program.⁶⁵ Believing that *Grove City* too narrowly construed Title IX, Congress promptly passed, over a presidential veto, the Civil Rights Restoration Act of 1987,⁶⁶ which reinstated a rule of institution-wide application for Title IX.⁶⁷

Ordinarily, of course, Congress’ demonstrated ability to respond to a particular statute’s judicial interpretation might not cut decisively in either direction; whatever the Court’s decision, the argument would go, Congress can step in to “fix” it. But, here, given the prevailing presumption against implying private rights of action and the clear-statement rule that applies to Title IX as a Spending Clause statute, the more prudent course is for the Court to proceed with caution and to decline to create a cause of action that Congress did not. In staying its hand, we said, the Court would put the ball back where it belongs—in Congress’ court.

- ¹ The oral argument transcript can be found on the U.S. Supreme Court's website at: http://www.supremecourtus.gov/oral_arguments/argument_transcripts/02-1672.pdf.
- ² Brief of the States of Alabama, Delaware, Hawaii, Nevada, Oregon, South Dakota, Tennessee, Utah, and Virginia as Amici Curiae in Support of Respondent at i, *Jackson* (No. 02-1672).
- ³ 441 U.S. 677 (1979).
- ⁴ 532 U.S. 275 (2001).
- ⁵ 501 U.S. 1083 (1991).
- ⁶ *Id.* at 1103.
- ⁷ *Id.*
- ⁸ *Id.*
- ⁹ *See, e.g., Cannon v. Univ. of Chicago*, 441 U.S. 677, 730-31, 743, 746 (1979) (Powell, J., dissenting).
- ¹⁰ 377 U.S. 426 (1964).
- ¹¹ *Va. Bankshares*, 501 U.S. at 1102.
- ¹² *Id.*
- ¹³ *Id.* (citing *Touche Ross & Co. v. Reddington*, 442 U.S. 560, 575 (1979)).
- ¹⁴ *Id.*
- ¹⁵ *Id.*
- ¹⁶ *Alexander v. Sandoval*, 532 U.S. 275, 293 n.8 (2001).
- ¹⁷ *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 20 (1979).
- ¹⁸ *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998).
- ¹⁹ 451 U.S. 1 (1981).
- ²⁰ *Id.* at 17.
- ²¹ *Barnes v. Gorman*, 536 U.S. 181, 187 (2002).
- ²² *Pennhurst*, 451 U.S. at 17.
- ²³ *Gebser*, 524 U.S. at 287 (citation omitted).
- ²⁴ 20 U.S.C. § 1681(a) (2000).
- ²⁵ Brief for the Petitioner at 8, *Jackson* (No. 02-1672).
- ²⁶ *General Motors Corp. v. Tracy*, 519 U.S. 278, 298 (1997).
- ²⁷ *Lenard v. Argento*, 808 F.2d 1242, 1246 (7th Cir. 1987).
- ²⁸ *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 21 (1979).
- ²⁹ *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001) (quoting *Cannon v. Univ. of Chicago*, 441 U.S. 677, 694 (1979)).
- ³⁰ *Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)).
- ³¹ 396 U.S. 229 (1969).
- ³² Brief for the Petitioner at 8, 14, *Jackson* (No. 02-1672).
- ³³ *Id.* at 21.
- ³⁴ *Sullivan*, 396 U.S. at 237 (internal citations omitted).
- ³⁵ *Id.*
- ³⁶ *Id.* at 251 (Harlan, J., dissenting).
- ³⁷ *Id.* at 254.
- ³⁸ *Id.* at 235 (majority opinion).
- ³⁹ *See* 34 C.F.R. § 100.7(e).
- ⁴⁰ Brief for the Petitioner at 9, *Jackson* (No. 02-1672).
- ⁴¹ 532 U.S. 275, 284 (2001).
- ⁴² *Id.* at 285.

⁴³ Brief for the Petitioner at 33, *Jackson* (No. 02-1672) (citation omitted).

⁴⁴ *See generally id.*

⁴⁵ The oral argument transcript can be found on the U.S. Supreme Court website at: http://www.supremecourt.gov/oral_arguments/argument_transcripts/99-1908.pdf.

⁴⁶ 34 C.F.R. § 100.7(e).

⁴⁷ *See Alexander v. Sandoval*, 532 U.S. 275, 281-82 (2001) (assuming validity of § 602 regulations “proscribing” conduct not within the core of § 601).

⁴⁸ *Id.* at 284.

⁴⁹ Brief for the Petitioner at 22, *Jackson* (No. 02-1672).

⁵⁰ *Sandoval*, 532 U.S. at 287 (quoting *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964)).

⁵¹ *Id.*

⁵² *Cannon v. Univ. of Chicago*, 441 U.S. 677, 703, 707 (1979).

⁵³ *Sandoval*, 532 U.S. at 286-87; *accord, e.g.*, *Cent. Bank of Denver, N. A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 188 (1994) (holding that “[p]olicy considerations” are irrelevant except to show result “so bizarre’ that Congress could not have intended it”) (citation omitted); *Thompson v. Thompson*, 484 U.S. 174, 187 (1988) (“[The Court] ‘will not engraft a remedy on a statute, no matter how salutary.’” (quoting *California v. Sierra Club*, 451 U.S. 287, 297 (1981))); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15-16, 23 (1979) (finding that the relevant issue is not “utility” or “desirability of implying private rights of action in order to provide remedies thought to effectuate the purposes of a given statute” but, rather, “whether Congress intended to create the private remedy asserted”).

⁵⁴ Brief for the Petitioner at 22, *Jackson* (No. 02-1672).

⁵⁵ Brief of Amici Curiae New York Lawyers for the Public Interest, the Southern Poverty Law Center, and the Training and Advocacy Center of the National Association of Protection and Advocacy Systems Supporting Petitioner at 7, *Jackson* (No. 02-1672).

⁵⁶ Amicus Curiae Brief of the National Partnership for Women and Families and 31 Other Organizations and Individuals in Support of Petitioner at 16, *Jackson* (No. 02-1672).

⁵⁷ Brief for the Petitioner at 12, *Jackson* (No. 02-1672).

⁵⁸ Brief for the United States as Amicus Curiae Supporting Petitioner at 20 n.3, *Jackson* (No. 02-1672); *see also Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 292 (1998) (holding that agencies may enforce requirements “that effectuate [Title IX’s] non-discrimination mandate, 20 U.S.C. § 1682, even if those requirements do not purport to represent a definition of discrimination under the statute”).

⁵⁹ 34 C.F.R. § 106.3(a).

⁶⁰ *Id.* § 100.8 (incorporated in 34 C.F.R. § 106.71).

⁶¹ OFFICE OF CIVIL RIGHTS, U.S. DEP’T OF EDUC., ANNUAL REPORT TO CONGRESS: FISCAL YEARS 2001 AND 2002 (2003), *available at* www.ed.gov/about/offices/list/ocr/AnnRpt2002.

⁶² *See Gebser*, 524 U.S. at 288-89; *see also* CIVIL RIGHTS DIVISION, U.S. DEP’T OF JUSTICE, TITLE IX LEGAL MANUAL (2001), *available at* <http://www.usdoj.gov/crt/cor/coord/ixlegal.pdf> (“[A]gencies are encouraged to identify and seek the full complement of relief for complainants and identified victims . . . including . . . back pay . . .”).

⁶³ 117 CONG. REC. 30,408.

⁶⁴ 465 U.S. 555 (1984).

⁶⁵ *Id.* at 573-74.

⁶⁶ Pub. L. No. 100-259, 102 Stat. 28 (1988).

⁶⁷ *Cf.* 42 U.S.C. § 2000d-7 (abrogating state immunity for Title IX actions in response to *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985)).