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Did Gebser Cause the Metastasization of Sexual Harassment Under Title IX Ten Years Later

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COMMENTS

DID *GEBSER* CAUSE THE METASTASIZATION OF THE SEXUAL HARASSMENT EPIDEMIC IN EDUCATIONAL INSTITUTIONS? A CRITICAL REVIEW OF SEXUAL HARASSMENT UNDER TITLE IX TEN YEARS LATER

I. INTRODUCTION

Title IX of the Education Amendments of 1972[1] ("Title IX") has two very different faces. The media, on one hand, has cast its spotlight on Title IX's imprint on equal participation among men and women in college athletics. This impact has been so tremendous that the Women's National Basketball Association attributes its creation, and the 1999 World Cup champion United States Women's soccer team ascribes its success, to Title IX.[2] Throughout the 1990s, headlines routinely focused on female student athletes armed with Title IX and lobbying their universities to expand women's sports teams.[3] Subsequently, when financially strapped universities began cutting some non-self-sustaining men's teams, the media shifted focus to the backlash from male student athletes.[4] Media attention reached its pinnacle in 2002 when, amidst great publicity, Secretary of Education Rod Paige created the Commission of Opportunity in Athletics to study

1. 20 U.S.C. §§ 1681–1688 (2000).

2. *See* David S. Cohen, *Limiting* Gebser*: Institutional Liability for Non-Harassment Sex Discrimination Under Title IX*, 39 WAKE FOREST L. REV. 311, 311–12 (2004).

3. *See, e.g.*, Associated Press, *Female Athletes Win Title IX Suit vs. Brown*, ST. LOUIS POST-DISPATCH, Mar. 30, 1995, at 4D; Bob Monahan, *Women Get Boost at UMass Proposal Calls to Add Crew, Water Polo Teams*, BOSTON GLOBE, Dec. 8, 1993, at 98; Gary Reinmuth, *Illinois Joins Ranks of Women's Soccer*, CHI. TRIB., Oct. 7, 1997, at 3.

4. *See, e.g.*, Lori Riley, *Not in the Same Boat in Wake of Title IX, UConn Women Have Advantage Over Men's Crew*, HARTFORD COURANT, May 19, 1998, at C1; Jeffrey Shelman, *UC to Eliminate Three Men's Sports*, CIN. POST, May 6, 1998, at 1A.

methods for strengthening Title IX enforcement and expanding athletic opportunities for college students.[5]

Meanwhile, as college athletics dominated the media's Title IX attention, sexual harassment commanded that of the courts. The Supreme Court of the United States has yet to address substantively athletic equality, relying instead on lower courts to advance this aspect of Title IX jurisprudence. In the area of sexual harassment, however, the Court has spoken three times in the last decade and hundreds of lower court decisions have painted this part of the Title IX landscape. These cases have generally concerned teacher-on-student harassment, but have also included peer-to-peer harassment and even employee-employer harassment.

Gebser v. Lago Vista Independent School District was the first Supreme Court case to address a Title IX action alleging teacher-on-student sexual harassment.[6] The Court articulated a standard of liability for educational institutions faced with allegations of sexual harassment by a teacher.[7] It held that liability under Title IX would not attach to an educational institution unless an appropriate person, defined as an official of the institution with authority to take corrective action, has actual knowledge of the offensive conduct and fails to respond adequately.[8] A second Supreme Court opinion handed down just a year later reiterated the *Gebser* standard for peer-to-peer sexual harassment and added that the educational institution must exercise a threshold degree of control over the harasser and the environment in which the harassment occurs.[9] Then, in 2005, the Supreme Court spoke to retaliation by an educational institution against an individual who had alleged a Title IX violation.[10]

Prior to the actual knowledge standard crafted by the Court in *Gebser*, lower courts had applied as many as seven different institutional standards of liability. These included strict liability, agency principles or negligence, agency principles alone, negli-

5. *See* U.S. Dep't of Educ., Secretary's Commission on Opportunity in Athletics, http://www.ed.gov/about/bdscomm/list/athletics/index.html (last visited Apr. 2, 2008).

6. *See* 524 U.S. 274 (1998).

7. *See id.* at 290.

8. *Id.*

9. *See* Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 645 (1999).

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

gence, intentional discrimination, actual knowledge, and whether a reasonable avenue of complaint was made available.[11] Strict liability is the lowest standard of institutional liability any court has ever applied, while a "reasonable avenue of complaint" is the highest. Under a strict liability standard, once the plaintiff makes the necessary showing that sexual harassment occurred between a coach or teacher and a student, or between two students, liability is automatically imputed to the educational institution.[12] A "reasonable avenue of complaint" standard, on the other hand, shields educational institutions from liability so long as the institution merely provides a reasonable means for victims of sexual harassment to complain and notify the proper officials.[13] Leading up to the *Gebser* decision, most commentators argued for the adoption of a standard based on agency principles.[14]

This comment will evaluate the criticism of *Gebser* in two novel ways, now that ten years have passed since the Supreme Court issued the decision. Part II will provide pertinent background information on Title IX. Part III will identify the problem sexual harassment in educational institutions poses for this country's youth. Part IV will discuss the development of Title IX sexual harassment jurisprudence, including the *Gebser* decision. Part V will address the foundation of the criticism fired at *Gebser*'s adoption of an actual notice and deliberate indifference standard of institutional liability from two fresh perspectives. First, the policy behind agency principals will be contrasted with the realities of public school education. Second, an empirical test will provide statistics to critically evaluate the claims of commentators. Part VI will comment on the ten-year span of cases since *Gebser* and offer a compromise between the solution proffered by commentators and the actual decision in *Gebser*.

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11. *See* Dawn A. Ellison, *Sexual Harassment in Education: A Review of Standards for Institutional Liability Under Title IX*, 75 N.C. L. REV. 2049, 2095–118 (1997).

12. *See id.* at 2095–96 (citing Bolon v. Rolla Pub. Sch., 917 F. Supp. 1423, 1427–28 (E.D. Mo. 1996)).

13. *See id.* at 2116–18 (discussing Pallett v. Palma, 914 F. Supp. 1018 (S.D.N.Y. 1996)).

14. *See, e.g.*, Neera Rellan Stacy, *Seeking a Superior Institutional Liability Standard Under Title IX for Teacher-Student Sexual Harassment*, 71 N.Y.U. L. REV. 1338, 1384 (1996).

II. THE ROOTS OF TITLE IX

Title IX is the only federal avenue through which families of student-victims of sexual harassment may recover against educational institutions.[15] It 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."[16] Title IX was part of the Educational Amendments of 1972 and was aimed at combating discrimination based on sex in educational institutions receiving federal funding.[17] Its framework was drawn from the Civil Rights legislation of the previous decade.[18] While it is not necessary to provide an exhaustive history because other commentators have done so, a short historical summary of Title IX will develop the context for the remaining sections.

In 1970, Representative Edith Green (D-Ore.), Chairwoman of the Special Subcommittee on Education of the House of Representatives, directed a hearing that revealed the prevalence of sexual discrimination against female students in primary, secondary, and post-secondary schools.[19] Because Title IX was initially introduced as a floor amendment,[20] there is little legislative history, such as hearings or reports, to guide the courts in interpret-

15. *See* Meghan E. Cherner-Ranft, *The Empty Promise of Title IX: Why Girls Need Courts to Reconsider Liability Standards and Preemption in School Sexual Harassment Cases*, 97 NW. U. L. REV. 1891, 1893 (2003).

16. 20 U.S.C. § 1681(a) (2000).

17. *See* Kimberly A. Mango, *Students Versus Professors: Combating Sexual Harassment Under Title IX of the Education Amendments of 1972*, 23 CONN. L. REV. 355, 379 (1991).

18. The Civil Rights Act of 1964 included several provisions making discrimination unlawful. *See, e.g.*, 42 U.S.C. § 2000d (2000). The language of Title IX closely resembles the language of Title VI, which was part of the Civil Rights Act of 1964. It reads, "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." *Id.*

19. *See Discrimination Against Women: Hearings on H.R. 16098 Before the Spec. Subcomm. on Education and Labor*, 91st Cong. 14 (1970) (statement of Myra Ruth Harmon, President, National, Federation of Business and Professional Women's Clubs, Inc.); *see also* U.S. Dep't of Educ., *Title IX: A Sea Change in Gender Equity in Education in* TITLE IX: 25 YEARS OF PROGRESS (2007), http://www.ed.gov/pubs/TitleIX/part3.html.

20. *See* Pub. L. No. 92-318, § 901, 86 Stat. 373 (1972); Debora A. Hoehne, Note, *Assessing the Compatibility of Title IX and § 1983: A Post-*Abrams *Framework for Preemption*, 74 FORDHAM L. REV. 3189, 3194 (2006).

ing the scope of the amendment.[21] This void may explain the delay by courts in developing Title IX jurisprudence—its application to college athletic departments, whether sexual harassment falls within its scope, and what standard of liability to apply to educational institutions. In fact, courts have consistently cited this lack of legislative history as introducing uncertainty into efforts to interpret Title IX's scope.[22] For example, in 1984, the Supreme Court in *Grove City College v. Bell* limited Title IX's scope to specific programs or activities that receive financial assistance within an educational institution.[23] The Court's interpretation implied that Title IX could apply to some programs within an educational institution but not to others, such as self-sustaining athletic programs.[24] This interpretation was superseded by statute, however, when Congress passed the Civil Rights Restoration Act in 1988, which made Title IX applicable to all programs and activities within an educational institution receiving federal aid regardless of how the institution dispersed the aid.[25] Congress thus felt that the Court in *Grove City* misinterpreted the scope of the Amendment.

The United States Department of Education's ("DOE") Office for Civil Rights ("OCR") is currently responsible for enforcing the regulations promulgated under Title IX.[26] Specifically, the OCR

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21. *See* Note, *Sex Discrimination and Intercollegiate Athletics: Putting Some Muscle on Title IX*, 88 YALE L.J. 1254, 1255 (1979). Floor amendments are introduced by individuals during consideration of a bill or other measure. U.S. Senate, Floor Amendment, http://www.senate.gov/reference/glossary_term/floor_amendment.htm (last visited Apr. 2, 2008).

22. *See* Grove City College v. Bell, 465 U.S. 555, 586 (1984) (Brennan, J., concurring in part and dissenting in part) (explaining that Title IX's legislative history failed to clarify its intended application), *superseded by statute*, Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (codified at 20 U.S.C. § 1681 (2000)); 118 CONG. REC. 5808 (1972) (statement of Sen. Bayh).

23. *Grove City*, 465 U.S. at 573–75.

24. *See id.* at 573–74.

25. *See* Civil Rights Restoration Act § b.

26. *See* U.S. Dep't of Educ., Office for Civil Rights, About OCR, http://www.ed.gov/about/offices/list/ocr/aboutocr.html (last visited Apr. 2, 2008). Originally, the agency responsible for administering Title IX and promulgating regulations pursuant thereto was the Department of Health, Education and Welfare ("HEW"). It was responsible for issuing the 1975 regulations, which pertained to six general matters and barred sex discrimination in any academic, extracurricular, research, occupational training, or other educational program (preschool to postgraduate) operated by an organization receiving or benefiting from federal aid, see Non Discrimination on the Basis of Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance, 40 Fed. Reg. 24,128 (June 4, 1975) (codified at 45 C.F.R. § 86), as well as the 1979 interpretation, which clarified and interpreted the 1975 regulations, *see* Title IX of the Education Amendments of 1972; a Pol-

has the authority to terminate an educational institution's funding if an OCR investigation reveals a Title IX violation.[27] OCR issued a memorandum in 1981 stating that sexual harassment constituted sex discrimination within the meaning of Title IX.[28] The memorandum defined sexual harassment as consisting of "verbal or physical conduct of a sexual nature, imposed on the basis of sex, by an employee or agent of a recipient, that denies, limits, provides different, or conditions the provision of aid, benefits, services or treatment protected under [T]itle IX."[29] Additionally, covered institutions must have a grievance procedure in place that provides for the expeditious and equitable resolution of sexual harassment complaints.[30] Educational institutions are also prohibited from hiring an employee with a history of discriminatory behavior of which the institutions knew or should have known.[31]

An educational institution can thus be liable under Title IX directly or vicariously. If the institution fails to follow the regulatory guidelines of Title IX, it can be held in direct violation. This would occur, for example, if a university failed to provide a grievance procedure for sexual harassment complaints, or if the university knowingly hired an instructor with a criminal record of sexual harassment. Alternatively, the same university could be held vicariously liable under Title IX if one of its teachers committed sexual harassment when the university had actual knowledge of the conduct and failed to act reasonably. The Title IX regulations did not provide, however, *a standard* of institutional liability.

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icy Interpretation, 44 Fed. Reg. 71,413 (Dec. 11, 1979) (codified at 45 C.F.R. § 86). Subsequently, HEW was divided into the Department of Health and Human Services ("HHS") and the DOE. *See* Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 66 (1979) (codified as amended at 20 U.S.C. §§ 3401–3510 (2000)).

27. *See* 20 U.S.C. § 1682 (2000).

28. *See* Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006, 1015 (5th Cir. 1996) (citing OCR Policy Memorandum from Antonio J. Califa, Dir. of Litig., Enforcement, and Policy Ser., to Regional Civil Rights Dir. (Aug. 31, 1981) (on file with author)).

29. *Id.* (emphasis omitted).

30. *See* 34 C.F.R. § 106.8(b) (2007).

31. *See, e.g.*, Mueller v. Cmty. Consol. Sch. Dist., 678 N.E.2d 660, 663 (Ill. App. Ct. 1997).

III. THE SEXUAL HARASSMENT EPIDEMIC

While the OCR has the power to terminate federal funding for an institution that it finds has violated Title IX, student-victims of sexual harassment have another avenue for addressing Title IX violations. In *Cannon v. University of Chicago*, the Supreme Court held that a student-victim of sexual harassment could sue an educational institution for a violation of Title IX.[32] The Court determined that, although the statute did not explicitly provide a private right of action, one could be inferred from the congressional intent behind the statute.[33] Of course, with little guidance from legislative history, it remains a mystery how the Court was able to perceive Congress's intent to provide a private right of action. Notwithstanding, the Court's decision in *Cannon* bears much of the responsibility for the effort to eradicate sexual harassment from this country's educational institutions under the guise of Title IX.[34]

The Supreme Court's decision in *Gebser* has been criticized, however, as stymieing this effort.[35] Commentators have shown particular concern that the bar has been set too high. They claim that the current standard for liability sharply reduces the odds that courts will hear sexual harassment claims arising in educational institutions.[36] With more and more information surfacing about the prevalence of sexual harassment within our nation's schools, if true, the effect of the *Gebser* decision should prove troubling.

A recent investigation by the Associated Press exemplifies the sexual harassment epidemic facing our nation's schools.[37] It uncovered more than 2500 cases over five years of educators being punished for sexual-harassment related conduct.[38] The most disturbing fact uncovered by the investigation is not the sheer

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32. 441 U.S. 677, 680, 688–89 (1979).

33. *Id.* at 717.

34. *See* Jill S. Vogel, *Between a (Schoolhouse) Rock and a Hard Place: Title IX Peer Harassment Liability After* Davis v. Monroe County Board of Education, 37 HOUS. L. REV. 1525, 1535 (2000) (arguing that *Cannon* laid the foundation for Title IX sexual harassment doctrine).

35. *See infra* notes 154–59 and accompanying text.

36. *See, e.g.*, Cherner-Ranft, *supra* note 15, at 1910.

37. Associated Press, *Sexual Misconduct Plagues U.S. Schools*, Oct. 20, 2007, http://www.msnbc.msn.com/id/21392345/from/ET/ [hereinafter *Misconduct*].

38. *Id.*

prevalence of sexual harassment in schools, but that in more cases than not, it is not the schools ferreting out the illicit conduct, but rather the parents of the victims. For example, in the case of Gary C. Lindsey, a teacher from Oelwein, Iowa, it was not a school principal or government agency that terminated his career.[39] Rather, more than forty years after committing his first known act of sexual harassment—fondling a fifth-grade girl during recess—the persistent parents of one victim finally succeeded in having his license revoked.[40]

No one would argue that Congress has ignored the general problem of crimes against children. The trend over the last several decades signals a definite increase in protective legislation for victims of sex crimes, with many laws bearing the names of the young victims.[41] If the *Gebser* standard has indeed made it more difficult for victims to bring Title IX claims for sexual harassment, then a reasonable person could conclude that the absence of congressional response indicates a shift in policy. Moreover, one might view the new standard as contradicting the Court's previous announcement that Title IX should be given "'a sweep as broad as its language.'"[42] A closer look, however, may reveal the distinction between passing sex-crime legislation and broad enactments affecting teachers and educational institutions.

Sex crimes tend to punish individuals. In states like Texas, for example, convicted sex offenders face twenty-five-year minimum sentences, and child rapists may be sentenced to death.[43] Also, a series of laws passed in the mid-1990s led to federally mandated sex offender registries. In 1994, the Jacob Wetterling Act re-

39. *Id.*

40. *Id.*

41. *See, e.g.*, Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 116, 120 Stat. 587, 595 (codified at 42 U.S.C. § 16916) (LexisNexis 2008) (requiring certain sex offenders to update their whereabouts every three months); Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, Pub. L. No. 103-322, § 170101(a), 108 Stat. 2038, 2038 (1994) (codified at 42 U.S.C. § 14071(a) (2000)) (mandating that each state create a specific program to register sex offenders); Student Right-To-Know and Campus Security Act, Pub L. No. 101-542, § 204, 140 Stat. 2381, 2385–87 (1990) (codified as amended at 20 U.S.C. § 1092(f) (2000)) (requiring institutions of higher education to collect and make public campus crime statistics, including sex offenses).

42. *See* N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 521 (1982) (quoting United States v. Price, 383 U.S. 787, 801 (1966)).

43. Diane Jennings & Darlean Spangenberger, *Crackdown on Sex Offenders*, DALLAS MORNING NEWS, Oct. 21, 2007, at A1, *available at* http://www.dallasnews.com/sharedcontent/dws/news/politics/local/stories/DN-sexoffend_21tex.ART.State.Edition2.42880f4. html.

quired all states to pass legislation creating sex offender registries.[44] In 1996, based on a set of New Jersey laws called Megan's Laws, Congress passed a law requiring all states to publish personal information of known sex offenders.[45] Federal legislation passed just last year further enhanced uniformity in these registries by creating three tiers of sex offenders.[46] The individual sex-crime laws are ubiquitous and highly punitive.

Sex crime laws that touch an entire profession are much less prevalent. Teachers that commit sex crimes are certainly subject to conviction under sex crime laws just like any other sex criminal. Nonetheless, laws such as Title IX that affect education as a field carry different policy implications. In the 1999–2000 school year, fifty eight percent of all schools in the country reported difficulty in finding teachers in one or more fields.[47] While teachers who have not and do not intend to commit sexual harassment should not fear new legislation or court decisions strengthening Title IX enforcement, increased scrutiny and negative publicity on the teaching profession could hinder efforts to recruit new teachers. Therefore, the *Gebser* standard may not mark a shift in policy at all.

Legislators and courts may act tentatively toward uncovering sexual harassment for fear of the negative effects on the teaching profession. It might also be reasonable to believe that schools are similarly tentative toward uncovering sexual harassment. Perhaps this explains why Donald M. Landrum, a high school teacher from Polk County, North Carolina, experienced no resistance when he covered the window on his office door with paper after the school had specially installed the window upon discovering that Landrum was having meetings with female students behind closed doors.[48] Police later uncovered pornography and condoms and alleged he was close to having sexual relations with one

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44. *See* Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act § 170101(a).

45. *See* Megan's Law, Pub. L. No. 104-145, § 2, 110 Stat. 1345, 1345 (1996) (codified as amended at 42 U.S.C. § 14071(e) (2000)).

46. *See* Adam Walsh Child Protection and Safety Act.

47. RICHARD M. INGERSOLL, CENTER FOR THE STUDY OF TEACHING AND POLICY AND THE CONSORTIUM FOR POLICY RESEARCH IN EDUCATION, IS THERE REALLY A TEACHER SHORTAGE? 6 (2003), *available at* http://depts.washington.edu/ctpmail/PDFs/Shortage-RI-09-2003.pdf.

48. *See Misconduct*, *supra* note 37.

of his female students.[49] School apathy toward uncovering sexual harassment might also explain why Rebecca A. Boicelli, a former teacher in Redwood City, California, conceived a child with one of her sixteen-year-old students and was hired shortly thereafter by a school in a neighboring district.[50] Board members explained the situation as a failure to tell the police about the investigation.[51]

School boards and teachers' unions have demonstrated a propensity to combat sexual harassment in schools on their own accord, but their methods are suspect. Despite the case of Rebecca A. Boicelli, school systems have carved inroads into the sexual harassment epidemic through the sharing of information. In 1987, the National Association of State Directors of Teacher Education and Certification (the "Certification Association") created a list of teachers who have had licensing issues, including those resulting from behavioral problems.[52] The list contains more than 37,000 teachers[53] and is available to school administrators.[54] Nonetheless, the list has its flaws.[55] First, it only provides names, birthdates, and social security numbers; no information is provided concerning the details of the misconduct or the cause of the licensing issue.[56] It is up to a hiring school or state agency to conduct an investigation to uncover the specifics of any wrongdoing.[57] Second, the list is unavailable to the public.[58] Third, the list is believed not to include teachers who were disciplined prior to 1984.[59] Therefore, it may be difficult for a student-victim of sexual harassment to utilize the list to satisfy the *Gebser* standard that an educational institution knew of prior alleged wrongdoing by a teacher and should have known about the alleged unlawful conduct.

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49. *Id.*

50. *Id.*

51. *Id.*

52. *See* Jane Elizabeth Zemel, *Dirty Secrets: Flawed System Aids Bad Teachers*, POST-GAZETTE NEWS (Pittsburgh, Pa.), Nov. 1, 1999, *available at* http://www.post-gazette.com/regionstate/19991101abuse1.asp.

53. Robert Tanner, *Patchwork Laws, Inattention Have Allowed Teacher Sexual Misconduct to Flourish*, LAWRENCE J.-WORLD (Lawrence, Kan.), Oct. 23, 2007, http://www2.ljworld.com/news/ 2007/oct/23/patchwork_laws_inattention_allow_teacher_sexual_mi/.

54. *See* Zemel, *supra* note 52.

55. Tanner, *supra* note 53.

56. *Id.*

57. *Id.*

58. *Id.*

59. Zemel, *supra* note 52.

Notwithstanding piecemeal efforts like the Certification Association's list, school boards and teachers' unions have resisted legislative initiatives to strengthen efforts at rooting out sexual harassment in schools.[60] Most of this resistance stems from privacy concerns.[61] An organized group with a unified voice, such as a school board or teachers' union, is more likely to resist successfully laws affecting their constituents than is an individual affected by sex offender registration or sex crime laws. For example, after Chad Maughan, a teacher in Washington State caught twice viewing pornography on school computers, was convicted of raping a fourteen-year-old student on school grounds, the state legislature passed a law clarifying the definition of sexual misconduct and requiring school districts to share information.[62] Leading up to the law's passage, Washington State Senator Don Benton (R-17th) commented, "We had tremendous resistance from the teachers [sic] union when it came to personnel files."[63] Also, Representative Adam Putnam (R-Fla.) proposed legislation to create a national public registry of educators convicted of sexual offenses along with a national hotline for reports of sexual abuse in schools.[64] As of March 2008, the bill has not yet received a hearing.[65]

IV. DEVELOPMENT OF SEXUAL HARASSMENT JURISPRUDENCE

As a result of sparse legislative history and the absence of any pertinent regulations, the evolution of sexual harassment law under Title IX proceeded slowly, and many courts turned to Title VII, which covers sexual harassment in the workplace,[66] and Title VI, which proscribes racial discrimination in schools.[67] Although the support seems logical because Title IX concerns sexual harassment in schools, some courts have disagreed on the role Title VI and Title VII should play in fashioning Title IX jurispru-

60. *See Misconduct*, *supra* note 37.

61. School officials often fear public embarrassment so they strive to avoid publicity of allegations of sexual misconduct by dismissing their teachers quietly. *Id.* The state of Maine even has a law that keeps offending teachers' cases confidential. *Id.*

62. *See* Tanner, *supra* note 53.

63. *Id.*

64. *Id.*

65. *Id.*

66. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–2000e-17 (2000).

67. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d–2000d-7 (2000).

dence.[68] The extent of influence of Title VI and Title VII case law on Title IX claims was confused by the Supreme Court's decision in *Franklin v. Gwinnett County Public Schools*, which for the first time permitted damages for intentional discrimination under Title IX.[69] There, the Court relied on a Title VII case, *Meritor Savings Bank v. Vinson*, in stating "'when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor discriminate[s] on the basis of sex,'" and that "same rule should apply when a teacher sexually harasses and abuses a student."[70]

Although the Court in *Franklin* did not explicitly adopt the standard of employer liability of Title VII, the reference to *Meritor Savings Bank* led lower courts to assume it did.[71] Under Title VII, two different standards of employer liability may apply depending on the type of sexual harassment involved. The first type of sexual harassment claim involves the grant of a promise by a supervisor of some economic or job benefit in exchange for performance of a sexual act by a subordinate.[72] This quid pro quo harassment results in direct liability for the employer when courts have applied agency principles in adjudicating these Title VII claims.[73] In other words, an employer cannot shield itself from Title VII liability for quid pro quo sexual harassment by one of its employees simply by claiming that it lacked knowledge of the unlawful conduct.

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68. *Compare* Hastings v. Hancock, 842 F. Supp. 1315, 1318 (D. Kan. 1993) (applying the agency principles of Title VII to a claim under Title IX), *with* Leija v. Canutillo Indep. Sch. Dist., 887 F. Supp. 947, 950 (W.D. Tex. 1995) (refusing to apply Title VII principles to a Title IX case and instead relying on Title VI principles), *rev'd on other grounds*, 101 F.3d 393 (5th Cir. 1996).

69. *See* 503 U.S. 60, 76 (1992).

70. *Id.* at 75 (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986)).

71. *See* Roberts v. Colo. State Bd. of Agric., 998 F.2d 824, 832 (10th Cir. 1993); Lipsett v. Univ. of P.R., 864 F.2d 881, 896–97 (1st Cir. 1988); Kadiki v. Va. Commonwealth Univ., 892 F. Supp. 746, 749–50 (E.D. Va. 1995) ("[M]any lower courts have explicitly turned to Title VII and the broad body of related jurisprudence for guidance in Title IX cases, at least in the employment discrimination context." (citing Preston v. Virginia, 31 F.3d 203, 207 (4th Cir. 1994))).

72. *See* Patricia H. v. Berkeley Unified Sch. Dist., 830 F. Supp 1288 (N.D. Cal. 1993) (defining quid pro quo sexual harassment); Ellison, *supra* note 11 at 2055.

73. *See* Heather S. Murr, *The Continuing Expansive Pressure To Hold Employers Strictly Liable for Supervisory Sexual Extortion: An Alternative Approach Based on Reasonableness*, 39 U.C. DAVIS L. REV. 529, 533–34 (2006).

The second type of sexual harassment under Title VII is the creation of a hostile environment through harassing conduct.[74] Courts have stated that when harassing conduct "'has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment,'" a hostile environment is created in violation of Title VII.[75] The appropriate standard of liability in such a case is whether the employer had actual or constructive knowledge of the unlawful conduct.[76] If the employer lacked knowledge, no liability will attach. Nonetheless, even if the employer has actual or constructive knowledge, if the employer takes "prompt [and] reasonable" action to remedy the situation, no liability will attach.[77] Whether an action is "'prompt and reasonable' is a question of fact."[78]

A. *Institutional Standards of Liability Leading Up to* Gebser

While the knowledge standard was applied by the majority of courts hearing sexual harassment claims under Title IX, numerous other standards emerged in the wake of the Court's silence in *Franklin*. These standards ranged from strict liability, where an educational institution would be liable for any proven act of sexual harassment, to a standard where an employer could shield itself from liability by merely providing a reasonable avenue for the victim to complain. Although the Supreme Court has now responded to the confusion and cleared the muddied waters by adopting a standard of institutional liability, a review of the myriad of other standards applied during the late 1980s and 1990s leading up to *Gebser* will provide context for later discussion. The most emphasis will be given to the three standards discussed in *Gebser*, two of which the Court considered and dismissed.

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74. *See id.* at 533.

75. *Meritor Sav. Bank*, 477 U.S. at 65 (quoting 29 C.F.R. § 1604.11(a)(3) (1985)).

76. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 768–69 (1998) (Thomas, J., dissenting) (citing Dennis v. County of Fairfax, 55 F.3d 151, 153 (4th Cir. 1995); Davis v. Monsanto Chem. Co., 858 F.2d 345, 349 (6th Cir. 1988)).

77. Lewis v. Zilog, Inc., 908 F. Supp. 931, 957 (N.D. Ga. 1995) (citing Steele v. Offshore Shipbuilding, Inc., 867 F.2d 1311, 1316 (11th Cir. 1989)).

78. Stacy, *supra* note 14, at 1350.

1. Negligence: The "Should Have Known" Standard

Pre-*Gebser*, several courts borrowed from Title VII negligence as a standard of liability for Title IX claims of sexual harassment. For example, the United States Court of Appeals for the First Circuit applied a negligence standard to a case concerning an allegation of hostile environment sexual harassment brought under Title IX.[79] In *Lipsett v. University of Puerto Rico*, the court held that the university could not be liable unless it had actual knowledge, or with the exercise of reasonable care should have known of the unlawful conduct, and failed to take the appropriate steps to halt it.[80] The victim in the case, however, was of mixed employee-student status.[81] Annabelle Lipsett was a resident at the University of Puerto Rico medical school when she was sexually harassed by the chief resident and several male attending physicians.[82] The harassment consisted of many sexually derogatory comments in her presence, an environment featuring nude photos of women in the physician resting facilities, an atmosphere generally adverse to female physicians, and ultimately, the assignment of first-year resident duties to Lipsett, a second-year resident.[83]

In granting Lipsett's appeal of the lower court's grant of summary judgment for the defendants, the First Circuit found that Lipsett could have made a prima facie case of sexual harassment in violation of Title IX.[84] The court looked to Title VII because the case involved an employer and a student—Lipsett was trained by the university but also paid a salary.[85] Relying on a house report and Equal Employment Opportunity Commission ("EEOC") guidelines, the court stated that it had no difficulty extending Title VII standards of liability to the instant case because it concerned treatment by a supervisor in a "mixed employment-training context."[86] The court, however, limited its holding only to

79. The *Lipsett* case also included allegations of quid pro quo sexual harassment, but the court focused the majority of its opinion on addressing the hostile environment claim. *See* Lipsett v. Univ. of P.R., 864 F.2d 881, 902–03 (1st Cir. 1988).

80. *Id.* at 901.

81. *Id.* at 897.

82. *Id.* at 884.

83. *See id.* at 886–94.

84. *Id.* at 914.

85. *Id.* at 897.

86. *Id.*

the context of Title IX sexual harassment claims in the employment context.[87] Nothing but a Title VII claim in disguise, it is not surprising that *Lipsett* relied on Title VII's negligence standard in deciding the case.[88]

The Seventh Circuit, in contrast, was the first federal court to apply the negligence standard of "knew or should have known" to a case of wholly employee-student sexual harassment in *Deborah O. v. Lake Central School Corp.*[89] In an unpublished decision, the court cited the Supreme Court's decision in *Franklin* for the proposition that a school *could* be liable for sexual harassment by one of its teachers,[90] but had to reach for one of its own Title VII cases for the standard of liability.[91] The plaintiff would have to show that the school "knew or should have known about the harassment and yet failed to take appropriate remedial action."[92] It is unclear from the opinion whether the court was drawn to this standard by the Supreme Court's mention of *Meritor* in *Franklin*, but plainly absent is any corroboration for such an adoption in the teacher-student context.

Leading up to the *Gebser* decision, the Second Circuit in 1995 and the Eighth Circuit in 1996 similarly adopted negligence standards pulled straight from Title VII case law.[93] In quick succes-

87. *Id.* The court based this on the fact that both the EEOC guideline entitled "Procedures for Complaints of Employment Discrimination Filed Against Recipients of Federal Financial Assistance," 28 C.F.R. § 42.604 (1987), and the House Report accompanying Title IX, H.R. Rep. No. 92-554, at 2462 (1972), *reprinted in* 1972 U.S.C.C.A.N. 2462, 2512, refer to "*employment-related* claims under Title IX." *Lipsett*, 864 F.2d at 897.

88. The United States District Court for the District of Maryland case of *Ward v. Johns Hopkins Univ.*, 861 F. Supp. 367 (D. Md. 1994), closely mirrors *Lipsett*. There, two employees of Johns Hopkins University claimed that another employee of the university had sexually harassed them. *Id.* at 369. The court determined that the plaintiffs' Title IX claims were best analyzed through Title VII's substantive law considering Title IX's legislative history and the Supreme Court's directive to give Title IX "a sweep as broad as its language." *Id.* at 375 (quoting N. Haven Bd. of Educ. v. Bell, 456 U.S. at 521). Accordingly, the court held that a plaintiff must show that an educational institution had actual or constructive knowledge of the unlawful conduct and failed to take prompt and sufficient action to remedy the situation. *Id.* at 376.

89. *See* No. 94-3804, 1995 WL 431414, at *4 (7th Cir. July 21, 1995).

90. *Id.* (citing Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 75 (1992)).

91. *See id.* (citing Saxton v. Am. Tel. & Tel. Co., 10 F.3d 526, 535 (7th Cir. 1993)).

92. *Id.* at *4 (citing *Saxton*, 10 F.3d at 535).

93. *See* Kinman v. Omaha Pub. Sch. Dist., 94 F.3d 463, 469 (8th Cir. 1996); Murray v. N.Y. Univ. Coll. of Dentistry, 57 F.3d 243, 249–50 (2d Cir. 1995).

sion, district courts from the Eastern District of Virginia and the Northern District of Illinois followed suit.[94]

2. Vicarious Liability: The Doctrine of Respondeat Superior

The first federal court to apply agency principles to a claim under Title IX was the United States District Court for the District of Kansas in *Hastings v. Hancock*.[95] The primary issue for the court in *Hastings* was whether the harasser was aided by the agency relationship with the school district.[96] Although the court noted that the law of the Tenth Circuit did not support a finding of liability based merely on the existence of the employment relationship,[97] it employed a recognized agency theory of liability when it adopted the "aided by the agency relationship" standard.[98] Moreover, the court stated an additional avenue of liability under agency law—if the plaintiff could show that the harasser held a supervisory position, direct liability could be asserted because the educational institution could not defend itself by arguing no actual notice.[99]

The Sixth Circuit subsequently adopted agency principles by concluding that Title VII standards should be used in claims brought under Title IX. In *Doe v. Claiborne County*, the court held that Title VII agency principles applied to a Title IX claim when a physical education teacher entered into a sexual relationship with a fourteen-year-old student of the high school because "[the teacher] was an agent of the School Board."[100] The court understood the Supreme Court in *Franklin* to have implicitly approved the use of Title VII agency standards in Title IX claims, and also looked to Title IX's legislative history as well as statements by the OCR.[101] Although an agency standard of liability is arguably negligence couched in decorative language, it implicates impor-

94. *See* Slaughter v. Waubonsee Cmty. Coll., No. 94-C-2525, 1995 WL 579296, at *5 (N.D. Ill. Sept. 29, 1995); Kadiki v. Va. Commonwealth Univ., 892 F. Supp. 746, 749–51 (E.D. Va. 1995). For a summary of the facts and holdings of these cases, see Ellison, *supra* note 11, at 2101–04.

95. 842 F. Supp. 1315, 1318–20 (D. Kan. 1993).

96. *See id.* at 1319.

97. *Id.*

98. *See id.*; RESTATEMENT (SECOND) OF AGENCY § 219 (1958).

99. *Hastings*, 842 F. Supp. at 1320.

100. *See* 103 F.3d 495, 500, 503, 514–15 (6th Cir. 1996).

101. *Id.* at 514.

tant policy considerations associated with the doctrine of respondeat superior.[102]

3. Actual Notice and Deliberate Indifference

Prior to *Gebser*, the Fifth Circuit was the only federal court of appeals to reject agency principles and other theories of liability in favor of a standard based on an educational institution's actual knowledge of the sexual harassment. The court did so in a series of three cases in which it first rejected agency law and subsequently required notice in order to find liability under Title IX. In the first case in the series, *Canutillo Independent School District v. Leija*, the court held that the school district was not liable after a gym teacher sexually abused two second-grade students because notice was only provided to the students' homeroom teacher who did not alert a school official of the misconduct.[103] The court rejected agency principles in its analysis but failed to adopt any particular standard of liability, concluding that the students' claim would fail under any standard other than one based on agency principles.[104]

Shortly thereafter, however, the Fifth Circuit did adopt a standard of liability that foreshadowed the Supreme Court's announced rule in *Gebser*. In *Rosa H. v. San Elizario Independent School District*, the student-plaintiff alleged a Title IX violation arising from a sexual relationship between herself and a twenty-nine-year-old karate instructor employed by the school.[105] Upon learning of the inappropriate relationship, the school began monitoring closely karate classes at the school, but failed to conduct a full investigation, notify the school's Title IX coordinator, or report the relationship to law enforcement.[106] Unlike the situation in *Leija*, this set of facts forced the court to show its hand. It held that in order for a school district to be liable under Title IX, a school official with the power to take remedial action must have actual knowledge of the abuse and fail to take action to remedy it.[107] In so holding, the court in *Rosa H.* concluded that Title IX

102. *See infra* notes 211–21 and accompanying text.
103. *See* 101 F.3d 393, 402 (5th Cir. 1996).
104. *See id.* at 400.
105. *See* 106 F.3d 648, 650 (5th Cir. 1997).
106. *Id.* at 651.
107. *Id.* at 660.

liability based on agency principles was inherently inconsistent with the Spending Clause.[108] It also noted that neither the text of the amendment nor its regulations supported the use of agency principles.[109] Finally, it concluded that nothing in *Franklin* compelled the court to apply agency principles to Title IX actions.[110]

An important distinction exists, however, between the rule adopted by *Rosa H.* and the current rule created by *Gebser*. The Fifth Circuit in *Rosa H.* concluded its opinion by stating that liability could attach to the school district without actual knowledge of the *particular instance* of abuse alleged by the student-plaintiff.[111] Instead, a student-plaintiff could succeed in asserting a Title IX claim by showing that the educational institution was aware that the harasser "posed a substantial risk of harassing students in general."[112] Although dicta and adjacent to an eschewal of a negligence standard, this statement resembles the holdings of later decisions that have attempted to limit *Gebser* and reintroduce negligence and constructive notice into Title IX.[113]

4. Other Standards of Liability

Several other standards of liability emerged in the period before *Gebser*, but their application was not wide spread. At one extreme, the United States District Court for the Southern District of New York held that a university may escape liability under Title IX for alleged sexual harassment by one of its employees so long as it provides a reasonable procedure through which students can notify an appropriate official.[114] The court held the university not liable because it had a policy against sexual harassment in place and had implemented a complaint procedure of which all students and faculties were aware.[115] While this holding

108. *Id.* at 654 ("As a statute enacted under the Spending Clause, Title IX should not generate liability unless the recipient of federal funds agreed to assume the liability.").

109. *See id.*

110. *Id.*

111. *Id.* at 659.

112. *Id.*

113. *See infra* text accompanying notes 228–47.

114. *See* Pallett v. Palma, 914 F. Supp. 1018, 1024 (S.D.N.Y. 1996), *vacated*, Kracunas v. Iona Coll., 119 F.3d 80 (2d Cir. 1997).

115. *Id.* at 1025. The court lambasted the students' decision to bring the suit:

> That a faculty member on occasion will violate the published policies of an in-

is distinct from most other courts, it does bring into question whether the standard of liability should differ for universities and primary or secondary schools. Commentators have argued that actual notice is an inappropriate standard because minor student-victims of sexual harassment often lack the maturity to understand that the misconduct should be reported or are afraid of the stigmatization that accompanies reporting it.[116] Although the latter may still hold true in some university situations, college students between eighteen and twenty-two years of age unquestionably possess a higher level of understanding of what constitutes sexual harassment than elementary students. The Supreme Court has yet to consider the maturity of the victim in fashioning its Title IX jurisprudence, but it is worth considering how a standard that varies according to the maturity level of the victim would effect a balance between the need to eradicate sexual harassment and protect educational institutions from over-exposure to damages.

At the other extreme, at least one federal court has imposed strict liability on educational institutions for Title IX claims of sexual harassment. The United States District Court for the Eastern District of Missouri in *Bolon v. Rolla Public Schools* stated that any intentional act of discrimination by an employee of a school would be imputed to the school district under the principles of respondeat superior.[117] The court described that standard as strict liability, and offered numerous public policy reasons to support its holding.[118] For example, the court cited this nation's mandatory requirement that children attend school as supporting a rule protecting children in all situations of school employee misconduct.[119] Moreover, the court touched upon an oft-cited weakness in the actual knowledge standard—in theory,

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> stitution and do so clandestinely, as here, is not a basis for students or employees who have eschewed the established procedures for rectifying the wrong done to them, to run instead to the courts, to mulct the charitable funds of a non-profit teaching institution. Those funds could be used better for the instruction of other students.

Id. at 1024. If anything, the court's sharp rebuke supports arguments for different standards of liability for primary or secondary schools and universities or colleges, where, in the latter case, an avenue for complaining may prove more effective in providing relief.

116. *See, e.g.*, Fermeen Fazal, *Is Actual Notice an Actual Remedy? A Critique of* Gebser v. Lago Vista Independent School District, 36 HOUS. L. REV. 1033, 1056 (1999).

117. 917 F. Supp. 1423, 1427 (E.D. Mo. 1996).

118. *Id.* at 1428–29.

119. *See id.* at 1428.

schools could shield themselves from liability by "clos[ing] their eyes to the problem."[120] Still, strict liability for our schools may be holding the publicly funded institutions to too high a standard, even considering the Supreme Court's directive to give Title IX "'a sweep as broad as its language.'"[121]

B. *The* Gebser *Decision and the Adoption of Actual Notice and Deliberate Indifference*

The *Gebser* decision settled discrepancies among the lower courts' application of a standard of liability to educational institutions in Title IX actions, or at least most courts have interpreted it as accomplishing such. Essentially, *Gebser* created a two-part test for determining whether liability for the sexual harassment committed by one of its employees should be imputed to an educational institution. First, an employee with the authority to correct the wrongdoing must have actual notice of it.[122] Second, the authorized employee must demonstrate a deliberate indifference to the wrongdoing.[123]

In *Gebser*, an eighth-grade student was the victim of sexual harassment at the hands of one of Lago Vista high school's teachers, Frank Waldrop, during an after-school book club.[124] After continuing for nearly a year, the unlawful relationship was finally discovered when a police officer witnessed Waldrop and the student having sexual intercourse.[125] The student brought a number of claims under Title IX, § 1983, and state negligence laws.[126] The United States District Court for the Western District of Texas granted summary judgment in favor of the school on all claims, holding that the school lacked actual notice of Waldrop's behavior.[127] The only indication of the behavior was the parents'

120. *Id.* at 1429.

121. *See* N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 521 (1982) (quoting United States v. Price, 383 U.S. 787, 801 (1966)).

122. *See* Gebser v. Lago Ind. Sch. Dist., 524 U.S. 274, 277 (1998); Jeremy Beck, *Entity Liability for Teacher-on-Student Sexual Harassment: Could State Law Offer Greater Protection than Federal Statutes?*, 35 J.L. & EDUC. 141, 143 (2006).

123. *Gebser*, 524 U.S. at 277; Beck, *supra* note 122, at 143.

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

125. *Id.* at 278. Waldrop's teaching license was revoked and Lago Vista terminated his employment after the relationship was discovered. *Id.*

126. *Id.* at 278–79.

127. *Id.* at 279.

complaint about his offensive comments in class, and the district court found this insufficient to create constructive notice.[128] The student appealed only the Title IX claim, but the Fifth Circuit affirmed, holding that strict liability or respondeat superior was "inconsistent with 'the Title IX contract,'" and that there was insufficient evidence to show the school should have known about the unlawful conduct.[129]

On the granting of certiorari by the Supreme Court, the petitioner pushed for the adoption of one of two standards of institutional liability. First, the petitioner argued that the Court should follow the guidance of a 1997 policy statement issued by the OCR, which stated that a school should be found liable when a teacher "is 'aided in carrying out the sexual harassment of students by his or her position of authority with the institution,'"[130] which would certainly include most instances of teacher-on-student sexual harassment. Essentially, this is respondeat superior liability.[131] In the alternative, the petitioner urged the court to adopt a theory of constructive notice, where the school would be liable when its administrators should have known of the unlawful conduct.[132] Both of these theories of liability would result in a broader application of Title IX liability than the actual notice standard applied by the lower courts.

The Supreme Court, however, refused to adopt either of the petitioner's theories of liability. It specifically found that agency principles were not appropriate in determining institutional liability in a Title IX action because, unlike Title VII, Title IX provides no reference to "agent" or definition for "employer."[133] Therefore, Congress did not expressly call for the application of agency principles.[134] In refusing to adopt a constructive notice standard, which is essentially a negligence standard, the Court noted that because the private damage remedy under Title IX

128. *Id.*

129. *Id.* (quoting Doe v. Lago Vista Indep. Sch. Dist., 106 F.3d 1223, 1225 (5th Cir. 1997)).

130. *Id.* at 282 (citing Brief for Petitioners at 36, Gebser v. Lago Indep. Sch. Dist., 524 U.S. 274 (1997) (No. 96-1866) (quoting Office for Civil Rights; Sexual Harassment Policy Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034, 12,039 (Mar. 13, 1997))).

131. *See infra* text accompanying notes 166–72.

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

133. *See id.* at 283.

134. *See id.* at 285.

was judicially crafted, it had significant leeway in interpreting the statute's scope, as long as the purpose of the statute would not be frustrated.[135] The Court thus looked to Congress's likely intention with respect to the scope of Title IX.[136]

Title IX was passed in the era of the civil rights statutes.[137] These statutes expressly provided for private remedies, however, and were limited to injunctive and equitable relief, not the unlimited recovery afforded by strict liability.[138] It was not until 1991 that Congress expressly made damages available under Title VII, and even then it carefully limited them to a maximum amount.[139] The Court in *Gebser* noted that adopting the petitioner's position would allow unlimited recovery when Congress had not spoken on either the right or the remedy and when it had carefully limited the amount of recovery in another context.[140] According to the Court, whereas Title VII focuses on compensating victims for past discrimination, Title IX aims to protect individuals from discrimination.[141] If that is the case, however, it is confusing why the Court extended Title IX beyond injunctive or equitable relief in the first place.

The Court relied on other aspects of Title IX to provide further support for its decision not to base liability on constructive notice or agency principles. It likened the granting of federal funds under Title IX to a contract between the receiving institution and the government.[142] The receiving institution essentially promises not to discriminate in exchange for the receipt of federal funding.[143] The Court doubted that Congress intended for a breach of this "contract" to occur without the actual knowledge of one of the

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135. *Id.* at 284–85.

136. *See id.* at 285–86.

137. *See id.* at 285; *supra* note 18 and accompanying text.

138. *See Gebser*, 524 U.S. at 285–86.

139. *Id.* at 286 (citing 42 U.S.C. § 1981a(b)(3) (1994) (current version at 42 U.S.C. § 1981a(b)(3) (2000)).

140. *Id.*

141. *Id.* at 286–87.

142. *Id.* at 286.

143. *Id.* The conditioning of federal funding on state action is fairly common, and the Supreme Court has declared it constitutional under the Taxing and Spending Clause. *See, e.g.*, South Dakota v. Dole, 483 U.S. 203, 210–11 (1987) (upholding the constitutionality of conditioning federal highway funds on states raising the minimum drinking age to twenty-one). *See generally* U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . . .").

contracting parties.[144] Furthermore, the Court considered the administrative enforcement of Title IX. The OCR cannot instigate an enforcement action against an educational institution without first notifying the "appropriate person or persons of the failure to comply with the requirement and [the agency] has determined that compliance cannot be secured by voluntary means."[145] Also, the OCR should consider whether the receiving institution can bring itself into compliance with Title IX through voluntary means.[146] The Court construes this administrative procedure as resting on the policy that federal funds should not be diverted "from beneficial uses" when institutions are unaware of the sexual harassment and are willing to institute corrective measures.[147] In sum, the Court was extremely wary of creating or extending a judicially implied remedy for Title IX that far exceeded the scope of the express remedy supplied by Congress.

Instead, the Court stated that the target entity of a Title IX action must have actual notice.[148] More specifically, to impute liability to the recipient institution, a person within the institution who possesses the authority to address the wrongdoing and implement corrective measures must have actual notice.[149] The Court limited this requirement to instances that "do not involve official policy of the recipient entity."[150] In a case concerning official policy, it is unclear whether a constructive notice theory of liability or a strict liability approach would apply. Unfortunately, the Court also failed to define what would constitute official policy.

The Court also required that for liability to attach to the institution—even if there is actual notice as the Court defines it—the recipient institution must exhibit deliberate indifference to the unlawful conduct.[151] This standard of deliberate indifference was taken directly from the requirement of deliberate indifference for

144. *Gebser*, 524 U.S. at 287–88.
145. 20 U.S.C. § 1682 (2000).
146. *Id.*
147. *Gebser*, 524 U.S. at 289.
148. *Id.* at 285.
149. *Id.* at 290.
150. *Id.* Circuit courts have leveraged this statement by the Court to limit the application of *Gebser*. *See infra* note 229 and accompanying text.
151. *Gebser*, 524 U.S. at 277.

a § 1983 claim.[152] Moreover, the mere failure to institute an official grievance process for sexual harassment claims, which is required under DOE regulations, would not give rise to liability without more.[153]

V. CRITICISM OF *GEBSER*—IS IT FOUNDED?

Gebser is the Supreme Court's most criticized Title IX case.[154] The gravamen of recent criticism is that *Gebser* and *Davis* represent a sharp turnaround in the Supreme Court's position on the intended scope of Title IX with respect to sexual harassment.[155] The contrast between the prior pronouncement of the Court that the statute should be given a "sweep as broad as its language,"[156] and the limiting of institutional liability by *Gebser* and *Davis*, has not gone unnoticed.[157] Essentially, commentators have accused the Court of gutting Title IX and creating "'an almost insurmountable hurdle for a victim hoping to prove the school liable.'"[158] In other words, if courts continue to require that the terms "actual knowledge" and "deliberate indifference" mean more than a complaint by a sexually abused student to a principal or guidance counselor and mere inaction by the recipient of the knowledge, plaintiffs will be unsuccessful in their Title IX claims.[159]

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152. *Id.* at 291 ("Comparable considerations led to our adoption of a deliberate indifference standard for claims under § 1983 alleging that a municipality's actions in failing to prevent a deprivation of federal rights was the cause of the violation." (citing Bd. of Comm'rs v. Brown, 520 U.S. 397 (1997))).

153. *Id.* at 291–92. The DOE regulations require each educational institution receiving funding to "adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by [Title IX]." 34 C.F.R. § 106.8(b) (2006).

154. *See* Callie R. Owen, *Silence Broken:* Gebser's *New Standard of School Liability for Title IX Sexual Harassment*, 87 KY. L.J. 815, 827, 837–38 (1999).

155. *See, e.g.*, William E. Thro & Brian A. Snow, *The Subtle Implications of* Gebser v. Lago Vista Independent School District, 141 EDUC. L. REP. 409, 436 (2000).

156. *See* N. Haven Bd. Of Educ. v. Bell, 456 U.S. 512, 521 (1982) (quoting United States v. Price, 383 U.S. 787, 801 (1966)).

157. *See* Cherner-Ranft, *supra* note 15, at 1910.

158. *See id.* (quoting Anne D. Byrne, Note, *School Liability Under Title IX for Sexual Abuse of a Student By a Teacher: Why Has the Supreme Court Allowed Schools To Put Their Heads in the Sand?* Gebser v. Lago Vista Independent School District, 188 S. Ct. 1989 (1998), 22 HAMLINE L. REV. 587, 614 (1999)).

159. *See id.* at 1920–21.

A. *What About Alternative Avenues of Relief for Sexual Harassment?*

As many commentators have argued, the *Gebser* standard appears to dampen Title IX's influence on sexual harassment in educational institutions.[160] Student-victims seeking relief may encounter difficulty in satisfying the two-prong test under *Gebser* necessary to hold the institution liable.[161] Little attention, however, has been given to the fact that there is another course of action under Title IX. If the alternative course is successful, then the ill effects of *Gebser* may be exaggerated.

1. The Possibility of Student-Victims Reporting Sexual Harassment to the Office of Civil Rights

Still operating under the Title IX framework, victims could attempt to persuade the OCR to conduct its own investigation and thereby prompt the withholding of federal funds. This course of action, however, is unlikely on two accounts. First, the withholding of federal funds by the DOE would provide no relief to the victim of the sexual harassment.[162] Therefore, student-victims lack pecuniary motivation to pursue this avenue of redress. Second, since Title IX was passed in 1972, the DOE has failed to withhold federal funding from an educational institution on even one occasion.[163] Perhaps the threat of withholding alone prompts educational institutions to address the unlawful conduct. Or, perhaps the OCR wants to avoid depriving schools of funds that ultimately benefit the very students Title IX is designed to protect.[164] Whatever the reason, student-victims of sexual harassment are unlikely to waste time attempting to persuade a governmental

160. *See, e.g.*, *id.* at 1919.

161. *See id.* at 1920.

162. While the threat of withholding funds could prompt the educational institution to make changes to protect future students, that would not compensate the victim for past harm.

163. *See* Julie A. Davies & Lisa M. Bohon, *Re-Imagining Public Enforcement of Title IX*, 2007 B.Y.U. EDUC. & L.J. 25, 41. In *Franklin v. Gwinnet County Public Schools*, the sexually harassed student filed a complaint with the OCR, which in turn found that the district had violated Title IX. 503 U.S. 60, 64 n.3 (1992). The coach resigned, however, and the district commenced a sexual harassment policy. *Id.* The OCR subsequently determined that the district had come into compliance with Title IX, and did not withhold federal monies. *Id.*

164. *See* Davies & Bohon, *supra* note 163, at 41.

agency to take an action that it has failed to take in over twenty-five years. Moreover, although it is an unfair generalization to characterize student-victims as motivated solely by the prospect of monetary relief, it is indisputably a factor in a decision to reveal an embarrassing situation by filing a lawsuit.

2. The Prospect of Student-Victims Seeking Relief Under Common Law

While Title IX is the only federal statute providing redress for student-victims of sexual harassment,[165] plaintiffs have sought redress under common law. Similar to the prospect of reporting allegations of sexual harassment to the OCR, if common law suits prove successful, the results should undermine criticism of *Gebser*. The following discussion of the different avenues of common law relief, however, exemplifies their shortcomings in defeating the sexual harassment epidemic.

a. Common Law Vicarious Liability

Student-victims of sexual harassment have attempted to bring state common law claims of vicarious liability against educational institutions, alleging that the institution is liable under the theory of respondeat superior. In the case of *Medlin v. Bass*, for ex-

165. A student-victim could also bring a § 1983 claim, but the prospect of success is unlikely. Section 1983 provides that liability shall attach only to "[e]very person who, under color of any statute . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983 (2000). An educational institution will rarely be held liable under § 1983 because the statute only applies where an institution adopts a specific policy or custom of sexual harassment. *See* Bd. of the County Comm'rs v. Brown, 520 U.S. 397, 403–04 (1997) (holding that a municipality can only be liable under § 1983 if the plaintiff shows "*deliberate* conduct" on the part of the municipality); Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690–91 (1978) (determining that a local government can only be liable for its own policies and customs, and "cannot be held liable under § 1983 on a *respondeat superior* theory"). Thus, the statute will not provide redress to a student-victim vis-à-vis the educational institution where a coach or teacher has committed sexual harassment with a personal motive. Section 1983 claims may be brought against individuals for violation of a student-victim's equal protection rights. *See generally* Hoehne, *supra* note 20 (discussing a multitude of § 1983 actions against teachers, principals, and schools). With the average teacher making about $47,000 per year, Press Release, Am. Fed'n of Teachers, AFT Salary Survey: Teachers Need 30 Percent Raise (Mar. 29, 2007), *available at* http://www.aft.org/presscenter/releases/2007/032907.htm, however, student victims stand to reap little financial redress from bringing § 1983 claims against teachers who have committed sexual harassment. Moreover, several United States courts of appeal have held that Title IX preempts a § 1983 claim. *See* Hoehne, *supra* note 20, at 3190.

ample, the plaintiff, as guardian ad litem for her minor daughter, brought an action against the defendant, Vann J. Bass, the principal of the victim's high school.[166] Through an amended complaint, the minor plaintiff joined the school board as an additional defendant, alleging that it negligently hired Bass and that because Bass's conduct was within the scope of his employment, liability should be imputed to the board.[167] The court disagreed, however, holding that because the school board had followed through in contacting two of Bass's three references, it had discharged its duty to investigate Bass prior to hiring him and could not reasonably have known of his pedophilic tendencies.[168] The court's holding was not shaken by the fact that another principal had made the school board aware of a rumor that Bass was homosexual.[169]

The court's analysis of whether Bass was acting within the scope of his employment is particularly important because pre-*Gebser* courts and commentators have argued for the adoption of agency principles in Title IX cases.[170] On account of their sexual nature, Bass's acts were held to be "intentional tortious acts designed to carry out an independent purpose," and therefore not within the scope of his employment.[171] The dissent argued that a jury could find the assault to have occurred within Bass's scope of employment because he brought the minor plaintiff into his office to discipline her for truancy—an act clearly within the scope of his employment.[172]

Not all student-victims of sexual harassment have been unsuccessful in imputing liability to educational institutions, however. *Medlin* stands in stark contrast to a 2004 case from the United States District Court for the District of Nevada. In *Doe v. Green*, the victim, a fourteen-year-old female high school student, and her parents brought a respondeat superior action as well as a Title IX claim against Mojave High School for acts committed by

166. 398 S.E.2d 460, 461 (N.C. 1990).

167. *Id.*

168. *Id.* at 461–62.

169. *Id.* at 462.

170. *See id.* at 466 (Martin, J., dissenting); *see also supra* notes 95–102 and accompanying text.

171. *Medlin*, 398 S.E.2d at 464.

172. *Id.* at 465 (Martin, J., dissenting).

Doe's assistant soccer coach, Jeremy Green.[173] Green—also a special education teacher—entered into a sexual relationship with Doe after several months of courting and flirtatious behavior.[174] The court looked to Nevada's lengthy history of common law to find that "'the proper inquiry [was] not whether the wrongful act itself was authorized but whether it was committed in the course of a series of acts of the agent which were authorized by the principal.'"[175] According to the court, because the school board vested authority in Green to direct and discipline students, and to otherwise have substantial and prolonged contact with them, the school district was subject to respondeat superior liability for the acts committed by Green during those times when he should have been engaging in his duties as a coach and instructor.[176]

The stark contrast in these two decisions illustrates the incongruity among lower courts in determining a teacher's scope of employment. Thus, common law respondeat superior liability is not only a poor alternative to Title IX, but forewarns of the inconsistent result should the Supreme Court abrogate *Gebser* and inject agency principles into Title IX.

b. Negligence in Hiring

Another Title IX alternative for student-victims of sexual harassment is to bring an action against an educational institution for negligently hiring a teacher or coach who commits an unlawful sexual act.[177] In some jurisdictions, a school or other educational institution may defeat a claim for negligence in hiring an employee who has sexually harassed a student just by obtaining references and interviewing the applicant. For example, in *Murray v. Research Foundation of State University of New York*, Reginald Wright, an employee of the Foundation, sexually as-

173. 298 F. Supp. 2d 1025, 1028 (D. Nev. 2004). For a discussion of the Title IX claim in *Green*, see *infra* text accompanying notes 244–47.

174. *Green*, 298 F. Supp. 2d at 1028, 1030.

175. *Id.* at 1042 (quoting Nev. Dept. of Human Res. v. Jimenez, 935 P.2d 274, 281 (Nev. 1997), *opinion withdrawn, reh'g dismissed by* Nev. Dept. of Human Res. v. Jimenez, 941 P.2d 969 (Nev. 1997)).

176. *Id.*

177. In order to establish such a claim, a plaintiff must generally show that the institution possessed a duty to exercise reasonable care in hiring, that the institution breached that duty by knowingly hiring an incompetent teacher, and that the hiring of the incompetent teacher proximately caused the student-victim's injury. Beck, *supra* note 122, at 145.

saulted the plaintiff's son in his office over a six-month period.[178] The Foundation responded by showing "that it conducted an extensive interview and obtained written references prior to hiring Wright."[179] The court held that in the absence of any information leading a reasonable person to suspect Wright of a tendency to commit sexual harassment, the Foundation was under no duty to investigate Wright beyond interviewing and obtaining references.[180] Likewise, because the Foundation "neither knew nor had reason to know that Wright posed a risk to children," it was not negligent in retaining him.[181]

In other jurisdictions, however, legislative enactments place higher duties on educational institutions in hiring employees.[182] In *Mueller v. Community Consolidated School District 54*, for example, the minor-plaintiff was the student manager of a junior high school wrestling team.[183] After riding with the wrestling coach, Anthony Robinson, back to Robinson's house under the guise of working on a personnel roster, the minor-plaintiff was sexually assaulted.[184] She then sued the school district, alleging violation of a state statute requiring criminal background checks.[185] The school district argued, among other things, that the statute was designed to protect the public at large and imposed no "duty to protect individual members of the public absent a special relationship."[186] The court rejected that argument, holding that the statute was intended to protect a specific class of individuals—school children—and not the public at large.[187] Because the statute applied, the minor-plaintiff did not need to show that the school district was aware of the danger that Anthony Robin-

178. *See* 723 N.Y.S.2d 805, 806–07 (N.Y. App. Div. 2001).

179. *Id.* at 807.

180. *Id.*

181. *Id.*

182. Illinois, for example, has enacted a statute that requires schools to initiate a criminal background check prior to hiring an employee. *See* 105 ILL. COMP. STAT. 5/21-1 (2006). This essentially creates negligence per se liability when a school hires a teacher or coach without initiating the background check and the teacher or coach sexually harasses a student.

183. 678 N.E.2d 660, 662 (Ill. App. Ct. 1997).

184. *Id.*

185. *Id.* at 663.

186. *Id.* at 667 (citing Arizzi v. City of Chicago, 559 N.E.2d 68, 70 (Ill. App. Ct. 1990)).

187. *Id.*

son posed to its students in order to advance her per se negligence claim.[188]

The law for negligent hiring of teachers is plagued by the same uniformity concerns as common law respondeat superior. As *Mueller* illustrates, local legislatures are willing to impose a higher standard of background checks for teachers, which—coupled with federalism concerns—arguably reinforces the position that local governments are better situated to pass education related legislation. That argument is beyond the scope of this comment, however, and a uniform solution will undoubtedly have the most immediate effect on the sexual harassment epidemic.

c. Duty of Care to Supervise Employee Interactions with Students

While the common law standard to exercise reasonable care in retaining and supervising an employee closely follows the standard for hiring an employee, schools may be under a higher duty to supervise employee conduct. Two cases from New York—*Murray* from 2001 and *Doe v. Whitney* from 2004—illustrate this distinction. In *Murray*, the court analogized the duty of a school to supervise to the supervision a reasonably prudent parent would exercise.[189] The court held that a reasonably prudent parent would know whether the student-victim was enrolled in Wright's program and whether he was permitted to meet with Wright behind closed doors.[190]

In *Doe v. Whitney*, the defendant Ty Whitney, a first-grade teacher at Goshen Christian School, allegedly sexually abused a student from the fall of 1997 until the spring of 2000.[191] When the student-plaintiff brought an action against the school for negligently hiring Whitney, the court dismissed the claim because Whitney was recommended by his previous employer and a school board member, and the entire school board interviewed him.[192] With respect to the claim for negligent supervision, however, the

188. *Id.*

189. *See* 723 N.Y.S.2d 805, 807 (N.Y. App. Div. 2001).

190. *Id.* In *Murray*, the student-victim was not actually enrolled in the program, but Wright nonetheless supplied him with passes so that he could be excused from class to meet with Wright in his office behind a closed door. *Id.*

191. *See* 779 N.Y.S.2d 570, 572 (N.Y. App. Div. 2004).

192. *Id.*

court emphasized that "'a school owes its students such care as a parent of ordinary prudence would observe in comparable circumstances.'"[193] Because Whitney kept the student-plaintiff in the classroom during recess and removed him from his classes on a weekly basis without the consent of his teachers and without explanation, there was a triable issue of fact on the negligent supervision claim.[194] Therefore, the school's failure to notice the student-plaintiff's absence from recess and unexplained removal from classes could constitute breaches of the school's duty of supervision.[195]

Obviously, for very young children, this standard could act as an effective combatant against sexual harassment. To continue the analogy, as the need for parental supervision lessens with the age of a child, so would the effectiveness of such a standard with the age of a student-victim. A high school or college would have little supervisory responsibilities over employees teaching students in their mid-to-late teens and early twenties.

d. Educational Institution Sovereign Immunity

Unfortunately for student-victims of sexual harassment or abuse, even if they make the requisite showing for a negligence claim, an educational institution can still escape liability by asserting the doctrine of sovereign immunity.[196] As a general rule, acts considered to be governmental are shielded from liability whereas acts that are ministerial are not.[197] The determination of

193. *Id.* (quoting Doe v. Orange-Ulster Bd. Of Coop. Educ. Servs., 771 N.Y.S.2d 389, 390 (N.Y. App. Div. 2004)).

194. *Id.*

195. *Id.*

196. States, and their institutions, such as public schools, have sovereign immunity under the Eleventh Amendment. *See* U.S. CONST. amend. XI; R. Craig Wood & Mark D. Chestnutt, *Violence in U.S. Schools: The Problems and Some Responses*, 97 EDUC. L. REP. 619, 631 (1995). States can waive this immunity, however, and the Supreme Court has held that Congress intended to abrogate the states' sovereign immunity for Title IX claims when their public educational institutions accept federal funds. *See* Seminole Tribe v. Florida, 517 U.S. 44, 55–56 (1996) (discussing Congress's power to abrogate state sovereign immunity). With respect to common law claims against public schools for sexual harassment, state courts do not agree whether a public school waives its sovereign immunity when one of its employees commits sexual harassment.

197. This distinction derives from Chief Justice John Marshall's opinion in *Marbury v. Madison*. *See* 5 U.S. (1 Cranch) 137, 149–50 (1803) ("It is not consistent with the policy of our political institutions, or the manners of the citizens of the United States, that any ministerial officer having public duties to perform, should be above the compulsion of law in exercise of those duties.").

which category an educational institution's act falls into has varied from jurisdiction to jurisdiction.[198]

Governmental action generally involves discretionary policy-making and planning activities which are immune from tort liability. If the action is ministerial or operational, however, and the common law or a statute creates a duty of care, then a school board or other agency can be held liable.[199] For example, a Florida court of appeals overturned a lower court's finding that the Florida Department of Education had sovereign immunity when it reinstated a teacher a few years after revoking his license for impregnating a minor student.[200] The court distinguished governmental from ministerial actions and held that the agency could be held liable because its negligence arose from "the manner in which [its] policies were implemented."[201] If anything, the prospect of educational institutions escaping liability for teacher-on-student sexual harassment underscores the importance of an effective Title IX remedy.

There are numerous barriers to invoking institutional liability under common law; for educational institutions in particular, they can prove insurmountable. From common law respondeat superior liability to negligence in hiring or supervision, lack of uniformity makes the common law a poor alternative to Title IX. Moreover, even if a student-victim successfully proves a sexual harassment claim, educational institutions can still argue for sovereign immunity. Up to this part of the analysis, commentators appear correct in asserting that *Gebser* has undercut the only viable remedy for student-victims of sexual harassment.

B. *Is Respondeat Superior Really the Answer?*

One of the more prominent attacks on *Gebser* has focused on the Court's rejection of vicarious liability for educational institutions.[202] In fact, many commentators urged the Court to adopt agency principles in crafting the standard of liability well before

198. *See* Wood & Chestnutt, *supra* note 196, at 631.
199. *See id.*
200. *See* Ingram v. Wylie, 875 So. 2d 680, 681–82 (Fla. Dist. Ct. App. 2004).
201. *Id.* at 682.
202. *See* Cohen, *supra* note 2, at 352–57.

the *Gebser* decision.[203] Those commentators surveyed the various standards employed by lower courts and argued that agency principles would best effectuate Title IX's scope and congressional intent.[204]

To a certain extent, commentators accurately predicted the outcome and rationale the Court adopted in *Gebser*. For example, one commentator noted the absence of the word "agent" or "employer" in the statutory language of Title IX, which contrasts with the express language of Title VII.[205] The majority opinion in *Gebser* made an identical observation in justifying its dismissal of the application of agency principles to Title IX.[206] Commentators have rebuked this reasoning, however, with three arguments. First, the relationship between a teacher and a student resembles the relationship between an agent and a third-party.[207] Second, Title VII, to which courts have consistently applied agency principles, concerns the same subject matter, only in the employment context.[208] Third, commentators interpreted the *Franklin* decision as authorizing the application of respondeat superior in the Title IX context.[209] All of these points, however, appear to be rooted in the underlying argument that applying any standard other than one based on agency principles would both render Title IX ineffective in fulfilling Congress's intent to provide relief to student-victims of sexual harassment and ignore the Supreme Court's directive to give the amendment a "broad sweep."[210]

In pushing for the adoption of agency principles in Title IX analyses, however, commentators and the Court in *Gebser* failed to consider the modern theory and policy basis for vicarious liability in the educational context. The modern theory behind respondeat superior liability is that the employer is in a better position to assume the risk of liability than either the employee or the in-

203. *See, e.g.*, Stacy, *supra* note 14, at 1367.

204. *See generally* Ellison, *supra* note 11; Stacy, *supra* note 14.

205. *See* Stacy, *supra* note 14, at 1367.

206. *See* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 283 (1998).

207. Stacy, *supra* note 14, at 1367–68.

208. *See id.* at 1368.

209. *See id.* at 1369–70. In its opinion, the Court in *Franklin* alluded to *Meritor*, a Title VII case that invoked the use of agency principles in analyzing the liability of an employer. *See* Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 75 (1992) (citing Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986)).

210. *See* N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 521 (1982) (quoting United States v. Price, 383 U.S. 787, 801 (1966)).

jured plaintiff.[211] The employer can better absorb the cost of liability by distributing it to its customers through higher prices.[212] Moreover, the employer is well-equiped to understand the risks of liability and has access to lower insurance rates than the injured plaintiff or employee.[213] Therefore, vicarious liability makes economic sense because risk and liability are allotted to the party best able to mitigate them.[214]

Accordingly, the question that should be posed in determining whether vicarious liability should apply to Title IX is: are educational institutions as well-suited to assume the risk of respondeat superior liability as private employers? Unfortunately, courts and commentators have generally skipped this level of analysis and vaulted directly into questions of which type of respondeat superior liability should apply—apparent authority or the agency relationship's role in aiding sexual harassment,[215]and whether the sexual harassment occurred within the employee's scope of employment.[216]

The economic situation of educational institutions that receive federal funding is vastly different from that of a private corporation. Universities may be able to raise tuition to cover the cost of liability that may result from sexual harassment suits,[217] but primary and secondary schools lack fiscal control.[218] Most public

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211. *See* WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 69, at 459 (4th ed. 1971).

212. *See, e.g.*, Laura L. Hirschfeld, *Legal Drugs? Not Without Legal Reform: The Impact of Drug Legalization on Employers Under Current Theories of Enterprise Liability*, 7 CORNELL J.L. & PUB. POL'Y 757, 794–95 (1998).

213. *See* Christopher E. Krueger, Note, Mary M. v. City of Los Angeles*: Should a City Be Held Liable Under Respondeat Superior For a Rape by a Police Officer*?, 28 U.S.F. L. REV. 419, 424 (1994).

214. *See* Alan O. Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 HARV. L. REV. 563, 565 (1988).

215. *See, e.g.*, Stacy, *supra* note 14, at 1371.

216. *See supra* notes 165–76 and accompanying text.

217. Nearly all universities across the country have raised tuition in recent years, often significantly. *See* Dennis Cauchon, *Grants More than Offset Soaring University Tuition*, USA TODAY, June 27, 2004, at 4A, *available at* http://www.usatoday.com/news/nation/2004-06-27-demystifying-tuition_x.htm.

218. Local property taxes constitute the largest source of funding for public schools in most jurisdictions. Stewart E. Sterk & Mitchell L. Engler, *Property Tax Reassessment: Who Needs It?*, 81 NOTRE DAME L. REV. 1037, 1037 (2006); *see also* U.S. Dep't of Educ., 10 Facts About K-12 Education Funding, http://www.ed.gov./about/overview/fed/10facts/index.html (last visited Apr. 2, 2008) ("In the 2004–05 school year, 83 cents out of every dollar spent on education is estimated to come from the state and local levels."). While public

educational institutions also operate on very strict budgets, and do not have the deep pockets of many corporations. Therefore, it is questionable whether schools are able to bear the risk of liability in the same way a corporation can.

The prospect of obtaining insurance coverage presents a particularly difficult issue for educational institutions, and ironically, the *Gebser* decision has all but eliminated the option of Title IX insurance coverage. Under a standard of liability based on agency principles, courts could conceivably rule that a general liability insurance policy covers monetary damages awarded under a Title IX claim because the school did not necessarily commit an intentional tort.[219] This possibility, although perhaps unlikely, was nonetheless squelched by *Gebser*, because the standard for institutional liability under Title IX now requires that the educational institution act with deliberate indifference.[220] A court would almost certainly consider an act of deliberate indifference to be an intentional act, which is uninsurable in the marketplace.[221]

Consequently, the inability of educational institutions to bear the risk of liability arising from Title IX claims distinguishes them from private corporations. This fact undermines the argument that agency principles belong in the Title IX equation. It is surprising that the Court in *Gebser* did not respond to the school district's arguments by pointing out the incongruity between the theory of respondeat superior and the financial position of school districts. In fact, from a deterrence standpoint, the potential impact of monetary damages on educational institutions' strained budgets should motivate them to institute higher levels of supervision for teachers, coaches, and other employees. Perhaps the *Gebser* decision illustrated the Court's unwillingness to consider deterrence a sufficient reason to adopt agency principles in Title IX liability.

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schools could petition local government to raise taxes and allocate further funding, no general decision-making authority with regard to funding rests with the school boards.

219. Though its decision was subsequently reversed, the United States District Court for the Western District of Texas actually found that an insurance contract covered damages arising from a Title IX claim. *See* Canutillo Indep. Sch. Dist. v. Nat'l Union Fire Ins. Co., 900 F. Supp. 844, 850 (W.D. Tex. 1995), *rev'd*, 99 F.3d 695 (5th Cir. 1996).

220. *See* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 277 (1998).

221. Nearly all employment-related insurance policies exclude intentional or willful conduct, and courts have upheld these exclusions. *See* Richard L. Suter, *Insurance Coverage of Discrimination, Sexual Harassment and Other Employment-Related Claims*, 11 ME. B.J. 82, 86 (1996).

C. *An Empirical Test*

Because so many variables exist, it may be difficult to test the accuracy of assertions by commentators that plaintiffs' chances of bringing successful Title IX claims will suffer in the wake of *Gebser*. Nonetheless, what follows is an attempt to construct an empirical test to gauge whether an obstacle has arisen to Title IX claims in the nearly ten years since the *Gebser* decision. The chosen test statistic is the grant or denial of motions for summary judgment or dismissal on the pleadings by educational institutions on Title IX sexual harassment claims. If *Gebser* truly marked a shift in Title IX jurisprudence, it seems logical that the main tools for filtering unfounded claims—grant on summary judgment or dismissal on the pleadings—would expose such a shift.

For the survey to be manageable, only cases heard in federal court were examined. Two time periods were selected: cases coming before the court on a motion for summary judgment or dismissal on the pleadings between 1996 and 1997—the two years preceding *Gebser*—and cases between 2006 and 2007—a two-year time frame nearly ten years after *Gebser*. Only cases concerning teacher-student, coach-student, or peer-to-peer sexual harassment were taken into account.[222] Moreover, during the 2006–2007 time period, only cases that mentioned the *Gebser* decision were included in the survey to ensure that the court analyzed the motion according to the test for institutional liability pronounced by the Court in *Gebser*.

For the purposes of this survey, the commentators who have criticized the *Gebser* decision were assumed to be correct. In other words, it is assumed that the *Gebser* decision has resulted in a

222. Westlaw's online database of "all-federal" cases was searched in order to provide the cases for the survey. For the 1996–1997 time period, the following search terms were entered into the Terms and Connectors search box: "Title /2 IX /s sexual /2 harassment & da(aft 1995 & bef 1998)." For the 2006–2007 time period, the following search terms were entered into the Terms and Connectors search box: "Title /2 IX & sexual /2 harassment & Gebser & da(aft 2005 & bef 2008)." A handful of cases from the two time periods included cases of employer-employee sexual harassment under Title IX, but these cases were excluded from the survey. What remains are cases of peer-to-peer or teacher-student sexual harassment. Cases that were decided on the pleadings or on summary judgment were decided under the *Gebser* standard. Any case decided for another reason was not included unless the court espoused its opinion on whether the case would have survived based on the *Gebser* standard alone.

higher standard of liability—actual knowledge and deliberate indifference—and consequently, courts should, in theory, grant more motions for summary judgment and motions to dismiss based on the pleadings. Therefore, the null hypothesis for the survey is that there will be significantly more grants of summary judgment and motions to dismiss from the 2006–2007 time period than the 1996–1997 time period because courts in the later time period will be applying a higher standard of institutional liability. The results are summarized and discussed below:

Motion for Summary Judgment/Motion to Dismiss Title IX Claim by Educational Institution	Granted by District Court	Denied by District Court	Percentage of Motions Granted
1997–1998 (Pre-*Gebser*)	10	15	40.0%
2006–2007 (Post-*Gebser*)	15	14	51.7%

There were a similar number of cases that came before the United States district courts during the two time periods that fit the survey's criteria. Twenty-five cases of Title IX claims for sexual harassment against students were heard on motions for summary judgment or motions to dismiss based on the pleadings between 1996 and 1997 and twenty-nine between 2006 and 2007. In the former time period—prior to the Supreme Court's adoption of the actual notice and deliberate indifference standard—federal district courts granted ten of twenty-five motions for summary judgment or motions to dismiss on the pleadings by educational institutions.[223] That equates to a judgment in favor of the moving

223. For the court decisions during the 1996–1997 time period granting the educational institutions' motions for summary judgment or dismissal on the pleadings, see Doe v. Berkeley County Sch. Dist., 989 F. Supp. 768 (D.S.C. 1997); Piwonka v. Tidehaven Indep. Sch. Dist., 961 F. Supp. 169 (S.D. Tex. 1997); Marsh v. Dallas Indep. Sch. Dist., No. 3:94-CV-2295-R, 1997 WL 118416 (N.D. Tex. Mar. 10, 1997); Haley v. Va. Commonwealth Univ., 948 F. Supp. 573 (E.D. Va. 1996); Brooks v. Tulane Univ., No. CIV. A. 96-443, 1996 WL 709424 (E.D. La. Dec. 10, 1996); Gonzalez v. Kahan, No. CV88-922, 1996 WL 705320 (E.D.N.Y. Nov. 25, 1996); Doe v. Lance, No. 3:95-CV-736RM, 1996 WL 663159 (N.D. Ind.

educational institution 40.0% of the time. After *Gebser*, however, between 2006 and 2007, of twenty-nine cases involving claims of sexual harassment under the color of Title IX, federal district courts granted judgment in favor of the moving educational institution fifteen times, or 51.7% of the time.[224]

Oct. 30, 1996); Wright v. Mason City Cmty. Sch. Dist., 940 F. Supp. 1412 (N.D. Iowa 1996); Linson v. Trustees of Univ. of Pa., No. Civ. A. No. 95-3681, 1996 WL 479532 (E.D. Pa. Aug. 21, 1996); Pallet v. Palma, 914 F. Supp. 1018 (S.D.N.Y. 1996), *vacated*, Kracunas v. Iona Coll., 119 F.3d 80 (2d Cir. 1997).

For the court decisions during the 1996–1997 time period denying the educational institutions' motions for summary judgment or dismissal on the pleadings, see Miles v. N.Y. Univ., 979 F. Supp. 248 (S.D.N.Y. 1997); Doe v. Oyster River Coop. Sch. Dist., 992 F. Supp. 467 (D.N.H. 1997); Lawrence v. Cent. Conn. State Univ., No. 3:96-CV-1492, 1997 WL 527356 (D. Conn. Aug. 19, 1997); Doe v. Londonderry Sch. Dist., 970 F. Supp. 64 (D.N.H. 1997); Seneway v. Canon McMillan Sch. Dist., 969 F. Supp. 325 (W.D. Pa. 1997); Nicole M. v. Martinez Unified Sch. Dist., 964 F. Supp 1369 (N.D. Cal. 1997); Collier v. William Penn Sch. Dist., 956 F. Supp. 1209 (E.D. Pa. 1997), *rev'd*, 191 F.3d 444 (3d Cir. 1999); Doe v. Covington County Sch. Bd., 969 F. Supp. 1264 (M.D. Ala. 1997); Donovan v. Mount Ida Coll., No. CIV. A. 96-CV-10289RGS, 1997 WL 259522 (D. Mass. Jan. 3, 1997); Stilly v. Univ. of Pittsburgh Sys. of Higher Educ., 968 F. Supp. 252 (W.D. Pa. 1996); Bruneau v. S. Kortright Cent. Sch. Dist., 935 F. Supp. 162 (N.D.N.Y. 1996), *aff'd*, 163 F.3d 749 (2d Cir. 1998); Doe v. Petaluma City Sch. Dist., 949 F. Supp. 1415 (N.D. Cal. 1996); Nelson v. Almont Cmty. Sch., 931 F. Supp. 1345 (E.D. Mich. 1996); Burrow v. Postville Cmty. Sch. Dist., 929 F. Supp. 1193 (N.D. Iowa 1996); Bolon v. Rolla Pub. Sch., 917 F. Supp. 1423 (E.D. Mo. 1996).

224. For the court decisions during the 2006–2007 time period granting the educational institutions' motions for summary judgment or dismissal on the pleadings, see Patterson v. Hudson Area Sch., No. 05-74439, 2007 WL 4201137 (E.D. Mich. Nov. 28, 2007); Alegria v. Texas, No. G-06-0212, 2007 WL 3256586 (S.D. Tex. Nov. 2, 2007); Hansen v. Bd. of Trs. for Hamilton Se. Sch. Corp., No. 1:05-cv-670-LJM-WTL, 2007 WL 3091580 (S.D. Ind. Oct. 19, 2007); Herndon v. Coll. of the Mainland, No. G-06-286, 2007 WL 2142087 (S.D. Tex. July 25, 2007); Johnson v. Clovis Unified Sch. Dist., No. 1:04-CV-6719 AWIDLB, 2007 WL 1456062 (E.D. Cal. May 17, 2007); Ross v. Corp. of Mercer Univ., 506 F. Supp. 2d 1325 (M.D. Ga. 2007); Peer v. Porterfield, No. 1:05-cv-769, 2006 WL 389263 (W.D. Mich. Jan. 8, 2007); Hunter v. Barnstable Sch. Comm., 456 F. Supp. 2d 255 (D. Mass. 2006); Doe v. Ohio State Univ. Bd. of Regents, No. 2:04CV0307, 2006 WL 2813190 (S.D. Ohio Sept. 28, 2006); Peck v. W. Aurora Sch. Dist., No. 06-C-1153, 2006 WL 2579678 (N.D. Ill. Aug. 30, 2006); Mattingly v. Univ. of Louisville, No. 3:05CV-393-H, 2006 WL 2178032 (W.D. Ky. July 28, 2006); Bailey v. Orange County Sch. Bd., No. 6:04-cv-1751-0rl-22KRS, 2006 WL 2092267 (M.D. Fla. July 26, 2006), *aff'd*, 222 Fed. App'x. 932 (11th Cir. 2007); Doe v. Huddleston, No. 03-1107, 2006 WL 1582455 (C.D. Ill. June 6, 2006); Cox v. Univ. of Ark., No. 4:05CV0001254-WRW, 2006 WL 1185380 (E.D. Ark. May 3, 2006), *rev'd on other grounds*, Cox v. Sugg, 484 F.3d 1062 (8th Cir. 2007); Chivers v. Cent. Noble Cmty. Sch., 423 F. Supp. 2d 835 (N.D. Ind. 2006).

For the court decisions during the 2006–2007 time period denying the educational institutions' motions for summary judgment or dismissal on the pleadings, see Doe v. Autauga County Bd. of Educ., No. 2:04-cv-1155-WKW (WO), 2007 WL 3287347 (M.D. Ala. Nov. 5, 2007); Aquilar v. Corral, No. CIV. S-07-1601 LKK/KJM, 2007 WL 2947557 (E.D. Cal. Oct. 9, 2007); Chancellor v. Pottsgrove Sch. Dist., 501 F. Supp. 2d 695 (E.D. Pa. 2007); Doe v. Norwalk Cmty. Coll., No. 3:04-cv-1976 (JCH), 2007 WL 2066496 (D. Conn. July 16, 2007); Britney B. v. Martinez, 494 F. Supp. 2d 534 (W.D. Tex. 2007); A.G. v. Autauga County Bd. of Educ., 506 F. Supp. 2d 927 (M.D. Ala. 2007); Frechel-Rodriguez v. P.R. Dep't of Educ.,

For commentators alleging that *Gebser* "severely limit[ed] the options available to student-victims of sexual harassment,"[225] the data does not appear to support the null hypothesis that federal district courts should grant more motions for summary judgment and dismissal post-*Gebser*. While the percentage of motions granted is about ten percent higher post-*Gebser*, that change is small and possibly statistically insignificant when the number of court cases surveyed is considered.[226] If the impact of *Gebser* had followed many commentators' predictions, the number of lower courts granting motions for summary judgment and dismissal should have changed dramatically during the two time periods. The results of the survey do not, however, support the projected impact. This does not mean that the *Gebser* decision had no impact on the chances of a student-victim of sexual harassment of recovering from an educational institution receiving federal funds.[227] That type of conclusion cannot be drawn from results of

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No. 06-1095 (JAF), 2007 WL 1411760 (D.P.R. May 9, 2007); Bruning v. Carol Cmty. Sch. Dist., 486 F. Supp. 2d 892 (N.D. Iowa 2007); Michelle M. v. Dunsmuir Joint Union Sch. Dist., No. 2:04-cv-2411-MCE-PAN, 2006 WL 2927485 (E.D. Cal. Oct. 12, 2006); Doe v. Derby Bd. of Educ., 451 F. Supp. 2d 438 (D. Conn. 2006); Annamaria M. v. Napa Valley Unified Sch. Dist., No. C 03-0101 VRW, 2006 WL 1525733 (N.D. Cal. May 30, 2006); Doe v. Erskine Coll., No. Civ. A. 8:04-23001RBH, 2006 WL 1473853 (D.S.C. May, 25, 2006); Doe v. Alameda Unified Sch. Dist., No. C 04-02672 CRB, 2006 WL 734348 (N.D. Cal. Mar. 20, 2006); Zamora v. N. Salem Cent. Sch. Dist., 414 F. Supp. 2d 418 (S.D.N.Y. 2006).

225. Kristen L. Safier, Comment, *A Request for Congressional Action: Deconstructing the Supreme Court's (In)Activism in* Gebser v. Lago Vista Independent School District, 118 S. Ct. 1989 (1998) *and* Davis v. Monroe County Board of Education, 119 S. Ct. 1661 (1999), 68 U. CIN. L. REV. 1309, 1328 (2000).

226. Using a Binomial Proportions test, the likelihood that there is no statistical significance between the proportion 10|25 and 15|29, representing the number of motions for dismissal or summary judgment for moving educational institution during the 1996–1997 and 2006–2007 periods, respectively, is 38.9%. Using a Chi-square test for equality of distributions, the likelihood that there is no statistical significance between the two proportions rises to 55.4%. Thus, the difference between the two sets of data is small and possibly statistically insignificant.

227. There are numerous reasons why the survey does not conclusively indicate that the *Gebser* decision has had no negative impact on the success of student-plaintiffs' Title IX claims. First, the number of motions for dismissal and summary judgment that are granted or denied may not accurately reflect the effect of the *Gebser* decision. The survey does not indicate the reason for grant or denial. It is possible that, for example, more frivolous cases have been brought in the latter time period than the former, thereby skewing the results. Moreover, the survey is not necessarily representative of the "average" decision of lower courts. In other words, the two sample periods could be skewed toward courts that are more or less likely to grant these types of motions than the "average" federal district court in the United States, where the "average" court represents the median on a distribution of courts around a mean on a scale of likelihood to grant these motions. Also, some courts were imposing a higher standard—discriminatory intent—such as the United States District Court for the Eastern District of Louisiana. *See* Linson v. Trs. of Univ. of Pa., No. CIV. A. 95-3681, 1996 WL 637810, at *3 (E.D. Pa. Nov. 4, 1996). Again, because

the survey. Rather, the conclusion should be narrow—only that the results do not support the conclusion that the standard of liability developed under *Gebser* has significantly affected the number of motions granted between the two time periods.

VI. THE NATURAL SHIFT TO BROADER INTERPRETATIONS OF NOTICE—CONSTRUCTIVE NOTICE IN SUBSTANCE AND THE LIMITING OF *GEBSER*

Now, almost ten years after *Gebser*, the lower courts have had time to digest the adoption of the actual notice and deliberate indifference standard. While the expectation that student-victims would encounter significant difficulties in surviving the courts' gatekeeping role has not occurred, a counter-trend may have emerged. Some courts appear to be effectively drifting back toward a standard based on constructive notice instead of actual notice.[228] Per the Court's direction, the term "constructive notice" has not been specifically used after *Gebser*, but lower courts have been finding actual notice under facts resembling prior cases where constructive notice existed. Additionally, some courts have limited *Gebser* by interpreting the Supreme Court's decision to apply only to cases where the offending school employee's behavior was not a foreseeable result of the school's policy.[229]

One example of a possible and recent drift away from the *Gebser* standard surfaced in *Williams v. Board of Regents of the University System of Georgia*.[230] There, a female college student was sexually assaulted by several student athletes from different Georgia sports teams.[231] The Eleventh Circuit first stated that "preexisting knowledge of [the offender]'s past sexual misconduct . . . [is] relevant when determining whether [the plaintiff] alleged facts sufficient to survive the defendants' motion to dismiss her Title IX complaint."[232] Evidently, the student-athletes who committed the sexual assault had a history of sexual misconduct and

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the survey does not indicate the reason underlying the grant of denial of the motions, caution should be taken in drawing conclusions.

228. *See infra* notes 230–47 and accompanying text.

229. *See, e.g.*, Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170, 1177 (10th Cir. 2007).

230. 477 F.3d 1282 (11th Cir. 2007).

231. *Id.* at 1288.

232. *Id.* at 1293.

the coaches that recruited them were aware of this behavior.[233] While high level school officials were made aware of the particular incident on the university campus,[234] the court's willingness to include this preexisting knowledge into its determination of Title IX institutional liability cuts against the eschewal of constructive notice and negligence standards in *Gebser* and *Davis*.[235] Specifically, it directly conflicts with *Gebser*'s instruction that a plaintiff must show an appropriate person had "actual knowledge of discrimination *in the recipient's programs*."[236]

One of the more highly publicized cases in the Title IX arena in recent years, *Simpson v. University of Colorado Boulder* illustrates the willingness of United States courts of appeal to limit *Gebser*.[237] In *Simpson*, several female University of Colorado students were sexually assaulted by high-school football recruits who were on a recruiting tour hosted by members of the football team and a female student ambassador at the campus.[238] The Tenth Circuit noted the variety of sources of information indicating that a sexual assault was possible, if not likely, to occur on these recruiting visits if they were inadequately supervised.[239] Because the Title IX complaint was that the university sanctioned, and even funded, a program "that, without proper control, would encourage young men to engage in opprobrious acts," the court held that the notice standard of *Gebser* and *Davis* did not apply.[240] It based this distinction on the Court's remarks in *Gebser*: "The Court said that the requirements it imposed applied to 'cases like this one that do not involve official policy of the [school district].'"[241] This tact by the Tenth Circuit diverts significantly from the course chartered by *Gebser* because the actual policy of the University of Colorado Boulder was not one of sexual harassment, but one that created an environment in which sexual harassment

233. *Id.* at 1289–90.

234. *Id.*

235. *But see* Escue v. N. Okla. Coll., 450 F.3d 1146, 1153–54 (10th Cir. 2006) (reasoning that knowledge of past instances of misconduct "'were too dissimilar, too infrequent, and/or too distant in time' to provide the school with actual knowledge of sexual harassment").

236. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290 (1998) (emphasis added).

237. *See* 500 F.3d 1170, 1177 (10th Cir. 2007).

238. *Id.* at 1173.

239. *Id.* at 1182–83.

240. *Id.* at 1177.

241. *Id.* (quoting *Gebser*, 524 U.S. at 290).

was likely to occur.[242] This standard sounds in negligence. One could conclude that the Court in *Simpson* merely reasoned that the university *should have known* of the sexual harassment because it was a foreseeable result of the recruiting program, but that the court simply used different language to announce its holding.

Doe v. Green, a case discussed earlier,[243] validates that the Tenth Circuit is not alone in distinguishing *Gebser* and drifting back toward a standard based on constructive notice. Analyzing the Title IX claim, the court in *Green* acknowledged that "'actual notice' is required under *Gebser*."[244] In a peculiar turn, however, the court then held that "'the actual notice standard is met when an appropriate official has actual knowledge of a substantial risk of abuse to students based on prior complaints by *other* students.'"[245] The Court in *Gebser* indicated that "complaint[s] from parents of other students charging only that [the teacher] had made inappropriate comments during class . . . was plainly insufficient" to create actual knowledge.[246] While it is unclear how *Gebser* would have decided a case where there were complaints by other students of separate conduct amounting to sexual harassment, *Green* assumed it would have found actual notice in such a case.[247]

VII. CONCLUSION

The current consensus is that Title IX has more bark than bite, especially after the Supreme Court raised the standard of institutional liability in *Gebser*. Although this conclusion makes sense in theory, there is a lack of empirical evidence showing that courts are more inclined to rule in favor of educational institutions post-*Gebser*. Perhaps this is because courts are aware of the sexual harassment epidemic plaguing our nation's schools and universities. Even if commentators are wrong about *Gebser*'s direct impact on the viability of Title IX claims by student-victims, the

242. *See id.*

243. *See supra* notes 173–76 and accompanying text.

244. Doe v. Green, 298 F. Supp. 2d 1025, 1032 (D. Nev. 2004).

245. *Id.* at 1033 (quoting Johnson v. Galen Health Inst., Inc., 267 F. Supp. 2d 679, 688 (W.D. Ky. 2003)) (emphasis added).

246. *Gebser*, 524 U.S. at 291.

247. *See Green*, 298 F. Supp. 2d at 1033.

continued prevalence of sexual harassment in our nation's schools makes the debate over whether the Court's decision negatively impacted Title IX claims wholly irrelevant. The debate should center instead on how to root out sexual harassment.

Arguably the strongest point made by commentators criticizing the *Gebser* standard is that educational institutions may attempt to avoid learning of sexual harassment in their schools—and therefore avoid Title IX liability. This may be a valid point, and the cases of teachers who have been accused, convicted, or held liable for sexual misconduct, yet continued to teach in other districts, may support this view, although it is difficult to measure. Moreover, student-victims of sexual harassment may be less prone to report misconduct than adults because the student may lack maturity, misunderstand the conduct, or fear stigmatization by peers.[248]

A middle ground between this criticism and the drawback to moving to a vicarious liability standard would permit liability for negligence by reintroducing the concept of constructive notice. A constructive notice standard would accomplish a similar objective in the education context as in the employment context,[249] but without placing unreasonable demands on educational institutions like the doctrine of respondeat superior. It would push educational institutions to improve monitoring and prevention systems and negate whatever tendency student-victims of sexual harassment have in reporting the conduct.

One important question remains, however: How will change in the legal standard be effected? One possible solution would be for the media to turn its powerful spotlight to sexual harassment just as it has to equality in sports. Still, the Supreme Court has yet to contribute to the jurisprudence of Title IX's other half even in the face of intense media exposure. Moreover, ten years is barely a tick of the second hand on the Supreme Court's clock. It is unlikely the Court would revisit such a recent decision as *Gebser*. A second possible solution is for local governments to legislate in the area, but a uniform solution would have a more significant impact. After the courts and local governments, only one option

248. Stacy, *supra* note 14, at 1359.

249. *See* Note, *Notice in Hostile Environment Discrimination Law*, 112 HARV. L. REV. 1977, 1982–86 (1999) (explaining the constructive notice standard in the employment context).

remains. If the federal government is truly shouldering responsibility for improving education, as evidenced by federal education funding and blanket legislation such as No Child Left Behind,[250] then the charge for curing this repugnant disease afflicting our nation's schools rests with Congress. A recent study by the DOE showed that 6.7% of children *report* being victims of physical, sexual abuse in schools.[251] Title IX was passed over thirty-five years ago when no such data existed. Perhaps it is time for a congressional revisit.

Justin F. Paget

250. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended at 20 U.S.C. §§ 6301–7941 (Supp. V 2005)).

251. *See* CHAROL SHAKESHAFT, U.S. DEP'T OF EDUC., EDUCATOR SEXUAL MISCONDUCT: A SYNTHESIS OF EXISTING LITERATURE 20 (2004).