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Cover Page Footnote

J.D. Candidate, 2007, Fordham University School of Law. I would like to thank Professors Tracy Higgins and Danielle Citron for their excellent guidance, and Professor Shiela Foster for her invaluable insight. I would also like to thank my parents, John and Margherita Hoehne, my husband, Jeffrey Feldman, my sister, Francesca Hoehne, and my in-laws, Beth and Sidney Feldman, for their love and support.

ASSESSING THE COMPATIBILITY OF TITLE IX AND § 1983: A POST-*ABRAMS* FRAMEWORK FOR PREEMPTION

*Debora A. Hoehne**

INTRODUCTION

Sexual harassment of students by fellow students and by the teachers entrusted with their education is a pervasive national problem.[1] In more egregious cases, students, fearing confrontation and reprisal, may respond to such harassment by transferring schools and by seeking legal recourse.[2] Although victims of sexual harassment can file a civil suit to remedy their harassment, their legal recourse may be limited. The *Sea Clammers* doctrine of statutory preemption curtails the potential claims by students who experience sexual harassment.[3]

Consider the story of Nicole Delgado, a music student at Western Illinois University, who was subjected to the verbal and physical advances of her voice teacher, James Stegall.[4] Although Ms. Delgado told another teacher

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1. *See* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 292 (1998) ("The number of reported cases involving sexual harassment of students in schools confirms that harassment unfortunately is an all too common aspect of the educational experience."); National Women's Law Center, Sexual Harassment, http://www.titleix.info/content.jsp?content_KEY=190&t=sexual_harassment.dwt (last visited Mar. 5, 2006). According to the National Women's Law Center ("NWLC"), eighty percent of students will be subject to unwelcome sexual behavior during their educational experience, with twenty-five percent subject to continuing harassment. *Id.*; *see* Am. Ass'n of Univ. Women, Drawing the Line: Sexual Harassment on Campus 14 (2005) (stating that two-thirds of college students report being sexually harassed); Am. Ass'n of Univ. Women, Harassment-Free Hallways: How to Stop Sexual Harassment in School 9 (2004), *available at* http://www.aauw.org/ef/harass/pdf/completeguide.pdf (stating that "four out of five [eighth-through eleventh-grade public school] students . . . said they had experienced sexual harassment at some point during their school lives, with one-third reporting they experienced it often" and that adverse effects included avoiding school, cutting classes, lack of attention, and diminished class participation).

2. *See, e.g.*, Bruneau v. S. Kortright Cent. Sch. Dist., 163 F.3d 749 (2d Cir. 1998).

3. *See infra* Part I.B.2.

4. *See* Delgado v. Stegall, 367 F.3d 668, 670 (7th Cir. 2004) (holding that Title IX claims foreclosed § 1983 claims against a state university that lacked actual knowledge of a

and a counselor about the harassment, neither educator reported the conduct to the University's administration.[5] Despite evidence that Stegall had made advances to at least four other female students during his tenure at Western Illinois, only one student filed a complaint against him in the ten years before Stegall's harassment of Ms. Delgado.[6] Based on this history, the University's administration claimed it had no actual notice of Stegall's harassment of Ms. Delgado.[7]

Ms. Delgado, after transferring to another college, filed suit against Western Illinois University and Stegall under Title IX of the Education Amendments Act of 1972[8] and 42 U.S.C. § 1983.[9] The United States courts of appeals currently disagree on how Ms. Delgado's claims should proceed. Some courts would hold that her claim against Stegall under § 1983 is preempted by her Title IX claim. Other courts would allow her to pursue both claims.[10] The U.S. Supreme Court has had occasion to review the disagreement but has not spoken directly to the issue.[11]

What does this mean for plaintiffs? First, Title IX's preemption of relief under § 1983 can undermine the efforts of students like Nicole Delgado to obtain relief and bring about change. Unlike under § 1983, plaintiffs pursuing Title IX claims must show "actual knowledge" and "deliberate indifference" on the part of institutions before such institutions can be held liable.[12] By contrast, § 1983 generally requires plaintiffs to show supervisory officials' gross negligence.[13]

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teacher's misconduct but did not foreclose § 1983 claim against a teacher for sexual harassment).

5. *Id.*

6. *Id.* at 670-71.

7. *Id.* at 671.

8. 20 U.S.C. § 1681 (2000).

9. 42 U.S.C. § 1983 (2000). Section 1983 plaintiffs can assert their federal constitutional and most federal statutory rights, excluding rights protected by 42 U.S.C. § 1981 and statutes that either provide no private right of action or that provide their own comprehensive remedies. *See* 1 Martin A. Schwartz, Section 1983 Litigation § 1.05, at 1-25 (4th ed. 2005); *infra* Part I.B.

10. The U.S. Court of Appeals for the Seventh Circuit allowed Ms. Delgado to proceed with her § 1983 claim against Stegall in his individual capacity but preempted her claims against Western Illinois officials under § 1983. *Delgado*, 367 F.3d at 674-75; *see also infra* Part II.B.2.

11. *See* Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n, 377 F.3d 504 (6th Cir. 2004), *vacated*, 125 S. Ct. 1973 (2005) (mem.); *see also infra* Part II.B.5.

12. *See* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290 (1998) (holding that students could not obtain money damages from school districts for their teachers' sexually harassing or abusive conduct unless the students showed that an "appropriate person" with actual knowledge of the harassment and with the ability to take corrective action was deliberately indifferent to that knowledge).

13. *See* Harold S. Lewis, Jr. & Elizabeth J. Norman, Civil Rights Law and Practice 98 (2d ed. 2004) (stating that in cases involving certain constitutional violations, like deprivations of due process, plaintiffs must show defendant's recklessness or gross negligence); *see also* Daniels v. Williams, 474 U.S. 327, 334 n.3 (1986) (holding that a deputy sheriff's negligence in leaving a pillow on a stairway and causing an inmate unintended injury did not deprive the inmate of his liberty interest to be free from bodily injury "without due process of law" within the meaning of the Fourteenth Amendment's Due

Unless defendant Stegall was known as a serial harasser,[14] Western Illinois would not have had actual knowledge of the harassment sufficient to satisfy the first prong of the Supreme Court standard for institutional liability under Title IX.[15] To satisfy the deliberate indifference requirement, defendant Stegall's harassment would need to be notorious such that university officials knew about the risk he posed and recklessly failed to prevent his harassment of Ms. Delgado.[16]

Second, preemption would limit the potential defendants in lawsuits like Nicole Delgado's. The Supreme Court noted in *Davis v. Monroe County Board of Education*[17] that Title IX suits can only be brought against institutions, not individuals.[18] Section 1983 suits, on the other hand, can be brought against individual state actors.[19] Defendant Stegall indeed was a

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Process Clause). This standard varies somewhat among courts. *See, e.g.*, Flores v. Morgan Hill Unified Sch. Dist., 324 F.3d 1130, 1135 (9th Cir. 2003) (stating that where an equal protection violation was asserted, the court "agree[d] with . . . other circuits that have considered similar issues that the plaintiffs must show either that the defendants intentionally discriminated or acted with deliberate indifference"); Lipsett v. Univ. of P.R., 864 F.2d 881, 914 (1st Cir. 1988) (requiring a showing of "gross negligence amounting to deliberate indifference" to establish § 1983 liability for an equal protection violation).

14. *See Delgado*, 367 F.3d at 672. The *Delgado* court points out that the U.S. Supreme Court requires knowledge of "acts of sexual harassment" rather than specific acts directed at the plaintiff. *Id.* (citing Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 641 (1999)).

15. *See Gebser*, 524 U.S. at 290.

16. *Delgado*, 367 F.3d at 671. Judge Richard Posner notes that "[d]eliberate indifference means shutting one's eyes to a risk one knows about but would prefer to ignore." *Id.* This corresponds to "recklessness" which is the "equivalent of intentionality." *Id.*; *see supra* note 12 and accompanying text.

17. 526 U.S. 629 (1999) (finding that student-on-student sexual harassment may constitute discrimination prohibited by Title IX where the funding recipient's deliberate indifference to severe and offensive harassment deprives a student of meaningful access to education and where the recipient has control over both the harasser and the circumstances in which the harassment occurs).

18. *Id.* at 640-41 ("The Government's enforcement power may only be exercised against the funding recipient . . . .).

19. A defendant in a § 1983 action acts under color of state law where he or she "ha[s] exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" West v. Atkins, 487 U.S. 42, 49 (1988) (citation omitted). State officials who cause a deprivation of a federal right can be sued for damages in their personal capacity, subject to a qualified immunity defense. *See* Hafer v. Melo, 502 U.S. 21, 25, 31 (1991). To overcome a state actor's qualified immunity defense, a plaintiff must show that the state actor knew or reasonably should have known that he or she was violating a plaintiff's clearly established constitutional or statutory rights. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (holding that in a § 1983 suit for damages based upon their unconstitutional official acts, government officials performing "discretionary functions" within the scope of their authority enjoy qualified immunity "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known"); *see also* Anderson v. Creighton, 483 U.S. 635 (1987) (easing standards and procedures for defending on the ground of qualified immunity). In *Delgado*, Western Illinois may have been insulated from suit in federal court under § 1983 on sovereign immunity grounds. *See* Loeffler v. Univ. of Ill. at Chi., 36 F. Supp. 2d 1058, 1058 (N.D. Ill. 1999) (mem.); *see also* U.S. Const. amend. XI. Sovereign immunity extends to state agents and agencies that are "arm[s] of the state." Regents of the Univ. of Cal. v. Doe, 519 U.S. 425, 430-31 (1997). "[N]onconsenting States may not be sued by private individuals in federal court." Bd. of Trustees of Univ. of Ala. v. Garrett, 531

state actor who "used his position to discriminate against her on the basis of her sex, in violation of her federally protected rights to equal protection of the laws."[20] Ms. Delgado, however, could not prove that the conduct of her teacher, defendant Stegall, amounted to a policy or practice by her school that would allow her to recover from Western Illinois under Title IX.[21] Ms. Delgado's only recourse was to sue defendant Stegall in his individual capacity under § 1983. If Title IX preempts such suits, Ms. Delgado would be left without a remedy for Stegall's sexual harassment.[22] Such a result is unjust and contravenes Congress's intent in adopting Title IX.

This Note examines whether plaintiffs who experience sex discrimination in the education context can concurrently assert claims under Title IX and § 1983. Part I of this Note describes Title IX and § 1983. It discusses ways in which the Supreme Court has curtailed civil rights litigation: its retrenchment in the area of rights of action under § 1983 and its holdings on preemption of § 1983 relief. In particular, the discussion of preemption law[23] highlights *City of Rancho Palos Verdes, California v. Abrams*,[24] the Court's most recent clarification of when federal statutes preempt claims under § 1983.[25]

Part II briefly introduces the disagreement among the federal courts of appeals as to whether Title IX should preempt relief under § 1983. In addition, Part II explains the circuit courts' arguments for and against Title IX preemption of § 1983 actions. This part also explores how the *Abrams* opinion, written by Justice Antonin Scalia, and the concurrences, written by

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U.S. 356, 363 (2001). For a discussion of sovereign immunity, the Fourteenth Amendment, and Title IX, see Melanie Hochberg, Note, *Protecting Students Against Peer Sexual Harassment: Congress's Constitutional Powers to Pass Title IX*, 74 N.Y.U. L. Rev. 235 (1999) (arguing that Congress enacted Title IX pursuant to both its Spending Clause and Fourteenth Amendment powers). However, municipalities and their officials and employees may be liable under § 1983 for deprivations of rights guaranteed under federal law. *See* Monell v. Dep't of Soc. Servs. of N.Y., 436 U.S. 658, 691 (1978) (holding that there is no respondeat superior liability under § 1983). The term "municipality" is generally thought to include school districts and boards. *See* David Jacks Achtenberg, *Taking History Seriously: Municipal Liability Under 42 U.S.C. § 1983 and the Debate over Respondeat Superior*, 73 Fordham L. Rev. 2183, 2186 n.11 (2005). Claimants who allege that a local educational institution, or its supervisory officials acting in their official capacity, violated the Federal Constitution must show that an official policy or practice, such as a failure to act that would amount to an official policy of inaction, was the "moving force" behind the claimant's injury. Bd. of County Comm'rs of Bryan County v. Brown, 520 U.S. 397, 404 (1997). Other sources of municipal liability include custom-based liability, a failure to train or supervise theory, and a hiring-based theory of liability. *See* Achtenberg, *supra*, at 2188-89. See *Williams ex rel. Hart v. Paint Valley Local School District*, 400 F.3d 360 (6th Cir. 2005), for sample jury instructions in a suit involving claims brought under Title IX and § 1983.

20. *Delgado*, 367 F.3d at 673.

21. *Id.* at 674.

22. *Id.* at 674-75.

23. *See infra* Part I.B.2.

24. 125 S. Ct. 1453 (2005).

25. *See infra* notes 123-43. *Abrams* held that by creating the specific and very circumscribed remedies contained in the Telecommunications Act of 1996 ("TCA"), Congress intended to supplant a § 1983 remedy. 125 S. Ct. at 1463.

Justices Stephen G. Breyer and John Paul Stevens, support each side of the circuit split.

Part III concludes that *Abrams* leads to preemption of § 1983 actions for statutory and possibly also constitutional claims against institutions. *Abrams* does not support preemption of constitutional claims against individuals, the approach adopted by the U.S. Court of Appeals for the Seventh Circuit. However, in light of the dispute among circuits concerning the preemption of relief under § 1983 and the heightened liability standards under Title IX, many sexual harassment and sex discrimination plaintiffs are left without a meaningful remedy. Thus, Part III argues that amendment of Title IX will best solve this statutory interpretation problem and restore Title IX's compatibility with § 1983 in sex discrimination suits.

I. BACKGROUND

This part describes the background and scope of Title IX and then provides an overview of § 1983 and two issues surrounding civil rights litigation under § 1983: rights of action enforceable under § 1983 and preemption.

A. *Overview of Title IX*

Title IX of the Education Act Amendments of 1972 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."[26] The enforcement section of Title IX authorizes all federal aid-awarding agencies to promulgate regulations that ensure recipient institutions comply with Title IX.[27] So long as some of an institution's funding emanates from a federal source, that institution must abide by Title IX.[28] Institutions that discriminate on the basis of sex risk losing their federal funds.[29]

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26. 20 U.S.C. § 1681(a) (2000). There are eight exceptions to this coverage. *See id.* § 1681(a)(2)-(9). One commentator argues that these "exceptions codif[ied] Congress' belief that gender-based distinctions, unlike racial distinctions, are desirable and appropriate in certain circumstances." Allison Herren Lee, *Title IX, Equal Protection, and the Richter Scale: Will VMI's Vibrations Topple Single-Sex Education*, 7 Tex J. Women & L. 37, 68 (1997).

27. *See* 20 U.S.C. § 1682.

28. *Id.*; *see* Bradford C. Mank, *Are Anti-Retaliation Regulations in Title VI or Title IX Enforceable in a Private Right of Action: Does* Sandoval *or* Sullivan *Control This Question?*, 35 Seton Hall L. Rev. 47, 60 (2004) (noting that Title IX "applies to virtually all public and private educational institutions, and includes all institutional operations such as academic programs or athletics").

29. 20 U.S.C. § 1682. In practice, no institution has had its federal funding terminated for noncompliance with Title IX. *See* Linda Jean Carpenter & R. Vivian Acosta, Title IX 24 (2005).

1. Title IX's Legislative History

Congress enacted Title IX at a time when issues concerning sex discrimination gained national recognition.[30] In enacting Title IX, Congress sought to encourage equal treatment of the sexes in education.[31] The solution Congress designed to discourage sex discrimination was to eliminate funding for educational institutions that support discriminatory practices.[32] The floor debate comments of Senator Birch Bayh[33] and Representative Patsy Mink[34] reflected these goals.[35] Representative Mink stated that "'[m]illions of women pay taxes into the Federal treasury and . . . resent that these funds should be used for the support of institutions [that] den[y] equal access'"[36] to women, while Senator Bayh commented that "'[Title IX] is a strong and comprehensive measure which . . . is needed . . . to provide women with solid legal protection as they seek education and training for later careers.'"[37]

Senator Bayh first introduced Title IX as a floor amendment in 1971, but this 1971 version of Title IX was defeated and reintroduced in 1972.[38] Congress rejected an alternate proposal that would have erected a more general ban against the distribution of federal monies to educational institutions engaging in discrimination on the basis of sex in favor of the current version of Title IX, which created a civil right to be free from sex discrimination.[39]

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30. Carpenter & Acosta, *supra* note 29, at 3.

31. *See* Cannon v. Univ. of Chi., 441 U.S. 677, 704 n.36 (1979) (quoting 118 Cong. Rec. 5802, 5806-07 (1972) (comment of Sen. Bayh)). Title IX was patterned after Title VI, which prohibits all recipients of federal funding from discriminating on the basis of race, color, or national origin. *See* Civil Rights Act of 1964 Title VI § 601, 42 U.S.C. § 2000(d) (2000). Title IX was intended to fill in a "perceived gap created by Title VI and Title VII," which prohibits employers from discriminating on the basis of sex and other protected classifications because "neither law prohibited sex discrimination in the academic environment." David S. Cohen, *Limiting* Gebser*: Institutional Liability for Non-Harassment Sex Discrimination Under Title IX*, 39 Wake Forest L. Rev. 311, 317-18 (2004) (arguing that the *Gebser* standard of actual notice and deliberate indifference should not be applied to Title IX non-harassment claims because sexual harassment was not a recognized legal theory at Title IX's drafting whereas non-harassment claims were central to Title IX's prohibitions).

32. *See Cannon*, 441 U.S. at 704.

33. Senator Bayh was the principal drafter of Title IX. Mank, *supra* note 28, at 60.

34. Representative Mink coauthored Title IX and played a leading role in the passage of Title IX. *See* Feminist Majority Foundation, *US Representative Patsy Mink Will be Remembered as a Feminist Champion and Benefactor for Women*, Feminist Daily Newswire, Sept. 30, 2002, http://feminist.org/news/newsbyte/uswirestory.asp?id=7024.

35. *See Cannon*, 441 U.S. at 704.

36. *Id.* at n.36 (quoting 117 Cong. Rec. 39,248, 39,252 (1971)).

37. *Id.* (quoting 118 Cong. Rec. 5802, 5806-07 (1972)).

38. The second version was entitled "Title IX—Prohibition of Sex Discrimination." *See* Cohen, *supra* note 31, at 318.

39. *See Cannon*, 441 U.S. at 693 n.14. Several senators objected to the fact that the alternate bill did not expressly authorize a private remedy for victims of discrimination. *Id.* This indicates that at least some of Title IX's drafters anticipated the statute would be privately enforced.

2. Scope of Title IX

The Office for Civil Rights ("OCR"), a division of the Department of Education,[40] enforces Title IX.[41] The Title IX regulations promulgated by the OCR[42] provide three avenues of enforcement: utilizing a school or university's internal procedures,[43] filing an administrative complaint with the OCR,[44] or litigating either through private means or through suits

40. At the time Title IX was drafted, the Department of Education ("DOE") was the Department of Health, Education, and Welfare ("HEW"). *See* Carpenter & Acosta, *supra* note 29, at 31 n.3. This name change did not significantly affect the statute. *Id.*

41. The Office for Civil Rights ("OCR") receives some criticism from commentators who argue that it is less effective than it could be in enforcing Title IX's mandate. *See* Joan E. Schaffner, *Approaching the New Millennium with Mixed Blessings for Harassed Gay Students*, 22 Harv. Women's L.J. 159, 166 (1999) ("[R]ather than wield its own authority and administratively enforce its own standards that hold schools vicariously liable for harassment on their campuses, the OCR acquiesces by following court precedent in circuits where that precedent is in conflict with its own policies."); *see also* Julie A. Klusas, Note, *Providing Students with the Protection They Deserve: Amending the Office of Civil Rights' Guidance or Title IX to Protect Students from Peer Sexual Harassment in Schools*, 8 Tex. F. on C.L. & C.R. 91 (2003) (arguing that the OCR provides conflicting legal standards for peer sexual harassment that result in over-disciplining and under-protecting of students, and advocating amendment of OCR harassment guidance or alternatively amendment of Title IX liability standards applicable to private suits for money damages).

42. After conducting hearings, debates, and receiving comments from a wide range of groups, the OCR presented its draft regulations for Title IX to Congress on June 18, 1974. Carpenter & Acosta, *supra* note 29, at 5-6. The regulations were approved on July 21, 1975. *Id.* at 6.

43. The OCR furnishes guidelines that provide schools with information about standards of liability for Title IX violations and in-house procedures to follow to remedy such violations. *See* OCR, Overview of the Agency, http://www.ed.gov/about/offices/list/ocr/aboutocr.html (last visited Mar. 5, 2006). However, the in-house complaint is the least effective method for enforcing Title IX. Carpenter & Acosta, *supra* note 29, at 21.

44. The OCR was intended to be an "inexpensive, efficient, and effective" way of remedying Title IX violations. *See* Sudha Setty, Note, *Leveling the Playing Field: Reforming the Office for Civil Rights to Achieve Better Title IX Enforcement*, 32 Colum. J.L. & Soc. Probs. 331, 332-33 (1999) (suggesting specific OCR reforms that would improve institutions' compliance with Title IX). The OCR has jurisdiction to investigate Title IX complaints where the allegation of sex discrimination is made against an educational institution receiving federal funds. *See* Carpenter & Acosta, *supra* note 29, at 22. "The person or organization filing the complaint need not be a victim of the alleged discrimination, but may complain on behalf of another person or group." OCR, *supra* note 43. There is no fee to file an administrative complaint with the OCR. *See* Setty, *supra*, at 332. The OCR visits educational institutions that have received valid complaints, independently assesses the situation, and assists the educational institution in formulating a compliance plan. *See id.* at 332-33. Title IX requires that the OCR allow institutions to voluntarily cure the violations before terminating funds. *See id.* Victims of sex discrimination cannot receive compensation from OCR administrative proceedings. *See* Beth B. Burke, Note, *To Preclude or Not to Preclude?: Section 1983 Claims Surviving Title IX's Onslaught*, 78 Wash. U. L.Q. 1487, 1495 (2000) (arguing that Title IX should preclude statutory claims based on Title IX itself because Title IX's remedial scheme is comprehensive, but also stating that Title IX should not preclude constitutional claims under § 1983).

brought by the Department of Justice under the authority of the Attorney General.[45]

Title IX includes remedies other than the termination of funds to educational institutions by federal agencies. In 1979, the Supreme Court ruled in *Cannon v. University of Chicago* that Title IX supports an implied right of action for aggrieved individuals.[46] Although Title IX's purpose was "generally served by the statutory procedure for the termination of federal financial support," the Court determined that Congress also "wanted to provide individual citizens [with] effective protection against those practices."[47] For the Court, terminating federal funds could not serve this purpose because it was too severe a penalty and would be an "inefficient and cumbersome" means to address isolated reports of discrimination.[48] The Court held that an "award of individual relief to a private litigant who has prosecuted her own suit is not only sensible but is also fully consistent

45. *See* Exec. Order No. 12,250, 3 C.F.R. 298 (1981), *reprinted in* 42 U.S.C. 200d-1 note (2000); *see also* Carpenter & Acosta, *supra* note 29, at 21. There are competing considerations when choosing between filing an administrative complaint and initiating a private lawsuit. OCR personnel do not act as zealous advocates for equity; "zealousness of an OCR investigation depends largely on the administrative climate of a particular regional OCR office or the commitment of the specific OCR employees assigned." *Id.* at 22. In addition, Title IX complainants are amici curiae to administrative proceedings, rather than parties, while Title IX recipients participate directly in any investigation and are afforded due process protection in administrative hearings. Mank, *supra note* 28, at 61. If, after a hearing, OCR finds an institution not in compliance with Title IX, the agency must send a written report to the congressional committee with jurisdiction over the discriminatory program and wait thirty days. *Id.* at 62. In the end, OCR usually enters into a settlement with the funding recipient to prevent future discrimination. *Id.* Therefore, with these considerations in mind, students with the necessary resources may choose to bypass these administrative procedures in favor of a private lawsuit.

46. *See* Cannon v. Univ. of Chi., 441 U.S. 677, 695-98 (1979). To establish a prima facie case of sexual discrimination under Title IX, "a plaintiff must show: (1) that he or she was excluded from participation in, denied the benefits of, or subjected to discrimination in an educational program; (2) that the program receives federal assistance; and (3) that the exclusion from the program was on the basis of sex." Seamons v. Snow, 84 F.3d 1226, 1232 (10th Cir. 1996), *aff'd in part, rev'd in part*, 206 F.3d 1021 (10th Cir. 2000). Some lower courts have also allowed suits based on the regulations promulgated pursuant to Title IX that prohibit facially neutral policies with a discriminatory impact on one sex. *See* Lewis & Norman, *supra* note 13, at 322. However, *Alexander v. Sandoval* called into question the future of disparate impact suits based on enforcement regulations. *Id.*; *see infra* note 84 and accompanying text; *see also* Jonathan M.H. Short, *"Something of a Sport:" The Effect of* Sandoval *on Title IX Disparate Impact Discrimination Suits*, 9 Wm. & Mary J. Women & L. 119 (2002) (analyzing the impact of *Sandoval* on Title IX disparate impact litigation); *cf.* Jackson v. Birmingham Bd. of Educ., 125 S. Ct. 1497, 1506-07 (2005) (finding coach's suit based on Title IX and a regulation prohibiting retaliation for reporting Title IX violations did not conflict with *Sandoval* because retaliation was prohibited by the statute's text, and thus the Court did not need to rely on the regulation at all).

47. *Cannon*, 441 U.S. at 704-05.

48. Erwin Chemerinsky & Catherine Fisk, *Civil Rights Without Remedies: Vicarious Liability Under Title VII, Section 1983, and Title IX*, 7 Wm. & Mary Bill Rts. J. 755, 791 (1999); *see Cannon*, 441 U.S. at 705.

with—and in some cases even necessary to—the orderly enforcement of the statute."[49]

The Court later clarified, in *Franklin v. Gwinnett County Public Schools*, that plaintiffs could seek monetary damages for intentional violations of Title IX[50] but limited such damages to situations where an institution had "actual notice" of sexual harassment and displayed "deliberate indifference" to the tortious conduct of its employees.[51] Although Title IX is most often

49. *Cannon*, 441 U.S. at 705-06. The *Cannon* Court also cited comments during the debate of Title IX that indicated members of Congress foresaw termination of funding would be rare because alternative remedies like lawsuits would prove to be a preferable and more effective remedy to end discrimination. *Id.* at 705 n.38. The Court also gave weight to the opinion of the DOE (then known as HEW), which submitted a brief arguing that administrative enforcement was not always feasible and thus private enforcement was necessary to ensure that sex discrimination was eliminated in federally funded education programs. *Id.* at 708 n.42. Finally, the Court also looked to the background assumptions drawn from Congress's experience with Title VI as supporting the availability of private suits under Title IX. Specifically, the Court noted that with respect to Title VI, after which Title IX was patterned, "a judicial remedy—either through the kind of broad construction of state action under § 1983 . . . or through an implied remedy—would be available to private litigants" regardless of whether or not federal funds were terminated. *Id.* at 711-12.

50. *See* Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 69, 76 (1992) (recognizing an implied right of action against a school district under Title IX for failure to prevent a teacher's sexual harassment of a student and finding that a damages remedy is available for private suits brought to enforce Title IX). *But see* Lewis & Norman, *supra* note 13, at 318, 329 (citing Barnes v. Gorman, 536 U.S. 181, 185-86, 190 n.4 (2002) (finding that punitive damages are not available for violations of Title VI, § 202 of the Americans with Disabilities Act, and § 504 of the Rehabilitation Act, but declining to address whether the holding extended to Title IX because the issue was not reviewed by the courts below)) (suggesting that punitive damages may not be available because of the quasi-contractual nature of Spending Clause legislation like Title IX).

51. *See* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290-93 (1998). The Court noted that Title IX was enacted pursuant to Congress's Spending Clause authority and thus the contractual nature of the relationship between the federal government and the funding recipient required that a plaintiff allege that an "appropriate person" received notice and had the opportunity to remedy any Title IX violation. *Id.* at 287. Although the Court did not define who is an "appropriate person" that must receive actual notice of the violation, it is clear that liability is not based on respondeat superior. *See id.* at 290. Instead, the plaintiff must show wrongdoing on the part of the institution itself. *See id.* The Supreme Court subsequently applied the same standard to hostile environment claims involving student-on-student sexual harassment where the school exercises substantial control over the harasser and the circumstances in which the harassment occurs, and where the harassment is so pervasive, severe, and offensive that it deprives the student of a meaningful educational opportunity. *See* Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 651 (1999). In *Davis*, the Court defined "deliberate indifference" as where a school official's behavior was "clearly unreasonable" under the circumstances. *Id.* at 648. Although *Gebser* and *Davis* involved Title IX liability standards for institutions for the sexual harassment of students, one commentator argues that the Supreme Court left open whether this standard of institutional liability applies to non-harassment sex discrimination claims. *See* Cohen, *supra* note 31, at 335-36. This commentator points out that, in cases involving non-harassment claims, lower courts have applied either the standards articulated by *Gebser* or by Title VII antidiscrimination law. *Id.* at 336. One student commentator argues that the heightened liability standard applies to both harassment and non-harassment violations because the actual notice standard stems from the fact that Title IX is Spending Clause legislation, and not because the cases involved harassment. *See* Klusas, *supra* note 41, at 102-03. The OCR,

in the spotlight for disputes over equity in athletics programs,[52] litigation under Title IX has also encompassed employment, admissions, single-sex schools, prison education programs, sexual harassment,[53] and retaliation for reporting incidents of sexual discrimination.[54] Sexual harassment and equity in athletics nonetheless remain the most heavily litigated areas in Title IX suits.

The Supreme Court further expanded the scope of Title IX's private right of action by broadening its reading of sex discrimination in *Jackson v. Birmingham Board of Education*.[55] Emphasizing the far-reaching purpose behind Congress's enactment of Title IX, the majority concluded that retaliation against a person alleging sex discrimination in a federally funded educational program is a form of intentional discrimination encompassed by Title IX's private right of action because such retaliation constitutes differential treatment "on the basis of sex."[56] The *Jackson* majority created an intent-based test to determine what conduct constitutes sex discrimination prohibited by Title IX.[57] Disputed conduct that is motivated by "gender-based animus"[58] falls within Title IX's prohibition against sex discrimination.

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however, has muddied the waters by issuing a Revised Guidance preferencing constructive notice over actual notice where Congress or the Supreme Court is silent. *See id.* at 101-03.

52. Courts categorize Title IX regulations concerning female student athletes as covering "effective accommodation, which concerns the availability of participation opportunities, and equal treatment, which includes scholarships as well as the other athletic benefits and opportunities." Catherine Pieronek, *Title IX Beyond Thirty: A Review of Recent Developments*, 30 J.C. & U.L. 75, 78 (2003) (summarizing recent developments in Title IX case law concerning effective accommodation and equal treatment of female athletes, and reviewing and analyzing the findings of President George W. Bush's 2002 Commission on Opportunity in Athletics). Prospective student athletes can bring claims of ineffective accommodation while current student athletes can bring suit for unequal treatment. *Id.*

53. Lee, *supra* note 26, at 58.

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

55. *Id.* Justice Sandra Day O'Connor wrote the opinion in the 5-4 decision, and was joined by Justices John Paul Stevens, David H. Souter, Ruth Bader Ginsburg, and Stephen G. Breyer.

56. *Id.* at 1509-10. The majority was also persuaded by DOE regulations that prohibited retaliation against persons reporting Title IX violations. *Id.* at 1510. Justice Clarence Thomas dissented and was joined by Chief Justice William Rehnquist and Justices Antonin Scalia and Anthony Kennedy. He wrote that a victim's sex should occupy a central role in determining whether the allegedly discriminatory behavior constitutes sex discrimination. *See id.* at 1510-11 (Thomas, J., dissenting). Justice Thomas also found no indication in Title IX's text that Congress intended to create a private remedy for retaliation. *See id.* at 1514-16.

57. *Id.* at 1504 (noting that retaliation was "an intentional response to the nature of the complaint: an allegation of sex discrimination").

58. Leading Cases, *Retaliation as Sex Discrimination*, 119 Harv. L. Rev. 357, 365 (2005).

3. Congress and the Courts: Interpretation of Title IX

Congress can amend a statute to overcome what it deems an erroneous interpretation by the Supreme Court.[59] The amendment procedure provides Congress with an opportunity to clarify or to emphasize its original intent.[60] With those goals in mind, Congress has twice amended Title IX,[61] and made § 1988 applicable to Title IX plaintiffs,[62] to remedy judicial interpretations it found inconsistent with Title IX.

In its amendments to Title IX, Congress addressed—and abrogated—judicial interpretations it found undermined Title IX. Responding to pre-*Cannon* circuit court rulings that victims of sex discrimination had no private right to sue under Title IX, Congress allowed courts, in their discretion, to award reasonable attorney's fees to prevailing parties in Title IX suits.[63] Congress, following *Cannon*, also extended Title IX liability to all institutional recipients of federal funds without regard to whether the discriminatory program received federal funds.[64] Congress also abrogated

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59. This strategic interaction between courts and Congress, where Congress may modify a statute to correct what it deems an erroneous interpretation by courts, implicates separation of powers concerns. *See* Jeffrey A. Segal, *Separation-of-Powers Games in the Positive Theory of Congress and Courts*, 91 Am. Pol. Sci. Rev. 28, 31 (1997). Some commentators on this interaction draw on economic models of political behavior, such as game theory analysis, to describe the competing considerations underlying a legislature's choice to overturn a judicial decision. *See, e.g.*, Keith E. Whittington, *Legislative Sanctions and the Strategic Environment of Judicial Review*, 1 Int'l J. Const. L. 446, 448 (2003). For a discussion of how the Court's statutory interpretation affects the way Congress frames its work, as well as how the judiciary responds to the threat of legislative sanction, see Georg Vanberg, *Legislative-Judicial Relations: A Game-Theoretic Approach to Constitutional Review*, 45 Am. J. Pol. Sci. 346 (2001).

60. *See* Klusas, *supra* note 41, at 105.

61. *See infra* notes 64-65.

62. *See infra* note 63.

63. *See* Civil Rights Attorney's Fees Awards Act of 1976 (CRAFAA), Pub. L. No. 94-559, 90 Stat. 2641 (1976) (codified as amended at 42 U.S.C. § 1988 (2000)). The CRAFAA in turn supported the *Cannon* Court's reasoning that a private right of action would help fulfill Title IX's promise of ending sex discrimination in educational institutions. Cannon v. Univ. of Chi., 441 U.S. 677, 685 n.6 (1979). The Court noted that Congress provided attorneys fees for Title IX because, like other civil rights statutes dependant on private enforcement, "'fee awards have proved an essential remedy if *private* citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain.'" *Id.* (quoting S. Rep. No. 94-1011, at 2 (1976)). The Court went on to discuss that when the CRAFAA was enacted, many members of Congress assumed Title IX authorized private suits and that private enforcement was even necessary to Title IX's enforcement. *Id.* at 686 n.7.

64. *See* Civil Rights Restoration Act of 1987 (CRRA), Pub. L. No. 100-259, 102 Stat. 28 (1988) (codified as amended at 20 U.S.C. § 1687 (2000)); Burke, *supra* note 44, at 1496-97. The Act reversed the part of the Court's decision in *Grove City College v. Bell* that limited Title IX's scope to the specific educational programs receiving federal funding rather than the entire institution. 465 U.S. 555 (1984) (holding that federal financial aid awarded directly to students attending public college triggered Title IX regulation of the college); *see also* NCAA v. Smith, 525 U.S. 459, 466 n.4 (1999) (acknowledging that Congress enacted the CRRA to change the ruling in *Grove City*); Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 73 (1992) (same). Congress, overriding President Reagan's veto, mandated institution-wide compliance with Title IX where any part of the institution received federal

state immunity guaranteed under the Eleventh Amendment to federal fund recipients under Title IX.[65] This amendment ensured that plaintiffs could recover monetary damages from a state in federal court for Title IX violations.

Members of Congress recently proposed an amendment to Title IX that would change the standard of liability for sexual harassment victims suing under Title IX. The Fairness and Individual Rights Necessary to Ensure a Stronger Society ("FAIRNESS") Act, also known as the Civil Rights Act of 2004,[66] would have replaced the "actual knowledge" and "deliberate indifference" requirements for sexual harassment plaintiffs under Title IX with the constructive notice standard applicable to employers under Title VII.[67] The FAIRNESS Act stalled in committees considering it in both Houses during the session of the 108th Congress.[68] To date, its provisions relating to Title IX have not been reintroduced during the 109th Congress.[69] Several commentators have endorsed the change in liability standards for sexual harassment under Title IX set forth in the proposed FAIRNESS Act.[70]

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funds. *See* S. Rep. No. 100-64, at 2 (1987) (declaring that Congress, in passing the CRRA, "restor[ed] the effectiveness and vitality of the four major civil rights statutes that prohibit discrimination in federally assisted programs"). However, only the particular program that is not in compliance with Title IX will lose its federal funds. *See* 20 U.S.C. § 1682 (2000).

65. The Civil Rights Remedies Equalization Act ("CRREA"), enacted as § 1003 of the Rehabilitation Act Amendments of 1986, 42 U.S.C § 2000(d)(7) (2000), is applicable to cases initiated by both the DOE and individual plaintiffs. *See* Kristen M. Galles, *Filling the Gaps: Women, Civil Rights, and Title IX*, 31 Hum. Rts. 16, 17 (2004); Burke, *supra* note 44, at 1496.

66. *See* Fairness and Individual Rights Necessary to Ensure a Stronger Society: Civil Rights Act of 2004, S. 2088, 108th Cong. §§ 101, 111-12 (2004); H.R. 3809, 108th Cong. §§ 101, 111-14 (2004). The FAIRNESS Act was introduced in the House on February 11, 2004 by Representatives John Conyers (MI), John Lewis (GA), and George Miller (CA), 150 Cong. Rec. H514 (daily ed. Feb. 11, 2004), and in the Senate on February 12, 2004 by Senator Ted Kennedy (MA), 150 Cong. Rec. S1296 (daily ed. Feb. 12, 2004) (statement of Sen. Kennedy). *See* Dina Lassow, *In Support of a New Civil Rights Act*, 31 Hum. Rts. 22, 22 (2004).

67. *See* 29 C.F.R. § 1604.11(d) (2004) ("With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.").

68. *See* Bill Summary and Status for the 108th Congress, http://thomas.loc.gov (follow "Bills, Resolutions" hyperlink, then follow "Search Bill Summary and Status" hyperlink, and search for Bill Numbers "H.R. 3809" and "S. 2088" in the 108th Congress). After a bill is drafted and introduced, it must survive the committee to which it is referred. William N. Eskridge, Jr., et al., Legislation and Statutory Interpretation 69 (2000). "[M]ost bills die in committee." *Id.* at 70. Although outside the scope of this Note, there is a substantial body of scholarship that addresses legislative deliberation under the rubric of public choice and social choice theory. *See, e.g.*, William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. Pa. L. Rev. 1479 (1987); Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as an Oxymoron*, 12 Int'l Rev. L. & Econ. 239 (1992); Maxwell L. Stearns, *The Misguided Renaissance of Social Choice*, 103 Yale L.J. 1219 (1994).

69. *See* Legislation in Current Congress, http://thomas.loc.gov (search for "Title IX" under "Search Bill Text").

70. *See* Chemerinsky & Fisk, *supra* note 48, at 792-93 (arguing that, for Title IX, the Court should adopt the employer liability standard applicable in Title VII cases because of

B. *Civil Rights Litigation Under § 1983*

Section 1983[71] does not create substantive rights for civil rights litigants.[72] Instead, it provides a means to redress the deprivation of federally protected rights by persons acting under color of state law.[73] Section 1983 creates a remedy for a state actor's discrimination based on constitutionally prohibited factors like race, gender, and religion.[74] An individual acting under color of state law could be held liable for deprivations of constitutional guarantees, such as the right to equal protection[75] or due process[76] as well as for violations of statutory provisions

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the nondelegable duty of schools to protect children from discrimination and the minimal deterrence that actual notice would provide in the educational context); Cohen, *supra* note 31; Meghan E. Cherner-Ranft, Comment, *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 (2003) (arguing that Title IX does not provide adequate relief for plaintiffs in sexual harassment and sex discrimination suits and thus should not preclude suit under § 1983); Klusas, *supra* note 41, at 108 (noting that Congress could institute a constructive notice standard and clearly state that "anyone who has control over student discipline" can receive constructive notice).

71. 42 U.S.C. § 1983 (2000).

72. *See* Sheldon H. Nahmod et al., Constitutional Torts 2-3 (2d ed. 2004). Originally, § 1983 created a right to sue for constitutional violations only and did not reference federal statutes. However, in 1874, Congress added "and laws" to the text of § 1983, and the meaning of this addition has provoked much scholarly debate. *See, e.g.*, Bradford C. Mank, *Suing Under § 1983: The Future After* Gonzaga University v. Doe, 39 Hous. L. Rev. 1417, 1419-20 (2003) (arguing that "the *Gonzaga* decision places a heavy and unnecessary burden of proof on plaintiffs by requiring unambiguous and explicit evidence that Congress intended to create an individual right benefiting a class including the plaintiff"). Not all federal laws create rights enforceable under § 1983. *See* Blessing v. Freestone, 520 U.S. 329, 340 (1997) (finding that plaintiffs have the burden of demonstrating violations of enforceable federal rights, not merely violations of federal law); *see also infra* Part I.B.1.

73. 42 U.S.C. § 1983. Section 1983 claims cannot be brought against private persons, but they can be brought against entities acting under color of state law or individuals acting in their official capacity and implementing an official policy, custom, or practice. *See* Monell v. Dep't of Soc. Servs. of N.Y., 436 U.S. 658, 690 (1978) (holding that municipalities cannot be sued on a respondeat superior theory but "can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where" the allegedly unconstitutional action "implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers"); *see also* Pembaur v. City of Cincinnati, 475 U.S. 469 (1986) (holding that local government entities are responsible for the official policies and acts of their employees with policymaking authority as determined by local laws, customs, and usages).

74. *See* Felder v. Casey, 487 U.S. 131, 139 (1988) (finding that the central purpose of § 1983 is to provide a means for individuals whose federal constitutional or statutory rights are violated to recover damages or equitable relief).

75. The Equal Protection Clause of the Fourteenth Amendment states that "[n]o state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. In the sexual harassment context, the Equal Protection Clause has been interpreted to guarantee a right to be free from sex discrimination. In addition, plaintiffs also assert equal protection violations when an institution fails "to investigate and address the plaintiff's complaints of sexual harassment." Burke, *supra* note 44, at 1498 n.77. Gender classifications challenged under the Equal Protection Clause receive intermediate scrutiny. *See* Craig v. Boren, 429 U.S. 190, 197 (1976) (holding that "[t]o withstand constitutional challenge, . . . classifications by gender must serve important governmental objectives and must be substantially related to . . . those

like those contained in Title IX. In practice, the Supreme Court limits the federal laws that can be privately enforced under § 1983.[77]

At the outset, a court must decide if a federal statute creates a right that is presumptively enforceable through § 1983.[78] Then, a court must determine whether that statutory right can coexist with relief under § 1983 or if Congress has expressly or implicitly rebutted the presumption of the availability of a § 1983 remedy.[79]

1. Rights Enforceable Under § 1983

In 1980 the Supreme Court first held that § 1983 could serve as a vehicle to vindicate federal statutory rights.[80] The Court narrowed that mandate in a subsequent series of cases that clarified the plaintiffs who could pursue claims under § 1983.[81] In *Blessing v. Freestone*,[82] the Court emphasized

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objectives"); *see also* United States v. Virginia, 518 U.S. 515, 531, 533 (1996) (holding that "[p]arties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action," and that "[t]he burden . . . is demanding and it rests entirely on the State."). In athletic equity cases, where the equal protection violation may involve allocation of athletic resources or scheduling of sporting events based on gender classifications, the defendants must show that the impermissible gender classifications serve a legitimate governmental interest. *See, e.g.*, Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n, 377 F.3d 504, 512-13 (6th Cir. 2004), *vacated*, 125 S. Ct. 1973 (2005).

76. The Fourteenth Amendment's Due Process Clause prohibits states from "depriv[ing] any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. To show a procedural or substantive due process violation, plaintiffs must prove a state actor knew or reasonably should have known his or her conduct clearly violated the plaintiff's established constitutional right, and that the state actor deliberately deprived the plaintiff of that right, or that supervisors acquiesced to that conduct. *See, e.g.*, Murrell v. Sch. Dist. No. 1, Denver, Co., 186 F.3d 1238, 1249 (10th Cir. 1999) (finding a school deliberately indifferent to a male student's sexual assault of a female special education student where a janitor and teachers knew of the assault but the school failed to investigate the assault, inform the police, or discipline the male student).

77. *See, e.g.*, Gonzaga Univ. v. Doe, 536 U.S. 273 (2002).

78. *See id.* at 297 (Stevens, J., dissenting); *see also infra* notes 85-87 and accompanying text.

79. *Gonzaga*, 536 U.S. at 297 (Stevens, J., dissenting).

80. *See* Maine v. Thiboutot, 448 U.S. 1, 6-8 (1980).

81. *See* Suter v. Artist M., 503 U.S. 347 (1992) (holding that foster care children could not bring a § 1983 action against the State of Illinois for violations of the Child Welfare Act's ("CWA's") "reasonable efforts" provision because the provision did not create a binding obligation on states). The *Suter* Court in dicta also raised the issue that the alternative remedial scheme of terminating federal funds for states without a state plan that conformed to the CWA's requirements might "manifest Congress' intent to foreclose remedies under § 1983." *Id.* at 360. "[D]issatisfied with 'the Supreme Court's interpretation in *Suter* of the scope of § 1983 and the effect it might have on enforcement of the Social Security Act ("SSA")[,]' Congress in 1994 amended the federal [SSA] to essentially restore the principles governing the enforcement of the [Act] that existed pre-*Suter*," namely a private right of action to enforce through § 1983 obligations found in state plan requirements under the SSA. 1 Schwartz, *supra* note 9, § 4.03, at 4-30; *see* 42 U.S.C. § 1320(a)(2), (10) (2000) (second alteration in original).

82. 520 U.S. 329, 348 (1997) (holding that the statute at issue did not foreclose relief under § 1983 because it "contains no private remedy—either judicial or administrative—

that a plaintiff seeking to enforce a federal statute under § 1983 must demonstrate that a specific federal statutory provision creates an enforceable right, not just that federal law has been violated.[83] Also, the Court has curtailed private rights of action for disparate impact discrimination claims, holding that "[t]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others."[84]

The most recent Supreme Court decision limiting the availability of § 1983 to enforce federal statutes is *Gonzaga University v. Doe*.[85] In *Gonzaga*, the Court held that if Congress wants to create a federal statutory right, "it must do so in clear and unambiguous terms."[86] The Court reasoned that § 1983 does not allow suits against state actors for violation of every federal law, it only permits the enforcement of clearly articulated "*rights*, not . . . broader or vaguer 'benefits' or 'interests.'"[87]

Underlying these rules is the Court's strong presumption against finding implied private rights of action. Instead, plaintiffs must rely on a federal statute's express enforcement mechanism, which is typically entrusted to federal agencies, and which may not provide complete remedies in the form of money damages or injunctive relief.[88] Under such circumstances, a § 1983 claim may supplement the available remedy against state actors.[89] Professor Cass Sunstein has attributed the Supreme Court's limits on

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through which aggrieved persons can seek redress" but rather relies on Executive Branch oversight to ensure states' compliance).

83. *See* 1 Schwartz, *supra* note 9, § 4.03, at 4-32. The Court also stated that "a plaintiff's ability to invoke § 1983 cannot be defeated simply by '[t]he availability of administrative mechanisms to protect the plaintiff's interests.'" *Blessing*, 520 U.S. at 347 (quoting Golden State Transit Corp. v. Los Angeles, 498 U.S. 103, 106 (1989)).

84. *See* Alexander v. Sandoval, 532 U.S. 275, 290 (2001) (holding that Title VI does not contain an implied right of action for disparate impact claims).

85. 536 U.S. 273 (2002) (holding that Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232(g) (2000), does not create a privately enforceable right to not have student records disclosed without written consent).

86. *See id.* at 290. The Court pointed to Title VI and Title IX as statutes containing the requisite rights-creating language. *Id.* at 284. The Court explained that the administrative procedures established by FERPA, whereby individuals filed written complaints to be reviewed and resolved by an appointed panel, supported the argument that Congress could have intended to foreclose a private remedy. *Id.* at 289-90. Despite the comprehensive individualized review system established by FERPA, "in the thirty years between FERPA's adoption and *Gonzaga*, the [DOE] did not once withhold or terminate funding for a violation of the Act." Sasha Samberg-Champion, Note, *How to Read* Gonzaga*: Laying the Seeds of a Coherent Section 1983 Jurisprudence*, 103 Colum. L. Rev. 1838, 1859 (2003).

87. *Gonzaga*, 563 U.S. at 283.

88. *See* Nahmod et al., *supra* note 72, at 234 ("The [federal] agency may . . . have a limited range of enforcement tools at its disposal, such as cutting off federal funds. Absent recourse to section 1983, individuals who are harmed by violations of such statutes may have no way of obtaining a remedy.").

89. *See* Cass R. Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. Chi. L. Rev. 394, 415 (1982).

implied rights of action to the Court's belief that these issues merit legislative action, not judicial policymaking.[90]

2. Statutory Preemption of § 1983 Relief

Congress can override § 1983 with other federal statutes or specify that "for some laws § 1983 is not available as an enforcement mechanism."[91] A federal statute's comprehensive remedial scheme can also indicate that a § 1983 remedy would be incompatible with the federal statute's remedy regime.[92] In that vein, the Court has held that Congress "implicitly" foreclosed a private remedy under § 1983 in several instances.[93]

a. *The* Middlesex County Sewerage Authority v. National Sea Clammers Ass'n[94] *Doctrine*

After announcing that § 1983 was available to plaintiffs to vindicate violations of federal statutory rights,[95] the Court subsequently sought to curtail states' liability under § 1983. In *Sea Clammers*, the Supreme Court held that Congress need not be explicit to preclude relief under § 1983.[96] The Court explained that Congress can manifest an intent to preempt § 1983 claims by creating a comprehensive enforcement mechanism within the statute.[97] The plaintiffs in *Sea Clammers* sought injunctive and declaratory relief, along with monetary damages from various state agencies and state and federal officials, for the alleged discharge of pollutants in violation of federal environmental statutes.[98] The Court sua sponte raised

90. *Id.* at 438-39; *see also Gonzaga*, 536 U.S. at 300 (Stevens, J., dissenting) ("[O]ur implied right of action cases reflec[t] a concern, grounded in separation of powers, that Congress rather than the courts controls the availability of remedies for violations of statutes." (internal quotation omitted)).

91. Erwin Chemerinsky, Federal Jurisdiction 528 (3d ed. 1999).

92. *See* City of Rancho Palos Verdes, Cal. v. Abrams, 125 S. Ct. 1453 (2005); Smith v. Robinson, 468 U.S. 992 (1984); Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1 (1981); *see also* Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 522 (1990) (holding that the Medicaid Act's remedial scheme—withholding federal funds and administrative review—did not manifest Congress's intent to preclude a private remedy); Wright v. City of Roanoke Redevelopment & Hous. Auth., 479 U.S. 418, 423 (1987) (holding that a federal statutory rent ceiling created rights enforceable under § 1983 and noting that private enforcement is unavailable "where Congress has foreclosed such enforcement of the statute in the enactment itself and where the statute did not create enforceable rights, privileges, or immunities within the meaning of § 1983").

93. *See Abrams*, 125 S. Ct. at 1458; *Smith*, 468 U.S. at 1009; *Sea Clammers*, 453 U.S. at 20.

94. 453 U.S. 1.

95. *See supra* text accompanying note 80; *infra* note 99.

96. *Sea Clammers*, 453 U.S. at 20.

97. *Id.*

98. *Id.* at 4-5. The plaintiffs invoked a broad array of legal theories, including the Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act), 33 U.S.C. §§ 1251-1387 (2000); the Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. §§ 1401-1445 (2000); federal common law; the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 407 (2000); the National Environmental Policy Act of 1969, 42 U.S.C. §§

the issue of whether the plaintiffs could sue the state municipalities and local sewerage boards under § 1983 for their alleged violation of federal environmental laws.[99] Analyzing the plain language of the environmental statutes, the judicial and administrative remedies available under them, and the legislative history, the Court concluded that the environmental statutes precluded § 1983 relief.[100] The Court explained that the "unusually elaborate enforcement provisions" that allowed citizens and enforcement agencies to bring suit to enforce the environmental statutes' provisions[101] evinced congressional intent to preempt § 1983 claims.[102] The Court reasoned that to allow suits under § 1983 would contravene the statutes' extensive enforcement scheme.[103]

Sea Clammers did not, however, resolve the question of what specifically would constitute a sufficiently comprehensive enforcement scheme that would preempt § 1983 claims. Professor Sunstein argues that the *Sea Clammers* doctrine, given its lack of clarity, provides inadequate guidance on the question of whether a federal statute's remedial scheme preempts § 1983 claims.[104] Professor Sunstein suggests an alternative approach: A federal statute preempts a § 1983 remedy when (1) a federal statute establishes an independent cause of action, either expressly or "justifiably" implied by the words of the statute;[105] (2) open-ended standards govern how an agency determines a statute's substantive reach;[106] (3) consistency or coordination is needed for a statute's enforcement;[107] or (4) the statute favors informal enforcement methods, like negotiation, over litigation.[108]

4321, 4331-4335 (2000); New York and New Jersey environmental statutes; the Fifth, Ninth, and Fourteenth Amendments to the U.S. Constitution; 46 U.S.C. § 740; the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2672, 2674-2680 (2000); and state tort law. *Id.* at 5 n.6.

99. *Id.* at 19. Justice Lewis F. Powell, Jr., writing for the Court, noted that in the previous term the Court had decided *Maine v. Thiboutot*, which construed § 1983 as authorizing private suits for violations of federal statutory rights by state officials. *Id.*; *see* Maine v. Thiboutot, 448 U.S. 1, 6-8 (1980). Justice Powell dissented in *Thiboutot*, and presumably sought an opportunity to curtail that holding. *See id.* at 22 (Powell, J., dissenting) ("The Court's opinion does not consider the nature or scope of the litigation it has authorized. In practical effect, today's decision means that state and local governments, officers, and employees now may face liability whenever a person believes he has been injured by the administration of *any* federal-state cooperative program, whether or not that program is related to equal or civil rights." (footnote omitted)).

100. *See Sea Clammers*, 453 U.S. at 19-21.

101. *Id.* at 13. The Environmental Protection Agency had a number of enforcement options aside from civil suits, including compliance orders and criminal penalties. *Id.*

102. *Id.* at 20.

103. *Id.*

104. *See* Sunstein, *supra* note 89, at 427-38.

105. *Id.* at 427-28. Professor Sunstein cites as an example the citizen-suit provisions created by the environmental statutes at issue in *Sea Clammers*. *Id.*

106. *Id.* at 428-30 (arguing that where statutes, like the Sherman Act, impose a "reasonableness" standard for legal conduct, that finding falls within an agency's discretion because of its "particular competence in assessing and weighing the relevant facts and policies").

107. *Id.* at 430-32. Professor Sunstein writes that preemption is appropriate where it is "relatively clear from the structure or history of the statute that Congress intended to

One student commentator has argued that the Court's "remedial scheme" approach inevitably leads to preclusion.[109] It is suggested that the analysis should focus on rights rather than remedies.[110] Under this view, the question of § 1983's preemption should turn on whether the statute vindicates the same rights as § 1983.[111] If the federal statute fails to provide alternative relief that is akin to § 1983 relief, the statute should not be interpreted to preclude § 1983 claims.[112] This approach, the student commentator observes, would honor § 1983's goal of broadening litigants' access to federal courts to redress civil rights violations perpetrated by state officials.[113]

b. *Constitutional Provisions in Conflict with Statutory Schemes:* Smith v. Robinson[114]

The Supreme Court has also addressed congressional withdrawal of a cause of action under § 1983 for constitutional violations. In *Smith v. Robinson*, the Supreme Court "held that Congress has the power to exclude particular constitutional claims from the scope of § 1983."[115] The plaintiff in *Smith*, a special education student suffering from cerebral palsy, asserted violations of the Education of the Handicapped Act ("EHA"),[116] section 504 of the Rehabilitation Act of 1973, and the Fourteenth Amendment's Due Process and Equal Protection Clauses.[117] The plaintiff's statutory and constitutional claims were based on the same set of facts.[118] The *Smith* Court found that the EHA preempted the § 1983 litigation because Congress intended the EHA to serve as an exclusive remedy for violations of a child's right "to a free appropriate public education."[119] The Court held that if the alleged constitutional violation is "virtually identical" to the plaintiff's statutory right, and Congress intended that statute to serve as the

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concentrate enforcement responsibilities in a particular institution" or "a rational enforcement scheme requires the exercise of prosecutorial discretion." *Id.* at 431.

108. *Id.* at 434-35. For example, this occurs where there is a cooperative process between a regulatory agency and a state. *Id.* at 435.

109. *See* Myron D. Rumeld, Note, *Preclusion of Section 1983 Causes of Action by Comprehensive Statutory Remedial Schemes*, 82 Colum. L. Rev. 1183, 1186 (1982) (analyzing the comprehensiveness test for preempting § 1983 actions and concluding that statutory § 1983 actions should be precluded only where the statutory remedial scheme otherwise affords that plaintiff adequate relief).

110. *See id.* at 1184-90.

111. *See id.* at 1203.

112. *See id.* at 1200, 1204-05.

113. *See id.* at 1201.

114. 468 U.S. 992 (1984).

115. *See* 1 Schwartz, *supra* note 9, § 3.03, at 3-28.

116. The Education of the Handicapped Act ("EHA") was renamed the Individuals with Disabilities Education Act ("IDEA") in 1990. *See* 20 U.S.C. §§ 1400-1419 (2000).

117. *Smith*, 468 U.S. at 994-95. The Court noted that the plaintiff "made no effort to enlarge the remedies available under the EHA" by asserting a § 1983 claim. *Id.* at 1004-05. However, the Court signaled that it would have foreclosed such litigation. *Id.* at 1008 n.11.

118. *Id.* at 1009.

119. *Id.*

"exclusive avenue" for a plaintiff to obtain redress, the statutory remedy subsumed the § 1983 claim for the alleged constitutional violation.[120] In *Smith*, the plaintiff's constitutional claims were virtually identical to the EHA claims, and the EHA's legislative history indicated Congress sought a cooperative process for resolving disputes.[121] Therefore, the Court found that allowing plaintiffs to pursue their constitutional claims under § 1983 rather than bringing them only under the EHA's carefully tailored administrative review procedures would undermine Congress's judgment of the best method to ensure states' compliance with their obligations to educate handicapped children.[122]

c. *Revisiting the Rebuttable Presumption of Recourse to § 1983:* City of Rancho Palos Verdes, California v. Abrams[123]

In 2005, the Supreme Court reconsidered the *Sea Clammers* doctrine and further clarified the availability of § 1983 for violations of federal statutory rights. *Abrams* involved the Telecommunications Act of 1996 ("TCA"), which limits state and local governments in their regulation of wireless communications facilities and gives plaintiffs a private cause of action for violations of the statute.[124] The TCA also establishes remedies limiting relief for plaintiffs in ways that § 1983 does not.[125]

The *Abrams* Court addressed whether Congress intended for the TCA remedy to coexist with an alternative remedy available under § 1983.[126] Justice Scalia, writing for the Court, identified two situations where § 1983 is unavailable to redress violations of federal statutory rights: (a) where the

120. *Id.*

121. *Id.*

122. *Id.* at 1011-13. Congress responded to the Supreme Court's decision in *Smith* by enacting the Handicapped Children's Protection Act of 1986 ("HCPA"). *See* Pub. L. No. 99-372, 100 Stat. 796 (1986) (codified as amended at 20 U.S.C. § 1415 (2000)). The HCPA provides that IDEA does not limit an individual's right to pursue claims under other federal statutes or provisions of the U.S. Constitution. *See* 20 U.S.C. § 1415(*l*) ("Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution . . . ."); 1 Schwartz, *supra* note 9, § 3.03, at 3-30. Therefore, Congress made clear that IDEA does not restrict the assertion of constitutional claims under § 1983. *See id.* IDEA does, however, require plaintiffs to exhaust their state remedies before filing a civil action under IDEA in federal court. *See id.* Although Congress repudiated the outcome in *Smith*, the underlying principle of *Smith* remains good law. *Id.* In other words, Congress could withdraw recourse to § 1983 for particular constitutional claims. *Id.* "Whether Congress has in fact exercised this power in a given instance is strictly a question of congressional intent." *Id.*

123. 125 S. Ct. 1453 (2005).

124. *Id.* at 1455-56.

125. *Id.* at 1458-60. The TCA's enforcement mechanism mandated that judicial review be sought within thirty days of a final decision and heard on an expedited basis, likely excluded compensatory damages, and had no provision for reasonable attorney's fees and costs. *Id.* at 1459-60. "A § 1983 action, by contrast, can be brought much later than thirty days after the final action, and need not be heard and decided on an expedited basis." *Id.* at 1460 (footnote omitted). Moreover, the remedies available to successful § 1983 plaintiffs include damages and reasonable attorney's fees and costs. *Id.*

126. *Id.*

statute mandates more restrictive remedies than § 1983[127] and (b) where the statute contains private remedies that suggest congressional intent to supplant § 1983 relief.[128] The Court held that even if a plaintiff has demonstrated that a federal statute confers a private right of action on a class of beneficiaries to which the plaintiff belongs, a defendant can rebut the presumption that the plaintiff has a § 1983 claim.[129] This requires that the defendant show that Congress intended to foreclose a "more expansive remedy under § 1983" by enacting a sufficiently specific or comprehensive federal statutory remedial scheme that logically implies Congress's intent for the statutory remedy to be exclusive.[130] The Court found that the TCA created a "complex and novel statutory scheme"[131] that "adds no remedies to those available under § 1983, and limits relief in ways that § 1983 does not."[132] Thus, the Court held that the statutory scheme of the TCA preempted the plaintiff's § 1983 claims.[133]

The Court reasoned that Congress's limitations of the remedies available under the TCA reflect its deliberate decision to restrain remedial options for TCA violations.[134] For the Court, such limitations cannot be "evaded through § 1983."[135] The Court distinguished past decisions that upheld § 1983 claims for federal statutory violations because in those cases the federal statute failed to provide a private remedy—either judicially or administratively.[136] The presence of private remedies under the TCA undermined the propriety of upholding a § 1983 action based on the TCA.[137] Furthermore, the Court in *Abrams* rejected Congress's inclusion of a "saving clause" in the TCA that would have prevented the TCA's comprehensive remedial scheme from affecting plaintiffs' ability to vindicate under § 1983 rights in existence prior to the TCA's enactment.[138]

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127. *Id.* at 1459 (noting the "more restrictive remedies provided in the violated statute itself").

128. *Id.* ("Moreover, in *all* of the cases in which we have held that § 1983 *is* available for violation of a federal statute, we have emphasized that the statute at issue, in contrast to those in *Sea Clammers* and *Smith*, *did not* provide a private judicial remedy.").

129. *Id.*

130. *Id.* at 1458.

131. *Id.* at 1460.

132. *Id.* at 1459.

133. *Id.* at 1463.

134. *Id.* at 1459-60.

135. *Id.* at 1460.

136. *Id.* at 1459.

137. *Id.*

138. *Id.* at 1461-62 (finding that denying enforcement of the TCA under § 1983 does not "impair" the § 1983 remedy). The Court points out that the absence of a remedy, such as attorney's fees, itself represents a congressional choice to exclude that remedy through other federal statutes. *Id.* at 1460. *But see* Jackson v. Birmingham Bd. of Educ., 125 S. Ct. 1497, 1505 (2005) (rejecting the argument that Congress could have expressly mentioned retaliation as discrimination prohibited by Title IX, as it did when it enacted Title VII, and that such an omission evinced congressional intent to foreclose a cause of action for such conduct). At least one scholar would question preclusion in the face of a savings clause. *See* Chemerinsky, *supra* note 91, at 528 ("It is curious to find an implicit preclusion of litigation when there is an explicit provision preserving all other remedies.").

The *Abrams* concurrences written by Justices Breyer and Stevens urged a more cautious approach to the preemption of § 1983 claims. Justice Breyer's concurrence[139] advocated an analysis that looks beyond a statute's express remedies.[140] He emphasized the importance of evaluating the context in which Congress adopted the federal statute, in addition to the text of the statute itself, to determine whether Congress designed the statute to constitute a comprehensive and exclusive remedial scheme.[141]

Justice Stevens's concurrence mirrored this approach. He wrote that legislative history is essential to assessing whether a statute's "comprehensive and exclusive remedial scheme" impliedly forecloses a § 1983 remedy.[142] Justice Stevens would find that only in "*exceptional* case[s]"—where the statutory scheme Congress established is "unusually comprehensive and exclusive"—would a statute foreclose relief under § 1983.[143]

II. IS TITLE IX COMPATIBLE WITH § 1983? A POST-*ABRAMS* EVALUATION OF THE DIVERGENT CIRCUIT COURT APPROACHES

Title IX presents a particularly complex problem with respect to § 1983 preemption because the Supreme Court has found that Title IX's statutory scheme includes an implied right of action, permitting a plaintiff to sue for monetary damages in addition to—or instead of—equitable or declaratory relief. As a result, the question for the purpose of § 1983 preemption turns on whether this scheme, arguably including the judicially "found" implied right of action, is sufficiently comprehensive to indicate Congress's intent to preempt a § 1983 claim. The federal courts of appeals are split as to whether Congress intended to foreclose a remedy under § 1983 for sex discrimination.[144]

With varying levels of analysis, the courts have followed three different strategies in resolving the issue. On one hand, the Sixth, Eighth, and Tenth

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139. Justice Breyer's concurrence was joined by Justices O'Connor, Ginsburg, and Souter. *Abrams*, 125 S. Ct. at 1462 (Breyer, J., concurring).

140. *Id.*

141. *Id.*; *see also infra* Part II.A.4.

142. *Abrams*, 125 S. Ct. at 1463-64 (Stevens, J., concurring); *see also infra* Part II.A.4.

143. *Abrams*, 125 S. Ct. at 1464 (Stevens, J., concurring); *see also infra* Part II.A.4.

144. *Compare* Crawford v. Davis, 109 F.3d 1281 (8th Cir. 1997), Lillard v. Shelby County Bd. of Educ., 76 F.3d 716 (6th Cir. 1996), *and* Seamons v. Snow, 84 F.3d 1226 (10th Cir. 1996), *aff'd in part, rev'd in part*, 206 F.3d 1021 (10th Cir. 2000), *with* Delgado v. Stegall, 367 F.3d 668 (7th Cir. 2004), Bruneau v. S. Kortright Cent. Sch. Dist., 163 F.3d 749 (2d Cir. 1998), Williams v. Sch. Dist. of Bethlehem, Pa., 998 F.2d 168, 176 (3d Cir. 1993) (vacating the district court's judgment on a § 1983 claim concurrently litigated with a Title IX claim because "the constitutional claims are 'subsumed' in [T]itle IX"), *and* Pfeiffer v. Marion Ctr. Area Sch. Dist., 917 F.2d 779, 783, 789 (3d Cir. 1990) (refusing to hear a § 1983 claim in a case where a student brought claims against the school district, board, and officials under Title IX and § 1983 for gender discrimination, and where the district court held that the § 1983 claims were subsumed by Title IX, because the *Sea Clammers* doctrine had been applied in analogous cases).

Circuits have held that Title IX does not preempt § 1983 claims.[145] These courts have found that Title IX's express remedies weigh against Congress's intent to preempt § 1983 relief.[146]

By contrast, the Second and Third Circuits, along with some district courts, have held that Title IX preempts § 1983 claims.[147] These courts have found that Title IX established a comprehensive remedial scheme that evinced congressional intent to preempt all non-Title IX remedies.

Among courts that would generally find preemption, yet another approach has identified circumstances in which certain § 1983 claims might not be preempted.[148] For example, the Seventh Circuit has held that preemption depends on the identity of the defendant and whether the § 1983 claim vindicates rights under Title IX or those asserted in the U.S. Constitution.[149] Under that approach, Title IX would not preempt § 1983 claims asserting that state actors in their individual capacity committed constitutional torts but would preempt § 1983 claims asserted against educational institutions and supervisory officials as well as § 1983 claims based on Title IX.[150]

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145. *See Crawford*, 109 F.3d at 1284; *Lillard*, 76 F.3d at 723-24; *Seamons*, 84 F.3d at 1234. District courts in the Fourth Circuit would also follow this approach. *See* Jennings v. Univ. of N.C. at Chapel Hill, 240 F. Supp. 2d 492, 500-01 (M.D.N.C. 2002) (holding that plaintiff's § 1983 claims were not subsumed by Title IX claims); Carroll K. v. Fayette County Bd. of Educ., 19 F. Supp. 2d 618, 623 (S.D.W. Va. 1998) (holding that Title IX does not preempt suit under § 1983 when the underlying set of facts not only violates Title IX but also violates independent constitutional rights).

146. *See infra* Part II.A.

147. *See Bruneau*, 163 F.3d 749; *Pfeiffer*, 917 F.2d 779; *see, e.g.*, Canty v. Old Rochester Reg'l Sch. Dist., 54 F. Supp. 2d 66, 73-77 (D. Mass. 1999) (finding Title IX preempts claims under § 1983 even though it does not provide a private right of action against individuals); Nelson v. Univ. of Me. Sys., 914 F. Supp 643, 647-48 (D. Me. 1996) (finding that Title IX's remedies preempt any constitutional or statutorily based claims asserted under § 1983); *see also infra* Part II.B.

148. One student commentator has argued that lower courts have not properly distinguished between statutorily and constitutionally based claims in their analysis of whether Title IX should preempt relief under § 1983. *See* Michael. A. Zwibelman, Comment, *Why Title IX Does Not Preclude Section 1983 Claims*, 65 U. Chi. L. Rev. 1465, 1471-73 (1998) (arguing that Title IX precludes neither Title IX-based claims nor constitutional claims brought under § 1983 because a judicial determination that a statute creates an implied right of action compels the conclusion that Congress did not intend to preclude § 1983 claims); *see also infra* Part II.A.2-3.

149. *See Delgado*, 367 F.3d at 672-73.

150. *See* Doe v. D'Agostino, 367 F. Supp. 2d 157, 170-71 (D. Mass. 2005) (following the Seventh Circuit's approach and preempting constitutional claims against educational institutions but not individuals when brought in the same lawsuit as Title IX claims); *infra* Part II.B.4. *Compare* Boulahanis v. Bd. of Regents, 198 F.3d 633 (7th Cir. 1999) (dismissing a § 1983 claim against an institution based on a statutory claim for sex discrimination because it was preempted by Title IX), *and* Waid v. Merrill Area Pub. Schs., 91 F.3d 857 (7th Cir. 1996) (holding Title IX preempts a constitutional claim brought under § 1983 against an institution), *with Delgado*, 367 F.3d at 669 (allowing a Title IX claim against an institution and a § 1983 claim for an equal protection violation against a teacher). However, the Second and Third Circuits do not recognize that constitutional claims fall outside the preemptive reach of Title IX. *See Bruneau*, 163 F.3d at 757-58; *Pfeiffer*, 917 F.2d at 789; *see also infra* Part II.B.3. The Second Circuit saw "nothing in *Sea Clammers* that

This part examines the circuits' varying approaches to suits involving Title IX and § 1983 claims and explores whether these courts' rationales comport with the Supreme Court's decision in *Abrams*. Part II.A explores the reasoning of courts that find Title IX does not preempt § 1983 claims. Part II.B develops the rationale of those courts that find Title IX preempts § 1983 relief. Parts II.A.4 and II.B.5 analyze how the Supreme Court's opinion and the concurring viewpoints about the compatibility of federal statutes with enforcement under § 1983, as laid out in the *Abrams* decision, frame the disagreement among the circuit courts on the preemption question.

A. *Decisions Finding that Title IX Does Not Preempt Relief Under § 1983*

This section outlines the reasoning of courts that have found that the express remedies provided by Title IX are not comprehensive enough to overcome the presumption of enforceability under § 1983 and that Title IX's legislative history does not manifest an intent to preempt relief under § 1983. These courts have also declined to find that Title IX subsumes constitutional claims, although one circuit would not permit § 1983 claims based on violations of Title IX itself.[151]

1. Applying the *Sea Clammers* Doctrine to Express Remedies

Courts finding that Title IX does not preempt § 1983 claims have considered the available remedies expressly provided by Title IX and found that the implied private right of action is outside the relevant statutory enforcement scheme. In *Crawford v. Davis*,[152] a student sued the University of Central Arkansas and certain of its high-level officials under Title IX and § 1983 for inadequately responding to her sexual harassment complaints.[153] The Eighth Circuit found that Title IX did not provide a sufficiently comprehensive remedy under the *Sea Clammers* doctrine and thus did not preempt § 1983 claims.[154] The court reasoned that Title IX's provision concerning the termination of federal funds failed to constitute an "unusually elaborate enforcement provision."[155] The court explained that the absence of expressly authorized citizen suits and administrative enforcement procedures, present in the environmental statutes in *Sea Clammers*, illustrated that Congress did not design Title IX to preempt other remedies.[156] The court further based its decision on the Supreme

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would support a constitutional rights exception," even though the court declined to "address the extent to which Title IX subsume[d] a § 1983 claim against the individual defendants" in that case. *Bruneau*, 163 F.3d at 755, 757.

151. *See* Seamons v. Snow, 84 F.3d 1226, 1234 n.8 (10th Cir. 1996), *aff'd in part, rev'd in part*, 206 F.3d 1021 (10th Cir. 2000); *infra* notes 209-10 and accompanying text.

152. 109 F.3d 1281 (8th Cir. 1997).

153. *Id.* at 1282.

154. *Id.* at 1284.

155. *Id.* (citation omitted).

156. *Id.*

Court's analysis of Title IX's legislative history in *Cannon* and *Franklin* where the Court indicated that Title IX's statutory scheme is not exclusive, and, as a result, identified an implied private damages remedy.[157]

The Tenth Circuit in *Seamons v. Snow*[158] similarly found that Title IX's statutory scheme was not so comprehensive as to warrant preemption of § 1983 claims. *Seamons* involved a football player who reported a hazing incident committed by his teammates to his coach.[159] His coach rebuked the plaintiff for reporting the incident and asked the plaintiff to apologize to his teammates for having done so.[160] School officials never took action against the perpetrators of the hazing incident, instead suggesting that the plaintiff transfer to another school.[161] The plaintiff alleged that his coach fostered a hostile environment and that the school officials' response constituted sex discrimination and harassment.[162] The plaintiff sued under Title IX and § 1983, alleging due process, equal protection, and First Amendment violations.[163]

The Tenth Circuit, focusing on the sole express remedial provision in Title IX (i.e., the termination of federal funds), observed that any private right of action under Title IX was implied.[164] In the Tenth Circuit's view, the express remedy could not support a finding of preemption.[165] The court reasoned that nothing less than an express provision for a private right of action could demonstrate congressional intent to supplant § 1983 suits for constitutional torts.[166]

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157. *Id.* (citing Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 76 (1992); Cannon v. Univ. of Chi., 441 U.S. 677, 683 (1979)).

158. 84 F.3d 1226 (10th Cir. 1996), *aff'd in part, rev'd in part*, 206 F.3d 1021 (10th Cir. 2000).

159. *Id.* at 1230.

160. *Id.*

161. *Id.*

162. *Id.* The court found that the hazing conduct to which the plaintiff was subjected did not constitute sex discrimination because the plaintiff did not demonstrate that the conduct was "sexual" in nature or that the defendants would have acted differently in response to the occurrence of a similar event in the women's athletic program. *Id.* at 1232-33. *But see* Jackson v. Birmingham Bd. of Educ., 125 S. Ct. 1497, 1507 (2005) (finding that Title IX's protections, in contrast to other federal antidiscrimination laws, encompass discrimination on the basis of sex, not "discrimination on the basis of *such individual's* sex" (internal quotation omitted)).

163. *Seamons*, 84 F.3d at 1230.

164. *Id.* at 1233-34.

165. *Id.*

166. *See id.* at 1234. The Fifth Circuit has also, in dicta, agreed with the Tenth Circuit's interpretation of Title IX's remedial measures. *See* Lakoski v. James, 66 F.3d 751 (5th Cir. 1995). In *Lakoski*, the University of Texas Medical Branch at Galveston denied tenure to a female professor. *Id.* at 752. The professor brought a sex discrimination action against the university under Title IX and under § 1983 for the alleged Title IX violation. *Id.* The court declined to "say that Title IX provides a remedial scheme sufficiently comprehensive to indicate *by itself* that Congress intended to foreclose § 1983 suits based upon rights created by Title IX." *Id.* at 755. However, the court went on to hold that plaintiffs seeking damages for employment discrimination on the basis of sex in federally funded educational programs under Title IX "directly or derivatively through § 1983" are preempted by Title VII, which provides the exclusive remedy for such discriminatory employment practices. *Id.* at 753,

2. Independent Constitutional Claims Are Not "Virtually Identical"

Courts have also addressed the narrower issue of whether § 1983 actions alleging equal protection or due process violations are preempted by Title IX, even assuming that § 1983 claims based on Title IX itself are preempted. The Eighth Circuit has found that Title IX does not preclude constitutionally based § 1983 claims.[167] There, with respect to the plaintiff's equal protection claim, the Eighth Circuit held that Title IX "in no way restricts a plaintiff's ability to seek redress via § 1983 for the violation of independently existing constitutional rights, even if the same set of facts also gives rise to a cause of action [under Title IX]."[168]

Similarly, the Sixth Circuit, in *Lillard v. Shelby County Board of Education*,[169] held that *Sea Clammers* did not "stand for the proposition that a federal statutory scheme can preempt independently existing constitutional rights, which have contours distinct from the statutory claim."[170] Likewise, the court reasoned, *Smith* did not impede plaintiffs from bringing constitutional claims independent of the Title IX claims where there was "no legislative history indicating a congressional intention to preclude reliance on section 1983 as a remedy."[171] The Sixth Circuit upheld the plaintiff's due process claim under § 1983, reasoning that a due process action[172] did not assert remedies unavailable under Title IX but instead sought to enforce distinct and independent federal constitutional rights.[173] Therefore, the court ruled that Title IX does not preclude constitutionally based § 1983 claims that are not "virtually identical" to Title IX claims.[174]

The Tenth Circuit in *Seamons* relied on the Sixth Circuit's reasoning that Title IX does not supersede constitutional claims under § 1983.[175] The

758. *But see* Zwibelman, *supra* note 148, at 1477 ("[T]he existence of other civil rights statutes merely highlights the likelihood that discrimination remedies sometimes will overlap.").

167. *See* Crawford v. Davis, 109 F.3d 1281, 1284 (8th Cir. 1997).

168. *Id.* For the same reasons, the Eighth Circuit also allowed a student to bring a due process claim against her teacher-abuser for violation of the student's constitutional right to bodily integrity. *See* Kinman v. Omaha Pub. Sch. Dist., 171 F.3d 607, 611 (8th Cir. 1999).

169. 76 F.3d 716 (6th Cir. 1996).

170. *Id.* at 723.

171. *Id.*

172. Plaintiffs may want to assert procedural due process violations where they were denied their right to a fair hearing. *See* Zwibelman, *supra* note 148, at 1479. In addition, plaintiffs may want to assert substantive due process claims, such as deprivation of education, privacy, or bodily integrity. *See id.* (noting that claims could be based on a plaintiff's "liberty interest in bodily integrity under the substantive due process right in the Fourteenth Amendment"). For the Supreme Court's discussion of the right to bodily integrity, see Ingraham v. Wright, 430 U.S. 651, 673-74 (1977) (holding that "unjustified intrusions on personal security" by the state are "[a]mong the historic liberties" that the Due Process Clause protects).

173. *Lillard*, 76 F.3d at 723.

174. *Id.*

175. Seamons v. Snow, 84 F.3d 1226, 1233 (10th Cir. 1996). The plaintiff's due process claims failed because the court found that there was no liberty or property interest to support

Seamons court found that because *Sea Clammers* resolved only preemption of § 1983 statutory claims, it was inapplicable to constitutional violations.[176] Thus, plaintiffs suing under § 1983 for constitutional violations do not circumvent Title IX's remedial scheme.[177]

3. Statutorily Based Claims Are Allowed

The Eighth Circuit is the only circuit to definitively hold that Title IX does not preempt § 1983 claims based on violations of Title IX.[178] The Sixth Circuit in *Lillard* stated in dicta that "even if the defendants' argument had been directed at an attempt by the plaintiffs to enforce their Title IX rights" under § 1983, *Sea Clammers* suggests that those claims would not be preempted.[179] However, the Tenth Circuit, also in dicta, declined to find such an exception.[180]

4. Applicability of the *Abrams* Concurrences to the Preemption Question

The two concurring opinions in *Abrams* that urge a more a careful analysis as to whether a statutory scheme preempts an alternative remedy in § 1983 can be read as supporting the circuit court decisions that refuse to find Title IX preemption of § 1983 claims.[181] Justice Breyer's concurrence stressed that the TCA involved "deferential consideration of matters within an agency's expertise."[182] Thus, this demonstrated that Congress, in enacting the TCA, meant "to foreclose—not to supplement—§ 1983 relief."[183] Similarly, the Sixth and Eighth Circuits reasoned that the Court's reading of a private right of action into Title IX indicates that Congress did not mean to rely solely on agency expertise but rather presumed that enforcement of Title IX could be left in the hands of private attorney generals.[184]

Justice Stevens's concurring opinion emphasized that legislative history is essential to determine the coextensiveness of a federal statute and

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a procedural due process claim and no state action to support a substantive due process claim. *Id.* at 1234-36.

176. *Id.* at 1233-34. However, the *Seamons* court failed to apply the *Smith* "virtually identical" test, and thus did not separately analyze each of the plaintiff's constitutional claims. *See id.* at 1233.

177. *Id.* at 1233-34.

178. Crawford v. Davis, 109 F.3d 1281, 1284 (8th Cir. 1997).

179. *Lillard*, 76 F.3d at 723.

180. *See Seamons*, 84 F.3d at 1234 n.8; *see also infra* notes 209-10 and accompanying text.

181. *See* City of Rancho Palos Verdes, Cal. v. Abrams, 125 S. Ct. 1453, 1462-63 (2005) (Breyer, J., concurring); *id.* at 1463 (Stevens, J., concurring).

182. *Id.* at 1463 (Breyer, J., concurring).

183. *Id.*

184. *See* Crawford v. Davis, 109 F.3d 1281, 1284 (8th Cir. 1997) (stating that "the [*Cannon*] Court has indicated that the sole express enforcement mechanism contained in Title IX is not exclusive); *Lillard*, 76 F.3d at 723 (noting that the *Cannon* "Court concluded that implying a private right of action would . . . complement . . . the public remedy explicitly created in the statute").

§ 1983.[185] Because of the "streamlined and expedited" enforcement scheme under the TCA,[186] Justice Stevens did not think that the TCA's "statutory requirements can simply be mapped onto the existing structure of § 1983, [although] there is nothing in the legislative history to suggest that Congress would have wanted [the Court] to do so."[187] That silence was an important choice on the part of Congress and reinforced the Court's textual and structural reading of the TCA.[188] This rationale supports the *Crawford* court's finding that preemption analysis should extend beyond the four corners of Title IX's text to consider Congress's legislative history.[189] The *Crawford* court determined that the history, as discussed in the Court's decision in *Cannon*, does not demonstrate that Congress intended that its termination of federal funds was the exclusive remedy for sex discrimination in education.[190]

Justice Stevens also disagreed with the Court's quickness to abandon the usual presumption that § 1983 is available to remedy federal statutory rights.[191] Justice Stevens would foreclose the remedy in only the most exceptional cases.[192] He offered no guidance, however, for what constitutes an "exceptional" case other than that such a statutory scheme would be "unusually comprehensive and exclusive,"[193] and that the TCA was such a case because it was tailored to foster an expedited review process.[194] Therefore, it appears that Justice Stevens's view supports the Tenth and Eighth Circuit decisions holding that Title IX is not a comprehensive remedial scheme because its enforcement regulations are

185. *Abrams*, 125 S. Ct. at 1463 (Stevens, J., concurring). Professor John F. Manning notes that Justice Stevens would be more likely to rely on a law's background purpose, often reflected in its legislative history, to divine a statute's meaning given Justice Stevens's belief that Congress is imprecise in its statutory drafting but "quite coherent in the substantive framing of policies that serve some overarching purpose." John F. Manning, *Respect for Congress in the Law of Statutory Interpretation*, 74 Fordham L. Rev. 2009, 2010 (2005). Justice Scalia, on the other hand, prefers textualism—"a philosophy that gives precedence to a statute's semantic meaning, when clear, and eschews reliance on legislative history or other indicia of background purpose to vary the conventional meaning of the text"—because of his belief that Congress is precise in drafting statutes due to the compromises that are forged to pass legislation but is "quite messy in the substantive policies it adopts." *Id.*

186. *Abrams*, 125 S. Ct. at 1464 n.* (Stevens, J., concurring).

187. *Id.* Justice Stevens thought it was important that "despite the fact that awards of damages and attorney's fees could have potentially disastrous consequences for the likely defendants in most private actions[,] ... nowhere in the course of Congress' lengthy deliberations is there any hint that Congress wanted damages or attorney's fees to be available." *Id.* at 1465 (Stevens, J., concurring).

188. *See id.*

189. *See Crawford*, 109 F.3d at 1284.

190. *See id.*

191. *See Abrams*, 125 S. Ct. at 1464 (Stevens, J., concurring).

192. *Id.*

193. *Id.*

194. *See id.* at 1463-64, 1464 n.*. Justice Stevens determined the TCA's review process was a significant departure from the right of action available under § 1983. *Id.* at 1464 n.*.

not unusually elaborate or exceptional.[195] Rather, those circuits conclude that Title IX is a general statute protecting against sex discrimination and the use of federal funds to support sex discrimination, and such an express remedy is insufficient to preempt § 1983 claims.[196]

B. *Title IX Should Preclude Relief Under § 1983*

This section outlines the arguments of courts holding that the express and judicially created remedies under Title IX illustrate that § 1983 suits would duplicate those remedies and evade Title IX's comprehensive remedial scheme. Additionally, the Second and Third Circuits would find that Title IX subsumes constitutional claims as well as statutorily based claims.

1. Looking Beyond Title IX's Express Remedies

These courts, in applying the *Sea Clammers* doctrine, emphasize an analysis of Congress's purpose in enacting the statute, which the Supreme Court determined was consistent with recognition of a private right of action under Title IX. For example, in *Bruneau v. South Kortright Central School District*,[197] a student sued her teacher, assistant superintendent, and school district under Title IX and § 1983 for failing to protect her from sexual harassment by her peers.[198] The Second Circuit dismissed the § 1983 claim based on a violation of Title IX.[199] The court explained that Title IX itself "establishes a complex administrative enforcement scheme to ensure compliance with its provisions,"[200] and the § 1983 claim contravened the scheme. The court also reasoned that the Supreme Court has found "that Title IX implicitly permits an individual to bring a private cause of action,"[201] which suggests that the plaintiff had "access to a full panoply of remedies including equitable relief and compensatory damages"[202] without § 1983 and further indicates congressional intent to supersede a § 1983 remedy.[203]

The Third Circuit's reasoning was similar. In *Pfeiffer v. Marion Center Area School District*,[204] the plaintiff, a pregnant teen who was dismissed

195. *See Crawford*, 109 F.3d at 1284; Seamons v. Snow, 84 F.3d 1226, 1233-34 (10th Cir. 1996), *aff'd in part, rev'd in part*, 206 F.3d 1021 (10th Cir. 2000); *see also supra* notes 152-66 and accompanying text.

196. *See Crawford*, 109 F.3d at 1284; *Seamons*, 84 F.3d at 1233-34; *see also supra* note 32 and accompanying text.

197. 163 F.3d 749 (2d Cir. 1998).

198. *Id.* at 752-53.

199. *Id.* at 758-59.

200. *Id.* at 756 (citing 34 C.F.R. § 100.7(a)-(d) (1997)). The court pointed out that an injured individual could file a complaint with the DOE, which would investigate the allegations and either attempt to resolve the matter informally or terminate the institution's federal funding pursuant to an administrative hearing. *Id.*

201. *Id.* (citing Cannon v. Univ. of Chi., 441 U.S. 677, 709 (1979)).

202. *Id.*

203. *Id.*

204. 917 F.2d 779 (3d Cir. 1990).

from her high school's chapter of the National Honor Society for engaging in premarital sex, filed a complaint against her school that included a request for injunctive relief and damages under Title IX and claims of gender discrimination under § 1983.[205] The district court held that the plaintiff's constitutional claims were "subsumed" by Title IX and thus barred under the *Sea Clammers* doctrine.[206] The Third Circuit agreed, refusing to hear the § 1983 claim and finding that the *Sea Clammers* doctrine had "been applied consistently in analogous cases" where the statutory scheme in question provided an enforcement scheme comprehensive enough to preclude relief under § 1983.[207] Thus, the plaintiff could not bypass Title IX's remedial scheme, including its enforcement regulations and implied right of action, by bringing suit under § 1983.[208]

2. Section 1983 Claims Duplicate Title IX Claims

Several circuits find that plaintiffs suing under both § 1983 and Title IX for Title IX violations seek duplicate relief, and so the § 1983 claims ought to be barred. Despite recognizing § 1983 claims asserting violations of the U.S. Constitution, the Tenth Circuit held that Title IX precludes § 1983 claims for violations of Title IX.[209] The Tenth Circuit explained that if the plaintiff prevailed on both claims, the relief granted would be duplicative.[210] The Second[211] and Seventh[212] Circuits also adhere to this approach.

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205. *Id.* at 782-83.

206. *Id.* at 789.

207. *Id.*

208. *Id.*; *see also* Williams v. Sch. Dist. of Bethlehem, Pa., 998 F.2d 168, 176 (3d Cir. 1993). The approach that has emerged in the Third Circuit is one where plaintiffs choose between asserting claims under Title IX or § 1983. *See* DiSalvio v. Lower Merion High Sch. Dist., 158 F. Supp. 2d 553, 558 (E.D. Pa. 2001) (finding that *Sea Clammers* bars § 1983 claims for Title IX violations and that "[i]t is equally well-settled, at least in the United States Court of Appeals for the Third Circuit, that a § 1983 action based on a violation of constitutional rights would be subsumed by Title IX if the plaintiff brings a Title IX claim as well."). In *DiSalvio*, the plaintiff brought a claim of sexual harassment pursuant to § 1983 for a deprivation of her right to bodily integrity under the Fourteenth Amendment's Due Process Clause, but she chose not to bring a similar claim under Title IX. *Id.* at 556 & n.3. Therefore, the court found that "there was no statutory claim into which her constitutional claim under § 1983 could be subsumed," and thus her claim was outside of preemption's reach. *Id.* at 558.

209. Seamons v. Snow, 84 F.3d 1226, 1234 n.8 (10th Cir. 1996), *aff'd in part, rev'd in part*, 206 F.3d 1021 (10th Cir. 2000).

210. *Id.* The Tenth Circuit analogized to interpretations of Title VII that do not allow Title VII to serve as a basis for an independent remedy under § 1983 even though concurrent application of Title VII in the same litigation does not bar a cause of action for a constitutional violation under § 1983. *Id.*

211. *See* Bruneau v. S. Kortright Cent. Sch. Dist., 163 F.3d 749, 756 (2d Cir. 1998).

212. *See* Boulahanis v. Bd. of Regents, 198 F.3d 633 (7th Cir. 1999); Waid v. Merrill Area Pub. Schs., 91 F.3d 857 (7th Cir. 1996). In *Boulahanis* and *Waid*, the Seventh Circuit found such claims duplicative, as well as any equal protection claims against institutions. *See infra* note 225. In *Delgado*, which established an exception for personal-capacity suits

3. "Virtually Identical" Constitutional Claims Are Preempted

The Second and Third Circuits preempt § 1983 claims asserting constitutional violations in lawsuits that concurrently allege violations of Title IX. The Third Circuit's decision in *Pfeiffer* found Title IX preempted § 1983 claims for Fourteenth Amendment violations asserted against a school district and its officials in both their personal and official capacities.[213] In addition, the Second Circuit in *Bruneau* declined to find an exception to the *Sea Clammers* doctrine for a constitutional equal protection claim.[214] The court reasoned that the Supreme Court's holding in *Smith* remained relevant despite Congress's having enacted a statute that was designed to supersede *Smith* and provide a remedy under § 1983.[215] The Second Circuit found that where § 1983 and Title IX claims are based on the same factual predicate, "Title IX's enforcement scheme fully addresses . . . constitutional claims."[216] Thus, "Title IX provides the exclusive remedial avenue."[217] The Second Circuit determined that to allow the constitutional claims would entail bypassing the statute's comprehensive remedial scheme.[218]

4. Partial Preemption: Separate Cause of Action for Individual Liability

Another approach holds that Title IX should not preempt § 1983 claims based on an individual defendant's violation of the U.S. Constitution. The Seventh Circuit has held that the preemption question concerning Title IX turns on whether the defendants who actually committed the tortious acts were individuals or "school officials responsible for the policy or practice that violates Title IX."[219] Although affirming that Title IX supplants claims under § 1983 seeking to hold institutions' high-level officials liable for sexual harassment,[220] *Delgado v. Stegall* marked a change in course for the Seventh Circuit from a prior decision that did not distinguish between individuals and officials.[221] Because the court found "no hint" in the

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asserting constitutional claims against state actors whose abuse did not constitute a policy or practice for which a state-sponsored institution could be found liable under Title IX, the Seventh Circuit affirmed that Title IX "furnishes all the relief that is necessary to rectify the discriminatory policies or practices of the school itself." Delgado v. Stegall, 367 F.3d 668, 674 (7th Cir. 2004).

213. *Pfeiffer*, 917 F.2d at 789.

214. *See Bruneau*, 163 F.3d at 757-58.

215. *See id.* at 758 n.1 (citing 20 U.S.C. § 1415(f) (2000)).

216. *Id.* at 758.

217. *Id.*

218. *Id.*; *see also infra* note 221.

219. Delgado v. Stegall, 367 F.3d 668, 674 (7th Cir. 2004); *see also supra* note 150 and accompanying text.

220. *Delgado*, 367 F.3d at 674.

221. *See* Boulahanis v. Bd. of Regents, 198 F.3d 633 (7th Cir. 1999); Waid v. Merrill Area Pub. Schs., 91 F.3d 857 (7th Cir. 1996). In considering "parallel" Title IX and § 1983 claims brought by a teacher against a school district's director of curriculum and school principal that had passed her over for permanent appointment, the court found that Congress in enacting Title IX "created a strong incentive for schools to adopt policies that protect

"background or history of Title IX" that Congress intended to supplant § 1983 when "relief is sought against a teacher or other non-managerial employee" who has sexually harassed a student, claims against individuals under § 1983 should not be preempted.[222] The court explained that application of the *Sea Clammers* doctrine risked "immuniz[ing the teacher] from liability for his federal constitutional tort" where school officials had no actual knowledge of the teacher's conduct.[223] The court rejected that possibility since it risked leaving students who were sexually harassed by their teachers with no "federal remedies for sex discrimination."[224] In so ruling, the Seventh Circuit distinguished its prior cases—finding that Title IX precluded relief under § 1983 and declining to distinguish between individual and institutional liability—as limited to suits against school officials.[225]

The Seventh Circuit explained that its approach in *Delgado* followed the Supreme Court's decision in *Gebser v. Lago Vista Independent School District*.[226] In *Gebser*, the Supreme Court stated that its decision does "not affect any right of recovery that an individual may have against a school district as a matter of state law or against the teacher in his individual capacity under state law or under 42 U.S.C. § 1983."[227] The Eighth Circuit, although reaching a different conclusion about preemption, similarly relied on *Gebser* in *Kinman v. Omaha Public School District*.[228] There, the court upheld a plaintiff's § 1983 claim for equal protection and due process violations against her teacher because the *Gebser* Court "made it clear that that decision has no effect on an individual-capacity suit against a teacher

federal civil rights" or else lose federal funding. *Waid*, 91 F.3d at 862. This indicated Congress's intent to place the burden of compliance with its mandate against sex discrimination with institutions rather than such institutions' individual officers. *Id.* The comprehensiveness of judicial remedies under Title IX suggested to the Seventh Circuit that "Congress saw Title IX as the device for redressing any grievance arising from a violation of federal civil rights by an educational institution." *Id.* at 863. After *Waid*, the Seventh Circuit decided *Boulahanis*, 198 F.3d 633. There, male athletes complaining of sex discrimination brought suit against Illinois State University and its officials for eliminating their sports teams. *Id.* at 635. The plaintiffs asserted that the decision to eliminate their teams violated Title IX and that various school officials violated their constitutional rights. *Id.* at 636. The court found that the plaintiffs' claims against individual officials under § 1983 were preempted by Title IX. *Id.* at 640. The court rejected a distinction between institutional liability and individual liability, finding that Title IX authorizes suits against institutions, not individuals. *Id.* The *Boulahanis* court determined that the fact that Title IX did not reach individual liability did not make the statute less comprehensive; it only indicated Congress's decision that suits against institutions were the best means of redress for sex discrimination. *Id.* Because institutions have the burden of enforcing Title IX, and the plaintiffs had recourse under Title IX, the Title IX claim preempted remedies under § 1983. *Id.*

222. *Delgado*, 367 F.3d at 675.
223. *Id.* at 674.
224. *Id.* at 674-75.
225. *Id.*
226. *See id.* at 674.
227. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 292 (1998).
228. 171 F.3d 607 (8th Cir. 1999).

brought under . . . section 1983."[229] A number of district courts followed this reasoning in upholding § 1983 claims asserting constitutional violations by state actors in their individual capacities.[230]

5. Applicability of *Abrams* to Preclusion

Abrams may be read to support circuit court decisions that find Title IX preempts § 1983 claims. Although refusing to draw a bright-line rule that the existence of a private judicial remedy in a statute forecloses enforcement of that statute under § 1983, the *Abrams* opinion certainly supports the conclusion that the recognition of an implied private right of action under Title IX can preclude a claim under § 1983 to vindicate Title IX.[231] In suits asserting claims under Title IX and § 1983, *Abrams* indicates that the inference that the § 1983 claim would be duplicative must be overcome by express or implicit textual indication that the statutory remedy should not supplant § 1983 relief.[232] This would support the reasoning of the Second and Seventh Circuits, which consider Title IX's complete remedial scheme, including its implied private right of action, when analyzing Title IX's preclusive effect on § 1983 claims.[233]

The plaintiff in *Abrams* never asserted constitutional claims.[234] The plaintiff instead sought to enforce the TCA and obtain monetary damages under a § 1983 claim.[235] Although the *Abrams* decision did not squarely address the validity of § 1983 claims alleging constitutional violations, Justice Scalia expressed concern about affording plaintiffs a "more expansive remedy under § 1983" where a statute forecloses such remedies.[236] As a result, *Abrams* can be read to foreclose a more expansive

229. *Id.* at 611.

230. *See, e.g.*, Doe v. Woodridge Elementary Sch. Dist. No. 68 Bd. of Educ., No. 04 C 8250, 2005 WL 910732, at *4 (N.D. Ill. Apr. 13, 2005) (holding that the availability of a claim under Title IX precludes suit against individuals who, in their official capacity, act pursuant to a school policy or custom, but not against individuals who engage in discrimination in their individual capacity); Hayut v. State Univ. of N.Y., 127 F. Supp. 2d 333, 339-40 (N.D.N.Y. 2000) (mem. decision order) (finding that Title IX does not preclude § 1983 actions against individuals and limiting the Second Circuit's preemption decision in *Bruneau* to constitutional claims asserted against school districts); *see also* Schultzen v. Woodbury Cent. Cmty. Sch. Dist., 250 F. Supp. 2d 1047, 1055-56 (N.D. Iowa 2003) (granting summary judgment for the defendant on a § 1983 claim for a Title IX violation because individuals are not recipients of federal financial assistance, but reaching the merits of a § 1983 claim against the individual for alleged equal protection and due process violations because such claims are permissible).

231. *See* City of Rancho Palos Verdes, Cal. v. Abrams, 125 S. Ct. 1453, 1459 (2005); *see also supra* Part II.B.1-2.

232. *Abrams*, 125 S. Ct. at 1459.

233. *See supra* Part II.B.2.

234. *See Abrams*, 125 S. Ct. at 1457.

235. *Id.* The plaintiff also sought attorney's fees under § 1988. *Id.* The CRAFAA allows courts the discretion to award reasonable attorney's fees to prevailing parties in civil rights suits. 42 U.S.C. § 1988(b) (2000). See *supra* note 63 and accompanying text for a discussion of Congress's amendment of § 1988 to incorporate prevailing parties in Title IX suits.

236. *Abrams*, 125 S. Ct. at 1458-59.

method of enforcement, including constitutional claims, under § 1983 when such claims assert Title IX violations. This concern about evading a statute's remedial scheme is echoed in the Second and Third Circuit holdings that decline to allow § 1983 claims for constitutional violations where the same conduct is alleged as a Title IX violation.[237]

The Court manifested its concern that lower courts should consider the compatibility of Title IX and § 1983 claims when, in May 2005, the Supreme Court vacated a Sixth Circuit decision involving the equity of a high school's scheduling of sports.[238] Without issuing an opinion, the Court remanded the case back to the Sixth Circuit for reconsideration in light of *Abrams*.[239] The Sixth Circuit ruling before the Court concerned allegations that the Michigan High School Athletic Association ("MHSAA")[240] discriminated on the basis of sex by making girls play in "non-traditional" seasons, which disadvantaged female athletes in their access to college recruiters, high-quality competitions, and other opportunities as compared to male athletes.[241] The plaintiffs challenged the MHSAA's scheduling policy under Title IX, § 1983, and Michigan state law.[242] The Sixth Circuit affirmed the lower court's judgment that the MHSAA violated the Fourteenth Amendment's Equal Protection Clause.[243] However, the Sixth Circuit never addressed the validity of the Title IX claim because it found the MHSAA violated the Equal Protection Clause by using impermissible gender classifications that were not related to a legitimate governmental interest to assign seasons to various high school sports.[244]

The Supreme Court's decision to vacate and remand that Sixth Circuit ruling can be interpreted as a signal that the Court regards Title IX as the only recourse available to complainants of sex discrimination in schools. In light of *Abrams*, where the Court expressed concern about allowing plaintiffs "more expansive" remedies under § 1983 than Congress intended, § 1983 claims for Title IX and constitutional violations arguably circumvent Title IX's remedial scheme, which affords litigants suing institutions for sex discrimination the option of pursuing private suits or

237. *See supra* Part II.B.3.

238. *See* Mich. High Sch. Athletic Ass'n v. Cmtys. for Equity, 125 S. Ct. 1973 (2005) (mem.).

239. *Id.*

240. The trial court found the Michigan High School Athletic Association ("MHSAA") to be a state actor and subject to Title IX as an entity with controlling authority over a federally funded program. Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n, 178 F. Supp. 2d 805, 848, 854 (W.D. Mich. 2001), *aff'd*, 377 F.3d 504 (6th Cir. 2004), *vacated*, 125 S. Ct. 1973 (2005) (mem.).

241. *See Cmtys. for Equity*, 377 F.3d at 513; *see also* Caroline Hendrie, *High Court Orders New Review of Michigan Title IX Case*, Educ. Week, May 11, 2005, at 28.

242. *See Cmtys. for Equity*, 178 F. Supp. 2d at 807-08. The § 1983 claims were based on violations of the Fourteenth Amendment's Equal Protection Clause and did not assert violations of Title IX under § 1983. *Id.* at 807.

243. *See Cmtys. for Equity*, 377 F.3d at 513.

244. *See id.* at 512-13.

administrative review within the parameters of Title IX.[245] The Seventh Circuit echoes this concern, stating that Congress enacted Title IX as its intended avenue of relief for redressing discrimination on the basis of sex in educational programs.[246]

III. RECONCILING TITLE IX AND § 1983: A FRAMEWORK FOR PREEMPTION AND STATUTORY AMENDMENT

Congress passed Title IX to ensure that federal government funds would not go to educational institutions guilty of discrimination, and, in turn, to protect individuals against sex discrimination.[247] Title IX's legislative history reflects congressional concern that discrimination in educational programs disadvantaged women as they moved through their education and later in their careers.[248] Title IX itself expressly provides for the termination of federal funding for institutions that fail to comply with its provisions.[249] The Supreme Court also has recognized an implied private right of action under Title IX to enhance Title IX's effectiveness in combating sex discrimination.[250]

The question of whether Title IX should preempt relief under § 1983 for sex discrimination is a persistent problem that courts have grappled with for some time now, with inconsistent answers. The decisions in the circuit courts that fail to address the distinction between institutional and individual defendants when assessing Title IX's compatibility with § 1983[251] undermine Title IX's effectiveness as an instrument against sex discrimination. This part argues that the Seventh Circuit's approach to Title IX preemption of § 1983 claims comports with the Supreme Court's preemption cases, including *Abrams*.[252] However, to best honor Title IX, this Note urges Congress to amend Title IX's liability standards and, at a minimum, to codify the Seventh Circuit's approach to individual liability.[253] This would remedy the current conflicting statutory interpretations of Title IX while ensuring plaintiffs receive adequate protection against sex discrimination.

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245. *See supra* notes 42-45 and accompanying text. In their Supreme Court brief, the MHSAA argued that "Congress's enactment of Title IX reflects its judgment that promoting gender equity in education is best achieved by creating incentives for educational institutions to work with the . . . (DOE) to establish policies that will eliminate discrimination." Reply Brief of Petitioner at 8-9, *Cmtys. for Equity*, 125 S. Ct. 1973 (No. 04-1021), *available at* 2005 WL 856035.

246. *See supra* note 221.

247. *See supra* text accompanying note 32.

248. *See supra* text accompanying notes 36-37.

249. *See supra* note 29 and accompanying text.

250. *See* Cannon v. Univ. of Chi., 441 U.S. 677, 695-96 (1979).

251. *See supra* Part II.B.1-3.

252. *See* Delgado v. Stegall, 367 F.3d 668, 674 (7th Cir. 2004); *infra* Part III.A.

253. *See infra* Part III.B.

A. *The Seventh Circuit Articulates an Approach Most Consistent with Preemption Doctrine After* Abrams

At the outset, this Note echoes Justice Stevens's criticism that the *Abrams* Court was too hasty to rebut the presumption of enforceability under § 1983.[254] In cases like *Suter v. Artist M.* and *Smith v. Robinson*, the Court emphasized that the defendant bears a heavy burden to rebut the presumption that a statute's comprehensive remedial scheme is incompatible with § 1983.[255] Those decisions suggest that the finding of congressional intent to preempt § 1983 claims should not be an easy decision. This interpretation makes sense in light of the fact that the Supreme Court has found statutory schemes sufficiently comprehensive to preempt suits under § 1983 on only three occasions, including *Abrams*.[256]

1. Claims Against Individuals

The preemption of state actors' constitutional torts attributable to such defendants in their individual capacities risks moving away from the Court's position by preempting claims that Title IX does not purport to govern. Title IX reaches institutions, not individual defendants.[257] Thus, no overlap exists between Title IX and § 1983 regarding individual defendants employed by state-sponsored educational programs receiving federal funds.[258] Preemption of § 1983 claims for constitutional torts committed by teachers in their individual capacities would limit liability in a way not contemplated by Title IX. This was not the result Congress intended in enacting Title IX.[259]

Justice Stevens's urging that preemption should be found only in exceptional cases[260] accords with the historical importance of § 1983. Congress passed § 1983 to serve as a conduit to enforce substantive rights, not as a source of substantive rights on its own.[261] It is designed to ensure that all litigants have access to the federal courts to redress deprivations of their federal and constitutional rights.[262] Section 1983's significance is made clear by the fact that much of this country's civil rights litigation in federal courts involves § 1983.[263] As Justice Breyer urged in his *Abrams*

254. *See* City of Rancho Palos Verdes, Cal. v. Abrams, 125 S. Ct. 1453, 1464 (2005) (Stevens, J., concurring).

255. *See* Suter v. Artist M., 503 U.S. 347 (1992); Smith v. Robinson, 468 U.S. 992 (1984).

256. *See Abrams*, 125 S. Ct. 1453; *Smith*, 468 U.S. 992; Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1 (1981).

257. *See supra* text accompanying note 18.

258. *Compare supra* notes 26-29 and accompanying text *with supra* notes 71-76 and accompanying text.

259. *See supra* Part I.A.1.

260. *See Abrams*, 125 S. Ct. at 1464 (Stevens, J., concurring).

261. *See supra* Part I.B.

262. *See supra* notes 72-74 and accompanying text.

263. *See* Lewis & Norman, *supra* note 13, at 45 (noting that § 1983 is the most important of the Reconstruction Civil Rights Acts).

concurrence, context is critical to understanding a statute's compatibility with § 1983.[264] With this principle in mind, the circumstances in which Congress enacted Title IX informs the availability of a § 1983 remedy to litigants for violations of their constitutional rights.[265] At the time of Title IX's passage, § 1983 provided redress for the constitutional violations of individual state actors.[266] This indicates that Congress wanted to continue individual liability for equal protection and due process violations concurrently with institutional liability under Title IX. Given the *Gebser* Court's decision to leave open the possibility of redress against individual harassers under state tort law or § 1983,[267] extending Title IX preemption beyond institutional defendants subject to suit under Title IX would mark a significant departure from prior case law.

The Seventh Circuit approach more squarely serves Title IX's remedial purpose than the approaches of other circuits that adhere to a more expansive reading of the Court's preemption doctrine. Most notably in *Delgado* is the distinction between individuals and institutions.[268] There, the Seventh Circuit recognized that Title IX, interpreted in *Cannon* to contain a private damages remedy, is comprehensive when wielded to rectify the discriminatory practices of an educational institution.[269] Title IX, however, has not been interpreted to apply to teachers who act outside of school policy or practice.[270] The Seventh Circuit correctly found that the application of the *Sea Clammers* doctrine to the constitutional torts of individuals working for federally assisted educational institutions would undermine the prevailing presumption at the time of Title IX's drafting: that § 1983 would be available to redress constitutional violations that Title IX does not remedy.[271]

Furthermore, the Seventh Circuit notes that nothing indicates that preemption of state actors' constitutional torts attributable to such defendants in their individual capacities would further Title IX's policies.[272] It is indeed within Congress's power to preempt more expansive remedies than those it has provided for in a statute.[273] But Congress must clearly signal its decision to do so. Congress has the capacity to speak clearly on this point and has not done so with Title IX.

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264. *See Abrams*, 125 S. Ct. at 1462 (Breyer, J., concurring).

265. *See* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 285-86 (1998) (denying damages recovery against a school district for a teacher's harassment of a student based on respondeat superior because the principal civil rights statutes in existence at Title IX's enactment did not provide for damages awards).

266. *See* Monroe v. Pape, 365 U.S. 167, 171-87 (1961), *overruled on other grounds by* Monell v. Dep't of Soc. Servs. of N.Y., 436 U.S. 658 (1978).

267. *See Gebser*, 524 U.S. at 292.

268. *See Delgado v. Stegall*, 367 F.3d 668, 674 (7th Cir. 2004).

269. *Id.*; *see also* Boulahanis v. Bd. of Regents, 198 F.3d 633, 640 (7th Cir. 1999); Waid v. Merrill Area Pub. Schs., 91 F.3d 857, 863 (7th Cir. 1996).

270. *See Delgado*, 367 F.3d at 672.

271. *See id.* at 675.

272. *See id.* at 674.

273. *See supra* text accompanying note 91.

Moreover, the Seventh Circuit's approach comports with the *Abrams* Court's observation that any limitations in a statute are deliberate and ought not to be evaded by an alternative § 1983 remedy.[274] Indeed, the Seventh Circuit's limitation of preemption to suits involving school entities and officials amenable to suit under § 1983, and not nonsupervisory employees like teachers,[275] adheres to the limitations of Title IX.[276] Individual liability under § 1983 for constitutional violations is not limited by Title IX's express or implied remedies.[277] Preemption thus cannot reach such claims.

2. Claims Against Educational Institutions and Officials Amenable to Suit Under § 1983

The Seventh Circuit also correctly concludes that a showing of comprehensiveness is met for Title IX, demonstrating its incompatibility with statutory claims asserted against school entities and officials under § 1983.[278] In this vein, § 1983 claims based on Title IX would be preempted because the private right of action implied in Title IX is sufficiently comprehensive to override Title IX plaintiffs' access to § 1983. Title IX plaintiffs' ability to seek recourse in the courts may not transform Title IX into an "exceptional" statutory scheme that is "unusually comprehensive and exclusive,"[279] nor does "the availability of a private judicial remedy . . . conclusively establish[] a congressional intent to preclude § 1983 relief."[280] However, the statutes the Court has deemed incompatible with § 1983 all contained a federal judicial review provision.[281] In *Sea Clammers*, because the environmental statutes enacted by Congress created numerous statutory remedies, including two citizen-suit provisions, the Court found Congress did not intend to preserve a right of action under § 1983.[282] Likewise, in *Smith*, the "'carefully tailored' local administrative procedures followed by federal judicial review"[283] Congress delineated in the EHA were inconsistent with relief under § 1983.[284] And,

274. *See* City of Rancho Palos Verdes, Cal. v. Abrams, 125 S. Ct. 1453, 1460 (2005).

275. *See supra* Part II.B.4.

276. Indeed, the Third Circuit's approach, which fails to distinguish between claims asserted against individuals and those asserted against institutions amenable to suit under § 1983, presents a doctrinal puzzle: Although preemption should, in theory, foreclose recourse to § 1983 as an alternative remedy to Title IX, plaintiffs in the Third Circuit choose between pursuing claims under Title IX or § 1983, which can lead plaintiffs to forgo recourse to Title IX in favor of suit under § 1983. *See* DiSalvio v. Lower Merion High Sch. Dist., 158 F. Supp. 2d 553, 558 (E.D. Pa. 2001); *see also supra* note 208.

277. In contrast, § 1983 claims asserted against individuals to redress Title IX violations would evade limitations upon Title IX's remedy because Title IX's statutory focus is institutions. *See supra* Part I.A.2.

278. Waid v. Merrill Area Pub. Schs., 91 F.3d 857, 863 (7th Cir. 1996).

279. *Abrams*, 125 S. Ct. at 1464 (Stevens, J., concurring).

280. *Id.* at 1459.

281. *See supra* Part I.B.2.

282. *See* Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 20 (1981).

283. Blessing v. Freestone, 520 U.S. 329, 347 (1997).

284. *See* Smith v. Robinson, 468 U.S. 992, 1009 (1984); *see also supra* Part I.B.2.b.

in *Abrams*, the TCA's thirty-day time frame for initiating enforcement actions convinced the Court that such a streamlined and expedited scheme would be fundamentally incompatible with the statute of limitations for § 1983 actions.[285]

Although Title IX is a more general statute than those at issue in *Sea Clammers*, *Smith*, and *Abrams*, it contains a private right of action that Congress implicitly ratified in its amendments to the statute.[286] Title IX's express administrative remedy—the withdrawal of federal funds for discriminatory institutions in order to prohibit federal resources from supporting discrimination on the basis of sex—would be insufficient to preempt § 1983 suits.[287] However, to effectuate the right contained in the statute and "provide individual citizens effective protection" against discrimination,[288] the Court found a private federal remedy in Title IX.[289] This implied right of action has been the only viable avenue of recourse for Title IX plaintiffs because no institution has lost its federal funds as a result of a Title IX violation.[290] Thus, while Title IX does not restrict relief otherwise available under § 1983, it nevertheless "adds no remedies to those available under § 1983"[291] and "furnishes all the relief that is necessary to rectify the discriminatory policies or practices of the school itself."[292]

The preemption of virtually identical constitutional claims asserted against institutions or officials under § 1983 is a more complex issue that *Abrams* addressed only indirectly.[293] In light of *Abrams*, the Court has signaled that it may view Title IX as the only legal avenue for plaintiffs to assert claims of gender-based discrimination against federal fund recipients.[294] Similarly, the Seventh Circuit determined that "Congress saw Title IX as the device for redressing any grievance arising from a violation

285. *See Abrams*, 125 S. Ct. at 1456.

286. *See supra* notes 63-65 and accompanying text.

287. The Court held in *Blessing*, *Wilder*, and *Wright* that administrative review alone is insufficient to demonstrate the comprehensiveness that would foreclose relief under § 1983. *See Blessing*, 520 U.S. at 347-48; Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 521-23 (1990); Wright v. City of Roanoke Redevelopment & Hous. Auth., 479 U.S. 418, 427-28 (1987).

288. Cannon v. Univ. of Chi., 441 U.S. 677, 704 (1979).

289. *See id.* at 705-06.

290. *See* Carpenter & Acosta, *supra* note 29, at 24.

291. City of Rancho Palos Verdes, Cal. v. Abrams, 125 S. Ct. 1453, 1459 (2005).

292. Delgado v. Stegall, 367 F.3d 668, 674 (7th Cir. 2004); *cf.* Samberg-Champion, *supra* note 86, at 1884 (noting that the importance of recourse to § 1983 for the enforcement of federal rights is greatest where "[§] 1983 provides remedies for primary rights that otherwise have none"). Title IX's remedial scheme as currently enforced is problematic not because of a lack of judicial review for individuals who experience sexual harassment but rather because of the liability standard articulated by the Court in *Gebser* and *Davis*. *See supra* Part I.A.2; *see also infra* Part III.B. The concern is that this standard will lead educational institutions to "insulate themselves from knowledge about [discrimination on the basis of sex]" and thus "claim immunity from damages liability." Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 300-01 (1998) (Stevens, J., dissenting).

293. *See supra* notes 238-39 and accompanying text.

294. *See supra* notes 239-46 and accompanying text.

of federal civil rights by an educational institution."[295] Insofar as the Seventh Circuit considered claims framed as equal protection violations and Title IX violations, its view may have support.[296]

First, the Supreme Court has adopted an expansive reading of rights protected by Title IX, as exemplified in the *Jackson* Court's holding that retaliation against a person reporting sex discrimination was itself discrimination on the basis of sex and prohibited by Title IX's text.[297] Such an expansive reading accords with the view that Title IX was meant to provide far-reaching and comprehensive protection against discrimination in the education context.[298] Therefore, a claim alleging an equal protection violation is virtually identical to Title IX's broad statutory prohibition of discrimination on the basis of sex when based on the same underlying conduct and asserted against the same parties.

In addition, the circumstances in which Congress enacted Title IX indicate that its remedial scheme was meant to constitute a stronger and more comprehensive measure than was constitutionally mandated in 1972.[299] At that time, equal protection had been recently extended to gender-based discrimination, with only rational basis scrutiny.[300] Title IX's legislative history, in contrast, "speaks of remedying discrimination against women in much stronger terms than the 'rational relationship' that was constitutionally required in 1972."[301] Although plaintiffs asserting equal protection claims do not bypass any goals of this far-reaching mandate, such legislative history "indicates that Congress perceived [Title IX] as the most effective vehicle"[302] for protecting students' constitutional guarantee to be free from discrimination on the basis of sex. Thus, courts might conclude that Title IX's remedial scheme is sufficiently comprehensive to subsume allegations of equal protection violations or retaliation claims—because the substantive rights involved are virtually identical to Title IX's antidiscrimination right—but is not preemptive of independent substantive

295. Waid v. Merrill Area Pub. Schs., 91 F.3d 857, 863 (7th Cir. 1996).

296. In *Delgado*, *Boulahanis*, and *Waid*, the Seventh Circuit addressed § 1983 claims alleging violations of the Fourteenth Amendment's Equal Protection Clause. *Delgado*, 367 F.3d at 673; Boulahanis v. Bd. of Regents, 198 F.3d 633, 640 (7th Cir. 1999); *Waid*, 91 F.3d at 860.

297. *See supra* Part I.A.2.

298. *See supra* Part I.A.1. As one student commentator notes, it is likely that Title IX's drafters expected the termination of federal funds to be a powerful tool in eradicating gender-based discrimination in educational programs. *See* Cherner-Ranft, *supra* note 70, at 1900 n.82; *cf.* Cannon v. Univ. of Chi., 441 U.S. 677, 705 n.38 ("Congress itself has noted the severity of the fund-cutoff remedy and has described it as a last resort . . . .").

299. *See* Lee, *supra* note 26, at 71; *see also* David S. Cohen, *Title IX: Beyond Equal Protection*, 28 Harv. J.L. & Gender 217, 245-46 (2005) (discussing doctrinal differences between Title IX and the Fourteenth Amendment's Equal Protection Clause and concluding that Title IX provides greater protection from sex discrimination than the Equal Protection Clause).

300. Lee, *supra* note 26, at 70.

301. *Id.* at 71.

302. Smith v. Robinson, 468 U.S. 992, 1013 (1984).

due process claims, such as violations of the right to bodily integrity, which are not virtually identical to Title IX claims.[303]

The Seventh Circuit's preemption approach is the most plausible given the state of the law and would reconcile the *Abrams* Court's more expansive view of preemption[304] and the views articulated by Justice Stevens's *Abrams* concurrence.[305] To that end, the Seventh Circuit's approach requires that courts consider, prior to a finding of preemption, whether claims are asserted against educational entities or individuals and in what capacity, and it enables courts to allow constitutional claims brought against individual tortfeasors.[306]

B. *Amending Title IX*

This post-*Abrams* framework for preemption necessitates amending Title IX, as Congress has done in the past in response to rulings it deemed inconsistent with Title IX's remedial purpose.[307] Two potential avenues exist to amend Title IX. First, Congress could alter the liability standard to eliminate the actual knowledge and deliberate indifference requirements articulated by the Supreme Court in *Gebser* and *Davis*.[308] If Congress did this, Title IX could instead embrace a constructive notice standard akin to the standard applicable to employers faced with Title VII sexual harassment suits.[309] Such an amendment would lessen the burden of proof that Title IX plaintiffs face at trial, rendering Title IX litigation more effective.[310]

303. *See* Burke, *supra* note 44, at 1517 (arguing that "substantive due process claims . . . are not virtually identical to a Title IX violation"); Zwibelman, *supra* note 148, at 1473, 1479 (noting the constitutional claims that a victim of sexual harassment by a teacher could bring under the U.S. Constitution and arguing that they are not virtually identical to rights protected by Title IX).

304. *See* City of Ranchos Palos Verdes, Cal. v. Abrams, 125 S. Ct. 1453, 1459-62 (2005).

305. *See id.* at 1463-64 (Stevens, J., concurring).

306. Some may view the Seventh Circuit's approach as flawed because its preemption framework might not sufficiently restore the utility of Title IX. One student commentator argues that preemption of constitutional claims asserted against teachers and supervisory officials not shielded by immunity, along with Title IX's "onerous" standard of liability, leads to the implausible result of impoverishing Title IX. *See* Cherner-Ranft, *supra* note 70, at 1919-21; *see also supra* text accompanying note 12 (discussing the liability standard under Title IX); *supra* note 13 (discussing liability standards under § 1983). Title IX's remedial scheme—intended to constitute greater protection than the constitutionally mandated rational basis scrutiny of sex-based classifications under the Equal Protection Clause at the time of Title IX's passage—would ironically narrow, even as equal protection has grown more robust. *See supra* notes 299-301 and accompanying text. However, congressional amendment of Title IX's liability standards and codification of the Seventh Circuit's exception for individual liability would address this result. *See infra* Part III.B.

307. *See supra* Part I.A.3.

308. *See supra* note 51 and accompanying text.

309. *See supra* note 67 and accompanying text.

310. It is notable that the teacher-student relationship is given less protection than the employer-employee relationship. *See* Chemerinsky & Fisk, *supra* note 48, at 793-94. Title VII provides greater relief to victims of workplace harassment since the acts of employees are the acts of the employer, and employers are only subject to a standard of constructive notice rather than the actual notice and deliberate indifference standards applied to the educational context. *See id.*

Because the 108th Congress attempted this approach as part of the provisions included in the FAIRNESS Act, sponsors for such legislation could easily be identified.[311]

Second, Congress could amend Title IX, as it amended the EHA after the Supreme Court's *Smith* decision,[312] to specify that Title IX does not preempt or diminish constitutional remedies available under § 1983. At a minimum, Congress could make clear that it has not withdrawn a § 1983 remedy for constitutional claims asserted against individuals acting under color of state law, since there is no recourse under Title IX for such claims.[313] This would allow constitutional claims and Title IX claims to work together to afford protection to plaintiffs.

A legislative remedy is superior to other solutions. Looking to the Supreme Court would likely be ineffective given the Court's current conservative approach to civil rights litigation, especially with respect to limiting private rights of action and weakening the presumption of statutory enforceability under § 1983.[314] This is particularly true given the addition of Chief Justice John Roberts and Justice Samuel Alito to the Court.[315] Increasing the oversight function of the OCR also would be misguided because the OCR tends to follow circuit courts' interpretations of Title IX.[316] The OCR regional offices are also not uniform in their interpretation of Title IX's regulations.[317]

The proposed amendment to Title IX would settle questions surrounding the claims that can be raised in a suit for sex discrimination. This would provide plaintiffs and defendants with clear notice of available claims along

311. *See supra* note 66 and accompanying text. For an analysis of interest group coalition building in support of an amendment to Title IX's liability standards in the context of peer-to-peer sexual harassment, see Klusas, *supra* note 41, at 111-15.

312. *See supra* note 122.

313. If Congress indeed intends for Title IX and § 1983 to serve as alternative overlapping remedies for gender discrimination in the education context it could specify that § 1983 claims against both individuals and institutions are not preempted. It is also worth noting that adopting the Seventh Circuit's approach to individual liability could hold state institutions to a greater level of accountability than private institutions. This is because Title IX could extend to both public and private institutional defendants' sex discrimination, whereas § 1983 applies only to state actors and would not apply to individual defendants at private institutions. Plaintiffs would have the option to sue teachers at public institutions who are not shielded by qualified immunity under both federal and state law for their discriminatory conduct, whereas plaintiffs might only have recourse to state tort law to sue private teachers for such conduct. Congress might therefore legislate so as to place private teachers on a par with public teachers in this respect.

314. *See supra* Part I.B.

315. There is also the risk that the judiciary might limit Title IX's remedial scheme since the Supreme Court has refined the contours of Title IX's judicially "found" cause of action in recent years. *See, e.g.*, Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 284 (1998) (5-4 decision) ("Because the private right of action under Title IX is judicially implied, we have a measure of latitude to shape a sensible remedial scheme that best comports with the statute."); *see also* Jackson v. Birmingham Bd. of Educ., 125 S. Ct. 1497, 1504 (2005) (5-4 decision).

316. *See supra* note 41.

317. *See* Carpenter & Acosta, *supra* note 29, at 22.

with reasonable means to assess litigation strategy and settlement options. Amending Title IX also adheres to the "clear statement" principle behind spending clause legislation. Because of the contractual nature of federal grant-in-aid programs, states must have adequate notice of the terms attached to acceptance of federal funds.[318] Therefore, clarifying the compatibility of Title IX with § 1983 through legislative amendment will give states notice of individual liability and their need to possibly indemnify individuals against the increased risk of litigation.[319]

CONCLUSION

Virtually all educational institutions receive some portion of funds from the federal government. Although plausible, it would be hard to imagine any educational institution or program choosing to forego its federal funding in order to support sex discrimination at its institution. Victims of sex discrimination at such institutions can look to Title IX to redress the deprivation of their right to be free from sex discrimination. However, because of the standard for holding institutions accountable for the discriminatory conduct of their employees, and the competing circuit court views on Title IX's preemption of § 1983, plaintiffs are not sufficiently protected against discrimination by individuals in federally funded educational programs.

Under the preemption analysis articulated in *Abrams* and its line of case law, the Seventh Circuit's approach emerges as the most plausible approach to the question of whether Title IX should preempt relief under § 1983 for claims of sex discrimination. By allowing § 1983 to vindicate rights that Title IX does not, namely constitutional claims against individuals, the Seventh Circuit approach would not immunize individual tortfeasors for their constitutional violations and would not undermine the remedial scheme set forth in Title IX. Codifying this approach along with an alternate liability standard in an amendment to Title IX will remedy the conflict among the circuits and ensure plaintiffs are given meaningful review of their sexual harassment and gender equity claims.

318. *See supra* note 51.
319. *See* Delgado v. Stegall, 367 F.3d 668, 674 (7th Cir. 2004).