

DO SEXUAL HARASSMENT PLAINTIFFS GET
TWO BITES OF THE APPLE?: SEXUAL
HARASSMENT LITIGATION AFTER
*FITZGERALD V. BARNSTABLE SCHOOL
COMMITTEE*

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I. INTRODUCTION

In January 2009, the United States Supreme Court ruled in *Fitzgerald v. Barnstable School Committee* that students may file claims alleging sexual harassment by their teachers, professors, or both under Title IX of the Education Amendments of 1972 and 42 U.S.C. § 1983.¹

Before *Fitzgerald*, the federal circuit courts of appeals were split as to whether Title IX precluded simultaneous § 1983 claims against individual teachers and school officials.² Because individuals are generally not recognized as appropriate defendants under Title IX, this meant plaintiffs could only allege discrimination at the hands of a teacher or professor by making a Title IX claim against the school or institution.³ As a result of the Court's decision in *Fitzgerald*, plaintiffs essentially now get one full bite of the proverbial apple when litigating these sexual harassment claims, as they now have a full range of claims and defendants amenable to suit.

This Article addresses the course of litigation alleging sexual harassment claims by students against their teachers and the impact of the Court's decision in *Fitzgerald*, and provides suggestions as to steps institutions can take to limit potential damages for these types of claims. Part II of the Article outlines the history of litigation under both Title IX and § 1983, Part III examines the Court's decision in *Fitzgerald*, and Part IV discusses the implications for educational institutions handling concurrent and parallel Title IX and § 1983 claims.

II. TITLE IX AND § 1983 BEFORE *FITZGERALD*

Sexual harassment is a pervasive problem and occurs in all

1. *Fitzgerald v. Barnstable Sch. Comm.*, 129 S. Ct. 788, 792 (2009).

2. *Id.* at 793 (“The [First Circuit] Court of Appeals’[s] decision deepened a conflict among the Circuits regarding whether Title IX precludes use of § 1983 to redress unconstitutional gender discrimination in schools.” (citations omitted)); see also Michael A. Zwibelman, Comment, *Why Title IX Does Not Preclude Section 1983 Claims*, 65 U. CHI. L. REV. 1465, 1465–66 (1998) (explaining common legal actions sought by victims of sexual harassment).

3. 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, 1491 (2000) (citations omitted). Most of the courts having considered the issue have concluded “‘only a grant recipient can violate Title IX,’ not individuals.” *Id.* at n.20 (quoting *Doe v. Petaluma City Sch. Dist.*, 830 F. Supp. 1560, 1576 (N.D. Cal. 1993)).

environments, including the workplace and schools.⁴ In fact, a 2005 study by the American Association of University Women (AAUW) found eighty-nine percent of students felt harassment occurred at their colleges, while sixty-two percent reported they had experienced some form of sexual harassment.⁵ The law on sexual harassment is relatively new and is developing slowly in response to this growing phenomenon.⁶

In the school environment, harassment can occur at the hands of peers, school employees, and teachers.⁷ Typically, victims of sexual harassment in schools or universities have tried to sue the harasser, school, college, or university under Title IX, and school officials under § 1983, for failing to take appropriate steps to stop the harassment.⁸ In the past, sexual harassment claims by students against their teachers and professors were met with mixed success. In some cases, the claims against individuals pursuant to § 1983 were found to be barred by Title IX's sufficiently comprehensive remedial scheme, which courts found showed Congress's intent to make Title IX the sole avenue of recovery for discrimination in schools.⁹

4. *See id.* at 1487–88 (“Sexual harassment, abuse, and other forms of sex discrimination pervade every grade level of the U.S. school system with immeasurable adverse consequences for our children and society. Incidents of sexual harassment begin as early as kindergarten and increase in frequency throughout elementary school.” (footnotes omitted)); *see also* William A. Kaplin, *A Typology and Critique of Title IX Sexual Harassment Law After Gebser and Davis*, 26 J.C. & U.L. 615, 615 (2000) (examining the lengthy history of sexual harassment in educational institutions).

5. CATHERINE HILL & ELENA SILVA, AAUW EDUC. FOUND., DRAWING THE LINE: SEXUAL HARASSMENT ON CAMPUS 14 (2005), available at <http://www.aauw.org/learn/research/upload/DTLFinal.pdf>.

6. *See* Kaplin, *supra* note 4, at 615 (“Only since the mid-1970’s has sexual harassment been emerging from private shadows into the public light.”); Deborah L. Rhode, *Sex Harassment Remains a Problem in Schools*, NAT’L L.J., Oct. 5, 1998, at A25 (“We finally have acknowledged the problem, but we are a considerable distance from solving it.”).

7. *See* Debora A. Hoehne, Note, *Assessing the Compatibility of Title IX and § 1983: A Post-Abrams Framework for Preemption*, 74 FORDHAM L. REV. 3189, 3189 (2006). “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.” *Id.* at 3189 n.1 (quoting *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 292 (1998)); *see also* HILL & SILVA, *supra* note 5, at 14–22 (discussing the types of harassment most often alleged at different institutions).

8. *See* Zwibelman, *supra* note 2, at 1465–71.

9. *See, e.g.*, Hoehne, *supra* note 7, at 3216–22 (detailing litigation of Title IX and § 1983 through 2005).

A. Title IX

Title IX of the Education Amendments of 1972 provides, in relevant part, “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”¹⁰ Patterned after Title VI of the Civil Rights Act of 1964,¹¹ Congress enacted Title IX at a time when sex discrimination and sexual harassment issues were gaining national attention.¹² By enacting Title IX, Congress sought to encourage equal treatment of males and females in education.¹³ “Title IX applies to all public and private educational institutions that receive Federal funds . . . including, but not limited to, elementary and secondary schools, school districts, proprietary schools, colleges, and universities.”¹⁴ “The ‘education program or activity’ of a school includes all of the school’s operations.”¹⁵ Therefore, Title IX was intended to protect students in connection with all of the academic, educational, extracurricular, athletic, and other programs of the school, whether such activities take place in the facilities of the school, on a school bus, at a class-training program, or elsewhere.

Section 1682, the enforcement section of Title IX, authorizes agencies awarding federal funds “to promulgate regulations that ensure recipient institutions comply with Title IX.”¹⁶ The Office for Civil Rights (OCR) is charged with enforcing the regulations governing the interpretation of Title

10. 20 U.S.C. § 1681(a) (2006).

11. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 694 (1979). “The drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been during the preceding eight years.” *Id.* at 696 (citations omitted).

12. See LINDA JEAN CARPENTER & R. VIVIAN ACOSTA, *TITLE IX* 3 (2005).

13. See *Cannon*, 441 U.S. at 704 n.36 (citing 117 CONG. REC. 39252 (1971) (statement of Rep. Mink)).

14. OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., *REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES* 2 (2001), available at <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

15. *Id.* (citing 20 U.S.C. § 1687 (2000); *Conforming Amendments to the Regulations Governing Nondiscrimination*, 65 Fed. Reg. 68,049 (Nov. 13, 2000)); see also 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) (“[Title IX] applies to virtually all public and private educational institutions, and includes all institutional operations such as academic programs or athletics.” (citations omitted)).

16. Hoehne, *supra* note 7, at 3193 (citing 20 U.S.C. § 1682 (2000)) (giving an overview of Title IX).

IX and maintains the power to revoke an institution's funding when a violation of the statute occurs.¹⁷ Title IX regulations require that funding recipients designate at least one employee to coordinate efforts to comply with and carry out the institution's responsibilities under the regulations, including complaint investigation.¹⁸ Under the statute, student victims may file a written complaint with OCR.¹⁹ If OCR determines a Title IX violation has occurred, it will attempt to bring the institution under compliance using informal means.²⁰ If compliance cannot be achieved using these methods, OCR may initiate proceedings to terminate federal funding or enlist the Justice Department to seek compliance of Title IX through judicial action.²¹ Commentators have suggested, however, these enforcement mechanisms are not satisfactory procedures for victims.²² The transient nature of student life, settlement negotiations that take place without the victim's participation, punishment imposed on institutions for noncompliance with no corresponding compensation to victims, and termination of government funding that could result in further harm to students are some of the issues commentators have identified.²³

Other remedies outside OCR are also available under Title IX. In

17. Dawn A. Ellison, Comment, *Sexual Harassment in Education: A Review of Standards for Institutional Liability Under Title IX*, 75 N.C. L. REV. 2049, 2058 (1997) (footnotes omitted) (identifying duties and powers of OCR).

18. 34 C.F.R. § 106.8(a) (2009) ("Each recipient shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part, including any investigation of any complaint communicated to such recipient alleging its noncompliance with this part or alleging any actions which would be prohibited by this part. The recipient shall notify all its students and employees of the name, office address and telephone number of the employee or employees appointed pursuant to this paragraph.").

19. *Id.* § 100.7(b).

20. *See id.* § 100.7(d)(1). The regulations do not specify what "informal means" are to be undertaken. *See id.*; *see also* Kimberly L. Limbrick, *Developing a Viable Cause of Action for Student Victims of Sexual Harassment: A Look at Medical Schools*, 54 MD. L. REV. 601, 611 (1995) (describing the role of OCR in this process as an unsatisfactory procedure).

21. Limbrick, *supra* note 20, at 611 (citations omitted).

22. *Id.* at 611–12 (discussing the lack of resolution a Title IX enforcement provides for the actual sexual harassment victim); *see also* CARPENTER & ACOSTA, *supra* note 12, at 24 (noting no institution appears to have had federal funding terminated for noncompliance with Title IX); Burke, *supra* note 3, at 1495 (noting the administrative proceeding under Title IX provides the victim with no personal compensation); Ellison, *supra* note 17, at 2058–59 (labeling required procedures under Title IX as insufficient in resolving student-suffered harm).

23. Limbrick, *supra* note 20, at 611–17.

Cannon v. University of Chicago, the United States Supreme Court held for the first time an implied right of action exists under Title IX and student victims need not exhaust their institutional remedies prior to filing suit.²⁴ Noting one of the goals of Title IX was to protect students against sex discrimination in education, the Court held, “The award of individual relief to a private litigant who has prosecuted her own suit is not only sensible but is also fully consistent with—and in some cases even necessary to—the orderly enforcement of the statute.”²⁵ The Court, while recognizing a private right of action was not expressly authorized by statute, reasoned that terminating federal funds did not serve the purpose of protecting citizens from sex discrimination because it was too severe a penalty and would be an inefficient and cumbersome means to address isolated reports of discrimination.²⁶

In *Franklin v. Gwinnett County Public Schools*, the Court made clear a private plaintiff may pursue monetary damages for a school’s violation of Title IX.²⁷ While the statute did not provide for such a right of action and recovery, the Court concluded, “[A]bsent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute.”²⁸ Congress can amend a statute to correct what it deems to be an erroneous statutory interpretation by the Supreme Court.²⁹ Because

24. See *Cannon v. Univ. of Chi.*, 441 U.S. 677, 683–89 (1979).

25. *Id.* at 705–06 (citations omitted).

26. See *id.* at 704–06, 709. “[I]n [the case of an isolated violation,] it makes little sense to impose on an individual, whose only interest is in obtaining a benefit for herself, . . . the burden of demonstrating that an institution’s practices are so pervasively discriminatory that a complete cutoff of federal funding is appropriate.” *Id.* at 705.

27. *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 62–66, 76 (1992). In *Franklin*, Christine Franklin, a high school student in the Gwinnett County School District, was sexually harassed from the start of her tenth-grade year throughout her eleventh-grade year by Andrew Hill, a teacher and athletic coach employed by the high school. *Id.* at 63–64. Franklin also alleged the School District became aware of the harassment, took no action to stop the behavior, and discouraged her from filing a sexual harassment claim. *Id.* As a result, Franklin filed a claim for damages in federal court, asserting the School District was liable under Title IX. *Id.* at 63.

28. *Id.* at 70–71.

29. Hoehne, *supra* note 7, at 3199 n.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.” (citing Jeffrey A. Segal, *Separation-of-Powers Games in the Positive Theory of Congress and Courts*, 91 AM. POL. SCI. REV. 28, 31 (1997))).

Congress enacted amendments to Title IX subsequent to the *Cannon* decision, which first recognized the implied private remedy, and did not amend the language of Title IX to suggest the Court incorrectly found the right to a private remedy, the *Franklin* Court reasoned that Congress “did not intend to limit the remedies available in a suit brought under Title IX.”³⁰

While the Court’s decision in *Franklin* sparked an increase in the number of Title IX claims alleging sexual harassment,³¹ the decision failed to offer guidance as to the standard for holding an educational institution liable for the sexual harassment suffered by its employees or students.³² In 1997, OCR published a guidance document suggesting agency principles should apply and a school should be responsible for the use of its authority by the employee or agent who harasses a student.³³ Despite a

30. *Franklin*, 503 U.S. at 72–73. “In the years *after* the announcement of *Cannon*, . . . Congress was legislating with full cognizance of that decision.” *Id.* at 72. Following the *Cannon* decision, Congress enacted two provisions. *Id.* The first included the Rehabilitation Act Amendments of 1986, which attempt to abrogate state Eleventh Amendment immunity under Title IX. *Id.* (citing 42 U.S.C. § 2000d-7(a)(1) (1988) (“A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of . . . [T]itle IX . . . or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.”)). The *Franklin* Court noted, “This statute cannot be read except as a validation of *Cannon*’s holding.” *Id.* Second, in the Civil Rights Restoration Act of 1987, Congress expanded the coverage of Title IX, holding liable any program discriminating on the basis of sex in an institution receiving federal funds, regardless of whether that particular program receives federal funds. *Id.* at 73 (discussing Congress’s disapproval of *Grove City College v. Bell*, 465 U.S. 555 (1984), which held an entire school is not subject to Title IX simply because one group receives funds).

31. Ellison, *supra* note 17, at 2062 (citing *Leija v. Canutillo Indep. Sch. Dist.*, 887 F. Supp. 947, 952 (W.D. Tex. 1995), *rev’d*, 101 F.3d 393 (5th Cir. 1996)). *Leija* noted “most lawyers, litigants, and judges did not grasp the full availability of Title IX remedies until the *Franklin* decision.” *Id.* at 2062 n.74 (citing *Leija*, 887 F. Supp. at 952).

32. *Id.* at 2061–62 (“In spite of *Franklin*’s rather straightforward holding, the Court’s failure to address several major issues . . . has created much confusion in the lower courts.”).

33. Sexual Harassment Guidance, 62 Fed. Reg. 12,034, 12,039 (Mar. 13, 1997). In the Guidance, OCR stated, “A school’s liability for sexual harassment by its employees is determined by application of agency principles” and “a school will always be liable for even one instance of *quid pro quo* harassment by a school employee in a position of authority, such as a teacher or administrator, whether or not it knew, should have known, or approved of the harassment at issue.” *Id.* (citations omitted). “Under agency principles, if a teacher or other employee uses the authority he or she is given

“longstanding ‘recogni[tion] that considerable weight should be accorded to an executive department’s construction of a statutory scheme,’”³⁴ courts applied different liability standards in cases litigated post-*Franklin*.³⁵ Lower courts divided over whether to compare Title IX to Title VI³⁶ or Title VII³⁷ of the Civil Rights Acts of 1964. “Title IX and Title VI both use identical language to describe the statutes’ beneficiaries and provide the same administrative enforcement scheme, [however,] Title IX is closer in scope and function to Title VII, which combats gender discrimination and sexual harassment.”³⁸ Some courts adopted strict liability standards, holding schools strictly liable for harassment: “intentional discrimination by teachers is imputed to the school district under the principles of respondeat superior.”³⁹ Other courts, referring to Title VII jurisprudence, adopted agency or constructive knowledge standards, suggesting a school would be held liable whenever it had reason to know of an employee’s harassment.⁴⁰ Still other courts adopted an actual knowledge liability standard requiring plaintiffs prove the school actually knew of the alleged

(e.g., to assign grades) to force a student to submit to sexual demands, the employee ‘stands in the shoes’ of the school and the school will be responsible for the use of its authority by the employee or agent.” *Id.* (citations omitted).

34. Amy Busa, Recent Development, *Two Steps Forward, One Step Back: The Supreme Court’s Treatment of Teacher-Student Sexual Harassment in Gebster* [sic] v. Lago Vista Independent School District, 34 HARV. C.R.-C.L. L. REV. 279, 296 (1999) (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)).

35. Henry Seiji Newman, Note, *The University’s Liability for Professor-Student Sexual Harassment Under Title IX*, 66 FORDHAM L. REV. 2559, 2580 (1998) (summarizing standards for institutional liability as strict liability and negligence, the latter “based on actual or constructive notice”).

36. 42 U.S.C. § 2000d (2006) (providing “[n]o person . . . shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance”).

37. *Id.* § 2000e-2(a)(1) (providing, in relevant part, “[i]t shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual’s race, color, religion, sex, or national origin”); see Busa, *supra* note 34, at 281–83 (discussing court decisions based on comparisons to Title VI and Title VII).

38. Busa, *supra* note 34, at 281 (citations omitted).

39. *Bolon v. Rolla Pub. Sch.*, 917 F. Supp. 1423, 1427 (E.D. Mo. 1996).

40. See, e.g., *Doe v. Claiborne Cnty., Tenn.*, 103 F.3d 495, 513–15 (6th Cir. 1996) (finding ample authority for the application of agency principles); *Lipsett v. Univ. of P.R.*, 864 F.2d 881, 901 (1st Cir. 1988) (holding an institution liable if an official “knew, or in the exercise of reasonable care, should have known, of the harassment’s occurrence” and failed to halt it (citations omitted)).

harassment and failed to take action.⁴¹

“Following the Court’s decisions in *Cannon* and *Franklin*, it appeared as though Title IX would provide [students] with a comprehensive statutory scheme through which to combat sex discrimination and sexual harassment.”⁴² However, the Court subsequently clarified that the standard for institutional liability was a high one when it decided the case of *Gebser v. Lago Independent School District*.⁴³ The Court took the case to determine circumstances under which a school district would be held liable under Title IX.⁴⁴ The case involved allegations of teacher-on-student harassment.⁴⁵ The Court declared a damages remedy under Title IX required an official with at least the “authority to address the alleged discrimination and to institute corrective measures” have actual knowledge of the discrimination, fail to respond, and such response amount to deliberate indifference.⁴⁶ In *Davis v. Monroe County Board of Education*, the Court reconsidered these liability standards and, after reflecting on its prior decisions and the underlying purpose of Title IX, held the standard espoused in *Gebser* was the correct one and that it applied in certain circumstances to student-on-student conduct, as well.⁴⁷ This decision sparked much commentary suggesting it would “be difficult for potential plaintiffs to [prove actual knowledge and deliberate indifference] and, in practice, [would] provide scant opportunity for successful Title IX damages actions against educational institutions.”⁴⁸ Thus, the standard of liability for a plaintiff to prove an institution liable for sexual harassment was a very high one.⁴⁹

41. See, e.g., *Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648, 660 (5th Cir. 1997) (holding no textual evidence in Title IX or case precedent applies agency or constructive knowledge principles).

42. 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, 1906 (2003).

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

44. See *id.* at 277.

45. *Id.*

46. *Id.* at 290.

47. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 642–45 (1999) (reiterating the holding of *Gebser*).

48. Cherner-Ranft, *supra* note 42, at 1910 (quoting Kaplin, *supra* note 4, at 622).

49. Busa, *supra* note 34, at 297–98 (arguing the Court disregarded the school districts’ duty to protect students); Cherner-Ranft, *supra* note 42, at 1925–26 (arguing plaintiffs “face an almost impossible task” as a result of this high burden).

In addition to this burden, other unresolved issues from *Franklin* and *Cannon* made it difficult for plaintiffs to assert claims against those they believed were responsible.⁵⁰ Courts have also split regarding the liability of an individual defendant under Title IX, with a majority of courts concluding sexual harassment claims cannot be brought against individuals under Title IX.⁵¹ If individuals are not proper defendants under Title IX, plaintiffs must pursue other options to seek redress against those they believe to be responsible for the harassment, be it a teacher, professor, dean, principal, member of the school board or board of trustees, or other individual.⁵² One such option is to bring a claim under § 1983.⁵³

B. Section 1983

“During the Reconstruction Era, Congress enacted § 1983 to provide a federal remedy in an impartial forum for state violations of constitutional rights.”⁵⁴ The statute provides a private right of action in federal court to individuals who have suffered a violation of a right secured under the Constitution or federal law by a party acting “under color of” state law.⁵⁵ “Section 1983 does not create substantive rights for civil rights litigants.”⁵⁶ Rather, it provides a means to redress the deprivation of federally protected rights.⁵⁷

To assert a violation of a right under § 1983, a plaintiff must establish two elements: (1) the violator acted under the color of state law and (2)

50. Ellison, *supra* note 17, at 2061–62.

51. *Id.* at 2061–62 & 2062 n.72 (citations omitted).

52. See Zwibelman, *supra* note 2, at 1465 (discussing the implications of a plaintiff’s ability to vindicate rights against individual harassers under Title IX, § 1983, or both).

53. Burke, *supra* note 3, at 1500–02 (identifying various forms of claims brought under § 1983).

54. *Id.* at 1498.

55. See 42 U.S.C. § 1983 (2006); see also Daniel J. McDonald, *A Primer on 42 U.S.C. § 1983*, UTAH B.J., May 1999, at 29.

56. Hoehne, *supra* note 7, at 3201 (citations omitted); see also Jacob E. Meyer, Note, “Drive-By Jurisdictional Rulings”: *The Procedural Nature of Comprehensive-Remedial-Scheme Preclusion in § 1983 Claims*, 42 COLUM. J.L. & SOC. PROBS. 415, 416 (2009) (“Section 1983 confers no rights of its own but merely provides a cause of action for rights secured via the Constitution or federal law.” (citing CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3573.2 (2d ed. 2008))).

57. See 42 U.S.C. § 1983 (2006) (stating a person who causes another to be deprived “of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured”).

the violator's action deprived the victim of a right, privilege, or immunity "secured by the Constitution or laws of the United States."⁵⁸ Sexual harassment victims began turning to § 1983 to assert claims against the individual harassers or supervisors they claimed were responsible for the harassment or its aftermath.⁵⁹ "Plaintiffs commonly frame their allegations of sexual harassment and discrimination in educational settings as constitutional and federal law violations under § 1983."⁶⁰ These § 1983 claims may be based on the Fourteenth Amendment's Equal Protection⁶¹ and Due Process Clauses,⁶² as well as Title IX.⁶³ Thus, a claimant can

58. McDonald, *supra* note 55, at 30 (citations omitted) ("[N]ot every violation of federal law is actionable under § 1983.>").

59. See Burke, *supra* note 3, at 1498–1501 (describing the use of § 1983 in Title IX cases); see also Zwibelman, *supra* note 2, at 1466 (identifying implications for plaintiffs bringing claims under both Title IX and § 1983).

60. Burke, *supra* note 3, at 1498.

61. *Id.* at 1498–99 & n.77 (discussing how plaintiffs base § 1983 claims on the Fourteenth Amendment's Equal Protection Clause). Burke states:

To prove a Fourteenth Amendment Equal Protection Clause violation against a state educational institution or its supervisory officials in their official capacities, a plaintiff must establish the institution's culpability. This burden can be met if the actions of a final policymaker caused the violation, or if a final policymaker sanctioned a state actor's conduct or if a state actor's conduct was part of a broader policy of conduct condoned against the plaintiff. This policy must constitute a "custom or usage with the force of law.

Id. at 1498 n.77 (citations omitted). Because the Equal Protection Clause serves as a form of protection and not a complete remedy for sexual harassment, institutions must perform investigative activities regardless of a plaintiff's gender. *Id.* Plaintiffs are charged with proving "an educational institution administered a facially neutral school policy in an intentionally discriminatory manner" or, when claiming an equal protection violation by an individual in his official capacity, "the state actor's failure to investigate the plaintiff's claim . . . amounted to gross negligence." *Id.* (citing Connie C. Flores, Comment, *The Fourteenth Amendment and Title IX: A Solution to Peer Sexual Harassment*, 29 ST. MARY'S L.J. 153, 177–78 (1997)).

62. *Id.* at 1498–99 & 1499 n.78 ("Plaintiffs may allege violations of their right to due process, such as a fair hearing, or violations of their right to substantive due process, for example a deprivation of education, privacy, or bodily integrity." (citations omitted)). "To establish a violation under procedural or substantive due process, a plaintiff must prove that the state actor knew or should have known that his conduct deprived a student from a protected constitutional right." *Id.* at 1499 n.78 (citing Adam Greenfield, Note, *Annie Get Your Gun 'Cause Help Ain't Coming': The Need for Constitutional Protection from Peer Abuse in Public Schools*, 43 DUKE L.J. 588, 595 (1993)).

63. *Id.* at 1500 & n.80 ("To establish a § 1983 claim based on Title IX, a plaintiff must prove that the state actor 'knew or should have known' that he violated a

choose to sue a school and its officials under Title IX and individuals or officials under § 1983 for violations of Title IX and other constitutional rights.⁶⁴

While there was a time § 1983 litigation was viewed and interpreted liberally,⁶⁵ the Supreme Court has since limited the federal laws that can be privately enforced under § 1983.⁶⁶ Even where a plaintiff is able to articulate an enforceable right under a federal statute, a claim may be limited or destroyed by a number of restrictions, including those relating to definition of “under color of,” state and individual immunity, and express or implied preclusion by Congress.⁶⁷ The remainder of this Article focuses on express or implied preclusion by Congress.

C. Preemption

Congress can override potential application of, and liability under, § 1983 with other federal statutes or by specifying that § 1983 is not an available enforcement mechanism for some laws.⁶⁸ “[E]vidence of such congressional intent may be found directly in the statute creating the right, or inferred from the statute’s creation of a ‘comprehensive enforcement

‘clearly established’ right under Title IX for the plaintiff to be free from sex discrimination in a federally funded educational program.” (citations omitted)). This is a lower standard than what “a plaintiff must prove under Title IX against educational institutions and state actors in their official capacities [because] [u]nder Title IX, a plaintiff must prove that the defendant had ‘actual notice’ of the violation and that he was ‘deliberately indifferent’ to the wrongful conduct.” *Id.* at 1500 n.80 (citation omitted).

64. See generally Zwibelman, *supra* note 2, at 1465–71 (explaining common legal actions sought by victims of sexual harassment).

65. See McDonald, *supra* note 55, at 29–30 (discussing the initial lack of litigation under § 1983 until the 1960s, when it began to be used as a vehicle for enforcing constitutional rights, and later for enforcing federal civil rights laws); see also *Maine v. Thiboutot*, 448 U.S. 1, 4–5 (1980). “[T]he § 1983 remedy broadly encompasses violations of federal statutory as well as constitutional law.” *Id.* at 4 (citing *Rosado v. Wyman*, 397 U.S. 397 (1970)).

66. *Middlesex Cnty. Sewerage Auth. v. Nat’l Sea Clammers Ass’n*, 453 U.S. 1, 19–20 (1981) (holding § 1983 is only available for statutes creating enforceable rights and does not foreclose on the use of § 1983 by creating specific remedies).

67. See, e.g., *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 63–64 (1989) (holding a state is not a person under § 1983 and § 1983 does not override Eleventh Amendment immunity); *Sea Clammers*, 453 U.S. at 10–22 (describing restrictions imposed by express or implied congressional preclusions).

68. ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 528 (3d ed. 1999).

scheme that is incompatible with individual enforcement under § 1983.”⁶⁹ Prior to the Court’s decision in *Fitzgerald*, the circuit courts of appeals were split with respect to whether Title IX preempted § 1983 claims.⁷⁰ The Second, Third, and Seventh Circuit Courts of Appeals held the implied private action for money damages under Title IX was evidence of a comprehensive remedial scheme precluding § 1983 suits.⁷¹ Meanwhile, the Sixth, Eighth, and Tenth Circuits held Title IX did not preclude § 1983 claims, ruling that Title IX’s only explicit remedy is administrative termination of a recipient’s funding, and such a remedy is insufficiently comprehensive to preclude § 1983 action.⁷² The United States Supreme Court granted certiorari in the *Fitzgerald* case to provide resolution to this conflict.⁷³

III. THE *FITZGERALD* CASE

Fitzgerald v. Barnstable School Committee involved claims of peer-on-peer harassment of a kindergarten girl by a third grade boy.⁷⁴ During the 2000–2001 school year, the daughter of Lisa and Robert Fitzgerald, a kindergarten student, told her parents that whenever she wore a dress to school, an older student on her school bus would bully her into lifting her skirt.⁷⁵ Lisa Fitzgerald immediately called the school principal, who arranged for the Fitzgeralds and their daughter to meet with the principal and another school official, Lynda Day.⁷⁶ Day and the principal then questioned the alleged bully, and Day further questioned the bus driver and several students who rode the bus.⁷⁷ The bully denied the allegations,

69. *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 120 (2005) (quoting *Blessing v. Freestone*, 520 U.S. 329, 341 (1997)).

70. *Fitzgerald v. Barnstable Sch. Comm.*, 129 S. Ct. 788, 793 (2009).

71. *See Bruneau ex rel. Schofield v. S. Kortright Cent. Sch. Dist.*, 163 F.3d 749, 758–59 (2d Cir. 1998); *Pfeiffer v. Marion Ctr. Area Sch. Dist.*, 917 F.2d 779, 789 (3d Cir. 1990); *Waid v. Merrill Area Pub. Sch.*, 91 F.3d 857, 862–63 (7th Cir. 1996); *see also* Bradford C. Mank, *Using § 1983 to Enforce Title VI’s Section 602 Regulations*, 49 U. KAN. L. REV. 321, 368–69 (2001) (“There is a split in the federal courts of appeals regarding whether Title IX precludes § 1983 remedies.” (citations omitted)).

72. *See Cmty. for Equity v. Mich. High Sch. Athletic Ass’n*, 459 F.3d 676, 691 (6th Cir. 2006); *Crawford v. Davis*, 109 F.3d 1281, 1284 (8th Cir. 1997); *Seamons v. Snow*, 84 F.3d 1226, 1234 (10th Cir. 1996).

73. *Fitzgerald*, 129 S. Ct. at 793.

74. *Id.* at 792.

75. *Id.*

76. *Id.*

77. *Id.*

and based on these discussions, Day concluded the girl's accusations could not be corroborated.⁷⁸ The Fitzgeralds' daughter then provided new information, telling her parents the boy also "coerced her into pulling down her underpants and spreading her legs."⁷⁹ This information was promptly relayed to school officials, and another meeting was scheduled with the family to discuss the additional details and question other students, including the boy.⁸⁰

In the meantime, the local police department launched a concurrent investigation and concluded there was insufficient evidence to proceed criminally against the boy.⁸¹ After considering both the school and police investigation, school officials concluded there was insufficient evidence to warrant disciplinary action.⁸² The school did, however, propose other remedial measures, suggesting the girl could be transferred to a different bus or rows of empty seats be left "between the kindergartners and older students on the original bus."⁸³ The Fitzgeralds felt these proposals punished their daughter instead of the bully and suggested transferring the boy to a different bus or placing a monitor on the original bus.⁸⁴ The superintendent of the school system, Russell Dever, did not act on either of these suggestions.⁸⁵ The Fitzgeralds began taking their daughter to school to avoid further incidents on the bus, but she continued reporting disturbing incidents at school, including an incident in which a gym teacher required the plaintiff to "high five" the alleged harasser.⁸⁶ She also accumulated an excessive number of absences throughout the remainder of the school year.⁸⁷

In April 2002, the Fitzgeralds filed suit in the Federal District Court of Massachusetts, alleging: "(1) a claim for violation of Title IX against the Barnstable School Committee (the school system's governing body), (2) claims under 42 U.S.C. § 1983 for violations of Title IX and the Equal Protection Clause of the Fourteenth Amendment against the [S]chool [C]ommittee and [superintendent] Dever, and (3) Massachusetts state-law

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Fitzgerald v. Barnstable Sch. Comm.*, 504 F.3d 165, 170 (1st Cir. 2007).

87. *Fitzgerald*, 129 S. Ct. at 792.

claims against the [S]chool [C]ommittee and Dever.”⁸⁸ The School Committee and superintendent filed a motion to dismiss, which the trial court granted with respect to the § 1983 and state-law claims, and a motion for summary judgment, which was subsequently sustained, with respect to the Title IX claim.⁸⁹

A. *The Court of Appeals’s Decision*

The Fitzgeralds appealed these rulings to the First Circuit Court of Appeals.⁹⁰ Reasoning that “section 1983 cannot be used to enforce a statutory right when that statute’s remedial scheme is sufficiently comprehensive as to demonstrate Congress’s intent to limit the available remedies to those provided by the statute itself,” the First Circuit Court of Appeals held the Fitzgeralds’ § 1983 claims—both Title IX and equal protection—were precluded by Title IX.⁹¹ With respect to § 1983 claims arising out of alleged Title IX violations, the court held the remedial scheme contained within Title IX—withholding of federal funds—in addition to the implied private right of action available under *Cannon*, was “strong evidence of congressional intent to preclude parallel actions under section 1983.”⁹² With respect to the equal protection claims, the court reasoned “a sufficiently comprehensive remedial scheme also may preclude constitutional claims that are virtually identical to those” brought under the statute.⁹³ Therefore, the court held that the plaintiffs’ equal protection claims were also barred by the comprehensiveness of Title IX’s remedial scheme, “especially as embodied in its implied private right of action.”⁹⁴ Thus, the court upheld the dismissal of both of the § 1983 claims.⁹⁵

With respect to the Title IX claims, the court of appeals’s decision focused on the actions taken by the school in response to the complaints as proof there had been no Title IX violation.⁹⁶ The court noted that for a plaintiff to prevail on a Title IX claim against an institution, the plaintiff must first show: (1) “The educational institution is covered by Title IX” through receipt of federal funding, (2) the harassment was “severe,

88. *Id.* at 792–93.

89. *Id.* at 793.

90. *Fitzgerald*, 504 F.3d at 168–69.

91. *Id.* at 176, 179 (citations omitted).

92. *See id.* at 177 (citations omitted).

93. *Id.* at 179 (citing *Smith v. Robinson*, 468 U.S. 992, 1011 (1984)).

94. *Id.*

95. *Id.* at 179–80.

96. *See id.* at 170–74.

pervasive, and objectively offensive,” (3) “the harassment deprived [him or] her of educational opportunities or benefits,” (4) “the educational institution had actual knowledge of the harassment,” and (5) “the institution’s deliberate indifference caused the student to be subjected to the harassment.”⁹⁷ The court further clarified deliberate indifference requires more than a “less than ideal” response by the school.⁹⁸ The court held, “In this context, the term requires a showing that the institution’s response was ‘clearly unreasonable in light of the known circumstances.’”⁹⁹ Therefore, the court of appeals held, to be liable for sexual “harassment, the institution’s deliberate indifference must, at a minimum, have caused the student to undergo harassment, made her more vulnerable to it, or made her more likely to experience it.”¹⁰⁰ The court evaluated the school’s response to the plaintiff’s complaints and determined there had been no “deliberate indifference.”¹⁰¹ Thus, the court upheld the district court’s issuance of summary judgment, reasoning no rational fact finder could determine that the School Committee acted with deliberate indifference.¹⁰² The United States Supreme Court granted certiorari.¹⁰³

B. *The Supreme Court Opinion*

Seeking to resolve the circuit split, the United States Supreme Court granted certiorari to determine “whether Title IX precludes the use of § 1983 to redress gender discrimination in schools.”¹⁰⁴ In a unanimous decision, the Court held that Title IX does not preclude § 1983 claims based on Title IX or the Constitution.¹⁰⁵ The Court arrived at its holding by: (1) distinguishing cases upon which the School Committee relied to argue Title IX preempted § 1983 claims alleging Title IX violations;¹⁰⁶ (2) comparing substantive rights and protections under Title IX and the Equal Protection Clause to establish constitutionally-based § 1983 claims are also not precluded;¹⁰⁷ and (3) discussing the context and legislative history of

97. *Id.* at 171 (citations omitted).

98. *Id.*

99. *Id.* (quoting *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 648 (1999)).

100. *Id.* (citing *Davis*, 526 U.S. at 645).

101. *Id.* at 175.

102. *Id.*

103. *Fitzgerald v. Barnstable Sch. Comm.*, 129 S. Ct. 788, 793 (2009).

104. *Id.*

105. *Id.* at 791–92.

106. *Id.* at 793–96.

107. *Id.* at 796–97.

Title IX's enactment as further support that neither type of § 1983 claim is precluded.¹⁰⁸

1. *Distinguishing Sea Clammers, Smith, and Rancho Palos Verdes*

The Court addressed the cases relied upon by the School Committee to argue the plaintiffs' § 1983 statutory claims based on an alleged violation of Title IX were precluded and found the cases to merely establish "[t]he crucial consideration is what Congress intended."¹⁰⁹ In each case, "the statutes at issue required plaintiffs to comply with particular procedures and/or to exhaust particular administrative remedies prior to filing suit."¹¹⁰ In *Middlesex County Sewerage Authority v. National Sea Clammers Association*, "[t]he plaintiffs brought suit under § 1983 for violations of the Federal Water Pollution Control Act and the Marine Protection, Research, and Sanctuaries Act of 1972."¹¹¹ The Court noted its analysis in that case hinged "on [those] two statutes' 'unusually elaborate enforcement provisions,' which authorized the Environmental Protection Agency to seek civil and criminal penalties for violations, permitted 'any interested person' to seek judicial review, and contained detailed citizen suit provisions allowing for injunctive relief."¹¹² The Court reasoned that allowing similar and parallel § 1983 claims to be litigated simultaneously "would have thwarted Congress'[s] intent in formulating and detailing these provisions."¹¹³

The Court interpreted the *Sea Clammers* doctrine several years later in *Smith v. Robinson*. In *Smith*, the plaintiffs based their claims on what they alleged was "deprivation of a free, appropriate public education for their handicapped child," which they alleged violated "the Education of the Handicapped Act (EHA) and the Due Process and Equal Protection Clauses of the Fourteenth Amendment."¹¹⁴ "[T]he *Smith* plaintiffs relied on § 1983 to assert independent constitutional rights [rather than] the statutory rights guaranteed by the EHA," as the *Sea Clammers* plaintiffs had done.¹¹⁵ The Court reasoned, similar to *Sea Clammers*, however, the

108. *See id.* at 797.

109. *See id.* at 793–94 (quoting *Smith v. Robinson*, 468 U.S. 992, 1012 (1984)).

110. *Id.* at 795.

111. *Id.* at 794.

112. *Id.* (quoting *Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 13–14 (1981)).

113. *Id.*

114. *Id.*

115. *Id.*

statute's detailed remedial scheme indicated Congress's intent for "the statute to provide the sole avenue for relief."¹¹⁶ Finally, the Court noted that in *Rancho Palos Verdes v. Abrams*, "[T]he plaintiff brought claims for injunctive relief under the Telecommunications Act of 1996 (TCA) and for damages and attorney's fees under § 1983."¹¹⁷ The Court reasoned in a manner similar to *Sea Clammers*, determining that because the TCA provided "highly detailed and restrictive administrative and judicial remedies, [and those] 'limitations . . . [were] not to be evaded through § 1983,' . . . Congress must have intended the statutory remedies to be exclusive."¹¹⁸

In all three cases, the Court reasoned, "Offering plaintiffs a direct route to court via § 1983 would have circumvented these procedures and given plaintiffs access to tangible benefits—such as damages, attorney's fees, and costs—that were unavailable under the statutes" and therefore would be "inconsistent with Congress[s] carefully tailored scheme."¹¹⁹ The Court noted Title IX's "only express enforcement mechanism, § 1682, is an administrative procedure resulting in the withdrawal of federal funding from institutions that are not in compliance."¹²⁰ Although the Court had previously recognized an implied right of action in *Franklin v. Gwinnett County Public Schools*, under which both injunctive relief and damages were available, the Court in *Fitzgerald* found these remedies to "stand in stark contrast to the 'unusually elaborate,' 'carefully tailored,' and 'restrictive' enforcement schemes of the statutes at issue in *Sea Clammers*, *Smith*, and *Rancho Palos Verdes*."¹²¹ Because Title IX, unlike those statutes, "has no administrative exhaustion requirement and no notice provisions . . . plaintiffs can file directly in court, and can obtain the

116. *Id.* (citing *Smith v. Robinson*, 468 U.S. 992, 1011 (1984)). *Smith* stated:

In light of the comprehensive nature of the procedures and guarantees set out in [the statute] and Congress's express efforts to place on local and state educational agencies the primary responsibility for developing a plan to accommodate the needs of each individual handicapped child, we find it difficult to believe that Congress also meant to leave undisturbed the ability of a handicapped child to go directly to court

Smith, 468 U.S. at 1011.

117. *Fitzgerald*, 129 S. Ct. at 795.

118. *Id.* (citing *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 124 (2005)).

119. *Id.* (citations omitted).

120. *Id.*

121. *Id.* (citing *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 76 (1992)).

full range of remedies” under its implied right of action.¹²² Therefore, the Court held, “[P]arallel and concurrent § 1983 claims will neither circumvent required procedures, nor allow access to new remedies.”¹²³ The Court further noted, under *Rancho Palos Verdes*, “[t]he provision of an *express*, private means of redress in the statute itself” is crucial to the determination of congressional intent and “the existence of a more restrictive private remedy for statutory violations has been the dividing line between those cases in which . . . an action would lie under § 1983 and those in which [the Court has] held that it would not.”¹²⁴ Because Title IX contains no express private remedy, much less a more restrictive one, the Court, “[m]indful that [it] should ‘not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy for a substantial equal protection claim,’” held there was no basis for finding Congress intended Title IX to preclude other claims under § 1983.¹²⁵

2. *Comparing Substantive Rights and Protections Under Title IX and the Equal Protection Clause*

The Court’s second area of analysis involved the plaintiffs’ Constitution-based § 1983 claims alleging a violation of the Equal Protection Clause.¹²⁶ This involved a consideration “of the substantive rights and protections guaranteed under Title IX and under the Equal Protection Clause” to assess whether these claims were identical.¹²⁷ The Court held that the differences between potential Title IX and equal protection claims lent “further support to the conclusion that Congress did not intend Title IX to preclude § 1983 constitutional suits.”¹²⁸

The Court found that Title IX and the Equal Protection Clause have the potential to reach different actors.¹²⁹ While Title IX reaches public and private “institutions and programs that receive federal funds,”¹³⁰ it has not been interpreted as a vehicle authorizing suit against teachers, school

122. *Id.* at 795–96 (citations omitted).

123. *Id.* at 796.

124. *Id.* (quoting *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 121 (2005)).

125. *Id.* (quoting *Smith v. Robinson*, 468 U.S. 992, 1012 (1984)).

126. *Id.* at 796–97.

127. *Id.* at 796.

128. *Id.*

129. *Id.*

130. *Id.* (citing 20 U.S.C. § 1681(a), (c) (2006)).

officials, or other individuals.¹³¹ In contrast, although the Equal Protection Clause applies solely to state actors, § 1983 equal protection claims apply to both state actors and municipalities, which are not proper Title IX parties.¹³²

Title IX and the Equal Protection Clause also have the potential to reach different situations.¹³³ Several activities that could be challenged on constitutional grounds are exempted from Title IX's restrictions.¹³⁴ For example, elementary and secondary schools are exempted from the prohibition against discrimination in admissions,¹³⁵ and "military service schools and traditionally single-sex public colleges" are exempt from all Title IX provisions.¹³⁶ However, "[s]ome [of these] exempted activities may form the basis of equal protection claims."¹³⁷ Where similar activities and defendants are involved, the standards for establishing liability are not always the same or similar.¹³⁸ For example, under Title IX, a "plaintiff can establish . . . liability by showing that a single school administrator with authority to take corrective action responded to harassment with deliberate indifference,"¹³⁹ while a claim similar to a § 1983 claim for a "violation of the Equal Protection Clause . . . must show that the harassment was the result of municipal custom, policy, or practice."¹⁴⁰ This divergence further supports the Court's holding that the plaintiffs' "§ 1983 suits based on the Equal Protection Clause remain available to plaintiffs alleging

131. *Id.* (citing *Hartley v. Parnell*, 193 F.3d 1263, 1270 (11th Cir. 1999)). Title IX claims can only be brought against government entities and their officials, not an individual. *Burke*, *supra* note 3, at 1491.

132. *Fitzgerald*, 129 S. Ct. at 796 (citing *West v. Atkins*, 487 U.S. 42, 48–51 (1988)).

133. *See id.*

134. *Id.*

135. *Id.* (citing 20 U.S.C. § 1681(a)(1) (2006)).

136. *Id.* (citing 20 U.S.C. § 1681(a)(4)–(5) (2006)).

137. *Id.* (citations omitted). The Court noted *United States v. Virginia*, 518 U.S. 515 (1996), and *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), were examples of such exempted activities. *Id.* The *Fitzgerald* Court noted *Virginia* found "men-only admissions polic[ies] at Virginia Military Institute violated the Equal Protection Clause," and in *Hogan*, the Court found a "women-only admission policy at a traditionally single-sex public college violated the Equal Protection Clause." *Id.* (citations omitted).

138. *Id.* at 797.

139. *Id.* (citing *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998)).

140. *Id.* (citing *Monell v. Dep't. of Soc. Servs.*, 436 U.S. 658, 694 (1978)).

unconstitutional gender discrimination in schools.”¹⁴¹

3. *The Context and Legislative History of Title IX’s Enactment*

The Court’s third area of analysis involved analyzing the congressional intent underlying the enactment of the statute by evaluating the legislative history of Title IX.¹⁴² The Court noted, “In enacting Title IX, Congress . . . authorize[d] the Attorney General to intervene in private suits alleging discrimination on the basis of sex in violation of the Equal Protection Clause.”¹⁴³ The Court thus reasoned Congress must have “envisioned that private plaintiffs would bring constitutional claims to challenge gender discrimination” and that the plaintiffs would bring such claims under § 1983.¹⁴⁴

Modeled after Title VI of the Civil Rights Act of 1964, Congress “passed Title IX with the explicit understanding that it would be interpreted as Title VI was.”¹⁴⁵ “Title VI was routinely interpreted to allow for parallel and concurrent § 1983 claims.”¹⁴⁶ The Court held because Congress was aware of this routine interpretation, it is likely it intended Title IX to be interpreted to allow parallel and concurrent claims, as well.¹⁴⁷ Thus, resolving the inconsistency amongst the circuits, the Court held that Title IX was not meant to be an exclusive mechanism for addressing gender discrimination in schools, nor was it meant to be a substitute for § 1983 suits as a means of enforcing constitutional rights.¹⁴⁸

IV. LITIGATING TITLE IX AND § 1983 CLAIMS CONCURRENTLY: *SEXUAL HARASSMENT PLAINTIFFS GET ONE FULL BITE OF THE APPLE*

Congress’s intent that § 1983 claims be addressed by Title IX is the basis for § 1983 claims’ doctrine of preclusion.¹⁴⁹ If, as *Fitzgerald* dictates, plaintiffs can make their claims against individuals and institutions under both Title IX and § 1983, does this necessarily mean these plaintiffs unfairly receive two bites of the proverbial apple? The answer appears to

141. *Id.*

142. *Id.* (citation omitted).

143. *Id.* (citing Pub. L. No. 92-318, § 906, 86 Stat. 375 (1972)).

144. *Id.*

145. *Id.* (citing *Cannon v. Univ. of Chi.*, 441 U.S. 677, 694–96 (1979)).

146. *Id.* (citations omitted).

147. *See id.*

148. *Id.* at 793.

149. *See id.*

be “no.” In fact, a more accurate answer may be that such a ruling allows the plaintiffs to get one full, and perhaps more satisfying, bite of the apple.

A. *More Defendants in Sexual Harassment Claims*

The holding in *Fitzgerald*—that Title IX has no preclusive effect on either type of § 1983 claim—has significance for both plaintiffs and defendants.¹⁵⁰ Plaintiffs may have a list of potential defendants, including the alleged harassing “teacher [or professor], the principal, the members of the school board, the superintendent, the school district itself, and [even] the municipality in which the school district operates.”¹⁵¹ Section 1983 would allow suit against any and all of these potential defendants in their personal capacities.¹⁵² Prior to the Court’s decision in *Fitzgerald*, plaintiffs were forced to bring their allegations of misconduct solely against the school or university because individuals cannot be sued under Title IX.¹⁵³ Such a practice led to frustration on the part of the plaintiffs, considering the high standard for holding institutions liable.¹⁵⁴ For the institution to be liable for the actions of its subordinates, these claimants would have to show the institution had actual notice of the underlying violation and that it acted with deliberate indifference in failing to prevent the harassment.¹⁵⁵ Agency principles would not apply and there was no constructive notice, or “knew or should have known,” standard.¹⁵⁶ This standard provided an

150. See Zwibelman, *supra* note 2, at 1482–85 (comparing Title IX and § 1983 claims, and their implications and interactions in any court proceedings).

151. *Id.* at 1465.

152. *Id.* at 1483 (citing *Monroe v. Pape*, 365 U.S. 167, 180–83 (1961)).

153. See *Fitzgerald*, 129 S. Ct. at 796.

154. Anne D. Byrne, Comment, *School District Liability Under Title IX for Sexual Abuse of a Student by a Teacher: Why Has the Supreme Court Allowed Schools to Put Their Heads in the Sand?* *Gebser v. Lago Vista Independent School District*, 118 S. Ct. 1989 (1998), 22 HAMLINE L. REV. 587, 614–30 (1999) (arguing the Title IX standard of “actual notice” coupled with “deliberate indifference” is too high of a burden and the Court should have adopted the lower Title VII standard for Title IX cases).

155. See *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 285, 290 (1998) (discussing the Court’s rejection of respondeat superior or constructive notice standards in favor of “actual notice” and requiring “deliberate indifference”); see also Kaplin, *supra* note 4, at 621–22 (discussing the “deliberate indifference” requirement); Daniel P. Colling, Note, *Statutory Modification Needed for Title IX in Light of Gebser v. Lago Vista Independent School District*, 45 WAYNE L. REV. 1565, 1581–82 (1999) (discussing the Court’s decision to apply “actual notice” to Title VII cases rather than agency principles).

156. *Gebser*, 524 U.S. at 282–84 (citations omitted) (declining to adopt 1997

“incentive for school districts to take an ‘ostrich-like’ approach to sexual harassment.”¹⁵⁷ “The less the school district [knew] about inappropriate actions by its teachers, the more likely it [was to] be insulated from liability.”¹⁵⁸ Moreover, “[a] standard based on actual knowledge coupled with deliberate indifference place[d] the burden . . . on the minor victim . . . to know the ‘correct’ person to go to, the ‘person with authority to take action,’ and the victim must prove that the school knew about, and did nothing to prevent, the abuse.”¹⁵⁹ This was a very difficult “standard if the school district [or university] [did] not have policies that clearly inform students who this ‘correct’ person is.”¹⁶⁰

However, now that plaintiffs have the ability to sue both the institution under Title IX, as well as individuals under § 1983, the facts of the alleged harassment should come to light more easily. If institutions follow the *Revised Sexual Harassment Guidance*, every school would have “[s]trong policies and effective grievance procedures . . . to let students and employees know that sexual harassment will not be tolerated and to ensure that they know how to report it.”¹⁶¹ If students make use of these grievance procedures early, the school or university would have the opportunity to learn of the alleged harassment before the filing of a formal complaint.¹⁶² The school could initiate investigative procedures, including conversations

OCR guidelines that “would hold a school district liable in damages under Title IX where a teacher is ‘aided in carrying out the sexual harassment of students by his or her position of authority with the institution,’ irrespective of whether school district officials had any knowledge of the harassment and irrespective of their response upon becoming aware” (citations omitted). OCR subsequently revised these guidelines. See OFFICE FOR CIVIL RIGHTS, *supra* note 14, at i–iii (discussing the liability standard from *Gebser* and adjusting guidelines accordingly).

157. Byrne, *supra* note 154, at 618 (arguing the school in *Gebser* avoided actual notice by failing to have a grievance procedure); see also *Gebser*, 524 U.S. at 300–01 (Stevens, J., dissenting) (“As long as school boards can insulate themselves from knowledge about this sort of conduct, they can claim immunity from damages liability.”).

158. Byrne, *supra* note 154, at 618 (citation omitted).

159. *Id.* at 619 (citations omitted).

160. *Id.*; see also Kaplin, *supra* note 4, at 621–22 (discussing the requirement that a school have actual notice, while many schools do not provide students with directions or channels for giving notice).

161. See OFFICE FOR CIVIL RIGHTS, *supra* note 14, at iii.

162. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 305 n.17 (1998) (Stevens, J., dissenting) (quoting *Gebser*, who stated, “‘If I had known at the beginning what I was supposed to do when a teacher starts making sexual advances towards me, I probably would have reported it. I was bewildered and terrified and I had no idea where to go from where I was.’” (citation omitted)).

with the alleged harasser, as soon as practicable. Knowing the student may eventually file an action against both the individual harasser and the school should encourage a more thorough investigation on the part of the institution and its employees.

Presumably, claimants would file the Title IX and § 1983 actions simultaneously, making allegations against the institution pursuant to Title IX and against any individuals pursuant to § 1983.¹⁶³ In addition to a Title IX claim against the institution, claimants could attach several § 1983 claims against teachers, professors, principals, deans, or others, including violations of: (1) Title IX, (2) “the Fourteenth Amendment right to due process, alleging a denial of a fair hearing in which to bring her complaint,” (3) “the liberty interest in bodily integrity under the substantive due process right in the Fourteenth Amendment,” and (4) “the right under the Equal Protection Clause of the Fourteenth Amendment to be free from discrimination on the basis of sex.”¹⁶⁴ The victims of harassment can typically reach teachers, professors, or others in a position of authority through § 1983 “because they are considered to be official state actors acting under color of law, within the meaning of the statute.”¹⁶⁵ Because Title IX precludes causes of action against individuals, § 1983 is the only way to reach some of these potential defendants, who can now be named along with the institution in the action.¹⁶⁶

163. Zwibelman, *supra* note 2, at 1465. The Court in *Fitzgerald* appeared to assume as much when it discussed the fact that Title IX does not have an administrative exhaustion requirement and no notice provisions. *Fitzgerald v. Barnstable Sch. Comm.*, 129 S. Ct. 788, 795 (2009). Because, according to the Court, a plaintiff can file directly in court under the “implied private right of action,” “parallel and concurrent § 1983 claims will neither circumvent required procedures, nor allow access to new remedies.” *Id.* at 795–96 (citations omitted). The Court specifically held the possibility equal protection claims could reach different actors and different factual situations was enough to justify the finding such claims were not precluded by Title IX. *Id.* at 796. There could be a situation, however, in which the § 1983 claim alleges the very same conduct against the very same defendants, and therefore, the claims are virtually identical. In such a situation, defendants should argue this narrow class of claims would be precluded by Title IX, or at the very least, argue for issue or claim preclusion as necessary. *E.g.*, Lindsay Niehaus, *The Title IX Problem: Is It Sufficiently Comprehensive to Preclude § 1983 Actions?*, 27 QUINNIPIAC L. REV. 499, 524–26 (2009) (arguing *Gebser* allows for some concurrent claims that may give plaintiffs double recovery if claims involve the same individuals and testimony).

164. Zwibelman, *supra* note 2, at 1479 (detailing § 1983 claims that might be brought by students against individuals and institutions, but noting the Title IX claim is nearly identical to the equal protection claim).

165. Cherner-Ranft, *supra* note 42, at 1919 n.261.

166. *Fitzgerald*, 129 S. Ct. at 796 (declaring, while the Equal Protection Clause

B. *Standard of Liability Under Title IX and § 1983*

“Section 1983 does not contain substantive rights like Title IX.”¹⁶⁷ While Title IX provides the substantive right “to be free from sex discrimination in educational settings,” § 1983 provides citizens a way to vindicate those rights.¹⁶⁸ To assert a federal violation under § 1983, a plaintiff must establish two elements: “(1) [T]he violator acted under the color of state law, and (2) the violator’s action deprived the victim of a right, privilege, or immunity secured by the Constitution or laws of the United States.”¹⁶⁹ This second prong requires plaintiffs “allege all of the elements of the constitutional or federal right.”¹⁷⁰ Therefore, “[t]o establish a § 1983 claim based on Title IX, a plaintiff must prove that the state actor ‘knew or should have known’ that he violated a ‘clearly established’ right under Title IX for the plaintiff to be free from sex discrimination in a federally funded educational program.”¹⁷¹ As opposed to Title IX’s “actual knowledge” and “deliberate indifference” standard, this § 1983 standard is lower.¹⁷² Typically, “the plaintiff need not prove that the defendant acted willfully or with a specific intent to deprive the plaintiff of a federal right.”¹⁷³ It is therefore possible a plaintiff may find it easier to prove the principal, dean, superintendent, or school district is responsible for a teacher’s misconduct under § 1983.¹⁷⁴

V. CONCLUSION

While disagreement has existed in the past, *Fitzgerald* makes clear that victims of sexual harassment may bring claims under both Title IX and § 1983. Arguments that Title IX’s comprehensive enforcement scheme is

reaches only state actors, § 1983 equal protection claims may be brought against individuals, municipalities, and other state entities if such a defendant is acting under color of state law (citing *West v. Atkins*, 487 U.S. 42, 48–51 (1988)).

167. Burke, *supra* note 3, at 1498 (citing McDonald, *supra* note 55, at 30).

168. *Id.* (citations omitted).

169. *Id.* (citations omitted).

170. *Id.*

171. *Id.* at 1500 n.80 (citations omitted).

172. *Id.* However, it is not significantly lower, and commentators have suggested § 1983 actions are also difficult to win because they require a plaintiff to show tacit authorization or deliberate indifference. Newman, *supra* note 35, at 2567–68 (discussing difficulties plaintiffs incur when litigating § 1983 claims).

173. Cherner-Ranft, *supra* note 42, at 1911 (citations omitted) (comparing the burden of proof under Title IX and § 1983).

174. Zwibelman, *supra* note 2, at 1466–67 (discussing the lower standard for proving violations under § 1983).

incompatible with individual enforcement under § 1983 left victims largely without remedy, as they could only allege sexual harassment against the institution, not the individuals responsible. Title IX's remedy of withdrawing funds is infrequently, if ever, applied and does nothing to compensate the individual victims. After *Fitzgerald*, these victims will have the ability to seek recovery against all those responsible for the alleged harassment. Schools and institutions will have a greater incentive to follow OCR Guidelines as they can no longer hide behind their lack of knowledge when proper investigatory and remedial action is not taken. For the first time since Title IX's inception, *Fitzgerald* has provided victims of sexual harassment with one full bite of the apple.