NOTE

PROTECTING STUDENTS AGAINST PEER SEXUAL HARASSMENT: CONGRESS'S CONSTITUTIONAL POWERS TO PASS TITLE IX

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INTRODUCTION

Peer sexual harassment occurs when one student harasses another.[1] For many individuals, this term elicits memories of the recent, well-publicized suspensions of two elementary school boys for kissing female classmates.[2] Unfortunately, many incidents of peer sexual harassment involve far more egregious acts, ranging from namecalling

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1 The U.S. Department of Education Office for Civil Rights (OCR) considers peer sexual harassment to be a form of hostile environment sexual harassment. It defines the latter as follows:

> Sexually harassing conduct (which can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature) . . . by another student . . . that is sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from an education program or activity, or to create a hostile or abusive educational environment.

Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034, 12,038 (1997) [hereinafter Sexual Harassment Guidance].

The OCR interprets Title IX to prohibit sexual harassment of both girls and boys, regardless of the sex of the harasser. See id. at 12,039; cf. Oncale v. Sundowner Offshore Serv., Inc., 118 S. Ct. 998, 1002 (1998) (holding that same-sex sexual harassment can be sex discrimination under Title VII). Although boys can be victims of sexual harassment, girls are more often victims, and girls or their parents are more likely to bring peer sexual harassment suits. See Robert J. Shoop & Debra L. Edwards, How to Stop Sexual Harassment in Our Schools 14-15 (1994). Additionally, the effect of sexual harassment is greater on girls than boys. See id. at 15.

2 Sexual harassment is a form of sex discrimination. See Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64-67 (1986) (holding that creation of offensive or hostile work environment is form of sex discrimination under Title VII). When a school does not respond to sexual harassment, it "permits an atmosphere of sexual discrimination to permeate the

and sexual jokes to unwelcome intimate contact and rape.[3] Not surprisingly, peer sexual harassment can have a severe impact on a victim's educational experience and psychological well-being.[4]

Despite general consensus that schools need to play a role in preventing peer sexual harassment,[5] courts disagree on whether schools can violate Title IX by failing to take adequate remedial action against peer sexual harassment.[6] Several peer sexual harassment victims have brought cases attempting to hold schools liable for students' suffering.[7] These victims argue that Title IX, which prohibits sex discrimination in schools and guarantees that students receive the

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educational program and results in discrimination prohibited by Title IX." Sexual Harassment Guidance, supra, at 12,039.

See Rene Sanchez, In School, Early Lessons on Sexual Harassment, Wash. Post, Oct. 4, 1996, at A1 (reporting suspensions of Jonathan Prevette of Lexington, N.C. and De'Andre Dearinge of New York City for unwelcome kissing of girls during school hours).

[3] The media has described other specific incidents of peer sexual harassment and has noted an increase in its occurrence. See Anne Bryant, Sexual Harassment in Schools Takes Its Toll, USA Today Mag., Mar. 1995, at 40 (relating that boys in Duluth, Minnesota repeatedly wrote graffiti containing sexual slurs about classmate); Bill Hewitt et al., Bitter Lessons: School Days Aren't Golden Rule Days Anymore, and Some Parents Are Suing to Keep Their Kids from Being Abused, People Wkly., Oct. 28, 1996, at 53 (reporting that sixth-grade girl was subjected to verbal harassment and threats to her life); Ron Stodghill II, Where'd You Learn That?, Time, June 15, 1998, at 52, 53 (indicating that Denver schools experienced "sharp rise in lewd language, groping, pinching and bra-snapping incidents among sixth-, seventh- and eighth-graders").

[4] See Shoop & Edwards, supra note 1, at 56-66; Alexandra A. Bodnar, Note, Arming Students for Battle: Amending Title IX to Combat the Sexual Harassment of Students by Students in Primary and Secondary School, 5 S. Cal. Rev. L. & Women's Stud. 549, 559-65 (1996); see also infra notes 35-38 and accompanying text.

[5] Recognizing peer sexual harassment as a wide spread problem, the OCR has issued guidelines and pamphlets instructing schools on how to prevent and effectively respond to reports of peer sexual harassment. See, e.g., Office for Civil Rights, U.S. Dep't of Education, Sexual Harassment: It's Not Academic (1997) [hereinafter Sexual Harassment: It's Not Academic]; Sexual Harassment Guidance, supra note 1. Additionally, several practitioners have written books containing suggestions for schools and teachers on how to combat peer sexual harassment. See, e.g., Judith Berman Brandenburg, Confronting Sexual Harassment, What Schools and Colleges Can Do (1997) (discussing all forms of sexual harassment that occur in educational settings including peer sexual harassment and suggesting means of recognizing and responding to it); Audrey Cohan et al., Sexual Harassment and Sexual Abuse, A Handbook for Teachers and Administrators (1996) (same); Shoop & Edwards, supra note 1 (same).

[6] Compare Doe v. Oyster River Coop. Sch. Dist., 992 F. Supp. 467, 479 (D.N.H. 1997) (finding liability), and Burrow v. Postville Community Sch. Dist., 929 F. Supp. 1193, 1205 (N.D. Iowa 1996) (same), with Doe v. Oktibbeha County Sch. Dist., No. 1:96 CV332-S-D, 1998 WL 378299, at *1 (N.D. Miss. Apr. 2, 1998) (finding no liability), and Wright v. Mason City Community Sch. Dist., 940 F. Supp. 1412, 1420 (N.D. Iowa 1996) (same).

[7] See, e.g., Piwonka v. Tidehaven Indep. Sch. Dist., 961 F. Supp. 169, 171 (S.D. Tex. 1997); Collier v. William Penn Sch. Dist., 956 F. Supp. 1209, 1211-14 (E.D. Penn. 1997); *Burrow*, 929 F. Supp. at 1199.

benefits of education without regard to sex, provides a private right of action for victims of peer sexual harassment.[8]

This 1998-1999 term, the Supreme Court, in *Davis v. Monroe County Board of Education*,[9] will decide the issue of school liability for peer sexual harassment. In *Davis*, the plaintiff, Aurelia Davis, brought suit on behalf of her daughter, LaShonda, against the Board of Education of Monroe County, Georgia, and two school officials.[10] LaShonda alleged that a fellow fifth-grader, "G.F." attempted to fondle, did fondle, and directed offensive language toward her on several occasions.[11] After every incident, LaShonda reported G.F.'s behavior to her mother and to her teachers.[12] The plaintiff's complaint alleged that the defendants' response to LaShonda's reports was inadequate.[13] The district court dismissed the claims, and a divided three-judge panel reinstated them.[14] The Eleventh Circuit then granted a rehearing en banc.[15]

The en banc panel affirmed the district court's dismissal, ruling that Ms. Davis did not have a cause of action cognizable under Title IX, and holding that a school cannot be held liable for peer sexual harassment.[16] The court reasoned that the school did not have notice of potential liability for peer sexual harassment, which it held is a prerequisite for liability under Spending Clause legislation such as Title IX.[17] The court therefore refused to hold the school liable.[18]

Focusing on the Spending Clause nature of Title IX and the limitations of spending power legislation, the Fifth Circuit, in *Rowinsky v. Bryan Independent School District*,[19] also held that a school cannot be held liable for peer sexual harassment.[20] The court reasoned that to hold schools liable for peer sexual harassment would require schools to control third parties.[21] Concluding that Spending Clause legislation

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8 In these cases, the failure of a school district to respond adequately to complaints of peer sexual harassment forms the basis of the Title IX claim. Title IX states 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." 20 U.S.C. § 1681 (1990).

9 120 F.3d 1390 (11th Cir. 1997), cert. granted, 119 S. Ct. 29 (1998).

10 See id. at 1392.

11 See id. at 1393.

12 See id. at 1393-94.

13 See id. at 1394.

14 See id. at 1392.

15 See id.

16 See id. at 1392.

17 See id. at 1399-1401; see also infra notes 118-22 and accompanying text.

18 See *Davis*, 120 F.3d at 1406.

19 80 F.3d 1006 (5th Cir. 1996).

20 See id. at 1012-16.

21 See id. at 1013.

can place conditions only on the behavior of the grant recipient, the court found that peer sexual harassment is not within the scope of Title IX's prohibitions.[22]

The approach to the interpretation of Title IX taken by the Fifth and Eleventh Circuits deviates from the well-accepted mode of statutory construction. To determine the scope of a statute, courts usually consider the text, legislative history, and agency interpretation of a statute.[23] Interpreted properly, Title IX reaches peer sexual harassment.[24]

In straying from the traditional process of statutory interpretation, the Fifth and Eleventh Circuits unduly emphasized that Title IX was passed pursuant to the Spending Clause. The analysis of the scope of Title IX should not depend on what power Congress used to enact it. It should be limited, rather, to the traditional canons of statutory construction.

The congressional power used to pass Title IX, however, is relevant to the issue of sovereign immunity. Some defendants of peer sexual harassment suits are entities entitled to sovereign immunity and therefore cannot be sued in federal courts.[25] Congress can abrogate sovereign immunity by explicitly stating its intent to do so and passing legislation pursuant to the Enforcement Clause of the Fourteenth Amendment.[26] Congress may not, however, abrogate sovereign immunity through legislation passed pursuant to the Spending Clause.[27]

The assertions by the Fifth and Eleventh Circuits that Title IX was not passed pursuant to the Fourteenth Amendment were not made in the context of sovereign immunity. The reasoning of those circuits, however, bolsters the argument that an entity entitled to sovereign immunity cannot be sued in federal court for failing to take remedial action against peer sexual harassment.[28] Contrary to these two circuits, other federal courts have held that Title IX is within Congress's Fourteenth Amendment power and contains a valid abrogation

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22 See id. at 1013-16.

23 See infra note 140.

24 See infra Part II.B.

25 See infra notes 163-65 .

26 See Seminole Tribe v. Florida, 517 U.S. 44, 55-56 (1996) (discussing limitations of Congress's power to abrogate state sovereign immunity).

27 See id. at 72-73 (holding that Congress cannot limit sovereign immunity through its Article 1 powers).

28 See Litman v. George Mason Univ., 5 F. Supp. 2d 366, 372-73 (E.D. Va. 1998) (citing *Davis* and *Rowinsky* to support conclusion that Title IX is exercise of Congress's spending power and not its Fourteenth Amendment power).

of sovereign immunity.[29] This Note argues that these courts are correct—that Congress used its Fourteenth Amendment power in passing Title IX and successfully abrogated sovereign immunity.

The Note begins with an overview of peer sexual harassment in schools, emphasizing its frequency and severe effects, and an explanation of why schools should adopt antiharassment policies. It continues with a discussion of the judicial and legislative history of Title IX. Part II provides a brief explanation of Congress's powers under the Spending Clause and describes the Fifth and Eleventh Circuits' analysis of Title IX's scope. Next, it considers the breadth of Title IX by using traditional tools of statutory interpretation and focuses on a Seventh Circuit opinion in which the court found that Title IX reaches peer sexual harassment. Part II continues with a discussion of sovereign immunity and the Fourteenth Amendment. This Part concludes by describing the analysis of courts that have found that Title IX is within Congress's Fourteenth Amendment power and abrogates sovereign immunity. By establishing that Congress can use multiple powers to pass legislation and by analogizing Title IX to other laws, Part III argues that Title IX was passed pursuant to both the Spending Clause and the Fourteenth Amendment.[30]

I
PEER SEXUAL HARASSMENT AND TITLE IX

This Part begins with an evaluation of the extent and effects of peer sexual harassment. It continues with an explanation of why schools are an appropriate forum to address peer sexual harassment and how school liability will encourage schools to adopt antiharassment policies. The Part concludes with a discussion of the scope of Title IX, the legislation under which school liability can be found.

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[29] See Doe v. University of Ill., 138 F.3d 653, 657-60 (7th Cir. 1998), petition for cert. filed, 67 U.S.L.W. 3083 (U.S. Aug. 4, 1998) (No. 98-126); Franks v. Kentucky Sch. for the Deaf, 142 F.3d 360, 362-63 (6th Cir. 1998); Crawford v. Davis, 109 F.3d 1281, 1282-83 (8th Cir. 1997); Thorpe v. Virginia State Univ., 6 F. Supp. 2d 507, 516-17 (E.D. Va. 1998).

[30] It is possible that Title IX is within another congressional power such as the commerce power. See Laurence Tribe, American Constitutional Law, § 5-8, at 316 (2d ed. 1988) (describing Congress's commerce power as broad). But see United States v. Lopez, 514 U.S. 549, 566 (1995) (limiting reach of Commerce Clause and holding that it "does not include the authority to regulate each and every aspect of local schools"). This Note limits its discussion to the Spending Clause and the Fourteenth Amendment since the disagreement between the courts focuses on these two powers. Additionally, since spending and other Article 1 powers cannot be used to abrogate immunity, the possibility that Title IX was passed pursuant to these powers does not alter the sovereign immunity analysis.

A. The Prevalence of Peer Sexual Harassment and Its Effects

In 1993, the American Association of University Women (AAUW) conducted a survey of girls and boys in eighth to eleventh grades.[31] The survey asked the students if they had experienced sexual harassment defined to include: making sexual comments, jokes, or looks; spreading sexual rumors about a student; flashing or mooning; touching, grabbing, or pinching in a sexual way; pulling off or down clothing; and forcing sexual acts.[32] Eighty-five percent of the girls surveyed reported that they had been sexually harassed, and seventy-nine percent reported that they had been sexually harassed by a peer.[33] These statistics reflect that over half of school-aged girls are victims of peer sexual harassment as defined by the AAUW.[34]

In addition to asking students if they had been sexually harassed, the AAUW survey asked students to describe how they were affected by the harassment.[35] Students reported that they felt embarrassed, self-conscious, scared, and less confident in themselves.[36] Studies of peer and other forms of sexual harassment show that these feelings often translate into bouts of depression, decreased participation in the classroom, and overall poorer academic performance.[37] Victims may

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31 See American Association of University Women Educational Foundation, Hostile Hallways: The AAUW Survey on Sexual Harassment in America's Schools 5 (1993) [hereinafter Hostile Hallways] (describing methodology of survey).

32 See id. at 5.

33 See id. at 7, 11. The study reflects that 76% of boys experienced sexual harassment. See id. at 7. The acts described in the survey only constitute actionable sexual harassment if they meet the legal definition of sexual harassment. To establish a prima facie case of peer sexual harassment, a student must show that: 1) she belongs to a protected class; 2) she was subjected to unwelcome verbal or physical conduct of a sexual nature; 3) the harassment was based on sex; 4) the harassment was sufficiently severe or pervasive so as to alter the conditions of her education and create a hostile working environment; and 5) there was some basis for liability. See Adusumilli v. Illinois Inst. of Tech., No. 97 C 8507, 1998 WL 601822, at *2 (N.D. Ill. Sept. 9, 1998) (explaining what plaintiff must show to establish prima facie case of peer sexual harassment); cf. Klemencic v. Ohio State Univ., 10 F. Supp. 2d 911, 915 (S.D. Ohio 1998) (adopting same test for teacher-student sexual harassment suit).

34 The allegations made by plaintiffs in peer sexual harassment cases support the survey findings. See, e.g., Nicole M. v. Martinez Unified Sch. Dist., 964 F. Supp. 1369, 1372 (N.D. Cal. 1997) (noting plaintiff's allegations that peer sexual harassment consisting of unwanted verbal comments and male student touching plaintiff's breast during class caused her to transfer out of school); Collier v. William Penn Sch. Dist., 956 F. Supp. 1209, 1211 (E.D. Pa. 1997) (relating that plaintiff alleged harassment included offensive language, sexual propositions, and threats of physical harm that escalated to male student exposing his penis and grabbing plaintiff's breast).

35 See Hostile Hallways, supra note 31, at 6.

36 See id. at 16-17.

37 See id. at 15-16; see also Shoop & Edwards, supra note 1, at 61-62 (explaining that sexual harassment victims develop low self-esteem and citing study that reflects correlation between low self-esteem and psychiatric assistance, depression, and aggressive behavior).

try to evade their harassers by avoiding classes, modifying their schedules, skipping school, or, in extreme cases, changing schools.[38]

Recognizing the injurious effects of sexual harassment on the educational development of its victims,[39] the Office of Civil Rights (OCR), the administrative agency responsible for the enforcement of Title IX, and education experts have made concrete recommendations to schools to assist them in their battle against the sexual harassment of students.[40] These recommendations suggest that schools: adopt and publicize a sexual harassment policy which includes a definition of sexual harassment;[41] establish grievance procedures which protect the confidentiality of both victims and perpetrators;[42] develop a mechanism to investigate complaints quickly and effectively;[43] and educate

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[38] See id. at 17-18; see also Franks v. Kentucky Sch. for the Deaf, 956 F. Supp. 741, 743 (E.D. Ky. 1996) (commenting that plaintiff asserted that her daughter was sexually assaulted and raped by peer and that she transferred her daughter because of sexual harassment), aff'd, 142 F.3d 360 (6th Cir. 1998).

[39] The courts too have recognized the severe effects of sexual harassment on the educational environment. As one court explained, "'A nondiscriminatory environment is essential to maximum intellectual growth and is therefore an integral part of the educational benefits that a student receives. A sexually abusive environment inhibits, if not prevents, the harassed student from developing her full intellectual potential and receiving the most from the academic program.'" Patricia H. v. Berkeley Unified Sch. Dist., 830 F. Supp. 1288, 1293 (N.D. Cal. 1993) (quoting Ronna Greff Schneider, Sexual Harassment and Higher Education, 65 Tex. L. Rev. 525, 551 (1987)); see also Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 1989, 2000 (1998) (noting large number of incidents of student sexual harassment and extraordinary harm suffered by harassment victims); Doe v. University of Ill., 138 F.3d 653, 663 (7th Cir. 1998) (observing that sexual harassment may deny victim full benefit of her education), petition for cert. filed, 67 U.S.L.W. 3083 (U.S. Aug. 4, 1998) (No. 98-126); Davis v. Monroe County Bd. of Educ., 120 F.3d 1390, 1417 (11th Cir. 1997) (Barkett, J., dissenting) (remarking that sexual harassment subordinates girls in classroom), cert. granted, 119 S. Ct. 29 (1998).

[40] See, e.g., Brandenburg, supra note 5, at 49-65 (discussing policies and grievance procedures); Cohan, supra note 5, at 21-75 (giving detailed recommendations on how to handle complaints and concrete steps to be taken to prevent sexual harassment); Shoop & Edwards, supra note 1, at 121-239 (providing suggestions on investigations of and hearings on sexual harassment, examples of policies, and guidelines for age-appropriate curriculums for grades K-12).

[41] See Brandenburg, supra note 5, at 49-51 (encouraging schools to adopt policies that provide definitions and examples of sexual harassment); Emmalena K. Quesada, Note, Innocent Kiss or Potential Legal Nightmare: Peer Sexual Harassment and the Standard for School Liability Under Title IX, 83 Cornell L. Rev. 1014, 1059-62 (1998) (asserting that first step for schools is to adopt sexual harassment policy).

[42] See Joseph Beckham, Liability for Sexual Harassment Involving Students Under Federal Civil Rights Law, 99 Educ. Law Rep. 689, 700 (1995) (suggesting that grievance procedures can provide for reasonable confidentiality); Quesada, supra note 41, at 1062 (emphasizing that school procedure must assure confidentiality). The OCR currently requires schools to adopt grievance procedures. See 34 C.F.R. § 106.8 (1998) ("A recipient shall adopt and publish grievance procedures. . . .").

[43] See Cohan, supra note 5, at 21-55 (providing step-by-step procedures on how to handle sexual harassment complaint); Maureen O. Nash, Student on Student Sexual Harass-

students, teachers, administrators, parents, and staff about the definition of sexual harassment and the school's policy and grievance procedures.[44]

B. *The Role of Schools in the Prevention of Peer Sexual Harassment*

Schools should be encouraged to adopt antiharassment policies because they are effective in decreasing the number of occurrences of sexual harassment.[45] Furthermore, schools are an appropriate forum to address the problem of peer sexual harassment because they have the power and duty to "'inculcate the habits and manners of civility'"[46] in children. Additionally, schools have "custodial and tutelary"[47] responsibility and have established discipline procedures to enforce their rules and regularly control students' behavior.[48]

Holding schools liable for peer sexual harassment is likely to provide an impetus for schools to adopt antidiscrimination programs because such programs will limit their liability in two ways.[49] First, such

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ment: If Schools Are Liable, What About the Parents?, 31 Creighton L. Rev. 1131, 1149 (1998) (recommending that schools address sexual harassment claims "swiftly and surely").

[44] See Shoop & Edwards, supra note 1, at 173-239 (outlining curriculum on sexual harassment for grades K-12); Quesada, supra note 41, at 1063-64 (discussing importance of sexual harassment education).

[45] See Brandenburg, supra note 5, at 49 (reporting studies reflecting that institutions with strong policies have fewer sexual harassment complaints); Shoop & Edwards, supra note 1, at 147-48 (referring to program designed to educate students on sexual harassment and stating that school counselors and administrators believe that there are significantly fewer instances of sexual harassment as result of program); Rebecca J. Wilson, How to Prevent Sexual Harassment Claims in Your Own Backyard, 63 Def. Couns. J. 237, 237 (1996) (explaining that most effective prevention tool in workplace is comprehensive and well-communicated antiharassment policy); Shelley Donald Coolidge, In Halls of Learning, Students Get Lessons in Sexual Harassment, Christian Sci. Monitor, Sept. 18, 1996, at 1 (describing Massachusetts high school's antiharassment policy as effective).

[46] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986) (stating that objective of public education is to inculcate students with fundamental values and that such values must take into account sensibilities of others); accord Veronia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655 (1995); see also Brown v. Board of Educ., 347 U.S. 483, 493 (1954) (observing that school is principal instrument in introducing child to cultural values).

[47] *Veronia Sch. Dist. 47J*, 515 U.S. at 655 (explaining that schools stand *in loco parentis* over children entrusted to them).

[48] See Andrea Giampetro-Meyer et al., Sexual Harassment in Schools: An Analysis of the "Knew or Should Have Known" Liability Standard in Title IX Peer Sexual Harassment Cases, 12 Wis. Women's L.J. 301, 321-25 (1997) (observing that school boards exert wide control over students' behavior through various means including disciplinary tools).

[49] See Burlington Indus., Inc. v. Ellerth, 118 S. Ct. 2257, 2270 (1998) (recognizing role courts can play to encourage adoption of antiharassment policies); Sexual Harassment Guidance, supra note 1, at 12,040 (explaining that schools are more likely to be liable in absence of policies and procedures); Giampetro-Meyer, supra note 48, at 326 (same); see also Quesada, supra note 41, at 1057-65 (suggesting that to limit liability schools adopt written sexual harassment policy, establish complaint procedures, educate members of

programs decrease the occurrence of peer sexual harassment, through education and responsiveness to complaints, thereby decreasing the number of potential plaintiffs who might recover damages from a school.[50]

Second, by adopting an antiharassment program, even if it is not completely successful in eradicating harassment, the school's actions are still likely to reduce liability for harassment that does occur.[51] This Note contends that liability should be found only if a school fails to take remedial action against peer sexual harassment or creates an environment which tolerates harassing behavior. In *Davis*, if the school had taken prompt appropriate actions in response to LaShonda's complaints such as directing G.F. to apologize, providing G.F. with counseling to educate him on the definition of sexual harassment and its effects, or separating him from LaShonda,[52] it should not be held liable. If the school did little or nothing in response to the complaint, it should be subject to damages pursuant to Title IX. Since schools can avoid the possibility of an adverse judgment by responding to complaints of sexual harassment, school liability for peer sexual harassment would facilitate the development of effective antiharassment programs.[53]

Several courts have held that schools can be held liable for peer sexual harassment under Title IX.[54] These courts reason that to find a

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school community about school policy and reporting procedures, address complaints, and conduct investigations).

50 See Sexual Harassment Guidance, supra note 1, at 12,040 (stating that policies and grievance procedures send message to students that sexual harassment will not be tolerated); Brandenburg, supra note 5, at 49 (explaining that by adoption of policies schools demonstrate that elimination of sexual harassment is important goal).

51 The OCR's policy guidelines establish that a school can be liable if it knew or should have known of the sexual harassment. See Sexual Harassment Guidance, supra note 1, at 12,042. However, in light of Gebser v. Lago Vista Independent School District, 118 S. Ct. 1989 (1998), it is likely that a school will be held liable only if it had actual notice of peer sexual harassment and acted with deliberate indifference. See infra note 73. Therefore, a school district will not be liable for each incident of harassment; only harassment of which the district knows and to which the district does not respond adequately. See also infra note 235 (discussing notice standards).

52 See Sexual Harassment Guidance, supra note 1, at 12,042, 12,044 (providing suggested responses to complaints of student sexual harassment). The remedial action taken should be proportional to the severity of the harassment. See id. at 12,043.

53 See Gregory E. Karpenko, Note, Making the Hallways Safe: Using Title IX to Combat Peer Sexual Harassment, 81 Minn. L. Rev. 1271, 1273 (1997) (asserting that absence of liability leaves little incentive for schools to adopt antiharassment policies).

54 See e.g., Doe v. Oyster River Coop. Sch. Dist., 992 F. Supp. 467, 479 (D.N.H. 1997) (finding Title IX permits peer sexual harassment claim against school district and adopting "knew or should have known" standard of notice); Nicole M. v. Martinez Unified Sch. Dist., 964 F. Supp. 1369, 1377 (N.D. Cal. 1997) (same); Burrow v. Postville Community Sch. Dist., 929 F. Supp. 1193, 1205 (N.D. Iowa 1996) (holding Title IX permits claim for peer sexual harassment when school officials knew of harassment).

cause of action for a school's failure to respond to peer sexual harassment is consistent with the purpose of the Act.[55] The next section discusses the purpose and breadth of Title IX.

C. *Title IX's Objectives and Scope*

Title IX was passed in 1972 to prohibit sex discrimination in educational institutions that receive federal financial assistance.[56] Prior to the passage of Title IX, no such protection existed.[57] Title VI of the Civil Rights Act of 1964 prohibits discrimination based on race and national origin in all federally financed programs, including schools, but does not address sex discrimination.[58] Title VII of the Civil Rights Act of 1964 prohibits sex discrimination by employers against employees but does not protect students.[59] Because the Civil Rights Act gave no protection from gender discrimination in schools, Congress passed Title IX to address this need.[60] An examination of the judicial and legislative history of Title IX reveals its broad scope.

1. *The Supreme Court's Interpretation of Title IX*

Title IX does not explicitly prohibit sexual harassment in schools.[61] However, Supreme Court Title IX cases lay the groundwork for holding schools liable for peer sexual harassment.[62] To begin

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55 See *Doe v. Oyster River Coop. Sch. Dist.*, 992 F. Supp. at 475; *Nicole M.*, 964 F. Supp. at 1377; *Burrow*, 929 F. Supp. at 1204-05.

56 See Title IX of the Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 374 (codified as amended at 20 U.S.C. § 1681(a) (1994)). For the text of Title IX, see supra note 8.

57 See 117 Cong. Rec. 30,403 (1971) (statement of Sen. Bayh) (noting that Civil Rights Act does not deal with educational institutions).

58 See 42 U.S.C. § 2000d (1994) ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."); id. § 2000d-4a(2) (defining program as including educational institutions).

59 See id. §§ 2000e, 2000e-2.

60 See, e.g., 117 Cong. Rec. 30,411 (1971) (statement of Sen. Cook) (observing gap in antidiscrimination law); Paul C. Sweeney, Abuse Misuse & Abrogation of the Use of Legislative History: Title IX & Peer Sexual Harassment, 66 UMKC L. Rev. 41, 56 (1997) (same); Quesada, supra note 41, at 1021 (noting that Title IX filled gap in civil rights legislation left by Title VI and Title VII).

61 At least two authors have suggested that Title IX be amended to prohibit explicitly peer sexual harassment. See Bodnar, supra note 4, at 584-89 (arguing that Title IX protection against peer sexual harassment is not sufficient and that amendment to Title IX is necessary to remedy adequately peer sexual harassment); Connie C. Flores, Comment, The Fourteenth Amendment and Title IX: A Solution to Peer Sexual Harassment, 29 St. Mary's L.J. 153, 196 (1997) (same).

62 Schools can be held liable for behavior such as: failing to accommodate fully and effectively athletic interests and abilities of female athletes, see Cohen v. Brown Univ., 101 F.3d 155, 175 (1st Cir. 1996); denying admittance based on sex, see Cannon v. University of

with, the Supreme Court has mandated that Title IX must be construed broadly[63] and that it affords a private right of action.[64]

In *Cannon v. University of Chicago*,[65] the petitioner alleged that she was denied admission to medical school because she was a woman.[66] Her complaint posed the question of whether a private cause of action existed under Title IX.[67] Referring to the language, the legislative history, and the purpose of the statute, the Court answered in the affirmative.[68]

More recent Court decisions have addressed specifically sexual harassment in schools. In *Franklin v. Gwinnett County Public Schools*,[69] the petitioner sought monetary damages from her high school for the sexual harassment she suffered from her teacher.[70] Holding that the petitioner suffered from intentional sex discrimination by the school, the Court found that the petitioner was entitled to compensation.[71] Last term, in *Gebser v. Lago Vista Independent School District*,[72] the Court established that a school must receive actual notice of teacher-student sexual harassment before a school can be held liable.[73]

Chicago, 441 U.S. 677, 680 (1979); and acting with deliberate indifference to actual knowledge of teacher-student sexual harassment, see Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 1989, 1993 (1998). For a review of judicial decisions relating to the scope of Title IX in the context of athletic activities, see Diane Heckman, On the Eve of Title IX's 25th Anniversary: Sex Discrimination in the Gym and Classroom, 21 Nova L. Rev. 545 (1997).

63 See North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 521 (1982) ("There is no doubt that 'if we are to give [Title IX] the scope that its origins dictate, we must accord it a sweep as broad as its language.'" (alteration in original) (quoting United States v. Price, 383 U.S. 787, 801 (1966))).

64 See *Cannon*, 441 U.S. at 717.

65 441 U.S. 677 (1979).

66 See id. at 680.

67 See id. at 688.

68 See id. at 717.

69 503 U.S. 60 (1992).

70 See id. at 62-64.

71 See id. at 75, 76 (explaining that school intentionally discriminates when teacher sexually harasses student).

72 118 S. Ct. 1989 (1998).

73 See id. at 1993. *Gebser* involved school liability for a teacher's sexual relationship with his student, a form of sexual harassment. See id. On the issue of notice, the Court held:

> [A] damages remedy will not lie under Title IX unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs and fails adequately to respond.
>
> We think, moreover, that the response must amount to deliberate indifference to discrimination.

Id. at 1999.

The standard of notice that should apply to peer sexual harassment has been the topic of much academic commentary. See, e.g., Kathy Lee Collins, Student-to-Student Sexual

2. *Legislative Amendments to Title IX*

As with an analysis of judicial decisions, an examination of the legislative history of Title IX reveals that its scope is broad. As stated in a Senate Report: "The inescapable conclusion is that congress intended that . . . Title IX . . . be given the broadest interpretation."[74]

Since the enactment of Title IX, Congress has extended its reach three times. First, Congress passed the Civil Rights Attorney's Fees Awards Act of 1976[75] (CRAFAA). The CRAFAA expanded the remedies available under Title IX by giving the courts discretion in awarding a successful Title IX plaintiff "reasonable attorney's fee[s]."[76]

The second enactment, Section 1003 of the Rehabilitation Act Amendments of 1986,[77] was passed following a Supreme Court decision limiting the scope of Title IX.[78] The Section abrogates the Eleventh Amendment immunity of states from suit under, inter alia, Title IX.[79] It enables petitioners to recover against a state in federal court for Title IX violations.[80]

Harassment Under Title IX: The Legal and Practical Issues, 46 Drake L. Rev. 789, 833 (1998) (proposing standard that requires plaintiff to show "proof of deliberate indifference or other direct evidence of intent to discriminate"); Giampetro-Meyer, supra note 48, at 301 (arguing for "'knew or should have known'" standard); Karpenko, supra note 53, at 1273-74 (suggesting intentional discrimination standard); Julie Shaflucas, Note, Sexual Harassment Between Students: Whether to Turn a Blind or Watchful Eye, 23 J. Legis. 317, 324 (1997) (proposing actual or constructive notice standard).

74 S. Rep. No. 100-64, at 7 (1987), reprinted in 1988 U.S.C.C.A.N. 3, 9.

75 Pub. L. No. 94-559, 90 Stat. 2641 (codified as amended at 42 U.S.C. § 1988 (1994)).

76 See 42 U.S.C. § 1988(b) (1994).

77 Pub. L. No. 99-506, 100 Stat. 1807, 1845 (codified as amended in scattered sections of 29, 42 U.S.C. (1994)).

78 Congress passed the Rehabilitation Act Amendments following Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985). In *Atascadero*, the Court held that Congress did not intend to abrogate state immunity when it passed § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1994). See *Atascadero*, 473 U.S. at 246. Section 504 is worded similarly to Title IX and Title VI. Compare 29 U.S.C. § 794 (1994) (prohibiting exclusion from participation in, denial of benefits of, or subjection to discrimination "under any program or activity receiving Federal financial assistance"), with 20 U.S.C. § 1681 (1994) (substantially similar), and 42 U.S.C. § 2000d (1994) (identical). Given the similarities of all three statutes, Congress abrogated sovereign immunity with respect to suits brought under § 504, Title IX, and Title VI, inter alia, when it responded to *Atascadero.* See S. Rep. No. 99-388, at 27-28 (1986) (noting similar wording of statutes).

79 See 42 U.S.C. § 2000d-7(a) (1994).

80 See id. § 2000d-7(2); see also Purcell v. Pennsylvania Dept. of Corrections, No. CIV. A. 95-6720, 1998 WL 10236, at *13 (E.D. Pa. Jan. 9, 1998) (finding that Rehabilitation Act Amendments abrogate states' immunity and entitles litigants to same remedies against state that they have against private parties); Burns-Vidlak v. Chandler, 980 F. Supp. 1144, 1150 (D. Haw. 1997) (same).

In 1988, two years after passing the Rehabilitation Act Amendments, Congress passed the Civil Rights Restoration Act of 1987[81] (CRRA). The CRRA subjects an entire institution to the requirements of Title IX if any one program or activity within that institution receives federal funds; if one office within a college receives federal funds, the statute reaches the entire school.[82]

The judicial interpretation and legislative history of Title IX indicate that its reach is broad. However, courts have disagreed over whether the scope of Title IX is broad enough to reach peer sexual harassment. The answer of at least two circuit courts to this question has depended on the courts' view on which constitutional source of power Congress used to enact Title IX.

II

COURTS' ANALYSIS OF TITLE IX AND THEIR USE OF CONGRESSIONAL POWER

A court typically inquires into the congressional power used to pass legislation in response to a challenge to the constitutionality of a statute.[83] However, in deciding whether Title IX provides a private cause of action for peer sexual harassment, two courts analyzed the power used to pass Title IX despite the fact that defendants in such cases did not argue that Title IX is unconstitutional. These courts engaged in the inquiry into which power Congress used, not to determine the constitutionality of Title IX, but to determine its scope. The courts' focus on the power used to pass Title IX in this context is misplaced.

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[81] Pub. L. No. 100-259, 102 Stat. 28 (codified as amended in scattered sections of 20, 42 U.S.C.). This legislation effectively overturned the Court's decision in Grove City College v. Bell, 465 U.S. 555 (1984). In *Grove City College*, the Court narrowly construed Title IX by holding that an entire college was not subject to the statute's provisions when only the financial aid office received federal funds. The Court reasoned that the program-specific language of Title IX limited the reach of Title IX to the specific program or activity receiving the federal funds. See id. at 570-74.

[82] See 20 U.S.C. § 1687 (1994) (defining "'program or activity'" as educational institution "any part of which is extended Federal financial assistance"); see also Robert E. Shepherd, Jr., Why Can't Johnny Read or Play? The Participation Rights of Handicapped Student-Athletes, 1 Seton Hall J. Sport L. 163, 188-89 (1991) (noting that CRRA extended civil rights legislation to entire institution whenever federal funds were accepted by any program within institution).

[83] See, e.g., City of Boerne v. Flores, 117 S. Ct. 2157 (1997) (deciding that Religious Freedom Restoration Act of 1993 (RFRA) is not within Congress's Fourteenth Amendment power and therefore unconstitutional); United States v. Lopez, 514 U.S. 549 (1995) (holding that Gun-Free School Zone Act of 1990 is not within Congress's commerce power and therefore unconstitutional).

A. *Courts' Use of the Spending Clause in the Analysis of Title IX*

This section first describes Congress's spending power. It then outlines the Fifth and Eleventh Circuits' analysis in *Rowinsky v. Bryan Independent School District*[84] and *Davis v. Monroe County Board of Education*,[85] respectively. These courts heavily relied on their assertion that Title IX was passed solely pursuant to the Spending Clause to conclude that Title IX does not reach peer sexual harassment.

1. *Congress's Power to Spend*

Article 1 Section 8 of the Constitution grants Congress the power to tax and spend.[86] The extent to which Congress may exert this power has been the subject of debate since the Founding.[87] The central question of the debate is one permutation of the familiar federal dilemma: How much power should be vested with the federal government?

Alexander Hamilton and James Madison disagreed on the amount of power the Spending Clause gives Congress.[88] Madison feared that an unlimited spending power would grant the federal government too much power.[89] He therefore argued that the fiscal power of Congress was "limited and explained by the particular enumeration subjoined."[90] He contended that Congress could use its Spending Clause power to achieve only those ends attainable through one of its other granted powers, such as the power to regulate interstate commerce.[91] Unlike Madison, Hamilton reasoned that the enumerated

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[84] 80 F.3d 1006 (5th Cir. 1996).

[85] 120 F.3d 1390 (11th Cir. 1997), cert. granted, 119 S. Ct. 29 (1998).

[86] "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. Const. art. I, § 8., cl. 1.

[87] See Albert J. Rosenthal, Conditional Federal Spending and the Constitution, 39 Stan. L. Rev. 1103, 1112 (1987) (observing that Framers disagreed over proper construction of spending power).

[88] See Robert W. Adler, Unfunded Mandates and Fiscal Federalism: A Critique, 50 Vand. L. Rev. 1137, 1256 n.312 (1997) (noting that Hamilton argued that spending is independent of other grants of congressional authority and that Madison was in opposition); David E. Engdahl, The Spending Power, 44 Duke L.J. 1, 2 (1994) (noting that Hamilton's view of spending power ""has prevailed over that of Madison'") (quoting Helvering v. Davis, 301 U.S. 619, 640 (1937)).

[89] See Engdahl, supra note 88, at 27-29.

[90] James Madison, Speech in the First Congress—Third Session (Feb. 2, 1791), in 6 The Writings of James Madison 19, 28 (Gaillard Hunt ed., 1906).

[91] See David P. Currie, The Constitution in Congress: Jefferson and the West, 1801-1809, 39 Wm. & Mary L. Rev. 1441, 1450 (1998) (stating that Madison contended that federal spending be limited "to that which is incident to the exercise of its enumerated powers"); Engdahl, supra note 88, at 19-20 (discussing Madison's view of spending power); Michele L. Landis, "Let Me Next Time Be 'Tried by Fire'": Disaster Relief and the Origins of the American Welfare State 1789-1874, 92 Nw. U. L. Rev. 967, 975 n.46 (1998)

powers of Congress are plenary.[92] Thus he argued that Congress could use its spending power to achieve ends outside of those attainable pursuant to the other granted powers.[93] The Supreme Court has consistently adopted the Hamiltonian interpretation of the spending power, upholding spending power legislation that falls outside Congress's other enumerated powers.[94]

Congress often uses its spending power by placing conditions upon the grant of federal money.[95] That is, Congress may require specific acts in exchange for receipt of federal funds.[96] States that fail to meet the conditions placed upon the grant of federal funds may be held liable to those who would have benefited from the conditions.[97]

Standards for liability under Spending Clause-based legislation vary depending on whether failure to meet the stated conditions is intentional.[98] When damages are sought for an unintentional violation of the conditions, the recipient must have notice of its failure to meet the condition.[99] However, the notice requirement is not invoked when there is an intentional violation.[100]

Title IX is an example of typical Spending Clause legislation because it conditions federal assistance on the prohibition of sex discrim-

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(noting Madison's understanding that Congress can only spend to reach goals of its enumerated powers).

92 See Engdahl, supra note 88, at 12-13 (defining "'plenary' governing competence" as government's power to fashion any policy that is within scope of granted power).

93 See id. at 13-24.

94 See, e.g., South Dakota v. Dole, 483 U.S. 203, 210 (1987) (finding that Congress can achieve objectives through spending power that it cannot achieve through its other powers); Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127, 143 (1947) (holding that Congress could regulate local officials through its spending power even though it could not do so through any other power); United States v. Butler, 297 U.S. 1, 66 (1936) (adopting Hamilton's position on Spending Clause).

95 See Engdahl, supra note 88, at 34 (observing that federal funds often are subject to numerous conditions).

96 For example, Congress has required states to raise their minimum drinking ages to 21 in exchange for federal highway funds. See 23 U.S.C. § 158 (1994) (directing Secretary of Transportation to withhold percentage of federal funds from states in which it is lawful for persons under 21 years of age to purchase or possess alcohol). In South Dakota v. Dole, 483 U.S. 203 (1987), the Court upheld this provision, finding that the Spending Clause enabled Congress to pass the legislation. See id. at 207, 210-12 (explaining how Congress may use conditional federal grants). For a critique of *Dole*, see Lynn A. Baker, Conditional Federal Spending After *Lopez*, 95 Colum. L. Rev. 1911, 1916 (1995) (arguing that congressional spending power should not be as expansive as permitted by *Dole*).

97 See Engdahl, supra note 88, at 93-108 (discussing third-party enforceability of conditions that accompany federal aid).

98 See Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 74-75 (1992) (distinguishing liability for intentional violations from liability for unintentional violations).

99 See Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 1989, 1998-99 (1998) (establishing actual notice requirement for teacher-student sexual harassment).

100 See *Franklin*, 503 U.S. at 74-75 (holding that notice need not be found when plaintiff alleges intentional discrimination).

ination in schools.[101] The Fifth and Eleventh Circuits have held that the Spending Clause nature of Title IX limits its ability to reach peer sexual harassment. The next section outlines the courts' reasoning.

2. *Two Courts' View of How the Spending Clause Limits the Scope of School Liability*

The Fifth and Eleventh Circuits in *Rowinsky v. Bryan Independent School District*[102] and *Davis v. Monroe County Board of Education*,[103] respectively, have held that a school cannot be held liable for peer sexual harassment.[104] The courts reached this result by finding that Title IX was passed pursuant solely to the Spending Clause and not Section 5 of the Fourteenth Amendment.[105] They then reasoned that the Spending Clause power cannot be extended to reach peer sexual harassment.

The two courts developed at least four reasons to support the finding that Title IX is Spending Clause legislation. First, the Eleventh Circuit inferred that Title IX was enacted pursuant to Congress's spending power because it entails a conditional grant of federal

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[101] See supra note 8 for the text of Title IX; see also Floyd v. Waiters, 133 F.3d 786, 789, 792-93 (11th Cir.) (observing that Title IX is typical Spending Clause legislation), vacated by 119 S. Ct. 33 (1998).

[102] 80 F.3d 1006 (5th Cir. 1996). In *Rowinsky*, two eighth grade girls in the Bryan Independent School District, using the pseudonyms Jane and Janet Doe, and their parents complained repeatedly to school officials about sexual harassment committed by the girls' male peers. The girls were physically and verbally abused by three male students. The harassment consisted of offensive name calling, grabbing of the girls' genitals, recitation of sexual comments, and slapping the girls' buttocks among other violating acts. The school responded with disciplinary actions for the implicated male students. See id. at 1008-10. Not satisfied with the school's response, Jane and Janet's mother, Mrs. Rowinsky, brought an action against the school district and its officials alleging that the defendants "condoned and caused hostile environment sexual harassment." Id. at 1010.

[103] 120 F.3d 1390 (11th Cir. 1997), cert. granted, 119 S. Ct. 29 (1998). For the facts of *Davis*, see supra notes 9-18 and accompanying text.

[104] In dicta, the Fifth Circuit stated that a school can be held liable if it reacts differently to sexual harassment claims made by girls and those made by boys. See *Rowinksy*, 80 F.3d at 106. The Seventh Circuit has pointed out that this approach allows a school to ignore all claims. See Doe v. University of Ill., 138 F.3d 653, 662 (7th Cir. 1998) (explaining schools receive more complaints from girls than boys and that therefore Fifth Circuit's approach would impose much greater cost on girls), petition for cert. filed, 67 U.S.L.W. 3083 (U.S. Aug. 4, 1998) (No. 98-126).

[105] See *Davis*, 120 F.3d at 1397-98 & 1397 n.12; *Rowinsky*, 80 F.3d at 1012-13 & 1012 n.14.

funds.[106] Second, both courts analogized Title IX to Title VI,[107] which they observed to be Spending Clause legislation.[108]

A third justification for concluding that Title IX was passed pursuant to the Spending Clause was that Title IX applies to private institutions that receive federal funds as well as public institutions.[109] Noting that legislation promulgated pursuant to Section 5 of the Fourteenth Amendment only reaches state actors, both courts concluded that Title IX cannot be Equal Protection Clause legislation.[110]

Finally, the Fifth Circuit cited *Pennhurst State School and Hospital v. Halderman*[111] for support that Title IX is not based on the Fourteenth Amendment.[112] In *Pennhurst*, the Supreme Court refused to hold that Congress used its Fourteenth Amendment power when it passed the "bill of rights" provision of the Developmentally Disabled Assistance and Bill of Rights Act (DDABRA),[113] which granted

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106 See *Davis*, 120 F.3d at 1397.

107 See id. at 1398; *Rowinksy*, 80 F.3d at 1012 n.14 (stating that "Title IX was modeled after Title VI and uses identical language"). Title IX is often analogized to Title VI. See, e.g., Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 1989, 1997 (1998) (noting that Title IX was patterned after Title VI); Cannon v. University of Chicago, 441 U.S. 677, 694-96 (1979) (same); Daniel B. Tukel, Student Versus Student: School District Liability for Peer Sexual Harassment, 75 Mich. B.J. 1154, 1157 (1996) (same). But see Roberts v. Colorado State Bd. of Agric., 998 F.2d 824, 832 (10th Cir. 1993) (acknowledging that Title IX was modeled on Title VI, but asserting that Title VII is more appropriate analogue); Patricia H. v. Berkeley Unified Sch. Dist., 830 F. Supp. 1288, 1290 (N.D. Cal. 1993) (noting that Title IX was patterned after Title VI but commenting that appellate courts more often turn to Title VII to interpret Title IX).

108 See *Davis*, 120 F.3d at 1398; *Rowinsky*, 80 F.3d at 1012 n.14. To support their decisions, both the Fifth and the Eleventh Circuits cited Guardians Ass'n v. United States Civil Service Comm'n, 463 U.S. 582 (1983), a case in which the Supreme Court considered whether New York City Police Department's "last-hired, first-fired" employment policy violated the petitioner's Title VI rights. *Guardians* was a fragmented decision in which five Justices authored opinions. See Cheryl L. Anderson, Damages for Intentional Discrimination by Public Entities Under Title II of the Americans With Disabilities Act: A Rose by Any Other Name, but Are the Remedies the Same?, 9 BYU J. Pub. L. 235, 248 (1995) (describing Court's *Guardians* decision as "badly fragmented"). Nonetheless, the opinion of the Court explicitly recognized the Spending Clause nature of Title VI. See *Guardians*, 463 U.S. at 598-99 (noting that Title VI is spending power legislation). Observing that Title IX was modeled after Title VI, the courts reasoned that Title IX also must be based on the Spending Clause. See *Davis*, 120 F.3d at 1398-99 (drawing similarities between Title VI and Title IX); *Rowinsky*, 80 F.3d at 1012 n.14 (same). A comparison of the texts of Title IX and Title VI illustrates why the argument that the statutes are analogous is compelling. Title IX's language mirrors that of Title VI, substituting "sex" for "race, color, or national origin." See, e.g., *Cannon*, 441 U.S. at 694-96 (comparing language of Title IX and Title VI).

109 See *Davis*, 120 F.3d at 1398 n.12; *Rowinsky*, 80 F.3d at 1012 n.14.

110 See *Davis*, 120 F.3d at 1398 n.12; *Rowinsky*, 80 F.3d at 1012 n.14.

111 451 U.S. 1 (1981).

112 See *Rowinsky*, 80 F.3d at 1012 n.14.

113 Pub. L. No. 94-103 § 201, 89 Stat. 486, 502-03 (1975) (codified as amended at 42 U.S.C. § 6009 (1994)).

states federal funds to assist in providing care for the developmentally disabled.[114] In holding that the bill of rights provision of the DDABRA was not based on the Fourteenth Amendment, the Court promulgated the often cited *Pennhurst* warning, cautioning that it "should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment."[115]

Although both courts reached the conclusion that Title IX was passed pursuant to the Spending Clause and not the Fourteenth Amendment, the courts differed on how this conclusion prevented school liability for peer sexual harassment. The Eleventh Circuit focused on the notice requirements of spending legislation,[116] while the Fifth Circuit focused on the types of conditions that can be placed on federal funding.[117]

The Eleventh Circuit analogized conditional federal funding to a contract between the government and the grant recipient.[118] It reasoned that the terms of a contract must be unambiguous and that the recipient must have notice of the conditions that it is agreeing to meet.[119] In the context of Title IX, the court explained, the school must have notice of all the terms upon which the receipt of federal funds is conditioned.[120] The court noted that a discussion of peer sexual harassment was absent from the legislative history.[121] It concluded that because schools did not have notice in the "contract," they could not be held liable for peer sexual harassment.[122]

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114 See *Pennhurst*, 451 U.S. at 11-14, 15-17 (discussing terms of DDABRA and congressional power under Fourteenth Amendment). The Court held that a "bill of rights" contained in DDABRA was not a condition of the federal funds because states must be aware of the conditions on which grants of federal money are made. See id. at 17, 23. The court stated that unlike other provisions of DDABRA, the bill of rights did not expressly state that it was a condition. See id. at 13, 23 (noting absence of conditions for receipt of federal funds from § 6010). The fact that states would be required to fund specific services if the bill of rights were a condition also greatly influenced the Court's decision. See id. at 18 ("Nothing in either the 'overall' or 'specific' purposes of the Act reveals an intent to require the States to fund new, substantive rights."); see also id. at 16 (stating that "the rights asserted impose affirmative obligations on the States to fund certain services").

115 Id. at 16. The Court further stated that "[t]he case for inferring intent is at its weakest, where, as here, the rights asserted impose *affirmative* obligations on the States to fund certain services." Id. at 16-17.

116 See *Davis*, 120 F.3d at 1399.

117 See *Rowinsky*, 80 F.3d at 1013.

118 See *Davis*, 120 F.3d at 1399 (noting that prospective recipient can decline grant).

119 See id. (explaining that notice is necessary to guarantee voluntary participation).

120 See id.

121 See id. at 1394-97.

122 See id. at 1399-1401. But see id. at 1414 (Barkett, J., dissenting) (concluding that schools did have notice of liability for peer sexual harassment).

The Seventh Circuit responded to the Eleventh Circuit's conclusion that the school did not have notice in Doe v. University of Ill., 138 F.3d 653, 662-63 (7th Cir. 1998), petition for

Although the Fifth Circuit also concluded that Title IX did not reach peer sexual harassment, it differed in its analysis by focusing on the nature of conditions of federal grants.[123] The court argued that conditions are coercive measures.[124] To ensure that the coercion is effective, the condition must be easily met.[125] The court further reasoned that schools would have severe difficulty controlling the behavior of third parties, here student harassers.[126] Because conditions on federal funds must be met easily, and controlling the harassing behavior of students would not be easy, the court concluded that the prevention of peer sexual harassment could not be a condition of federal funding, and therefore schools could not be held liable for it.[127]

In addition to its Spending Clause analysis, the Fifth Circuit turned to the more traditional tools of statutory construction. It supported its conclusion with an examination of the legislative history and administrative interpretation of Title IX.[128] The court explained that a narrow reading of Title IX is supported by the legislative history.[129] The court quoted Senator Birch Bayh who cited faculty employment, admissions procedures, and scholarships as aspects of school administration that prompted the drafting of Title IX.[130] Noting that all of the acts listed by Senator Bayh are performed by the

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cert. filed, 67 U.S.L.W. 3083 (U.S. Aug. 4, 1998) (No. 98-126). Citing *Franklin*, the Seventh Circuit explained that such notice requirements do not apply when the school intentionally violated Title IX. See id. at 663. In this case, the plaintiff alleged that the school did not respond sufficiently "in the face of its knowledge that the harassment was occurring." See id. at 662. Failure to respond to such complaints, the court reasoned, is an intentional violation of Title IX and therefore does not require notice. Id. at 663; see also *Davis*, 120 F.3d at 1414 (Barkett, J., dissenting) (concluding that school's failure to respond to peer sexual harassment is intentional violation of Title IX); Doe v. Petaluma City Sch. Dist., 949 F. Supp. 1415, 1426 (N.D. Cal. 1996) (describing school's failure to implement policies and grievance procedures as intentional violation of Title IX).

However, arguing that sexual harassment is a form of intentional discrimination might not be viable in the wake of *Gebser*. In *Gebser*, the Court did not categorize teacher-student harassment as intentional discrimination and required actual knowledge for a school to be held liable. See Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 1989, 1999-2000 (1998).

123 See *Rowinsky*, 80 F.3d at 1012-13.

124 See id. at 1013.

125 See id. ("[T]he value of a spending condition is that it will induce the grant recipient to comply with the requirement in order to get the needed funds. In order for the coercion to be effective, the likelihood of violating the prohibition cannot be too great.").

126 See id. ("Imposing liability for the acts of third parties would be incompatible with the purpose of a spending condition, because grant recipients have little control over the multitude of third parties who could conceivably violate the prohibitions of [T]itle IX.").

127 See id.

128 See id. at 1013-14.

129 See id.

130 See id. at 1014 (quoting 118 Cong. Rec. 5803 (1972) (statement of Sen. Bayh)).

grant recipient,[131] the court concluded that the purpose of Title IX was to eradicate sexual discrimination committed only by the school or its agents.[132]

Additionally, the court considered the memoranda and regulations promulgated by the OCR.[133] The court first noted that the OCR regulations only addressed actions by the grant recipients.[134] Second, the court observed that the OCR's Policy Memorandum defines sexual harassment as conduct by an employee or an agent of the recipient—not by a student.[135] The court also stated that the OCR's Policy Memorandum left the issue of school liability for peer sexual harassment unresolved.[136]

The Fifth Circuit conceded that, prior to the time of the sexual harassment at issue in *Rowinsky*, OCR had issued Letters of Finding that applied Title IX to peer sexual harassment.[137] Arguably, these OCR statements reflected OCR's interpretation of Title IX to reach peer sexual harassment. However, the court stated that "Letters of Finding[ ] should be accorded little weight."[138]

B. Using Traditional Tools of Statutory Interpretation to Determine the Scope of Title IX

The courts' focus on the power used to pass Title IX in its analysis of the scope of Title IX deviates from traditional methods of statutory interpretation.[139] In determining the scope of a statute, courts usually

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131 See id.

132 See id. at 1011 n.10, 1014 (defining "grant recipient").

The Fifth Circuit also relied on the fact that the legislative history does not mention sexual harassment to support its conclusion that Congress did not intend for Title IX to reach it. See id. at 1013-15. This reasoning implies that the Supreme Court's decision in Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992), is incorrect. See *Davis*, 120 F.3d at 1413-14 (Barkett, J., dissenting). In *Franklin*, the Court found that Title IX entitled a victim of teacher-student sexual harassment to compensatory damages despite the fact that the legislative history of Title IX did not mention sexual harassment. See *Franklin*, 503 U.S. at 76. Furthermore, "sexual harassment" was not widely recognized until after the passage of Title IX. See Catherine A. MacKinnon, Sexual Harassment of Working Women 27 (1979) (reporting that term sexual harassment was coined in 1976); Shoop & Edwards, supra note 1, at 13 (observing that term sexual harassment was coined in 1974).

133 See *Davis*, 120 F.3d at 1014-16.

134 See id.

135 See id. at 1015.

136 See id.

137 See id. Letters of Finding are issued during investigations of specific institutions and are designed to bring an offending institution into voluntary compliance. See id.

138 Id.

139 If the Supreme Court had followed the interpretive methods of the Fifth and Eleventh Circuits, it likely would have decided both Gebser v. Lago Vista Independent School District, 118 S. Ct. 1989 (1998), and Franklin v. Gwinnett County Public Schools, 503 U.S.

consider the text, legislative history, and agency interpretation of the statute.[140] To decide whether Title IX reaches peer sexual harassment, courts should apply these tools of statutory interpretation, which, this Note argues, leads to the conclusion that Title IX does reach peer sexual harassment.

In *Doe v. University of Illinois*,[141] the Seventh Circuit applied the common canons of statutory construction. This Part describes the Seventh Circuit's analysis. It also argues that the text and congressional intent of Title IX indicates Congress's intention to prevent peer sexual harassment.

1. The Seventh Circuit's Holding that Title IX Affords a Private Right of Action for Peer Sexual Harassment

To determine whether liability for peer sexual harassment is within the scope of Title IX, the Seventh Circuit considered the statute's judicial and legislative history.[142] The court first noted that the

60 (1992), differently. The circuits' approach entails an examination of the legislative history of Title IX, which does not speak to teacher-student sexual harassment. Accordingly, schools would not be "on notice" and there could be no cause of action under Title IX for teacher-student sexual harassment. The Court did not adopt this approach in either *Gebser* or *Franklin*. See *Gebser*, 118 S. Ct. at 1998-99 (explaining that Spending Clause nature of Title IX requires actual notice for school liability of teacher-student sexual harassment); *Franklin*, 503 U.S. at 74-75 (holding that monetary damages are available for Spending Clause statutes such as Title IX and therefore for teacher-student sexual harassment).

140 See, e.g., Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 63-67 (1986) (consulting text, legislative history, agency, and judicial interpretation to hold that sexual harassment that creates hostile work environment violates Title VII); Cohen v. Brown Univ., 991 F.2d 888, 894-97 (1st Cir. 1993) (analyzing text and agency interpretation to decide appropriate standard for finding Title IX violation by schools for failing to provide adequate athletic programs for women); Cass R. Sunstein, Interpreting Statutes in the Regulatory State, 103 Harv. L. Rev. 405, 412 (1989) (naming text, structure, purpose, congressional intent, and legislative history as "traditional sources of interpretation"). Justice Scalia has challenged the use of legislative history in statutory construction and advocates relying on a statute's "plain meaning" in interpretation. See Bradley C. Karkkainen, "Plain Meaning": Justice Scalia's Jurisprudence of Strict Statutory Construction, 17 Harv. J.L. & Pub. Pol'y 401, 401 (1994) (describing Justice Scalia's approach to statutory interpretation).

141 138 F.3d 653 (7th Cir. 1998), petition for cert. filed, 67 U.S.L.W. 3083 (U.S. Aug. 4, 1998) (No. 98-126). In this case, the plaintiff, Ms. Doe, was a student at University High School. A group of her male peers at various times touched Ms. Doe and uttered insulting epithets, and at least one of the male students deliberately exposed his genitals in front of Ms. Doe. In response, school officials took some remedial actions against three of the male students. School officials suggested to Ms. Doe that she was to blame for the harassment and that it was she who needed to change her behavior. Unsatisfied with the school's response to the harassment, Ms. Doe's parents removed her from University High School and enrolled her in a private high school in another state. See id. at 655.

142 See id. at 664-65. The court found it necessary to look beyond the text and legislative history of Title IX to define its scope. It reasoned that if the text and legislative history alone governed interpretation of Title IX, the Supreme Court could not have found a pri-

Supreme Court's declaration that Title IX is to "be given 'a sweep as broad as its language'"[143] and that school liability for peer sexual harassment is consistent with that goal.[144]

The court also observed that federal courts often look to Title VII cases to inform Title IX analyses.[145] Stating that students should be given at least as much protection as adult employees, the court found it appropriate to consider the scope of Title VII in determining the scope of Title IX.[146] The court noted that an employer can be held directly liable for its failure to respond to the harassing behavior of its employees if it could have prevented the harassment by reasonable care.[147] Translating this standard to the Title IX setting, the court concluded that a school is directly liable for its failure to take appropriate action in response to peer sexual harassment when it could have prevented it.[148]

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vate right of action for violations of Title IX or determined that teacher-student harassment violates Title IX. See id.

143 See id. at 665 (quoting North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 521 (1982)).

144 See id.

145 See id. (citing Preston v. Commonwealth of Va. ex rel. New River Community College, 31 F.3d 203, 206-09 (4th Cir. 1994)); Lipsett v. University of P.R., 864 F.2d 881, 896-97 (1st Cir. 1988); Mabry v. State Bd. of Community Colleges & Occupational Educ., 813 F.2d 311, 316 n.6 (10th Cir. 1987).

146 See *Doe v. University of Ill.*, 138 F.3d at 665. The court did acknowledge a distinction between the two statutes that might cause a problem in the broad application of Title VII standards to Title IX. Prospective Title VII litigants are required to file a complaint with a federal administrative agency, the Equal Employment Opportunity Commission, before filing suit in federal court. No such administrative review procedure is required by Title IX. See id. at 666. The court considered it possible to infer that Congress's failure to establish comparable administrative procedures for Title IX indicated that Congress "did not contemplate that courts would recognize as broad a range of causes of action under Title IX as under Title VII." Id. The court rejected this argument, however, by observing that once the Supreme Court recognized a private right of action under Title IX, Congress had the opportunity to establish administrative review of Title IX complaints but did not find it necessary to do so. See id.

In Gebser v. Lago Vista Independent School District, 118 S. Ct. 1989 (1998), the Supreme Court refused to apply Title VII notice standards to Title IX. See id. at 1995-97. However, determining the *notice* necessary for liability requires different analysis than determining the *scope* of Title IX. Title VII standards can provide guidance to determine what actions violate Title IX even if Title VII standards do not inform the notice requirements of Title IX. This is the analysis the Seventh Circuit adopted. See *Doe v. University of Ill.*, 138 F.3d at 668 (adopting actual notice standard for school liability for peer sexual harassment).

147 See *Doe v. University of Ill.*, 138 F.3d at 666.

148 See id. at 666-67. In Smith v. Metropolitan School District Perry Township, 128 F.3d 1014, 1034 (7th Cir. 1997), cert. denied 118 S. Ct. 2367 (1998), the Seventh Circuit refused to hold a school liable for its employees' actions based on agency principles, explaining that agency principles do not apply in the Title IX context. See id. at 1022-28. The court distinguished *Doe v. University of Illinois* from *Smith* by explaining that in the former, agency principles are not necessary since the school is being held directly liable for its own behavior. See *Doe v. University of Ill.*, 138 F.3d at 662.

Finally, the court asserted that school liability is consistent with the OCR's interpretation of Title IX.[149] The court cited OCR guidelines and Letters of Finding to establish that the OCR has had a long-standing policy that a school's failure to adequately respond to peer sexual harassment violates Title IX.[150]

2. *The Text and Congressional Intent of Title IX*

Reading the text and legislative history broadly as mandated by both the Court and Congress,[151] it is likely that Congress intended Title IX to cover peer sexual harassment. The text prohibits sex discrimination in education programs and activities which are federally funded.[152] This broad prohibition coupled with the Supreme Court's recognition that sexual harassment is a form of sex discrimination[153] indicates that Title IX reaches peer sexual harassment.

Additionally, peer sexual harassment is pervasive at every level of education, affecting children of all ages.[154] Given the severe effects of sexual harassment, its presence in schools denies equal access to education.[155] The text indicates that this is precisely what Title IX was designed to prevent.[156]

More specifically, the legislative history is laden with statistics of the percentage of women admitted to professional and graduate

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149 See *Doe v. University of Ill.*, 138 F.3d at 667. Administrative agencies' construction of statutes are entitled to deference provided that their interpretation of the law does not conflict with congressional intent. See NLRB v. Town & Country Elec., Inc., 516 U.S. 85, 89-90, 94 (1995) (giving deference to NLRB's interpretation of National Labor Relations Act); National R.R. Passenger Corp. v. Boston & Main Corp., 503 U.S. 407, 417 (1992) (asserting that judicial deference to agency interpretation is "dominant, well-settled principle of federal law"); Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006, 1014 n.20 (5th Cir. 1996) (according deference to OCR when interpreting Title IX).

150 See *Doe v. University of Ill.*, 138 F.3d at 667 (observing that Letters of Finding date back to 1989). For a critique of the OCR's guidelines, see Daniel G. McBride, Guidance for Peer Sexual Harassment? Not!, 50 Stan. L. Rev. 523 (1998). Mr. McBride criticizes the guidelines for providing "vague definitions, misleading examples, and conclusions without analysis." Id. at 564.

In addition to the guidelines, the OCR has published a pamphlet to educate school officials on the issue of sexual harassment in schools. The pamphlet includes peer sexual harassment in its definition of a "hostile environment." See Sexual Harassment: It's Not Academic, supra note 5, at 4 (defining hostile environment harassment as created by school employee, another student, or school visitor).

151 See supra notes 63, 74 and accompanying text.

152 For the text of Title IX, see supra note 8.

153 See Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 1989, 1995 (1998) ("[S]exual harassment can constitute discrimination on the basis of sex under Title IX."); Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64-67 (1986) (recognizing that sexual harassment that creates hostile work environment is form of sex discrimination under Title VII).

154 See supra notes 31-34 and accompanying text.

155 See Shoop & Edwards, supra note 1, at 56.

156 For the text of Title IX, see supra note 8.

schools, employed by colleges as professors, and employed as professionals, as well as the percentage of women receiving scholarship aid to finance higher education.[157] It can be inferred from the inclusion of these statistics that an objective of Title IX was to create an environment that would foster increased participation of women in schools. As long as sexual harassment exists in schools, this objective will be hindered.

By analyzing its text, legislative and judicial history, and the OCR's interpretation, Title IX can be construed to reach peer sexual harassment. An inquiry into the power Congress used in passing Title IX is not necessary or consistent with this well-accepted method of statutory interpretation. The Fifth and Eleventh Circuits went beyond this method of statutory construction and focused on the congressional power used to pass Title IX.[158] This focus, although misplaced in the context of statutory interpretation, is central to the question of federal courts' jurisdiction over a case brought under Title IX in which a state agent is the defendant. The next section explores the importance of congressional power in the context of sovereign immunity.

C. The Fourteenth Amendment and Sovereign Immunity

Although the Seventh Circuit did not question what power Congress used to pass Title IX to determine its scope, the court did delve into the question to determine if Congress abrogated states' sovereign

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[157] See 118 Cong. Rec. 274, 276, 3939-40 (1972) (statement of Sen. McGovern) (reporting that 2% of dentists, 7% of physicians, 28% of doctorate recipients, and 9% of full professors were women at time, and other similar statistics); 118 Cong. Rec. 3939-40 (1972) (providing tables on number of women faculty members at leading law schools and admitted to selective undergraduate schools) (compiled from the Association of American Law Schools Directory of Law Teachers, 1968-70).

[158] Perhaps the courts strained traditional interpretive methods in order to insulate school budgets from expensive litigation. The dissent in Gebser v. Lago Vista Independent School District, 118 S. Ct. 1989 (1998), suggested that this goal may have motivated the majority's establishment of a strict notice standard in the teacher-student harassment context. See id. at 2006 (Stevens, J., dissenting). An extremely narrow notice standard does protect school budgets, as would the absence of school liability for inaction in the face of peer sex harassment. See Tashawna K. Duncan & Mary Jane K. Rapport, Understanding and Implementing OCR's Sexual Harassment Guidance, 124 Educ. Law. Rep. 21, 26 (1998) (observing that school liability for peer sexual harassment could drain schools' financial resources).

Maximizing school budgets is desirable, but this goal should not prevent the Court from finding that Title IX provides a remedy for victims of peer sexual harassment. Rather, limits could be placed on the damages that a victim is entitled to receive. See Leija v. Canutillo Indep. Sch. Dist., 887 F. Supp. 947, 956-57 (W.D. Tex. 1995) (developing scheme of limited liability for teacher-student harassment), rev'd, 101 F.3d 393 (5th Cir. 1996), cert. denied, 117 S. Ct. 2434 (1997). A scheme that recognizes the school's responsibility to respond to peer sexual harassment but places limits on the amount a victim can recover would provide victims a remedy while protecting the public fisc.

immunity in passing Title IX.[159] This section briefly describes current sovereign immunity jurisprudence, emphasizing the role of the Fourteenth Amendment in abrogating sovereign immunity. It continues with a description of the Fourteenth Amendment and the power it confers to Congress. The section concludes by considering court decisions holding that Title IX was passed pursuant to the Fourteenth Amendment and abrogates sovereign immunity.

1. Sovereign Immunity and the Fourteenth Amendment

The Eleventh Amendment[160] grants states immunity from suit in federal court. Not only can states themselves claim sovereign immunity, but an entity that is considered an "arm of the State" is also entitled to sovereign immunity.[161] Whether an entity is an arm of the state is dependent on the political organization of a specific state.[162]

Often plaintiffs in peer sexual harassment bring a suit against an entity that is arguably an arm of the state. For example, school districts are often named defendants.[163] Peer sexual harassment defen-

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159 See Doe v. University of Ill., 138 F.3d 653, 657-60 (7th Cir. 1998), petition for cert. filed, 67 U.S.L.W. 3083 (U.S. Aug. 4, 1998) (No. 98-126).

160 "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. Although the wording of the Eleventh Amendment appears to prohibit only suits brought against a state by a citizen of another state, the Supreme Court has interpreted the Amendment broadly to prohibit suits brought by citizens of the same state. See Hans v. Louisiana, 134 U.S. 1, 21 (1890). For a critique of the *Hans* decision, see Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 259-60, 299-302 (1985) (Brennan, J., dissenting, joined by Justices Marshall, Blackmun, and Stevens).

This Note uses the terms sovereign immunity and Eleventh Amendment immunity interchangeably.

161 See Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977) (applying test to determine if entity is arm of state and thereby entitled to Eleventh Amendment immunity); Jackson v. Hayakawa, 682 F.2d 1344, 1350 (9th Cir. 1982) (same).

162 See, e.g., *Mount Healthy City Sch. Dist. Bd. of Educ.*, 429 U.S. at 280-81 (considering definitions employed by state, control by state entities, source of money, and power to levy taxes and issue bonds in determining whether local school board is arm of state); Ambus v. Granite Bd. of Educ., 995 F.2d 992, 997 (10th Cir. 1993) (noting that monetary damages were assigned to school board and that local district was funded through local property tax assessments before concluding that Utah school districts were not arms of state); Mitchell v. Los Angeles Community College Dist., 861 F.2d 198, 201 (9th Cir. 1989) (evaluating whether money judgment against college district would be paid from state funds, whether district performs central state functions, whether district may sue, whether district has power to take property, and corporate statutes of district to determine if it is arm of state).

163 See e.g., Doe v. Petaluma City Sch. Dist., 54 F.3d 1447 (9th Cir. 1995); Doe v. Oyster River Coop. Sch. Dist., 992 F. Supp. 467 (D.N.H. 1997); Nicole M. v. Martinez Unified Sch. Dist., 964 F. Supp. 1369 (N.D. Cal. 1997). Some states' school districts have been found to be arms of the state. See, e.g., Belanger v. Madera Unified Sch. Dist., 963 F.2d 248, 251 (9th Cir. 1992) (California); Street v. Cobb County Sch. Dist., 520 F. Supp. 1170, 1172 (N.D. Ga. 1981) (Georgia). More states' school districts, however, have been found not to

dants can also be an entity usually recognized as an arm of the state such as a state university.[164] The defense of sovereign immunity, therefore, can severely limit a plaintiff's ability to recover from state entities in federal court.[165]

Sovereign immunity, however, is not absolute. Congress does have the power to abrogate Eleventh Amendment immunity.[166] To successfully do so, Congress must express unequivocally its intent to abrogate state immunity and must act pursuant to a power which entitles it to abrogate immunity.[167]

Prior to *Seminole Tribe v. Florida*,[168] Congress could act under one of its Article 1 powers or the Fourteenth Amendment to abrogate state immunity.[169] In *Seminole Tribe*, however, the Court overturned

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be arms of the state. See, e.g., Duke v. Grady Mun. Sch., 127 F.3d 972, 973 (10th Cir. 1997) (New Mexico); Gary A. v. New Trier High Sch. Dist. No. 203, 796 F.2d 940, 945 (7th Cir. 1986) (Illinois). Because the inquiry into whether an entity is an arm of the state is heavily dependent on state law and a state's political organization, a state could manipulate its laws to render a school district an arm of the state and thereby entitled to Eleventh Amendment immunity.

164 See, e.g., Doe v. University of Ill., 138 F.3d 653, 656-57 (7th Cir. 1998), petition for cert. filed, 67 U.S.L.W. 3083 (U.S. Aug. 4, 1998) (No. 98-126); Thorpe v. Virginia State Univ., 6 F. Supp. 2d 507, 509-10 (E.D. Va. 1998). State universities are usually found to be arms of the state. See, e.g., Watson v. University of Utah Med. Ctr., 75 F.3d 569, 577 (10th Cir. 1996); Treleven v. University of Minn., 73 F.3d 816, 819 (8th Cir. 1996); Hutsell v. Sayre, 5 F.3d 996, 999 (6th Cir. 1993). Additionally, state universities may administer a high school or other secondary or elementary schools as was the case in *Doe v. University of Ill.*, 138 F.3d at 655.

165 Eleventh Amendment immunity, however, does not affect plaintiffs' ability to sue a state entity in state court. See, e.g., Nevada v. Hall, 440 U.S. 410, 421 (1979). Additionally, plaintiffs can circumvent sovereign immunity by bringing a suit against state officers instead of the state institution. See Ex parte Young, 209 U.S. 123, 155-56 (1908) (holding that suit may be brought in federal court to enjoin state attorney general from executing unconstitutional state statute). The monetary damages awarded in a suit against a state official, however, may be limited. See, e.g., Edelman v. Jordan, 415 U.S. 651, 668 (1974) (prohibiting retrospective monetary relief that would require substantial funds to be paid from state treasury).

166 See Seminole Tribe v. Florida, 517 U.S. 44, 55 (1996). Additionally, a state may waive its sovereign immunity. See, e.g., Idaho v. Coeur d'Alene Tribe of Idaho, 117 S. Ct. 2028, 2033 (1997); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 (1985) (stating that test for whether state has waived immunity should be "stringent"). A state's acceptance of federal funds may constitute a waiver of sovereign immunity. See Kit Kinports, Implied Waiver After *Seminole Tribe*, 82 Minn. L. Rev. 793 (1998); Gregory J. Newman, Note, The *Seminole* Decision's Effect on Title IX Claims: Blockading the Path of Least Resistance, 46 Emory L.J. 1739, 1740-41 (1997). Indeed, at least one court has held that by receiving federal funds under Title IX, a state university waived its Eleventh Amendment immunity. See Litman v. George Mason Univ., 5 F. Supp. 2d 366, 374-77 (E.D. Va. 1998) ("[C]ongress can condition a grant of federal funds on the States' willingness to consent to be sued in federal court.").

167 See *Seminole Tribe*, 517 U.S. at 55.

168 517 U.S. 44 (1996).

169 See Pennsylvania v. Union Gas Co., 491 U.S. 1 (1976) (holding that Congress could abrogate state immunity when it acted pursuant to Commerce Clause power); Fitzpatrick

its precedent that Article 1 empowered Congress to abrogate state immunity.[170] The Court held that Congress could only abrogate sovereign immunity when acting pursuant to Section 5 of the Fourteenth Amendment.[171] After *Seminole Tribe*, the inquiry into what power Congress used to enact a law becomes extremely important and often dispositive to the question of abrogation. The focus on the Fourteenth Amendment in the context of sovereign immunity places weight on the scope of Congress's power under the Amendment. The next section outlines the breadth of Congress's Fourteenth Amendment power.

2. *The Fourteenth Amendment, Gender Equality, and Congressional Power*

In 1868, Congress, motivated by the desire to protect the recently freed slaves from discrimination, enacted the Fourteenth Amendment.[172] Initially used to combat only race discrimination, over time, the Fourteenth Amendment has been interpreted to prohibit other forms of discrimination, including gender discrimination.[173] The Supreme Court first relied on the Fourteenth Amendment to guarantee gender equality in *Reed v. Reed*.[174] In this case, the Court addressed a challenge to Idaho's method of appointing an administrator of estates.[175] All other things being equal, Idaho's probate code required that male candidates be chosen over female candidates.[176] The Court held that this statute violated the Equal Protection Clause of

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v. Bitzer, 427 U.S. 445, 456 (1976) (finding that Eleventh Amendment is limited by Fourteenth Amendment).

170 See *Seminole Tribe*, 517 U.S. at 66.

171 See id. at 59, 66; see also Wayne L. Baker, Seminole Speaks to Sovereign Immunity and Ex Parte Young, 71 St. John's L. Rev. 739, 755 (1997) (stating that Congress may abrogate sovereign immunity only if it acts pursuant to Fourteenth Amendment); Eric B. Wolff, Comment, Coeur D'Alene and Existential Categories for Sovereign Immunity Cases, 86 Cal. L. Rev. 879, 887-88 (1998) (same).

172 See Strauder v. West Virginia, 100 U.S. 303, 306-07 (1879) (stating that purpose of Civil Rights Amendments was to secure all civil rights for recently emancipated slaves); Slaughter-House Cases, 83 U.S. 36, 67-72 (1872) (same); George Anastaplo, Amendments to the Constitution of the United States: A Commentary, 23 Loy. U. Chi. L.J. 631, 798-99, 803 (1992) (noting that Fourteenth Amendment was passed primarily to protect newly freed slaves).

173 See, e.g., United States v. Virginia, 518 U.S. 515 (1996) (holding Virginia Military Institute's admissions policy of excluding women violated Fourteenth Amendment); Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) (finding denial of admission to men by nursing school violated Fourteenth Amendment); Orr v. Orr, 440 U.S. 268, 270 (1979) (holding unconstitutional Alabama alimony statutes that "provide that husbands, but not wives, may be required to pay alimony upon divorce").

174 404 U.S. 71 (1971).

175 See id. at 71-74.

176 See id. at 72, 73.

the Fourteenth Amendment and labeled the practice arbitrary and lacking a rational relationship to a state objective.[177]

Throughout the early 1970s, courts continued to hold unconstitutional certain statutory schemes that made distinctions based on gender.[178] It was not until 1976 that the Court developed a test to determine whether such distinctions denied a class of men or women equal protection of the laws.[179] In *Craig v. Boren*,[180] the Court held that provisions discriminating on the basis of gender will be subject to "heightened scrutiny."[181] Such provisions will be struck down as unconstitutional unless they are substantially related to an important government objective.[182]

Though the Fourteenth Amendment has been useful in the judicial context, it was primarily designed as a tool for Congress.[183] Accordingly, Congress has used its power under the Fourteenth

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177 See id. at 76-77.

178 See, e.g., Stanton v. Stanton, 421 U.S. 7, 13-17 (1975) (striking down Utah statute that required parents to support male children until they reached age of 18 and female children until they reached age of 21 as unconstitutional); Frontiero v. Richardson, 411 U.S. 677, 688-91 (1973) (holding that military policy of preventing women from declaring their spouses as dependents for purpose of obtaining housing, medical, and dental benefits denied women equal protection of laws).

179 See Craig v. Boren, 429 U.S. 190, 204-05 (1976) (finding that different legal drinking ages for men and women violates Fourteenth Amendment); Ann Elizabeth Mayer, Reflections on the Proposed United States Reservations to CEDAW: Should the Constitution be an Obstacle to Human Rights?, 23 Hastings Const. L.Q. 727, 785 (1996) (observing that intermediate scrutiny standard was articulated in *Craig*); Holly B. Fechner, Note, Toward an Expanded Conception of Law Reform: Sexual Harassment Law and the Reconstruction of Facts, 23 U. Mich. J.L. Reform 475, 481 n.21 (1990) (stating that Court adopted standard of intermediate scrutiny in *Craig*).

180 429 U.S. 190 (1976).

181 The Court has applied continuously the heightened scrutiny test in the context of gender discrimination. See, e.g., Rostker v. Goldberg, 453 U.S. 57 (1981) (upholding men-only selective student registration); Kirchberg v. Feenstra, 450 U.S. 455 (1981) (striking down law giving husband right to dispose of jointly owned property without consent of wife); Craig v. Boren, 428 U.S. 190 (1976) (striking down law restricting sale of beer to 18 year-old males and 21 year-old females). In United States v. Virginia, 518 U.S. 515 (1996), the Court elevated the standard of scrutiny applied to gender discrimination. See id. at 515 ("Parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action."). For a discussion of the level of scrutiny established by the Court, see Kathryn A. Lee, Note, Intermediate Review 'With Teeth' in Gender Discrimination Cases: The New Standard in United States v. Virginia, 7 Temp. Pol. & Civ. Rts. L. Rev. 221 (1997).

182 See *Craig*, 429 U.S. at 197.

183 See Michael J. Gerhardt, The Ripple Effects of *Slaughter-House*: A Critique of a Negative Rights View of the Constitution, 43 Vand. L. Rev. 409, 444 n.149 (1990) (stating that Fourteenth Amendment was designed as tool for Congress); Margaret E. Deane, Note, *City of Richmond v. J.A. Croson Co.*: A Federal Legislative Answer, 100 Yale L.J. 451, 462 (1990) (same).

Amendment to combat gender discrimination.[184] Section 5, the Enforcement Clause, authorizes Congress to enact "appropriate legislation" to achieve the goals of the Amendment.[185] As explained in *Ex parte Virginia*,[186] one of the first cases to consider the constitutionality of congressional legislation passed pursuant to the Fourteenth Amendment, "[i]t is the power of Congress which has been enlarged[.] Congress is authorized to *enforce* the prohibitions by appropriate legislation."[187]

The Court has upheld the spirit of *Ex parte Virginia* by consistently finding that Congress has broad power to enact laws under the Fourteenth Amendment.[188] The breadth of this power is exhibited by the ability of Congress to prohibit state action which the Court would not itself prohibit under the Fourteenth Amendment.[189] In *Katzenbach v. Morgan*,[190] the Supreme Court held that Congress, using its Section 5 power, could prohibit state action that the Court pre-

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184 For example, Congress used its Fourteenth Amendment power in passing Title VII and the Equal Pay Act, both of which address gender discrimination in the workplace. See, e.g., Fitzpatrick v. Bitzer, 427 U.S. 445, 447 (1976) (noting that 1972 amendments to Title VII were authorized by Section 5 of Fourteenth Amendment); Timmer v. Michigan Dept. of Commerce, 104 F.3d 833, 842 (6th Cir. 1997) (holding that Equal Pay Act was passed pursuant to Fourteenth Amendment); Jones v. American State Bank, 857 F.2d 494, 498-99 (8th Cir. 1988) (stating that Title VII was passed pursuant to congressional authority under Section 5 of Fourteenth Amendment).

185 "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5. "[A]ppropriate legislation" is legislation designed to enforce objectives of the Fourteenth Amendment. See Ex parte Virginia, 100 U.S. 339, 345-46 (1879).

186 100 U.S. 339 (1879).

187 Id. at 345.

188 See, e.g., City of Rome v. United States, 446 U.S. 156, 175-76 (1980) (discussing breadth of Congress's Fifteenth Amendment power); Katzenbach v. Morgan, 384 U.S. 641, 649-51 (1966) (holding that Fourteenth Amendment power given to Congress is broad); South Carolina v. Katzenbach, 383 U.S. 301, 325-27 (1966) (observing that Congress has full remedial powers under Fifteenth Amendment and citing *Ex parte Virginia* to support its statement that Congress's power is broad). Although *City of Rome* and *Katzenbach* discussed the breadth of the Fifteenth Amendment, it is still helpful in determining the scope of the Fourteenth Amendment since the two amendments are often grouped together and referred to similarly in opinions and journal articles. See, e.g., *City of Rome*, 446 U.S. at 176-77 (citing both Fourteenth and Fifteenth Amendment cases to establish power granted to Congress in Fifteenth Amendment is broad); Tribe, supra note 30, § 5-12, at 330-31 (describing history of Civil Rights Amendments).

189 Although Congress can prohibit state actions that were not found to be violations of the Constitution by the judicial branch, it does not have the power to "restrict, abrogate, or dilute" the guarantees ensured by the Fourteenth Amendment. See *Morgan*, 384 U.S. at 651 n.10. The theory that Congress can enlarge constitutional rights but not inhibit them has been called Brennan's "one-way ratchet" theory. For a discussion, see Tribe, supra note 30, § 5-14, at 343-50.

190 384 U.S. 641 (1966).

viously had found constitutional.[191] Writing for the Court, Justice Brennan explained that "[N]either the language nor history of § 5 supports such a construction."[192] The Court affirmed its decision in *Ex parte Virginia*,[193] stating that the Fourteenth Amendment was designed to augment congressional power and that the power granted to Congress was broad in scope.[194] It further held that Congress enjoyed discretion in legislating to protect the rights guaranteed by the Fourteenth Amendment.[195] As Justice Brennan stated, "Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."[196]

The Court recently recognized the limits of Congress's Fourteenth Amendment power by distinguishing between the power to fashion remedies for discrimination and the power to define what constitutes a constitutional violation in *City of Boerne v. Flores*.[197] In that case, the Court held that Congress exceeded its Fourteenth Amendment power in enacting the Religious Freedom Restoration Act of 1993 (RFRA).[198] Congress passed the RFRA in an attempt to establish a strict scrutiny test to state actions that substantially burden a person's religious practices.[199] The RFRA standard was stricter than that required by the Court.[200] The Court, holding that Congress did not possess the power to make a "substantive change in constitutional protections," struck down the RFRA.[201] The Court explained that the history of the Fourteenth Amendment and earlier Court decisions

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191 In this case, registered voters in New York state challenged Congress's power to pass Section 4(e) of the Voting Rights Act of 1965 (VRA) which essentially prohibited the use of a literacy test for voter registration. See id. at 643-47 & n.1. Prior to the passage of the VRA, the Court had upheld (against an Equal Protection challenge) a literacy test comparable to New York's. See Lassiter v. Northampton Election Bd., 360 U.S. 45 (1959) (upholding constitutionality of North Carolina English literacy test). The challengers to the VRA argued that since literacy tests were constitutional, Congress could not prohibit this state action. See *Morgan*, 384 U.S. at 648.

192 *Morgan*, 384 U.S. at 648.

193 100 U.S. 339 (1879).

194 See *Morgan*, 384 U.S. at 650.

195 See id. at 651.

196 Id.

197 117 S. Ct. 2157 (1997).

198 See id. at 2157.

199 See H.R. Rep. No. 103-88, at 6 (1993) (stating that "the compelling government interest test must be restored").

200 See id. at 2161-62 (quoting 42 U.S.C. § 2000bb-1 (1994)). The RFRA provided that the government could not apply a rule that "'substantially burden[s]'" an individual's exercise of religion unless the government could articulate a compelling reason. See id. at 2162 (quoting 42 U.S.C. § 2000bb-1 (1994)).

201 *City of Boerne*, 117 S. Ct. at 2170.

support the interpretation that Congress may provide remedies for constitutional violations but may not define what constitutes such a violation.[202]

Contrary to the Fifth and Eleventh Circuits, several courts have held that Title IX was passed pursuant to the Fourteenth Amendment.[203] The next subsection considers these cases.

3. *Courts' Analyses that Title IX Was Passed Pursuant to the Fourteenth Amendment and Abrogates Sovereign Immunity*

The defense of sovereign immunity has been asserted in several peer and teacher-student sexual harassment cases.[204] In these cases, to assess if Congress successfully abrogated states' immunity, courts have inquired whether Title IX is within Congress's Fourteenth Amendment power.[205] Several courts have held that it is. In so holding, these courts observe that the objective of Title IX—to rid schools of sex discrimination—falls within Congress's Four-

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[202] See id. at 2164-68.

[203] See Doe v. University of Ill., 138 F.3d 653, 659 (7th Cir. 1998), petition for cert. filed, 67 U.S.L.W. 3083 (U.S. Aug. 4, 1998) (No. 98-126); Crawford v. Davis, 109 F.3d 1281, 1283 (8th Cir. 1997); Thorpe v. Virginia State Univ., 6 F. Supp. 2d 507, 513-17 (E.D. Va. 1998); Franks v. Kentucky Sch. for the Deaf, 956 F. Supp. 741, 750-51 (E.D. Ky. 1996), aff'd, 142 F.3d 360 (6th Cir. 1998). But see Litman v. George Mason Univ., 5 F. Supp. 2d 366, 373-74 (E.D. Va. 1998) (holding that Title IX could not have been passed pursuant to Fourteenth Amendment). Unlike the Fifth and the Eleventh Circuits, which held that Title IX was passed pursuant to the Spending Clause to the exclusion of the Fourteenth Amendment, the courts did not hold that Title IX was passed pursuant to the Fourteenth Amendment to the exclusion of any other congressional power.

[204] See, e.g., *Doe v. University of Ill.*, 138 F.3d at 656-57 (peer sexual harassment); Franks v. Kentucky Sch. for the Deaf, 142 F.3d 360, 362 (6th Cir. 1998) (same); *Crawford*, 109 F.3d at 1282 (teacher-student sexual harassment); *Thorpe*, 6 F. Supp. 2d at 509 (peer sexual harassment); *Litman*, 5 F. Supp. 2d at 369-70 (teacher-student sexual harassment).

[205] Some courts ask whether Congress enacted Title IX under the Fourteenth Amendment, see *Doe v. University of Ill.*, 138 F.3d at 660 ("This Court holds, therefore, that Congress enacted Title IX and extended it to the States, at least in part, as a valid exercise of its powers under Section 5 of the Fourteenth Amendment."), while some ask whether Congress *could have enacted* Title IX under the Fourteenth Amendment, see *Franks*, 142 F.3d at 363 ("Congress had the authority, pursuant to Section 5, to make Title IX applicable to the states."); *Crawford*, 109 F.3d at 1283 (posing question as whether Congress "could have enacted Title IX pursuant to [Section] 5 of the Fourteenth Amendment" and answering affirmatively); *Thorpe*, 6 F. Supp. 2d at 516 ("Congress could have enacted Title IX under Section 5 of the Fourteenth Amendment."); see also *Litman*, 5 F. Supp. 2d at 373 (noting that recent case law frames issue as "'whether Congress could have enacted the legislation at issue' pursuant to § 5 of the Fourteenth Amendment") (quoting *Crawford*, 109 F.3d at 1283).

teenth Amendment power.[206] The Eighth Circuit, in *Crawford v. Davis*,[207] stated:

> Section 5 of the Fourteenth Amendment expressly grants Congress broad authority to enforce the amendment's substantive provisions "by appropriate legislation." Because the Supreme Court has repeatedly held that those substantive provisions proscribe gender discrimination in education, we are unable to understand how a statute enacted specifically to combat such discrimination could fall outside the authority granted to Congress by [Section] 5.[208]

Like the Eighth Circuit, the Seventh Circuit concluded that Title IX is Fourteenth Amendment legislation in *Doe v. University of Illinois*.[209] In its reasoning, the Seventh Circuit criticized the Fifth Circuit's reliance on *Pennhurst* as support for its holding that Title IX is not based on the Fourteenth Amendment.[210] The Seventh Circuit noted that a key factor in the *Pennhurst* holding that the bill of rights provision of the DDABRA was not passed pursuant to the Fourteenth Amendment was that it placed affirmative obligations on grant recipients to provide and pay for treatment for the mentally disabled.[211] The Seventh Circuit distinguished Title IX from the DDABRA, explaining that Title IX does not place an affirmative funding obligation on the recipient[212] and concluded that therefore *Pennhurst* did not preclude a finding that Title IX is Fourteenth Amendment legislation.[213] The court continued by responding to the Fifth Circuit's reliance on the *Pennhurst* warning that courts be cautious in interpreting legislation as exercises of Congress's Fourteenth Amendment power.[214] The court explained that the *Pennhurst* warning does not

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206 See *Doe v. University of Ill.*, 138 F.3d at 656-60 (observing that objectives of Title IX were plainly within Congress's Fourteenth Amendment power); *Franks*, 956 F. Supp. at 751 (stating that since "the focus of Title IX is to stamp out discrimination on the basis of sex in an educational setting," Title IX "fall[s] under the umbrella of the Fourteenth Amendment").

207 109 F.3d 1281 (8th Cir. 1997).

208 Id. at 1283 (citations omitted).

209 138 F.3d 653 (7th Cir. 1998), petition for cert. filed, 67 U.S.L.W. 3083 (U.S. Aug. 4, 1998) (No. 98-126).

210 See id. at 663-64. The *Rowinsky* court cited *Pennhurst*'s warning that the Court is cautious in finding that Congress intended to act under the Fourteenth Amendment. See discussion of *Pennhurst* and the Fifth Circuit's use of the decision, supra notes 111-15 and accompanying text.

211 See *Doe v. University of Ill.*, 138 F.3d at 663-64 (observing that *Pennhurst* Court contrasted DDABRA with statutes that prohibited certain kinds of state conduct).

212 See id. at 664 (stating that Title IX obliges schools receiving federal funds to respond to sexual harassment and contrasting it with DDABRA).

213 See id. at 663-64.

214 See id. at 664.

mean that Congress may never impose obligations by way of the Fourteenth Amendment.[215]

In addition to passing legislation pursuant to a power that empowers it to abrogate state immunity, Congress must unequivocally express its intent to do so. The courts consistently have held that Congress intended to abrogate sovereign immunity through Title IX.[216] Finding that Congress expressed its intent to abrogate state immunity and that Title IX is within Congress's Fourteenth Amendment power, these courts held that Title IX successfully abrogates state immunity.

Although the Fifth and Eleventh Circuits inappropriately placed the constitutional power used to pass Title IX at the center of their analysis of the scope of Title IX, the power used is important in the analysis of sovereign immunity. In light of the role the Fourteenth Amendment plays in enabling victims of peer sexual harassment to sue schools in federal court for their failure to take appropriate remedial action, this Note concludes by arguing that Title IX was passed pursuant to the Fourteenth Amendment.

III

TITLE IX SHOULD BE CONSTRUED AS PASSED PURSUANT TO BOTH THE SPENDING CLAUSE AND THE FOURTEENTH AMENDMENT

There is no dispute that Title IX is Spending Clause-based legislation. However, courts do disagree on whether Congress also used its Fourteenth Amendment power in passing Title IX. This Part expands on courts' arguments that Title IX was passed pursuant to the Fourteenth Amendment by considering the constitutional power used to pass similar laws.

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215 See id. The Seventh Circuit also explained that the Fifth Circuit misconstrued the issue before it by conceptualizing liability for peer sexual harassment as holding the school liable for students' behavior. See id. at 662 (explaining that "the Fifth Circuit's analysis fundamentally misunderstands the nature of the claim that plaintiffs in this kind of case advance"). Rather, the court determined, it is more accurate to understand Title IX as holding a school liable for its *own* action or inaction. See id. The OCR also has adopted this view of school liability for peer sexual harassment. See Sexual Harassment Guidance, supra note 1, at 12,039-40 (describing school liability for peer sexual harassment as holding school responsible for its failure to take remedial action). Furthermore, in South Dakota v. Dole, 483 U.S. 203 (1987), the Supreme Court found constitutional Spending Clause legislation that placed conditions upon the recipient states' willingness to prohibit persons under the age of 21 from drinking. See id. at 206-09.

216 See Franks v. Kentucky Sch. for the Deaf, 142 F.3d 360, 362 (6th Cir. 1998) (citing Rehabilitation Act Amendments); Crawford v. Davis, 109 F.3d 1281, 1283 (8th Cir. 1997) (same); Thorpe v. Virginia State Univ., 6 F. Supp. 2d 507, 510-12 (E.D. Va. 1998) (same).

A. *Congressional Use of More Than One Power to Pass an Act*

Since Title IX places conditions on federal fund recipients, it is clearly Spending Clause legislation.[217] A threshold question in the analysis of whether Title IX can rest on the Fourteenth Amendment, therefore, is whether Congress can use more than one of its enumerated powers when it passes legislation. Federal courts have held that Congress has done this and, more importantly, that Congress has simultaneously used its spending power and Fourteenth Amendment power in passing legislation.[218]

The Education of the Handicapped Act[219] (EHA) and the Handicapped Children's Protection Act of 1986[220] (HCPA) are prime examples. These laws are traditional spending power statutes placing conditions on the state recipients of federal funds. The conditions ensure that the recipient state has established goals and plans to initiate programs for the education of disabled children.[221] Despite the conditional nature of these laws, district and circuit courts have held that Congress used its Fourteenth Amendment power in addition to its Spending Clause power in passing these laws.[222]

The Supreme Court has also found that Spending Clause legislation can be construed as an exercise of Congress's power under Section 5 of the Fourteenth Amendment. In *Fullilove v. Klutznick*[223] the

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217 See supra note 101 and accompanying text.

218 In holding that Title IX was passed pursuant to the Spending Clause exclusively, the Fifth and Eleventh Circuits analogized Title IX to Title VI and cited Guardians Ass'n v. United States Civil Service Commission, 463 U.S. 582 (1983), for the proposition that Title VI was Spending Clause legislation. See Davis v. Monroe County Bd. Of Educ., 120 F.3d 1390, 1398 (11th Cir. 1997), cert. granted, 119 S. Ct. 29 (1998); Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006, 1013 n.14 (5th Cir. 1996). In so doing, the circuit courts overstated the holding of *Guardians*. The Supreme Court did state that Title VI was spending power legislation in *Guardians*. See *Guardians*, 463 U.S. at 598-99 (1983). The Court did not state, however, that Title VI was passed pursuant to the Spending Clause to the exclusion of any other congressional power. Consequently, *Guardians* is not inconsistent with the argument that Congress exercised its authority granted by both the Spending Clause and Section 5 of the Fourteenth Amendment in passing either Title VI or Title IX. See Bryant v. New Jersey Dept. of Trans., 1 F. Supp. 2d 426, 434-35 (D.N.J. 1998) (holding that Title VI was passed pursuant to Fourteenth Amendment, reasoning similarly). In Gebser v. Lago Vista Independent School District, 118 S. Ct. 1989 (1998), the Court observed that Congress used its spending power when it passed Title IX. The Court did not state, however, that Congress used this power to the exclusion of any other power. See id. at 1998.

219 20 U.S.C. §§ 1400-1420 (1994).

220 20 U.S.C. § 1415 (1994)

221 See 20 U.S.C. § 1412 (1994).

222 See Council v. Dow, 849 F.2d 731, 735 (2d Cir. 1988) (asserting that Congress enacted EHA and HCPA pursuant to Fourteenth Amendment and Spending Clause); David D. v. Dartmouth Sch. Comm., 775 F.2d 411, 422 (1st Cir. 1985) (same); Crawford v. Pittman, 708 F.2d 1028, 1036 (5th Cir. 1983) (same).

223 448 U.S. 448 (1980).

Court considered Congress's power to pass the "minority business enterprise" (MBE) provision of the Public Works Employment Act of 1977.[224] The MBE places a condition upon the receipt of newly appropriated federal funds for local public works projects.[225]

In examining which source of congressional power enabled the passage of the MBE, the Court acknowledged that its enactment was an exercise of Article 1 spending power.[226] However, the Court also held that the MBE could be construed as an exercise of congressional authority under Section 5 of the Fourteenth Amendment.[227] Citing the congressional record, the Court found that the purpose of the legislation was to grant federal funds to the minority business community in hopes of eradicating the disparity between the percentage of federal funds directed at minority owned enterprises and the percentage of minorities in the population at large.[228] Noting that the objective of attacking racial discrimination falls within the Fourteenth Amendment, the Court concluded that the MBE fell within congressional authority to enforce it.[229]

B. Congress's Use of the Fourteenth Amendment

Other arguments support the postulate that Congress chose to use its Fourteenth Amendment power in addition to its spending power in passing Title IX. Such grounds lie in the analogy between Title IX and Title VII. Title IX and Title VII are similar in that they both prohibit sex discrimination.[230] As explained above, Title IX was

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224 42 U.S.C. § 6705(f)(2) (1994).

225 See id. The condition requires that at least 10% of the materials used in projects funded by the newly appropriated money be purchased from minority-owned businesses. See id.

226 See *Fullilove*, 448 U.S. at 473.

227 See id. at 475.

228 See id. at 459, 478 (holding that Congress had historical basis to conclude that traditional procurement practices could continue to deny minorities' access to public contracting); id. at 503-06 (Powell, J., concurring) (stating that legislative history reflects that Congress had reasonable basis to conclude that legislation was necessary).

229 See id. at 476-78.

230 Title VII states:

> It shall be an unlawful employment practice for an employer—
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (1994).

drafted to remedy the fact that Title VII does not prohibit sex discrimination in schools.[231]

Courts often draw on Title VII cases when interpreting Title IX.[232] For example, in the Title IX case *Franklin*, the Court cited the Title VII case *Meritor Savings Bank, FSB v. Vinson*[233] which held that sexual harassment is a form of sex discrimination.[234] Given the similarity in the purpose of both statutes, the legislative history of Title IX, and the courts' reliance on Title VII cases when deciding Title IX cases, the congressional power used to pass Title IX is arguably the same congressional power that was used to pass Title VII, namely, the Fourteenth Amendment power.

There is an argument against looking at the congressional power used to pass Title VII to provide guidance for the analysis of Title IX; this past term the Court established different standards of notice for sexual harassment under Title VII and Title IX.[235] In the Title VII

For the wording of Title IX, see supra note 8.

231 See, e.g., 118 Cong. Rec. 5803 (1972) (statement of Sen. Bayh) (stating that Title IX provisions would extend Title VII provisions to educational institutions); see also supra notes 56-60 and accompanying text.

232 See Mabry v. State Bd. of Community Colleges and Occupational Educ., 813 F.2d 311, 316 n.6 (10th Cir. 1987) (stating that Title VII is "the most appropriate analogue when defining Title IX's substantive standards"); Amy Lovell, Comment, "Other Students Always Used to Say, 'Look at the Dykes'": Protecting Students from Peer Sexual Orientation Harassment, 86 Cal. L. Rev. 617, 634 (1998) ("Courts frequently look to Title VII case law for guidance when interpreting Title IX."); see also Quesada, supra note 41, at 1048 ("Title VII and Title IX are analogous.").

Before the Court's holding in Gebser v. Lago Vista Independent School District, 118 S. Ct. 1989 (1998), that Title VII standards of notice are inapplicable to Title IX, legal commentators argued that Title VII notice standards should be applied to Title IX. See Verna L. Williams & Deborah L. Brake, When a Kiss Isn't Just a Kiss: Title IX and Student-to-Student Harassment, 30 Creighton L. Rev. 423, 442-56 (1997) (arguing that Title VII notice standards should be applied to Title IX); Kaija Clark, Note, School Liability and Compensation for Title IX Sexual Harassment Violations by Teachers and Peers, 66 Geo. Wash. L. Rev. 353, 354 (1998) (same); Charles James Harris, Jr., Note, Message to the Judiciary: The Proper Application of Title IX May Save Our Children, 63 UMKC L. Rev. 429, 450 (1995) (same). But see Sweeney, supra note 60, at 83 (arguing that applying Title VII sexual harassment theory to Title IX is not supported by legislative history).

233 477 U.S. 57 (1986).

234 See Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 75 (1992) (holding that sexual harassment is form of sex discrimination under Title IX).

235 Compare Farragher v. City of Boca Raton, 118 S. Ct. 2275 (1998) (finding that employer can be held vicariously liable, subject to affirmative defense, for sexual harassment committed by supervisor to employee), and Burlington Indus., Inc. v. Ellerth, 118 S. Ct. 2257 (1998) (same), with Gebser v. Lago Vista Indep. Sch., 118 S. Ct. 1989 (1998) (holding that school can be held liable for teacher-student sexual harassment if official who has authority to address alleged discrimination has knowledge).

The notice standards established by the Court last term result in children receiving less protection from sexual harassment than adults. This result seems backwards since the negative ramification of sexual harassment in schools may be longer lasting and have a stronger impact on its young victims. See Quesada, supra note 41, at 1050; see also Joan

cases, the Court relied on agency principles to hold that employers are subject to vicarious liability for their employees' actions.[236] In *Gebser*, petitioner argued that agency principles should be applied to Title IX and therefore actual notice would not be necessary for school liability.[237] The Court, however, refused to establish this standard.[238] It reasoned that agency principles are inapplicable to Title IX and that the contractual framework of Title IX requires schools to have actual notice before they can be held liable.[239]

The Court's recent holding is not fatal to the argument that Title VII should inform the analysis of Title IX for the purposes of determining the congressional power used in their passage. The question of which power, or powers, Congress used in passing Title IX is distinct from the question of which standard of notice is necessary for school liability.[240] Furthermore, the inapplicability of agency principles to Title IX does not prevent a Fourteenth Amendment analysis of its enactment.[241]

The Supreme Court, in *Fitzpatrick v. Bitzer*,[242] stated that Title VII was passed pursuant to the Fourteenth Amendment.[243] Furthermore, this case involved the 1972 amendment to Title VII[244] that abrogated states' immunity and authorized suits against the government for violations of Title VII.[245] The Rehabilitation Act Amendments modify Title IX in a similar fashion—they announce Congress's une-

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Biskupic, This Term, Supreme Court Ruled to the Nation's Beat, Wash. Post, June 28, 1998, at A1 (reporting that critics regard Court's cases as defying common sense); David G. Savage, High Court Holds Employers to Strict Harassment Rules, L.A. Times, June 27, 1998, at A1 (commenting that two rulings are hard to reconcile).

236 See *Farragher*, 118 S. Ct. at 2290; *Burlington Indus.*, 118 S. Ct. at 2267-70.

237 See *Gebser*, 118 S. Ct. at 1995 (observing that petitioners and United States submitted that agency principles should apply to Title IX).

238 See id. at 1994-99.

239 See id. The Court further contrasted Title VII and Title IX by observing that Title VII has an express right of action, and Title IX has a judicially implied right of action. See id. at 1996.

240 See Doe v. University of Ill., 138 F.3d 653, 660, 667-68 (7th Cir. 1998) (resolving question of notice after establishing that Title IX is based on Fourteenth Amendment and that Title IX reaches peer sexual harassment), petition for cert. filed, 67 U.S.L.W. 3083 (U.S. Aug. 4, 1998) (No. 98-126).

241 See id. at 667 (finding absence of agency relationship irrelevant to Fourteenth Amendment analysis of direct liability); see also supra note 148.

242 427 U.S. 445 (1976).

243 See id. at 447. Other courts have followed this holding. See, e.g., Jones v. American State Bank, 857 F.2d 494, 498-99 (8th Cir. 1988) (asserting that Title VII was passed pursuant to Fourteenth Amendment); EEOC v. Pacific Press Publ'g Ass'n, 676 F.2d 1272, 1279 n.10 (9th Cir. 1982) (holding Title VII was passed pursuant to both Commerce Clause and Fourteenth Amendment).

244 Civil Rights Act of 1964, Pub. L. No. 88-352 §§ 701-718, 78 Stat. 241, 253-66 (codified as amended at 42 U.S.C. §§ 2000e-2000e-15 (1994)).

245 See *Fitzpatrick*, 427 U.S. at 447, 453 n.9.

quivocal intent to abrogate state immunity from suits for violations of Title IX.[246] The similarity between the Title VII amendment and the Rehabilitation Act Amendments bolsters the argument that Congress used the same power in passing Title VII and Title IX.

The federal courts' examination of Congress's power to pass the Equal Pay Act (EPA) patterned the reasoning of the *Fitzpatrick* Court. Challenges to the passage of the EPA arose after the 1974 amendments to the Act. These amendments applied the EPA to the states, thereby abrogating state immunity.[247] Again, similar to the outcome of Title VII, the courts found the EPA to be an exercise of Congress's Fourteenth Amendment power.[248]

The analyses of the constitutional power used to pass the Voting Rights Act[249] (VRA) and the MBE also can inform the analysis of the constitutional power used to pass Title IX. The legislative history of Title IX is rich with statistics indicating that the Act was designed to ensure equal education opportunities for women.[250] These statistics are quite similar to those that the Court relied upon to support its holding that the VRA and the MBE were passed pursuant to the Fourteenth Amendment.[251]

Given the similarities in the statutes' legislative history, the congressional power used to pass Title IX can be compared to the congressional power used to pass the MBE and the VRA. These analogies support the argument that Title IX was passed pursuant to the Fourteenth Amendment. This position is not diminished by the absence of a discussion of Section 5 in the legislative history.

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246 See 42 U.S.C. § 2000d-7(a)(1) (1994).

247 See, e.g., Marshall v. City of Sheboygan, 577 F.2d 1, 2 (7th Cir. 1978) (stating that Secretary of Labor brought action against city for violation of EPA; city defended itself stating that Congress did not have power to apply EPA to government).

248 See Timmer v. Michigan Dept. of Commerce, 104 F.3d 833, 842 (6th Cir. 1997) (holding EPA as passed pursuant to Fourteenth Amendment despite fact that words "[Section] 5 of the Fourteenth Amendment" do not appear in legislative history); Usery v. Charleston County Sch. Dist., 558 F.2d 1169, 1171 (4th Cir. 1977) (finding that EPA was passed using Fourteenth Amendment so as to not frustrate intent of Congress); Usery v. Allegheny County Inst. Dist., 544 F.2d 148, 155 (3d Cir. 1976) (concluding that EPA was passed using Congress's Fourteenth Amendment powers).

249 42 U.S.C. § 1974 (1994).

250 See, e.g., 118 Cong. Rec. 3939-40 (1972) (providing statistics on percentage of undergraduate and graduate students and professors who were women at time); 118 Cong. Rec. 274 (1972) (statement of Sen. McGovern) (stating that only 2% of dentists, 7% of physicians, and 2% of full professors in major universities were women at time).

251 Compare Oregon v. Mitchell, 400 U.S. 112, 132-33 (1970) (comparing percentage registration of white and nonwhite voters), and Fullilove v. Klutznick, 448 U.S. 448, 459 (1980) (citing statistics that reflect that less than 1% of federal procurement was conducted with minority-owned businesses in 1976), with 117 Cong. Rec. 30,411 (1971) (observing that 9% of America's college professors, 6% of law school students, and 8% of medical school students were women at time).

C. Congressional Record

Although Congresspersons are cognizant of the power conferred upon them by the Constitution, congressional laws often lack a clear statement of what power Congress exercised to pass a specific piece of legislation.[252] The fact that the record does not contain an explicit statement that Congress used its Fourteenth Amendment power is not dispositive. In *EEOC v. Wyoming*[253] the Court stated:

> It is in the nature of our review of congressional legislation defended on the basis of Congress' powers under [Section] 5 of the Fourteenth Amendment that we be able to discern some legislative purpose or factual predicate that supports the exercise of that power. That does not mean, however, that Congress need anywhere recite the words "section 5" or "Fourteenth Amendment" or "equal protection". . . .[254]

Thus the fact that Congress did not state specifically that it was exercising its power as granted by Section 5 of the Fourteenth Amendment does not prohibit a finding that Title IX was passed using that power.[255]

Although Title IX's congressional record does not contain an explicit statement regarding the power Congress used to pass it, the record does contain statistics on the percentage of women in undergraduate and professional schools and on faculties.[256] These statistics support the argument that Title IX is remedial and therefore within Congress's Fourteenth Amendment power as defined by *City of Boerne*.[257] In *City of Boerne*, the Court explained that for a statute

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252 See Rosenthal, supra note 87, at 1119.

253 460 U.S. 226 (1983).

254 Id. at 243 n.18.

255 There are statements in the congressional record that may indicate Congress's belief that it used its Fourteenth Amendment power in passing Title IX. See 117 Cong. Rec. 30,156 (1971) (statement of Sen. Lee W. Metcalf) ("I urge the Senate to adopt this amendment, and to take a forward step, both in higher education and in protecting equal rights for all Americans."); 117 Cong. Rec. 30,158 (1971) ("While no case relating to sex discrimination in public education has yet reached the Supreme Court, discrimination based on sex in public education should be prohibited by the 14th amendment." (reprinting The President's Task Force of Women's Rights and Responsibilities, A Matter of Simple Justice 8 (1970))).

256 See supra notes 157 and 250.

257 In determining whether a statute is remedial in nature, courts have consulted legislative history. See Scott v. University of Miss., 148 F.3d 493, 502-03 (5th Cir. 1998) (reciting excerpts from congressional record of Age Discrimination in Employment Act (ADEA) to support conclusion that ADEA is remedial); Varner v. Illinois State Univ., 150 F.3d 706, 716-17 (7th Cir. 1998) (consulting legislative record to determine remedial nature of EPA).

At least one court has found that Title IX exceeds the guarantees of the Fourteenth Amendment. See Litman v. George Mason Univ., 5 F. Supp. 2d 366, 374 (E.D. Va. 1998) (explaining that since Title IX reaches private actors and prohibits nonintentional discrimi-

to be remedial, "there must be a congruence and proportionality between the injury to be prevented and the means adopted to that end."[258] The Court reasoned that RFRA could not be remedial in part because the legislative history did not reflect a well-documented injury.[259] The legislative history of Title IX does not suffer from this deficiency.

The means adopted to ameliorate the documented harm in Title IX also greatly differ than those adopted in the RFRA. The RFRA applied strict scrutiny to any law that placed a substantial burden on an individual's free exercise of religion.[260] This would have an immense effect since it would render many laws invalid.[261] Title IX does not have such a dramatic effect. To establish a cause of action under Title IX for peer sexual harassment, a plaintiff must demonstrate the elements of a prima facie case of sexual harassment.[262] If the plaintiff is successful, the school can assert an affirmative response, namely that it did not know of the harassment or it responded appropriately.[263]

The evil redressed by Title IX, furthermore, has been recognized by the Supreme Court—the right to be free from sex discrimination in schools.[264] Several courts also have recognized a Fourteenth Amendment right to be free from sexual harassment.[265] This is contrary to

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nation, it reaches farther than Fourteenth Amendment and is not within Congress's Enforcement Clause power).

258 City of Boerne v. Flores, 117 S. Ct. 2157, 2164 (1997).

259 See id. at 2169-71 (noting RFRA's legislative record lacks recent examples of religious persecution and contrasting it with legislative record of VRA).

260 See id. at 2171.

261 See id.

262 For the elements of a prima facie case of either peer or teacher-student sexual harassment, see supra note 33; cf. *Varner*, 150 F.3d at 717 (outlining elements of prima facie EPA violation case and affirmative defenses in holding that EPA is remedial).

263 These are affirmative defenses that a school can assert in a case of teacher-student sexual harassment. See Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 1989, 1999 (1998) (establishing standard of liability for teacher-student sexual harassment).

264 See United States v. Virginia, 518 U.S. 515, 519 (1996) (holding Virginia Military Institute's admissions policy of excluding women violated Fourteenth Amendment); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723 (1982) (finding denial of admission to men to nursing school violated Fourteenth Amendment); Crawford v. Davis, 109 F.3d 1281, 1283 (8th Cir. 1997) (observing that Supreme Court has held that substantive provisions of Fourteenth Amendment proscribe gender discrimination in education).

265 See Southard v. Texas Bd. Of Criminal Justice, 114 F.3d 539, 550 (5th Cir. 1997) (finding that sexual harassment violates Equal Protection Clause of Fourteenth Amendment); Lankford v. City of Hobart, 73 F.3d 283, 286 (10th Cir. 1996) (establishing what plaintiff must assert to allege violation of Fourteenth Amendment due to sexual harassment); Doe v. Petaluma City Sch. Dist., 54 F.3d 1447, 1453 (9th Cir. 1995) (Pregerson, J., dissenting) (noting that "cases . . . clearly indicate[ ] a student's right to be free from peer-to-peer sexual harassment under the due process and equal protection clauses of the Fourteenth Amendment"); Klemencic v. Ohio State Univ., 10 F. Supp. 2d 911, 921 (S.D. Ohio

the RFRA in which the right protected was not recognized by the Court.[266]

Title IX qualifies as a remedial scheme even if it provides a higher standard of equality than the Court finds the Constitution demands. In a theoretical explanation of *City of Boerne*, Professors Christopher Eisgruber and Lawrence Sager define remedies as "states of affairs which are not required by the Constitution, but which are instrumentally useful to achieving those states of affairs which are."[267] They argue that the Court should be sympathetic to legislation that establishes "a vision of constitutional justice more robust than the Court's own" as long as it is consistent with the Court's constitutional commitments.[268] Indeed, in *City of Boerne*, the Court recognized that legislation can be remedial even if it reaches beyond the requirements of the Fourteenth Amendment and prohibits conduct which is not unconstitutional.[269] Even if Title IX reaches beyond the protection granted by the Equal Protection Clause, it is consistent with the Court's constitutional commitments, namely establishing gender equality, and within Congress's Fourteenth Amendment power.[270]

CONCLUSION

The issue of peer sexual harassment is a pervasive problem hampering the education of many young persons. Only effective, accessible remedies can successfully eliminate this phenomena. By holding

1998) (stating what plaintiff must assert in alleging sexual harassment as violation of Fourteenth Amendment). Furthermore, the Court announced that Congress should be given deference to its determination of what constitutes remedial action. See *City of Boerne*, 117 S. Ct. at 2164 (declaring that "Congress must have wide latitude" in determining line between remedial action and substantive change in law).

266 See *City of Boerne*, 117 S. Ct. at 2160-61 (describing test established by RFRA as "an anomaly in the law"); Christopher L. Eisgruber & Lawrence G. Sager, Congressional Power and Religious Liberty After City of Boerne v. Flores, 1997 Sup. Ct. Rev. 79, 92 (describing RFRA as "in conceptual conflict" with Court's constitutional commitments).

267 Eisgruber & Sager, supra note 266, at 87-88.

268 See id. at 90. Professors Eisgruber and Sager explain that the Court should be generous to Congress, in part, because of the Court's institutional limitations. See id. at 90-92.

269 See *City of Boerne*, 117 S. Ct. at 2163; see also Coger v. Board of Regents of the State of Tenn., 154 F.3d 296, 307 (6th Cir. 1998) (conceding ADEA may prohibit constitutional conduct while holding that it is within Congress's Fourteenth Amendment power); Varner v. Illinois State Univ., 150 F.3d 706, 716 (7th Cir. 1998) (rejecting argument that since EPA proscribes some constitutional conduct it is not within Congress's Fourteenth Amendment power); Goshtasby v. Board of Trustees of the Univ. of Ill., 141 F.3d 761, 772 (7th Cir. 1998) (finding ADEA as appropriate legislation under Congress's Fourteenth Amendment power despite fact that it might prohibit constitutional behavior).

270 Title IX is similar to legislation that Professors Eisgruber and Sager argue is within Congress's Section 5 power. See Eisgruber & Sager, supra note 266, at 90-92 (arguing that enacting legislation to enable people to bring race discrimination disparate impact claims against government is within Congress's power).

schools liable for failing to take remedial action in response to peer sexual harassment, the judicial system can provide an incentive for schools to adopt antiharassment policies.

In considering the potential of school liability, two circuit courts found that Title IX is limited in scope. These courts held that the Spending Clause nature of Title IX prevents it from reaching peer sexual harassment. The courts' emphasis on the congressional power used to pass Title IX is misplaced. To determine the scope of Title IX, a court should consult traditional tools of statutory construction. These tools, the statute's text, legislative history, and agency interpretation, indicate that Title IX is broad and reaches peer sexual harassment.

While the congressional power used to pass Title IX should not play a part in the analysis of its breadth, it is important in the context of sovereign immunity. Congress may abrogate sovereign immunity only if it enacts legislation pursuant to its Fourteenth Amendment power. An inquiry into the constitutional power used to pass Title IX, therefore, is critical to the question of whether Title IX successfully abrogates sovereign immunity.

The analysis of the constitutional power underlying Title IX reveals its Fourteenth Amendment underpinnings. The legislative history of Title IX demonstrates it was passed to ensure gender equality by providing girls and women with an equal opportunity for education. Congress's decision to effectuate this end by conditioning its federal education grants on the prohibition of sex discrimination should not prevent the conclusion that Title IX is also within Congress's Fourteenth Amendment power and therefore abrogates Eleventh Amendment immunity.

By finding schools liable for violations of Title IX in the context of peer sexual harassment, courts contribute to the development of effective strategies to combat peer sexual harassment. Faced with the possibility of adverse judgments, schools will take more proactive measures to eliminate or significantly decrease the level of peer sexual harassment. To hold otherwise would leave victims subject to the inappropriate behavior of their peers as teachers and school administrators stand idly on the sidelines.