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Dispelling the Misconceptions Raised by the Davis Dissent

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I. INTRODUCTION

Recently, the Supreme Court, in *Davis v. Monroe County Board of Education,* held school districts liable under Title IX for deliberate indifference to known instances of student-on-student sexual "harassment that is so severe, pervasive and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit."[1] While I generally agree with the result in the *Davis* case, I am dissatisfied with the majority opinion that failed to adequately address the concerns (dare I say criticisms) of the dissent. Although, one could take the view that the criticisms are frivolous and not worth the effort to address, the concerns are legitimate yet misconceived. I will address three primary concerns raised by the *Davis* dissent and attempt to dispel them by addressing them directly as the majority should have done.

Justice Kennedy, joined by Chief Justice Rehnquist and Justices Scalia and Thomas, wrote a rather scathing dissenting opinion, claiming the majority had insinuated the federal government into one of the most traditional areas of state concern, and concluded that there are "few interventions more intrusive upon the delicate and vital relations between teacher and student, between student and student, and between the state and its citizens than the one the Court creates . . . by its own hands."[2] The dissent viewed this case as one primarily about federalism, meaning an issue best left to the states, arguing that preserving the federal system is both a legitimate end itself as well as a means for ensuring that choices are made by a government more closely involved with the electorate than the

* Associate Professor of Law, George Washington University Law School. My thanks to the editors of the Hastings Women's Law Journal for inviting me to participate in such an outstanding symposium.

1. Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 633 (1999).
2. *Id.* at 685 (Kennedy, J., dissenting).

vast federal government.[3]

While it is true that control over the education of our nation's children has traditionally been relegated to the states, the conduct here is not, as the dissent characterized it, merely misconduct best addressed by the school under its student discipline procedures. Of course, when one student harasses another student, it is a matter of school discipline. However, this case concerns a special type of harassment—harassment based on gender which is so severe, pervasive and objectively offensive that it effectively bars the victim's access to an educational opportunity.[4] The dissent refused to concede that such student-on-student harassment is sexual harassment, much less sex discrimination, because of the immaturity of students and the lack of a power relationship between the harasser and the victim.[5] The dissent characterized the conduct as clearly inappropriate, immature, childish and even objectively offensive, but claimed it merely represented "children in the throes of adolescence struggle to express their emerging sexual identities."[6] However, a strong argument can be made that such conduct rises to a level of sex discrimination and thus invokes a special need for the federal courts to step in. The majority never once mentioned the word federalism and while it did find that such conduct constitutes sex discrimination,[7] it failed to explain the underlying theoretical basis for such a finding. Thus, the majority opinion is less persuasive than it might have been.

Additionally, the dissent claimed that the majority failed to acknowledge the limits upon schools' ability to discipline students. The dissent provided a laundry list of limitations, which prevent schools from taking certain actions, including the harasser's right to freedom of speech.[8] Specifically, the dissent argued that a student's request for the school to remedy peer sexual harassment will conflict with the alleged harasser's claim that his speech is protected, citing the controversy over university speech codes designed to deal with peer sexual and racial harassment.[9] The majority did acknowledge that schools are constrained in their disciplinary authority but stated that the standard is sufficiently flexible to account for any constraint.[10] This response is somewhat less than satisfying. In fact, the school First Amendment cases generally support primary and secondary schools' right to discipline students and the speech code cases can be

3. *See id.* at 684-85.
4. *See id.* at 631.
5. *See id.* at 673 (Kennedy, J., dissenting).
6. *Id.*
7. *See id.* at 650.
8. *See id.* at 664-68 (Kennedy, J., dissenting) (including state Constitutional rights to free primary and secondary education, federal due process rights, and the IDEA).
9. *See id.* at 667.
10. *See id.* at 648-49.

distinguished.

Thus, I attempt to make the majority's decision more compelling by directly addressing these three issues: (1) why the decision in this case is consistent with our federalism principles; (2) why the conduct at issue is sex discrimination and (3) why the First Amendment rights of the alleged harassers will not likely be a concern under the standard adopted by the majority.

II. FEDERALISM

While the term "federalism" has recently come to represent a position of empowering states' rights, it more accurately reflects a dual sovereign system in which the powers of government are divided in order to promote citizen satisfaction and governmental efficiency.[11] Under federalism principles, not only are the states to be protected from an overreaching federal power, but the national government is empowered to act when appropriate.[12]

A. ERADICATING SEX DISCRIMINATION IN SCHOOLS IS A NATIONAL PRIORITY

To determine the appropriate allocation of responsibilities between the two sovereigns, we should consider the virtues of federalism. Justice O'Connor, in *Gregory v. Ashcroft*,[13] enumerated the traditional values embodied in our federalist structure. Federalism is designed to (1) decentralize government such that it is more sensitive to the diverse needs of its citizens, (2) increase opportunity for citizen involvement in the democratic process, (3) allow for more innovation and experimentation and (4) make government more responsive by putting states in competition with each other.[14] Thus, when regulating an area that is sensitive to local conditions or is of recent vintage, such that state experimentation is beneficial, the power should be relegated to the individual states. This allows for local taste or experimentation to achieve a variety of solutions. Of course, the result is a patchwork of diverse laws, many of which may be unacceptable to citizens of other states. When, however, we as a society have established certain principles of liberty and justice so fundamental as to be guaranteed to all Americans, the national government rightly grants

11. *See* Geoffrey Moulton, *The Quixotic Search for a Judicially Enforceable Federalism*, 83 MINN. L. REV. 849, 852 (1999).
12. *See id.*
13. 501 U.S. 452, 455 (1991).
14. *See id.* at 458.

and polices those rights.[15] Thus, an appropriate allocation of powers will allow the nation to reap the benefits of both interstate diversity and national uniformity.

Was then the dissent correct that this case was primarily about federalism? I believe it is a matter of federalism, properly understood, and that the decision was in fact consistent with federalism principles. Title IX was enacted pursuant to Congress' spending power[16] but reflects and enforces Fourteenth Amendment principles of equal protection.[17] By labeling the conduct as mere "discipline," and comparing it to teasing based on weight or wearing glasses,[18] the dissent failed to recognize the important federal interest at stake. If one accepts that actionable student-on-student sexual harassment constitutes sex discrimination, then one must recognize that it is a matter of national concern and requires a uniform, national approach to address the concern. This is not a case in need of state experimentation or a diverse approach to satisfy local interests. Rather, we as a society have established a principle of equal protection under the laws and equal treatment of the sexes as a fundamental right guaranteed to all citizens. Thus, it is consistent with the underlying tenets of federalism to create a federal case out of student-on-student sexual harassment that rises to the level of sex discrimination.[19]

B. STATES' ELEVENTH AMENDMENT IMMUNITY

The Eleventh Amendment is an important constitutional safeguard of our federalist system of government. The Eleventh Amendment provides that "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."[20] In general, this provision protects states' sovereignty from encroachment by the federal courts.

This Amendment raises a significant issue in the context of Title IX liability. Title IX liability is limited to entities, both public and private, that receive federal funding.[21] Chief among the potentially liable entities are

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15. *See* Martin Feigenbaum, *The Preservation of Individual Liberty Through the Separation of Powers and Federalism: Reflections on the Shaping of Constitutional Immortality*, 37 EMORY L.J. 613, 622 (1988).

16. *See* Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 637 (1999).

17. *See* Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 75 n.8 (1992).

18. *See Davis*, 526 U.S. at 677 (Kennedy, J., dissenting).

19. *See* discussion *infra* Part III (justifying contention that actionable student-on-student sexual harassment constitutes sex discrimination).

20. U.S. CONST. amend. XI.

21. *See* 20 U.S.C. § 1681(a) (2000) ("No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination

public schools, which may be deemed state actors for purposes of the Eleventh Amendment, and may, thus, attempt to claim immunity from suit in federal court.[22] Immunity from suit, however, is not absolute. There are two circumstances in which an individual may sue a state. "First, Congress may authorize such a suit in the exercise of its power to enforce the Fourteenth Amendment—an Amendment enacted after the Eleventh Amendment and specifically designed to alter the federal-state balance. Second, a state may waive its sovereign immunity by consenting to suit."[23] The lower courts are currently divided over the issue of whether Congress had the authority to abrogate states' immunity under Title IX[24] when it amended the Rehabilitation Act of 1986 to state: "A State shall not be immune under the Eleventh Amendment . . . from suit in Federal court for a violation of . . . Title IX of the Education Amendments . . . ."[25] The issue turns on whether Congress passed Title IX pursuant to its Section Five power under the Fourteenth Amendment.[26] The Court has held that Congress passed Title IX pursuant to its Spending Clause power[27] but has failed to address whether Congress could have acted under its Section Five powers as well.[28] This is critical because in *Seminole Tribe of Florida v. Florida*, the Court held that Congress lacks power under Article I to abrogate the states' sovereign immunity.[29] Thus, if Title IX rests solely on

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under *any educational program or activity receiving Federal financial assistance.*") (emphasis added).

22. *See, e.g.*, Litman v. George Mason Univ., 186 F.3d 544, 547 (4th Cir. 1999) (finding GMU a state instrumentality); Franks v. Kentucky Sch. for the Deaf, 142 F.3d 360, 361 (6th Cir. 1998) (addressing state immunity argument raised by Kentucky School for the Deaf and the State Board for Elementary and Secondary Education of Kentucky).

23. College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 670 (1999).

24. *Compare Franks*, 142 F.3d at 363; Doe v. University of Ill., 138 F.3d 653, 660 (7th Cir. 1998); *and* Crawford v. Davis, 109 F.3d 1281, 1283 (8th Cir. 1997) (valid abrogation of immunity under Title IX) *with* Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006, 1012 n.14 (5th Cir. 1996); Davis v. Monroe County Bd. of Educ., 120 F.3d 1390, 1397-99 (11th Cir. 1997); Litman v. George Mason Univ., 5 F. Supp. 2d 366, 373 (E.D. Va. 1998) (invalid abrogation of immunity under Title IX) (on appeal the Fourth Circuit declined to address the issue of abrogation).

25. Rehabilitation Act Amendments of 1986, 42 U.S.C. § 2000d-7 (2000).

26. *See* U.S. CONST. amend. XIV § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

27. *See* Gebser v. Lago Vista Ind. Sch. Dist., 524 U.S. 274, 287 (1998). The Spending Clause provides that "Congress shall have [the] Power to . . . provide for the . . . general Welfare of the United States." U.S. CONST. art. I, § 8, cl. 1.

28. *See* Franklin v. Gwinnet County Pub. Sch., 503 U.S. 60, 75 n.8 (1992).

29. 517 U.S. 44, 72-73 (1996). The Court is closely divided over this decision. Just this term, the dissent in *Kimel v. Florida Board of Regents*, 528 U.S. 62, 93-97 (2000), disagreed with the holding of *Seminole Tribe* that Congress lacks the power under its Article I powers to abrogate states' immunity, arguing:

> Congress' power to authorize federal remedies against state agencies that

Congress' Article I spending power, harassed students cannot maintain their suits against public schools deemed state instrumentalities unless they can demonstrate that the state waived its sovereign immunity by accepting federal funds. The Supreme Court has recently addressed both the scope of Congress' power to abrogate states' immunity and to provide for states' waiver of immunity.

1. Abrogating States' Immunity

This term the Supreme Court in *Kimel v. Florida Board of Regents*,[30] a closely divided five to four decision, held that Congress had exceeded its powers in subjecting states to federal age discrimination suits by their employees under the Age Discrimination in Employment Act (ADEA). This case provided an opportunity for the Court to refine its landmark ruling in *Seminole Tribe*[31] in which the Court held that Congress, under its Article I powers, lacked the power to abrogate states' immunity. In order to abrogate a state's sovereign immunity, Congress must have (1) "unequivocally expresse[d] its intent to abrogate the immunity" and (2)

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violate federal statutory obligations is coextensive with its power to impose those obligations on the States in the first place. Neither the Eleventh Amendment nor the doctrine of sovereign immunity places any limit on that power.

It is the Framers' compromise giving each State equal representation in the Senate that provides the principal structural protection for the sovereignty of the several States. The Framers also directed that the House be composed of Representatives selected by voters in the several States, the consequence of which is that "the states are the strategic yardsticks for the measurement of interest and opinion, the special centers of political activity, the separate geographical determinants of national as well as local politics."

. . . [T]he [Eleventh] Amendment only places a textual limitation on the diversity jurisdiction of the federal courts. Because the Amendment is a part of the Constitution, I have never understood how its limitation on the diversity jurisdiction of federal courts defined in Article III could be "abrogated" by an Act of Congress. Here, however, private petitioners did not invoke the federal courts' diversity jurisdiction; they are citizens of the same State as the defendants and they are asserting claims that arise under federal law. Thus, today's decision (relying as it does on *Seminole Tribe*) rests entirely on a novel judicial interpretation of the doctrine of sovereign immunity, which the Court treats as though it were a constitutional precept. It is nevertheless clear to me that if Congress has the power to create the federal rights that these petitioners are asserting, it must also have the power to give the federal courts jurisdiction to remedy violations of those rights, even if it is necessary to "abrogate" the Court's "Eleventh Amendment" version of the common-law defense of sovereign immunity to do so. That is the essence of the Court's holding in *Pennsylvania v. Union Gas Co.* . . . I remain convinced [it] was correctly decided.

Id.

30. 528 U.S. 62, 67 (2000).

31. 517 U.S. 44, 47 (1996).

"acted pursuant to a valid exercise of power."[32] In *Kimel*, the Court decided that while Congress did unequivocally express its intent to abrogate state immunity under the ADEA,[33] it did not act pursuant to a valid exercise of power. Specifically, applying the "congruence and proportionality" test established in *City of Boerne v. Flores*,[34] the Court found that the ADEA is not "appropriate legislation" under Section Five of the Fourteenth Amendment.[35]

In *Kimel*, the Court explained:

> . . . Congress' power "to enforce" the [Fourteenth] Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text.
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> Nevertheless, we have also recognized that the same language that serves as the basis for the affirmative grant of congressional power also serves to limit that power. For example, Congress cannot "decree the substance of the Fourteenth Amendment's restrictions on the States . . . . It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation." . . . In *City of Boerne*, we noted that the determination whether purportedly prophylactic legislation constitutes appropriate remedial legislation, or instead effects a substantive redefinition of the Fourteenth Amendment right at issue, is often difficult . . . . Accordingly, recognizing that "Congress must have wide latitude in determining where [that line] lies," we held that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[36]

The Court then found the ADEA to violate the congruence and proportionality test. First, noting that the Court has "considered claims of unconstitutional age discrimination under the Equal Protection Clause three times" and found each time that they did not violate the Equal Protection Clause, the majority concluded that "the substantive requirements the ADEA imposes on state and local governments are disproportionate to any unconstitutional conduct that conceivably could be targeted by the Act."[37]

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32. *Id.* at 55 (internal quotations omitted).
33. 528 U.S. at 72-78.
34. 521 U.S. 507, 520 (1997).
35. *Kimel*, 528 U.S. at 81-88.
36. *Id.* at 81 (citations omitted).
37. *Id.* at 83.

The Court distinguished the case of age discrimination from that of race or sex discrimination, stating:

> Age classifications, unlike governmental conduct based on race or gender, cannot be characterized as "so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy." Older persons, again, unlike those who suffer discrimination on the basis of race or gender, have not been subjected to a "history of purposeful unequal treatment." Old age also does not define a discrete and insular minority because all persons, if they live out their normal life spans, will experience it. Accordingly, . . . age is not a suspect classification under the Equal Protection Clause.[38]

The majority stated that "the ADEA makes unlawful, in the employment context, all 'discriminat[ion] against any individual . . . because of such individual's age'"[39] and thus "prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard."[40] Moreover, the majority found that the ADEA was not reasonable prophylactic legislation but rather an attempt to redefine the states' legal obligations. The Court found that "the ADEA's legislative record confirms that Congress' 1974 extension of the Act to the states was an unwarranted response to a perhaps inconsequential problem. Congress never identified any pattern of age discrimination by the states, much less any discrimination whatsoever that rose to the level of constitutional violation."[41] The majority thus concluded that

> [i]n light of the indiscriminate scope of the Act's substantive requirements, and the lack of evidence of widespread and unconstitutional age discrimination by the States . . . the ADEA is not a valid exercise of Congress' power under Section Five of the Fourteenth Amendment. The ADEA's purported abrogation of the States' sovereign immunity is accordingly invalid.[42]

This case is merely the latest in a series of cases invalidating congressional authority to abrogate States' immunity.[43] These cases, in

38. *Id.* (citations omitted).
39. *Id.; see also* 29 U.S.C. § 623(a)(1) (1994).
40. *Kimel*, 528 U.S. at 86.
41. *Id.* at 89.
42. *Id.* at 91.
43. *See generally* Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank, 527 U.S. 627 (1999) (holding that the Patent and Plant Variety Protection Remedy

general, suggest that the Court will carefully scrutinize any attempt by Congress to hold states to a federal statutory standard that exceeds the floor established by the Fourteenth Amendment. Section Five merely grants Congress the right to "enforce" the dictates of the Fourteenth Amendment, not to establish standards that provide heightened protection to individuals vis-a-vis the states. Additionally, although the Court has recognized that "[d]ifficult and intractable problems often require powerful remedies,"[44] and Congress is not precluded by Section Five from enacting reasonably prophylactic legislation, Congress must provide sufficient reasons for such action by demonstrating evidence of the evil perpetrated by the states that it purports to remedy.

The same month *Kimel* was decided, the Fifth Circuit, in *Pederson v. Louisiana State University*,[45] determined that Congress has the power, under Section Five, to abrogate states' immunity under Title IX. Finding that there is no dispute that Congress unambiguously expressed its intent to abrogate states' immunity pursuant to section 2000d-7,[46] the only issue before the court was whether Congress acted pursuant to a valid exercise of power.[47] The court acknowledged that Title IX was enacted pursuant to Congress' Article I spending power but further noted that the subjective intent of Congress in enacting legislation is irrelevant.[48] Thus, if Congress could have enacted Title IX pursuant to its Section Five powers it could validly abrogate states' immunity.[49]

The court turned to its analysis in *Lesage v. Texas*,[50] in which a Fifth Circuit panel had held that Title VI, which proscribes racial discrimination in federally-funded public institutions, as well as the subsequent explicit abrogation of state sovereign immunity to permit federal enforcement of Title VI, were within Congress' power to enforce the Fourteenth

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Clarification Act (Patent Remedy Act), which subjected states to patent infringement suits, was not appropriate legislation under Section Five of the Fourteenth Amendment); College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) (held that sovereign immunity was neither validly abrogated by the Trademark Remedy Clarification Act (TRCA), nor voluntarily waived by the state's activities in interstate commerce); Alden v. Maine, 527 U.S. 706 (1999) (held that FLSA provision authorizing private suits against states is unconstitutional abrogation of state immunity); City of Boerne v. Flores, 521 U.S. 507 (1997) (held that the Religious Freedom Restoration Act of 1993 (RFRA) was not appropriate legislation under Section Five).

44. *Kimel*, 528 U.S. at 88.
45. 201 F.3d 388, 404-05 (5th Cir. 2000).
46. *See supra* text accompanying note 25.
47. *Pederson*, 201 F.3d at 404.
48. *See id.* at 405.
49. *See id.* at 405-06.
50. 158 F.3d 213 (5th Cir. 1998).

Amendment.[51] The *Lesage* court found that Title VI "prohibits precisely that which the Constitution prohibits in virtually all possible applications."[52] The court did note that "[t]he text of the statute apparently does not account for a constitutionally permissible race-based distinction,"[53] citing *United States v. Paradise*,[54] as an example of a case in which a narrowly tailored race-based remedy survived scrutiny. However, because so few race-based classifications are permissible, the court concluded that "[i]t can therefore hardly be argued that the statute does not reflect 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'"[55] Thus, Congress could have enacted Title VI pursuant to its Section Five powers. Moreover, even if subjective intent were relevant,

> it is the statute abrogating immunity, not the particular substantive provision of the statute, which specifically concerns us. Congress unquestionably enacted 42 U.S.C. [section] 2000d-7 with the "intent" to invoke the Fourteenth Amendment's congressional enforcement power . . . . The Congressional Record contains specific references to exercising congressional power under Section Five of the Fourteenth Amendment to accomplish this abrogation of Eleventh Amendment immunity.[56]

Extending this analysis to Title IX's proscription of sex discrimination in federally-funded educational institutions, the *Pederson* court stated:

> We believe it beyond peradventure that Title IX meets the test first explained in *Seminole Tribe* and recently clarified by *College Savings Bank* and *Florida Prepaid.* Congress expressed a clear intent to abrogate immunity with CRREA, and that Act was appropriately passed under Congress's [section] 5 power to remedy past discrimination. As such, it was appropriate legislation itself and its goal—protecting the reach of Title IX and other similar

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51. *Id.* at 217.
52. *Id.*
53. *Id.* at 217 n.2.
54. 480 U.S. 149 (1987) (district court order imposing fifty percent promotion requirement on the Alabama Department of Public Safety for the selection of new state trooper corporals was permissible under the Equal Protection Clause of the Fourteenth Amendment, in that it was justified by compelling governmental interest in eradicating discriminatory exclusion of blacks from positions and was narrowly tailored to serve its purposes).
55. *Lesage*, 158 F.3d at 217 (quoting City of Boerne v. Flores, 521 U.S. 507, 520 (1997)).
56. *Id.* at 218 (citation omitted).

statutes—was, by extension, also appropriate.[57]

While the conclusion in *Pederson* might very well be correct, the reasoning of the court lacks the substantive support the Supreme Court has recently found necessary before upholding congressional power to abrogate states' immunity under the "congruence and proportionality" test.[58] "In order to enact 'appropriate' legislation under the remedial power of Section Five, Congress must identify conduct transgressing the Fourteenth Amendment's substantive provisions and must tailor its legislative scheme to remedy or to prevent such conduct."[59] Sex discrimination, while subject to heightened scrutiny, is not subject to strict scrutiny as is race discrimination. The scope of Title IX, proscribing *all* forms of sex discrimination in federally-funded educational programs, does not allow for sex-based classifications tailored to serve important governmental interests. Thus, a state may argue that Congress is exceeding its power to enforce the Fourteenth Amendment by proscribing constitutional sex-based discrimination. It is significant that the Court in *Kimel* distinguished age

57. 201 F.3d 388, 407 (5th Cir. 2000).

58. In fact, other circuits finding that Congress validly abrogated states' immunity under Title IX fall into the same trap of concluding without any serious "congruence and proportionality" analysis. *See* Franks v. Kentucky Sch. for the Deaf, 142 F.3d 360, 363 (6th Cir. 1998) ("Section Five of the Fourteenth Amendment grants Congress the authority to enforce the Amendment's substantive provisions which proscribe, *inter alia*, sex discrimination in education. Since Title IX also proscribes gender discrimination in education, it follows that Congress had the authority, pursuant to Section Five, to make Title IX applicable to the states.") (citation omitted). Furthermore in *Doe v. University of Ill.*, 138 F.3d 653, 660 (7th Cir. 1998) the Seventh Circuit stated:

> The appropriate question is, were "the objectives of [Title IX] . . . within Congress' power under the [Fourteenth] amendment?" The answer is, quite plainly, that they were. As the court below noted . . . protecting Americans against "invidious discrimination of any sort, including that on the basis of sex," is a central function of the federal government. Prohibiting "arbitrary, discriminatory government conduct . . . is the very essence of the guarantee of 'equal protection of the laws' of the Fourteenth Amendment." Title IX prohibits such discriminatory government conduct on the basis of sex when it occurs in the context of State-run, federally funded educational programs and institutions. 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 Five of the Fourteenth Amendment. For that reason, Congress validly abrogated the States' Eleventh Amendment immunity from suit when it passed the Equalization Act expressly making States subject to suits to enforce Title IX.

(citations omitted). *See also* Crawford v. Davis, 109 F.3d 1281, 1283 (8th Cir. 1997) ("Because the Supreme Court has repeatedly held that those substantive provisions proscribe gender discrimination in education, see, e.g., *United States v. Virginia*, 518 U.S. 515 (1996), we are unable to understand how a statute enacted specifically to combat such discrimination could fall outside the authority granted to Congress by § 5.").

59. *Pederson*, 201 F.3d at 407 (citation omitted).

discrimination from both race and sex discrimination, noting that a state may often meet rational basis scrutiny in enacting age-based legislation.[60] But this does not automatically save all sex-based legislation. Without more, it is unclear that the current Court would so easily uphold Congress' abrogation of state immunity under Title IX.

2. Waiving States' Immunity

Even if the Supreme Court were to find that Congress lacked the authority to abrogate states' immunity under Title IX, private plaintiffs have a strong argument that by accepting federal funds, states waive their immunity from suit in federal court. Just last term, the Court in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board* limited the conditions under which a state may be found to have impliedly waived its immunity by formally overruling *Parden v. Terminal Railroad of Alabama Docks Department.*[61] The parties had argued that:

> [A] *Parden*-style waiver of immunity [applied] so long as the following two conditions are satisfied: First, Congress must provide unambiguously that the State will be subject to suit if it engages in certain specified conduct governed by federal regulation. Second, the State must voluntarily elect to engage in the federally regulated conduct that subjects it to suit.[62]

The Court disagreed, finding that the "constructive-waiver experiment of *Parden* was ill conceived."[63] The Court noted that (1) "*Parden*-style waivers are simply unheard of in the context of *other* constitutionally protected privileges"[64] and (2) "[r]ecognizing a congressional power to exact constructive waivers of sovereign immunity through the exercise of Article I powers would also, as a practical matter, permit Congress to circumvent the antiabrogation holding of *Seminole Tribe*."[65] The Court, however, distinguished *Parden*-style waivers from those based upon a state's acceptance of federal funds.

> [W]e have held in such cases as *South Dakota v. Dole*, 483 U.S. 203, 107 S. Ct. 2793, 97 L. Ed. 2d 171 (1987), that Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not

60. *See* Kimel v. Florida Bd. of Regents, 528 U.S. 62, 83 (2000).
61. 527 U.S. 666 (1999) *overruling* Parden v. Terminal R.R. of Alabama Docks Dep't, 377 U.S. 184 (1964).
62. *Id.* at 679.
63. *Id.* at 680.
64. *Id.* at 681.
65. *Id.* at 683.

> require them to take, and that acceptance of the funds entails an agreement to the actions. These cases seem to us fundamentally different from the present one . . . . Congress has no obligation to use its Spending Clause power to disburse funds to the States; such funds are gifts. In the present case, however, what Congress threatens if the State refuses to agree to its condition is not the denial of a gift or gratuity, but a sanction: exclusion of the State from otherwise permissible activity [advertising in interstate commerce].[66]

Within one month of this decision, the Fourth Circuit, in *Litman v. George Mason University*,[67] held that George Mason University (GMU), a state instrumentality, waived its sovereign immunity from suit in federal court by voluntarily accepting federal education funding under Title IX. The court first noted that a state may

> "[W]aive its immunity by voluntarily participating in federal spending programs when Congress expresses 'a clear intent to condition participation in the programs . . . on a State's consent to waive its constitutional immunity.'" . . . But because of the Eleventh Amendment's vital role in preserving the federal balance, determinations of whether a state has waived its immunity are subjected to "stringent," exacting standards.[68]

Thus, the "mere receipt of federal funds cannot establish that a State has consented to suit in federal court."[69]

Turning to the Title IX framework, the court found that the statute provides unambiguously for a waiver of immunity as a condition on the receipt of federal education funds. The court summarized Congress' Spending Clause power as follows:

> As a federal spending program, it operates "much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." In other words, in exercising its spending power, the federal government "condition[s] an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds." And it also conditions

66. *Id.* at 686-87.

67. 186 F.3d 544 (4th Cir. 1999) (Ms. Litman brought suit against GMU under Title IX, claiming sex discrimination and sexual harassment by employees of GMU.).

68. *Id.* at 550 (citation omitted).

69. *Id.* at 551 (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 246-47 (1985) (citations omitted)).

> these funds on the recipient state's consent to be sued in federal court for an alleged breach of the promise not to discriminate . . . . Spending Clause legislation, in contrast to other Article I legislation or Section Five legislation, presents a state with a choice: the state can either comply with certain congressionally mandated conditions in exchange for federal funds or not comply and decline the funds . . . . This mechanism for exercising power under the Spending Clause, however, must have limits . . . . *First*, the exercise of the spending power must be for the general welfare. *Second*, if the grant or expenditure is, when made to the states, accompanied by conditions, the conditions must be stated "unambiguously." *Third*, any conditions imposed must "bear some relationship to the purpose of the federal spending" so that a reasonable nexus exists between the two. *Fourth*, the grant or expenditure and the conditions attached to it may not violate any independent constitutional prohibition. And *fifth*, the financial inducement offered by Congress must not be "so coercive as to pass the point at which pressure turns into compulsion."[70]

The question thus becomes whether the conditions on the receipt of federal funds under Title IX—that the recipient (1) not discriminate based on sex [71] and (2) waive its sovereign immunity when responding to alleged acts of discrimination[72]—fall within these limitations on Congress' spending power. First, it was *not* disputed that Title IX funds are spent for the general welfare, that the two conditions are reasonably related to grants of education funds or that the attachment of these conditions to the funding arrangement is not coercive. Rather, GMU argued:

> [I]t did not knowingly waive its Eleventh Amendment immunity because that condition of waiver was not made unambiguously clear in the text of [section] 2000d-7(a)(1) [since the provision] uses neither the term "condition" nor the term "waiver" and . . . "it is constitutionally impossible for Congress to require the States to waive the Eleventh Amendment as a condition of receiving federal funds."[73]

First, the court found that GMU did knowingly waive its immunity. Under Title IX a recipient must apply for federal funding and must manifest its intent to comply with the federal regulations imposed on the

70. *Id.* at 551-53 (citations omitted).
71. *See* 20 U.S.C. § 1681(a) (2000).
72. *See* 42 U.S.C. § 2000d-7(a)(1) (2000).
73. Litman v. George Mason Univ., 186 F.3d 544, 553 (4th Cir. 1999).

receipt of such funds.[74] Among the conditions of receipt is the waiver provision of section 2000d-7(a)(1), which the Supreme Court has characterized as "unequivocal."[75] Moreover, the Fourth Circuit rejected GMU's

> assertion that a statute "must say something like 'as a condition of receiving federal funds under this Act, the States agree to waive their Eleventh Amendment immunity.'" The only difference between GMU's proffered language and that employed in § 2000d-7(a)(1) is that the former is cast in the affirmative (i.e., "the States agree to waive") and the latter in the negative (i.e., "a State shall not be immune"). But this difference in phrasing is of no constitutional import.[76]

Next, the court found no merit in GMU's contention that Congress may not require states to waive their immunity as a condition of receiving federal funds.[77] While Congress may not use its Spending Clause power to induce states to act unconstitutionally, "the range of permissible conditions extend beyond the original enumerations of congressional power granted by the Constitution."[78] Further, "while abrogating Eleventh Amendment immunity would be impossible unless exercised under the Fourteenth Amendment, conditioning federal funds on an unambiguous waiver of a state's Eleventh Amendment immunity is as permissible as a state's direct waiver of such immunity."[79] The Fourth Circuit, quoting the Court in *College Savings Bank,* recognized that unlimited "congressional power to exact constructive waivers of sovereign immunity through the exercise of Article I powers would also, as a practical matter, permit Congress to circumvent the antiabrogation holding of *Seminole Tribe.*"[80] Nevertheless,

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74. *See* 34 C.F.R. § 106.4(a) (2000) (providing, in pertinent part, that "[e]very application for Federal financial assistance for any education program or activity shall as condition of its approval contain or be accompanied by an assurance from the applicant or recipient, satisfactory to the Assistant Secretary, that each education program or activity operated by the applicant or recipient and to which this part applies will be operated in compliance with this part").

75. Lane v. Pena, 518 U.S. 187, 198 (1996). The Court in *Atascadero* held that section 504 of the Rehabilitation Act of 1973, 29 U.S.C. section 794, did not unequivocally demonstrate Congress' intent to abrogate the states' Eleventh Amendment immunity. 473 U.S. 234, 245-46 (1985). Section 2000d-7 was a response to that decision. *See* Pederson v. Louisiana State Univ., 201 F.3d 388, 404 n.17 (5th Cir. 2000).

76. *Litman,* 186 F.3d at 554.

77. *See id.*

78. *Id.*

79. *Id.* at 555.

80. *Id.* at 556 (quoting College Savings Bank v. Prepaid Postsecondary Educ. Bd., 527 U.S. 666 (1999)).

Seminole Tribe and its progeny do not

> preclude Congress from conditioning federal grants on a state's consent to be sued in federal court to enforce the substantive conditions of the federal spending program. Indeed, to do so would affront the Court's acknowledgment in *Seminole Tribe* of "the unremarkable . . . proposition that States may waive their sovereign immunity." Furthermore, in *New York* the Court emphasized that principles of federalism do not pose an independent constitutional bar to Congress' powers under the Spending Clause: "By [employing the spending power to attach conditions on the States' receipt of federal funding], as by any other permissible method of encouraging a State to conform to federal policy choices, the residents of the State retain the ultimate decision as to whether or not the State will comply. If a State's citizens view federal policy as sufficiently contrary to local interests, they may elect to decline a federal grant."[81]

Thus, to summarize, under a theory of abrogation and/or waiver, harassed students likely retain the right to hold state instrumentalities liable for damages in federal court for violations of Title IX. Moreover, such a result is wholly consistent with basic federalism principles. Congress, acting pursuant to its Article I spending power and its Section Five Fourteenth Amendment power, enacted Title IX, recognizing the important federal interest in eradicating sex discrimination in our nation's schools. The remaining question, however, is whether student-on-student sexual harassment constitutes sex discrimination.

III. SEX DISCRIMINATION

The federalism argument above is founded on a belief that the conduct at issue in *Davis*—student-on-student sexual harassment that is so severe, pervasive and objectively offensive that it has a systemic effect on the educational programs and thus deprives the victims of access to educational opportunities—constitutes sex discrimination. The majority was correct to find that such harassment constitutes sex discrimination; however, the argument would be more persuasive if the Court had explained directly the theoretical justification for such a result.

The majority grounded its reasoning on the statutory text of Title IX, which protects students from being "excluded from participation in" or "denied the benefits of" any education program.[82] Thus, if the peer sexual

81. *Id.* (citations omitted).
82. Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 650 (1999).

harassment deprives victims of educational opportunities on the basis of their sex, it should be deemed sex discrimination. The majority explained that whether the harassing conduct rises to a level of "actionable" harassment, i.e. discrimination,

> depends on a constellation of surrounding circumstances, expectations, and relationships, including but not limited to, the ages of the harasser and the victim and the number of individuals involved. . . . [U]nlike the adult workplace, . . . students often engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to it. Damages are not available for simple acts of teasing and name-calling among school children, however.[83]

The victim must demonstrate "a concrete, negative effect on her . . . ability to receive an education."[84]

The dissent, in contrast, stated that to classify student-on-student sexual harassment as sex discrimination erases, "in one stroke, all differences between children and adults, peers and teachers, schools and workplaces."[85] What are the differences to which the dissent referred? There are several differences that distinguish schools and workplaces, among them are: (1) the degree of socialization of the harassers and victims; (2) the presumed competence of the harassers and victims to make informed choices about sexuality; (3) the degree of hierarchy in each setting; (4) the level of control that harassers exercise over the setting and (5) the history of female access to or male entitlement in the respective environments.[86]

These differences do not support a finding that peer sexual harassment in schools is not sex discrimination. The first two differences, the degree of socialization and presumed competence of the harassers and their victims, will differentiate the type of conduct considered sex discrimination in the school setting from that in the employment context. However, these differences do not negate the fact that certain student peer sexual harassment can comprise sex discrimination because the harm of sexual harassment in the schools is qualitatively the same as the harm of sexual harassment in the workplace.[87] The dissent in the Eleventh Circuit *Davis* decision quite persuasively argued that it is equally important, if not more

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83. *Id.* at 651-52 (citations omitted).

84. *Id.* at 654.

85. *Id.* at 675 (Kennedy, J., dissenting).

86. *See generally* Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169 (1998).

87. *See* Katherine Franke, *Gender, Sex, Agency and Discrimination: A Reply to Professor Abrams*, 83 CORNELL L. REV. 1245, 1247 (1998) [hereinafter Franke, *Reply*].

so, to protect students from sexual harassment than to protect workers from sexual harassment since

> the damage caused by the sexual harassment also is arguably greater in the classroom than in the workplace, because the harassment has a greater and longer lasting impact on its young victims, and institutionalizes sexual harassment as accepted behavior. "Moreover, a nondiscriminatory environment is essential to maximum intellectual growth and is therefore an integral part of the educational benefits that a student receives."[88]

"[S]chool is a place where girls gain a sense of themselves as competent, confident, and independent individuals . . . sexual harassment affects girls educationally, emotionally, and physically,"[89] making them feel more afraid and less self-confident. "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."[90]

Neither do the differences in the degree of hierarchy, level of control, nor history of access prevent student-on-student sexual harassment from being characterized as sex discrimination. First, a broad view of power encompasses societal structures that reinforce the harasser's dominance over the victim. As Daniel McBride states:

> Subordination by student sexual harassment relies, in part, upon the conveyance of structural power from the school to the harassers . . . . By refusing to act, the school cedes power to the student to control the victim's educational environment. The harassing student then derives a measure of subordinating power over the victim by creating a hostile environment and controlling the level of hostility.[91]

Second, "the ability to control and influence behavior exists to an even greater extent in the classroom than in the workplace, as students look to

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88. Davis v. Monroe County Bd. of Educ., 120 F.3d 1390, 1417 n.7 (11th Cir. 1997) (Barkett, J., dissenting) (internal citation omitted).

89. Franke, *Reply*, *supra* note 87, at 1248 (citing OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., SEXUAL HARASSMENT: IT'S NOT ACADEMIC (1997) (noting that "[s]exual harassment can threaten a student's physical or emotional well-being, influence how well a student does in school, and make it difficult for a student to achieve his or her career goals"); *see also* Nan Stein, *Secrets in Public: Sexual Harassment in Public (And Private) Schools*, Center for Research on Women Working Paper No. 256 (1993) (recounting the effects of sexual harassment on students).

90. *Davis*, 120 F.3d at 1417 n.7.

91. Daniel McBride, *Guidance for Student Peer Sexual Harassment? Not!*, 50 STAN. L. REV. 523, 545 (1998).

their teachers for guidance as well as for protection."[92] Third, there is a history of denial of educational opportunities to females[93] demonstrating similarities between the history of women's access to education and their access to the workplace.

There is a strong body of work analyzing the theoretical bases for characterizing sexual harassment as sex discrimination. Several commentators have developed theoretical models to justify sexual harassment as a form of sex discrimination.[94] These models have been derived, primarily, in the context of employment discrimination; however, one can apply this jurisprudence to student-on-student sexual harassment in order to demonstrate that student peer sexual harassment can constitute sex discrimination.[95] There are basically four theories explaining why sexual harassment is sex discrimination.[96] The following very briefly describes each theory and discusses their relevance to the *Davis* decision and to peer sexual harassment in schools.

First, sexual harassment is sex discrimination because it violates formal equality principles. The underlying tenet is that "sexual harassment limits women in a way men are not limited."[97] Thus, women are forced to overcome obstacles that similarly situated men are not. This violates our notions of fairness because individuals are being treated differently based solely on their sex rather than upon standards of merit. The majority in *Davis* implicitly relied on this model to justify finding that student peer sexual harassment is sex discrimination by requiring that the harassment be

92. *Davis*, 120 F.3d at 1417 n.7.

93. *See, e.g.*, Pamela J. Smith, *Looking Beyond Traditional Educational Paradigms: When Old Victims Become New Victimizers*, HAMLINE L. REV. 101, 108-12 (1999); *see also* United States v. Virginia, 518 U.S. 515, 537 (1996) (Justice Ginsburg summarized the history of women in higher education in Virginia as follows: "First, protection of women against higher education; next, schools for women far from equal in resources and stature to schools for men; finally, conversion of the separate schools to coeducation."); 2 THOMAS WOODY, A HISTORY OF WOMEN'S EDUCATION IN THE UNITED STATES 254 (1929).

94. *See, e.g.*, Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998); Abrams, *supra* note 86; Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691 (1997) [hereinafter Franke, *Sexual Harassment*]; Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 446 (1997); CATHARINE MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979).

95. *See generally* McBride, *supra* note 91.

96. Commentators disagree over the adequacy of each theory described here. *See, e.g.*, Franke, *Sexual Harassment*, *supra* note 94, at 729-62 (criticizing theories of formal equality, purely sexual, and subordination). However, my purpose today is not to endorse nor critique these theories but to suggest that they can be applied to the school context although they were developed in the context of the workplace, and thus lend support to the finding that actionable student-on-student sexual harassment constitutes sex discrimination.

97. Franke, *Sexual Harassment*, *supra* note 94, at 706.

such as to deny victims *equal access* to educational opportunities,[98] the harassment limits girls in a way that boys are not limited. This finding is supported by studies that have confirmed that "peer sexual harassment creates unequal educational opportunities between males and females."[99]

A second theory used to demonstrate why sexual harassment is sex discrimination is that it is sexual. This theory is founded on a belief that the sexual aspect of the harassment has the "effect and purpose of sexualizing women by reducing their humanity generally, and their status as workers to objects of male sexual pleasure."[100] There is a problem, however, with extending such a theory to the school context. The theory is founded on a belief that sexual conduct of any kind is inappropriate in the workplace.[101] However, a certain amount of sexual conduct is appropriate in the school context since school provides a forum for students to meet and date other students while exploring their sexuality. Thus, this theory, if appropriate at all, would require careful application in the school context.

A third theory is that sexual harassment is sex discrimination because it is sexually subordinating. This theory is based upon a view that "women's situation is a structural problem of enforced inferiority."[102] Catharine MacKinnon defined this approach in terms of what it does, it "replicates and perpetuates a sexual hierarchy in which men possess and maintain their power by virtue of their ability to define women in terms of their sexuality."[103] The *Davis* dissent implicitly recognized this model of sexual harassment but interpreted the model narrowly, suggesting that only a formal power relationship between the harasser and victim will satisfy such a model and, thus, student-on-student sexual harassment does not qualify as sex discrimination.[104] However, as stated above,[105] a broader view of power recognizes the conveyance of structural power to the individual harasser, which in turn can have the effect of subordinating the victim even if the harasser and victim are similarly situated.

Finally, Katherine Franke argues that sexual harassment is sex discrimination because it establishes a technology of sexism.[106] This theory

98. Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 650 (1999).

99. McBride, *supra* note 91, at 542; *see also* Davis v. Monroe County Bd. of Educ., 120 F.3d 1390, 1417 (11th Cir. 1997) ("[A] female student should not be required to run a gauntlet of sexual abuse in return for the privilege of being allowed to obtain an education.").

100. Franke, *Sexual Harassment*, *supra* note 94, at 715.

101. *See id.* at 725.

102. *Id.* at 726.

103. *Id.* at 728 (quoting MACKINNON, *supra* note 94, at 4-5).

104. 526 U.S. 629, 675 (1999) (Kennedy, J., dissenting).

105. *See supra* text accompanying note 91.

106. Franke, *Sexual Harassment*, *supra* note 94, at 762-71.

is perhaps the most satisfying as it equally accounts for different, as well as, same-sex sexual harassment. This theory conceptualizes sexual harassment as one of gender subordination defined in hetero-patriarchal terms that constructs the identities of men and women according to fundamental gender stereotypes: men as sexual conquerors and women as sexually conquered.[107] Further, it recognizes that such sexism "is also capable of oppressing some men by terrorizing, stigmatizing and inducing conformity among men who are effeminate, are sexually inexperienced, or depart in other ways from conventional masculinity."[108] Moreover, Professor Franke contends that her theory is as relevant in the school context as it is in the workplace, contending that the wrong of school-based sexual harassment is not different in any principled way from the wrong of workplace sexual harassment.[109] As Professor Franke explained so well in her reply to Professor Abrams:

> I raise the example of sexual harassment in the schools to illustrate the ways in which the sexual harassment of women by men in many different contexts, not just the workplace, operates as a means by which women are sexualized, women are feminized, women's competence is called into question, and various public and private fora are preserved as domains best suited to hetero-masculine men. Even though the harassment of men by women seemingly excuses men from the injury this conduct inflicts, I maintain that harassment of this kind serves to discipline men as well. Both the perpetrators of, and male witnesses to, the sexual harassment of women by men are subject to a regulatory practice that inscribes, enforces, and polices hetero-patriarchal gender norms in men. Men who sexually harass women are teaching both men and women a lesson about gendered power. This lesson, discipline, or enactment of hetero-patriarchal power can take place in the workplace, schools, athletics, political institutions, and countless other institutional settings within any culture. Each location contributes a unique set of intersectional dynamics that render the sting of gender discipline painful and effective in different ways. However, this fact does not undermine the overarching notion that the wrong of sexual harassment lies in its function as a technology of sexism.[110]

107. *See* Abrams, *supra* note 86, at 1191.
108. *Id.* at 1192.
109. Franke, *Reply*, *supra* note 87, at 1248.
110. *Id.* at 1249.

Thus, there exists theoretical support for categorizing student peer sexual harassment actionable under Title IX as sex discrimination, which, in turn, supports federal protection of equal rights consistent with our notions of federalism.

IV. THE FIRST AMENDMENT RIGHTS OF THE HARASSER

Finally, the *Davis* dissent argued that public schools held liable for student-on-student sexual harassment will be caught in a double-bind between the free speech rights of the harasser and the rights of the victim to be free from discrimination, which will in turn constrain schools' ability to discipline the harasser.[111] First, it is important to note that student peer harassment cases to date have involved unwanted touching in addition to vulgar speech.[112] Under these circumstances, the school would have every right to discipline the harassing student for the tortious conduct. Further, if the harassment is pure speech that qualifies as "fighting words"—words, which by their very utterance are directed at an individual and inflict injury or intend to incite an immediate breach of the peace—it is not protected.[113] However, if the harassment is based solely on the harasser's speech, which does not meet such criteria, a First Amendment conflict may arise.

A. THE COLLISION BETWEEN SEXUAL HARASSMENT LAW AND FIRST AMENDMENT RIGHTS IN THE WORKPLACE

While the Supreme Court has not dealt directly with the possible collision between sexual harassment laws and First Amendment rights,[114]

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111. 526 U.S. 629, 664-69 (1999) (Kennedy, J., dissenting).

112. *See, e.g., Davis*, 526 U.S. 629 (fifth-grade student was sexually harassed over six-month period by boys trying to touch her breasts and vaginal area and directing vulgarities at her); Oona, R.-S. v. Santa Rosa City Schs., 890 F. Supp. 1452, 1455-57 (N.D. Cal. 1995) (boys repeatedly referred to eleven-year-old girl's private parts as "melons" and "beavers," and student teacher fondled girl's buttocks), *aff'd sub nom.* Oona, R.-S. v. McCaffrey, 122 F.3d 1207 (9th Cir. 1997); Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006 (5th Cir. 1996) (while on bus, boys repeatedly harassed eighth-grade girls, swatting their bottoms, groping their genital areas and commenting "When are you going to let me fuck you?"), *cert. denied*, 519 U.S. 861 (1996). *But see* Emmalena Quesada, *Innocent Kiss or Potential Legal Nightmare: Peer Sexual Harassment and the Standard of School Liability Under Title IX*, 83 CORNELL L. REV. 1014, 1015-16 (1998) (discussing the publicity two young school boys received after being reprimanded for kissing a schoolmate). In the case of the young boys being reprimanded for kissing a schoolmate, the school principals claimed that such behavior violated the school's policy against sexual harassment, although such a trivial, isolated incident does not rise to the level of sexual harassment. *See id.* at 1018. Nevertheless, such publicity detracts from the seriousness of the real problem of sexual harassment on our campuses.

113. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).

114. The Court had an opportunity in the Title VII case *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), to confront the issue but declined to do so, making no reference to the

several commentators have analyzed the issue in the context of the workplace[115] and the university.[116] Just last year, the California Supreme Court, in *Aguilar v. Avis Rent A Car System, Inc.*, held that

> a remedial injunction prohibiting the continued use of racial epithets in the workplace does not violate the right to freedom of speech if there has been a judicial determination that the use of such epithets will contribute to the continuation of a hostile or abusive work environment and therefore will constitute employment discrimination.[117]

The U.S. Supreme Court denied certiorari[118] with Justice Thomas dissenting.[119] Avis was held liable under the Fair Employment Housing Act (FEHA), the California counterpart to Title VII, for allowing its manager to verbally harass Latino employees using derogatory racial epithets. Avis appealed on the ground that the injunction was an illegal prior restraint on speech.[120] Justice Thomas, however, noted that "[a]ttaching liability to the utterance of words in the workplace," which do not qualify as fighting words, obscenity or some other category recognized as outside the scope of First Amendment protection,

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First Amendment issues raised by both sides in the case.

115. *See, e.g.*, Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481 (1991); Richard Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog that Didn't Bark*, 1994 SUP. CT. REV. 1; Jules Gerard, *The First Amendment in a Hostile Environment: A Primer on Free Speech and Sexual Harassment*, 68 NOTRE DAME L. REV. 1003 (1993); Suzanne Sangree, *Title VII Prohibitions Against Hostile Environment Sexual Harassment and the First Amendment: No Collision in Sight*, 47 RUTGERS L. REV. 461 (1995); Marcy Strauss, *Sexist Speech in the Workplace*, 25 HARV. C.R.-C.L. L. REV. 1 (1990).

116. *See, e.g.*, Amy Candido, Comment, *A Right to Talk Dirty?: Academic Freedom Values and Sexual Harassment in the University Classroom*, 4 U. CHI. L. SCH. ROUNDTABLE 85 (1997); Beverly Earle & Anita Cava, *The Collision of Rights and a Search for Limits: Free Speech in the Academy and Freedom from Sexual Harassment on Campus*, 18 BERKELEY J. EMP. & LAB. L. 282 (1997); Robert W. Gall, *The University as an Industrial Plant: How a Workplace Theory of Discriminatory Harassment Creates a "Hostile Environment" for Free Speech in America's Universities*, 60 LAW. & CONTEMP. PROBS. 203 (1997); Rodney A. Smolla, *Academic Freedom, Hate Speech, and the Idea of a University*, 53 LAW. & CONTEMP. PROBS. 195 (1990).

117. Aguilar v. Avis Rent A Car System, Inc., 21 Cal. 4th 121, 126 (1999), *cert. denied*, 120 S. Ct. 2029 (2000).

118. It is likely the Court declined certiorari in *Aguilar* because the appellate record below was woefully inadequate. 21 Cal. 4th at 128, 132, 149. Moreover, the California Supreme Court plurality opinion rested solely on the prior restraint issue and declined to address the broader issue of whether the regulation of speech that constitutes harassment violates the First Amendment. *See id.* at 131 n.3.

119. Avis Rent A Car System, Inc. v. Aguliar, 120 S. Ct. 2029, 2029 (2000) (Thomas, J., dissenting.).

120. *See id.*

> is likely invalid for the simple reason that speech is fully protected speech . . . . Even if these words do constitute so-called "low-value speech," the content-based nature of FEHA's restriction—which bars speech based upon "race, religious creed, . . . sex, . . . or sexual orientation," but not because of . . . numerous other traits—renders it invalid under our current jurisprudence.[121]

Justice Thomas' statement suggests that anti-discrimination laws, including Title IX, may be invalid if liability is founded solely on speech (not to mention the special problems raised by the injunctive proscription as a prior restraint). Nevertheless, we still await the full Court's pronouncement on this difficult issue.

However, the concurring and dissenting California Justices in *Aguilar* did confront the issue of whether regulation of speech that constitutes harassment violates the First Amendment even though the petitioners chose not to appeal the money damages portion of the judgment.[122] Justices Werdegar and Brown of the California Supreme Court provided a good summary of the scholarship to date, analyzing the collision between one's right to equality and one's right to speak one's mind.

Justice Werdegar, in her concurrence, wrote separately to address the preliminary question: "whether the First Amendment permits imposition of civil liability under FEHA for pure speech that creates a racially hostile or abusive work environment."[123] She began by noting that no matter how distasteful the majority may find certain speech, such speech is generally protected under the First Amendment unless it falls into an enumerated category of speech found to lie outside the First Amendment's protection (none of which were alleged here).[124] She then turned to the two Supreme Court cases most relevant to this issue: *R.A.V.*[125] and *Harris*.[126] In *R.A.V.* the Court held that a municipal ordinance banning certain hate speech that met the definition of fighting words was unconstitutional because it involved "viewpoint discrimination by prohibiting hate speech on some topics but not others."[127] The concurring Justices in *R.A.V.*

> expressed concern that the majority's rationale called into question the constitutionality of sexual harassment claims under Title VII . . . Justice Scalia replied that the Title VII claims did not come

121. *Id.* at 2031 (internal citation omitted).
122. 21 Cal. 4th at 128.
123. *Id.* at 147 (Werdegar, J., concurring).
124. *See id.* at 151.
125. R.A.V. v. City of St. Paul, Minnesota, 505 U.S. 377 (1992).
126. Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993).
127. *Aguilar*, 21 Cal. 4th at 153.

> within the ambit of the majority's analysis: "since words can in some circumstances violate law directed not against speech but against conduct" . . . a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech. Thus for example, sexually derogatory "fighting words," *among other words*, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices.[128]

Justice Werdegar, admitting that Justice Scalia's explanation was "unclear," suggested that "all nine Justices participating in *R.A.V.* assumed that the core Title VII prohibition against speech that creates a discriminatory hostile work environment would pass constitutional muster."[129] Furthermore, turning to *Harris*, a Title VII sexual harassment case involving the defendant's speech as a contributory factor in creating the hostile work environment, Justice Werdegar noted that neither the majority nor concurring opinions in *Harris* "mention[ed] whether harassing speech, standing alone, may constitute a violation of Title VII consistent with the First Amendment."[130] Instead, the *Harris* Court simply found that a plaintiff's entitlement to relief under Title VII does not depend upon her ability to demonstrate psychological injury.[131]

Justice Werdegar, concluding that the question remains open, explained that strands of First Amendment doctrine, when "taken together, indicate that, even if speech creating a . . . hostile or abusive work environment is protected by the First Amendment, such speech may be subject to some restrictions consistent with that amendment."[132] These strands involve balancing the following considerations: the location of the speech, the relative captivity of the audience and the permissibility of time, place and manner restrictions on speech. First, the Court has recognized that "strong public policies governing the workplace—both private and public—may justify some limitations on the free speech rights of employers and employees," which, in turn, is consistent with the reality that workplaces "are not usually thought of as marketplaces for the testing of political and social ideas."[133] Second, employees are not reasonably free to walk away from their jobs when confronted with harassing speech, further suggesting

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128. *Id.* (quoting *R.A.V.*, 505 U.S. at 389) (alterations in original) (internal citations omitted).

129. *Id.* at 154 (quoting Richard H. Fallon, *Sexual Harassment, Content Neutrality, and the First Amendment Dog that Didn't Bark*, 1994 SUP. CT. REV. 1, 12).

130. *Id.*

131. *See id.*

132. *Id.* at 154-55.

133. *Id.* at 158-59.

that greater restrictions on speech may be tolerated in the workplace.[134] Finally, regarding the injunction and recognizing that it is not content-neutral, Justice Werdegar found a compelling state interest in eliminating unlawful discriminatory practices in private employment and, if limited to defendant's speech within the workplace, a multitude of alternative channels of communication remain for such speech that present a strong case for upholding the injunction.[135]

In contrast, dissenting Justice Brown found this analysis less than persuasive.[136] He began by quoting the "bedrock principle underlying the First Amendment, . . . that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[137] He then argued that *Harris's* deliberate silence does not suggest that harassing speech which creates a hostile work environment is not protected[138] and that *R.A.V.*, if relevant at all, "suggests Title VII's content-based regulation of speech is invalid to the extent it regulates 'fully protected speech' like the speech at issue here [in contrast to the fighting words proscribed in *R.A.V.*]."[139] He then chastised the *Aguilar* plurality for creating an exception that swallows the First Amendment by relying on the argument

> that the government is merely proscribing discriminatory conduct, whether or not spoken words are an integral part of that conduct, and therefore it can incidentally regulate speech in the workplace without violating the First Amendment . . . [because] it is the speaker's philosophical beliefs and opinions themselves that cause the injury, and it is those beliefs and opinions that the government wants to censor.[140]

Finally, although he claimed to find Justice Werdegar's concurring opinion no more persuasive, he argued that the California Constitution has balanced the scales weighing First Amendment rights against equality rights by "requiring the speaker to pay damages for injurious speech" while finding the prior restraint unconstitutional.[141] Thus, it appears that even Justice Brown would not find FEHA or Title VII damages liability based upon harassing speech violative of the First Amendment.

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134. *See id.* at 159-61.
135. *See id.* at 162-65.
136. *See id.* at 189, 193 (Brown, J., dissenting).
137. *Id.* at 190 (quoting Texas v. Johnson, 491 U.S. 397, 414 (1989)).
138. Aguilar v. Avis Rent A Car System, Inc., 21 Cal. 4th 121, 126 (1999).
139. *Id.* at 192.
140. *Id.*
141. *Id.* at 194.

B. THE COLLISION OF RIGHTS IN THE SCHOOL CONTEXT

Let us now turn to the education forum and Title IX liability for peer sexual harassment of youth in schools. A critical distinction exists between the analysis above and the issue raised by the dissent in *Davis*: the forum in which the discrimination and speech take place. Two fora are relevant to our Title IX inquiry—primary and secondary level schools and college campuses. Let's see what implications these different fora have on the collision of First Amendment rights and the right to be free from discrimination.

1. Primary and Secondary Schools

At the primary and secondary school levels, the Court has recognized that schools have two missions: to convey certain basic social and political norms while stimulating students to think independently.[142] The first mission supports more rigorous regulation of students' speech while the second supports little regulation. Thus, from a First Amendment standpoint these two missions are often in conflict.

In attempting to balance these two goals the Court has explained that while neither students nor teachers "shed their constitutional rights to freedom of speech . . . at the schoolhouse gate" there is "a need for affirming the comprehensive authority . . . of school officials, consistent with fundamental constitutional safeguards, . . . to control conduct in schools."[143] Thus, when the expressive conduct "materially disrupts classwork or involves substantial disorder or invasion of the rights of others," it is not constitutionally protected.[144] In fact, "it is a highly appropriate function for public school education to prohibit the use of vulgar and offensive terms in public discourse"[145] in an effort to "inculcate the habits and manners of civility as values" that are part of our democratic society.[146]

In recent years, primary and secondary schools have enacted racial harassment and intimidation policies in response to incidents of racial tensions.[147] Several courts have addressed the First Amendment

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142. *See* Stanley Ingber, *Socialization, Indoctrination, or the "Pall of Orthodoxy": Value Training in the Public Schools*, 1987 U. ILL. L. REV. 15, 15-20.

143. Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 506-07 (1969).

144. *Id.* at 513.

145. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986).

146. *Id.* at 681.

147. *See, e.g.*, Derby High School Racial Harassment and Intimidation Policy, which states in relevant part:

> District employees and student(s) shall not racially harass or intimidate another student(s) by name calling, using racial or derogatory slurs, wearing or possession of items depicting or implying racial hatred or prejudice.

implications of these policies when violators, suspended under them, have argued that the policies violate their right to free speech.[148] Recently, the Tenth Circuit upheld the three-day suspension of a seventh-grade student at Derby High School for drawing a confederate flag on a piece of paper during math class in violation of the district's policy. The panel cited Supreme Court precedent that "[a] school need not tolerate student speech that is inconsistent with its basic educational mission even though the government could not censor similar speech outside the school."[149] "[W]here school authorities reasonably believe that a student's uncontrolled exercise of expression might 'substantially interfere with the work of the school or impinge upon the rights of other students,' they may forbid such expression."[150] In the case of Derby High School, the court found that the school officials had sufficient evidence to support the restriction of such expression based upon the history of racial tensions.[151] Moreover,

> [t]he fact that [plaintiff's] conduct may not have resulted in an actual disruption of the classroom . . . does not mean that the school had no authority to act. The district had the power to act to prevent problems before they occurred; it was not limited to prohibiting and punishing conduct only after it caused a disturbance.[152]

Most recently, in a similar case, the Eleventh Circuit found school administrators, sued for violating a student's First Amendment rights after disciplining him for displaying the confederate flag in violation of school

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> District employees and students shall not at school, on school property or at school activities wear or have in their possession any written material, either printed or in their own handwriting, that is racially divisive or creates ill will or hatred. (Examples: clothing, articles, material, publications or any item that denotes Ku Klux Klan, Aryan Nation-White Supremacy, Black Power, Confederate flags or articles, Neo-Nazi or any other "hate" group. This list is not intended to be all inclusive). Violations of this policy shall result in disciplinary action by school authorities.

West v. Derby Unified Sch. Dist. No. 260, 206 F.3d 1358, 1361 (10th Cir. 2000) (emphasis omitted from original).

148. *See West*, 206 F.3d at 1358. *See generally* Denno v. School Bd. of Volusia County, Fla., 218 F.3d 1267 (11th Cir. 2000); Melton v. Young, 465 F.2d 1332 (6th Cir. 1972).

149. *West*, 206 F.3d at 1366 (citing Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988) (internal citations and quotations omitted)); *see also* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986) ("The determination of what manner of speech in the classroom . . . is inappropriate properly rests with the school board.").

150. *West*, 206 F.3d at 1366 (quoting Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 509 (1969)).

151. *See id.* at 1366-67.

152. *Id.* (quoting West v. Derby Unified Sch. Dist. No. 260, 23 F. Supp. 2d 1223, 1233 (1998) (internal citations and quotations omitted)).

policy, entitled to qualified immunity.[153] The court analyzed the legal landscape of First Amendment school jurisprudence noting two guiding standards: the *Tinker* "reasonable risk of disruption" standard and the more flexible *Fraser* standard that allows school administrators to "balance the freedom of . . . students to advocate unpopular and controversial views against the school's interest in teaching students the boundaries of socially appropriate behavior."[154] Based upon the relevant legal landscape, the court concluded that the actions of the individual defendants in disciplining the student did not violate clearly established First Amendment rights under the more flexible *Fraser* standard.[155]

The school First Amendment cases relied upon in these cases, *Tinker* and *Fraser*, establish the contours of students' rights to expression while at school and the corresponding rights and responsibilities of school administrators to provide a sound educational program for all its students. In *Tinker*, the Court held that the school could not prohibit students from wearing black arm bands to school to demonstrate their disapproval of the Vietnam war unless the school could show that such expression would "materially and substantially interfer[e] with the requirements of appropriate discipline in the operation of the school."[156] Several years later, the Court, in *Fraser*, upheld the authority of the school to discipline a student who gave an offensively lewd and indecent speech at a school assembly.[157] The Court distinguished the sexually vulgar and offensive speech at issue in *Fraser* from the political views expressed in *Tinker*.[158] Although the political views expressed in *Tinker* may have been deemed "offensive" by many, the school was not constitutionally capable of disciplining such speech merely because it disagreed with the views expressed.[159] In contrast, it was the vulgarity and crudeness of the words themselves used by the student in *Fraser*, unrelated to the message conveyed, that was deemed both offensive and inappropriate in an educational environment.[160]

153. *See* Denno v. School Bd. of Volusia County, Fla., 218 F.3d 1267, 1278 (11th Cir. 2000).

154. *Id.* at 1275. The court cited both *West* and a recent Seventh Circuit case in which the panel noted: "Supreme Court decisions since *Tinker* indicate that the teaching of civility and the inculcation of traditional moral, social, and political norms may override student expression, or at least that it is permissible for a school board to so order its educational priorities." Muller v. Jefferson Lighthouse Sch., 98 F.3d 1530, 1539 (7th Cir. 1996) (claim brought by an elementary school child challenging the school's restriction on the child's attempt to distribute, during non-instructional times, invitations to a religious meeting).

155. *See Denno*, 218 F.3d at 1278.

156. *Tinker*, 393 U.S. at 513 (quoting Burnside v. Byars, 363 F.2d 744, 749 (1966)).

157. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986).

158. *Id.* at 680, 685.

159. 393 U.S. at 513-14.

160. 478 U.S. at 685; *see* Boroff v. Van Wert City Bd. of Educ., 220 F.3d 465, 473-74 (6th Cir. 2000) (Gilman, J., dissenting). Moreover, the speech in *Fraser* was delivered during a

How do these principles inform the debate between the free speech rights of the harasser and the victim's right to be free from sexual harassment? In fact, two courts have responded to claims of a violation of freedom of expression in the context of peer sexual harassment. In 1996, a junior high school student brought an action against the school for failure to stop peer sexual harassment.[161] The school defendants argued that holding schools liable, absent discrimination on the part of the school's agent, would unfairly place the school in a bind "between their obligation to avoid infringing the freedom of speech of the harassers and their duty to prevent harassment of the victim."[162] The district court judge disagreed, noting that "school First Amendment cases . . . recognize that a student's freedom of expression is limited both by other students' rights and by the school's right and duty to maintain order."[163] The court emphasized that such "cases not only permit schools, but specifically recognize a duty on the part of schools, to regulate the speech of their students in a manner consistent with proper education."[164]

More recently, following the *Davis* decision, student plaintiffs brought a facial challenge to a school's anti-harassment policy (patterned after Title IX).[165] The policy prohibited harassment based on race, sex and sexual orientation.[166] The plaintiffs argued that it violated their individual rights under the First and Fourteenth Amendments, including their free exercise of religion. They felt compelled by their religion to speak out about the sinful nature and harmful effect of homosexuality, which in turn might subject them to liability for harassment.[167] The trial court granted the defendant's motion to dismiss, finding that the definition of harassment as language or conduct that "'substantially interferes with a student's educational performance' or which creates a hostile educational environment"[168] does not on its face violate the Constitution.[169] The court recognized, however, that while under certain circumstances enforcement of the policy may have the effect of infringing on protected liberties, the policy itself does not have such an effect.[170]

The Third Circuit reversed the district court, finding the policy

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school-sponsored assembly in which the school administrators could reasonably have been perceived as condoning the expression if the administrators took no action. 478 U.S. at 685.

161. *See* Doe v. Petaluma City Sch. Dist., 949 F. Supp. 1415 (N.D. Cal. 1996).

162. *Id.* at 1426.

163. *Id.*

164. *Id.* at 1426-27.

165. *See* Saxe v. State College Area Sch. Dist., 77 F. Supp. 2d 621 (M.D. Pa. 1999), *rev'd*, 2001 WL 123852 (3d Cir. Feb. 14, 2001).

166. *See* 77 F. Supp. 2d at 623.

167. *See id.* at 622-23.

168. *Id.* at 625.

169. *See id.* at 627.

170. *See id.*

overbroad.[171] The court found that:

> [T]he policy would require the following elements before speech could be deemed harassing: (1) verbal or physical conduct (2) that is based on one's actual or perceived personal characteristics and (3) that has the purpose or effect of either (3a) substantially interfering with a student's educational performance or (3b) creating an intimidating hostile, or offensive environment.[172]

The court noted that this policy is broader than that of Title IX. First, it protects against harassment based upon "personal characteristics" not protected under federal law.[173] Second, it precludes harassment that only has the *purpose* of substantially interfering with a student's educational performance, which ignores *Tinker's* requirement that the speech actually cause a material disruption.[174] Third, it prohibits harassment that creates a hostile environment in contrast to *Tinker's* message that the "undifferentiated fear or apprehension of disturbance is not enough to justify a restriction of student speech."[175] Thus, the policy covers substantially more speech than that which will cause substantial disruption in the educational environment and is, therefore, unconstitutionally overbroad.

In sum, schools have a responsibility to maintain order on school grounds and thus, if the expression is likely to lead to material disruption of the educational environment, discipline is appropriate. Moreover, schools have a responsibility to teach manners and civility to their students, thus if the words (in contrast to the viewpoint)[176] expressed are vulgar and offensive, discipline is appropriate. With these guiding principles in mind, it appears that the *Davis* Court carefully drafted a standard that would protect the harassed and the alleged harasser. Only sexual harassment, even if purely verbal, that is so "severe, pervasive and objectively offensive"[177] to deny the harassed educational opportunities, is actionable. This standard carefully circumscribes prohibited speech to that which substantially interferes or disrupts the education environment. Thus, the standard allows schools to discipline students for sexual harassment without violating the free speech rights of the alleged harassers. Of course,

171. Saxe v. State College Area Sch. Dist., No. 99-4081, 2001 WL 123852 (3d Cir. Feb 14, 2001).
172. *Id.* at *14.
173. *Id.* at *7.
174. *See id.* at *14-*15.
175. *Id.* at *15.
176. Contrast "Suck my dick, you bitch" with "Girls are stupid and their only contribution to society is to make babies." While both expressions may be deemed "offensive," the words used in the first are vulgar and offensive, independent of the viewpoint expressed, while the second is offensive because of the viewpoint expressed.
177. Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 633 (1999).

schools should keep in mind that this "standard reflects the cumulative effect of all harassment on the victim. . . . The First Amendment, however is an individual right that is applied incident by incident."[178] So it is possible that a student acting within his free speech rights on one occasion could, when combined with other instances of improper behavior, have a severe and pervasive harassing effect on the victim.[179] Nevertheless, under the Court's school First Amendment jurisprudence and its Title IX jurisprudence, it is fairly clear that schools not only are able to punish harassers without violating their First Amendment rights, but they have an affirmative duty to do so consistent with their educational mission.

2. College Campuses

The college campus presents a different set of considerations. The *Davis* dissent focused primarily on this forum in its critique of the *Davis* majority, citing four cases each striking down university speech codes designed to deal with peer sexual and racial harassment.[180] The dissent argued that these cases demonstrate the limited nature of a university's control over student behavior and, thus, squarely depict the bind that college administrators face being bound by both Title IX and the First Amendment rights of their students.[181] As one First Amendment scholar has indicated: the resolution of the conflict between the protection of free speech and academic freedom on the one hand and protecting equality of all individuals through the regulation of hate speech and the enforcement of anti-discrimination laws on the other, "turns on how society conceives the idea of a university."[182] Professor Smolla suggests:

> For many, its [the university's] principal distinguishing characteristic is unfettered expressive freedom . . . that embraces, heart and soul, John Stuart Mill's wide-open marketplace [of ideas]. For others, . . . the university is an island of equality, civility, tolerance, and respect for human dignity; a place where the contemplative and rational faculties of man [and woman] should triumph over blind passion and prejudice.[183]

Of course, these two visions are not mutually exclusive. The Court, however, has generally emphasized the former vision. The Court has held

178. McBride, *supra* note 91, at 555.
179. *See id.*; *see also* Kay Kindred, *When Equal Opportunity Meets Freedom of Expression: Student-on-Student Sexual Harassment and the First Amendment in School*, 75 N.D. L. REV. 205, 208 (1999) (concluding that the First Amendment jurisprudence in the school context permits far greater regulation of harassing speech than in other contexts).
180. 526 U.S. at 667 (Kennedy, J., dissenting) (citations omitted).
181. *See id.*
182. Smolla, *supra* note 116, at 216.
183. *Id.* at 216-17.

that the state cannot impose a policy that prohibits certain speech because it disagrees with the ideas or messages conveyed or because the ideas are themselves offensive to some.[184] Moreover, "[t]hese principles acquire a special significance in the university setting, where the free and unfettered interplay of competing views is essential to the institution's educational mission."[185] The university plays the "important social role of promoting the critical spirit on which descriptive autonomy and political democracy ultimately depend."[186]

Professor Fallon has briefly addressed the extension of sexual harassment law and competing First Amendment rights from the workplace to the university campus[187] and has suggested that while First Amendment tensions are especially severe in the campus setting, one crucial distinction might help to advance the analysis. Hostile environment actions encompass two logically distinct types of claims, both of which are actionable under Title VII: "inherently sexual speech," which conveys a "sexuality message," and sex-based speech, which conveys a hostility message.[188] Professor Fallon suggests that the free speech values implicated by these two types of harassment differ. On the one hand, stringent prohibition of inherently sexual speech "would neither implicate nor threaten any special function of the university."[189] On the other hand, broad prohibition of sex-based speech is "much more likely to chill debate at the heart of the university's critical, discursive, truth-seeking, and pedagogical missions."[190] Thus, he suggests that

> prohibition against gender-based harassment by hostility messages should be limited to speech that: (i) is intended to insult or stigmatize on the basis of gender, (ii) is . . . targeted at an individual or small group . . . (iii) makes use of words or symbols that are commonly understood to convey direct, visceral hatred for human beings on the basis of their gender, and (iv) has the purpose or reasonably foreseeable effect of unreasonably interfering with

184. *See, e.g.*, Doe v. University of Mich., 721 F. Supp. 852, 863 (E.D. Mich. 1989) (citing Texas v. Johnson, 491 U.S. 397 (1989); Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972); Cohen v. California, 403 U.S. 15, 24 (1971); NAACP v. Button, 371 U.S. 415, 445 (1963); Terminiello v. Chicago, 337 U.S. 1, 4 (1949); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).

185. *Id.* (citing Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967); Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957)).

186. Fallon, *supra* note 115, at 52 (citing *Keyishian*, 385 U.S. at 603; Healy v. James, 408 U.S. 169, 180 (1972)).

187. *See id.* at 52-54.

188. *Id.* at 53 (quoting Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481, 492 (1991)).

189. *Id.*

190. *Id.* at 54.

an individual's work or academic performance . . . .[191]

Finally, turning to the speech code cases relied upon by the dissent,[192] they are distinguishable from the case of actionable peer sexual harassment under Title IX. First, the speech codes involved were found to be vague and overbroad. One such example is the University of Wisconsin code that prohibited expressive behavior that is discriminatory, directed at an individual, demeans the sex of the individual and creates an intimidating, hostile or demeaning environment for education.[193] The court found that the term "demean" is ambiguous and questioned whether the speech must actually demean or merely intend to demean.[194] Moreover, "speech does not lose its protected status merely because it inflicts injury or disgrace onto its addressees."[195] Additionally, the code is overbroad in that it is a content-based restriction on the "robust exchange of ideas" on campus, and covers a wide variety of situations where no breach of the peace is likely to result, reaching beyond fighting words.[196] By contrast, the standard under Title IX in light of the *Davis* decision defines actionable harassment as conduct so severe, pervasive and objectively offensive that it has a systemic effect on the educational program and deprives the victims of access to educational opportunities. Such a standard is a more comprehensive definition of harassment and sets the bar much higher—requiring a finding of deprived access to opportunities. Thus, the Title IX standard is less vulnerable to claims of vagueness and overbreadth. Secondly, the alleged harassing speech involved in the speech code cases tended to be isolated remarks often made in the course of academic discussion and research, e.g., a graduate social work student openly stating his belief that homosexuality was a disease and that he intended to develop a counseling plan for changing gay clients to straight,[197] or a one-time event, such as a fraternity's "ugly woman contest."[198] Such alleged misconduct is hardly sufficiently severe or pervasive to deprive the victim of access to educational opportunities. Neither the harassment standards

191. *Id.*

192. *See* Dambrot v. Central Mich. Univ., 55 F.3d 1177 (6th Cir. 1995); Iota XI Chapter of Sigma Chi Fraternity v. George Mason Univ., 993 F.2d 386 (4th Cir. 1993); UWM Post v. Board of Regents of Univ. of Wis., 774 F. Supp. 1163, 1172 (E.D. Wis. 1991); Doe v. University of Mich., 721 F. Supp. 852, 865 (E.D. Mich. 1989); Gall, *supra* note 116; Earle & Cava, *supra* note 116 (analyzing the First Amendment implications of campus speech codes).

193. *See UWM Post*, 774 F. Supp. at 1172.

194. *See id.*

195. *Id.* at 1172 n.7.

196. *Id.* at 1176-77 (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312-13 (1978)).

197. *See* Doe v. University of Mich., 721 F. Supp. 852, 865 (E.D. Mich. 1989).

198. Iota XI Chapter of Sigma Chi Fraternity v. George Mason Univ., 993 F.2d 386 (4th Cir. 1993).

nor the alleged misconduct involved in these cases are of the same nature as that which would be actionable under Title IX.[199] Thus, a school would rarely be caught in a bind between the free speech rights of the harasser and the rights of the victim when disciplining a student for conduct that is clearly actionable under Title IX.

V. CONCLUSION

The majority in *Davis* correctly held that schools should be held liable under Title IX for deliberate indifference to known instances of student-on-student harassment that is so severe, pervasive and objectively offensive that it effectively bars the victim's access to an educational opportunity. However, the *Davis* majority failed to adequately address the concerns raised by the dissent that: (1) as a matter of federalism, this issue should be left to the states; (2) student peer sexual harassment does not constitute sex discrimination and (3) holding schools liable for student peer sexual harassment will place schools in a bind between protecting the harassed and trampling the First Amendment rights of the harasser. I have attempted to address each of these concerns directly. I have argued that the majority decision is consistent with our basic federalism principles because actionable student peer sexual harassment rises to the level of sex

199. Robert Gall reviewed the speech codes of six universities/colleges which he claimed represented three approaches to dealing with First Amendment concerns raised by the speech-code cases. *See* Gall, *supra* note 116, at 231. "The first approach ignores these concerns," adopting the workplace concept of hostile environment unaccompanied by any remarks suggesting that the guidelines should be tempered by notions of free expression critical to the mission of a university. *Id.*; *see also id.* at 232 (discussing the sexual harassment policies of Piedmont Community College in Roxboro, North Carolina and Cape Fear Community College in Wilmington, North Carolina). The second approach uses "a middle-ground strategy," adopting the hostile environment harassment guidelines while stating that concepts of free expression must be respected. *Id.* at 231; *see also id.* at 232-38 (discussing the harassment policies of the University of Connecticut, Princeton University and Duke University). The third approach chooses not to regulate speech based on the hostile environment harassment concept at all. *See id.* Instead, according to Mr. Gall, the university "honor[s] its spirit of free inquiry while not forgetting its obligation toward fighting discrimination." *Id.*; *see also id.* at 238-42 (discussing the non-discrimination policy of the University of Chicago). Mr. Gall concludes that the University of Chicago approach best accommodates free speech ideals while protecting persons from discrimination by: (1) expressly recognizing free expression to be essential to its mission; (2) declining to shield people from ideas that they may find disagreeable or offensive or "enforce social standards of civility" and (3) choosing not to forbid the creation of a hostile environment but rather specifically prohibiting "[a]busive conduct [including threats of violence] directed at a particular individual that compromises that individual's ability to function within the University setting and that persists after the individual has asked that it stop." *Id.* at 238-39. Further, the University of Chicago's policy bans sexual harassment defined as "[s]exual advances, requests for sexual favors, or sexually-directed remarks . . . when either: 1. submission to such conduct is used or threatened to be used as a basis for academic or employment decisions; or 2. such conduct directed at an individual persists despite its rejection." *Id.* at 240.

discrimination in federally-funded educational institutions, and thus is a matter of national concern and appropriately addressed through national legislation pursuant to Congress' Spending Clause and Fourteenth Amendment Section Five powers. Further, schools that enforce the standard articulated by the Court in disciplining harassing students will steer clear of violating the harasser's First Amendment rights.