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Opening the Floodgates-Deliberate Indifference, Causation and Control as Means of Authorizing Unlimited Litigation Under Title IX: *Davis v. Monroe County Board of Education*

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Opening the Floodgates—Deliberate Indifference, Causation and Control as Means of Authorizing Unlimited Litigation Under Title IX: *Davis v. Monroe County Board of Education*

I. INTRODUCTION

In the wake of the many tragedies sweeping through schools across the United States, focus has turned even more acutely to the regulation of student conduct toward other students—in the classrooms, on the playgrounds, and in any setting that can be arguably linked to an educational institution. So too, the mania engulfing discourse on sexual politics was sure to collide with educational concerns, particularly where the primary actors involved are those undergoing the protracted and often painful phase of establishing sexual identity. In so examining regulation of education vis-à-vis sexual politics across all realms of society from a purely legal perspective, one may find herself mired in purely paternalistic protectionist semantics, in constitutional preservationist dialogue or somewhere on that long stretch of road constituting the continuum in between. The art is finding the proper position in which to place the flag of compromise–a quest which frequently plagues members of bench and bar, as well as parents, educators and administrators nationwide. The Supreme Court has made yet another attempt at establishing a middle ground in *Davis v. Monroe County Board of Education*,[1] undoubtedly the most recent chapter written in the realm of public school regulation of sexual politics.

In *Davis*, petitioner, acting on behalf of fifth grader LaShonda Davis, brought an action for damages against the Monroe County Board of Education alleging exclusion from educational programs and/or activities in violation of Title IX. Among the allegations levied by Davis were claims of pervasive, persistent, lewd and sexually explicit advances made by a fellow student, including "[touching her] breasts and genital area and [making] vulgar statements," over a five–month period.[2] The case reached the Supreme Court on appeal from the Eleventh Circuit

1. 526 U.S. 629 (1999).

2. *Id.* at 633. The offensive student's behavior began in December, when the classmate, referred to as G.F., touched the petitioner's breasts and genital area and made lewd and offensive comments. *Id.* In February, during physical education class, the offending student placed a door stop in his pants and began to act in a sexually provocative manner. Petitioner reported the

which dismissed the complaint for failure to state a cause of action upon which relief could be granted.[3] Faced with the task of articulating the bounds of the damage liability of recipients of federal educational funding for actions taken by students, the Court applied and further refined a test articulated in *Gebser v. Lago Vista Independent School District*.[4] Specifically, the Supreme Court held:

> [A] private damages action may lie against the school board in cases of student-on-student harassment . . . only where the funding recipient acts with deliberate indifference to known acts of harassment in its programs or activities. Moreover, . . . such an action will lie only for harassment that is so severe, pervasive and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit.[5]

This Note rejects the Court's application of the deliberate indifference, causation and control standard as applied to student-on-student sexual harassment claims. Furthermore, this Note argues that the application of control principles, in conjunction with its causal requirements, falls short of harmonizing the delicate interests involved in classroom sexual harassment cases and runs awry of the policies underlying Title IX. Part II of this Note examines the evolution of the *Davis* test by looking at the principle cases establishing private rights of action under Title IX, as well as the *Davis* decision itself. Part III breaks down the *Davis* test, analyzing its underpinnings and articulating the impracticabilities inherent in the *Davis* test, and those that are likely to follow in subsequent cases. The deliberate indifference, control and causation elements of the test run contrary to Title IX and to the scope of implied private rights of action cases establishing *Davis*'s claim. Part IV examines the competing interests in *Davis*, urges a narrowing of the broad conferral of remedial power now available against recipients of federal education funding, and suggests replacing the deliberate indifference and control elements of the *Davis* test with an intent requirement, as mandated by the terms of Title IX.

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student's conduct to her physical education teacher. Allegedly, this and similar behavior continued until mid-May, when G.F. plead guilty to charges of sexual battery. *Id.* at 634.

3. *Id.* at 636-37.

4. 524 U.S. 274 (1998). In *Gebser*, a student brought suit against several parties, including the school board, alleging exclusion from educational opportunities after she was engaged in a sexual relationship with her teacher. *See infra* Part II.B.

5. *Davis*, 526 U.S. at 632.

II. A CLOSER LOOK AT *DAVIS*

A. *The Origins of Damages Actions Under Title IX: Cannon v. University of Chicago to Franklin v. Gwinnett County Public Schools*

The Supreme Court first authorized a private right of action for exclusion from educational opportunities or activities under Title IX in *Cannon v. University of Chicago*.[6] In *Cannon*, the Court applied the four-part *Cort v. Ash* test and held that petitioner could state a private cause of action under Title IX.[7] Specifically, the Court held that the petitioner, a student who was allegedly refused entrance into medical school because of her gender, was an intended beneficiary of Title IX, that the legislative scheme was not frustrated by permitting a private cause of action, and that the cause of action would neither frustrate nor impede the underlying foundation of Title IX or the relevant state interests.[8] The Court noted, however, that these suits were neither frequent nor costly and thus did not constitute an excessive burden upon funding

6. *Id.* at 639 (citing Cannon v. Univ. of Chicago, 441 U.S. 677 (1979)).

7. *Cannon*, 441 U.S. at 689-709 (citing Cort v. Ash, 422 U.S. 66 (1975) (holding that the test in determining whether a private cause of action is appropriate for a violation of a statutorily imposed right where Congress is silent, is (1) whether the statute was enacted for the benefit of a special class of which the plaintiff is a member, (2) whether there is any indication of intent on behalf of the legislature to create a private remedy, (3) whether creation of such a remedy is consistent with the purpose underlying the statutory scheme, and (4) whether the subject matter involves an area of such concern to the States that implying a federal remedy would be inappropriate)).

8. *Id.* In examining the legislative history of Title IX to determine the second element of the *Cort* test, i.e., whether the legislature intended to create a private federal remedy, the *Cannon* Court used Title VI as a paradigm to create a private cause of action under Title IX. Such a result was possible because the literal language of Title IX mirrors that of Title VI. Specifically, the Court stated that Title IX was patterned after Title VI of the Civil Rights Act of 1964. Except for the substitution of the word "sex" in Title IX to replace the words "race, color, or national origin" in Title VI, the two statutes use identical language to describe the benefited class. Both statutes provide the same administrative mechanism for terminating federal financial support for institutions engaged in prohibited discrimination. Neither statute expressly mentions a private remedy for the person excluded from participation in a federally funded program. The drafters of Title IX explicitly assumed that Title IX would be interpreted and applied as Title VI had been in the preceding eight years. *Id.* at 694. Accordingly, when Title IX was enacted in 1972, the Court looked to the state of Title VI private rights of action to infer legislative intent as to private causes of action under Title IX. Finding that courts had permitted private actions alleging infringement of federal statutory rights, the Court reasoned that the same result was required under Title IX. *Id.* at 696 (stating that "[w]hen Title IX was enacted, the critical language in Title VI had already been construed as creating a private remedy"). Specifically, the Fifth Circuit, as well as a dozen other federal courts after the enactment of Title IX, had inferred private rights of action under Title VI. *Id.* However, an indication of congressional intent *not* to attach liability to school boards (i.e., the funding recipients) is Congress' failure to amend Title VII in 1991 to so provide. Although this premise would also militate against the recognition of implied rights of action almost entirely, the issue of private damages actions brought under Title IX is outside the scope of this Note.

recipients.[9] When the *Cannon* decision was handed down in 1979, the Court had not yet recognized sexual harassment as a form of discrimination.

From *Cannon* came *Franklin v. Gwinnett County Public Schools*,[10] in which the Court permitted money damages for Title IX violations. In *Franklin*, however, the action for damages arose in the context of alleged intentional harassment by a school educator.[11]

The *Franklin* Court held that "a damages remedy is available for an action brought to enforce Title IX."[12] In establishing the right to monetary relief for violations of rights conferred upon students under Title IX, the Court relied upon several propositions, stating that, "[w]here legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."[13] Moreover, the Court maintained

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9. *Id.* It should also be noted that the Court relied upon the infrequency of suit and, accordingly, the diminished threat to the fiscal health of educational institutions covered under Title IX, in allowing an implied private right of action. The Court inferred that no evidence existed to show that cases under Title IX or Title VI would be so costly or voluminous so as to disrupt the educational institution. The Court stated that "[w]hatever disruption of the academic community may accompany an occasional individual suit seeking admission is dwarfed by the relief expressly contemplated by the statute—a cutoff of all federal funds." *Id.* at 710 n.44. Interestingly, as pointed out in the dissenting opinion in *Davis*, the petitioner in *Davis* sought damages of $500,000, yet, the total amount of federal funding received by the Monroe County Board of Education under Title IX was only $679,000. *Davis*, 526 U.S. at 681 (citing Brief for the School Amici 25 n.20). Furthermore, in 1993, the American Association of University Women Educational Foundation found that four out of every five women have been subjected to some form of sexual harassment during their educational tenure. HOSTILE HALLWAYS: THE AAUW SURVEY ON SEXUAL HARASSMENT IN AMERICA'S SCHOOLS 7 (1993) [hereinafter "HOSTILE HALLWAYS"].

10. 503 U.S. 60 (1992).

11. In *Franklin*, petitioner alleged that she was continually sexually harassed by an employee of the Gwinnett County Public Schools; as a result, petitioner was effectively denied equal access to educational opportunities and benefits in violation of Title IX. Petitioner claimed that, beginning in the fall of her sophomore year of high school, Andrew Hill, a sports coach and teacher employed by the school district, engaged her repeatedly in sexual discourse, which included asking her specific questions regarding her sexual experiences with her boyfriend, and questions regarding her willingness to have sexual intercourse with an older man. *Id.* at 63. Petitioner alleged that Hill kissed her forcibly on the mouth while on school property, telephoned her home and urged Petitioner to meet him. Petitioner also alleged that during her junior year of high school, Hill excused Petitioner from class a number of times, took her to an office on school property and coerced her into engaging in sexual intercourse. *Id.* Finally, petitioner alleged that the teachers and administrators of Gwinnet County, although aware of the petitioner's claims of sexual harassment by Hill and claims of sexual harassment made by other female students, took no action to stop the harassment, and discouraged petitioner from pursuing legal action against Hill. *Id.* at 64. On April 14, 1988, Hill resigned on the condition that the school cease all investigation of him and his conduct. *Id.*

12. *Id.* at 76.

13. *Id.* at 66 (quoting Bell v. Hood, 327 U.S. 678, 684 (1946)).

that a private remedy was required by common law.[14] The Court also relied upon non-Title IX cases as support for the proposition that monetary damages were an appropriate remedy for an intentional violation of federal statute.[15]

The *Franklin* Court was also confronted with claims that "the normal presumption in favor of all appropriate remedies should not apply because Title IX was enacted pursuant to Congress' Spending Clause Power.[16] In response, the Court cited *Pennhurst State School and Hospital v. Halderman*,[17] and held that money damages are available in actions brought under federal statutes enacted pursuant to the Spending Clause when the violation is intentional, due to the contractual nature of Spending Clause; monetary damages are not permitted for unintentional violations because "the receiving entity of federal funds lacks notice that it will be liable."[18]

The most recent whittling of the doctrine of private damages actions under Title IX came in 1998 when the Court decided *Gebser v. Lago Vista Independent School District*.[19]

B. *Gebser v. Lago Vista Independent School District*

Once again, the Court had to address the question of whether a school board could be held liable for sexual harassment of a student by a

14. In addition, the *Franklin* Court pointed to the age-old legal principle that it is the province and domain of the judiciary to provide remedy for an infringement of a right. *Id.* at 66. Citing Blackstone, and *Marbury v. Madison*, 5 U.S. 137 (1803), the Court seemed to equate the right of redress to one of monetary relief. *See Franklin*, 503 U.S. at 66. "This principle originated in the English common law, and Blackstone described it is 'a general and indisputable rule that, where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded.'" *Franklin*, 503 U.S. at 66-67 (quoting 3 W. Blackstone, Commentaries 23 (1783)). *See also* Ashby v. White, 1 Salk. 19, 21, 87 Eng. Rep. 808, 816 (Q.B. 1702) ("If a statute gives a right, the common law will give a remedy to maintain that right.").

15. *Franklin*, 503 U.S. at 70 (citing Guardians Ass'n. v. Civil Serv. Comm'n of New York City, 463 U.S. 582 (1983) and Consol. Rail Corp. v. Darrone, 465 U.S. 624 (1984)).

16. *Id.* at 74.

17. 451 U.S. 1 (1981). In *Pennhurst*, a mentally disabled patient brought an action against Pennhurst, a state-owned and operated institution alleging, inter alia violations of 42 U.S.C. § 6010. *Id.* at 6. Pennhurst claimed the patient could not maintain a private cause of action under the Rehabilitation Act because Congress did not specifically establish such an action under the Act. *Id.* at 10. The Court held that remedies are limited under statutes enacted pursuant to the Spending Clause when the alleged violation is unintentional. *Id.* at 28-29. According to the Court, "Legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." Therefore, an entity receiving federal funds must have notice that it will be liable for damages for such a violation. *Id.* at 17.

18. *Franklin*, 503 U.S. at 74. ("The point of not permitting monetary damages for an unintentional violation is that the receiving entity of federal funds lacks notice that it will be liable for a monetary award.")

19. 524 U.S. 274 (1989).

teacher. In *Gebser*, a ninth grade student was allegedly induced into a sexual relationship with her teacher.[20] Neither the school nor the school board had promulgated, advertised, established or articulated a policy or grievance procedure against sexual harassment. Apparently, no one was privy to the actions taken by the teacher despite evidence of repeated inappropriate sexual comments and innuendoes made by the allegedly harassing teacher both during and outside of class, as well as complaints about the teacher lodged by the parents of two other students.[21]

The United States District Court for the Western District of Texas granted summary judgment in favor of the school district, rejecting Gebser's Title IX claim. The district court reasoned that Title IX "was enacted to counter *policies* of discrimination . . . in federally funded education programs and that only if school administrators have some type of notice of the gender discrimination and fail to respond in good faith can the discrimination be interpreted as a *policy* of the school district."[22] The Court of Appeals for the Fifth Circuit affirmed.[23]

In affirming the ruling of the lower courts, Justice O'Connor, writing for the majority, opined that Gebser failed to state an action for damages for discrimination under Title IX.[24] Specifically, the Court held that:

> damages remedy will not lie under Title IX unless an official who, at a minimum, has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf, has actual knowledge of discrimination in the recipient's programs and fails to adequately respond . . . . We think, moreover, that the response must amount to deliberate indifferent to discrimination.[25]

The *Gebser* Court premised its actual knowledge/deliberate indifference standard on considerations of contractual notice requirements

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20. Petitioner alleged that, as an eighth-grade student, she entered a book discussion class headed by teacher Frank Waldrop. *Id.* at 277. Petitioner claims that Waldrop made sexually explicit comments and suggestions to the students. *Id.* Subsequently, petitioner was enrolled in several high school classes taught by Waldrop, throughout which Waldrop continued to make sexually explicit comments, many of which he directed specifically at petitioner. *Id.* at 278. Allegedly, Waldrop visited petitioner at her home, kissed and fondled her, and thereafter initiated sexual intercourse. *Id.* The sexual relationship continued for roughly one year. Although the relationship was not reported to school officials, parents of other students complained to the school's principal. The principal met with Waldrop to discuss the complaints, and warned Waldrop to maintain proper conduct and refrain from making any sexually explicit comments. *Id.* Waldrop was later fired after he was arrested when he and petitioner were discovered engaged in sexual intercourse by a police officer. *Id.*

21. *Id.*

22. *Id.* at 279 (quoting App. to Pet. for Cert. 6a-7a).

23. Doe v. Lago Vista Indep. Sch. Dist., 106 F.3d 1223 (5th Cir. 1997).

24. *Gebser*, 524 U.S. at 290.

25. *Id.*

due to Title IX's enactment under the Spending Clause,[26] and application of principles underlying Title IX's express means of enforcement.[27] Furthermore, the Court rejected the application of agency principles, holding that the conduct of the teacher should not be deemed the conduct of the funding recipient.[28] As the funding recipient was held to have been neither aware of nor deliberately indifferent to the harassment, Gebser was unable to recover.[29]

The Court in *Gebser* laid the foundation for the "actual knowledge/ deliberate indifference" standard yet fell short of fully articulating the parameters of the "deliberate indifference" element of the Title IX test.[30] This omission led inevitably to *Davis*.

C. *Davis v. Monroe County Board of Education*

1. THE *DAVIS* DILEMMA: STUDENT-STUDENT HARASSMENT AS A CAUSE OF ACTION UNDER TITLE IX

In *Davis*, petitioner, acting on behalf of her daughter, LaShonda Davis, a fifth grader, brought an action for damages against the Monroe County Board of Education alleging that her daughter was excluded from educational programs and activities in violation of Title IX.[31] Davis claimed she was subjected to pervasive and persistent sexually explicit acts taken by a fellow student, including his "[touching her] breasts and genital area and [making] vulgar statements."[32] This and similar conduct lasted for five months, during which Davis and her mother made repeated complaints to a number of teachers and to the school's principal.[33] Petitioner also produced evidence of the teachers'

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26. *Id.* at 287.

27. 20 U.S.C. § 1682 provides:

> in pertinent part, Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however*, that no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means.

20 U.S.C.A. § 1682 (West 2000).

28. *Gebser*, 524 U.S. at 283, 285.

29. *Id.*

30. *Id.* at 290.

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

32. *Id.* at 633.

33. *Id.* at 635.

and the principal's utter failure to respond to these complaints.[34]

The Federal Court for the Middle District of Georgia dismissed Davis's complaint, holding that student-on-student sexual harassment does not constitute a viable cause of action under Title IX,[35] and the Eleventh Circuit affirmed.[36] The Supreme Court granted certiorari.[37]

2. THE *DAVIS* TEST

In an opinion written by Justice O'Connor,[38] the Court held that, "student-on-student sexual harassment [is] capable of triggering a damages claim [if it] involve(s) the overt, physical deprivation of access to school resources."[39]

Broken into its constituent elements, this test—the Court's apparent response to the impending unlimitable reach of harassment law—presents a number of questions that must be resolved in order to determine whether a claimant has properly stated a claim for exclusion from an educational program or activity under Title IX. According to the specific, explicit and literal terms of the *Davis* test, one must examine (1) whether the funding recipient exercised *control* over the harasser, (2) whether the harassing behavior impeded the educational opportunities of the victim/harassee,[40] (3) whether the funding recipient possessed *actual knowledge* of the harassment,[41] and (4) whether the recipient displayed

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34. *Id.*

35. Davis v. Monroe County Bd. of Educ., 862 F.Supp. 363, 367 (M.D. Ga. 1994).

36. A panel for the Court of Appeals for the Eleventh Circuit reversed the District Court's dismissal of Petitioner's complaint. Davis v. Monroe County Board of Education, 74 F.3d 1186, 1195 (11th Cir. 1996) (holding that as Title VII encompasses a claim for damages due to a sexually hostile working environment created by co-workers and tolerated by the employer, and therefore, Title IX encompasses a claim for damages due to a sexually hostile educational environment created by a fellow student or students when the supervising authorities knowingly fail to act to eliminate the harassment).

The Eleventh Circuit granted the Monroe County Board of Education's motion for rehearing en banc and affirmed the district court's dismissal of Davis's complaint on the basis that, as Title IX was passed under the Spending Clause, notice to the funding recipient must be clear and unambiguous. *Davis*, 120 F.3d 1390 at 1392.

37. *Davis*, 526 U.S. at 637.

38. It should be noted that the *Gebser* decision, holding that a student allegedly harassed by her teacher did not state a cause of action for damages under Title IX, was also written by Justice O'Connor.

39. *Davis*, 526 U.S. at 650.

40. Put another way, whether the behavior was "so severe, pervasive and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit." *Id.* at 633.

41. The actual knowledge element of the *Davis* test arises from the enactment of Title IX as under the Spending Clause. The Court states that:

> private damages actions are available only where recipients of federal funding had adequate notice that they could be liable for the conduct at issue . . . [T]here can, of course, be no knowing acceptance of the terms of the putative contract if a state is

deliberate indifference to the actions of the harasser.[42] This formulation, however, on its face runs contrary to the literal language, as well as legislative history, of Title IX.

III. BORN IN A BARN: THE *DAVIS* TEST AS AN OPEN INVITATION TO PERPETUAL LITIGATION OF TITLE IX HARASSMENT SUITS

A. *Deliberate Indifference*

According to the Court, the *Davis* test mandates that liability attach only where the funding recipient acts with *deliberate indifference* to known acts of harassment in its programs or activities.[43] The inclusion of a deliberate indifference standard is an attempt by the Court to satisfy the Title IX requirement that, in order for liability to attach, the action of the funding recipient must be the cause of the exclusion; in essence, it is the deliberate indifference that is the cause of the exclusion.

The Court's holding, however, erects no fences indicating the limits on school board liability, i.e., what does and does not constitute "deliberate indifference"? The Monroe County Board of Education met with the allegedly offending student, but only after prolonged requests. It changed the classroom seating structure, but only following repeated demands. While these actions may on their face appear patently insufficient, the Court fails to articulate the Board's specific error(s). Did the school board wait too long? Would the identical actions still constitute deliberate indifference if taken following the third request instead of the sixth? Are these actions in and of themselves insufficient to clear the bar of indifference into the land of acceptable (non-liability) reaction? The illustrations that may or may not give rise to Title IX liability under the deliberate indifference element of the *Davis* test are almost infinite. Thus, deliberate indifference utterly fails as a quantitative yardstick by which to gauge the legality of funding recipients' responses to known acts of harassment.

> unaware of the conditions imposed by the legislation or is unable to ascertain what is expected of it.

Id. at 640 (quoting *Pennhurst*, 451 U.S. at 17).

As the Court held in *Pennhurst*, as federal funding takes the form of a contract between the funding recipient and the federal government. *Pennhurst*, 451 U.S. at 28. Accordingly, a funding recipient must have notice of the potential liability in order to been deemed to have consented to the requirement. *Id.* at 17. The Court stated that "legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." *Id.* at 17. Contention of the actual notice requirement as applied by the Court in *Davis* is, as it is consistent with traditional notions embedded in contract law, outside the scope of this Note.

42. *Davis*, 526 U.S. at 633.

43. *Id.* at 363 (emphasis added).

B. *Causation*

Title IX specifically states that "[n]o person on the basis of sex shall be excluded from participation in, be denied the benefits of or be subjected to discrimination *under* any education program or activity receiving federal financial assistance."[44] In essence, the statute says the exclusion must be caused by the funding recipient. Yet, the Court's test blurs the element of causation, seemingly requiring two separate and distinct actors to cause a student's exclusion from an educational activity or program.

First, the *Davis* test as stated requires that the behavior of the harasser cause the exclusion. Specifically, the Court held that the conduct of the harasser must be "so severe, pervasive and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit."[45] Citing *Meritor Savings Bank v. Vinson*,[46] the *Davis* Court stated that physical exclusion was not necessary to show deprivation of an educational opportunity. Specifically, the Court stated that:

> [i]t is not necessary, however, to show physical exclusion to demonstrate that students have been deprived by the actions of another student or students of an educational opportunity on the basis of sex. Rather, a plaintiff must establish sexual harassment of students that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities.[47]

However, the *Meritor*[48] test for identifying "hostile environment" sexual harassment, while supplying an established and much used qualitative framework, cannot be harmonized in conjunction with the Court's additional causal requirement placed upon the funding recipient absent application of agency principles, a prospect which the Court emphatically rejects.

Conversely, the Court ardently insists that, as a result of its holding, liability may be incurred by the Monroe County Board of Education but could only be so incurred as a result of the Board's inaction rather than the action of the harasser. It is not disputed that in order for liability to attach under Title IX, the discrimination must occur "under [an] educational program or activity."[49]

Yet, without applying agency principles, which would substantiate

44. 20 U.S.C. § 1681(a) (emphasis added).
45. *Davis*, 526 U.S. at 633.
46. Meritor Savings Bank v. Vinson, 477 U.S. 57, 67 (1986).
47. *Davis*, 526 U.S. at 633.
48. *Meritor Savings Bank*, 477 U.S. at 67.
49. 20 U.S.C. § 1681(a).

the imputation of the agent's actions to the principal, one is left with the propositions that: (1) the offending student must cause the harassment, and (2) the funding recipient must act with deliberate indifference. This "double-causation requirement" runs contrary to the requirements of Title IX.

Moreover, the Court's analytical framework, under which the harasser's behavior must be examined to determine whether the behavior caused the discrimination, was derived almost verbatim from hostile work environment sexual harassment claims under Title VII.[50] Under Title VII, a single instance of harassment may be so severe as to constitute a hostile work environment. Taken to its logical conclusion, this double-causation requirement demands that the funding recipient be held liable if a single instance of harassment was so severe and objectively offensive so as to cause exclusion. Yet, the Court vehemently asserts an opposite conclusion. Specifically, the Court states that:

> [a]lthough, in theory, a single instance of sufficiently severe one-on-one peer harassment could be said to have [the effect of denying a victim equal access], we think it unlikely that Congress would have thought such behavior sufficient to rise to this level in light of the inevitability of student misconduct and the amount of litigation that would be invited by entertaining claims of official indifferences to a single instance of one-on-one peer harassment.[51]

Although the Court exercised the foresight to perceive the inundation of litigation sure to emanate from its holding when applied to a single sufficiently severe act of harassment, many other scenarios may yield the same or similar results. What if there were two severe incidents? On this, and other similar questions, the Court remains silent, but its holding speaks volumes, and will almost surely lead to volumes more in future court pleadings.

C. *Control*

The Court further requires that the funding recipient exercise control over the harasser. The Court states that:

> [t]he statute's plain language confines the scope of prohibited conduct based on the recipient's degree of control over the harasser and the environment in which the harassment occurs . . . a recipient's damages liability is limited to circumstances wherein the recipient exercises substantial control over both the harasser *and* the context in which the harassment occurs.[52]

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50. 42 U.S.C. §§ 2000e to 2000e-17 (1994).

51. *Davis*, 526 U.S. at 652-53.

52. *Id.* at 644-45 (emphasis added).

This element fails to establish perimeters outlining the boundaries of a recipient's liability, thus failing to create a practicable guideline for funding recipients not only when responding to complaints lodged by students and/or their representatives, but also in monitoring the conduct of students on a daily basis[53] in any number of educational settings that may arguably be deemed "under" the recipient's programs.[54]

Further, the Court's assertion that "the petitioner attempts to hold the Board liable for *its own decision* to remain idle in the face of known student-on-student harassment in its schools,"[55] rather than holding the school board liable for the actions of the harasser, renders control over the individual *and* the environment in which the harassment occurs superfluous. Arguably, a decision not to act by a funding recipient was a decision made by and in regard to an educational program or activity and therefore is "under" that program or activity.[56] The control element of the *Davis* test creates greater uncertainty around a test already mired in ambiguity.

IV. FINDING DIRECTION: A LIGHT IN THE DARKNESS OF *DAVIS*

A. *Establishing a Roadmap: Policy Concerns Underlying Davis*

In an attempt to bring order to the chaos of recipient liability under Title IX, credence must be lent to the underlying policy considerations that permeate Title IX.

Classroom harassment throws into the fray another set of concerns that almost wholly alter the margins of debate and call for more careful analysis. One primary concern is the interest in preserving the autonomy of school administrators to effectively educate our nation's youth. This concern, implicated in *Davis*, can be narrowed into a number of distinct categories, each a star directing the ship of compromise to the most equitable and efficient harbor. First, the underlying impetus of

53. Under the *Davis* test it is unclear whether failing to provide adequate mechanisms for detecting harassment would lead to liability. Under the clear terms of the test, the recipient must have actual knowledge. *Id.* at 633. Furthermore, the school board in *Gebser* failed to institute a mechanism for detecting and processing complaints of sexual harassment, yet escaped liability on the ground of lack of knowledge. *Gebser*, 524 U.S. at 290-91.

54. For example, a school-sponsored football game on school grounds would be an example of an environment over which a school board exercises control, but an arena wherein exercising control is in practice difficult, imposes an onerous burden upon funding recipients.

55. *Davis*, 526 U.S. at 641.

56. It should be noted and remembered that the *Davis* test applies to all educational institutions covered by Title IX, thus including public collegiate institutions receiving federal funding assistance. The parameters of control in collegiate settings are almost impossible to define, and a great chasm exists between the actual and intended spheres of control. For example, college dormitories are surely areas over which the funding recipient should exercise control, but control mechanisms may be impracticalities in certain circumstances.

Title IX is to protect each child's right to equal access to educational benefits and opportunities.[57] Second, Title IX seeks to maintain the fiscal health of schools in order to provide the most effective and efficient educational opportunities to the greatest number of children. Third, it provides reasonable regulations that avoid infringement upon the right of free speech enjoyed by students, teachers and administrators. Fourth, it preserves the ideals of federalism and the severance of the separate and distinct realms of federal and state authority. Finally, it upholds the demands of a tri-parte government system.[58] A rule governing the regulation of student interaction should take into account each of these policies, yet should keep in mind that such a rule is not to be enforced in a vacuum. A number of substantive and procedural safeguards that govern nearly all facets of America's educational system already exist.[59]

The Court claims that the principles underlying the enactment of Title IX demand application of the *Davis* test. It must be noted, however, that the rationale may have developed along with the case law. According to Senator Evan Bayh, Title IX was intended to be pervasive. "It is clear to me that sex discrimination reaches into all facets of education—admission, scholarship programs, faculty hiring and promotion, professional staffing and pay scales."[60] Yet, the discrimination in *Davis* deals with none of these, but, rather, with constructive deprivations induced by alteration of the educational environment because of sexual harassment. To be sure, at the time Title IX was enacted, the Court had yet to recognize a cause of action for sex discrimination based upon hostile environment even in cases arising under Title VII, under which remedies and recoveries have been deemed far broader than those under Title IX.[61]

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57. 118 Cong. Rec. 5802, 5803 (1972).

58. Courts have become exceedingly accustomed to the force of judicial policymaking under the auspice of implied rights of action. When the rights and responsibilities of our nation's educational system hang in the balance, congressional decrees should be more strictly construed and policymaking should be on its shortest leash.

59. A failure to permit a private damages action against funding recipients under Title IX would not altogether preclude a harassed student from having his day in court or from recovery, as there remain many available and open avenues, such as actions under state tort laws.

60. 118 Cong. Rec. 5802, 5803 (1972).

61. It was not until 1986, in *Meritor*, 477 U.S. at 67, that the Court held that "[f]or sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" *Id.* at 58 (quoting Rogers v. EEOC, 454 F.2d 234, 238 (15th Cir. 1971)). Moreover, it was not until 1991 that Congress amended Title VII to permit private rights of action for damages; Title VII was urged by the Court in *Gebser* as a wide reaching statute in regard to which Congress intended greater and far broader remedial measures be available than under Title IX. *Gebser*, 524 U.S. at 283.

B. *The Next Step: A Return to Title IX Principles*

Reconsideration is necessary to eliminate the confusion and lessen the influx of litigation likely to result from the irregular boundaries established by the *Davis* test. The deliberate indifference and control elements of the *Davis* test are each fabricated from shards of statutory principle in an attempt by the Court to fashion a remedial scheme that would provide redress for students denied equal opportunity to educational programs or activities covered under Title IX. A return to the principles articulated and demanded by the text of Title IX, as expounded upon in *Pennhurst*,[62] would be more appropriate to harmonize the competing interests underlying student-on-student sexual harassment claims under Title IX.[63] *Pennhurst* demonstrates the proper inquiry to examine private rights of action arising under statutes enacted pursuant to the Spending Clause. Specifically, to maintain an action, a plaintiff must show that the actions of the *funding recipient intentionally caused* the exclusion. This represents the minimum standard required by the literal language underlying Title IX and the corresponding underlying congressional intent. Put another way, for liability to attach to a funding recipient for exclusion of a student from an educational opportunity or benefit, the recipient must have *intended* the exclusion.

The *Cannon* Court, which predicated its holding upon the fact that litigation is neither so costly nor voluminous so as to impugn the legislative scheme, recognized the potential effect that costly and multitudinous litigation would have on a school district's financial well-being. The Court inferred that no evidence existed to show that cases under Title IX or Title VII would be either so costly or voluminous as to disrupt the educational institution.[64]

In *Davis*, however, petitioner sought damages of $500,000 although the total amount of federal funding received by the district was only $679,000.[65] Further, studies have found that four out of every five women claim to have been subjected to some form of sexual harassment throughout their educational career.[66] So, with the changing times must come changing rules.

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62. *See infra* Part A.

63. The Court in *Pennhurst* held that remedies are limited under statutes enacted pursuant to the Spending Clause when the alleged violation is unintentional. *Pennhurst*, 451 U.S. at 17.

64. The Court stated that "[w]hatever disruption of the academic community may accompany an occasional individual suit seeking admission is dwarfed by the relief expressly contemplated by the statute—a cutoff of all federal funds." *Cannon*, 441 U.S. at 710 n.44.

65. *Davis*, 526 U.S. at 681 (citing Brief for the School Amici 25 n.20).

66. HOSTILE HALLWAYS, *supra*, note 9, at 7.

V. CONCLUSION

The Court's holding in *Davis* riddles even larger and more hazardous holes in the fabric of the American educational system and threatens even more perilously the constitutional demarcation of state and federal authority. The *Davis* test transcends the limitations fixed by Congress in enacting Title IX, and considerations of federalism and separation of powers. From a well of restrictive covenants, the Court ladles a remedial structure which provides almost unlimitable monetary relief, in stark contrast to the remedial structure established by Congress in Title IX.

The proper standard to be applied in cases alleging exclusion from educational opportunities or benefits because of a student's sexual harassment of another student is one that restricts damages actions under Title IX to those instances where the recipient has intended, and thus caused, the exclusion. The Court's holding in *Pennhurst*[67] demands the infusion of an intent requirement, as does the text and underlying policies of Title IX. Such an infusion will not foreclose altogether a right of redress for students who were denied an educational opportunity or benefit *under* a program or activity covered by Title IX.

As noted by the Court in *Cannon* in 1979, such suits were not so frequent or costly as to jeopardize the fiscal health of educational institutions.[68] Although perhaps the case at the time of *Cannon*, today, failing to provide monetary damages for abuses suffered in society seems almost un-American given the over-litigiousness of contemporary society. The educational arena is no exception to the rule that the first reaction to every action is in a court of law. The Court's rule in *Davis* has followed the modern trend. Thus, a return to the principles demanded under *Cannon* and Title IX should be the first step toward arresting the catastrophic effect that limitless litigation and boundless liability would have on America's educational institutions, as well as the multitude of federal programs and activities that can arguably be deemed Spending Clause legislation, for "the interpretive method we sow today for one provision might be reaped by us tomorrow for another."[69]

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67. *See supra* note 17.

68. *Cannon*, 441 U.S. at 709.

69. Eugene Volokh, *The Amazing Vanishing Second Amendment*, 73 N.Y.U. L. REV. 831, 840 (1998).