THE MYSTERIOUSLY REAPPEARING CAUSE OF ACTION: THE COURT'S EXPANDED CONCEPT OF INTENTIONAL GENDER AND RACE DISCRIMINATION IN FEDERALLY FUNDED PROGRAMS

Derek W. Black*

Abstract

This Article addresses whether a cause of action exists under federal statutes to challenge gender and racial inequity in federally funded programs. The question has widespread ramifications because Congress appropriates funds to millions of programs that are subject to these statutes. The Court has held that the only cause of action that exists under these statutes is for intentional discrimination, but in a series of recent cases the Court has developed a framework that broadens the concept of intentional discrimination. Unfortunately, lower courts have focused on older and narrower interpretations of intentional discrimination without accounting for the more complex nuances in recent cases. Thus, lower courts continue to assume that intentional discrimination includes only actions that are motivated by animus or the inappropriate consideration of gender or race. A thorough analysis of Supreme Court precedent, however, provides a different answer. Specifically, in regard to Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments, the Court has also recognized that intentional discrimination occurs when a funding recipient makes a conscious choice that frustrates the congressional objective to eliminate discrimination and inequity in federally funded programs. More specifically, the Court's decisions reveal three factors that are consistently present when the Court has imposed liability under this broader notion of intentional discrimination: whether the defendant made a value choice in regard to the challenged activity or conditions, whether permitting the activity or conditions within a federally funded program would be inconsistent with congressional objectives, and whether the defendant's choice is a cause of the continuance of

Copyright © 2008 by Derek W. Black.

* Assistant Professor of Law, Howard University School of Law. I would like to thank Howard University School of Law and its faculty for its support, particularly Dean Kurt Schmoke for research stipends and assistance. I would also like to thank Nina Frant and Marissa Gunn for their research assistance. Last, I would like to thank those civil rights advocates and civil servants at federal agencies who struggle each day to make sense of precedent in a way that improves the lives and education of our children. I hope that this Article may be of some small assistance to them.

the activity or condition. However, to permit plaintiffs to establish that any circumstances beyond those in the Court's recent decisions are inconsistent with congressional objectives, federal agencies must provide regulations and guidance that specifically identify those circumstances.

I. INTRODUCTION .... 359 R
II. HISTORY AND INTERPRETATION OF THE INTENT DOCTRINE .... 366 R
III. THE SUPREME COURT'S RECENT INTERPRETATIONS OF INTENTIONAL DISCRIMINATION IN TITLE IX AND TITLE VI .... 371 R
A. *Alexander v. Sandoval* .... 371 R
B. *Franklin v. Gwinnett County* .... 373 R
C. *Gebser v. Lago Vista* .... 373 R
D. *Davis v. Monroe County* .... 376 R
E. *Jackson v. Birmingham* .... 377 R
IV. A BROADER CONCEPT OF INTENTIONAL VIOLATIONS OF THE STATUTORY PROHIBITION OF DISCRIMINATION .... 378 R
A. The Absence of Traditional Intentional Discrimination .... 381 R
B. Value Choices .... 385 R
C. Value Choices That Have Direct Causal Effects .... 389 R
D. Frustrating the Congressional Objective to Combat Discrimination and Inequality .... 391 R
E. An Affirmative Obligation to Enforce and Further Congressional Objectives .... 395 R
V. BRINGING TOGETHER A MODIFIED INTENT STANDARD .... 400 R
VI. IMPLICATIONS AND PRACTICAL EXTENSIONS .... 405 R
A. What Types of Discrimination Mandate a Response by Funding Recipients? .... 405 R
B. Reconciling *Sandoval* with a Broad Concept of Responsive Obligations .... 409 R
C. The Legal Authority of Agencies to Identify Circumstances Inconsistent with Congressional Objectives .... 411 R
D. The Need and Capacity for Agency Interpretation .... 415 R
E. The Prospect and Focus of Future Interpretations .... 418 R
VII. CONCLUSION .... 423 R

I. INTRODUCTION

Today, one of the most pressing and unresolved questions for courts and plaintiffs is what causes of action still exist to challenge

racial and gender inequity under Title VI of the Civil Rights Act of 1964[1] and Title IX of the Education Amendments of 1972.[2] Relying on old and narrow precedent, lower courts would turn most victims away, believing that they have no right to recourse.[3] However, although not yet recognized by lower courts or commentators, the Supreme Court has been developing a framework that provides these victims a remedy. The remedy arises based on the obligations that private and public institutions assume when they accept federal funds. The federal government distributes billions of dollars each year to millions of programs and entities.[4] When recipients accept this funding, they agree to comply with various antidiscrimination statutes, including Title VI and Title IX.[5] Moreover, recipients subject themselves to legal suit when they contravene those statutes.[6] Unfortunately, due to ambiguous, conclusory, and seemingly conflicting Supreme Court decisions, determining when a defendant's actions rise to the level of actually contravening those statutes and, hence, entitle an individual to sue, is often difficult. This Article will demonstrate that a thorough, collective analysis of recent Supreme Court cases reveals an answer that resolves this uncertainty and expands those circumstances under which a plaintiff has a right to challenge racial and gender inequity in federally funded programs.

Without question, the Supreme Court has been clear that a cause of action exists for discrimination when race or gender plays a role in a decision to extend or deny benefits to an individual, when a recipient is deliberately indifferent to sexual harassment, or when a recipient retaliates against someone who complains about discrimination.[7]

1. 42 U.S.C. § 2000d (2000).

2. 20 U.S.C. §§ 1681–1688 (2000).

3. *See infra* notes 43–54 and accompanying text. **R**

4. For instance, nearly every public and private college in the country receives federal funding, along with every public school district and many private schools. Last year, Congress appropriated 67.2 billion dollars to schools. Budget Office, Dep't of Educ., Overview, http://www.ed.gov/about/overview/budget/index.html?src=gu (last visited Feb. 20, 2008).

5. *See* Pennhurst State Sch. v. Halderman, 451 U.S. 1, 17 (1981) (discussing congressional power to condition receipt of federal funds on compliance with federally imposed conditions).

6. *See* Cannon v. Univ. of Chi., 441 U.S. 677, 690–94 (1979) (recognizing an implied private cause of action under Title IX).

7. *See* Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 171 (2005) (holding that an implied private right of action exists under Title IX when an individual who has complained of sex discrimination is retaliated against by a funding recipient); Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 633 (1999) (holding that a private cause of action exists under Title IX in cases of student-on-student harassment when the funding recipient acts with deliberate indifference to the harassment); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 277 (1998) (holding that a school is not liable under Title IX for a teacher's

Likewise, the Court is clear that a mere disparate impact based on race or gender does not establish a cause of action.[8] However, the Court has not always explicitly explained *why* a cause of action does or does not exist under these circumstances and, hence, *how* these holdings apply to other circumstances.

Resolving these apparent gaps in the Court's jurisprudence is crucial because countless other circumstances arise that do not clearly fall in or out of the previously explicitly prohibited activities, and these circumstances often result in serious gender and racial inequities. For instance, too many schools continue to provide unequal athletic opportunities for women.[9] Too many disregard the disproportionately low number of women in high level math and science courses and the disproportionately high number of minorities in special education and dead-end curriculum tracks.[10] Some communities know all too well that their daughters', sisters', or nieces' soccer team cannot schedule matches on their school's football field. They also know that although racial minorities may comprise only twenty five percent of their school district, these students regularly make up over half of the district's special education program.

Unfortunately, many courts assume that plaintiffs cannot use the law to compel federal fund recipients to address these issues unless they either have proof of discriminatory animus, or can prove that

sexual harassment of a student unless a school district official was deliberately indifferent to the harassment); Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265–66 (1977) (holding that a cause of action exists under the Equal Protection Clause when there is proof that a discriminatory purpose was a motivating factor in a decision that results in a racially disproportionate impact).

8. *See* Alexander v. Sandoval, 532 U.S. 275, 280–81 (2001) (holding that a cause of action under Title VI exists only for intentional discrimination).

9. *See, e.g.*, CAL. EDUC. CODE § 66271.6(l) (2004) (indicating that although major gains have been made, gender inequalities in sports continue to persist, including in regard to "(1) Participation rates for women and girls (2) Number of sports offered (3) Number of levels of teams (4) Encouragement by spirit and band groups (5) Facilities (6) Locker rooms (7) Scheduling of games and practice times (8) Level of finical support by the district, school, booster club or clubs, and outside sponsors (9) Treatment of coaches (10) Opportunities to receive coaching and academic tutors (11) Travel and per diem allowance (12) Medical and training facilities and services (13) Housing and dining facilities and services (14) Scholarship money (15) Publicity").

10. *See generally* RACIAL INEQUITY IN SPECIAL EDUCATION, at xv–xvi (Daniel J. Losen & Gary Orfield eds., 2002) (discussing the overrepresentation of racial minorities in special education); JEANNIE OAKES, KEEPING TRACK: HOW SCHOOLS STRUCTURE INEQUALITY xiv (1985) (explaining how the practice of separating students for instruction by achievement or ability has contributed to racial inequality in education); JEANNIE OAKES, LOST TALENT: THE UNDERPARTICIPATION OF WOMEN, MINORITIES, AND DISABLED PERSONS IN SCIENCE 1–3 (1990) (discussing the historical problem of underrepresentation of women and minorities in the mathematic and scientific workforces).

race or gender played a role in the decision-making. Courts feel constrained to these parameters because they focus exclusively on the Supreme Court's holding in *Alexander v. Sandoval* that limits causes of action under Title VI (or Title IX) to victims of intentional discrimination.[11] In the past, the intentional discrimination doctrine has devastated racial and gender equity in school desegregation, general educational practices, environmental justice claims, transportation, government contracting, and various other publicly funded programs.[12] Yet, the Supreme Court has consistently reiterated the intent standard as the touchstone of any viable discrimination claim.[13] The ramifications of recent extensions of the intent standard to statutory claims of gender and race discrimination in cases like *Sandoval* are so devastating that advocates have introduced and supported legislation

11. *Sandoval*, 532 U.S. at 281.

12. *See, e.g.*, Keyes v. Sch. Dist., 413 U.S. 189, 208 (1973) (holding for the first time that a plaintiff must demonstrate intentional segregative actions to obtain relief in school desegregation); S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 274 F.3d 771, 774 (3d Cir. 2001) (rejecting a claim of environmental racism based on the absence of evidence of intentional discrimination); Cureton v. NCAA, 252 F.3d 267, 270–71, 271 n.3 (3d Cir. 2001) (requiring parties to prove intentional discrimination beyond extensive examples of the disparate impact of scholastic requirements for participation in freshman education and athletic scholarships, despite a tenuous link between the requirements and the desired outcomes); Latinos Unidos de Chelsea en Accion v. Sec'y of Hous. & Urban Dev., 799 F.2d 774, 795 (1st Cir. 1986) (requiring residents to prove intentional discrimination in funding of housing projects); *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1437–39, 1512 (2d ed. 1988) (explaining how the Equal Protection Clause is violated by governments, and how the Court fails to confront such discrimination by its requirement that the discrimination be intentional); Barbara Flagg, *"Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 961–66 (1993) (explaining the evolution of the Court's definition of intentional discrimination); Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1050, 1055–57 (1978) (critiquing the intent doctrine's disregard for the discriminatory effects of governmental policies); Michael J. Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540, 541–42 (1977) (discussing the serious consequences the intent doctrine would have).

13. *See Sandoval*, 532 U.S. at 281 (holding that a plaintiff must demonstrate intentional discrimination under Title VI to sustain a cause of action); Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979) (requiring "discriminatory purpose"); Arlington Heights v. Metro Hous. Dev. Corp., 429 U.S. 252, 266 (1977) (requiring "invidious discriminatory purpose [as] a motivating factor"); Washington v. Davis, 426 U.S. 229, 239 (1976) (holding that a "racially disproportionate impact" alone is insufficient to support an invidious discrimination claim). Consequently, the Court has denied relief to plaintiffs regardless of the racial inequity or disadvantage they suffered if they could not demonstrate intent. *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279, 292–95 (1987) (finding evidence of racial bias throughout the Georgia death penalty scheme insufficient to prove an equal protection violation because the defendant failed to establish intentional discrimination directed at him personally).

to change the standard.[14] Those who are less optimistic simply conclude that courts will no longer police antidiscrimination norms and, thus, are not viable venues for remedying gender and race inequality.[15]

Although there is merit in these views, the vitriol that is directed toward the intent doctrine has caused many to overlook favorable nuances that the Court has imported through recent cases.[16] While the Court has seemingly left the standard untouched for equal protection claims, it has quietly expanded the means to demonstrate a violation of statutory prohibitions of discrimination. When institutions and programs such as schools receive federal money, they agree to comply with various antidiscrimination statutes, which in turn can create more stringent prohibitions of discrimination than does the Equal Protection Clause. Unfortunately, neither lower courts nor scholars have fully recognized the expansion of prohibited activities under Title VI and Title IX, probably because the expansion has occurred pri-

---

14. Fairness and Individual Rights Necessary to Ensure a Stronger Society: Civil Rights Act of 2004, H.R. 3809, 108th Cong. § 101 (2004). In general, the Act's purpose was to "restore, reaffirm, and reconcile legal rights and remedies" under the varying civil rights statutes. 150 CONG. REC. H514 (2004). Specifically, it would have amended the Civil Rights Act of 1964, the Education Amendments of 1972, and the Age Discrimination Act of 1975 to allow proof of "discrimination based on disparate impact" and "rights of action and recovery for unlawful discrimination (intentional or based on disparate impact) and harassment." Civil Rights Act of 2004, H.R. 3809, 108th Cong., Summary as of 2/11/04 (2004), *available at* http://www.thomas.gov/cgi-bin/bdquery/z?d108:HR03809:@@@D&summ2=& (last visited Feb. 20, 2008). In addition, the Act would have amended the Uniformed Services Employment and Reemployment Rights Act of 1994, the Age Discrimination in Employment Act of 1967, and the Fair Labor Standards Act of 1938 (FLSA) to "provide that a State's receipt or use of Federal financial assistance for a State program or activity shall constitute a waiver of sovereign immunity." *Id.* Finally, it would have amended the Air Carrier Access Act of 1986 to "authorize civil actions in Federal court for discrimination based on disability." *Id.* Over fifty groups supported the bill, including the Leadership Conference on Civil Rights, People For the American Way, and the National Council of Jewish Women. Organizations Endorsing FAIRNESS: The Civil Rights Act of 2004, http://www.civilrights.org/campaigns/civil_rights_act/org_support.html (last visited Feb. 20, 2008).

15. *See* Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 4, 41–47 (2006) (asserting that the Court's abandonment of the disparate impact standard to address structural problems of workplace inequality means that, "[i]n the end, social and not legal change is what will be necessary to eliminate structural workplace inequalities"); RIGHTS AT RISK: EQUALITY IN AN AGE OF TERRORISM 1–3 (Dianne M. Piché et al. eds., 2002) (characterizing recent Court decisions as an "assault on civil rights remedies").

16. David Cohen, unlike others, has recognized the subtle expansion of intent through these cases, but did not analyze the expansion or connect it with the larger question of intent generally and its implications on Title VI. David S. Cohen, *Title IX: Beyond Equal Protection*, 28 HARV. J.L. & GENDER 217, 255–56 (2005).

marily under claims of retaliation and sexual harassment.[17] Rather than engage in the nuanced analysis necessary to reconcile the Court's expansive decisions with its narrow decision in *Alexander v. Sandoval*, most have focused on *Sandoval*'s emphatic stance in regard to claims of race and gender inequities that do not represent intentional discrimination. Lower courts and commentators interpret *Sandoval*'s holding as eliminating room for an expansive understanding of intentional discrimination.[18]

The decision's uncompromising position has prompted lower courts to question whether a cause of action exists for any civil rights claim that does not clearly and easily fall into the category of intentional discrimination.[19] They focus on the causes of action that *Sandoval* seemingly eliminated without appreciating the significance of those cases where the Court has explicitly recognized causes of action for discrimination. Even in scholarship, the harm that *Sandoval* levied on civil rights has overshadowed the positive and mitigating aspects of

17. *See, e.g.*, Peters v. Jenney, 327 F.3d 307, 318 (4th Cir. 2003) (asserting that retaliation can be defined "as a means of implementing or actually engaging in intentional discrimination by encouraging such discrimination and removing or punishing those who oppose it or refuse to engage in it"); Jones v. United Parcel Serv., 378 F. Supp. 2d 1312, 1314 (D. Kan. 2005) (finding that the Court has held discriminatory actions to include retaliation under Title IX, even though not specifically mentioned in the statute's text); Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 43–60 (2005) (providing a sophisticated analysis of *Jackson v. Birmingham*, retaliation claims, and how they are situated within intentional discrimination, but not connecting the case to implications in regard to the larger line of Title IX cases); *The Supreme Court, 2004 Term—Leading Cases*, 119 HARV. L. REV. 357, 362–64 (2005) (struggling to reconcile *Jackson* with intentional discrimination precedent and, hence, over-narrowing a retaliation claim because the author failed to account for the *Gebser* line of cases).

18. *See* Benjamin Labow, *Federal Courts:* Alexander v. Sandoval*: Civil Rights Without Remedies*, 56 OKLA. L. REV. 205, 230 (2003) (concluding that *Sandoval*'s holding was so hostile to disparate impact theories that if the validity of disparate impact regulations were to come before the Court, it would likely hold that the regulations themselves are invalid exercises of power); Patrick Moulding, *Fare or Unfair? The Importance of Mass Transit for America's Poor*, 12 GEO. J. ON POVERTY L. & POL'Y 155, 174 (2005) (finding that *Sandoval* might even prevent agencies from interpreting discrimination broadly).

19. *See, e.g.*, Bryant v. Indep. Sch. Dist., 334 F.3d 928, 930 (10th Cir. 2003) (requiring plaintiffs to prove discriminatory intent under Title VI); Horner v. Ky. High Sch. Athletic Ass'n, 206 F.3d 685, 692–93 (6th Cir. 2000) (issued prior to *Sandoval*, but finding that the only clear standard for proving intent in the Supreme Court was deliberate indifference); Almendares v. Palmer, 284 F. Supp. 2d 799, 802 (N.D. Ohio 2003) (finding a cause of action under Title VI only for intentional discrimination, and not disparate impact); *see also* Gant v. Wallingford Bd. of Educ., 195 F.3d 134, 141 (2d Cir. 1999) (making contradictory statements that "[t]he ultimate inquiry, of course, is one of discriminatory purpose on the part of the defendant himself," but three sentences later stating that "deliberate indifference can be found when the defendant's response to known discrimination is clearly unreasonable").

the Court's holdings in *Franklin v. Gwinnett County*,[20] *Gebser v. Lago Vista*,[21] *Davis v. Monroe County*,[22] and *Jackson v. Birmingham*.[23] This oversight is, in part, attributable to *Sandoval* being a race discrimination case arising under Title VI of the Civil Rights Act,[24] whereas the Court's other decisions are gender discrimination cases arising under Title IX of the Education Amendments.[25] However, such a distinction is immaterial because the Court has repeatedly recognized that Title IX was modeled after Title VI, held that its decisions are coextensive between the two, and required plaintiffs to demonstrate exactly the same thing under both: intentional discrimination.[26] Thus, *Sandoval* cannot be understood and applied appropriately without harmonizing it with the Court's three most recent and significant Title IX gender discrimination cases.

A collective analysis of *Sandoval*, *Franklin*, *Gebser*, *Davis*, and *Jackson* (hereinafter "*Gebser* line of cases") reveals that although the Court has indicated that a plaintiff must demonstrate intentional discrimination to sustain a claim under Title VI and Title IX, intent has a wider meaning than the traditional intentional discrimination requirement that gender or race be a factor in a decision-making process. For instance, the Court in *Jackson* explicitly wrote that evidence of "deliberate indifference constituted intentional discrimination on the basis of sex," even though the traditional indicia of intentional discrimination are entirely absent.[27] Thus, other factors and elements must have existed to motivate the Court to impose liability under the intent standard. This Article will demonstrate that among these additional elements are a value choice by the defendant, the existence of condi-

20. 503 U.S. 60 (1992).

21. 524 U.S. 274 (1998).

22. 526 U.S. 629 (1999).

23. 544 U.S. 167 (2005). In fact, many find the sexual harassment standards objectionable themselves because of the burden of proof they place on plaintiffs. *See, e.g.*, David S. Cohen, *Limiting* Gebser*: Institutional Liability for Non-Harassment Sex Discrimination Under Title IX*, 39 WAKE FOREST L. REV. 311, 315 (2004) (concluding that *Gebser* and *Davis* "unnecessarily thwart Title IX's purpose by establishing a difficult hurdle" for plaintiffs). However, these critiques do not address how the deliberate indifference standard would be easier to meet than the intent doctrine.

24. 42 U.S.C. § 2000d (2000).

25. 20 U.S.C. §§ 1681–1688 (2000).

26. *Jackson*, 544 U.S. at 177–78 (applying *Sandoval*'s Title VI holding to Title IX); Grove City Coll. v. Bell, 465 U.S. 555, 566 (1984) (noting that Title IX was patterned after Title VI); N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 514 (1982) (same); Cannon v. Univ. of Chi., 441 U.S. 677, 694–99 (1979) (arguing that because the drafters of Title IX assumed it would be interpreted as Title VI had been, and because Title VI had been construed as creating a private remedy, Title IX also includes an implied private remedy).

27. *Jackson*, 544 U.S. at 182.

tions within a federally funded program that are inconsistent with congressional objectives, and action/inaction by the defendant that undermine those objectives. By distilling these factors, this Article will reveal the principle that: *a violation of Title VI or Title IX occurs not only when the funding recipient directly engages in traditional forms of intentional discrimination, but also when a funding recipient makes a conscious choice to frustrate the congressional objective to eliminate discrimination and inequity in federally funded programs.*

This Article will begin by discussing the evolution of the intent standard and the recent difficulty lower courts have encountered in using the standard to assess discrimination. Next, it will recount the Court's holdings in the *Gebser* line of cases and identify the expansion of intentional discrimination's meaning within the context of Title IX and Title VI. Third, the Article will distill the indicia and framework that the Court has relied on to determine whether particular activities are prohibited by these statutes. It will then reduce the indicia and framework to a foundational principle and explore how this principle can extend beyond the facts of these cases. The Article then recognizes that any further extension is particularly dependent on federal agencies playing a role in defining what activities are prohibited under the relevant statute. Agencies, however, are well-suited, if not best-suited, to resolve the most difficult and ambiguous instances of purported discrimination. The Article concludes by exploring the nature of those instances.

II. HISTORY AND INTERPRETATION OF THE INTENT DOCTRINE

The Supreme Court initially applied the intent standard to equal protection claims of racial discrimination in the 1970s in *Arlington Heights v. Metropolitan Housing Development Corp.*,[28] and later to claims of gender discrimination in *Personnel Administrator v. Feeney*.[29] The Court required plaintiffs to show a defendant intentionally discriminated against them based on gender or race,[30] meaning that race or gender was a factor or played a role in the defendant's action.[31] Thus, simply showing that a policy had a disparate impact or that a defen-

28. 429 U.S. 252 (1977). The Court had also applied this standard to the federal government through the Fifth Amendment. Washington v. Davis, 426 U.S. 229, 239 (1976).

29. 442 U.S. 256 (1979).

30. *Id.* at 272; *Arlington Heights*, 429 U.S. at 266; *Washington*, 426 U.S. at 242.

31. *See* Miller v. Johnson, 515 U.S. 900, 916 (1995) (holding that plaintiffs must show "that race was the predominant factor motivating the legislature's [redistricting] decision"); McCleskey v. Kemp, 481 U.S. 279, 292–93 (1987) (requiring proof that defendant's jury was motivated by racial animus when it imposed the death penalty, rather than statistical evidence that demonstrated that black men were sentenced to death at far greater rates

dant was aware that the impact would occur is insufficient. A plaintiff must show that the defendant acted "because of" gender or race, not merely "in spite of" the disparate impact.[32]

The full effect of this requirement, however, was not initially felt because plaintiffs were not limited to claims under the Equal Protection Clause. Plaintiffs could also bring claims under statutes such as Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972,[33] which prohibit discrimination and denials of equal access based on race and gender, respectively, in programs that receive federal funds.[34] The statutes also mandate that federal agencies enforce these prohibitions, primarily through the enactment and enforcement of regulations.[35] Pursuant to these statutes, numerous federal agencies enacted regulations that prohibit policies and actions that have a disparate effect based on race or gender.[36] Courts subsequently permitted plaintiffs to assert claims under Title VI and Title IX to enforce these regulations.[37] Thus, under Title VI or Title IX, a plaintiff could sustain a discrimination claim with proof of disparate

for killing whites, than whites for killing blacks); *Arlington Heights*, 429 U.S. at 266 (requiring "invidious discriminatory purpose [as] a motivating factor").

32. *Feeney*, 442 U.S. at 279 (finding that a "[d]iscriminatory purpose . . . implies more than intent as volition or intent as awareness of consequences," but rather "that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group"); *McCleskey*, 481 U.S. at 298 (relying on *Feeney*'s articulation of intentional gender discrimination to set the standard for intentional race discrimination).

33. Cannon v. Univ. of Chi., 441 U.S. 677, 690–93 & n.14 (1979) (recognizing an implied cause of action under the statutes).

34. 42 U.S.C. § 2000d (2000); 20 U.S.C. §§ 1681–1688 (2000).

35. 42 U.S.C. § 2000d-1; 20 U.S.C. § 1682.

36. Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 619 & n.7 (1983) (Marshall, J., dissenting) ("[E]very Cabinet Department and about 40 federal agencies adopted standards interpreting Title VI to bar programs with a discriminatory impact.") (citing Dep't of Agric., 7 C.F.R. § 15.3(b)(2) (1982); Dep't of Commerce, 15 C.F.R. § 8.4(b)(2) (1982); Dep't of Def., 32 C.F.R. § 300.4(b)(2) (1982); Dep't of Educ., 34 C.F.R. § 100.3(b)(2) (1982); Dep't of Energy, 10 C.F.R. §§ 1040.13(c)–(d) (1982); Dep't of Health & Human Servs., 45 C.F.R. §§ 80.3(b)(2)–(3) (1982); Dep't of Hous. & Urban Dev., 24 C.F.R. §§ 1.4(2)(i)–(3) (1982); Dep't of the Interior, 43 C.F.R. §§ 17.3(b)(2)–(3) (1982); Dep't of Justice, 28 C.F.R. §§ 42.104(b)(2)–(3) (1982); Dep't of Labor, 29 C.F.R. §§ 31.3(b)(2)–(3) (1982); Dep't of State, 22 C.F.R. § 141.3(b)(2) (1982); Dep't of Transp., 49 C.F.R. §§ 21.5(b)(2)–(3) (1982); Dep't of Treasury, 31 C.F.R. § 51.52(b)(4) (1982)).

37. *See id.* at 584 n.2, 607 n.27 (majority opinion) (finding that administrative regulations incorporating a disparate impact standard are valid). Lower courts interpret *Guardians* as recognizing such a cause of action. *E.g.*, Powell v. Ridge, 189 F.3d 387, 399–400 (3d Cir. 1999); N.Y. Urban League v. New York, 71 F.3d 1031, 1036 (2d Cir. 1995); Roberts v. Colo. State Bd. of Agric., 998 F.2d 824, 832 (10th Cir. 1993); United States v. Yonkers, No. 80 Civ. 6761, 1995 WL 358746, at *5 (S.D.N.Y. June 14, 1995).

impact, making intent unnecessary and a statutory claim easier to establish than a constitutional one.[38]

However, in 2001, the Supreme Court held in *Sandoval* that neither the disparate impact regulations, nor Title VI itself, created a cause of action for disparate impact discrimination.[39] The Court held that, as with equal protection claims, plaintiffs must show intentional discrimination to establish a violation.[40] To some, this holding sounded a death knell to achieving racial or gender justice through the courts.[41] Constitutional claims of discrimination had been extremely difficult to sustain ever since *Feeney*, and *Sandoval* seemingly made statutory claims equally difficult. The widespread ramifications and shock of such an uphill battle caused most to be unable to see beyond or contextualize *Sandoval*.

Courts and scholars have largely overlooked significant nuances of the Court's other recent, but less dramatic, holdings regarding intentional discrimination that subtly expand the meaning of intentional discrimination. They have remained mired in an understanding of intent based on the Court's early descriptions in *Ar-*

38. *Compare* Quarles v. Oxford Mun. Separate Sch. Dist., 868 F.2d 750, 754 n.3 (5th Cir. 1989) (allowing a case to proceed under Title VI through a disparate impact analysis), NAACP v. Med. Ctr., Inc., 657 F.2d 1322, 1324 (3d Cir. 1981) (concluding that "disparate impacts of a neutral policy may be adequate to establish discrimination under Title VI"), *and* GI Forum v. Tex. Educ. Agency, 87 F. Supp. 2d 667, 677 (W.D. Tex. 2000) (applying a burden shifting disparate impact analysis), *with* S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 274 F.3d 771, 774 (3d Cir. 2001) (rejecting a claim of environmental racism based on the absence of evidence of intentional discrimination as required by *Sandoval*, although the district court had previously permitted a claim of disparate impact prior to *Sandoval*), *and* Cureton v. NCAA, 252 F.3d 267, 275 (3d Cir. 2001) (rejecting plaintiffs' motion to amend dismissed complaint alleging only disparate impact claim to include claim of intentional discrimination). Intent was required if a plaintiff sought monetary damages under the statute. *Guardians*, 463 U.S. at 602–03 (1983).

39. Alexander v. Sandoval, 532 U.S. 275, 280–81, 285–86 (2001).

40. *Id.* at 280–81.

41. *See* Sam Spital, *Restoring* Brown*'s Promise of Equality After* Alexander v. Sandoval*: Why We Can't Wait*, 19 HARV. BLACKLETTER L.J. 93, 111 (2003) (discussing post-*Sandoval* litigation and how the case creates a barrier for private plaintiffs seeking to use federal law to redress racial discrimination in education); *see also* Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1520 (2005) ("*Sandoval*, viewed by civil rights litigators as a tremendous setback, would seem to preclude what had been the most viable legal theory for challenging test bias.") (citation omitted); Sara Rosenbaum & Joel Teitelbaum, *Civil Rights Enforcement in the Modern Healthcare System: Reinvigorating the Role of the Federal Government in the Aftermath of* Alexander v. Sandoval, 3 YALE J. HEALTH POL'Y L. & ETHICS 215, 238–39 (2003) (noting that the civil rights community was shocked by the Court's failure to recognize the right of individuals to bring private actions under Title VI to enforce the disparate impact regulations); Melanie K. Gross, Note, *Invisible Shackles:* Alexander v. Sandoval *and the Compromise to the Medical Civil Rights Movement*, 47 HOW. L.J. 943, 981–86 (2004) (discussing how *Sandoval* potentially eradicated another strategy for the medical civil rights movement).

lington Heights and *Feeney*.[42] Relying solely on those descriptions, however, leads to a particularly narrow conceptualization of discrimination as being either intentional or unintentional, with no grey area in between. Consequently, recent lower courts have readily dismissed claims of retaliation for a racially hostile environment, pursuant to *Sandoval* or *Feeney*, because such claims did not clearly or explicitly demonstrate intentional discrimination.[43] Most lower courts have not made an attempt to harmonize the Court's other recent decisions with *Sandoval*; other courts that have consulted recent Court decisions have been simply confused as to how to assess intentional discrimination.

For instance, just prior to *Sandoval*, the Sixth Circuit in *Horner v. Kentucky High School Ass'n* admitted that "the question of what standard to apply to determine intent when a facially neutral policy is challenged" still lingers.[44] The court found that "the only clear test in the Supreme Court is that of 'deliberate indifference,'"[45] but that the deliberate indifference test is not "readily analogous" to general discrimination and inequality because it arises out of the sexual harassment context.[46]

Sandoval's holding only complicated the question, causing lower courts to struggle to situate previously recognized causes of action within *Sandoval*'s undefined parameters of intent. For example, a district court dismissed a claim for a racially hostile environment because, as the court read *Sandoval*, "there is no private right of action under Title VI to remedy non-intentional forms of discrimination such as disparate impact and permitting the existence of a hostile environment."[47] On appeal, the Tenth Circuit also rejected a deliberate

42. *E.g.*, McCleskey v. Kemp, 481 U.S. 279, 298 (1987); Horner v. Ky. High Sch. Athletic Ass'n, 43 F.3d 265, 276 (6th Cir. 1994); S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., No. Civ. A. 01-702(FLW), 2006 WL 1097498, at *22–23 (D.N.J. Mar. 31, 2006); NAACP v. Austin, 857 F. Supp. 560, 572 (E.D. Mich. 1994); Brown v. Bd. of Sch. Comm'rs, 542 F. Supp. 1078, 1103–05 (S.D. Ala. 1982).

43. Bryant v. Indep. Sch. Dist., 334 F.3d 928, 929 (10th Cir. 2003) (restating the lower court's holding that "there is no private right of action under Title VI to remedy non-intentional forms of discrimination such as disparate impact and permitting the existence of a hostile environment"); Jackson v. Birmingham Bd. of Educ., 309 F.3d 1333, 1347–48 (11th Cir. 2002), *rev'd*, 544 U.S. 167 (2005) (holding that Title IX permits retaliation claims only from persons that have experienced intentional discrimination).

44. 206 F.3d 685, 692–93 (6th Cir. 2000).

45. *Id.* at 693.

46. *Id.* The Sixth Circuit stated that "'intent' in th[e sexual harassment] context means 'actual notice' of the abuse by a third party and a failure to stop it." *Id.*

47. *Bryant*, 334 F.3d at 929 (discussing the unpublished district court decision). Prior to *Bryant*, the Supreme Court had found a cause of action for sexual harassment under Title IX. Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 633 (1999). Various courts

indifference theory, but then almost inexplicably found that the indifference that permitted the racial hostility established a claim of intent because "[c]hoice implicates intent."[48]

Conversely, the Eleventh Circuit in *Jackson v. Birmingham*[49] eliminated a cause of action for retaliation against those who complained of discrimination because the court did read the claim as falling squarely within *Sandoval*'s categorization of intentional discrimination.[50] Moreover, the court did so notwithstanding the fact that a cause of action for retaliation exists for all other civil rights laws.[51] The district court's opinion in *Almendares v. Palmer*[52] may be the most poignant demonstration of the confusion and exhaustion of courts as to this issue. Specifically, the district court indicated that although various tests and types of evidence have sufficed for intent, prior court decisions are of little help because few courts (including its own court of appeals) have revisited the issue since *Sandoval*.[53] Rather than addressing the issue further, however, the *Almendares* court simply ended its analysis by stating: "Liberally construing the complaint, . . . I cannot conclude, that beyond a doubt, no set of facts alleged in plaintiffs' . . . [c]omplaint would entitle plaintiffs to relief."[54] The objective of the following analysis is to provide a framework to guide courts through this confusion.

---

had concluded that the principles of Title IX and Title VI were interchangeable, as the former had been modeled after the latter, and they were coextensive. *See, e.g.*, Grove City Coll. v. Bell, 465 U.S. 555, 566 (1984); N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 514 (1982); Cannon v. Univ. of Chi., 441 U.S. 677, 694–96 (1979).

48. *Bryant*, 334 F.3d at 932–34; *see also* Peters v. Jenney, 327 F.3d 307, 321–23 (4th Cir. 2003) (drawing a distinction between causes of action for retaliation based on complaints of intentional discrimination and retaliation based on complaints of disparate impact discrimination so as to allow the former and reject the latter).

49. 309 F.3d 1333 (11th Cir. 2002), *rev'd*, 544 U.S. 167 (2005).

50. *Id.* at 1347–48. However, the Supreme Court reversed the Eleventh Circuit's ruling. Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 183–84 (2005).

51. *E.g.*, 42 U.S.C. § 2000e-3(a) (2000); 42 U.S.C. § 3617 (2000).

52. 284 F. Supp. 2d 799 (N.D. Ohio 2003).

53. *Id.* at 804 ("Because of *Sandoval*, many cases finding a violation of Title VI . . . are not good law.").

54. *Id.* at 808. Interestingly, the court noted that some courts have applied a test of "deliberate indifference," under which the court stated "there would be no question that plaintiffs have stated a claim. If plaintiffs' allegations are true, defendants' conscious choice to ignore or refuse to remedy the effect of their English-only policy or practice causes the disparate effect to continue." *Id.* at 807 n.5. However, the court found that such a test does not lend itself to direct application in the instant case. *Id.*

III. THE SUPREME COURT'S RECENT INTERPRETATIONS OF INTENTIONAL DISCRIMINATION IN TITLE IX AND TITLE VI

If courts are to overcome apparent gaps in and confusion regarding Supreme Court precedent, they cannot interpret *Sandoval* in a vacuum. Rather, *Sandoval* must be understood as but one among a series of cases where the Court has recently explored liability under Title VI and Title IX. These cases demonstrate that intentional discrimination is not a narrow concept restricted solely to instances where race or gender played a role in a funding recipient's decision. The *Gebser* line of cases demonstrates that a defendant also violates Title VI and Title IX when it takes intentional action/inaction that causes, contributes to, or perpetuates the discrimination or disadvantages that occur within its programs.[55] Such a violation occurs, even when the defendant did not initially desire or act to create discrimination or disadvantage, if the discrimination and disadvantage continue to occur because the defendant knowingly refuses or fails to intervene.[56]

For instance, staff members, who are not agents of the school, may harass female students. Or teachers might adopt pedagogically unsound or unjustified practices that unfairly exclude minorities from an educational opportunity. School officials may have had nothing to do with these occurrences, but when they later learn of them and take no action to limit their continuation, the school intentionally violates Title VI or Title IX's prohibition against discrimination. In such instances, the Court has consistently imposed liability on defendants. To elucidate this principle, this Article must first discuss the basic holding and reasoning of each case individually.

A. Alexander v. Sandoval

Although *Sandoval* followed *Franklin*, *Gebser*, and *Davis*, it is helpful to analyze its reasoning first because it has dominated the attention and framed the analysis of subsequent courts. In *Sandoval*, the plaintiff asserted that a disparate impact regulation—enacted pursuant to Title VI—created a private cause of action to challenge a state policy that required all drivers' license examinations to be administered in English only and with no aids or accommodations for individuals who spoke English as a second language.[57] The lower courts

55. *See infra* notes 71–110 and accompanying text. R

56. *See infra* notes 85–89 and accompanying text. R

57. Alexander v. Sandoval, 532 U.S. 275, 278–79 (2001).

agreed and sustained a private cause of action to enforce the disparate impact regulation.[58]

The issue before the Supreme Court was whether a disparate impact regulation could serve as the basis for a private cause of action.[59] The Court assumed that agencies could validly enact the regulations,[60] but held that the regulations could not create a private cause of action.[61] Only the statute itself could create a cause of action, and Title VI prohibits only intentional discrimination, whereas the regulations go beyond this to prohibit unintentional discrimination as well.[62] Thus, although agencies can enforce disparate impact regulations administratively, the only private cause of action under Title VI is one for intentional discrimination.[63]

The Court, however, did not discuss what amounts to or how one proves intentional discrimination. At most, the decision characterized its precedent as concluding that mere disparate impact is not prohibited because it does not evidence intentional discrimination.[64] The Court did not reveal why this is necessarily so. Nor did the Court identify any circumstances that would amount to intentional discrimination. It merely suggested that a bright line between intentional and unintentional discrimination exists and delineates viable causes of action.[65]

---

58. *Id.* at 279.

59. *Id.* at 278.

60. *Id.* at 281–82.

61. *Id.* at 288–89, 291 ("[W]e have found no evidence anywhere in the text to suggest that Congress intended to create a private right to enforce regulations promulgated under § 602.").

62. *Id.* at 280–81.

63. The Court reached this conclusion by conceptualizing Sections 601 and 602 of Title VI as clauses with independent, rather than complementary, purposes. Section 601 provides that "no person . . . shall . . . be subjected to discrimination . . . ." 42 U.S.C. § 2000d (2000). Section 602 provides that agencies shall effectuate this provision through regulations. *Id.* § 2000d-1. The Court found that Section 601 focuses on individual rights and, hence, creates an implied private cause of action, whereas Section 602 focuses neither on the persons regulated nor the persons protected; rather, it focuses on the agencies. *Sandoval*, 532 U.S. at 280, 289. Thus, according to the Court, nothing in Section 602 confers any private rights and, hence, it cannot create a private cause of action. *Id.* at 291, 293. Agencies may use Section 602 to further, as they deem reasonable, the conferred rights of Section 601, but Section 602 itself cannot create new private rights that are beyond those inherent in Section 601, nor can it create an additional private cause of action. Because the Court read precedent to hold that Section 601 prohibits only intentional discrimination, Section 602 cannot create a privately enforceable right to prohibit disparate impact. In short, *Sandoval* stands for the principle that Title VI, and by implication Title IX, prohibits only intentional discrimination, and although federal agencies may proscribe other types of activities, private individuals cannot enforce them in court.

64. *Sandoval*, 532 U.S. at 282–83.

65. *Id.* at 284.

B. Franklin v. Gwinnett County

The Supreme Court's recent Title IX cases, conversely, provide more depth to the meaning of intentional discrimination.[66] The first case in this line, *Franklin v. Gwinnett County*, involved an allegation that a teacher/coach had sexually harassed a female student and that the school knew but refused to take remedial action, even to the point of discouraging the student from pressing charges.[67] The Court addressed whether this was intentional discrimination for which the school district could be held liable. The Court wrote, "Title IX placed on [schools] the duty not to discriminate on the basis of sex, and 'when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor "discriminate[s]" on the basis of sex.' "[68] Consequently, the Court concluded, "the same rule should apply when a teacher sexually harasses and abuses a student."[69] Furthermore, "Congress surely" would not have intended for federal money to support such intentional action when the entire purpose of Title IX was to eliminate it.[70]

C. Gebser v. Lago Vista

Although *Franklin* answered the narrow question of whether sexual harassment is intentional discrimination under Title IX, it did not address the contours of when harassment by a school's employees would likewise constitute intentional discrimination by the school dis-

66. Three of these cases preceded *Sandoval* and, thus, causes of action under disparate impact regulations or for "unintentional" discrimination had theoretically not been eliminated. These cases, however, expound on the meaning of intent because in each case the plaintiffs were seeking monetary damages, which requires plaintiffs to demonstrate intentional discrimination. Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 632–33 (1999); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 278–79 (1998); Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 64 (1992). State entities are required to pay monetary awards for intentional violations of Title IX, even if a student is suing for sexual harassment by a teacher. *Franklin*, 503 U.S. at 75 ("Congress surely did not intend for federal moneys to be expended to support the intentional actions it sought by statute to proscribe. Moreover, the notion that Spending Clause statutes do not authorize monetary awards for intentional violations is belied by our unanimous holding in *Darrone*."). Thus, these cases, like *Sandoval*, address the same question of what a plaintiff must show to sustain a cause of action for intentional discrimination. *Compare Franklin*, 503 U.S. at 70 (relying on *Guardians*' holding that a plaintiff must prove intentional discrimination rather than merely disparate impact), *with Sandoval*, 532 U.S. at 282–83 (same).

67. *Franklin*, 503 U.S. at 63–64.

68. *Id.* at 75 (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986)).

69. *Id.*

70. *Id.*

trict itself.[71] That issue came squarely before the Court in *Gebser v. Lago Vista* where, although the school was unaware of it, a teacher allegedly sexually harassed a student.[72] The Court noted that the legal consequences are different under Title IX than Title VII (which prohibits employment discrimination), because Title VII expressly embodies agency principles that make the employer liable for its employees' actions, whereas Title IX does not include any language on that issue.[73] Therefore, to answer the question before it, the Court had to determine whether *Franklin* had imposed liability based on a respondeat superior theory or some other basis.

The Court in *Gebser* concluded that *Franklin* was not based on respondeat superior, but rather the school in *Franklin* was liable because it knew of the harassment and took no action to stop it.[74] In contrast, the school in *Gebser* was unaware of the harassment, and the Court explicitly rejected liability based on respondeat superior, holding that a school could be liable only when it was actually aware of the harassment.[75]

In determining whether to impose liability under respondeat superior or some other theory, the Court's conclusions were primarily guided by whether doing so under the facts of the case would "'frustrate the purposes' of Title IX."[76] It reiterated its conclusions from earlier cases that Title IX was enacted "'[t]o avoid the use of federal resources to support discriminatory practices' and 'to provide individual citizens effective protection against those practices.'"[77] The Court reasoned that *protecting* "individuals from discriminatory practices car-

71. *Gebser*, 524 U.S. at 283 ("Whether educational institutions can be said to violate Title IX based solely on principles of respondeat superior or constructive notice was not resolved by *Franklin*'s citation of *Meritor*.").

72. *Id.* at 278–79 (noting that although the principal received one complaint regarding the teacher's comments in the classroom, it was insufficient to raise a genuine issue as to whether the school district had actual or constructive knowledge of the teacher's sexual harassment of a student).

73. *Id.* at 283. For instance, in Title VII, employers can be liable for the actions of their employees through respondeat superior. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 72 (1986). In effect, the employees' actions become those of the employer and, thus, if the employee engages in discrimination so, too, might the employer.

74. *Gebser*, 524 U.S. at 283 (reasoning that respondeat superior would have explained the holding in *Franklin* only if the Court had held the school liable for harassment of which it was unaware).

75. *Id.* at 292–93 ("[W]e will not hold a school district liable in damages under Title IX for a teacher's sexual harassment of a student absent actual notice and deliberate indifference.").

76. *Id.* at 285 (quoting Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 595 (1983)).

77. *Id.* at 286 (quoting Cannon v. Univ. of Chi., 441 U.S. 677, 704 (1979)).

ried out by recipients of federal funds" is dissimilar to Title VII's purpose to *compensate* victims.[78] First, imposing liability on schools that are neither aware of discrimination, nor contribute to its continuation, would not serve to protect students from the schools' discriminatory actions.[79] Conversely, Title VII's purpose is furthered even when the defendant was unaware of the discrimination, because its purpose is to compensate victims of discrimination in the workplace.[80] Thus, liability under Title IX would be inconsistent with the congressional purpose in this situation.

Second, Congress structured Title IX (as well as Title VI) to be contractual in nature rather than generally applicable like Title VII.[81] Because it is contractual, federal fund recipients must have notice of potential liability before courts can impose it.[82] The Court in *Gebser* found that such notice does not exist when the defendant engages in unintentional discrimination or it is unaware that discrimination is occurring.[83] Consequently, the Court refused to impose liability based on respondeat superior or the argument that the school had constructive notice.[84]

The Court, however, did indicate that under certain circumstances sexual harassment by school employees could subject the school to liability. When that harassment effectively becomes the policy of the school rather than solely the act of an employee or third party, a school will be liable for the harassment.[85] The harassment, although carried out by an employee, becomes the policy or action of the school itself when "an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures . . . has actual knowledge of discrimination . . . and fails adequately to respond."[86] The Court labeled this inadequate response as "deliberate indifference to discrimination."[87] The Court reasoned

78. *Id.* at 287.

79. *Id.* at 289.

80. *Id.* at 287.

81. Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 640 (1999) (noting that Title IX is contractual in nature); Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 599 (1983) (noting that Title VI is contractual in nature); Pennhurst v. Halderman, 451 U.S. 1, 17 (1981) (discussing how legislation is contractual when enacted pursuant to the Spending Clause).

82. Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 74 (1992); *Guardians*, 463 U.S. at 598.

83. *Gebser*, 524 U.S. at 289.

84. *Id.* at 292–93.

85. *Id.* at 290.

86. *Id.*

87. *Id.*

that liability was appropriate because the school is not being held liable for someone else's action but for its own official decision not to remedy the discrimination.[88] The Court also analogized to other civil rights precedent that holds such conduct by the defendant is "the cause" of the deprivation of federal rights.[89] In short, a school will be held liable for deliberate indifference to discrimination that occurs within its programs.

D. Davis v. Monroe County

Similar issues came before the Court in *Davis v. Monroe County*. In *Davis*, the plaintiff alleged that a student, rather than a teacher, sexually harassed her.[90] The Court, relying on *Gebser*'s reasoning, held that a school's deliberate indifference could make it liable for the harassment.[91] Concerned, however, with imposing liability for the all-too-normal inappropriate interaction between children, the Court addressed whether and when student-on-student harassment amounts to discrimination. Recognizing the practicalities of student-on-student harassment, the Court held that such harassment was actionable discrimination only when it "is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit."[92] Significantly, the Court did not frame its holding solely in regard to discrimination, but also in regard to a denial of equal access to or benefits of an educational program, which, although rarely referenced, is also explicitly prohibited by Title VI and Title IX.[93]

The school argued that such a rule would make a school liable for the actions of third parties rather than those of the school itself or even its employees.[94] In response, the Court, as it did in *Gebser*, indicated that schools are only liable for their own actions, namely their deliberate indifference to discrimination.[95] Justifying this notion, the Court focused extensively on how the school's actions caused the discrimination. Using the language of Title IX again, the Court reasoned that a school itself "subject[s]" students to discrimination and "exclude[s]" them from participation in its programs when it know-

88. *Id.* at 290–91.
89. *Id.* at 291 (citing Bd. of Comm'rs v. Brown, 520 U.S. 397 (1997); Collins v. Harker Heights, 503 U.S. 115, 123–24 (1992); Canton v. Harris, 489 U.S. 378, 388–92 (1989)).
90. Davis v. Monroe County, 526 U.S. 629, 632 (1999).
91. *Id.* at 643.
92. *Id.* at 633.
93. *Id.* at 650.
94. *Id.* at 640.
95. *Id.* at 640–41.

ingly allows student-on-student discrimination or harassment to continue.[96] Neither in *Gebser*, nor in *Davis*, did the Court purport to hold a school liable under principles of agency, respondeat superior, or even *in loco parentis*. Rather, a school is liable because a school "intentionally violates Title IX" when it "is deliberately indifferent" to discrimination.[97]

E. Jackson v. Birmingham

The issue before the Court in *Jackson v. Birmingham* was whether an individual who complains about discrimination has a private cause of action when a school retaliates against him in response to the complaint.[98] This case presented a difficult issue because it followed *Sandoval*, which had eliminated all private causes of action for non-intentional discrimination. Relying on *Sandoval*, the trial and appellate courts dismissed the claim for retaliation, concluding that Title IX did not imply such a right to a private cause of action, federal regulations could not create such a right, and retaliation itself is not intentional discrimination.[99] The Supreme Court, however, found that *Sandoval* did not bar the claim because retaliation is in fact a form of intentional discrimination.[100]

The Court emphasized that Title IX's prohibition against action that subjects students to gender discrimination is sweeping.[101] "'Discrimination' is a term that covers a wide range of intentional unequal treatment . . . ."[102] Hence, in *Davis* and *Gebser*, the schools' deliberate indifference to sexual harassment could amount to intentional discrimination, even though the schools did not engage in the harassment themselves.[103]

Consistent with a broad interpretation of intentional discrimination, the Court assessed what intentional discrimination entails and means. The Court wrote, "[r]etaliation is, by definition, an intentional act" and "is a form of 'discrimination' because the complainant

---

96. *Id.*

97. *Id.* at 643.

98. 544 U.S. 167, 171 (2005).

99. *Id.* at 172.

100. *Id.* at 178.

101. *Id.* at 173 (discussing how *Franklin* established that parties can seek monetary damages, *Gebser* established that parties can sue under an argument of deliberate indifference, and *Cannon* created a cause of action for any form of intentional discrimination).

102. *Id.* at 175; *see also id.* at 183 (noting that Title IX provides a cause of action that "encompass[es] diverse forms of intentional sex discrimination").

103. *Id.* at 173.

is being subjected to differential treatment."[104] Furthermore, retaliation must be understood as a form of discrimination "'on the basis of sex' because it is an intentional response to the nature of the complaint: an allegation of sex discrimination."[105] In comparison to deliberate indifference, "retaliation presents an even easier case," because "[i]t is easily attributable to the funding recipient, and it is always—by definition—intentional."[106] Thus, Title IX provides a private cause of action to prohibit it.

In response to the defendant's argument, the Court added that retaliation is discriminatory even if the discrimination about which the plaintiff initially complained was discrimination against a third party.[107] To be discriminated against on the basis of sex, it is enough that the complainant "speaks out about sex discrimination."[108] After doing so, he or she may also become the victim of discriminatory retaliation. The Court emphatically argued that this interpretation was necessary for the statute's prohibitions to have effect. If those who are best suited to reveal discrimination—teachers—are not protected, discriminatory violations would too often go unremedied and "Title IX's enforcement scheme would unravel."[109] For instance, the Court in *Davis* and *Gebser* held that a school district is only liable for harassment of which it has previous actual knowledge. If a district were free to retaliate against those who provide notice, however, employees and students would soon refrain from providing notice and sexual harassment could flourish in schools with no prospect of legal intervention.[110]

IV. A BROADER CONCEPT OF INTENTIONAL VIOLATIONS OF THE STATUTORY PROHIBITION OF DISCRIMINATION

Unfortunately, neither scholarship nor lower court decisions have analyzed these cases collectively and determined their relation to the broader question of what activities amount to actionable intentional gender and race discrimination. As the following will show, the only answer to such an inquiry that maintains consistency with the Court's jurisprudence is that intentional discrimination, within the context of Title VI and Title IX, is broader than its traditional conno-

104. *Id.* at 173–74.
105. *Id.* at 174.
106. *Id.* at 183.
107. *Id.* at 179.
108. *Id.*
109. *Id.* at 180.
110. *Id.* at 180–81.

tation of race- and gender-motivated action by a defendant. The *Gebser* line of cases demonstrates that the statutory bar of discrimination in federally funded programs—which the Court has interpreted to mean "intentional" discrimination—also prohibits volitional actions that effectively perpetuate discrimination, undermine congressional intent, or subject individuals to inequality. Although the Court has given no sign that discrimination under the Fifth or Fourteenth Amendment is anything other than a narrow inquiry into whether the decision-maker harbored a race- or gender-based bias/motive, the *Gebser* line of cases demonstrates that intentional discrimination in Title VI and Title IX is a broader term that may include additional categories of action beyond traditional notions of intentional discrimination.

Lower courts, however, have been reluctant to acknowledge that intent has broad application because of *Sandoval*'s apparent focus on a narrow form of intent and dismissal of the broader form that would include disparate impact.[111] They seem to perceive that allowing a non-sexual harassment case to proceed under a theory of deliberate indifference, for instance, would create an unauthorized exception to the intentional discrimination requirement, rather than merely expanding its interpretation and meaning.[112] Such notions are no longer tenable given the fact that the Supreme Court in *Jackson* explicitly situated a new cause of action within the context of intentional

111. *See, e.g.*, Save Our Valley v. Sound Transit, 335 F.3d 932, 934 (9th Cir. 2003) (dismissing plaintiff's disparate impact claim under a Department of Transportation disparate impact regulation); Wallace v. Chi. Hous. Auth., 298 F. Supp. 2d 710, 721–22 (N.D. Ill. 2003) (holding that the disparate impact resulting from the failure to provide adequate relocation services to address Chicago's past state-sanctioned, residential segregation did not violate Title VI); Wise v. Union Acceptance Corp., IP 02-0104-C-M/s, 2002 U.S. Dist. LEXIS 23335, at *10–12 (S.D. Ind. Nov. 19, 2002) (distinguishing a disparate impact claim for a bank's lending policies from a Title VI disparate impact claim because Congress intended ECOA to prohibit conduct that has the effect of discrimination); Lechuga v. Crosley, 228 F. Supp. 2d 1150, 1151, 1155 (D. Or. 2002) (applying *Sandoval* and dismissing a claim of disparate impact based on an unemployment agency's policy not to offer materials, counseling, or forms in a language other than English).

112. *See* Pryor v. NCAA, 288 F.3d 548, 567–69 (3d Cir. 2002) (distinguishing Title VI's intentional discrimination standard from deliberate indifference, in that Title VI claims are raised for commissions rather than omissions); *see also* Cabrini-Green Local Advisory Council v. Chi. Hous. Auth., No. 04 C 3792, 2005 U.S. Dist. LEXIS 273, at *20–21 (N.D. Ill. Jan. 5, 2005) (dismissing plaintiffs' Title VI complaint because it included no allegations of deliberate segregation in public housing); Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326, 328–29 (N.Y. 2003) (upholding the reversal, in light of *Sandoval*, of the trial court's ruling that a sound basic education includes the right to be free from racial disparate impact); White v. Engler, 188 F. Supp. 2d 730, 743 (E.D. Mich. 2001) (requiring that, after *Sandoval*, plaintiffs submit an amended complaint that withdrew disparate impact charges and pled intentional discrimination instead).

discrimination. Thus, *Sandoval* cannot be read narrowly or in isolation. Rather, the Court's deliberate indifference, intent, and retaliation cases must be synthesized to arrive at a single and generally applicable standard for intentional discrimination.

The *Gebser* line of cases adheres to *Sandoval*'s holding that the only cause of action available under Title VI and Title IX is one for intentional discrimination,[113] but they also explicitly hold that, in addition to inappropriate considerations of race or gender, intentional discrimination includes deliberate indifference to a violation of one's rights,[114] deliberate indifference to circumstances that create unequal participation by race or gender,[115] and retaliation against those who challenge discriminatory action.[116] However, the basic holdings in these cases are of little help and provide no predictability beyond the particular circumstances of harassment and retaliation. The holdings provide that intent can be established with evidence short of a race or gender motivation on the part of the defendant—a previously contested or rejected proposition. The cases, however, do not facially provide the crucial explanation as to why retaliation or deliberate indifference amount to intentional discrimination while disparate impact, for instance, does not. Thus, although the cases reinforce the long overlooked lesson of *Arlington Heights*—that intentional discrimination is not limited to any set of factors or preconceived notions of

113. *Compare* Alexander v. Sandoval, 532 U.S. 275, 281 (2001) (holding that Title VI creates a private cause of action only for intentional discrimination), *with* Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 642–43 (1999) (finding that a school district may be liable for damages under Title IX if it is deliberately indifferent to known student-on-student harassment), Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 292–93 (1998) (finding that a school district may be liable for damages under Title IX if it has "actual knowledge" of and is deliberately indifferent to the sexual harassment of a student by a teacher), *and* Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 74–75 (1992) (finding that monetary damages are appropriate under Title IX when an intentional discrimination occurs in the form of sexual harassment of a student by a teacher). *See also* Bryant v. Indep. Sch. Dist., 334 F.3d 928, 931 (10th Cir. 2003) (stating that Title IX creates a private cause of action solely for intentional discrimination); *Pryor*, 288 F.3d at 562 (same, regarding Title VI); S. Camden Citizens in Action v. N.J. Dept. of Envtl. Prot., No. Civ. A. 01-702(FLW), 2006 WL 1097498, at *66 (D.N.J. Mar. 31, 2006) (same).

114. *Gebser*, 524 U.S. at 287, 290 (finding that while Title IX protects one's right to be free from discrimination in a federally funded program, Title IX imposes liability only where a school official is deliberately indifferent to the discrimination); Gant v. Wallingford Bd. of Educ., 195 F.3d 134, 140 (2d Cir. 1999) (finding that in order to state a claim for racial discrimination, the plaintiff must show deliberate indifference by the board of education).

115. *Davis*, 526 U.S. at 650–52 (imposing liability under Title IX when a school is deliberately indifferent to student-on-student sexual harassment that creates unequal access to or a denial of participation in school resources or opportunities).

116. Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 173–74 (2005).

what discrimination is[117]—they do not clearly state a principle by which a subsequent court could determine what additional actions lacking in the traditional indicia of intentional discrimination could be interpreted as prohibited discrimination.

That, however, is not to suggest that such a principle does not exist. In fact, a profound principle that provides a more flexible and applicable standard to evaluate discrimination claims under Title VI and Title IX does emerge upon close examination of the particular circumstances and factors that motivated the Court in these cases. Certain factors or indicia are continually repeated in these cases and form the theoretical foundation and justification for the Court's holdings. In particular, the Court is motivated by whether a defendant makes a value choice in regard to the existence of discrimination or inequity, whether that choice directly causes discrimination or inequity to continue, whether the existence of that discrimination or inequity in a federally funded program is inconsistent with congressional objectives, and whether as a practical matter the defendant's action would affirmatively further congressional objectives. By explicating these common denominators rather than the mere holdings, this Article reveals a consistent principle that is applicable beyond the mere strictures of sexual harassment or retaliation.

A. *The Absence of Traditional Intentional Discrimination*

The Court explicitly states that it will hold a defendant liable only for intentional discrimination, but the "intentional discrimination" for which the Court holds these schools liable is not of the type the Court has previously demanded in equal protection and other antidiscrimination cases. Intentional discrimination in the other decisions is a race or gender consideration, a purpose to benefit or disadvantage a race or gender group, or the intentional differential treatment of similarly situated individuals.[118] One might posit that this traditional type of intentional discrimination exists in the *Gebser* line of cases because harassment occurred,[119] but the discriminatory acts are those of a third party, not the defendant school district, and the Court is explicit

117. Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 268 (1977) (writing that its list of factors were not "exhaustive," but merely instructive).

118. *See* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 272–73 (1979) (emphasizing that racial or gender classifications are presumptively invalid); *Arlington Heights*, 429 U.S. at 265–67 (stating that the racially disparate impact of legislation may be circumstantial evidence of whether the official action was motivated by a discriminatory purpose, such that it is subject to judicial scrutiny).

119. *See Gebser*, 524 U.S. at 299–301 (Stevens, J., dissenting) (arguing that a teacher's sexual harassment of a student is in itself intentional discrimination because, under Title

that the defendant is liable for its own actions, not anyone else's.[120] The defendant's act with respect to the discrimination is merely one of disregard, instead of engagement. Thus, the defendant's action is dissimilar to traditional intentional discrimination. For this reason, lower courts have previously rejected mere disregard as insufficient to establish an equal protection claim of discrimination.[121]

In the deliberate indifference cases, the Court does not even imply that the defendant's actions represent a gender bias, purpose or differential treatment, nor does any evidence suggest as much. The fundamental fault of the schools is that, once someone else discriminated against a student, the schools did not act to remedy it or prevent its recurrence. One might hypothesize that sometimes an inappropriate consideration or bias causes a school to avoid remedying harassment, but such a motive is far from inherent and does not explain the Court's imposition of liability.[122] It is equally likely that the school failed to act for some non-discriminatory reason, such as institutional loyalties or simple distaste for administrative and tenure complications inherent in disciplining its staff.[123] Moreover, in modern discrimination cases, the Court has been entirely unwilling to disregard the possibility of legitimate non-discriminatory explanations, even unlikely ones.[124] Thus, no basis exists to conclude that the Court simply assumed an inappropriate consideration or bias motivated the

---

IX guidelines issued by the Department of Education, districts are accountable for sexual harassment by teachers).

120. *See id.* at 290–91 (majority opinion) (premising Title IX liability on a recipient's official decision not to remedy the alleged discrimination).

121. *See, e.g.*, Pryor v. NCAA, 288 F.3d 548, 567–69 (3d Cir. 2002) (rejecting evidence of deliberate indifference as sufficient to establish a claim of intentional discrimination); Jones v. Ind. Area Sch. Dist., 397 F. Supp. 2d 628, 645–46 (W.D. Pa. 2005) (finding that although facts could establish liability under a deliberate indifference claim, the plaintiff "has come forward with no evidence to support an equal protection claim"); *see also* Gant v. Wallingford Bd. of Educ., 195 F.3d 134, 141 (2d Cir. 1999) (recognizing deliberate indifference to racial harassment as being distinct from a traditional intentional discrimination claim where an "action (or inaction) [was] taken 'maliciously or sadistically for the very purpose of causing harm'" (quoting Farmer v. Brennan, 511 U.S. 825, 835 (1994)).

122. *See Gant*, 195 F.3d at 149–50 (concluding that, generally, race discrimination will not be inferred merely because a school-related decision affects a minority student).

123. Several other explanations abound, such as maintaining relationships among faculty, or trying to minimize awareness of the situation so as to avoid suit against the school. Apparently, in *Franklin v. Gwinnett County*, the school's primary concern was avoiding any legal process. 503 U.S. 60, 63–64 (1992) (detailing that after a teacher resigned, the investigation into his harassment of a student stopped).

124. *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279, 296–97 (1987) (refusing to infer discrimination from statistics demonstrating significant racial biases and instead assuming good faith by the prosecutor); *see also* Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151, 1152–53 (1991) (discussing empirical findings that show a pattern of failing to infer discrimination).

defendants in the deliberate indifference cases. Rather, the Court understood that no inappropriate bias or motivation existed.

Ironically, not only does deliberate indifference here lack the normal indicia of intentional discrimination, it bears some semblance to claims of discrimination that the Court has previously rejected. For instance, the Court has rejected theories of disparate impact, or those that would hold a defendant liable for the natural and foreseeable consequences of its actions,[125] particularly because these theories do not require that the defendant acted "because of," not merely "in spite of," such results.[126] Yet, a defendant's deliberate indifference toward inequality is more akin to acting "in spite of" than "because of" the inequality, as bias or illicit purpose may often be absent from the deliberate indifference. In short, a school that is deliberately indifferent to discrimination is merely carrying on with business as usual in spite of, not because of, the fact that harassment is occurring in its program.

Retaliation similarly lacks some key indicia of intentional discrimination. Because the Court in *Jackson* did not require proof that the underlying complaint regarding discrimination against the girls' basketball team involved intentional discrimination,[127] the retaliation could be entirely detached from any intentional discrimination. And, even assuming the underlying discrimination is intentional, retaliation against the complainant is not necessarily an act of traditional intentional discrimination.[128]

First, regardless of whether underlying intentional discrimination exists, if a man complains of discrimination against women and is retaliated against, the retaliation is unrelated to *his* gender, which is part of a prima facie claim of discrimination and, hence, predominates the dissent's argument in *Jackson*.[129] Although the retaliation is obviously

---

125. Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 464 (1979); Washington v. Davis, 426 U.S. 229, 239, 242 (1976); *see also* Derek W. Black, *The Contradiction Between Equal Protection's Meaning and Its Legal Substance: How Deliberate Indifference Can Cure It*, 15 WM. & MARY BILL RTS. J. 533, 564–69 (2006) (analyzing the Court's break from objective measures of intent and shift to subjective measures).

126. Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979).

127. Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 173–74 (2005) (concluding that retaliation alone is an act of intentional discrimination, even without an inquiry into the activities of which the plaintiff had initially complained); Brake, *supra* note 17, at 52; *see also* *Jackson,* 544 U.S. at 187 (Thomas, J., dissenting) (indicating that there was not even an allegation in the case that the "sex discrimination underlying [the] complaint occurred"). R

128. Charles J. Russo & William E. Thro, *The Meaning of Sex:* Jackson v. Birmingham School Board *and Its Potential Implications*, 198 EDUC. L. REP. 777, 788 (2005).

129. *Jackson*, 544 U.S. at 186–89 (Thomas, J., dissenting); *see also* Brake, *supra* note 17, at 51–52 (critiquing the majority's analysis of retaliation as intentional discrimination). R

an intentional act—the point on which the majority hinges its analysis—it is not inherently motivated by a discriminatory purpose or bias toward the complainant.[130] It, of course, *could* be motivated by a desire to continue the underlying discrimination (about which the man complained), but merely that such a desire is possible is the most that can be assumed regarding the defendant's purpose. Although this would be an objectionable attempt to suppress his speech—or further discrimination against women—it would not be gender discrimination against him.[131] Moreover, the Court's failure to require a showing of underlying intentional discrimination demonstrates that the only action the Court finds objectionable is the action toward the complainant, not the alleged discriminatory action toward the person on whose behalf the complaint is lodged. Consequently, in an effort to reconcile retaliation with the intent doctrine, some lower courts had previously required the complainant to demonstrate that the retaliation against him arose out of a discriminatory purpose toward him.[132] In short, although retaliation always entails intentional action, it does not inherently entail the discriminatory purpose required by the intentional discrimination doctrine.

Second, if the underlying intentional discrimination does not exist, one could not even assert that retaliation is an act of furthering discrimination against women. Facially, the retaliation against the complainant would be unrelated to any intentional discrimination. To be intentional discrimination, the retaliation itself would have to be discriminatorily motivated.[133] This would only be the case if the defendant retaliated because of a gender bias or purpose toward the

130. *See* Brake, *supra* note 17, at 51 (finding that the majority's rationale is premised on the notion that the plaintiff was retaliated against because of his opposition to intentional discrimination, but that a significant "distance between retaliation for a person's actions and the dominant status-based framework of intentional discrimination" exists). **R**

131. *Jackson*, 544 U.S. at 187 (stating that "[a] victim of sexual harassment suffers discrimination because of her own sex, not someone else's"); Russo & Thro, *supra* note 128, at 788 (arguing that the linkage to discrimination is "indirect" at best). **R**

132. *E.g.*, Reese v. Jefferson Sch. Dist., 208 F.3d 736, 740 (9th Cir. 2000); Nabozny v. Podlesny, 92 F.3d 446, 453–54 (7th Cir. 1996).

133. One commentator, in an attempt to reconcile *Jackson* with traditional intentional discrimination, argues that *Jackson*'s recognition of a retaliation claim is much narrower than the one articulated in this Article. *The Supreme Court*, *supra* note 17, at 362–64. Rather, that commentator suggests that to sustain a claim of retaliation, a court "would have to scrutinize the defendant's intent to determine whether gender-based animus motivated the challenged employment decision." *Id.* at 362 (footnote omitted). Thus, although retaliation for complaints of discrimination alone would be sufficient, the reason for the retaliation must be intentionally discriminatory. *Id.* at 362–63. However, the commentator fails to read *Jackson* as part of a continual line of cases diverging from the traditional intent standard and instead approaches *Jackson* as being a single outlier that must be reconciled. *Id.* at 365–66. **R**

complainant.[134] However, in such an instance, the retaliation would simply be a manifestation of bias toward the complainant rather than a response motivated by the substance of the complaint.[135] In addition, once the motivation behind the retaliation is detached from the substance of the complaint, it becomes equally possible that a defendant retaliates for various reasons other than bias or impermissible purpose toward the complainant, such as discouragement of "troublemakers." Yet, the Court does not make any of these inquiries because the answers would only reveal that retaliation is unlike the Court's traditional notion of intentional discrimination.[136]

Thus, the import of these cases is that although the Court asserts that one must prove intentional discrimination in Title VI and IX cases—just as one must in equal protection cases—intentional discrimination carries a different meaning here. The unresolved question now is how, in the absence of traditional intentional discrimination, these cases can justify liability and situate themselves within the intent standard, which the Court indicates it is applying. As the following sections demonstrate, several indicia coalesce to provide the basis for liability, including value choices, direct causation, and the frustration of congressional ends.

B. Value Choices

Throughout the *Gebser* line of cases, the Courts justified imposing liability because the circumstances evidenced an element of choice by the defendant. Analysis along this axis is naturally attractive to the Court because intent, the core of actionable discrimination claims, correlates with choice in many respects. For instance, one generally intends a specific result only if one chooses to undertake an action that will cause that result. One's inaction might likewise amount to a choice if one knows that a specific result will occur absent some affirmative action. However, liability does not necessarily accompany a

---

134. *See, e.g.*, *Reese*, 208 F.3d at 740 (requiring plaintiff to establish that defendant school officials acted with a discriminatory purpose in failing to respond adequately to complaints of sexual harassment when bringing a Section 1983 claim); *Nabozny*, 92 F.3d at 453–54 (same).

135. *See, e.g.*, Gant v. Wallingford Bd. of Educ., 195 F.3d 134, 150 (2d Cir. 1999) (Calabresi, J., concurring) (finding it appropriate to analyze the issue of intentional discrimination regarding an adverse action separate and apart from the issue of deliberate indifference toward a complaint of harassment, but that if deliberate indifference toward the harassment actually occurred, evidence of it would be merged with that of intentional discrimination).

136. *See The Supreme Court*, *supra* note 17, at 363 (admitting that insofar as the Court recognized a claim based solely on retaliation, "the hallmarks of discrimination are absent"). R

refusal to act because the individual may have no responsibility to act.[137] Conversely, if a specific result occurs, but one made no choice or took no volitional action, the individual cannot be said to have contributed to or intended that result and rarely, if ever, would be legally liable.[138] In essence, choice is part of intent, but making a choice does not inherently involve the type of intent the Court requires to justify liability.

Consequently, something more than volitional choice is necessary to justify liability within the context of intentional discrimination. The facts in the *Gebser* line of cases bridge the gap between choice and intent; not only did the defendants in those cases make choices, the choices manifested *value* judgments regarding discrimination and inequality. Thus, although the defendants may have lacked the traditional race/gender motivation or bias, the defendants did make choices that indicate a particular stance toward the elimination of discrimination and inequality in their programs.

The deliberate indifference cases entail straightforward value choices by the defendant. In *Gebser*, *Davis*, and *Franklin*, the defendants chose how to react to sexual harassment within the school. When the defendants took action to address or prevent it, the Court refused to impose liability, regardless of the pervasiveness or severity of the harassment, because the schools' actions reflect an anti-discriminatory value.[139] Conversely, if a defendant chose to ignore an allegation, allow the harassment to continue, or attempted to disengage from the controversy, the Court indicated those inappropriate value choices could lead to liability. As the Court wrote, "[t]he premise, in other words, is an official decision . . . not to remedy the violation."[140]

In fact, the centerpiece of the deliberate indifference framework is designed to identify whether the defendant made an objectionable value choice. Each of the individual deliberate indifference requirements—notice of the harassment, authority to control it, and failure to remedy it—ultimately establish that the defendant made a value choice in regard to the sexual harassment. If the defendant knows of

---

137. Jon Hanson & Kathleen Hanson, *The Blame Frame: Justifying (Racial) Injustice in America*, 41 HARV. C.R.-C.L. L. REV. 413, 421–22 (2006).

138. *Id.*

139. Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 648–49 (1999) (allowing school administrators flexibility to respond to harassment in a merely reasonable manner); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290–91 (1998) (recognizing a private cause of action only when the appropriate official—one with authority over the educator—has actual notice of the alleged harassment and chooses not to address the situation, thus ensuring that officials are liable for only their own behavior).

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

harassment and has the duty and power to control it, the defendant necessarily makes a choice as to whether to do so, and that choice is inherently laden with value. Moreover, the Court's distinction between actual and constructive notice reinforces its concern with the nature of the defendant's choice.

The Court in *Gebser* refrained from imposing liability when mere constructive notice exists[141] and instead required actual notice.[142] Although a school might be generally "responsible" in some respect when it has constructive notice of harassment, one cannot conclude the school has made a choice, particularly a value choice, in regard to the harassment if the school is not actually aware of the harassment.[143] At most, the school has made a passive choice not to supervise or monitor adequately the activities occurring within the school. Such passivity may represent a value choice in regard to how to allocate resources, but it is not a value choice in regard to the harassment itself.

Moreover, even if a school knows of the discrimination, the school cannot be said to have made a value choice in regard to it if the discrimination is beyond its power to control. When the school has the power to control harassment of which it is aware, however, the school is then faced with the value choice of either allowing it to persist or stopping it. That choice then becomes the "policy" of the school,[144] and its policy choice is ultimately determinative as to whether the harassment continues.[145]

141. *Id.* at 282–84. Such a theory is based upon the notion that the school is ultimately responsible for guarding and protecting its students, particularly against harm perpetrated by one of the school's employees, whom the school has a duty to supervise.

142. *Id.* at 288. In no event will the Court hold a school district responsible for sexual harassment that occurs therein if the school district does not know of the harassment. *Id.*

143. Plaintiffs argued that the school district should be liable for what amounts to constructive notice, which arises from the school's failure to fulfill its responsibility to promulgate and publicize appropriate sexual harassment procedures. *Id.* at 282. In essence, the school did not provide a reasonable avenue for complaints to be lodged and redressed, nor was it tailored to the age and maturity of students it was designed to protect. Brief for Petitioners at 13, *Gebser*, 524 U.S. 274 (No. 96-1866); *see also* Brief for the United States as Amicus Curiae Supporting Petitioners at 16–17, *Gebser*, 524 U.S. 274 (No. 96-1866) (arguing that whether or not a federal fund recipient has adopted a policy against sex discrimination and an adequate grievance procedure for such complaints is highly relevant in determining the liability of the recipient).

144. *Gebser*, 524 U.S at 290 (determining when discrimination becomes the policy of the school district).

145. In *Franklin v. Gwinnett County*, after the school began investigating a teacher-student sexual harassment complaint, the accused teacher resigned, and the investigation ceased. 503 U.S. 60, 64 (1992).

Like the defendants in the deliberate indifference cases, the school administrators in *Jackson v. Birmingham* had several choices of how to respond to the complaint of discrimination against the girls basketball team. They could have eliminated the inequities that Jackson believed were discriminatory, disagreed with him, told him that they were maintaining their policies and that he must adhere to them, or even told him to file an administrative or legal complaint.[146] Of course, they had another choice: take adverse action against him to quell his propensity to complain. Among these choices, the school took the last option, the only legally prohibited choice.[147]

Although the school may have lacked the traditional discriminatory motive, the nature of the choice to retaliate manifests a type of intent that the Court finds sufficient to impose liability. The Court wrote "retaliation is discrimination . . . because it is an intentional response to . . . the complaint."[148] The Court also emphasized that "[r]etaliation is, by definition, an intentional act."[149] These conclusions neither liken retaliation to a gender bias or motive toward the complainant, nor suggest that a link to such a bias or motive is necessary to impose liability. Rather, they indicate the importance and sufficiency of a defendant having made an intentional choice. Of course, simply making a choice, even if it results in inequality, is not necessarily prohibited by Title IX.[150] However, the choice here is not one that simply inadvertently fosters discrimination, rather it is a choice imbued with a value judgment regarding how to react to the potential existence of discrimination or inequity. Thus, although the choice may not be one designed to treat others unequally based on race, or one premised on bias, the choice does amount to a direct choice to act contrary to the elimination of potential discrimination, such that the defendant does more than make a volitional choice—the defendant makes an intentional value choice. However, a value choice alone does not fully explain or justify the holdings in these cases. The Court also examines whether and to what extent that choice causes the continuation of the discrimination because the nature of the choice is irrelevant if it does not affect the outcome.

146. *See, e.g.*, Cassandra M. Hausrath, Note, Jackson v. Birmingham Board of Education*: Expanding the Class of the Protected, or Protecting the Protectors?*, 40 U. RICH. L. REV. 613, 629 (2006) (discussing a school's choices when someone alleges discrimination).

147. Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 171–72 (2005).

148. *Id.* at 174.

149. *Id.* at 173–74.

150. *See supra* notes 122–124 and accompanying text. R

C. *Value Choices That Have Direct Causal Effects*

In addition to value choices, the Court's analysis highlights the importance of whether a defendant's choice is the direct, rather than indirect, cause of continuing discrimination. The *Gebser* line of cases rejects liability based on indirect causation or responsibility in some general sense. For instance, the Court's requirement that the recipient have "the authority to take remedial action" is aimed at distinguishing those instances when the recipient is an indirect cause and only generally responsible for the discrimination, from those instances when the recipient is a direct cause and, therefore, culpable.[151] The Court cautioned that "[d]eliberate indifference makes sense as a theory of direct liability under Title IX only where the funding recipient has some control over the alleged harassment."[152] Without control, the defendant might be generally responsible because it occurred at school or under its supervision, but the defendant is not a direct cause of, or culpable for, the discrimination.

Only when the defendant has the type of control that would have allowed it to prevent or remedy the discrimination can it be said to have directly caused it. In the *Gebser* line of cases, the school only becomes a cause of the discrimination after a third party initiates the discrimination and the school subsequently fosters its continuation.[153] Once the discrimination occurs, the school's action, if it has control over the discrimination, can be a direct and but-for cause of its continuation.[154]

---

151. Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 644–45 (1999).

152. *Id.* at 644.

153. *See, e.g.*, *id.* at 633–35 (stating that after the student was harassed, she reported it to her teacher who then indicated she would report it to school officials, none of whom took action to prevent subsequent harassing behavior); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 277–78 (1998) (stating that the school teacher harassed and initiated sexual contact with student on a regular basis, and parents of other students reported his harassing activity to the school, but that the school failed to prevent future occurrences); Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 63–64 (1992) (stating that the coach continually sexually harassed the plaintiff, and that the school's inaction permitted it to continue).

154. *See, e.g.*, Vance v. Spencer County Pub. Sch. Dist., 231 F.3d 253, 259, 261–63 (6th Cir. 2000) (finding that the school had actual knowledge of harassment toward a student, but that its knowingly "inadequate and ineffective" action produced no results and allowed the harassment to continue); Franklin v. Gwinnett County Pub. Sch., 911 F.2d 617, 618–19 (11th Cir. 1990), *rev'd*, 503 U.S. 60 (1992) (stating that the band director and school principal did not investigate or take seriously the allegations regarding the coach's harassment of the plaintiff, and that the school's only action was to discourage the plaintiff from suing); Jones v. Ind. Area Sch. Dist., 397 F. Supp. 2d 628, 644–46 (W.D. Pa. 2005) (finding that school officials with control had actual knowledge of sexual harassment by another student and that the school's "ineffective" response had allowed the harassment to continue for the "previous four years"); *see also* 15 AM. JUR. 2D *Civil Rights* § 338 (2000) (con-

In *Gebser*, the Court began by noting that liability is premised on a school official who "refuses to take action to bring the recipient into compliance" or "fails adequately to respond" to discrimination.[155] The school official's action, not simply that of an employee, permits the continued discrimination to occur.[156] Thus, the Court recognized that deliberate indifference to the "deprivation of federal rights was the *cause* of the violation" or discrimination.[157] In *Jackson* and *Davis*, the Court similarly characterizes the schools' deliberate indifference as subjecting students to discrimination.[158] In *Davis*, the Court employs the characterizations together, finding that a school may be liable because "its deliberate indifference 'subject[s]' its students to" and "'cause[s] [students] to undergo' harassment."[159] In effect, the school's official policy causes the violation to remain unremedied and allows subsequent harassment to continue. Hence, both the school and harasser are culpable.

The same direct causation does not exist when a school merely has a history of not remedying such actions or has yet to develop a policy to address them. For instance, the Department of Education's 1997 guidebook on sexual harassment—an authority upon which the *Gebser* plaintiff relied—premised a school's liability for sexual harassment on the theory that a teacher is "'aided in carrying out the sexual harassment of students by his or her position of authority with the institution.'"[160] The theory was that the school is liable because its institutional structure is a partial or indirect cause of the harassment. Such reasoning may be consistent with general tort law concepts of

cluding that "if [an educational institution] learns that its measures have proved inadequate, it is required to take further steps to avoid new liability").

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

156. *Id.* at 290–91.

157. *Id.* at 291 (emphasis added) (citing Board of Comm'rs v. Brown, 520 U.S. 397 (1997); Canton v. Harris, 489 U.S. 378, 388–92 (1989)). The same analysis above is demonstrated in *Franklin* where the school directly caused the continuation of discrimination by taking no action to prevent the known harassment that it had the authority and duty to prevent. *See Franklin*, 503 U.S. at 63–64 (discussing the plaintiff's allegations that school officials took no action to dissuade subsequent harassment). The only affirmative action the school took was to dissuade the victim from initiating charges. *Id.* at 64.

158. Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 174 (2005); *Davis*, 526 U.S. at 640–41, 644–45.

159. *Davis*, 526 U.S. at 644–45 (quoting RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1415 (1966)). The Court further conceptualized the deliberate indifference as "mak[ing] [students] liable or vulnerable" to harassment. *Id.* at 645.

160. *Gebser*, 524 U.S. at 282 (quoting Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034, 12,039 (Dep't of Educ., Office for Civil Rights, March 13, 1997) (final policy guidance)).

causation, which include indirect causation,[161] but the Court rejected liability in these circumstances, requiring direct causation and culpability.[162] Similarly, when the plaintiff in *Gebser* argued that the failure to promulgate a grievance procedure or policy for handling allegations of harassment was a basis for liability, the Court rejected the argument, as this failure would only demonstrate indirect causation.[163] The same reasons justify the Court's rejection of a constructive notice theory of liability.

The causal analysis, however, does not appear to play a role in *Jackson*, primarily because the Court did not require proof that underlying discrimination exists.[164] If underlying discrimination does not exist, retaliation may at best indirectly cause or foster future discrimination, which the Court rejected as a basis of liability in *Gebser*.[165] Only if underlying discrimination does exist, or the Court assumes it exists, can retaliation directly cause or allow discrimination to continue unabated by eliminating the means of redressing it. Notwithstanding the Court's disinterest in requiring a victim of retaliation to establish underlying discrimination in *Jackson*, the causal link between a defendant's value choice and continuing discrimination is an important and consistent principle that motivates the Court to impose liability elsewhere in the *Gebser* line of cases.

D. *Frustrating the Congressional Objective to Combat Discrimination and Inequality*

The above analysis demonstrates that a defendant's value choices in regard to certain activities amount to intentional discrimination for which the Court will impose liability, but the analysis does not reveal what other value choices might amount to intentional discrimination or a violation of the underlying statute. The following analysis shows that the Court's focus on the congressional purpose and policy behind the underlying statutes helps to answer this question and demon-

---

161. DAN B. DOBBS, THE LAW OF TORTS 420–22 (2000) (discussing the liberal inference of causation that courts allow in torts, whereby one could find that the failure to have a lifeguard on duty at a swimming pool or warn someone of a danger was the cause of the plaintiff's injury, "even though it is perfectly possible that the precautions required would have availed nothing in the particular case").

162. *Gebser*, 524 U.S. at 283, 287–88 (finding that Congress did not intend vicarious liability and constructive notice to be sufficient grounds for recovery under Title IX).

163. *Id.* at 291–92.

164. Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 173–74 (2005) (concluding that the retaliation alone was an act of intentional discrimination and making no inquiry regarding the activities of which the plaintiff had initially complained).

165. *Gebser*, 524 U.S. at 291–92 (rejecting the failure to have a grievance procedure as a basis for imposing liability).

strates that liability hinges on how the value choice relates to congressional objectives.

Whether the choice a defendant makes is actually one that evidences an objectionable value or purpose hinges on whether the defendant's action frustrates or furthers the ends that Congress sought in enacting the statute. Consequently, in the *Gebser* line of cases, the Court focused on actions that perpetuate inequality or prevent the elimination of discrimination. In *Gebser*, for instance, the Court recognized that gender discrimination and inequality were occurring and, although the school itself did not initiate the discrimination, the gender discrimination was the type of activity that Congress sought to prohibit within federally funded programs.[166] Under these facts, the traditional intentional discrimination standard would relieve the school of liability, but a standard focused on value choices would dictate otherwise. Ultimately, the Court's analysis rested on whether liability under these circumstances would further or "'frustrate the purposes' of Title IX."[167]

The *Gebser* Court reasoned that the existence of discriminatory harassment in a federally funded program is directly contrary to congressional objectives, but imposing liability on the school would not inherently further the end of protecting students because, without any prior knowledge of the harassment, the school was not in the position to act differently to protect against the harassment.[168] Thus, liability here would simply compensate victims for the sake of compensation.

The Court ultimately sculpted the deliberate indifference standard in a manner that reinforces congressional objectives. The standard accounts for both whether discrimination is occurring and whether its occurrence is in any respect attributable to the school's actions. The standard does not ask who initially perpetrated the discrimination, why it is occurring, or any number of other questions. Rather, it simply asks whether the school can prevent or rectify it.[169] In this respect, the standard honors the concern of not funding dis-

166. The congressional objective is "[t]o avoid the use of federal resources to support discriminatory practices." *Id.* at 286 (quoting Cannon v. Univ. of Chi., 441 U.S. 677, 704 (1979)).

167. *Id.* at 285.

168. *See id.* at 285–86 (finding that Congress did not "contemplate[ ] unlimited recovery in damages against a funding recipient where the recipient is unaware of the discrimination in its programs").

169. *See id.* at 290 (holding that damages will not be awarded under Title IX unless "an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs and fails adequately to respond").

criminatory practices while imposing liability only when the school failed in its duty to protect students from these practices. Thus, deliberate indifference furthers the twin purposes of Title IX.[170]

The Court's application of the deliberate indifference standard in *Davis* again indicates close attention to congressional objectives. Although the school argued that the harassment was by a student rather than a teacher—which means it lacked the direct control and authority it would have over a teacher[171]—the Court still found the existence of harassment in a federally funded program (due to the school's deliberate indifference) to be at odds with the congressional purpose of preventing discrimination and ensuring equal educational access.[172] Hence, the central questions were whether equal access was being denied as a result of the harassment,[173] and whether the district acted to prohibit or allow such a denial.[174] Regardless of the harasser's status as a student, federal funds cannot be used to support a program in which the school allows discrimination to occur without frustrating Title IX's purpose. Thus, the Court reasoned that liability should attach even though neither the school's agents nor its employees desired or created the discrimination, but because the school allowed inequality and discriminatory practices contrary to congressional objectives to persist.[175] In short, the school's deliberate indifference produced results Congress sought to eliminate.

The Court's focus in *Davis* on furthering congressional objectives also refutes the dissent's claim that the majority erred by conceptualizing "the immature behavior of children and adolescents" as sexual harassment or discrimination.[176] The dissent argued such a characterization is particularly suspect when the activity is not under the control of, "authorized by, pursuant to, or in accordance with, school policy or actions."[177] However, by focusing solely on the issue of what can be characterized as gender discrimination perpetrated by a

170. *See id.* (stating that the general rule permitting the Court to use any available remedy where a federal right has been violated "'yields where necessary to carry out the intent of Congress or to avoid frustrating the purposes of the statute involved'") (quoting Guardians v. Civil Serv. Comm'n, 463 U.S. 582, 595 (1983)).

171. Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 640 (1999).

172. *Id.* at 640–41. *But see id.* at 656–57 (Kennedy, J., dissenting) (contending that the majority did not demonstrate congressional purpose to create the implied cause of action; indeed, the potential costs stemming from the majority's decision "are so great that it is most unlikely Congress intended to inflict them").

173. *Id.* at 651–52 (majority opinion).

174. *Id.* at 653.

175. *Id.* at 640–41.

176. *Id.* at 672–77 (Kennedy, J., dissenting).

177. *Id.* at 660.

school's agent, the dissent's critique fails to account for the congressional purpose implicated here. The significance of the school's choice to act with indifference is that it permits a state of affairs to exist which Congress sought to prohibit. Whether the student's behavior can be characterized as sexual harassment, or whether it is officially authorized, is irrelevant to whether the behavior creates unequal access to the educational program. When unequal access occurs through means within the school's control, the school has an obligation to intervene; its intentional failure to do so is a violation of the statute.

The Court's opinion in *Jackson* even more directly demonstrates the concern for whether a school's choices will perpetuate inequality and discrimination that frustrate congressional objectives. As discussed above, the Court devoted most of its analysis to whether retaliation is intentional discrimination—the substance of which drew the harsh criticism of the dissent and commentators.[178] Maintaining consistency with *Sandoval* compelled this intentional discrimination analysis in *Jackson*. However, the heart of the reasoning in *Jackson* rests on furthering congressional objectives. Reiterating the hortatory language of *Cannon*, the Court wrote: "Congress enacted Title IX not only to prevent the use of federal dollars to support discriminatory practices, but also 'to provide individual citizens effective protection against those practices.'"[179] Those purposes "'would be difficult, if not impossible, to achieve if persons who complain about sex discrimination did not have effective protection against retaliation.'"[180] Without protection, individuals would rarely, if ever, report discrimination, Title IX violations would go unremedied, and its "enforcement

178. Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 188–89 (2005) (Thomas, J., dissenting) (criticizing the majority's reasoning); *see, e.g.*, *The Supreme Court*, *supra* note 17, at 361 (characterizing the majority's conclusion that retaliation is discrimination as a "weakness" in the opinion). R

179. *Jackson*, 544 U.S. at 180 (majority opinion) (quoting Cannon v. Univ. of Chi., 441 U.S. 677, 704 (1979)).

180. *Id.* (quoting Brief for the United States as Amicus Curiae Supporting Petitioner at 13, *Jackson*, 544 U.S. 167 (No. 02-1672)).

scheme would unravel."[181] It is inappropriate to "assume that Congress left such a gap in its scheme."[182]

In short, the Court recognized a cause of action not merely because retaliation might fall within intent, but primarily because allowing retaliation would undermine Title IX's purpose. Thus, *Jackson* reinforces the *Gebser* line of cases' consistent examination of whether a school's choices frustrate the elimination of discrimination and inequity, relying on the answer as a basis for alleviating or imposing liability.

E. An Affirmative Obligation to Enforce and Further Congressional Objectives

A deeper analysis of the Court's focus on the congressional objectives of Title IX reveals holdings that effectively require schools to affirmatively enforce those congressional objectives. Moreover, from a policy perspective, nothing short of such an obligation is likely to stop the discrimination or produce results consistent with congressional intent. The problem of differential treatment or unequal educational access in these cases is accentuated because the schools' actions might very well be duplicated or prevalent in other schools.[183] Hence, the first question is whether the law can prohibit the schools' actions, but the second and deeper issue is what school policies would best prevent discrimination in the schools. The *Gebser* line of cases reveals a con-

181. *Id.* Deliberate indifference claims require that individuals report discrimination to the school, but if the school was free to retaliate against them subsequently, individuals would be unlikely to report discrimination. *Id.* at 180–81. Consequently, deliberate indifference claims would become impossible to pursue and the underlying discrimination would persist. *Id.* (discussing the hypothetical of a teacher refusing to speak out against a principal's harassment of a student for fear of retaliation). Similarly, federal agencies cannot enforce Title IX against a school district simply based on the discovery of discrimination; rather, they must first afford the recipient notice of the violation. 42 U.S.C. § 2000d-1 (2000). However, as with deliberate indifference, recipients could use retaliation as a means of discouraging individuals from providing future notice. *Jackson*, 544 U.S. at 181. Furthermore, teachers and individuals other than students are in the best position to provide notice to the school or agency and, without protection from retaliation, Title IX might lose this crucial link in its enforcement scheme. *Id.*

182. *Jackson*, 544 U.S. at 181.

183. *See* HOSTILE HALLWAYS: THE AAUW SURVEY ON SEXUAL HARASSMENT IN AMERICA'S SCHOOLS 7 (1993) (finding that 81% of students claim to have experienced some form of sexual harassment during their school lives, and that among those reporting sexual harassment, "85% of girls and 76% of boys surveyed say they have experienced unwanted and unwelcome sexual behavior that interferes with their lives"); Laura M. Sullivan, *An Evolutionary Perspective of Peer Sexual Harassment in American Schools: Premising Liability on Sexual, Rather Than Power Dynamics*, 3 WM. & MARY J. WOMEN & L. 329, 331–32 (1997) (reporting that 39% of women surveyed on a college campus indicated that sexual harassment was a daily occurrence).

cern with shaping affirmative rules that address the latter as well as the former.

In essence, these cases force the Court to decide whether to adopt a legal standard that would, as a practical matter, allow discrimination and inequality to persist in federally funded schools, or to adopt a standard that would force funding recipients to combat circumstances that conflict with the broad mandate of Title IX.[184] In the deliberate indifference cases, the schools undertook actions that, if permitted as continuing policy, would allow teachers to indiscriminately sexually harass students and leave the students without legal recourse under Title IX.[185] Similarly, the school's action in *Jackson*, if permitted as a continuing policy, would eliminate the likelihood of discrimination and inequality being discovered.[186] The widespread permissibility of these possibilities presents a serious affront to Title IX that challenges the very essence of the statute's purpose. Confronted with this practicality, the Court is pressured to establish a cause of action for such affronts, regardless of how other varying legal frameworks would adjudicate them. The holdings in the *Gebser* line of cases demonstrate that whether the school's actions represent a policy that would permit widespread circumstances inconsistent with the implementation and enforcement of Title IX is a determinative factor.[187]

---

184. *See* David J. Barron, *Fighting Federalism with Federalism: If It's Not Just a Battle Between Federalists and Nationalists, What Is It?*, 74 FORDHAM L. REV. 2081, 2119 (2006) (discussing the choices before the Court when facing a conflict between federalism interests and protecting civil and minority rights); Jonathan R. Siegel, *The Polymorphic Principle and the Judicial Role in Statutory Interpretation*, 84 TEX. L. REV. 339, 339–42 (2005) (discussing the need for the flexibility to make judicial "choices" in implementing congressional intent and Justice Scalia's textual philosophy, which is aimed at limiting judicial choices).

185. For instance, in several cases following *Gebser*, schools still undertook actions that allowed teachers to indiscriminately harass students. *See, e.g.*, Vance v. Spencer County Pub. Sch. Dist., 231 F.3d 253, 259, 262–63 (6th Cir. 2000) (finding that the school's inadequate and ineffective action produced no abatement of the harassment); Murrell v. Sch. Dist., 186 F.3d 1238, 1243–44, 1247–49 (10th Cir. 1999) (finding that the school allowed peer sexual harassment to continue unabated and took no disciplinary action against the harasser, even after the victim was in the hospital); Jones v. Ind. Area Sch. Dist., 397 F. Supp. 2d 628, 644–46 (W.D. Pa. 2005) (finding that the school's response, if any at all, was ineffective and allowed the harassment to continue for the "previous four years"); Canty v. Old Rochester Reg'l Sch. Dist., 66 F. Supp. 2d 114, 116 (D. Mass. 1999) (finding that a teacher raped a student and then continued to harass the student because the school only issued reprimand letters and forbade future contact). Without the threat of liability in these cases, there is no suggestion that these schools would have impeded the discrimination.

186. *Jackson*, 544 U.S. at 180–81.

187. *See* Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 653 (1999) (allowing recovery in cases in which the school's policies have a "systemic effect on educational programs or activities").

The Court's motivation in this respect is belied by its focus on what it calls a school's "official policy." The Court invariably emphasized that the school was being held liable for its own policy, not the actions of a third party.[188] The Court never suggested nor implied that the school's policy was to discriminate against students. The school's policy was objectionable because it was at odds with eliminating discrimination and inequality in schools. Thus, the only reasonable inference from what the Court leaves unstated is that it determines liability based on whether the school's policy is consistent with effective and affirmative enforcement of Title IX. As the Court wrote in *Jackson*, in the absence of a cause of action, Title IX's enforcement scheme would "unravel."[189]

The Court, however, refrains from overstepping its judicial bounds into the legislative or administrative realm of deciding the best method for implementing and enforcing Title IX. Instead, the Court turns to agency expertise for assistance in determining what practices are contrary to antidiscrimination enforcement and implementation. In each of the cases, either through policy guidance or regulations, the Department of Education had previously indicated what actions were appropriate under the specific circumstances. In *Gebser*, the Department of Education had indicated through policy guidance that it would deem a school in violation of Title IX if a teacher harassed a student.[190] The same was true in regard to student harassers in *Davis*.[191] Similarly, in *Jackson*, the Department of Education regulations had prohibited retaliation.[192]

In none of these cases did the Court suggest that it imposed liability based solely or primarily on the agency's interpretation of discrimination. In fact, in *Sandoval*, the Court flatly rejected such a basis for imposing liability,[193] finding that the disparate impact regulation did not further Title VI's primary purpose of prohibiting intentional discrimination.[194] But, in *Davis*, *Gebser*, and *Jackson*, the Court reached

188. *E.g.*, *id.* at 642–43, 653; Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290–91 (1998).

189. *Jackson*, 544 U.S. at 180.

190. *Gebser*, 524 U.S. at 282 (citing Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034, 12,039 (Dep't of Educ., Office for Civil Rights, March 13, 1997) (final policy guidance)).

191. *Davis*, 526 U.S. at 643–44, 647–48 (citing Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034, 12,039-40 (Dep't of Educ., Office for Civil Rights, March 13, 1997) (final policy guidance)).

192. *Jackson*, 544 U.S. at 178 (citing 34 C.F.R. § 100.7(e) (2004)).

193. Alexander v. Sandoval, 532 U.S. 275, 285–86, 289–90 (2001).

194. *Id.*

the opposite conclusion and cited regulations and/or guidance favorably, regarding them as furthering Title IX's prohibition and identifying prohibited activity.[195] Moreover, deference toward them was not pro forma or a foregone conclusion because the regulations' dictates were not obvious extensions of Title IX's prohibitions. The Court relied on these dictates, despite the fact that they were directed at discrimination that was not the direct result of the school's actions.

This deference reflects a reinforcement of the agency's enforcement scheme rather than a change in the Court's intentional discrimination standards. Although articulating a rhetoric of intentional discrimination, the *Gebser* line of cases substantively ensures that schools adopt policies and act in compliance with agency guidelines and regulations.[196] Of course, the Court added qualifiers to the agency standards for a violation, such as actual notice or harassment that denies access, but the starting point for the Court's standards is the agency's judgment of the appropriate manner to enforce Title IX's prohibitions. The Court's additional requirements, such as notice, merely incorporate a modicum of intent into the agency interpretation so as to present a facial adherence to the intent standard.[197]

Through this reliance on agency regulations and guidance, the Court effectively imposes an affirmative enforcement structure upon the school in the *Gebser* line of cases. When a school accepts federal funds, it knows, for instance, that it must comply with Title IX[198] and will be subject to the Department of Education's administrative regulation, guidance, and enforcement.[199] The Court further reinforces this regulatory structure through its inclination to impose liability when schools act in a manner directly contrary to the agency's interpretation of compliance with the statute. Consequently, legal liability becomes in part a function of regulatory compliance and is not judged solely by a school's subjective motivations, but also in conjunction with a school's objective actions that either do or do not further the elimination of discrimination and inequality. This represents a

195. *Davis*, 526 U.S. at 643–44, 647–48; *Gebser*, 524 U.S. at 282. Although indicating it did not need to rely on the regulations, the Court in *Jackson* reached the same conclusion regarding retaliation that the agency had through its regulations. *Jackson*, 544 U.S. at 178.

196. *See supra* notes 190–195 and accompanying text. **R**

197. *See supra* note 195 and accompanying text. **R**

198. *See Davis*, 526 U.S. at 640 (finding that congressional legislation under the Spending Clause is "'much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions'" (quoting Pennhurst v. Halderman, 451 U.S. 1, 17 (1981))).

199. 20 U.S.C. § 1682 (2000).

shift in focus to the effect of the recipient's actions on those for whom Title IX was enacted to protect.

The Court's standards, unlike those of the agency, however, do not rest exclusively upon the effects of the school's action, but retain some consistency with the "intentional discrimination" standard through a focus on value choices. These value choices represent a level of subjective intent that resembles the traditional intentional discrimination standard in some respect. For instance, although the Department of Education indicated that a school might be out of compliance by virtue of the mere occurrence of the sexual harassment of a student[200]—which disregards the school's stance toward the harassment—the Court required actual knowledge of the harassment[201]—which considers a school's subjective intent. A school that has actual notice of harassment or unequal educational access knows that circumstances prohibited by Title IX exist and will either allow discrimination to continue or attempt to prevent it. The Court requires the latter, thus mandating that the school enforce the statute when the failure to do so, although not intentional discrimination, would amount to a subjective choice.

The same analysis applies to retaliation. When someone complains of discrimination, the school knows that the discrimination exists or possibly exists. Thus, the defendant's response is a conscious course of action regarding that possible discrimination. The school can retaliate against the complainer and undermine the statute's prohibitions, or the school can disassociate itself from the discrimination by investigating the complaint in good faith and render any underlying discrimination an unintentional violation. The Court imposes liability for the former, but not the latter, thus incorporating the concepts of intentional discrimination, yet still imposing liability when the school itself may have only intentionally contravened enforcement policy rather than directly engaged in intentional discrimination.

In short, the Court's holdings reflect two distinct, yet competing considerations. First, the holdings impose a de facto obligation on the schools to go beyond just complying with the statute by refraining

200. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 282 (1998) (stating that the Department of Education would hold the school liable "irrespective of whether school district officials had any knowledge of the harassment . . . [or] their response upon becoming aware" (citing Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034, 12,039 (Dep't of Educ., Office for Civil Rights, March 13, 1997) (final policy guidance))).

201. *Id.* at 290.

from engaging in discrimination itself: the holdings require the schools to actively enforce the statute's prohibitions as a general matter. Second, when a school consciously fails in this obligation, the school is deemed to have engaged in an intentional violation of the statute. Thus, full compliance with the statute entails both refraining from discrimination and enforcing an antidiscrimination mandate within the school's programs.

V. Bringing Together a Modified Intent Standard

As the above demonstrates, the *Gebser* line of cases, although requiring proof of intentional discrimination, diverges from the Court's traditional evaluation of intentional discrimination. However, the Court altered its precedent without explicitly acknowledging it or explaining why, nor does any single variable explain this shift or justify liability. For instance, although choice exists in all of the cases, choice in these cases presents only a semblance of intentional discrimination and requires other elements to coalesce to justify liability. Because the schools' choices are not necessarily related to a gender or race motivation, their choices correlate with intent only because the schools had knowledge that their choices would contribute to existing discrimination. The Court's traditional discrimination standard, however, looks for subjective intent, whereas choice in the *Gebser* line of cases is only an objective inquiry.[202] In fact, the Court has directly rejected objective measures of intent in equal protection cases.[203] Thus, the Court's focus on choice in the *Gebser* line of cases presents, at most, a rough approximation of "intent" insufficient to reconcile these cases with the intent standard.

It goes without saying that causation, congressional objectives, and enforcement do not approximate or establish intent either. Hence, the only explanation is that the Court initiated a subtle change to intentional discrimination within the context of Title VI and Title IX.[204] Rather than explicitly overrule or clarify its precedent, the Court modified its precedent to broaden the meaning of, or

202. *See* Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977) (requiring discriminatory "purpose"). The Court's focus on subjective intent became even clearer in *Columbus Board of Education v. Penick*, 443 U.S. 449, 464 (1979), when the Court abandoned the objective "natural and foreseeable consequence[s]" test in favor of the subjective "inten[t] to segregate" test.

203. *Columbus*, 443 U.S. at 464–65; *see also* Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979).

204. *See* Cohen, *supra* note 16, at 255–56 (recognizing a clear and significant differentiation of intent under the statutory prohibition versus the constitutional prohibition, while not suggesting that this broader view of intent is far-reaching or would change Title IX). **R**

liability for, intentional discrimination in Title VI and Title IX. This modification of the intent standard combines traditional intentional discrimination concerns with an effects inquiry, leading the Court to scrutinize defendants' conscious choices in regard to their effect on furthering congressional objectives.

In the *Gebser* line of cases, the Court did not impose liability simply because a school made a choice, even if that choice might ultimately allow discrimination to occur in the future.[205] The Court likewise refused to impose liability simply because discrimination occurred within a school's program.[206] But it did impose liability when these two elements coalesced to produce circumstances that would frustrate the purpose and objectives of the antidiscrimination statute.[207] More precisely, it imposed liability when the defendant's choice was to allow discrimination and inequality to persist in the school, which produced the exact type of circumstances that Congress sought to prevent.

Such action is not "intentional discrimination" in the traditional form, but it is connected to it. The defendant knows that its actions are a direct cause and perpetuating factor of the continued existence of inequality or discrimination. Of course, the Court has rejected intentional discrimination theories based on "awareness"[208] and "foreseeability,"[209] primarily because inequality and disparity can be merely

205. For instance, that a school chooses not to invest the time and effort to monitor its programs and then does not discover that discrimination is occurring is insufficient to establish liability. Similarly, that a school chooses to disregard the sexual harassment of some students by other students will not result in liability unless there is a denial of access. Davis v. Monroe County Bd. of Educ., 536 U.S. 629, 633 (1999). Additionally, choices that result in fostering an environment that ultimately allows a teacher to harass a student will not justify liability without actual notice. *Gebser*, 524 U.S. at 292–93.

206. *Gebser*, 524 U.S. at 279–80 (affirming lower court's refusal to impose strict liability on a school district by mere virtue of the existence of harassment within the school).

207. *See id.* at 292–93 (stating liability would attach when a school district had actual notice of discrimination and demonstrated deliberate indifference to it).

208. Pers. Admin. of Mass. v. Feeney, 442 U.S. 256, 279 (1979).

209. Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 464–65 (1979). This case overruled the holdings of several courts of appeals. *See, e.g.*, Hart v. Cmty. Sch. Bd. of Educ., 512 F.2d 37, 50 (2d Cir. 1975) (using natural and foreseeable consequences to establish intent); United States v. Sch. Dist. of Omaha, 521 F.2d 530, 536–37 (8th Cir. 1975), *vacated*, 433 U.S. 667 (1977) (overturning a district court that had failed to presume intent based on the natural, probable and foreseeable consequences of the defendant's actions); Morgan v. Kerrigan, 509 F.2d 580, 588 (1st Cir. 1974) (stating that a "pattern of selective action and refusal to act can be seen as consistent only when considered against the foreseeable racial impact of such decisions"); Oliver v. Mich. State Bd. of Educ., 508 F.2d 178, 182 (6th Cir. 1974) ("A presumption of segregative purpose arises when plaintiffs establish that the natural, probable, and foreseeable result of public officials' action or inaction was an increase or perpetuation of public school segregation.").

an indirect outgrowth of a defendant's legitimate objectives.[210] The intent in the *Gebser* line of cases, however, is not susceptible to this defense. First, the schools' options and objectives here are far more circumscribed because the existence or prospect of discrimination and inequality is already upon them. Second, one of the most significant barriers for plaintiffs in gender and race equal protection cases has been that the defendant generally has no affirmative obligation toward them,[211] which renders a defendant's inaction, ignorance, and indifference toward racial or gender harms largely of no consequence. But under Title VI and Title IX, as a condition of receiving federal funds, the schools accept the responsibility to act in accordance with the statutes' prohibitions on discrimination, which the Court interprets broadly in the *Gebser* line of cases.[212] In essence, the Court's analysis moves toward consistency with other antidiscrimination frameworks such as disability, where the law imposes affirmative obligations on the defendants to make accommodations and, thus, inaction or indifference can amount to discrimination.[213]

In the *Gebser* line of cases, an affirmative obligation in regard to race and gender discrimination arises from the congressional objective to eliminate discrimination and inequality.[214] Refraining from

210. *See, e.g.*, Anderson v. Cornejo, 355 F.3d 1021, 1024 (7th Cir. 2004) (finding that disparities can be "chalked up to random variance" or "causes other than race, sex, or another proscribed ground of decision. That's the point of decisions such as *Personnel Administrator of Massachusetts v. Feeney* . . . ."); Chavez v. Ill. State Police, 251 F.3d 612, 645–48 (7th Cir. 2001) (finding that awareness of racially disparate impact of searches or stops is insufficient because the actual purpose is to catch criminals and is unrelated to the impact).

211. *See, e.g.*, Pryor v. NCAA, 288 F.3d 548, 568 (3d Cir. 2002) (distinguishing an intentional discrimination claim from the claims in the *Gebser* line of cases because those cases addressed a defendant "who sat by passively" instead of one who "committed an intentional . . . violation"); Perry, *supra* note 12, at 555–56 (articulating the Equal Protection Clause's prohibition of race discrimination as a negative right in contrast to the First Amendment, which requires "affirmativ[e] accommodat[ion]"); Cohen, *supra* note 16, at 255–56 (discussing the constitutional prohibition on discrimination as a negative right). **R** **R**

212. *See, e.g.*, Bryant v. Indep. Sch. Dist., 334 F.3d 928, 933 (10th Cir. 2003) ("Choice implicates intent. . . . [W]hen administrators who have a duty to provide a nondiscriminatory educational environment for their charges are made aware of egregious forms of intentional discrimination and make the intentional choice to sit by and do nothing, they can be held liable . . . .").

213. Black, *supra* note 125, at 568–69 (discussing the distinction between the obligations courts impose on defendants in disability discrimination cases and those they impose in race discrimination cases). **R**

214. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 286 (1998) (stating that Congress's purpose in enacting Title IX was "'[t]o avoid the use of federal resources to support discriminatory practices'" (quoting Cannon v. Univ. of Chi., 441 U.S. 667, 704 (1979))); Charles F. Abernathy, *Legal Realism and the Failure of the "Effects" Test for Discrimination*, 94 GEO. L.J. 267, 275–76 (2006) (concluding that the purpose of Title VI was not merely to

discriminating would be insufficient for a school to meet its obligation of seeing that others are not discriminating against the students and that inequalities are not impinging on educational opportunities. With such an obligation, no "neutral" choices, nor independent objectives, are available to the school. Its choice, although not necessarily intentionally discriminatory, will combine with the circumstances to produce a result that either furthers or frustrates congressional objectives.[215] Moreover, in so far as its options are circumscribed and clear, the school's conscious choice will either be a furtherance of congressional objectives by preventing discrimination or a disregard for those objectives that fosters continued discrimination.

In so far as this affirmative obligation is not explicitly highlighted in race and gender cases, some might be skeptical of interpreting the *Gebser* line of cases as creating such an obligation. Such an interpretation, however, has significant precedent and justification in education. In particular, when federal courts ordered schools to desegregate, they were under a similar affirmative obligation.[216] Moreover, with school desegregation, the affirmative obligation to desegregate and remedy past discrimination was imposed on subsequent school boards long after *de jure* segregation and the direct effects of past school board decisions ended.[217] To sustain a claim, a plaintiff need show only that inequality is persisting in the schools, regardless of whether

enforce the Constitution, but rather to add a statutory norm that could eliminate segregation and leave open the option of prohibiting *de facto* segregation); *see also* Cohen, *supra* note 16, at 255–56 (concluding that Title IX and recent cases impose an affirmative duty on funding recipients). **R**

215. David Cohen pushes this responsibility of schools under Title IX even further, arguing that the notice and deliberate indifference requirements may not, or should not, apply to other non-harassment discrimination. Cohen, *supra* note 16, at 254. In short, he aptly argues that in regard to things such as admissions practices, scholarships, or sports opportunities, respondeat superior should apply and make schools strictly liable for discriminatory practices that occur within the context of their educational obligations to students. *Id.* at 256. **R**

216. Green v. Sch. Bd. of New Kent County, 391 U.S. 430, 435 (1968) ("[S]chool boards operating such [dual] school systems were *required* by *Brown II* 'to effectuate a transition to a racially nondiscriminatory school system'" (quoting Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955))).

217. *Id.* at 437–38 (holding that even thirteen years later, formerly dual school systems are "charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch"); Keyes v. Sch. Dist., 413 U.S. 189, 210–11 (1973) (rejecting "any suggestion that remoteness in time has any relevance to the issue of intent" and finding that "remoteness in time [from original discriminatory acts] certainly does not make those [current] actions any less 'intentional'"). *See generally* Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 460–61 (1979) (imposing a continuing affirmative duty to desegregate); *Keyes*, 413 U.S. at 200 (imposing an affirmative duty on a subsequent school board).

it is a result of a neutral or discriminatory policy.[218] The school denies the students equal protection if the school's current action either perpetuates or fails to remedy the effects of past segregation and inequality.[219] Disability law, similarly, requires schools to make affirmative accommodations and efforts to ensure that students receive an equal and appropriate educational opportunity.[220]

In the *Gebser* line of cases, the implicit basis for liability is the same. The schools accept federal funds and consequently assume an affirmative responsibility to carry out congressional antidiscrimination and equality objectives in their programs. They cannot take a neutral stance toward this affirmative obligation. Thus, actions, regardless of motive, that by choice contravene these objectives will justify liability.[221] And, as at least one prominent commentator notes, legislative intent indicates this affirmative obligation exists particularly in regard to eliminating substantially disproportionate representation by gender in admissions and sports.[222] In sum, the *Gebser* line of cases demonstrates the Court's modification of the intent standard in a manner that allows plaintiffs to sustain a cause of action when a school makes a conscious choice to frustrate Congress's purpose to eliminate discrimination and inequity in federally funded schools.

218. *Keyes*, 413 U.S. at 212 (holding that "the mere assertion of such a [neutral] policy is not dispositive where, as in this case, the school authorities have been found to have practiced *de jure* segregation"); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 28 (1971) ("All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes. But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation."); NAACP v. Duval County Sch., 273 F.3d 960, 966 (11th Cir. 2001) (applying the standard that requires a school to rebut the presumption that racial disparities in specific aspects of the school are the vestiges of past segregation).

219. *See* Missouri v. Jenkins, 515 U.S. 70, 89 (1995) (stressing the trial court's duty to ascertain whether the school board eliminated "'vestiges of past discrimination . . . to the extent practicable'" (quoting Bd. of Educ. v. Dowell, 498 U.S. 237, 249–50 (1991))); Freeman v. Pitts, 503 U.S. 467, 492 (1992) (same).

220. *See, e.g.*, Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400–1487 (2000) (requiring schools to provide students with disabilities a free appropriate public education); Duvall v. County of Kitsap, 260 F.3d 1124, 1138 (9th Cir. 2001) (indicating that a defendant cannot disregard this duty through deliberate indifference); Bartlett v. New York State Bd. of Law Exam'rs, 156 F.3d 321, 331 (2d Cir. 1998), *vacated*, 527 U.S. 1031 (1999) (same); Tyler v. City of Manhattan, 118 F.3d 1400, 1406 (10th Cir. 1997) (same).

221. Cohen, *supra* note 16, at 255–56. R

222. *See id.* at 256 & n.279 (indicating that a school would have to take remedial steps to remedy such gender disproportionality in athletics) (citing 44 Fed. Reg. 71,413, 71,418 (Dec. 11, 1979)).

VI. IMPLICATIONS AND PRACTICAL EXTENSIONS

The challenge beyond distilling the underlying and uniting principles of the *Gebser* line of cases is to determine how they might extend to contexts beyond harassment and retaliation. Extending them will require courts to address specific issues and agencies to provide assistance. The primary requirement for applying the *Gebser* framework is identifying what other practices conflict with congressional objectives and then identifying what action a funding recipient must take in response to those practices.

A. *What Types of Discrimination Mandate a Response by Funding Recipients?*

The *Gebser* line of cases makes determining what type of responsive action a recipient must take rather straightforward. Upon learning of activities that are prohibited by a relevant statute and within a school's control, a school must take reasonable actions to remedy or prevent the recurrence of the prohibited activity.[223] Consequently, if someone brings prohibited inequality and discrimination to the school's attention, the school cannot disregard it or take adverse ac-

223. Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 648–49 (1999). In *Davis*, the Court did not require a specific response from the school or that it must remedy or prevent all future harassment. Rather, the Court stated "the recipient must merely respond to known peer harassment in a manner that is not clearly unreasonable." *Id.* at 649. However, the Court suggested that the school's failure in that case "to investigate or to put an end to the harassment" was deliberate indifference. *Id.* at 654. Moreover, although lower courts have consistently reiterated and adhered to the Court's principle of deference in regard to the specific actions schools must take, the courts have consistently found that, as a practical matter, schools' responses should be effective and adequate efforts to stop the harassment and should not be unjustifiably delayed. *See, e.g.*, Hayut v. State Univ. of New York, 352 F.3d 733, 751 (2d Cir. 2003) (assessing both the nature and timeliness of the responsive action); Vance v. Spencer County Pub. Sch. Dist., 231 F.3d 253, 262–63 (6th Cir. 2000) (finding the school's ineffective measures to be evidence of deliberate indifference); Gant v. Wallingford Bd. of Educ., 195 F.3d 134, 141 (2d Cir. 1999) (adhering to the Court's "clearly unreasonable" standard); Murrell v. Sch. Dist., 186 F.3d 1238, 1247–48 (10th Cir. 1999) (finding the school's actions ineffective because they allowed harassment to continue); Wills v. Brown Univ., 184 F.3d 20, 26 (1st Cir. 1999) (finding that if a school's efforts "proved inadequate, it may be required to take further steps to avoid new liability"); Bruneau v. South Kortright Cent. Sch. Dist., 163 F.3d 749, 761 (2d Cir. 1998) (remedial action should not follow only after "a lengthy and unjustified delay"); Jones v. Ind. Area Sch. Dist., 397 F. Supp. 2d 628, 644–46 (W.D. Pa. 2005) (not requiring any particular response other than that the school take additional action when it knows its previous ones to be ineffective or inadequate); Canty v. Old Rochester Reg'l Sch. Dist., 66 F. Supp. 2d 114, 117 (D. Mass. 1999) (finding if the school's actions were "inadequate" to stop harassment, it must "'take further steps'" (quoting *Wills*, 184 F.3d at 25)). In short, the courts will not dictate that a school take specific action, but if the school's chosen action allows harassment to continue, the courts will require the school to take further action.

tion against the complainant.[224] In essence, the school must make a good faith effort to eliminate known discrimination and inequality in its programs. Knowing that it has this obligation, the failure to fulfill it, although not necessarily amounting to traditional intentional discrimination, is an intentional violation of the statute and warrants liability.

The more difficult question left lingering from these cases is what other actions or circumstances amount to discrimination or inequality to which a school must respond. In fact, the cases may appear contradictory on this issue. The Court in *Sandoval* emphatically indicated that unintentional discrimination—of which disparate impact is a quintessential example—is not a violation of Title VI.[225] Hence, *Sandoval* would suggest that a failure to respond to disparate impact alone would not amount to an actionable claim.

Jackson, however, implicitly contradicts such a conclusion because the Court focused solely on the response to the allegation of discrimination without addressing the underlying discrimination.[226] Moreover, this distinction did not go unnoticed, but was at the core of the dissent's critique. The dissent wrote that under the majority's holding, a "retaliation claimant need not prove that the complained-of sex discrimination happened. . . . [Thus,] a retaliation claim may succeed where no sex discrimination ever took place."[227] The dissent further argued that causes of action for retaliation are merely enforcement mechanisms that Congress has specifically included in some antidiscrimination statutes, but chose not to include in Title IX (and Title VI).[228]

Of course, the majority could overcome this if retaliation itself was inherently an act of intentional discrimination, but as indicated above, the Court's analysis falters on this point and is instead justified by retaliation being an intentional act that contravenes the enforce-

224. *See* Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 171 (2005) (prohibiting retaliation); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290 (1998) (prohibiting deliberate indifference to discrimination).

225. Alexander v. Sandoval, 532 U.S. 275, 285 (2001).

226. 544 U.S. at 173–74.

227. *Id.* at 187–88 (Thomas, J., dissenting).

228. *Id.* at 189–90. *Compare* Title IX of the 1972 Education Amendments, 20 U.S.C. §§ 1681–1686 (2000) (providing no retaliation prohibition) *with* Title VIII of the Fair Housing Act, 42 U.S.C. § 3617 (2000) (providing that no one shall "coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by [the Fair Housing Act]").

ment of the statute and congressional objectives.[229] Hence, *Jackson* rests neither on intentional discrimination toward the complainant nor on the existence of underlying intentional discrimination against the girls' basketball team. Therefore, returning to the issue of what underlying circumstances require an affirmative response, the holding in *Jackson* suggests, in contrast to *Sandoval*, that a defendant might be liable even when the underlying circumstances are unintentional or, at least, not clearly established as intentionally discriminatory.[230]

The sexual harassment cases fall between *Sandoval* and *Jackson* in terms of the types of underlying circumstances that require a defendant to respond. Some lower courts and commentators conceptualize the deliberate indifference cases as justifying liability against the schools because the underlying harassment itself is intentional discrimination.[231] The Court in *Gebser* did reach the general finding that "sexual harassment can constitute discrimination on the basis of sex under Title IX,"[232] but it did not necessarily predicate liability on the underlying activity being intentional discrimination.

First, the focus of the Court's analysis was the schools' responses to the harassment rather than the harassment itself.[233] Second, the Court's analysis of harassment was not in terms of "intentional" discrimination, but rather in the general sense of discrimination.[234] The Court directed this general examination of harassment toward Title IX's general prohibition of discrimination and whether the existence of harassment is inconsistent with the statute's purpose, rather than any specific circumstantial inquiry of intentionally discriminatory motive. In fact, the deliberate indifference framework is the equivalent

229. *See supra* notes 98–110 and accompanying text. R

230. Russo & Thro, *supra* note 128, at 791–92 (asserting that *Jackson* destroyed the linkage between Title IX and the Equal Protection Clause and opened the door to Title IX reaching disparate impact discrimination). R

231. *See, e.g.*, Pryor v. NCAA, 288 F.3d 548, 568 (3d Cir. 2002) (dismissing the deliberate indifference test in the Title VI context because it "presupposes that an intentional act of wrongdoing occurred in the first instance"); S. Camden Citizens in Action v. N.J. Dept. of Envtl. Prot., No. Civ. A. 01-702(FLW), 2006 WL 1097498, at *36 (D.N.J. Mar. 31, 2006) (same).

232. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 283 (1998) (citing Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75, 80–81 (1998)).

233. *Id.* at 288–89.

234. *See id.* at 283 (finding that harassment "can constitute discrimination on the basis of sex"); *id.* at 285 (discussing whether "the recipient is unaware of discrimination"); *id.* at 286–87 (stating the purpose is to "'avoid . . . support[ing] discriminatory practices'" (quoting Cannon v. Univ. of Chi., 441 U.S. 677, 704 (1979))). Whereas, the distinction between intentional and unintentional discrimination focuses on the school's action, not the harassment itself. *See id.* at 287 (finding that a school should not be liable for discrimination of which it is unaware and which is thus unintentional).

of this circumstantial inquiry and addresses the schools' actions, not the underlying harassment.

Third, whether the underlying discrimination qualifies as intentional is conceptually irrelevant because neither the schools, nor their agents, engaged in the discrimination, and the Court judged liability based on the schools' actions, not those of third parties.[235] In that respect, the Court is unconcerned with the underlying "discrimination." Here, their deliberate indifference is analogous to retaliation because the Court's focus is on how the schools responded to harassment, not on the harassment itself.

Fourth, in *Davis* the dissent challenged the assertion that intentional discrimination even existed because the harassment had been perpetrated by a student rather than a teacher.[236] The majority, however, did not respond to this challenge directly but countered by setting the threshold for liability on whether the harassment amounted to a denial of access.[237] Thus, the majority did not necessarily find the characterization of the activity—i.e., sexual harassment versus general immature behavior between boys and girls—to be decisive, but rather whether the activity denied equal access.[238] Consequently, the existence of underlying intentional discrimination is almost entirely removed from the analysis. In short, the Court found the question of whether sexual harassment occurred to be irrelevant to liability when the behavior nonetheless created unequal educational access.[239] This reasoning undermines the notion that the Court allowed these cases to proceed because it simply assumed the harassment was intentional discrimination.

However, even if the preceding analysis is correct and liability in these cases is not justified by the existence of underlying intentional discrimination, automatically jumping to any additional conclusion—that a cause of action exists even when the underlying activity is unintentional or merely causes a disparate impact so long as the defendant responded inappropriately—is a mistake. The Court's hostility toward

235. *See id.* at 291 (concluding that fund recipients could be liable in damages only where their own deliberate indifference "cause[d]" the discrimination); Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 642–43, 653 (1999) (adopting *Gebser*'s holding that a school can be liable only for its own actions, and such actions can be in the form of indifference to discrimination).

236. *Davis*, 526 U.S. at 660, 672 (Kennedy, J., dissenting).

237. *Id.* at 651 (majority opinion).

238. *Id.* at 651–52.

239. *See id.* at 652 (stating that Title IX was designed to prevent harassment where a child's behavior is so severe and offensive that it denies its victims equal access to education).

disparate impact in *Sandoval* suggests that even if such a conclusion was theoretically defensible, the Court would reject it.[240] Yet, the Court's other decisions demonstrate a willingness to expand beyond the strictures of *Sandoval* so long as the decision can be situated, albeit awkwardly, within intent.[241] Moreover, even *Sandoval* ceded an important caveat to its holding by refusing to challenge, and instead assuming, the validity of the disparate impact regulations.[242] Thus, although these regulations do not independently establish a private cause of action, federal agencies can still construe unjustified disparate impacts as violations of the statute which they will enforce administratively.[243] In sum, the *Gebser* line of cases collectively indicates that a future claim based on a federal fund recipient's inappropriate response to an activity within its programs can exist when the underlying activity lies somewhere between traditional intentional discrimination and purely unintentional discrimination.

B. *Reconciling* Sandoval *with a Broad Concept of Responsive Obligations*

Of course, the major retort to the last argument is that *Sandoval* prohibits a cause of action for anything short of intentional discrimination. However, as demonstrated above, the Court has already recognized such a claim on several occasions, regardless of what rhetoric it might employ to obfuscate this slight retreat from intent. More importantly, *Sandoval*'s pronouncements regarding intentional discrimination are appropriately understood as only being a rejection of what it saw to be an expansive and imprecise disparate impact standard rather than a rejection of everything resembling or related to disparate impact.

240. *See* Labow, *supra* note 18, at 230 (postulating that the Court would invalidate agency regulations prohibiting disparate impact); *see also* David J. Galalis, *Environmental Justice and Title VI in the Wake of* Alexander v. Sandoval*: Disparate-Impact Regulations Still Valid Under* Chevron, 31 B.C. ENVTL. AFF. L. REV. 61, 64–65 (2004) (same). R

241. *See, e.g.*, Jackson v. Bd. of Educ., 544 U.S. 167, 173–74 (2005) (finding that a school's retaliation against an individual reporting discrimination is a violation of Title IX because retaliation is "another form of intentional sex discrimination").

242. Alexander v. Sandoval, 532 U.S. 275, 281–82 (2001).

243. *See id.* (refusing to challenge the regulation's validity); Dep't of Justice, Background and Questions and Answers, DOJ Clarifying Memorandum Regarding Limited English Proficiency and Executive Order 13,166, October 26, 2001, http://www.usdoj.gov/crt/cor/lep/Oct26BackgroundQ&A.htm (concluding that "*Sandoval* did not invalidate Title VI or the Title VI disparate impact regulations, and federal agencies' obligation to enforce the statute and regulations remains in effect"). Moreover, the Court recognized that outside of disparate impact, agency regulations might further the ban on intentional discrimination and in such case would "authoritatively construe the statute itself." *Sandoval*, 532 U.S. at 284.

For thirty years prior to *Sandoval*, both the Supreme Court and lower courts permitted causes of action for disparate impact and analogous circumstances.[244] With this history and without a direct repudiation of it, *Sandoval*'s narrow holding that no independent cause of action exists for disparate impact regulations[245] need not be read as concluding that all disparate impact is legally defensible. Instead, the Court's objection in *Sandoval* is that the Court believes that only some specific impacts fairly represent discrimination and that disparate impact in general does not always establish a prima facie case of discrimination.[246] If the Court is correct, permitting a cause of action based on general disparate impact standards could impose significant and widespread burdens on innocent defendants because our national racial disparities are endemic.[247]

In fact, the Court first articulated its notion that most disparate impacts may be benign in *Arlington Heights v. Metropolitan Housing*, writing, "[i]n many instances, to recognize the limited probative value of disproportionate impact is merely to acknowledge the 'heterogeneity' of the Nation's population."[248] Hence, permitting disparate impact claims could allow plaintiffs to enjoin certain policies even though no underlying substantive discrimination exists.[249] However, *Arlington Heights* was explicit that assessing disparate impact nevertheless is "an important starting point" in identifying discrimination.[250] *Sandoval* does not challenge or contradict this. Thus, neither *Arlington Heights* nor *Sandoval* is a repudiation of the notion that some dispa-

244. *See, e.g.*, David Crump, *Evidence, Race, Intent, and Evil: The Paradox of Purposelessness in the Constitutional Racial Discrimination Cases*, 27 HOFSTRA L. REV. 285, 308–10 (1998) (demonstrating that in some cases the Court has imposed liability for disparate impact alone and in others the Court has been willing to assume a legitimate purpose by the government without requiring the government to articulate it); *id.* at 332–33 (concluding that "it was not necessary . . . to create a mandatory presumption of unconstitutionality upon proof of disparate impact").

245. *Sandoval*, 532 U.S. at 293.

246. Crump, *supra* note 244, at 308–10 (explaining that, in cases where the Court rejected a pure disparate impact claim, its objection was primarily to making the defendant explain his or her action when the Court was willing to assume a legitimate purpose); Perry, *supra* note 12, at 554 (stating that a court "cannot fairly conclude" that race was the motivation for the disparate impact when a plausible motivation exists). **R** **R**

247. For a discussion of the extensive racial disparities in the United States, see generally DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993).

248. 429 U.S. 252, 266 n.15 (1977) (citing Jefferson v. Hackney, 406 U.S. 535, 548 (1972); Washington v. Davis, 426 U.S. 229, 248 (1976)).

249. The problem is that the Supreme Court has never engaged in such analysis or explained why disparate impact is not discrimination. Instead, the Court has simply reached conclusions without analysis. Black, *supra* note 125, at 569–70. **R**

250. 429 U.S. at 266.

rate impacts represent discrimination, but rather a skepticism toward a decontextualized and general disparate impact standard that calls into question the basic "heterogeneity" of our nation. Moreover, this reading of *Sandoval* is consistent with the Court's first disparate impact case, *Yick Wo v. Hopkins*, where it held that although a law may be facially neutral, its application can produce disproportionate impacts so extreme that no explanation other than discrimination exists.[251] The problem, however, is that *Yick Wo* and *Sandoval* are concerned with situations at opposite ends of the spectrum and fail to address the middle ground: the point at which disparate impact stops being an incidental consequence and becomes evidence of discrimination.[252] Insofar as the *Gebser* line of cases does not fit neatly within the extremes of *Yick Wo* or *Sandoval*'s circumstances, the line of cases helps define and create a framework for the middle ground discussed above. Unfortunately, the framework is only as good as the substance to which it is applied. In the *Gebser* line of cases, the Court was aided by substantive agency guidance regarding the practices in question. Similar guidance may be crucial if the courts are to apply the framework to new circumstances.

C. *The Legal Authority of Agencies to Identify Circumstances Inconsistent with Congressional Objectives*

With appropriate focus and substantiation, that middle ground could become the province of federal agencies charged with enforcing Title VI and Title IX. Where agencies have been more precise in drawing a line between permissible and prohibited activities, the Court's objections to relying upon those judgments have been diminished and would likely continue to be. This is particularly true when agencies have addressed specific activities where disparities might occur and then buttressed their standards with context and reasoning. This is in contrast to generally applicable disparate impact regulations, for instance, that may sweep broadly without any context or rea-

251. 118 U.S. 356 (1886). In *Yick Wo*, a facially neutral policy prohibited the licensing of hand laundries except with the commissioner's consent. *Id.* at 357–58. Consent was granted to all but one of the non-Chinese applicants but none of the Chinese applicants. *Id.* at 359. As the Court in *Arlington Heights* wrote, "[s]ometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face." 429 U.S. at 266 (citing Gomillion v. Lightfoot, 364 U.S. 339 (1960); Lane v. Wilson, 307 U.S. 268 (1939); Guinn v. United States, 238 U.S. 347 (1915); *Yick Wo*, 118 U.S. 356).

252. *Arlington Heights*, 429 U.S. at 266 ("The evidentiary inquiry is then relatively easy. But such cases are rare. Absent a pattern as stark as that in *Gomillion* or *Yick Wo*, impact alone is not determinative, and the Court must look to other evidence.") (footnotes omitted).

soning. When agencies refrain from that type of line drawing, the Court has been consistently deferential.

First, in *Chevron v. Natural Resources Defense Council, Inc.* and subsequent cases, the Court held that when Congress has charged an agency with enforcing a statute, the Court must defer to the agency's interpretation so long as it is reasonable.[253] Second, judicial deference toward agencies is most appropriate, if not mandated, in regard to statutory prohibitions on race and, by extension, gender discrimination. Both Title VI and Title IX succinctly dictate that "[n]o person in the United States shall, on the ground of race [or sex] . . . , be subjected to discrimination under any program or activity receiving Federal financial assistance."[254] Yet neither provides any further explanation of or context for what the prohibition means.[255] Legislative history reveals that Congress recognized the need for further explanation in Title VI.[256] The legislative history also shows that Congress intentionally refrained from defining discrimination, in part, because Congress itself was rather uncertain as to what "discrimination" meant.[257] Thus, "as part of a complicated compromise," Congress deliberately avoided prescribing what discrimination entails[258] and, instead, provided agencies with the responsibility to define discrimination's contours through the enactment of regulations.[259]

253. 467 U.S. 837, 842–45 (1984); *see also* United States v. Mead Corp., 533 U.S. 218, 226–27 (2001) (qualifying but reaffirming *Chevron*).

254. 42 U.S.C. § 2000d (2000); 20 U.S.C. § 1681(a) (2000).

255. The only exception is that Title IX excluded application of the prohibition to practices rooted in educational tradition and controversy, such as single-sex institutions and physical and sexual education classes. 20 U.S.C. § 1681(a)(5); 34 C.F.R. § 106.34(a)–(e) (2006). Title IX does contain extensive language about certain admission and placement issues, but those are necessary to provide clarity and maintain consistency about its having excluded single-sex institutions and other issues from coverage. *See* 20 U.S.C. § 1681(a)(3)–(9).

256. Charles F. Abernathy, *Title VI and the Constitution: A Regulatory Model for Defining "Discrimination,"* 70 GEO. L.J. 1, 20–39 (1981). The very importance and contestability of antidiscrimination terms prevented Congress from resolving the ambiguity in the midst of legislative processes. *See generally id.* (revealing Congress's awareness of the ambiguity, uncertainty as to how to define it, and its ultimate "compromise" of delegating the issue to agencies). Resolving the ambiguity is challenging not simply because it is complicated, but because it broaches the most "controversial" issues. *Id.* at 4.

257. *Id.* at 25–27.

258. *Id.* at 3, 20–39. "The Congress that considered title [sic] VI was aware of the ambiguity inherent in the word 'discrimination,' and indeed this central definitional problem set the agenda for legislative action." *Id.* at 22.

259. 42 U.S.C. § 2000d-1; Abernathy, *supra* note 256, at 3. Abernathy asserts Congress envisioned that delegating responsibility for defining discrimination to agencies would allow the meaning of discrimination to evolve. *Id.* at 21, 28–29, 41–42. Although potentially dangerous to those who are to be protected and are in the minority, the flexibility in defining discrimination would remain politically, rather than constitutionally, accountable. R

Additionally, neither Title VI nor Title IX includes an explicit private cause of action. Thus, the statutes, on their faces, create no immediate means by which a court would interpret the meaning of discrimination within the statutes. Instead, the explicit enforcement mechanism and interpretation rest solely with agencies. Except in so far as agencies brought suit against a funding recipient for a violation of the statute, the courts were initially irrelevant in most respects. Only when the Court later held that plaintiffs have an implied cause of action under the statutes did the courts become relevant. Moreover, a structure founded on agency primacy is natural because the primary interest at stake is monitoring the use of federal funds to prevent their use in a manner inconsistent with congressional objectives. Agencies are suited to this work, while courts lack both the capacity for and interest in it. Thus, it is altogether appropriate that agencies play the central role in defining discrimination and violations of the statutes, on which courts should rely heavily in making their decisions. And it is wholly inappropriate for courts to disregard or minimize agencies' authority in this respect. *Sandoval* did not change the deference owed to agencies, but simply refined it.[260] As an important commentator concludes, courts still must defer to agency regulations "that clarify or further define individual rights reasonably implicit in a statute without contradicting the central underlying principle . . . that Congress alone possesses the legislative authority necessary to create individual rights."[261]

Third, although the Court has never explicitly acknowledged that it would afford agencies this level of deference in their interpretations of race or gender discrimination, this type of deference is implicit in and almost a prerequisite to the Court's holdings in *Gebser*, *Davis*, and *Jackson*, which relied heavily upon regulations in justifying liability.[262]

Id. at 9. "Congress intended to enshrine a policy of nondiscrimination in the use of federal program funds that was to be responsive to agency expertise and to congressional political desires." *Id.* at 21.

260. Alexander v. Sandoval, 532 U.S. 275, 289–90 (2001) (expressing that while agencies have the power to enforce statutes, they may not expand them to create new rights beyond those contained within the statute itself).

261. Bradford C. Mank, *Can Administrative Regulations Interpret Rights Enforceable Under Section 1983?: Why* Chevron *Deference Survives* Sandoval *and* Gonzaga, 32 FLA. ST. U. L. REV. 843, 850 (2005).

262. Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 177–78 (2005) (expressing that its decision not to rely on an agency's regulation resulted because the statute itself contained the prohibition, yet reaching the same conclusion as the agency regarding the retaliation); Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 647–48 (1999) (citing Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034, 12,039-40 (Dep't of Educ., Office for Civil Rights, March 13, 1997) (final policy guidance)); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S.

As demonstrated earlier, with the exception of *Sandoval*'s finding that disparate impact regulations are an over-expansive interpretation of discrimination, the *Gebser* line of cases has routinely reached holdings that rest upon and are consistent with agencies' interpretations of the statutes' prohibitions.[263] Moreover, these cases have done so even when that interpretation does not fit precisely within the intent doctrine.

The task now is for agencies to accept their responsibility and authority. If they do not address those circumstances that fall within the grey areas and substantiate their conclusions as to where to draw lines, both the law and the plaintiffs' ability to redress their situations in court are likely to stall.[264] The Court is not predisposed to unilaterally identify new activities as violating Title VI or Title IX and hence require a funding recipient to take responsive action. Thus, applying the framework from the *Gebser* line of cases beyond the cases' factual circumstances is contingent on agencies' past and future interpretations of the statutes. Fortunately, agencies have the expertise to provide the specificity and context necessary for the Court to rely upon their interpretations and enforcement mechanisms.[265] Unfortunately, the Court's reluctance may arise at the same point at which an agency's interpretation is also the most crucial: the margins of the distinction between intentional and unintentional discrimination.

To quell the reluctance when an agency declares some "unintentional discrimination" or disparate impact at the margins to be prohibited, an agency must define the prohibition narrowly and base it on the context in which the impact operates. Additionally, articulating its reasoning in terms of the statute's guarantee of equal access to

---

274, 288–92 (1998) (reviewing Department of Education regulatory requirements). Petitioners in *Gebser* argued that the regulatory requirement that a school adopt grievance procedures was sufficient to sustain a claim. *Id.* at 291–92. The Court rejected the argument that a violation of those regulations amounted to prohibited discrimination. *Id.* at 292. However, the Department of Education never suggested that such a failure was discrimination, but rather that it was required for compliance and enforcement of the statute. *See id.* Regardless, the Court emphasized that agencies nonetheless have authority to enact such requirements. *Id.* Most importantly, the Court in *Gebser* looked to agency regulation first in determining what activity the statute prohibits, and ultimately the agency interpretations were a predicate for the holdings in both *Gebser* and *Davis*. Derek Black, *Picking up the Pieces after* Alexander v. Sandoval*: Resurrecting a Private Cause of Action for Disparate Impact*, 81 N.C. L. REV. 356, 362–63 (2002).

263. *See supra* notes 190–195 and accompanying text. R

264. *See, e.g.*, Cohen, *supra* note 16, at 251–53 (discussing the importance of and disagreement over what constitutes notice that an activity is discriminatory). R

265. *See, e.g.*, 34 C.F.R. § 300.646 (2007) (prohibiting disproportionality in special education programs and providing schools with various mechanisms to limit and prevent its occurrence).

programs, as the Court did in *Davis*, rather than simply in terms of discrimination, would also encourage the Court to accept the reasoning.[266] Activities such as student-on-student harassment may present contentious issues in a pure discrimination analysis, but the question of whether the students are receiving equal access to education is more straightforward. In fact, if access is unequal, the inability to articulate it as a direct consequence of intentional discrimination is of lesser relevance. Moreover, prohibiting such activity does not place schools in a precarious or unjustified situation because liability would attach only upon the school's failure to respond to the unequal access appropriately, not upon the mere existence of it.[267]

D. The Need and Capacity for Agency Interpretation

Several circumstances arise where an agency could—and should—define the margins of unintentional discrimination in a manner that would provide a basis for the Court to recognize a plaintiff's cause of action. For instance, a racially hostile environment might arise from any number of causes that are unrelated to official actions of a school or even intentional discrimination by others.[268] Because Title VI poses no duty to prohibit them in advance,[269] a hostile environment might germinate through no intentional discrimination or inappropriate action of the school. However, the environment, at some point, will likely have a detrimental effect on educational opportunities and the school will recognize this. But the school may be un-

266. 20 U.S.C. § 1681(a) (2000) (providing that no one shall be "excluded from participation in, [or] be denied the benefits of [an educational program]," in addition to the prohibition on discrimination); 42 U.S.C. § 2000d (2000) (same).

267. *See supra* notes 223–243 and accompanying text. **R**

268. *See, e.g.*, Gant v. Wallingford Bd. of Educ., 195 F.3d 134, 141–42, 144 (2d Cir. 1999) (discussing the racially hostile comments made by students, for which the principal was told they were reprimanded and had apologized, and for which a teacher later held a class meeting); Frederick Schauer, *The Speech-ing of Sexual Harassment*, *in* DIRECTIONS IN SEXUAL HARASSMENT LAW 347–60 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004) (discussing instances of individuals creating a hostile work environment and the conflicts between prohibiting such activity and individuals' First Amendment rights); Office for Civil Rights, Dep't of Educ., Frequently Asked Questions about Racial Harassment, http://www.ed.gov/about/offices/list/ocr/qa-raceharass.html (last visited Feb. 20, 2008) (indicating that "[a] racially hostile environment may be created by oral, written, graphic or physical conduct related to an individual's race, color, or national origin," but recognizing the regulation of such conduct can raise First Amendment concerns).

269. Frequently Asked Questions about Racial Harassment, *supra* note 268 (recognizing the inability to control the content of individuals' comments and the conflict that regulating harassing behavior could have with the First Amendment). Moreover, the Supreme Court's decisions in the *Gebser* line of cases do not hold a school liable for discriminatory behavior of which it should be aware, but only for that which it is actually aware. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290 (1998). **R**

clear as to when it should or must intervene. The Department of Education could be instrumental in indicating when an environment rises to the level of being racially hostile or denying equal access and hence clarify when a school would have a duty to intervene.[270] The agency's past experiences provide it with a unique ability to articulate standards or factors that address when an environment becomes hostile or affects a student's equal educational opportunity. However, without such guidance, the point at which a school must react will be inherently ambiguous.

Likewise, an agency might operate at and define the margins of unintentional discrimination in regard to standardized tests. A school, for completely legitimate reasons, may select a standardized test to use in making decisions in regard to students' classroom placements or promotions to the next grade. The test, however, could contain a race or gender bias that is unknown to both the test publisher and the school. Based on this ignorance, administering the test would in no respect be intentionally discriminatory. Nonetheless, if the Department of Education later discovers the bias in the test, it would have the power to prohibit a school from relying upon it, even though no intentional discrimination exists, because the test would deny equal educational access. If the school then fails to take corrective action, the framework from the *Gebser* line of cases would allow a court to establish a basis to impose liability.

The real difficulty for an agency is not identifying problem areas like those above, but rather addressing the circumstances with a level of specificity that justifies prohibiting the activity and clearly indicates when a funding recipient would be obligated to take responsive action. For instance, the Office for Civil Rights has made determinations regarding tests that, although providing general guidance, most likely are insufficient to establish that a funding recipient should have taken alternative or responsive action under specific circumstances. The Office for Civil Rights indicated in its Title VI policy guidelines for student assignments that

270. For instance, the Office for Civil Rights' Sexual Harassment Guidance did exactly this. Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034, 12,039-42 (Dep't of Educ., Office for Civil Rights, March 13, 1997) (final policy guidance). Of course, the Supreme Court referenced this guidance as placing schools on notice of potential liability, but the guidance went further and has served as a basis for lower courts to assess exactly how a school should respond. *See, e.g.*, Vance v. Spencer County Pub. Sch. Dist., 231 F.3d 253, 261 n.5 (6th Cir. 2000) (quoting the policy guidance's directions as to how a school should respond to harassment or a hostile environment).

> school districts should be careful to use appropriate criteria and evaluation and testing methods before assigning students to specialized classes or courses of study. Tests must be educationally sound indicators of a student's particular needs and achievement . . . . For example, a minority student who has not been properly tested for possible learning disabilities may be assigned to remedial courses that do not provide the type of instruction needed. As another example, national origin minority students with limited-English proficiency may be tested in English, receive scores that are not valid indicators of their proficiency in the tested areas, and be assigned to a class that does not meet their needs. Such student assignments would be discriminatory.[271]

Here, the guidance clearly alerts the federal fund recipients of issues with which they should be concerned, but it lacks the conclusiveness or direction discussed earlier within the *Gebser* framework.

Agencies, however, have previously demonstrated the capacity to avoid such shortcomings and provide the more specific notice necessary to establish a responsive duty by the recipient.[272] In addition, where federal agencies have left gaps, state agencies have often provided a roadmap for greater specificity. For instance, state departments of education have regularly delved deeper into issues such as the reliability of specific standardized tests or the need to rely upon multiple specific factors in making placement decisions so as to eliminate bias.[273] In short, the question is not whether agencies should or can more accurately assess what unintentionally discriminatory circumstances are prohibited so as to place schools on notice of the duty to take corrective action; the question is whether they will.

271. Office for Civil Rights, Dep't of Educ., Student Assignment in Elementary and Secondary Schools & Title VI (1998), http://www.ed.gov/about/offices/list/ocr/docs/tviassgn.html.

272. *See, e.g.*, 34 C.F.R. § 300.646 (2007) (providing guidance as to procedures to help redress potential disproportionality in special education, although failing to specify disproportionality); Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034, 12,039-42 (Dep't of Educ., Office for Civil Rights, March 13, 1997) (final policy guidance) (providing sexual harassment guidance).

273. *See, e.g.*, Ga. Dep't of Educ., Gifted Education, http://public.doe.k12.ga.us/ci_iap_gifted.aspx (last visited Feb. 20, 2008) (detailing the measure by which students should be evaluated for gifted and talented); *see also* GA. COMP. R. & REGS. 160-4-2-.38 (1998) (defining narrowly four specific factors used for evaluating students: mental ability, achievement, creativity, and motivation).

E. The Prospect and Focus of Future Interpretations

As is implicit above, the potential for future assistance from agencies in this area is expansive, yet burdened with hard work, data collection, and research. Agencies' reach, in terms of setting standards that serve as a basis for legal liability, will never be as broad as it was with disparate impact regulations, but by adding the specificity absent from general disparate impact regulations, future agency pronouncements could be legally more helpful and reliable. Unfortunately, no agencies have or are likely to receive the resources to generate a wealth of new guidance and regulations.[274] Nor is it clear, notwithstanding resources, that they would choose to do so because cases such as *Sandoval* have engendered a reluctance to address activities that might otherwise be characterized as non-intentional discrimination.[275] In fact, some commentators suggest that although *Sandoval* did not challenge disparate impact regulations, agencies are no longer willing to enforce them.[276]

They reasonably assert that new regulations and enforcement that address this pressing issue would only invite the Supreme Court to shrink rather than expand agencies' regulatory power.[277] The converse danger, however, is that agencies, by their lack of initiative, will shrink into irrelevance because they speak only to those activities that are clearly prohibited by statute and on which the Court neither seeks nor needs their expertise. By avoiding tough issues, agencies may likewise leave plaintiffs and defendants to engage in unreliable and inconsistent battles that provide courts with inadequate bases for their conclusions.[278] However, by tackling these issues in the past, agencies

274. *See* Gary D. Bass et al., *The Adverse Consequences of a New Federal Direction*, *in* RIGHTS AT RISK: EQUALITY IN AN AGE OF TERRORISM 311–13, 320–21, 337–38 (Dianne M. Piché et al. eds., 2002) (discussing the trend of restricting resources for federal agencies).

275. LEADERSHIP CONFERENCE ON CIVIL RIGHTS EDUCATION FUND, THE BUSH ADMINISTRATION TAKES AIM: CIVIL RIGHTS UNDER ATTACK 34–36 (2003), *available at* http://www.civilrights.org/publications/reports/taking_aim/ (indicating a curtailment in federal enforcement of civil rights laws as a result of reduced funding and *Sandoval*).

276. *See, e.g.*, MOTHERS ORGANIZED TO STOP ENVIRONMENTAL SIN (M.O.S.E.S.), EPA OCR'S MISGUIDANCE DOCUMENT, 2–3, 18–19 (2000), *available at* http://www.epa.gov/ocr/docs/t6com2000/t6com2000_078.pdf; Galalis, *supra* note 240, at 64 (postulating that *Sandoval* could "eradicate" any hopes to enforce disparate impact administratively). R

277. Galalis, *supra* note 240, at 64–65 (noting speculations that the *Sandoval* decision would eliminate the ability to enforce agency regulations); Labow, *supra* note 18, at 230 (concluding that were the issue before the Court it would likely hold the regulations themselves to be an invalid exercise of power). R R

278. Crump, *supra* note 244, at 322–29 (finding that when the courts have only statistics upon which to base their decisions and the existence or absence of discrimination is unclear, the courts' legal conclusions "[are] likely to be influenced more by predisposition than in the usual case of fact-finding" and "subject to [significant] counter-arguments"). R

have been instrumental in educating the Court and Congress as to the nature of discrimination and what is necessary to prevent it.[279] The imperative now is for agencies to reassert their authority and accept the responsibility to enforce and further the congressional objectives that Congress originally entrusted to them.[280]

Agencies, however, need not now begin to evaluate the entire field of circumstances upon which they operate. Resource limitations and the need for efficiency prohibit it. Their efforts will be most effective by focusing on the currently most contentious or undecided areas,[281] and in which their past and future experiences indicate are of the greatest relevance. Moreover, doing so is part of what Congress envisioned when enacting Title VI. Congress fully recognized that the line between prohibited discrimination and permissible inequity was far from clear,[282] and that, to avoid unprincipled speculation,[283] agency guidance and expertise would be necessary.[284]

The courts' inability to draw a fine line capable of justification in an area of contention and uncertainty is most clearly demonstrated in special education. Race and gender disparities in special education programs are endemic in our public schools,[285] and parents fre-

279. *See, e.g.*, N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 531–34 (1982) (discussing the process by which Congress required the Department of Health, Education and Welfare to submit its regulations to Congress forty-five days before they took effect); Cohen, *supra* note 23, at 313 (discussing how agency regulations further defined the meaning of sex discrimination and extended it to marital status, pregnancy, and retaliation). **R**

280. *See supra* notes 253–273 and accompanying text. **R**

281. For a discussion of how areas of significant contention, such as race bias in police stops or mortgage lending, are fraught with uncertainty and in need of clarification, see Crump, *supra* note 244, at 321–30. **R**

282. *See generally* Abernathy, *supra* note 256, at 21–23 (revealing Congress's awareness of the ambiguity, uncertainty as to how to define it, and ultimate "compromise" of delegating the issue to agencies). Resolving the ambiguity is challenging not simply because it is complicated, but because it broaches the most "controversial" issues. *Id.* at 4. Moreover, that Congress knew the matter was complex enough to require experience-driven expertise is demonstrated by Congress's recognition that it could not determine what "discrimination" would mean in a specific context. *Id.* at 25–27. **R**

283. *See id.* at 3, 20–39 (noting Congress's determination that clear regulations will eliminate questions surrounding the obligations of funding recipients). "The Congress that considered title [sic] VI was aware of the ambiguity inherent in the word 'discrimination,' and indeed this central definitional problem set the agenda for legislative action." *Id.* at 22.

284. 42 U.S.C. § 2000d-1 (2000); Abernathy, *supra* note 256, at 3. Abernathy asserts that Congress envisioned that this would allow the meaning of discrimination to evolve. *Id.* at 28–32, 41–42. Although potentially dangerous to those who are to be protected and are in the minority, the flexibility in defining discrimination would remain politically, rather than constitutionally, accountable. *Id.* at 9. "Congress intended to enshrine a policy of nondiscrimination in the use of federal program funds that was to be responsive to agency expertise and to congressional political desires." *Id.* at 21. **R**

285. RACIAL INEQUITY IN SPECIAL EDUCATION, *supra* note 10, at xv–xvi. **R**

quently file legal and administrative complaints of discrimination.[286] Unfortunately, courts lack any authoritative guidance or baselines from which to work and must independently discern whether the disparities are probative of intentional discrimination.[287] However, the numerous special education procedures, the limitless varying circumstances of individual students, and the inherent pedagogical issues make the courts' inquiries difficult and possibly unreliable.[288] Consequently, although a special education program might be obviously misdirected and ineffective, most courts are unlikely to infer discrimination as a cause. First, as a general matter, courts are predisposed against making an inference of discrimination, even in factually simple cases.[289] Given the complexity of special education programs, the likelihood of attributing the disparities and shortcomings to factors other than discrimination greatly increases. Second, it may be that, placing aside the factual complications of special education, traditional intentional discrimination would not fully explain the disparities in many programs.[290] Hence, the problem is both one of factual complications and a questionable legal tool.

However, the framework from the *Gebser* line of cases combined with agency interpretations and guidelines would resolve this situation. The agency has knowledge of and access to national norms in special education, and it knows the demographic makeup nationally, regionally, and locally.[291] It has the capacity to collect research and data that indicate the statistical ranges in which demographic numbers would fall if students were being accurately assessed for special

286. OFFICE FOR CIVIL RIGHTS, DEP'T OF EDUC., ANNUAL REPORT TO CONGRESS: FISCAL YEAR 2005, app. B (2006) (indicating that 5,533 total complaints were filed that year and that 2,893 were in regard to disability).

287. 34 C.F.R. § 300.646 (2007) (specifying special education areas in which schools should assess disproportionality, but providing no guidance as to what constitutes a "significant disproportionality").

288. For a discussion on the procedures and changes to old procedures under the Individuals with Disabilities Education Improvement Act, see Mark C. Weber, *Reflections on the New Individuals with Disabilities Education Improvement Act*, 58 FLA. L. REV. 7, 26–40 (2006).

289. Eisenberg & Johnson, *supra* note 124, at 1193–95 (detailing empirical findings that show a pattern of failing to infer discrimination); Reshma M. Saujani, *"The Implicit Association Test": A Measure of Unconscious Racism in Legislative Decision-Making*, 8 MICH. J. RACE & L. 395, 402 (2003) (suggesting that "under the current equal protection framework, a decision-maker would either have to admit to holding racial animus or leave a paper trail from which a rational person could infer discriminatory intent"). R

290. *See* Saujani, *supra* note 289, at 402 (suggesting that most behaviors that result in racial disparities arise from unconscious, as opposed to intentional, motivations) (citing Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 321–22 (1987)). R

291. The Office for Civil Rights requires all federally funded schools to report various data, information, and assurances annually. 34 C.F.R. §§ 100.4, 100.6 (2006).

education and specific disabilities.[292] Marshalling its own expertise along with this data, it could then determine what deviations from these ranges would signal or strongly suggest gender, ethnic, or race bias in the program. Or, less controversially, the agency could conclude that certain deviations were indicative of unacceptable unequal access.[293]

The existence of the deviation itself, however, would not expose the school to legal liability. Instead, the existence and notice of it would merely require the school's responsive action. Nor would any specific type of corrective action necessarily be dictated to the school, as multiple alternatives may be pedagogically sound.[294] However, if a school failed to act upon notice that such circumstances required remedial measures, that failure would amount to a choice to perpetuate the inequality that Congress sought to prohibit and which the Court has used to justify imposing legal liability in the *Gebser* line of cases.[295]

292. *Id.* § 100.6. First, the Office for Civil Rights requires that "recipients should have available for the Department racial and ethnic data showing the extent to which members of minority groups are beneficiaries of and participants in federally-assisted programs." *Id.* Second, the Office of Special Education and Rehabilitative Services requires local schools to submit detailed plans regarding their special education programs and yearly reports regarding the individual students in those programs. 34 C.F.R. §§ 300.200, 300.640-.646 (2007). Third, and in particular, the Office requires a report regarding racial disproportionality in special education. *Id.* § 300.646.

293. In fact, Senator Ron Wyden and more than 200 scientists recently requested that the Department of Education engage in this exact type of investigation in regard to gender representation in math and science programs. Marcia D. Greenberger & Neena K. Chaudhry, *Sex Discrimination in Education: Miles to Go Before We Sleep*, 32 HUM. RTS. 19, 21 (2005). Unfortunately, the agency declined this request. *Id.*

294. The Court in *Davis* indicated as much when it stated that a funding "recipient must merely respond to known peer harassment in a manner that is not clearly unreasonable," and it is not required to "engage in particular disciplinary action." Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 648–49 (1999). Lower courts have made clear that several options may be available to a school so long as it responds. *See, e.g.*, Vance v. Spencer County Pub. Sch. Dist., 231 F.3d 253, 260 (6th Cir. 2000) ("The recipient is not required to 'remedy' sexual harassment nor ensure that students conform their conduct to certain rules" and "courts should not second guess the disciplinary decisions that school administrators make."); Gant v. Wallingford, 195 F.3d 134, 141 (2d Cir. 1999) (concluding that this is not a reasonableness standard that would "transform[ ] every school disciplinary decision into a jury question"); Murrell v. Sch. Dist., 186 F.3d 1238, 1244 (10th Cir. 1999) (reciting facts indicating that the school could have informed the parent, investigated the matter, referred it to the police department, or taken disciplinary action against the harasser); Jones v. Ind. Area Sch. Dist., 397 F. Supp. 2d 628, 644–46 (W.D. Pa. 2005) (requiring no particular response other than that the school take additional action when it knows its previous ones to be ineffective or inadequate).

295. *See, e.g.*, *Vance*, 231 F.3d at 260–61 (finding that simply "do[ing] something in response to harassment" is insufficient, and that to avoid liability it must "take reasonable action in light of [the] circumstances to eliminate the [harassing] behavior"); *Murrell*, 186 F.3d at 1244 (finding facts present to conclude that a motion to dismiss the plaintiff's Title IX claim was unwarranted because after learning of sexual harassment, the school chose

Agency guidelines that provided this guidance would not be susceptible to objections based on *Sandoval* that the agency went beyond the statutory prohibition. In *Sandoval*, one could argue that the general disparate impact regulation that prohibited the English-only requirement for driver's licenses overreached and was too generalized because it called into question what may have been an incidental byproduct of pursuing the legitimate end of reinforcing English as the official state language.[296] Hence, a general prophylactic disparate impact regulation that might prohibit it would not necessarily further Title VI's prohibition as interpreted by the Court. Such reasoning, however, is inapplicable in regard to more contextualized and specific regulation, even if such regulation addresses issues of disproportionality or disparate impact.

For instance, the Office of Special Education and Rehabilitative Services at the Department of Education maintains a regulation in regard to disproportionality in special education programs.[297] The regulation applies to very specific disproportionalities in schools: the identification of students with disabilities, their physical placements within the school, and their discipline therein.[298] Medical and scientific research demonstrate that national incidences of learning disabilities and mental retardation are consistent across racial and ethnic groups.[299] Consequently, the Office of Special Education makes the natural inference that racial disproportions in special education are a product, at least partially, of racial bias in the system. Racially disparate placements, for instance, may not be a product of racial animus, but the disparity almost necessarily evidences a racial bias if the data regarding incidences of disabilities are accurate. Thus, unlike the regulation in *Sandoval*, prohibiting this impact directly furthers Title VI.

In addition, unlike in *Sandoval*, this disproportionality is not merely a byproduct of some plausible legitimate end that the school is seeking to pursue in special education. A school district would be hard pressed to respond that the disproportionality was a necessary byproduct of achieving some other educational, administrative, or monetary objective. Rather, a school's likely defense would simply be

---

not to inform the parent, investigate the matter, refer it to the police department, or take any disciplinary action against the harasser).

296. I argue in a separate Article that this defense of Alabama's policy in *Sandoval* is illegitimate and irrational, but one could still make the argument in its defense, which means that a general prohibition on disparate impact may be imprecise. Black, *supra* note 125, at 579–83. **R**

297. 34 C.F.R. § 300.646 (2007).

298. *Id.*

299. RACIAL INEQUITY IN SPECIAL EDUCATION, *supra* note 10, at xxiii. **R**

that it tested students who were referred, made individual assessments, and the disproportionality was the unintended result.

Given that such a response may often be true, neither the *Gebser* framework, nor the regulation, would automatically impose liability at this point. Rather, without singling out an individual practice or person within the school's special education procedures as discriminatory, the judgment of the agency through the regulation would merely recognize and place the school on notice that racial bias most likely exists somewhere in the system. Instead of imposing liability, the *Gebser* framework, as well as the agency, would simply require remedial action. Taking this action would, in effect, separate the school from the bias, but a refusal would be a knowing and intentional act to allow the bias and inequity to continue unabated. Such a refusal would amount to the same type and level of discrimination for which the Court consistently held schools liable in the *Gebser* line of cases. The only obstacle preventing a court from imposing liability in the special education example—and other similar situations—is the agency's reluctance or failure to provide that single missing link discussed above: marshalling its expertise and data to identify what level of disproportionality represents discrimination or unequal educational access.

In just the education context alone, similar examples abound in regard to issues such as ability grouping, English language learner programs, student discipline, and gifted programs. In all of these areas, the Department of Education could provide norms and requirements grounded in experience, research, and data that would allow all parties involved to know what is expected, prohibited, and why. The norms and requirements would justifiably shield schools from reproach under many circumstances, while forcing them to account for other problematic circumstances, including those that exist at the margins of intentional and unintentional discrimination and, hence, are currently in legal limbo. Most importantly, in education and several other areas, the regulatory bodies' actions could carry forward the central congressional purpose of these antidiscrimination statutes: the widespread elimination of discrimination and inequality in federally funded programs.

VII. CONCLUSION

The avenues the *Gebser* line of cases opens are as profound as those that many believe *Sandoval* closed. Without question, *Sandoval* and the intent doctrine limit claims that victims of gender and race inequity might otherwise have sustained, but the *Gebser* line of cases expands the notion of prohibited intentional discrimination in a man-

ner that addresses the Court's serious concern with usurping the legitimate policy decisions of local decision-makers. Yet without unduly usurping local decision-makers, the *Gebser* line of cases still reserves a cause of action for plaintiffs when those policy decisions intentionally contradict congressional ends. The Court's holdings in this respect are logical extensions of the structure that Congress created in Title VI and Title IX.

When institutions take federal money, they also take on the responsibility of using it in a manner consistent with Congress's intent to eliminate discrimination and inequity in federally funded programs. Congress, however, chose not to define what this specifically meant, in part because varying circumstances would affect the meaning, but more importantly because Congress recognized that agencies are better suited to this task. Thus, it mandated that agencies have the responsibility to enforce these objectives and provide funding recipients with notice and explanation of those circumstances that evidence prohibited discrimination and unequal access. If agencies fulfill this duty, funding recipients must act accordingly. If recipients fail to, they intentionally violate the statute and cause discrimination and inequity to persist. Although not traditional intentional discrimination, the Court has situated these circumstances within the intentional discrimination doctrine and consistently imposed liability in the *Gebser* line of cases.

However, agency regulations often do not provide the level of specificity necessary to find that circumstances exist in a federally funded program that violate the relevant statute. Thus, a recipient's failure to take responsive action is not inherently an intentional violation of Title VI or Title IX. To overcome this, agencies must marshal their expertise and delve into the areas of ambiguity and contention. In the absence of their guidance, courts will either reach inconsistent and irreconcilable decisions, or simply leave victims of gender and racial discrimination with no recourse other than to accept that, on the toughest issues, the instrument designed to redress their situation—the law—will be of no accord.