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ARTICLE

Equal Protection, Title IX, and the School Civil Rights Collapse

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Abstract. Tens of thousands of students in K-12 schools suffer sexual harassment each year. While presidential administrations and Congress have proposed reforms to Title IX to tackle this problem, the potential of Section 1983 Equal Protection Clause claims to protect students from and remedy their sexual harassment has gone overlooked. Not only does the Equal Protection Clause provide students some broader rights than Title IX, but Section 1983 also exists to remedy civil rights violations. Section 1983 Equal Protection Clause claims therefore have significant potential to address sexual harassment in ways Title IX cannot.

These equal protection claims based on school sexual harassment, however, have yet to fulfill their potential. When students who suffer sexual harassment bring these claims against schools, courts import Title IX's onerous standards into their evaluation of the equal protection issues. Courts thus collapse students' Title IX and equal protection rights, and students' equal protection claims fail. This Article is the first in the academic literature to identify this civil rights collapse and explain that it occurs based on false and unjustified assumptions.

To reverse this rights collapse, this Article proposes a reconceptualization of the standards for evaluating students' equal protection claims for school sexual harassment—one that unyokes their evaluation from Title IX. These changes would leverage the power of Equal Protection Clause claims to protect students where Title IX does not.

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Introduction

Beginning in student D.S.'s seventh-grade year and continuing "several times a week" throughout his eighth-grade year, at least fifteen different students repeatedly sexually harassed him in school.[1] Among other things, the students called D.S. "homo," "pussy," "f***ing faggot," and "pedophile."[2] They also physically assaulted him, with one student "grabb[ing] DS by the throat, thr[owing] him over a desk, and sa[ying] DS gives blowjobs to men."[3] In response, teachers and administrators at D.S.'s school blamed D.S. at least twice for the harassment he experienced,[4] and sometimes did nothing at all to address the harassment other than investigate D.S.'s reports of it.[5] D.S. ultimately brought equal protection claims against the county board of education, school officials, and the police chief based on their deliberate indifference to his years of sexual harassment.[6] Although sexual harassment is a form of sex discrimination that violates the Equal Protection Clause,[7] D.S.'s claim failed after the Sixth Circuit applied the standards for evaluating Title IX sexual-harassment claims to his equal protection claim.[8] Those Title IX standards allow schools to have virtually any response to student sexual harassment other than no response.[9] Sometimes Title IX standards allow for no response as well.[10] The court therefore found that the defendants did not

1. Stiles *ex rel.* D.S. v. Grainger Cnty., 819 F.3d 834, 841-45 (6th Cir. 2016).
2. *Id.* at 841, 844-45.
3. *Id.* at 845.
4. *See id.* at 842-44.
5. *Id.* at 842, 845.
6. *Id.* at 840, 851; *see also* Amended Complaint ¶ 217, Stiles *ex rel.* D.S. v. Grainger Cnty., No. 3:13-CV-00007 (E.D. Tenn. Mar. 23, 2015), *aff'd* 819 F.3d, ECF No. 41.
7. *See* Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246, 257-59 (2009); *see also* Shepherd v. Robbins, 55 F.4th 810, 816-17 (10th Cir. 2022) ("The Fourteenth Amendment's Equal Protection Clause prohibits a state actor from engaging in discriminatory conduct. And sexual harassment constitutes sex discrimination . . . ." (citation omitted)).
8. *Stiles*, 819 F.3d at 852-53, 856.
9. *See* Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 648-49 (1999); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290 (1998); *see also* Emily Suski, *Subverting Title IX*, 105 MINN. L. REV. 2259, 2274 (2021) ("[C]ourts regularly conclude that when schools repeat failed responses or implement responses otherwise inadequate to address the sexual harassment, those responses [do not violate Title IX]."); Catharine A. MacKinnon, *In Their Hands: Restoring Institutional Liability for Sexual Harassment in Education*, 125 YALE L.J. 2038, 2040-41 (2016).
10. *See* Suski, *supra* note 9, at 2270 ("Courts regularly allow schools to respond only intermittently to student sexual harassment. If a school does anything in response to student sexual harassment, even if only sporadically, the lower courts find that such occasional responses inoculate schools' other instances of not responding to sexual harassment."); Emily Suski, *The Title IX Paradox*, 108 CALIF. L. REV. 1147, 1149-50 (2020) ("Under the courts' current approach to [Title IX's] actual notice [standard], even a

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violate D.S.'s rights under the Equal Protection Clause.[11]

Both the Equal Protection Clause and Title IX prohibit sex discrimination, including sexual harassment, in schools.[12] Their protections, however, do not overlap entirely.[13] In *Fitzgerald v. Barnstable School Committee*, the Supreme Court found not only that the availability of a Title IX claim does not preclude an equal protection claim, but also that the Equal Protection Clause and Title IX operate in divergent, yet complementary, ways.[14] In *Fitzgerald*, the parents of a kindergarten student brought a Section 1983 equal protection claim against their daughter's school committee and superintendent for failing to address her repeated sexual harassment on a school bus.[15] Determining that the parents could bring concurrent equal protection and Title IX claims, the Court said that the "rights and protections" against sex discrimination in school under the Equal Protection Clause are broader in some respects than under Title IX.[16] Although the Court did not say much more about these distinct protections,[17] its conclusion makes sense given the differing purposes of Title IX and Section 1983. Title IX's remedial structure is limited because its primary purpose is to protect individuals from discriminatory practices, rather than to compensate victims of sexual harassment and discrimination.[18] On the

school that knows about a student's repeated sexual harassment has no obligation to address the issue, unless the school has very specific and timely information about particular instances.").

11. *Stiles*, 819 F.3d at 852-53, 856. The court said that "DS's deliberate indifference equal protection claim fails for the same reason as his Title IX claim. . . . [T]he record fails to show that the school administrators acted with deliberate indifference to DS's complaints of harassment." *Id.* at 852.

12. *Fitzgerald*, 555 U.S. at 257-59; *see Davis*, 526 U.S. at 646-47 (concluding that schools can be liable under Title IX for peer sexual harassment); *Gebser*, 524 U.S. at 277, 290-92 (finding that schools can be liable under Title IX for sexual harassment perpetrated by teachers).

13. *Fitzgerald*, 555 U.S. at 256-57.

14. *See id.* at 256-58. For example, the Court noted that "Title IX exempts from its restrictions several activities that may be challenged on constitutional grounds." *Id.* at 257; *see infra* Part II.D.

15. 555 U.S. at 249-50.

16. *Id.* at 256; *see* Parts II.A-.B (analyzing this language).

17. *See Fitzgerald*, 555 U.S. at 256-57.

18. *See* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 286-91 (1998) (noting that while "Title VII aims centrally to compensate victims of discrimination, Title IX focuses more on 'protecting' individuals from discriminatory practices carried out by recipients of federal funds" (quoting Cannon v. University of Chicago, 441 U.S. 677, 704 (1979))).

other hand, the Equal Protection Clause, as enforced through Section 1983, very much has a compensatory purpose.[19]

Section 1983 Equal Protection Clause claims therefore have significant potential to provide students with safeguards against sexual harassment where Title IX does not.[20] When students bring equal protection claims against schools for inadequately responding to sexual harassment, courts could require schools to compensate students and institute reforms.[21] Importantly, such compensation could include damages for students' emotional harm,[22] which is among the most devastating of the harms wrought by sexual harassment.[23] As it is, the Supreme Court has concluded that damages for emotional harm are not available to Title IX plaintiffs.[24] Developing the potential of Section 1983 equal protection claims is thus critical to providing a path to compensation.

Yet when students bring Section 1983 equal protection claims based on schools' responses to their sexual harassment, the lower courts collapse students' rights under the Equal Protection Clause and Title IX.[25] Students who suffer sexual harassment in school have available three theories of equal protection liability: retaliation, discriminatory or disparate treatment, and deliberate indifference.[26] The most promising of these three are claims based on schools' deliberate indifference to sexual harassment.[27] These deliberate-

19. Nancy Leong, *Municipal Failures*, 108 CORNELL L. REV. 345, 356 & n.36 (2023); *see also* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2232 (2023) (Sotomayor, J., dissenting) (noting the "remedial purpose of the Fourteenth Amendment").

20. *See Fitzgerald*, 555 U.S. at 256-59.

21. *See infra* Parts II.D, III.A-.C.

22. *See* Carey v. Piphus, 435 U.S. 247, 264 (1978) (noting that "mental and emotional distress . . . is compensable under § 1983").

23. *See, e.g.*, Kathleen C. Basile, Heather B. Clayton, Whitney L. Rostad, & Ruth W. Leemis, *Sexual Violence Victimization of Youth and Health Risk Behaviors*, 58 AM. J. PREVENTIVE MED. 570, 575-76 tbl.4 (2020) (finding that sexual violence victimization is associated with increased feelings of hopelessness and suicidality); Elizabeth Reed et al., *Experiencing Sexual Harassment by Males and Associated Substance Abuse & Poor Mental Health Outcomes Among Adolescent Girls in the US*, 9 SSM—POPULATION HEALTH 100476, at 6 (2019), https://perma.cc/3BY6-CTMS (concluding that "sexual harassment is pervasive . . . and is associated with adverse substance use and mental health outcomes" in adolescent girls).

24. Cummings v. Premier Rehab Keller, P.L.L.C., 142 S. Ct. 1562, 1576 (2022) ("[W]e hold that emotional distress damages are not recoverable under the Spending Clause antidiscrimination statutes we consider here[, including Title IX].").

25. *See infra* Part I.B.

26. *See infra* Part I.A; *infra* note 86 and accompanying text.

27. *See infra* Part I.A. The majority of the federal courts of appeals have heard Section 1983 equal protection claims for sexual harassment against schools, and they all recognize that schools can be liable under Section 1983 for their deliberate indifference to sexual harassment. *See, e.g.*, R.S. *ex rel.* S.S. v. Bd. of Educ., 371 F. App'x 231, 232, 234 (2d Cir.

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indifference claims remediate the damage that schools inflict on students by responding inadequately to sexual harassment.[28] But when courts evaluate these equal protection claims, they apply the standards for Title IX liability.[29] As a result, these equal protection claims afford students no more rights or protections against sexual harassment than Title IX and cease to function as an independent source of rights.[30]

If Title IX provided students expansive protections against sexual harassment, then collapsing their claims under Title IX and the Equal Protection Clause might be of little import. Yet Title IX sets an arduous bar for students seeking to hold schools accountable for their inadequate responses to sexual harassment.[31] As under the Equal Protection Clause, students can bring claims under Title IX for schools' deliberate indifference to their sexual

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2010); Sanches v. Carrollton-Farmers Branch Indep. Sch. Dist., 647 F.3d 156, 171 (5th Cir. 2011); Stiles *ex rel.* D.S. v. Grainger Cnty., 819 F.3d 834, 851-52 (6th Cir. 2016); Davis *ex rel.* M.D. v. Carmel Clay Schs., 570 F. App'x 602, 607 (7th Cir. 2014); K.C. v. Mayo, 983 F.3d 365, 368 (8th Cir. 2020); Rost *ex rel.* K.C. v. Steamboat Springs RE-2 Sch. Dist., 511 F.3d 1114, 1124-25 (10th Cir. 2008); Doe v. Sch. Bd., 604 F.3d 1248, 1263 (11th Cir. 2010).

28. *See infra* Part I.A. Even when students bring equal protection claims based on the other available theories of liability—retaliation or disparate treatment in responding to sexual harassment—they often assert equal protection claims based on schools' deliberate indifference as well. *See, e.g.*, *R.S.*, 371 F. App'x at 234 (asserting equal protection claims based on disparate treatment and deliberate indifference); *Sanches*, 647 F.2d at 171 (bringing equal protection claims based on retaliation and deliberate indifference).

29. *See infra* Part I.B. The Supreme Court has not established a standard for evaluating equal protection claims based on schools' deliberate indifference to sexual harassment. *See* Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246, 256-59 (2009) (concluding that "Title IX was not meant to be an exclusive mechanism for addressing gender discrimination in schools, or a substitute for § 1983 suits as a means of enforcing constitutional rights" but failing to set out distinct standards for Title IX and equal protection claims). The lower courts have therefore determined this standard on their own. *See R.S.*, 371 F. App'x at 234; *Carmel Clay Schs.*, 570 F. App'x at 607; *Doe*, 604 F.3d at 1263, 1266; *Stiles*, 819 F.3d at 851-52; Doe v. Galster, 768 F.3d 611, 622 (7th Cir. 2014); Doe v. Dardanelle Sch. Dist., 928 F.3d 722, 725 (8th Cir. 2019).

30. *See infra* Part I.B.

31. *See* Suski, *supra* note 10, at 1186-87 (contending that the lower courts' assessments of Title IX's actual-notice standard require students to report their sexual harassment in highly particularized ways of which they are not capable); Suski, *supra* note 9, at 2261-62 (arguing that courts empty the Title IX deliberate-indifference standard of its meaning such that it is nearly impossible for students to show schools acted with deliberate indifference to their sexual harassment); MacKinnon, *supra* note 9, at 2040-41, 2040 n.5 (critiquing the stringent Title IX deliberate-indifference standard and noting that the standard "has repeatedly and disproportionately been deployed against survivors' cases, including when administrative handling of their situations is concededly callous, incompetent, unresponsive, inept, and inapt").

harassment.[32] The Supreme Court has said that to succeed on a Title IX deliberate-indifference claim, courts must find that a school had actual notice of the alleged sexual harassment, had the authority to address and remedy it, and was nonetheless deliberately indifferent to it.[33] These standards are already stringent on their face, and courts ratchet them up in application.[34] Courts require very particularized actual notice of not just any sexual harassment, but of severe, pervasive, and objectively offensive sexual harassment.[35] Absent such notice, Title IX does not require schools to respond to student sexual harassment.[36] And even where schools have such notice, courts tend to find that schools are not deliberately indifferent under Title IX if schools have any response other than no response.[37] Because the courts adopt these Title IX standards in their evaluation of students' equal protection claims, those claims regularly fail.[38] Courts therefore forfeit the Equal Protection Clause's potential to provide students protections from sexual harassment where Title IX does not.[39]

Nothing requires courts to import these onerous Title IX standards into their evaluation of students' equal protection claims for deliberate indifference to sexual harassment.[40] In the context of other Section 1983 claims, the Supreme Court has applied the deliberate-indifference standard and related notice requirements more liberally.[41] In Section 1983 claims based on police failure to screen and train, for example, the Court has required plaintiffs to show constructive, not actual, notice that failing to adequately screen and train will result in civil rights violations.[42] As such, police act with deliberate indifference when the "plainly obvious" consequence of their conduct is a civil rights violation.[43] And although the Court has been explicit that the standards

32. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290 (1998); Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 642-43 (1999).

33. *Gebser*, 524 U.S. at 290; *Davis*, 526 U.S. at 642.

34. *See, e.g.*, Suski, *supra* note 10, at 1186-87.

35. *See id.*; Emily Suski, *Signaling Sexual Harassment*, 73 EMORY L.J. 1391, 1395-97 (2024) (analyzing how courts conclude that Title IX protects against only the most egregious sexual harassment in schools).

36. *See* Suski, *supra* note 10, at 1187; Suski, *supra* note 35, at 1396-97.

37. *See infra* Part I.B.2.

38. *See infra* Part I.B.

39. *See infra* Parts I.C, II.D.

40. *See infra* Part I.C.

41. *See infra* Part I.C.

42. *See, e.g.*, Bd. of Cnty. Comm'rs v. Brown, 520 U.S. 397, 411-12 (1997); Connick v. Thompson, 563 U.S. 51, 61 (2011); *infra* note 150 and accompanying text.

43. *Brown*, 520 U.S. at 411. To be sure, the civil rights violations experienced by students who suffer sexual harassment in school and adults who have been harmed by police are

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in these screening and training cases are "stringent," they are still more generous than the actual-notice standard and the anything-other-than-nothing version of deliberate indifference that courts apply under Title IX.[44] By introducing Title IX standards into students' Section 1983 equal protection claims for sexual harassment, the courts exceptionalize the treatment of these claims in ways that provide students fewer protections than are available to other Section 1983 deliberate-indifference plaintiffs.[45]

This Article interrogates the courts' exceptional treatment of students' equal protection claims against schools for deliberate indifference to sexual harassment. It argues that courts strip the Equal Protection Clause of its capacity to provide students more protections from sexual harassment in school than they have available under Title IX.[46] And it contends that courts do so based on analytic neglect and unjustified assumptions.[47]

This failure to develop the capacity of equal protection claims is especially tragic because sexual harassment is rampant in public schools and causes significant harm to students. Recent data on sexual violence in K-12 public schools show that the total incidents of sexual violence increased by a staggering 43% from the 2015-2016 school year to the 2017-2018 school year.[48] Incidents of sexual assault increased by 42% in public schools during the same period.[49] If the Equal Protection Clause's potential to compel schools to address and protect against sexual violence and harassment were realized, the Clause could work to reduce these harms.[50] As things stand now, it does not.[51]

The potential for the Equal Protection Clause to provide students broader safeguards against school sexual harassment has thus far gone overlooked in the academic literature. Other scholars have examined the many problems with Title IX claims for sexual harassment, including how the courts often

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very different, and so arguably the evaluation of their Section 1983 claims should be different. But students' immaturity and inexperience warrant relatively stronger, not weaker, protections than those afforded adults bringing Section 1983 claims.

44. *See Connick*, 563 U.S. at 61 (quoting *Brown*, 520 U.S. at 410); *infra* Part I.B.2.

45. *See infra* Parts I.B-.C.

46. *See infra* Part II.

47. *See infra* Part II.

48. U.S. DEP'T OF EDUC. OFF. FOR C.R., ERRATA SHEET EXPLAINER FOR 2017-18 CIVIL RIGHTS DATA COLLECTION SEXUAL VIOLENCE IN K-12 SCHOOLS ISSUE BRIEF 3 (2022), https://perma.cc/Y49C-RXTB. In 2017-2018, 13,799 incidents of sexual violence were reported as compared to 9,649 incidents in 2015-2016. *Id.*

49. *Id.*

50. *See infra* Part II.D.

51. *See infra* Parts I, II.A-.C.

render Title IX's protections meaningless.[52] None, though, have explored how those problematic analyses affect students' Equal Protection Clause claims based on school sexual harassment.[53]

To remedy this squandering of students' rights, this Article proposes reconceiving the deliberate-indifference framework, including its notice requirement, in students' equal protection claims against schools for sexual harassment.[54] This reconceived framework rejects the current approach of conflating students' rights under the Equal Protection Clause and Title IX.[55] That is, it jettisons the Title IX standards from students' Section 1983 equal protection claims for schools' deliberate indifference to sexual harassment.[56] Instead, this Article recommends that courts adopt the constructive-notice standard and the plainly obvious test used in other Section 1983 deliberate-indifference claims, and abandon the application of the Title IX severity standard.[57]

This Article proceeds in three Parts. Part I describes how courts' analyses of students' Section 1983 equal protection claims against schools for deliberate indifference to sexual harassment produce a civil rights collapse. That Part also explains how these analyses are not mandatory and in fact exceptionalize students' Section 1983 equal protection claims. Part II then argues that the courts collapse students' rights under the Equal Protection Clause and Title IX based on negligent analyses and unjustified assumptions. That Part further

52. *See, e.g.*, MacKinnon, *supra* note 9, at 2040 ("The deliberate indifference standard does not implement Title IX's distinctive statutory outcome-defined mandate of providing equal access to the benefits of an education. None of its liability elements necessarily promote equality, nor are they measured against an equality standard. Deliberate indifference as used under Title IX applies after assaults are reported with no attention to the unequal context, hierarchical relations, or documented climate of abuse that produces them. It looks at procedural steps taken by an educational institution but not at whether the steps produce a sex-equal education for the survivor or the group of which the survivor is a member."); Deborah L. Brake, *School Liability for Peer Sexual Harassment After* Davis*: Shifting from Intent to Causation in Discrimination Law*, 12 HASTINGS WOMEN'S L.J. 5, 25-28 (2001) ("There is a danger that courts will apply the deliberate indifference test so strictly as to exclude from liability all but those most egregious cases where schools take no action whatsoever in the face of the most severe forms of harassment.").

53. *See, e.g.*, Brake, *supra* note 52, at 25-28; Nancy Chi Cantalupo, *Dog Whistles and Beachheads: The Trump Administration, Sexual Violence, and Student Discipline in Education*, 54 WAKE FOREST L. REV. 303, 311 (2019); Deborah L. Brake & Verna L. Williams, *The Heart of the Game: Putting Race and Educational Equity at the Center of Title IX*, 7 VA. SPORTS & ENT. L.J. 199, 202 (2008).

54. *See infra* Part III.

55. *See infra* Part III.

56. *See infra* Part III.

57. *See infra* Part III; *see, e.g.*, Connick v. Thompson, 563 U.S. 51, 61 (2011); Bd. of Cnty. Comm'rs v. Brown, 520 U.S. 397, 407, 411 (1997).

contends that the courts consequently empty the Equal Protection Clause of the broader protections it could and should provide students who suffer sexual harassment in school. Part III recommends an evaluation paradigm that would realize the Equal Protection Clause's potential to protect and address student sexual harassment. These changes would restore the Equal Protection Clause as an independent rights source for students who suffer sexual harassment in school.

I. School Civil Rights Collapse: The Equal Protection and Title IX Overlap

When the Supreme Court said in *Fitzgerald v. Barnstable School Committee* that Equal Protection Clause claims for school sexual harassment and other forms of sex discrimination are in some ways broader than Title IX claims,[58] the Court's pronouncement should have carried particular significance. In making this statement, the Court acknowledged the ways in which Title IX stands out among civil rights statutes.[59] Other civil rights statutes provide more comprehensive civil rights protections than the Constitution.[60] By recognizing that the Equal Protection Clause provides safeguards where Title IX does not, the Court noted the unique ways the constitutional protections available for sex discrimination are broader than the statutory protections under Title IX.[61]

The Court, however, has said little more about how those protections against sex discrimination operate.[62] The lower courts have therefore stepped in to fill this void, and they have done so in ways that contravene the principle that the Equal Protection Clause provides some broader protections than

58. *See* 555 U.S. 246, 256-58 (2009). For a discussion of arguments that this language should be read more narrowly, and for a rebuttal of those arguments, see Parts II.A-.B below.

59. *See Fitzgerald*, 555 U.S. at 252-58.

60. Title VII, for example, allows for sex discrimination claims based on disparate impact, but such disparate-impact claims are not independently actionable under the Equal Protection Clause. *See* 42 U.S.C. § 2000e-2(k) (outlining disparate impact claims available under Title VII); Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 591 U.S. 1, 33-34 (2020) (explaining that "disparate impact on a particular group" is "[p]ossible evidence" of an equal protection violation, but does not singly establish a plausible equal protection claim). Title IX, in contrast, is riddled with exceptions to its protections. *See, e.g.*, 20 U.S.C. § 1681(a)(1)-(8) (excepting from Title IX's proscription on sex discrimination educational institutions "with contrary religious tenets" and institutions that train "individuals for military services or merchant marine," among others).

61. *See Fitzgerald*, 555 U.S. at 256-57.

62. *See id.* at 256-58.

Title IX.[63] Equal protection claims based on schools' deliberate indifference to sexual harassment are the most fitting and sometimes the only viable equal protection claims students have available against schools for sexual harassment.[64] Yet the courts simply adopt Title IX's rigid standards for these types of claims.[65]

In doing so, the courts collapse students' civil rights.[66] By applying Title IX standards to students' Section 1983 Equal Protection Clause claims against schools for their deliberate indifference to sexual harassment, courts make those claims coextensive, erasing the differences between them.[67] Accordingly, students' equal protection claims, like their Title IX claims, regularly fail.[68] Despite courts' treatment of students' equal protection claims, however, this civil rights collapse is neither inevitable nor necessary.[69]

A. Schools' Deliberate Indifference to Sexual Harassment: The Most Promising Equal Protection Claim for School Sexual Harassment

Students asserting equal protection claims against their schools based on sexual harassment have three potential theories of liability available.[70] Students can bring claims for retaliation following their complaints of sexual harassment. They can bring claims based on discriminatory or disparate treatment "in the investigation of student behavior and the treatment of

63. *See, e.g.*, R.S. *ex rel.* S.S. v. Bd. of Educ., 371 F. App'x 231, 234 (2d Cir. 2010); Sanches v. Carrollton-Farmers Branch Indep. Sch. Dist., 647 F.3d 156, 171 (5th Cir. 2011); Davis *ex rel.* M.D. v. Carmel Clay Schs., 570 F. App'x 602, 605, 607-08 (7th Cir. 2014); Doe v. Sch. Bd., 604 F.3d 1248, 1263, 1265-67 (11th Cir. 2010); Stiles *ex rel.* D.S. v. Grainger Cnty., 819 F.3d 834, 851-53 (6th Cir. 2016); Doe v. Galster, 768 F.3d 611, 613-14, 622 (7th Cir. 2014); Doe v. Dardanelle Sch. Dist., 928 F.3d 722, 725 (8th Cir. 2019).

64. *See infra* Part I.A.

65. *See, e.g.*, *Sanches*, 647 F.3d at 171; *Carmel Clay Schs.*, 570 F. App'x at 605, 607; *Doe*, 604 F.3d at 1263; *Dardanelle Sch. Dist.*, 928 F.3d at 725; *Stiles*, 819 F.3d at 851-53; *Galster*, 768 F.3d at 622.

66. *See infra* Part I.C.

67. *See infra* Part I.C.

68. *See infra* Part I.B.

69. *See infra* Part I.C.

70. *See, e.g.*, Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246, 259-60 (2009) (acknowledging the plaintiffs' by-then-abandoned claim against the school for deliberate indifference to sexual harassment); *Dardanelle Sch. Dist.*, 928 F.3d at 725 (involving a deliberate-indifference claim); *Sanches*, 647 F.3d at 171 (adjudicating deliberate-indifference and retaliation claims); *Stiles*, 819 F.3d at 851-52 (concerning deliberate-indifference and disparate-treatment claims).

student complaints" of sexual harassment.[71] And students can allege that their schools acted with deliberate indifference to their sexual harassment.[72]

Importantly, all of these claims provide students a means of holding schools, rather than just individual perpetrators, responsible for sexual harassment in school.[73] By holding schools responsible, students have access to more meaningful remedies, both because schools have more resources to pay damages and because schools can enact institutional-level reforms to prevent future civil rights violations.[74]

Of these three equal protection claims for school sexual harassment, deliberate-indifference claims hold the most promise. They do not suffer from the evidentiary problems that frustrate the other theories of equal protection liability, and they best fit the most common form of mismanagement in schools' handling of sexual harassment.[75]

Two evidentiary problems limit the usefulness of equal protection claims against schools for retaliation and for disparate treatment in responding.[76] First, retaliation claims require students to show a causal connection between their report of sexual harassment and any negative treatment by schools in response to it.[77] Because schools can often point to reasons other than the

71. *Fitzgerald*, 555 U.S. at 260; *see Sanches*, 647 F.3d at 170-71 (assessing Sanches' equal protection retaliation claim in the context of her alleged exclusion from a school cheerleading squad after she complained of sexual harassment); *Stiles*, 819 F.3d at 851-52 (dealing with an equal protection claim for school sexual harassment under a theory of disparate treatment).

72. *See Fitzgerald*, 555 U.S. at 259-60 (acknowledging the plaintiffs' by-then-abandoned deliberate-indifference claim); *Dardanelle Sch. Dist.*, 928 F.3d at 724-25 (considering a Section 1983 equal protection claim for deliberate indifference to a student's sexual harassment); Doe v. Galster, 768 F.3d 611, 622 (7th Cir. 2014) (evaluating a student's Section 1983 equal protection claim for school sexual harassment under a deliberate-indifference standard).

73. *See Fitzgerald*, 555 U.S. at 257; *see, e.g.*, *Stiles*, 819 F.3d at 840 (asserting equal protection and Title IX claims against the County Board of Education and several school officials).

74. For a discussion of how schools can pay even significant damages awards because they generally maintain liability insurance, see Part III.D below. *See* Leong, *supra* note 19, at 357, 386 (explaining how "[m]unicipality liability . . . offers a critical opportunity for plaintiffs . . . [because] a municipality is a potential deep pocket—a source of recovery when an individual officer is judgment-proof," and because liability "encourages municipalities to improve their practices and promotes a more productive legal and social discourse about responsibility for constitutional harms").

75. *See infra* notes 84-86 and accompanying text.

76. *See* Nabozny v. Podlesny, 92 F.3d 446, 454-55 (7th Cir. 1996) (finding sufficient evidence to establish a disparate-treatment claim but requiring that students marshal evidence of how a school treated students of another gender differently, such as by disciplining the perpetrators of male-on-female sexual harassment but not male-on-male sexual harassment).

77. *See, e.g.*, Sanches v. Carrollton-Farmers Branch Indep. Sch. Dist., 647 F.3d 156, 171 (5th Cir. 2011). When students do prevail on retaliation claims—at least at the summary

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report of sexual harassment for any such negative treatment, many students lose these claims.[78] Further, retaliation claims are available only when students report their sexual harassment themselves, which they rarely do.[79]

Second, discriminatory treatment claims require students to show that they were treated differently than students who reported other types of misconduct in school.[80] Because those other students enjoy significant federal privacy protections for their educational information, however, obtaining such proof is a difficult, if not impossible, task.[81]

By contrast, neither of these problems impede students' deliberate-indifference claims. Because deliberate-indifference claims require only an evaluation of a school's response to student sexual harassment on its own terms, they do not require students to establish any causal connection between

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judgment stage of litigation—they generally do so with very specific evidence connecting the alleged retaliatory actions with the reports of sexual harassment. *See, e.g.*, Doe v. Pennridge Sch. Dist., 413 F. Supp. 3d 393, 407-08 (E.D. Penn. 2019) (pointing to particular documentary evidence in finding that a reasonable jury could conclude that student Doe's school retaliated against her by "pre-judg[ing]" her request for special education services, because the school was "frustrated with Doe's ongoing complaints" of sexual harassment).

78. *See, e.g.*, Doe v. Gwinnett Cnty. Sch. Dist., No. 1:18-CV-05278, 2021 WL 4531082, at *16-17 (N.D. Ga. Sept. 1, 2021) (accepting a high school's argument that it did not retaliate against a student when it suspended her for five days after she reported being sexually assaulted, because her suspension was for the "legitimate, non-discriminatory reason" of violating a school rule against sexual activity).

79. *See* Suski, *supra* note 9, at 1170-87 (explaining why students frequently do not report their own sexual harassment, let alone in the particularized way required by the courts under Title IX).

80. *See, e.g.*, *Nabozny*, 92 F.3d at 454-55 (explaining that a Section 1983 equal protection claim for discriminatory treatment requires showing a difference in response to sexual harassment based on gender).

81. *See* 20 U.S.C. §§ 1232g(a)(4)(A), (b)(1) (conditioning the receipt of federal funds on schools' not disclosing without written parental consent student educational records, defined broadly as "records, files, documents, and other materials which—(i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution," subject to certain exceptions); *see, e.g.*, Stiles *ex rel.* D.S. v. Grainger Cnty., 819 F.3d 834, 852 (6th Cir. 2016) ("The district court correctly found that Plaintiff offered no evidence of how Defendants treated other students—male or female, heterosexual or homosexual—who similarly complained about or suffered from bullying."). Although relatively few discriminatory treatment claims have been brought under the Equal Protection Clause based on school sexual harassment, guidance on proving analogous race discrimination claims illustrates these proof problems. U.S. Department of Justice guidance on similar Title VI claims advises that statistical evidence is "often necessary" to prove a claim. U.S. DEP'T OF JUST., TITLE VI LEGAL MANUAL § VII, at 18, https://perma.cc/Y7T9-BW38 (archived Dec. 14, 2024). Given the privacy protections afforded to student records, obtaining such statistical evidence to support school sexual-harassment claims is daunting, and may not even be doable.

their reports of harassment and schools' treatment of them.[82] Deliberate-indifference claims also do not require comparing schools' treatment of survivors and their treatment of other students.[83]

In addition, deliberate-indifference claims better capture the kinds of injuries schools' responses to sexual harassment, or lack thereof, regularly cause students.[84] Unlike retaliation and discriminatory-treatment claims, equal protection claims for schools' deliberate indifference to student sexual harassment can remedy schools' failures to address or protect against sexual harassment.[85] Consequently, they are often the most promising and viable claim a student has available under the Equal Protection Clause.[86]

82. *See* Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246, 257 (2009); *Stiles*, 819 F.3d at 852; *supra* note 76 and accompanying text.

83. *See Stiles*, 819 F.3d at 852.

84. *See, e.g.*, *id.* at 840-45 (detailing a deliberate-indifference claim based on the school's "failure to recognize and reasonably respond to a pattern" of sexual harassment over two years); Doe v. Dardanelle Sch. Dist., 928 F.3d 722, 724-27 (8th Cir. 2019) (detailing a deliberate-indifference claim based on the school's failure to respond to student Doe's sexual harassment beyond discussing the incidents with the perpetrator); *see also* Vance v. Spencer Cnty. Pub. Sch. Dist., 231 F.3d 253, 262-63 (6th Cir. 2000) (finding a school deliberately indifferent to a student's sexual harassment in violation of Title IX where the school "use[d] the same ineffective methods to no acknowledged avail").

85. *See supra* notes 75-83 and accompanying text.

86. Students potentially have available other Section 1983 claims against schools for sexual harassment, including claims based on schools' failures in hiring, training, or supervising staff. *See* Bd. of Cnty. Comm'rs v. Brown, 520 U.S. 397, 411 (1997) ("[W]here adequate scrutiny of an applicant's background would lead a reasonable policymaker to conclude that the plainly obvious consequence of the decision to hire the applicant would be the deprivation of a third party's federally protected right . . . the official's failure to adequately scrutinize the applicant's background constitute[s] 'deliberate indifference.'"); Connick v. Thompson, 563 U.S. 51, 62 (2011) ("[C]ontinued adherence to [a course of training] that [policymakers] know or should know has failed to prevent tortious conduct by employees may establish the conscious disregard for the consequences of their action—the 'deliberate indifference'—necessary to trigger municipal liability." (quoting *Brown*, 520 U.S. at 407)). If such failures resulted in sexual harassment, then a student could bring a Section 1983 claim against the school. *See Brown*, 520 U.S. at 411. Failure-to-train claims offer little protection, however, because courts have required that students show the school had notice of sexual harassment occurring prior to the failure to train. *See, e.g.*, Davis *ex rel.* M.D. v. Carmel Clay Schs., 570 F. App'x 602, 607-08 (7th Cir. 2014) ("[B]ecause the School did not learn of the assaults against [student] M.D. until after they occurred . . . the School's administration had no basis to think its training was obviously inadequate and, consequently, the School cannot be liable under a 'failure-to-train' theory."). Failure-to-supervise claims likewise offer students little protection against sexual harassment, in large part because such claims are available to students only when the perpetrator is a school staff member who the school did not adequately supervise. Because a relatively small proportion of school sexual harassment appears to be perpetrated by school staff, such claims provide no avenue for relief under Section 1983 for the vast majority of student victims. *See* Elizabeth L. Jeglic et al., *The Nature and Scope of Educator Misconduct in K-12*, 35 SEXUAL ABUSE 188, 191, 196 (2023) (finding that just over 11% of students in a four-

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Unsurprisingly, then, students who suffer sexual harassment in school commonly ground their equal protection complaints on schools' deliberate indifference to such harassment.[87]

B. How Title IX Swallows Students' Equal Protection Claims for Schools' Deliberate Indifference to Sexual Harassment

Despite the promise of equal protection claims against schools for deliberate indifference to sexual harassment, these claims routinely fail in court. In evaluating these claims, courts must determine whether a rights violation occurred and whether the school should be held responsible for it, as they do in any Section 1983 claim.[88] Courts, however, do not assess schools' deliberate indifference to sexual harassment by applying the frameworks they

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state study experienced educator misconduct or sexual harassment, but conceding that underreporting is common); Robin McDowell, Reese Dunklin, Emily Schmall & Justin Pritchard, *AP Reveals Hidden Horror of Sex Assaults by K-12 Students*, ASSOCIATED PRESS (Apr. 30, 2017, 11:36 PM CDT), https://perma.cc/H6F4-G86F (finding, based on 17,000 student reports of sexual assault from 2011 to 2015, that there were seven incidents of peer-on-peer school sexual assault for every assault by an adult).

87. *See, e.g.*, Sanches v. Carrollton-Farmers Branch Indep. Sch. Dist., 647 F.3d 156, 171 (5th Cir. 2011); *Carmel Clay Schs.*, 570 F. App'x at 607; Doe v. Sch. Bd., 604 F.3d 1248, 1253 (11th Cir. 2010); *Dardanelle*, 928 F.3d at 724-25; *Stiles*, 819 F.3d at 851; Doe v. Galster, 768 F.3d 611, 622 (7th Cir. 2014).

88. *See Brown*, 520 U.S. at 403-04. These deliberate-indifference claims asserting municipal liability, like other theories of liability available to students under Section 1983 equal protection claims, must establish a school's direct, rather than vicarious, liability. *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694 (1978). Per *Monell*, "a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents." *Id.* Rather, municipal liability occurs under Section 1983 "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury." *Id.* That is, a school's alleged misconduct must "be said to represent official policy." *See id.* As Joanna Schwartz has explained, "[i]n the . . . years since the Supreme Court decided *Monell*, the Court has set out what have come to be understood as three or four different theories of local government liability, depending on how you count." Joanna C. Schwartz, *Municipal Immunity*, 109 VA. L. REV. 1181, 1195 (2023). In student sexual-harassment cases against schools under Section 1983, courts do not always make clear what theory of local government liability they are applying, and instead rely heavily on their Title IX analyses to find no Section 1983 equal protection liability. *See, e.g.*, *Sanches*, 647 F.3d at 171 (stating that the student plaintiff must "show that her sexual harassment was the result of a policy or practice of the [school] district" and then affirming summary judgment because, "[a]s discussed [in the Title IX analysis], . . . there is no evidence that the district was ever deliberately indifferent"). Although courts often do not analyze deeply whether a school's deliberately indifferent response to sexual harassment qualifies as an official policy of the school, good arguments exist that a school administrator's failure to respond adequately constitutes a decision by someone with final decision-making authority and so satisfies the official policy or custom requirement for Section 1983 municipal liability. *See infra* Part III.B.2.

use in other Section 1983 claims.[89] Nor do they develop a framework specifically for these equal protection claims against schools.[90] Instead, courts apply the standards for Title IX sexual-harassment claims.[91] More specifically, they apply (1) Title IX's particularized actual-notice standard, (2) its unique deliberate-indifference standard, and (3) its rigid severity standard.[92] Courts thus treat the type of harm—sexual harassment—as determinative of the standard for evaluation.[93] In doing so, courts erase differences between claims under the Equal Protection Clause and Title IX.[94]

1. An identical actual-notice standard

When students allege that schools violated the Equal Protection Clause with their deliberately indifferent responses to sexual harassment, courts have understandably required that students show the schools had notice of the sexual harassment.[95] Absent at least some notice of harassment, schools cannot know a response is required, let alone act with deliberate indifference to it. In evaluating these equal protection claims, however, the courts do not adopt just any notice standard. They adopt the exceedingly burdensome actual-notice standard applied in Title IX sexual-harassment claims.[96] In students' Title IX claims, and therefore their equal protection claims, courts require that schools not only actually know about the sexual harassment, but also know at specific times.[97] Otherwise, schools need not respond to the sexual harassment

89. *See infra* Part I.C.

90. *See infra* Part I.C.

91. *See infra* Part I.B.1.

92. *See infra* Part I.B.2.

93. *See infra* Part I.B.3.

94. *See infra* Part I.C.

95. *See, e.g.*, Davis v. Carmel Clay Schs., 570 F. App'x 602, 605, 607 (7th Cir. 2014); Doe v. Galster, 768 F.3d 611, 617, 622 (7th Cir. 2014); Doe v. Dardanelle Sch. Dist., 928 F.3d 722, 725 (8th Cir. 2019).

96. *E.g.*, *Carmel Clay Schs.*, 570 F. App'x at 607 (explaining that student M.D.'s Title IX claim "fails because the School can only be liable for failing to prevent harassment about which . . . it had actual knowledge," and "[s]imilarly, [his] § 1983 . . . equal protection claims fail because the School could not be deliberately indifferent in failing to protect M.D. from mistreatment about which it lacked actual knowledge").

97. *See id.* at 605 (finding that student M.D.'s Section 1983 and Title IX claims failed because the school did not actually know about the "mistreatment of M.D. until after the mistreatment had ceased"); Suski, *supra* note 10, at 1157-60 ("Lower courts effectively require contemporaneous reporting of student sexual harassment. Courts find that both delays in reporting and prior warnings of probable sexual harassment fail to meet the actual notice requirement."); *see also Galster*, 768 F.3d at 617-18 ("School administrators have actual knowledge only of the incidents that they witness or that have been reported to them."); *Dardanelle Sch. Dist.*, 928 F.3d at 724-25 (affirming the

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at all.[98] Because courts require such particularized actual knowledge, students' equal protection claims rarely succeed.[99]

Under Title IX, courts demand that students time their reports of sexual harassment precisely.[100] To establish schools had actual notice, the courts require that students show that the schools were directly informed of a student's sexual harassment while it was ongoing.[101] If students do not time their reports of harassment in this way, then schools can ignore the reports and do nothing about it.[102] Courts will not deem the schools to have actual notice of the sexual harassment and so the schools will not be liable for violating Title IX under a deliberate-indifference theory.[103]

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district court's finding that an initial incident of sexual harassment did not put the school on notice of subsequent sexual harassment).

98. *See Carmel Clay Schs.*, 570 F. App'x at 607.

99. *See, e.g.*, *id.*; *Galster*, 768 F.3d at 617-18, 622; *Dardanelle Sch. Dist.*, 928 F.3d at 724-25, 727. Catharine MacKinnon has pointed out that "[t]he implicit rule often appears to be that schools do not know enough for actual notice standards until they are informed of an exact specific possibility that then becomes an actuality." MacKinnon, *supra* note 9, at 2070. Elsewhere I have made a related critique, arguing that students in the K-12 public schools generally cannot provide such particularized notice. *See* Suski, *supra* note 10, at 1169-87.

100. *See, e.g.*, *Carmel Clay Schs.*, 570 F. App'x at 605.

101. *See, e.g.*, *id.* at 605, 607. In *Davis v. Carmel Clay Schools*, the Seventh Circuit found that because student M.D.'s school did not know about M.D.'s sexual harassment until "after [the harassment] ceased," it lacked knowledge of it to trigger any consequences under Title IX. *Id.* Lacking such actual knowledge, then, entitles schools to do nothing in response to sexual harassment. *See id.* (involving no response after an investigation); *see also* MacKinnon, *supra* note 9, at 2089 ("The tendency of the notice standard to individuate, to make every assault an exception, entrenches the 'one free rape' default baseline."). Given that courts, including the Seventh Circuit, have often found that prior harassment gives no notice of subsequent sexual harassment, students find themselves in a timing conundrum when trying to establish actual notice under Title IX. *See Galster*, 768 F.3d at 617-18 (concluding that reports of recent prior sexual harassment did not provide sufficient notice of subsequent, more severe harassment); *Dardanelle Sch. Dist.*, 928 F.3d at 725; *supra* note 97 and accompanying text.

102. *See Carmel Clay Schs.*, 570 F. App'x at 604-05. Although in *Carmel Clay Schools* the school did respond to a report of sexual assault on the bus, the Seventh Circuit found that this knowledge of the assault after the fact was insufficient to establish actual notice under Title IX that the assault would occur. *See id.* Accordingly, the school could have done nothing after the assault and still would not have been liable under Title IX. *See id.* Courts also require under Title IX, and therefore under Section 1983 equal protection claims based on deliberate indifference, that schools have particular information in order to satisfy the actual-notice standard. *See, e.g.*, *Dardanelle Sch. Dist.*, 928 F.3d at 724-25, 727 (affirming the district court's application of the Title IX actual-knowledge standard to student Doe's equal protection claim and concluding that even though Doe, who was sexually assaulted twice by student R.C., reported the first instance of assault to the school, that report did not put the school on notice that R.C. would again sexually assault Doe).

103. *See, e.g.*, *Carmel Clay Schs.*, 570 F. App'x at 607.

Borrowing this particularized actual-notice standard to evaluate students' equal protection claims for sexual harassment, courts find that failures to adhere to these specific timing requirements are fatal to students' claims, as well.[104] Consider *Davis v. Carmel Clay Schools*, a 2014 case from the Seventh Circuit. There, ninth-grade student M.D.'s report of severe peer sexual harassment failed to satisfy the particularized actual-notice standard under Title IX because he did not precisely time his report.[105] His equal protection claims failed for the same reason.[106]

M.D. endured repeated sexual assaults and verbal harassment from four seniors on the basketball team over a three-month period.[107] They "taunted him with sexual innuendos, grabbed (or tried to grab) his genitals, and flashed their own genitals at him on a nearly daily basis."[108] They also "gooched" M.D., including in one instance by "dragg[ing] him into the shower, tr[ying] to force his pants down, and then 'gooch[ing]' him."[109] And on a bus ride the seniors sexually assaulted M.D again.[110] M.D. was "dragged down onto a seat, someone sat on his face, someone tried to pull down his pants, and one of the four seniors tried to stick his finger in or through M.D.'s pants."[111] M.D. reported his harassment to the basketball coach, telling the coach that "[the seniors] were messing with [him] on the back of the bus on the way home, and . . . messing with [him] in the locker room" by "fingering [him] in [his] behind."[112] The court, however, found his report insufficient to establish actual notice under Title IX.[113] Although M.D. reported the harassment shortly after he suffered it, he did not report it prior to suffering more harassment.[114] The court thus found that like M.D.'s Title IX claim, his "equal protection claims fail[ed] because the School could not be deliberately indifferent in failing to protect M.D. from mistreatment about which it lacked actual knowledge."[115]

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104. *E.g.*, *id.* at 605.

105. *See id.* at 603-04, 606-07.

106. *See id.* at 605, 607-08.

107. *Id.* at 603-04.

108. *Id.* at 603.

109. *Id.* As the court explained, "[t]he plaintiffs define 'gooching' as 'putting a person's hands or fingers between the buttocks of another person, and at times anally penetrating the person.'" *Id.* at 603 n.1.

110. *Id.* at 604.

111. *Id.*

112. *Id.* at 606-07.

113. *Id.*

114. *See id.* The bus incident occurred on January 22, 2010, and according to M.D., he spoke with the basketball coach on February 8. *See id.* at 604, 607 n.6.

115. *Id.* at 607.

2. An identical deliberate-indifference standard

Even when students overcome these particularized actual-notice requirements, their equal protection claims for deliberate indifference to sexual harassment may still fail because students cannot show that their schools' responses to the harassment were deliberately indifferent.[116] In evaluating deliberate indifference, courts adopt the deliberate-indifference standard applied in Title IX claims for school sexual harassment.[117] Under Title IX, the Supreme Court has said that any response by a school to sexual harassment that is "not clearly unreasonable" is not deliberately indifferent.[118] Applying this standard, the lower courts tend to find any response by a school, other than none at all, suffices to show that the school was not deliberately indifferent to students' sexual harassment.[119] As such, even when schools offer students little to no protection from sexual harassment, their responses do not qualify as deliberately indifferent for purposes of students' Title IX claims or, by extension, their equal protection claims.[120]

116. *See, e.g.*, Stiles *ex rel.* D.S. v. Grainger Cnty., 819 F.3d 834, 852-53 (6th Cir. 2016); Sanches v. Carrollton-Farmers Branch Indep. Sch. Dist., 647 F.3d 156, 171 (5th Cir. 2011).

117. *See, e.g.*, *Stiles*, 819 F.3d at 852; Adams v. Demopolis City Schs., 80 F.4th 1259, 1269 n.1, 1273-74 (11th Cir. 2023); *Sanches*, 647 F.3d at 171. That said, at least one court has used a slightly more generous standard than the one available under Title IX to evaluate a student's equal protection claim for sexual harassment against individual defendants, albeit in the context of higher education. *See* Feminist Majority Found. v. Hurley, 911 F.3d 674, 702-03 (4th Cir. 2018) (explaining that a school official's failure "to reasonably respond" to student sexual harassment constitutes deliberate indifference to it). Courts have frequently applied Title IX standards somewhat more generously in higher-education students' claims than in K-12 public-school students' claims. *See* Emily Suski, *The Two Title IXs*, 101 N.C. L. REV. 403, 420-30 (2023) (explaining how courts both articulate and apply the Title IX standards more expansively in higher education students' Title IX claims).

118. Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 649 (1999).

119. *See, e.g.*, *Adams*, 80 F.4th at 1264-67, 1270, 1274 (concluding following an equal protection claim by a 9-year-old student, who was sexually as well as racially harassed for months and consequently committed suicide, that the school had not been deliberately indifferent under Title IX and therefore not under the Equal Protection Clause either, even though the school at times did nothing in response to reports of the harassment).

120. Troublingly, the Eleventh Circuit has not only applied the Title IX deliberate-indifference standard to equal protection claims, but has also applied that onerous standard to Title VI claims. In *Adams v. Demopolis City Schools*, the court of appeals concluded that a student's Title VI claim failed for the same reason as her equal protection claim, because, "[a]s we explained when applying the same standard to [her] Title IX claim, [the student] failed to submit evidence that [the school] acted with deliberate indifference to any known instances of bullying." *Id.* at 1274. The court came to this conclusion despite the fact that the school used the same failed responses repeatedly and sometimes did not respond at all to reports of the student's harassment. *See id.* at 1265-66.

When courts find that any response to sexual harassment suffices to show a school was not deliberately indifferent, they accept responses that could not reasonably address or prevent the harassment.[121] Schools can therefore both blame and punish survivors for their own abuse, and those responses will not constitute deliberate indifference under either Title IX or the Equal Protection Clause.[122] Similarly, a school can respond to a student's sexual assault during class by simply telling the teacher to keep the lights on and the students separated in the classroom, and it does not amount to deliberate indifference under this standard.[123] It is not relevant to the deliberate-indifference analysis under Title IX that these responses cannot reasonably address the cause of the harassment or its effects, and therefore cannot protect against it.[124] It thus does not matter to the deliberate-indifference analysis under the Equal Protection Clause either.[125]

Courts also find that when schools occasionally do nothing at all in response to sexual harassment, they are also not deliberately indifferent.[126] For example, in *Stiles ex rel. D.S. v. Grainger County*, student D.S. suffered a compression fracture after student S.P. "picked [D.S.] up and rammed him head

121. *See* Doe v. Galster, 768 F.3d 611, 613-14, 622 (7th Cir. 2014) (denying liability where a school refused to provide student Doe a safety plan or allow her to avoid one of the students who harassed her in school, thus failing to protect her upon the harasser's return to school after a temporary expulsion); Doe v. Dardanelle Sch. Dist., 928 F.3d 722, 724, 726-27 (8th Cir. 2019) (denying liability where a school merely "sternly" talked to student R.C. "after he bumped student Doe's breast with his arm and called her a bitch").

122. In *Doe v. Galster*, when middle school student Jane Doe was harassed by other students—which included being called "bitch" and "whore"—and occasionally responded to the harassment in kind, the school punished both Doe and her perpetrator without determining whether Doe (or the other student) had acted in self-defense. *See* 768 F.3d at 614, 616. The school also made them both "sign an agreement that they would stay away from each other." *Id.* at 614. The court did not consider these blanket consequences to be evidence of deliberate indifference, and ultimately found that "[a] reasonable jury could not find that [the school] acted with deliberate indifference." *Id.* at 622.

123. *Dardanelle Sch. Dist.*, 928 F.3d at 726-27. The Eighth Circuit found this response to student R.C.'s assault of student Jane Doe "not 'clearly unreasonable'" and so not deliberately indifferent under Title IX or the Equal Protection Clause, because "R.C. denied the [assault] and nobody else in the home economics class witnessed it." *Id.* at 727 (quoting *Davis*, 526 U.S. at 649). Because the court found a way to discredit Doe's report, the Eighth Circuit concluded that the school was required to do very little to protect Doe; its minimal response accordingly did not constitute deliberate indifference. *See id.* Both Doe's Title IX and equal protection claims therefore failed. *Id.*

124. *See, e.g.*, *Dardanelle Sch. Dist.*, 928 F.3d at 727; *Galster*, 768 F.3d at 620-22; Stiles *ex rel.* D.S. v. Grainger Cnty., 819 F.3d 834, 852-53 (6th Cir. 2016); *supra* note 121.

125. *See, e.g.*, *Dardanelle Sch. Dist.*, 928 F.3d at 725, 727; *Galster*, 768 F.3d at 619, 622; *Stiles*, 819 F.3d at 852.

126. *See* Stiles, 819 F.3d at 842, 852.

first into the wall" as part of a pattern of sexual and physical harassment.[127] In response, the assistant principal did nothing to protect D.S. from or address his harassment, including nothing to discipline the perpetrator, because "she believed [the perpetrator] was truly remorseful."[128] The Sixth Circuit concluded that this nonresponse did not constitute deliberate indifference under Title IX because the school had sometimes responded to other instances of D.S.'s harassment.[129] Applying the Title IX deliberate-indifference standard to D.S.'s Section 1983 equal protection claim, the court also found that the school's occasional nonresponse did not establish an Equal Protection Clause violation.[130] The court was explicit on this conclusion, stating that "DS's deliberate indifference equal protection claim fails for the same reason as his Title IX claim."[131]

3. An identical severity standard

In addition to Title IX's actual-notice and deliberate-indifference standards, courts also import Title IX's stringent severity standard into their evaluations of students' equal protection claims against schools for deliberate indifference to sexual harassment.[132] Under Title IX, the Supreme Court has said that schools must have knowledge not just of some sexual harassment, but of "severe, pervasive, and objectively offensive" sexual harassment.[133] If students cannot show that they suffered sexual harassment of that intensity, then their Title IX claims fail.[134] Because courts apply this Title IX severity standard to students' equal protection claims against schools for deliberate indifference to sexual harassment, their equal protection claims also fail.[135]

127. *Id.*

128. *Id.* at 842.

129. *Id.* at 851.

130. *Id.* at 852.

131. *Id.*

132. *See, e.g.*, R.S. *ex rel.* S.S. v. Bd. of Educ., 371 F. App'x 231, 233 (2d Cir. 2010); Sanches v. Carrollton-Farmers Branch Indep. Sch. Dist., 647 F.3d 156, 165-66, 171 (5th Cir. 2011).

133. Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 650 (1999).

134. *See, e.g.*, *R.S.*, 371 F. App'x at 233-34; *Sanches*, 647 F.3d at 165-66. This severity standard arguably makes some sense in students' equal protection claims against individual defendants based on a hostile-environment theory, because the degree of harassment in the overall school environment is a key element of the claim. *See* Doe v. Hutchinson, 728 F. App'x 829, 830-32 (10th Cir. 2018) (applying the "severe or pervasive" standard to a student's claim against a teacher based on a hostile-environment claim theory of Equal Protection Clause liability). It makes much less sense in a student's claim that her school did not respond adequately to sexual harassment, because the degree to which the environment was hostile is not at issue.

135. *E.g.*, *R.S.*, 371 F. App'x at 233-34 (finding that "the record is insufficient as a matter of law to permit a reasonable jury to find that [the student] endured harassment . . . severe

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Under the Title IX severity standard, even when students endure repeated sexual harassment over a period of days or months, courts have found the harassment insufficiently severe to establish a Title IX claim, and therefore insufficiently severe to establish an equal protection claim as well.[136] For instance, the Second Circuit has found that repeated emails by one student to another, including profanity and crude sexual demands, do not meet the severe, pervasive, and objectively offensive standard under Title IX.[137] The Fifth Circuit has similarly concluded that sexual harassment in the form of rumor spreading and gendered name-calling is insufficiently severe to make out a Title IX claim.[138] Even though such harassment can cause students to develop mental-health disorders—including anxiety, post-traumatic stress disorder, depression, and suicidal ideation—and to leave school, courts have not found the harassment sufficiently severe under Title IX.[139] In each of these cases, because the severity standard from Title IX was not met, the students' equal protection claims failed as well.[140]

C. Unnecessarily Exceptionalizing Section 1983 Equal Protection Claims for School Sexual Harassment

By importing Title IX standards into the evaluation of Section 1983 equal protection claims for deliberate indifference to sexual harassment, courts collapse students' civil rights.[141] In assessing these two claims under identical standards, courts have practically eliminated the Equal Protection Clause as a

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and pervasive" under Title IX and therefore "to the extent [her] § 1983 claim sounds in sexual harassment, it fails for the same reason").

136. *See, e.g.*, *id.*; *Sanches*, 647 F.3d at 159-65, 171.

137. *R.S.*, 371 F. App'x at 233.

138. *Sanches*, 647 F.3d at 159-62. Although the *Sanches* court asserted that it was separating the determination of whether high school student Samantha Sanches suffered discrimination based on sex from the determination of whether any such discrimination was severe, pervasive, and objectively offensive, the court ultimately conflated these determinations. *See id.* at 165. In deciding whether Sanches being called a "ho" qualified as sex discrimination, the court said that Sanches was called a "ho" only once and "not even . . . directly." *Id.* The court adopted a similar analysis when considering severity. *See id.* at 165-66. The court thus concluded that Sanches' harassment did not constitute sex discrimination. *See id.* Through this flawed reasoning, which conflates the nature of the harassment with the amount suffered, the court also concluded that Sanches did not have a viable equal protection claim based on the school's responses to her harassment, because her equal protection claim rose and fell with her Title IX claim. *See id.* at 165, 171.

139. *See, e.g.*, Brief for Plaintiffs-Appellants-Cross-Appellees & Special Appendix at 10-11, *R.S.*, 371 F. App'x 231 (No. 09-2680-cv), 2009 WL 7072700, ECF No. 26; *Sanches*, 647 F.3d at 164, 170-71; *R.S.*, 371 F. App'x at 233.

140. *See R.S.*, 371 F. App'x at 233-34; *Sanches*, 647 F.3d at 165-66, 171.

141. *See supra* Part I.B.

viable independent source of rights for victims of school sexual harassment.[142] Yet the application of this analytical framework and the consequent failing of students' Section 1983 equal protection claims are not necessary. In other Section 1983 claims against municipalities,[143] the Supreme Court has not required that courts apply such stringent standards;[144] specifically, the Court has neither required actual notice nor adopted the demanding construction of the deliberate-indifference standard that is applied under Title IX.[145] Although the standards for evaluating these other Section 1983 claims are unquestionably "stringent,"[146] they are not as stringent as the Title IX standards.[147] The courts thus not only collapse students' rights,[148] but also exceptionalize the treatment of their equal protection claims for sexual harassment against schools.[149]

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142. *See supra* Part I.B. Courts have also produced other collapses, including remedial collapses. *See* Leah Litman, *Remedial Convergence and Collapse*, 106 CALIF. L. REV. 1477, 1482 (2018) ("[W]hen the same standard dictates the availability of different remedies that are supposed to substitute for one another, courts will be foreclosing all of the remedies when they rely on that standard to deny one of the remedies.").

143. See note 88 for a discussion of municipal liability. As the Supreme Court noted in *Fitzgerald*, schools are "municipal entit[ies]." Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246, 257 (2009).

144. *See, e.g.*, Bd. of Cnty. Comm'rs v. Brown, 520 U.S. 397, 407 (1997).

145. *See id.* at 410 (applying the obvious-consequences test to a determination of deliberate indifference rather than the not-clearly-unreasonable standard that courts have applied in school sexual-harassment cases); Connick v. Thompson, 563 U.S. 51, 59, 61-62 (2011) (same). Further, the Supreme Court has made plain that there is no one-size-fits-all deliberate-indifference standard, but rather its meaning varies depending on the underlying claim. For example, in the Eighth Amendment context, the Court has refused to adopt the definition of deliberate indifference from police failure-to-train cases, explaining that "'deliberate indifference' is a judicial gloss, appearing neither in the Constitution nor in a statute." Farmer v. Brennan, 511 U.S. 825, 840 (1994).

146. *Brown*, 520 U.S. at 410.

147. *See supra* Part I.B. Section 1983 claims generally have stringent standards for evaluation. Even under *Brown*'s relatively less onerous deliberate-indifference standard, the Supreme Court still found that a police department's failure to adequately screen a potential officer for employment did not make out a constitutional violation. 520 U.S. at 415-16 (1997) ("Bryan County is not liable for Sheriff Moore's isolated decision to hire Burns without adequate screening, because respondent has not demonstrated that his decision reflected a conscious disregard for a high risk that Burns would use excessive force in violation of respondent's federally protected right."). Still, the deliberate-indifference standard under *Brown* is not as stringent as the standard in Title IX claims. *See id.* at 412 (requiring a constructive-notice standard for equal protection claims); Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 650 (1999) (requiring an actual-notice standard for Title IX claims).

148. *See supra* Part I.B.

149. *See supra* note 45 and accompanying text. *Compare Brown*, 520 U.S. at 407 (applying a constructive-notice standard to equal protection claims against a municipality based on inadequate hiring practices), *and* Shepherd v. Robbins, 55 F.4th 810, 818-19 (10th Cir.

footnote continued on next page

In municipal-liability claims under Section 1983 for deliberate indifference in police training, for example, plaintiffs can show that police had constructive, rather than actual, notice that their training would lead to a civil rights violation.[150] If applied to students' claims for schools' deliberate indifference to sexual harassment, this constructive-notice standard would require proof of only what a school should have known.[151] It would not necessitate the more burdensome task of establishing what the school actually knew, as is required under Title IX.[152]

Likewise, in other Section 1983 equal protection claims, plaintiffs do not need to satisfy the same stringent test for deliberate indifference as in Title IX claims. For example, in *Board of County Commissioners v. Brown*, the Supreme Court concluded that a municipality could be liable for a sheriff's deliberate indifference in hiring if the decision reflected a disregard for a constitutional or statutory violation that was "a known or obvious consequence" of the hiring decision,[153] in contrast to a "not clearly unreasonable" response as required

2022) (noting the existence of an equal protection claim based on sexual harassment when it involves "a power imbalance created by the alleged harasser's governmental authority"), *with* Stiles *ex rel.* D.S. v. Grainger Cnty., 819 F.3d 834, 852 (6th Cir. 2016) (applying an actual-notice standard to student D.S.'s equal protection claim based on sexual harassment).

150. *See, e.g.*, *Connick*, 563 U.S. at 61 (explaining in a Section 1983 failure-to-train claim that "when city policymakers are on actual or constructive notice that a particular omission in their training program causes city employees to violate citizens' constitutional rights, the city may be deemed deliberately indifferent if the policymakers choose to retain that program"); *Farmer*, 511 U.S. at 840-41 (noting that the deliberate-indifference standard for municipal liability for failure to train requires "obviousness or constructive notice"). Even when courts have rejected the most stringent construction of actual notice possible under Title IX, the standards they adopt are still more stringent than Section 1983's constructive-notice standard. *See, e.g.*, Doe v. Fairfax Cnty. Sch. Bd., 1 F.4th 257, 265 (4th Cir. 2021) (rejecting the argument that actual notice requires subjective knowledge of sexual harassment under Title IX and instead holding "that when a school official with authority to address complaints of sexual harassment and to institute corrective measures receives a report that can objectively be construed as alleging sexual harassment, that receipt establishes actual notice of such harassment for Title IX purposes").

151. *See Connick*, 563 U.S. at 61 (requiring constructive, not actual, notice for deliberate-indifference claims based on police failure to train).

152. *See supra* Part I.B.1.

153. 520 U.S. at 410-11. Further, at least one federal court of appeals has not simply adopted the Title IX version of deliberate indifference wholesale in students' equal protection claims based on school sexual harassment. *See* Rost *ex rel.* K.C. v. Steamboat Springs RE-2 Sch. Dist., 511 F.3d 1114, 1125 (10th Cir. 2008) (assessing whether a school "acquiesced" to a student's sexual harassment to determine whether it violated the Equal Protection Clause by acting with deliberate indifference to that sexual harassment).

under Title IX.[154] While the differences between the "obvious consequences" standard in other Section 1983 claims and the "not clearly unreasonable" deliberate-indifference standard in Title IX claims might seem small, there is a colorable argument that an obvious consequence of a school's occasional nonresponse to sexual harassment is the victim suffering more sexual harassment by a perpetrator. Such a showing frequently fails to satisfy Title IX's deliberate-indifference standard.[155] The obvious-consequences test would thus enable plaintiffs to establish a school's deliberate indifference more easily than under the Title IX standard.[156]

In addition, in other equal protection claims for sexual harassment outside the school context, courts do not adopt any severity standard for the harassment, let alone one as oppressive as the Title IX severity standard for sexual harassment.[157] This lack of any severity standard in other Section 1983 claims for sexual harassment outside of schools, of course, means that these other claims require none of the proof that the Title IX severity standard requires.[158]

Presently, though, none of these less onerous Section 1983 standards apply in students' Section 1983 equal protection claims based on schools' deliberate indifference to sexual harassment because courts use the more stringent Title IX standards in their evaluation.[159] Students therefore have no more rights against sexual harassment under the Equal Protection Clause than under Title IX.[160]

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154. Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 648-49 (1999) (explaining that Title IX's deliberate-indifference standard merely requires schools to "respond to known peer harassment in a manner that is not clearly unreasonable").

155. *See supra* Part I.B.2; *infra* Part III.C; MacKinnon, *supra* note 9, at 2068 ("The basic floor for no deliberate indifference is that the school, upon being correctly notified of a teacher's sexually harassing conduct toward a student, 'did not turn a blind eye and do nothing.'" (quoting Kinman v. Omaha Pub. Sch. Dist., 171 F.3d 607, 610 (8th Cir. 1999))).

156. *See Brown*, 520 U.S. at 410; *infra* Part III.C.; *see also, e.g.*, Howard v. Baca, No. 2023 WL 2755308, at *1, *5, *8 (W.D. Okla. Mar. 31, 2023) (concluding in an equal protection claim against a city for deliberate indifference that the plaintiff's sexual assault by a police officer during a traffic stop was the "highly predictable or plainly obvious consequence" of the city's inaction in response to three prior complaints of the officer's sexually inappropriate behavior).

157. *See, e.g.*, Shepherd v. Robbins, 55 F.4th 810, 814, 816-17 (10th Cir. 2022) (explaining in a Section 1983 claim for sexual harassment by the Utah Highway Patrol in violation of the Equal Protection Clause that "sexual harassment occurs when a state actor abuses his governmental authority to further his own sexual gratification" without any mention of that harassment needing to rise to a particular level).

158. *See Shepherd*, 55 F.4th at 819.

159. *See supra* Part I.B.

160. *See supra* Part I.C.

II. Unjustifiably Collapsing Students' Rights

This civil rights collapse and the courts' failure to leverage the Equal Protection Clause's potential to require schools to protect students from sexual harassment is not only unnecessary but also unjustified.[161] The courts collapse students' rights and exceptionalize their equal protection claims against schools for deliberate indifference to sexual harassment by making three false and unjustified assumptions.[162]

First, the courts neglect to consider the ways in which students' equal protection claims for sexual harassment might be broader than Title IX claims.[163] Although courts acknowledge that equal protection claims based on schools' deliberate indifference can be brought against individuals as well as schools, courts erase other differences between the claims.[164] Second, courts neglect to consider the impact of *Fitzgerald* on relevant circuit precedent predating *Fitzgerald*.[165] Third, courts neglect to consider the reasons the Supreme Court defined deliberate indifference as it did under Title IX and whether those rationales apply to Equal Protection Clause claims.[166] Consequently, courts unjustifiably assume that one uniform deliberate-indifference framework—Title IX's framework—applies to all school sexual-harassment claims, no matter the theory of liability.[167] The courts thus unwarrantedly collapse students' civil rights and forfeit the Equal Protection Clause's potential to protect students where Title IX does not.[168]

A. Assuming Equal Protection Claims Are Broader than Title IX Claims Because They Can Be Brought Against Individual Defendants

When the Supreme Court acknowledged in *Fitzgerald* that Equal Protection Clause claims for sex discrimination in school are broader in some

161. *See supra* Parts I.B-.C; *infra* Parts II.A-.C.

162. *See infra* Parts II.A-.C. It could be that courts, in collapsing students' civil rights, intentionally disregard the Supreme Court's characterization of the Equal Protection Clause as in some ways broader than Title IX. *See supra* note 58 and accompanying text. But that seems improbable given the rarity of such abject disregard of Supreme Court opinions. *See* Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 818-19 (1994) (noting that a lower court judge will "refuse[] to follow a Supreme Court precedent" only "[o]n rare occasion").

163. *See infra* Part II.A.

164. *See infra* Part II.A.

165. *See infra* Part II.B.

166. *See infra* Part II.C.

167. *See infra* Part II.C.

168. *See infra* Parts II.A-.D.

ways than Title IX claims, it made explicit one such difference.[169] It noted that unlike Title IX claims, equal protection claims can be brought against individual defendants as well as school districts.[170] Beyond that, though, the Court said little else about how equal protection claims provide broader protections than those available under Title IX.[171] Rather, it left the work of determining the scope and contours of these claims, including their precise standards, to the lower courts.[172]

Yet the lower courts routinely neglect to do this work.[173] The Court never suggested that individual liability represented the exclusive difference between the two claims; to the contrary, the Court suggested that it was discussing only "example[s]" of differences between the claims.[174] But lower courts have applied these two claims as though individual liability represents the sole difference between them.[175] By using the same standards in both equal protection and Title IX claims for deliberate indifference, the courts treat these claims as if their only distinction is that equal protection claims apply to a wider category of defendants.[176] When plaintiffs bring these two claims against school districts, the courts thus render equal protection claims no broader than their parallel Title IX claims.[177]

This parallel treatment of the two claims follows from courts' cursory analysis of their merits. Lower courts often confine their analyses of equal protection claims to a paragraph or two at most.[178] That discussion tends to omit any substantive analysis of the differences between these two types of claims.[179] Instead, courts often determine that simply because a student has no viable Title IX claim against their school for sexual harassment, they also have

169. *See* Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246, 256-58 (2009) (noting, for example, that "[e]ven where particular activities and particular defendants are subject to both Title IX and the Equal Protection Clause, the standards for establishing liability may not be wholly congruent").

170. *Id.* at 257.

171. *See id.* at 256-58.

172. *See id.*

173. *See supra* Part I.B.

174. *See Fitzgerald*, 555 U.S. at 256-57.

175. *See supra* Part I.B.

176. *See supra* Part I.B.

177. *See supra* Part I.B.

178. *See, e.g.*, R.S. *ex rel.* S.S. v. Bd. of Educ., 371 F. App'x 231, 234 (2d Cir. 2010) (spending a total of one sentence analyzing student S.S.'s equal protection claim against her school based on its response to her sexual harassment); Davis v. Carmel Clay Schs., 570 F. App'x 602, 607 (7th Cir. 2014) (disposing of student M.D.'s equal protection claim in a single paragraph).

179. *See, e.g.*, *R.S.*, 371 F. App'x at 234; *Carmel Clay Schs.*, 570 F. App'x at 607.

no valid equal protection claim.[180] In *R.S. ex rel. S.S. v. Board of Education*, for example, the Second Circuit did not even apply the facts alleged in ninth-grade student S.S.'s sexual-harassment complaint to its analysis of her equal protection claim; the court dismissed both her Title IX and equal protection claims based solely on its Title IX evaluation.[181] S.S. suffered repeated sexual harassment from another student via email and consequently experienced "considerable anxiety."[182] In response, the school took no action against the alleged sender besides disabling his email account.[183] In evaluating S.S.'s Section 1983 equal protection claim, the Second Circuit did not assess it independently.[184] Instead, the court merely said that "to the extent [S.S.'s] § 1983 claim sounds in sexual harassment, it fails for the same reason as [her] parallel claim under Title IX."[185]

By neglecting to consider the ways in which equal protection claims against schools for deliberate indifference to sexual harassment could be broader than Title IX claims, courts necessarily assume that equal protection claims are broader than Title IX claims only because they can be brought against individuals as well as schools, and so treat them as such without any further analysis of the matter.[186] That assumption fails, however. As noted, *Fitzgerald* mentioned the wider category of defendants in equal protection claims as part of a broader discussion of examples of the differences between the claims.[187] Moreover, the ability to sue both individuals and schools alone cannot make equal protection claims for sexual harassment meaningfully broader than Title IX claims. Assuming that no other difference exists would mean that equal protection claims against schools or individuals for deliberate indifference to sexual harassment would confront the same highly restrictive

180. *See, e.g.*, *R.S.*, 371 F. App'x at 234; *Carmel Clay Schs.*, 570 F. App'x at 607.

181. *See R.S.*, 371 F. App'x at 233-34.

182. *Id.* at 233.

183. *See id.*

184. *See id.* at 234.

185. *Id.*; *see also Carmel Clay Schs.*, 570 F. App'x at 607 (concluding student M.D.'s equal protection claim failed for the same reason as his Title IX claim—the school's lack of actual knowledge of the harassment—without further analysis).

186. *See, e.g.*, *R.S.*, 371 F. App'x at 234 (acknowledging that some equal protection claims can implicate a different standard than Title IX claims but finding that the equal protection claim based on sexual harassment in that case did not, and so treating the claims as different only because they were brought against individual and institutional defendants); *Carmel Clay Schs.*, 570 F. App'x at 607 (applying Title IX's actual-knowledge standard to an equal protection claim without considering whether any other standard should be applied, and so treating the claims as different only because they were brought against individual and institutional defendants).

187. *See* Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246, 257 (2009).

substantive standard as Title IX claims against schools.[188] The ability to bring essentially the same unsuccessful claims against more defendants does not functionally make them broader: These claims all fail under the weight of the same highly restrictive Title IX standards.[189]

That said, perhaps when the Supreme Court observed in *Fitzgerald* that equal protection claims for sex discrimination in school are broader in ways than Title IX claims,[190] it was not contemplating equal protection claims against schools for deliberate indifference to sexual harassment. It could be the Court meant only that the Equal Protection Clause provides some broader protections than Title IX because some equal protection claims—such as sex discrimination in school admissions—are not available under Title IX.[191] *Fitzgerald*, however, involved a claim against a school for its deliberate indifference to a kindergartener's sexual harassment by a third-grade student.[192] Equal protection claims for sexual harassment and schools' deliberate indifference to it, then, did not represent some abstract concept that the Court could have inadvertently overlooked or failed to consider in *Fitzgerald*.[193] Rather, the Court had the opportunity to consider Section 1983 equal protection claims for schools' deliberate indifference and explain that they were not substantively broader than parallel Title IX claims.[194] That the Court forwent this opportunity suggests that equal protection claims are indeed broader than Title IX claims.

188. *See supra* Part I.B.

189. *See, e.g.*, *R.S.*, 371 F. App'x at 234; Stiles *ex rel.* D.S. v. Grainger Cnty., 819 F.3d 834, 852, 856 (6th Cir. 2016) (calling the standard for evaluating individual school staff liability for deliberate indifference to sexual harassment in a Section 1983 equal protection claim "'substantially the same' as the deliberate-indifference standard applied in Title IX cases" (quoting Williams *ex rel.* Hart v. Paint Valley Local Sch. Dist., 400 F.3d 360, 369 (6th Cir. 2005))).

190. *See Fitzgerald*, 555 U.S. at 256-58.

191. *See id.* at 257. The *Fitzgerald* Court did discuss this form of sex discrimination, noting that although "Title IX exempts elementary and secondary schools from its prohibition against discrimination in admissions . . . . Some exempted activities may form the basis of equal protection claims." *Id.*

192. *Id.* at 249-50; Fitzgerald v. Barnstable Sch. Comm., 504 F.3d 165, 169 (1st Cir. 2007), *rev'd*, 555 U.S. 246 (2009); Hunter *ex rel.* Hunter v. Barnstable Sch. Comm., 456 F. Supp. 2d 255, 259-61 (D. Mass. 2006), *aff'd*, 504 F.3d 165 (1st Cir. 2007), *rev'd*, 555 U.S. 246 (2009).

193. *See Fitzgerald*, 555 U.S. at 249-50.

194. *See id.* at 251, 256-58.

B. Assuming That Circuit Precedent Predating *Fitzgerald v. Barnstable School Committee* Still Applies

The courts also neglect to consider how the Supreme Court's decision in *Fitzgerald v. Barnstable School Committee* affects their own circuit precedent.[195] Instead, they assume that circuit precedent decided prior to *Fitzgerald* continues to apply after *Fitzgerald* without any need for reconsideration.[196] This assumption fails because it privileges horizontal stare decisis over vertical stare decisis.[197] Given that the Supreme Court made plain in *Fitzgerald* that the standards for evaluating equal protection and Title IX claims are different, circuit precedent decided before *Fitzgerald* demands reconsideration.[198]

Prior to *Fitzgerald*, a number of federal courts of appeals adopted something akin to the Title IX standards for evaluating Section 1983 equal protection claims against schools for deliberate indifference to sexual harassment.[199] Even though those prior decisions did not fully embrace the Title IX standards, circuit courts after *Fitzgerald* have both cited those prior decisions as if they did embrace the Title IX standards and neglected to consider what impact, if any, *Fitzgerald* has on these decisions.[200] In *Davis v. Carmel Clay Schools*, for example, the Seventh Circuit relied on one case predating *Fitzgerald* in applying Title IX's actual-knowledge standard, and a

195. *See, e.g.*, Davis v. Carmel Clay Schs., 570 F. App'x 602, 607 (7th Cir. 2014) (applying the standards from *Nabozny v. Podlesney*, 92 F.2d 446, 454 (7th Cir. 1996)); R.S. *ex rel.* S.S. v. Bd. of Educ., 371 F. App'x 231, 234 (2d Cir. 2010) (applying the standards from *Hayut v. State University of New York*, 352 F.3d 733, 744-45 (2d Cir. 2003)); Stiles *ex rel.* D.S. v. Grainger Cnty., 819 F.3d 834, 852 (6th Cir. 2016) (applying the standards from *Williams ex rel. Hart v. Paint Valley Local School District*, 400 F.3d 360, 369 (6th Cir. 2005)).

196. *See, e.g.*, *Carmel Clay Schs.*, 570 F. App'x at 607; *R.S.*, 371 F. App'x at 234; *Stiles*, 819 F.3d at 852.

197. *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1416 n.5 (2020) (Kavanaugh, J., concurring in part).

198. *See Fitzgerald*, 555 U.S. at 257-58. Of course, reconsidering precedent does not mean overruling it. That said, good reasons exist for the lower courts to overrule their precedent applying Title IX standards to equal protection claims for schools' deliberate indifference to sexual harassment. *See infra* Part II.C.

199. *See, e.g.*, Nabozny v. Podlesny, 92 F.3d 446, 453-54 (7th Cir. 1996) (explaining that equal protection claims for sexual harassment require intent or deliberate indifference); *Williams*, 400 F.3d at 369; *Hayut*, 352 F.3d at 744-45 (suggesting that equal protection claims based on school sexual harassment require the harassment to be severe or pervasive).

200. *See, e.g.*, *Carmel Clay Schs.*, 570 F. App'x at 607 (citing *Nabozny*, 92 F.3d at 454); *Stiles*, 819 F.3d at 852 (citing *Williams*, 400 F.3d at 369); *R.S.*, 371 F. App'x at 234 (citing *Hayut*, 352 F.3d at 744-45). In *R.S. v. Board of Education*, the Second Circuit at once recognized that Title IX and equal protection claims may have different standards following *Fitzgerald* and yet affirmed the lower court's application of the Title IX severity standard to student R.S.'s equal protection claim. 371 F. App'x at 234. It did so by relying on its 2003 decision doing the same. *Id.* at 234 (citing *Hayut*, 352 F.3d at 744-45).

different case, also predating *Fitzgerald*, in applying Title IX's deliberate-indifference standard.[201] The court drew upon these cases without at all considering *Fitzgerald*'s potential effect on them.[202] Using these cases, the court found that for the same reasons student M.D.'s Title IX claim failed, his equal protection claim also failed.[203] Had the court considered the Supreme Court's admonition that the standards for evaluating these claims are distinct, it could not have justified equating them.[204]

This failure to reconsider precedent in light of *Fitzgerald* runs into principles of stare decisis. Under vertical stare decisis, "the state courts and the other federal courts have a constitutional obligation to follow a precedent of [the Supreme] Court unless and until it is overruled by [the Supreme] Court."[205] Vertical stare decisis, therefore, is "absolute."[206] Only when vertical stare decisis does not resolve a question can a lower court turn to its own precedent.[207]

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201. 570 F. App'x at 607 (first citing *Nabozny*, 92 F.3d at 454; and then citing Hill v. Shobe, 93 F.3d 418, 421 (7th Cir. 1996)).

202. *See Carmel Clay Schs.*, 570 F. App'x at 607.

203. *Id.*

204. *See* Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246, 257-58 (2009).

205. Ramos v. Louisiana, 140 S. Ct. 1390, 1416 n.5 (2020) (Kavanaugh, J., concurring in part); *see also* G. Alexander Nunn & Alan M. Trammell, *Settled Law*, 107 VA. L. REV. 57, 66-67 (2021) ("The clearest example of binding precedent is vertical stare decisis—when superior courts create precedent that an inferior court is duty-bound to follow."); Payne v. Taslimi, 998 F.3d 648, 655 n.4 (4th Cir. 2021) ("[W]e are not bound by previous panels where 'the prior opinion has been overruled by an intervening opinion from . . . the Supreme Court.'" (quoting McMellon v. United States, 387 F.3d 329, 333 (4th Cir. 2004) (en banc))).

206. *Ramos*, 140 S. Ct. at 1416 n.5 (Kavanaugh, J., concurring in part) (noting that vertical stare decisis must be absolute in "a hierarchical system with 'one supreme Court'" (quoting U.S. CONST. art. III, § 1)). Notably, not all scholars see stare decisis as so absolute. Some such scholars critique stare decisis for its malleability. *See, e.g.*, Michael Gentithes, Janus-*Faced Judging: How the Supreme Court Is Radically Weakening Stare Decisis*, 62 WM. & MARY L. REV. 83, 86-87 (2020) (arguing that the Supreme Court has weakened stare decisis in ways and for reasons that call into question the stability of precedent more generally). Others see strength in the doctrine's flexibility. *See, e.g.*, Richard M. Re, *Precedent as Permission*, 99 TEX. L. REV. 907, 912 (2021) ("Some of stare decisis's most lamented shortcomings, namely its malleability and merits-sensitivity, may actually be underappreciated strengths. And the permission model can be blended with binding approaches to precedent, thereby yielding new ways of structuring and reforming the stare decisis inquiry."). Even if flexible, though, vertical stare decisis still trumps horizontal stare decisis. *See Ramos*, 140 S. Ct. at 1416 n.5 (Kavanaugh, J., concurring in part). The circuit courts' treatment of their own past precedent in light of *Fitzgerald* therefore defies the vertical-horizontal stare decisis hierarchy. *See, e.g.*, *Carmel Clay Schs.*, 570 F. App'x at 607 (citing *Nabozny*, 92 F.3d at 454).

207. *Ramos*, 140 S. Ct. at 1416 n.5 (Kavanaugh, J., concurring in part).

Horizontal stare decisis, in comparison, is more flexible.[208] Under horizontal stare decisis, courts typically follow the decisions of prior panels in their circuits, but they have some discretion.[209] Horizontal stare decisis therefore provides courts at least some latitude to not follow prior panel decisions.[210]

In applying circuit precedent predating *Fitzgerald* without considering *Fitzgerald*'s impact, then, courts take liberties with stare decisis principles.[211] By neglecting to evaluate or even question *Fitzgerald*'s effects on prior decisions in their circuits, courts assume that circuit precedent still applies, wholly unchanged.[212] This assumption falls apart because it reverses the obligations imposed on the courts by vertical and horizontal stare decisis principles.[213]

Of course, if any reexamination would have no effect on students' equal protection claims, then the courts' failure to respect vertical stare decisis might be inconsequential.[214] However, given that *Fitzgerald* involved a school's failure to respond to a student's sexual-harassment claims, and that the Court strongly indicated that equal protection claims have more substantive breadth than Title IX claims, such circuit precedent demands at least reconsideration.[215] Indeed, before applying Title IX's exacting standards, courts would have to consider whether the Supreme Court's reasoning for

208. *See, e.g.*, Dodge v. Cnty. of Orange, 282 F. Supp. 2d 41, 80 (S.D.N.Y. 2003) (explaining that horizontal stare decisis is "not an 'inexorable command'" and so is "flexible" (quoting Lawrence v. Texas, 539 U.S. 558, 577 (2003))); *see also Payne*, 998 F.3d at 655 n.4 (describing decisions to follow prior circuit decisions as "prudential" and "overcome by our mandate as an inferior court to follow the Supreme Court's commands (vertical stare decisis)").

209. *See, e.g.*, *Payne*, 998 F.3d at 655 n.4 ("[W]e are not bound by previous panels where 'the prior opinion has been overruled by an intervening opinion from . . . the Supreme Court.'" (quoting *McMellon*, 387 F.3d at 333)); *see also* Brett M. Kavanaugh, *The Judge as Umpire: Ten Principles*, 65 CATH. U. L. REV. 683, 687 (2016) ("Horizontal stare decisis has some flexibility, as it must. Vertical stare decisis is absolute.").

210. *See Payne*, 998 F.3d at 655 n.4; Kavanaugh, *supra* note 209, at 687.

211. *See, e.g.*, *Carmel Clay Schs.*, 570 F. App'x at 607 (citing *Nabozny*, 92 F.3d at 454); *see also Ramos*, 140 S. Ct. at 1416 n.5 (Kavanaugh, J., concurring in part).

212. *See, e.g.*, *Carmel Clay Schs.*, 570 F. App'x at 607 (citing *Nabozny*, 92 F.3d at 454); Stiles *ex rel.* D.S. v. Grainger Cnty., 819 F.3d 834, 852 (6th Cir. 2016) (citing Williams *ex rel.* Hart v. Paint Valley Loc. Sch. Dist., 400 F.3d 360, 369 (6th Cir. 2005)); R.S. *ex rel.* S.S. v. Bd. of Educ., 371 F. App'x 231, 234 (2d Cir. 2010) (citing Hayut v. State Univ. of N.Y., 352 F.3d 733, 744-45 (2d Cir. 2003)).

213. *See Ramos*, 140 S. Ct. at 1416 n.5 (Kavanaugh, J., concurring in part).

214. Arguably, though, any failure to follow the precepts of vertical stare decisis is not inconsequential. *See* Kavanaugh, *supra* note 209, at 686-87 (deeming vertical stare decisis essential). After all, respecting the decisions of a higher body ensures uniformity in jurisdictions' approaches. *See id.*

215. *See* Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246, 249-50, 256-58 (2009); *see supra* notes 190-94 and accompanying text.

imposing those standards was unique to Title IX.[216] The courts' continued dependence on that reasoning without any reexamination, therefore, is unjustified.

C. Assuming One Universal Deliberate-Indifference Framework Exists for and Applies to Any School Sexual-Harassment Claim

In determining students' Section 1983 equal protection claims, courts also neglect to contemplate both (1) the reasons the Supreme Court adopted Title IX's particular deliberate-indifference framework, and (2) whether these reasons apply to Section 1983 equal protection claims.[217] Rather, courts assume that there is only one deliberate-indifference framework for school sexual-harassment claims.[218] If the courts did consider whether they should apply the Title IX deliberate-indifference framework or the framework applied in other Section 1983 claims, they would find at least two reasons for rejecting the Title IX deliberate-indifference framework.

First, the Supreme Court restricted the scope of a school's Title IX liability with the actual-notice requirement for a reason inapplicable to Section 1983. Indeed, the Court did so because Title IX—unlike Section 1983—has no express private right of action; it only has an express public system of enforcement through the United States Department of Education.[219] The Supreme Court therefore implied a private right of action under Title IX.[220] In finding an implied private right of action under Title IX, the Court required actual notice because "Title IX's express means of enforcement—by administrative agencies—operates on an assumption of actual notice to officials of the funding recipient."[221] The Court thus concluded that "[i]t would be unsound . . . for a statute's *express* system of enforcement to require notice to the recipient and an opportunity to come into voluntary compliance while a judicially *implied*

216. *See infra* Part II.C.

217. *See, e.g.*, Doe v. Dardanelle Sch. Dist., 928 F.3d 722, 725 (8th Cir. 2019).

218. *See supra* Part I.B. For example, in *Doe v. Dardanelle School District*, the Eighth Circuit affirmed a lower court decision stating that "Title IX and § 1983 have the same deliberate indifference standard" without any interrogation of that notion. *Id.* The district court therefore found that student Jane Doe's school was not deliberately indifferent to her sexual assault by student R.C. under Title IX or the Equal Protection Clause even though the school did nothing more than tell the teacher in the class where the assault happened to keep the students separated. *Id.* at 726-27. The court of appeals did point out in a footnote that Doe did not argue that the lower court erroneously applied the deliberate-indifference standard and so it did not consider that issue. *Id.* at 725 n.2.

219. *See* 42 U.S.C. § 1983; Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 288-89 (1998).

220. *See Gebser*, 524 U.S. at 281 (citing Cannon v. Univ. of Chi., 441 U.S. 677 (1979)).

221. *Gebser*, 524 U.S. at 288.

system of enforcement permits substantial liability without regard to the recipient's knowledge or its corrective actions upon receiving notice."[222] The Court also insisted on Title IX's particular deliberate-indifference standard to avoid creating an implied liability scheme that exceeded the bounds of the express one.[223] It said that Title IX's public "administrative enforcement scheme presupposes that an official who is advised of a Title IX violation refuses to take action to bring the recipient into compliance."[224] The Court consequently adopted the deliberate-indifference standard because it approximates the public enforcement standard, saying, "[t]he premise . . . [of liability] is an official decision by the recipient not to remedy the violation."[225]

Although the Supreme Court chose to imply a private cause of action under Title IX and so limit it, there is no such need with Section 1983 claims.[226] The defining aspect of Section 1983 is its explicit private cause of action.[227] The Supreme Court's concerns about limiting Title IX's implicit cause of action to accord with the notice requirements of its administrative enforcement scheme therefore do not apply to Section 1983 claims.[228] Rather than take heed of these distinctions, though, courts neglect to even acknowledge them.[229] They simply adopt the actual-notice and deliberate-indifference standards from Title IX in students' Section 1983 equal protection claims against schools for their failures to respond adequately to sexual harassment.[230]

Second, the Supreme Court confined Title IX liability with the strict actual-notice requirement because Title IX, unlike Section 1983, was enacted

222. *Id.* at 289.

223. *See id.* at 290-91.

224. *Id.* at 290.

225. *Id.*

226. *See* 42 U.S.C. § 1983 ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .").

227. *See, e.g.*, Moor v. Alameda County, 411 U.S. 693, 699 (1973) (expressing that Section 1983 "was intended to provide private parties a cause of action for abuses of official authority which resulted in the deprivation of constitutional rights, privileges, and immunities").

228. *See Gebser*, 524 U.S. at 289-90.

229. *See, e.g.*, Doe v. Dardanelle Sch. Dist., 928 F.3d 722, 725 (8th Cir. 2019) (affirming the district court's determination that "Title IX and Section 1983 have the same deliberate indifference standard" without acknowledging the possibility of any distinction between the two claims).

230. *See supra* Part I.B.

under Congress's Spending Clause authority.[231] Given the "contractual nature" of Title IX, the Court explained that its "central concern" in implying a right of action was "ensuring that 'the receiving entity of federal funds [has] notice that it will be liable for a monetary award.'"[232] The Court therefore devised an actual-notice framework particular to Title IX claims.[233] In contrast, Congress enacted Section 1983 pursuant to its authority under Section 5 of the Fourteenth Amendment, without offering any entity the "contract" of obtaining new liability in exchange for federal funds.[234] Accordingly, Section 1983's liability framework does not operate under the same constraints as Title IX.[235] Yet the courts neglect to contemplate these differences in statutory authority and assume that Section 1983 claims for school sexual

231. *See Gebser*, 524 U.S. at 287 ("Title IX's contractual nature has implications for our construction of the scope of available [implied private] remedies. When Congress attaches conditions to the award of federal funds under its spending power . . . as it has in Title IX . . . we examine closely the propriety of private actions holding the recipient liable in monetary damages for noncompliance with the condition."); *infra* note 234 and accompanying text. To be sure, the Supreme Court has never explicitly ruled on the basis for congressional authority to enact Title IX. In *Franklin v. Gwinnett County Public Schools*, in response to the argument that Title IX was enacted pursuant to Congress's authority under Section 5 of the Fourteenth Amendment as well as its Spending Clause authority, the Court said, "[b]ecause we conclude that a money damages remedy is available under Title IX for an intentional violation irrespective of the constitutional source of Congress' power to enact the statute, we need not decide which power Congress utilized in enacting Title IX." 503 U.S. 60, 75 n.8 (1992). But then in *Gebser v. Lago Vista Independent School District*, the Court's next Title IX case, the Court treated Title IX as if it were enacted solely pursuant to Congress's Spending Clause authority without deciding the question, explaining that to enact Title IX, Congress "condition[ed] an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds." *See* 524 U.S. at 286-87.

232. *Gebser*, 524 U.S. at 287 (quoting *Franklin*, 503 U.S. at 74).

233. *See Gebser*, 524 U.S. at 287-88, 290.

234. Monroe v. Pape, 365 U.S. 167, 171 (1961) ("[Section 1983] came onto the books as § 1 of the Ku Klux Act of April 20, 1871. It was one of the means whereby Congress exercised the power vested in it by § 5 of the Fourteenth Amendment to enforce the provisions of that Amendment."); *see also* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 665 (1978) (explaining that the precursor to Section 1983, the Civil Rights Act of 1871, was enacted to enforce the Fourteenth Amendment).

235. *See Monell*, 436 U.S. at 665 (describing how Section 1983 was enacted as a way to enforce the Fourteenth Amendment); *Gebser*, 524 U.S. at 286-88 (explaining Title IX's contractual nature).

harassment have the same deliberate-indifference standard as Title IX.[236] They thus unjustifiably treat these claims identically.[237]

D. Forfeiting the Potential of Section 1983 Equal Protection Clause Claims

If the courts did not unjustifiably limit the reach of Section 1983 Equal Protection Clause claims in these ways, such claims could do substantially more to require schools to protect students from sexual harassment.[238] The history of sex discrimination in this country, and Supreme Court doctrine on the potential power of Section 1983 Equal Protection Clause claims to address and protect against it, justify this broader reach.[239] In addition, as the Supreme

236. *See, e.g.*, Doe v. Dardanelle Sch. Dist., 928 F.3d 722, 724-25 (8th Cir. 2019) (affirming the district court's grant of summary judgment to the school district, wherein the district court "explained that Title IX and § 1983 have the same deliberate indifference standard and concluded that [the school district] was not deliberately indifferent," without interrogating the distinctions between Title IX and Section 1983).

237. *See, e.g.*, *id.* at 725.

238. *See supra* Parts II.A-.C. One might reasonably wonder whether tort law could provide a sufficient remedy for student sexual harassment, particularly given the availability of vicarious liability in tort. Tort law, however, is inadequate for at least two reasons. First, it fails to recognize the injury as one involving civil rights and to capture its gravity. As Catharine MacKinnon contended decades ago, sexual harassment is more than simply an injury inflicted on an individual as an individual. *See* CATHARINE MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 172 (1979). It is a "group-defined injury which occurs to many different individuals regardless of unique qualities or circumstances, in ways that connect with other deprivations of the same individuals, among all of whom a single characteristic—female sex—is shared." *Id.* Second, even if tort could capture the gravity of the civil rights violation inherent to sexual harassment, generous defenses limit the extent to which schools can be held to account for them. For example, a school can readily avoid vicarious liability for a teacher's sexual relationship with a student by showing the activity was discretionary. *See, e.g.*, Doe 1 v. Bd. of Educ., 955 N.Y.S.2d 600, 602 (N.Y. App. Div. 2012) (concluding a school was not liable for a teacher's sexual relationship with a student because the activity fell outside the scope of employment). Some scholars, though, have been more optimistic about the potential for redress in tort for sexual harassment, at least in the employment context. *See, e.g.*, Martha Chamallas, *Discrimination and Outrage: The Migration from Civil Rights to Tort Law*, 48 WM. & MARY L. REV. 2115, 2118 (2007) ("[T]he migration of legal concepts and values from civil rights to torts is important because it opens up an additional avenue for employees to seek redress for workplace injuries and exposes employers in some cases to greater amounts of damages.").

239. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 531-33 (1996) (chronicling how judicial interpretation of the Equal Protection Clause has brought decisive gains for women's rights). For an argument that the framers of the Fourteenth Amendment envisioned expansive coverage, see Nina Morais, Note, *Sex Discrimination and the Fourteenth Amendment: Lost History*, 97 YALE L.J. 1153, 1157 (1988) ("Not only were the framers [of the Fourteenth Amendment] made aware of women's political concerns by the suffragist's petitions; comments made during the debates also suggest that many of them foresaw the use of the Fourteenth Amendment in sex discrimination cases.
footnote continued on next page

Court has explained, the Equal Protection Clause and Title IX were never meant to overlap completely.[240] Importantly, the Equal Protection Clause enforced through Section 1983 can provide remedies for the harms of sexual harassment where Title IX cannot.[241]

For at least two reasons, the Equal Protection Clause, as enforced through Section 1983, is best read as creating a less stringent scheme than Title IX does for students who seek to remedy sex discrimination in school. First, the Equal Protection Clause exists to protect against historical and continuing discrimination, and, as the Supreme Court has said, "our Nation has had a long and unfortunate history of sex discrimination."[242] Second, the purpose of Section 1983 is to remediate and compensate for civil rights violations and deter future violations.[243] Neither of these features apply to Title IX, which does not seek to address this history of sex discrimination, and which the Supreme Court has explicitly said does not have this kind of compensatory structure.[244] Indeed, the Court has elaborated that Title IX exists to protect,

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According to one historian, '[o]pponents of the amendment frequently pointed . . . out' that 'the language of Section I, on its face, was broad enough to protect women as well as racial minorities.' But the threat that women might file sex discrimination suits did not prevent a majority of Congress from supporting the Amendment. Nor did it lead supporters to defend the Amendment by claiming that it did not reach sex discrimination, even when they were pressed to do so." (alteration in original) (quoting JUDITH A. BAER, EQUALITY UNDER THE CONSTITUTION: RECLAIMING THE FOURTEENTH AMENDMENT 90 (1983))).

240. *See* Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246, 258-59 (2009) (explaining that when it enacted Title IX, Congress "authorize[d] the Attorney General to intervene in private suits alleging discrimination on the basis of sex in violation of the Equal Protection Clause," and thus that "it appears that the Congress that enacted Title IX explicitly envisioned that private plaintiffs would bring constitutional claims to challenge gender discrimination," so "it must have recognized that plaintiffs would do so via 42 U.S.C. § 1983").

241. *See* Leong, *supra* note 19, at 355-56 (describing the reach of Section 1983); Robertson v. Wegmann, 436 U.S. 584, 590-91 (1978) (same). Unlike Section 1983, with its compensatory and remedial power, the Supreme Court has said that Title IX exists only to protect, as opposed to compensate for, sex discrimination, and that to the extent it provides any compensatory remedies, those do not include remedies for emotional harm. *See* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 287 (1998); Cummings v. Premier Rehab Keller, P.L.L.C., 596 U.S. 212, 230 (2022).

242. *Virginia*, 518 U.S. at 531 (quoting Frontiero v. Richardson, 411 U.S. 677, 684 (1973)); *see also* Morais, *supra* note 239, at 1158 (arguing that "[w]hen all the [Fourteenth Amendment] framers' comments on women are read together, they suggest that women's rights, short of suffrage, were thought to be within the reach of the Fourteenth Amendment").

243. *Robertson*, 436 U.S. at 590-91 ("The policies underlying § 1983 include compensation of persons injured by deprivation of federal rights and prevention of abuses of power by those acting under color of state law."); Leong, *supra* note 19, at 355.

244. *See* 118 CONG. REC. 5807 (1972) (statement of Sen. Birch Bayh); *Gebser*, 524 U.S. at 286-87 (contrasting Title IX's protective purpose with Title VII's purpose of "'mak[ing]

footnote continued on next page

rather than to make survivors of sexual harassment and other forms of sex discrimination whole.[245] Title IX does not even afford survivors of sexual harassment a remedy for emotional harm.[246] Section 1983 Equal Protection Clause claims, then, must do this work.[247]

The Equal Protection Clause thus should provide complementary protections to remedy, deter, and compensate survivors of sexual harassment. When students suffer sexual harassment in school, they continue to suffer from the deeply rooted sex discrimination that is part of the country's history and present.[248] Sexual harassment also causes other significant harms that should be compensated and deterred.[249] Sexual harassment prevents students from accessing the benefits and programs of school.[250] Students who have endured sexual harassment in school even leave the public schools entirely because their schools fail to respond adequately to it and so experience a complete denial of access to education.[251] Sexual harassment also causes students significant emotional harms, including trauma, anxiety, and depression, among other things.[252] Section 1983 Equal Protection Clause claims

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persons whole for injuries suffered through past discrimination'" (quoting Landgraf v. USI Film Prods., 511 U.S. 244, 254 (1994))).

245. *See Gebser*, 524 U.S. at 285-87.

246. *See Cummings*, 596 U.S. at 230.

247. *See Robertson*, 436 U.S. at 590-91.

248. *See* United States v. Virginia, 518 U.S. 515, 531-32 (1996); *see* Morais, *supra* note 239, at 1157-58.

249. *See, e.g.*, Sarah J. Rinehart, Dorothy L. Espelage & Kristen L. Bub, *Longitudinal Effects of Gendered Harassment Perpetration and Victimization on Mental Health Outcomes in Adolescence*, 35 J. INTERPERSONAL VIOLENCE 5131, 6008 (2020) (finding that youth who reported increases in sexual harassment victimization also reported increases in mental health problems); *infra* note 252 and accompanying text.

250. For example, student M.D.'s father withdrew him from Carmel High School upon learning that three of the four students who sexually harassed M.D. would be reenrolled. *See* Davis v. Carmel Clay Schs., 570 F. App'x 602, 604 (7th Cir. 2014).

251. For example, ninth-grade student M.D. withdrew from school after the school did nothing in response to his being sexually harassed and assaulted by classmates. *Id.*

252. *See, e.g.*, Brief for Plaintiffs-Appellants-Cross-Appellees & Special Appendix at 10-11, R.S. *ex rel.* S.S. v. Bd. of Educ., 371 F. App'x 231 (2d Cir. 2010) (No. 09-2680-cv), 2009 WL 7072700, ECF No. 26 (describing how, after being sexually harassed via email, student S.S. had "an emotional breakdown," "eventually sought out counseling," "was diagnosed with Acute Stress Disorder and Post Traumatic Stress Disorder," and ultimately left the school district); Sanches v. Carrollton-Farmers Branch Indep. Sch. Dist., 647 F.3d 156, 164 (5th Cir. 2011) (describing how, following her sexual harassment, student Samantha Sanches was "diagnosed . . . with depression and prescribed medication," "cried often, and had passive suicidal thoughts"); *see also* Rinehart et al., *supra* note 249, at 6008 ("[Y]outh who reported increases in sexual harassment victimization also reported increases in mental health problems . . . .").

thus can and should provide compensation for, and more rigorously deter, sexual harassment in school than Title IX.[253]

III. Unyoking Equal Protection Claims from Title IX

Currently, courts' evaluations of students' Section 1983 equal protection claims against schools for deliberate indifference to sexual harassment produce a rights collapse.[254] But because the Supreme Court has not determined the standards for evaluating these equal protection claims, an opportunity exists to remedy the rights collapse.[255] Courts should both delink their equal protection analyses from Title IX and adopt standards for evaluating equal protection claims that afford some broader protections against sexual harassment than are available under Title IX.[256]

More specifically, in students' equal protection claims against schools for deliberate indifference to sexual harassment, courts should define the deliberate-indifference standard and its predicate notice requirements more liberally than under Title IX.[257] As a threshold matter, they should adopt a constructive-notice standard, rather than Title IX's actual-notice standard.[258] Courts should also abandon the Title IX requirement that schools have notice of severe, pervasive, and objectively offensive sexual harassment.[259] Instead, as in Section 1983 equal protection claims for sexual harassment outside the school context, they should not require the sexual harassment to be of any particular severity.[260] In addition, courts should apply the plainly obvious test used in other Section 1983 claims for deliberate indifference.[261] In applying that test, courts should interrogate the degree to which a school's response to sexual harassment was reasonably tailored to addressing and preventing it.[262]

A framework for applying these constructive-notice and deliberate-indifference standards follows. This proposed paradigm would require courts to evaluate the proportionality of the school's response to the severity of the harassment.[263] In addition, it calls for courts to distinguish between responses

253. *See supra* Parts II.A-.C.

254. *See supra* Parts I.B-.C.

255. *See* Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246, 259-60 (2009).

256. *See supra* Part I.B.

257. *See supra* Part I.B.

258. *See* Connick v. Thompson, 563 U.S. 51, 61 (2011); *infra* Part III.A.

259. *See supra* Part I.B.3; *infra* Part III.B.

260. *See infra* Part III.B.1.

261. *See infra* Part III.B.1.

262. *See infra* Part III.B.1.

263. *See infra* Part III.B.1.

to sexual harassment perpetrated by one individual and sexual harassment perpetrated more systemically.[264] That distinction matters because responses that are tailored to addressing and preventing sexual harassment perpetrated by a single individual can differ from those that are tailored to addressing and preventing more systemic sexual harassment.[265] All these changes would unyoke the Equal Protection Clause analysis from Title IX and provide new protections to students when they suffer sexual harassment in schools.[266]

Significantly, all these proposed changes fit within the parameters the Supreme Court has set for Section 1983 claims generally.[267] These proposals are therefore relatively modest. Their modesty, among other things, could inevitably give rise to critiques. These recommendations could, for example, be criticized as "reformist reforms."[268] Further, even with these proposals, students may still face an uphill battle when trying to establish school liability under Section 1983.[269] These and other critiques of the recommendations advanced here are addressed in the final Subpart.

A. A Constructive-Notice Standard

Because the Supreme Court has insisted that municipalities can only be held liable under Section 1983 for "action[s] for which the municipality is

264. *See infra* Part III.B.1.

265. *See infra* Part III.B.1.

266. Nancy Leong and Joanna Schwartz, among others, have explained the advantages of municipal liability for vindicating civil rights violations. *See* Leong, *supra* note 19, at 357-58; Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 944-45 (2014). Schwartz has explained that municipal liability is a more direct route of accountability and recovery since employers will often indemnify employees. *See* Schwartz, *supra*, at 944-45. In a significant empirical study of police officer liability, Schwartz found that "[b]etween 2006 and 2011, in forty-four of the country's largest jurisdictions, officers financially contributed to settlements and judgments in just .41% of the approximately 9225 civil rights damages actions resolved in plaintiffs' favor, and their contributions amounted to just .02% of the over $730 million spent by cities, counties, and states in these cases." *Id.* at 890. She thus concluded that because "municipalities virtually always satisfy officers' settlements and judgments," municipal liability for police officers "amount[s] to de facto respondeat superior liability." *Id.* at 944. Leong notes that municipal liability expands the scope of discovery over individual Section 1983 liability and may better allow for recovery when the violation is collective. *See* Leong, *supra* note 19, at 358.

267. *See* Connick v. Thompson, 563 U.S. 51, 61 (2011); Bd. of Cnty. Comm'rs v. Brown, 520 U.S. 397, 407 (1997).

268. *See* Amna A. Akbar, *Non-Reformist Reforms and Struggles over Life, Death, and Democracy*, 132 YALE L.J. 2497, 2518-20 (2023).

269. *See* Schwartz, *supra* note 88, at 1199 (noting that "commentators argue that *Monell* doctrine makes it nearly impossible to prevail on Section 1983 claims against local governments").

actually responsible,"[270] it has required the municipalities to have some notice of a civil rights violation.[271] The Court has not, however, demanded actual notice.[272] Constructive notice generally suffices in Section 1983 claims against municipalities.[273] To discontinue courts' exceptional treatment of equal protection claims against schools for deliberate indifference to sexual harassment and delink courts' evaluation of these claims from Title IX, courts should adopt a constructive-notice standard.[274] Further, they should abandon the Title IX requirement that schools have notice of severe, pervasive, and objectively offensive sexual harassment in students' equal protection claims.[275] In addition to bringing the evaluation of school sexual-harassment claims in line with that of other Section 1983 deliberate-indifference claims, these changes would comport with Section 1983's compensatory and deterrent purposes.[276]

By adopting a constructive-notice standard and abandoning the requirement that schools have notice of severe, pervasive, and objectively offensive harassment, courts would require schools to respond to any sexual harassment in school that they knew or should have known about, no matter its severity.[277] It would require schools to act when they have good reason to

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270. Pembaur v. City of Cincinnati, 475 U.S. 469, 479-80 (1986).

271. *See Connick*, 563 U.S. at 62 ("Without notice that a course of training is deficient in a particular respect, decisionmakers can hardly be said to have deliberately chosen a training program that will cause violations of constitutional rights.").

272. *See id.* at 61.

273. *See id.*

274. *See supra* Part II.D.

275. *See supra* Part I.C.

276. *See Connick*, 563 U.S. at 61; Bd. of Cnty. Comm'rs v. Brown, 520 U.S. 397, 407 (1997). As Nancy Leong has pointed out, Congress enacted Section 1983 "as part of the Ku Klux Klan Act of 1871" in response to "widespread violence against Black people" following Reconstruction. *See* Leong, *supra* note 19, at 355. Congress's purpose in passing Section 1983 was both to compensate individuals who suffered civil rights violations and prevent these violations from recurring. *See id.*; Robertson v. Wegmann, 436 U.S. 584, 590-91 (1978); *supra* note 243 and accompanying text.

277. *See Connick*, 563 U.S. at 61; *supra* Part I.B.3. The current particularized actual-notice standard allows and even encourages schools to bury their heads in the proverbial sand and do nothing in response to students' sexual harassment if they do not have very particularized actual notice of very significant sexual harassment. *See supra* Part I.B.1. A constructive-notice standard, by contrast, would eliminate the perverse incentives schools have to ignore even sexual harassment they strongly suspect is occurring. *See* MacKinnon, *supra* note 9, at 2091 (explaining how Title IX's standards "encourage[] schools not to know and to avoid learning about sexual atrocities so as to avoid notice of them"). With this incentive in place, much sexual harassment in schools goes unaddressed, uncompensated, and anything but deterred.

suspect that students are suffering any sexual harassment in school.[278] If they did not, schools would have to remediate their failures, compensate survivors of the harassment, or both.[279] In these ways, the remedial and compensatory purposes of Section 1983 would be better met.[280]

B. A Reconceived Deliberate-Indifference Paradigm

By requiring schools to respond when they have even constructive notice, courts would require schools to respond to more harassment. But requiring schools to respond to more harassment and requiring them to do something meaningful to address it are, of course, two different things.[281] Accordingly, even beyond the notice requirement, the deliberate-indifference standard in equal protection claims for school sexual harassment must be reconceptualized so that it is divorced from Title IX's anemic version. To do this, courts should incorporate a variation of the "plainly obvious" test they apply in other Section 1983 municipal-liability claims.[282] That standard would impose liability where it is plainly obvious that a school's response to sexual harassment makes further harassment of a student likely.[283] To implement that standard, courts should evaluate whether schools' responses to sexual harassment are reasonably tailored to address and prevent sexual harassment.[284] If they are not, then it is plainly obvious that sexual harassment is likely to recur.[285]

In making this assessment, courts should consider two factors. First, they should assess the proportionality of the response to the severity of the

278. *See Connick*, 563 U.S. at 61; *see also id.* at 103 (Ginsburg, J., dissenting) (explaining that constructive notice under Section 1983 holds municipalities liable when they "knew or should have known" that their actions would lead to a deprivation of civil rights); *supra* note 150 and accompanying text.

279. *See* Leong, *supra* note 19, at 386, 392 (noting that municipal liability serves Section 1983's compensatory goals because "municipalities frequently can satisfy judgments that individual defendants cannot," and further serves Section 1983's deterrence goals because "municipalities have the power to institute reforms across the entire" institution).

280. *See id.* at 355; *Robertson*, 436 U.S. at 590-91; *supra* note 276 and accompanying text; *supra* note 243 and accompanying text.

281. *See* Suski, *supra* note 9, at 2279-87 (critiquing courts' application of the deliberate-indifference standard in Title IX sexual-harassment claims as allowing schools to do anything in response to sexual harassment, including allowing schools' responses to cause additional harms to students).

282. *See* Connick v. Thompson, 563 U.S. 51, 62 (2011); Bd. of Cnty. Comm'rs v. Brown, 520 U.S. 397, 407 (1997).

283. *See Brown*, 520 U.S. at 407, 411.

284. *See infra* Part III.B.1.

285. *See infra* Part III.B.1.

harassment.[286] Second, they should evaluate whether schools tailored their responses to either the systemic or individually perpetrated nature of the harassment.[287] Finally, courts should also incorporate a rebuttable presumption of deliberate indifference if schools did not consider the severity of the harassment or differentiate their responses based on the harassment's systemic or individual nature.[288]

Making this assessment, though, would not end the analysis. Courts would still have to evaluate whether a school's response to sexual harassment represents an "'official policy' or 'custom.'"[289] Otherwise, it does not give rise to liability under Section 1983.[290] Although in most cases students can overcome this hurdle by showing that the school's response reflects a final policymaking decision,[291] the requirement represents a significant enough potential obstacle to students' Section 1983 equal protection claims for sexual harassment that it bears addressing. Accordingly, this Subpart reconceives the deliberate-indifference framework and then address this "official policy" obstacle.

1. Considering proportionality in and disaggregating the deliberate-indifference analysis

To fully end the exceptional treatment of students' Section 1983 Equal Protection Clause claims for schools' deliberate indifference to sexual harassment, courts should apply the plainly obvious test used in other Section 1983 deliberate-indifference claims.[292] In other Section 1983 claims against municipalities based on failures to adequately address a violation, the Supreme Court has said that to establish deliberate indifference, a plaintiff must show that the municipality disregarded a known or obvious risk of injury, meaning that "the plainly obvious consequence of the decision to [act inadequately] would be the deprivation of a third party's federally protected right."[293] In addition, the Court has explained that a single municipal decision

286. *See infra* Part III.B.1.

287. *See infra* Part III.B.1.

288. *See infra* Part III.B.1.

289. Starbuck v. Williamsburg James City Cnty. Sch. Bd., 28 F.4th 529, 533 (4th Cir. 2022) (quoting Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690-691 (1978)).

290. *Id.*

291. *See id.*

292. *See* Bd. of Cnty. Comm'rs v. Brown, 520 U.S. 397, 407, 411 (1997).

293. *Id.* at 411. This test is essentially a risk assessment. In *Brown*, the Court repeatedly referred to the degree to which a municipality's failure to screen an applicant reflects deliberate indifference to the "risk" of constitutional injury. *See id.* at 410-12. If the risk reaches the level of "obvious," then the municipality has exceeded the Constitution's tolerance for risk of injury. *See id.*

can suffice to show deliberate indifference when the "plainly obvious" consequence of that decision is the deprivation of civil rights.[294]

More specifically, in applying this plainly obvious test, courts should require schools to respond to sexual harassment in ways reasonably tailored to preventing it, because if schools do not respond in such ways, the likelihood of sexual harassment recurring is plainly obvious.[295] Empirical research shows that absent interventions, perpetrators of sexual harassment not only continue to sexually harass but also escalate the severity of their behavior.[296] A school that does not respond to sexual harassment in a way that is at least reasonably tailored to preventing sexual harassment is therefore responding in ways that create a high risk or make it plainly obvious that the harassment will recur.[297]

In assessing whether schools' responses to sexual harassment are reasonably tailored to preventing and addressing sexual harassment, courts should first consider the proportionality of schools' responses to the overall severity of the sexual harassment, and second consider whether schools differentiated their responses to sexual harassment based on its individual or systemic nature.

First, in considering the proportionality of the school's response to the overall severity of the harassment, less severe harassment would require a less significant response from the school to meet this reasonably tailored test. In contrast, more severe harassment would require a more significant intervention to qualify as reasonably tailored to addressing and preventing sexual harassment.

To determine the overall severity of the sexual harassment, courts should consider both the severity of the acts of sexual harassment and the severity of the harm. To determine the severity of the acts of sexual harassment, courts should balance three factors: the frequency and amount of the harassment, the

294. *See id.* at 407, 411.

295. Significantly, this is essentially the test that the Fourth Circuit used to assess an individual school employee's deliberate indifference to sexual harassment in an equal protection claim. *See* Feminist Majority Found. v. Hurley, 911 F.3d 674, 703 (4th Cir. 2018) ("[T]he plaintiff must allege that the school administrator knew about harassment of the plaintiff 'and acquiesced in that conduct by refusing to reasonably respond to it.'" (quoting Murrell v. Sch. Dist. No. 1, 186 F.3d 1238, 1250 (10th Cir. 1999))).

296. *See, e.g.*, Dorothy L. Espelage, Kathleen C. Basile, Ruth W. Leemis, Tracy N. Hipp & Jordan P. Davis, *Longitudinal Examination of the Bullying-Sexual Violence Pathway Across Early to Late Adolescence: Implicating Homophobic Name-Calling*, 47 J. YOUTH & ADOLESCENCE 1880, 1888-90 (2018) (finding "that male and female students who perpetrated bullying or homophobic name-calling in middle school had higher odds of perpetrating sexual violence in high school" and so calling for early interventions to interrupt this behavior).

297. *See id.* at 1888.

duration of the harassment, and the type of harassment.[298] In considering the severity of the harm, courts should assess, at a minimum, whether the harassment exacerbated or caused mental health problems, whether the harassment caused any physical harm, and whether the harassment caused students to miss school or school-related activities.[299] In this paradigm, repeated and frequent verbal harassment that continued for months or more and caused or exacerbated mental health problems would be severe, and a single instance of sexual assault or rape would also be considered severe. Thus, while this reconceived evaluation jettisons the Title IX severity standard, the severity of the harassment is not irrelevant.[300]

Second, courts should determine whether schools differentiated their responses to the sexual harassment based on the individual or systemic nature of the harassment. Students may suffer sexual harassment at the hands of individual perpetrators, as well as multiple perpetrators acting in some degree of concert.[301] Because the modes of sexual harassment differ, the responses to them must differ as well. For example, research has shown that providing individuals with skills training, including in "communication, problem solving, empathy, and conflict management," is effective in ending individual harassing behavior.[302] Systemic harassment, on the other hand, can require broader, even school-wide, intervention.[303] Courts, then, should assess the plainly obvious test by considering whether a student's sexual harassment was perpetrated by one individual or more systemically by multiple students, and whether the school responded accordingly. Further, when schools respond to sexual harassment only by suspending or expelling the perpetrator, courts should deem such responses per se not reasonably tailored or proportional. Courts should make this finding because such interventions are, simply put,

298. Currently, courts infrequently, if ever, consider these factors, and even when they do, they do not consider these factors in light of one another. *See, e.g.*, R.S. *ex rel.* S.S. v. Bd. of Educ., 371 F. App'x 231, 233-34 (2d Cir. 2010) (recounting a string of three sexually profane, disparaging, and arguably threatening emails sent in quick succession from one student to another and dismissing them as "lamentable" but not actionably severe with little more analysis). For further discussion of the current approach in the lower courts, see Part I.B above.

299. For an example of how courts fail to consider these factors, see Part I.B above.

300. *See supra* Part III.A.

301. *See, e.g.*, Davis v. Carmel Clay Schs., 570 F. App'x 602, 603-04 (7th Cir. 2014) (describing how four boys together repeatedly sexually harassed student M.D. over a period of months).

302. Espelage et al., *supra* note 296, at 1890.

303. *See, e.g.*, *id.* (noting that "[o]ngoing prevention programming throughout middle school and during the transition to high school seems to be critical to prevent middle school aggression as well as sexual violence in high school").

ineffective.[304] They do not deter misbehavior and create their own negative externalities.[305]

Finally, courts should also incorporate a rebuttable presumption of deliberate indifference into their analyses, which would trigger if a survivor of sexual harassment can show that a school did not even consider, let alone tailor, its interventions to the nature of the harassment or its severity. For example, if a student could show that their school responded to their peer sexual harassment just by separating them and their perpetrator in class, they could likely establish that the response is not reasonably tailored to preventing the harassment,[306] as such minimal interventions are not among the types of interventions that have been shown to be effective at addressing sexual harassment.[307] It is therefore plainly obvious that the use of such ineffective responses will lead to the harassment resuming after the separation.[308] In such a case, the burden would then shift to schools to prove that they did reasonably

304. *See, e.g.*, CHRISTINA LICALSI, DAVID OSHER & PAUL BAILEY, AM. INSTS. FOR RSCH., AN EMPIRICAL EXAMINATION OF THE EFFECTS OF SUSPENSION AND SUSPENSION SEVERITY ON BEHAVIORAL AND ACADEMIC OUTCOMES 5 (2021), https://perma.cc/85RG-S4YH (finding that suspensions and expulsions are counterproductive in deterring future misbehavior).

305. *See, e.g.*, *id.* ("Receiving a more severe type and length of exclusionary discipline in response to a behavioral incident also has substantial long-term negative effects on students, including increases in the number of days students miss due to absence, increases in the number of days they miss due to suspension, decreases in their likelihood of earning both English language arts (ELA) and math credits, and decreases in their likelihood of graduating.").

306. *See* Doe v. Dardanelle Sch. Dist., 928 F.3d 722, 726-27 (8th Cir. 2019) (describing how a school separated students in response to sexual harassment but finding that response not deliberately indifferent).

307. *See, e.g.*, Jennifer L. Doty, Amy L. Gower, Jessie H. Rudi, Barbara J. McMorris & Iris W. Borowsky, *Patterns of Bullying and Sexual Harassment: Connections with Parents and Teachers as Direct Protective Factors*, 46 J. YOUTH & ADOLESCENCE 2289, 2300 (2017) (finding that "best practices in prevention strengthen youth connections with adults at home, at school, and in the community"); *see also* Elizabeth J. Letourneau & Charles Borduin, *The Effective Treatment of Juveniles Who Sexually Offend: An Ethical Imperative*, 18 ETHICS & BEHAV. 286, 298-99 (2008) ("An 8.9-year post-treatment follow-up of ultimate outcomes revealed that [juvenile multi-systemic therapy] participants were significantly less likely than their usual services counterparts to be rearrested for sexual (12.5% vs. 41.7%) and nonsexual (29.2% vs. 62.5%) offenses." (citation omitted)); *cf.* Porto v. Town of Tewksbury, 488 F.3d 67, 70-71 (1st Cir. 2007) (describing how student S.C.'s school responded to his ongoing sexual harassment by repeatedly separating him and his harasser, with limited or no effect on the tide of harassment, and that S.C. ultimately attempted suicide).

308. *See* Doty et al., *supra* note 307, at 2300 (describing other responses to sexual harassment that have demonstrated efficacy); Letourneau & Borduin, *supra* note 307, at 298-99 (same); *cf. Porto*, 488 F.3d at 70-71 (noting that separating a student from his harasser did not stem the abuse).

tailor their responses to sexual harassment and were not deliberately indifferent.

Schools could still rebut this presumption of deliberate indifference. A school could rebut the presumption by showing that its response to the sexual harassment—separating the students, for example—was reasonably tailored to the harassment. A school may be able to make this showing where the only notice it had of the harassment, constructive or otherwise, was one minor instance of only arguable sexual harassment, and so its response was proportional. Similarly, in a case of systemic sexual harassment, a school could show that it developed broader strategies to address and prevent the harassment and considered the severity of the harassment in its response. Even if the school could not fully implement those strategies before the sexual harassment continued, such a showing could rebut the presumption of deliberate indifference.[309] Deliberate indifference therefore lies in the school's failure to consider the mode of harassment and customize its response to it. If the school can show that it made such efforts, it will not be found to be deliberately indifferent.

2. The significant but not insurmountable official policy caveat

Even with these changes, a student still would not be able to establish a Section 1983 equal protection claim for deliberate indifference to sexual harassment without also showing that the deliberate indifference represents an official policy of the school.[310] When the Supreme Court concluded in *Monell v. Department of Social Services* that local governing authorities, including schools, could be liable under Section 1983 for violating the constitutional rights of individuals, it also said that such liability exists only for official policies or

309. One such strategy to target systemic harassment, developed by the CDC and found to be effective at addressing and preventing sexual violence, is a multimodal approach that takes training and time to implement. *See* KATHLEEN C. BASILE ET AL., DIV. OF VIOLENCE PREVENTION, NAT'L CTR. FOR INJURY PREVENTION & CONTROL, & CTRS. FOR DISEASE CONTROL & PREVENTION, STOP SV: A TECHNICAL PACKAGE TO PREVENT SEXUAL VIOLENCE (2016), https://perma.cc/EB4P-3XRM (describing various methods to address and prevent sexual harassment on a school-community-wide basis, including social-emotional-skills training and improved school monitoring); *see also* Espelage et al., *supra* note 296, at 1890 (describing that the CDC Stop SV strategy adopts approaches with evidence of effectiveness in addressing sexual harassment).

310. *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690-91 (1978). Unlike in actions brought against individual state or municipal actors, qualified immunity does not pose a barrier to claims against municipalities, including schools. Owen v. City of Indep., 445 U.S. 622, 638 (1980); *see also* Joanna C. Schwartz, *Backdoor Municipal Immunity*, 132 YALE L.J.F. 136, 137 (2022) ("Local governments can also be sued under Section 1983 when their officers violate the Constitution, and governments cannot claim the protections of qualified immunity.").

customs of those local governing bodies.[311] Students can show such official policies or customs in four ways,[312] but the most viable of them in this context is showing that the decision to act, or not, in response to sexual harassment is made by someone with final policymaking authority.[313]

To establish that a school administrator's response to sexual harassment amounts to a final policy, the plaintiff must show that the policy is not subject to review by the municipality's policymakers, such as a school board.[314] In many deliberate-indifference cases, students will be able to make this showing because they complain about the schools' failures to act adequately (which policymakers do not review) rather than about any disciplinary actions (which policymakers do review).[315] Indeed, students typically do not bring claims

311. *See Monell*, 436 U.S. at 690-91.

312. Starbuck v. Williamsburg James City Cnty. Sch. Bd., 28 F.4th 529, 533 (4th Cir. 2022).

313. *Id.* The other three ways to establish that a school's action or inaction amounts to an official policy or custom are by showing: (1) an express policy; (2) an omission, such as a failure to train employees properly; and (3) a practice "'so persistent and widespread' as to constitute 'a custom or usage with the force of law.'" *Id.* (quoting Lytle v. Doyle, 326 F.3d 463, 471 (4th Cir. 2003)). Although a school could, at least conceivably, have an express policy of responding inadequately to sexual harassment, such express policies are rare at best. They do, though, arguably exist. For example, a high school student in Gwinnett County, Georgia, reported being sexually assaulted on campus, and five days later, her school suspended her for violating a student code of conduct rule prohibiting oral sex. *See* Doe v. Gwinnett Cnty. Sch. Dist., No. 18-CV-05278, 2021 WL 4531082, at *3 & n.12 (N.D. Ga. Sept. 1, 2021). As construed by the court, this rule did "not necessarily require a finding . . . that the sexual act was consensual." *Id.* at *8. The rule therefore arguably represents an express policy that requires inadequate, even harmful responses to sexual harassment. However, the school's failure to do anything more than punish the survivor of the assault could also constitute a final policy because the disciplinary action is not reviewable. *See id.*; Goss v. Lopez, 419 U.S. 565, 581 (1975); *infra* note 317 and accompanying text; *see also* Riddick v. Sch. Bd., 238 F.3d 518, 523-24 (4th Cir. 2000) (explaining that a plaintiff can establish that a response to sexual harassment amounts to final policy if the decision was not reviewable by municipal policymakers). In addition, schools could theoretically fail to train employees on how to appropriately respond to sexual harassment. Still, the Department of Education's requirement that schools train staff at least superficially on responding to sexual harassment, perhaps paradoxically, undermines such claims because even superficial training would demonstrate that a school did not fail to train staff on sexual harassment policies and procedures. *See* U.S. DEP'T OF EDUC., OFF. FOR C.R., QUESTIONS AND ANSWERS ON THE TITLE IX REGULATIONS ON SEXUAL HARASSMENT 8 (2022), https://perma.cc/B8MP-MZ72.

314. *See Riddick*, 238 F.3d at 523-24 ("When a municipal official's discretionary action 'is subject to review by the municipality's authorized policymakers, they have retained the authority to measure the official's conduct for conformance with their policies.'" (quoting St. Louis v. Praprotnik, 485 U.S. 112, 127 (1988))).

315. *See, e.g.*, *Stiles*, 819 F.3d at 841; *supra* Part I.B.2.

based on responses that are reviewable,[316] such as disciplinary decisions involving suspensions and expulsions.[317] Rather, students ordinarily bring claims based on schools' failure to respond to sexual harassment in any meaningful way, or any way at all.[318] Because schools' failures to respond to sexual harassment are not reviewable by a school board, those decisions constitute final policymaking decisions.[319]

Further and importantly, the proposals outlined here generally reject school exclusion of any kind as an inadequate, poorly tailored response to sexual harassment.[320] Accordingly, when a student challenges their school's deliberate indifference to sexual harassment, a school that simply excludes the harasser would not be able to show that it reasonably tailored its response.[321] A student whose school excludes their harasser could thus nonetheless state a viable claim for deliberate indifference.[322]

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316. *Cf. Stiles*, 819 F.3d at 841 (bringing an equal protection claim for deliberate indifference based on, among other things, a school's occasional failure to respond to reports of sexual harassment).

317. *See Goss*, 419 U.S. at 581 (holding that once a decision to suspend or expel a student has been made, "due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story"). Under *Goss*, ten-day out-of-school suspensions are the threshold for reviewable disciplinary decisions. *Id.*

318. *See, e.g.*, *Stiles*, 819 F.3d at 841 (describing D.S.'s claim that the school failed to respond adequately or, at times, at all to his sexual harassment).

319. *See* Riddick v. Sch. Bd., 238 F.3d 518, 523-24 (4th Cir. 2000).

320. *See supra* Part III.B.1.

321. *See supra* Part III.B.1.

322. Establishing that a school's response to sexual harassment by a teacher or other school employee is a final policymaking decision is more complicated. If the primary response to such sexual harassment involves a school-level administrator disciplining the staff member, including by removing the staff member from their job, then those decisions can be reviewed by school district administrators or, in the case of unionized school districts, by the union. *See Riddick*, 238 F.3d at 523-24; Mike Antonucci, *Analysis: When Unions Don't Protect Teachers' Jobs*, THE 74 (Sept. 6, 2017), https://perma.cc/6SWM-RYZL ("[Under union contracts,] the teacher receives tenure—or, as the unions prefer to say, due process protection. [Consequently, school districts] dismissing or reprimanding a tenured teacher must follow prescribed procedures set out in collective bargaining agreements . . . ."). To the extent that principals have sole authority to discipline employees, though, then they would arguably qualify as final policymakers. *See Riddick*, 238 F.3d at 523-24. Even when principals do not, the impact of their potential non-final-policymaker status has a relatively small impact on students' ability to bring Section 1983 claims against schools for sexual harassment, simply because the vast majority of sexual harassment in school happens between students. In a recent study, 11.7% of student participants reported experiencing some form of educator sexual misconduct. Jeglic et al., *supra* note 86, at 196. While that percentage is unconscionably high, it pales in comparison to the 48% of students who suffer sexual harassment by other students. CATHERINE HILL & HOLLY KEARL, AM. ASS'N U. WOMEN, CROSSING THE

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C. Alternative Case Outcomes

If courts incorporated this reconceived framework into their evaluation of students' equal protection claims against schools for deliberate indifference to sexual harassment, case outcomes would change. Courts would be bound to find equal protection violations and would have to hold schools to account under Section 1983. Section 1983's remedial and deterrent goals would therefore be better achieved.[323]

Under this framework, courts would demand that schools respond to sexual harassment when the schools should have known of its occurrence.[324] If the schools did, then a student like M.D., who was sexually assaulted by high-school basketball players in the locker room at school and on the bus during a basketball trip, could hold the school responsible for not doing anything about the assaults they should have known about.[325] The school should have known about the assaults because, among other things, school staff were required to be present in the locker room but were not.[326] Under a constructive-notice standard, then, M.D. could hold the school responsible for doing nothing in response to his sexual assaults.[327]

In addition, by excising the Title IX framework from their evaluation of students' equal protection claims for schools' deliberate indifference to sexual harassment, courts could stop imposing a threshold severity requirement on that harassment.[328] If courts were to abandon the application of Title IX's severity standard, then they could require schools to address sexual harassment whenever it occurs.[329] For example, when students experience repeated sexual

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LINE: SEXUAL HARASSMENT AT SCHOOL 17 (2011), https://perma.cc/AT77-NE24 (finding that 48% of students surveyed encountered some form of harassment in 2010-2011). It could be that the rate of adult-perpetrated sexual harassment is closer to that of peer sexual harassment than these two studies suggest, because the adult study included grades K-12 while the peer study included only grades 7-12; nonetheless, the large gulf between the two percentages suggests that even including elementary schools in a study of peer sexual harassment rates would not close the gap. *See id.* at 2; Jeglic et al., *supra* note 86, at 194.

323. *See* Leong, *supra* note 19, at 388, 392; *supra* notes 238-53 and accompanying text.

324. *See* Bd. of Cnty. Comm'rs v. Brown, 520 U.S. 397, 412-13 (1997) (applying the deliberate-indifference test based on whether, in light of a police officer's background, the hiring officer "should have concluded" that the use of excessive force by that police officer was a "plainly obvious" consequence of hiring him).

325. *See* Davis v. Carmel Clay Schs., 570 F. App'x 602, 603-04, 606 (7th Cir. 2014).

326. *See id.* at 606.

327. *See id.* at 606-07.

328. *See supra* Part I.B.3 (describing how courts impose Title IX's severity requirement on students' equal protection claims).

329. *See supra* Part I.B.3 (explaining that when courts import Title IX's severity requirement into equal protection claims for indifference to sexual harassment, schools do not have

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harassment that causes "considerable anxiety," courts could not dismiss it as insufficiently severe to qualify for the safeguards afforded by the Equal Protection Clause.[330]

With this reconceived deliberate-indifference standard, courts could hold schools to account for their failure to respond in ways reasonably tailored to protecting against sexual harassment. When schools respond to student sexual harassment by blaming the survivor or by inconsistently responding to repeated offenses, as D.S.'s middle school did in *Stiles ex rel. D.S. v. Grainger County*, then the schools would be liable under Section 1983 for violating the Equal Protection Clause.[331] D.S.'s school, for instance, would be liable because blaming the survivor does nothing to protect against harassment, let alone to address its systemic nature.[332] In addition, doing nothing in response to student sexual harassment not only fails to protect against it, but also arguably invites more of it.[333] With these changes, schools would be required to respond meaningfully to sexual harassment and be held liable if they did not.[334]

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an obligation to respond to sexual harassment that does not meet that severity requirement).

330. *See, e.g.*, R.S. *ex rel.* S.S. v. Bd. of Educ., 371 F. App'x 231, 233-234 (2d Cir. 2010).

331. *See* 819 F.3d 834, 843-44 (6th Cir. 2016).

332. *See id.*; Shana L. Maier, *Sexual Assault Nurse Examiners' Perceptions of the Revictimization of Rape Victims*, 27 J. INTERPERSONAL VIOLENCE 287, 289-90 (2012) (noting that victim-blaming is a harmful response to sexual harassment and constitutes a revictimization of survivors of sexual trauma).

333. *See* Espelage et al., *supra* note 296, at 1362. In this 2022 research review, the authors found that bullying precedes and leads to sexual harassment and violence. *See id.* Because social dominance-seeking lies at the heart of this harassing behavior, the authors argued that "educators must first become aware of such dominance behaviors and disincentivize them in their own contexts." *Id.* at 1365.

334. For examples and characteristics of effective responses, see *id.* at 1363-64. Even with these changes, students would still, of course, have available Title IX claims through Title IX's private right of action, *Davis*, 526 U.S. at 643, as well as the ability to enforce their rights through Title IX's public-enforcement scheme, 34 C.F.R. § 106.45. Given the burdens courts currently place on students bringing private Title IX claims, though, these claims can hardly be called adequate for addressing the harms wrought by sexual harassment. *See, e.g.*, Suski, *supra* note 9, at 2260 (arguing that "courts' evaluations of the deliberate-indifference standard in K-12 public school students' Title IX claims drastically circumscribe the standard's meaning" and "allow the K-12 public schools to mete out the very kinds of harms the standard can protect against"); Suski, *supra* note 10, at 1151 (contending that, with Title IX's stringent actual notice requirement, "courts demand that students do what they often cannot in order to access Title IX's protections"). The newly promulgated Title IX regulations that govern
Title IX's public system of enforcement, while arguably an improvement in at least some respects over prior versions, still have their deficiencies. *See* 34 C.F.R. § 106.45. For example, they do not provide any monetary damages to compensate survivors of sexual harassment for their injuries. *See id.* As such, they also are an inadequate remedy for survivors of sexual harassment.

D. Reformist Reforms, Other Understandable Critiques, and Replies to Them

Although this reconceived framework for assessing Section 1983 equal protection claims for schools' deliberate indifference to sexual harassment is relatively modest, it admits to understandable critiques. These critiques fall into three broad categories. First, its modesty could itself be faulted as merely a reformist reform.[335] Second, this framework could be critiqued for its negative externalities. Third, one could question the effectiveness or even necessity of this framework.

1. Reformist reforms

As Amna Akbar has forcefully written, "[t]he primary concern [with reformism as compared to revolution] is that to focus on reformism is to orient action toward entrenching, rather than overthrowing or substituting, a fundamentally corrupt system, institution, or set of relations."[336] Reformism, Akbar points out, "does not try to remake power, politics, or the state, but it engages with power, politics, and the state as it is constituted."[337] Because the recommendations embodied in the proposed framework do not seek to undo the power structures inherent in the public schools that frequently do little, if anything, to address student sexual harassment, they could be critiqued as mere reformist reforms.[338]

Unquestionably, this project does not seek to undo the public-school system or the power structures embedded in it.[339] Rather, the project's goals are more immediate.[340] It seeks to provide a means to prompt schools to

335. *See infra* Part III.D.1.

336. Akbar, *supra* note 268, at 2518-19.

337. *Id.* at 2520.

338. *See id.* at 2518-19.

339. *See generally supra* Parts III.A-.B (describing the proposed use of a constructive-notice standard and reconceived deliberate-indifference standard that departs from the Title IX standards for evaluating students' equal protection claims).

340. Non-reformist reformation, or revolution, is almost inevitably a long-term project. As Akbar notes, most non-reformist reformations have yet to succeed. For example, despite the strong swell of support for non-reformist police reforms following George Floyd's murder—some of which have passed the United States House of Representatives—such reforms have stalled in the Senate and ultimately failed. Akbar, *supra* note 268, at 2520-22. Akbar also calls for larger, time-intensive reforms that "center collective, democratic mass organization that prepare the poor, working-class, Black, and brown people—now dominated classes—to govern." *Id.* at 2571. Even if one were to work long-term to disassemble the public-school power structures, including by use of such mass organizations, students who suffer sexual harassment in school during and after such reform would still have an immediate need for rights, recourse, and remedies.

protect students now. Instead of taking a position on whether the power structures inherent in the current public education system should be undone, this project addresses the needs of students who currently suffer sexual harassment in school with little to no protection under the Equal Protection Clause even though it could—and should—protect them.[341] This endeavor thus intentionally focuses on the urgent, immediate needs of students in schools.

2. The negative externalities from increasing school liability

Even if the reformist critique can be set aside, this proposal can still be critiqued for its negative externalities. The first such externality centers on schools' potentially increased use of exclusionary school discipline, meaning suspensions and expulsions. In general, schools' use of such discipline has numerous repercussions for students, including the now-infamous school-to-prison pipeline.[342] In addition, schools' use of exclusionary disciplinary tactics disproportionately punishes Black and brown students.[343] This proposal, though, would not contribute to the use of such discipline and disproportionality because its reforms demand an inquiry into whether schools have taken steps to address and prevent the harassment. Indeed, exclusionary school discipline does not address or prevent the harassment; it only—at best—forestalls it until the end of the school disciplinary period.[344] As

341. *See supra* Parts II.D, III.A-.B.

342. For an in-depth discussion of exclusionary discipline repercussions and the school-to-prison pipeline, see *School-to-Prison Pipeline*, ACLU, https://perma.cc/QDR8-TKSH (archived Dec. 19, 2024) ("[The school-to-prison pipeline is] a disturbing national trend wherein youth are funneled out of public schools and into the juvenile and criminal legal systems. . . . [S]chools have embraced *zero-tolerance policies* that automatically impose severe punishment regardless of circumstances. Under these policies, students have been *expelled* for bringing nail clippers or scissors to school.").

343. *See, e.g.*, *School-to-Prison Pipeline Statistics*, AM. BAR ASS'N (July 11, 2023), https://perma.cc/2XR9-3H65 ("2.7 million K-12 students received one or more out-of-school suspensions during the 2015-2016 school year. This number revealed a disproportionate impact on Black or African American students. While this demographic made up just 8% of both the male and female students, they represented 25% and 14% of their respective gender's out-of-school suspensions."); *see also* DANIEL J. LOSEN & PAUL MARTINEZ, LOST OPPORTUNITIES: HOW DISPARATE SCHOOL DISCIPLINE CONTINUES TO DRIVE DIFFERENCES IN THE OPPORTUNITY TO LEARN, at vi (2020), https://perma.cc/BET2-39MJ (finding that among secondary-school students, "Black students lost 103 days per 100 students enrolled" due to out-of-school suspensions, "which is 82 more days than the 21 days their White peers lost").

344. *See supra* Part III.B.1; LICALSI ET AL., *supra* note 304, at 5; *see also* Brenda Alvarez, *School Suspensions Do More Harm than Good*, NEATODAY (Sept. 10, 2021), https://perma.cc/ZEP7-NXGE ("The American Institutes for Research recently released a study that shows in-school and out-of-school suspensions are ineffective methods for dealing with student misbehavior in middle and high schools. . . . [This finding] underscore[s]

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such, the use of such discipline would not help a school avoid liability under this framework.

The second potential negative externality produced by these proposals is that they could subject schools to liability for failing to respond to relatively minor sexual harassment. The standards proposed here, however, account for the severity of the harassment by demanding that courts consider the proportionality of a school's response in determining whether it is reasonably tailored to protect against sexual harassment.[345] Accordingly, if a school could show that it took some steps proportional to protecting against relatively minor harassment, it would not be deliberately indifferent to and so liable for the harassment.[346]

The third externality concerns whether increasing school liability would cause schools to devote a substantial amount of their limited resources to one student in the form of a damages award. This critique warrants pause. Schools generally have limited resources, and low-income schools even more so.[347] In addition, low-income schools' particularly limited resources might leave them more vulnerable to Section 1983 liability under this proposal, because they cannot afford the staff or interventions necessary to address sexual harassment.[348] For these reasons, one could reasonably question the value in channeling schools' resources to a single student, even when the schools have committed such egregious failures as violating students' constitutional rights.[349] The vast majority of school districts, however, anticipate this very problem and protect against it by enrolling in liability-insurance policies.[350]

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that suspending students does little to reduce future misbehavior for the disciplined students or their peers . . . .").

345. *See supra* Part III.B.

346. *See supra* Part III.B. As a practical matter, cases of minimal sexual harassment would most likely rarely be brought because they would not incur much in the way of damages and so would not be cost-effective to litigate.

347. SYLVIA ALLEGRETTO, EMMA GARCÍA & ELAINE WEISS, PUBLIC EDUCATION FUNDING IN THE U.S. NEEDS AN OVERHAUL: HOW A LARGER FEDERAL ROLE WOULD BOOST EQUITY AND SHIELD CHILDREN FROM DISINVESTMENT DURING DOWNTURNS 1, 2, 8 (2022), https://perma.cc/FMZ5-YJ59 ("Education funding generally is inadequate and inequitable . . . . Spending is not nearly enough, on average, to provide students with an adequate education.").

348. *See id.* at 8, 19.

349. *See supra* Part III.C.

350. The National School Boards Association not only recommends that schools have liability insurance, but it also has developed guidance on it for schools. NAT'L SCH. BDS. ASS'N, FOSTERING SAFER SCHOOLS: A LEGAL GUIDE FOR SCHOOL BOARD MEMBERS ON SCHOOL SAFETY 22-23 (2022), https://perma.cc/G88N-DTW3. What is more, that guidance specifically discusses insurance needed for Section 1983 liability. *Id.* at 22; *see also* Julie Blair, *Liability Insurance's Skyrocketing Costs Confound Districts*, EDUC. WK. (Feb. 6, 2002), https://perma.cc/HQ47-LMQJ (noting that most school districts have

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Potential damages awards would thus be paid through schools' liability insurance, not out of their operating funds.[351] Such awards would not, then, substantially reduce the resources available for schools to educate and support students generally.[352] To be sure, however, insurance premiums may rise if schools face newly increased liability.[353]

3. Questions about effectiveness

As much as schools' use of liability insurance may quell concerns about the impact of liability on students generally, it also raises a question about moral hazard, among other critiques, regarding the effectiveness of these recommendations. That is, the existence of liability-insurance protection could lead schools to disregard even the increased risk of liability for deliberate indifference to sexual harassment, because the insurance insulates them from the consequences of it.[354] Here, though, schools' limited budgets do potentially incentivize guarding against this moral hazard, as insurance premiums tend to go up when insured schools incur liability.[355] Unlike damages awards, those

multiple forms of liability insurance). Even small school districts have liability insurance. *See, e.g.*, Mark Lieberman, *Schools' Insurance Costs Are Soaring—And Climate Change Isn't the Only Reason*, EDUC. WK. (June 27, 2023), https://perma.cc/UHU9-BPMK (reporting that a 900-student school district in Oklahoma has liability insurance, along with school districts across California, West Virginia, Iowa, Louisiana, and Mississippi, among other states, reflecting the extent to which school districts have such insurance).

351. *See* RICK GRAYCAREK & MARGARET HURST, LEGISLATIVE RSCH. COMM'N, PROGRAM REVIEW & INVESTIGATIONS COMM., SCHOOL INSURANCE 14-18 (2007), https://perma.cc/T43Z-CZYR.

352. *See id.*; *infra* note 356 and accompanying text. Because insurers play such a large role in identifying risk and managing it for municipalities, John Rappaport has argued that insurers have a role in regulating police. John Rappaport, *How Private Insurers Regulate Public Police*, 130 HARV. L. REV. 1539, 1544 (2017) ("[An insurer's] contractual relationship with the municipality gives it the means and influence necessary . . . to 'regulate' the municipality it insures. . . . [T]he insurer may possess superior information, such as data that cut across myriad police agencies; deeper and more nimble resources, including 'boots on the ground' and the capacity to develop harm-prevention technologies; market incentives that favor good, but not overzealous, risk-management policies; and the flexibility to develop and prescribe individualized risk-reduction plans. If it uses the loss-prevention tools at its disposal, the insurer can reintroduce, or possibly even enhance, constitutional tort law's deterrent effects.").

353. *See, e.g.*, Blair, *supra* note 350 (reporting that school-district liability-insurance premiums have "skyrocketed" due to an increase in lawsuits involving school districts, among other things).

354. *See* Rappaport, *supra* note 352, at 1543 (defining moral hazard as "the propensity of insurance to reduce the insured's incentive to prevent harm").

355. *See, e.g.*, Blair, *supra* note 350.

premiums would affect schools' operating budgets.[356] Schools therefore would likely be incentivized to mitigate moral hazard and liability to avoid these costs to their operating budgets.[357] While this increased legal exposure would impose some disproportionate financial strain on lower-income school districts, it would nonetheless have a deterrent effect.[358] And even if this deterrent effect falls disproportionately on lower-income school districts, that disproportionality is more tolerable than allowing unchecked sexual harassment in schools.

Additionally, one might argue that disaggregating the deliberate-indifference evaluation such that it considers both the proportionality of a school's response to the severity of the sexual harassment and the mode of sexual harassment might rely too much on evolving social science.[359] The social science unquestionably does evolve, but it does so with respect to understandings about the particularities of sexual harassment, such as why it happens.[360] The basic insight at the heart of the disaggregation proposed here—that sexual harassment happens on an individualized as well as on a more systemic basis—has long been understood and accepted.[361] Requiring schools to act on that insight therefore is not dependent on evolving social science.[362]

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356. *See, e.g.*, GRAYCAREK & HURST, *supra* note 351, at 25 (noting the potential operating-cost savings of self-insured districts as compared to commercially insured school districts, because the costs of insurance come out of schools' operating budgets). Some states subsidize these costs. *See, e.g.*, N.C. DEP'T OF PUB. INSTRUCTION, HIGHLIGHTS OF THE NORTH CAROLINA PUBLIC SCHOOL BUDGET 8 (Mar. 2023), https://perma.cc/H2H-WHWM (noting that the state of North Carolina provided just over $3 million in fiscal year 2022-2023 in support to all school districts across the state for liability insurance). That said, the subsidies are not unlimited and so cannot cover substantial increases. *See id.*

357. *See* GRAYCAREK & HURST, *supra* note 351, at 12-13; *supra* note 356 and accompanying text.

358. *See supra* Part III.D.2; Rappaport, *supra* note 352, at 1554-55 (explaining that insurers can "discourage risky behavior . . . [by using] *differentiated premiums*," which "charg[e] more to riskier customers," sometimes as identified through "loss history").

359. *See supra* Part III.B.

360. *See, e.g.*, Dorothy L. Espelage, Katherine M. Ingram, Jun Sung Hong & Gabriel J. Merrin, *Bullying as a Developmental Precursor to Sexual and Dating Violence Across Adolescence: Decade in Review*, 23 TRAUMA, VIOLENCE, & ABUSE 1358, 1361, 1363-65 (2022) (finding that bullying is a precursor to sexual harassment and so interrupting bullying can prevent sexual harassment).

361. *See, e.g.*, AM. ASS'N OF UNIV. WOMEN EDUC. FOUND., HOSTILE HALLWAYS: THE AAUW SURVEY ON SEXUAL HARASSMENT IN AMERICA'S SCHOOLS 23 (1993), https://perma.cc/2XGM-TQD8 (finding, in 1993, that "[a]mong girls [in grades eight to eleven] who have been sexually harassed: 81% percent report having been harassed by a male acting alone, 57% by a group of males").

362. *See id.*; *see also* HILL & KEARL, *supra* note 321, at 11 (finding that 48% of middle and high school students surveyed reported experiencing sexual harassment in the 2010-2011 school year); Dorothy L. Espelage, Jun Sung Hong, Sarah Rinehart & Namrata Doshi,
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Further, scholars have recently questioned the effectiveness of holding municipalities of any sort liable under Section 1983.[363] In particular, they have explained the often insurmountable challenges in establishing an official policy or custom under *Monell*.[364] Significantly, though, courts have been unusually willing to find that a school official's deliberate indifference to sexual harassment qualifies as a final policymaking decision sufficient to trigger Section 1983.[365] Unlike other Section 1983 claims against municipalities, the proposals here may have more hope of providing students redress for sexual harassment under Section 1983.[366]

Finally, the proposals here could be criticized as unnecessary. As this critique goes, if courts would simply apply more plaintiff-friendly standards in equal protection claims against *individual* school officials, students would achieve needed redress for their sexual harassment. However, if courts heightened the standard only for individual liability under Section 1983—without adopting more rigorous standards in counterpart claims against schools under the Equal Protection Clause—then students would be unlikely to recover significant damages. School teachers and other school staff are typically not deep-pocketed defendants.[367] Focusing liability on them in lieu of

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Understanding Types, Locations, & Perpetrators of Peer-to-Peer Sexual Harassment in U.S. Middle Schools: A Focus on Sex, Racial, and Grade Differences, 71 CHILD & YOUTH SERVS. REV. 174, 177 (2016) (finding that 43% of surveyed students in grades five through eight reported some experience of sexual harassment involving words or gestures within the previous year); Nabozny v. Podlesny, 92 F.3d 446, 451-52 (7th Cir. 1996) (involving systemic sexual harassment in a nearly thirty-year-old case where multiple students sexually harassed the plaintiff consistently across different schools from seventh to tenth grade); Murrell v. Sch. Dist. No. 1, 186 F.3d 1238, 1243-44 (10th Cir. 1999) (involving individualized sexual harassment in a twenty-five-year-old case in which one high school student repeatedly sexually harassed another).

363. *See* Schwartz, *supra* note 88, at 1198-1200, 1236-37; *supra* note 269 and accompanying text.

364. *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694 (1978); Schwartz, *supra* note 88, at 1198, 1236-37 ("Since before the ink on the *Monell* decision was dry, it seems, the decision has been harshly criticized by Justices, judges, and commentators."); *supra* note 269 and accompanying text.

365. *See* Sanches v. Carrollton-Farmers Branch Indep. Sch. Dist., 647 F.3d 156, 170-71 (5th Cir. 2011) (stating that to prevail on a Section 1983 claim, the plaintiff must establish "that her sexual harassment was the result of a policy or practice of the [school] district" yet still concluding that a school official's clearly unreasonable actions would suffice to establish the district's policy or practice of deliberate indifference).

366. *See id.*

367. Tim Walker, *Average Teacher Salary Lower Today Than Ten Years Ago, NEA Report Finds*, NEATODAY (Apr. 26, 2022), https://perma.cc/UR8L-9A5P (finding that average teacher salaries have declined in inflation-adjusted terms); *see also* NAT. EDUC. ASS'N, ESP EARNINGS: EDUCATION SUPPORT PROFESSIONALS' PAY (2024), https://perma.cc/5G4N-MDYF (showing that in 2022, education-support professionals made 10% less, adjusted for inflation, than they did ten years earlier).

schools by applying stricter standards of liability is thus unlikely to compensate victims or deter future sexual harassment by holding schools to account.[368] In addition, individual liability alone would not result in institutional reforms.[369] Focusing only on Section 1983 claims against individuals would fail to meet the compensatory, remedial, and deterrence goals of Section 1983.[370]

Conclusion

The Equal Protection Clause has significant potential to provide students protection against sexual harassment in school. Courts, however, currently forfeit this potential. They do so by applying the oppressive Title IX standards to their evaluation of students' Section 1983 equal protection claims against schools for deliberate indifference to sexual harassment. By importing these exceedingly stringent Title IX standards, the courts produce a rights collapse. Although the Supreme Court has said that the Equal Protection Clause provides students some broader safeguards than Title IX, the lower courts' evaluations erase the distinctions between the claims. This essentially eliminates the Equal Protection Clause as a source of students' rights when their schools fail to adequately respond to sexual harassment. Further, the courts conflate these claims based on analytic neglect and false, unjustified assumptions.

To remedy this squandering of students' rights, courts should adopt a reconceived framework for evaluating students' Section 1983 Equal Protection Clause claims against schools for their deliberate indifference to sexual harassment. Courts should apply a constructive-notice requirement in their evaluations of these claims. In addition, they should incorporate the reimagined version of the deliberate-indifference standard proposed here. This standard would require courts to both (1) evaluate whether schools' responses to sexual harassment were reasonably tailored to address and prevent the harassment, and (2) disaggregate that assessment based on whether the harassment was individually or systemically perpetrated and proportional to

368. Given that teachers make so little money, they likely do not have the resources to remediate the harms of sexual harassment. *See* Walker, *supra* note 367. Nor can they individually effect systemic changes. *See supra* note 363 and accompanying text (explaining the systemic nature of sexual harassment).

369. *See* Leong, *supra* note 19, at 392-93; *supra* note 369 and accompanying text.

370. *See* Leong, *supra* note 19, at 388, 392 (explaining that municipal liability furthers Section 1983's compensatory purposes because "[m]unicipalities often have the means to satisfy judgments when individual defendant government officials cannot" and furthers its deterrence purposes because "entities are in the best position to prevent constitutional violations").

its severity. Finally, courts should adopt a rebuttable presumption of deliberate indifference when students can show that their schools did not tailor their responses to differences in the mode of sexual harassment—or even consider those differences at all. By unyoking the evaluation of students' Equal Protection Clause claims against their schools for deliberate indifference to sexual harassment from Title IX claims, these reforms will work to fulfill the Equal Protection Clause's potential to provide students safeguards from sexual harassment in school where Title IX does not.