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BATTER UP: A LOOK AT THE SUPREME COURT'S LINEUP, INCLUDING THE INTERACTION WITH THE NEW CHIEF UMPIRE ON THE BENCH, AS TITLE IX MARKS ITS FORTIETH ANNIVERSARY

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* This article is dedicated to the memory of my father, F. Roger Heckman, a champion softball pitcher for teams competing in the City of New York. Attorney in New York and Adjunct Professor at Adelphi University, New York. B.A., *cum laude*, St. John's University, New York; J.D., St. John's University School of Law, New York.

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We don't accomplish anything in this world alone, and whatever happens is the result of the whole tapestry of one's life and all the weavings of individual threads from one to another that creates something.
- SANDRA DAY O'CONNOR

I. INTRODUCTION

A number of federal civil rights laws were enacted during the latter part of the Twentieth Century to prevent sex discrimination, including Title IX of the Education Amendments of 1972[1] (Title IX), which prohibits such discrimination in educational program and activities that receive federal funds. The statute mandates that, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ."[2] Thus, in exchange for the receipt of federal funding, an educational institution agrees not to engage in discriminatory activities as proscribed by the statute, regulations, and case law.[3]

One of the most contentious areas during Title IX's history has been its application to athletics programs, specifically involving intercollegiate and interscholastic athletic programs.[4] Historically, athletic departments were

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1. Discrimination Based on Sex or Blindness, 20 U.S.C. §§ 1681–1688 (2011). Title IX is also referred to as the "Patsy Takemoto Mink Equal Opportunity in Education Act," due to a 2002 resolution, signed by President George W. Bush. *See* H.R.J. Res. 113, 107th Cong. (2002) (honoring the former member of the House of Representatives from Hawaii).

2. *Id.* § 1681(a).

3. 34 C.F.R. § 106.4 (2011) (requiring an assurance of compliance, which was triggered in the Supreme Court's decision in *Grove City Coll. v. Bell*, 465 U.S. 555 (1984)). *See* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 286 (1998) (describing the interaction as amounting "essentially to a contract"). *See also* Diane Heckman, *Is Notice Required in a Title IX Athletics Action Not Involving Sexual Harassment?*, 14 MARQ. SPORTS L. REV. 175 (2003) [hereinafter Heckman, *Is Notice Required?*] (focusing on whether the *Gebser* pre-litigation notice is required in routine athletics' gender equity cases—devoid of any sexual harassment claims, and arguing that it would constitute the official policy of the particular educational institutions and thus fall within the Court's exception. The article first concentrates on purported sexual harassing actions taken by educational employees, including athletic employees. It then addresses the traditional workings of academic athletic departments and post-*Gebser* case law, while also mentioning Title IX's "contractual nature"). *See infra* text accompanying notes 166–67 (indicating then Judge John G. Roberts' description of this as a "bargain.").

4. Diane Heckman, *New Rules for the Game Mark the 35th Anniversary of Title IX Involving Athletic Programs*, 234 EDUC. L. REP. 515, 516 (2008) [hereinafter Heckman, *New Rules for the Game*]. *See* Diane Heckman, *The Glass Sneaker: Thirty Years of Victories and Defeats Involving Title IX and Sex Discrimination in Athletics*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 551 (2003) [hereinafter Heckman, *The Glass Sneaker*] (the article starts out with the wonderful quote from renowned author, Pearl S. Buck, "The basic discovery about any people is the discovery of the relationship between its men and its women." *Id.* at 551. It then explores the statute concerning physical education classes, interscholastic and intercollegiate student-athletes, athletic scholarships,

segregated based on the sex of the students. Even though the statutory language was devoid of any mention of either sports or athletics, the 1975 Title IX regulations would cover "athletics,"[5] and allow for separate male and female teams in certain situations,[6] and require "equal opportunity" when separate athletic programs were provided for male and female student-athletes.[7]

This Article looks at the Supreme Court's interaction with Title IX over its forty-year history, including the activities of the members of the Rehnquist Court and the new Roberts Court. Justice Sandra Day O'Connor, the first female Justice of the Supreme Court, announced her retirement during July 2005. This led to President George W. Bush making his first Supreme Court nomination of circuit court Judge John G. Roberts, Jr., a relatively new member of the District of Columbia Circuit Court, for the prestigious position. A mere two months later, Chief Justice William Rehnquist, who had been in poor health, died. This resulted in President Bush altering the nomination of Judge Roberts from the Associate Justice position to that of Chief Justice. The Article focuses on testimony from the U.S. Senate Judiciary Committee's confirmation hearings addressing the nomination of Judge John G. Roberts, Jr. for the position of Chief Justice of the U.S. Supreme Court. The situation was unique in that there has never been such an expansive dialogue concerning a Supreme Court nominee over his or her views concerning this gender equity statute. Due to Title IX's public association with sports, it was fascinating that Judge Roberts, in his opening remarks, chose a sports metaphor in describing his role as a judge to that of an umpire.[8]

During Title IX's tenure, there have been a number of contested items regarding the law's application. Pivotal issues concerned the jurisdictional aspects of Title IX and the remedies that may be afforded to potential litigants

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and athletic employment); Diane Heckman, *On the Eve of Title IX's 25th Anniversary: Sex Discrimination in the Gym and Classroom*, 21 NOVA L. REV. 545 (1997) [hereinafter Heckman, *Sex Discrimination in the Gym*] (this comprehensive article provides a blueprint of the major areas of Title IX's application, including education generally, extracurricular athletic activities, employment and sexual harassment); Diane Heckman, *Scoreboard: A Concise Chronological Twenty-Five Year History of Title IX Involving Interscholastic and Intercollegiate Athletics*,7 SETON HALL J. SPORT L. 391 (1997) [hereinafter Heckman, *Scoreboard*] (accessible article, with mosaic-like entries to glean the history of Title IX); Diane Heckman, *Women & Athletics: A Twenty Year Retrospective on Title IX*, 9 U. MIAMI ENT. & SPORTS L. REV. 1 (1992) [hereinafter Heckman, *Women & Athletics*] (this foundation article still stands up and provides a wealth of information about Title IX).

5. 34 C.F.R. § 106.41.

6. *Id.* § 106.41(b).

7. *Id.* § 106.41(c).

8. *See Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) [hereinafter *Roberts' Confirmation Hearing*]; Heckman, *New Rules for the Game*, *supra* note 4, at 515.

who seek redress for violations of the statute. Justice Roberts was involved with certain landmark Title IX litigation while working as both a government and private attorney.[9] Part II provides an overview of the Title IX issues that the Supreme Court has confronted. It addresses the Rehnquist Court lineup; the substantive Title IX Supreme Court decisions issued; the retirement of the center fielder, Justice O'Connor; and the installation of the new players on the team, Chief Justice Roberts, Associate Justice Samuel A. Alito, Jr. and Associate Justice Sonya Sotomayor—all former Circuit Court of Appeals jurists—and Associate Justice Elena Kagan, the only current member without prior experience as a jurist. Part III investigates the critical issue of what remedies may be available for a Title IX claim. Part IV excavates the bellwether issue of what constitutes the receipt of federal funds to engender oversight of the statute by educational programs and activities. Part V looks at whether athletic associations are governed by this statute. Part VI provides a postscript. The Appendix contains a table summarizing the Supreme Court opinions that targeted Title IX. Woven throughout this presentation is an examination of Judge Roberts' remarks presented during his Senate confirmation hearings.

II. THE JUDICIAL BRANCH: "TAKE ME OUT TO THE BALL GAME"[10]

A. The Rehnquist Lineup

1972 marked Title IX's enactment, as well as the commencement of the judicial career of William Rehnquist, when President Richard M. Nixon nominated him to the Supreme Court as an Associate Justice. In 1986, President Ronald Reagan then selected Justice Rehnquist to be the Chief Justice. The Rehnquist Court featured: Chief Justice Rehnquist, and according to seniority, Associate Justices John Paul Stevens, Sandra Day O'Connor, Antonin Scalia, Anthony M. Kennedy, David H. Souter, Clarence Thomas, Ruth Bader Ginsburg, and Steven Breyer. Despite being on the bench for over thirty years, Chief Justice Rehnquist did not author any of the Title IX majority opinions. The time of the burgeoning awareness of Title IX also coincided with the tenure of Justice O'Connor, the first female Justice on the U.S. Supreme Court (September 22, 1981–January 31, 2006).[11] Justice

9. As an attorney, Mr. Roberts successfully represented the National Collegiate Athletic Association (NCAA) in the Title IX appeal before the Supreme Court in *NCAA v. Smith*, 525 U.S. 459 (1999) (discussed within). *See infra* text accompanying notes 166–67, concerning the nominee's description of the case.

10. JACK NORWORTH & ALBERT VON TILZER, *Take Me Out to the Ball Game* (1908).

11. O'Connor became an Associate Justice of the Supreme Court coinciding with the 1981 term through January 2006, when her successor was sworn in as a member of the Court.

O'Connor authored the most Title IX opinions rendered by the Court—three[12] of the eight Title IX challenges[13]—and from a Title IX perspective, was literally the keeper of the flame. Justice Ruth Bader Ginsburg (August 3, 1993–present) authored one opinion.[14] Thus, the two female jurists accounted for fifty percent of the governing Title IX opinions.[15] President George H.W. Bush nominated Clarence Thomas to fill the vacancy caused by the retirement of Justice Thurgood Marshall. Justice Thomas was a former head of the Office for Civil Rights (OCR), a division within the U.S. Department of Education that handles oversight of a number of civil rights statutes that impact upon education, including administratively overseeing Title IX sex discrimination concerns. His nomination to the Court would be stung by claims of purported inappropriate actions toward a female employee during his government employment.[16]

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12. *See* Jackson v. Birmingham Bd. of Educ., 544 U.S. 167 (2005); Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629 (1999) (examining Title IX peer sexual harassment); *Gebser*, 524 U.S. 274 (examining Title IX teacher-student sexual harassment).

13. *See Jackson*, 544 U.S. 167; *Davis*, 526 U.S. 629; *Gebser*, 524 U.S. 274. *See also Smith*, 525 U.S. 459; Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60 (1992); *Grove City Coll.*, 465 U.S. 555 (1984); N. Haven Bd. of Educ. v. Bell, 456 U.S. 512 (1982); Cannon v. Univ. of Chi., 441 U.S. 677 (1979). *See infra* Appendix Table 1. Summary of Pre-Roberts Court's Title IX decisions.

14. *Smith*, 525 U.S. 459. *See* Toni J. Ellington *et al*., *Justice Ruth Bader Ginsburg and Gender Discrimination*, 20 U. HAW. L. REV. 699 (1998).

15. Diane Heckman, *Title IX Marks Its 35th Anniversary by Opening the Doors to Single-Sex Public Elementary and Secondary Schools*, 237 EDUC. L. REP. 1, 3 (2008).

16. *See Confirmation Hearings on the Nomination of Clarence Thomas to be an Associate Justice of the Supreme Court: Hearing Before the S. Comm. on the Judiciary*, 102nd Cong. 36–40 (1991) (testimony of Anita Hill); KEVIN MERIDA & MICHAEL A. FLETCHER, SUPREME DISCOMFORT: THE DIVIDED SOUL OF CLARENCE THOMAS (2007) [hereinafter SUPREME DISCOMFORT]; Adam Cohen, *The Next Big Thing in Law? The Harsh Jurisprudence of Justice Thomas*, N.Y. TIMES, June 3, 2007, § 4, at 13.

> In the last 100 Supreme Court arguments, Clarence Thomas has not uttered a word. . . . They offer a wealth of insight, but they have no answer to the central enigma he poses: why the justice who has faced the greatest hardships regularly rules for the powerful over the weak, and has a legal philosophy notable for its indifference to suffering.

Id. (referring to SUPREME DISCOMFORT, the 2007 biography on Justice Thomas). *See also* JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT (2007) (focusing principally on the actions of the Rehnquist Court) ("Thomas's confirmation hearings, of course, turned into a . . . carnival of accusation and counterclaim between the nominee and his one-time aide Anita Hill." *Id.* at 21.

> Hill had been a young lawyer on Thomas's staff, first at the Department of Education and then at the Equal Employment Opportunity Commission. During those years, she had confided to friends that her boss had made a series of bizarre sexual comments and overtures to her. . . . Thomas rejected Hill's allegations of mistreatment, but otherwise refused to answer any questions about his relationship with Hill or his personal life.

Id. at 27).

Chief Justice Rehnquist ushered in the Rehnquist Revolution, finding that a number of congressional statutes were unconstitutional acts of usurpation by the legislative branch, by transgressing initially the Commerce Clause,[17] followed by infringement of the Eleventh Amendment to the U.S. Constitution.[18] This amendment embedded the principle of federalism, and specifically, the rights of the states to be free from having to defend themselves in federal courts concerning allegations of violating federal statutes in a lawsuit brought by citizens. Whether an individual can sue a state or arm of a state in federal court, without transgressing the Eleventh Amendment, is an issue that has come to the forefront in all federal civil-rights-based litigation.[19] This would include Title IX, as the statute can apply to state colleges and universities, as well as public elementary and secondary schools—leaving these educational institutions potentially targeted. Thus, "[t]he stance by the recent two Supreme Court nominees on the power of Congress . . . vis-à-vis the Eleventh Amendment was a topic of intense interest by the Senators on the Judiciary Committee, who interviewed then Judges . . . Roberts and . . . Alito."[20]

After switching the original nomination of Judge Roberts to fill Justice O'Connor's seat to that of Chief Justice, President Bush then nominated Judge Alito, from the Third Circuit Court of Appeals, for her position. This occurred during the end of 2005, after President Bush's counsel, Harriet E. Miers, withdrew her name from consideration for the position. Justice Alito was sworn in on January 31, 2006, and attended President Bush's 2006 State of the Union address that evening at the Capitol building. When the senators on the Judiciary Committee questioned then-Judge Alito, their concerns with him did

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17. U.S. CONST. art. I, § 8, cl. 3 ("To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").

18. U.S. CONST. amend. XI. See Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (Supreme Court, in a divided opinion, found the Age Discrimination in Employment Act, 29 U.S.C. §§ 621–34, did not abrogate the Eleventh Amendment immunity to allow state employees to commence private lawsuits in federal courts seeking remedies against certain state entities, including the Alabama State University and Florida State University, based on the federal law); United States v. Lopez, 514 U.S. 549, 567–68 (1995).

19. *See generally* Diane Heckman, *The Impact of the Eleventh Amendment on the Civil Rights of Disabled Educational Employees, Students and Student-Athletes*, 227 EDUC. L. REP. 19 (2008) [hereinafter Heckman, *The Impact of the Eleventh Amendment*]. While a case-by-case inquiry must be made in general, state universities are deemed "arms of the State" to come under the Eleventh Amendment definition; whereas K–12 public schools are not deemed "arms of the State." *Id.* at 29–33 (discussing whether defendants would be cocooned).

20. *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 388–89 (2006) [hereinafter *Alito's Confirmation Hearing*]. *See infra* text accompanying note 161 (presenting a portion of the transcript); Heckman, *The Impact of the Eleventh Amendment*, *supra* note 19, at 26. *See also Roberts' Confirmation Hearing*, *supra* note 8.

not target Title IX case law.[21] There were no changes to the composition of the members of the Judiciary Committee, who conducted the January 2006 Alito Confirmation Hearing, since its earlier inquest of Judge Roberts.

Title IX allows litigants to bring private causes of action against public educational institutions. Although Title IX was purportedly enacted pursuant to the Spending Powers,[22] on October 21, 1986, Congress enacted the Civil Rights Remedies Equalization Act (Equalization Act), which specifically directs, "[a] State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of . . . [T]itle IX of the Education Amendments of 1972 . . . ." [23] The Equalization Act has presently provided armor to protect Title IX from judicial cannibalism concerning the Eleventh Amendment.[24] Thus, Title IX has not been hampered from a Supreme Court ruling insulating public schools,[25] with the Court substantively interpreting the statute in three recent post-*Seminole Tribe* cases,[26] with one passing reference to the Eleventh Amendment.[27] Albeit, all of the Title IX cases were brought against public school districts,

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21. *Id.*; Adam Liptak, *The Roberts Court: The Most Conservative Court in Decades*, N.Y. TIMES, July 25, 2010, at 1, 18 (indicating "But only one change—Justice Alito's replacement of Justice O'Connor—really mattered. That move defines the Roberts court.") [hereinafter Liptak, *The Most Conservative Court in Decades*]. *See infra* text accompanying notes 161–62.

22. *See* Heckman, *Is Notice Required?*, *supra* note 3, at 192 (referencing *Gebser*, 524 U.S. at 287). *See Franklin*, 503 U.S. at 75 (1992) ("Moreover, the notion that Spending Clause statutes do not authorize monetary awards for intentional violations is belied by the unanimous holding in *Darrone*." (referring to Consolidated Rail Corp. v. Darrone, 465 U.S. 624 (1984))). The accompanying footnote alerted, "Because 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." *Id.* at 75 n.8).

23. 42 U.S.C. § 2000d-7(a)(1) (2011).

24. Albeit, the Supreme Court has determined that this express provision within or attached to a specific piece of federal legislation will no longer solely equate with constituting a satisfactory legal abrogation. The federal statute must now have an appropriate Fourteenth Amendment nexus. *See* Heckman, *The Impact of the Eleventh Amendment*, *supra* note 19, at 27.

25. Earlier, in *Lipsett v. University of Puerto Rico*, the Puerto Rico district court ruled that the state university was insulated from a Title IX monetary damages claim in a sexual harassment case brought by a female medical student and employee, but not from her claim for injunctive relief. 745 F. Supp. 793 (D.P.R. 1990), *rev'd,* 864 F.2d 881, 899 (1st Cir. 1988). *See also* Litman v. George Mason Univ., 186 F.3d 544, 552 (4th Cir. 1999) (proffering, "As a general proposition, therefore, when Congress acts pursuant to its spending power, there is no categorical prohibition against its attaching conditions to grants made to the states."), *cert. denied*, 528 U.S. 1181 (2000); Franks v. Ky. Sch. for the Deaf, 142 F.3d 360 (6th Cir. 1998) (concerning a sexual harassment claim brought by female student). *See* Diane Heckman, *Title IX Tapestry: Threshold and Procedural Issues*, 153 EDUC. L. REP. 849, 856–57 n.61, 858–59 (2001) [hereinafter Heckman, *Title IX Tapestry*] (listing and discussing other cases).

26. *See Jackson*, 544 U.S. 167; *Davis*, 526 U.S. 629; *Gebser*, 524 U.S. 274.

27. *See Gebser*, 524 U.S. at 284.

traditionally not deemed arms of the state for Eleventh Amendment application, as opposed to state universities. The federal courts are allowing such federal litigation to take place for those seeking Title IX redress (including monetary damages)—finding that the receipt of the federal funds provides the implicit waiver of the Eleventh Amendment sovereign immunity protection.[28] In *Franklin v. Gwinnett County Public Schools*, the Supreme Court, in allowing for all traditional remedies when pursuing a Title IX cause of action, stated:

> Our reading of the two amendments to Title IX enacted after *Cannon* leads us to conclude that Congress did not intend to limit the remedies available in a suit brought under Title IX. In the Rehabilitation Act Amendments of 1986, . . . 42 U.S.C. §2000d-7, Congress abrogated the States' Eleventh Amendment immunity under Title IX, Title VI, § 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975. . . . In addition to the Rehabilitation Act Amendments of 1986, Congress also enacted the Civil Rights Restoration Act of 1987, Pub. L. 100-259, 102 Stat. 28 [(1988)]. Without in any way altering the existing rights of action and the corresponding remedies permissible under Title IX, Title VI, § 504 of the Rehabilitation Act, and the Age Discrimination Act, Congress broadened the coverage of these antidiscrimination provisions in this legislation.[29]

Presently, no defendants have successfully asserted the Eleventh Amendment to shield them from Title IX lawsuits. Currently, "[i]t remains to be seen whether the Roberts Court will maintain the status quo exhibited by his predecessor and mentor, Chief Justice Rehnquist, or move in another direction concerning Congress's legislative authority."[30]

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28. *See, e.g.*, Delgado v. Stegall, 367 F.3d 668 (7th Cir. 2004) (sexual harassment claim by female student against male professor); Pederson v. La. State Univ., 213 F.3d 858 (5th Cir. 2000) (addressing an intercollegiate athletics sports teams offered to female students); *Litman*, 186 F.3d 544 (expelled female student unsuccessfully charged retaliation for advancing unsubstantiated sexual harassment against a male professor; the case discussed Title IX's abrogation of Eleventh Amendment immunity).

29. 503 U.S. at 72–73.

30. Heckman, *The Impact of the Eleventh Amendment*, *supra* note 19, at 26. *See also* William E. Thro, *An Essay: The Roberts Court at Dawn: Clarity, Humility, and the Future of Education Law*, 222 EDUC. L. REP. 491, 491–92 (2007), noting the differences between the Rehnquist Court and the newer Roberts Court, *id.* at 491–92, and opining, "Consequently, the Roberts Court practices judicial restraint. In place of ambiguous decisions that reflect a middle course but provide little guidance, the Roberts Court provides a clarity that provides needed guidance and, ultimately, limits the judicial

B. Title IX Pre-Roberts Supreme Court Decisions

Title IX was enacted on June 23, 1972. In the intervening forty years, the Supreme Court has rendered eight substantive decisions concerning Title IX. Table I of the Appendix contains a summary of each opinion to provide a context for the new Roberts Court.

1. In *Cannon v. University of Chicago*, the Court ruled a student was entitled to assert a private cause of action alleging Title IX. Specifically, a female medical student commenced this lawsuit concerning her expulsion from the medical school, which she alleged was due to her sex.[31] The statute was silent on this significant aspect.[32] This decision set the stage for plaintiffs to pursue relief for purported sex discrimination through the courts, rather than having to rely primarily on administrative hearings handled by the OCR.

2. In *North Haven Board of Education v. Bell*, [33] the Court upheld the

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power of the lower courts." *Id.* at 492. *But see* Parents Involved in Cmty. Schs.. v. Seattle Sch. Dist., 551 U.S. 701 (2007) (Fourteenth Amendment case concerning use of race), where the author recognizes the numerous opinions rendered by the Justices, stating, "there is some confusion regarding what is and is not the Court's ruling." Thro, *supra* note 30, at 493 n.16. The same criticism could be made concerning the Roberts Court's output in *Morse v. Frederick*, with its myriad decisions concerning First Amendment free speech rights of public school students who express verbiage for the illegal use of drugs, which was *de jure* extrapolated from the high school senior's unfurled banner, with the words, "Bong Hits 4 Jesus." 551 U.S. 393 (2007). Thro argues the *Morse* case "does provide a bright-line rule in a small, but important, area." Thro, *supra* note 30, at 497. It remains to be seen whether the *Morse* opinion will result in expanded restriction of students' free speech rights when also speaking out about other illegal activities, without a political or advocacy patina. *See, e.g.*, Ponce v. Socorro Indep. Sch. Dist., 508 F.3d 765 (5th Cir. 2007) (dealing with First Amendment student free speech case involving a putative threat of a Columbine-type of violence at his school, which relied on a concurrence rendered by Justice Alito from the *Morse* case). *See* Diane Heckman, *Just Kidding: K-12 Students, Threats and First Amendment Freedom of Speech Protection*, 259 EDUC. L. REP. 381, 400 (2010) (discussing the *Ponce* case in depth).

31. *Cannon*, 441 U.S. 677. *See* Cobb v. U.S. Dep't of Educ., 487 F. Supp. 2d 1049, 1053 (D. Minn. 2007) (expounding upon the *Cannon* opinion, as to whether Title IX allows a private cause of action against the U.S. Department of Education, and determining that, "In fact, the Supreme Court did acknowledge that private lawsuits against federal funding agencies had previously been allowed under Title VI and explained that such cases 'are . . . consistent, at least, with the widely accepted assumption that Title VI creates a private cause of action.'" This court indicated, "There is no binding precedent deciding whether a private right of action against a federal funding agency exists under Title IX." *Id.* The court ultimately determined "that a private right of action against federal funding agencies exists when the funding agency itself is accused of acting to violate Title IX and foster discrimination." *Id.* at 1054).

32. 20 U.S.C. §§ 1681–88.

33. *N. Haven Bd. of Educ.*, 456 U.S. 512. *See* Diane Heckman, Jackson v. Birmingham Board of Education: *Supreme Court to Review Whether There is a Title IX Cause of Action by an Athletic Department Employee for Retaliation*, 194 EDUC. L. REP. 1, 4–5 (2005) [hereinafter Heckman, Jackson v. Birmingham Board of Education] (The commentary informed, "Whether Title VII trumps Title IX in employment-related sex discrimination cases remains a significant issue owing to the favorable aspects of Title IX compared with Title VII." *Id.* at 5 (referring to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e [hereinafter Title VII]). The article concludes, "To leave a

constitutionality of the Title IX regulations governing employment (Subpart E),[34] brought by a public school board against the Secretary of the U.S. Department of Health, Education and Welfare, the predecessor agency of the U.S. Department of Education, which came into existence in 1980. After the expansive Title IX regulations were enacted in 1975,[35] Congress had an opportunity to reject their adoption, but neglected to do so. In a subsequent opinion, the Court would later comment, "Congress' failure to disapprove the [Title IX] regulations is not dispositive, but, as we recognized in *North Haven* . . ., it strongly implies that the regulations accurately reflect congressional intent."[36] Presently, the Supreme Court has never invalidated any of the Title IX regulations.

3. In *Grove City College v. Bell*,[37] the divided Court imposed a narrow determination adopting that the specific program or activity must receive federal funds in order for Title IX to apply.[38] In this case, there was no evidence of any gender discrimination at this private, independent Pennsylvania college. Instead, the college refused to enter into a written "Assurance of Compliance," as warranted by the regulations.[39] While the college itself received no direct federal funding, some of its students received Basic Education Opportunity Grant (BEOG) awards, federal money that went

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coach unprotected from asserting a Title IX retaliation claim seems antithetical to the purpose and spirit of the law." Heckman, Jackson v. Birmingham Board of Education, *supra*, at 33. The Supreme Court essentially agreed in *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005)).

34. *See* 34 C.F.R. §§ 106.51–106.61.

35. 34 C.F.R. pt. 106 (1975). *See* Heckman, *Women & Athletics*, *supra* note 4, at 12–13.

36. *Grove City Coll.*, 465 U.S. at 568.

37. *Id. at* 555. There were multiple opinions filed, including a separate concurrence issued by Justice Powell, Chief Justice Burger and Justice O'Connor. *Id.* at 576. The latter opinion agreed with the holding, but did so

> reluctantly and [was written] briefly to record my view that the case is an unedifying example of overzealousness on the part of the Federal Government. . . . It was and is the policy of this small college to remain wholly independent of government assistance, recognizing—as this case well illustrates—that with acceptance of such assistance one surrenders a certain measure of the freedom that Americans always have cherished. . . . One would have thought that the Department [of Education], confronted as it is with cases of national importance that involve actual discrimination, would have respected the independence and admirable record of this College.

Id. at 576–77.

The Court rejected the institution-wide coverage argument. *Id.* at 573. *See* Heckman, *Women & Athletics*, *supra* note 4, at 30–31.

38. 20 U.S.C. § 1681.

39. 34 C.F.R. § 106.4. "When Grove City persisted in refusing to execute an Assurance, the Department [of Education] initiated proceedings to declare the College and its students ineligible to receive [Basic Educational Opportunity Grants]." *Grove City Coll.*, 465 U.S. at 561.

toward the students' tuition at the universities and colleges. The Court stated, "[w]e conclude, therefore, that the Department [of Education] may properly condition federal financial assistance on the recipient's assurance that it will conduct the aided program or activity in accordance with Title IX and the applicable regulations."[40] Even though armed with that determination, however, the practical effect of this case was that the Court's ruling extended Title IX's application merely to the college's financial affairs office, which actually received the funding for athletic and academic scholarships and grants as this was the only department within the college that directly received federal funds. There was no trickle out or leakage effect imposed by the country's highest court based on the contention: that simply because an educational institution received federal funds, this would subject the whole school and by implication all of its parts to comply with Title IX dictates. Congress disagreed with this cramped judicial interpretation that had been sanctioned by the Reagan administration. Four years later, President Ronald Reagan vetoed the Civil Rights Restoration Act of 1987 (1988 Amendments) (Restoration Act), intended to repair the damage done by the Court's decision, by utilizing a broad definition for what constituted an educational program or activity. [41] However, on March 22, 1988, Congress legislatively overturned the Court's opinion, after overriding the presidential veto. The Restoration Act would be the only major change to the statute in the intervening forty years. Its impact was significant as it opened the doors for litigants to ensure that extracurricular athletic programs provide equal opportunity, especially for female students and prospective female student-athletes.[42]

4. During 1992, in *Franklin*,[43] the Court sanctioned a damages remedy for

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40. *Id.* at 575.

41. 20 U.S.C. § 1687, Pub. L. 100–259, 102 Stat. 28 (1988) states:

> For the purposes of this title, the term "program or activity" and "program" mean all of the operations of . . . a college, university, or other postsecondary institution, or a public system of higher education; or . . . a local educational agency . . . system of vocational education, or other school system . . . except that such term does not include any operation of an entity which is controlled by a religious organization if the application of section 901 [20 U.S.C. § 1681] to such operation would not be consistent with the religious tenets of such organization.

President Reagan, in a speech given on March 22, 1988, stated, "The Grove City bill would force court-ordered social engineers into every corner of American society. I won't cave to the demagoguery of those who cloak a big government power grab in the mantle of civil rights." EQUAL PLAY: TITLE IX AND SOCIAL CHANGE 102 (Nancy Hogshead-Makar & Andrew Zimbalist eds., 2007) [hereinafter EQUAL PLAY]. The prognostication has failed to materialize in the intervening period.

42. *See* Diane Heckman, *The Explosion of Title IX Legal Activity in Intercollegiate Athletics During 1992–93: Defining the "Equal Opportunity" Standard,* 1994 DETROIT C. L. REV. 953 (1994).

43. *Franklin*, 503 U.S. 60 (Justice White authored the opinion, joined in Justices Blackmun,

a Title IX sexual harassment action involving a "female student . . . against the school board for the action of a male teacher, who was incidentally a coach of one of the boys' [interscholastic athletic] teams."[44] The Court described the school employee as "a sports coach and teacher."[45] The Court, in adopting a broad view of the statute, stated, "[w]e cannot say, therefore, that Congress has limited the remedies available to a complainant in a suit brought under Title IX."[46] The decision was instrumental in utilizing this civil rights statute to ensure eradication of sex discrimination within the schoolhouse doors, especially sexual harassment claims.

5. On June 22, 1998, the Court rendered its opinion in *Gebser v. Lago Vista Independent School District*, involving a female high school freshman student's claim of sexual harassment against a Texas public school district, based on the actions of a fifty-year-old male teacher.[47] The highest court agreed to hear an appeal from the Fifth Circuit concerning what standard, if any, should be applied to determine the Title IX liability of an educational institution involving the alleged harassing actions of a (male) teacher toward a (female) student. The Title IX statute and implementing regulations,[48] as well as the earlier *Franklin* decision, shed no verbiage on what standard should be applied—thus, leading to the use of dissimilar standards by the lower courts, including a strict liability standard, an agency standard, a Title VI standard and a Title VII hostile environment standard—so the issue was clearly ripe for review.[49] The Court determined "that damages may not be recovered in those circumstances unless an official of the school district who at a minimum has authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately indifferent to, the teacher's misconduct."[50]

6. In *NCAA v. Smith*, a female graduate student challenged the practices

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Stevens, O'Connor, Kennedy and Souter. Justice Scalia submitted a concurring opinion, joined in by Chief Justice Rehnquist and Thomas).

44. Heckman, *Is Notice Required?*, *supra* note 3, at 179. *See also* Heckman, *Scoreboard*, *supra* note 4, at 406.

45. *Franklin*, 503 U.S. at 63.

46. *Id.* at 73.

47. *Gebser*, 524 U.S. 274 (5–4) (The majority consisted of Justices O'Connor (author), Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas; the dissent featured Justices Stevens, Souter, Ginsburg, and Breyer). *See* Diane Heckman, *Deconstructing Title IX Sexual Harassment Matters Involving Students and Student-Athletes in the Post*-Davis *Era*, 206 EDUC. L. REP. 469, 471–72 (2006) [hereinafter, Heckman, *Deconstructing Title IX Sexual Harassment*] (discussing the opinion in detail); Heckman, *Is Notice Required?*, *supra* note 3, at 191–96.

48. Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefitting from Federal Financial Assistance, 34 C.F.R. pt. 106 (1997).

49. *See* Heckman, *Is Notice Required?*, *supra* note 3, at 180–81.

50. *Gebser*, 524 U.S. at 277.

of the National Collegiate Athletic Association (NCAA), the most important collegiate athletic association.[51] When an athlete transfers from one school to another, athletic associations generally impose a one-year transfer rule, whereby the athlete would not be able to play for the new school for one year following the transfer. Student-athletes seek to avoid that penalty by seeking waivers of the rule. After a transfer from one college to another, Smith wanted to continue to be eligible to play volleyball. She argued that the NCAA granted more waivers for eligibility for males versus female student-athletes to allow them to validly participate on collegiate athletic teams. The Court found a lack of jurisdiction over the NCAA, as it would not imbue the athletic association's receipt of federal funds, a necessary prima facie element, due to the fact that most—if not all—of its member colleges and universities were recipients of federal funds. The Court essentially eschewed a trickle down effect to bring an entity within Title IX's coverage.

7. In 1999, the Court rendered its fractured decision in *Davis v. Monroe County Board of Education*,[52] finding that Title IX allowed a cause of action against a public school district based on peer sexual harassment.[53]

8. In *Jackson v. Birmingham Board of Education*, the Court condoned the ability of a (male) former coach of a girls' high school interscholastic basketball team to assert his retaliation claim, pursuant to Title IX, for the alleged imposition of an adverse employment action against him for speaking out about claimed inequities faced by the female student-athletes at the Alabama high school where he worked.[54] The coach, who was also a teacher, started receiving negative evaluations for his coaching after expressing his viewpoint as to the inequitable conditions his athletes experienced, and he was ultimately removed as coach. Justice O'Connor noted that the Court agreed to hear this appeal to resolve a disagreement among the circuit courts.[55] The

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51. *Smith*, 525 U.S. 459 (Judge Alito did not participate in the underlying Third Circuit opinion). *See* Heckman, *The Glass Sneaker*, *supra* note 4, at 569–70.

52. *Davis*, 526 U.S. 629 (5–4) (The majority consisted of Justices O'Connor (author), Chief Justice Rehnquist and Justices Scalia, Kennedy and Thomas; the dissent comprised Justices Stevens, Souter, Ginsburg and Breyer). *See* Heckman, *Deconstructing Title IX Sexual Harassment*, *supra* note 47, at 472–74; Diane Heckman, *Tracing the History of Peer Sexual Harassment in Title IX Cases*, 183 EDUC. L. REP. 1, 12–15 (2004) [hereinafter Heckman, *Peer Sexual Harassment*]; Heckman, *Is Notice Required?*, *supra* note 3, at 196.

53. *See* Heckman, *Peer Sexual Harassment*, *supra* note 52, at 12–15.

54. *Jackson*, 544 U.S. 167 (2005) (5–4) (The majority consisted of Justice O'Connor (author), Chief Justice Rehnquist and Justices Scalia, Kennedy and Thomas; the dissent comprised Justices Stevens, Souter, Ginsburg and Breyer). *See* Heckman, Jackson v. Birmingham Board of Education, *supra* note 33.

55. *Jackson*, 544 U.S. at 172–73 (citing Lowrey v. Texas A&M Univ. Sys., 117 F.3d 242 (5th Cir. 1997) and Preston v. Va. *ex rel.* New River Cmty. Coll., 31 F.3d 203 (4th Cir. 1994)). *See* Heckman, Jackson v. Birmingham Board of Education, *supra* note 33, at 9–12, 14 (discussing the

Court underscored that it has allowed Title IX sexual harassment claims despite lack of explicit language[56] and would also allow retaliation claims despite the lack of explicit language in the statute. Parenthetically, the Title IX regulations did refer to retaliation.[57] Specifically, the Court enunciated, "[r]eporting incidents of discrimination is integral to Title IX enforcement and would be discouraged if retaliation against those who report [such retaliation] went unpunished. Indeed, if retaliation were not prohibited, Title IX's enforcement scheme would unravel."[58] Justice O'Connor explained, "Title IX's enforcement scheme also depends on individual reporting because individuals and agencies may not bring suit under the statute unless the recipient has received 'actual notice' of the discrimination."[59] The majority adduced, "[m]oreover, teachers and coaches such as [this coach of the girls' basketball team] are often in the best position to vindicate the rights of their students because they are better able to identify discrimination and bring it to the attention of administrators."[60] The Court held, "[t]he statute is broadly worded; it does not require that the victim of the retaliation also be the victim of the discrimination that is the subject of the original complaint. Where the retaliation occurs because the complainant speaks out about sex discrimination, [the statutory language] 'on the basis of sex' . . . is satisfied."[61]

C. The Legacy of the Center Fielder, Justice Sandra Day O'Connor

In profiling the significance of Justice Sandra Day O'Connor, commentator Jeffrey Toobin ascribed,

> [o]n race, sex, religion, and the power of the federal government, the subjects that produced the enduring controversies, control of the Court generally belonged to the moderate swing justices, first Lewis F. Powell and then

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Lowrey case; also citing Lamb-Bowman v. Del. State Univ., 39 F. App'x 748 (3d Cir. 2002) (unpublished opinion), *cert. denied*, 537 U.S. 1047 (2002); Weaver v. Ohio State Univ., 194 F.3d 1315 (6th Cir. 1999); Musso v. Univ. of Minn., 105 F.3d 409 (8th Cir. 1997). The author opined, "Coaches are pivotal due to the repository of knowledge they possess about the factors involving their student- athletes and how the gender equity offered them compares with that afforded members of other teams within a particular school."), 18–19 (discussing *Preston*); Diane Heckman, Lowrey v. Texas A&M University Systems: *Title IX Vis-a-Vis Title VII Sex Discrimination and Retaliation in Educational Employment*, 124 EDUC. L. REP. 753 (1998).

56. *Jackson*, 544 U.S. at 173.

57. 34 C.F.R. § 106.71.

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

59. *Id.* at 181.

60. *Id.*

61. *Id.* at 179.

> Sandra Day O'Connor, who steered the Court in line with their own cautious instincts—which were remarkably similar to those of the American people.[62]

He summarized the role of Justice O'Connor, noting:

> [t]hese decisions—the legacy of the Rehnquist Court—came about largely because for O'Connor there was little difference between a judicial and a political philosophy. She had an uncanny ear for American public opinion, and she kept her rulings closely tethered to what most people wanted or at least would accept. No one ever pursued centrism and moderation, those passionless creeds, with greater passion than O'Connor. No justice ever succeeded more in putting her stamp on the law.[63]

Justice O'Connor's legacy in the area of Title IX is apparent based on her decisions, ascribing that Title IX will cover sexual harassment actions against the educational institutions, whether the particular offending actors involved school employees or fellow students.[64] She also captured the spirit of the Title IX paradigm by dictating that retaliation actions are a logical and appropriate basis for a lawsuit in order to effectuate the underlying goals of Title IX.[65]

The standards Justice O'Connor authored will have a far-reaching impact on the students in this country. While the jurist allowed for sexual harassment to be a potential subset within the Title IX scheme, she imposed strict standards to meet to be able to go forward. Justice O'Connor predicated the standards principally upon the notice element—unless it is the official policy of the educational institution, in which case notice would not be required. Thus, as to the former situation, if the educational institution has notice of the offensive actions of their employees or students and essentially takes no good faith action to end or ameliorate the situation, then the school can be held responsible. However, if the school does not have notice or knowledge of the situation, it prevents the entity from having the opportunity to take action, and

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62. TOOBIN, *supra* note 16, at 2. He continued, "Few associate justices in history dominated a time so thoroughly or cast as many deciding votes as O'Connor—on important issues ranging from abortion to affirmative action, from executive war powers to the election of a president." *Id.* at 7. *See also* Liptak, *The Most Conservative Court in Decades*, *supra* note 21, at 18 (indicating, "Until she retired in 2006, Justice O'Connor was very often the court's swing vote, and in her later years she had drifted to the center-left.").

63. TOOBIN, *supra* note 16, at 7–8.

64. *See Davis*, 526 U.S. 629; *Gebser*, 524 U.S. 274.

65. *See Jackson*, 544 U.S. 167.

thus, the entity should be shielded from the imposition of civil liability and the diminution of its treasuries for actions by their employees clearly not within the normal course of business.

In the usual employment situation, *respondeat superior* prevails as the legal theory for personal injury actions to hold the employer liable for the actions of their employees undertaken in the normal course of business. Herein, the Court imposed a layer, so that schools would not be vicariously responsible for the odious sexual harassment actions taken by school employees, when the institutions were unaware of the actions. The Court identified that notice is not needed to go forward with a Title IX claim where it is the school's official policy.[66] However, if not, then the potential plaintiff must place the "appropriate person" on notice.[67] The problem engendered by this qualification is what category of individual at the educational institutions will fit this definition in order to withstand a motion to dismiss. By not identifying the permissible categories, the Court essentially ignored the workings of the normal school system where students routinely come in contact with teachers and coaches and not the governing or administrative supervisory personnel. The Court does a disservice if teachers and coaches—operational employees—are not included to satisfy the notice requirement.[68] Regardless, Justice O'Connor began a dialogue with the country in *Gebser*, which she continued in *Davis*, cementing the determination that sexual harassment in schools that receive federal funds will not be tolerated, employing her nuanced notice requirements in both cases.

In *Jackson*, the next installment in her trilogy, Justice O'Connor indicated that if the purpose of Title IX is to protect individuals being discriminated against, it must also protect the ones speaking out about the discriminatory practices. The following syllogism comes to mind: If Title IX protects students, and teachers and coaches speak out about Title IX to protect the students, then the teachers and coaches who speak out should also be protected. Justice O'Connor understood that schools should not be repositories of discrimination for our nation's youth, even though she fashioned a pre-notice requirement. The image of her holding the scales of

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66. *Gebser*, 524 U.S. at 290–91; *see also* Mansourian v. Regents of Univ. of Cal., 602 F.3d 957 (9th Cir. 2010) (case settled during 2012) (applying the "official policy" exception in an equal opportunity athletics-related case); Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170 (10th Cir. 2007) (case settled) (landmark decision, applying the "official policy" exception in a sexual harassment case involving an intercollegiate athletics department).

67. *Gebser*, 524 U.S. at 290–91; *see also Mansourian*, 602 F.3d 957; *Simpson*, 500 F.3d 1170.

68. *See* Heckman, *Deconstructing Title IX Sexual Harassment*, *supra* note 47, at 477 (identifying three categories of educational employees: Tier I – Governing Employees, Tier II – Supervisory (Management) Employees, and Tier III – Operative or Operational Employees), 499 (criticizing the standard applied).

justice comes to mind. In her three Title IX decisions, the rulings or score was 5–4. Without the center fielder on the team, it remains to be seen how the Roberts Court will treat this civil rights statute intended to protect gender equity.[69]

D. The Roberts Court: Introducing the New Chief Umpire

John G. Roberts, Jr. became the seventeenth Chief Justice of the U.S. Supreme Court on October 5, 2005, coinciding with the commencement of the October 2005–2006 term. The Senate Judiciary Committee conducted four days of hearings from September 12–15, 2005, to discuss the background and temperament of Judge Roberts for the elevated position.[70] The jurist's comportment, during the hearing, is the gold standard for any judicial nominee. The Senate Judiciary Committee was composed of the following seventeen men and one woman: Chairman Sen. Arlen Specter (R-Pa.), Minority Chair Patrick J. Leahy (D-Vt.), Sen. Orrin G. Hatch (R-Utah), Sen. Edward M. Kennedy (D-Mass.), Sen. Charles E. Grassley (R-Iowa), Sen. Joseph R. Biden, Jr. (D-Del.) (since became Vice-President),[71] Sen. Jon Kyl (R-Ariz.), Sen. Herbert Kohl (D-Wis.), Sen. Mike DeWine (R-Ohio), Sen.

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69. Cohen, *supra* note 16 (informing, "But Justice Thomas is a lot less marginal with the recent changes in the court – particularly the replacement of Sandra Day O'Connor, a moderate conservative, with Samuel Alito, a more extreme one.").

70. *See Roberts' Confirmation Hearing, supra* note 8 (The first day, September 12, 2005 involved the presentation of the witness, Judge Roberts, along with his opening extemporaneous comments, *id.* at 1–56 (actual opening comments of Judge Roberts, at 55–56, including the "umpire" reference), followed by his official written responses, *id*. at 57–139; the first full day of questioning by the Senate Judiciary Committee occurred on Tuesday, September 13, 2005, *id.* at 141–282; the second day of questioning of the witness followed on Wednesday, September 14, 2005, *id.* at 283–411; and the third and final day of questioning of the witness occurred on September 15, 2005, *id*. at 413–451). The Judiciary Committee ultimately voted 13-5 to approve the nomination. On September 29, 2005, the U.S. Senate confirmed the nomination 78-22; www.senate.gov/pagelayout/reference/nominations/Nominations.htm (last visited Jan. 30, 2012).

71. During January 2007, Sen. Biden (D-Del.) sought to become the 2008 Democratic candidate for President. He subsequently withdrew his name from contention. On January 20, 2009, he was sworn in as Vice President of the United States, along with President Barack Obama, a former U.S. Senator (D-Ill.). Jeff Zeleny, *For the 44th President, a Long Day Steeped in Pomp, History and Emotion*, N.Y. TIMES, Jan. 21, 2009, at P1 (special supplement to mark the occasion of Barack Obama becoming the nation's 44th President). Chief Justice Roberts administered the oath of office to the new President. Adam Liptak, *A Few Rough Patches for a Presidential Oath*, N.Y. TIMES, Jan. 21, 2009, at P6. Then-Sen. Obama voted against the elevation of Judge Roberts to the position of Chief Justice. *See* obamaspeeches.com/031-Confirmation-of-Judge-John-Roberts-Obama-speech.htm (last visited Jan. 30, 2012). *See supra* note 70. Both President Obama and Chief Justice are graduates of Harvard Law School and former editors of the *Harvard Law Review*. *Roberts' Confirmation Hearing, supra* note 8, at 60. Chief Justice Roberts attended the most recent January 2012 State of the Union address delivered by President Obama. NBC News Coverage of State of the Union Address (Jan. 24, 2012, 9:20 EST).

Dianne Feinstein (D-Cal.) (the only female on the 109th Senate Judiciary Committee), Sen. Jeff Sessions (R-Ala.), Sen. Russell D. Feingold (D-Wis.) (lost his re-election campaign), Sen. Lindsey O. Graham (R-S.C.), Sen. Charles E. Schumer (D-NY), Sen. John Cornyn (R-Tex.), Sen. Sam Brownback (R-Kan.),[72] Sen. Richard J. Durbin (D-Ill.), and Sen. Tom Coburn (R-Okla.). The interplay between Sen. Biden and Judge Roberts is especially poignant due to their current positions, respectively as Vice President of the United States and Chief Justice of the Supreme Court. Procedurally, the questioning started with the Republican Committee Chair and then alternated between the Democrat and Republican senators on the Committee, who wanted to interpose questions, or in some cases, commentary. Unlike the remarks made on the floor of Congress reported in the *Congressional Record*, U.S. Senators do not have the privilege to edit their remarks for transcripts of hearings' testimony.

As indicated, during Judge Roberts' Senate Judiciary Committee Hearings to become Chief Justice, he referred to his role as that of an umpire.[73] In his opening statement to the Committee, he stated:

> Judge ROBERTS. My personal appreciation that I owe a great debt to others reinforces my view that a certain humility should characterize the judicial role. Judges and Justices are servants of the law, not the other way around. Judges are like umpires. Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ball game to see the umpire.[74]

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72. During January 2007, Sen. Brownback (R-Kan.) sought to become the 2008 Republican candidate to seek the presidency. He announced his withdrawal from the race during October 2007. *Brownback to End Presidential Run, Sources Say*, CNNPOLITICS (Oct. 18, 2007), http://articles.cnn.com/2007-10-18/politics/brownback.dropout_1_presidential-campaign-senator-brownback-opinion-research-corporation?_s=PM:POLITICS.

73. *Roberts' Confirmation Hearing*, *supra* note 8, at 161.

74. *Id*. at 55 (Sen. Kohl noted,

> [b]ut as all of us with any involvement in sports know, no two umpires or no two referees have the same strike zone or call the same kind of a basketball game, and ballplayers and basketball players understand that, depending upon who the umpire is and who the referee is, the game can be called entirely differently.

Id. at 203. Sen. Hatch (R-Utah) commented, "Yesterday you used the analogy of an umpire who calls balls and strikes, but neither pitches, nor bats." *Id.* at 161. Sen. Grassley (R-Iowa) inquired, "So, Judge Roberts, beyond your umpire analogy, what do you understand to be the role of a judge in a democratic society?" *Id*. at 177).

Of course, cartoonists and the legislators would pounce on this accessible imagery of the baseball umpire. Additionally, during his opening remarks and elsewhere, Judge Roberts talked about wanting to be a modest jurist,[75] reprising the umpire imagery. He asserted:

> Mr. Chairman, I come before the Committee with no agenda. I have no platform. . . . If I am confirmed, I will confront every case with an open mind. I will fully and fairly analyze the legal arguments that are presented. I will be open to the considered views of my colleagues on the bench, and I will decide every case based on the record, according to the rule of law, without fear or favor, to the best of my ability, and I will remember that it's my job to call balls and strikes, and not to pitch or bat.[76]

Interestingly, considering the breadth of topics that may be entertained during this type of hearing, there was testimony or inquiry as to three of the Title IX Supreme Court decisions, and the Civil Rights Restoration Act, which is a rather remarkable scenario.[77] Judge Roberts did not entertain any Title IX cases during his relatively brief tenure as a Circuit Court judge. However, he was involved with Title IX cases while working for the federal government and as a private attorney. A certain consistency was exhibited in all three of these cases, where Mr. Roberts (referred to as Mr. Roberts or Attorney Roberts for when he was working as an attorney to distinguish his judicial career) purportedly argued to limit or constrain the reach of Title IX.[78] Granted in the first and second cases, *Grove City College*[79] and *Franklin*,[80] Mr. Roberts was working in the executive branch of the U.S. Government (respectively as Special Assistant to the Attorney General, U.S. Department of Justice (Aug. 1981–Nov. 1982) during President Reagan's first term; Associate Counsel to President Ronald Reagan, White House Counsel's Office (Nov. 1982–May 1986); and a member of the legal staff at the U.S. Department of Justice – Principal Deputy Solicitor General (Oct. 1989–Jan. 1993) during President George H.W. Bush's administration), and thus was charged with presenting the role of his employer.[81] And according to Judge Roberts, he "was not

75. *See id.* at 55.
76. *Id.* at 56.
77. *See infra* Parts III, IV and V. *See also Roberts' Confirmation Hearing, supra* note 8.
78. *Id.*
79. *See generally Grove City Coll.*, 465 U.S. 555.
80. *See generally Franklin*, 503 U.S. 60.
81. *See Roberts' Confirmation Hearing, supra* note 8, at 58, 69, 72.

formulating policy."[82] However, in the third case, *NCAA v. Smith*,[83] the NCAA had its own in-house counsel, and Mr. Roberts, who was then a seasoned lawyer and partner at a prestigious law firm, was hired as a private attorney to represent the most influential and powerful athletic association in the country.

During the 1990s, a few litigants commenced cases arguing violation of both Title IX and the Violence Against Women Act (VAWA),[84] a congressional statute aimed at protecting women from violence. The Rehnquist Court ultimately ruled the VAWA legislation was unconstitutional as exceeding the Article I powers conferred upon Congress in the U.S. Constitution.[85] In a question from Sen. Joseph Biden, a strong supporter of the VAWA statute, the following interaction occurred:

> Senator BIDEN. Okay. Judge, is gender discrimination, as you have written in a memo, a "perceived" problem or is it a real problem?
>
> Judge ROBERTS. The memo you talked about, Senator, I've had a chance to look at it. It concerned a 50-State inventory of particular proposals to address it. "Perceived" was not

82. *Id.* at 175. *See infra* note 114 (explaining the role of the U.S. Solicitor General. However, in his written response, he explained his governmental work: "Immediately prior to joining [a private law firm] for the first time in 1986, I served in counseling and advisory roles in the federal government. My duties as Associate Counsel to the President involved reviewing bills submitted to the President for signature or veto, drafting and reviewing executive orders and proclamations, and generally reviewing the full range of Presidential activities for potential legal problems." *Roberts' Confirmation Hearing, supra* note 8, at 71. As to his work as the Special Assistant to the U.S. Attorney General, Judge Roberts informed that "My duties. . . were also of an advisory nature, focusing on particular matters of concern to the Attorney General." *Id.* at 72.

83. *See generally Smith*, 525 U.S. 459.

84. 42 U.S.C. § 13981 (1994).

85. *See* Brzonkala v. Va. Polytechnic Inst. and State Univ., 132 F.3d 949 (4th Cir. 1997) (The plaintiff-female student claimed she was raped by two university male football players. She alleged a violation of Title IX and the VAWA, based on allegations of preferential treatment provided to one of the alleged perpetrators, and lack of proper protocol in following the university procedure for inquiry into this kind of case), *en banc decision vacating an earlier court decision;* Brzonkala v. Va. Polytechnic Inst. and State Univ., 169 F.3d 820 (4th Cir. 1999) (7–4 ruling), *aff'd, sub nom.* United States v. Morrison, 529 U.S. 598 (2000) (ruling the federal statute was unconstitutional in violation of the Commerce Clause. U.S. CONST. art. 1, § 8). Previously, in *Ericson v. Syracuse University*, 45 F. Supp. 2d 344 (S.D.N.Y. 1999), a New York district court had upheld the constitutionality of the VAWA, in another dual Title IX-VAWA case predicated on allegations of sexual harassment by the male women's tennis coach toward two of his female tennis players. The parties ultimately settled the case. *See* Diane Heckman, *Title IX and Sexual Harassment Claims Involving Educational Athletic Department Employees and Student-Athletes in the Twenty-First Century*, 8 VA. SPORTS & ENT. L.J. 223, 243-44 (2009) [hereinafter Heckman, *Title IX and Sexual Harassment Claims*] (discussing the case); Heckman, *Is Notice Required?, supra* note 3, at 202–03 (same) .

> being used in that case to suggest that there was any doubt that there is gender discrimination and that it should be addressed. . . .
>
> Of course, gender discrimination is a serious problem. It's a particular concern of mine and always has been. I grew up with three sisters, all of whom work outside the home. I married a lawyer who works outside the home. I have a young daughter who I hope will have all of the opportunities available to her without regard to any gender discrimination.
>
> There is no suggestion in anything that I've written of any resistance to the basic idea of full citizenship without regard to gender.[86]

Title IX litigants have also asserted violations of the Fourteenth Amendment Equal Protection Clause.[87] The Supreme Court has imposed three tests to ascertain if a violation of this provision of the Fourteenth Amendment has occurred: (1) a strict scrutiny test is imposed for fundamental rights (education is not deemed a fundamental right)[88] and for classifications based on suspect classes (based on race, alienage or national origin);[89] notably, it does not include sex within that arena; (2) an intermediate test has been imposed for classifications based on an individual's sex (gender) or birth legitimacy; and (3) a reasonable relationship test[90] is used for all other classifications, such as those based on age or disability. Later on in the hearing, Judge Roberts discussed the three tiers relative to the Fourteenth

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86. *Roberts' Confirmation Hearing*, *supra* note 8, at 190. There were a number of references to the *Morrison* case during the hearings with the Senators, understandably quite concerned about the judicial infringement on their ability to legislate. *Id.* at 225, 356.

87. U.S. CONST. amend. XIV, § 1, which directs, in part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

88. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973). *See* Diane Heckman, *Fourteenth Amendment Procedural Due Process Governing Interscholastic Athletics*, 5 VA. SPORTS & ENT. L.J. 1, 15 (2005) [hereinafter Heckman, *Fourteenth Amendment Procedural Due Process*].

89. *See* Diane Heckman, *The First Amendment and Academia: Twenty Years of Examining Matters of Public Concern*, 188 EDUC. L. REP. 585 (2004).

90. "Under 'traditional' equal protection analysis, a legislative classification must be sustained unless it is 'patently arbitrary' and bears no rational relationship to a legitimate governmental interest." Frontiero v. Richardson, 411 U.S. 677, 683 (1973).

Amendment Equal Protection Clause, where he proffered,

> Gender issues are in the middle tier because the Court thinks that there are situations where distinctions can be justified, and there are other situations—but it's more than just the rational relation, but not as suspect as the most heightened level because there may be other justifications. Cases throughout the Court's history where they have upheld distinctions under that analysis, like the all-male draft, for example, that was upheld . . .
>
> . . . .
>
> . . . Justice Ginsburg, I think, in her opinion in the VMI case said that the intermediate scrutiny had to be applied with—I forgot the exact phrase—"exacting rigor" or something along those lines, to indicate that it is well beyond the rational relation test, but it's not as inherently suspect as racial classifications.[91]

Historically, the 1972 Equal Rights Amendment would have deemed sex a suspect class and thus entitled to the greatest legal protection.[92] However, this constitutional amendment was not ratified by the necessary two-thirds of states within the allotted time period. During 1973, in *Frontiero v. Richardson*, the Supreme Court would impose the highest test to classifications based on sex; however, its utility is circumscribed, as this was only a plurality decision.[93] The Court first referenced the intermediate test in *Craig v. Boren*.[94] In *Mississippi University for Women v. Hogan*, the Court fleshed out a pervasiveness justification requirement for state action to be deemed constitutional when classifications are based upon an individual's sex.[95]

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91. *Roberts' Confirmation Hearing*, *supra* note 8, at 281–82 (referring to United States v. Virginia, 518 U.S. 515 (1996)).

92. H.R.J. Res. 208, 92d Cong. (1971) (approved by the House of Representatives on Oct. 12, 1971). It would have required that "[e]quality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." *Id.* *See* H.R. Equal Rights for Men and Women (July 14, 1971), to accompany H.R.J. Res. 208, *available at* www.archives.gov/legislative/features/griffiths/committee-report.pdf (last visited Jan. 30, 2012).

93. *See generally Frontiero*, 411 U.S. 677.

94. Craig v. Boren, 429 U.S. 190, 197 (1976) (directing that such classifications "by gender must serve important government objectives and must be substantially related to achievement of those objectives."). *See also* Califano v. Webster, 430 U.S. 313 (1977) (allowing female wage earners to lop off their three lowest earning years when calculating Social Security benefits to remedy past discrimination, whereas male workers were not treated the same).

95. Miss. Univ. for Women v. Hogan, 458 U.S. 718, 723 (1982) (mandating an "exceedingly persuasive" standard). The Court also imparted, "In limited circumstances, a gender-based

Later, in *United States v. Virginia*,[96] the Court reiterated the "pervasiveness justification" test in a case dealing with whether females could be restricted from admission to the Virginia Military College, one of the two remaining all-male public colleges in the country.[97] Justice Ruth Bader Ginsburg instructed:

> Parties who seek to defend gender-based government action must demonstrate an "exceedingly persuasive justification" for that action . . . . Focusing on the differential treatment or denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is "exceedingly persuasive." The burden of justification is demanding and it rests entirely on the State . . . . The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.[98]

As one court stated, "[i]n sex discrimination cases brought under the *Fourteenth Amendment*, plaintiff must demonstrate that the discrimination was intentional."[99] The Equal Protection Clause has been the legal theory for redress in many actions in the area of gender equity involving extracurricular athletic activities.[100] As a Second Circuit Court judge wrote, "[i]t is

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classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened." *Id.* at 728.

96. *See generally* 518 U.S. 515 (emphasizing the "exceedingly persuasive" standard) (Justice Ginsburg authored the majority opinion; Chief Justice Rehnquist issued a concurring opinion joining in on the judgment rendered, while Justice Scalia presented his dissent, *id.* at 558 (Scalia, J., dissenting)) (Justice Clarence Thomas recused himself as his son was attending Virginia Military Institute at the time of the appeal).

97. The Citadel, located in South Carolina, was the country's other public military school. It was also embroiled in litigation challenging its all-male admission policy. *See* United States v. Jones, 136 F.3d 342 (4th Cir. 1998). *See also* Faulkner v. Jones, 10 F.3d 226 (4th Cir. 1993).

98. *United States v. Virginia*, 518 U.S. at 531–33. Justice Ginsburg also cited material in a letter from Thomas Jefferson to Samuel Kercheval. *Id.* at 532. *See* Heckman, *Sex Discrimination in the Gym*, *supra* note 4, at 556–58; Heckman, *Scoreboard*, *supra* note 4, at 394.

99. Croteau v. Fair, 686 F. Supp. 552, 553 (E.D. Va. 1988) (discussed within). Upon its remand from the Supreme Court, the Seventh Circuit Court in *Cannon*, 648 F.2d at 1107, stated, "A violation of the Equal Protection clause had previously been held to require a finding of intentional discrimination; disparate impact alone will not support a cause of action under the Constitution."

100. *See* Heckman, *Women & Athletics*, *supra* note 4, at 4 n.14. *See, e.g.*, Miami Univ. Wrestling Club v. Miami Univ., 195 F. Supp. 2d 1010 (S.D. Ohio 2001), *aff'd,* 802 F.3d 608 (6th Cir. 2002), *cert. denied,* 526 U.S. 1145 (1999) (men's wrestling team); Boulahanis v. Bd. of Regents, 198 F.3d 633 (7th Cir. 1999) (men's swimming and wrestling teams), *cert. denied*, 530 U.S. 1284 (2000); Bruneau v. S. Kortright Cent. Sch. Dist., 163 F.3d 749 (2d Cir. 1998) (sexual harassment action), *cert. denied,* 526 U.S. 1145 (1999); Cohen v. Brown Univ., 809 F. Supp. 978 (D.R.I. 1992) (granting of a

irrefutable that Congress could not, by enacting a statute like Title IX, somehow erode or limit a constitutional right such as the right to equal protection under the *Fourteenth Amendment to the United States*."[101] Surprisingly, Judge Roberts could not identify the actual test.[102]

A review of the salient material from the Roberts' confirmation hearings is presented within; for an introspection as to how this jurist viewed critical aspects of Title IX. Part III discusses the provision of compensatory money

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preliminary injunction in favor of female student-athletes), *aff'd,* 991 F.2d 888 (1st Cir. 1993), 101 F.3d 155 (1st Cir. 1996) (sanctioning the grant of a permanent injunction for the plaintiffs), *cert. denied,* 520 U.S. 1186 (1997) (retaining two women's intercollegiate sports: gymnastics and volleyball); Horner v. Ky. High Sch. Athletic Ass'n, 43 F.3d 265 (6th Cir. 1994) (interscholastic fastpitch softball) (finding no violation of the Fourteenth Amendment Equal Protection Clause); Kelley v. Bd. of Trs. of Univ. of Ill., 35 F.3d 265, 272 (7th Cir. 1994) (finding no violation of the Fourteenth Amendment Equal Protection Clause) (male student-athletes), *cert. denied,* 513 U.S. 1128 (1995); Sullivan v. Cleveland Heights, 869 F.2d 961 (6th Cir. 1989) (finding no equal protection violation concerning a 10-year-old female who was not allowed to use the same locker room as her male teammates on the community hockey team); Ridgeway v. Mont. High Sch. Ass'n, 858 F.2d 579 (9th Cir. 1988) (concerning scheduling of certain girls' interscholastic teams); Cook v. Colgate Univ., 802 F. Supp. 737 (N.D.N.Y. 1992) (elevating women's ice hockey club team to an intercollegiate sport), *vacated as moot,* 992 F.2d 17 (2d Cir. 1993); O'Connor v. Bd. of Educ., 645 F.2d 578 (7th Cir. 1981), *on remand,* 545 F. Supp. 376, 380 (N.D. Ill. 1982) (denying female's request seeking participation on boys' basketball team); Cape v. Tenn. Secondary Sch. Athletic Ass'n, 424 F. Supp. 732 (E.D. Tenn. 1976), *rev'd,* 563 F.2d 793 (6th Cir. 1977) (examining differing rules used for girls' versus boys' high school basketball and finding no Fourteenth Amendment violation); Barnett v. Tex. Wrestling Ass'n, 16 F. Supp. 2d 690 (N.D. Tex. 1998) (female student seeking participation on the all boys' interscholastic wrestling team); Adams v. Baker, 919 F. Supp. 1496, 1500 (D. Kan. 1996) (wrestling) (finding a violation of the female student-athlete's rights pursuant to the Fourteenth Amendment Equal Protection Clause) (interscholastic wrestling); Gonyo v. Drake Univ., 837 F. Supp. 989 (S.D. Iowa 1993) (awarding of athletic scholarships at this private university); Lantz v. Ambach, 620 F. Supp. 663 (S.D.N.Y. 1985) (female seeking to participate on all-boys' interscholastic football team); Force v. Pierce City R-VI Sch. Dist., 570 F. Supp. 1020 (W.D. Mo. 1983) (female student seeking to participate on the all boys' eighth grade football team); Hoover v. Meiklejohn, 430 F. Supp. 164 (D. Colo. 1977) (female student-athlete seeking participation on the all boys' junior varsity soccer team); Jones v. Okla. Secondary Sch. Activities Ass'n, 453 F. Supp. 150 (W.D. Okla. 1977) (alleging a detrimental impact by having female use girls' basketball rules, which included using merely half the court, as opposed to the boys' basketball rules, using the full court); Leffel v. Wis. Interscholastic Athletic Ass'n, 444 F. Supp. 1117, 1123 (E.D. Wis. 1978) (concerning lack of certain teams for the girls, including any baseball or tennis teams) (finding a violation of the Equal Protection Clause); Gilpin v. Kan. State High Sch. Activities Ass'n, 377 F. Supp. 1233 (D. Kan. 1973) (there was only a cross-country track team for boys and none for the girls); Haas v. S. Bend Cmty. Sch. Corp., 289 N.E.2d 495 (Ind. 1972) (interscholastic golf team) (finding athletic association rule which prevented "mixed competition" in non-contact sports violated the Fourteenth Amendment. *Id.* at 501). *See also* Heckman, *Fourteenth Amendment Procedural Due Process, supra* note 88, at 16 n.68 (listing a number of Title IX related cases where the courts held that no property interest was triggered needed to satisfy a prima facie Fourteenth Amendment case, whereby a plaintiff must demonstrate that a life, liberty or property interest was triggered).

101. *Bruneau*, 163 F.3d at 763 (Oakes, C.J., concurring). *See* Heckman, *Title IX Tapestry, supra* note 25, at 859 (providing background information on the jurisdictional and procedural matters involved in Title IX litigation).

102. *See Bruneau*, 163 F.3d 749. *See also supra* text accompanying note 99.

damages, at issue in the *Franklin* case, which is positioned as a procedural aspect (because a potential plaintiff would want to know what remediation is available when drafting a complaint and pursuing litigation). This is followed by an examination of the jurisdictional aspect of necessitating the receipt of federal funds by the defendant, at issue in the *Grove City College* and *NCAA v. Smith* cases, which is presented in Parts IV and V. Two points that need emphasizing: first, Mr. Roberts was operating in the rarefied highest echelons of Republican politics; and second, this individual has an extraordinary command of the English language and facility in answering questions so that a review of his oral and written remarks are instructive. Clearly, this is a brilliant and successful man, a multi-millionaire, with an impeccable curriculum vitae, including being a graduate of Harvard University Law School, editor of the *Harvard Law Review*, a former law clerk to Chief Justice Rehnquist (1980–1981), as well as one of the "go to guys" to argue a case before the Supreme Court, before being placed on possibly the most influential Circuit Court in the country today, the District of Columbia Circuit Court.[103]

III. TITLE IX REMEDIES: "SHOW ME THE MONEY"[104] – STRIKE ONE

Overall, the possible remedies available to a Title IX plaintiff would be the following: (1) the withdrawal of federal funds to the educational institution, which is explicitly permitted by the statute;[105] (2) declarative relief, to declare the rights of the parties;[106] (3) injunctive relief to order the educational institution to cease engaging in the discriminatory action or to undertake certain actions to ameliorate the situation;[107] and (4) the award of monetary damages. The issue of what damages are permitted has been an area of contention. This is once again fostered due to the lack of statutory language concerning the issuance of damages.[108]

A. Compensatory Damages

Litigants routinely sought injunctive relief to end the Title IX

103. *Roberts' Confirmation Hearing, supra* note 8, at 57–71, 133.

104. Dialogue from the movie, JERRY MAGUIRE (Gracie Films & TriStar Pictures 1996).

105. 20 U.S.C. § 1682.

106. *See, e.g.*, *Leffel*, 444 F. Supp. at 1119.

107. *See, e.g.*, *Cohen*, 991 F.2d at 907 (affirming the grant of a preliminary injunction in favor of the female student-athletes) (The Court stated, "On the record compiled to date, the preliminary injunction requiring Brown [University] to reinstate its women's volleyball and gymnastics teams for the time being came well within the encincture of judicial discretion. We will not meddle."); Roberts v. Colo. State Bd. of Agric., 998 F.2d 824, 833 (10th Cir. 1993) ("[W]e believe monetary relief alone is inadequate. The district court correctly ordered an equitable remedy.").

108. 20 U.S.C. § 1682.

discriminatory activity, or less frequently, declaratory action relief. Remarkably, it would take until 1992, in *Franklin*,[109] when the Supreme Court—in its third Title IX decision—ruled that a plaintiff could be awarded pecuniary damages, where intentional discrimination was proven.[110] It was this opinion that triggered a groundswell of litigation, so that in addition to seeking court orders to cease the gender-based discrimination, now the students and educational employees sought to be compensated for the purported violations. Large judgments have not been the norm, generally due to the history of Title IX, the burden on litigants to successfully assert a prima facie case,[111] and the delayed pronouncement that compensatory damages were permitted.[112] There was some dicta, by the Supreme Court in *Gebser*, a post-*Franklin* case, as to whether compensatory damages should issue in a case involving allegations of sexual harassment.[113] The Court has provided no further comments on the issue of monetary damages—thus, the status quo exists.

B. Roberts' 2005 Judiciary Committee Confirmation Hearing

The Supreme Court invited the Federal Government to weigh in on the issue of whether it should grant the petition for a writ of certiorari in the *Franklin* case to address the issue whether the Title IX statute allowed for compensatory damages. The U.S. Solicitor General's brief asserted the affirmative position that the Court should review the case, but that damages should not be allowed.[114] This first brief filed by U.S. Solicitor General

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109. *Franklin*, 503 U.S. 60. *See* Heckman, *Title IX Tapestry*, *supra* note 25, at 867.

110. *Franklin*, 503 U.S. at 76.

111. *See infra* text accompanying note 129.

112. *See Croteau*, 686 F. Supp. 552 (where the female high school student unsuccessfully sought $100,000 in compensatory damages for not being put on the boys' varsity interscholastic baseball team). Julie Croteau went on to appear in the movie, A LEAGUE OF THEIR OWN (Columbia Pictures Corporation 1992), depicting a women's professional softball team during World War II. However, settlements in certain Title IX sexual harassment cases have resulted in large monetary figures. *See* Heckman, *Title IX and Sexual Harassment Claims*, *supra* note 85, at 252, 267, 269.

113. *Gebser*, 524 U.S. at 284. *See also* Heckman, *Title IX Tapestry*, *supra* note 25, at 867.

114. Brief of the United States as Amicus Curiae, Franklin v. Gwinnett Cnty. Sch. Dist. (1992) (No. 90-918), 1991 WL 11009216, at *20 (filed on May 20, 1991, by the Hon. Kenneth W. Starr, U.S. Solicitor General). Like Justice Roberts, Starr was also a law clerk to Chief Justice William J. Rehnquist (1975–1977), and a judge on the District of Columbia Circuit Court (1983–1989). Starr was Solicitor General (1989–1993) during President George H.R. Bush's administration. The nominee explained the role indicating that he "worked in the Department of Justice in the Office of the Solicitor General, it was my job to argue cases for the United States before the Supreme Court. I always found it very moving to stand before the Justices and say, 'I speak for my country.'" *Roberts' Confirmation Hearing*, *supra* note 8, at 55. He further elaborated, "With minor exceptions, the Office of the Solicitor General is the exclusive representative of the federal government before the Supreme

Kenneth W. Starr, which featured the name of John G. Roberts, Jr. prominently in the third position as Deputy Solicitor General, interjected, "[i]n our view, the [Eleventh Circuit] court of appeals was correct in its conclusion that Title IX does not impliedly authorize a private plaintiff to recover compensatory legal damages, even if the plaintiff alleges an intentional violation of the statute."[115] The Court agreed to hear this appeal during the October 1991 term. The Court permitted the U.S. Solicitor General to participate in oral arguments as to the merits of the case.[116]

The Senate Committee questioned Judge Roberts on his contemporaneous view of *Franklin*. As a deputy attorney working with Kenneth Starr, then U.S. Solicitor General, Mr. Roberts' name appeared on a brief on the merits purportedly arguing that the female student subject to physical sexual harassment was not entitled to monetary damages, according to Sen. Patrick Leahy (D-Vt.) (Minority Chair of the Senate Judiciary Committee) [internal footnotes are used to annotate the material].

> Senator LEAHY. Justice White, in an opinion joined by Justice O'Connor and others wrote that you fundamentally misunderstood the law and history of the Court's role in providing appropriate remedy for such abuse, and that you had invited them to abdicate their historical judicial authority to award appropriate relief [pursuant to Title IX].
>
> So do you now personally agree with and accept as binding law the reasoning of Justice White's opinion in *Franklin*?[117]
>
> Judge ROBERTS. Well, it certainly is a precedent of the Court that I would apply under [the] principle[] of *stare decisis*. The Government's position in that case, of course, in no way condoned the activities involved. The issue was an open one. The courts of appeals had ruled the same way that the Government had argued before the Supreme Court, and it arose because we were dealing with an implied right of action, in other words, [a] right of action under the statute that courts

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Court." *Id.* at 72. *See* Dennis J. Hutchinson, *Rehnquist's Law,* N.Y. TIMES, Oct. 13, 2002, § 7, at 14 (reviewing the following autobiography, KENNETH W. STARR, FIRST AMONG EQUALS (2002), wherein "Starr concedes that 'justices appointed for life' constitute 'the least accountable branch of government.'"). The Solicitor General is the "President's chief advocate before the Supreme Court." TOOBIN, *supra* note 16, at 16.

115. Brief of the United States, *supra* note 114, at *6. *See* Heckman, *Women & Athletics*, *supra* note 4, at 23 n.100.

116. *Franklin*, 502 U.S. 803. *See* Heckman, *Women & Athletics*, *supra* note 4, at 23 n.101.

117. *Franklin*, 503 U.S. at 72–73.

> had implied. The reason that there was difficulty in determining exactly what remedies were available is because Congress had not addressed that question. The remedies that were available, as we explained, included issues such as restitution, *backpay*, injunctive relief, and the open issue, again, was whether damages were available. The Supreme Court issued its ruling and cleared that up.[118]

This colloquy featured no mention of the Third Circuit's 1990 opinion in *Pfeiffer v. Marion Center Area School District*,[119] reflecting the opposite viewpoint that could have alternatively been adopted by the federal government when invited to offer its position in the *Franklin* case.

Parenthetically, the Title IX statute contains absolutely no explicit mention of providing "backpay"—essentially this was a transfer of Title VII remedies onto Title IX. This emphasis by the nominee on indicating that the statute allowed for backpay and the only unsettled aspect was the money damages is a bit of a mystery. A review of the Supreme Court decision in *Franklin*[120] illustrates that the Court devoted specific attention to the issue of backpay and responded in unequivocal language as to what it thought of the Government's position. While remedies could be limited where legislation was hinged upon the Spending Clause of the U.S. Constitution, this did not apply when intentional discrimination appeared. The Court stated, "[f]inally, the United States asserts that the remedies permissible under Title IX should nevertheless be limited to backpay and prospective relief. In addition to diverging from our traditional approach to deciding what remedies are available for violation of a

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118. *Roberts' Confirmation Hearing, supra* note 8, at 156–57 (emphasis added). It was curious that Judge Roberts identified the remedy of "backpay," which while common in Title VII employment actions, was not in Title IX cases. The author cannot recall one pre-*Franklin* case where a court awarded a plaintiff backpay pursuant to Title IX. In addition, the controversy over whether Title IX could be used at all by an educational employee to successfully seek redress for sex discrimination by an educational institution was and remains a contested issue. *See supra* Section III(A). *See* Heckman, *Sex Discrimination in the Gym*, *supra* note 4, at 597–600 (citing Tyler v. Howard Univ., No. 91-CA11239 (D.C. Sup. Ct. Sept. 15, 1995) (post-*Franklin* ruling awarding the female basketball coach damages for retaliation and lost pay for breach of both Title IX and a District of Columbia statute)).

119. 917 F.2d 779, 789 (3d Cir. 1990) (herein a female sought compensatory damages for her dismissal from the local chapter of a National Honor Society, due to her pregnancy. The National Women's Law Center represented the former high school student. The Third Circuit Court accessed the *Cannon* opinion, stating, "the Supreme Court indicated that Congress intended to create remedies in Title IX comparable to those available under Title VI." *Id.* at 787. The court continued, "Tracking this analysis to a Title IX claim, we now conclude, not without some difficulty, that compensatory relief is available for certain Title IX violations and that this is one of them." *Id.* at 788). *See supra* note 112 (concerning the 1988 *Croteau* litigation).

120. *Franklin*, 503 U.S. 60.

federal right, this position conflicts with sound logic."[121] The Court continued, "[b]ackpay does nothing for petitioner [a student] . . . and [since] she herself no longer attends a school in the Gwinnett system, prospective relief accords her no remedy at all. The Government's answer that administrative action helps other similarly situated students in effect acknowledges that its approach would leave petitioner remediless."[122] That the jurist, in the interim decade, never updated his understanding of the remediation Title IX affords, despite the *Franklin* ruling on a case he worked on, is distressing.

And, of significance, while Judge Roberts answered the direct question posed by the Senator in his first sentence, the remainder of the jurist's response was essentially a summary of the Government's argument presented to the Court. It was certainly not an effusive endorsement of the *Franklin* ruling, but simply an abstract declaration of a fundamental element of American jurisprudence. Significantly, Judge Roberts did, however, indicate his intent to apply the Court's holding.

The colloquy about this case continued with Sen. Leahy stressing the sexual abuse the tenth-grade female student had received by a male teacher and "sports coach" in the *Franklin* case. After receiving Judge Roberts' response, Sen. Leahy then asked:

> Senator LEAHY. Now, do you feel that they [the Supreme Court] were acting, even though it went differently than what you had argued [on behalf of the Government], do you feel the Court's opinion is based on sound reasoning?
>
> Judge ROBERTS. Well, I don't want to say—
>
> Senator LEAHY. Do you think it is a solid precedent?
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> Judge ROBERTS. It is a solid—it's a precedent of the Court. It was, as you say, a unanimous precedent. It concerned an issue of statutory interpretation because it was unclear

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121. *Id.* at 75 (The Court continued, "First, both remedies are equitable in nature, and it is axiomatic that a court should determine the adequacy of a remedy in law before resorting to equitable relief." *Id.* 75–76). Brief of the United States, *supra* note 113, at *19.

> The same objectives should inform the scope of any private remedies under Title IX. Equitable relief—including, when appropriate, such "make whole" relief as backpay—serves to enforce compliance with the statute. Awards of legal damages to selected beneficiaries of federal financing programs, by contrast, would threaten "a potentially massive financial liability," . . . while securing compliance only indirectly through deterrence.

Id.

122. *Franklin*, 503 U.S. at 76.

> whether Congress had intended a particular remedy to be available or not. That was the question before the Court. The court of appeals had ruled one way. The Supreme Court ruled the other way.
>
> The administration's position was based on the principle that the decision about the remedy of *backpay* was a decision that should be made by Congress and not the Court. The Court saw the case the other, and that issue is now settled, and those damages actions are brought in courts around the country.[123]

Judge Roberts started to mirror the senator's characterization in the first sentence of this reply and then, according to the transcript, immediately put the reins on the statement, simply as he did initially with this line of inquiry introduced by this senator, stating the obvious and nothing more.

Sen. Leahy then called Judge Roberts on the backpay remedy, inquiring what type of backpay would a student receive, which was a fair point—and again, Title IX, even before *Franklin*, was not known by the courts for ever awarding backpay. It was as if the Title VII statute was being substituted for this Title IX matter, which is surprising because the nominee was so knowledgeable about the law, providing detailed legal discourse to the Committee, and by extension the Nation, on many legal topics. While Judge Roberts found the underlying behavior in the *Franklin* case "abhorrent then . . . [and] now,"[124] one can see the verbal agility or dexterity of this individual,[125] as he immediately dropped the backpay quest, and responded:

> Judge ROBERTS. Restitution and injunction to prohibit the harmful activity. Again, the issue arose because Congress had not spelled out whether there was a right of action in the first place or what the components of that right of action should be. The issue—
>
> Senator LEAHY. We will go back to this in my next round, I

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123. *Roberts' Confirmation Hearing, supra* note 8, at 157 (emphasis added). *See* Brief of the United States, *supra* note 114, at *15 ("We believe that the statute is not framed in terms suggesting that awards of damages are essential for effective enforcement.").

124. *Roberts' Confirmation Hearing*, *supra* note 8, at 157.

125. In the written questionnaire, as to supplying the text of any speeches that the nominee may have given, Judge Roberts replied that he used none—that there were no prepared texts, which was evident by the judicial candidate not referring to a written text during his opening remarks to the Senate Judiciary Committee. *Id.* at 67 ("On no occasion did I speak from a prepared text. Notes or recordings are available only as indicated." There were notes for only two of the many public speeches).

> can assure you. My time is up.[126]

Thus, in all that banter, the best that Judge Roberts could say about the Supreme Court opinion in *Franklin* was that it was a precedent. For a man so extraordinarily facile and in command of his words, as exemplified by his enormous scholarly and legal achievements and being hired to argue numerous cases before the Supreme Court, his inability to verbalize the sentence that it was a "strong precedent" as opposed to merely a precedent should not be comforting for advocates of Title IX.[127] The words of Justice Scalia are triggered, wherein he begrudgingly supported the majority position in *Franklin*, with his reasoning that essentially too much water had passed under the bridge.[128]

On September 15, 2005, Sen. Leahy did return to the *Franklin* case.

> Senator LEAHY [summarily going through the Court's rationale] Now, the reason I raise this case [*Franklin*] is not that it is one of those rare ones where you were on the losing side, but I raise it because I felt it was a case about what our courts should do, including doing justice and remedying rights and protecting Americans.
>
> So my question to you is this: Do you now recognize that the Supreme Court's view in the case as set forth in Justice White's opinion was the right one and the positions of the United States in your brief were the wrong ones?
>
> Judge ROBERTS. Well, as a judge looking at it, obviously when you lose a case, as you point out, [9-0] it's a pretty clear signal that the legal position you were advocating was the wrong one. The position the administration took in that case was the same position that the court of appeals had taken. . . .

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126. *Id.* at 157.

127. *Id.* (emphasis added). Later on in the hearing, Sen. Sessions (R-Alabama) would afford Judge Roberts an opportunity to bolster that what he did at the time was advocating the position of the "highest Federal court in the land at that time." *Id.* at 230.

128. *Franklin*, 503 U.S. at 76–78 (Scalia, J., concurring) (commenting it was "too late in the day." *Id.* at 78). Judge Roberts revealed, "And at argument sometimes, Justice Scalia would not be as receptive to an argument based on legislative history as some of the others, but, again, the name of the game is counting to five when you're arguing up there." *Roberts' Confirmation Hearing, supra* note 8, at 320. This recounts Justice Brennan's "Rule of Five," referring to the number of Supreme Court justices needed to form a majority. *See* TOOBIN, *supra* note 16, at 84–85 (Like the other justices, Breyer knew the famous question that William Brennan used to ask his law clerks. "What's the most important law at the Supreme Court?" . . . the justice would raise his tiny hand and say, "Five! The law of five! With five votes, you can do anything around here!").

> . . .
>
> Senator LEAHY. And I understand that. I thought I sort of laid that out earlier. But my question is: Do you now accept that Justice White's position was right and that the Government's position was wrong?
>
> Judge ROBERTS. Well, I certainly accept the decision of the Court, the 9–0 decision, as you say, as a binding precedent of the Court and, again, have no cause or agenda to revisit it or any quarrel with it.[129]

This is another example of the jurist's ability to parse his words and stand his ground, accepting the decision as precedent, but not answering whether it was the right position. For Title IX advocates, this would constitute strike one against Title IX.

IV. THE RECEIPT OF FEDERAL FUNDS: STRIKE TWO

A. Recipient of Federal Funds by the Educational Institutions

In order to establish a general Title IX prima facie case, the following elements are required: (1) the defendant took discriminatory action against the plaintiff based on the plaintiff's sex; (2) the defendant is an educational institution; (3) that is a recipient of federal funds; and (4) the plaintiff placed the defendant on notice, prior to the lawsuit, about the discriminatory action, unless it was the official policy of the educational institution.[130] The third aspect would be contentious. It is rare for an educational institution not to receive federal funds.[131] Whether the particular program or activity received federal funds (program-specific approach), or it was sufficient for some part of the educational institution to receive federal funds and thus trigger oversight over the entire institution and all its separate programs and activities (institution-wide approach) was an issue that would ultimately land before the Supreme Court.

In *Grove City College*, the Supreme Court, in eschewing a broad interpretation, found that the particular program or activity that is alleged to be

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129. *Roberts' Confirmation Hearing, supra* note 8, at 413–14.

130. *See* Heckman, Jackson v. Birmingham Board of Education, *supra* note 33, at 2–3; Heckman, *Title IX Tapestry, supra* note 25, at 849, 850.

131. *But see* Buckley v. Archdiocese of Rockville Ctr., 992 F. Supp. 586, 590 (E.D.N.Y. 1998) (finding that a private coed Roman Catholic high school and the overseeing archdiocese were not under Title IX solely because the diocese received the services of a single employee of the public school district, a school psychologist).

at the core of the Title IX sex discrimination, must receive the actual federal funds for the lawsuit to proceed.[132] As one court recounted about the lawsuit commenced against the Secretary of Education,

> [r]egulations promulgated under that section [§ 901(a)] forbade aid to educational programs which did not execute an "Assurance of Compliance" required by 34 C.F.R. § 106.4 (1983). Grove City College [a private college] did not discriminate, did not receive any direct federal aid, but [due to] religious and other First Amendment protected grounds declined to enter into compacts with the government and refused to execute the Assurance of Compliance.[133]

In the case of colleges and universities, it was common for students to receive federal funding to subsidize their tuitions and for student-athletes to receive athletic scholarships. The Court found that such federal monies only went to the admissions office—the particular office that received the student aid—and not to the college as a whole, for educational services for which the monies were remitted.

This "effectively nullified" Title IX's application, resulting in congressional action to revise the statute, to specifically use a broad-based approach.[134] Albeit, it took Congress four years to pass the Restoration Act,[135] which applied not only to Title IX,[136] but a number of other federal

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132. 465 U.S. 555. The Court informed that, although the college received no direct federal funding, however "Grove City's students receive BEOG's [Basic Educational Opportunity Grants] to pay for the education they receive at the College. Their eligibility for assistance is conditioned upon continued enrollment at Grove City and on satisfactory progress in their studies. 20 U.S.C. § 1091(a)(1), (3) (1982 ed.)." *Id.* at 566 n.13. *See, e.g.*, Bennett v. W. Tex. State Univ., 799 F.2d 155, 158 (5th Cir. 1986) (in this post-*Grove City* class action case, the Fifth Circuit Court determined "[t]his type of 'trickle down' benefit is just the type that *Grove City* explicitly ruled did not trigger Title IX coverage." It found there was "merely a ministerial relationship between the two programs [athletic department and financial aid department], insufficient to bring athletic scholarships under Title IX coverage." *Id.* at 159. The university's athletic department had received no earmarked federal funds.

133. DKT Mem'l Fund Ltd. v. Agency for Int'l Dev., 887 F.2d 275, 295 (D.C. Cir. 1989).

134. *See* Heckman, *Scoreboard*, *supra* note 4, at 403. *See also* EQUAL PLAY, *supra* note 41, at 100.

> In addition to slashing enforcement budgets, President Reagan's administration attempted to squelch Title IX's broader application with a new limiting interpretation of the law's reach. Whereas, the Nixon, Ford, and Carter administrations had all interpreted Title IX to prohibit discrimination throughout any institution if it received federal funds, Reagan officials wrote the administrative rules so that only the specific program that received the federal funds was covered by antidiscrimination laws.

135. *See* 20 U.S.C. § 1687. For cases examining the Restoration Act's constitutionality and

statutes,[137] to legislatively adopt the institution-wide approach. There has been no substantive challenge to the revision, which represents the last change to the Title IX statute. However, because the Restoration Act contained no language as to whether it would be retroactively applied, it triggered some minimal litigation for those cases on the docket when the change was enacted.[138]

B. Roberts' 2005 Judiciary Committee Confirmation Hearing

An area of major concern at both the Roberts and Alito hearings, as manifested by the commentary and questions posed by the senators on the Judiciary Committee concerned the ability of Congress to pass legislation—presumably, representing the will of the nation (and the legislative role of the Senate and House of Representatives)—without it being trampled on by the Supreme Court based on Eleventh Amendment sovereign immunity impediments. No less than three senators on the Committee directed questions to Judge Roberts about the *Grove City College* decision and the subsequent Restoration Act. It must be remembered that the Roberts' confirmation hearing reflected partisan politics, with the Democratic members interrogating the nominee while the Republicans were looking to bolster this candidate designated by a Republican President.

1. Interrogation by Sen. Ted Kennedy

During the Roberts' confirmation hearings, Sen. Edward M. Kennedy (D-Mass.), whose political legacy focused on the area of civil rights, pointedly inquired of then-Judge Roberts about his role regarding the then-Reagan Administration's perception of both the *Grove City College* decision and subsequent Restoration Act. A problem arises as to the source for purported written statements by the nominee, as it was not specifically identified and does not appear to be appended within the transcript of the Hearings. Sen. Kennedy provided a succinct review of the *Grove City College* decision [internal footnotes have been added for informational purposes]:

> Senator KENNEDY. Let me, if I could, go to the Civil Rights

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retroactive application, see *Leake v. Long Island Jewish Medical Center*, 695 F. Supp. 1414 (E.D.N.Y. 1988), *aff'd,* 869 F.2d 130 (2d Cir. 1989); *Crouteau*, 686 F. Supp. 552.

136. *See* 20 U.S.C. § 1687.

137. *See, e.g.*, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a) (2011).

138. *See, e.g., Leake,* , 869 F.2d 130(concluding the Restoration Act would provide retroactive application to Rehabilitation Act cases).

> Restoration Act.[139] In 1981, you supported an effort by the Department of Education to reverse 17 years of civil rights protections at colleges and universities that receive Federal funds.[140] Under the new regulations, the definition of Federal assistance to colleges and universities would be narrowed to exclude certain types of students loans and grants so that fewer institutions would be covered by the civil rights laws. As a result, more colleges and universities would legally be able to discriminate against people of color, women, and the disabled.[141]
>
> Your efforts to narrow the protection of the civil rights laws did not stop there, however. In 1984, in *Grove City v. Bell*, the Supreme Court decided, contrary to the Department of Education regulations that you supported, that student loans and grants did, indeed, constitute Federal assistance to colleges for purposes of triggering civil rights protections.
>
> But in a surprising twist, the Court concluded that the non-discrimination laws were intended to apply only to the specific program receiving the funds and not to the institution as a whole. . . .
>
> A strong bipartisan majority in both the House and the Senate decided to pass another law, the Civil Rights Restoration Act, to make it clear that they intended to prohibit discrimination in all programs and activities of a university that received Federal assistance. You vehemently opposed the Civil Rights Restoration Act. Even after the *Grove City* Court found otherwise, you still believed that there was—and this is your quote—"a good deal of intuitive appeal to the argument that Federal loans and grants to students should not be viewed as

139. 20 U.S.C. § 1687, Pub. L. 100-259, 102 Stat. 28 (1988).

140. The specific statement or memorandum was not identified or supplied in the Hearing transcript. Judge Roberts identified a proposal of U.S. Secretary of Education Terrel H. Bell. *Roberts' Confirmation Hearing*, *supra* note 8, at 174–75. Secretary Bell held the position during the first term of the Reagan Administration, from 1981–1984, and was the named defendant in two of the major Title IX cases, *North Haven Board of Education v. Bell*, 456 U.S. 512 (1982), and *Grove City College v. Bell*, 465 U.S. 555 (1984). In referring to seventeen years, Sen. Kennedy was probably referring to the passage of Title VII of the Civil Rights Act of 1964, as with the addition of seventeen years, it would come to 1981 (the year of the alleged memorandum, rather than when Title IX was enacted, which was in 1972).

141. Presumably, referring to other federal statutes.

> Federal financial assistance to the university."[142] You realize, of course, that these loans and grants to the students were paid to the university as tuition. Then even though you acknowledged that the program-specific aspect of the Supreme Court decision was going to be overturned by the congressional legislation, you continued to believe that it would be "too onerous" for colleges to comply with nondiscrimination laws across the entire university unless it was "on the basis of something more solid than Federal aid to students."
>
> . . . Do you still believe today that it is too onerous for the Government to require universities that accept tuition payments from students, who rely on Federal grants and loans not to discriminate in any of their programs or activities?
>
> Judge ROBERTS. No, Senator, and I did not back then. You have not accurately represented my position.
>
> . . . [Interplay among Sen. Kennedy, Chairman Specter and Judge Roberts as to whether Senator Kennedy had given the nominee a sufficient opportunity to complete his response.]
>
> Judge ROBERTS. Senator, you did not accurately represent my position. The *Grove City College* case presented two separate questions, and it was a matter being litigated, of course, in the courts. The universities were arguing that they were not covered at all by the civil rights laws in question simply because their students had Federal financial assistance and attended their universities. That was their first argument.
>
> The second argument was, even if they were covered, all that was covered was the admissions office and not other programs that themselves did not receive separate financial assistance.
>
> *Our* position, the position of the administration—and, again, that was the position I was advancing.[143] I was not formulating policy. I was articulating and defending the administration position. And the administration's position was, yes, you are covered if the students receive Federal

142. Again, the specific memorandum was not identified or attached as an exhibit in the official transcript released. *See Roberts' Confirmation Hearing, supra* note 8. This was presumably adopting a direct approach, rather than an indirect one, as the money went to students who then gave it to universities. This argument would prove successful in insulating the NCAA in *NCAA v. Smith*. 525 U.S. 459 (1999).

143. *Roberts' Confirmation Hearing, supra* note 8, at 175 (emphasis added).

financial assistance, and that the coverage extended to the admissions office. That was the position that the Supreme Court agreed with. We were interpreting legislation. The question is: What is the correct interpretation of the legislation? The position that the administration advanced was the one I have just described. The universities were covered due to Federal financial assistance to their students. It extended to the admissions office.

The Supreme Court in the *Grove City* case agreed with that position. So the position the administration had articulated, the Supreme Court concluded, was a correct interpretation of what this body, the Congress, had enacted.

Congress then changed the position about coverage, and that position was, *I believe*, signed into law by the President and that became the new law.[144] The memo you read about [HEW] Secretary Bell's proposal,[145] if I remember it, was, well, he said, if we're going to cover all of the universities, then we shouldn't hinge coverage simply on Federal financial assistance. And the position I took in the memorandum was that, no, we should not revisit that question. We should not revisit the question that Federal financial assistance triggers coverage.

Senator KENNEDY. I have the memo here.[146] I have 22 seconds left. And your quote is this, "If the entire institution is to be covered, however, it should be on the basis of something more solid than Federal aid to the students." I think most of the Members of the Congress feel that if the aid to the universities, tuition, loans and grants are going to be sufficient to trigger all of the civil rights laws—your memorandum here, "If the entire institution is to be covered, however, it should be on the basis of something more solid than Federal aid to the students." That is your memorandum.

Judge ROBERTS. Well, Senator, again, the administration policy was as I articulated it, and it was my job to articulate

144. Restoration Act, 20 U.S.C. § 1687, Pub. L. 100-259, 102 Stat. 28.

145. *Roberts' Confirmation Hearing, supra* note 8, at 175–76 (not supplied). *See supra* note 140 (concerning Sec. Bell).

146. *Id.*

the administration policy.[147]

After all that exchange, one learned nothing about how the nominee viewed the issue contemporaneously, as opposed to his clearly masterful ability to volley questions posed at him. One comment: that Judge Roberts, while making it explicit that he was acting in an employer-employee relationship, nevertheless used the pronoun "our," rather than an objective description. Clearly, since Title IX's enactment in 1972, the tether for the statute's application to eradicate sex discrimination was the provision of federal funds to the schools. Federal funds came directly to colleges in the form of revenue for research endeavors and indirectly through federal funds provided to collegiate students explicitly to pay tuition costs at the colleges and universities, which was a major part of the federal expenditure scheme. Any checks issued—either by the federal government or by students for tuition—were made payable to the particular college or university and not a particular department. The whole tenet of Title IX was the voluntary acquiescence by the recipient to accept the federal funding. Without access to the particular memo, it is difficult to definitely assess if the nominee rejected this, instead articulating a rather miserly approach by requiring "something more solid" than student federal aid. For someone so attuned to this issue, to be unable to definitely state what happened to the 1988 Restoration Act, which occurred during the Reagan Administration, where President Reagan vetoed the bill, rather than verbalizing "I believe, signed into law by the President" is simply perplexing (even though the nominee had briefly ventured into private practice at that juncture (May 1986–Oct. 1989), until being appointed as the Principal Deputy Solicitor General in October 1989 during President George H.W. Bush's tenure. Moreover, the nominee would subsequently argue before the Supreme Court in another Title IX case, *NCAA v. Smith*, which dealt with the statutory addition to the law that embodied the directive from the Restoration Act, where the nominee, in representing the NCAA, registered another cramped but more logical, and successful, interpretation for what constituted being a recipient of federal funds. One could transfer the earlier sentiment into an argument that "something more solid" was needed to reign in the NCAA from being saddled with Title IX oversight.

One gets the impression that then Attorney Roberts was a tenacious advocate. What is interesting—aside from his mastery of recall as to the intricacies involving cases and matters he worked on twenty years ago—is the way he implicitly framed it from an athletic contest point[148] in that he won,

147. *Id.* at 174–76 (emphasis added).

148. *Id. See Roberts' Confirmation Hearing*, *supra* note 8, at 202, where the nominee opined,

that he was, in fact, successful. Albeit from the Senate testimony, it was his nature to be publicly modest about his extraordinary accomplishments rather than exhibit a blustery type of approach.

2. Inquiry by Sen. Charles E. Grassley

Sen. Charles E. Grassley (R-Iowa) then picked up the baton regarding this case, pointing out in that memo ascribed to the nominee:

> Senator GRASSLEY: But Senator Kennedy left out what your assessment was on it, and you wrote these words. "As a practical matter, however, I do not think the administration can revisit the issue at this late date."
>
> Can you tell us what your position was in this memo? And Mr. Chairman, I would like to have this entire memo submitted for the record.[149] [granted]
>
> . . . .
>
> Judge ROBERTS. The issue was the—in the *Grove City* case, the Court had said that receipt of financial aid by students triggered coverage under the civil rights statutes, limited to the admissions office, the admission policies. The Civil Rights Restoration Act changed that result to say that the limitation was not to the admissions office but applied more generally to the institution.
>
> Secretary [of Education] Bell submitted a proposal. He said, well, if it's going to apply more generally to the institution, then the trigger of simply having students who receive financial aid shouldn't be enough. And the position that we took in response to Secretary Bell's proposal was no, that we weren't going to revisit it. We had argued earlier in *Grove City* that financial aid was enough to trigger coverage and we weren't going to revisit that question. The position was that coverage of the entire institution based on receipt of financial aid was appropriate.[150]
>
> Senator GRASSLEY. So Senator Kennedy's words were not quoting you but quoting words that Secretary Bell had in this

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"Well, the Court got it right in each case." (discussing some other cases).

149. *Id.* at 182. The memorandum, dated February 12, 1982, was not included as an exhibit in the Hearing transcript.

150. *Id.* It was the holding of the Court regardless of whether it was appropriate or not.

> memo, and you were reacting to those.
>
> Judge ROBERTS. Well, it's, again, 23-some years ago. But my recollection is that that was his proposal. Our response was that, no, we're not going to do that, we're not going to change the position we've taken in light of the new legislation.
>
> [Senator Grassley then went into a discussion of the Voting Rights Act.][151]

What about inquiring what the candidate's current position was, as of 2005? Not surprisingly, the jurist again recited the issues that were confronted in the case—as he had for Sen. Kennedy.

3. Exchange with Sen. Joseph Biden

But that was not the end of the discussion. There was a bit of partisanship between both sides of the aisle. Sen. Joseph Biden, Jr. (D-Del.) also dived into the pool with some preliminaries, followed by this exchange:

> Senator BIDEN. The date of the memo was February 12, 1982. I will give you a copy, ask them to bring you down a copy of the memo.
>
> Judge ROBERTS. I can't elaborate on—I can't elaborate beyond what's in the memo. I just—
>
> Senator BIDEN. Well, I hope you don't still hold that view, man. I mean, if the idea that you're not going to—that a conservative civil rights—the head of the Civil Rights Division in the Reagan administration says it is pretty clear Kentucky is discriminating against women in their prison system,[152] and you say, in effect, that may be but, look, we shouldn't move on it, I recommend we don't do anything about this, and the reason we shouldn't do anything [about] this is three-fold: one, private citizens already went ahead and filed suit on this; number two, if, in fact, you go ahead and do this, they may do away with the system [educational programs provided to male prisoners] for the men because there's [sic] tight budgets—and I forget the third one. You now have the memo.

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151. *Id*. at 182–83.

152. *See, e.g.*, Archer v. Reno, 877 F. Supp. 372 (E.D. Ky. 1995).

> Judge ROBERTS. Well, I have the memo and see that one of the areas that you mentioned I say that—and this is to the Attorney General, and I say the reason we shouldn't do this is because "you have publicly opposed such approaches." So, again, it would have been—
>
> Senator BIDEN. It was only his idea, then? I mean, you were just protecting him so he wouldn't be inconsistent?
>
> Judge ROBERTS. I was a lawyer on his staff, and according to this memorandum—and, again,
>
> I don't remember anything independently of this 23 years ago. But the memorandum suggests, a staff lawyer to his boss, that this is inconsistent with what you have said. And, again, I guess I would regard that as good staff work rather than anything else.
>
> Senator BIDEN. I regard it as very poor staff work, with all due respect, Judge, because it seems to me you insert your views very strongly in here. You don't say you said this. You say, "And, by the way, there's [sic] other reasons why we shouldn't do this. Assume you're saying you wouldn't go this route before, but I want to give you more ammunition here, Brad.[153] Private plaintiffs have done this; it is inconsistent with three themes in your judicial restraints effort: equal protection claim, relief of a well-involved judicial inference, et cetera; and, by the way, the end result may be with tight budgets they may do away with this."
>
> My time is running out. I will come back to this. I hope you get a chance to study it between now and the time we get back

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153. The transcript did not specify a complete name for this individual. However, the Assistant Attorney General of the Civil Rights Division at the U.S. Justice Department during most of the Reagan Administration was William Bradford Reynolds.

There was a memorandum from Mr. Roberts to "Brad Reynolds." *See* National Archives News, *Records Pertaining to John G. Roberts, Jr.* (Released on Sept. 2, 2005) (Files concerning William Bradford Reynolds from 1981-1988) (Memorandum from John Roberts to Brad Reynolds, AAG Civil Rights Division; Voting Rights Act; Internal Memos (Feb. 8, 1982) (Box # 14; Folder # 387), *available at* http://www.archives.gov/news/john-roberts/accession-60-89-0172/001-Box14-Folder387.pdf; University of California at Santa Barbara, *Radio Address to the Nation on Civil Rights* (June 15, 1985), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=38782#axzz1rYVMVjoy (wherein President Reagan referred to "Brad Reynolds." (Parenthetically, Judge Roberts was appointed as Special Assistant by Hon. W. French Smith. *Roberts' Confirmation Hearing*, *supra* note 8, at 69. During the two-term Reagan Administration (Jan. 1981–Jan. 1989), Smith was succeeded by Hon. Edwin Meese III, in 1985, who was succeeded by Hon. Richard L. Thornburgh, U.S. Attorney General, during the George H.W. Bush Administration.).

to the second round.[154]

Sen. Biden would nevertheless continue exploring this area with Judge Roberts.

> Senator BIDEN. The next question. You know, I find it fascinating, this whole thing about Title IX and whether or not by Title IX—you and I know what we are talking about, but for the public at large who really has an interest in all of this as well, the issue was whether or not when a student gets aid, whether or not it only goes to the admissions piece of it.
>
> Now, you said something that was accurate but I don't think fulsome to Senator Kennedy, and correct me if I am wrong. You said, look, we were arguing that it did apply—Title IX did apply. If a student got aid, it applied to the university. That was one of the questions, whether or not you have no application or a narrow application [to the educational institution]. And you argued that it should apply to the admissions process.
>
> But there is a second issue in that case, and the second issue is: Do you apply it narrowly only to do with the admissions policy or do you apply it to if they are discriminating in dormitories?[155]
>
> I got your answer on the first part. You thought it should apply, at least narrowly. Were you arguing that it should apply broadly? And this was before—let me make it clear. The district court, I say to my friends—because I had forgotten this. The district court had ruled that this only applies to admissions, and there was a question. The Chairman of Reagan's Commission on Civil Rights said we should get in on the side of the plaintiff here, and we should appeal this to the Supreme Court or to a higher court and say, "No, no, this applies across the board, this applies if you don't put money in sports programs, you don't put money in dormitories, et cetera."
>
> What was your position on Reagan's Civil Rights Chairman, Clarence Pendleton, suggesting that we appeal the decision of

154. *Roberts' Confirmation Hearings, supra* note 8, at 192–93.

155. Presumably, referring to a program-wide analysis.

the circuit court narrowly applying it only to the admissions office?

Judge ROBERTS. Senator, I was a staff lawyer. I didn't have a position. The administration had a position, and the administration's position was the two-fold position you've set forth. First, Title IX applies. Second, it applies to the office, the admissions office.

[Some interchange as to the answers supplied.] . . . .

Judge ROBERTS. –dispute that was 20-some years ago. The effort was to interpret what this body, Congress, meant. The administration position was Federal financial aid triggers coverage. It's limited to the admissions office. The United States Supreme Court agreed on both counts.

Senator BIDEN. I understand that.

Judge ROBERTS. So I would say that the administration correctly interpreted the intent of Congress in enacting that legislation.

Senator BIDEN. Well, let me read what you wrote in that memo. You said you "strongly agree." Now, when my staff sends me a memo saying, "Senator, I recommend you do the following . . . and I strongly agree," that usually is a pretty good indication what they think. Now, maybe they don't. Maybe they just like to use the word "strongly." They said "strongly agree." It usually means they agree. Number one.

Number two, you went on to say, and I quote, that if you have the broad interpretation, it will be—the Federal Government will be rummaging "willy-nilly through institutions." So you expressed not only that you strongly agree, but you thought that if you gave them this power to broadly interpret it, to apply to dormitories and all these other things, that they would willy-nilly—they would rummage willy-nilly through institutions.

It seems to me you had a pretty strong view back then. Maybe you don't have it now.

Judge ROBERTS. Well, and the Supreme Court's conclusion was that that the administration position was a correct reading of the law that this body passed. So if the view was strongly held, it was because *I thought that was a correct reading of the law*. The Supreme Court concluded that it was a correct

reading of the law.[156]

It is unknown why the document or documents were not initially provided to the witness. The Chairman, a former trial attorney, should have required that the witness be provided with any written memoranda discussed by the senators. All this *sturm und drang* about events two decades ago. Sen. Biden was attempting to elicit—albeit in his ubiquitous style[157]—Judge Roberts' current sentiments. The part of "being able to do away with this" through "tight budgets" was the most disturbing. It embodies a win at any cost mentality. In other words, while a law may be on the books, if there is no money to enforce the law, it is essentially toothless and thus de facto non-existent. For example, if there are insufficient inspectors to inspect whether meat from cows complies with U.S. Department of Agriculture standards, then the regulations become de facto meaningless. Or, from a Title IX perspective, if there is not sufficient money appropriated to the OCR, then it puts a strain on administrative enforcement of the statute by the executive department and specifically the U.S. Department of Education.

Remarkably, the Title IX matter would not rest. On September 14, 2005, during the second day of questioning, Sen. Orren Hatch (R-Utah), a former chair of the Judiciary Committee, would afford the witness an opportunity to redress apparent criticism of his Title IX colloquy during the previous day:

> Senator HATCH. Now, also yesterday the Democratic staff of the Committee released a press release stating that you failed to distance yourself from what it called your "earlier *cramped positions* on Title IX and women's rights." . . . Now, what assurance can you give the Committee that you will fairly interpret the civil rights laws, including critical statutes such as Title IX, fully and fairly, consistent with the purposes Congress intended in passing these laws?
>
> Judge ROBERTS. [essentially repeated what he had said in his opening statement including that "I have no agenda," and distinguishing that his role as a judge differed from the role of a "staff lawyer."] I am now a judge, and I have had the experience and I think my record will establish that that is how I approach cases across the spectrum of issues that are

156. *Id*. at 193–94 (emphasis added).

157. Mark Leibovich, *Speaking Freely, Sometimes, Biden Finds Influential Role*, N.Y. TIMES, Mar. 29, 2009, at 1, 16. (indicating that "they also acknowledge that the verbose vice president has struggled to adjust at times to working within a White House that prizes discipline."). As of March 2012, Vice President Biden has maintained a relatively low profile during the current administration.

> raised before the courts.[158]

From a semantics viewpoint, it could be argued that the term "cramped" was a rather surprisingly bland word used for partisan politics, here adopted by the Democratic Party to describe the judge's unflinching and static verbiage. Was that the best term the Democrats could muster? It hardly seemed worthwhile to even call attention to the statement and bring it up. Again, the witness deftly slid a fastball across the home plate without straining or getting any dirt on his uniform. He kept to the mantra. The entire answer, such as it was, voiced absolutely no mention of the words "Title IX" or "gender discrimination." Sen. Hatch continued with his questioning reminding the audience that Attorney Roberts had ultimately advocated the correct position in *Grove City College*.

> Senator HATCH. So I find it strange to criticize you because you won a case in the Supreme Court and have not advocated against women's rights in any way, shape, or form ever in your career, as far as I can understand. Is that correct?
>
> Judge ROBERTS. That's correct, Senator.
>
> Senator HATCH. And, in fact, you are a strong supporter of women's rights and gender equality?
>
> Judge ROBERTS. Yes, Senator.[159]

It would have been interesting if there was an amplification by the nominee on this particular area of support of women's rights. No Democratic senator picked up on this exchange to seek examples.

4. Alito's Judiciary Committee Confirmation Hearing

The Senate hearings for his colleague, then Judge Samuel A. Alito, did not explicitly focus on Title IX jurisprudence. However, Judge Alito had the following general exchange during his Senate Judiciary Confirmation hearing, which implicitly referred to Title IX [internal footnotes have been added for informational purposes]:

> Senator [Russell] FEINGOLD [D-Wis.]. Thank you, Judge.

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158. *Roberts' Confirmation Hearings*, *supra* note 8, at 310–11 (emphasis added). *See supra* text accompanying notes 75–76 (Judge Roberts' opening remarks).

159. *Id.* Sen. Coburn (R-Okla.)would mention Title IX and a pre-*Grove City* case, *University of Richmond v. Bell*, 543 F. Supp. 321 (E.D. Va. 1982) (utilizing a narrow approach), to also allude to the witness supporting women's rights. *Id.* at 399–400.

> Does Congress have the authority to enact legislation that would protect gay students from harassment in schools that receive Federal funding?
>
> Judge ALITO. That would fall within the *South Dakota v. Dole*[160] standard, and the question would be whether the condition that's attached to the receipt of the Federal funds is germane to the purpose of the funding, and that's a standard that gives Congress a very broad authority.
>
> Senator FEINGOLD. So that Congress does have the authority in general. The question would be the scope of it.
>
> Judge ALITO. Congress has the authority to attach all sorts of conditions to the receipt of Federal money. It has to be clear so that the States understand what they're getting into, that if you take this money there are conditions that go with it, but provided that that clear statement requirement is satisfied and provided that the condition is germane to the purpose of the funding, then Congress can attach conditions, and it could do so in this area.[161]

Judge Alito did not identify either of the Title IX Supreme Court decisions rendered in *Gebser* or *Davis*, which pertained to sexual harassment generally. The discussion becomes significant due to the Rehnquist Court's interpretation of the extent of the Eleventh Amendment's application, requiring that there be an appropriate Fourteenth Amendment section five nexus to uphold the ability

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160. 483 U.S. 203 (1987) (sanctioning Congress' imposition of a minimum drinking age of 21 in connection with the distribution of federal highway funds, 23 U.S.C. § 158, as a valid use of Congress' Spending Powers, pursuant to the U.S. Constitution. U.S. CONST. art. I, § 8, cl. 1.). *See* Justice Alito's decision in *Arlington Central School District Bd. of Education v. Murphy*, 548 U.S. 291, 296 (2006) (discussion of the Spending Clause with the Individuals with Disabilities in Education Act, 20 U.S.C. § 1400, as reauthorized by Individuals with Disabilities Education Improvement Act of 2004, Pub. L. 108-446, 118 Stat. 2647 (2004), case addressing whether compensation should be afforded expert witnesses), wherein the jurist almost reiterated verbatim his Senate Judiciary Committee response, stating:

> Congress has broad power to set the terms on which it disburses federal money to the States, . . . but when Congress attaches conditions to a State's acceptance of federal funds, the conditions must be set out "unambiguously." "[L]egislation enacted pursuant to the spending power [of the U.S. Constitution] is much in the nature of a contract," and therefore, to be bound by "federally imposed conditions," recipients of federal funds must accept them "voluntarily and knowingly." States cannot knowingly accept conditions of which they are "unaware" or which they are "unable to ascertain."

Id. at 296 (citations omitted) (referred to in Thro, *supra* note 30, at 497).

161. *Alito's Confirmation Hearing, supra* note 20, at 621.

of federal legislation to allow citizens to sue state entities in federal courts – and can arise where there is a federal-funding aspect to a federal statute (such as with Title IX).

Judge Alito commented generally about discrimination, "'[w]hen I get a case about discrimination, I have to think about people in my own family who suffered discrimination because of their ethnic background or because of religion or because of gender. And I do take that into account.'"[162] Albeit, one commentator stressed this Justice's empathy was constrained, "[i]n general, Alito has been no more likely to uphold civil rights claims than Roberts, and only somewhat more likely than Scalia and Thomas."[163]

V. OVERSIGHT OVER ATHLETIC ASSOCIATIONS: STRIKE THREE

"Generally, athletic associations have been buffered from Title IX jurisdiction, as the associations did not directly receive federal funds."[164] In *NCAA v. Smith*,[165] the Supreme Court unanimously concluded that the NCAA was not a recipient of federal funds to bring it within Title IX jurisdiction simply because its member schools received federal funds. As indicated, Attorney Roberts successfully represented the NCAA in the appeal before the Court. According to written testimony provided by then-Judge Roberts at his Senate Judiciary Committee nomination hearings, as to his role in representing the NCAA concerning its seeking a writ of certiorari by the Supreme Court and then upon its grant of the actual appeal, he wrote:

> The issue on the merits was what it meant to "receiv[e] Federal financial assistance," under the terms of the statute. On behalf of the NCAA, we argued that according to Supreme

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162. Emily Bazelon, *Mysterious Justice: What Drives Samuel Alito, Anyway?*, N.Y. TIMES, Mar. 20, 2011, § 6 (Magazine), at 14 (referring to his 2006 confirmation hearings). This author opined, "By operating one case at a time, rather than from a grand vision, Alito has proved himself to be the closest thing conservatives have to a feeling justice." *Id.* at 13. The article found that:

> Alito's sense of empathy . . . rarely extends to people who are not like him. Alito [who authored the majority decision] had no kind words for Lilly Ledbetter, for example, who for almost 20 years was paid less than the men doing the same job she held as a supervisor at Goodyear Tire and Rubber. In 2007, he wrote the 5–4 decision turning away Ledbetter's sex-discrimination suit because she didn't go to court soon enough; she didn't know about the pay discrepancy until years later.

Id. at 14 (referring to Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007) (addressing Title VII litigation)).

163. *Id.*

164. Heckman, *The Glass Sneaker*, *supra* note 4, at 570 n.82.

165. *Smith*, 525 U.S. 459.

> Court precedent, coverage under the statute is limited to direct recipients of federal funding—those who knowingly entered into a bargain by accepting the funding. In a unanimous opinion written by Justice Ginsburg, the Supreme Court agreed with this position and reversed the Third Circuit.[166]

Judge Roberts amplified:

> We argued in our briefs that the Supreme Court had developed a contract theory of coverage with respect to legislation, such as Title IX, enacted pursuant to Congress' Spending Clause powers. Under that theory, entities that knowingly and voluntarily accept federal funding are subject to the restrictions that come with it. The necessary implication of this theory is that coverage under the statute is limited to direct recipients of the funding – those who knowingly entered into a bargain by accepting the funding – and does not "follow [] the aid past the recipient to those who merely benefit from the aid."[167]

As Judge Roberts noted, "[t]he Court explained that, at most, the NCAA's 'receipt of dues demonstrates that it indirectly benefits from the federal assistance afforded its members. This showing, without more, is insufficient to trigger Title IX coverage.'"[168] The Supreme Court would agree with his position. The hearings contained no discourse as to role of Attorney Roberts representing the NCAA and the effect of this decision on female student-athletes subject to the rules and regulations of the most important athletic association nationally.

During the confirmation hearings, Sen. Dianne Feinstein (D-Cal.) had inquired about the Spending Clause:

> Senator FEINSTEIN. Well, let me ask you. Do you believe that State obligations created by Congress through the Spending Clause are enforceable by citizens in the courts?
>
> Judge ROBERTS. Well, the answer there is it depends on that law. In *Gonzaga* what the Court determined was that [the] provision at issue there was not enforceable by private citizens

166. *Roberts' Confirmation Hearing, supra* note 8, at 78 (written response).

167. *Id.* at 105.

168. *Id.* (citing *Smith*, 525 U.S. at 468).

> in the courts. It was enforceable by the Federal Government. The Federal Government can cut off the funds. More likely, the Federal Government can enforce the provision through proceedings against the university.
>
> In the *Wilder* case, a different statute, the Court determined the condition in that case, the Medicare—or Medicaid funding case was enforceable, a private citizen could go into court because the review of Congress' intent in that case came out differently than it did in the *Gonzaga* case.
>
> Senator FEINSTEIN. Thank you. Well, let me just finish this quickly. I am not a lawyer and I don't really know how to ask this question, but let me try. When is it a contract and when is it the law? Because if it is a contract, that affects a whole host of laws that we pass that are very important—Medicaid, Title IX, No Child Left Behind, even the Internet Protection Act, all of these things. So when does a contract attach?
>
> Judge ROBERTS. It's always a contract, and sometimes if the intent of Congress is that private parties be allowed to sue, it's more than a contract. But it's always at least a contract.
>
> Senator FEINSTEIN. So the intent has to be a specific intent.
>
> Judge ROBERTS. It doesn't—no, the courts don't require that. They don't require that you specifically say you have the right to sue. But the Court has to look at it and try to figure out did you intend—when you put this provision in, did you intend private parties to be able to sue for damages? *Or did you expect the Department of Education to enforce that and have the authority to cut off the funds or to impose other conditions because a university is violating it?* And as I've said, some cases come out one way, and some cases come out the other way. But in each of those cases, what the Court is trying to do is figure out what you, the Congress, meant in that statute.[169]

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169. *Roberts' Confirmation Hearing, supra* note 8, at 430 (emphasis added) (referring to *Gonzaga University v. Doe*, 536 U.S. 273 (2002) (addressing the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232 (2000) [hereinafter FERPA] (providing confidentiality as to certain school records) (finding there was no § 1983 private right of action for students to claim violation of the FERPA statute; thus, it would be up to the Department of Education to ameliorate any violations)). Presumably, the second case being referred to was *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498 (1990) (also involving the Spending Clause and a challenge to the Medicaid Act program). *See Gonzaga Univ*., 536 U.S. at 280 (citing *Wilder*, 496 U.S. 498 (1990)).

Too bad none of the senators inquired as to whether the jurist also supported the Court's decision in *Cannon*, allowing a citizen to go forward to safeguard his or her Title IX rights, rather than having to rely solely on the Department of Education, which due to policy or monetary reasons, could be restricted in its enforcement of the statute.

Near the end of the questioning of the witness, there was an exchange among Sen. Charles Schumer (D-NY), Sen. Feinstein, Chairman Spector and Judge Roberts, precipitated by Sen. Schumer's inquiry as to what type of judge the witness would be if elevated to the highest court.

> Senator SCHUMER. . . . Will you be a truly modest, temperate, careful judge in the tradition of Harlan, Jackson, Frankfurter and Friendly? Will you be a very conservative judge who will impede congressional prerogatives but who does not use the bench to remake society like Justice Rehnquist? Or will you use your enormous talents to use the Court to turn back a near century of progress and create the majority that Justices Scalia and Thomas could not achieve? This is the question that we on the Committee will have to grapple with this week. . . .
>
> Judge ROBERTS. . . . And, Senator Schumer, I don't think you can read those [50 Circuit Court] opinions and say that these are the opinions of an ideologue. You may think they're not enough. You may think you need more of a sample. That is your judgment. But I think if you've looked at what I've done since I took the judicial oath, that should convince you that I'm not an ideologue, and you and I agree that that's not the sort of person we want on the Supreme Court.[170]

VI. POSTSCRIPT

On January 21, 2009, in *Fitzgerald v. Barnstable School Committee*, the Roberts Court rendered its first Title IX-related opinion, concluding that the

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170. *Id.* at 442–43. *See* Linda Greenhouse, *Roberts Is at Court's Helm, But He Isn't Yet in Control*, N.Y. TIMES, July 2, 2006, at 2, 22–23.

> His goal of inspiring the court to speak softly and unanimously seemed a distant aspiration as important cases failed to produce majority opinions and members of the court, including occasionally the chief justice himself, gave voice to their frustration and pique with colleagues who did not see things their way.

Id. at 2.

Title IX statute does not preempt § 1983 claims[171] based on the Fourteenth Amendment Equal Protection Clause.[172] The case concerned peer sexual harassment alleged by a female kindergarten student against the Massachusetts public school she attended based on the actions of a male third-grade student that purportedly occurred on a frequent basis on a school bus over a number of months. The student's parents, who were dissatisfied with the public school's proposed solutions to the situation, instituted suit against the school committee responsible for the public school based on Title IX and also sought relief based on the Fourteenth Amendment through use of § 1983. Rather than Chief Justice Roberts electing to write this opinion, he instead passed the assignment to Justice O'Connor's successor, Justice Alito. The Court delivered a unanimous opinion.[173] The previous day, Sen. Biden was sworn in as Vice President of the United States.[174] On March 23, 2009, the Court declined to hear the appeal in *Equity in Athletics, Inc. v. U.S. Department of Education*,[175] concerning whether the elimination of intercollegiate teams at James Madison University, a NCAA Division I college, violated Title IX.

During May 2009, Justice Souter announced his intention to retire from the Court upon the induction of a successor.[176] Later that year, Congress approved President Barack Obama's first nominee to the Supreme Court, Circuit Court Judge Sonia Sotomayor, a member of the Second Circuit Court and the first Latina-American. Her Senate confirmation hearings focused on other topics. Justice Sotomayor has not presently participated in any Title IX cases. During April 2010, Justice Stevens, the Court's oldest jurist, made public his intention to retire at the end of the 2009–2010 term (which ended on June 28, 2010). President Obama nominated U.S. Solicitor General Elena Kagan.[177] Her Senate confirmation hearing took up four days commencing on

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171. 42 U.S.C. § 1983 (2011) (Civil Action for Deprivation of Rights).

172. Fitzgerald v. Barnstable Sch. Comm. 555 U.S. 246 (2009). *See* Diane Heckman, Fitzgerald v. Barnstable School Committee: *The Supreme Court and the Axis of Section 1983, Title IX and the Fourteenth Amendment Equal Protection Clause in Seeking Redress of Education-Related Sexual Harassment*, 246 EDUC. L. REP. 1 (2009) [hereinafter Heckman, Fitzgerald v. Barnstable School Committee] (examining, in detail, this case and the surrounding legal issues).

173. *See Fitzgerald*, 555 U.S. 246.

174. *See* Zeleny, *supra* note 71.

175. 291 F. App'x 517 (4th Cir. 2008) (unpublished opinion), *cert. denied*, 556 U.S. 1127 (2009).

176. *See* Editorial, *Justice Souter Departs*, N.Y. TIMES, May 3, 2009, § 4 (week in review), at 9 (stating, "Abiding commitment to core constitutional values is precisely what Justice Souter . . . has demonstrated in his 18 years on the court." The editorial also underscored, "Justice Souter went on to become a reliable champion of civil rights." *Id.*).

177. President Clinton had previously nominated Ms. Kagan, another Harvard Law School graduate, who was involved as a counsel with his White House, to a federal judge position, but the congressional confirmation hearings were never scheduled. The first two days of the Senate Judiciary

June 28, 2010. The lackluster hearings, based on inquires posed, concerned no questions directed toward Title IX. The Senate Judiciary Committee voted favorably on Solicitor General Kagan's nomination, and she was sworn in as the Court's fourth female Justice on August 7, 2010. One commentator opined that Justices Sotomayor and Kagan "have quickly become a formidable duo on the court's left flank, with the promise to serve as a 21st-century version of Thurgood Marshall and William Brennan."[178] The 2010–2011 term marked the fifth term of the Roberts Court, deemed the most conservative court in decades,[179] with "[f]our of the six most conservative justices of the 44 who have sat on the court since 1937 . . . serving now: Chief Justice Roberts and Justices Alito, Antonin Scalia and, most conservative of all, Clarence Thomas."[180]

On the legislative side, as indicated, Sen. Biden became Vice President of the United States. Sen. Kennedy died during August 2009.[181] Sen. Spector, Chairman of the Judiciary Committee from 2005–2007, changed his long-standing party affiliation (from Republican to Democrat), in 2009, and then lost a primary race that year to seek re-election for his Senate seat in Pennsylvania. Sen. Feingold lost his 2010 campaign for re-election. Sen. Brownback left the U.S. Senate in 2011 to become the Governor of Kansas.

VII. CONCLUSION

Forty years of Title IX jurisprudence before the Supreme Court has centered on threshold and jurisdictional issues as to whether individuals can pursue routine discriminatory claims against certain entities (*Cannon*, *North*

Committee hearings (June 28–29, 2010) were not directed to any specific discussion of Title IX. *The Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. (2010).

178. Emily Bazelon, *Chamber of Pain: The Next Few Years of Supreme Court Rulings Could Be Brutal for Liberals*, N.Y. TIMES, Aug. 7, 2011, § 6 (Magazine), at 9 [hereinafter Bazelon, *Chamber of Pain*].

179. Liptak, *The Most Conservative Court in Decades*, *supra* note 21, at 1. *See also* Jeff Shesol, *Evolving Circumstances, Enduring Value*, N.Y. TIMES, Sept. 19, 2010, at 14 (regarding STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW (2010)), stating

> [B]reyer and the court's liberals . . . are up against the most assertive and, let's just admit it, activist bloc of conservatives in modern memory. According to a recent analysis, even the right-leaning justices of the 1930s – the 'Four Hourseman' who tried to derail the New Deal – are moderates, when compared with John Roberts, Samuel Alito et al.

180. Liptak, *The Most Conservative Court in Decades*, *supra* note 21, at 18. *See also* Bazelon, *Chamber of Pain*, *supra* note 178, at 9 ("And with the left already outnumbered five to four on the Roberts court, liberals are feeling no small amount of trepidation heading into this period, as if the basic tenets of compassionate governance could be brought low.").

181. *See* EDWARD M. KENNEDY, TRUE COMPASS (2009) (memoir).

Haven, Grove City College and *Smith)* or claims involving sexual harassment (*Gebser* and *Davis*), or retaliation (*Jackson*) and if so, can compensatory damages be awarded (*Franklin*). It is somewhat fitting that Justice O'Connor, the first female member of this august group, is the jurist to author the most Title IX Supreme Court opinions. A review of the last four pre-Roberts Court decisions demonstrated the strong block (Chief Justice Rehnquist, Justice Scalia, Justice Thomas and Justice Kennedy) in the cases of *Gebser, Davis, Smith* and *Jackson,* to restrict or temper Title IX's applicability—even where causes of action were allowed to proceed. With the departure of Justice O'Connor, a tempered judicial supporter of the statute, albeit with tough parameters, and the death of Chief Justice Rehnquist, a non-supporter of broad application to Title IX, it now awaits the tenure of the two new men and two new women on the bench.[182] The hearings for Justice Alito were devoid of a substantive discussion of Title IX, and he had not participated in any of the underlying intermediate appellate court reviews for Title IX cases that marched through the Third Circuit Court (*Grove City College* and *Smith*). Likewise, the hearings for Justices Sotomayor and Kagan were not predicated upon discussions of Title IX.[183]

During September 2005, Judge Roberts, with all his intellectual acumen, was still regurgitating backpay remedies for students pursuant to Title IX—despite the Court explicitly rejecting this argument—without any internal reconfiguring or recalibration as a result of the *Franklin* opinion. The then-fifty-year-old jurist could not recall the exact trajectory of the Restoration Act and could not identify the exact standard used for Fourteenth Amendment Equal Protection Clause second-tier sex discrimination claims, while he knew the standards for the first and third tier ones. His unequivocal strong advocacy against Title IX as a government and private attorney can be added to the equation. Even the Solicitor General for the George W. Bush administration supported the plaintiff's position in *Jackson*[184] that Title IX allowed for a retaliation cause of action for the coach when he was speaking out for purported lack of gender equity for his student-athletes. To use the baseball metaphor, if Judge Roberts was the pitcher and Title IX the hitter, based on what occurred during his nomination hearings pertaining to his litigation career, Title IX struck out swinging on three pitches. With the addition of the

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182. *See generally* Linda Greenhouse, *The Roberts Court, Version 4.0*, N.Y. TIMES, Oct. 3, 2010, § 4 (week in review), at 10.

183. *See* Mark Walsh, *Supreme Court Nominee Elena Kagan Has Sparse Record on Education*, NSBA LEGAL CLIPS (May 20, 2010), http://legalclips.nsba.org/?m=2010&w=20.

184. Brief for the United States as Amicus Curiae Supporting Petitioner, Jackson v. Birmingham Bd. of Educ., 544 U.S. 167 (2005) (No. 02-1672), 2004 WL 1900496. *See* Heckman, *Deconstructing Title IX Sexual Harassment, supra* note 47, at 22.

Court's new Chief Umpire, certainly not inclined to like anything about the statute based on his fossilized congressional testimony evidencing his thoughts about his actions as an attorney, it will be interesting to see what occurs in the future. When the next Title IX case comes before the Court, rather than the customary opening words "Oyez, Oyez, Oyez," the session will start with "Batter up," and sitting behind the bench will be the Chief Umpire. Time will tell what the dimensions of the batter's box are for the Title IX players in the Roberts Court.[185]

185. *See supra* text accompanying note 171. Presently, the Roberts Court did not grant any petitions for writs of certiorari to address Title IX during his inaugural term (2005–2006), and the first full term without Justice O'Connor (2006–2007). During the next term (2007–2008), the Court agreed to hear the appeal in the Title IX-related case *Fitzgerald v. Barnstable School Committee*, and on January 21, 2009, the Court issued its decision. *Fitzgerald*, 555 U.S. 246 (unanimously ruling that Title IX did not preempt a Section 1983 Fourteenth Amendment Equal Protection Clause claim, finding the statute was not comprehensive). *See* Heckman, Fitzgerald v. Barnstable School Committee, *supra* note 172. *See also* Equity in Athletics, 291 F. App'x 517 *cert. denied*, 556 U.S. 1127 (2009) . There were no other grants of certiorari involving Title IX cases during the 2010–2011 term.

APPENDIX

TABLE 1. Summary of Pre-Roberts Court's Title IX Decisions

	Name of Case	**Decision**	**Author**	**Subject Matter**
1	*Cannon v. Univ. of Chicago,* 411 U.S. 677 (1979) (reversing and remanding Seventh Circuit)	(7–2)	Stevens	affording a private right of action (student) generally to remedy Title IX violations
2	*North Haven Sch. Bd. v. Bell,* 456 U.S. 512 (1982) (affirming and remanding Third Circuit)	(6–3)	Blackmun	upholding the constitutionality of the Title IX regulations (Subpart E\) governing employment
3	*Grove City Coll. v. Bell,* 456 U.S. 555 (1984) (affirming Third Circuit)	(7–2)	White	narrow interpretation as to the receipt of federal funds element
4	*Franklin v. Gwinnett Cnty. Public Schs.,* 503 U.S. 60 (1984) (9-0)[186] (reversing Eleventh Circuit)	(9–0)	White	allowing monetary damages as a remedy for intentional violation of the statute
5	*Gebser v. Lago Indep. Vista Sch. Dist.,* 524 U.S. 274 (1998) (affirming Fifth Circuit)	(5–4)	O'Connor	affording a cause of action against educational institutions based on teacher-student sexual harassment
6	*Nat'l Collegiate Athletic Ass'n v. Smith,* 525 U.S. 459 (1999) (vacating and remanding Third Circuit)	(9–0)	Ginsburg	indirect receipt of federal funds by an entity is not sufficient to render Title IX jurisdiction
7	*Davis v. Monroe County Bd. Of Educ.,* 526 U.S. 629 (1999) (reversing and remanding Eleventh Circuit)	(5–4)	O'Connor	affording a peer sexual harassment cause of action against the educational institution
8	*Jackson v. Birmingham Bd. of Educ.,* 544 U.S. 167 (2005) (reversing Eleventh Circuit)	(5–4)	O'Connor	affording educational employees a retaliation cause of action

186. Although this was a unanimous decision, Justice Scalia authored a concurring opinion reluctantly agreeing with the judgment, joined in by Chief Justice Rehnquist and Justice Thomas. A certain pattern emerged, as Chief Justice Rehnquist, along with Justices O'Connor, Scalia, Kennedy and Thomas, formed the stalwart block in four subsequent *Franklin* cases limiting or restricting Title IX, even though they were in the majority position. *See Gebser*, 524 U.S. 274*; NCAA v. Smith,* 525 U.S. 459; *Davis*, 526 U.S. 629; *Jackson*, 544 U.S. 167.