Judicial Deference and Sexual Discrimination in the University

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JUDICIAL DEFERENCE AND SEXUAL DISCRIMINATION
IN THE UNIVERSITY

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JUDICIAL DEFERENCE AND SEXUAL DISCRIMINATION IN THE UNIVERSITY

By Mark Bartholomew*

Gender discrimination is a problem for higher education. Instead of concentrating on their studies, some college students must concentrate on fending off sexual harassers. In a random sampling of Michigan State students, 25 percent reported being sexually harassed within the last year. Sexually hostile learning environments sabotage the educational progress and self-esteem of student victims. This harassment increasingly comes in the form of sexual speech, and raises related concerns about academic freedom. Title IX of the Educational Amendment Act of 1972 prohibits sex discrimination against students in educational institutions that receive federal funds. Equally disturbing, some female professors continue to face sexist university power structures that deny them equal opportunities. In its first incarnation, Title VII of

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* Yale Law School, Juris Doctorate, 2000. Cornell University, Bachelor of Arts, 1994. Special thanks to Stephen Yale and Shay Dvoretzky for their help with this article.

1 This Note uses the terms “college” and “university” interchangeably.

2 See Jane Elza, Liability and Penalties for Sexual Harassment in Higher Education, 78 ED. LAW REP. 631, 631 (1993); see also JUDITH BERMAN BRANDENBURG, CONFRONTING SEXUAL HARASSMENT: WHAT SCHOOLS AND COLLEGES CAN DO 14-17 (1997) (presenting a chart of the major studies of sexual harassment in higher education).


4 The counsel for the American Association of University Professors recently commented on the recent increase in sexual harassment cases filed under Title IX of the Civil Rights Act of 1964. 20 U.S.C. § 1681(a), concerning classroom speech or reading material. For her remarks, see Neil W. Hamilton, Contrasts and Comparisons Among McCarthyism, 1960s Student Activism and 1990s Faculty Fundamentalism, 22 WM. MITCHELL L. REV. 369, 387 (1996).


6 Although the vast majority of the reported cases of academic gender discrimination deal with discrimination against women, this Note is not meant to be limited to unfair treatment of women. Both Title VII and Title IX provide a cause of action for victims of same-sex sexual harassment. See Oncale v. Sundowner Offshore Services, Inc., 118 S. Ct. 998 (1998) (extending Title VII liability for male-male sexual harassment); Kinman v. Omaha Public Sch. Dist., 94 F.3d 463 (8th Cir. 1996) (extending Title IX liability for harassment of a female student by a female teacher). Title IX does not prohibit discrimination on the basis of sexual orientation, but harassing conduct of a sexual nature directed at gay or lesbian students (e.g., male students targeting a lesbian student for physical sexual advances) may create a hostile academic environment, and thus an actionable claim under Title IX. See OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUCATION, SEXUAL HARASSMENT GUIDANCE 1 (1997)
the Civil Rights Act\(^7\) exempted educational institutions from liability.\(^8\) But the glaring absence of women and minorities in higher educational employment prompted Congress to amend the Act.\(^9\) Congress intended to use Title VII to clean up universities where "women have long been invited to participate as students in the academic process, but without the prospect of gaining employment as serious scholars."\(^10\) Despite this strong language, most of the time Title VII professorial plaintiffs are unsuccessful. According to one study of Title VII tenure litigation, only one out of five plaintiffs alleging discrimination in a tenure decision wins her suit, and even the winners continue to face difficulties at their institutions.\(^11\)

Tenure discrimination plaintiffs confront a judiciary that regularly defers to the administrative judgments of universities.\(^12\) The scholarly community helps foster a

\(^8\) The original act exempted "educational institution[s] with respect to the employment of individuals to perform work connected with the educational activities of such an institution." Civil Rights Act of 1964 § 703, 78 Stat. 255.
\(^12\) See, e.g., Regents of the University of Michigan v. Ewing, 474 U.S. 214, 225 (1984) ("When judges are asked to review the substance of a genuinely academic decision . . . they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is . . . a substantial departure from accepted academic norms."); id. at 226 (["Courts are not] suited to evaluate the substance of the multitude of academic decisions . . ."); id. at 230 (Powell, J., concurring) ("Judicial review of academic decisions . . . is rarely appropriate . . ."); Board of Curators v. Horowitz, 435 U.S. 78, 96 n.6 (1978) (Powell, J., concurring) ("University faculties must have the widest range of discretion in making judgments . . ."); Pollis v. New Sch. for Social Research, 132 F.3d 115, 123 n.5 (2d Cir. 1997) ("Courts must take care not to trample [academic institutions'] legitimate exercise of academic freedom by findings of discrimination based on slender justification consisting primarily of the fact-finder's belief that the plaintiff was as well qualified as others."); Sweeney v. Board of Trustees of Keene State College, 569 F.2d 169, 176 (1st Cir. 1978) ("This reluctance [to examine higher education employment] no doubt arises from the courts' recognition that hiring, promotion, and tenure decisions require subjective evaluation most appropriately made by persons thoroughly familiar with the academic setting."); vacated and remanded on other grounds, 439 U.S. 24 (1978); Faro v. New York Univ., 502 F.2d 1229, 1231-32 (2d Cir. 1974) ("Of
hands-off approach to academic questions by arguing that colleges and universities are special institutions that are capable of resolving their own problems internally.\textsuperscript{13}

Strangely, however, student plaintiffs suing under Title IX do not confront the same deferential posture. This occurs even when the student plaintiffs are suing their professors over classroom speech and academic freedom is at stake. While others have noticed a pattern of deference in academic tenure cases,\textsuperscript{14} the inconsistent treatment of student plaintiffs under Title IX and professorial plaintiffs under Title VII has not been brought to light.

Even though Title VII and Title IX are different statutes, the asymmetric treatment of sexual harassment and tenure discrimination by the courts is cause for concern. First, the similarities between Title VII and Title IX greatly outweigh their differences. Second, and more importantly, both tenure discrimination and sexual harassment promote gender inequality in the university. It does not make sense to use the all fields, which the federal courts should hesitate to invade and take over, education and faculty appointments at a University level are probably the least suited for federal court supervision."\textsuperscript{15}).

\textsuperscript{13} Two examples of scholars proposing a special set of rules for academic institutions include J. Peter Byrne, \textit{Academic Freedom: A "Special Concern of the First Amendment}," 99 YALE L.J. 251 (1989) and Richard J. Yurko, \textit{Judicial Recognition of Academic Collective Interests}, 60 B.U. L. REV. 473 (1980). Byrne scolds today's courts for failing "to recognize that universities are fundamentally different from business corporations [and] government agencies." Byrne, supra, at 254. Instead, lawmakers should realize that "universities require legal provisions tailored to their own goals and problems." \textit{Id}. Yurko takes a different approach by using organizational theory to justify limited deference to the decisions of academic institutions. See Yurko, supra, at 506-40. Even scholars who do not choose to explore higher educational law seem to agree that it does not fit within their legal models. See, for example, Cynthia L. Estlund, \textit{Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment}, 75 TEX L. REV. 687, 774 (1997) ("The classroom environment seems most closely analogous to the workplace .... But crucial differences cause me to reject the analogy as at least premature.").

\textsuperscript{14} See Elizabeth Bartholet, \textit{Application of Title VII to Jobs in High Places}, 95 HARV. L. REV. 945, 961 (1982) ("In cases involving academic institutions, a number of courts have adopted a 'hands-off doctrine' ...."); John D. Copeland & John W. Murry, Jr., \textit{Getting Tossed From the Ivory Tower: The Legal Implications of Evaluating Faculty Performance}, 61 MO. L. REV. 233, 255 (1996) ("Prior to the granting of tenure, courts are inclined to give great deference to what is basically an academic evaluation which may use primarily subjective standards."); Richard J. Yurko, \textit{Judicial Recognition of Academic Collective Interests}, 60 B.U. L. REV. 473, 496 (1980) ("Academic institutions are accorded judicial deference unless a plaintiff can prove discrimination, but few plaintiffs can prove discrimination because academic institutions are accorded judicial deference.")
law to fight for sexual equality on one academic front and not the other. Third, an unbalanced deference regime endangers academic freedom: Tenure decisions receive deference, but in the context of Title IX hostile educational environment suits, professors’ decisions on how to teach classes do not. Admittedly, there is a tension between promoting equality and protecting freedom. Heavy handed judicial attempts to maintain an equal playing field for women may abridge free speech. But a double standard for gender discrimination is not an appropriate solution. The right of a professor to teach in a controversial, innovative manner seems just as crucial to preserving free thought in the university as the right of a university to grant lifetime tenure to candidates who offer the most influential and provocative scholarship.

In *Gebser v. Lago Vista Independent School District*, the Supreme Court recently reversed a line of case law that had highlighted the similarities between Title VII and Title IX. After presenting the evidence of an asymmetrical application of judicial deference to the university in Part I, Part II of this Note sketches the legal requirements for Title VII and Title IX suits. Part II then critiques the *Gebser* Court’s decision to weaken the remedial powers of Title IX relative to Title VII. The similarities between the two statutes outweigh their differences. More importantly, contrary to *Gebser’s* restrictive view of Title IX liability, today’s deference doctrine privileges Title IX sexual harassment plaintiffs over Title VII plaintiffs protesting discriminatory hiring in the academy. Part III explores the arguments for and against judicial deference in the

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16 See *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 75 (1992) (analogizing sexual harassment in the workplace to sexual harassment in the schools); *Bruzonkala v. Virginia Polytechnic Institute*, 132 F.3d 949 (4th Cir. 1997) (applying Title VII standards of institutional liability to hostile environment sexual harassment cases involving a student’s harassment of another student), *reh’g granted, opinion vacated*; *Torres v. Pisano*, 116 F.3d 625, 630 n.3 (2nd Cir. 1997) (“We have held that Title VII principles apply in
academic setting. The biggest argument against deference is the status quo’s uneven treatment of campus speech. The Note concludes by offering some suggestions for evaluating academic gender discrimination suits and applying the deference doctrine uniformly. Proof of ex ante agreements between learning institutions and their faculty and students should be required before judicial deference will apply.

I. ASYMMETRICAL APPLICATION OF JUDICIAL DEFERENCE

The language of judicial opinions varies markedly depending on whether the plaintiff is suing under Title VII or Title IX. To avoid second-guessing academic decision-makers, in Title VII suits, judges maximize both the supposed subjectivity of the tenure selection criteria and the dangers of judicial review to academic freedom. Title IX classroom sexual harassment cases, on the other hand, are marked by lengthy attention to testimony and university complaint procedures and little to no mention of the danger judicial review poses to academic free speech.

A. Facing the Facts vs. Emphasizing Subjectivity

First, Title IX opinions carefully examine university procedures for dealing with sexual harassment claims and do not hesitate to comment on the factual record. Judges in Title VII cases, on the other hand, avoid overturning administrative decisions by characterizing employment criteria as more subjective than they really are.

Academic sexual harassment opinions often contain long factual descriptions of instances of sexual harassment and the university system for receiving complaints. In Brzonkala v. Virginia Polytechnic Institute, a case that is also notable for its use of interpreting Title IX,”); Kinman v. Omaha Public Sch. Dist., 94 F.3d 463 (8th Cir. 1996) (applying Title VII standards to a case of teacher-student harassment).

17 132 F.3d 949 (4th Cir. 1997), reh’g granted, opinion vacated.
graphic language in contrast to the blander recitation of facts typical in Title VII cases, the court spends three pages detailing the administrative process for filing a harassment complaint at the university. Detailed examinations of university sexual harassment policies are common in Title IX cases. Title IX opinions often use material from briefs and deposition testimony to present a fuller picture of the harassing acts. Instead of deferring to university fact finders, Title IX courts tend to pride themselves on thorough investigations of the record. For example, in a particularly document intensive case involving a hostile environment suit brought by a female surgical resident, the court spent ten pages scrutinizing supervisor evaluations and the structure of the residency program. The court emphasized its rigorous review: “The record in this case is quite large . . . we have reviewed every page carefully.”

Meanwhile, judges avoid substantive commentary on employment procedures in university Title VII cases. A plaintiff who points to a factor that suggests her qualification for tenure may face a court that believes “there is no common unit of

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18 Christy Brzonkala was freshman who was brutally gang raped by two members of the school football team. The court describes Brzonkala’s terrible ordeal in detail. Id. at 953-54.
19 See id. at 954-56.
22 Lipsett v. University of Puerto Rico, 864 F.2d 881, 886-95 (1st Cir. 1988).
23 Id. at 886.
24 Plaintiffs often charge their faculty peer review committees with sex discrimination, but there are many other links in the tenure decision chain. A typical tenure review decision may involve the input of: a college dean; university president; provost or other chief academic officer; a central tenure review board; or a tenure appeals committee in addition to or instead of the peer review committee. The appeals committee is usually composed of faculty that are not associated with the tenure candidate’s department. See TERRY L. LEAP, TENURE, DISCRIMINATION, AND THE COURTS 49 (2d ed. 1995). Some university hiring policies require all of these groups to scrutinize a professor’s candidacy. Except for close votes, it is rare for the chief academic officer to overturn the recommendation of a peer review committee or a college dean. See id. at 46.
measure by which to judge scholarship."\textsuperscript{25} The court can then cite several other factors that may (or may not) have gone into the tenure calculus and uphold the university's decision. For example, in \textit{Lieberman v. Gant}, the court "tick[ed] off the topic heads of the evidence" that the female plaintiff was not qualified for tenure.\textsuperscript{26} After presenting this list, the court found that it did not need to engage in "a tired eye scrutiny" of plaintiffs' comparative evidence that male candidates with similar or inferior teaching or publishing records had been awarded tenure.\textsuperscript{27} Such an examination, the court found, would needlessly "second-guess" the peer reviewers who had assessed the plaintiff's qualifications.\textsuperscript{28} Other courts have followed the same lead, emphasizing the lack of established tenure criteria to ratify the university's decision,\textsuperscript{29} or the inherently subjective nature of all tenure decisions.\textsuperscript{30}

Even when common measurements of scholarship have been established, the court may still defer to administrative judgment. \textit{Siu v. Johnson}\textsuperscript{31} presented a tenure discrimination case ripe for rigorous judicial review. Siu, an assistant professor, was George Mason University's only East Asian faculty member.\textsuperscript{32} She applied for tenure after working at GMU for six years—the tenure track probationary period. The faculty

\textsuperscript{25} Zahorik v. Cornell Univ., 729 F.2d 85, 93 (2d Cir. 1984).
\textsuperscript{26} Lieberman v. Gant, 630 F.2d 60, 66 (2d Cir. 1980).
\textsuperscript{27} Id. at 67-68.
\textsuperscript{28} Id. at 68.
\textsuperscript{30} See Sweeney v. Board of Trustees of Keene State College, 569 F.2d 169, 176 (1st Cir.) ("This reluctance [to examine higher education employment] no doubt arises from the courts' recognition that hiring, promotion, and tenure decisions require subjective evaluation most appropriately made by persons thoroughly familiar with the academic setting."), vacated and remanded on other grounds, 439 U.S. 24 (1978).
\textsuperscript{31} 748 F.2d 238 (4th Cir. 1984).
\textsuperscript{32} See id. at 239.
handbook spelled out sixteen criteria to be used in tenure decisions.\textsuperscript{33} Siu was denied tenure on the grounds that she lacked scholarly potential. Unlike the typical tenure discrimination case, Siu could point to the sixteen written criteria that should have guided the administrators making the tenure decision (and the court in its review). The court, however, distanced itself from any critical examination of the tenure decision. In contrast to an objective promotion process "for which fairly stringent judicial review to insure [sic] adequacy is both necessary and possible[,]" the court decided that "[this] is one much more subjective and less susceptible, therefore to fine-tuned judicial review."\textsuperscript{34}

\textbf{B. Imposing Liability for Gender Discrimination vs. Protecting Academic Freedom}

Second, the opinions under the two statutes take drastically different views of the need to preserve free academic speech. Title VII academic cases suggest that the court has two duties: to settle the employment dispute at issue \textit{and} to preserve academic freedom. Courts that employ traditional modes of Title VII analysis, like the use of comparative evidence to make a case for disparate treatment, risk upsetting academic freedom values.\textsuperscript{35} In one case, a plaintiff received enthusiastic support from a tenure review committee only to have her candidacy rejected by the university president.\textsuperscript{36} Sitting in review, the First Circuit refused to admit as evidence the transcript of a speech made by the president that testified to his opinion of women. The court explained: "We

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{33} See id. at 240-41.
\item \textsuperscript{34} Id. at 244-45.
\item \textsuperscript{35} See Lieberman v. Gant, 630 F.2d 60, 67 (2d Cir. 1980) ("Indeed, to infer discrimination from a comparison among candidates is to risk a serious infringement of first amendment values [and] . . . our long tradition of academic freedom.").
\item \textsuperscript{36} Brown v. Trustees of Boston Univ., 891 F.2d 337 (1st Cir. 1989).
\end{itemize}
\end{footnotesize}
fear . . . the chilling effect that admission of such remarks could have on academic freedom." 37

In another case, the plaintiff protested the college's decision to relegate her to part-time, non-tenured employment. 38 She made her case through a statistical analysis of the qualifications and ages of the tenured faculty. 39 In dismissing her analysis, the court remarked that "courts must take care not to trample [the] legitimate exercise of academic freedom. . . . Unless courts heed this warning, university faculties will be selected by judges and jurors, causing significant damages to First Amendment values." 40

Title IX opinions do not exhibit the same driving concern with academic freedom. In fact, often judges studying sexual harassment charges against professors do not even mention the preservation of academic free speech. This is true even when the sexual harassment charge stems from classroom speech or office speech. 41 When academic freedom is mentioned in the context of Title IX, it is given short shrift. In Kadiki v. Virginia Commonwealth University, 42 a student charged her biology professor with sexual harassment. Statements made by the professor as he administered a makeup exam to the student were central to the court's holding. 43 Nevertheless, in a footnote, the court dismissed any concern that judicial interference in professor-student interaction could squelch academic speech: "[T]he Court [is not] persuaded by Defendant's argument that

37 Id. at 351. The Brown court ultimately found in favor of the plaintiff and awarded her tenure. At least one commentator, however, suggests that the favorable plaintiff verdict in the case was the result of a procedural irregularity. See Kathryn R. Swedlow, Suing for Tenure: Legal and Institutional Barriers, 13 REV. LITIG. 557, 585 (1994).
39 See id. at 119.
40 Id. at 123 n.5.
41 See, e.g., Slaughter v. Waubonsee Community College, 1994 WL 663596 (N.D. Ill.) (involving allegations of sexually offensive classroom statements); McClellan v. Board of Regents, 921 S.W.2d 684, 691-92 (Tenn. 1996) (involving remarks made during a medical training session).
'academic freedom' requires a relaxation of the general rule that an employer be held strictly liable for quid pro quo harassment. Academic freedom . . . should never be used to shield illegal, discriminatory conduct.\textsuperscript{44}

The purpose of the foregoing analysis is not to criticize courts for paying particular attention to procedural details or academic freedom values. Title IX courts must examine sexual harassment complaint procedures to determine institutional liability. The Supreme Court has instructed the lower courts (albeit obliquely) that academic freedom "is a special concern" for First Amendment analysis.\textsuperscript{45} Rather my point is that by allowing the courts to defer to Title VII tenure defendants but not to Title IX defendants, the current regime treats similar cases with similar issues at stake in fundamentally different ways. By minimizing the factual record as well as the clarity of promotion criteria, and by maximizing the threat to academic freedom, Title VII judges pave the way for deference to university decisions. A Title VII professorial plaintiff must not only confront her defendant's best arguments, but must do so on a legal playing field skewed to her employer's advantage.

II. COMPARING TITLE VII AND TITLE IX

In this Part, I argue that Title VII and Title IX should be evaluated in the same manner. After sketching the basic requirements of Title VII law, I attempt to refute some of the reasons commonly given for treating Title VII tenure cases differently. Until recently, courts cited Title VII precedents in Title IX cases. In \textit{Gebser v. Lago Vista School Independent School District}, however, the court held that Title VII liability requirements do not apply to Title IX. I argue that \textit{Gebser} is wrong and that Title VII

\textsuperscript{43} \textit{See id.} at 752.

\textsuperscript{44} \textit{Id.} at 754 n.8.
and Title IX liability should be determined in the same manner. Title IX’s text, the contractual relationship between federally-funded schools and the federal government, and the similarities between the schoolyard and the workplace all call for a uniform method of evaluating gender discrimination suits under both statutes. But even if Gebser is correct, the deference regime analyzed in Part I operates in a contrary manner by disadvantaging Title VII plaintiffs while privileging Title IX plaintiffs.

A. Title VII Law and Its Application to Title IX

Julia Prewitt Brown is one of the few plaintiffs to win her tenure in the courts. An English professor at Boston University, Brown received an approving 22-0 vote from the English department’s tenure committee. Nonetheless, Boston University’s president decided that Brown should not be granted tenure, partially on the basis of outside criticism of her scholarship. Brown sued. She brought in English department faculty members to testify that she exceeded the qualifications of B.U.’s tenured male professors. She also provided evidence of sexist remarks made by the president to other women. A federal court ordered her instatement as a tenured member of the faculty.

A successful suit for sexual discrimination in a tenure decision must clear several hurdles. First, the plaintiff must establish a prima facie case of discrimination. For a prima facie case, the plaintiff must show that: (1) she belongs to a protected group, (2) was qualified for tenure, and (3) was denied tenure under circumstances permitting an inference of discrimination. Once a prima facie case has been established, the

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46 Brown v. Trustees of Boston Univ., 891 F.2d 337, 340 (1st Cir. 1989).
47 Speaking about another female professor’s tenure chances, President Silber remarked, “I don’t see what a good woman in your department is worrying about. The place is a damn matriarchy.” Id. at 349. When the professor expressed concern about her tenure chances, the president said, “I never worried about job security, and your husband is a parachute, so why are you worried[?]” Id.
48 Tanik v. Southern Methodist Univ., 116 F.3d 775, 776 (5th Cir. 1997).
defendant college faces the burden of refuting the plaintiff’s claim by presenting evidence that the employment decision was made for a non-discriminatory reason.\textsuperscript{49} Failure to meet the school’s standards of scholarship\textsuperscript{50} or maintain a collegial working environment with co-workers\textsuperscript{51} are two reasons that would place the burden back on the plaintiff. The plaintiff’s burden now includes every element of the claim and she must refute the institution’s nondiscriminatory rationale for rejecting her.\textsuperscript{52}

These are the same guidelines that apply to most employment decisions evaluated under Title VII, but the courts recognize special conditions that set tenure votes apart from other employment decisions and require a hands-off approach.\textsuperscript{53} Judges may be reluctant to accept the analysis in Part I, but they do argue that the unusually long-term nature of a tenure decision and the sensitive nature of faculty relationships necessitate special treatment for Title VII tenure cases.\textsuperscript{54}

Admittedly, the special nature of a tenure decision does warrant a healthy respect for university decision-makers. Unlike other employers, academic hiring committees are

\textsuperscript{49} See Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24, 25 n.2 (1978); Fisher v. Vassar College, 114 F.3d 1332, 1336 (2d Cir. 1997) (en banc).

\textsuperscript{50} See also Lovelace v. Southeastern Mass. Univ., 793 F.2d 419, 425-26 (1st Cir. 1986).


\textsuperscript{52} See St. Mary’s Honor Ctr v. Hicks, 509 U.S. 502 (1993) (holding that a plaintiff must prove an intent to discriminate and not just that the defendant’s proffered reason for the employment decision was pretextual); Fisher, 114 F.3d at 1337 (applying Hicks to a tenure discrimination case).

\textsuperscript{53} See, e.g., Tanik v. Southern Methodist Univ., 116 F.3d 775, 776 (5th Cir. 1997) (discussing “the unique nature of the tenure decision”).

\textsuperscript{54} See Lieberman v. Gant, 630 F.2d 60, 64 (2d Cir. 1980) (“[A]dvancement to tenure entails what is close to a life-long commitment by a university, and therefore requires much more than the showing of performance of sufficient quality to merit continued employment.”); Pomona College v. Superior Court, 53 Cal. Rptr. 2d 662, 667 (Ct. App. 1996) (explaining that deference is warranted because “the essential characteristic of tenure is continuity of service, in that the institution in which the teacher serves has relinquished the freedom or power it otherwise would possess to terminate the teacher’s service”); Rosenzweig v. University of Minn., No. C0-89-1354, 1990 WL 1722, *3 (Minn. Ct. App. Jan. 16, 1990) (“demanding that work be done by those who do not work well together . . . would be detrimental to the inherently collegial nature of a university”); cf. Woolley v. Embassy Suites, Inc., 227 Cal. App. 3d 1520 (1991) (refusing to reunite parties to a long-term contract); Motown Record Corp. v. Brockert, 160 Cal. App. 3d 123, 137 (1984) (same).
not only deciding to give someone a job, but also determining if the applicant’s scholarly contributions will last for an entire career. Special deference to academic tenure decisions does not always make sense on these grounds, however, given the judiciary’s treatment of other professions with lifetime job security. For example, civil service employees, once past an early probationary period, can expect to retain their jobs for a lifetime. Yet government employees do not face an additional burden when attempting to prove discriminatory hiring practices. Moreover, despite judicial concerns over the intimate nature of academic relationships, courts are willing to make judgments in other relationship-oriented employment areas, and do not worry about academia’s sensitive nature when applying Title IX law to campus sexual harassment allegations.

The sexually harassed student has a private right of action under Title IX, which prohibits sex discrimination against students in educational institutions that receive federal funds. In the past, the lower courts ruled that Title VII employment law provides an analogy for evaluating Title IX sexual harassment suits. For example, the Second Circuit stated: “In reviewing claims of discrimination brought under Title IX... courts have generally adopted the same legal standards that are applied to such claims

55 See LEAP, supra note 24, at 62.
58 See Brzonkala v. Virginia Polytechnic Inst. and State Univ., 132 F.3d 949 (4th Cir. 1997), reh’g granted, opinion vacated (Feb. 5, 1998), reh’g en banc, 169 F.3d 826 (4th Cir. 1999), cert. granted, 120 S.Ct. 11 (1999); Kinman v. Omaha Pub. Sch. Dist., 94 F.3d 463 (8th Cir. 1996); Patricia H. v. Berkeley Unified Sch. Dist., 830 F. Supp. 1288, 1292 (N.D. Cal. 1993) (“a student should have the same protection in school that an employee has in the workplace”). But see Smith v. Metro. Sch. Dist. Perry Township, 128 F.3d 1014 (7th Cir. 1997) (refusing to apply Title VII’s “known or should have known” standard to a Title IX claim of student on student sexual harassment).
under Title VII."59 With the Supreme Court's recent ruling in *Gebser v. Lago Vista Independent School District*, however, this has changed.60 A divided *Gebser* Court found that the same agency principles that Title VII uses to hold employers responsible for the sexually harassing behavior of their employees could not be applied in Title IX to hold schools responsible for teacher harassment of students. Instead, a Title IX school can only be held liable under Title IX when it has actual notice of, and is deliberately indifferent to, a teacher's sexually harassing conduct.61 The *Gebser* opinion deserves close attention because it signals an effort to formalize the asymmetric treatment of Title VII and Title IX gender discrimination suits.

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

Alida Gebser was a high school student who had a sexual relationship with one of her teachers. Gebser did not report the relationship to school officials, but a police officer discovered Gebser and the teacher having sex.62 The school immediately fired the teacher. Gebser and her mother filed suit against the school district; they reasoned that the teacher's position of authority in the school helped him to carry out his sexual harassment against her. Under agency principles, the school district would be subject to vicarious liability because the teacher's authority facilitated the harassment.63 Alternatively, Gebser argued that at a minimum, a school district should be liable for damages if it had constructive notice, or should have known, of the harassment but failed

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59 Murray v. New York Univ. College of Dentistry, 57 F.3d 243, 248 (2d Cir. 1995); see also Torres v. Pisano, 116 F.3d 625, 630 n.3 (2d Cir. 1997) ("Title VII principles apply in interpreting Title IX.").
61 *Id.* at 2000.
62 See *id.* at 1993.
63 See *id.* at 1995.
to take action.\textsuperscript{64} In past Title VII cases, the Court had applied agency principles to determine liability for the acts of supervisors.\textsuperscript{65}

But the \textit{Gebser} majority held that neither agency principles nor constructive notice require liability in the Title IX context. Justice O'Connor, author of the majority opinion, distinguished the Court’s ruling in \textit{Franklin v. Gwinnett County Public Schools}.\textsuperscript{66} In \textit{Franklin}, a unanimous Court found a school district liable for the sexually harassing behavior of a sports coach. The \textit{Franklin} decision explicitly compared the situation of a student sexually harassed by a teacher to that of a subordinate sexually harassed by a supervisor in the workplace.\textsuperscript{67} Justice O'Connor explained, however, that while the school district in \textit{Franklin} knew about the harassment and did nothing to stop it, Gebser’s school immediately took action once it learned of the teacher-student affair.\textsuperscript{68} According to O'Connor, any lessons taken from \textit{Franklin} should be limited to cases where the school actually knows of teacher-student misconduct and still fails to act.

After distinguishing \textit{Franklin}, Justice O'Connor made two basic arguments to separate Title VII from Title IX. First, she made a textual argument. Title VII explicitly defines “employer” to include “any agent,”\textsuperscript{69} while Title IX does not include any

\textsuperscript{64} See id.

\textsuperscript{65} See Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986) (finding an employer liable for the sexually harassing behavior of a supervisor even though the employer was unaware of the supervisor’s actions).

\textsuperscript{66} 503 U.S. 60 (1992).

\textsuperscript{67} See id. at 75.

\textsuperscript{68} See \textit{Gebser}, 118 S. Ct. at 1995-96. The Seventh Circuit recently made the same argument. See Smith v. Metropolitan Sch. Dist. Perry Township, 128 F.3d 1014, 1022 (7th Cir. 1997) (“[I]n \textit{Franklin} the school defendants knew of teacher’s alleged harassment and instead of acting to stop it, dissuaded the plaintiff from pressing charges. Thus institutional liability rested on the institution’s actions, and the Supreme Court was not faced with creating a standard for institutional liability based on a teacher’s actions.”).

\textsuperscript{69} 42 U.S.C. § 2000e(b) (1994).
reference to a learning institution's "agents." Therefore, Title VII's agency principles should not be imported to Title IX.70

Second, O'Connor distinguished the constitutional sources of authority for each statute. Congress enacted Title IX through its authority under the Spending Clause.71 As a result, Title IX operates on a contractual basis: Universities accept federal funds and in return agree not to discriminate.72 With Title VII, there is no contract between the government and the employer at issue. Congress enacted Title VII through its authority under the Fourteenth Amendment.73 Title VII is an outright prohibition on discrimination with no strings attached; Title IX's constitutional parentage requires it to attach a condition, the receipt of federal funds, to the enforcement of sexual equality. O'Connor argued that Title IX's Spending Clause roots require an additional notice burden not required under Title VII. Parties entering into contractual relations with the government must be forewarned that certain behavior will subject them to monetary penalties.74 O'Connor argued that monetary damages cannot be levied unless the grantee had actual notice that it was administering the program in violation of statutory requirements. In support of her argument, she cited cases where the Court held that monetary relief for violations of Spending Clause statutes should be limited to prospective relief.75 Since

70 See Gebser, 118 S. Ct. at 1996; see also Smith, 128 F.3d at 1036 (Coffey, J., concurring) (explaining that Title IX's omission of the word "agent" makes it "obvious that "Title VII is not the most appropriate analogue when defining Title IX's substantive standards") (citation omitted).
71 U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties . . . to . . . provide for the . . . general Welfare.").
72 See Gebser, 118 S. Ct. at 1997-98.
73 See U.S. CONST. art. XIV, § 5 (giving Congress the "power to enforce [the amendment] by appropriate legislation").
74 See Gebser, 118 S. Ct. at 1998.
75 See, e.g., Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 596 (1983).
school district officials had no actual notice of Gebser’s harassment, they should not be liable for her teacher’s behavior.\(^7\)

C. Critiquing the Gebser Opinion: Why Title VII and IX Should Be Evaluated in the Same Manner

The Gebser majority’s rationale for limiting Title IX does not stand up to close scrutiny. Justice Stevens, writing for the Gebser dissenter, lists three flaws in the majority’s analysis. First, two separate textual analyses reveal that Title IX should offer even greater remedial possibilities than Title VII. The language of Title VII focuses on the discriminator: “It shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . .”\(^7\) On the other hand, Justice Stevens points out that the drafters of Title IX chose passive verbs that emphasize the victim of the discrimination rather than the discriminator: “[N]o person . . . 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.”

\(^7\) O’Connor actually made a third argument based on Title IX’s scheme for administrative enforcement. The Department of Education’s Office of Civil Rights (OCR) is the agency responsible for administering Title IX. Under the administrative rules, an official who is advised of a Title IX violation must refuse to take action before the OCR can prosecute. See 20 U.S.C. § 1682 (1994). Asserting that a statute’s express system of enforcement should match a system of enforcement that is judicially implied, O’Connor reasoned that ignoring an OCR order is roughly equivalent to deliberate indifference to a private complaint of sexual harassment. See Gebser, 118 S.Ct. at 1999.

An argument can be made against O’Connor’s effort to base relief for an implied cause of action on agency guidelines. The Seventh Circuit held that the inconsistency between Title VII’s administrative review requirements and Title IX’s review provisions (or lack thereof) was irrelevant to a determination of Title IX liability. Even though Title VII plaintiffs, unlike Title IX plaintiffs, must seek administrative review before filing suit, the court found that Title VII precedents could be applied to Title IX suits. See Doe v. University of Illinois, 138 F.3d 653, 666 (7th Cir. 1998). In reaching this conclusion, the court explained that private citizens have had the right to bring suit under Title IX for over eighteen years. During this time, Congress has not considered requiring administrative review for Title IX plaintiffs to promote informal settlement of discrimination claims. Obviously, Congress has not been troubled by the inconsistencies between Title IX’s express and implied methods of enforcement that disturbed Justice O’Connor. Without evidence of legislative intent to the contrary, the administrative requirements for explicit causes of action should not prohibit the Court from setting an appropriate standard for implicit causes of action.

Title IX’s language is not confined to identifying the perpetrator. Instead, the choice of passive verbs asks the interpreter to look at where the discrimination occurred. Once it has been established that a student was sexually harassed as a result of her participation in an educational program, “this statute [has] broader coverage than Title VII.”

Stevens also turns Title IX’s failure to mention “agents” into a virtue for liability-seeking plaintiffs. In *Meritor*, the Court interpreted the word “agent” as a limitation on the liability of the employer: “Congress’ decision to define ‘employer’ to include any ‘agent’ of an employer surely evinces an intent to place some limit on the acts of employees for which employers under Title VII are held responsible.” It is unfair to penalize some Title VII plaintiffs because their statute contains a word and then penalize Title IX plaintiffs because their statute does not contain the same word.

One other textual argument, not covered in the Stevens dissent, highlights the statute’s use of the word “under” to argue against the *Gebser* majority’s stingy definition of Title IX liability. The statute reads: “No person . . . shall be subjected to discrimination under any education program or activity receiving Federal financial assistance . . .” Other word choices could have limited the scope of Title IX’s protective umbrella by requiring that the program itself discriminate against students. Instead, the statute asks if an individual was subjected to discrimination under a program

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78 *See Gebser*, 118 S. Ct. at 2002 (Stevens, J., dissenting) (quoting 20 U.S.C. § 1681(a) (1994)); *see also* Cannon v. University of Chicago, 441 U.S. 677, 691-93 (1979) (explaining that Congress drafted Title IX “with an unmistakable focus on the benefited class”).

79 *Gebser*, 118 S. Ct. at 2002 (Stevens, J., dissenting)

80 *Id.* at 2003 n.9 (Stevens, J., dissenting) (quoting Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 72 (1986) (citations omitted)).

or activity sponsored by a federally funded school. Once harassment takes place on school grounds under the authority of a school’s agent, Title IX liability is triggered.

All three of these textual arguments affirm the broad scope intended in the construction of Title IX. The objection to these arguments is that they prove too much. Did Congress really intend for liability to attach to the school whenever discrimination occurs in an educational program? Maybe, maybe not. Title IX’s legislative history is extremely sparse. What these word choices do prove is that Congress did not try to write a statute with higher liability threshold that Title VII. If the statute’s choice of language—using passive verbs, omitting the word “agent,” protecting those victimized “under” a school’s auspices—gives a clue to Congressional intent, then Congress intended Title IX to provide at least the same amount of protection to sexual discrimination victims as Title VII.

After analyzing the text, Stevens trains his sights on O’Connor’s Spending Clause reasoning. An argument not made by Stevens, however, should be addressed first. The Gebser majority suggests that Title VII standards cannot be applied to Title IX because Congress used different Constitutional powers to enact each statute. A more thorough review of the case law, however, shows that the Court has repeatedly used Title VII to analyze claims arising under Title VI, which like Title IX was enacted through the Spending Clause. For example, in Guardians Association v. Civil Service Commission, the Court found that Title VI’s prohibition of discrimination was “subject to the

construction given the anti-discrimination proscription of Title VII in *Griggs v. Duke Power Co.*." In another case, the Court used the Title VII "business necessity" defense to analyze claims of Title VI discriminatory student placement. Except for the substitution of the word "sex" to replace the words "race, color, or national origin" in Title VI, the two statutes use identical language to identify the protected class. Congress surely did not intend to apply Title VII standards to student victims of racial discrimination while leaving sexually discriminated students with a less generous cause of action. Thus, Supreme Court precedent supports, and definitely does not bar, borrowing liability standards from a statute authorized under one type of constitutional authority and applying them to a statute enacted through a separate constitutional provision.

Stevens finds fault with the incentives created by O'Connor's constitutional analysis. Under the deliberate indifference standard, Title VII employers must take proactive measures to prevent sexual harassment or risk vicarious liability, but federally funded school systems can look the other way and avoid taking responsibility for the conduct of teachers and students. A Title VII employer does not enter into an agreement to obey the law in return for federal funds. A Title IX school, however, agrees to assume the statutory duty not to discriminate in consideration for financial benefit. Stevens

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87 See Audra Pontes, Comment, *Peer Sexual Harassment: Has Title IX Gone Too Far?*, 47 EMORY L.J. 341, 345, 348 (1998) (commenting on the parallel wording of Title VI and Title IX).
88 Senator Birch Bayh (D-Ind), the congressional sponsor of the floor amendment that eventually became Title IX, intended Title IX to fill the gap that had been left by Title VII, which did not cover educational institutions, and Title VI, which only prohibited racial discrimination in education. See 118 CONG. REC. 5803 (1972) (Title IX will "close[] loopholes in existing legislation relating to general education programs and employment resulting from those programs."). The Supreme Court has explained that "Senator Bayh's statements . . . are the only authoritative indications of congressional intent regarding the scope of [Title IX]." *Bell*, 456 U.S. at 527.
points out that agreeing to the statutory duties attendant to a contractual promise should be a more serious obligation than merely promising to obey the law without receiving anything in exchange. As the Franklin court explained, "Congress surely did not intend for federal moneys to be expended to support the intentional actions it sought by statute to proscribe." The majority implements a perverse incentive. A more sensible holding would penalize government beneficiaries more severely than those who discriminated without the use of federal aid.

Other arguments, not mentioned in the Gebser dissent, further support parallel interpretations of Title VII and Title IX. The employment context is not all that dissimilar from the education context, especially where sexual discrimination is concerned. Professors have just as much authority over students as supervisors have over employees: Both set times when the subordinate is supposed to be in attendance, evaluate the subordinate, and control recommendations that can effect the subordinate's future. Moreover, experiences at colleges and universities tend to shape ideas and attitudes for years to come. From the time of the first American post-secondary educational institutions, colleges and universities have seen themselves as secondary parents and moral authorities for youth. Thus, sexual harassment in the academy can

92 Similar points have been made concerning the authority of schoolteachers over young students. See Mary F. Loss, Kiss the Girls and Make Them Sue: Liability of Schools for Peer Sexual Harassment, 100 W. VA. L. REV. 271, 295 (1997) (arguing that employers do not have the same responsibilities for a subordinate's moral development that teachers do for their students so if employers are liable, schools should be liable); Quesada, supra note 91, at 1049 (describing the control a teacher has over her students).
93 This point is even stronger for secondary education where children are younger and the courts have affirmed the school's responsibility for transmitting values. See Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655 (1995); Board of Education v. Pico, 457 U.S. 853, 915 (1982) (Rehnquist, C.J., dissenting).
create harms that are just as serious and long-lasting as those in the employment context where victims tend to be older and less impressionable.\textsuperscript{95} It makes sense, therefore, to evaluate Title IX so that it offers the same protections to gender discrimination victims as Title VII.

For these reasons, Title VII agency principles should apply to Title IX cases. Title IX's text—its passive construction and word choice—militates in favor of protection to sexual harassment plaintiffs that is equal to, if not greater than, the protection afforded by Title VII. Moreover, as Justice Stevens points out, schools that receive federal funds in return for a promise to prevent sexual discrimination should not be held to a lesser standard than Title VII employers who receive no compensation for their anti-discrimination efforts. There are important similarities between the workplace and the schoolyard that support equal attempts to prevent sex discrimination in both areas.

More importantly, even if the differences articulated between Title VII and Title IX are accepted, they cannot explain the deference double standard at work in academic gender discrimination demonstrated in Part I. Gebser makes it harder for students to seek remedies in the courts and reduces the liability of academic employers. Under Gebser, Title IX's remedial scheme is limited relative to Title VII. The current deference double standard, however, \textit{limits} academic Title VII plaintiffs while privileging Title IX plaintiffs. The double standard works in exactly the reverse order from Gebser. Thus,

\textsuperscript{95} See Davis v. Monroe County Bd. of Educ., 74 F.3d 1186, 1193 (11th Cir. 1996) ("The damage caused by sexual harassment also is arguably greater in the classroom than in the workplace, because the harassment has a greater and longer lasting impact on its young victims, and institutionalizes sexual harassment as accepted behavior.")}, rev'd en banc, 120 F.3d 1390 (11th Cir. 1997), cert. granted, 524 U.S. 980 (Sept. 29, 1998).
even the supposed differences between Title VII and Title IX articulated by the *Gebser* court do not support an uneven application of judicial deference to university plaintiffs.

**III. THE ARGUMENT OVER JUDICIAL DEFERENCE**

The preceding analysis shows that courts should not plead ignorance in deciding some cases of university gender discrimination and not others, but should they plead ignorance at all? Besides eroding public faith in the judicial process, the inconsistent application of the deference doctrine also leaves administrators and faculty unclear on what speech and conduct is legally permitted. Before advocating a new set of guidelines for judicial deference, an examination of the pros and cons of the deference doctrine is appropriate.

**A. Why Judges Should Not Defer**

At first glance, any academic privilege seems unfair. Most people do not think of college administrators as disadvantaged citizens deserving legal perks denied to everyone else. There are several good arguments for ending judicial deference to academic judgments altogether. Current speech protections that are too vague in the university context combine with an inconsistent use of judicial deference to leave administrators, faculty, and students on unsure legal footing. Judges claim they are incompetent to officiate scholarly debates, but routinely investigate other unfamiliar employment contexts. By privileging the same elite institutions that launched their careers, judges appear biased against women who are underrepresented on both the federal bench and on faculty rosters. These are good reasons for an active judiciary to reform the current law of higher education.
1. Inconsistent Speech Protections

Both judges and scholars disagree on the First Amendment’s scope inside campus walls. Some argue that professors should be offered special legal protections to compensate for the increased free speech duties of their profession. Others attack the idea of a special professorial privilege. This debate has not been settled. Meanwhile, the unprincipled nature of the deference doctrine makes it difficult to predict judicial attitudes towards university speech. The result is that administrators do not know where to draw the line in setting sexual harassment guidelines that penalize speech, and professors are not sure how far they can go in giving lectures and advice to students.

Academic freedom to speak is still largely undefined except for two basic rules: protected speech must be of public concern and serve a pedagogical purpose. The public concern rule holds that employment speech loses its First Amendment protection when it is a matter of private interest. In Connick v. Meyers, the Supreme Court held that the discharge of an employee for negative comments about office morale and administration did not violate her First Amendment rights. Speech must reflect public concerns to enjoy legal protection. In higher education, this means that speech critical of internal administrative affairs and personnel actions, including tenure review, is unprotected.

97 See Lovelace v. Southeastern Mass. Univ., 793 F.2d 419, 426 (1st Cir. 1986) (“The first amendment does not require that each nontenured professor be made a sovereign unto himself.”).
98 See Estlund, supra note 13, at 773-74 (referring to the unsettled debate over appropriate academic speech).
100 See Matthew W. Finkin, THE CASE FOR TENURE 192-93 (1996); see also Colburn v. Trustees of Indiana Univ., 973 F.2d 581 (7th Cir. 1992) (holding that two professors’ request for administrative investigation of a potentially biased tenure committee was not protected speech).
A second rule is that restrictions on academic speech must be tied to legitimate pedagogical concerns. Action not directly relating to the exchange of ideas between student and teacher faces a more difficult burden than classroom speech. Unfortunately, both of these rules for academic speech are too indeterminate to serve as workable models for academic regulation. Even worse, their vagueness can provide cover for judicial decision-makers trying to avoid overturning academic decisions.

The test for matters of public concern becomes infinitely large or incredibly small depending on the trier of fact’s educational views. In *Silva v. University of New Hampshire*, a technical writing professor sued the university that found his sexual lecture comments had created a hostile academic environment. The *Silva* court, which chose not to defer to the university’s judgment, breezed through the *Connick* test by listing a series of newspaper articles about politically correct speech on college campuses to show that the “the preservation of academic freedom is a matter of public concern.” But just because a professor is asserting his or her right to speak does not mean that academic freedom is at stake. Similarly, just because a particular speech topic makes today’s headlines does not mean that the speech should be shielded from regulation. Judges should not be allowed to decide whether to affirm university speech sanctions based on the currency of controversial lecture topics.

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102 See *Alexander v. Yale Univ.*, 631 F.2d 178 (2d Cir. 1980). *Alexander* was the first case to find that offers of academic advancement in return for sexual favors constitute sex discrimination under Title IX. The *Alexander* court, however, reasoned that the more removed the harassing offers were from the educational context, the greater the burden on the plaintiff. One plaintiff sued on the basis of sexual harassment by a flute instructor in a Yale-sponsored music program; another charged harassment by her field hockey coach. Scrutinizing the language of Title IX that deals with the deprivation of “educational benefits,” the court found that “[w]here the alleged deprivation . . . relates to an activity removed from the ordinary educational process, a more detailed allegation of injuries suffered as a result of the deprivation is required.” *Id.* at 184. The flutist’s and field hockey player’s claims were dismissed.
In another case involving a professor and a writing class, the court took a narrow view of academic speech that is of public concern. The professor offered definitions of pornography and challenged his creative writing students to provide their own definitions. Students complained of sexual harassment and the professor was reprimanded. The professor sued, charging the school with abridging his First Amendment rights. Applying the Connick test, a federal district court found that the professor’s attempts to define pornography for the class were not matters of public concern so his speech was unprotected. Thus, in almost identical for a, professors made sexual lecture comments but the public concern test produced radically different outcomes.

Like the public concern test, the pedagogical purpose requirement is also too malleable to serve as a workable standard for regulating academic speech. Courts differ on what constitutes a viable pedagogical purpose. Keyishian v. Board of Regents struck down a New York law that terminated teachers who refused to certify that they were not Communists. But Keyishian was a 5-4 decision. To the majority, good teaching meant encouraging a free-flowing exchange of views; the classroom should be a “marketplace of ideas.” But to the dissenters, a good classroom restricts politically subversive

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104 Id. at 315.
106 Unlike a city park or town square, university lecture halls are not public forums. See Ward v. Hickey, 996 F.2d 448, 453 (1st Cir. 1993) (“[T]he classroom is not a public forum, and therefore is subject to reasonable speech regulation.”) The test for the reasonableness of an academic speech restriction is whether that restriction is linked to the university’s primary purpose—educating students. See ROBERT POST, CONSTITUTIONAL DOMAINS 324 (1995).
108 Id. at 603.
speech to show "the genius of our democracy."109 In this view of education, speech threatening to republican government is especially ripe for prohibition when it takes place in a university system designed to train democratic leaders. A better understanding of the teacher's role is needed before the Supreme Court's pedagogical purpose test can be applied in a coherent and just manner.110

Moreover, higher educational institutions have varied goals that further complicate the pedagogical purpose test. While elite research universities may see the promotion of new ideas as their primary mission, other colleges may have a different self-image. Trade schools, or even classes at research universities in mechanical and industrial arts, offer a different view of education where the right to speak out does not seem so precious. In these situations, students are expected to learn practical skills rather than volunteer new intellectual hypotheses. Courts need a better way of factoring in individual college mission statements when they adjudicate faculty and student disputes than the current speech regime provides.111

2. Judicial Activism Outside of Academia

Judicial willingness to rule in other unfamiliar employment contexts casts doubt on claims of courtroom incompetence in academic affairs. Judges protest that they are academically unqualified to review tenure decisions,112 but the same judges have

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109 ld. at 628 (Clark, J., dissenting).
110 Confusion over a teacher's appropriate role can be seen in Bishop v. Aronov, 926 F.2d 1066 (11th Cir. 1991). Here the Eleventh Circuit applied Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988), a decision allowing administrators to restrict the free speech of high school newspaper editors, to justify restrictions on faculty speech. A better understanding of the higher education instructor's role in facilitating new ideas in students and the important differences between university scholarship and secondary study should make for a stronger view of professorial rights.
111 Cf. Michael W. McConnell, Academic Freedom in Religious Colleges and Universities, in FREEDOM AND TENURE IN THE ACADEMY, supra note 96, at 303-24 (calling for an academic speech regime that preserves enclaves of sectarian academic thought for religious schools).
112 See supra note 12 and accompanying text.
intervened in Title VII cases involving highly skilled blue-collar jobs that they are just as unfamiliar with as professorships in Romance Studies.\textsuperscript{113} For example, the first case where the Court recognized Title VII’s disparate impact doctrine, \textit{Griggs v. Duke Power Co.}, dealt with the functioning of an electric power plant.\textsuperscript{114} Even though many of the jobs in the dispute involved highly technical skills, the Court placed the burden on the employer to show the job-relatedness of each discriminatory job qualification. In the academic setting, however, courts are more inclined to take an assertion of job-relatedness for granted.\textsuperscript{115}

There is no reason to think that judges are more knowledgeable about power plant jobs than academic careers. Academically trained themselves, judges need not retreat at the first sign of graduate scholarship. They are more likely to be acquainted with the academic world than any other career setting.\textsuperscript{116} Moreover, there is a danger in putting too much faith in academic peer review. Even faculty members in the same discipline may not have a full grasp of their colleagues’ work. Although members of the same English department, a faculty expert on Hemingway may know nothing about the scholarly work of a tenure candidate versed in feminist literature. Unfamiliarity with a professor’s field should not disqualify a judge from determining whether an employment action was discriminatory.

\textsuperscript{113} See Bartholet, \textit{supra} note 14 (discussing how courts have applied Title VII differently depending on the amount of pay and prestige involved in the job).

\textsuperscript{114} 401 U.S. 424 (1971).

\textsuperscript{115} See \textit{supra} notes 24-40 and accompanying text.
3. **Appearances of Judicial Bias**

By deferring to institutional opinion, judges can appear prejudiced against just claims of discrimination filed by women in a male dominated environment.\(^{117}\) Judicial sympathies seem to lie with administrators and the masculine old guard serving on tenure committees and upper-tier administrative posts. Both judges and administrators may prize their status as members of professions that require the finest academic pedigrees.\(^{118}\) Of course, plaintiff professors will possess similar pedigrees, but a judge may find it easier to believe the truth of a negative professional evaluation than to believe that elite institutions are capable of prejudice in their hiring decisions.\(^{119}\) Also, female and homosexual professors may be experts in new areas of study like feminist literature and gay and lesbian studies. A judge may be more likely to side with older male deans and faculty members steeped in a more recognizable intellectual tradition.

Unprovable bias on the part of judges is not the focus of this Note. University gender discrimination suits are tough questions, and the bench does its best to come up with the correct answers. Nevertheless, allegations of judicial prejudice do show the need for changes in the current legal regime. A deferential system for higher education that is marked by clear rules instead of ad hoc application will help deflect charges of

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\(^{116}\) See NEIL HAMILTON, ZEALOTRY AND ACADEMIC FREEDOM 222 (1995); Swedlow, supra note 37, at 582.

\(^{117}\) See Susan J. Scollay & Carolyn S. Bratt, Untying the Gordian Knot of Sexual Harassment, in SEXUAL HARASSMENT ON CAMPUS: A GUIDE FOR ADMINISTRATORS, FACULTY, AND STUDENTS 264 (Bernice R. Sandler & Robert J. Shoop eds., 1997) ("Not only are the administrative and instructional staffs of most colleges and universities male dominated, but the academic culture of most institutions of higher education is both male-defined and male-normed.").

\(^{118}\) See Yurko, supra note 13, at 491 ("The deans and professors who are attacked by the plaintiff as discriminators share with the judge the status of membership in one of the 'intellectual professions.' A judge may empathize with the well-educated and scholarly academic decision-makers in a way that he does not with foremen, personnel managers, and other decision-makers...").

bias. It will be harder to second guess judicial motivations if deference is consistently and logically applied or not applied at all.\textsuperscript{120}

\textbf{B. How Judges Could Defer}

For the reasons mentioned above, blanket judicial deference to academic decision making does not make sense, and its unequal application to only one group of gender discrimination plaintiffs should be ended. But should there be no judicial restraint for disputes in higher education? Universities are unique settings that do not fit the mold set by standard employment law.\textsuperscript{121} There could be reasons for maintaining a tradition of deference in certain well-defined situations.

1. \textit{Promoting Information-Forcing Devices}

Some organizations are allowed to have more discretion over their internal affairs than others. Distinct bodies of corporate and administrative law have been developed to grant special privileges to organizations where society has recognized a value to internal problem resolution. For example, corporations benefit from their own legal standard: the business judgment rule. Under the business judgment rule, managers are excused for errors made in good faith and without being grossly negligent.\textsuperscript{122} Like corporations, administrative agencies enjoy relaxed judicial scrutiny. The substantial evidence rule requires courts to follow an agency's findings of fact if they are based on substantive

\textsuperscript{120} Second guessing of judicial motivations in academic contexts is evident in the legal literature: Many judges identify strongly with decision makers in colleges and universities, who come from similar backgrounds and enjoy similar privileges and perquisites. Because judges believe that they themselves do not discriminate, they find it hard to believe that senior professors, deans, and college presidents do. Judges defer to the academic power structure, not to the principle of academic freedom.


\textsuperscript{121} See Zahorik v. Cornell Univ., 729 F.2d 85, 91-93 (2d Cir. 1984) (arguing that a combination of factors sets the academic world apart from general employment settings).
evidence. If a reasonable mind could accept the agency’s findings, even if the evidence supporting the agency’s conclusion is less than a preponderance of the evidence, the agency decision must be upheld.\(^{123}\)

Part of the reason society can afford to give corporate managers and administrative agencies the protections of the business judgment and substantial evidence rules is that these organizations are required to spell out their intentions in a much clearer manner than most institutions. These organizations are governed by information-forcing devices that universities lack. Registration statements and disclosure requirements remove some of the ambiguity from the shareholder-corporate officer relationship. Administrative agencies have to file annual budgets. Courts will not interfere with a board of directors’ decision as long it is within the framework of powers described in the corporate charter.\(^{124}\)

Academic institutions could face similar requirements when defending a Title VII or Title IX claim. A properly managed deference regime would force administrators to plainly state the implied bargain between educational employer and faculty member or learning institution and student. With deference only being granted to documents that quantify and record criteria for promotion and standards for acceptable speech, administrations would have incentives to achieve ex ante understandings with students and faculty. At the stage in a Title VII suit where the university must rebut a prima facie case of discrimination, the university’s judgment should only be deferred to if it can

\(^{122}\) See DANIEL V. DAVIDSON ET AL., BUSINESS LAW: PRINCIPLES AND CASES 836 (4th ed. 1993). For a similar point arguing that corporations and labor organizations profit from laws that shelter them from judicial review, see Richard J. Yurko, supra note 13, at 513.

\(^{123}\) See, e.g., Chrysler Corp. v. EPA, 631 F.2d 865, 890 (D.C. Cir. 1980); Marker v. Finch, 322 F. Supp. 905, 911 (D. Del. 1971).

\(^{124}\) See, e.g., Summit Range & Livestock Co. v. Rees, 265 P.2d 381 (Utah 1953).
articulate a coherent and standardized process for making tenure decisions. The agreement between the faculty and administration should explain if the school consistently evaluated tenure candidates on the basis of scholarship and if there are safeguards for a professor seeking tenure who is articulating a new theory or working in a new field unfamiliar to her reviewers. Failure to present a coherent review process designed to encourage new scholarly ideas should remove the presumption of deference.

In the Title IX context, faculty-student panels could draw up handbooks in an attempt to define acceptable academic speech. One guidepost for such a project might be distinguishing between speech that offends a gender group collectively and speech that can be personally inappropriate. Students come to school expecting to be challenged; the bargain between the institution and its collective population does not reflect individual student sensitivities. On the other hand, speech that denigrates an entire gender group shutting them out of the academic marketplace does not fit in with today’s standards for academic discourse and could be proscribed in the handbook.

The business judgment and substantial evidence rules should not be applied wholesale to academic institutions. Rather they serve as useful analogies for the development of another legal regime to regulate the judiciary’s grip on academic action.

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125 The most important factor in many academic sexual harassment cases is the presence or absence of a written and publicized sexual harassment policy. See John F. Lewis & Susan C. Hastings, Sexual Harassment in Education 20 (2d ed. 1994).

126 See Amy H. Candido, Comment, A Right to Talk Dirty?: Academic Freedom Values and Sexual Harassment in the University Classroom, 1997 U. Chi. L. Sch. Roundtable 85, 90 (“‘Truths’ are more likely to be challenged in the academic setting than anywhere else.”)

127 Some college policies have begun to recognize the difference between speech that is personally offensive and speech that stigmatizes an entire group on the basis of gender. The Harvard Law School’s recently adopted sexual harassment guidelines separate harassment into two camps: (1) speech or conduct of “explicitly sexual nature” and (2) speech that is not “inherently sexual” but targets individuals because of “gender or sexual orientation.” Harvard Law School Sexual Harassment Guidelines 1 (1995). The guidelines state that while the Supreme Court does not distinguish between these two types of harassment, “[i]n the context of a university . . . interests in free expression are of central importance, and must be weighed against interests in freedom from harassing speech.” Id.
Professor J. Peter Byrne scolds today's courts for failing "to recognize that universities are fundamentally different from business corporations [and] government agencies." Byrne argues that scholars are uniquely qualified for self-regulation. He also disparages the ability of courts to understand the tenure decision-making process. Looking at the evidence, however, shows that academic self-policing has not been particularly successful. My point is that courts should look at the similarities between business, government, and institutions of higher learning to develop an academic deference model that is more consistent with the rest of our law.

2. Removing the Deference Presumption

Additional evidence that casts the institution's decision-making ability in doubt should remove the presumption of deference generated by evidence of an ex ante agreement. Direct evidence of sexual bias could reveal a university fact-finder's partiality. For example, sexist statements made by peer review committee members would allow the court to return to its role as supreme arbiter. In Brown, the court relied on derogatory remarks that indicated a dismissive attitude. Courts should not be afraid to factor in specific statistical evidence that reveals a pattern of discrimination. Despite administration assertions that only a professor's scholarship was taken into account, a

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128 Byrne, supra note 13, at 254 (1989).
129 Id. at 284 ("One probably safely assumes that most scholars attempt to put aside mere disagreement or repugnance most of the time.").
130 Id. at 305 ("It would be perilous for courts [to examine] academic personnel decisions. . . . Courts are ill-equipped to find their way among the labyrinths of academic decision-making.").
131 As a by no means unusual example of intra-faculty animosity, see Jew v. University of Iowa, 749 F. Supp. 946, 948-51 (S.D. Iowa 1990) (cataloging a list of offences by faculty members including: using racial slurs; yelling sexual epithets in a drunken outburst; and a faculty member posting on his office door sexual cartoons that intimated a relationship between two disliked faculty members). See also Gray, supra note 120, at 1592-94 (discussing clashes pitting administration against faculty and faculty member against faculty member).
132 For remarks, see supra note 47.
widely disparate success rate between male and female professors seeking tenure should remove the deference presumption.

Finally, the deference model should not be applied in situations that particularly highlight the possibility of biased judgment. Claims that a plaintiff could not coexist with her coworkers may be a smokescreen for sexually harassing behavior that no one should have to coexist with. Scholarship in a new discipline that is not published in established academic media may find exposure in other forms. The court should be especially sensitive to complaints from scholars in disciplines where gender is part of the subject matter. Unless a candidate in Women's Studies is reviewed by faculty in the same field, bias may creep more easily into the employment calculus.

3. Application of the New Deference Model

Two hypothetical examples can illustrate the use of this new deference model. Suppose that Professor X is rejected for tenure at Elite University after teaching engineering there for six years. Professor X notes that she has given more interviews in local newspapers and published more articles than some of her tenured male colleagues. The university cites X's poor teaching evaluations and lack of creativity for her failure to receive tenure.

Under the proposed deference model, a court should look for evidence, perhaps written in a faculty handbook, signaling an agreement on tenure review criteria between Elite University and X. If Elite can cite such an agreement, and the agreement lists teaching evaluations as a central criterion, then the court should defer to Elite's decision and not challenge its reliance on such evaluations. Unlike the Siu court, a court under this deference regime cannot disregard tenure criteria agreed to by both the
administration and the faculty member. On the other hand, the court should not defer to the creativity criterion if it is not defined in an agreement. Unlike the Lieberman court, a court following this deference model should only defer to factors that are part of an ex ante agreement; a court should not assume that all factors cited by the university warrant deference. Finally, X’s comparative evidence should be compelling if the administration cannot cite a criterion for tenure that had been agreed on beforehand. And if the disparity between male and female tenure votes is especially severe, it should remove the deference presumption created by a faculty-administration agreement.

Now suppose that Student A files a Title IX sexual harassment suit against Cut-Above College. Student A is offended by sexual comments made by Professor Y during his office hours. Even though the statements were made in an office instead of the classroom, the court recognizes the importance of academic freedom in this situation. Cut-Above recently created a new sexual harassment policy drawn up by a committee of faculty, administrators, and students.

Instead of only looking to the public concern and pedagogical purpose tests to determine if Professor Y’s speech is protected, the court can also examine Cut-Above’s sexual harassment policy. Public concern should not be demonstrated through reports in the media. The university’s policy can determine which areas of speech are of concern to the university community and should be protected by deference, and which should be subject to sanction. The university policy may seek to prohibit comments directed at

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133 See supra text accompanying notes 31-34.
134 See supra text accompanying notes 26-30.
135 Compare with the Pollis decision referred to in notes 38-40 and accompanying text.
136 Compare with the Kadiki court’s treatment of statements made in a professor’s office. See supra text accompanying notes 42-44.
137 See supra text accompanying notes 103-04.
individuals because of their gender or sexual orientation while preserving the professor’s right to make explicitly sexual comments. To win deference from the court, Cut-Above will need to cite a passage in its sexual harassment policy that applies to Professor Y’s statements.

The sexual harassment statement may be worded differently depending on what kind of school Cut-Above is. If it is a technical school, the policy may be less accepting of explicitly sexual comments; if it is a liberal arts university, the administration may be more solicitous of provocative statements that challenge established ways of thinking. In effect, the school is determining what speech serves a pedagogical purpose and what does not. This is an advantage over the current deference regime that takes a “one-size fits all” approach to academic speech.

In both cases, the new deference model asks the court to look to ex ante agreements between plaintiff and defendant before invoking deference. Academic freedom is preserved while at the same time universities retain their autonomy to set their own rules for speech and conduct. Most importantly, there is a common baseline for both Title VII and Title IX cases that moves to standardize deference to university decision-making.

IV. CONCLUSION

The current gender discrimination law of higher education is inconsistent. Courts feel free to jump into disputes over sexual harassment in the classroom, but plead intellectual ignorance to avoid scrutinizing administrative judgments in tenure decisions. Distinctions between Title VII and Title IX cannot justify the deference double standard. Legislative and textual analysis of Title IX demonstrates that Congress intended sexually
harassed plaintiffs to have the same protections as employee-victims of discrimination. And even if the Gebser Court's argument that Title IX liability should be more difficult to prove than Title VII liability is correct, the current deference regime acts in the opposite manner.

Ad hoc application of judicial deference, combined with overly flexible tests for university speech, leaves plaintiffs and administrators with little to depend on. A uniform set of legal guidelines for judicial deference in these matters is needed. A regime tying deference to ex ante agreements between administrators and the university's members can be analogized to the deference regimes for other organizations. One benefit to a deference model that draws on similarities with other social organizations is that arguments for deference do not look so self-serving. Tenured academics who write in support of absolute academic freedom and lax legal review of academic decisions are writing in their own self-interest. It is in everyone's interest to take gender out of the calculus for intellectual ability and educational opportunity and strike a better balance between academic equality and academic freedom.