



Title IX

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Office of Equal Opportunity & Title IX



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Content Flag

The content and discussion in this presentation will necessarily engage with sex/gender discrimination and issues of sexual harassment. Much of it may be emotionally and intellectually challenging to engage with.

I will attempt to flag especially graphic or intense content that discusses or represents discrimination and sexual harassment, such as sexual assault, dating violence, domestic violence, and similar conduct, and will do my best to make this a space where we can engage thoughtfully with difficult content.



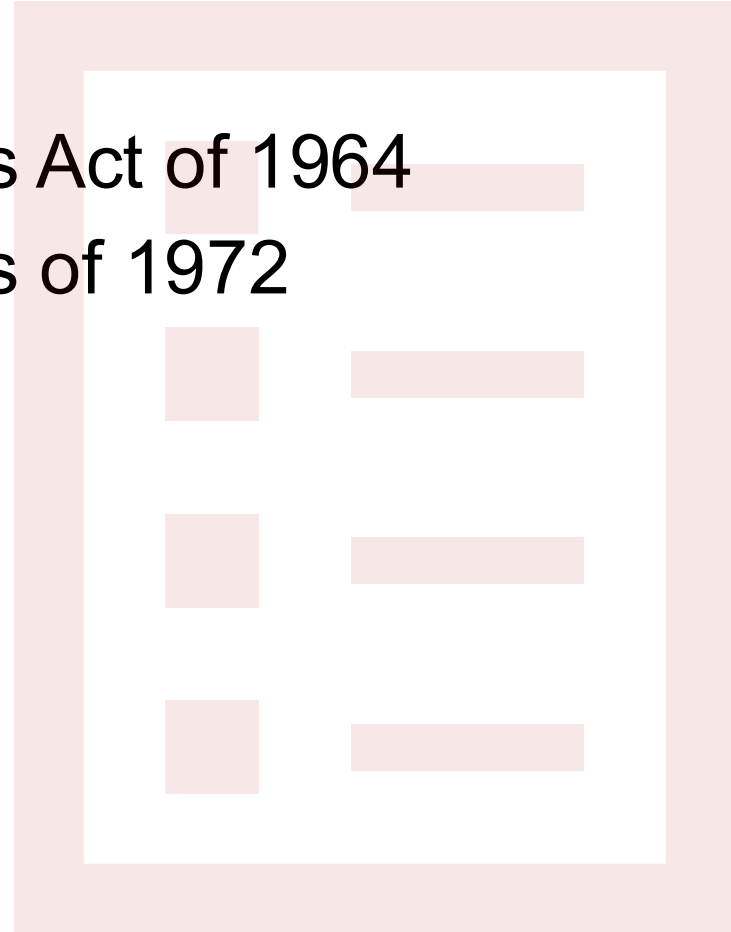
Presentation Norms

- **Questions don't have to be saved until the end.**
- We are free to discuss **hypothetical and/or generic** examples.
- **The OEO does not do DEI work** (and never has) – we are an administrative office to support all individuals affected by discrimination, consistent with state and federal laws like Title IX.
- We will be talking about all forms of discrimination today, including sexual misconduct. **Please take care of yourself** and know what you can safely discuss.
- **I am a mandatory reporter** and must report possible incidents of discrimination or misconduct I become aware of.



Agenda

- Title VI and Title VII of the Civil Rights Act of 1964
- Title IX of the Education Amendments of 1972
- SCOTUS and Title IX
- Sex-Based Discrimination
- Sex-Based Harassment
- DOE Guidance and History
- 2020 Title IX Regulations
- Athletics



Legislative Path to Title IX



Public funds

*“Simple justice requires that **public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes or results in racial discrimination.** Direct discrimination by Federal, State or local governments is prohibited by the Constitution. But indirect discrimination, through the use of Federal funds, is just as invidious; and it should not be necessary to resort to the courts to prevent each individual violation.”*

– **President John F. Kennedy**

June 19, 1963

Special Message to the Congress on Civil Rights & Job Opportunities

Title VII

Title VII of the Civil Rights act of 1964.

- It shall be **unlawful employment practice** for an employer...to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's **race, color, religion, sex, national origin**...
- 42 U.S. Code § 2000e-2



Title VII and Sex

- On February 8, 1964, while the bill was being debated on the House floor, **Rep. Howard W. Smith of Virginia**, Chairman of the Rules Committee and **staunch opponent of all civil rights legislation**, **rose up and offered a one-word amendment to Title VII**, which prohibited employment discrimination. **He proposed to add “sex” to the bill in order “to prevent discrimination against another minority group, the women . . .”**
- This stimulated several hours of humorous debate, later enshrined as “Ladies Day in the House,” before **the amendment was passed by a vote of 168 to 133.**
- **At the time only two states** Hawaii and Wisconsin **had state laws prohibiting discrimination on the basis of sex in employment.**

Jo Freeman, How “Sex” Got Into Title VII: Persistent Opportunism as a Maker of Public Policy, 9 Law & Inequality 163 (1991)

Title VII and Sex

“On February 8, 1964, two days before the House sent the bill to the Senate, [Howard W.] Smith offered from the floor an amendment inserting the word “sex” after the word “religion” in several clauses of the bill, and the amendment was promptly agreed to.”

“One can find neither committee hearing nor report to explain why the amendment was adopted or what it was intended to do. **If Congress put sex in Title VII as a joke or as a strategy that backfired, what would this tell us about the meaning of the statute? The possibilities are unsettling. For how should we construe a Congressional joke?**”

Michael Evan Gold, A Tale of Two Amendments: The Reasons Congress Added Sex to Title VII and Their Implication for the Issue of Comparable Worth, 1981 Duquesne University Law Rev. 301 (1981).

Title VI

Title VI of the Civil Rights act of 1964.

- “No person in the United States shall, on the ground of **race, color, or national origin**, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under **any program or activity receiving Federal financial assistance.**”
- 42 U.S. Code § 2000d



Title IX of the Education Amendments of 1972



The Education Amendments of 1972

- In 1970, legislators began to draw attention to the problem of **discrimination on the basis of sex in the field of education**.
- At the same time, the Equal Rights Amendment to the Constitution and proposals to prohibit sex discrimination in other areas were also being debated in Congress.
- On June 23, 1972, President Nixon signed the bill into law. **Title IX contained the landmark prohibition against sex discrimination in federally funded education programs.**
- Nixon focused his public remarks on what he considered Congress' failure to curb SCOTUS authority with respect to school bussing and desegregation and **did not mention sex discrimination.**



Title IX of the Education Amendments of 1972 (Title IX)

“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** ...” [exceptions]



Patsy Mink

U.S. Congresswoman from Hawaii;
Co-Author of Title IX

Title IX (exceptions)

1. Educational Institutions Commencing Planned Change in Admissions;
2. Educational Institutions of Religious Organizations with Contrary Religious Tenets;
3. Educational Institutions Training Individuals for Military Service;
4. Public Educational Institutions with Traditional and Continuing Admissions Policy;
5. Social Fraternities or Sororities; Voluntary Youth Service Organizations (e.g., Young Men's Christian Association, Young Women's Christian Association, Girls Scouts, Boy Scouts, Camp Fire Girls);
6. Boy or Girl Conferences (e.g., Boys State, Boys Nation, Girls State, Girls Nation);
7. Father-Son or Mother-Daughter Activities; and
8. Institutions of Higher Education Scholarship Awards in "Beauty" Pageants.



SCOTUS and Title IX



Private Right of Action

Cannon v. University of Chicago (1979)

FACTS

- Petitioner's complaints allege that her applications for admission to medical school were denied by the respondents because she is a woman.
- "Only two facts alleged in the complaints are relevant to our decision. First, petitioner was excluded from participation in the respondents' medical education programs because of her sex. Second these education programs were receiving federal financial assistance at the time of her exclusion."

Private Right of Action

Cannon v. University of Chicago (1979)

HOLDING

- An individual has a private right of action under Title IX.
(Congress intended that Title IX would be interpreted and applied as Title VI has been).
- **Title IX Goals:** First, to “avoid the use of federal resources to support discriminatory practices” and second, to “provide individual citizens effective protection against those practices.”
- Title IX has an implied private right of action.

Individual Relief

Franklin v. Gwinnett Cty. Pub. Sch. (1992)

FACTS

- A high school student alleged that she had been subjected to continual sexual harassment by a coach/teacher.
- After the complaint was brought to the school the teacher resigned on the condition that the school close its investigation, which it did.
- “In this case we must decide what remedies are available in a suit brought pursuant to [Title IX’s] implied right.”

Individual Relief

Franklin v. Gwinnett Cty. Pub. Sch. (1992)

HOLDING

- Sexual harassment and sexual abuse of a student by a teacher may mean the school itself engaged in intentional sex discrimination. Monetary damages are an available remedy in private actions brought to enforce Title IX for alleged intentional violations.
- Monetary damages are a potential remedy for Title IX violations.

Extent of Private Right of Action

Women's Equity Action League v. Cavazos (WEAL II)
(D.C. Cir. 1990)

FACTS

- Litigation began in 1970 when black students attending racially segregated public schools in 17 states complained of the delinquency of the Department of Health, Education, and Welfare (HEW) in enforcing Title VI of the Civil Rights Act of 1964.
- Litigation expanded significantly to include all 50 states, multiple federal agencies, and additional civil rights statutes.

Extent of Private Right of Action

Women's Equity Action League v. Cavazos (WEAL II)
(D.C. Cir. 1990)

HOLDING

- The court in WEAL II, ruled that, absent congressional authorization, individuals do not have a private right of action **against the federal government** under Title VI, Title IX, or Section 504.
- Individuals may not compel the federal government to enforce Title IX.
- **Note: Opinion by Ruth Bader Ginsburg, Circuit Judge*

Other Legislation

Civil Rights Remedies Equalization Amendment of 1986

- 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... Title IX of the Education Amendments of 1972

Civil Rights Restoration Act of 1987

- Prompted by *Grove City College v. Bell* (1984). Congress expands Title IX explicitly to all “programs and activities” of an institution.



Sex-Based Discrimination



Extent of Sex-Based Discrimination

North Haven Bd. of Education. V. Bell (1982)

- A teacher filed a **complaint of sexual discrimination when she was not rehired after her pregnancy leave**. The Department of Education asked the school to submit its hiring, security and tenure practices. Feeling the government was overstepping its bounds, the school refused. **The U.S. Supreme court upheld Title IX regulations that prohibited sex discrimination in employment.**
- SCOTUS: Title IX applies to **employment** (and pregnancy?).



Title IX statutory language

“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 ...”



Retaliation

Jackson v. Birmingham Bd of Educ. (2005)

- **Male coach was removed from his position after he complained of unequal funding for the girls' basketball team at a public high school and then received negative work evaluations and was removed as the coach.**
- **SCOTUS: retaliation against a person because that person has complained of sex discrimination is a form of intentional sex discrimination encompassed by Title IX's private cause of action.**



Retaliation

§ 106.71(a) Retaliation Prohibited (2020)

- **No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part.**
- **Institutions must keep identities of parties “confidential” with limited exceptions.**



Sex-Based Harassment



Alexander v. Yale (2nd Cir. 1980)

Goals: Plaintiffs sought

1. declaratory judgement that Yale's practices violated Title IX, and
2. an order enjoining Yale to implement Title IX grievance procedures.

Five plaintiffs sued on behalf of:

- female students who have had to choose between tolerating sexual demands from “men in positions of authority at Yale” or sacrificing “any educational opportunity, benefit or chance to grow or advance educationally;”
- female students who “are subject to the discriminatory atmosphere adverse to their educational development created by the practice of such sexual harassment.”



Alexander v. Yale (2nd Cir. 1980)

- District court dismissed the claims by four plaintiffs as lacking standing or failing to articulate a claim.
- One plaintiff, Pamela Price, the District court held that “academic advancement conditioned upon submission to sexual demands constitutes sex discrimination in education.” However, at trial Price could not prove her claims.
- The 2nd Circuit affirmed but agreed that only plaintiff Price presented a justiciable claim for relief under Title IX.
- **Takeaway: Title IX prohibits Sexual Harassment.**



Meritor Savings Bank v. Vinson (1986)

- Taylor, Vice President, demanded sexual favors, sexual intercourse, followed Vinson to the restroom, exposed himself, forcibly raped Vinson, publicly fondled Vinson (and other female employees).
- Vinson brought sexual harassment claims under Title VII of the Civil Rights Act of 1964, which prohibits “sex” discrimination.
- **“Without question, when a supervisor sexually harasses a subordinate because of the subordinate’s sex, that supervisor ‘discriminate[s] on the basis of sex.’”**



Meritor Savings Bank v. Vinson (1986)

- “For sexual harassment to be actionable, it must be **sufficiently severe or pervasive** to alter the conditions of [the victim’s] employment and create an abusive working environment.”
- SCOTUS recognized sexual harassment as a violation of Title VII of the Civil Rights Act of 1964.
- First case to reach the Supreme Court and would redefine sexual harassment in the workplace. **The court, for the first time, made sexual harassment an illegal form of discrimination.**



Gebser v. Lago Vista Indep. Sch. Dist. (1998)

- Gebser endured sexual comments by her high school teacher, Waldrop, including escalating comments when the two were alone. Waldrop initiated sexual contact, sexual relationship.
- **Gebser did not report to school officials.**
- School became aware of general sexual comments in the classroom and addressed Waldrop's conduct.
- Police discovered Waldrop and Gebser engaging in sexual intercourse and arrested Waldrop. **Waldrop was fired by the school district.**



Gebser v. Lago Vista Indep. Sch. Dist. (1998)

- The Supreme Court **analyzed the conditions under which a school district will be liable for monetary damages** for an employee sexually harassing a student.
- SCOTUS held that **where a school has actual knowledge of an employee sexually harassing a student but responds with deliberate indifference to such knowledge, the school itself has engaged in discrimination under Title IX.**
- Explicitly relies on *Meritor* – sexual harassment is sex discrimination.



Davis v. Monroe Cty. Bd. Of Educ. (1999)

- Parent, on behalf of fifth-grade student, sued school board and officials under Title IX for failure to remedy classmate's sexual harassment of student.
- Classmate attempted to touch student's intimate parts and made excessively crude and sexual comments. Conduct occurred for many months. Multiple victims.
- **Student and parent repeatedly reported conduct to multiple school employees, including teachers and the principal. No disciplinary action was taken. No separation of students.**



Davis v. Monroe Cty. Bd. Of Educ. (1999)

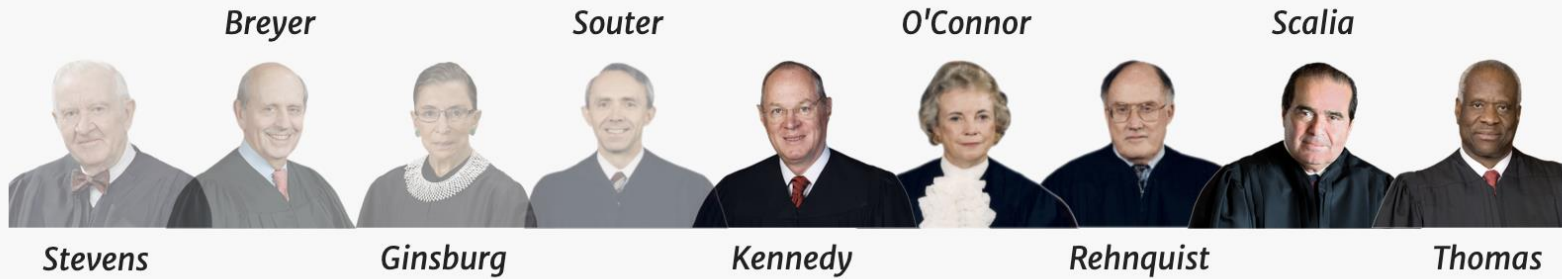
- The Supreme Court held that where sexual harassment is committed by a peer rather than an employee, **the same standards of actual knowledge and deliberate indifference apply.**
- “Moreover, we conclude that such an action will lie only for harassment that is **so severe, pervasive, and objectively offensive** that it effectively bars the victim's access to an educational opportunity or benefit.”
- Substantial control over both the harasser and the context in which the known harassment occurs.



Gebser (1998)

5-4 DECISION

MAJORITY OPINION BY SANDRA DAY O'CONNOR



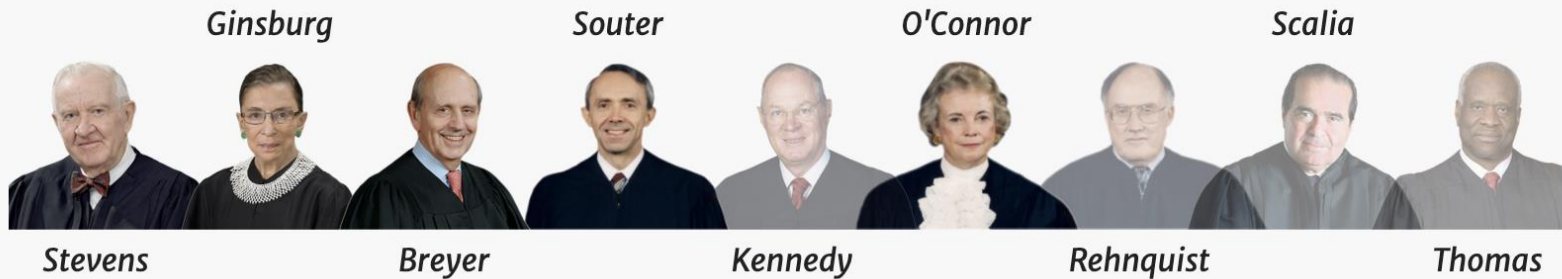
Left Leaning

Right Leaning

Davis (1999)

5-4 DECISION FOR DAVIS

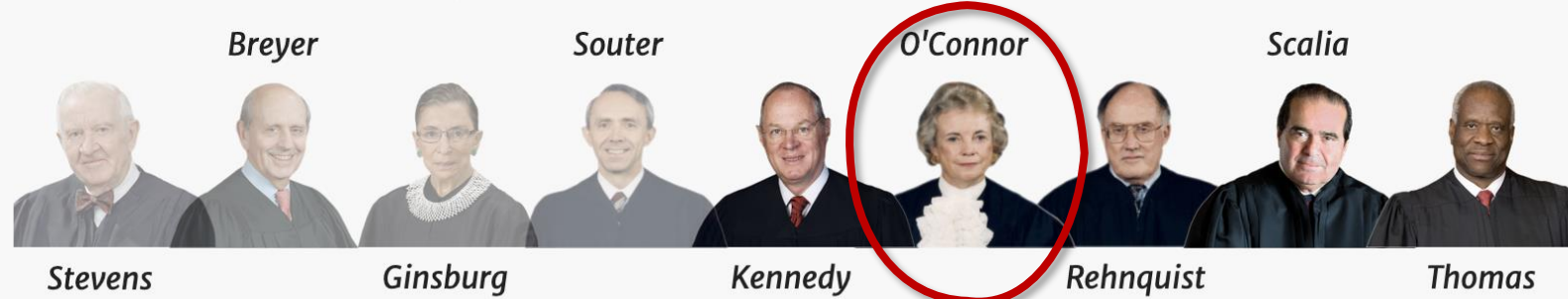
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Gebser (1998)

5-4 DECISION

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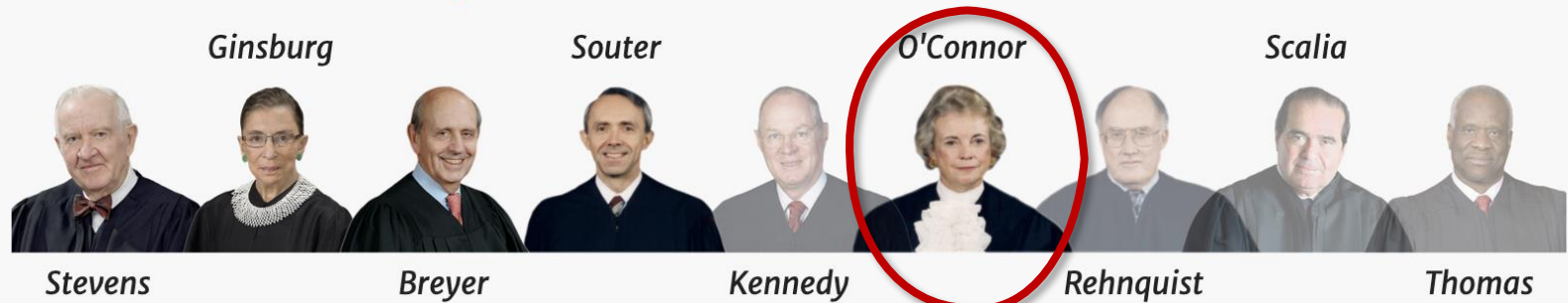


O'Connor
authors both
opinions

Davis (1999)

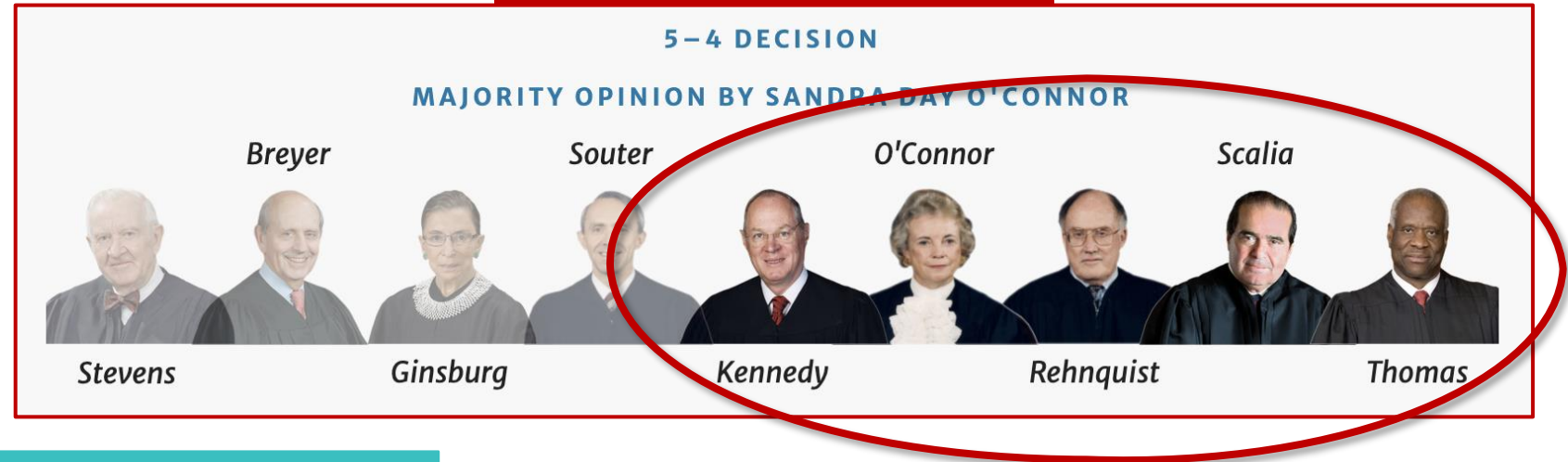
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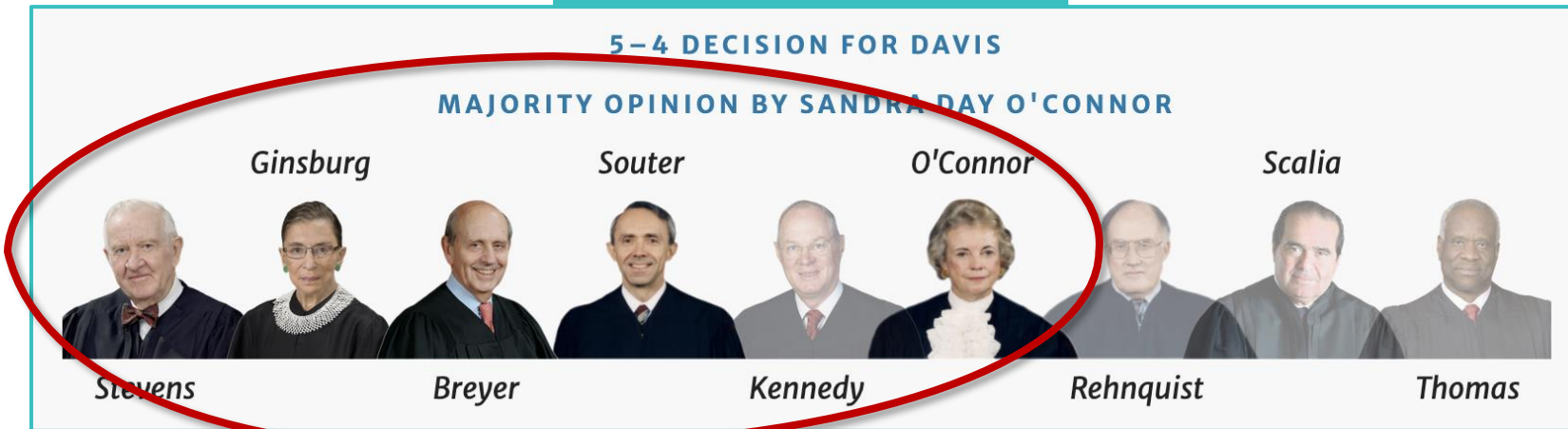
Gebser (1998)

Right Wing of
the Court in
Agreement



Davis (1999)

Left Wing of
the Court in
Agreement



Brown v. University of Arizona (9th Cir. 2023, en banc)

To obtain damages under Title IX for student-on-student harassment, **a plaintiff must show the following under *Gebser/Davis*** (becomes the Gebser/Davis Standard):

1

that the educational institution had “substantial control over both the harasser and the context in which the known harassment occurs,”

2

that the harassment was so “severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect,”

3

that a school official with “authority to address the alleged discrimination and to institute corrective measures . . . has actual knowledge of [the] discrimination,”

4

that the school acted with “deliberate indifference” to the known harassment;

5

that the school’s “[d]eliberate indifference ‘must, at a minimum, cause students to undergo harassment, or make them liable or vulnerable to it.’”

Agency Guidance



Department of Education

Two Major Phases

1

Period of sub-regulatory guidance

The Dear Colleague Letters

2

2020 Regulations:

- Focused on sexual harassment and students
- Extensive procedural requirements for adjudication
- Emphasis on due process for all parties
- Incorporated the *Gebser/Davis* standard

Doe v. Purdue University (7th Cir. 2019)

- John Doe was found responsible for sexual violence by Purdue under its Title IX policy, and suspended for an academic year, expelled from ROTC, and had scholarships terminated.
- Jane Doe alleged that in November 2015 she was sleeping in John's room and woke to him groping her over her clothes without her consent, and alleged that John confessed to other sexual conduct while Jane was asleep.
- **Jane did not file a complaint. Purdue elected to pursue Jane's allegations.**



Doe v. Purdue University (7th Cir. 2019)

- John submitted a written response and provided evidence.
- John was required to appear before a committee but **was not given a copy of the investigative report and its contents were not shared with him**. Moments before the committee appearance John was given “a few minutes” to read a **redacted** version of the report.
- **The report falsely claimed that he had confessed to the allegations**. Summary failed to include key details.



Doe v. Purdue University (7th Cir. 2019)

- **Jane neither appeared or submitted a written statement.** A University representative provided Jane's account.
- No ability to cross examine or question Jane.
- Two members of the committee stated **they had not read the report.** One member of the committee asked questions that **assumed John's guilt.**
- **Committee refused John's request to present witnesses,** including a witness who was present at the time of the events and could have provided that Jane's account was false.



Doe v. Purdue University (7th Cir. 2019)

Decision by Amy Coney Barrett (then 7th Circuit judge)

- Clear **due process issues** under the 14th Amendment to the United States Constitution.
- Title IX issues - **inference of discrimination**.
 - Purdue report credited Jane's account without directly hearing from her.
 - Committee did not read the investigative report and believed Jane without any evidence from her.



Title IX Regulations



2020 Trump/DeVos Regulations

- Applies to **Students** and **Employees** and **other participants**
- Defines “**Sexual Harassment**” as
 1. Quid Pro Quo
 2. Environment (severe, pervasive, and objectively offensive)
 3. Sexual Assault (Clery and VAWA definitions)
- Applies to a school’s “**Programs and Activities**” and conduct “**in the United States**”



School's Responsibility

- Schools must "**promptly**" respond to sexual harassment
- Must offer **supportive measures**
- Must follow a federally articulated grievance process for investigations when there is a signed Formal Complaint
- If the allegations do not meet the definition of sexual harassment, or did not occur within a Program or Activity or within the United States, the school **must dismiss** for the purposes of Title IX, ***but may still address under other the school's own code of conduct.***



Grievance Process

- Treat parties **equally**, and apply all rules equally.
- Require **objective evaluation** of **all relevant evidence**
- No credibility determinations based on a **party's status** as a Complainant or a Respondent
- Presumption that Respondent is **not responsible** for a violation
- Title IX personnel must be free of conflicts of interest and bias
- **Live hearings** before decision-makers with the **ability to cross-examine** the other party (for post-secondary institutions).



Questions?

