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Framework Not Formula: How the Solution to a 23-Year Circuit Split is Straightforward Statutory Construction

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NOTE

FRAMEWORK NOT FORMULA: HOW THE SOLUTION TO A 23-YEAR CIRCUIT SPLIT IS STRAIGHTFORWARD STATUTORY CONSTRUCTION

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† Senior Staff, Liberty University Law Review; J.D. Candidate, Liberty University School of Law, May 2018; B.A., The University of Colorado at Boulder, 2011. I would like to dedicate this Note to my husband, Jared, and our future children. May our family always use our gifts, talents, and voices to honor God and the least of these.

ABSTRACT

Not all statutes are created equal, even when equality is the purpose for their creation. Some statutes are instructive, designed to regulate conduct or apportion public funds. On the other hand, some statutes shape cultural values by aiming to eradicate unethical cultural norms. The second type of statute asserts a nation's principles, defines its priorities in social policy, and represents the character it hopes to assume. The Civil Rights Act of 1964 and the Education Amendments of 1972 represent a collection of the latter kind of statute. In fact, they were passed by Congress in order to obtain the lofty goal of equality for all American citizens.

The Civil Rights Act of 1964 was passed as an effort to take a step forward in upholding the importance of anti-discrimination in employment. As both statutory law and case law developed in the area of discrimination, the interplay of certain anti-discriminatory laws became unclear. This Note focuses on the tension that arises when two particular statutes—each pertaining to anti-discrimination—are interpreted to disrupt the full effect of the other, thus minimizing a plaintiff's ability to seek damages under both statutes.

Title VII, set forth in the Civil Rights Act of 1964, was designed to protect employees from discrimination based on race, color, religion, sex, or national origin in their place of employment. Title IX, set forth in the Education Amendments of 1972, protects students against discrimination based on sex in education programs that receive federal financial assistance. The goal of both statutes was to deter discrimination; however, Title VII focuses on a wide range of forms of discrimination in the workplace, while Title IX focuses only on sex discrimination in federally funded education program. Thus, when a federally funded educational institution discriminates against either a student or employee based on sex, the two statutes intersect.

Some circuits have determined that a failure to satisfy Title VII's administrative procedures should preempt a Title IX claim by the plaintiff on the same matter. Their reasoning is that Title VII's tedious qualification requirements should not be circumvented. Other circuits do not allow the preemption based on the rationale that the legislative intent of the Civil Rights Act was not in favor of keeping plaintiffs from relief, but was, in fact, designed to effect exactly the opposite result.

The two biggest problems with this circuit split—which has lasted over twenty years—are that (1) plaintiffs in circuits that support a Title VII preemption of Title IX are at a strategic disadvantage when pressing their case, and (2) many employers are uncertain about discrimination policies. This Note proposes that until the Supreme Court settles this circuit split in

favor of eliminating the preemption, courts should use a systematic approach, relying on clear legislative intent to construe the interplay between Title VII and Title IX against preemption.

I. INTRODUCTION

Eight years after the Civil Rights Act of 1964 was passed, Congress passed the Higher Education Amendments of 1972.[1] Once case law extended the protections of Title IX to both employees and attendees of publicly funded educational programs, Title IX and Title VII inevitably intersected. Two questions then arose. First, can an employee of a federally funded education program with a sexual discrimination claim pursue a remedy under Title IX after failing to meet the procedural requirements of Title VII? Second, if a plaintiff does not satisfy the administrative requirements that accompany Title VII and is consequently denied a trial, can a plaintiff pursue the same claim under Title IX?

The circuits are split as to the answer to this question, and they have been since 1995. Some circuits hold that Title VII preempts a claim under Title IX;[2] others hold that Title VII does not preempt a Title IX claim.[3] Those that argue for Title VII preemption are concerned that the tedious administrative procedures that have been carefully put in place to protect against frivolous claims would be circumvented if preemption did not occur.[4]

Those who argue that Title VII should not preempt Title IX are usually concerned with preserving the constitutional right of plaintiffs to not be discriminated against, a right that may be violated even though a plaintiff's claim may not satisfy the burdensome administrative requirements under a

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1. THE U.S. DEPARTMENT OF EDUCATION, http://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html (last modified April 2015).

2. The Second Circuit, Third Circuit, and some district courts have held in favor of preemption. *See* Bruneau v. S. Kortright Cent. Sch. Dist., 163 F.3d 749 (2d Cir. 1998) *abrogated by Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246 (2009); Pfeiffer by Pfeiffer v. Marion Ctr. Area Sch. Dist., 917 F.2d 779 (3d Cir. 1990) *abrogated by Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246 (2009); *see, e.g.*, Canty v. Old Rochester Reg'l Sch. Dist., 54 F. Supp. 2d 66, 76 (D. Mass. 1999); Nelson v. Univ. of Me. Sys., 914 F. Supp 643, 648 (D. Me. 1996).

3. The Sixth, Eighth, and Tenth Circuits have held that Title IX does not preempt Title VII. *See* Crawford v. Davis, 109 F.3d 1281, 1284 (8th Cir. 1997); Lillard v. Shelby Cty. Bd. of Educ., 76 F.3d 716, 723-24 (6th Cir. 1996); Seamons v. Snow, 84 F.3d 1226, 1234 (10th Cir. 1996); Jennings v. Univ. of N.C. at Chapel Hill, 240 F. Supp. 2d 492, 500-01 (M.D.N.C. 2002); Carroll K. v. Fayette Cty. Bd. of Educ., 19 F. Supp. 2d 618, 623 (S.D.W. Va. 1998).

4. *See Lakoski v. James*, 66 F.3d 751, 752-53 (5th Cir. 1995).

Title VII claim.[5] Unfortunately, this circuit split has resulted in a strategical disadvantage to plaintiffs in pro-preemption circuits.

This Note will discuss the case law that developed the question of whether Title VII preempts Title IX when a plaintiff fails to satisfy Title VII requirements, but still wants to bring the claim under Title IX. This Note will provide a rationale for favoring the elimination of this preemption based on a framework of statutory construction, and propose that after over twenty years, the most rational solution to this circuit split (other than a Supreme Court decision) is a straightforward, working framework aimed at uncovering the legislative intent regarding the intersection of the two statutes. Sections One and Two will discuss the brief histories of the Civil Rights Act of 1964 and the Higher Education Amendments of 1972, as well as the foundational cases that established the circuit split. Section Three will propose a straightforward method of statutory construction to resolve ambiguity at the intersection of the statutes. Section Four will examine the current methodology used by some circuits as compared to the proposed framework for statutory construction. Section Five will suggest that Title VII and Title IX fulfill their respective articulated legislative intents, thereby providing compelling justification for eliminating the Title VII preemption of Title IX.

II. BACKGROUND: HOW THE MODERN-DAY TITLE VII AND TITLE IX CIRCUIT SPLIT WAS CREATED

The Civil Rights Act was signed into law in 1964 by President Lyndon Johnson.[6] The Act was a strong response to the anti-discrimination social

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5. *See* Winter v. Pa. State Univ., 172 F. Supp. 3d 756, 775 (M.D. Pa. 2016).

6. James Patterson, *The Civil Rights Movement: Major Events and Legacies*, THE GILDER LEHRMAN INSTITUTE OF AMERICAN HISTORY, https://www.gilderlehrman.org/history-by-era/civil-rights-movement/essays/civil-rights-movement-major-events-and-legacies (last visited Aug. 30, 2017). When President Johnson signed the Act, he stated:

> Americans of every race and color have died in battle to protect our freedom. Americans of every race and color have worked to build a nation of widening opportunities. Now our generation of Americans has been called on to continue the unending search for justice within our own borders. We believe that all men are created equal. Yet many are denied equal treatment. We believe that all men have certain unalienable rights. Yet many Americans do not enjoy those rights. We believe that all men are entitled to the blessings of liberty. Yet millions are being deprived of those blessings--not because of their own failures, but because of the color of their skin. The reasons are deeply imbedded in history and tradition and the nature of man. We can understand--without rancor or hatred--how this all happened. But it cannot continue. Our

movement, which was led by Americans like John Lewis, Bayard Rustin, Gloria Richardson, and, of course, Martin Luther King, Jr. who stated that "[w]e are here—we are here because we are tired now."[7] This new social policy codified by Congress featured eleven titles that affected much change in the social fabric of the United States through reform in employment policies for public entities.[8] Most importantly, the Civil Rights Act of 1964 sought to end discrimination in public employment through provisions like Title VII and the Equal Employment Opportunity Act of 1972.[9]

The Civil Rights Act shaped the workplace and the public arena, and helped to redefine social policy in the United States with respect to discrimination.[10] For example, it outlawed racial segregation in schools, unequal application of voter registration for public facilities, and employment discrimination in the workplace.[11] About eight years later, Congress took yet another important step in its legislative effort to affect social anti-discriminatory policy by broadening the scope of the Equal Employment Opportunity Act to apply not only to federal government employees, but also state and local government employees, businesses with more than fifteen employees, and government-subsidized schools.[12]

Title IX followed the enactment of Title VII under the Education Amendments of 1972. According to Indiana Senator Birch Bayh, a strong proponent for women's rights in education, the amendment was important

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> Constitution, the foundation of our Republic, forbids it. The principles of our freedom forbid it. Morality forbids it. And the law I will sign tonight forbids it.

Lyndon Johnson Signs Civil Rights Act of 1964, HISTORY (July 2, 1964), http://www.history.com/speeches/lyndon-johnson-signs-civil-rights-act-of-1964.

7. TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS 1954-63 140 (1988); *accord* PBS.ORG, http://www.pbs.org/black-culture/explore/civil-rights-leaders/#.WEHEs6IrKqA, (last visited Aug. 3, 2017).

8. EQUAL OPPORTUNITY EMPLOYMENT COMMISSION, https://www.eeoc.gov/eeoc/history/35th/thelaw/eeo_1972.html (last visited Nov. 10, 2016). Title VII makes it unlawful 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, or national origin." 42 U.S.C.A. § 2000e-2 (West 2017).

9. *See* EQUAL OPPORTUNITY EMPLOYMENT COMMISSION, https://www.eeoc.gov/eeoc/history/35th/thelaw/eeo_1972.html; 42 U.S.C.A. § 2000e-2 (West 2017).

10. Tamara Lytle, *Title VII Changed the Face of the American Workplace,* SOCIETY FOR HUMAN RESOURCE MANAGEMENT (May 21, 2014), https://www.shrm.org/hr-today/news/hr-magazine/pages/title-vii-changed-the-face-of-the-american-workplace.aspx.

11. *Id.*

12. EQUAL OPPORTUNITY EMPLOYMENT COMMISSION, https://www.eeoc.gov/eeoc/history/35th/thelaw/eeo_1972.html, (last visited Aug. 20, 2017).

to provide "the women of America something that is rightfully theirs—an equal chance to attend the schools of their choice, to develop the skills they want, and to apply those skills with the knowledge that they will have a fair chance to secure the jobs of their choice."[13] President Nixon signed the bill in late June of 1972.[14]

The goal of both statutes was to deter discrimination. Title VII focused on employment and Title IX focused on federally funded programs in education. When a federally funded educational institution discriminates against either a student or employee based on sex, the two statutes intersect. Consequently, a plaintiff could conceivably have a claim under either statute.

When both statutes apply, some circuits have determined that a Title VII claim preempts a Title IX claim. The circuits reached this conclusion because a Title VII claim entails procedures that suggest a plaintiff should not be granted a court date without satisfying the administrative requirements.[15] However, other circuits do not allow a Title VII claim to preempt a Title IX claim.[16]

Three major cases developed this circuit split: *Cannon v. University of Chicago, Great American Federal Savings & Loan Assoc. v. Novotny*, and *North Haven Board of Education v. Bell*. Each case demonstrates the Supreme Court's straightforward approach to interpreting the statutes.[17] However, as straightforward as the Supreme Court's individual interpretation of either Title VII or Title IX may be in each case, confusion still exists with respect to whether a plaintiff's failure to qualify under a Title VII claim should automatically abrogate his claim under Title IX.[18] Because the two statutes both serve to "penetrate deeply into American norms or institutional practice"[19] and "successfully penetrate public normative and institutional culture in a deep way,"[20] determining how the

13. *Title IX Created Opportunities for Women*, THE COUNCIL OF STATE GOVERNMENTS, http://www.csg.org/pubs/capitolideas/sept_oct_2012/titleIX.aspx (last visited Sept. 28, 2017).

14. *Id.*

15. *See Lakoski v. James*, 66 F.3d 751, 753 (5th Cir. 1995).

16. *See* Winter v. Pa. State Univ., 172 F. Supp. 3d 756, 773 (M.D. Pa. 2016).

17. *See generally Lakoski,* 66 F.3d 751.

18. Douglas P. Ruth, *Title VII & Title IX =?: Is Title IX the Exclusive Remedy for Employment Discrimination in the Educational Sector*, 5 CORNELL J.L. AND PUB. POL'Y 185 (1996).

19. William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1215 (2001).

20. *Id.*

two interact could prove a profoundly suggestive commentary on American culture and institutional practice.

A. Cannon v. University of Chicago

In Cannon v. University of Chicago, the petitioner alleged that she was denied entry into medical school because of her sex.[21] Because the educational program at The University of Chicago received government funding, the petitioner's claims fell within the scope of several statutes, including Title VI and Title IX.[22] However, even though the petitioner qualified for relief under Title VI and Title IX, both the district and circuit court ruled adversely on both theories.[23] Regarding Title IX, the district court granted the University's motion to dismiss and the Seventh Circuit affirmed.[24] In response to the adverse holdings, the plaintiff petitioned for a writ of certiorari specifically regarding the Title IX question.[25]

On review, the Supreme Court stated that Title IX does not offer an implied right of private remedy.[26] The Supreme Court considered the Seventh Circuit's holding in light of a legislative act that was passed shortly after the Seventh Circuit affirmed.[27] The act, The Civil Rights Attorney's Fees Awards Act of 1976, authorized an award of attorney's fees to prevailing private parties in actions to enforce Title IX.[28] In light of such an act, the Supreme Court carefully reconsidered the question of whether Title IX created an implied private action.[29] After carefully considering a factor analysis created in a precedent case, *Cort v. Ash*,[30] the Supreme Court determined that Congress intended to create a private cause of action for those harmed by the violation of a statute.[31] It held that because the subsequent Civil Rights Attorney's Fees Awards Act of 1976 statute was not intended to create a remedy that did not originally exist, Title IX impliedly gave rise to a private cause of action for those harmed by its violation.[32]

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21. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 680 (1979).
22. *Id.* at 680, 684.
23. *Id.* at 680, 683-84.
24. *Id.* at 683.
25. *Id.* at 685-86.
26. *Id.* at 687-88.
27. *Cannon*, 441 U.S. at 685-86.
28. *Id.* at 685.
29. *Id.* at 685-86.
30. *Cort v. Ash,* 422 U.S. 66 (1975).
31. *Cannon*, 441 U.S. at 688-89.
32. *Id*. at 688-89.

Therefore, even though Congress did not write Title IX with an express provision that provided aggrieved parties a right of private remedy, Title IX impliedly provides one.[33]

B. Great American Federal Savings & Loan Assoc. v. Novotny

Great American Federal Savings & Loan Assoc. v. Novotny was, like *Cannon, decided in 1979.*[34] *In Great American Federal Savings & Loan Assoc.*, the plaintiff was a man who alleged that the bank discriminated against him because he spoke up on behalf of his female colleagues whom the defendant was discriminating against.[35] Novotny was a member of Great American Federal Savings & Loan Association's ("the Association") board of directors, a loan officer, and the Secretary for the Association after being with the association for twenty-five years.[36] When Novotny noticed that the association "intentionally and deliberately embarked upon and pursued a course of conduct the effect of which was to deny to female employees equal employment opportunity," he mentioned the discrimination during a board meeting.[37] Immediately after this board meeting, he was fired. His involvement with the association ended, and he was not re-elected as Secretary or as a board member.[38]

The plaintiff brought an action under 42 U.S.C. § 1985(3),[39] alleging that he had been injured as the result of the Association's conspiring to deprive

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33. *Id.* at 717.

34. *See Cannon v. Univ. of Chi.*, 441 U.S. 677 (1979); *Great Am. Fed. Sav. & Loan Ass'n v. Novotny,* 442 U.S. 366 (1979).

35. *Great Am. Fed. Sav. & Loan Ass'n v. Novotny,* 442 U.S. 366, 368-69 (1979).

36. *Id.* at 368.

37. *Id.* at 368-69.

38. *Id.* at 369.

39. 42 U.S. CODE § 1985(3) (2007).

> CONSPIRACY TO INTERFERE WITH CIVIL RIGHTS (3)
> DEPRIVING PERSONS OF RIGHTS OR PRIVILEGES
>
> If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any

him of the equal protection, the equal privileges, and the immunities that the law provided him.[40] In his complaint, he also claimed that the Association retaliated against him because he opposed one of their practices, and that their behavior fell squarely within the actions prohibited in § 704(4)[41] of Title VII of the Civil Rights Act of 1964.[42]

The district court granted the defendant's motion to dismiss under 42 U.S.C. §1985(3), holding that the defendants, as directors of a single corporation, "could not, as a matter of law and fact, engage in a conspiracy."[43] On appeal, the *en banc* panel of three judges unanimously overturned the district court's holding.[44] The panel held not only that "conspiracies motivated by an invidious animus against women fall within § 1985(3), and that . . . a male allegedly injured as a result of such a conspiracy, had standing to bring suit under that statutory provision," but also that "Title VII could be the source of a right asserted in an action under §1985(3)."[45]

On review, the Supreme Court considered the question of whether an individual injured by another's conspired violation of Title VII is then

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citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

40. *Great Am. Fed. Sav. & Loan Ass'n*, 442 U.S. at 369.

41. 42 U.S.C.A. § 2000e-3 §704 (West 2017).
(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings.
It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on—the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this [subchapter], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this [subchapter].

42. *Great Am. Fed. Sav. & Loan Ass'n*, 442 U.S. at 370.

43. *Id.* at 369.

44. *Id.* at 369-70.

45. *Id.* at 370.

deprived of "the equal protection of the laws, or of equal privileges and immunities under the laws" as within the meaning of § 1985(3).[46] To answer this question, the Court revisited a previous explanation it gave of the purpose of Title VII[47] in *Alexander v. Gardner-Denver Corp.* stating:

> Congress enacted Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin . . . . Cooperation and voluntary compliance were selected as the preferred means for achieving this goal. To this end, Congress created the Equal Employment Opportunity Commission and established a procedure whereby existing state and local employment opportunity agencies, as well as the Commission, would have an opportunity to settle disputes through conference, conciliation, and persuasion before the aggrieved party was permitted to file a lawsuit.[48]

The Supreme Court then analyzed Title VII's statutory provisions and procedural measures, including how and when an individual should file a discrimination claim.[49] In short, the Court reminded the parties of the strict time limitations and procedural requirements for claims filed under Title VII.[50] Further, the Court stated that some of these procedural measures increase the possibility of "voluntary conciliation" instead of lawsuits.[51] At that time, Title VII offered an aggrieved party only equitable relief, such as injunctive relief like back-pay, and the majority of federal courts did not permit punitive or general award damages; therefore, the Court reconsidered the Third Circuit's unanimous overruling of the district court.[52]

The Supreme Court held that if a plaintiff could assert a violation of Title VII through § 1985(3), he could avoid most, if not all, of the detailed and

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46. *Id.* at 372.

47. *See, e.g.*, Fall v. Ind. Univ. Bd. of Trs., 12 F. Supp. 2d 870, 881-84 (N.D. Ind. 1998) (citing *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 417 (1975)) ("[T]he primary objective of Title VII is not to provide redress for harassed employees, but to avoid the harm in the first place.").

48. *Great Am. Fed. Sav. & Loan Ass'n,* 442 U.S. at 373 (quoting Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974)).

49. *Id. at* 373-75.

50. *Id.*

51. *Id.* at 374.

52. *Id.* at 374-76.

specific procedural and remedial provisions of Title VII such that "[t]he short and precise time limitations of Title VII would be grossly altered."[53] The Supreme Court vacated the Third Circuit's judgment and remanded the case to be decided consistent with its opinion.[54]

C. North Haven Board of Education v. Bell

About three years after the Supreme Court decided both Cannon and *Great American Federal Savings & Loan Assoc.*, the Court considered a novel question regarding the scope of Title IX in *North Haven Board of Education v. Bell.*[55] *In North Haven Board of Education, the primary question considered was whether Title IX regulations extended to the employment practices of educational institutions.*[56]

In 1978, Elaine Dove, a tenured teacher at North Haven, filed a complaint against the public school, alleging that her contract was not renewed because of sex discrimination when she returned from a one-year pregnancy leave.[57] *The* Department of Health, Education, and Welfare ("HEW") promptly began investigating Dove's claim, pursuant to the authority given to HEW to regulate pursuant to § 902 of Title IX.[58] Upon receiving requests for information concerning its policies on tenure, hiring, seniority, and leaves of absence, North Haven refused to cooperate with the HEW.[59] Before Ms. Dove filed suit against North Haven, the school filed for declaratory judgment against the HEW in order to determine whether *Title IX regulations are extended to the employment practices of educational institutions.*[60]

The district court agreed with North Haven that *Title IX regulations were not intended to be extended to employment practices of educational institutions,* permanently enjoined HEW from interfering with the school's federal funds for noncompliance with Title IX regulations, and granted summary judgment to the school.[61] However, the Third Circuit reversed the judgment, reasoning that because the language of § 901 of Title IX was

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53. *Great Am. Fed. Sav. & Loan Ass'n,* 442 U.S. at 375-76.

54. *Id.* at 378.

55. *See N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512 (1982); *Cannon v. Univ. of Chi.*, 441 U.S. 677 (1979); *Great Am. Fed. Sav. & Loan Ass'n v. Novotny,* 442 U.S. 366 (1979).

56. *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 515-17 (1982).

57. *Id.* at 517.

58. *Id.* at 515-17.

59. *Id.* at 517.

60. *Id.* at 518.

61. *Id.*

inconclusive, the court must look to legislative history in order to interpret Congress's intent when writing Title IX.[62] In so doing, the Second Circuit determined that Congress did indeed intend to prohibit employment discrimination through the statute.[63]

The Supreme Court analyzed the question by looking to the language of Title IX and the legislative history of the Act.[64] *In considering the language of Title IX, the Court determined that its expansive language "seem[ed]* to favor inclusion of employees."[65] However, the Court did not end its analysis after considering the language of the statue because the Act does not expressly include employees in its scope.[66] Instead, the Court turned to the legislative history of Title IX in order to surmise *Congress's intent.*[67]

The Supreme Court stated that because the only express indications of legislative intent for the Act came from remarks made by Senator Bayh in a Senate debate in 1972, his remarks were not dispositive of the legislative intent, but were influential in determining legislative intent.[68] *During the Senate's debate in 1972, Senator Bayh responded to Senator Pell's request for clarification as to the application of Title IX by stating that "[i]n the area of employment, we permit no exceptions*" to discrimination.[69] The Court interpreted the remarks made during the Senate's debate—coupled with the House's version of the Act, which had redacted a previous provision that had expressly excluded employment practices—to mean Congress intended to include employment practices.[70] This holding effectively broadened the scope of Title IX, leading to the current circuit split as to whether Title VII's strict procedural measures should preempt damages under Title IX.

III. THE FRAMEWORK FOR ANALYZING TITLE VII AND TITLE IX

When a statute is ambiguous, a court must look to the rules of statutory construction to decipher the legislative intent of the statute.[71] The primary

62. *N. Haven Bd. Of Educ.*, 456 U.S. at 519.

63. *Id.* at 519.

64. *Id.* at 520, 522.

65. *Id.* at 522.

66. *Id.*

67. *Id.* at 522.

68. *N. Haven Bd. of Educ.*, 456 U.S. at 526-27.

69. *Id.* at 526.

70. *Id.* at 527-28, 530.

71. *See N. Haven Bd. of Educ.*, 456 U.S. 512; *see also* Jack Stark, *Reader Expectation Theory and Legislative Drafting*, 17 STATUTE L. REV. 210, 214 (1996); Jack Stark, *The Legislative Language Game*, 43 FED. LAW. 39, 41 (1996).

rule of statutory construction is "to ascertain and give effect to the intention of the Legislature as expressed in the statute."[72] In order to discover the intention of the Legislature, a court should look to four specific indicators: (1) the plain language of the statute as an entire statute, (2) other statutes regarding the same or similar subject matter, (3) the "evils and mischiefs to be remedied,"[73] and (4) the "natural or absurd consequences of any particular interpretation."[74] As a rule, a statute should be interpreted in such a way that reflects the plain language of the statute in the context of what it was designed to accomplish.[75] When there is confusion as to how two statutes interact with one another, this framework[76] should be applied to each statute, and then compared to one another under the same analysis.

A. The Statutory Construction of Title VII

The first step in statutory construction is to examine the plain language of the statute.[77] Since President Lyndon Johnson signed the Act fifty-two years ago, a "near-comprehensive web of civil rights protections against discrimination has been woven by Congress."[78] The plain language of Title VII makes two forms of employment discrimination unlawful: to either not hire, fire, or "otherwise . . . discriminate against"[79] an individual; or to treat employees and potential employees in a way that "adversely affects [their] status"[80] based on "race, color, religion, sex, or national origin."[81]

Next, the court should look to other similar statutes.[82] This step is nearly impossible with Title VII, since it was among the first of its kind. The Civil Rights Act was Congress's reaction to the social anti-discriminatory movement.[83] Therefore, looking to other anti-discriminatory employment

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72. State v. Anderson, 972 P.2d 32, 33 (Okla. Crim. App. 1998) (citing *Thomas v. State,* 404 P.2d 71, 73 (Okla. Crim. App. 1965)).

73. *Anderson*, 972 P.2d at 33.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. R.I. Comm'n for Human Rights v. Graul, 120 F. Supp. 3d 110, 122 (D.R.I. 2015).

79. 42 U.S.C. § 2000e-2 (1998).

80. *Id.*

81. *Id.*

82. State v. Anderson, 972 P.2d 32, 33 (Okla. Crim. App. 1998).

83. PBS.ORG, http://www.pbs.org/black-culture/explore/civil-rights-leaders/" \l ".WEHEs6IrKqA, (last visited Aug. 29, 2017); *see generally* JULES ARCHER, THEY HAD A DREAM: THE STRUGGLES OF FOUR OF THE MOST INFLUENTIAL LEADERS OF THE CIVIL RIGHTS

statutes, often designed after Title VII, may prove illogical and ineffective. Instead, the court should move to Steps 3 and 4—looking to the "evils and mischiefs to be remedied"[84] and the "natural or absurd consequences of any particular interpretation"[85] in order to interpret Title VII.

The purpose of Title VII is to "achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."[86] Therefore, the evil and mischief to be remedied is keeping minority citizens in lower positions than white citizens solely because of discrimination. While preventing this evil and mischief is the underlying purpose of this statute, another purpose—as evidenced by the procedures required to file a Title VII claim—is to protect employers from frivolous lawsuits and prevent a floodgate of Title VII litigation.[87] Individuals that file employment discrimination lawsuits under Title VII have the advantage of a powerful statutory weapon,[88] but getting into the courtroom is a tedious process.

Any individual bringing a claim under Title VII must adhere to administrative procedures according to the administration that Congress appointed to enforce Title VII: the Equal Employment Opportunity Commission ("EEOC").[89] According to the EEOC, an individual or organization on behalf of an individual that has a claim under Title VII must first file a "charge of . . . discrimination"[90] before filing a job discrimination lawsuit.[91] Once that charge has been filed, the EEOC may encouraged mediation or send the charge to an investigator.[92] If an investigator approves the case, the individual may then receive a "right to sue" notice if the case is likely to succeed and the EEOC has the authority to investigate it.[93] With the right to sue notice, an individual may finally bring a job discrimination lawsuit in a court of law.

MOVEMENT, FROM FREDERICK DOUGLASS TO MARCUS GARVEY TO MARTIN LUTHER KING, JR. TO MALCOLM X (First Sky Pony Press 2016) (1993).

84. State v. Anderson, 972 P.2d 32, 33 (Okla. Crim. App. 1998).

85. *Id.*

86. Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1972).

87. *Lakoski v. James*, 66 F.3d 751, 753 (5th Cir. 1995).

88. *See id.* at 751.

89. EQUAL OPPORTUNITY EMPLOYMENT COMMISSION, https://www.eeoc.gov/eeoc/history/35th/thelaw/eeo_1972.html, (last visited Aug. 29, 2017).

90. *Id.*

91. *Id.*

92. EQUAL OPPORTUNITY EMPLOYMENT COMMISSION, https://www.eeoc.gov/employers/process.cfm (last visited Sept. 18, 2017.).

93. *Id.*

In addition to this process, there are timing issues that arise when an individual files a charge of discrimination. Before considering judicial timing concerns like any statutes of limitations, an individual must adhere to the timeliness requirements of the EEOC.[94] An individual has 180 days to file a charge of discrimination after the discrimination occurred.[95] Once filed, the EEOC will give the individual a copy of the filing.[96] Within ten days, the employer will also receive a copy of the charge of discrimination.[97] If the parties choose to use mediation, the EEOC tends to settle disputes within three months.[98] However, if the case goes to an investigator, the individual must wait ten months, on average, before receiving a right to sue notice if the case is not dismissed.[99]

An individual that files an employment discrimination lawsuit under Title VII has the advantage of a powerful statutory weapon. Title VII affords plaintiffs with the possibility of two types of remedies: compensatory and punitive damages.[100] First, a plaintiff may receive compensatory damages for out-of-pocket expenses the discrimination caused and for any emotional harm the discrimination caused.[101] Second, a plaintiff may receive punitive damages in cases of "especially malicious or reckless" discrimination.[102]

In summary, individuals that receive a right to sue notice from the EEOC may be encouraged that their suit has a chance of success because the EEOC did not dismiss it. As those individuals seek the best claims to bring before the court, Title VII can serve as an effective tool for restoring their grievances through compensatory and possibly punitive damages, depending on the court's decision, the severity of the employer's conduct, and the company's size.

The natural consequences of the procedures of Title VII have multiple benefits. First, its tedious requirements protect employers from frivolous claims and protect the courts from an inundation of unfounded Title VII claims. Second, Title VII helps plaintiff's cases who pass the requirements because the approval of an objective party demonstrate that some form of

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. EQUAL OPPORTUNITY EMPLOYMENT COMMISSION, https://www.eeoc.gov/employers/process.cfm (last visited Sept. 18, 2017).

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

discrimination likely occurred. However, the absurd consequence of weighing the procedural requirements of Title VII too heavily is that it limits a claimant's relief through a different cause of action—namely, Title IX—simply because of the claimant's inability to satisfy the procedural requirements of the other.

B. The Statutory Construction of Title IX

> The first step in statutory construction is to examine the plain language of the statute.[103]

Next, the court should look to other statutes like the statute in question. However, Title IX was, like Title VII, among the first of its kind. The Education Amendments of 1972 was Congress's codified reaction to the same Civil Rights Movement as Title VII. Therefore, looking to other anti-discriminatory employment statutes in order to interpret one of the first ones may not be effective. Instead, the court should focus on Steps Three and Four: looking to the "evils and mischiefs to be remedied," and the "natural or absurd consequences of any particular situation" in order to interpret Title IX.

Because the purpose of Title IX is to prohibit sex-based discrimination in public education programs, the evil and mischief to be remedied is hindering individuals from reaching their maximum potential in a public education program due to sex discrimination. Title IX does not have the same administrative oversight as Title VII, so it is far less limited in its operation and scope. In fact, in *Franklin v. Gwinnett County Public Schools*, the Supreme Court interpreted "no person" and "any educational program or activity" literally, holding that money damages were available for a student-plaintiff filing an action for sexual harassment under Title IX. This holding effectively broadened the scope of Title IX to allow money damages for student plaintiffs.[104] Because the Supreme Court has held that the scope of Title IX is broad,[105] the natural consequence is that plaintiffs would use Title IX whenever possible.

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103. *See* State v. Anderson, 972 P.2d 32, 33 (Okla. Crim. App. 1998) (citing *Thomas v. State,* 404 P.2d 71, 73 (Okla. Crim. App. 1965)).

104. *Franklin v. Gwinnett Cty. Pub. Sch.*, 911 F.2d 617, 622 (11th Cir. 1990) *rev'd*, 503 U.S. 60 (1992).

105. *See id.; see also* State v. Anderson, 972 P.2d 32, 33 (Okla. Crim. App. 1998).

IV. EXTENDING BASIC STATUTORY FRAMEWORK FOR THE TITLE VII PREEMPTION OF TITLE IX

The basic framework for statutory construction is useful when a statute is ambiguous in its own right. In the case of Title VII and Title IX, there is ambiguity regarding the remedy available for a plaintiff when the two anti-discrimination statutes intersect on the issue of sex discrimination within federally funded education employment. If courts extended the use of basic statutory construction to analyze the ambiguity that arises from the interplay of two unambiguous statutes, the result would be a systematic form of analysis, notwithstanding the conclusions ultimately drawn in each case. The seminal case holding that Title VII preempts a plaintiff's Title IX claims, *Lakoski v. James*, did not provide a framework for how the court arrived at its conclusion. However, a recent district court opinion analyzed the same issue in favor of non-preemption after setting out a clear framework that follows closely the basic framework for statutory construction.

A. Lakoski v. James *and* Winter v. Pennsylvania State University

Procedural measures limit the scope of Title VII. *In Great American Federal Savings & Loan Association*, the Court commented that the "administrative process . . . plays . . . a crucial role in the scheme established by Congress in Title VII."[106] T*he procedural limits of Title VII also serve as a safeguard that Congress placed on a floodgate of discrimination litigation as well as a way to encourage mediation and* "voluntary conciliation" instead of adjudication.[107]

In Lakoski v. James, Dr. Joan Lakoski sued the University of Texas under Title IX[108] instead of Title VII.[109] Dr. Lakoski sued the University, alleging that the University discriminated against her on the basis of sex when it

106. *Great Am. Fed. Sav. & Loan Ass'n*, 442 U.S. at 376.

107. *Id.* at 374.

108. Title IX provides that "[n]o 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." 20 U.S.C.A. § 1681(a) (West 2017).

109. Title VII makes it unlawful 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, or national origin." 42 U.S.C. § 2000e-2 (1998 & Supp. V 1993); *see also Lakoski v. James*, 66 F.3d 751, 752 (5th Cir. 1995).

denied her tenure[110] and suggested at trial that the University judged her by different standards than her male colleagues.[111] The district court dismissed all of the claims she alleged except for the Title IX claim.[112] The jury found in favor of Dr. Lakoski, awarding her over $250,000 in damages due to the University's intentional discrimination based on her sex.[113] The district court judge, however, decreased her award to $150,000, plus attorney's fees.[114]

Upon review, the Fifth Circuit reversed.[115] In its 1995 opinion, the Fifth Circuit held that for plaintiffs whose causes of actions could fall under both Title VII and Title IX, Title VII provides their exclusive remedy.[116] Before beginning its analysis, the court quipped that:

> Critical to our resolution of this case is the fact that, although Dr. Lakoski possessed a colorable claim of employment discrimination in violation of Title VII, she chose not to pursue the remedy made available by Title VII. Title VII provides an administrative procedure in which an aggrieved individual must first pursue administrative remedies before seeking judicial relief. Dr. Lakoski chose to circumvent this procedure and immediately assert her rights under Title IX both directly and derivatively through 42 U.S.C. § 1983.[117]

The subsequent analysis of the case hangs under the shadow of this stern statement; it is no surprise that the court ruled against the plaintiff.

1. *Lakoski v. James* Analysis as Compared to Basic Statutory Construction

The Court refused Lakoski's assertion that Title IX offered her a right of private action for damages for employment discrimination.[118] The court distinguished Lakoski's case from precedent in *Cannon*, *Bell*, and

110. *Lakoski v. James*, 66 F.3d 751(5th Cir. 1995).

111. *Id.* at 753.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 758.

116. *Lakoski*, 66 F.3d at 758.

117. *Id.* at 753 (internal citation omitted).

118. *Id.* at 754.

Franklin,[119] because the plaintiffs in those cases did not have the dual option of using Title VII or Title IX as Lakoski did.[120] Next, the court pointed out that the record indicated that the district court erred in submitting to the jury both Lakoski's Title IX and § 1983 claim.[121] Finally, the court considered the congressional intent of Title IX to determine if Lakoski's claim for a private right of action for employment discrimination was valid under the Act.[122] The Fifth Circuit held that "Congress intended Title VII to exclude a damage remedy under Title IX for individuals alleging employment discrimination."[123]

The First Circuit's rationale focused on congressional intent. First, the court asserted that "Congress chose a variety of tools to remedy employment discrimination."[124] It noted that Title IX "is part of a larger federal legislative scheme designed to protect individuals from employment discrimination on the basis of sex";[125] Title IX and Title VII are separate tools used to accomplish the same larger purpose, not separate tools to be used to accomplish the same, narrow purpose.[126] Second, the court emphasized that the administrative oversight and the tedious procedure required to file a Title VII act are crucial to how Congress designed Title VII's statutory scheme.[127] Thus, the court reasoned that for a plaintiff to be able to circumvent the administrative process of the Act by simply filing under Title IX was not Congress's intent for either of the statutes.[128]

The *Lakoski* court followed Steps One through Three of the basic statutory construction framework, as demonstrated in *Anderson*, for discovering the intention of the Legislature.[129] That is, the *Lakoski* court considered the plain language of the statutes as a whole,[130] other anti-

119. *See Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60 (1992) (holding that money damages were available for a student-plaintiff filing an action for sexual harassment under Title IX and began the broadening of the scope of Title IX); *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512 (1982); *Cannon v. Univ. of Chi.*, 441 U.S. 677 (1979).

120. *Lakoski*, 66 F.3d at 754.

121. *Id.*

122. *Id.*

123. *Id.* at 755.

124. *Id.*

125. *Id.*

126. *Lakoski*, 66 F.3d at 757 (stating that "Congress chose two remedies for the same right, not two rights addressing the same problem").

127. *Id.* at 755.

128. *Id.* at 756.

129. *See supra* Section III.B.

130. *See* State v. Anderson, 972 P.2d 32, 33 (Okla. Crim. App. 1998).

discriminatory statutes regarding the similar subject matter,[131] and the "evils and mischiefs to be remedied."[132]

In fact, given the court's preliminary remarks,[133] it would seem that it focused most heavily on the mischief to be remedied. The court labored over the plaintiff's decision to "circumvent . . . procedure,"[134] disagreeing with her "jurisprudential arithmetic,"[135] and her "beguilingly simple syllogism that [the decisions in] *Cannon*, *Bell*, and *Franklin*"[136] all led to a private right of action under Title IX. Further, the court was "unwilling to do such violence to the congressionally mandated procedures,"[137] ruling that Title VII claims preempted Title IX claims in employment sex discrimination cases.

However, the court failed to examine Step Four. The *Lakoski* court did not look to the "natural or absurd consequences of any particular interpretation."[138] Focused on eliminating the perceived mischief of a plaintiff circumventing important procedural steps, the court did not consider the absurd result of denying a plaintiff a remedy by using one anti-discrimination statute to foreclose her opportunity of a remedy under another. The *Lakoski* court is an example of the current difficulty facing a plaintiff in a jurisdiction that preempts Title IX claims with Title VII.

When the statutes intersect, the plaintiff may sue the employer under both statutes or choose only one, depending on the jurisdiction. The Fifth Circuit does not allow a plaintiff that has failed to meet the Title VII procedural measures to subsequently file a complaint under Title IX. Therefore, the Fifth Circuit requires a claimant to choose strategically, using the reasoning from the *Lakoski* court.[139] However, the Fourth Circuit allows a plaintiff to file complaints under both statutes such that the plaintiff may seek relief to the fullest extent under each statute. The following recent case exemplifies the proper reasoning under a basic framework for statutory construction that a court should use to uncover legislative intent.

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131. *Id.*

132. *Id.*

133. *Lakoski*, 66 F.3d at 753.

134. *Id.*

135. *Id.* at 754.

136. *Id.*

137. *Id.*

138. State v. Anderson, 972 P.2d 32, 33 (Okla. Crim. App. 1998).

139. *Lakoski*, 66 F.3d at 751.

In *Winter v. Pennsylvania State University*, plaintiff Dr. Thomas Winter was a tenured professor at the Wilkes-Barre campus for thirty-eight years.[140] The tenure policy at Penn State provided that once a professor became tenured, he could only be fired for "grave misconduct."[141] When Dr. Winter was terminated in late November 2014 for "the adequate cause of grave misconduct effective immediately,"[142] Dr. Winter filed a lawsuit against the university and eleven of its employees for violating his rights under federal law.[143]

In March 2014, Dr. Winter alleged that two of the included Penn State employee-defendants, the Director of Academic Affairs and the Vice Provost for Affirmative Action and Title IX Coordinator, conducted an "ambush interview" of him.[144] According to Dr. Winter, the Director of Academic Affairs lured him into a meeting by emailing that they needed to meet with him the following day about an "academic matter."[145] When Dr. Winter arrived to the meeting, the Director of Academic Affairs left immediately, leaving Dr. Winter alone with the Vice Provost for Affirmative Action and Title IX Coordinator.[146] The "ambush interview" then proceeded, wherein the Vice Provost for Affirmative Action and Title IX Coordinator informed Dr. Winter about a sexual harassment complaint that had been filed against him on behalf of a twenty-one-year-old undergraduate student, J.T.[147] In the email that called Dr. Winter to the meeting, there had been no warning that the meeting was regarding a sexual harassment complaint.[148] Furthermore, Dr. Winter did not see a copy of the complaint, and there was no follow-up meeting before the matter was investigated and termination proceedings began.[149]

The Vice Provost's investigation of Dr. Winter occurred concurrently with other Title IX complaints against Penn State.[150] Specifically, the U.S. Department of Education was in the process of investigating the university

140. Winter v. Pa. State Univ., 172 F. Supp. 3d 756, 761 (M.D. Pa. 2016).
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.* at 762.
145. *Id.*
146. *Winter*, 172 F. Supp. 3d at 762.
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*

for the way it handled sexual misconduct complaints.[151] After the appropriate reports had been filed, Dr. Winter's termination hearings began in September 2014.[152] According to the plaintiff, the judge allowed hearsay and double-hearsay testimony over the objection of Dr. Winter's counsel.[153] In addition, the four-member panel at the hearing allowed two officials that out-ranked all of the members of the panel to testify against Dr. Winter despite their lack of personal knowledge about what transpired between Dr. Winter and J.T.[154] Dr. Winter alleged that these officials' testimony that he had been "grooming" J.T. had a "highly inflammatory effect" in light of Penn State's former assistant football coach, Jerry Sandusky's child abuse scandal.[155]

Shortly after the hearings, the President of Penn State terminated Dr. Winter for "grave misconduct"[156] because of Dr. Winter's two comments about J.T.'s appearance, one "hug" with her after one such comment, and a questionable off-campus lunch to "discuss her independent study" that was followed by five more invitations to lunch that J.T. refused, telling Dr. Winter of her discomfort with his compliments on her appearance and personality.[157] Dr. Winter then filed this lawsuit against the university, alleging a violation of his substantive and due process rights, sex discrimination under Title IX, and breach of contract.[158] In short, Dr. Winter's discrimination allegation rested on his belief that due to the recent Jerry Sandusky scandal, the defendants lacked "the impartiality necessary to provide [him] with a fair investigation"[159] because "Defendants were motivated by a desire to 'improve their standing with the Department of Education' and to 'avoid further public criticism.'"[160]

Regarding Dr. Winter's Title IX claim, the university sought to dismiss this claim based on Title VII preemption as well as insufficient facts to support the allegation that Penn State University discriminated against Dr. Winter because of his sex.[161] Dr. Winter responded that the Third Circuit

151. *Id.*
152. *Winter*, 172 F. Supp. 3d at 762.
153. *Id.*
154. *Id.* at 762-63.
155. *Id.* at 763.
156. *Id.*
157. *Winter*, 172 F. Supp. 3d at 763.
158. *Id.* at 765.
159. *Id.* at 763.
160. *Id.*
161. *Id.* at 773.

recognized that Title VII does not preempt Title IX and that he had indeed pled a violation of Title IX.[162] The United States District Court for the Middle District of Pennsylvania addressed this count first by thoroughly addressing the issue of Title VII preemption of Title IX with respect to other courts, reading previous Supreme Court opinions regarding each statute together, and looking to the congressional intent regarding Title VII in relation to other statutes.[163] While addressing each of these matters, the *Winter* court fulfilled each step of basic statutory construction.

2. *Winter v. Pennsylvania* Analysis as Compared to Basic Statutory Construction

In *Winter v. Pennsylvania*, the court began its analysis by linking the holdings of the three Supreme Court opinions to create the following rule: plaintiff-victims, whether students or employees,[164] of sex discrimination by a university that directly benefits from federal funding have a private cause of action[165] for which money damages are available.[166] This combined, literal reading of the holdings and principles in *Cannon*, *Bell*, and *Franklin* leaves no room for Title VII to preempt Title IX.

Next, the court rationalized its reading of these holdings by looking to Congress's intent when creating the two statutes.[167] The court mentioned the defendants' arguments that "the comprehensive administrative scheme underlying Title VII suggests that it is the exclusive remedy for employment discrimination"[168] and "that Congress did not intend for plaintiffs to circumvent this scheme by filing claims pursuant to Title IX."[169] Rebuking both arguments, the court referred to a 1975 case in which the Supreme Court explained the legislative history of Title VII, stating that "[d]espite Title VII's range and its design as a comprehensive solution for the problem

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162. *Id.*

163. *Winter,* 172 F. Supp. 3d at 773.

164. *Winter,* 172 F. Supp. 3d at 773-74 (citing *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 520 (1982)) (stating that "[e]mployees who directly participate in federal programs or who directly benefit from federal grants, loans or contracts" also have a claim under Title IX).

165. *Id.* at 773 (referring to *Cannon*'s holding that there is an implied private cause of action for victims of sex discrimination by universities receiving federal funding); *see also Cannon v. Univ. of Chi.*, 441 U.S. 677, 703-10 (1979).

166. *Id.* at 774 (referring to *Franklin*'s holding that money damages were available to student-plaintiffs under a sexual harassment action under Title IX); *see also Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 73 (1992)).

167. *Id.* at 775.

168. *Id.* (citing Johnson v. Ry Exp. Agency, Inc., 421 U.S. 454, 459 (1975)).

169. *Id.*

of invidious discrimination in employment, the aggrieved individual clearly is not deprived of other remedies he possesses and is not limited to Title VII in search for relief."[170] Instead, "[t]he legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable . . . federal statutes."[171]

Further, the court quoted a 1971 House of Representative hearing that stated that the remedies available under a Title VII claim are "co-extensive with the individual's right to sue under the provisions of the Civil Rights Act . . . and that the two procedures augmented each other"[172] instead of mutually excluding each other. Accordingly, the *Winter* court conclusively decided to oppose the notion that Title VII preempts Title IX. Thus, in careful consideration of legislative intent, the *Winter* court examined the "natural or absurd consequences" of the particular situation of foreclosing a plaintiff's gender-based discrimination claim through Title IX by preempting it with a statute specifically designed to reduce discrimination against women (among others) in the workplace.[173]

B. *The Natural or Absurd Consequences of Favoring Preemption:* Littlejohn v. City of New York

This circuit split as to whether Title VII preempts damages that could be acquired under Title IX has a strong effect on defendant-employers as well as plaintiff-employees. First, in order to receive fair adjudication—that is, without receiving a windfall or being short-changed—plaintiffs should have certainty about the damages available to them in order to pursue the best case against their employer. Second, in order to provide proper training and to effectively prevent costly litigation, defendant-employers deserve to have certainty about the consequences that a discrimination action can have on them.

In *Littlejohn v. City of New York*, a female employee filed suit against her former employer for sexual harassment as well as racial discrimination. The Court of Appeals held that the plaintiff employee's sexual harassment claim was not reasonably related to claims in her Equal Employment Opportunity Commission (EEOC) complaint, which alleged racial discrimination. Although the plaintiff had attempted to amend her EEOC complaint by

170. *Winter,* 172 F. Supp. 3d at 775 (quoting Johnson v. Ry Exp. Agency, Inc., 421 U.S. 454, 459 (1975)).

171. *Id.*

172. *Id.* (citing H.R. Rep NO. 92-238, at 19 (1971)).

173. *See generally Winter*, 172 F. Supp. 3d at 756.

submitting an unsworn letter to the district administration office, the letters did not effectively add her sexual harassment claim to the existing EEOC claim. The court asserted that it has "made clear that unsworn letters sent to the EEOC describing additional claims of discrimination unrelated to the claims described in the EEOC charge cannot "enlarge [the] scope [of the original charge] to include new claims."[174] Consequently, the Court of Appeals affirmed the district court's dismissal of her sexual harassment claim.

> Littlejohn did not follow the procedural requirements of her Title VII claim and was therefore precluded from bringing both a sexual harassment and racial discrimination claim. According to the court, "Littlejohn could have filed a separate charge with the EEOC alleging an additional basis of discrimination within the appropriate limitations period, but she could not amend prior unrelated charges to add this additional basis simply by sending Berry an unsworn letter."[175] The sexual harassment claim Littlejohn sought to add could not be tacked onto a separate, original claim with the EEOC, even though both claims shared the same facts and circumstances. In short, *Littlejohn* is a good example of how one procedural misstep can unravel a plaintiff's claim and foreclose her opportunity for a legal remedy in jurisdictions that favor preemption. As discrimination becomes more difficult to detect in the employment sphere, is it fair to measure the merit of a Title IX claim on the tedious procedural measures of Title VII?

V. THE BENEFITS OF STATUTORY CONSTRUCTION THAT FAVORS NON-PREEMPTION

Title VII and Title IX have dramatically impacted sex-discrimination in the workplace. Each statute was a product of impactful acts that sought to end discrimination and give previously disadvantaged groups more economic opportunity. The effects of the Civil Rights Act and the Education Amendments Act have not only revolutionized employment, but also have immensely impacted American society and economics. The impact these Acts have made on the American workplace and lifestyle are congruous with the legislative intent behind them. Both Acts provide a safeguard

174. Littlejohn v. City of New York, 795 F.3d 297, 323 (2d Cir. 2015) (quoting *Holtz v. Rockefeller & Co.*, 258 F.3d 62, 83 (2d Cir. 2001)).

175. *Id.* at 323-24.

against sexual discrimination. The positive impact of refusing to tolerate sexual discrimination in the workplace is a compelling reason why courts should favor non-preemption of Title IX by Title VII.

A. The Effects of the Civil Rights Act in Employment: How Title VII Changed the Face of the American Workplace

The effects of the Civil Rights Act in employment in the United States are vast. Three specific changes that the Civil Rights Act brought to the American workforce have radically altered the way the workplace operates and the makeup of the American workplace. First, the private sector has followed the lead of the government with respect to anti-discriminatory practices. Now, the American workplace as a whole offers equal opportunity employment.[176] Second, women now hold far more jobs than before enactment of the Civil Rights Act, including executive positions in large companies and other white-collar jobs.[177] Finally, with a clear standard against discrimination in the workplace, much of today's discrimination in the workplace is subtle.[178]

The private sector did not tarry in offering the same anti-discriminatory protections that the public sector was required to offer.[179] Although many individuals in the United States hesitated to adopt the rationale behind the Civil Rights Act, many private companies soon realized the invaluable benefit to a diverse workforce.[180] According to Nicole Butts, an expert who trains Human Resources professionals, "[d]iversity in the workforce today is a financial issue."[181] Quite simply, she believes that the best way to serve customers requires relating to customers.[182] Therefore, if a customer base is diverse, she believes that employees should also be diverse so that the company can relate to the needs of its customers.[183] John Lewis, chief diversity officer at Coca-Cola, stated that "[t]he more diverse a room when decisions are made, the better the decisions."[184]

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176. Tamara Lytle, *Title VII Changed the Face of the American Workplace*, SOCIETY FOR HUMAN RESOURCE MANAGEMENT, (May 21, 2014), https://www.shrm.org/hr-today/news/hr-magazine/pages/title-vii-changed-the-face-of-the-american-workplace.aspx.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. Lytle, *supra*, note 176.

183. *Id.*

184. *Id.*

While companies see the necessity of a diverse workforce for many reasons, including social equality and legal liability, the most important is that money talks.[185] Private companies' products and services are far more competitive when the workforce designing and marketing their products and services represents the marketplace.[186] New perspectives from female and minority employees revolutionized American businesses by reaching more audiences more effectively within the marketplace.[187]

According to Jocelyn Frye, a senior fellow at a Washington D.C. think tank, women represented almost fifty percent of the U.S. civilian workforce, as recently as 2014.[188] In 1967, only four years after the Civil Rights Act was passed, women represented about twenty-nine percent of the civilian workforce.[189] Thus, in thirty-six years, one protected group under the Act has increased its participation in the workforce by almost twenty percent.[190] Judging by numbers alone, women have benefited most from the protections that the Civil Rights Act provided.[191] The effect of having more women in the workforce has altered the way that businesses operate because women tend to bring two distinct qualities to the table: interpersonal-relationship skills and multi-tasking.[192]

Companies that are hiring more women and underscoring the female perspective do so for reasons beyond idealism and altruism—women add to economic growth.[193] According to a 2015 study released by McKinsey & Company, if women globally were afforded the opportunity to reach their economic potential, "$28 trillion could be added to the GDP by 2025."[194] The Civil Rights Act has helped give women an opportunity to pursue successful careers and provide for their families while revolutionizing the marketplace and the workplace.[195]

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185. *Id.*

186. *Id.*

187. *Id.*

188. Lytle, *supra* note 176.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. Johnathan Woetzel, et al. *How Advancing Women's Equality Can Add $12 Trillion to Global Growth*, MCKINSEY GLOBAL INSTITUTE, (September 2015), http://www.mckinsey.com/global-themes/employment-and-growth/how-advancing-womens-equality-can-add-12-trillion-to-global-growth.

195. Lytle, *supra* note 176.

Finally, another effect of the Civil Rights Act is that much of today's discrimination in the workplace is no longer overt.[196] Before Title VII was passed, employers were free to name the race, gender, or religion of applicants that they would accept.[197] Especially in regions of the country that were historically prejudiced against African Americans, these practices limited men and women in their ability to pursue meaningful work, provide for their families, and build the life they desired.[198] For example, it was not rare for a young black man like the former head of the Martin Luther King, Jr. Center for Nonviolent Social Change, Mr. William Walker, to travel from the segregated South to the North in the 1950s just to find summer work.[199]

By defining a clear standard for employer behavior, Title VII has changed the way discrimination occurs in the workplace.[200] Today, most discrimination cases in employment law do not have a "smoking gun" that points to obvious discrimination;[201] it is often difficult to prove when employers discriminate in violation of Title VII, because the days of social acceptance of open discrimination based on sex, race, or religion are virtually no more.[202] Several important factors that employment lawyers consider to detect discrimination are how "similarly situated employees are treated,"[203] any "smoking gun"[204] comments, and statistics that demonstrate a pattern of bias toward one group or against a protected group.[205]

Over the last fifty years, Title VII claims have shifted from lawsuits against employers for not hiring employees to lawsuits against employers for not fairly promoting, or for unfairly terminating employees.[206] This development highlights two facts: (1) employers in the United States have

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. Lytle, *supra* note 176.

201. *Id.*

202. *See generally* Thomas Barnard & Adrienne L. Rapp, *Are We There Yet? Forty Years After the Passage of the Civil Rights Act: Revolution in the Workforce and the Unfulfilled Promises that Remain*, 22 HOFSTRA LAB. & EMP. L.J. 627 (2005); *see also* Maurice Wexler, et. al., *The Law of Employment Discrimination from 1985 to 2010*, 25 ABA J. LAB. & EMP. L. 349, 362 (2010) (discussing the effect of the EEOC issuing a broadened definition of discrimination).

203. Lytle, *supra* note 176.

204. *Id.*

205. *Id.*

206. *Id.*

progressed since Title VII was passed by giving Americans employment opportunities, and (2) a "super statute" such as Title VII can promote social change, but it will not eradicate social inequality.

Thus, while the Civil Rights Act and Title VII have not completely eliminated discrimination in the workplace, they have greatly impacted American employment by setting a clear standard against open discrimination of individuals based on gender, race, or religion.[207] Title VII promoted anti-discrimination shifts in the private sector through its standard for the public sector, increased the female influence in the marketplace and in the workplace, and set the bar higher for employer standards of conduct toward minority employees.[208] In only fifty years, Title VII has revolutionized the American marketplace and social climate regarding discrimination in the workplace.[209]

B. The Effect of the Education Amendment Act of 1972: More Than Title IX: How Equity in Education Has Shaped the Nation

Just as the Civil Rights Act of 1964 changed the face of employment in the United States, Title IX has altered education in the U.S., as men and women alike have pursued different career paths not formerly available to them.[210] For example, before Title IX was passed, most colleges had a set quota for the number of women they admitted. Also, many classified ads for jobs described the gender required for any applicants, and employers were permitted to pay women less money to do the same job as men.[211] Although Title IX did not "single-handedly[] transform our society, it was—and remains—one of the most comprehensive and effective mechanisms for social change"[212] in America. For example, in the early seventies, married women could not get lines of credit in their names, and men were not allowed to attend the birth of their children in the nursery ward.[213]

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207. *Id.*

208. *Id.*

209. Lytle, *supra* note 176.

210. KATHERINE HANSON ET AL., *Preface* to MORE THAN TITLE IX, HOW EQUITY IN EDUCATION HAS SHAPED THE NATION, at xx (2009).

211. *Id.*

212. *Id.*

213. *Id.*

Education, the great equalizer, has the power to change the trajectory of a life through the opportunities it affords.[214] It is no surprise that Title IX, a super statute that encourages equality in education, has altered the social perspective of the nation for many of the same reasons that Title VII has revolutionized employment. Today, women are the majority of undergraduates in universities and colleges, and mothers' hours of paid work has tripled since 1965.[215] While women have benefited greatly from Title IX, men have also been granted liberties to pursue careers not traditionally considered for men. For example, men now pursue careers as nurses and elementary school teachers, whereas in the sixties and seventies such careers were not considered suitable for men.[216]

After more than forty years since it has been passed, Title IX's effect on education and the U.S. economy is astounding. Title IX opened doors for women in education to participate more freely in the marketplace in various ways, including as doctors, dentists, executives, and work-from-home full-time mothers.[217] While traditional roles[218] for women emphasized the importance of a strong, stable family unit in America, the stereotypes of those roles often limited or minimized their opportunities to achieve academic, intellectual, and career potentials.[219] Title IX allowed women to cultivate and encourage their educational desires, while also encouraging men and women alike to choose careers that suit their skill sets and life goals, regardless of traditional gender roles assigned to a particular career.[220] The social and economic effect of Title VII and Title IX on the American workplace is a colossal tribute to the American Dream and honors the liberty this great nation was founded upon.

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214. Pamme Boutselis, *Why is Education Important? Q&A with Dr. Paul LeBlanc*, (Sept. 28, 2015), http://www.snhu.edu/about-us/news-and-events/2015/09/why-is-education-important.

215. HANSON, *supra* note 210, at xx.

216. *See generally id.* It is not uncommon for men to bring Title IX claims. *See, e.g.*, Winter v. Pa. State Univ., 172 F. Supp. 3d 756 (M.D. Pa. 2016).

217. HANSON, *supra* note 210, at xx.

218. For many years before Title IX was passed, the dignified role of a wife and mother was not regarded with the respect and recognition that her efforts deserved, as women were often "unpaid, underpaid, and undervalued." *Id.* at 120. Title IX has helped many women achieve their personal and career goals both inside and outside of the home. *Id.*

219. *See id.* at xx.

220. *Id.* at xxvi.

VI. CONCLUSION

Congress enacted the Civil Rights Act of 1964 as a necessary change in response to a tumultuous time in American politics and social policy. The Act, along with many anti-discrimination statutes that followed shortly thereafter, has "penetrate[d] deeply into American norms [and] institutional practice" such that it has "successfully penetrate[d] public normative and institutional culture in a deep way."[221] Because of the magnitude of social importance that both the Civil Rights Act of 1964 and the Higher Education Act of 1972 brought, uncertainty about how they interact with one another can carry strong social implications.

By using careful statutory construction to interpret how Title VII and Title IX should affect one another, it appears absurd that when two anti-discriminatory statutes apply to the same claim, the inability to qualify for the tedious administrative measures of one statute would result in a plaintiff's forfeiture of the other claim. Further, a literal collective reading of Supreme Court decisions on the issue disfavors the argument that Title VIII's procedural requirements should determine a plaintiff's use of Title IX in the alternative.

A Supreme Court decision settling this circuit split in favor of eliminating Title VII's preemption of Title IX when a plaintiff has failed to fulfill the procedural measurements of Title VII would be justified. Furthermore, it would also assert that where sex discrimination in federally funded education programs are concerned, the United States does not put the importance of procedural measures above a claimant's ability to have her day in court. Until a Supreme Court resolution to the circuit split occurs, circuit courts should utilize a systematic, disciplined approach to resolving ambiguities that arise from the interplay between Title VII and Title IX. In so doing, the courts would demonstrate that the issue of sex discrimination in federally funded education programs is a matter to be given the attention of careful, contemplative analysis instead of a mere balancing of important interests.

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221. William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1215 (2001).