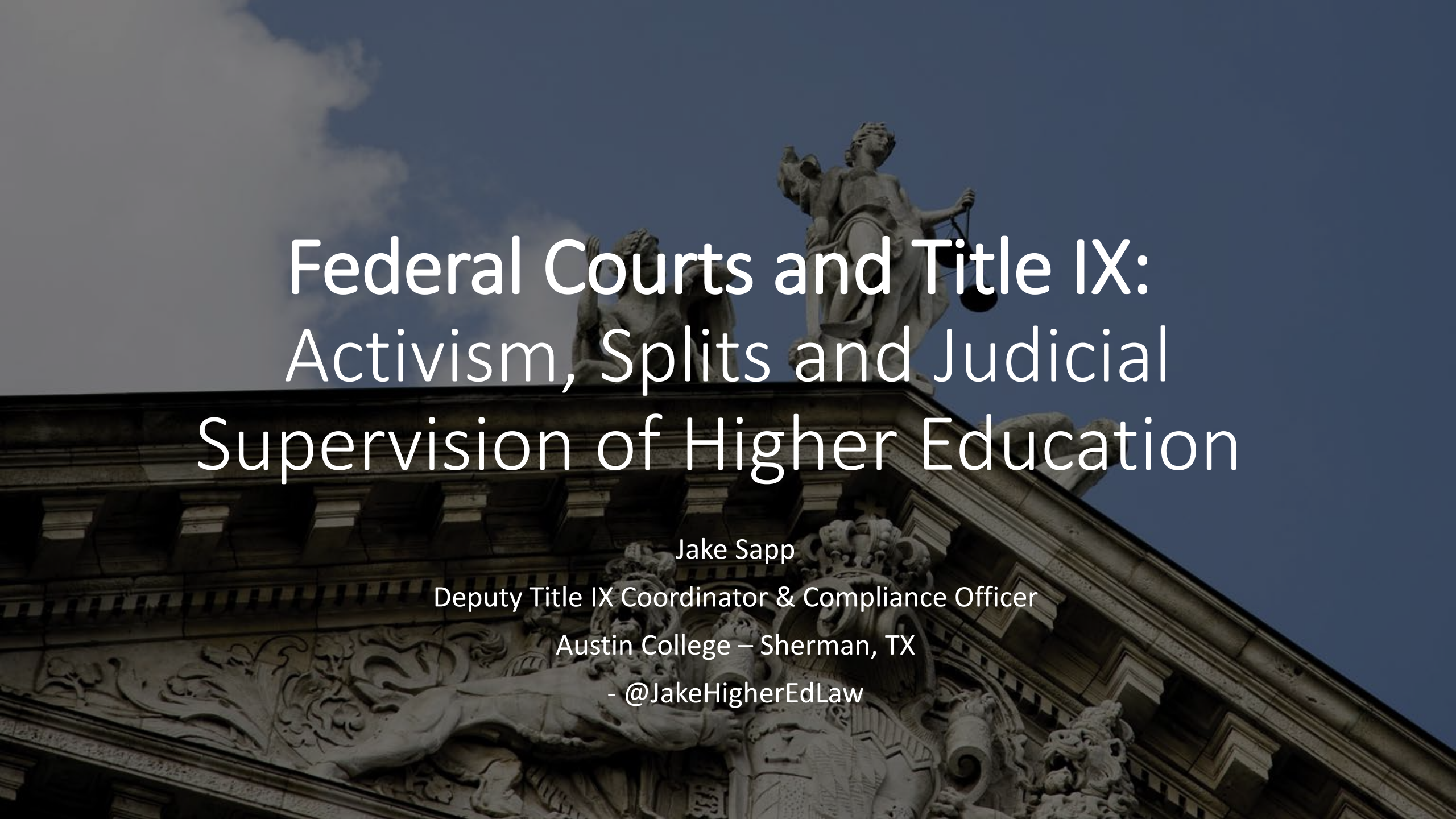


Federal Courts and Title IX: Activism, Splits and Judicial Supervision of Higher Education

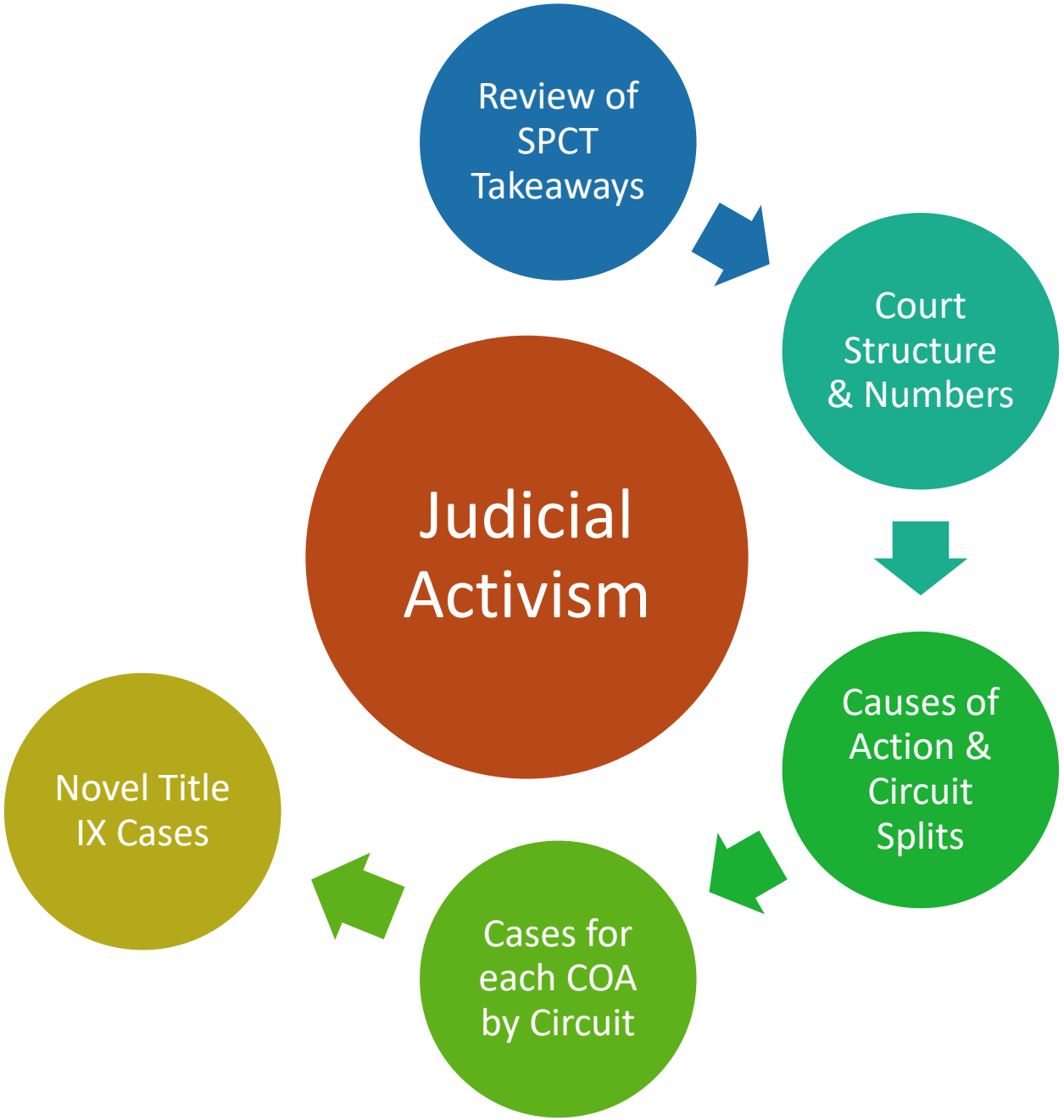
Jake Sapp

Deputy Title IX Coordinator & Compliance Officer

Austin College – Sherman, TX

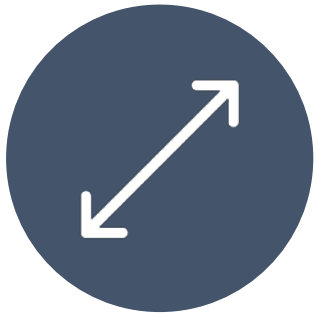
- @JakeHigherEdLaw

Overview of presentation

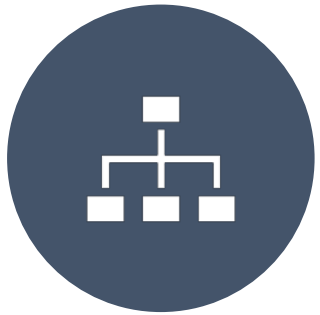


Webinar 1 - Supreme Court Takeaways

EVOLUTION



EXPANSION



RELATION

SOLVING

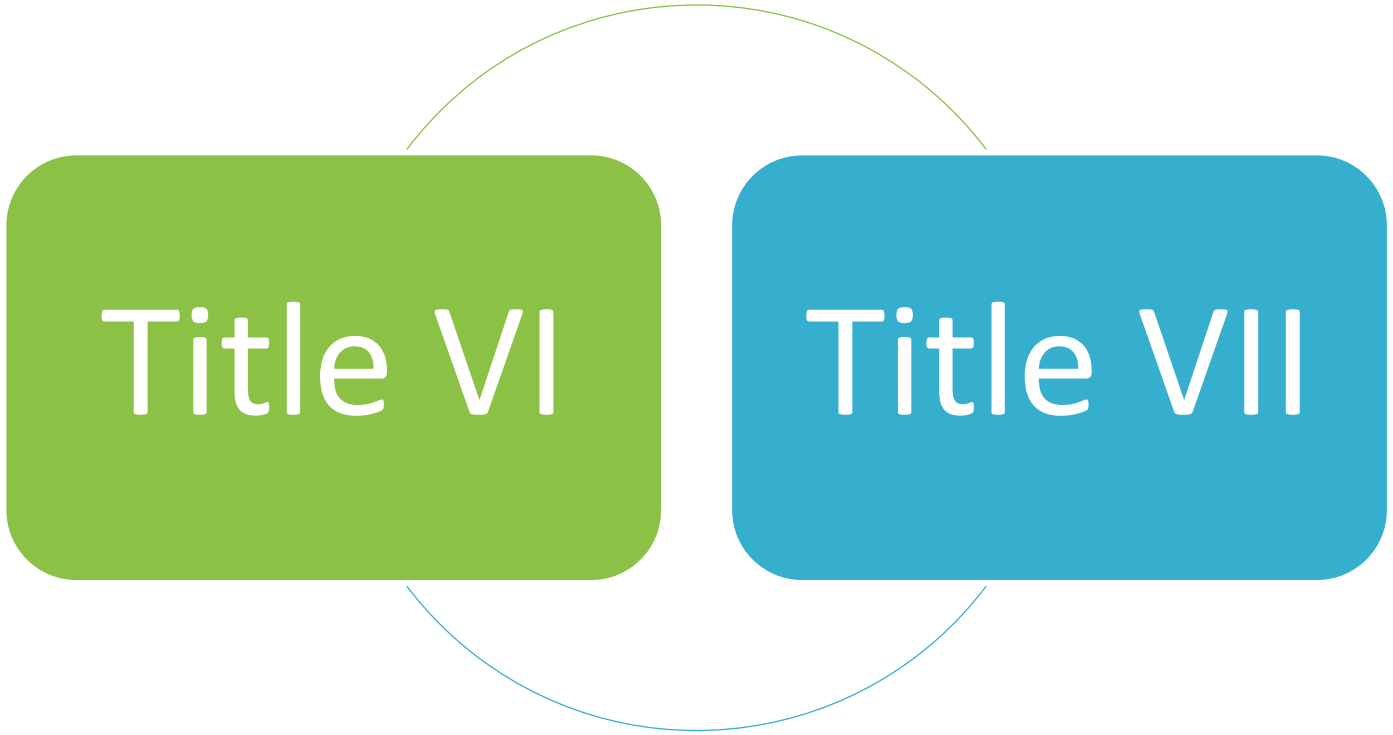
Evolution

- Cannon, IPCOA
- Goss, Student Due Process
- Mathews, What Process is Due?

Expansion

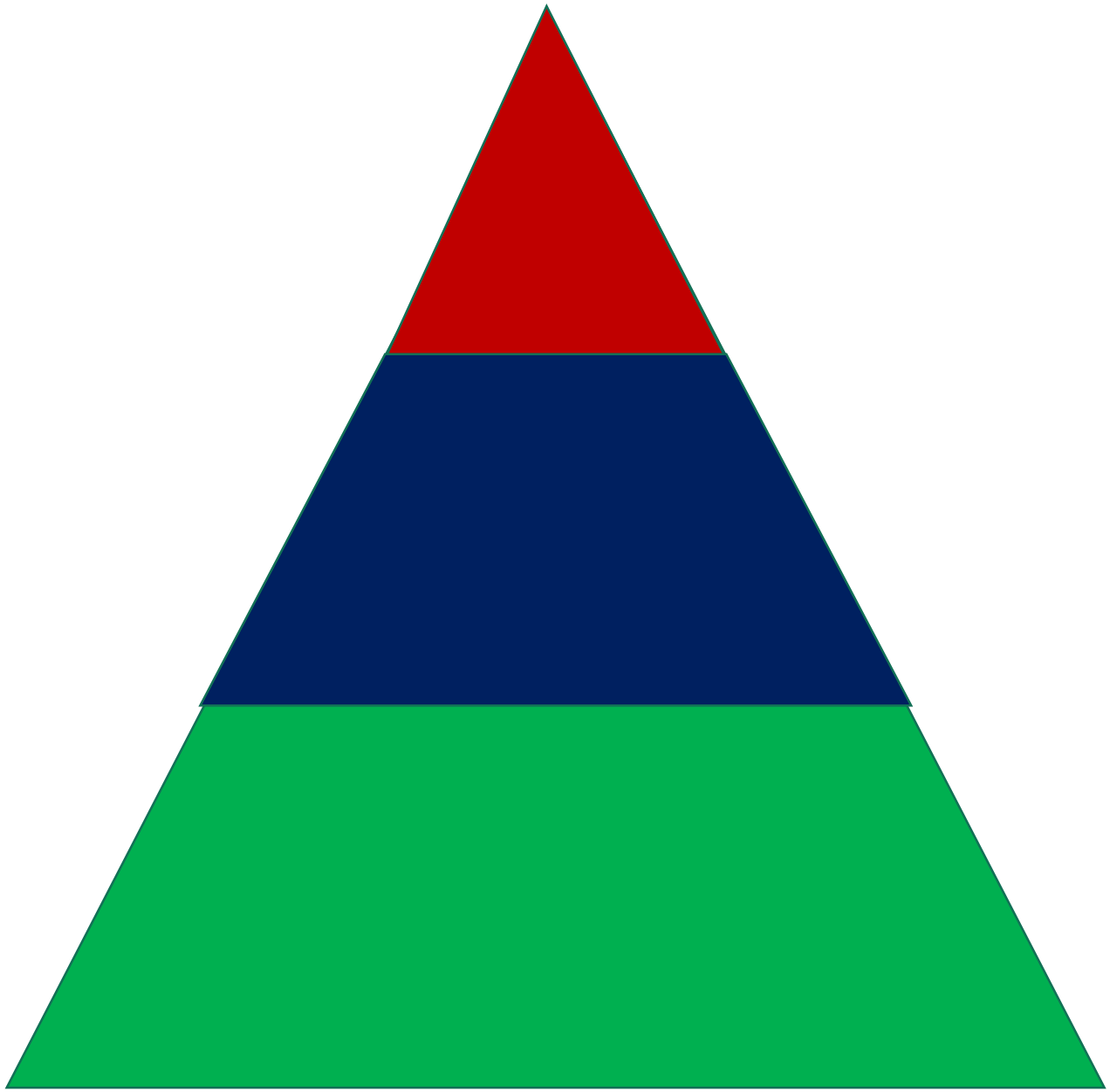
- North Haven -> Employees covered
- Franklin -> Money damages available
- Gebser -> Teacher harasses student
- Davis -> Student harasses student
- Jackson -> Retaliation Prohibited

Relation



Solving

Federal Circuit Court Structure



The United States Federal Courts

Supreme Court

United States Supreme Court

Appellate courts

U.S. Courts of Appeals (12 regional courts of appeals and the national jurisdiction Court of Appeals for the Federal Circuit)

Trial courts

U.S. District Courts (94 judicial districts and the U.S. bankruptcy courts)

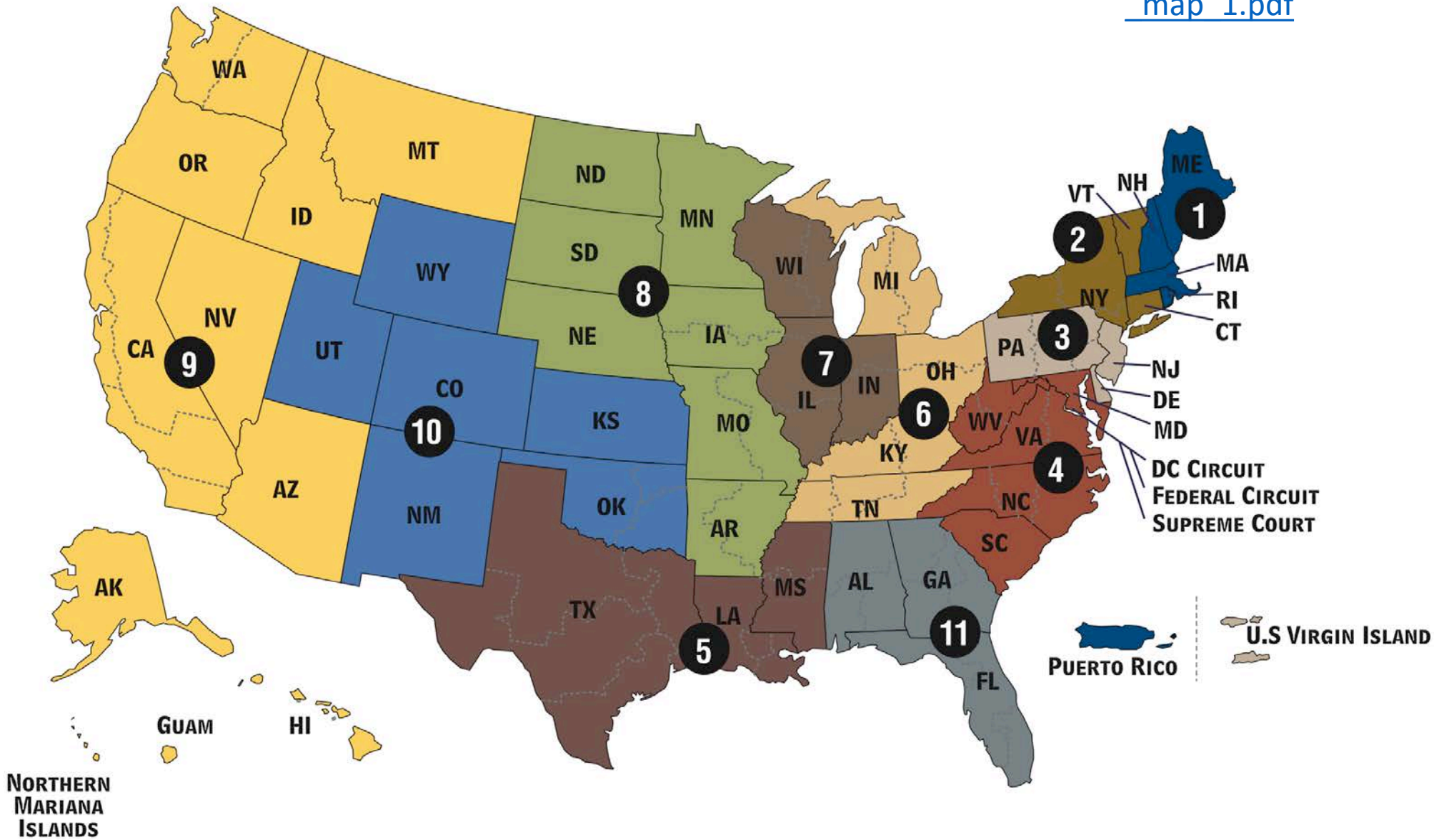
U.S. Court of International Trade

U.S. Court of Federal Claims

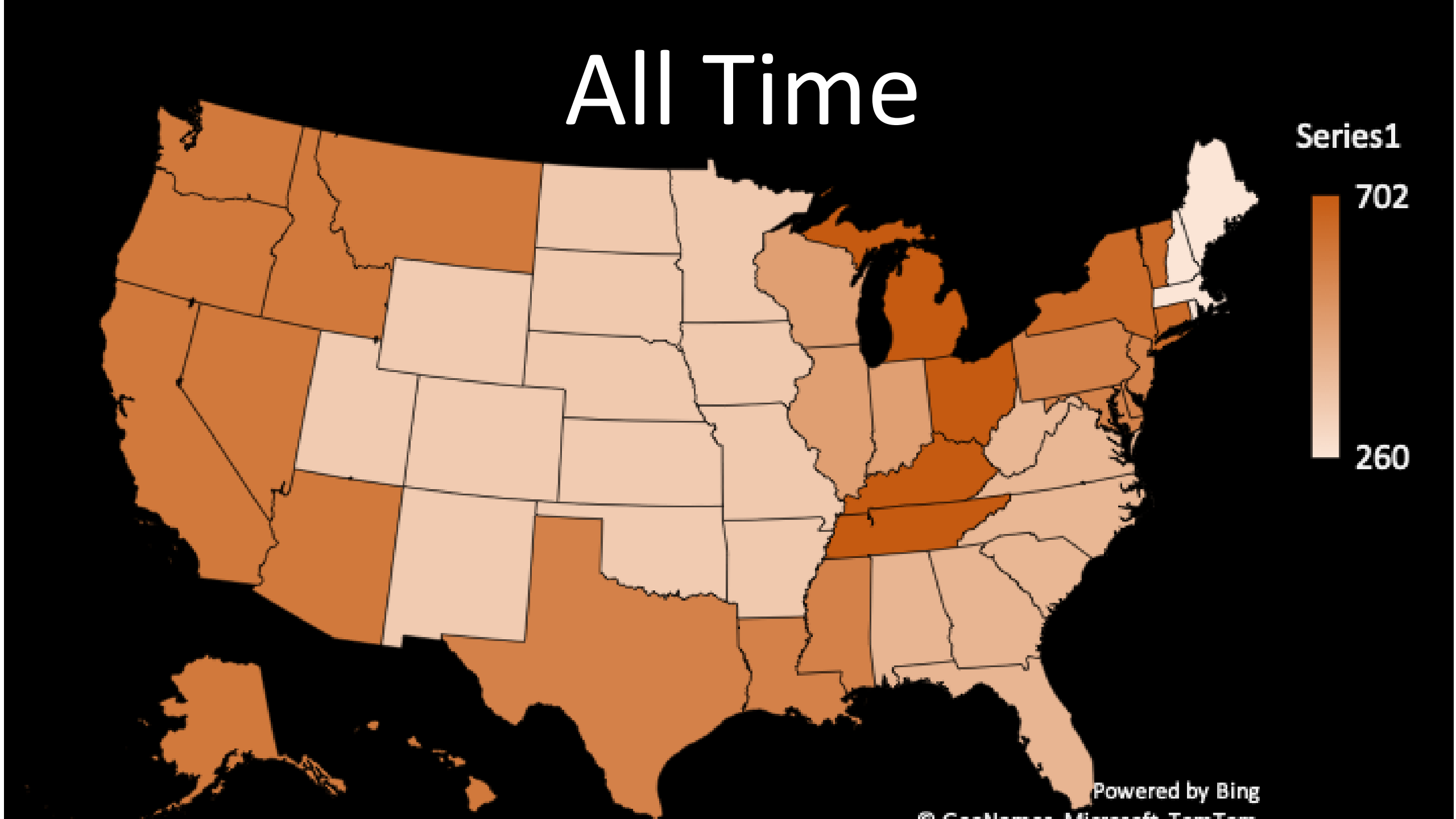
Geographic Boundaries

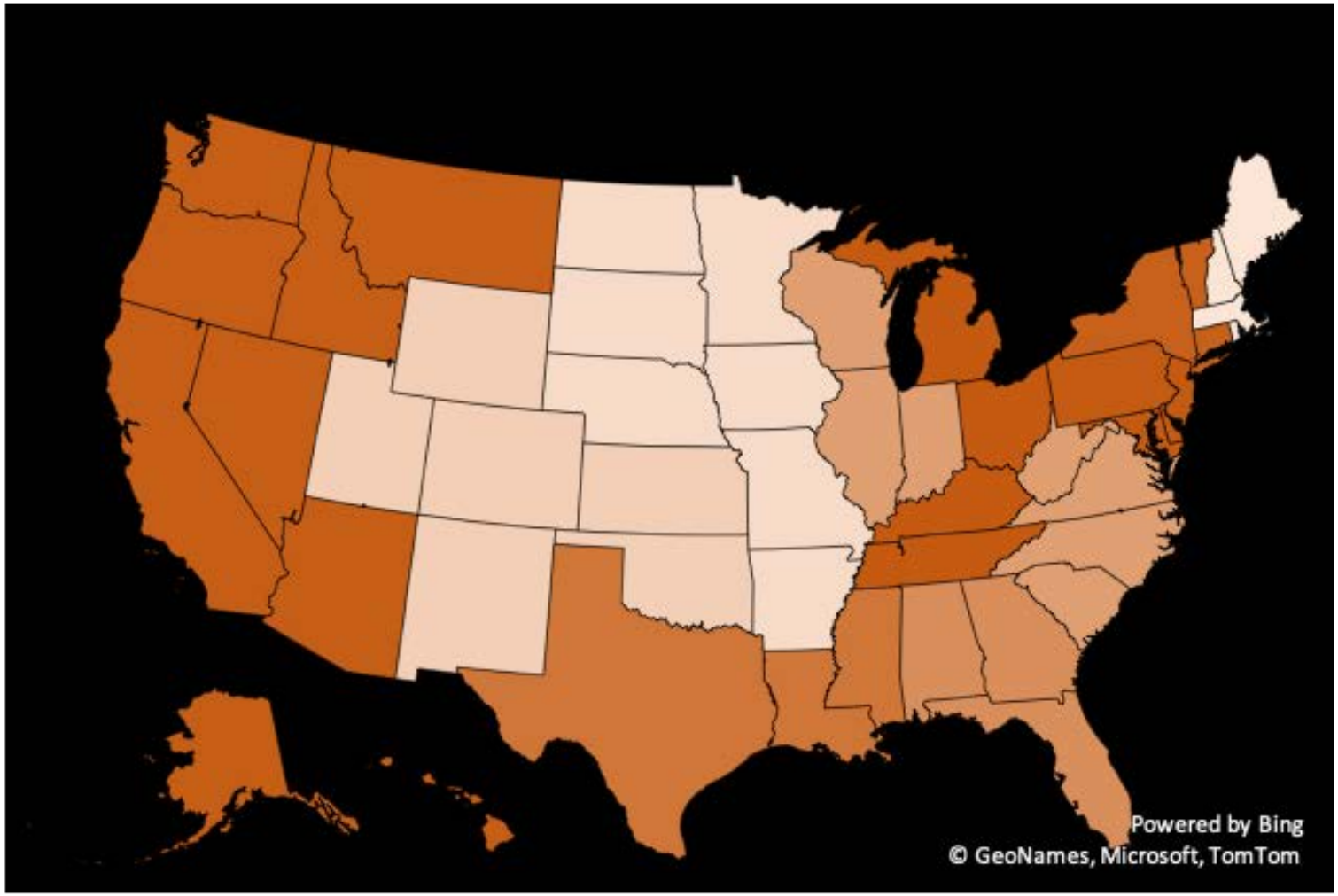
of United States Courts of Appeals and United States District Courts

https://www.uscourts.gov/sites/default/files/u.s._federal_courts_circuit_map_1.pdf

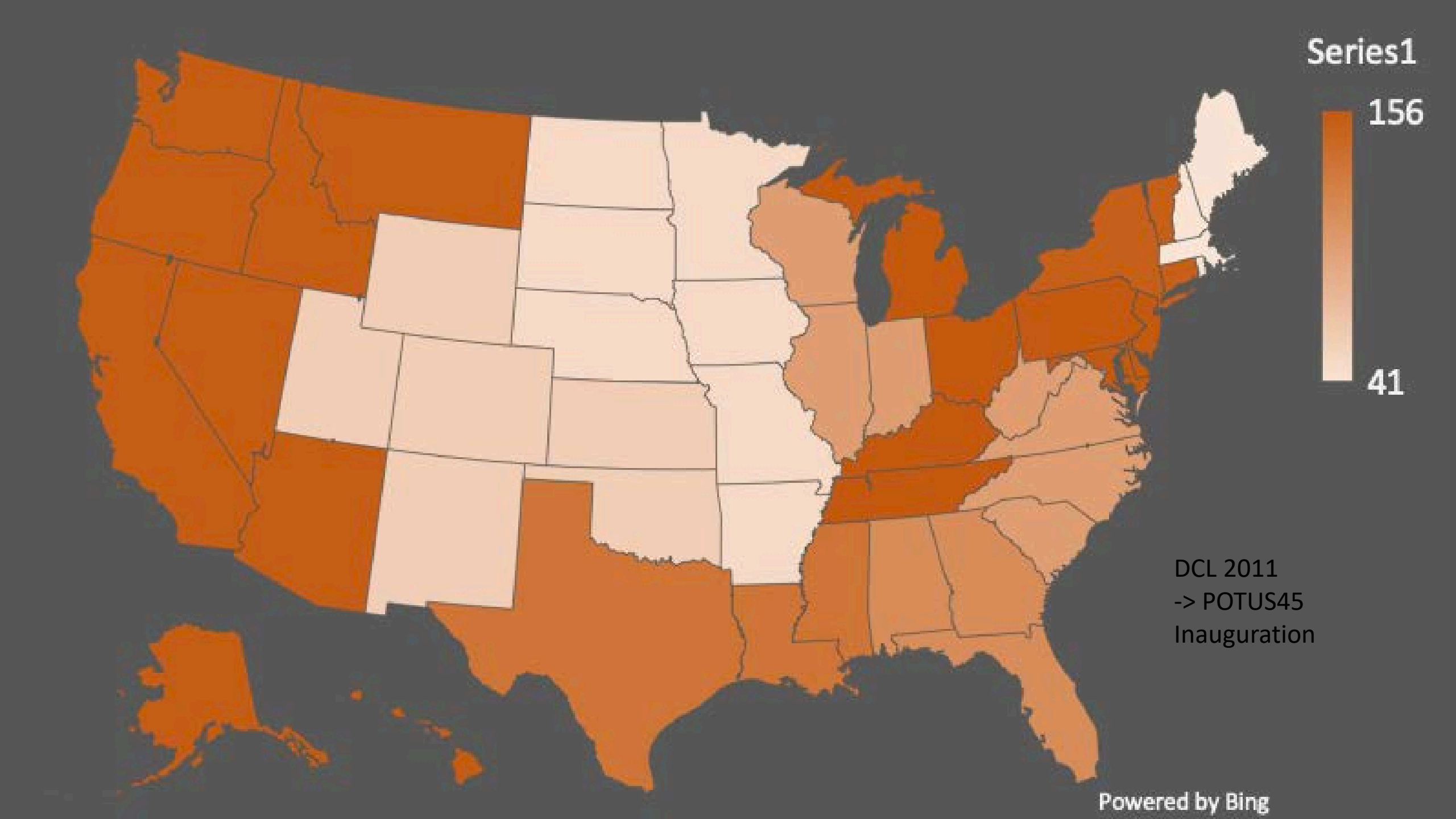


All Time





Inception – 2011 DCL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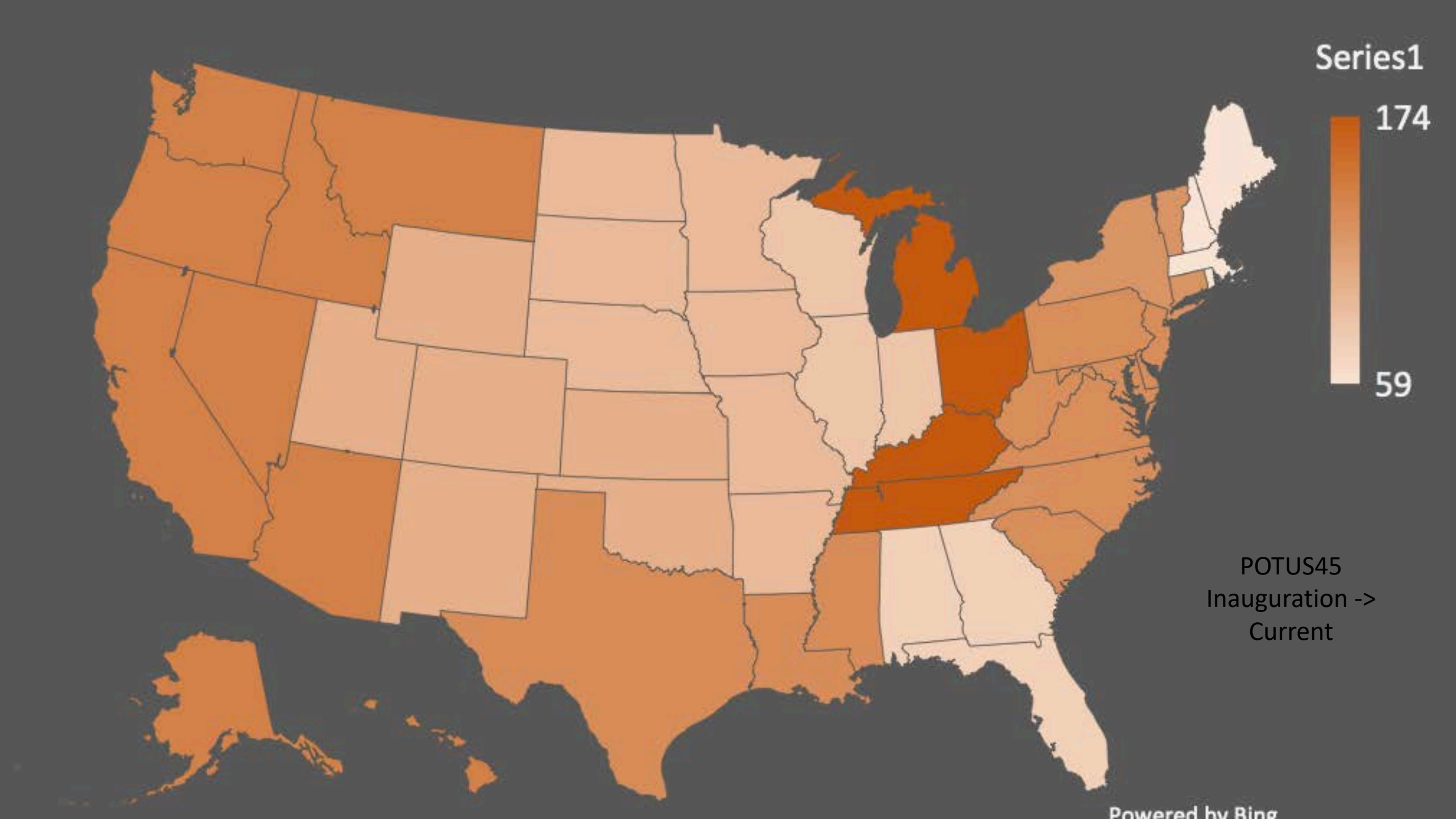
DCL 2011
-> POTUS45
Inauguration
Powered by Bing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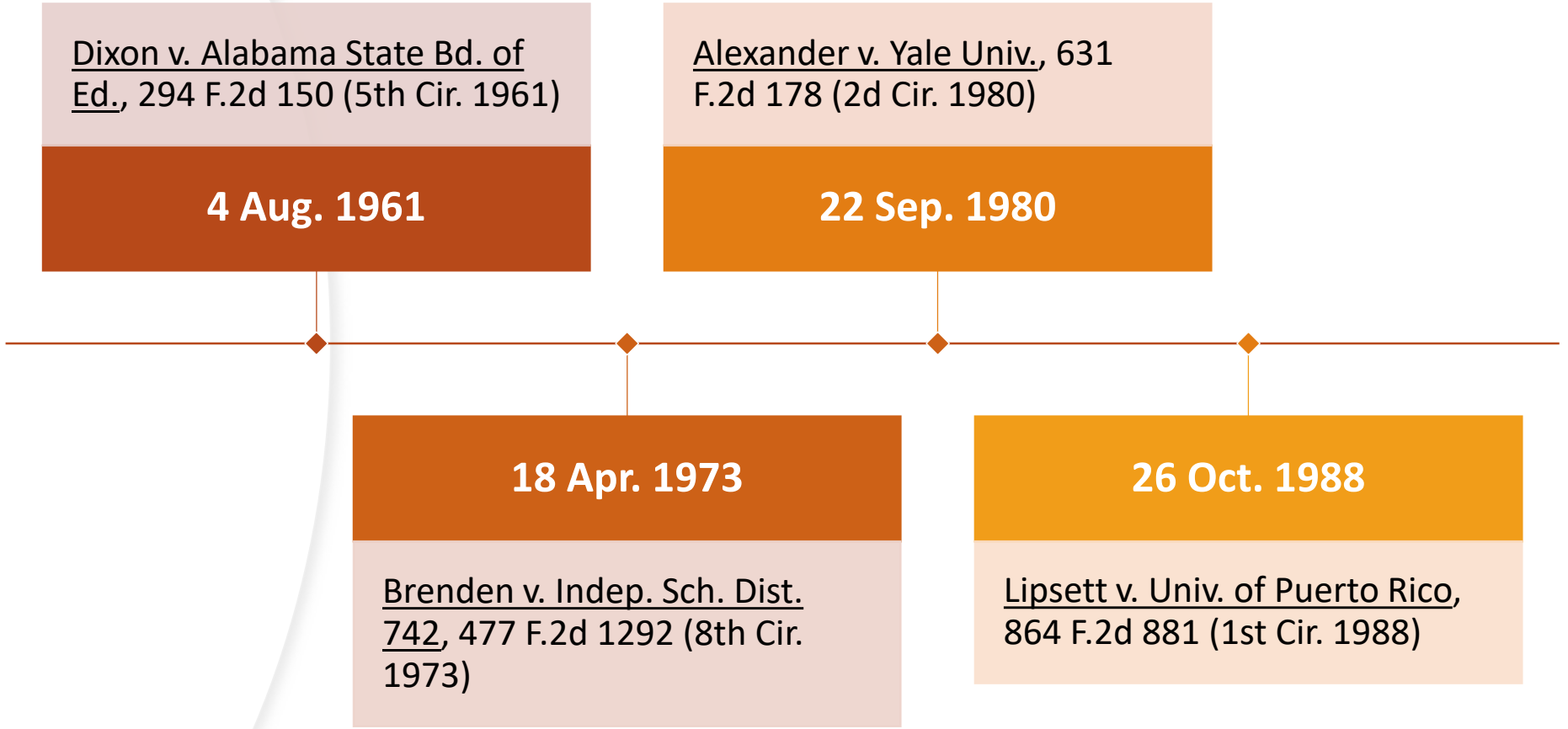
Material Acknowledgements

1) Competing Narratives of Law
2) Sensitive information covering Sexual Assault
3) Sharing the law, Not my Personal Opinions

Notable Historic Cases



Dixon v. Alabama State Bd. of Ed., 294 F.2d 150 (5th Cir. 1961)

"Our sense of justice should be outraged by denial to students of the normal safeguards. It is shocking that the officials of a state educational institution, which can function properly only if our freedoms are preserved, should not understand the elementary principles of fair play.

It is equally shocking to find that a court supports them in denying to a student the protection given to a pickpocket.

We are confident that precedent as well as a most fundamental constitutional principle support our holding **that due process requires notice and some opportunity for hearing before a student at a tax-supported college is expelled for misconduct."**

- 1) The nature of the hearing should vary depending upon the circumstances of the particular case. The case before us requires something more than an informal interview with an administrative authority of the college.
- 2) The notice should contain a statement of the specific charges and grounds which, if proven, would justify expulsion under the regulations of the Board of Education.
- 3) A charge of misconduct, depends upon a collection of the facts concerning the charged misconduct, easily colored by the point of view of the witnesses. In such circumstances, a hearing which gives the Board or the administrative authorities of the college an opportunity to hear both sides in considerable detail is best suited to protect the rights of all involved.
- 4) This is not to imply that a full-dress judicial hearing, with the right to cross-examine witnesses, is required.
- 5) In the instant case, the student should be given the names of the witnesses against him and an oral or written report on the facts to which each witness testifies.
- 6) He should also be given the opportunity to present to the Board, or at least to an administrative official of the college, his own defense against the charges and to produce either oral testimony or written affidavits of witnesses in his behalf.
- 7) If the hearing is not before the Board directly, the results and findings of the hearing should be presented in a report open to the student's inspection.

Brenden v. Indep. Sch. Dist. 742, 477 F.2d 1292 (8th Cir. 1973)

1st Title IX Substantively Considered

"Girls shall be prohibited from participation in the boys' interscholastic athletic program either as a member of the boys' team or a member of the girls' team playing the boys' team.

"The girls' team shall not accept male members."

Reliance on Equal Protection Claim for **dissimilar treatment for similarly situated men & women**: 1) the character of the classification in question; 2) the individual interests affected by the classification; 3) and the governmental interests asserted in support of the classification.

Regulation = Found to have violated Equal Protection Clause.

Intent to Eliminate Sex Based Discrimination

1963 Presidential Commission on the Status of Women: "Early and definitive court pronouncement, particularly by the United States Supreme Court, is urgently needed with regard to the validity under the 5th and 14th of laws and official practices discriminating against women, to the end that the principle of equality becomes firmly established in constitutional doctrine."

Passage of Title VII, Equal Pay Act, Title IX, Equal Rights Amendment

Discrimination in high school interscholastic athletics constitutes discrimination in education.

Pre-Cannon's Private Cause of Action.

Alexander v. Yale Univ., 631 F.2d 178 (2d Cir. 1980)

–

CATHARINE A. MACKINNON

5 Female Students & 1 Male Professor

Student 1 (sexually coerced by flute instructor, unresponsive administration)

Student 2 (Sexually Harassed by coach of Men's Field Hockey team, lack of legit procedures to report)

Student 3 (Quid Pro Quo, sex for A in class) = went to Trial

Student 4 (convo with victim, no procedures)

Student 5 (Self investigated claims at Yale, faced intimidation)

Argument: Refusing to consider seriously women students' complaints of sexual harassment by male faculty members and administration.

Lipsett v. Univ. of Puerto Rico, 864 F.2d 881 (1st Cir. 1988)

- Woman sexually harassed while in the Surgery Program & dismissed from the Program because of her sex.
- Bias: 1) Men outnumbered women 2) Inferior female facilities 3) Openly discussed by male staff 4) Warned not to complain 4) Playboys on wall 5) Sexual nicknames for females 6) Sexual drawings posted 7) Supervisor Quid Pro Quo for protection. 8) Retaliation via no assignments 9) Discharged
- Substantial body of case law developed under Title VII -> 1983 & Title IX.

Lipsett – Established Title VII Law

Sexual harassment recognized as Sex discrimination actionable under Title VII. William v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976)

Quid Pro Quo = supervisor conditions the granting of an economic or other job benefit upon the receipt of sexual favors from a subordinate, or punishes that subordinate for refusing to comply. Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977)

Hostile Environment = one or more supervisors or co-workers create an atmosphere so infused with hostility toward members of one sex that they alter the conditions of employment for them. Meritor v. Bank of Am., 600 F.2d 211 (9th Cir. 1979)

Discriminatory Discharge: Direct &/or Indirect evidence of discharge based on sex stereotypes. Hopkins v. Price Waterhouse, 920 F.2d 967 (D.C. Cir. 1990)

Title VII standards applied to Title IX & 1983

Quid Pro Quo = (1) subject to unwelcome sexual advances by a supervisor or teacher and (2) reaction to these advances affected tangible aspects of compensation, terms, conditions, or privileges of employment or educational training.

- In rebuttal, the defendant may show that the behavior complained of either 1) did not take place or 2) that it did not affect a tangible aspect of the plaintiff's employment or education.

Hostile Environment = subjected to 1) unwelcome sexual advances 2) so "severe or pervasive" that it 3) altered their working or educational environment.

- In response, the defendant may show 1) that the events did not take place or 2) that they were isolated or genuinely trivial.
- Court must Determine whether conduct was Unwelcomed (physical gestures & verbal expressions) = Perspective Dilemma

Lipsett Holding

1) Dr's = Deliberate Indifference under 1983

2) Dr's reliance on biased complaints = 1983

3) Federal Employee Quid Pro Quo under 5th Am.

4) University liable under Title IX: Constructive Knowledge of Hostile Environment & Illegal Discharge

Current Title IX Causes of Action & Circuit Splits

Recognized Sex Discrimination COA

- Deliberate Indifference
- Retaliation
- 42 U.S.C. 1983 – Due Process & Equal Protection
- Erroneous Outcome
- Selective Enforcement
- Inequity in Athletics
- Pre-Assault Claim
- Plausible Inference

Circuit Splits

- Deliberate Indifference
- Plausible Inference
- Pre-Assault claim
- Employees & Title IX

Gebser – Teacher on Student Deliberate Indifference

- “We think, moreover, that the response must amount to deliberate indifference to discrimination.”
- Damages remedy requires: An **Appropriate person** has **Actual Knowledge** & **fails to adequately respond**.
- App. Person: an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf
- Actual Knowledge: Not constructive knowledge or should have known standard.

The Principal only had knowledge of inappropriate comments made in class. Fired when discovered sexual relationship.

Davis – Student on Student Deliberate Indifference

1) Respondent is a Federal Funding Recipient
2) Appropriate Official has
3) Actual Knowledge of misconduct
4) Misconduct is so Severe, Pervasive, and Objectively Offensive
5) That it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school &,
6) Recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances.
7) Damages liability is limited to circumstances wherein the recipient exercises substantial control over both the harasser and the context in which the known harassment occurs. Only then can the recipient be said to "expose" its students to harassment or "cause" them to undergo it "under" the recipient's programs.

Deliberate Indifference

Supreme Court (Gebser & Davis)

“That is, the deliberate indifference must, at a minimum, "cause [students] to undergo" harassment or **"make them liable or vulnerable"** to it.” – Davis

Circuit Split (Farmer v. Kollaritsch)

Farmer v. Kansas State Univ., 918 F.3d 1094 (10th Cir. 2019)

Student 1

Parties = Farmer, Weckhorst, University of Kansas

Farmer = Alcohol // Alleged consensual sex, Male left, another male hiding in closet then raped her.

Reported to police & school CARE center// Not informed about T9

Fear of running into attacker caused her to: miss class, seclude from friends, withdraw from extracurricular activities, depression, excessive sleep, excessive drinking, slitting wrists.

Student 2

- Party off campus - Blacked out
- Raped in front of 15 students = recorded & posted online
- Taken to Fraternity House ‘sleep room’ & Raped by another fraternity member.
- Reported to KSU Women’s center, police, IFC
- No disciplinary action taken
- Afraid to be on campus & see attacker: grades fell & lost scholarship, symptoms of PTSD, distanced herself from friends and family.

Dispute

What harm must plaintiffs allege that KSU's deliberate indifference caused them?

KSU's argument = further Sexual harassment required

VS

Farmer's argument = vulnerable Is enough

Court's Analysis

- Davis: Random House Dictionary definition of "subject" to include, "to make liable . . . ; lay open; expose."
- KSU = further actual incidents of sexual harassment required. CT = this runs counter to purpose of Title IX
- CT = cites to 4 USDCT cases & 11th Cir Williams v. Bd of Regents = specific action taken by survivors that have deprived them educational opportunities. Further Harassment required, but what is the Further Harassment?
- Acknowledge that Courts look at Further Harassment

Holding

- Plaintiffs can state a viable Title IX claim for student-on-student harassment by alleging that the funding recipient's deliberate indifference caused them to be "vulnerable to" further harassment without requiring an allegation of subsequent actual sexual harassment.
- Reasonable Fear Warning

Kollaritsch v. Michigan State Univ. Bd. of Trustees, 944 F.3d 613 (6th Cir. 2019)

3 Students Facts

1) Kollaritsch (reported sexual assault, investigation, no contact order issued, saw each other on campus 9 times, reported retaliation, investigated, lawsuit filed)

2) Gross (reported sexual assault, investigation, expulsion, new investigation (lawyers) overturned OG decision, reinstated, lawsuit filed)

3) Jane Roe 1 (reported sexual assault, investigation, insufficient evidence, male student withdrew from college, lawsuit filed)

Dispute

1) Is Further Actionable Conduct required? What is it?

2) Meaning of Severe, Pervasive, & Objectively Offensive.

Plaintiffs argument

Davis allows liability when Schools:

1) Cause students to undergo harassment

- = Requires further harassment

2) Make students liable or vulnerable to it

- = Must NOT require further harassment

Courts Analysis – Walkthrough of each Davis element

- Davis = 2 parts
    1) Actionable Harassment -> Non-Consensual
        = 1) Severe, 2) Pervasive, and 3) Objectively Offensive
    2) Deliberate Indifference
        = 1) Knowledge, 2) Act, 3) Injury, 4) Causation

Severe

More than juvenile behavior among students that is antagonistic, non-consensual, and crass.

“simple acts of teasing and name-calling" are not enough, "even where these comments target differences in gender."

"It is not enough to show…that a student has been teased or called offensive names."

Pervasive

Systematic / ***Multiple*** incidents of harassment; one incident of harassment is not enough.

Davis - **single** incident falls short

Objectively Offensive

"Behavior that would be offensive to a reasonable person under the circumstances"

Constellation of surrounding circumstances, expectations, and relationships.

Ages of the harasser and the victim and the number of individuals involved.

The victim's perceptions are not determinative.

Knowledge

- "Knowledge" = Actual Knowledge of an incident of actionable sexual harassment
- Rejects Constructive Knowledge
- Knowledge -> Action taken Connection

Act

"Clearly unreasonable in light of the known circumstances,"

Control over the alleged harassment & authority to take remedial action

Same victim requirement

01

Deprivation of "access to the educational opportunities or benefits provided by the school,”

02

1) Inability "to concentrate on her studies"

2) Fear of attending school

3) Suicide note

03

More than Emotional harm

Injury

Causation

- "[T]he deliberate indifference must, at a minimum, cause students to **undergo harassment or make them liable or vulnerable to it.”**
- “But for” Test
- Plaintiffs = Vulnerability alone misreading
- Correct Reading of Davis: Commission or Omission
- Post notice harassment presumption
- Cormier, 29 Yale J.L. & Feminism at 23-24

Kollaritsch Deliberate Indifference Holding

- Plaintiff must plead, and ultimately prove:

1) An incident of actionable sexual harassment,

2) School's actual knowledge of it,

3) Some further incident of actionable sexual harassment,

4) The further actionable harassment (3) would not have happened **but for** the objective unreasonableness (deliberate indifference) of the school's response,

5) The Title IX injury is attributable to the post-actual-knowledge further harassment.

Concurrence

- Subject to = Experienced harm
- If a person can be "subjected to harassment" without experiencing any harassment as a result of the defendant's conduct, then a person can also be "subjected to discrimination" without experiencing any discrimination as well. And that surely can't be right.
- Exclude = Blocked ≠ more likely to not get
- Spending clause legislation – Pennhurst
- Davis = Narrow holding
- Liability Examples

Erroneous Outcome & Selective Enforcement

Yusuf v. Vassar Coll., 35 F.3d 709 (2d Cir. 1994)

- Yusuf a Bengali male = student at Vassar
- Attacked by student roommate = drunk white male.
- Roommate's girlfriend retaliated by bringing sexual harassment charges.
- Notice Deficiencies
- Hearing Deficiencies
- Yusuf Suspended for 1 semester.
- Alleged Violations of 42 USC 1981 & Title IX

Title IX Erroneous Outcome & Selective Enforcement

Relation to Title VI & Title VII & Equal Protection

Albert v. Carovano, 851 F.2d 561 (2d Cir. 1988)

Burt v. City of New York, 156 F.2d 791 (2d Cir. 1946)

Snowden v. Hughes, 321 U.S. 1 (1944)

"Title IX bars imposition of University discipline where gender is a motivating factor In the decision to discipline."

Erroneous Outcome = Innocent and wrongly found to have committed the offense.

Selective Enforcement = Regardless of the student's guilt or innocence, the severity of the penalty and/or the decision to initiate the proceeding was affected by gender.

Proving Gender Bias

A) Statements by members of the disciplinary tribunal, statements by pertinent university officials, or patterns of decision-making that also tend to show the influence of gender.

B) The allegation that males invariably lose when charged with sexual harassment at Vassar provides a verifiable causal connection similar to the use of statistical evidence in an employment case.

Doe v. Miami

Statistical Evidence

Attorney Affidavit

Pattern of gender-based decision making

External Pressure

Title IX
Plausible Inference Standard

Doe v. Purdue Univ., 928 F.3d 652 (7th Cir. 2019)

Due Process & Title IX

- Legally Protected Entitlement?
- Contract

Fundamentally Unfair Procedures

- ("[F]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights.") Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951) (Frankfurter Concurring)
- Failure to examine Jane Roe -> No Impeachment

Doe v. Purdue Univ., 928 F.3d 652 (7th Cir. 2019)

Implied Private Cause of Action -> Gebser

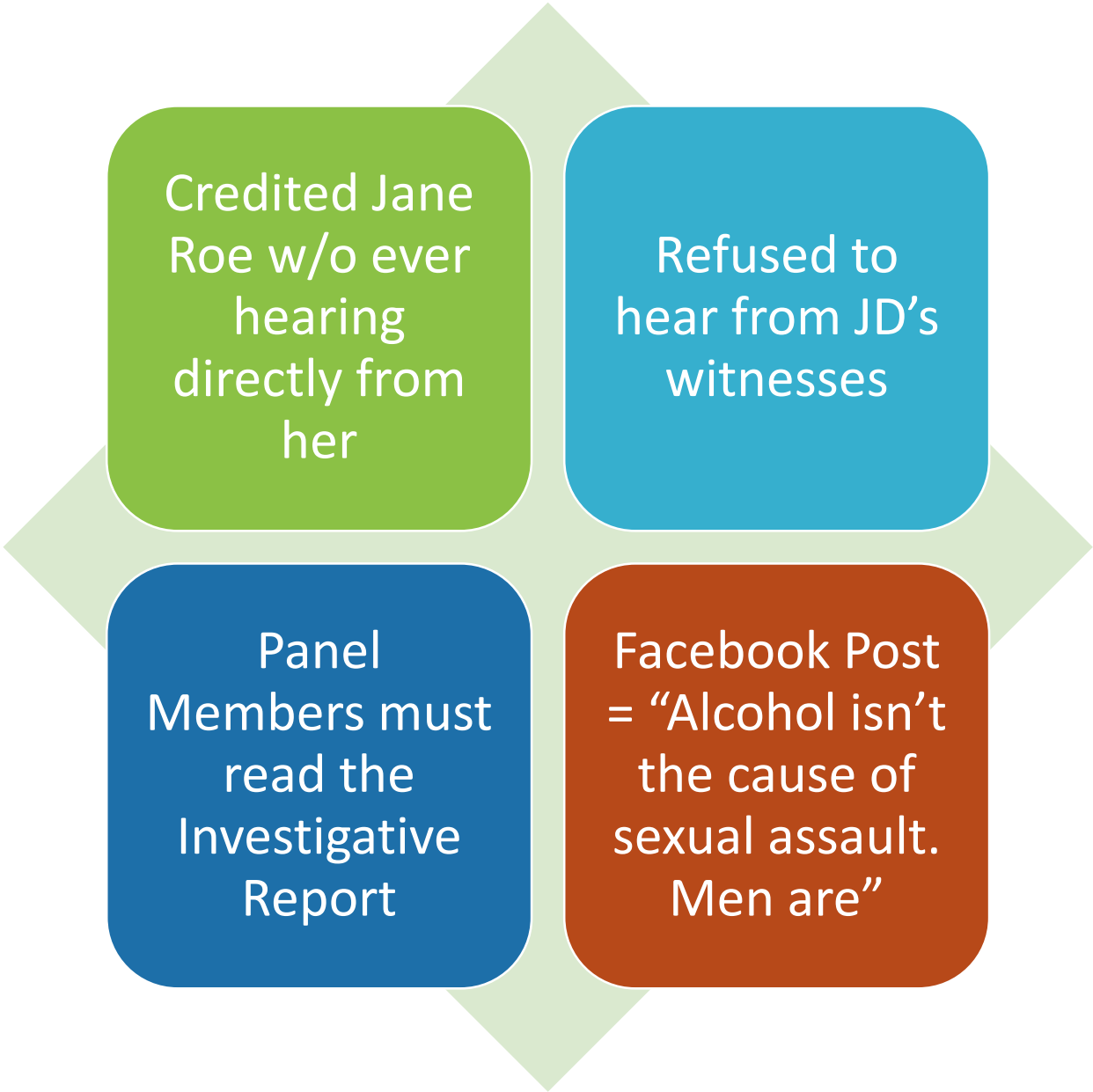
Erroneous Outcome & Selective Enforcement -> Yusuf

Deliberate Indifference -> Doe v. Miami Univ., 882 F.3d 579 (6CA 2018)

7th Circuit Splits from all other circuits

- “We see no need to superimpose doctrinal tests on the statute. All of these categories simply describe ways in which a plaintiff might show that sex was a motivating factor in a university's decision to discipline a student.”
- **Do the alleged facts, if true, raise a plausible inference that the university discriminated against John "on the basis of sex**"?

Plausible Discrimination Finding



Doe v. University of the Sciences, No. 19-2966 (3d Cir. May 29, 2020)

We agree with the Seventh Circuit and "see no need to superimpose doctrinal tests on the [**Title IX**] statute." Thus, we adopt the Seventh Circuit's straightforward pleading standard

Pleadings must support a plausible inference that a federally-funded college or university discriminated against a person on the basis of sex.

External Pressure + Sex as motivating factor.

DCL 2011 + No investigation of Accusers

Title IX & Athletics

Archaic Assumption = historical assumptions about boys' and girls' physical capabilities

Effective Accommodation = 34 C.F.R. § 106.41(c)(1)

Equal Treatment = 34 C.F.R. § 106.41(c)(2)-(10)

Athletics – Effective Accommodation

- (1) showing substantial proportionality (the number of women in intercollegiate **athletics** proportionate to their enrollment);
- (2) proving that the institution has a "history and continuing practice of program expansion" for the underrepresented sex (in this case, women); or
- (3) where the university cannot satisfy either of the first two options, establishing that it nonetheless "fully and effectively accommodate[s]" the interests of women

Mansourian v. Regents of Univ. of California, 602 F.3d 957 (9th Cir. 2010)

Athletics - Equal Treatment

- require equivalence in the availability, quality and kinds of other athletic benefits and opportunities provided male and female athletes
- sex-based differences in the schedules, equipment, coaching, and other factors affecting participants in athletics
- McCormick v. Sch. Dist. Of Mamaroneck, 370 F.3d 275 (2d Cir. 2004)

Title IX Retaliation

- Retaliation against a person b/c they complained of sex discrimination is another form of intentional sex discrimination. = Jackson v. Birmingham Bd. Of Educ., 544 U.S. 167 (2005)

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)

- Establishes a 3 Step Burden Shifting Process:

1. Plaintiff establishes a Prima Facia case of discrimination

   "(1) Person engaged in protected conduct; (2) Person was subjected to an adverse employment action; and (3) the adverse employment action is causally linked to the protected conduct."

2. Defendant must articulate a legitimate, non-discriminatory reason for the adverse action

3. Plaintiff must show by a preponderance of the evidence that the defendant's proffered reason is pretextual and that the actual reason for the adverse employment action is discriminatory."

Title IX & 42 USC § 1983

Outline of a 42 U.S.C. § 1983 Case

- 1) Deprived of a constitutional right (Liberty / Property)
- 2) by a state official acting under the color of law.
- 11th Amend – 1) Waived 2) Abrogated by statute 3) Ex Parte Young exception– Prospective Relief
- 3 Causes of Action
  1) Substantive Due Process Violation (bars certain arbitrary gov. actions "regardless of the fairness of the procedures used to to implement them." Actions that Shock the Conscience
  2) Procedural Due Process Violation (guarantee of a fair procedure)
  3) Equal Protection Violation (Equal treatment under the laws)

Due Process Cases

- Goldberg v. Kelly, 397 U.S. 254 (1970);
- Regents v. Roth, 408 U.S. 564 (1972);
- Goss v. Lopez, 419 U.S. 565 (1975);
- Mathews v. Eldridge, 424 U.S. 319 (1976);
- Bishop v. Wood, 426 U.S. 341 (1976);
- Paul v. Davis, 424 U.S. 693 (1976);
- Codd v. Velger, 429 U.S. 624 (1977);
- Ingraham v. Wright, 430 U.S. 651 (1977)

Expanding recognized Interests

- Liberty . . . guaranteed (by the Fourteenth Amendment), the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.' Meyer v. Nebraska, 262 U.S. 390 (1923)
- The Court has also made clear that the Property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money. By the same token, the Court has required due process protection for deprivations of liberty beyond the sort of formal constraints imposed by the criminal process. Board of Regents v. Roth, 408 U.S. 573 (1972)
- For '(w)here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.' Wisconsin v. Constantineau, 400 U.S. 433 (1971)

Student Interests in continuing education – Circuit split?

- Protected property interests: a property interest in continuing their education and a property interest in a transcript "unmarred" by the finding of responsibility for sexual misconduct.
- "As an initial matter, we note that the Supreme Court never has held that the interest in continued education at a public university constitutes a fundamental property or liberty interest that finds refuge in the substantive protections of the Due Process Clause." Martinson v. Regents of the Univ. of Mich., 563 F. App'x 365 (6th Cir. 2014)
- "[O]ur own precedent suggests that the opposite is true," although this court has not definitively decided the issue.
- A consensus on this issue does not appear to have emerged among our sister circuits either. Williams v. Wendler, *530 F.3d 584 (7CA 2008)* (holding that a suspension from a public university is not a deprivation of constitutional property); Butler v. Rector & Bd. of Visitors of Coll. of William & Mary, 121 F. App'x 515 (4th Cir. 2005) (assuming, without deciding, that a student had "a property interest in continued enrollment" in a master's program "that is protected by the Due Process Clause").

Goss v. Lopez, 419 U.S. 565 (1975)

- Nine students suspended // Disciplinary Reasons
- Some students suspended w/o hearing or evidence on record indicating they were not bystanders.
- Ohio Rev. Code Ann. 3313.48 & 3313.64 (1972 & 1973) & 3321.04 (1972).
- Property (state law) Board of Regents v. Roth, 408 U.S. 564 (1972)
- Liberty interest (reputation) Wisconsin v. Constantineau, 400 U.S. 433 (1971)
- 10-day suspension requires oral or written notice of the charges against them, if he denies them, an explanation of the evidence the authorities have an opportunity to present his side of the story.

Mathews v. Eldridge, 424 U.S. 319 (1976)

(1) the nature of the private interest affected—that is, the seriousness of the charge and potential sanctions,

(2) the danger of error and the benefit of additional or alternate procedures, and

(3) the public or governmental burden were additional procedures mandated.

Student's Constitutional Interest

Unanswered by the SPCT – Creatures of State Law

Goss v. Lopez, 419 U.S. 565 (1975)
(Ohio law created Interest)

No Circuit consensus on Constitutional Interest

Reputation tied to Liberty Interest

"Assume without deciding"

Due Process - Cross Examination

Doe v. Baum, 903 F.3d 575 (6th Cir. 2018)

Procedural Due Process & Title IX

(Goss, Mathews, Dixon, Univ. of Cinn, Flaim) Recognizes Student Interest = Property & Reputation

-> Jaksa v. Regents of Univ. of Michigan, 597 F. Supp. 1245 (E.D. Mich. 1984) = Con ≠ Cross Exam

Disciplinary Decision -> Credibility Determination

Balance of Interests

Procedural Due Process violation & Title IX Erroneous Outcome=External Pressure, crediting Roe, NoCrossEX

Haidak v. Univ. of Mass.-Amherst, 933 F.3d 56 (1CA 8/6/2019)

Gorman v. Univ. of Rhode Island, 837 F.2d 7 (1st Cir. 1988)

(Goss, Mathews, Dixon, MagnaCarta) (Recognizes Paramount Student Interest, No cross exam required.)

Schools Interest: 1) protecting itself and other students from those whose behavior violates the basic values of the school, 2) Allocation of resources toward ”promoting & protecting the primary function of institutions that exist to provide education.

Haidak = Challenging the Suspension & Expulsion hearings Title IX & 1983.

Not a common law trial // Rejects Baum

Plummer v. Univ. of Houston, 860 F.3d 767 (5th Cir. 2017)

Due Process & Title IX Selective Enforcement

Davis, Goss, Mathews, Dixon, Flaim(6CA)

Univ. of Texas Med. Sch. at Houston v. Than, 901 S.W.2d 926 (Tex. 1995). Texas Constitution recognizes liberty interest in higher education/Reputation.

School = Strong Interest: educational process, safe LE, preserving limited administrative resources.

Process = multiple meaningful opportunities to be heard & Video evidence of violation.

Plummer

- Inadequate Notice of standards, Unfair investigation, Bias, No direct evidence, No Cross Exam.
- 2nd Mathews = “The danger of error and the benefit of additional or alternate procedures” (video evidence)
- “Additional procedures were not necessary in case without significant factual disputes” (Mathews & Flaim(6CA))
- Selective Enforcement

Can Employees Sue under Title IX? (Under Review)

Lakoski v. James, 66 F.3d 751 (5CA 1995) v. Doe v. Mercy Catholic Med. Ctr. 850 F.3d 545 (3d Cir. 2017)

1st, 3rd, 4th, 6th, 10th = Title VII does not preempt Title IX

5th, 7th, 11th = Title VII does preempt Title IX

2nd & 8th = No consensus

Pre-Assault Claim

- Karasek v. Regents of Univ. of California, 956 F.3d 1093 (9th Cir. 2020)
- SimSimpson v. Univ. of Colorado Boulder, 500 F.3d 1170 (10th Cir. 2007)

(1) a school maintained a policy of deliberate indifference to reports of sexual misconduct,

(2) which created a heightened risk of sexual harassment that was known or obvious

(3) in a context subject to the school's control, and

(4) as a result, the plaintiff suffered harassment that was so severe, pervasive, and objectively offensive that it can be said to have deprived the plaintiff of access to the educational opportunities or benefits provided by the school

Circuit Walkthrough

1st Cir.

- DI = Doe v. Brown Univ., 896 F.3d 127 (1st Cir. 2018)
- EO = Doe v. Trustees of Bos. Coll., 892 F.3d 67 (1st Cir. 2018)
- SE = Haidak v. Univ. of Massachusetts-Amherst, 933 F.3d 56 (1st Cir. 2019)
- Rtl. = Theidon v. Harvard Univ., 948 F.3d 477 (1st Cir. 2020) = Uses McDonnell Douglas
- Athl = Cohen v. Brown Univ., 101 F.3d 155 (1st Cir. 1996)
- CRXM = Haidak v. Univ. of Massachusetts-Amherst, 933 F.3d 56 (1st Cir. 2019)

2nd Cir.

- DI = Zeno v. Pine Plains Cent. Sch. Dist., 702 F.3d 655 (2d Cir. 2020)
- EO = Doe v. Colgate Univ. Bd. of Trs., 760 Fed. Appx. 22 (2d Cir. 2019)
- SE = Id.
- Rtl = Holcomb v. State Univ. of New York, 698 Fed. App'x 30 (2d Cir. 2017) = uses McDonnell Douglas
- Athl = McCormick v. Sch. Dist. Of Mamaroneck, 370 F.3d 275 (2d Cir. 2004)

3rd Cir.

- DI = Doe v. Univ. of the Sciences, No. 19-2966 (3d Cir. 2020)
- EO = was **Doe v. Princeton Univ., Case No. 3:20-cv-4352-BRM-TJB**

Now = Doe v. Univ of the Sciences

- SE = Id.
- Rtl = Doe v. Princeton uses McDonnell Douglas framework – Not mentioned in Univ. of Sciences.

4th Cir.

- DI = Feminist Majority Found. v. Hurley, 911 F.3d 674 (4th Cir. 2018)
- EO = Doe v. Loh, 767 Fed. App'x 489 (4th Cir. 2019)
- SE = N/A
- Rtl = Feminist Majority Found Uses McDonnell Douglas

5th Cir.

- DI = I. L. v. Hous. Indep. Sch. Dist., 776 Fed. App'x 839 (5th Cir. 2019)
- EO = Klocke v. Univ. of Texas, 938 F.3d 204 (5th Cir. 2019)
- SE = Id.
- Rtl = Minnis v. Bd. of Sup'rs of Louisiana State Univ. & Agr. & Mech. Coll., 620 Fed. App'x 215 (5th Cir. 2015) McDonnell Douglas isnt wrong.

6th Cir.

- DI = Doe v. Uni. of Kentucky, No. 5:17-cv-00345 (6th Cir. 2020)
- EO = Doe v. Case Western Reserve Univ., Case No. 19-3520 (6th Cir. 2020)
- SE = Doe v. Univ. of Dayton, 766 Fed. App'x 275 (6th Cir. 3/15/2019)
- Rtl = Bose v. Bea, 947 F.3d 983 (6th Cir. 2020) uses McDonnell Douglas, for causation kicks Cat Paw's theory b/c there is actual notice by employer required.

7th Cir

- DI = Hye-Young Park v. Secolsky, 787 Fed. App'x 900 (7th Cir. 2019)
- EO = Doe v. Columbia Coll. Chi., 933 F.3d 849 (7th Cir. 2019) says we don't do that anymore look at Doe v. Purdue, 928 F.3d 652, 657 (7th Cir. 2019)
- SE = Id.
- Rtl = Burton v. Bd. Of Regents, 851 F.3d 690 (7th Cir. 2017) Uses McDonnell Douglas – not addressed by Purdue

8th Cir

- DI = **Pearson v. Logan Univ., 937 F.3d 1119, (8th Cir. 2019)**
- EO = N/A
- SE = N/A
- Rtl = Rossley v. Drake Univ., Case No. 19-1392 (8th Cir. 2020)
- Ath = Chalenor v. Univ. of N.D., 291 F.3d 1042 (8th Cir. 2002)

9th Cir

- DI = **Karasek v. Regents of the Univ. of Cal., 956 F.3d 1093 (9th Cir. 2020)**
- EO Austin v. Univ. of Oregon, 925 F.3d 1133 (9th Cir. 2019)
- SE Id.
- Rtl = Id. applies McDonnell Douglas
- AthEA - Ollier v. Sweetwater Union High Sch. Dist., 768 F.3d 843 (9th Cir. 2014)

10th Cir

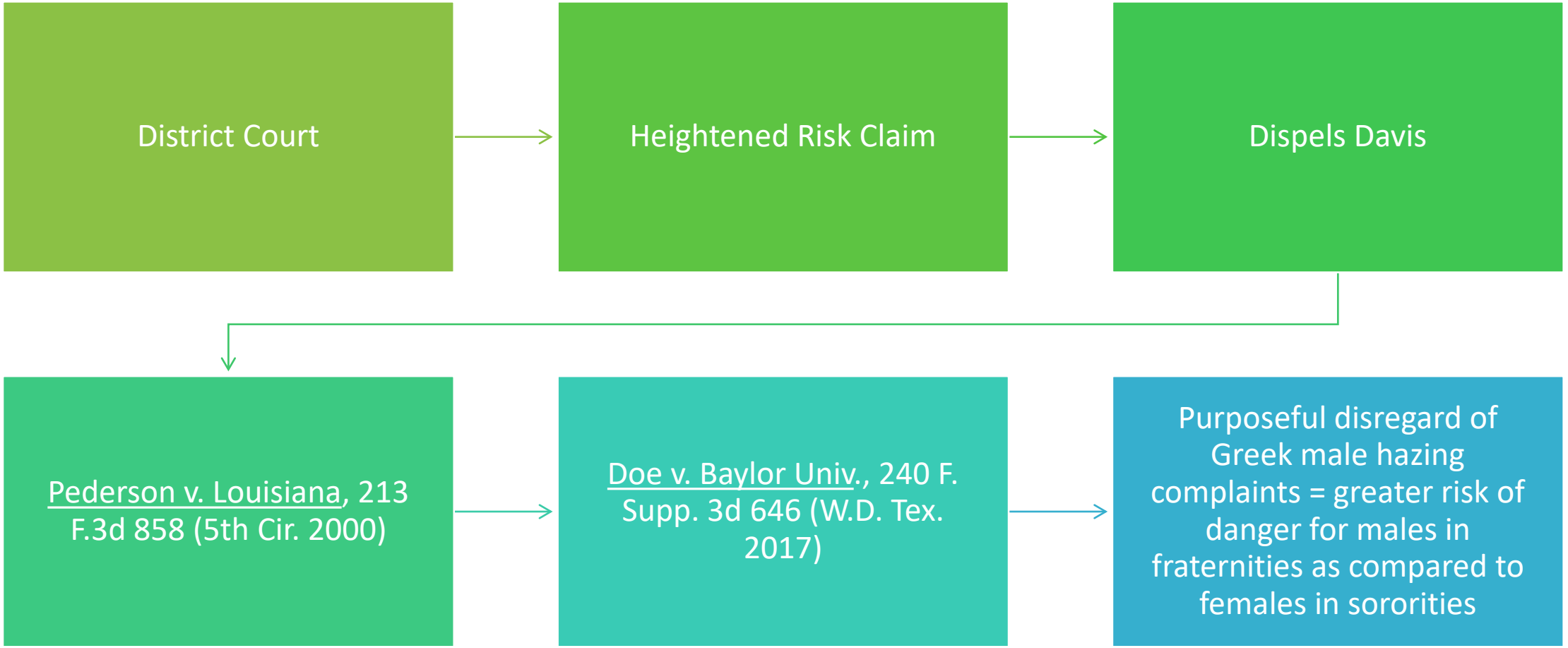
- DI = **Karasek v. Regents of the Univ. of Cal., 956 F.3d 1093 (10th Cir. 2019)**
- EO = N/A
- SE = N/A
- Rtl = Hiatt v. Colo. Seminary, 858 F.3d 1307 (10th Cir. 2017) uses McDonnell Douglas
- Ath = Roberts v. Colorado State Bd. Of Agric., 998 F.2d 824 (10th Cir. 1993)

11th Cir.

- DI = Kocsis v. Fla. State Univ. Bd. of Trs., 788 Fed. Appx. 680 (11th Cir. 2019)
- EO = Doe v. Valencia Coll., 903 F.3d 1220 (11th Cir. 2018) “we assume w/o holding EO violates T9)
- SE = N/A (In Footnote of Valencia Ct Refused to talk about SE b/c it wasn’t plead and they’ve never done it.)
- Rtl = Kocis & uses the McDonnell Douglas Framework

Novel Title IX Cases

Gruver v. Louisiana, 401 F. Supp. 3d 742 (M.D. La. 2019)



McCluskey v. State of Utah

Complaint filed

Equal Protection // Deliberate Indifference under Title IX

School's Omission led to Death

Judicial Activism

Cannon

Subjecting university admission decisions to judicial scrutiny = adverse effect on independence of members of University.

Academic community or courts will become unduly burdened.

Administrators will worry about risk of litigation in that they will fail to discharge their important responsibilities in an independent and professional manner.

Failure of another complex statutory scheme to create express remedies has not been accepted as a reason for refusing to imply an otherwise appropriate remedy under a separate action.

Court has avoided this kind of excursion into extrapolation of legislative intent.

Whatever may be the wisdom of this approach to the problem of private discrimination, it was Congress' choice, not to be overridden by this Court.

Cannon

Because Title IX applies to most of our Nation's institutions of higher learning, it also trenches on the authority of the academic community to govern itself, an authority the free exercise of which is critical to the vitality of our society.

If such a significant incursion into the arena of academic polity is to be made, it is the constitutional function of the Legislative Branch, subject as it is to the checks of the political process, to make this judgment.

Goss

Brief disciplinary suspensions are almost countless. To impose in each such case even truncated trial-type procedures might well overwhelm administrative facilities in many places and, by diverting resources, cost more than it would save in educational effectiveness.

Further formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool, but also destroy its effectiveness as part of the teaching process.

Davis

We stress that our conclusion here does not mean that recipients can avoid liability only by purging their schools of actionable peer harassment or that administrators must engage in particular disciplinary action.

The dissent erroneously imagines that victims of peer harassment now have a Title IX right to make particular remedial demands.

As we have noted, courts should refrain from second guessing the disciplinary decisions made by school administrators.

School administrators will continue to enjoy the flexibility they require so long as funding recipients are deemed "deliberately indifferent" to acts of student-on-student harassment only where the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances.

Houston v. Plummer

"It is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking in wisdom or compassion." *Wood v. Strickland*, 420 U.S. 308, 326 (1975); *see also Davis ex rel LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 648 (1999) ("[C]ourts should refrain from second-guessing the disciplinary decisions made by school administrators."). "A university is not a court of law, and it is neither practical nor desirable it be one." *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 635 n.1 (6th Cir. 2005) (citation omitted). Ultimately, courts must focus on "ensuring the presence of 'fundamentally fair procedures to determine whether the misconduct has occurred.'" *Id.* at 634 (quoting *Goss v. Lopez*, 419 U.S. 565, 574 (1975)).

Title IX in the Federal Circuit Courts

SPCT: Deliberate Indifference & Retaliation

Fed Cir: EO, SE, AA, PI, PA, XExam

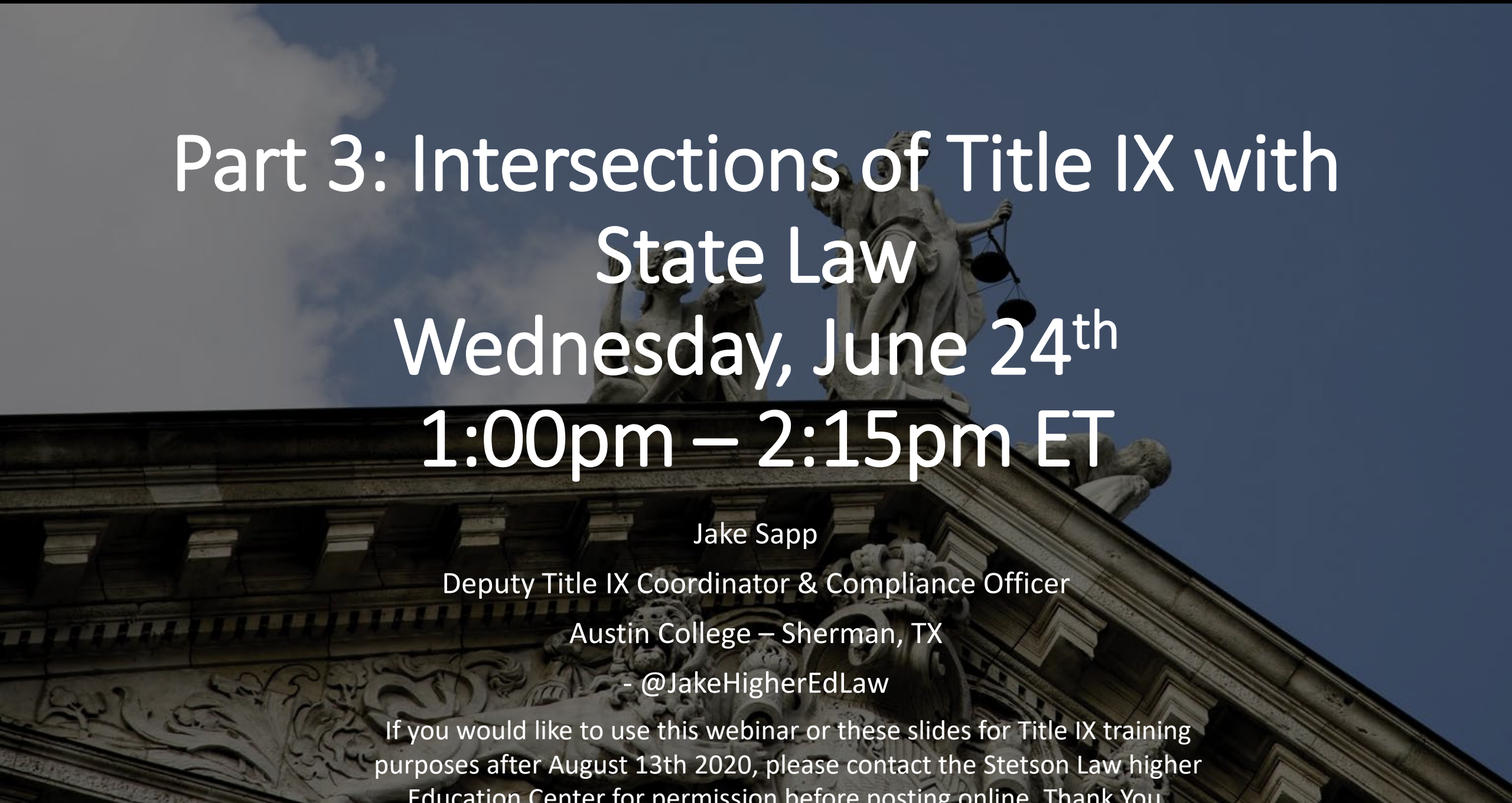
Evolution

Expansion

Civil Rights

Evolution & Expansion of Title IX Liability

- Deliberate Indifference
- Erroneous Outcome
- Selective Enforcement
- Retaliation
- Inequity in Athletics
- Pre-Assault Claim
- 42 U.S.C. 1983 – Due Process & Equal Protection
- Plausible Inference
- Heightened Risk -> Student Death



Part 3: Intersections of Title IX with State Law
Wednesday, June 24th
1:00pm – 2:15pm ET

Jake Sapp

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If you would like to use this webinar or these slides for Title IX training purposes after August 13th 2020, please contact the Stetson Law higher Education Center for permission before posting online. Thank You