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Reluctant Judicial Factfinding: When Minimalism and Judicial Modesty Go Too Far

Scott A. Moss[†]

I. THE MINIMALISM DEBATE, AND A COMPETING ARGUMENT FOR AN INCREASED JUDICIAL ROLE

A. *Minimalism's Ideologically Diverse Fan Club*

Judicial minimalism is all the rage among a wide range of judges and commentators. The basic idea is not new: that the Supreme Court should exercise restraint in striking down laws based on constitutional rights is a traditional argument of judicial conservatives, originalists, and others with qualms about broad constitutional decisions.¹ In this vein, Douglas Kmiec praises one of the Roberts Court's first high-profile cases, *Ayotte v. Planned Parenthood of Northern New England*,² as a "profound[] exercise of judicial restraint."³ In rejecting a facial challenge to a requirement of parental consent for a minor's abortion, "*Ayotte* stands for three principles: nullify no more of an unconstitutional law than is necessary, do not rewrite state laws to make them constitutional, and stay true to the intent of the legislature in passing the law at issue."⁴

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1. For examples of judges espousing this view, see *United States v. Virginia*, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting) ("[T]his most illiberal Court . . . has embarked on a course of inscribing one after another of the current preferences of the society (and in some cases only the counter-majoritarian preferences of the society's law-trained elite) into our Basic Law."); Diane S. Sykes, *Reflections on the Wisconsin Supreme Court*, 89 MARQ. L. REV. 723, 737–38 (2006) (Seventh Circuit judge and former state Supreme Court Justice criticizing several rulings broadening constitutional rights because courts should "defer to the judgment of those elected to represent the people" and because "legislative correction is impossible and the constitution is difficult to amend").

2. 546 U.S. 320, 323 (2006) (holding that if a state statute requiring parental notification before a minor has an abortion "would be unconstitutional in medical emergencies . . . invalidating the statute entirely is not always necessary or justified, for lower courts may be able to render narrower declaratory and injunctive relief").

3. Douglas W. Kmiec, *Overview of the Term: The Rule of Law & Roberts's Revolution of Restraint*, 34 PEPP. L. REV. 495, 515 (2007).

4. *Id.*

What is new is minimalism's support from those who support decisions broadening constitutional rights. Cass Sunstein famously agrees with *Roe v. Wade*⁵ that the Constitution protects abortion rights but opines that:

[t]he Court would have done far better to proceed slowly and incrementally . . . [It] might have ruled that abortions could not be prohibited in cases of rape or incest, or that the law at issue in *Roe* was invalid even if some abortion restrictions might be acceptable. Such narrow grounds would have allowed democratic processes to proceed with a degree of independence—and perhaps to find their own creative solutions . . .⁶

Sunstein similarly splits the difference on other controversial rights, defending how the Court simultaneously refused to strike a ban on assisted suicide⁷ yet struck a criminal ban on nontraditional sex.⁸ Sunstein said that in the latter case, however, he “would have preferred a narrower rationale for the Court’s conclusion”: “For substantive due process, a form of minimalism seems best, embodied in a willingness to reject some traditions, but in a way that is usually respectful of democratic judgments and that attempts to avoid the most contentious debates”⁹

Minimalism has its limitations and critics, of course. Sunstein himself notes that minimalism is not the panacea for all jurisprudence: “Any defense of minimalist adjudication is essentially the same in principle as a defense of standards over rules—and there is no reason to think that such a defense can be made convincing in all of the contexts” where the Court adjudicates.¹⁰ In a more critical vein, Tracy Thomas argues that one major manifestation of the Court’s minimalism—its declaration of a preference for “proportionality” rather than breadth in remedies—“elevates the preferences of defendant wrongdoers above justice to plaintiffs. This perversion of the remedial process into protection for the wrongdoer is a threat to the rule of law”¹¹

5. 410 U.S. 113 (1973).

6. CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 180–81 (1996).

7. *Washington v. Glucksberg*, 521 U.S. 702 (1997).

8. *Lawrence v. Texas*, 539 U.S. 558 (2003).

9. Cass R. Sunstein, *Due Process Traditionalism*, 106 MICH. L. REV. 1543, 1547 (2008).

10. Cass R. Sunstein, *Problems with Minimalism*, 58 STAN. L. REV. 1899, 1902 (2006). Sunstein focuses on Justice O'Connor's decisions, but his point is just as applicable to the Court's jurisprudence generally.

11. Tracy A. Thomas, *Proportionality and the Supreme Court's Jurisprudence of Remedies*, 59 HASTINGS L.J. 73, 125 (2007).

B. A Realm of Too Much Minimalism: Reluctant Judicial Factfinding

Whatever the merits of minimalism in constitutional adjudication, this Essay argues that in another aspect of federal adjudication—what this Essay terms “reluctant judicial factfinding”—we already have too much minimalism. In certain areas of law, courts are quite reluctant to engage in close scrutiny of critically important facts, instead falling back on policies that avoid such factfinding, including:

- a) *relying upon formalities over substance*, such as when affirmative defenses turn on the quality of defendants’ compliance efforts, and courts approve such efforts based on their formal characteristics, without any closer look at their substance (see Part II below);
- b) *deferring to the parties* whose actions are at issue, as in cases challenging actions by defendants that are certain kinds of complex institutions, such as prisons or schools (see Part III below); and
- c) *avoiding issuing rulings* the litigation rules contemplate, such as the awards of attorney’s fees mandated by Federal Rule 37 for prevailing parties on discovery motions (see Part IV below).

Parts II, III, and IV discuss each of these three areas of reluctant judicial factfinding. Then, Part V offers some thoughts as to possible causes of this reluctance to undertake factual inquiries that statutes, rules, and Supreme Court precedent instruct district and appellate courts to undertake. One possibility is that hostility to litigation motivates courts to shy away from detailed factfinding that certain cases require. Such hostility likely is part of the story—at least as to some courts that exhibit an unusual degree of hostility to certain kinds of cases. But more fundamentally, even a judge not at all hostile to litigation may shy away from the sort of detailed factual look at a party that would require the judge to second-guess attorney motivations in discovery, to second-guess judgment calls by complex institutions such as prisons or universities, or to second-guess the details of a workplace anti-bias program. Such reluctance may derive from an otherwise commendable judicial modesty—yet in the three areas this Essay discusses, judicial second-guessing of litigants is mandated by law, and refusal to second-guess just yields poor factual findings. In short, judges should not shy away from aggressive factfinding roles where their authority and need to do so is clear, even if it stretches judges past understandable limits of their comfort zone.

II. AVOIDING FACTFINDING BY RELYING UPON FORMALITY OVER SUBSTANCE: INSUFFICIENT SCRUTINY OF ANTI-DISCRIMINATION PROGRAMS

In employment discrimination and harassment cases, two key defenses for employers turn on the quality of their anti-discrimination and anti-harassment programs. Unfortunately, the case law on these defenses shows little judicial appetite for the sort of fact-laden, subjective inquiries these defenses require of judges.

First, *Faragher v. City of Boca Raton*¹² and *Burlington Industries, Inc., v. Ellerth*¹³ announced that even where an employee proves unlawful workplace harassment by a supervisor, the employer is not vicariously liable if it establishes a two-part affirmative defense: “(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise” (the *Faragher/ Ellerth* defense).¹⁴

Second, an employment discrimination plaintiff can recover punitive damages against an employer only when the employer acted “with malice or with reckless indifference” to the employee’s anti-discrimination rights.¹⁵ In *Kolstad v. American Dental Association*,¹⁶ the Supreme Court interpreted that statutory requirement as disallowing punitive damages when the employer can establish an affirmative defense: that whatever individuals in the workplace committed the discrimination, they did so contrary to the employer’s good faith efforts to comply with the discrimination laws (the *Kolstad* defense).¹⁷

Employer programs are key to both the *Faragher/ Ellerth* defense and the *Kolstad* defense. The *Faragher/ Ellerth* inquiry into the employer’s efforts “to prevent and correct promptly any sexually harassing behavior”¹⁸ and the *Kolstad* inquiry into whether the employer “has undertaken . . . good faith efforts at Title VII compliance”¹⁹ are distinct but substantially overlap “in practice.”²⁰

12. 524 U.S. 775 (1998).

13. 524 U.S. 742 (1998).

14. *Faragher*, 524 U.S. at 807.

15. 42 U.S.C. § 1981a(b)(1) (2000).

16. 527 U.S. 526 (1999).

17. *Id.* at 544.

18. *Faragher*, 524 U.S. at 807.

19. *Kolstad*, 527 U.S. at 544.

20. Bettina B. Plevan, *Training and Other Techniques to Address Complaints of Harassment*, 682 PRAC. LAW INST./LITIG. 675, 755 (2002) (“In theory, failure to establish a *Faragher* defense should not necessarily defeat the ability to prove a *Kolstad* defense. In practice, however, that is not always the case . . .”).

Both *Faragher/Ellerth* and *Kolstad* expressly demand that the employer bear a burden of proving not just the existence but the substantive sufficiency of their anti-bias programs—yet the case law features little judicial inquiry into substance. Under *Kolstad*, the employer must prove that it undertook “good faith . . . compliance” efforts;²¹ under *Faragher/Ellerth*, the employer must prove it “exercised reasonable care” in its efforts to prevent and correct workplace harassment.²² To many courts, however, the mere fact that an employer has the fairly standard workplace anti-bias policy—any employee training, a grievance policy, and an official anti-discrimination/harassment policy—suffices, without any inquiry into the substance of the complaint process or training, to establish both the *Kolstad* defense²³ and the *Faragher/Ellerth* defense.²⁴ Such courts “have deferred to an employer’s procedures, regardless of their actual effectiveness,” Susan Sturm has noted.²⁵

This approach many courts are taking is one of facial adequacy—an employer merely has to check the boxes of the standard anti-bias program—that reflects a judicial reluctance to undertake the sort of scrutiny of anti-bias programs that the Supreme Court has made an important

21. *Kolstad*, 527 U.S. at 544 (emphasis added).

22. *Faragher*, 524 U.S. at 807 (emphasis added).

23. See, e.g., *Bryant v. Aiken Reg'l Med. Ctr., Inc.*, 333 F.3d 536, 548–49 (4th Cir. 2003) (*Kolstad* satisfied by employer’s “organization-wide Equal Employment Opportunity Policy” that contained (1) a ban on discrimination, (2) a grievance policy encouraging employees to report discrimination or harassment, (3) a diversity training program with classes and group exercises, and (4) tracking of employee demographics by department); *Cooke v. Stefani Mgmt Servs., Inc.*, 250 F.3d 564, 568–69 (7th Cir. 2001) (defense satisfied by employer program that contained (1) a sexual harassment policy, (2) a sexual harassment seminar for managers, and (3) an anti-harassment poster mounted in the workplace). But see *Swinton v. Potomac Corp.*, 270 F.3d 794, 810–11 (9th Cir. 2001) (explaining when purported anti-discrimination program is insufficient under *Kolstad*: “[T]he inaction of even relatively low-level supervisors may be imputed to the employer if the supervisors are made responsible, pursuant to company policy, for receiving and acting on complaints of harassment. . . . [I]t is insufficient for an employer simply to have in place anti-harassment policies; it must also implement them.”).

24. “[D]istribution of a valid antiharassment policy provides compelling proof that [an employer] exercised reasonable care in preventing and promptly correcting sexual harassment,” various circuits have held. *Adams v. O’Reilly Auto., Inc.*, 538 F.3d 926, 929 (8th Cir. 2008) (citation omitted); see also *White v. BFI Waste Servs., LLC*, 375 F.3d 288, 299 (4th Cir. 2004) (“distribution by an employer of an anti-harassment policy provides ‘compelling proof that the [employer] exercised reasonable care in preventing and promptly correcting harassment’”) (citation omitted); *Walton v. Johnson & Johnson Servs., Inc.*, 347 F.3d 1272, 1286 (11th Cir. 2003) (noting that disseminating an anti-harassment policy is “fundamental to meeting the requirement for exercising reasonable care in preventing sexual harassment”); *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 295 (2d Cir. 1999) (holding that “an anti-harassment policy with complaint procedures is an important consideration in determining whether [an] employer has satisfied” its *Faragher/Ellerth* duty); *Brown v. Perry*, 184 F.3d 388, 395 (4th Cir. 1999); *Shaw v. Autozone, Inc.*, 180 F.3d 806, 811 (7th Cir. 1999).

25. Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 537 (2001).

part of many discrimination and harassment cases. That many courts are relying only on formalities rather than substance is unfortunate, given the extensive criticism of many employer programs as pro forma, ineffectual, or worse. “Many of the internal dispute resolution mechanisms developed by employers . . . consist of boilerplate from the most recent decisions of the Court or the reproduction of EEOC guidelines,”²⁶ making such programs “symbolic rather than substantive.”²⁷ Worse, limited judicial scrutiny presents a “risk that employers will adopt legalistic, sham, or symbolic internal processes that leave underlying patterns of bias unchanged.”²⁸

Given the very real difference between good and bad workplace anti-bias programs,²⁹ to the extent that courts are not endeavoring to distinguish among such programs, they are allowing employers to escape discrimination liability with affirmative defenses they do not deserve. By avoiding factfinding as to the substance of anti-bias programs, courts do not really avoid factual findings; they just ensure that they will too often find such programs effective, regardless of their substance or actual effectiveness.

III. AVOIDING FACTFINDING BY DEFERRING TO DEFENDANTS IN CASES AGAINST PUBLIC SCHOOLS, PRISONS, AND UNIVERSITIES

In certain areas of law, courts grant defendants a striking degree of deference in assessing the reasonableness of conduct challenged as unlawful. The main areas of such deference this Essay will note are employment claims against colleges or universities, prisoners’ claims of constitutional rights violations, and public school students’ free speech claims.

26. *Id.* at 543.

27. Susan Bisom-Rapp, *Bulletproofing the Workplace: Symbol and Substance in Employment Discrimination Law Practice*, 26 FLA. ST. U. L. REV. 959, 963 (1999). Bisom-Rapp further notes “how defense lawyers attempt to strategically position employers to safeguard these clients against discrimination and other employment-related litigation,” *id.* at 961, and presents a “content analysis of the defense literature advocating preventative practices” showing that employment defense attorneys often “creat[e] the appearance of nondiscriminatory decision making without an equivalent emphasis on facilitating substantive change for protected groups.” *Id.* at 965–66.

28. Sturm, *supra* note 25, at 490 (“Some courts have deferred to an employer’s procedures, regardless of their actual effectiveness in eliminating [discrimination] . . . [This] uncritical acceptance of internal dispute resolution processes legitimates purely formalistic solutions,” *id.* at 537–38).

29. For further criticism of courts’ failure to distinguish among workplace anti-bias programs, see Scott A. Moss & Peter H. Huang, *Replacing Too-Narrow “Rationality” Premises in Employment Law: How Behavioral & Happiness Research Actually Can Be Useful* (unpublished manuscript, on file with author).

- In employment claims against colleges or universities, courts apply a “deferential standard” in scrutinizing the challenged employer decision³⁰—especially as to denials of promotion to tenured status,³¹ but in other employment decisions as well.³² Deference explains “the relative ease with which the courts of appeals have found the employer’s burden to be satisfied in the academic context”;³³ “[f]aculty plaintiffs prevail on the merits in civil rights cases only about one quarter of the time.”³⁴

30. *Bina v. Providence Coll.*, 39 F.3d 21, 26 (1st Cir. 1994) (“[C]ourt review of tenure decisions should be guided by an appropriately deferential standard. ‘A court may not simply substitute its own views concerning the plaintiff’s qualifications for those of the properly instituted authorities; the evidence must be of such strength and quality as to permit a reasonable finding that the denial of tenure was obviously or manifestly unsupported.’” (quoting *Brown v. Trustees of Boston Univ.*, 891 F.2d 337, 346 (1st Cir. 1989)); *accord Jiminez v. Mary Washington Coll.*, 57 F.3d 369, 376 (4th Cir. 1995) (“[W]hile Title VII is available to aggrieved professors, we review professorial employment decisions with great trepidation.”); *Faro v. New York Univ.*, 502 F.2d 1229, 1231–32 (2d Cir. 1974) (holding, in gender discrimination case under Title VII, that “[o]f all fields . . . the federal courts should hesitate to invade and take over, education and faculty appointments at a University level are probably the least suited for federal court supervision”).

31. *Carlile v. S. Rountt Sch. Dist.* RE-3J, 739 F.2d 1496, 1500–01 (10th Cir. 1984) (“[C]ourts are reluctant to review the merits of tenure decisions,” and defendants in such cases “are given wide latitude in discretion concerning whom to award tenure.”).

32. *See, e.g., Farrell v. Butler Univ.*, 421 F.3d 609, 616 (7th Cir. 2005) (affirming grant of summary judgment to defendant on professor’s sex discrimination claim in denial of bonuses; “As nonobjective as the selection criteria . . . may have been, this circuit and others have been reluctant to review the merits of tenure decisions and other academic honors in the absence of clear discrimination. We have previously recognized that scholars are in the best position to make the highly subjective judgments related with the review of scholarship and university service.”); *Bina*, 39 F.3d 21 (“The district court appropriately applied this [deferential] standard to the present case, even though this is a case not of denial of tenure but of denial of appointment to a tenure track position.”); *Dorsett v. Bd. of Trustees for State Colls. & Univs.*, 940 F.2d 121, 123–24 (5th Cir. 1991) (noting in harassment claim: “In public schools and universities across this nation, interfaculty disputes arise daily over teaching assignments, room assignments, administrative duties, classroom equipment, teacher recognition, and a host of other relatively trivial matters. A federal court is simply not the appropriate forum in which to seek redress for such harms. We have neither the competency nor the resources to undertake to micromanage the administration of thousands of state educational institutions.”) (citations omitted); *Smith v. Univ. of N. Carolina*, 632 F.2d 316, 345 n.26 (4th Cir. 1980) (“University employment cases have always created a decisional dilemma for the courts. Unsure how to evaluate the requirements for appointment, reappointment and tenure, and reluctant to interfere with the subjective and scholarly judgments which are involved, the courts have refused to impose their judgment as to whether the aggrieved academician should have been awarded the desired appointment or promotion. . . . ‘We, therefore, refuse to embark upon a comparative inquiry . . . into either the quantity or the quality of the published scholarly contributions of the University’s faculty members who have been granted or denied promotion.’”) (citations omitted).

33. *Lynn v. Regents of Univ. of Calif.*, 656 F.2d 1337, 1344 (9th Cir. 1981) (reversing defense judgment in gender discrimination case but noting the deference courts grant academic defendants).

34. Barbara A. Lee, *Employment Discrimination in Higher Education*, 26 J.C. & U.L. 291, 292 (1999). Compare the success rates of 41 to 57 percent (depending on type of claim) for all employment discrimination plaintiffs (*i.e.*, not just academic plaintiffs). *Id.* at 292 n.5.

- In prisoner constitutional rights claims, courts expressly apply a lower, more deferential standard of scrutiny than in non-prison claims of the same rights. Governmental restrictions on most speech must be “necessary” to “compelling” or “significant” interests, but restrictions on prisoners’ speech need only be “reasonably related” to “legitimate” interests;³⁵ as a result, “[m]ost regulations of prisoner speech have been upheld,”³⁶ including significant limits on prisoners’ rights to send mail,³⁷ order books,³⁸ or possess any newspapers, magazines, or photographs.³⁹
- In public student speech claims, the Supreme Court allows content-based restrictions, such as censoring newspaper articles on pregnancy and divorce⁴⁰ and punishing a high school student for a speech with mild sexual content.⁴¹ The Court recently allowed punishing a student for a banner that read, “BONG HITS 4 JESUS”;⁴² though the banner was “cryptic,” the school “reasonably viewed [it] as promoting illegal drug[s].”⁴³ Deferring to an official’s interpretation of cryptic speech “departs markedly from the Court’s general First Amendment rule” allowing punishment only of incitement that is intentional and likely to succeed imminently.⁴⁴ These decisions “cast doubt on . . . whether students retain free speech rights. There simply are hardly any Supreme Court cases in the past thirty years protecting students’ constitutional rights.”⁴⁵

35. See, e.g., *Beard v. Banks*, 548 U.S. 521, 528 (2006); *Turner v. Safley*, 482 U.S. 78, 87 (1987).

36. ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* § 11.4.4, at 1147 (3d ed. 2006) (collecting cases).

37. *Turner*, 482 U.S. 78 (1987) (upholding rule against prisoners mailing letters to prisoners elsewhere).

38. *Bell v. Wolfish*, 441 U.S. 520 (1979) (upholding rule against prisoners receiving hardcover books other than from publishers or bookstores).

39. *Beard*, 548 U.S. 521 (upholding rule disallowing newspapers, magazines, or photographs to prisoners housed in unit for those who committed misconduct while incarcerated).

40. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

41. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

42. *Morse v. Frederick*, 127 S. Ct. 2618, 2622 (2007).

43. *Id.* at 2624–25.

44. Scott A. Moss, *Students and Workers and Prisoners—Oh, My! A Cautionary Note About Excessive Institutional Tailoring of First Amendment Doctrine*, 54 UCLA L. REV. 1635, 1642 (2007).

45. Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What’s Left of Tinker?*, 48 DRAKE L. REV. 527, 529 (2000).

These doctrines are cast as “deference” doctrines, but given the range of other areas where courts decline to delve deeply into critical facts, they fit into a broader pattern: the way in which courts “defer” is not just by applying a different legal standard (as in prisoner claims), but by expressing a reluctance to undertake detailed factfinding under the same legal standards (as in student and academic employee claims). Similar critiques apply to each of these three areas in which courts defer to defendants on questions fundamental to liability (as well as to other areas in which courts defer similarly).⁴⁶ A criticism I have levied against academic deference—that it is premised on an exaggerated sense that certain fields are too complex for judges to analyze—equally applies to any deference based on the complexity or subjectiveness of particular fields:

[A]cademia is far from the only field in which evaluation of performance is discretionary and entails highly specialized knowledge; the same is true of various other fields in which federal courts, from the district level to the Supreme Court, have allowed discrimination claims to prevail or survive dispositive motions, such as: accounting partnerships; administrative law judgeships; law enforcement; engineering;⁴⁷ computer programming; and hard sciences such as chemistry.⁴⁷

With these areas of deference being similar, and subject to similar critiques, the widely varied criticisms of academic deference thus apply to each of these areas. By “mak[ing] it too difficult for a plaintiff to survive a motion for summary judgment,” deference “frustrates the intent of Title VII by insulating universities from judicial scrutiny”⁴⁸ and has

46. Two other areas where courts grant deference to defendants on fundamental liability questions are students’ challenges to academic discipline and public employees’ First Amendment claims. See Curtis J. Berger & Vivian Berger, *Academic Discipline: A Guide to Fair Process for the University Student*, 99 COLUM. L. REV. 289, 334 (1999) (arguing that deferential “arbitrary and capricious” review of college students’ dismissals for academic failure “seems appropriate where the agency’s or school’s decision calls for an expert judgment,” but that “where a student’s career may be at stake because of an academic ‘crime,’ akin to fraud or copyright infringement, matters courts handle as fact-finders routinely, colleges should not enjoy quite the same . . . deference”); Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1497 (1999) (“Administrative efficiency is generally not considered a compelling interest under strict scrutiny, which may be one reason that free speech cases have explicitly adopted a more deferential standard for government-as-employer regulations, instead of purporting to apply strict scrutiny.”).

47. Scott A. Moss, *Against “Academic Deference”: How Recent Developments in Employment Discrimination Law Undercut an Already Dubious Doctrine*, 27 BERKELEY J. EMP. & LAB. L. 1, 6–7 (2006) (collecting cases).

48. Courtney T. Nguyen, *Employment Discrimination and the Evidentiary Standard for Establishing Pretext: Weinstock v. Columbia University*, 35 U.C. DAVIS L. REV. 1305, 1308–09 (2002) (criticizing *Weinstock*, 224 F.3d 33 (2d Cir. 2000), which affirmed a grant of summary judgment to a university on a professor’s sex discrimination claim).

been “criticized as a form of judicial abdication;”⁴⁹ the same could be said of the need for lawsuits to vindicate First Amendment rights. Preventing discrimination suits against universities may be especially troubling because of two juxtaposed facts: gender segregation is highly persistent in many parts of academia⁵⁰ (just as quite dramatic speech restrictions are common in prisons⁵¹); and the Supreme Court has noted, in explaining the permissibility of affirmative action in law school admission, that “diversity” can be “essential to [the] educational mission” of higher education (and free speech is no less essential).⁵²

Finally, as Professor Elizabeth Bartholet noted, academic deference seems not only undesirable, but contrary to legislative intent, because it is “inconsistent with the . . . [Title VII amendments] that specifically removed the exemption for academic institutions.”⁵³ A similar thematic point about constitutional rights—that they protect everyone, without exclusion of those in certain settings—equally undercuts the idea of watered-down speech rights for students or prisoners. Whereas older case law declared a convicted prisoner to have “not only forfeited his liberty, but all his personal rights,” making him “the slave of the State,”⁵⁴ the modern rule is to the contrary:

Prison walls do not form a barrier separating prison inmates from the protections of the Constitution. . . . [P]risoners retain the constitutional right to petition the government for the redress of grievances; they are protected against invidious racial discrimination by the Equal Protection Clause . . . and they enjoy the protections of due process.⁵⁵

Formally, at least, the same rule applies to public school students—they do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”⁵⁶

49. Elizabeth Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 945, 961 (1982) (noting and criticizing that in academic cases, “courts have adopted a ‘hands-off’ doctrine”).

50. See Moss, *supra* note 47, at 14–15 (noting evidence of the persistence of occupational segregation in legal academia and elsewhere); see generally Christine Jolls, *Accommodation Mandates*, 53 STAN. L. REV. 223, 293 tbl.3 (2000) (noting a wide range of occupations that were more than 95% male (e.g., a wide range of blue-collar/mechanical jobs, including supervisory positions, transportation jobs such as airplane pilots and ship captains, and firefighting) and several that were more than 95% female, such as prekindergarten and kindergarten teachers, childcare workers, secretaries and receptionists, and dental hygienists and dental assistants).

51. See *supra* notes 35–39 and accompanying text.

52. *Gutter v. Bollinger*, 539 U.S. 306, 328 (2003).

53. Bartholet, *supra* note 49, at 961.

54. *Ruffin v. Commonwealth*, 62 Va. (21 Gratt.) 790, 1871 WL 4928, at *4 (1871).

55. *Turner v. Safley*, 482 U.S. 78, 84 (1987) (collecting cases) (citations omitted).

56. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

Of course, the basic thrust of this Section is that these odes to the rights of prisoners and students are illusory platitudes to equal rights; courts' actual rulings do not grant students, prisoners, or academic employees equal rights to nondiscriminatory treatment, freedom of speech, or other liberties—and the lack of such equality of rights does not hold up when analyzed critically.

IV. AVOIDING FACTFINDING BY AVOIDING CERTAIN KINDS OF RULINGS: THE CURIOUS ABSENCE OF RULE-AUTHORIZED DISCOVERY SANCTIONS

When a party prevails on a motion to compel discovery by its opponent, or a motion for a protective order against discovery the other side has demanded, that prevailing party is entitled by Federal Rule 37 to recover from the opponent the attorney's fees and out-of-pocket expenses that the motion cost: "If the motion is granted . . . , the court *must* . . . require the party . . . whose conduct necessitated the motion . . . to pay to the movant's reasonable expenses incurred in making the motion, including attorney's fees."⁵⁷

This fee and cost shifting is mandatory with delineated exceptions: the prevailing party will not recover fees and costs if (a) it violated a rule in bringing the motion (most notably, if it had not undertaken the Rule 37-required "good faith" efforts to resolve the matter before making the motion), (b) the losing party had taken a "substantially justified" position that nevertheless lost, or (c) "other circumstances make an award of expenses unjust."⁵⁸ It is the losing party who must prove the applicability of an exception to the rule mandating fee and cost shifting.⁵⁹ The textual requirement of *substantial* justification for a losing position—the main exception to mandatory fee shifting—is not, by the text of the rule and some case law, easy to establish; plausible examples might be a close legal call or an inability to make the requested production.⁶⁰ The exception allowing a court not to shift fees also has been interpreted as applying where the injury was limited, such as when the discovery failure had been remedied by the time of the motion.⁶¹

57. FED. R. CIV. P. 37(a)(5)(A) (emphasis added). Rule 37(a) concerns motions to compel; motion for protective orders are governed by Rule 26(c), which makes the Rule 37 fee-shifting provision applicable to protective order motions. FED. R. CIV. P. 26(c)(3).

58. FED. R. CIV. P. 37(a)(5)(A)(i)–(iii).

59. *See, e.g.,* Neufeld v. Neufeld, 169 F.R.D. 289, 290 (S.D.N.Y. 1996) ("As the text of the rule makes clear, the party who has failed to [provide discovery] . . . bears the burden of demonstrating a substantial justification.").

60. *See, e.g.,* Cullins v. Heckler, 108 F.R.D. 172, 177 (S.D.N.Y. 1985) (holding that defendants proved "substantial justification" in not providing statistics they had not been keeping before litigation).

61. *See, e.g.,* Coon v. Froehlich, 573 F. Supp. 918 (S.D. Ohio 1983) (declining to award fees where deposition began late but already had occurred by time of motion).

There are numerous cases in which courts have awarded fees and costs to parties who prevail on discovery motions,⁶² and commentators have hailed the trend in recent years toward more judicial willingness to award attorneys' fees and other monetary sanctions on discovery motions:

For many years, lawyers and some judges complained loudly that the courts were unwilling to impose any [discovery] sanctions A rapidly growing body of decisions dealing with Rule 37 sanctions signals an end to this broad reluctance and imposing monetary sanctions, usually in the form of attorneys' fees and costs to parties victimized by abusive behavior, is now common.⁶³

Yet fee awards or other monetary sanctions are nowhere near as "common" as might be indicated by (a) the plain text of Rule 37 declaring them mandatory absent a specific showing by the losing party, or (b) the case law documenting those instances in which courts do award attorneys' fees or other sanctions. Georgene Vairo has noted how the 1970 amendment creating mandatory fee shifting "failed to turn Rule 37 into an effective tool" because "most judges continued to ignore the presumption contained in Rule 37(a)(4) and did not award expenses to the moving party with any regularity."⁶⁴ For example, "[o]ne study found that judges usually imposed sanctions only after he or she first ordered discovery, gave a party a second chance to comply, and the failure to comply was willful or not explained"⁶⁵—which also was this author's experience in his six years of district court litigation work.

Local civil rules sharply limiting discovery motions are a key reason for the lack of Rule 37 fee awards in two of the largest federal judicial districts—the United States District Courts for the Southern District of New York and the Eastern District of New York, which, in covering New York City and its most populous suburbs, encompass over ten million people and a disproportionate amount of the nation's financial and other business. Both districts have promulgated among their

62. See, e.g., *United States v. Aldeco*, 917 F.2d 689 (2d Cir. 1990) (holding that fee award was justified by party's failure to answer interrogatories timely); *Neufeld*, 169 F.R.D. 289 (S.D.N.Y. 1996) (awarding fees for failure to allow deposition, and noting, as to losing party's argument that its position was justified or understandable, that even though the losing party had filed a motion to relieve its counsel a day before the deposition, no motion to delay the deposition was filed, and dismissal of counsel was not yet ordered); *EEOC v. Klockner H & K Mach., Inc.*, 168 F.R.D. 233 (E.D. Wis. 1996) (awarding fees and costs against defendant that had withheld evidence of its finances on the unsupported premise that the capping of punitive damages eliminated its duty to produce financial records the law established as relevant to the amount of punitive damages).

63. Earl C. Dudley, Jr., *Discovery Abuse Revisited: Some Specific Proposals to Amend the Federal Rules of Civil Procedure*, 26 U.S.F. L. REV. 189, 217–18 (1992).

64. Georgene Vairo, *Rule 11 and the Profession*, 67 FORDHAM L. REV. 589, 595 (1998).

65. *Id.*

local civil rules requirements that parties let district judges resolve discovery disputes, by order if necessary, before any actual Rule 37 motion can be filed, as discussed below. Federal Rule 37(a)(1) requires that a party filing a motion to compel have “in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action”—and these two districts’ local rules supplement this rule with another, more significant pre-motion requirement.

- S.D.N.Y. Local Civil Rule 37.2 bars motions to compel or for protective orders until the parties present the dispute to the Court for a possible ruling that, because no formal motion has been made yet, may not include the fee award Rule 37 mandates for actual discovery motions: “No motion under Rules 26 through 37 . . . shall be heard unless . . . the moving party has first requested an informal conference with the court and such request has either been denied or the discovery dispute has not been resolved as a consequence of such a conference.”
- E.D.N.Y. Local Civil Rule 37.3 is, if anything, stricter in pre-empting discovery motions: it requires that parties in discovery disputes “shall notify the court” by phone or (more commonly) each submitting a “letter not exceeding three pages in length outlining the nature of the dispute and attaching relevant materials” (R.37.3(c)), and then specifically anticipates a “Decision of the Court” upon those letter submissions (R.37.3(e)).

Due to these rules, S.D.N.Y. and E.D.N.Y. cases commonly feature hotly-contested discovery disputes that the parties press to the judge, and that yield judicial rulings in favor of one side or the other—but that generate no fee awards whatsoever because, technically, the court resolved the disputes *before* the filing of any Rule 37 motion that could have provided fees to the prevailing party. For example:

- In one case, a Rule 37 motion to exclude testimony disclosed after a deadline was denied upon the parties’ letter submissions pursuant to S.D.N.Y. Local Civil Rule 37.2 and a telephone conference with the Magistrate Judge—with neither a fee award to the prevailing party nor discussing or finding whether the

losing party was substantially justified or otherwise established an exception to the fee requirement.⁶⁶

- In another case, at the initial case management conference required by Federal Rule 16, the court resolved a dispute about whether an employment discrimination plaintiff could obtain discovery of numerous personnel files of those who received the Store Manager positions the plaintiff was denied; the court's decision allowing discovery of most of the personnel files lacked a fee award and did not even appear on the case docket, which reflected only the order scheduling that case management conference.⁶⁷
- Yet another case shows how, perhaps because S.D.N.Y. and E.D.N.Y. local rules make fees on discovery motions unusual, even judges making on-the-record orders on discovery disputes sometimes just deny prevailing parties fees, without discussing or finding whether the losing party was substantially justified or otherwise established an exception to the fee requirement.⁶⁸

Thus, while local civil rules cannot formally repeal a federal rule of civil procedure, the S.D.N.Y. and E.D.N.Y. Local Civil Rules have effectively repealed the Rule 37 mandatory fee-shifting provision by preventing most Rule 37 motions from ever getting filed.

Professor Vairo's analysis of why courts do not award fees or other sanctions more often on discovery motions is, essentially, a description of the phenomenon and causes of exactly the sort of reluctant judicial factfinding this Essay diagnoses as prevalent among the federal courts:

Judges cited several reasons for declining to impose sanctions: a distaste for becoming involved in discovery disputes that litigants should be able to resolve themselves; a feeling that litigants should seek sanctions against an adversary only when they have been with-

66. *Margolin v. Food Emporium*, No. 99-cv-02961 (S.D.N.Y. filed April 23, 1999) (Civil Docket, entries dated December 3, 1999, and December 9, 1999) (letter pursuant to Local Civil Rule 37.2 and record of telephone conference with Magistrate Judge decision, respectively, in the latter of which the Court made its order, which is not recorded on the civil docket).

67. *Wright v. Sports Authority*, No. 01-cv-02326 (S.D.N.Y. filed March 20, 2001) (Civil Docket, entry #7).

68. *See, e.g., Ansoumana v. Gristedes Operating Corp.*, No. 00-cv-00253 (S.D.N.Y. filed January 13, 2000) (Civil Docket, entry #62) (summary order granting plaintiffs their requested protective order with no fee award, but also with no finding as to whether defendants established any of the exceptions to the rule requiring fee awards for prevailing parties on discovery disputes).

out fault in complying with discovery; and a feeling that the imposition of a sanction embarrasses or humiliates the attorney or party and should thus be resorted to only in extreme situations.⁶⁹

It is in many ways commendable that judges avoid costly formal motion practice by resolving discovery disputes after only limited briefing or informal oral argument at in-court scheduling conferences. Avoiding required fee shifting might lessen the burden of two inquiries that are difficult for judges to make: discerning when a fees-at-stake discovery motion has been brought for purely tactical reasons; and discerning the reasonableness of attorneys' fees (an inquiry that courts do undertake but that is quite time- and fact-intensive). Avoiding required fee shifting may have defensible motivations, but it means that the fee-shifting provision of Rule 37 is not in effect under the apparent terms of its plain text: fee shifting on discovery disputes is too often the exception rather than a rule-imposed mandate with narrow exceptions.

V. WHY COURTS AVOID FACTFINDING: A MIX OF TROUBLING HOSTILITY TO LITIGATION AND ADMIRABLE JUDICIAL MODESTY

District and appellate courts' reluctance to undertake deeper factual inquiries may have different causes. The district and appellate courts are not a monolithic bloc, but hundreds of different courts and judges. Most likely, different judges have different reasons for their factfinding reluctance, and some judges of course are not reluctant factfinders at all. Most judges' factfinding reluctance stems from one (or both) of two very different explanations: hostility to litigation and/or judicial modesty.

A. *Hostility to Litigation—Especially in Employment Discrimination*

Most of the forms of reluctant judicial factfinding discussed in this Essay may reflect a broad-based hostility to litigation, because they make it harder for plaintiffs to prevail. Specifically, out of hostility to litigation, some courts are eager to make whatever "findings" support an affirmative defense—such as the effectiveness of an anti-discrimination program—that might let it dismiss a case. I am not that quick to ascribe outcome-oriented motives to judges; it is too easy, and therefore sometimes a substitute for more careful analysis. But Andrew Siegel has persuasively shown that hostility to litigation is the most unifying theme of the Supreme Court's jurisprudence since the Rehnquist Court era, explaining more of the Court's jurisprudence than originalism, federalism, or political conservatism (e.g., it leads the Court to make inconsistent rulings in violation of theories that often hold sway with

69. Vairo, *supra* note 64, at 595.

certain Justices, such as federalism and originalism).⁷⁰ With hostility to litigation such a prominent force at the Supreme Court, it is not much of a stretch to suggest that it might play a role in at least some of the federal judiciary's rulings.

District and appellate judge hostility to litigation seems especially plausible in employment discrimination cases. Some judges have expressed outright hostility to employment discrimination cases by mocking plaintiffs' claims of discrimination, in fairly unprofessional terms, in decisions dismissing such claims.⁷¹ Other judges have written judicial decisions gratuitously expressing hostility to entire remedial statutes providing federal causes of action.⁷² Further, in just this decade, the Court has issued a series of "9-0 decisions reversing too-restrictive circuit holdings on the fundamental of what constitutes sufficient

70. Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097 (2006). Others, though, see apparent inconsistencies in the Court's jurisprudence as reflecting not hostility to litigation but "competing conservative principles in play," such as "respect for state authority versus respect for the unalienability of human life." Kmiec, *supra* note 3, at 507 (discussing the "competing conservative principles" appearing in cases about federal power to restrict liberal state medical policy such as the legalization of assisted suicide in *Gonzalez v. Oregon*, 546 U.S. 243 (2006) (Kmiec might have added *Gonzalez v. Raich*, 545 U.S. 1 (2005), in which the federal government sought to overturn California's law allowing medicinal use of marijuana)). The response in support of Siegel's thesis is that while the Court does regularly face tension among "conservative principles," especially in cases about a state's right to enact a policy more liberal than the federal government would like to allow, the Court's choice among conservative policies seems consistent with a pattern of choosing whichever "conservative principle" results in less litigation.

71. See, e.g., *Fisher v. Vassar Coll.*, 114 F.3d 1332, 1351 n.7 (2d Cir. 1997) (Jacobs, J., concurring) (using a literary reference to mock the concept of discrimination based on an intersection of two or more classes—specifically, plaintiff's claim, and the lower court's finding, of discrimination on the basis of Dr. Fisher's status as a married woman: "'How fascinating is that class / Whose only member is Me!' W.H. Auden, 'Islands,' 24, *The Shield of Achilles* (1955)."); *Rosa v. Brink's Inc.*, 103 F. Supp. 2d 287, 288 (S.D.N.Y. 2000) (Rakoff, J.) (in mocking the idea that a bigoted individual could be biased against a number of groups, beginning a judicial opinion dismissing an employment discrimination claim as follows: "Move over, Archie Bunker. According to the plaintiff here, defendant Brink's Inc. and three of its executives are so steeped in prejudice that they intentionally discriminated against her on grounds of race, national origin, gender, age, and disability—all at once.").

72. See, e.g., *Phillip v. ANR Freight Sys., Inc.*, 945 F.2d 1054, 1055 (8th Cir. 1991) (affirming denial of recusal made after District Judge Dean Whipple said, in ruling on an evidentiary dispute: "I am not going to let them in, unproven allegations. Just because lawsuits are filed doesn't give credibility to them, especially in these cases. Those are Title VII cases. Congress has created a nightmare because they entice anybody and everybody to file those things and entice any attorney to file them in the mere chance that if they win a dollar they can win attorney fees. So I think any Title VII cases ought to be looked at with suspicion to begin with because it's a crap shoot, which everybody engages in."); *Phillips v. Pepsi Bottling Group*, No. 05-cv-01322-EWN-PAC, 2007 WL 3378544, at *1 (D. Colo. Nov. 13, 2007) (denying motion for recusal made after, plaintiff claimed, a Magistrate Judge said: "'The biggest problem with your case is that Judge Nottingham hates employment cases and there's nothing you can do about [it] . . . [H]e will try to find anything in the summary judgment briefs to say there's no material issues and grant summary judgment, and if he doesn't, he will make it tough at trial, and you won't win.'").

evidence of discrimination”⁷³—with the unanimous reversals overturning too-narrow interpretations of the employment discrimination laws of the Second,⁷⁴ Fifth,⁷⁵ Sixth,⁷⁶ Ninth,⁷⁷ and Eleventh⁷⁸ Circuits (as well as in the other circuits whose case law was similar to any that the Supreme Court reversed, including the First⁷⁹ and the Eighth⁸⁰).

I do not mean to overstate the diagnosis of hostility to employment discrimination litigation in particular. I have argued elsewhere that even though the Supreme Court does seem hostile to litigation, it does not seem hostile to *employment discrimination* litigation in particular, given the amount of its discretionary docket it has spent issuing unanimous reversals of too-restrictive circuit views of the employment discrimination statutes.⁸¹ Further, numerous federal judges never adopted the too-restrictive views of the employment discrimination laws that the Supreme Court has felt compelled to reverse. Finally, hostility to employment discrimination law in particular might not explain hostility outside that realm, though arguably similar forms of hostility exist as to (for example) prisoner, student, or other constitutional rights litigation.

Yet the point remains: when the Supreme Court has to issue five unanimous reversals in less than a decade to correct most circuits as to a single body of law—employment discrimination—that indicates a relatively widespread problem of circuit hostility to that particular body of law, which constitutes a sizeable portion of the federal docket.⁸² The scattered written decisions by judges openly expressing hostility to that area of law is further evidence, because for every one judge willing to go out on a limb declaring open skepticism or upset about employment

73. Scott A. Moss, *Fighting Discrimination While Fighting Litigation: A Tale of Two Supreme Courts*, 76 FORDHAM L. REV. 981, 1001 (2007).

74. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 (2002).

75. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 146–49 (2000).

76. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 54 (2006).

77. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 90 (2003).

78. *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 456–57 (2006).

79. *Reeves*, 530 U.S. 133, not only reversed the Fifth Circuit’s view, but also abrogated the First Circuit’s (and others’) view, that as a matter of law a discrimination plaintiff could not prevail by proving that the employer’s asserted nondiscriminatory motivation was pretextual. See *Woods v. Friction Materials, Inc.*, 30 F.3d 255 (1st Cir. 1994).

80. *Burlington N. & Santa Fe Ry.*, 534 U.S. 506, not only reversed the Sixth Circuit’s view, but also abrogated the Eighth Circuit’s (and others’) view of what constituted actionable retaliation by employers. See *Spears v. Mo. Dep’t of Corr. & Human Resources*, 210 F.3d 850 (8th Cir. 2000) (holding that a retaliatory lateral transfer with no loss in pay was not actionable).

81. Moss, *supra* note 73, at 1001.

82. Labor and employment litigation (of which discrimination is the most prominent component) constitutes 12 to 14 percent of the federal docket. Ann C. Hodges, *Mediation and the Transformation of American Labor Unions*, 69 MO. L. REV. 365, 369 n.27 (2004).

cases, there presumably are others who hold the same view but have the sense of propriety not to declare so in public documents.

B. Judicial Modesty—Too Much of a Good Thing

A second possible explanation for reluctant judicial factfinding is a judicial tendency that is, generally speaking, admirable: courts are reluctant to make highly subjective fact determinations as to very devil-in-the-details specific matters outside the judicial expertise—such as whether a particular employer’s facially plausible anti-discrimination program is truly “effective.” Judicial modesty on balance is a good thing, given the power federal judges wield over the law and over cases that can determine individuals’ fates.

Yet for judges as for all of us, too much modesty can be a bad thing; it can prevent accomplishing as much as one otherwise might. And there are several good reasons judges should not expand otherwise admirable modesty into reluctance to undertake detailed factfinding on the premise that some subjects are ill-suited for judicial scrutiny. First, except in adjudicating cases of judicial misconduct, judges do little other than evaluate contested facts about which they have no personal expertise; judges with no criminal law experience handle heavy criminal dockets, while former prosecutors on the bench adjudicate cases about discrimination, copyrights, religious freedom, etc.⁸³ Judges are hired to be thoughtful legal analysts and diligent factual analysts, not to be subject-matter experts who should shy away from analyzing subjects they do not know in advance of the parties’ evidentiary presentations.

Second, courts cannot really avoid making murky determinations, such as the quality of employers’ anti-discrimination programs. By deeming virtually any facially plausible program “effective,” courts make *inaccurate* determinations that almost all such programs are “effective.” Similarly, when they refuse to award fees to prevailing parties on discovery disputes, as required by a rule mandating fees unless the losing party was “substantially justified,” courts are effectively holding *all* losing parties substantially justified. These refusals to undertake close factual analysis, do not really avoid the need to find facts; they just yield *bad* factual findings.

Third, and finally, even if passing judgment on employer programs or party discovery compliance is an undesirable role for federal judges, they are roles mandated by multiple sources. Congress has enacted statutes requiring dispute resolution in a wide range of areas by

83. See *supra* note 48 and accompanying text (noting that judges evaluate civil cases in a variety of complex areas).

generalist federal judges rather than by specialized courts; the Judicial Conference enacts civil procedure rules like the one requiring fee shifting in discovery disputes; and the Supreme Court announces fact-intensive doctrines like *defenses* requiring evaluation of employers' anti-discrimination programs.

In sum, for district and appellate judges, closely scrutinizing discovery compliance, employer programs, and other nuanced factual scenarios would not be improper judicial intrusion. Rather, it would be entirely proper judicial compliance with a role thrust upon federal judges by the complex web of rules and statutes they are entrusted and burdened with applying.

