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### Legitimacy and Agency Implementation of Title IX

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# LEGITIMACY AND AGENCY IMPLEMENTATION OF TITLE IX

SAMUEL R. BAGENSTOS\*

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Title IX of the Education Amendments of 1972 prohibits sex discrimination by programs receiving federal education funding.<sup>1</sup> Primary responsibility for administering that statute lies in the Office for Civil Rights of the Department of Education (OCR).

Because Title IX involves a subject that remains highly controversial in our polity (sex roles and interactions among the sexes more generally), and because it targets a highly sensitive area (education), OCR’s administration of the statute has long drawn criticism. The critics have not merely noted disagreements with the legal and policy decisions of the agency, however. Rather, they have attacked the agency’s decisions for being illegitimate—for reflecting the agency’s improper imposition of value judgments on the statute. Three key applications of Title IX have drawn the most controversy in this regard: gender equity in intercollegiate athletics; transgender students’ rights; and sex-based harassment and assault on college campuses.

In this essay, I argue that the critique is misplaced. One may agree or disagree with OCR’s applications of Title IX in these three key areas. But these applications are not illegitimate. To the contrary, they are implementation decisions made consistent with the longstanding “core” conception of discrimination—intentional disparate treatment.<sup>2</sup> These

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<sup>1</sup> 20 U.S.C. §1681 (2012).

<sup>2</sup> Anti-discrimination rules, like equality rules generally, can be cashed out in multiple distinct ways. See generally George Rutherglen, *Discrimination and Its Discontents*, 81 VA. L. REV. 117 (1995) (describing the “concept of discrimination” as “essentially contested”). Doug Rae and his colleagues, for example, identified 108 structurally distinct conceptions of equality. See DOUGLAS W. RAE ET AL., *EQUALITIES* 133 (1981). Much of the controversy regarding the application of anti-discrimination law rests on disagreements regarding which conception of anti-discrimination is the right one. See *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct.

decisions are inherently contestable, because even the “core” conception can be instantiated in many ways. But there are strong reasons to believe that OCR is best positioned to choose which instantiations to adopt.

In Part I, I demonstrate that the controversial positions of OCR do not involve *avant garde* interpretations of the anti-discrimination principle. Rather, they involve the resolution of questions of implementation: From what facts is it reasonable to draw an inference of disparate treatment? In what activities do we predict male and female college students would want to participate if they did not face discrimination? Should we look at discrimination on the level of the individual student or the institution as a whole? And what is the most effective way to reduce individuals’ acts of discrimination within an educational program?

In Part II, I argue that OCR is well positioned to decide these questions. These questions of implementation are precisely the sorts of questions that Congress cannot generally be expected to resolve. And they are the sorts of questions on which an agency like OCR plausibly has both an informational and a democratic advantage over the courts.

My argument does not rely on any transcendent preference for administrative resolution of policy questions—though it may offer a data point in support of such a preference. Rather, it relies on two key factors: first, the inherently contestable nature of these questions of implementation; and second, the proven democratic accountability of OCR. In a companion piece, I argue that OCR has generally been accountable to the public in its interpretations of Title IX.<sup>3</sup> Here, I focus on the contestable nature of the implementation decisions that are necessary to give life to the statute, and I compare the democratic responsiveness of OCR with that of Congress and the courts.

## I. IMPLEMENTING THE “CORE” CONCEPTION OF DISCRIMINATION

Title IX generally provides that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”<sup>4</sup> OCR has drawn controversy in its application of this text in three key areas: the slots universities allocate to men’s and women’s intercollegiate sports; the rights of transgender students

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2507, 2526–32 (2015) (Thomas, J., dissenting) (detailing dispute over adopting a disparate-impact conception of discrimination); *see generally* HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 1960–1972* (1990) (cataloguing discrimination legislation from 1960–1972). By contrast, I will argue, the controversy regarding Title IX is notable precisely because both OCR’s positions and the positions of OCR’s critics rest on the narrow “core” conception.

<sup>3</sup> See Samuel R. Bagenstos, *This is What Democracy Looks Like: Title IX and the Legitimacy of the Administrative State*, 118 MICH. L. REV. (forthcoming April 2020).

<sup>4</sup> 20 U.S.C. § 1681(a) (2012).

in elementary, secondary, and higher education; and the response of colleges to sexual harassment and assault against students.<sup>5</sup>

In each of these areas, critics contend that OCR has impermissibly stretched the concept of discrimination. To the contrary, I argue, OCR's interpretations rest on a straightforward understanding of that concept. Indeed, they rest on the widely understood "core meaning" of discrimination, which connotes the "intent to distinguish two or more groups on the basis of some specified characteristic."<sup>6</sup> A defense of OCR's interpretations thus does not in any way turn on the resolution of the long-running conflict over whether anti-discrimination laws prohibit actions with an unjustified disparate impact.

But OCR's critics, too, have a perfectly analytically tractable argument under the disparate treatment principle. The controversies thus do not turn on what definition of discrimination one adopts. Instead, they highlight that even the supposed core of that concept is itself contestable. In its "core" meaning, discrimination means dissimilar treatment of similarly situated people. But determining who is similarly situated requires resolution of both empirical and normative questions that the concept of discrimination cannot answer. The debate over OCR's application of Title IX to college athletics offers an example of this problem. The agency's longstanding position rests on a particular prediction of what the preferences of female students would be in the absence of discrimination.

Identifying dissimilar treatment and similarly situated comparators also turns on the level of generality at which the relevant act is framed. And again, the concept of discrimination cannot, analytically, tell us what level of generality to use.<sup>7</sup> The debate over OCR's application of Title IX to transgender students raises precisely this "levels-of-abstraction problem." The

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<sup>5</sup> See generally R. SHEP MELNICK, *THE TRANSFORMATION OF TITLE IX: REGULATING GENDER EQUALITY IN EDUCATION* (2018) (a recent book-length criticism of OCR's treatment of these three issues). For further discussions of one or the other of these issues, see David E. Bernstein, *Antidiscrimination Laws and the Administrative State: A Skeptic's Look at Administrative Constitutionalism*, 94 NOTRE DAME L. REV. 1381, 1387–92 (2019) (discussing campus sexual harassment and assault); David E. Bernstein, *The Abuse of Executive Power: Getting Beyond the Streetlight Effect*, 11 FLA. INT'L U. L. REV. 289, 290–98 (2016) (same); Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CALIF. L. REV. 881, 931–46 (2016) (same); Earl C. Dudley, Jr. & George Rutherglen, *Ironies, Inconsistencies, and Intercollegiate Athletics: Title IX, Title VII, and Statistical Evidence of Discrimination*, 1 VA. J. SPORTS & L. 177 (1999) (athletics).

<sup>6</sup> Rutherglen, *supra* note 2, at 118; see also *id.* at 127 ("'Discrimination,' as it is ordinarily used, refers to a process of noticing or marking a difference, often for evaluative purposes. The two most common synonyms for the verb 'discriminate' are 'distinguish' and 'differentiate,' which in turn denote recognizing, discerning, appreciating, or identifying a difference.").

<sup>7</sup> See Samuel R. Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 DUKE L.J. 345, 360 n.74 (2008) (noting that "the 'levels-of-abstraction problem' is common in constitutional adjudication, and it arises especially frequently when applying theories of equal treatment") (citations omitted) (quoting Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1084–85 (1981)).

position OCR took in the Obama Administration, interpreting the ban on sex discrimination to protect transgender students, rested in part on viewing discrimination at the level of the individual student, rather than at the level of a school as a whole.

Finally, even if we have a consistent understanding of what constitutes discrimination, we also face a separate question of how to attribute responsibility when the law regulates a corporate or collective entity. Whose actions count as those of the entity? Only the formal corporate actions of the entity's highest governing body? The informal actions of high-level employees? The actions of all supervisors? Of all employees? Of others who work or do business at the entity's facilities (contractors, customers, students)? These are questions that arise in the application of every anti-discrimination law.<sup>8</sup> And they are particularly acute given the text of Title IX, which, in the passive voice, says that no person shall "be subjected to discrimination under any education program or activity receiving Federal financial assistance."<sup>9</sup> Whose acts of discrimination count when applying that language? What does it mean to be subjected to discrimination "under" an education program? The debate over OCR's application of Title IX to campus sexual assault and harassment raises this set of questions.

#### A. *Resolving Empirical and Predictive Questions: College Athletics*

In implementing Title IX in sports, OCR and the courts have adopted a test that presses universities toward providing varsity athletic slots for men and women in proportion to the enrollment of members of each sex.<sup>10</sup> Critics have charged that this test unduly focuses on varsity sports. The most sustained critique of OCR's approach to Title IX comes from Shep Melnick, who offered a book-length challenge to the agency's implementation of the statute. He suggests that a better test would "look[ ] at the full array of athletic activities that schools offer, ranging from varsity and jayvee teams to club and intramural sports to recreational and fitness programs."<sup>11</sup> After all, he notes, "male and female students might have a different array of athletic interests."<sup>12</sup> If women are "more interested in athletic activities that they can continue to enjoy for many decades," and men "focus on team sports that few will be able to play after graduation," he suggests, there would be no sex discrimination if a school focused its women's sports budget on non-varsity (and even non-competitive) activities while devoting

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<sup>8</sup> See generally Samuel R. Bagenstos, *Formalism and Employer Liability Under Title VII*, 2014 U. CHI. LEGAL F. 145 (2014) (discussing the problem as it arises under Title VII).

<sup>9</sup> 20 U.S.C. § 1681(a) (2012).

<sup>10</sup> See, e.g., *Cohen v. Brown Univ.*, 101 F.3d 155, 166 (1st Cir. 1996).

<sup>11</sup> MELNICK, *supra* note 5, at 80.

<sup>12</sup> *Id.*

more of its men's sports budget to competitive, varsity activities.<sup>13</sup> Such a school would be equally serving the interests of male and female students, and thus not discriminating based on sex.<sup>14</sup>

This is a perfectly tractable understanding of discrimination. To be sure, it relies on viewing the problem at a particular level of generality. It requires us to look at the offerings of a college overall, to take for granted that sex-segregated teams are acceptable,<sup>15</sup> and to ask whether, on average, the school enables female students to satisfy their interests (in athletic opportunities, or in opportunities generally) as much as it enables male students to satisfy *their* interests. If women in general have less of an interest in participating in varsity athletics than do men, then requiring that schools allocate varsity athletic slots to men and women in proportion to their population gives female athletes something more than male athletes receive—each female athlete has a greater opportunity to satisfy her preferences than does each male athlete.

The key to that argument is the premise that women have less of an interest in participating in varsity athletics than do men. But one's interest in participating in a given activity is not an inherent trait. It is a trait that often depends significantly on the opportunities that are available. It is well established that "people tend to adjust their aspirations to their possibilities."<sup>16</sup> "The victims of inequality," in particular, "tend to reduce dissonance by adapting their preferences to the available opportunities."<sup>17</sup> People are, therefore, less likely to express interest in participating in an activity when it is not available to them. But that does not mean that they do not wish to participate in it—or would not wish to participate in it if it were available. Vicki Schultz and Stephen Petterson made a similar point in arguing against a supposed lack-of-interest defense under Title VII:

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<sup>13</sup> See *id.*

<sup>14</sup> Melnick also suggests that the prevailing test actually discriminates *against* female students, though this seems more a matter of disparate impact than of disparate treatment. He argues that the test effectively requires schools to invest more money and admissions slots into intercollegiate varsity athletics at the expense of academic and other extracurricular activities: "More money for athletic scholarships means fewer scholarships for those who shine academically and for those in financial need. More slots for athletes means fewer for musicians, social entrepreneurs, and the most serious and gifted scholars." *Id.* at 84. And "given female students' superior academic performance," he argues that "it is likely to be nonathlete female undergraduates and applicants" who pay the price. *Id.* Because this argument does not rest on the "core" concept of discrimination, I do not discuss it further in text.

<sup>15</sup> For an interesting discussion of the not-taken path of sex-integrationism in Title IX's application to athletics, see Elizabeth Sepper & Deborah Dinner, *Sex in Public*, 129 *YALE L.J.* 78, 130–36 (2019).

<sup>16</sup> JON ELSTER, *SOUR GRAPES: STUDIES IN THE SUBVERSION OF RATIONALITY* 109 (1987).

<sup>17</sup> Cass R. Sunstein, *Three Civil Rights Fallacies*, 79 *CAL. L. REV.* 751, 759 (1991). For a general discussion of the normative questions the adaptive-preference phenomenon raises for the use of preferences as a source of policy or measure of justice, see Samuel R. Bagenstos & Margo Schlanger, *Hedonic Damages, Hedonic Adaptation, and Disability*, 60 *VAND. L. REV.* 745, 773–95 (2007).

Because people's 'interest' in particular jobs and the sources of that interest are intangible factors that elude direct measurement and proof, the lack of interest defense invites courts to adopt the same sort of overbroad generalizations about women and minorities that Title VII has been construed to prohibit in other contexts.<sup>18</sup>

For this reason, anti-discrimination law doctrine has sought to guard against treating the preferences or interests of women or members of minority group as static. In one of the Supreme Court's earliest Title VII cases, the Court held that individuals who did not apply for a job could challenge an employer's discriminatory policy if they could show that the prospect of discrimination deterred them from making an application.<sup>19</sup> Courts apply the same principle today.<sup>20</sup>

In applying Title IX to college athletics, OCR and the courts have sought to respond to the same sorts of dynamics. As Deborah Brake argues, "allowing institutions to justify the allocation of fewer opportunities to female athletes on the grounds that girls and women are less interested in sport would enable them to justify an unequal allocation of opportunities based on their own practices that have suppressed female interest."<sup>21</sup> The relevant Title IX regulation requires schools to "provide equal athletic opportunity for members of both sexes."<sup>22</sup> The regulation goes on to explain that equal accommodation of the interests of male and female students is key. In enumerating the factors the agency should consider "[i]n determining whether equal opportunities are available," it gives pride of place to "[w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes."<sup>23</sup>

The dominant "three-part test," set forth in OCR guidance and adopted by the courts, implements this regulation by seeking to identify when the interests of men and women have been equally accommodated. When "intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments," the test concludes that no discrimination has occurred.<sup>24</sup> Proportional representation strongly suggests that the school has equally

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<sup>18</sup> Vicki Schultz & Stephen Petterson, *Race, Gender, Work, and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation*, 59 U. CHI. L. REV. 1073, 1078–79 (1992); see also Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 814 (1989) (arguing that a lack-of-interest defense "enshrines gender stereotypes at the core of Title VII").

<sup>19</sup> See *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 367–68 (1977).

<sup>20</sup> See, e.g., *Tabor v. Hilti, Inc.*, 703 F.3d 1206, 1226 (10th Cir. 2013); *EEOC v. Joe's Stone Crabs, Inc.*, 296 F.3d 1265, 1274 (11th Cir. 2002).

<sup>21</sup> Deborah Brake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 34 U. MICH. J.L. REFORM 13, 71 (2001).

<sup>22</sup> 34 C.F.R. § 106.41(c) (2019).

<sup>23</sup> 34 C.F.R. § 106.41(c)(1) (2019).

<sup>24</sup> Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,418 (Dec. 11, 1979).

accommodated the interests of both sexes. But the test recognizes that the *lack* of proportional representation, while potentially raising concerns about unequal accommodation of interests, is not dispositive. Thus, in the absence of proportional representation it permits a school to show compliance in one of two ways: either by showing “a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of [the ‘underrepresented’] sex,” or by directly demonstrating “that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.”<sup>25</sup>

Although the three-part test presses toward proportional representation, then, it does not require it—and it provides schools meaningful opportunities to show that they have accommodated student interest in the absence of proportional representation. The test effectively erects a pair of nested presumptions. The first presumption is this: If a school is not providing proportionate varsity athletic opportunities, then it is likely—but not certainly—failing to equally accommodate the interests of each sex. The second presumption is this: If a school is neither providing proportionate opportunities nor taking steps to meet the demonstrated interest of the underrepresented sex, then we can be comfortable in concluding that it is failing to equally accommodate the interests of each sex.

Those presumptions rest on a perhaps contestable factual assumption—that in the absence of discrimination male and female students would have equal interests in participating in varsity athletics. Melnick derides that assumption as an “abstract, dogmatic” assertion rather than one rooted in fact.<sup>26</sup> Even some who are more sympathetic than Melnick to the use of Title IX to expand women’s varsity athletic opportunities have suggested that the if-you-build-it-they-will-come assumption goes too far.<sup>27</sup> On the flip side, there is ample evidence that, as women’s varsity athletic opportunities have expanded, the interest of female students in those opportunities has increased apace.<sup>28</sup>

The crucial point, however, is this: That dispute is a factual one—and it is one that is difficult in principle to resolve, turning as it does on hypothetical questions of how expanded opportunities will affect female students’ interests. Whoever resolves the dispute will do so based on inherently contestable empirical predictions, necessarily informed by one’s substantive views of the importance of addressing the intangible factors that deny oppor-

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<sup>25</sup> *Id.*

<sup>26</sup> MELNICK, *supra* note 5, at 83.

<sup>27</sup> See generally, B. Glenn George, *Forfeit: Opportunity, Choice, and Discrimination Theory Under Title IX*, 22 YALE J.L. & FEMINISM 1 (2010) (illustrating how Title IX by itself is not enough to eradicate discrimination in sports).

<sup>28</sup> See Brake, *supra* note 21, at 15.



tunities.<sup>29</sup> But *either* resolution of the dispute is consistent with the “core” understanding of discrimination.<sup>30</sup>

*B. The Level-of-Abstraction Problem: The Rights  
of Transgender Students*

Before the Trump Administration reversed course, OCR interpreted Title IX to provide that discrimination against transgender students was impermissible sex discrimination.<sup>31</sup> At least one court agreed with that position, though the appeal from its decision was short-circuited.<sup>32</sup>

Critics asserted that the Obama OCR’s position went beyond the statutory prohibition on sex discrimination. In the mine run of transgender discrimination cases, defendants were not claiming the right to exclude transgender students entirely from school. Instead, they were insisting that transgender students use restrooms that accorded with the sex those students were assigned at birth.<sup>33</sup> Because Title IX explicitly permits schools to segregate restrooms based on sex, critics ask how it can possibly be impermissible sex discrimination to require transgender students to use one restroom rather than another.<sup>34</sup> And some see any discrimination as effectively *de minimis*. Melnick, for example, asserts that “the link to educational opportunity here is attenuated at best: the central issue is access to bathrooms and locker rooms, not classrooms; the number of students affected is tiny, and none of them have been denied access to anything even vaguely curricular in nature.”<sup>35</sup> The position of President Obama’s appointees, he argues, was rooted in an effort to “update decades-old legislation to comport with their understanding of ‘progress.’”<sup>36</sup> He contends that President Obama’s appointees

<sup>29</sup> Deborah Brake argues that Title IX has been successful in creating athletic opportunities for women precisely because it has been applied in a pragmatic, nondogmatic way. See Deborah L. Brake, *Title IX as Pragmatic Feminism*, 55 CLEV. ST. L. REV. 513, 535 (2007).

<sup>30</sup> To be sure, one can defend OCR’s approach to athletics based on a broader conception of discrimination. For an outstanding analysis that concludes that the best defense rests on principles of fair distribution in education, as well as on the “perfectionist” argument that OCR’s approach “encourages girls to develop socially valued traits and attributes associated with competitive athletics—for example physical skills, and a general sense of personal agency,” see Kimberly A. Yuracko, *One for You and One for Me: Is Title IX’s Sex-Based Proportionality Requirement for College Varsity Athletic Positions Defensible?*, 97 NW. U. L. REV. 731, 737 (2003).

<sup>31</sup> See Dear Colleague Letter on Transgender Students from Catherine E. Lhamon, Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ. & Vanita Gupta, Principal Deputy Assistant Att’y Gen. for Civil Rights, U.S. Dep’t of Justice 3 (May 13, 2016), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>, [perma.cc/EZN8-S4S8].

<sup>32</sup> See *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 723 (4th Cir. 2016), *vacated and remanded*, 137 S. Ct. 1239 (2017).

<sup>33</sup> See e.g., MELNICK, *supra* note 5, at 230.

<sup>34</sup> See *id.*

<sup>35</sup> *Id.* at 240.

<sup>36</sup> *Id.* at 20.

sought to transform Title IX “from a law designed to prevent schools from establishing educational practices that exclude or disadvantage female students to a far more sweeping effort to eliminate all forms of ‘sex stereotyping.’”<sup>37</sup> He describes the Obama Administration’s position as reflecting a broad effort at social engineering, rather than the mere application of the anti-discrimination principle:

Sexual stereotyping—which can include virtually all conventional thinking about sex and gender—must be identified, condemned, and corrected. Outmoded stereotypes about “masculinity and femininity”—based as they are on a mistaken bimodal, biological understanding of gender—should be replaced by an understanding that recognizes both the fluidity and the socially constructed nature of gender. Shortly after she left OCR, Assistant Secretary Catherine Lhamon told an interviewer, “The bathroom question never was just about a bathroom. It is about who that child is at school and how that child will be perceived and seen.” Any stigma that currently attaches to transgender status must be eliminated, which means changing how transgender students are “perceived and seen” by other students and school officials.<sup>38</sup>

Despite this florid description, a prohibition on acts driven by sex stereotypes reflects a straightforward application of the “core” conception of discrimination. To be sure, the Supreme Court did not formally recognize the sex stereotyping theory of anti-discrimination liability until its 1989 decision in *Price Waterhouse v. Hopkins*.<sup>39</sup> But that fact can be deceiving. If a business requires women, but not men, to act in a demure way to obtain a promotion, it has discriminated against women in the “core” sense. A woman who is denied a promotion for failing to conform to that stereotype, like Ann Hopkins, has experienced negative treatment that she would not have experienced had she been a man. On the “core” understanding of discrimination as treating similarly situated people differently based on a forbidden characteristic, a case like Hopkins’s is readily understood as one of sex discrimination.

And that is true even if an employer requires both male and female employees to conform equally to the stereotypes it attaches to their respective sexes (a prospect that may be more hypothetical than real). This is where the levels-of-abstraction problem comes in. If one considers things at a high level of abstraction, and looks at the overall opportunities for men and women at a workplace, it may appear that the enforcement of sex stereotypes against both sexes means there is no discrimination—men face some barriers that women don’t, but women face an equal and opposite set of barriers that

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<sup>37</sup> *Id.* at 236.

<sup>38</sup> *Id.* at 240 (footnote omitted).

<sup>39</sup> 490 U.S. 228 (1989).

men don't.<sup>40</sup> Closer to the ground, though—considering the treatment of an individual employee—it appears that there is discrimination: A woman who is denied a promotion because she does not conform to a stereotype about how women should act has suffered negative treatment that she would not have experienced if her sex were different. She has experienced a violation of the “core” of the anti-discrimination concept. And the same is true of a man at the same workplace who is denied a promotion because he does not conform to a stereotype about how men should act. On this understanding, a workplace can simultaneously discriminate against both men and women because of their sex.

Whether an employer who enforces stereotypes against both sexes can be said to discriminate, then, does not depend on whether one accepts or rejects the “core” understanding of discrimination as disparate treatment. One can accept that understanding and reach either conclusion. The difference between the two conclusions rests on the level of generality at which the case is framed: the level of the overall workplace or the level of the individual employee. And the anti-discrimination principle itself cannot tell us what level of generality to apply. American anti-discrimination law has tended to look to the individual level,<sup>41</sup> but that is not invariably the case.<sup>42</sup>

It is not hard to see how the sex stereotyping analysis can be applied to protect transgender students against discrimination under Title IX. If a school punishes a transgender female student because she does not identify or present herself as male (in terms of dress or the facilities she uses), but it does not visit the same negative treatment on a cisgender female student, one might be tempted to say that the basis of discrimination is gender identity rather than sex. That is particularly true if a school requires all students to identify and present themselves according to the sex they were assigned at birth. Such a policy, one might say, disadvantages neither female nor male students.

But that conclusion depends on framing the matter at a high level of abstraction. From the level of the individual transgender female student, the discrimination is apparent: If she had been assigned the female sex at birth, she would not be treated negatively for identifying and presenting as female;

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<sup>40</sup> Of course, this presumes that the barriers are equal and opposite. In many cases that will not be true. *See, e.g.,* Catherine L. Fisk, *Privacy, Power, and Humiliation at Work: Re-Examining Appearance Regulation As an Invasion of Privacy*, 66 LA. L. REV. 1111, 1134 (2006) (discussing *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104 (9th Cir. 2006), and noting that “anyone with ordinary experience in life knows that women would spend much more time and money applying the large quantity of makeup, styling their hair, and polishing their nails than men would in simply combing their hair and trimming their nails”). And even equally-applied stereotypes will often hinder women more than men, simply because the male stereotypes are better aligned with qualities valued in the workplace, such as initiative or hard-charging.

<sup>41</sup> *See* *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 708–09 (1978).

<sup>42</sup> *See, e.g.,* *Jespersen*, 444 F.3d at 1109 (upholding disparate sex-based grooming standards).

but because she was assigned the male sex at birth, she is treated negatively. As in the case of an employer that enforces sex-based stereotypes on both men and women, the case for a violation of the “core” anti-discrimination principle is apparent when the matter is considered at a low level of abstraction.

A wrinkle in the analysis arises, however, when we consider the factual context of most of the Title IX disputes regarding transgender students—access to bathrooms. Title IX’s regulations explicitly permit sex-segregated bathrooms.<sup>43</sup> If we understand this as a bathroom exception from the anti-discrimination principle, then transgender students simply have no claim. Even if barring them from the facilities designated for the gender with which they identify would constitute discrimination, on this theory there would be no anti-discrimination principle to apply.

But there is a better way of understanding the regulations permitting sex-segregated bathrooms. These regulations should be seen as defining what discrimination is, rather than identifying certain circumstances in which discrimination will be permitted. Sex-segregated restrooms are always sex-based, but they need not count as “discrimination” unless they cause a harm. For most people, sex-segregated restrooms (so long as they are otherwise equal) impose no material or stigmatic harm. (This is very different, of course, from race-segregated bathrooms.) But for transgender individuals, being forced to use the restroom assigned to a sex other than the one with which they identify causes serious harm. Because these students are excluded from particular bathrooms because of the sex they were assigned at birth—clearly a sex-based distinction—and the exclusion causes them serious harm, their treatment is readily characterized as sex discrimination.<sup>44</sup>

Of course, this is not the only way to understand the issue. As with sex stereotyping generally, if one looks at the matter from a high level of generality, it is possible to see no sex discrimination here, because both male and female students face similar barriers. But from an individual-level perspective, the argument for sex discrimination is straightforward. And *both* perspectives rest on the “core” understanding of discrimination.

### *C. The Institutional-Responsibility Problem: Campus Sexual Assault and Harassment*

Perhaps no aspect of Title IX jurisprudence has been more controversial than the statute’s application to sexual assault and harassment on campus. The Obama Administration took an aggressive position on this issue. It issued subregulatory guidance and entered settlement agreements that sought

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<sup>43</sup> 34 C.F.R. § 106.33 (2019).

<sup>44</sup> See *generally* Brief for Professors Samuel Bagenstos, Michael C. Dorf, Martin S. Lederman & Leah M. Litman as Amici Curiae in Support of Respondent, *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 137 S. Ct. 1239 (2017) (No. 16-273), 2017 WL 894898 (U.S. 2017) (providing a more fully developed version of this argument).

to require universities to beef up their protections of students who experience assault and harassment.<sup>45</sup> Those actions drew a sharp response—from advocates who believed that the new approach deprived accused students of important procedural protections,<sup>46</sup> and ultimately from the Trump Administration, which has reversed key aspects of the Obama approach.<sup>47</sup>

Interestingly, though, *none* of this controversy has challenged the Obama OCR's interpretation of the anti-discrimination principle. Sex-based harassment or assault violates the "core" conception of that principle on a fairly straightforward theory—the aggressor targets the victim for harm based on the victim's sex.<sup>48</sup> The controversy is about attribution: When should we attribute the discriminatory act of a student to the educational institution? In the terms set forth by the statute, when is discrimination by a student against another student discrimination under the school's "education program or activity"?<sup>49</sup>

A subsidiary, but important, controversy has been about due process: When OCR has urged schools to adopt procedures to identify and sanction students who commit harassment or assault, do those procedures provide appropriate protection to the accused? In this essay, I focus on the attribution question for two reasons. First, it is logically prior to the due process question. The agency's basis for pressing schools to adopt particular procedures depends on the conclusion that acts of harassment or assault would be attributable to a school that does not adopt them. Second, virtually nobody—not even the agency itself—has suggested that OCR should have the final word on whether its chosen processes provide due process. That is a constitutional question, on which the courts will necessarily have the last word. My focus here is on the questions of statutory construction and implementation.

Under President Obama, OCR answered the attribution question by saying that a school is responsible for discriminatory harassment or assault by one student against another when it does not adopt adequate procedures to prevent and punish that discrimination.<sup>50</sup> The Trump Administration has concluded that the procedural requirements imposed by the Obama OCR

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<sup>45</sup> See, e.g., MELNICK, *supra* note 5, at 149–53; Karen M. Tani, *An Administrative Right to Be Free from Sexual Violence? Title IX Enforcement in Historical and Institutional Perspective*, 66 DUKE L.J. 1847, 1874–75 (2017).

<sup>46</sup> See Tani, *supra* note 45, at 1852 (describing criticisms of OCR's actions).

<sup>47</sup> See *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 83 Fed. Reg. 61,462, 61,464–66 (Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106).

<sup>48</sup> See *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 649–50 (1999); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998).

<sup>49</sup> 20 U.S.C. § 1681(a) (2012).

<sup>50</sup> See "Dear Colleague" Letter from Russlynn Ali, Assistant Sec'y, Office for Civil Rights 3–4 (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [perma.cc/9LWW-SPR5]; Office for Civil Rights, U.S. Dep't Of Educ., *Questions and Answers on Title IX and Sexual Violence*, U.S. DEP'T EDUC. 1–3 (2014), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> [perma.cc/9LBT-WRNW] [hereinafter Questions and Answers].

were too extensive.<sup>51</sup> But it does not appear to disagree with the proposition that the failure to provide adequate procedures will make a school responsible for a student's discrimination against another.<sup>52</sup>

At least where private actors are suing for money damages under Title IX, the Supreme Court has taken a somewhat different view of institutional responsibility. The Court has said that, in a private damages action, a school is responsible for acts of discriminatory harassment when it "is deliberately indifferent to known acts of student-on-student sexual harassment and the harasser is under the school's disciplinary authority."<sup>53</sup> And deliberate indifference requires a showing that the school's "response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances."<sup>54</sup> The Obama Administration stated that the deliberate-indifference standard did not apply to administrative enforcement of Title IX.<sup>55</sup> But either way, the controversy over the Obama Administration's guidelines has centered on the question of when a school can be held responsible for discriminatory harassment of a student—not on whether the harassment is discriminatory in the first place.

It should be obvious that this is not a question that the anti-discrimination principle can answer. Whether or not a school is ultimately held responsible, we would not even be asking the attribution question unless the harassment constituted discrimination. The answer to the attribution question turns on broader issues of policy, and in particular of the need to find effective tools to prevent and remedy discriminatory harassment without imposing undue costs to academic freedom or the procedural interests of alleged perpetrators. Given the importance of the interests on all sides, virtually any resolution of these issues is likely to be extremely controversial. But that does not mean that OCR has in any way gone beyond the "core" of the anti-discrimination principle.

## II. THE LEGITIMACY OF OCR'S ACTIONS

In the previous part, I argued that the controversies over OCR's applications of Title IX do not involve disputes over whether to extend beyond the "core" conception of discrimination. Rather, they involve empirical and predictive questions, disagreements about the level of abstraction at which we will assess discrimination, and questions of whose discrimination to attribute to a school. The anti-discrimination principle incorporated in the statute does not resolve any of those questions.

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<sup>51</sup> See *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 83 Fed. Reg. 61,462, 61,464–66.

<sup>52</sup> See *id.* at 61,465.

<sup>53</sup> *Davis*, 526 U.S. at 647.

<sup>54</sup> *Id.* at 648.

<sup>55</sup> Questions and Answers, *supra* note 50, at 1 n.9.

In this part, I turn more directly to the current critique of the legitimacy of OCR's actions. I begin by highlighting the ways that the critique of OCR replicates the broader conservative attack on the legitimacy of the administrative state. Informed by the debate over that broader attack, I then argue that OCR is likely to be the entity that is best positioned to resolve the inherently contestable questions involved in implementing Title IX's anti-discrimination principle.

The interpretations OCR has offered in the three key areas I have discussed in this essay are no doubt contestable. Precisely because the statute's anti-discrimination principle does not answer the relevant questions, one can readily argue that OCR has gotten it wrong in the ways it has filled the gaps. But the critiques of OCR have not merely asserted that the agency has gotten it wrong. Rather, they insist that the agency's actions have been illegitimate. Melnick, for example, argues that OCR has adopted a reading of Title IX that would promote major social change, and that Congress never specifically endorsed the prospect that the law would have such a significant consequence. As a result, he suggests, the agency has gone beyond its legitimate authority.<sup>56</sup>

These criticisms of OCR resonate with the conservative position in today's broader debates about administrative law. As conservative judges and scholars have sharpened their challenges to the administrative state over the past several decades, they have increasingly attacked the delegation of major policy decisions to the Executive Branch by Congress.<sup>57</sup> Their attacks have entered the doctrine through the "major questions" exception to *Chevron* deference.<sup>58</sup> And recent opinions by Justices Gorsuch and Kavanaugh suggest that, if the Supreme Court revives a version of the constitutional nondelegation doctrine, it will do so by forbidding delegations that send such major questions to administrative agencies.<sup>59</sup>

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<sup>56</sup> See MELNICK, *supra* note 5, at 236–43, 263.

<sup>57</sup> See, e.g., PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014); DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993).

<sup>58</sup> See, e.g., Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN. L. REV. 19, 52–53 (2010) (describing the "elephants in mouseholes" canon as deriving from nondelegation concerns); John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 237 (describing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000)—a leading example of the major-questions exception—as deriving from nondelegation concerns); see generally Note, *Major Question Objections*, 129 HARV. L. REV. 2191 (2016) (critiquing the "major questions" doctrine).

<sup>59</sup> See *Gundy v. United States*, 139 S. Ct. 2116, 2136 (2019) (Gorsuch, J., dissenting) (stating that "as long as Congress makes the policy decisions when regulating private conduct, it may authorize another branch to 'fill up the details'"); *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., respecting the denial of certiorari) (stating that "Justice Gorsuch's thoughtful *Gundy* opinion raised important points that may warrant further consideration in future cases," and interpreting that opinion not to permit delegation of "major policy question[s] of great economic and political importance").

Defenders of the administrative state have, in turn, challenged both the broader conservative attack and the specific doctrinal responses.<sup>60</sup> I am largely sympathetic to those broader defenses of the administrative state, but this brief symposium essay is not the place to discuss them in detail. Still, perhaps a couple of aspects of the Title IX experience might be of interest to participants in the broader conversation.

Start with the following observation: In the civil rights era (roughly beginning with the enactment of the Civil Rights Act of 1964), the most intense political, judicial, and academic debates have involved the proper conception of discrimination—and particularly whether discrimination should be understood in terms of intent or effect.<sup>61</sup> Yet the most intense debates over Title IX do not raise that issue at all. As I showed in Part I, even the most aggressive positions taken by OCR are fully consistent with the narrow “core” conception of discrimination as disparate treatment. Yet those positions have triggered significant controversy for effecting major social changes.

The questions that have caused such controversy under Title IX have largely been questions of implementation: When discrimination has gone on for years, how do we assess its effect in discouraging its victims from seeking opportunities (college athletics)? Do we identify instances of discrimination at the individual level or at the level of the overall program (transgender students’ rights)? And when an individual discriminates against a student in an educational program, how do we determine whether to attribute that individual’s discrimination to the school (sexual harassment and assault)?<sup>62</sup>

Whoever applies Title IX’s non-discrimination requirement must answer questions like these. The answers are unlikely to be dictated by the statutory text, nor will broader legal principles compel an answer one way or another. The legal system thus has two choices: The courts may render Title IX’s non-discrimination requirement inoperative until Congress specifies the answers to these questions. They may accomplish this end by applying either a constitutional non-delegation doctrine or a canon of narrow interpretation that is informed by non-delegation principles. Or the legal system may accept that *some* other entity, whether an agency or a court, will fill in these details.

One might argue that I am describing the first option in too-extreme terms. Perhaps applying the non-delegation doctrine would not render Title IX totally inoperative because the statute could apply in any case in which

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<sup>60</sup> See generally Gillian E. Metzger, *The Supreme Court, 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017) (presenting the most magisterial defense to date of the administrative state).

<sup>61</sup> See *supra* note 2.

<sup>62</sup> See generally Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501 (2005) (providing an important argument that many of the disputes that appear to be about statutory interpretation are better understood as focusing on questions of implementation).



the unresolved implementation questions did not arise. The problem, though, is that those implementation questions are likely to arise in an incredibly broad range of cases. Many cases turn on what inferences of discrimination can be drawn from ambiguous evidence; it is impossible to resolve those cases without having a baseline empirical understanding of what sorts of actions raise plausible or strong inferences of discrimination. Many other cases turn on attribution: Is a professor's act of discrimination attributable to a school? An admissions officer's? What if these acts are in conflict with policy statements adopted by the highest corporate bodies of the school? It is only in rare cases in which one can avoid the implementation issues.

To require Congress to anticipate and specify answers to these questions is to impose a substantial hurdle to achieving the basic goal of non-discrimination—the basic goal that, everyone agrees, Congress endorsed in adopting Title IX. Many of these questions cannot be fully anticipated, at least in their crucial details, in advance of the application of the statute to particular facts. To hold up operation of the statute in areas raising them will delay achievement of the non-discrimination goal at the same time as it imposes a great burden on Congress to continually add detail to the law. Political polarization might in fact prevent Congress from responding and thus ensure that the operation of the statute will be held up indefinitely.<sup>63</sup>

The courts have taken a different tack. Where Title IX's text leaves open significant implementation questions, they have not refused to enforce the statute. Rather, they have provided the answers to these questions themselves. The lower courts have sometimes deferred to OCR's implementation decisions—most notably in the intercollegiate athletics cases.<sup>64</sup> But the Supreme Court has tended to go its own way. The Court has treated these implementation questions as issues of statutory interpretation that judges should have the primary role in deciding. Thus, the Court has rejected OCR's views about institutional liability and adopted its own actual-knowledge-plus-deliberate-indifference test.<sup>65</sup> And even when it has agreed with the agency—as it did in determining that retaliation was a form of sex discrimination prohibited by Title IX—it has done so on the basis of its own independent interpretation of the statute.<sup>66</sup>

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<sup>63</sup> See Tani, *supra* note 45, at 1895 (suggesting that political polarization in Congress will prevent it from adopting amendments that update Title IX); see generally Richard L. Hasen, *End of the Dialogue? Political Polarization, the Supreme Court, and Congress*, 86 S. CAL. L. REV. 205 (2013) (discussing the effects of polarization on the power of Congress relative to the Supreme Court).

<sup>64</sup> See, e.g., *Cohen v. Brown Univ.*, 101 F.3d 155, 173 (1st Cir. 1996).

<sup>65</sup> See *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 282–85, 290 (1998) (rejecting aided-by-the-agency-relationship standard for institutional liability that appeared in OCR guidance).

<sup>66</sup> See *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 178 (2005) (holding that Title IX prohibits retaliation, and stating that “we do not rely on the Department of Education’s regulation at all, because the statute itself contains the necessary prohibition”).

There is a strong argument, however, that it is OCR that is best positioned to decide these implementation questions. That argument is the two-pronged one familiar from longstanding debates in administrative law: that an agency is likely to develop greater expertise on the policy issues underlying implementation, and that the agency is likely to be more politically responsive than the courts.<sup>67</sup> The questions that have caused the greatest controversy in Title IX law are not strictly matters of legal interpretation. Their answers are not dictated by statutory text or legislative purpose. They require empirical and predictive judgments about the frequency of discrimination and the most effective means of preventing it, as well as the resolution of normative questions about how to balance the various interests at stake. Judges are generalists who are constrained by the evidence presented by the parties to a case; they are unlikely to have as strong a basis for making empirical and predictive judgments as that of agency officials. And if judges balance the interests incorrectly, the only remedy is the onerous one of correction by Congress. Agency officials, by contrast, work for the President and can thus be expected to be politically responsive.

All of this, as I said, is familiar. And it has been subject to a familiar line of attack by skeptics of the administrative state. Those skeptics argue that agency staff, driven by a narrow mission orientation, will steamroll their political superiors, override other important interests, and even disregard legal limitations to promote their desired outcomes. Much of the criticism of OCR's implementation of Title IX has followed that template. Critics argue that OCR has used Title IX to impose an extreme social agenda, one not rooted in the statute, and that the agency's actions have disregarded important interests held by those regulated by the law.<sup>68</sup>

As I have shown above, however, it is not fair to say that OCR has exceeded the limitations of Title IX. It has instead resolved implementation questions that the statute's non-discrimination rule does not answer. And in resolving those questions, it has not evaded democratic accountability. Rather, as I show extensively in other work, OCR has balanced the relevant interests in the full light of day.<sup>69</sup> In so doing, it has triggered important public debates. And when its decisions have drawn sufficient public opposition, the political appointees who run the agency have reversed them. When the Obama-era OCR's pronouncements on transgender rights and campus sexual assault triggered major public controversies, they found their way into the 2016 presidential race. After the election of President Trump, the agency withdrew the Obama-era transgender rights policy and prepared new regulations to displace the Obama-era sexual assault policy. OCR has thus been a venue for democratic deliberation over Title IX's implementation

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<sup>67</sup> See, e.g., Metzger, *supra* note 60, at 77–87.

<sup>68</sup> See *supra* text accompanying note 5.

<sup>69</sup> The remainder of this paragraph summarizes the argument in Bagenstos, *supra* note 3.

questions. Considerations of democratic accountability thus suggest that the agency should resolve those questions.

#### CONCLUSION

Unlike with other civil rights statutes, the most intense controversies over Title IX have not involved disputes over which conception of discrimination to endorse. Indeed, the disputants on all sides of these controversies have taken for granted the “core” conception of discrimination as intentional disparate treatment. These controversies have instead involved issues of implementation—issues that require assessment of empirical, predictive, and policy questions that the non-discrimination principle cannot itself answer. OCR is well positioned to answer these questions—indeed, plausibly better positioned than any likely alternative decisionmaker—and the critics are wrong to label its actions illegitimate.