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THIS IS WHAT DEMOCRACY LOOKS LIKE: TITLE IX AND THE LEGITIMACY OF THE ADMINISTRATIVE STATE

Samuel R. Bagenstos*

THE TRANSFORMATION OF TITLE IX: REGULATING GENDER EQUALITY IN EDUCATION. By *R. Shep Melnick*. Washington, D.C.: Brookings Institution Press. 2018. Pp. 325. \$35.99.

We are, once again, in the middle of a battle over the legitimacy of the administrative state.¹ An increasingly vocal band of scholars criticizes administrative agencies as unaccountable, elitist, captured, and implementing bad policy.² The more populist elements of the Trump Administration's rhetoric have taken this critique to a broader audience, to great political effect.³ Though the picture is complex, the Roberts Court has appeared sympathetic to important aspects of the critique.⁴

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1. See generally Gillian E. Metzger, *The Supreme Court, 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017).

2. See *id.* at 31–33 (collecting numerous examples).

3. See, e.g., Evan Osnos, *Trump vs. the “Deep State,”* NEW YORKER (May 14, 2018), <https://www.newyorker.com/magazine/2018/05/21/trump-vs-the-deep-state> [https://perma.cc/RT43-A4K7] (“Trump got to Washington by promising to unmake the political ecosystem, eradicating the existing species and populating it anew. This project has gone by various names: Stephen Bannon, the campaign chief, called it the ‘deconstruction of the administrative state’—the undoing of regulations, pacts, and taxes that he believed constrain American power. In Presidential tweets and on Fox News, the mission is described as a war on the ‘deep state,’ the permanent power elite.”). For a good recent assessment of the Trump Administration's legal efforts in this area, see Kathy Wagner Hill, *The State of the Administrative State: The Regulatory Impact of the Trump Administration*, 6 EMORY CORP. GOVERNANCE & ACCOUNTABILITY REV. 25 (2019).

4. For a careful description of the many ways in which recent doctrine has reflected a distrust of the administrative state, see Metzger, *supra* note 1, at 17–31. It is true that the Roberts Court has been less than maximally aggressive in seeking to roll back the administrative state. In *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), for example, the Court, by a 5–4 vote, refused to overrule prior cases like *Auer v. Robbins*, 519 U.S. 452 (1997), which demand deference to an agency's reasonable interpretation of its regulations. But *Kisor* narrowed *Auer* in the same breath that it reaffirmed that decision. See *Kisor*, 139 S. Ct. at 2414–18 (extensively highlighting the limits of *Auer* deference). Just a week earlier, Justice Gorsuch, joined by Chief Justice Roberts and Justice Thomas, argued in favor of reviving a robust constitutional non-delegation doctrine. See *Gundy v. United States*, 139 S. Ct. 2116, 2133–42 (2019) (Gorsuch, J., dissenting). Justice Alito expressed a willingness to “support th[e] effort” to revive the non-delegation doctrine if there were five votes on the Court for doing so. *Id.* at 2131 (Alito, J., concurring in the

Agencies enforcing civil rights laws—and particularly the Department of Education’s Office for Civil Rights (OCR)—have been a principal target of the critics of the administrative state.⁵ The heat on OCR increased with the Obama Administration’s aggressive efforts to enforce Title IX of the Education Amendments of 1972. The Obama-era OCR’s policies on campus sexual assault and the rights of transgender students drew substantial blowback.⁶

With *The Transformation of Title IX*, R. Shep Melnick⁷ steps into this fight—and he takes the side of those who find OCR’s actions illegitimate. Melnick is a leading right-of-center scholar of regulation and the administrative state. In this book, he takes on the administration of Title IX. He focuses on three especially controversial contexts in which the courts and OCR have applied the statute: intercollegiate athletics, campus sexual harassment and assault, and the treatment of transgender students in elementary and secondary schools. He argues that OCR and the courts have, through a process of “institutional leapfrogging,” steadily adopted more and more intrusive rules governing educational entities (pp. 6, 14, 15, 90, 152, 232, 243–44, 253, 255). He contends that these rules are highly contestable and neither specifically required by the statutory text nor envisioned by the statute’s drafters (p. 22). But, he argues, the leapfrogging process—in which the agency pushes forward, then the courts go a bit farther than the agency, then the agency goes even a bit farther, and so on—has enabled these massive innovations in the law to fly under the radar and evade democratic checks or debate (p. 251). OCR’s reliance on subregulatory guidance rather than notice-and-comment rulemaking has in his view facilitated the achievement of that result (p. 243). He concludes that “the evolution of Title IX raises fundamental questions about control, accountability, and legitimacy within a constitutional democracy” (p. 22).

The book offers an important take on some issues of high public salience. It reflects a detailed immersion in the operations of OCR, as well as a strong understanding of the legal doctrinal issues. But the book’s thesis is fundamentally misguided. OCR has not subverted or evaded democracy. Rather, the agency has served as a catalyst for democratic debate, a forum in which that debate has played out, and an implementer of the will of the peo-

judgment). Justice Kavanaugh—the obvious fifth vote—did not participate in *Gundy*. See Jeanie Suk Gersen, *The Supreme Court Is One Vote Away from Changing How the U.S. Is Governed*, NEW YORKER (July 3, 2019), <https://www.newyorker.com/news/our-columnists/the-supreme-court-is-one-vote-away-from-changing-how-the-us-is-governed> [<https://perma.cc/H8RH-SSGH>] (“Kavanaugh’s absence from the case likely changed its outcome.”).

5. See, e.g., 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) [hereinafter Bernstein, *Antidiscrimination Laws*]; David E. Bernstein, *The Abuse of Executive Power: Getting Beyond the Streetlight Effect*, 11 FLA. INT’L U. L. REV. 289, 290–98 (2016) [hereinafter Bernstein, *Abuse of Executive Power*]; Jeremy Rabkin, *Office for Civil Rights*, in *THE POLITICS OF REGULATION* 304 (James Q. Wilson ed., 1980).

6. See *infra* text accompanying notes 20–30.

7. Thomas P. O’Neill, Jr. Professor of American Politics, Boston College.

ple. The Title IX experience, I argue, supports the claim made by some scholars that administrative agencies can be a key locus of democratic deliberation over the scope of basic rights.⁸

When OCR's approaches have become entrenched in the law—as in the case of intercollegiate athletics—it is because those approaches, which may be controversial, nonetheless earn the support of the public and important political actors. But the often-harsh public reaction to OCR's efforts on sexual assault and transgender rights demonstrates that the agency cannot sidestep political debates where such a strong public consensus is not yet available. In these contexts, far from preempting democratic politics, the agency becomes a venue for democratic deliberation and debate. I elaborate on these points in Part I below.

In Part II, I dig into the specific procedural critiques Melnick offers. I show that OCR's reliance on subregulatory guidance has not evaded democratic checks. And I argue that Melnick's claim of "institutional leapfrogging" is probably not correct—and that, in any event, any "leapfrogging" that has occurred has been fully consistent with democratic deliberation.

I should note that this brief Review focuses on Melnick's procedural argument—that OCR's actions subvert democratic decisionmaking. The book is also plainly driven by substantive disagreement with OCR in each of the areas it discusses. Melnick makes clear that he believes that OCR has put too much of an emphasis on gender parity in intercollegiate athletics,⁹ that the agency has adopted a too intrusive and victim-protective regime for campus sexual assault,¹⁰ and that it should not be dictating which bathrooms schools may allow transgender students to use.¹¹ This brief Review is not the place to respond to those arguments on the merits. But it will not come as a surprise to readers that I take a different view than does Melnick on these matters.¹²

8. See Olatunde C.A. Johnson, *Overreach and Innovation in Equality Regulation*, 66 DUKE L.J. 1771 (2017); Bertrall L. Ross II, *Administering Suspect Classes*, 66 DUKE L.J. 1807 (2017); Bertrall L. Ross II, *Embracing Administrative Constitutionalism*, 95 B.U. L. REV. 519 (2015).

9. See p. 78.

10. See p. 200.

11. See p. 231.

12. I defended the substance of the Obama-era OCR's guidelines on campus sexual assault and harassment in Samuel R. Bagenstos, *What Went Wrong with Title IX?*, WASH. MONTHLY (Sept./Oct. 2015), <https://washingtonmonthly.com/magazine/septoct-2015/what-went-wrong-with-title-ix/> [<https://perma.cc/DF7E-LQG2>]. I defended the Obama-era OCR's approach to transgender rights in Brief for Professors Samuel Bagenstos et al. 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.

I. THE VIEW FROM 30,000 FEET: EXPLAINING THE PATTERN OF POLICY
OUTPUTS

Melnick argues that OCR has evaded democratic checks by pursuing major policy through enforcement actions and subregulatory guidance, and that the courts have aided and abetted the agency through a below-the-radar process of “institutional leapfrogging.” He supports this claim by digging into institutional detail. He pursues the various agency and court actions in each of his three policy areas of focus and identifies a variety of moments in which OCR failed to pursue a more overt strategy of policy change.

Melnick’s close-to-the-ground approach has a real value, and one cannot fully refute his argument without taking it on its terms. I attempt to do that in Part II below. But we can gain a useful reality check by taking a wider-angle view. If we look at the overall pattern of policy outputs in Melnick’s three areas of focus, does that pattern suggest that OCR and the courts have evaded democratic checks?

The answer, I would submit, is no. Melnick discusses three policy areas. In one of them—athletics—OCR’s approach has become entrenched over many decades across several presidential administrations. In the others—sexual harassment and the rights of transgender students—the Obama Administration’s OCR took a much more aggressive approach than the agency had in the past, its actions provoked significant judicial resistance, and the Trump Administration largely reversed course. This pattern demonstrates responsiveness to, not insulation from, public opinion.

Melnick asserts that Title IX’s regulation of college athletics has only “seldom” been accompanied by “sustained debate over the meaning of equality or the purpose of athletics in the educational setting” (p. 88). Rather, he says, policymaking has expanded through steady accretion “by administrators and judges who almost always claim they are just following previously established policy” (p. 88). This process, he argues, “narrowed the political debate” and hid the true stakes from the public (p. 144). Yet Melnick himself identifies numerous occasions through the years in which the statute’s application to athletics was a prominent subject of public legislative and administrative debate.

During the period in which the Department of Health, Education, and Welfare (HEW) was drafting its initial Title IX regulations in the early 1970s, Congress specifically addressed the athletics issue. Senator John Tower proposed to amend the statute to exempt “revenue-generating” sports, but the Senate rejected that proposal (p. 94). Instead, Congress adopted the so-called Javits Amendment, which required the Secretary to issue Title IX regulations that included “with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports.”¹³ When President Ford’s HEW Secretary issued those regulations in 1975, the House Education

13. Education Amendments of 1974, Pub. L. No. 93-380, § 844, 88 Stat. 484, 612 (1974); see p. 94.

and Labor Committee held hearings to evaluate them.¹⁴ But neither house of Congress exercised its pre-*Chadha*¹⁵ legislative veto authority.¹⁶ It is true that President Carter's HEW Secretary refused to submit a further set of athletic guidelines to Congress for approval in 1978 (p. 97). But that hardly kept the issue out of public political debate. When Congress passed the Civil Rights Restoration Act in 1988, to overturn the Supreme Court's *Grove City*¹⁷ case and extend Title IX's protections across an entire university that receives federal funds, the floor debates indicated "that the enactment was aimed, in part, at creating a more level playing field for female athletes."¹⁸ George H.W. Bush assumed the presidency the next year. His administration "announced that it would make enforcement of Title IX one of its top priorities" and "backed its words with action" (p. 103). President Clinton's OCR did the same (p. 105).

Although some Republican members of Congress who served in the new Gingrich majority sought to "rewrite Title IX to reverse OCR and the courts," Melnick notes that they "got nowhere" (p. 120). Public opinion stood firmly in favor of the use of Title IX to expand women's athletic opportunities, even if that policy imposed costs on men's sports. "A 2000 *Wall Street Journal*/NBC poll found that 70 percent of Republicans and 79 percent of Democrats approved of 'cutting back on men's athletics to ensure equivalent athletic opportunity for women.'"¹⁹ When the George W. Bush Administration tried to roll back athletics enforcement a few years later, it found itself forced to back away in the face of political pressure (pp. 120–22).

Title IX's application to intercollegiate athletics hardly looks like a case in which a backroom bureaucratic cabal, with the aid of a willing judiciary, snuck one past the American people. Rather, it looks like a case in which the American people got what they wanted. The issue was prominent, it was fought out in the open on repeated occasions for a number of years, and the supporters of expanded varsity athletic opportunities for women won.

The other two areas discussed by Melnick offer useful points of comparison. With regard to campus sexual assault, the Obama Administration took a particularly aggressive enforcement posture—one that was highly visible to the public (pp. 197–98). As Melnick notes, the administration introduced the new posture in a 2011 Dear Colleague letter "announced at a well-publicized

14. See *Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Educ. of the H. Comm. on Educ. & Labor*, 94th Cong. (1975).

15. *INS v. Chadha*, 462 U.S. 919 (1983).

16. See *McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 287 (2d Cir. 2004).

17. *Grove City Coll. v. Bell*, 465 U.S. 555 (1984).

18. *Cohen v. Brown Univ.*, 991 F.2d 888, 894 (1st Cir. 1993) (collecting examples); see also *McCormick*, 370 F.3d at 287–88 ("The congressional debate leading to the passage of this statute demonstrates concern by members of Congress about ensuring equal opportunities for female athletes.")

19. P. 120 (quoting Welch Suggs, *Most Americans Favor Cutting Men's Sports to Add Women's*, *Poll Finds*, *CHRON. HIGHER EDUC.* (June 23, 2000), <https://www.chronicle.com/article/Most-Americans-Favor-Cutting/106684> (on file with the *Michigan Law Review*)).

event” that included speeches from Vice President Biden and Secretary of Education Duncan (pp. 152–53). The administration consolidated that aggressive posture by issuing a new OCR guidance document in 2014—guidance accompanied by an extensive report from a presidential task force and a statement from President Obama himself (pp. 149–51).

The Obama Administration’s approach drew equally aggressive, and equally public, pushback—including in the Republican Party’s 2016 platform.²⁰ Once it was in office, the Trump Administration quickly withdrew the relevant OCR guidance documents from the Obama Administration (p. 222). And in November 2018 it issued proposed rules that would mark a dramatic change from the prior administration by increasing protections for those accused of sexual assault.²¹

Is this an example of bureaucrats subverting the democratic process? If so, which bureaucrats? Those who worked in the Obama Administration? Or those who worked in the Trump Administration? As Karen Tani shows, the Obama Administration’s actions involving campus sexual assault capped decades of work by social movement activists who organized to oppose violence against women.²² Those activists achieved major success through the legislative process by securing the enactment of the Violence Against Women Act.²³ But the Supreme Court invalidated that statute’s key remedies in *United States v. Morrison*.²⁴ Tani aptly notes that *Morrison* “left a shell of a statute: VAWA remained standing (largely in the form of funding streams for violence prevention, victims’ services, and law enforcement), but the aspirations at its core had received a significant blow.”²⁵

Activists fighting campus sexual assault thus secured support for their agenda from a majority of elected legislators, only to have their victory taken away by a 5–4 majority of unelected judges on the Supreme Court. Then, after the election of a president and vice president who supported their cause, those activists, backed by a “robust grassroots movement,”²⁶ turned to the administrative process to help secure the same goal. Once President Trump was elected, though, things changed. Although there was “no coherent grassroots social movement [that sought] to undo OCR’s work on college campuses”²⁷—only elite organizations like the Foundation for Individual Rights

20. See Jake New, *Trump, Clinton and Sex Assault*, INSIDE HIGHER ED (Oct. 11, 2016), <https://www.insidehighered.com/news/2016/10/11/approaches-campus-sexual-assault-would-differ-under-trump-clinton> [https://perma.cc/X9H9-X6VF].

21. See Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61,462 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106).

22. See 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, 1854–78 (2017).

23. See *id.* at 1859–60.

24. 529 U.S. 598 (2000).

25. Tani, *supra* note 22, at 1863 (footnote omitted).

26. *Id.* at 1875.

27. *Id.* at 1896.

in Education—the Trump Administration quickly acted to reverse the Obama-era policies.

Rather than being hidden from the public in the obscurity of bureaucratic hallways, OCR's actions involving sexual violence on campus were the subject of significant political debate. And far from displacing the debate over the issue, the agency was a key subject of that debate—and a key arena in which interested members of the public mobilized to achieve their policy goals. If anything, the Obama Administration's aggressive efforts to enforce Title IX against sexual violence on campus would thus seem to have more democratic legitimacy than the Trump Administration's retrenchment. But either way, the shifting administrative positions represented the democratic process in action.

When we look at Title IX protections for transgender students, we find a similar story: The Obama Administration took an aggressive and new enforcement posture. That posture was part of a broader policy of advancing the rights of transgender persons—one that was not limited to Title IX or education.²⁸ The Obama Administration's efforts to advance transgender rights, both in and out of education, caused significant political controversy. As Melnick notes, they “became front-page news in 2016 when the Department of Justice filed suit against the state of North Carolina, which had recently enacted legislation requiring that access to public restrooms be determined solely by the sex listed on an individual's birth certificate” (p. 226). When Donald Trump became president, his administration quickly reversed course on the Obama Administration's approach, in and out of the education context.²⁹ Again, nothing was hidden from the public. And the public responded. Although the last chapter of the story of transgender rights in the United States will not be written for some time to come, OCR's shifting positions on the issue across administrations reflect a persistent divide in public opinion.³⁰

From 30,000 feet, then, Melnick's cases do not seem to fit the story of bureaucrats and judges subverting the democratic process. Rather, the more

28. See p. 226 (noting that OCR's efforts were “one part of an administration-wide effort to extend coverage of Title VII and Title IX to transgender employees and students”); Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity, 77 Fed. Reg. 5662 (Feb. 3, 2012) (to be codified at 24 C.F.R. pts. 5, 200, 203, 236, 400, 570, 574, 882, 891, 982) (protecting against gender identity discrimination in HUD programs); Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,376, 31,471–72 (May 18, 2016) (to be codified at 45 C.F.R. pt. 92) (interpreting section 1557 of the Affordable Care Act to protect against discrimination based on gender identity).

29. See, e.g., Zack Ford, *Trump Just Dismantled One of the Last Major Protections Keeping Transgender People Safe*, THINK PROGRESS (May 24, 2019, 2:19 PM), <https://thinkprogress.org/trump-administration-targets-last-major-transgender-protection-section-1557-80d1ce664424/> [<https://perma.cc/FC3R-7JZQ>].

30. See, e.g., Anna Brown, *Republicans, Democrats Have Starkly Different Views on Transgender Issues*, PEW RES. CTR.: FACT TANK (Nov. 8, 2017), <https://www.pewresearch.org/fact-tank/2017/11/08/transgender-issues-divide-republicans-and-democrats/> [<https://perma.cc/EN2N-X9F6>].

apt story appears to be one of democratic deliberation and political responsiveness. As Melnick himself acknowledges, “since the creation of the Department of Education in 1980, OCR has rarely been out of step with the department secretary, the White House staff, or the Department of Justice” (p. 252).

II. THE VIEW FROM THE GROUND: ASSESSING THE PROCEDURAL CRITIQUE

From closer to the ground, things look no better for Melnick’s illegitimacy argument. Melnick makes two connected arguments that OCR and the courts have employed a process that has evaded democratic checks. More narrowly, he argues that OCR has “sidestep[ped]” the administrative-law “constraints” designed “to ensure that administrators consult a wide array of interests, gather data on both the costs and benefits of regulation, consider alternative approaches for addressing the problem, and explain their policy in a way that is accessible to attentive publics and reviewing judges” (pp. 242–43). Most notably, the agency “almost never uses notice-and-comment rulemaking” but instead relies on guidance documents, Dear Colleague Letters, and similar informal pronouncements to set forth its views of what the statute requires (p. 243). More broadly, he argues that “judges and administrators have bestowed upon themselves the authority to ‘update’—read amend—Title IX through the opaque forms of institutional leapfrogging” (p. 243). Neither the narrow nor the broad argument, though, establishes democratic illegitimacy here.

A. *The Reliance on Subregulatory Guidance*

Take the narrow argument first. Melnick joins a number of others who have challenged OCR’s reliance on subregulatory letters and guidance documents to make policy statements.³¹ They contend that these subregulatory documents have purported to impose requirements not demanded by the statute or its implementing regulations; that OCR has threatened to withhold federal funds from universities that do not comply with them; and that those institutions have predictably knuckled under. As Professors Gersen and Suk put it (speaking about sexual assault on campus specifically), OCR thus “achieved complete compliance with its nonbinding guidance document without ever having to defend its reasoning through public comments or judicial review.”³²

It’s worth unpacking this claim. Everybody seems to acknowledge that OCR’s subregulatory statements are not binding law in any formal sense. A school could not be held liable, or have its federal funds withheld, simply for violating those statements. It is only the violation of the statute or its imple-

31. See Bernstein, *Antidiscrimination Laws*, *supra* note 5, at 1387–88; Bernstein, *Abuse of Executive Power*, *supra* note 5, at 290–98; Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CALIF. L. REV. 881 (2016).

32. Gersen & Suk, *supra* note 31, at 909.

menting regulations that could lead to liability or withholding. And such a violation would have to be established in an administrative proceeding brought by OCR, with full judicial review of any legal question,³³ or in a private suit brought by an injured party, in which the court would ultimately decide what the law was. OCR simply does not have unchecked power to rewrite the requirements of Title IX. A school can always defend itself against a claim and insist that a court decide whether the agency's interpretation was correct.³⁴

Some of the critics assert that OCR can effectively bully schools into not defending themselves, because "the threat of lost federal funds is a big stick to wield."³⁵ To the contrary, as Melnick himself concludes, "eventually it became clear to almost everyone that the threat was an empty one."³⁶ Federal agencies in general—and OCR in particular—virtually never cut off federal funds in response to violations of the antidiscrimination conditions Congress has placed on that spending.³⁷ The major exception to this trend occurred during efforts to promote racial desegregation in elementary and secondary schools during the late 1960s.³⁸ But even in those cases, OCR quickly reversed the overwhelming majority of funding cut-offs—despite little progress toward compliance in many cases.³⁹ And as Melnick notes, "the

33. Gersen and Suk acknowledge the point. *See id.* ("To take away a school's federal funding, OCR would be statutorily required to hold a hearing and explain the precise way in which the school had failed to comply with a Title IX obligation. That explanation and legal analysis could be challenged in court and a judge would evaluate whether the interpretation and policy judgment articulated in OCR's reasoning was consistent with Title IX and the Administrative Procedure Act (APA). The fact that the school deviated from the DCL itself could not be treated as a per se Title IX violation." (footnotes omitted)).

34. *See* Blake Emerson, *The Claims of Official Reason: Administrative Guidance on Social Inclusion*, 128 YALE L.J. 2122, 2179 (2019) ("[T]he agency's use of the guidance in complaint investigations and settlements was not dispositive of whether the agency would allow a party the opportunity to contest its interpretations in an adjudicatory enforcement proceeding. To the contrary, the statutory and administrative enforcement scheme clearly contemplates an opportunity to contest the agency's legal interpretation in such a proceeding.").

35. *See* Gersen & Suk, *supra* note 31, at 909. Melnick notes that the Obama Administration's Assistant Secretary of Education for Civil Rights, Catherine Lhamon, threatened to take away federal education funds from institutions that failed to comply with the requirements set forth in OCR's subregulatory guidance concerning sexual assault but that she "never actually pulled the trigger on the funding cutoff." P. 151.

36. P. 47; *see also* Samuel R. Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 DUKE L.J. 345, 409 (2008) (stating that "the threat that federal funds will be withheld is remote at best").

37. *See, e.g.*, STEPHEN C. HALPERN, ON THE LIMITS OF THE LAW: THE IRONIC LEGACY OF TITLE VI OF THE 1964 CIVIL RIGHTS ACT 294–95 (1995) (noting OCR's reluctance under administrations of both political parties to use the fund-termination sanction); Eloise Pasachoff, *Agency Enforcement of Spending Clause Statutes: A Defense of the Funding Cut-Off*, 124 YALE L.J. 248, 252–53 (2014) (noting that funding terminations are extremely rare).

38. *See* Pasachoff, *supra* note 37, at 252.

39. *See* p. 47.

federal government has *never* terminated funding to educational institutions for violating Title IX.”⁴⁰

If the threat of funding termination is an empty one, how did the Obama-era OCR bully universities into giving up the fight? Melnick argues that the agency did so by prominently announcing its investigations, thus creating public relations problems for the agency’s targets, and by ensuring that the investigations would be both extensive and expensive to defend. This combination, he contends, “put enormous pressure on schools to reach legally binding settlements with OCR.”⁴¹ Gersen and Suk similarly argue that schools settle in significant part “because the political climate makes being seen as not opposing sexual violence a public relations nightmare.”⁴²

Assume, for a moment, that Melnick, Gersen, and Suk are correct—that schools with meritorious defenses settle to avoid the public-relations and other costs of being subject to an OCR investigation. Note that those costs—and thus the incentive to knuckle under—would be *exactly the same* even if the agency was not relying on subregulatory materials. In a world in which OCR had not issued Dear Colleague Letters, guidance, and other such policy pronouncements, it would still open investigations of schools that violated agency leaders’ understandings of what the law required. Those investigations would still impose costs on their targets. And their targets would have the same incentive to settle.

The only difference between a world with and a world without subregulatory guidance would be this: In a world with subregulatory guidance, institutions that are targets or potential targets of OCR investigations will know how agency officials intend to resolve questions left open by the statute and implementing regulations. In a world without subregulatory guidance, they will not have that knowledge.⁴³ That means that they will not be able to know in advance how to avoid an agency enforcement action—an ambiguity that may lead overly cautious university bureaucrats to go farther than necessary to stay on the right side of the agency.⁴⁴ And they will not be as able to

40. P. 35; *see also* p. 40 (“Title IX’s central enforcement mechanism, the termination of federal funds, has proved unworkable in practice.”).

41. P. 151; *see also* p. 45 (“Going through a lengthy investigation can be costly to an institution both financially and in terms of its reputation. That is why many colleges have agreed to follow OCR sexual harassment guidance even when it differs substantially from the Supreme Court’s interpretation of Title IX.”).

42. Gersen & Suk, *supra* note 31, at 909.

43. *See, e.g.*, Emerson, *supra* note 34, at 2180–81 (“If the agency concludes from its enforcement experience that recipients’ obligation to establish an equitable grievance procedure requires the use of a preponderance of the evidence standard in that procedure, merely precautionary language would fail to disclose that conclusion. Parties would be unaware of the agency’s true position—that such evidentiary standards are required under the regulation.” (footnote omitted)).

44. For an argument that uncertainty leads to overdeterrence under plausible conditions, see John E. Calfee & Richard Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 VA. L. REV. 965 (1984). For an argument that overreaching in the applica-

detect instances in which the agency is operating under an interpretation that deviates from its usual understanding of the statute and regulations. A world without subregulatory guidance is thus not likely to address the problem Melnick, Gersen, and Suk identify—but it is likely to be both less efficient and less transparent.

Perhaps, though, courts will defer to subregulatory guidance when interpreting Title IX. If courts feel bound to defer to that guidance, then OCR will be able to effectively make new law without going through the notice-and-comment process.⁴⁵ *Auer v. Robbins* requires courts to defer to agencies' interpretations of their own regulations unless those interpretations are "plainly erroneous or inconsistent with the regulation."⁴⁶ As Melnick makes clear, though, the courts have not reliably deferred to the interpretations OCR has issued through subregulatory means (pp. 15, 40, 45, 226). These courts have notably included the Supreme Court, which has twice refused to rely on the agency's pronouncements in interpreting Title IX.⁴⁷

Indeed, even in cases in which courts have *cited* doctrines of deference in endorsing OCR's interpretations, it is likely that they were not deferring to agency decisions they believed to be questionable but reasonable; rather, they were upholding agency decisions they agreed with on the merits. Melnick himself notes the Gavin Grimm case as an example of this phenomenon (pp. 233–34). There, a majority of the Fourth Circuit held that Title IX protected a transgender student's right to use the restroom for the gender with which he identified.⁴⁸ The court rested its holding on *Auer* deference to OCR's interpretation.⁴⁹ In accordance with the Fourth Circuit's decision, the district court issued a preliminary injunction requiring the school to permit Grimm to use the appropriate restroom.⁵⁰ The Supreme Court then granted certiorari to review the Fourth Circuit's decision.⁵¹ While the case was pending, the Trump Administration withdrew the guidance to which the lower

tion of Title IX has resulted from the actions of overly cautious university bureaucrats, rather than overly aggressive enforcement by OCR, see Bagenstos, *supra* note 12.

45. See, e.g., Brief for the Cato Inst. et al. as *Amici Curiae* Supporting Petitioner at 14–15, *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019) (No. 18-15), 2019 WL 460142 (arguing that this is what OCR attempted to do in Title IX cases involving discrimination against transgender individuals); Jonathan H. Adler, *Auer Evasions*, 16 GEO. J.L. & PUB. POL'Y 1, 20–21 (2018) (same).

46. 519 U.S. 452, 461 (1997) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)).

47. 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"); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998) (rejecting aided-by-the-agency-relationship standard for institutional liability that appeared in OCR guidance).

48. 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).

49. See *id.* at 717–24.

50. *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, No. 4:15CV54, 2016 WL 3581852 (E.D. Va. June 23, 2016), *vacated*, 853 F.3d 729 (4th Cir. 2017).

51. *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 137 S. Ct. 369 (2017).

court had deferred.⁵² The Supreme Court vacated the Fourth Circuit's decision and remanded for further proceedings in light of the Trump Administration's action.⁵³ On remand, the Fourth Circuit agreed to the parties' stipulation to vacate the preliminary injunction.⁵⁴

In a concurrence to that decision, the judges who had ruled for Grimm in the initial appeal despaired that "[t]oday, G.G. adds his name to the list of plaintiffs whose struggle for justice has been delayed and rebuffed."⁵⁵ They compared Grimm to other "brave individuals—Dred Scott, Fred Korematsu, Linda Brown, Mildred and Richard Loving, Edie Windsor, and Jim Obergefell, to name just a few—who refused to accept quietly the injustices that were perpetuated against them."⁵⁶ They described Grimm's case as being "about a boy asking his school to treat him just like any other boy"; "about protecting the rights of transgender people in public spaces and not forcing them to exist on the margins"; and "about governmental validation of the existence and experiences of transgender people, as well as the simple recognition of their humanity."⁵⁷ And they said that Grimm's suit had "demonstrated that some entities will not protect the rights of others unless compelled to do so."⁵⁸

"In this statement," Melnick concludes, "Judges Davis and Floyd make it clear that they were not simply deferring to OCR's expertise in the original case"; rather, their original decision reflected their own view of the scope of equal rights protected by Title IX (p. 246). That conclusion is quite plausible. When one reads their concurring opinion, which is driven by a certainty in the rightness of Grimm's cause, it is hard to believe that Judges Davis and Floyd would have ruled against Grimm even if OCR had been silent.

On a very plausible reading, then, *Auer* deference did not make a difference to the Fourth Circuit's resolution of Gavin Grimm's case—even though that court's initial decision purported to rely *entirely* on deference. If the Fourth Circuit's action was not unusual, and courts are using agency pronouncements as mere decoration for decisions they would have made anyway, then there is particular reason not to worry that OCR will bootstrap new legal requirements through the promulgation of unaccountable guidance. Although some early work concluded that courts treated the *Auer* doc-

52. Ariane de Vogue et al., *Trump Administration Withdraws Federal Protections for Transgender Students*, CNN (Feb. 23, 2017, 10:16 AM), <https://www.cnn.com/2017/02/22/politics/doj-withdraws-federal-protections-on-transgender-bathrooms-in-schools/index.html> [<https://perma.cc/C4FT-W3J7>].

53. See *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 137 S. Ct. 1239 (2017).

54. See *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 853 F.3d 729 (4th Cir. 2017).

55. *Id.* at 730 (Davis, J., joined by Floyd, J., concurring).

56. *Id.*

57. *Id.*

58. *Id.* at 731.

trine as a virtual guarantee of a government victory,⁵⁹ more recent empirical analyses suggest that *Auer* is no stronger than any other deference doctrine.⁶⁰ And the Supreme Court's recent decision in *Kisor v. Wilkie*, which purported to reaffirm *Auer* deference to agencies' interpretations of their own regulations, is likely to weaken *Auer* even further. In *Kisor*, the Court emphasized that the *Auer* doctrine has a narrow scope, one that "gives agencies their due, while also allowing—indeed, obligating—courts to perform their reviewing and restraining functions."⁶¹

There are other protections against potential OCR bootstrapping. As Melnick notes (pp. 51–52), the Supreme Court's decision in *Alexander v. Sandoval* holds that there is no private right of action to enforce legal rules that derive only from regulations rather than from the statute itself.⁶² That holding significantly limits the ability of OCR to impose new legal obligations—at least to the extent that those obligations will be enforced by private parties. Perhaps more important, because Title IX was enacted pursuant to the spending power, the Court has insisted that any obligations imposed by the statute have been made clear to schools at the time they accepted federal funds.⁶³ As a result, OCR will not be able to "surpris[e] participating States with postacceptance or 'retroactive' conditions."⁶⁴

Subregulatory pronouncements simply are not very strong tools for an agency to use to entrench its views of the law. And, indeed, reliance on such pronouncements has been the "undoing" of the Obama Administration's aggressive policies on sexual harassment and transgender rights.⁶⁵ It was precisely because OCR issued those policies through relatively informal means

59. See William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1142 (2008).

60. See Cynthia Barmore, *Auer in Action: Deference After Talk America*, 76 OHIO ST. L.J. 813 (2015); Richard J. Pierce, Jr. & Joshua Weiss, *An Empirical Study of Judicial Review of Agency Interpretations of Agency Rules*, 63 ADMIN. L. REV. 515 (2011); William Yeatman, Note, *An Empirical Defense of Auer Step Zero*, 106 GEO. L.J. 515 (2018). See generally Nicholas R. Parrillo, *Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries*, 36 YALE J. ON REG. 165, 213–14 (2019) ("[J]udicial deference to guidance is not as strong as we might assume. For one thing, agency win rates under *Auer* have fallen in recent years, so they are comparable with those under the alternative deference regime of *Chevron*, perhaps indicating that *Auer* is not some all-powerful government weapon. Plus, a recent study indicates that, in the U.S. circuit courts, over half the opinions reviewing guidance documents' interpretations of statutes or legislative rules do so not under the strongly deferential *Chevron* framework or the supposedly super-deferential *Auer* framework, but instead under the *Skidmore* framework, which offers the weakest deference of the three." (footnotes omitted)).

61. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019).

62. 532 U.S. 275 (2001).

63. See, e.g., *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287 (1998). For my effort to untangle current Spending Clause law, see Samuel R. Bagenstos, *The Anti-leveraging Principle and the Spending Clause After NFIB*, 101 GEO. L.J. 861 (2013).

64. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 25 (1981).

65. Adler, *supra* note 45, at 23–24.

that the Trump Administration was able to quickly reverse them. Had the Obama-era agency used more formal notice-and-comment rulemaking, the succeeding administration would have likely been forced to go through its own time-and-resource-consuming rulemaking process to shift course.

B. “Institutional Leapfrogging”

What about the “institutional leapfrogging” critique? Have administrators and courts been able to make major changes in the law and society, all while hiding the nature and scope of their innovations, by “extend[ing] regulation in a large number of small steps, with each claiming to defer to the other”? (p. 251). Melnick describes the process of “institutional leapfrogging” as follows:

[T]he courts defer to agency guidelines while incrementally expanding upon them; the agency then argues that the judiciary has endorsed its reading of the statute, emboldening it to be a little more aggressive; and the court then incorporates this administrative iteration into its interpretation of the law. Each denies adding anything new while together they build a more demanding regulatory program. (p. 117)

Because it is difficult for observers to follow each step of a policy’s evolution, Melnick argues that this process of incremental expansion “provid[es] political camouflage to these policy innovations” (p. 251).

An initial problem with this argument is that it doesn’t fit Melnick’s data. Only one of the three case studies—athletics—seems even close to involving a pattern of “institutional leapfrogging” as Melnick defines it. In the area of campus sexual harassment and assault, OCR repeatedly found itself in *conflict* with the courts. In its 1998 *Gebser* decision,⁶⁶ the Supreme Court refused to defer to the standard for institutional liability that appeared in OCR’s 1997 sexual harassment guidance. As Melnick notes, when the Obama Administration’s OCR returned to this field in 2011, it “decided that the Court’s interpretation of Title IX was too conservative” and “staked out a much more aggressive stance,” which “meant that OCR could not count on federal courts to enforce its guidelines through private suits” (p. 153). Indeed, the courts pushed back against OCR’s actions by holding that universities had denied accused students due process by adopting the procedures suggested by the agency’s guidance (p. 152). And, in any event, the Obama-era OCR made no attempt to hide its newly aggressive stance toward rooting out sexual harassment and assault.⁶⁷

In the area of transgender rights, any effort at “institutional leapfrogging” was smothered in its crib. Here’s what happened: In January 2015,

66. *Gebser*, 524 U.S. 274.

67. See p. 198 (comparing earlier OCR efforts in this area, which took place “with little fanfare,” with the issuance of guidance documents in 2010, 2011, and 2014, which “received the full blessing of the Obama administration, with Vice President Biden often playing a leading role”).

OCR's Acting Deputy Assistant Secretary for Policy sent a letter to a transgender rights advocate. That letter said, among other things, that "[w]hen a school elects to separate or treat students differently on the basis of sex," it "generally must treat transgender students consistent with their gender identity."⁶⁸ The next year, in its opinion in the Gavin Grimm case, the Fourth Circuit deferred to the interpretation set forth in that letter.⁶⁹ And less than a month after the Fourth Circuit's decision, OCR (together with the Civil Rights Division of the Department of Justice) issued a more extensive Dear Colleague Letter on the rights of transgender students.⁷⁰ The Dear Colleague Letter, which reaffirmed the 2015 letter but addressed a broader variety of questions regarding transgender students' rights, said that its interpretation was "consistent with courts' and other agencies' interpretations of Federal laws prohibiting sex discrimination."⁷¹ In a footnote appended to the passage, the Letter cited the Fourth Circuit's decision in the Grimm case, as well as a half dozen cases brought under other federal statutes, and administrative pronouncements by the Departments of Justice and Labor, as well as the Equal Employment Opportunity Commission, on transgender rights.⁷²

Given the realities of drafting, gaining approval for, and publishing an interagency document like this, the Dear Colleague Letter was surely in the works well before the Fourth Circuit's decision. But the Dear Colleague Letter's citation of that decision makes it just barely plausible to call the Letter an example of "institutional leapfrogging." The problem is what happened next. In October 2016, the Supreme Court granted certiorari.⁷³ In February 2017, DOJ and OCR withdrew the May 2016 Dear Colleague Letter, as well as the January 2015 letter to which the Fourth Circuit had deferred.⁷⁴ Any game of leapfrog had been reversed. And it was reversed precisely because the agencies had never hidden—nor made any particular effort to hide—their innovations in the law from the public. Melnick calls this

68. Letter from James A. Ferg-Cadima, Acting Deputy Assistant Sec'y for Policy, Office for Civil Rights, U.S. Dep't of Educ., to Emily T. Prince 2 (Jan. 7, 2015), http://www.bricker.com/documents/misc/transgender_student_restroom_access_1-2015.pdf [<https://perma.cc/B5SJ-QMGR>].

69. 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).

70. See Catherine E. Lhamon, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ. & Vanita Gupta, Principal Deputy Assistant Attorney Gen. for Civil Rights, U.S. Dep't of Justice, Dear Colleague Letter on Transgender Students (May 13, 2016), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf> [<https://perma.cc/T28Y-XUJC>].

71. *Id.* at 2.

72. See *id.* at 6 n.5.

73. *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 137 S. Ct. 369 (2017).

74. See *supra* text accompanying notes 48–53; see also Andrew Mytelka, *Trump Administration Rescinds Obama-Era Guidance on Transgender Students*, CHRON. HIGHER EDUC. (Feb. 22, 2017, 11:00 PM), <https://www.chronicle.com/blogs/ticker/trump-administration-rescinds-obama-era-guidance-on-transgender-students/117025> [<https://perma.cc/7GZQ-F3DX>].

“[i]nstitutional [l]eapfrogging—[w]ith a [t]wist” (p. 152). The twist is that it didn’t happen.

What about athletics? Here at least we can see a pattern of OCR and the courts moving in the same direction across multiple administrations, though I doubt Melnick’s “leapfrogging” metaphor is really apt. In 1975, OCR issued regulations to implement Title IX. Those regulations included a requirement that a school “which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes.”⁷⁵ The regulation said that OCR would “consider” a number of “factors” in determining whether the “equal athletic opportunity” requirement was satisfied.⁷⁶ Those factors included “[w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes.”⁷⁷

In 1979, OCR issued a “Policy Interpretation” that elaborated on its 1975 regulations.⁷⁸ The Policy Interpretation established a three-part test for assessing compliance with the regulation’s “effectively accommodate the interests and abilities” language. The 1979 pronouncement provided that “[c]ompliance will be assessed in any one of the following ways”:

- (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
- (2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or
- (3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.⁷⁹

It was only after that point that the courts entered the picture. In 1993, the First Circuit issued its first of two opinions in the leading case of *Cohen v. Brown University*.⁸⁰ In a round of budget cuts in 1991, Brown had demoted its women’s volleyball and gymnastics teams, as well as its men’s golf and

75. 34 C.F.R. § 106.41(c) (2018).

76. *Id.*

77. *Id.*

78. See Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413 (Dec. 11, 1979).

79. *Id.* at 71,418.

80. 991 F.2d 888 (1st Cir. 1993).

water polo teams, from varsity to club status.⁸¹ Those cuts “took substantially more dollars from the women’s athletic budget than from the men’s budget, but did not materially affect the athletic opportunity ratios”—female athletes retained just over one-third of the slots for varsity athletes, in a school in which women made up 48% of the student population.⁸²

In its 1993 *Brown University* decision, the First Circuit upheld a preliminary injunction barring the school from cutting the women’s teams. In considering the “likelihood of success” factor, the court explained that Brown could not satisfy the first or second prong of the three-part test, because intercollegiate athletic opportunities were not offered to women in proportion to their enrollment and because the school had stopped adding women’s teams several years earlier.⁸³ That left the third prong: “whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.”⁸⁴ And Brown could not satisfy that prong, because it had cut two robust women’s teams—cuts that left “the interests and abilities” of the women who had been on those teams without “full[] and effective[] accommodat[ion].”⁸⁵

On remand, the district court found Brown liable for violating Title IX.⁸⁶ In 1996 the First Circuit affirmed the judgment of liability, largely based on the analysis in its 1993 preliminary injunction opinion.⁸⁷ While the university’s merits appeal to the First Circuit was pending, OCR issued a new “Clarification Memorandum” elaborating the three-part test.⁸⁸ In a passage that seemed to be inspired by the *Brown University* case, the Clarification Memorandum said, “If an institution has recently eliminated a viable team from the intercollegiate program, OCR will find that there is sufficient interest, ability, and available competition to sustain an intercollegiate team in that sport unless an institution can provide strong evidence that interest, ability, or available competition no longer exists.”⁸⁹ The First Circuit’s 1996 opinion did refer to this passage, but only after noting that its 1993 decision had engaged in the same analysis.⁹⁰

81. See *Cohen*, 911 F.2d at 892.

82. *Id.*

83. See *id.* at 903.

84. Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,418.

85. See *Cohen*, 991 F.2d at 904.

86. See *Cohen v. Brown Univ.*, 879 F. Supp. 185 (D.R.I. 1995), *aff’d in part, rev’d in part*, 101 F.3d 155 (1st Cir. 1996), *cert. denied*, 520 U.S. 1186 (1997).

87. See *Cohen v. Brown Univ.*, 101 F.3d 155 (1st Cir. 1996), *cert. denied*, 520 U.S. 1186 (1997).

88. *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test*, U.S. DEP’T EDUC. (Jan. 16, 1996), <https://www2.ed.gov/about/offices/list/ocr/docs/clarific.html> [<https://perma.cc/G65R-RH5M>].

89. *Id.*

90. See *Cohen*, 101 F.3d at 180.

Was this episode an example of “institutional leapfrogging” as Melnick defines it? Superficially, at least, the signs point to yes: OCR issued a pronouncement in 1979, the First Circuit relied on it in 1993, OCR then referred to the 1993 decision in a new pronouncement in 1996, and the First Circuit then referred to the new pronouncement in its own 1996 decision. But did each step in this process represent an expansion of the prior law? And were those incremental expansions cloaked in a false modesty that hid their effects from the public? There the argument gets a lot weaker.

Start with the 1993 First Circuit decision. Arguing that the 1993 decision represented an incremental expansion of Title IX, Melnick points to the court’s discussion of a particular question about how to interpret the third prong of OCR’s three-part test: In deciding whether “the interests and abilities of the members of [the “underrepresented”] sex have been fully and effectively accommodated by the present program,”⁹¹ should courts measure accommodation in absolute or relative terms?⁹² That is, should they consider whether the defendant university has fully accommodated the interests and abilities of women—regardless of whether it has done the same for men? Or should they instead decide whether the university has accommodated the interests and abilities of women *to the same extent* as it has accommodated the interests and abilities of men? The plaintiffs in the *Brown* case took the absolute view; the university took the relative view. In each of its two decisions, the First Circuit agreed with the plaintiffs.⁹³

Was the First Circuit’s resolution of this question an innovation? To the contrary, it appears to have represented the most straightforward interpretation of the language in the 1979 Policy Interpretation. Nothing in prong three’s language suggests that a court should consider whether the interests and abilities of women have been satisfied to the same extent as those of men. Rather, the language is phrased in absolute terms: whether “the interests and abilities of the members of that sex”—that is, the “underrepresented” sex—“have been fully and effectively accommodated by the present program.”⁹⁴

Brown argued—and Melnick seems to agree⁹⁵—that the full-and-effective-accommodation language should be read in light of the preamble to the 1979 Policy Interpretation. That preamble stated that “the governing principle in this area is that the athletic interests and abilities of male and

91. 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).

92. See pp. 112–14.

93. See *Cohen*, 101 F.3d at 176; *Cohen v. Brown Univ.*, 991 F.2d 888, 899–900 (1st Cir. 1993).

94. Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,418.

95. See p. 112.

female students must be equally effectively accommodated.”⁹⁶ But even if the overall regulation aims at equal accommodation of interests, it does not at all follow that each subpart of the three-part test must require proof of relative interest. And the First Circuit’s interpretation reflects the most natural reading of the Policy Interpretation’s *operative* language.

Still, let’s grant that the First Circuit moved the ball forward—by making clear that the courts would defer to the Policy Interpretation, and by adopting the absolute, rather than the relative, reading of the third prong. That’s just the everyday work that courts do—resolving legal questions and applying the law to the facts. “Institutional leapfrogging” would seem to require at least another step, one that extends beyond the prior interpretations while downplaying the extent of its innovation. For that step, Melnick highlights OCR’s 1996 Clarification Memorandum.

Melnick identifies three aspects of the 1996 memorandum that, in his view, represented an innovation. First, he says that the “most controversial feature” of that memorandum “was its description of Prong One as a ‘safe harbor’” (p. 117). But the text of the 1979 Policy Interpretation makes clear that the first prong was *always* a safe harbor: Where “intercollegiate level participation opportunities for male and female students [were] provided in numbers substantially proportionate to their respective enrollments,” the three-part test provided that a school would be in compliance.⁹⁷ By their terms, the second and third prongs provided that they did not apply unless “the members of one sex are underrepresented among intercollegiate athletes.”⁹⁸ Second, he says that the 1996 memorandum “tightened Prong Two by requiring ‘actual program expansion,’ that is, adding more women’s teams” (p. 118). But, again, there was nothing new about this requirement. The second prong, as it appeared in the 1979 OCR document, already explicitly required a school to “show a history and continuing practice of program expansion.”⁹⁹ Finally, he notes that the 1996 memorandum endorsed the First Circuit’s absolute rather than relative reading of the third prong.¹⁰⁰ But that is, by definition, not an *expansion* of the 1993 First Circuit decision. And, as I have shown, it is questionable whether the 1993 decision represented an innovation in any event.

Melnick makes no serious claim that the 1996 First Circuit decision expanded the interpretation of Title IX beyond what appeared in the 1993 First Circuit Decision and the 1996 Clarification Memorandum. He does argue that OCR later issued two pronouncements that moved the law forward. The first, a Dear Colleague Letter in 1998, “demanded that scholarship money awarded to male and female athletes be within 1 percent of the proportion of

96. Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,414.

97. *Id.* at 71,418.

98. *Id.*

99. *Id.*

100. *See* p. 118.

male and female varsity athletes at the school” (p. 119). The second, in 2010, reversed Bush Administration efforts to slightly soften the third prong of the three-part test and instead “requir[ed] schools to use ‘a broad range of indicators’ to prove that they have ‘fully’ accommodated the interests and abilities of their female students.”¹⁰¹ But even if we grant that these steps represented an expansion beyond prior OCR positions—and I think Melnick’s argument in that regard is overstated—they represent ordinary efforts by an administrative agency to increase its reach. They did not respond in any particularly direct way to the prior judicial pronouncements. Nor were the agency’s policy innovations, such as they were, hidden from the public. To the contrary, OCR announced its 2010 Dear Colleague Letter with great publicity: “The new policy was unveiled by Secretary Duncan and Vice President Biden before a large crowd in a college basketball arena” (p. 124). And, as I noted above, the aggressive use of Title IX to promote women’s sports has proven extremely popular politically.¹⁰² The “leapfrogging” metaphor seems strained.

CONCLUSION

The issues OCR has addressed in administering Title IX are among the most contentious in our polity. Contrary to the suggestion in Melnick’s book, the agency has not hidden its resolution of those issues under obscure bureaucratic forms while the public has been left in the dark. Rather, OCR has been at the center of a robust public debate. That is not undemocratic. That is what democracy looks like.

101. P. 124 (quoting Russlynn Ali, Assistant Sec’y for Civil Rights, Office for Civil Rights, U.S. Dep’t of Educ., Dear Colleague Letter on Guidance on Accommodating Students’ Athletic Interests and Abilities: Standard for Part Three of the “Three-Part Test” 4 (Apr. 20, 2010), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-20100420.pdf> [https://perma.cc/QK8C-YHGH]).

102. See *supra* text accompanying notes 13–18.