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Rights Regulation

As Title IX of the Education Amendments of 1972 approached its half-century mark, Americans could look back with pride and amazement at the progress we have made in opening the doors of educational opportunity for women and girls. In 1972, 58 percent of college students were male and only 42 percent female. By 2010 those numbers had flipped: 57 percent of college students were women, and that number keeps creeping up. From 1970 to 2008 the percentage of white men ages twenty-five to thirty-four with a bachelor's degree (B.A.) rose only modestly, from 20 percent to 26 percent. Meanwhile the proportion of white women of this age with a B.A. nearly tripled, shooting up from 12 percent to 34 percent. Among African Americans, women receive two-thirds of all B.A.s. Women now earn more graduate degrees than men. In 1970 men earned eight times as many Ph.D.s as women; today women earn more doctorates than do men (53 percent). Once all but shut out of medical, dental, and law schools, women have reached parity with men. Women earn more degrees in the sciences than men, although not as many in engineering and math. Female undergraduates are more likely to be selected for Phi Beta Kappa, to serve in student government, to write for college newspapers, and to engage in every extracurricular activity other than sports.¹

Girls' performance at the elementary and secondary levels is no less impressive. Girls get better grades than boys, in part because they do more homework

and misbehave less frequently. They now have higher educational aspirations, take more advanced placement courses, and participate in more extracurricular and out-of-school activities. They write better. Their advantage on verbal standardized tests is growing. Conversely, boys' advantage on math tests has shrunk, almost to the point of disappearing. Boys are falling farther and farther behind. At many colleges only affirmative action for boys keeps their proportion in the undergraduate student body above 40 percent. One finds these trends for every race and ethnicity.² As Thomas DiPrete and Claudia Buchmann put it in *The Rise of Women*, "Women have not merely gained educational equality with men; on many fronts they have surpassed men by a large and growing margin."³

Even in intercollegiate and interscholastic athletics, one of the few areas where males still predominate, the change has been dramatic. When Title IX was enacted, only 15 percent of college varsity athletes were women; four decades later that proportion was 43 percent. Between 1972 and 2015 the number of female varsity athletes at National Collegiate Athletic Association schools increased sevenfold. At the high school level female participation is now ten times what it was in 1970, rising from less than 300,000 to well over 3 million. In 1970 only 7 percent of interscholastic athletes were female. Today that number is 42 percent.⁴

Mission Accomplished?

At the heart of Title IX lies this simple prohibition: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any educational program or activity receiving Federal financial assistance." Since every public elementary, middle, and high school in the country and virtually every college and university—private as well as public—receives federal money, these thousands of institutions are all subject to the rules established by the courts and by the Department of Education's Office for Civil Rights (OCR) under Title IX. Although Title IX has long been associated in the public mind primarily with intercollegiate athletics, it covers all aspects of education, from English and math courses to sex education and intramural sports, from schools' treatment of pregnant students to first-graders' interaction on the playground, from sexual relations between college students to the pronouns used by transgender students. Over the past half century, judges and administrators have produced hundreds of pages of rules, guidelines, and interpretations to explain what educational institutions must do to stay on what one judge described as the "sunny side" of Title IX.⁵

Despite the stunning changes described above, Title IX has become more controversial than ever. Starting in 2011 the Obama administration issued detailed and demanding rules on what schools must do to combat sexual violence

and other forms of sexual harassment. In 2016 it announced guidelines—soon revoked by the Trump administration—on the rights of transgender students. These Title IX initiatives were part of the Obama administration’s We Can’t Wait campaign. “We can’t wait for an increasingly dysfunctional Congress to do its job,” the president told a crowd in Nevada. “When they won’t act, I will.”⁶ Not surprisingly, this drew a heated response from the Republican Party. Its 2016 platform devoted a separate section to Title IX, charging that the original purpose of Title IX had been perverted “by bureaucrats—and by the current President of the United States—to impose a social and cultural revolution upon the American people.”⁷ A year later Secretary of Education Betsy DeVos announced that her department would review and revise the controversial guidelines on sexual harassment and assault issued during the Obama years.

Title IX is both a powerful symbol of our broad national commitment to gender equality in education and a complex, controversial regulatory regime. Most of the advances in opportunities for female students occurred not because the law demanded them, but because our culture had profoundly shifted. In the late 1960s and early 1970s—before Title IX was enacted or enforced—the doors of educational opportunity began to swing open for women, and they quickly rushed through. Colleges and universities that had previously accepted only men started to admit women, including Yale, Princeton, Johns Hopkins, the University of Virginia, Williams, Bowdoin, Brown, Dartmouth, and Duke. Despite the fact that Title IX does not apply to admissions policy at private undergraduate schools, there are almost no all-male colleges left in the United States.

Title IX was itself the product of this cultural shift. It passed with little debate in 1972 because no one was left to defend (at least in public) practices that limited the educational and employment opportunities of women. In that year both houses of Congress also approved by wide margins the Equal Rights Amendment (ERA) to the Constitution, and sent it to the states for what at the time looked like quick ratification. As Congresswoman Bella Abzug (D-N.Y.) put it, “1972 was a watershed year. We put sex discrimination provisions into everything. There was no opposition. Who’d be against equal rights for women?” Birch Bayh, the primary sponsor of both the ERA and Title IX in the Senate, explained, “Once you get by the ERA, Title IX is a piece of cake.”⁸ The previous year the Supreme Court had for the first time ruled that a sex-based classification violated the Equal Protection clause of the Fourteenth Amendment.⁹ Two years later the Court suggested that gender-based classifications might be subject to the “strict scrutiny” previously reserved for judging racial classifications.¹⁰ In light of these changes, passage of Title IX seemed inconsequential. President Nixon did not even mention the mandate when he signed the omnibus legislation that contained it, nor was it covered in the next day’s *New York Times*.

In fact, DiPrete and Buchmann’s data show that there is hardly a country in the developed world that has not experienced this remarkable cultural transformation.

The “reversal from a male advantage to a female advantage in educational attainment,” they conclude, “has unfolded not only in the United States but also in most industrialized societies.”¹¹ Hanna Rosin, author of the provocatively titled *The End of Men and the Rise of Women*, claims that “women’s dominance on college campuses is possibly the strangest and most profound change of the century, even more so because it is unfolding in a similar way pretty much all over the world.”¹² Few of these countries have a Title IX equivalent.

Initially this made the job of enforcing Title IX far easier than enforcing prohibitions of racial discrimination. Nowhere did enraged alumni of men’s colleges stand in the doorway of the admissions office vowing, “Gender Segregation Now, Gender Segregation Forever.” Instead they flooded admissions offices with requests for interviews for their daughters.¹³ Despite the frequency with which sex discrimination and racial discrimination are equated (a central theme of subsequent chapters), the differences are huge and obvious.

Because so many barriers to educational opportunity for women fell so quickly in the 1960s and 1970s, the focus of the regulatory regime shifted from overt exclusion and discrimination to more subtle educational practices. Federal regulators paid less and less attention to what goes on in the classroom, and more attention to what happens on the playing fields, in the bedroom, and in restrooms and locker rooms. Their focus shifted from the policies and practices of educational institutions to the beliefs of students and their teachers. No longer was the goal simply to provide equal opportunity to female students. Now it was to break down a wide array of stereotypes—those held by women as well as men; those common outside schools as well as inside; and those related to the meaning of masculinity, femininity, sexual orientation, and gender identity. In 1972 few would have predicted that sports, sexual harassment, and transgender rights would become the major elements of Title IX regulation. Indeed, it took OCR nearly a quarter of a century to issue its first regulations on sexual harassment, and two decades more to announce guidelines on transgender rights. Certainly no one who voted for Title IX in 1972 thought that OCR would eventually write rules allowing students to choose for themselves whether to be treated as male or female.

This book traces the slow transformation of Title IX from its original focus on ending exclusionary institutional practices to its current emphasis on deconstructing stereotypes about sex and gender. Much of it is devoted to understanding Title IX policy on athletics (part II) and sexual harassment (part III). The shorter transgender story is examined in the penultimate chapter. Parts II and III both begin with a discussion of the issues addressed by regulators (chapter 5 on athletics, chapter 9 on sexual harassment), and then offer a detailed look at the evolution of regulatory policy in OCR and the courts. These stories are long and complicated. Policymaking has usually occurred in fits and starts (to use the title of chapter 6), featuring incremental expansion and what I describe as institutional “leapfrogging.” Such complexity and incrementalism often make the

story hard to follow, but are essential elements of the politics of Title IX. They hide the significance of policy innovations not just from regulated institutions and the public, but at times from the regulators themselves.

Part I of the book provides the context for these detailed case studies by presenting an overview of the broader civil rights state (chapter 2), explaining the key features of Title IX (chapter 3), and offering a first look at the Department of Education's Office for Civil Rights (chapter 4). The final two chapters of the book examine the logic behind the expansion of Title IX regulation and the prospects for significant retrenchment in coming years.

Title IX in Action

Title IX speaks in grand phrases with uncertain meaning. Court decisions and administrative guidelines tend to be more specific. But they, too, often remain coy or ambiguous on key terms. To get a sense of the "law in action"—what federal regulation really means for those on the receiving end—it is useful to examine developments at three much different schools, Quinnipiac University in suburban Connecticut, Harvard Law School in Cambridge, Massachusetts, and Palatine Township High School in Illinois. These vignettes offer a glimpse at how Title IX has evolved and why regulatory efforts under it have become so contentious.

Quinnipiac University, 2010–14

In July 2010 a federal district court judge in Connecticut addressed this civil rights issue: should "competitive cheer and tumbling" be considered an intercollegiate sport? Despite acknowledging that "competitive cheer and tumbling" is a form of team gymnastics rather than traditional sideline pom-pom waving, Judge Stefan Underhill ruled that Quinnipiac University could not count the members of that team as varsity athletes under Title IX. That meant that to comply with federal law, Quinnipiac would either have to add another women's varsity team or eliminate a men's team. Judge Underhill's ninety-five-page, heavily footnoted opinion also concluded that Quinnipiac had not properly reported the number of male and female cross-country runners, and had failed to apply uniform roster rules to male and female teams. His initial order required Quinnipiac to reinstate the previously disbanded women's volleyball team and to change the way it counts varsity athletes.¹⁴

After three and a half years of litigation Quinnipiac signed a twenty-five-page agreement with the volleyball players and the Connecticut chapter of the American Civil Liberties Union (ACLU) that cost the school more than \$8 million: at least \$5 million to upgrade athletic facilities for women; over \$600,000 for coaches, training, and equipment for women's teams; and nearly \$2 million in

attorneys' fees for the plaintiff. In addition to retaining the volleyball team, the college upgraded two other women's teams. The agreement established a monitor who would report to the court annually on the college's compliance—and be paid up to \$150,000 per year for his efforts. This \$8 million does not include the legal expenses the college ran up during those years of litigation.¹⁵

The Quinipiac case received considerable media attention—and ridicule. To some it represented yet another case of overreach by federal regulators and judges. Just as the Supreme Court had tried to establish the rules of “classic, Platonic golf” in a 2001 Americans with Disabilities Act case,¹⁶ now federal judges (with the help of bureaucrats in the Department of Education) were telling schools that synchronized swimming is a competitive sport, but competitive cheer and tumbling is not (or at least not yet). The most acerbic critique came from the sports and political commentator Gregg Easterbrook. Title IX, he wrote on ESPN.com, “has become an exemplar of the kind of government action that initially was justified but since has taken on a life of its own grounded in legal and bureaucratic nonsense.” The law has generated “increasingly incongruous legal intrusion into minor matters,” created “perverse results,” and “mainly serve[s] to make government look ridiculous.” Title IX, he fumed, “has become a Monty Python sketch,” degrading our understanding of civil rights. “Whether a college offers volleyball or cheer,” Easterbrook insisted, “is not a civil rights issue!”¹⁷

Easterbrook's column drew a spirited response from Nancy Hogshead-Makar, a former Olympic gold medal swimmer and director of advocacy for the Women's Sports Foundation (WSF).¹⁸ She pointed out that the case involved not just the status of competitive cheer and tumbling, but the court's finding that the college had “deliberately reported fraudulent numbers” to inflate the number of female athletes on team rosters. This, she argued, was a widespread problem in college sports. Despite the fact that Title IX had been on the books for almost forty years, male athletes still receive more scholarship money than females, and at the high school level boys still outnumber girls on varsity teams by a wide margin. Expanding athletic opportunities for women and girls is a legitimate government responsibility because “a large body of research continues to confirm with certainty that a sports experience leads to higher educational achievement and success in the workplace, life-time lower rates of obesity, breast cancer, osteoporosis, heart disease and depression.” She also noted that Judge Underhill was not making up his own definition of intercollegiate sports, but was simply applying rules developed by the Department of Education's Office for Civil Rights to distinguish sports from other extracurricular activities.

Intercollegiate and interscholastic athletics have attracted so much attention under Title IX not because sports is such an essential element of “equal educational opportunity”—at best it is a valuable extracurricular activity, at worst it is a serious distraction and a corrupting influence—but because it is one of the few activities that we continue to segregate by sex. Under Title IX the central rule for

high school and college sports is “separate but equal.” How do we measure equality in this context? By spending? By the number of varsity athletes or varsity roster spots? By the number and range of teams or activities? By participation rates in comparison to interest by male and female students? All these measures have flaws. All can be manipulated. And each reflects a somewhat different understanding of gender equality. Moreover, each measure creates its own set of incentives for schools, often unintended, occasionally silly, and all too frequently perverse. This serves as a useful reminder that Title IX cannot escape the challenges, dilemmas, and pathologies characterizing most forms of government regulation.

Harvard Law School, 2014–16

In 2014 the Office for Civil Rights launched investigations of scores of colleges across the country, alleging that they had failed to follow the agency’s recently announced guidelines on preventing sexual violence and other forms of sexual harassment. Like most of the schools under investigation, Harvard University quickly agreed to change disciplinary rules for all its students, undergraduate and graduate alike, to conform to OCR’s directives. A diverse group of Harvard Law School professors dissented, arguing that the rules Harvard had instituted under pressure from OCR violated basic principles of due process. The university, they maintained, was “jettisoning balance and fairness in the rush to appease certain federal administrative officials.”¹⁹ Soon thereafter one-third of the University of Pennsylvania Law School faculty signed a letter claiming that the agreement their school had reached with OCR “requires subordinating so many protections long deemed necessary to protect from injustice those accused of serious offenses.” They also charged that “OCR has used threats of investigation and loss of federal funding to intimidate universities into going further than even the guidance requires.”²⁰

Harvard Law School eventually struck a separate deal with OCR. The law school reintroduced disciplinary hearings, which the university had replaced with the OCR-favored “single-investigator model” in sexual harassment cases. It allowed both the accuser and the accused to consult with a lawyer throughout the process, and it offered to “provide financial assistance to parties unable to afford an attorney who would like to do so.” The law school acknowledged that this was a measure very few schools could afford.²¹

Shortly after these procedural matters were resolved, another sexual misconduct controversy rocked Harvard Law. *The Hunting Ground*, a widely publicized documentary about sexual violence on campus, castigated the school for readmitting a “rapist” who had been suspended for several semesters for sexual misconduct. This referred to Brandon Winston, an African American law student who in a criminal trial had been found not guilty of rape but guilty of misdemeanor nonsexual touching. To Winston’s accuser, Kamilah Willingham, and the producers of the documentary, this demonstrated that universities are unwilling

to take steps necessary to eliminate the “rape culture” on college campuses. Nineteen Harvard Law professors—including several noted African American and feminist scholars—took issue with this characterization both of the accused student and the school’s handling of the matter. They charged that “Winston was subjected to a long, harmful ordeal for no good reason,” that the film “prolong[ed] his ordeal with its unfair and misleading portrayal of the facts of his case,” and that it presented “a seriously false picture” not only of events at Harvard, but of “the general sexual assault phenomenon at universities.”²² Willingham, who is also African American, responded by demanding an apology from Harvard for “remain[ing] silent while 19 of the professors who presumably helped overturn my assailant’s sanction very publicly doubled down on his side, expending my rape trial into the court of public opinion and joining my assailant’s effort to brand me as a vindictive, slutty liar.” In 2016 she formed an organization called Survivors Eradicating Rape Culture to “end gender violence using culture change and social justice.”²³

Meanwhile across the street in the Yard, Harvard undergraduates were completing a “climate check,” a survey devised by a consortium of universities to get a better handle on the frequency of sexual misconduct on campus. Such “climate checks” constitute a key part of every compliance agreement OCR has negotiated with schools. Harvard’s participation rate was unusually high (63 percent), giving its results more credibility than most such surveys. Among its many findings, two stood out. Nearly 15 percent of women seniors reported having experienced during their four years on campus the most serious form of sexual assault—“attempted or completed nonconsensual penetration through use of physical force or incapacitation.” In other words, more than one out of seven female undergraduates said they had been the victim of assaults serious enough to constitute a crime in every state. Incongruently, nearly 70 percent of the female Harvard College students “who indicated they experienced an incident of penetration by force did not formally report it,” and 80 percent of female students “who indicated they experienced an incident of penetration by incapacitation” did not report it either. “The most frequently cited reason for not reporting was a belief that it was not serious enough to report.”²⁴

During its first year and a half, Harvard’s Office for Sexual and Gender-Based Dispute Resolution, the unit established to handle sexual harassment complaints, received sixteen allegations of sexual assault—only about ten per year from the university’s more than 20,000 students, a tiny fraction of 1 percent.²⁵ Does this mean that these students consider the emotional and social costs of reporting too onerous to bear? That they believe the punishment might be too severe? That they remain ambivalent about their relationship with the perpetrator? We do not know.

Surveys at other schools report a similar reluctance to consider such conduct “serious enough” to report. Moreover, despite the extensive publicity given to

the problem of sexual violence on campus and despite changes in college reporting systems designed to make them more victim friendly, the number of reports of sexual assault remains very small—at most schools less than 1 percent of the undergraduate population.²⁶

If the Quinnipiac case has more than a touch of comedy, the events at Harvard have all the makings of a tragedy. Compelling demands for protection of women from sexual assault collide with compelling demands for due process, especially for racial minorities that have been subject to so many unsubstantiated accusations in the past. Race and sex, violence and fairness, federal rules and institutional autonomy, law and culture, the complexities of intense interpersonal relationships—all were thrown into this volatile mix. After years of discussion and investigation, the extent and the causes of sexual assault on campus remain elusive, and OCR's guidelines have become more controversial than ever. Although the Trump administration withdrew two key guidance documents issued by OCR in 2011 and 2014, it has yet to explain what will take their place. Most schools have been reluctant to change their disciplinary codes until the Department of Education issues rules that are upheld in court. In short, the issue continues to roil campuses, with no workable solution yet in sight.

Palatine Township School District, 2015–17

On November 2, 2015, OCR sent to the superintendent of schools in Palatine, Illinois, a fourteen-page, single-spaced letter regarding his high school's treatment of "Student A," a transgender teenager who was born biologically male but for many years had identified as female. The school had previously acquiesced to almost all the requests made by Student A, including being listed as a girl, being referred to by female pronouns, using the girls' bathrooms, and playing on girls' sports teams. Citing the privacy concerns of other female students, though, the school refused to allow Student A to change clothes and shower in the girls' locker room. Instead, it offered Student A individual changing and showering facilities either next door or down the hall.

After many days of negotiation, OCR ruled that the school district had violated Title IX because the law requires schools to treat transgender students who identify as female exactly as they would treat any other female student. Shortly thereafter, the school agreed to give Student A full access to the girls' locker room, to hire a consultant "with expertise in child and adolescent gender identity," and to establish a "support team to ensure that Student A has access and opportunity to participate in all programs and activities, and is otherwise protected from gender-based discrimination at school." The agreement further stipulated that if other students object to Student A's presence in the locker room, they can use the alternative changing areas previously rejected by Student A.²⁷

A local group calling itself Students and Parents for Privacy then filed suit against the school district in federal court, alleging that girls at the high school “live in constant anxiety, fear and apprehension that a biological boy will walk in at any time while they use the locker rooms and showers and see them in a state of undress or naked.” Representing Student A, the Illinois chapter of the ACLU charged that “the plaintiffs and their counsel have insisted on cruelly mis-gendering our client” and that their description of transgender students was “outside the mainstream of medical and scientific understanding.” After Students and Parents for Privacy lost the court case, they took their cause to the voters, running a slate of candidates against the school board members who had signed the agreement with OCR. The *Chicago Tribune*’s story on the election reported that “transgender access has overshadowed all other issues.” The challengers lost, and the agreement remained in place.²⁸

Palatine proved to be an opening salvo in a rapidly escalating battle over the treatment of transgender students. In May 2016, OCR and the Department of Justice (DOJ) issued a Dear Colleague Letter (DCL) requiring schools to “treat a student’s gender identity [as defined by the student] as the student’s sex for purposes of Title IX.” They insisted that “the desire to accommodate others’ discomfort cannot justify a policy that singles out and disadvantages a particular class of students.” This applied not just to restrooms and locker rooms, but to single-sex classes, sports, housing, and overnight accommodations.²⁹

Meanwhile the state of North Carolina was enacting legislation requiring that access to restrooms in all public buildings (including schools) be determined on the basis of the “biological sex” listed on a person’s birth certificate. The Department of Justice sued North Carolina, arguing that the state’s bathroom law stigmatizes the transgendered, adding to “their isolation and exclusion” and “perpetuat[ing] a sense that they are not worthy of equal treatment and respect.” Announcing the lawsuit, Attorney General Loretta Lynch equated the state’s opposition to the department’s guidelines with southern states’ “fierce and widespread resistance to *Brown v. Board*” in the 1950s and 1960s. “It was not so very long ago,” Lynch said, that states like North Carolina “had signs above restrooms, water fountains and on public accommodations keeping people out based upon a distinction without a difference.” The country has “moved beyond those dark days, but not without pain and suffering. . . . Let us write a different story this time.”³⁰ North Carolina countersued, arguing that the prohibition against sex discrimination in Title IX and Title VII of the 1964 Civil Rights Act do not require states to accept students’ “gender identification” when it conflicts with their biology at birth. Governor Pat McCrory charged that “the Obama administration is bypassing Congress by attempting to rewrite the law and set restroom policies for public and private employers across the country.”³¹

Eleven states filed a similar suit in a federal district court in Texas, and won an injunction barring OCR from enforcing its transgender DCL anywhere in

the country.³² But the Fourth Circuit took a much different stance, holding that a Virginia high school *must* follow the policies established by OCR.³³ The Supreme Court decided to review that decision, scheduling oral argument for the spring of 2017. Before that could happen, though, OCR and the Department of Justice withdrew the transgender DCL, and the Supreme Court sent the case back to the Fourth Circuit for reconsideration in light of the new circumstances.³⁴ While that case was pending, the Seventh Circuit read Title IX to require schools to defer to students' gender identity.³⁵ The "bathroom war" suddenly became the latest battleground in the ongoing American culture war.

Title IX as Regulatory Regime

These stories offer a quick first look at the extensive regulatory regime described in this book. What can one learn from these stories? Five distinctive features of this policy area stand out. Each will be developed and supported at greater length in subsequent chapters.

1. *The growth of the American civil rights state.* Most obviously, these stories illustrate the reach of the American civil rights state. By "civil rights state" I mean the extensive set of statutes, court decisions, and administrative regulations, guidelines, interpretations, and settlement agreements designed to prevent and rectify discrimination based on race, ethnicity, religion, national origin, sex, disability, age, and sexual orientation. Although the term "civil rights state" will no doubt sound strange to many ears, it reminds us that since 1964 we have constructed an impressive edifice of nondiscrimination rules that apply to nearly every business, school, nonprofit, and government unit in the country. These rules are enforced by judges and administrators armed with formidable sanctions. Like its cousin, the American welfare state, the civil rights state has a distinctive form that reflects both our unusual constitutional system and our long history of struggle over civil rights.

Although we often associate "civil rights" with constitutional decisions such as the Supreme Court's 1954 landmark ruling in *Brown v. Board of Education*, the contemporary American civil rights state rests primarily on *statutory* rather than constitutional foundations. The key texts are the civil rights laws of the 1960s—the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Fair Housing Act of 1968—and subsequent legislation barring discrimination based on sex, disability, language, religion, and age. Over the years these laws have been amended to cover more actors and activities and to promote more aggressive and effective enforcement.

Just as important, since 1964 we have created a variety of federal agencies to interpret and enforce civil rights laws, which (like most statutes) remain silent

on crucial policy matters. These bureaucracies include not just the two mentioned above, the Department of Education's Office for Civil Rights and the Civil Rights Division of the Department of Justice, but also the Equal Employment Opportunity Commission (EEOC), the Department of Labor's Office of Federal Contract Compliance Programs, and several units in the Department of Housing and Urban Development. In addition, all federal departments and many agencies have their own civil rights offices.

Together these agencies issue thousands of pages of rules, covering not just sex discrimination in schools and racial discrimination in housing and employment, but also how employers must "accommodate" employees with disabilities; what constitutes an "appropriate education" for English-language learners and children with disabilities; and what forms of electoral redistricting illegally "dilute" the voting power of racial and linguistic minorities. The level of detail in these regulations can be surprising: one EEOC guidance document explains when employers can and cannot base an employment decision on a candidate's foreign accent.³⁶ HUD devotes ten dense, double-column pages of the *Code of Federal Regulations* to "Pet Ownership for the Elderly or Persons with Disabilities."³⁷ Because the central mandates in most civil rights laws are so vague—they prohibit discrimination without explaining what that key term means—writing these rules and guidelines means making civil rights policy.

Civil rights regulation is one form of the "social regulation" that has grown in leaps and bounds since the mid-1960s. This includes environmental and consumer protection and rules designed to reduce a wide array of health and safety risks. Social regulation differs from traditional "economic regulation" in several important ways. Traditional economic regulation tends to focus narrowly on one particular industry—railroads, aeronautics, electric power, nuclear energy, or oceangoing shipping. Its daily fare is limited to mundane matters of prices and service levels. Usually the regulatory body is a multimember commission partially insulated from presidential control. In contrast, new agencies such as the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA) regulate all sorts of business, are led by a single executive appointed by the president, and routinely make controversial decisions about what constitutes "acceptable risk" and fair outcomes. The cost of social regulation dwarfs that of all previous forms of federal regulation. Traditional regulation usually became the preserve of a small group of self-interested parties. Social regulation, in contrast, raises cultural and partisan issues that attract far wider and more impassioned attention.

2. *Courts, agencies, and institutional "leapfrogging."* In building the administrative apparatus of the civil rights state, Congress not only divided authority among a number of executive branch agencies, but gave federal courts substantial enforcement authority. This is particularly apparent for employment dis-

crimination. As Sean Farhang has explained, in 1964 Congress was unwilling to create a strong administrative agency, and instead handed responsibility for determining guilt and imposing sanctions in employment discrimination cases to the courts. Although civil rights organizations first opposed this approach, they eventually came to favor it over a more executive-centered enforcement framework. Since the 1990s, 15,000 to 20,000 employment discrimination suits have been filed in federal court every year.³⁸

Title IX, in contrast, was designed to place primary enforcement authority in the hands of the federal administrators: it directs them to deny federal funding to any educational institution that engages in sex discrimination. But this enforcement strategy quickly proved ineffective. For decades the real enforcement teeth in Title IX have come from lawsuits filed by private parties—such as the volleyball players who sued Quinnipiac and the transgender student who sued the Virginia school district.

Several factors contribute to the large role courts play within the civil rights state. The provisions of some civil rights laws are designed to protect rights guaranteed by the Fourteenth and Fifteenth Amendments. As a result, the line between constitutional interpretation and statutory interpretation often blurs.³⁹ Given the Supreme Court's insistence that the federal judiciary is the preeminent interpreter of the Constitution, judges have not been willing simply to defer to agencies' reading of these statutes. Moreover, as we can see in the North Carolina case, civil rights issues often raise serious federalism concerns. Not only have the Rehnquist and Roberts Courts occasionally (if inconsistently) expressed concern for protecting the "sovereign dignity" of the states, but federal agencies do not have nearly as much leverage against state and local governments as they do against private parties. In addition, most civil rights laws enacted since 1970 were passed by Democratic Congresses when Republicans controlled the White House. The laws' sponsors tended to trust federal judges more than administrators appointed by GOP presidents.⁴⁰

Although courts and agencies sometimes disagree on how to interpret civil rights statutes, in most instances each needs the other. Agencies rely on the courts for their superior political legitimacy, as well as their ability to issue injunctions and order the payment of money damages. Civil rights agencies seldom have authority to impose such sanctions by themselves. Courts, in turn, need agencies' ability to issue rules of general applicability, to investigate the thousands of complaints filed by private parties, and to negotiate and monitor a multitude of compliance agreements.

Throughout this book we will encounter examples of a process I call institutional "leapfrogging"—courts and agencies each taking a step beyond the other, expanding regulation without seeming to innovate.⁴¹ This was apparent in the Quinnipiac case. The district court relied heavily on OCR's 1996 "clarification" of its 1979 "interpretation" of its 1975 regulations. That agency "clarification"

rested in large part on circuit courts' reading of the 1979 "interpretation." The Quinipiac court then adopted a reading of those administrative guidelines that went well beyond what OCR had previously required. Similarly, OCR's sexual harassment rules built on the Equal Employment Opportunity Commission's Title VII guidelines, which followed Supreme Court decisions that were in turn based on previous EEOC rules that incorporated earlier lower court decisions. The 2016 OCR/DOJ Dear Colleague Letter on schools' treatment of transgender students claimed to follow the sole federal court opinion on the topic, a circuit court ruling that had deferred to a previous policy statement by the agency that was in turn based on a few settlement letters similar to the one signed by the Palatine School District.⁴² To describe this process as convoluted would be an understatement. Indeed that is one of its most important characteristics. Understanding how civil rights regulations evolved requires painstaking political archaeology, digging through one layer of judicial and administrative detail after another.

The court–agency leapfrogging so common in the 1970s and 1980s became somewhat less frequent by the late 1990s as the Supreme Court turned in a more conservative direction. This was most apparent with sexual harassment, where OCR adopted a far broader interpretation of Title IX than that announced by the Supreme Court in 1998–99. When courts and agencies see eye-to-eye (as they have with intercollegiate athletics), agencies can count on courts to provide the enforcement teeth and public legitimacy that the agencies themselves have lacked. But when courts and agencies diverge, agencies must scramble to invent new enforcement tools—as OCR did with sexual harassment.

It is important to remember, though, that the Supreme Court decides very few cases—fewer than eighty per year. Over the past forty-five years it has heard only eight Title IX cases, none on athletics, three on sexual harassment, and (so far at least) none on transgender rights.⁴³ This means that circuit courts usually have the final judicial word on interpretation of Title IX. They have been more inclined to adopt a broad reading of the law than has the Supreme Court.

3. *Educational exceptionalism.* Most forms of regulation are designed to change the behavior of business firms. Regulation is usually seen as an effort to address "market failures" such as monopoly, externalities, and imperfect information. Few of the educational institutions subject to Title IX are profit-making firms. The vast majority are public elementary and secondary schools that do not compete for "customers" and are not judged by their "bottom line." Colleges and universities (both public and private) obviously do compete for applicants, often intensely. Unlike business firms, though, they tend to maximize status rather than profits. These peculiar features of educational institutions change the politics of regulation, making the task of ensuring compliance with federal rules harder in some ways and easier in others.

On the one hand, schools are the type of bureaucracies James Q. Wilson has called “coping organizations.” These are organizations in which it is difficult either to observe the work done by key personnel (in this case, teachers) or to measure with confidence the consequences of their work. “A school administrator,” Wilson notes, “cannot watch teachers teach (except through classroom visits that momentarily may change the teacher’s behavior) and cannot tell how much students have learned except by standardized tests that do not clearly differentiate between what the teacher has imparted and what the student has acquired otherwise.”⁴⁴ Consequently schools tend to be decentralized, hard to control either from the top or through written rules. A federal agency with little more than 500 staff members can hardly expect to monitor or to control what goes on in the classrooms of the more than 20,000 schools subject to Title IX—however long and detailed its rulebook.

On the other hand, schools are filled with employees who consider themselves “professionals,” which means not only that they are guided by the norms of their profession, but also that they are concerned with their reputation among peers outside their formal organization. This limits hierarchical control within schools and often creates tension between school professionals and the elected officials—school boards, mayors, governors, legislators—who hire them and provide their funding.

It also means that federal regulators can increase their chances of changing educational practices by negotiating informal alliances with the numerous professionals who staff the institutions being regulated: special education teachers, psychologists, bilingual education teachers, coaches of women’s teams, diversity offices, human resources administrators, and many more. Professionals employed by schools in turn can use regulation and litigation as leverage to gain resources for the activities they consider especially important. As the lawyer in a seminal disability rights case told a gathering of specialists, “We have with some ease adopted the agenda that you, the professionals have set and we have taken them to court.”⁴⁵ Norma Cantú, head of OCR under President Clinton, explained, “Our investigators and negotiators were good at figuring out what the people on the other side of the table wanted . . . and giving them political cover.”⁴⁶ In recent years OCR has worked assiduously to build large, autonomous Title IX compliance offices within universities. Charles Epp’s research on “legalized accountability” in state and local governments demonstrates the importance of these internal compliance offices for changing bureaucratic behavior.⁴⁷ It is not unusual for such offices to exaggerate the demands of federal administrators and judges in order to extend their authority and enhance their status.

4. *The language of rights.* Most regulatory agencies establish “policies.” Civil rights agencies, as their name suggests, define legal rights. In practice there isn’t much difference between the two. OCR’s rules, like the rules issued by EPA or

OSHA, tell regulated institutions what they can and cannot do. Nonetheless, the language of rights has had a profound effect on the politics of regulation. Elsewhere the central regulatory standard is market efficiency; here it is “equality of opportunity.” Economists have established themselves as the experts on the former; in the United States lawyers claim to be the experts on the latter. Interpretation of civil rights statutes takes place in the shadow of courts’ interpretation of the Fourteenth Amendment’s Equal Protection clause. Although these laws cover private parties—which are not subject to the Fourteenth Amendment’s prohibitions—most judges and administrators believe that interpretation of civil rights statutes should track the evolving interpretation of constitutional provisions.

As Mary Ann Glendon has pointed out, “rights talk” tends to discourage exploration of costs, trade-offs, incentives, alternatives, consequences, and compromise by encouraging us to think in terms of moral absolutes.⁴⁸ The sort of policy analysis one finds in the rulemaking proceedings of EPA or OSHA is rarely found in OCR documents. In fact, OCR has virtually abandoned the standard rulemaking process, replacing it with unilateral statements about the evolving meaning of statutory rights. “Rights talk” also leads us to see the world in black and white, rather than in the shades of gray that characterize most policy debates. We expect one presidential administration to change many of the policies established by its predecessor. But we balk at “rolling back civil rights”—even when those rights are based on partisan interpretations of ambiguous legislation. As a result, the language of rights is frequently used to lock in preferred policies by delegitimizing opposition.

To complicate matters further, it is not unusual for one set of rights to collide with another. Consider the examples of rights in conflict found in our three stories. One student’s right to be free from sexual violence can conflict with another student’s right to due process. The right of transgender students to be treated according to their gender identity can conflict with other students’ right to privacy. To comply with Title IX some men’s teams have been eliminated while women’s teams scramble to fill their rosters. Aggrieved college wrestlers and gymnasts have charged that this constitutes “reverse discrimination.” In 2002 the executive director of the National Wrestling Coaches Association promised, “We’re prepared to do whatever it takes to eliminate the gender quota. . . . There shouldn’t be any gender discrimination, period, and there’s serious discrimination going on against men.”⁴⁹ Male students falsely accused of sexual assault made similar arguments a decade and half later. Rights are seldom as simple in practice as they sound in lofty political and academic debates. Behind the rhetoric of rights lies the messy complexity of regulatory politics.

5. *The idea of progress.* Soon after successfully defending the Civil Rights Act before the Supreme Court, former solicitor general Archibald Cox wrote, “Once

loosed, the idea of Equality is not easily cabined.”⁵⁰ The American civil rights state was originally constructed to destroy the racial caste system in the South. Attacking state-sponsored segregation, discrimination, and disenfranchisement required an unprecedented assertion of federal authority. Before long these same powers were being employed to address sex discrimination, the barriers faced by English-language learners and students with disability, age-based rules on hiring and retirement, and social norms regarding sexual orientation and gender identity. Regulation slowly moved from the most public—state laws mandating segregation—to the most private—sexual relations among adults.

In almost all areas of discrimination law there has also been a strong tendency to move from bans on *intentional* discrimination (the original focus of the Civil Rights Act) toward an expectation of *proportional results*. Intentional discrimination is hard to prove and easy to disguise. Once intentional racial and sex discrimination became illegal, judges and administrators looked for ways to ferret out discrimination that is more subtle, based on sophisticated pretexts, or even unintentional. The standard approach has been to place the burden of proof on businesses, schools, and other institutions that fail to produce proportional results in hiring or admissions to demonstrate that they have not discriminated on the basis of race, sex, or any other prohibited criteria. Under such “disparate impact” rules, only business or educational “necessity” can justify practices that result in disproportionate outcomes.

This proportionality standard is particularly apparent in athletics: the only “safe harbor” for college athletic departments is a distribution of male and female varsity athletes and scholarships that mirrors the proportion of male and female undergraduate students at the institution. The central argument against this manifestation of the proportionality rule—an argument repeated loudly and frequently by coaches of discontinued men’s teams—is that males and females differ in their relative interest in highly competitive sports. The distribution of athletic opportunities, they argue, should reflect students’ interest, not enrollment numbers. Women’s groups and OCR respond that interest often reflects opportunity, and Title IX is designed to upend gender stereotypes that all too often reflect decades of discriminatory practices rather than natural differences.

This means that civil rights regulation often seeks not just to change behavior, but to change the way all of us—employers and employees, teachers and students, and members of the public at large—think about race, sex, age, disability, language, religion, or ethnicity. As First Circuit judge Hugh Bownes claimed in an important Title IX case, “Title IX was enacted in order to remedy discrimination that results from stereotyped notions of women’s interests and abilities.”⁵¹ According to this interpretation, Title IX must be used to change the way men view women and women view themselves. “Build it and they will come” is the motto of many advocates for women’s sports: new opportunities will upend old gender stereotypes. One finds an even stronger effort to change

how people think about sex in OCR's regulations on sexual harassment and gender identity. Their goal is not just to punish those who engage in misconduct, but to change students' understanding of what constitutes proper sexual behavior, the right way to think about sex, and even what it means to be male or female. This is a heady job for government regulators.

This book explores the gradual expansion of the goals of Title IX regulation and the corresponding authority of OCR and federal judges. This transformation took place not through congressional amendment of the law, but through administrative and judicial reinterpretation of a statute that has changed little since 1972. On the one hand, this shows that the common complaining about government "gridlock" is overblown. Our constitutional system may make legislation hard to pass by creating multiple "veto points," but it also creates multiple "opportunity points" for innovation by judges, administrators, and state and local officials.⁵² Congress has been only one contributor to the growth of the civil rights state, and often just a minor and reactive one.

On the other hand, the transformation of Title IX raises serious questions about political accountability. Should unelected judges and administrators have the power to impose on local schools and private universities rules that the elected legislators who voted for Title IX had never imagined? Should we trust those judges and administrators to update decades-old legislation to comport with their understanding of "progress"—even if many others see the changes they mandate as constituting retrogression or decay? This is a topic to which I will return in chapters 12 and 13.

Evaluating Policy and Process

Much of this book is devoted to describing the institutions of the American civil rights state and the unusual processes that produced current Title IX policies. I try to explain the evolution of policy on athletics, sexual harassment, and transgender rights in a way that both supporters and opponents of these policies will consider fair and accurate. That does not mean I am agnostic on the merits of these policies. As the reader will see, I consider many of OCR's rules—especially those on sexual harassment—badly flawed, and I trace those flaws to serious deficiencies in the process that produced them.

Most of the problems associated with the extensive regulations and guidelines generated under Title IX are a result of regulators' unwillingness to seek input from those most affected by and most knowledgeable about these issues, and their lack of interest in examining the long-term costs and unintended consequences of their actions. Convinced that they were on the side of the angels, they made little effort to hear dissenting voices or to temper their vast ambitions. By using Dear Colleague Letters rather than rules established through the

process mandated by the Administrative Procedure Act, OCR avoided its obligation to justify its policies, collect relevant information, and respond to criticism. In order to do this, it had to conceal the novelty of its mandates. “Nothing new here,” the agency repeated year after year as its demands on schools escalated. All too often federal judges did just the same, enabling and legitimizing such agency action and enforcing the resulting regulations. In 2017 Secretary of Education Betsy DeVos promised to end what she described as “rule by letter,” and to employ Administrative Procedure Act rulemaking procedures for establishing new policies under civil rights laws.⁵³ Whether OCR will practice what Secretary DeVos has preached remains to be seen.

The connection between flawed policies and truncated procedures is clearest with sexual harassment rules. Surprising as it might seem, the due process and free speech issues that have featured so prominently in subsequent debate were never subjected to serious analysis by OCR before it issued its 2011 and 2014 guidelines. Nor was there any discussion of the substantial costs these requirements would impose on schools, or the way in which the new compliance offices mandated by the federal government would shift power within educational institutions. Instead of taking a hard look at the complicated evidence on the frequency and causes of sexual assault, the agency relied exclusively on a handful of studies, including one that even its authors described as unrepresentative of the diversity of American universities. None of the scores of agreements with individual schools were subject to public scrutiny before they were signed, sealed, and delivered. When criticism inevitably appeared, OCR’s leadership responded primarily with invective, insisting that critics were trying to “roll back civil rights” because they did not understand the seriousness of the issue.⁵⁴

As chapter 8 explains, a similar refusal to acknowledge the novelty of their guidelines or to explore their long-term implications characterized the athletics policies ever so slowly developed by the courts and OCR. Most disturbing was the potent combination of their focus on the most competitive level of college sports and their obliviousness to opportunity costs. Judges and administrators alike created strong incentives for schools to increase spending on intercollegiate athletics, despite the fact that at many colleges this benefited only a tiny fraction of “students-athletes” and reduced the resources available to those more serious about academic pursuits. How can it be, the president of Brown University asked, that the university can be “free to cut libraries and academic departments, but not athletics?”⁵⁵ The short answer is that neither the courts nor administrators gave any sustained attention to the central issue, namely, the relationship between sports and education. In a variety of ways described in chapter 8, it is likely that the unacknowledged costs of this interpretation of Title IX fall most heavily on women.

The transgender guidelines issued by OCR in 2016 (and revoked within a year) were in place for such a short time that it is impossible to evaluate their

long-term consequences or their wisdom. What is notable about them, though, is that on the basis of a very shaky legal argument and with virtually no explanation or presentation of evidence, federal regulators laid down a rule for thousands of school districts that brooked no exceptions and left little room for school officials to consider the special circumstances of each case. The complex psychological issue of gender identity was addressed by applying an almost entirely inapt analogy, that of racial segregation. On transgender issues American culture is changing with remarkable rapidity, making it more likely that in most places school officials will treat students struggling with gender dysphoria with compassion and understanding. Curt dictates from inside the Beltway do more to stoke the culture wars than to help those on the receiving end deal with complicated, real-life problems.

Behind the debates over particular Title IX policies lies a broader issue: Who should decide? In the United States, decisionmaking on most educational policy is highly decentralized. State and local educational institutions bear most of the responsibility for elementary and secondary education. Our system of higher education includes schools public and private, large and small, religious and nonsectarian, liberal arts colleges and professional schools, brick-and-mortar and online—a remarkable variety that has helped make our colleges and universities the best in the world. On a few issues we have decided that some types of decisions cannot be left to the discretion of those running these thousands of schools. Most important, none of them can discriminate on the basis of race, and most of them cannot discriminate on the basis of sex. Some of these prohibitions have originated in the Supreme Court's interpretation of the Constitution. Most have come from Congress. But almost all the federal mandates examined in this book bear at best an attenuated relationship to what the Constitution or Congress commands. Consequently, the evolution of Title IX raises fundamental questions about control, accountability, and legitimacy within a constitutional democracy. While I make no secret of the fact that this worries me a great deal, I prefer not to preach, but to lay out the story as fairly as I can and let the reader judge.

Given the tenor of contemporary debate on these topics, it is important to emphasize that criticism of current policies does not imply disagreement with the original, underlying purpose of Title IX—promoting *educational* opportunity for women and girls—nor does it deny the remarkable achievements of female students over the past half century or the seriousness of problems they still confront. Those of us who have daughters should be thankful that they can now be student-athletes if they so choose. At the elementary and secondary levels, much remains to be done in many parts of the country to encourage athletic activity and physical fitness among girls. Despite the attention paid to the issue in recent years, sexual assault and other forms of sexual misconduct remain a serious problem on college campuses. Indeed, it is rare to talk to a female college graduate who does not have a disturbing story to tell. We have yet to get a firm

handle on the extent of the problem, to say nothing of effective remedies for it. Transgender students face many serious personal and social challenges. Schools need to show compassion and flexibility in responding to their diverse needs.

Recognizing the *seriousness* of these *problems*, though, does not require us to accept the *adequacy* of the *solutions* offered by OCR and the courts. In the end, adequately understanding these issues requires us to descend from airy abstractions about rights, stereotypes, and equal opportunity into the sometimes confusing, often dreary weeds of statutory provisions, *Federal Register* notices, Dear Colleague Letters, judicial opinions, and settlement agreements. This is a world in which one finds many of the pathologies identified by serious students of regulation, including mission creep, goal displacement, bean counting, and unanticipated consequences. Regulating thousands of schools with millions of students and teachers is an enormously difficult task. It takes much more than good intentions. A first step for improving this regulatory regime is to learn from past mistakes.