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Brookings Cafeteria: The Transformation of Title IX

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(MUSIC)

DEWS: Welcome to the Brookings Cafeteria, the podcast about ideas and the experts who have them. I'm Fred Dews.

Few laws have had such far-reaching impact as Title IX of the Education Amendments of 1972. Intended to give girls and women greater access to sports programs and other courses of study in schools and colleges, the law has since been used by judges and agencies to expand a wide range of antidiscrimination policies. Most recently, the Obama administration's 2016 mandates on sexual harassment and transgender rights.

On today's show, Brookings Press Director Bill Finan talks with R. Shep Melnick, author of the new book "The Transformation of Title IX: regulating gender equality in education." Melnick is a professor of American politics at Boston College. Also on today's show, David Wessel looks at President Trump's trade policies. You can follow the Brookings podcast network on Twitter @policypodcasts to get the latest information about all our shows. First up, David Wessel.

WESSEL: I'm David Wessel and this is my economic update. Today's question is a simple one. Will Donald Trump's trade war trigger a recession? Sounds like a yes or no question but let me warn you at the outset - it's not. For now the U.S. economy is doing pretty well. The best guesses are that the economy grew at an annual rate of better than 4 percent in the second quarter, boosted perhaps by the big tax cut the president Trump signed. Businesses finally seem to be willing to invest. Unemployment is at a 17 year low (but that only counts people who say they're looking for work and there's still a large number of workers on the sidelines).

Employers have been stubbornly reluctant to raise wages. But with so many of them complaining of worker shortages these days history suggests that wage increases are likely to follow. But a recession is inevitable. The U.S. economy has been growing without interruption for nine years now only once before in the 90s have we gone so long without a recession. Economists say accurately that economic expansions don't die of old age, but they don't last forever either. So could a trade war be the trigger for the next recession. Well yes it could. But whether it will is a harder question because the answer depends on what Trump will really do as opposed to what he says, what our trading partners will do in response, and what businesses investors around the world will do in response to that.

It's not hard to sketch out the worst case scenario. The president, who incorrectly sees trade as a zero sum game and trade deficits as the nation's bottom line, sides with the trade hawks in his administration. He imposes tariffs on all sorts of imports from China, Europe, Mexico, Canada, and so on. The Chinese, the Europeans, the Mexicans, the Canadians respond with tariffs of their own and with other measures aimed at punishing the US economy. The Chinese for instance might let their currency depreciate or they might harass us multinationals doing business in China more than they already do. US farmers and other exporters suffer. Prices in the US rise. Global supply chains are disrupted and shortages

of parts and hot goods proliferate. The stock market tank. Fighting the recession proved difficult because the federal debt is already large by historic standards, so Congress won't cut taxes or increase spending as it should. And the Fed doesn't have much room to cut interest rates. Faced with weak demand at home businesses cut back. Given the size of markets outside the United States big multinationals shift even more production overseas. Harley Davidson turns out to be just the beginning. The rules based trading system the US helped create after World War II was irreparably damaged and the distrust engendered by the tit for tat tariffs makes it hard for leaders of the world's big economies to assemble a replacement or to cooperate on other problems of global consequence.

Or maybe not. Consider a couple of other scenarios. One is that the U.S. imposes a few tariffs on our trading partners respond in kind. A few industries get hurt hard, but the momentum of the global economy largely offsets the effects. And the grownups (if there are any) in Washington, Beijing, Brussels, Ottawa, and Mexico City understand the risk and they don't let this get out of hand. Goldman Sachs economists recently put it this way in a note: "the proposed U.S. tariffs and their expected retaliation pose a modest Macro risk to our optimistic outlook for the world economy". Though they did add "these risk could rise sharply if the trade war escalates and financial conditions tighten in response".

Another possibility is that President Trump backs off. He's made his point. He's got it headlines, but he realizes his trade policy risks undoing whatever economic benefits his tax cuts may deliver. His recent decision to reject proposals to impose harsh restrictions on Chinese investment in the U.S. suggests that the trade hawks in the White House have not completely won the internal battles. President Trump is acutely sensitive to his base, and the base clearly loves his rhetoric on immigration and on trade. But rightly or wrongly people tend to blame the president when the economy weakens. The president will try and blame others of course. But he must know that disrupting the expansion is not in his political interest, even if he believes his trade tactics are in the long run interests in the country. Maybe a few Fox News headlines are all it takes to get them to back off.

Now I'm really reluctant to put odds on these scenarios. I'm really not sure what's going to happen. What frightens me though is that we cannot rule out the worst case scenario.

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DEWS: And now on with the interview about Title IX here Bill Finan and Shep Melnick.

FINAN: Thanks Fred. And Shep, good to see you. Title IX - what in a nutshell is it?

MELNICK: The interesting thing about Title IX is how has changed over time. The law itself is really simple. It just says that any institution that receives federal funding, any educational institution, cannot discriminate on the basis of sex. Who could disagree with that?

FINAN: Right. Very simple.

MELNICK: The interesting thing about regulation that has evolved under it and the main thesis of my book is that the major purpose of Title IX in 1972 was to open the doors of educational opportunity for women. And there were many barriers facing women at that time. There was really quite gross discrimination against women faculty members. Many schools did not allow women to enter either a college, or a program, or a graduate program. So there was a lot of very overt discrimination and that was the purpose of the law, was to the extent that this activity is federally funded. The doors of opportunity had to be opened to women.

FINAN: And in the book you mentioned some of the major Ivy League universities where women were not allowed in, which seems phenomenally backward. Now 40 some years on and you also mentioned the shifts in the number of women who become college graduates too it's almost reversed what it was in 1972 in terms of male female.

MELNICK: Right it has reversed. In 1972, 57 percent of college graduates were men. 43 percent women. Now is exactly the opposite. And women are actually climbing close to 60 percent of college students. They received more PhDs than men. Believe it or not. And even in the sciences if you count biology they are close to parity in the professional schools. So it's a really remarkable change. One thing I should point out is that the Ivy League schools the ones that were single sex most of them were not required by Title IX to allow women to enter, because undergraduate schools that are private were exempted. But all of them did. And the pressures were really so powerful the cultural pressures and that's made a tremendous difference in those schools. I can say since I went to Harvard when I was four to one male it is a much better place now.

FINAN: So the simple prohibition that Title IX had in place the Sex Discrimination would not happen in educational facilities. That simple prohibition is a ground on campus a lot of issues that have been in the headlines recently from women and college athletics and sexual harassment to transgender students use of sex segregated facilities. Why is it so wide ranging? What happened?

MELNICK: That is the most interesting question. I could add to that now dress codes are going to be the new frontier of Title 9. How did that happen? You know nutshell is what I try to show in the book and my argument is that this original purpose of opening the doors of educational opportunity to women was transformed into an effort to try to undo all types of sexual stereotypes. Whether it be sexual stereotypes about women's interest in athletics, or relations between men and women and very private settings, of

courting and sexual relationships, or whether it be our understanding of what it means to be male or female which is the transgender issue. So the regulation took on this much more extensive and ambitious effort to try to change the way not just students and faculty and administrators, but the public at large thinks about a wide variety of matters relating to sex.

FINAN: It's also now fully at the center of the culture wars polarizing this country. Why has that happened?

MELNICK: Well as soon as you start talking about sexual stereotypes and what we mean by sex and improper sexual relations then you're into an area that is not consensual as is opening doors of opportunity for women but it's highly conflictual. And if my book can do anything I hope it is to convince people that we can back away from getting into this cultural warfare and to try to come to a more centrist moderate position on some of these issues.

FINAN: I'd like to argue that having read the book. You do make that point very well. One of the points you make in the book too is that gender segregation and racial discrimination are often equated and they shouldn't be. The differences are huge and obvious right. What are those differences?

MELNICK: Right. The Title IX was based on Title VI of the Civil Rights Act which involved race and in many areas the law we have said sex is like race. And with Title VII of the civil rights law that bans discrimination in employment we added the word sex to the word race. So what are some of the differences? Well it's most apparent in the area of athletics where we don't say men and women can compete on a level playing field on the same teams. And if the guys can jump higher and run faster and block harder than they should get all of the positions. That seems patently unfair to women. And so these physical differences between men and women sometimes not most aspects of education, but sometimes do become important. And the other area in which we have allowed some types of segregation based on sex is in areas involving privacy bathrooms, showers, dorm rooms. We cringe are revolted by the idea of having signs over bathrooms as a black and white but we accept usually having male and female for matters of privacy so these physical differences sometimes are important.

FINAN: Right. Large difference. A central concern of the book does is to go back we began with is the distance between what the legislators thought they were voting for in 1972 and what Title IX has become. You write that "certainly no one who voted for Title 9 in 1972 thought that the Office of Civil Rights would eventually write rules allowing students to choose for themselves whether to be treated as male or female." That distance has become the province of what you call the civil rights state. What is a civil rights state?

MELNICK: We are very comfortable talking about the welfare state, which is a collection of a wide variety of welfare programs both contributory like Social Security, and food stamps. And people have studied the welfare state and say well there is something distinctive about the American welfare state as opposed to European welfare state. When we look at it as a whole. So what I've tried to do is say let's look at this very extensive set of civil rights laws: race, disability, gender, age and language. And say - what is the characteristic of these sets of programs that are different from other programs and different from the way the European countries handled this?

And one of the key features of the civil rights debate that I've tried to highlight is what I call court agency leapfrogging. Which is that courts and agencies both have a big role in developing regulations in this area. And what has happened is that an agency will take a small step and the court will build on that. The agency will go further than that, and you get this constant expansion without people really thinking about what they're doing as new. And one of the things that bothers me is because they all have an interest in saying 'we're not doing anything new', that means they don't have to have opportunities for public participation. They don't have to do the type of analysis of most regulatory agencies do to consider costs and alternatives. So the process I think has been particularly opaque. And the one reason we got so far from the original understanding was that we had this process in which people really were not being frank, and sometimes not understanding themselves, how far we were moving away from that original intent.

FINAN: A question I wanted to ask you is that part of the problem - this is a point you make early on - is that Title IX speaks in grand phrases, with the uncertain meaning. And so there's been a lot of attempt to interpret those grand phrases into granular meaning, and is that what we're seeing here?

MELNICK: Right. I mean that's true of many forms of regulation. I think it's extreme here. One of the reasons that we have administrative procedures set up by the Administrative Procedure Act of 1946, is when we give agencies the ability to give more explicit meaning to these broad phrases, we expect them to go through a participatory open process and that I think is what is particularly lacking in this area of the law.

FINAN: You contrast what you're calling social regulation with what we know as economic regulation. Can you broadly describe the differences between the two? Because it's pretty obvious in the book how different they are.

MELNICK: Sure. Economic Regulation is primarily regulation of business firms to deal with what economists call market failures. Imperfect competition, externalities, monopoly power, and usually that means that setting prices for goods and services or setting limits of pollution or other forms of extra

nowadays. And I think we have some pretty good economic models of how to deal with some of these issues.

The social issues are much more questions of what do we mean by morality? What do we mean by justice? And that is much harder to quantify and involves many more political passions than even environmental policy. One thing I might point out since we're talking about the contrast between these areas: Scott Pruitt is trying to change a lot of things at EPA. He has to face a problem that most of those rules are set in place by notice and comment rulemaking and he can't undo them unless he goes through the same process.

FINAN: and that rulemaking process is..?

MELNICK: That rulemaking process is number one you have to explain your proposal in some detail. You have to open that up for comments from the public. Then you have to respond to all of what the court calls significant comments. It's really hard to know what is significant so agencies usually make sure they respond to everything and to make explicit what information you're basing it on why your argument is how, you get from point A to point B and how you deal with criticisms of it. Now that can be a very time consuming process. But it's also highly participatory and makes people think about what they're doing and what the alternatives are. And once you do that, you can only undo the regulation by going through the similar process. Which is really slow it up for better or worse - I think probably for better the process at EPA. But at the Office for Civil Rights and Department of Education since they don't go through that process the first place they can undo it in a similarly unilateral way were do what Secretary DeVos has done with the transgender and sexual harassment.

FINAN: You begin the book by looking at three case studies that show how Title IX has become the province of what you call the civil rights state. There's an event at Quinnipiac, and a case at Harvard Law, and then a public school in Illinois. Can you just briefly describe those three?

MELNICK: The Quinnipiac case involved athletics and the claim there was that they had not provided equal athletic opportunity to women students. And I said there were two parts of the controversy. One was that Quinnipiac fudged the numbers and I don't think it's a polite way of saying that. That happens a lot. But beyond that the argument was that they were not providing Varsity athletic opportunities that were proportional to the number of women in the school. So the regulation right now is that what you need to aim for is the number of varsity athletes that are male and female should reflect the proportion of male and female undergraduates. And since most schools now women are getting close to 60 percent of the undergraduate body, the argument is that varsity athletes should be at that level. So schools have been trying to figure out how to do this. As with many other places they decided that many women

there were interested in what's called competitive tumbling and cheer which is a combination of traditional cheerleading where a lot of gymnastics. So the court was asked to decide whether that is a sport.

FINAN: It's just the fact that the court has to make a decision like that. *laughs*

MELNICK: Right. Yeah. Gregg Easterbrook who is both a political and a sports commentator. I don't know if he's still affiliate with Brookings but he was for a long time ago. He said whether competitive tumbling and cheer is a sport is not a major civil rights issue. But once you get into this counting up by gender it's really hard to know how you don't try to figure out what is a sport and what is not.

The important takeaway there I think is that one of the features of regulation of athletics is that it focuses so heavily on *varsity* sports. I think that the interest that Title IX has generated among girls and women in sports is terrific. But I think where they took a wrong turn was to say we're going to count up the number of varsity sports. Because that affects a very, very few people. It's extremely expensive. And it has meant that we have pumped more money into varsity sports for a small number of people rather than looking at athletic opportunities across the spectrum from intramural to recreational to varsity. And one thing I will say : I'm critical of the Obama administration in many parts of this book. But one thing I think they did that was really great was to put more emphasis on elementary schools and high schools. Because the imbalance in opportunity for girls and boys I think is quite stark in many parts of the country and that's where I think this could do a lot of good.

FINAN: In the case of Harvard Law, we see of both race and gender and violence being brought together under the question of Title IX.

MELNICK: This is a case in which you have accusations of sexual assault. In this case the charges brought by black woman against a black man. As in many of these cases, exactly what happened is murky. The man was disciplined by the law school but allowed to come back after I think two years. And the woman who raised the allegation thought that this was far too little.

One of the things interesting about Harvard Law School and particularly in law schools in general is that while most law professors are clearly on the liberal side of the political spectrum, some of the harshest criticism of these rules has come from law professors who are concerned about due process. And I think the most interesting and eloquent statement of the criticism of lack of due process in many schools has come from four eminent women law professors at Harvard who said what I think is the key point: you don't have to give up due process protections to protect people against sexual assault. And how we put those two things together is really crucial.

FINAN: And the third case was a school district in Illinois and pointedly deals with the bathroom

issue. Right. Yeah that was really one of the opening salvos of the bathroom wars, that later erupted in North Carolina. The issue here is not whether transgender students deserve education, whether they have that basic right. The answer clearly is yes. The only question is what sex segregated facilities will be allocated to them. And the Office for Civil Rights said in 2016 “Dear Colleague” letter one of these unilateral declarations that you have to respect the gender identity of the student in these matters. Whether it be a use of bathrooms, or showers, in locker rooms, or dorm rooms (assigning people to roommates or sports teams). So that if a person who was born male and has male anatomy identifies as female they have to be treated as female in every aspect of education. And this raised issues about privacy. It raises issues about how do you figure out who gets to be on a male or female sports team. So all of these issues are coming out now.

The difficulty the Office for Civil Rights had was that the law clearly allows sex segregation of some facilities. And what the argument for transgender rights is, is that when the law says sex it should be interpreted mean gender identity. But of course the term gender identity was created to distinguish itself from sex as a term is usually used. So it's quite a legal stretch.

FINAN: The Trump administration has of course walked into this issue of tough on these controversies and Education Secretary Betsy DeVos has been at the forefront of that. What is your assessment of how she is approaching the issues we've been discussing?

MELNICK: This is an issue that I feel torn on. Because on the one hand I do think that many things need to be changed. I think that the withdrawal of the Dear Colleague letters on transgender rights and on sexual assault were proper. I can't think of a worse administration to symbolize these changes. I have not been impressed by Secretary DeVos's command of many of these issues. I have been impressed by the choice for Assistant Secretary for Civil Rights- if he is ever confirmed – Ken Marcos who is an experienced and thoughtful person, but I don't know if the Senate will ever confirm his nomination. But revising these regulations is going to be the proof of the pudding. And so far they haven't been able to do that. They promised that the era of rule by letter, of the “Dear Colleague” letter is over. They were going to do things through the proper administrative procedure. I applaud that. We're still waiting for even the proposal of the rulemaking that was promised in September. So I think the jury is very much out on what direction this administration is going to go.

FINAN: I want to end with a warning you deliver in the book. The evolution of Title IX raises fundamental questions about control accountability and legitimacy within a constitutional democracy. What are those fundamental questions and how do we address them?

MELNICK: I think the fundamental question is when you are going to set federal rules that establish

rules of conduct for every elementary school, every high school, virtually every college and university in the country, who should have that power? Now we'd like to say that Congress is the one that should do that. I would be delighted if Congress stepped up and was much more explicit on these things. I'm not holding my breath. Even when Congress was not in a state of gridlock it is now back in the 70s and 80s, they didn't say very much at all about how Title IX should be interpreted.

Given that what's really important is much more transparency starting with the administrator process. But I think also with the courts. Because right now the courts have basically said well we'll defer to agencies when we like the result and when we don't we'll give our own interpretations. I think a little more respect for statutory text would be useful, and a combination of more administrative process and a little bit more humility by the courts I think would do a great deal to restore constitutional balance.

FINAN: Shep, thank you for coming by today to talk about your new book with Brookings press the transformation of Title IX.

Well thank you very much.

DEWS: You can read more about the book, "The Transformation of Title IX," on our website Brookings.edu.

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DEWS: Thanks to audio engineer and producer Gaston Roboredo. Brennan Hoban and Chris McKenna are the producers. Bill Finan does the book interviews. Jessica Pavone and Eric Abalahin provide design and web support. Thanks to Camilo Ramirez and David Nassar for their guidance and support.

By the way David is moving on from Brookings after this week. Five years ago he asked should we have a podcast and thus was born the Brookings cafeteria. So David thank you especially for all that you've done to make this podcast a success, and thank you for supporting me in this podcasting journey. My best to you.

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Until next time, I'm Fred Dews.