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*The Tactics of Title IX**

Aaron Saiger†

BOOK REVIEW

The Transformation of Title IX: Regulating Gender Equality in Education, by R. Shep Melnick, Washington, D.C., Brookings Institution Press, 2018, 325pp., \$35.99 (paperback), ISBN: 978-0815732228

Title IX, enacted in 1972, forbids sex discrimination in education. More precisely, the statute requires that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” Shep Melnick’s new book traces how the Office of Civil Rights (OCR) in the United States Department of Education aggressively deployed this laconic instruction to engineer an ideologically fueled “transformation” of American schools, colleges, and universities.

Melnick tells two stories about Title IX. The first, which is better known, traces the expansion of the statute’s domain over time. Title IX today carries meanings likely unimagined by the lawmakers who drafted the statute in 1972. In recounting this history Melnick is fair but not neutral. His sympathy is clearly with those who see in this expansion a paradigmatic instance of administrative overreach in service of a progressive and substantially overwrought ideology. Melnick is especially critical of the Obama Administration, whose OCR took the position that because sex discrimination is systemic and structural, nondiscrimination demands nothing less than systemic and structural reconstruction of educational institutions. Readers fighting on all sides of the so-called “culture wars,” in which such thinking is a *casus belli*, will find that Melnick’s account, although unlikely to change any minds already made up, offers important evidence, nuance, and context.

Melnick simultaneously provides his readers a case study in the tactics of agency action. How did an obscure office in an often marginalized Cabinet department manage to engineer the transformation the OCR accomplished? This question, of course, is also of interest to culture warriors (of all sympathies). But it speaks equally to anyone interested more broadly in the power of the administrative state over educational institutions—or, for that matter, in its power and scope generally.

Melnick’s two stories interpenetrate. Both flow from the reality that although the opposite of discrimination is equal treatment, to mitigate discrimination sometimes requires one to treat

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different people differently. This claim, still controversial with respect to race, commands considerable consensus with respect to sex discrimination. But how far to extend differential treatment in service of nondiscrimination on the basis of sex creates hard cases.

One of those is athletics, to which Melnick, after providing an overview of the statute and its history in Part I, devotes Part II of his book. Here, the problem is straightforward: If all athletic teams were coeducational, most would field many more men than women. Equal opportunity for women athletes almost certainly requires having women-only as well as coeducational sports. Another hard case involves sexual behavior itself. The epiphenomena of sexual activity—ritual, romance, regret, power, culture—indisputably sometimes involve behaviors that discriminate based upon sex-the-characteristic. These problems structure Part III of Melnick’s book, “Sexual Harassment.” And a third case, at least as vexatious as the first two, involves how discrimination relates to sexual and gender identity. Melnick’s final chapter briefly treats the issue of bodily privacy in connection with school restrooms, locker rooms, and showers. Title IX regulations specifically permit such facilities to be sex-segregated, but they have become controversial as transgender students have raised their voices.

In each of these areas, Melnick documents a pattern, or at least a pattern pre-Trump. (The volume was largely completed before Trump’s election; Melnick addresses it briefly in the book’s final section.) Under Democratic administrations, the OCR defined discrimination ever more capaciously and regulated enthusiastically. When federal courts endorsed their extensions of the idea of discrimination, Democratic OCRs deployed those decisions to ratchet the scope of Title IX even wider. The OCRs of Republican administrations, meanwhile, declined to extend the reach of Title IX but also rolled nothing back.

The result of this ratchet is a Title IX that forbids behaviors by schools and universities that many might be reluctant to call “discrimination.” As the statute is enforced today, a college discriminates on the basis of sex if it fields fewer women than men as varsity athletes—even if fewer women than men express interest in, and try out for, varsity teams. A school discriminates on the basis of sex if it declines to police sexual interactions between students that fall short of sexual assault or occur off campus. Until the Trump Administration rolled back Obama-era policies, a school discriminated on the basis of sex if it accorded those accused of sexual offenses on campus a presumption of innocence. A school likewise discriminated if it did not permit students to use restrooms, locker rooms, and showers assigned to the gender that they express.

Have the lawyers of the OCR been right to characterize such policies as “discrimination”? Melnick mostly thinks not. Many of his interlocutors think so. I think reasonable minds can disagree. Take the demand of the Obama OCR that campuses adjudicate claims of sexual misconduct using a “preponderance of the evidence,” rather than the more demanding “clear and convincing” evidentiary standard. Many find it preposterous to describe as “discriminatory” evidentiary burdens that favor those charged with criminal acts, given the centrality of the presumption of innocence in our constitutional culture. On the other hand, campus proceedings are not criminal. Many other civil questions, adjudicated both by schools and by courts, use a preponderance of the evidence standard. This includes some, such as academic dishonesty, that can result in serious

punishment including expulsion. Why should sexual misconduct be the one genus of noncriminal claims that disfavors complainants?

(This, by the way, is exactly the kind of difficult, politically-inflected interpretive debate that we create government line agencies like the OCR to resolve. Such agencies' leaders are appointed and confirmed by political actors and are entitled to advance their political views through interpretation, so long as they cabin those views within the law.)

At the same time, however, counts of varsity athletes, standards of proof in campus proceedings, and transgender access to locker rooms are clearly outside the ambit of the problem the Congress set out to address in 1972. The drafters of Title IX surely were thinking about more traditional, straightforward kinds of sex discrimination. This is Melnick's first objection to the OCR's tactics. He calls the agency out for relying on what lawyers call "dynamic statutory interpretation" to force the statute to bear meanings it would not have borne when enacted.

The agency has indeed interpreted Title IX dynamically. But saying so does not substantially advance the debate over whether to do so is proper. Whether courts and regulators can "update" statutory meaning beyond initial legislative intent has been a wellspring of disagreement among jurists and academics for decades. The case of Title IX gives us few new arguments or insights that might move the needle in that perennial stalemate.

Melnick's second observation about OCR tactics does move the needle. He describes at length the assiduous efforts of the OCR to cultivate outside interest groups in order to advance its agenda and protect its power. It is a compelling account. One of the most far-reaching of Melnick's many examples is the requirement that every school and university designate a Title IX officer. That officer shares an interest with the OCR in maximizing the scope of Title IX and thus her own power and influence—but is a private employee. Title IX officers thus become beachheads for OCR policy inside the institutions the OCR regulates.

Another of Melnick's fascinating examples of the OCR's interest-group awareness is its vigorous insistence that, as schools sought to equalize the number of female and male athletes, the agency would "disfavor" any reduction in the number or resources of men's teams. This obviously serves to blunt any opposition to the OCR policy of parity that might emerge from big-ticket men's teams and their supporters. But how can one characterize such reductions as "discrimination"? Melnick's chapters on sports depict Vartan Gregorian, then president of Brown University, as a tragic hero, quixotically propounding the compelling but nevertheless doomed argument that the no-diminution policy protects not female students but athletic budgets, to the detriment of expenditures in support of instruction and scholarship.

Melnick's final argument about tactics is that the OCR systematically defies the law governing regulatory procedure. The Administrative Procedure Act, or APA, sets out procedures that all federal agencies must follow to make binding rules. Agencies must notify the public of their proposals and allow public comment. They then must justify their final rules, in writing, in light of the law and of the comments they receive. Title IX itself adds the additional procedural requirement that its implementing rules must be approved directly by the President of the United States.

After an initial flurry of rulemaking in the immediate aftermath of the law’s passage—which included, *inter alia*, the key requirement that institutions appoint Title IX officers—the OCR has generally abjured doing any of these things. Instead, without procedure of any kind, it has simply informed schools and universities of their obligations. These *ex cathedra*, procedurally unencumbered, unilateral notifications, in recent years often introduced with the faux-familiar salutation “Dear Colleague,” became the preferred genre for the OCR’s most consequential policy announcements, including its controversial guidelines regarding athletics, sexual misconduct, and transgender access.

The OCR justifies its “Dear Colleague” letters by insisting that they say nothing new. Notice and comment are for *new* regulatory requirements; schools and universities are *already* required not to discriminate. The OCR letters simply clarify what that existing requirement entails. Melnick mounts an extremely persuasive case that, with respect to many of the OCR’s more far-reaching letters, this claim is fatuous. The no-diminution principle for men’s teams, or the requirement that students be given access to locker rooms that match their expressed gender, are hardly “existing” requirements. Their imposition flouts the APA, as well as the Title IX requirement of direct presidential approval for rules.

The peroration of *The Transformation of Title IX* includes a plea to return to the methods of the APA. If the OCR wants to reinterpret a term like “discrimination,” let it do so in the sunlight, with public notice and public participation, in a way that lets arguments on all sides be heard and considered. Had the OCR done this, Melnick argues, its justifiable positions would have enjoyed the legitimacy conferred by careful, public, and lawful procedure. It also, Melnick strongly (and correctly) implies, would in so doing have found some of its more aggressive moves effectively foreclosed.

The power of Melnick’s book is to make a reader think that more procedure might actually cabin the OCR’s reach. But the contrary possibility is that any gains procedure might bring will be too late, effectively countered by the OCR’s successful long-term interest-group strategy. The Trump Administration is poised to offer a test. The Trump OCR not only withdrew its predecessor’s “Dear Colleague” letters on sexual harassment and transgender access, but initiated a full-blown APA rulemaking to formulate new rules for sexual misconduct. The notice adopts Melnick’s view of procedure, stating that “the obligations set forth in previous guidance were issued without the benefit of notice and comment that would have permitted the public and all stakeholders to comment on [its] feasibility and effectiveness.”

But, rather than urge a withdrawal from the field, the Trump proposals are largely prescriptive, requiring schools to adopt the opposite of many of the complainant-friendly policies that the Obama OCR had reminded its colleagues that they were obliged to follow. Many of the comments from schools and universities (including the “3,500+ members of the Association of Title IX Administrators (ATIXA)”) likewise continue to contemplate active government supervision of their efforts, even as they urge a return in some areas to the policies of the Obama era and in others endorse their reversal by Trump.

Some of Melnick's readers will be delighted by the Trump reversal of the Obama rules they despised. For them, as for supporters of the Obama OCR who now condemn Trump, procedure is like federalism, a value to be venerated when one dislikes a policy and disregarded when one is pleased. Other readers, concerned with the value of procedure in itself, may conclude that the most remarkable aspect of the transformation of Title IX is its apparent permanence. They also should be prepared to concede, if only *post facto*, that this transformation may come to bear procedural legitimacy.