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# RESTORING TITLE IX'S CONSTITUTIONAL INTEGRITY

ELIZABETH KAUFER BUSCH\* & WILLIAM E. THRO\*\*±

## INTRODUCTION

Over its first-half century, Title IX has dramatically altered the landscape of K-12 and higher education throughout the United States. The statute is credited with the removal of arbitrary barriers to women in admissions, vocational tracks, and educational programs and activities.<sup>1</sup> These were the goals of the bill's original sponsors, like Edith Green, who claimed the law was "designed to end discrimination on the basis of sex—in admission standards to undergraduate or graduate schools."<sup>2</sup> While women comprised only 39% of undergraduates in 1960, today women make up 59.5% of U.S. college students, essentially a reversal in the representation of the sexes in higher education.<sup>3</sup> Beyond these accomplishments, many applaud Title IX's transformation of women's sport. In athletics, there has been a 545% increase in the number of

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± The authors thank Linda Speakman for her editorial assistance.

1. Some dispute whether Title IX should be credited with these accomplishments, but merely with accelerating the momentum that was already moving in this direction. See Teresa R. Manning, *Was Title IX Necessary?*, LAW & LIBERTY (Apr. 6, 2022), <https://lawliberty.org/forum/was-title-ix-necessary/>; Mark J. Perry, *The Remarkable Story of Female Success in US Higher Education*, AM. ENTER. INST. (Aug. 29, 2019), <https://www.aei.org/carpe-diem/animated-chart-of-the-day-the-remarkable-story-of-female-success-in-us-higher-education/>.

2. Edith Green, Former Member of the U.S. House of Representatives, *The Road is Paved with Good Intentions: Title IX and What it is Not*, delivered at Brigham Young University (Jan. 25, 1977).

3. Claudia Goldin et al., *The Homecoming of American College Women: The Reversal of The College Gender Gap 1* (Nat'l Bureau of Econ. Rsch., Working Paper No. 12139, 2006).

women playing college sport and a 990% increase at the high school level.<sup>4</sup> Some experts even attribute American women's 2016 Olympic domination to Title IX.<sup>5</sup>

However, this anniversary is also a time to assess Title IX's significant transformations. Our term "transformation" signifies a change in policy beyond the original public meaning of Title IX's text, which may alter the content of the law, such as requiring a novel notion of non-discrimination, or instituting a new requirement not evident in the statutory language, such as requiring colleges to institute internal justice systems for trying sexual assaults. Students today can invoke Title IX to receive not only equal opportunities in admissions, activities, and programs, but also to attain equal numerical outcomes in athletics, receive protections against sexual misconduct by students, play on the athletic team that conforms with their gender identity, and often recover monetary damages when a school fails to ensure these things.

Such transformations brought several unanticipated consequences. First, the "reversal of the college gender gap" in undergraduate admissions has resulted in successful challenges to women-only programs.<sup>6</sup> Formal prohibitions within the law seem also to have been breached. Despite Title IX's prohibition of "preferential or disparate treatment to the members of one sex" in order to correct numerical imbalances,<sup>7</sup> schools may eliminate male teams with impunity, but have been frequently punished for cutting female teams.<sup>8</sup> The Due

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4. Beth A. Brook-Marciniak & Donna de Varona, *Amazing Things Happen When You Give Equal Funding to Women in Sports*, WORLD ECON. F. (Aug. 25, 2016), <https://www.weforum.org/agenda/2016/08/sustaining-the-olympic-legacy-women-in-sports-and-public-policy/>.

5. Bill Plaschke, *Column: American Women are Dominating the Games, and it Didn't Happen by Accident*, L.A. TIMES (Aug. 16, 2016, 6:05 PM), <https://www.latimes.com/sports/la-sp-oly-women-plaschke-20160816-snap-story.html>.

6. Mark J. Perry, *More Victories From My Efforts to Advance Civil Rights and Challenge Systemic Sexism in Higher Education*, AM. ENTER. INST. (Feb. 19, 2021), <https://www.aei.org/carpe-diem/another-victory-from-my-efforts-to-advance-civil-rights-and-challenge-systemic-sexism-in-higher-education-2/>; see also George R. La Noue, *Title IX for Men*, LAW & LIBERTY (Feb. 23, 2021), <https://lawliberty.org/title-ix-for-men/>.

7. Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefitting from Federal Financial Assistance, 40 Fed. Reg. 24,128, 24,137 (June 4, 1975).

8. ELIZABETH KAUFER BUSCH & WILLIAM E. THRO, TITLE IX: THE TRANSFORMATION OF SEX DISCRIMINATION IN EDUCATION 21-43 (2018). There is one exception to the elimination of male teams with impunity. Recently, male athletes threatened to sue when Clemson University announced the elimination of the male cross country and track and field teams. Clemson agreed to reinstate the two teams. This suit was threatened along with female athletes, who gained a female varsity team in the deal. This was the first time male and female athletes together threatened a Title IX athletics lawsuit in the fifty-year history. Though the threatened suit did not go to trial, it may be a harbinger of what is to come in Title IX's next fifty years. Justin Mai, *Male & Female Student-Athletes Win Historic Title IX Sex Discrimination Settlements with Clemson University*, BAILEY GLASSER LLP (Apr. 22, 2021), <https://www.baileyglasser.com/news-male-and-female-student-athletes-win-historic-title-ix-settlement-clemson-university>.

Process rights of students have been undermined by the Office for Civil Rights' (OCR) attempt to protect survivors of campus sexual misconduct, culminating in over 700 due process cases across the country.<sup>9</sup> Finally, in order to permit individuals access to the bathrooms, locker rooms, and athletic teams that comport with their gender identity as opposed to biological sex, the Department of Justice (DOJ) and Office for Civil Rights have attempted to redefine the words that comprise Title IX, resulting in two lawsuits by twenty-one states.<sup>10</sup> Each of these developments reflects and exacerbates the acrimonious division that has characterized Title IX's fifty year history—a division over the policies and the manner in which these changes have been effected.

There have been only two significant regulations promulgated during Title IX's five-decade lifespan—the congressionally-approved 1975 regulations<sup>11</sup> and the 2020 regulations concerning sexual misconduct.<sup>12</sup> Both of these official regulations took years to finalize. While the Executive Branch has enacted a total of four formal regulations, two of these were mere “technical clarifications on discrete issues” in 2000 and 2006.<sup>13</sup> The infrequency of formal regulations obscures Title IX's volatile history.

This essay frames Title IX's history as a conflict between two competing philosophies that we term “Constitutionalist” and “Anti-Constitutionalist.”<sup>14</sup> Our focus is not on the substance or wisdom of any particular Title IX policy, but on the equally important question of whether such transformations have been “Constitutionalist” or not.

A “Constitutionalist” alteration of law has two qualities:

1. Its content is consistent with the text of the U.S. Constitution, and

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9. Jonathan Taylor, *Milestone: 700+ Title IX/Due Process Lawsuits by Accused Students*, TITLE IX FOR ALL (May 5, 2021), <https://titleixforall.com/milestone-700-title-ix-due-process-lawsuits-by-accused-students/>.

10. Moriah Balingit, *Another Ten States Sue the Obama Administration Over Bathroom Guidance for Transgender Students*, WASH. POST (July 8, 2016), [https://www.washingtonpost.com/local/education/another-10-states-sue-obama-administration-over-bathroom-guidance-for-transgender-students/2016/07/08/a930238e-4533-11e6-88d0-6adee48be8bc\\_story.html](https://www.washingtonpost.com/local/education/another-10-states-sue-obama-administration-over-bathroom-guidance-for-transgender-students/2016/07/08/a930238e-4533-11e6-88d0-6adee48be8bc_story.html).

11. Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefitting from Federal Financial Assistance, 40 Fed. Reg. at 24,137. Congress passed the Civil Rights Restoration Act, which significantly expanded the scope of Title IX, but this was the legitimate action of elected representatives. Moreover, the Supreme Court has also transformed Title IX, these actions are not the focus of this essay. See BUSCH & THRO, *supra* note 8, at 21-43.

12. 34 C.F.R. § 106 (2022).

13. *Recalibrating Regulation of Colleges and Universities*, TASK FORCE ON FED. REGUL. HIGHER EDUC. 36 (2015), <https://www.acenet.edu/Documents/Higher-Education-Regulations-Task-Force-Report.pdf>.

14. See Elizabeth Kaufer Busch & William E. Thro, *Reclaiming the Constitutionalist Creed on Campus: Transforming Academe's Anti-Constitutionalist Culture*, 398 EDUC. L. REP. 565, 568-69 (2022).

2. It is enacted through legally mandated procedures and complies with the Constitution's enumerated and separated powers.

Constitutionalists utilize constitutional means (mandated processes) to achieve constitutional ends (policies permitted by the Constitution). In practice, a Constitutionalist would implement policies that both adhere to Title IX's text and to the Constitution's requirements through legally mandated processes. The Constitutionalist understands that the actual text of Title IX constitutes the statute's meaning and recognizes that its content must comply with the U.S. Constitution's goals, requirements, and limits. Equally important is their recognition that Title IX can only be altered through constitutionally legal means, which would ideally be through Congress passing a statutory amendment, but secondarily through formal regulations that comport with the Administrative Procedures Act. While the Constitutionalist's Title IX is result of debate and compromise through the democratic process, it does not mandate a certain interpretation of sports participation quota, the establishment of a parallel criminal justice system, nor diminishing of the role of biology.

Conversely, Anti-Constitutionalists fail to comply with one or both requirements. They make and enforce new Title IX rules unilaterally through informal administrative guidance or Dear Colleague Letters, Executive Orders, or judicial creativity; that is, they seek to bypass crucial aspects of the lawmaking process and/or they encourage novel Title IX policies that do not comply with its statutory text. Their worldview conceives Title IX, or any law, as a tool to be stretched and transformed towards the view of justice that the appointees in the Department of Education, the Administration who appointed them, or the judges who happen to sit on the bench, hold. Because they see the process of persuading Congress to pass a statute or the Administrative Procedure Act's time-consuming notice and comment period as hindrances to attaining justice or equality, democratic principles for them are secondary to adopting what elites view as the correct policy.<sup>15</sup> Additionally, we will see that the policies they enacted also tend to be Anti-Constitutionalist in content, that is, inconsistent with Title IX's text, with constitutional law, or with legal precedents.

For decades, appointees in the OCR, the agency responsible for enforcing Title IX,<sup>16</sup> have increasingly afforded to themselves unprecedented authority to promulgate and enforce new Title IX policy through informal guidance documents without input from congressional lawmakers and without following

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15. *West Virginia v. EPA*, 142 S. Ct. 2587, 2617 n.1 (2022) (Gorsuch, J., joined by Alito, J., concurring).

16. Before the creation of the Department of Education, the Department of Health, Education, and Welfare was responsible for enforcing Title IX.

the notice and comment procedures mandated by the Administrative Procedure Act. The OCR has transformed Title IX's enforcement, scope, meaning, and goals through “workarounds,”<sup>17</sup> “institutional leapfrogging,”<sup>18</sup> and “sub-regulatory” policy interpretations or Dear Colleague Letters without “guidance from Congress.”<sup>19</sup> In other words, the OCR has utilized Anti-Constitutionalist methods to alter Title IX Policy.

The three most controversial and impactful changes to Title IX enacted in an Anti-Constitutionalist manner include:

1. The 1979 Athletics Policy Interpretation mandating a Three-Prong Test for athletics participation compliance;<sup>20</sup>
2. The 2011 Dear Colleague Letter on Sexual Violence mandating the implementation of parallel justice systems to decide campus sexual misconduct;<sup>21</sup> and
3. The 2016 Dear Colleague Letter on Transgender Rights,<sup>22</sup> followed up by two Executive Orders<sup>23</sup> mandating transgender student accommodations.

While there is nothing inherently wrong with any of the above policy preferences, the Anti-Constitutionalist means of attaining those ends always

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17. David B. Rivkin Jr. & Andrew M. Grossman, *The Vaccine Mandate Case May Mark the End of the 'Work-Around' Era*, WALL ST. J. (Jan. 6, 2022), <https://www.wsj.com/articles/end-of-work-arounds-biden-executive-order-vaccine-mandate-covid-omicron-supreme-court-11641505106>.

18. R. Shep Melnick, *The Strange Evolution of Title IX*, NAT'L AFFS. (2018), <https://www.nationalaffairs.com/publications/detail/the-strange-evolution-of-title-ix>.

19. *Recalibrating Regulation of Colleges and Universities*, *supra* note 13, at 14.

20. Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,414 (Dec. 11, 1979); *see also A Policy Interpretation: Title IX and Intercollegiate Athletics*, U.S. DEP'T OF EDUC., OFF. FOR CIV. RTS. (Dec. 11, 1979), <https://www2.ed.gov/about/offices/list/ocr/docs/t9interp.html>; Norma V. Cantú, Assistant Sec'y for Civ. Rts., *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test*, U.S. DEP'T OF EDUC., OFF. FOR CIV. RTS. (Jan. 16, 1996), <https://www2.ed.gov/about/offices/list/ocr/docs/clarific.html>.

21. *Dear Colleague Letter: Sexual Violence Background, Summary, and Fast Facts (Rescinded)*, U.S. DEP'T OF EDUC., OFF. FOR CIV. RTS. (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/docs/dcl-factsheet-201104.pdf> [hereinafter *2011 Dear Colleague Letter*] (withdrawn by Catherine E. Lhamon, Assistant Sec'y for Civ. Rts., *Questions and Answers on Title IX and Sexual Violence (Rescinded)* U.S. DEP'T OF EDUC., OFF. FOR CIV. RTS. (Apr. 29, 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>).

22. Catherine E. Lhamon & Vanita Gupta, Assistant Sec'y for Civ. Rts. & Principal Deputy Assistant Att'y Gen. for Civ. Rts., *Dear Colleague Letter on Transgender Students (Rescinded)*, U.S. DEP'T OF JUST. & U.S. DEP'T OF EDUC., OFF. FOR CIV. RTS. (May 13, 2016), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>.

23. Exec. Order No. 13,988, 86 Fed. Reg. 7,023-25 (Jan. 20, 2021); Exec. Order No. 14,021, 86 Fed. Reg. 13,803-04 (Mar. 8, 2021).

brings nefarious consequences—both tangible and intangible. First, these tactics violate standing laws and legal traditions, practices that have been created only through the will of the People. The Constitution and the laws enacted through Constitutionalist means embody the will of the People. To disregard such institutional safeguards represents a rejection of the People’s will and a challenge to the legitimacy of the Constitutional Republic. More tangibly, such expedient practices erode the public trust in law, the Constitution, and the institutions of government that create and uphold such laws. Though bureaucratic legal processes may seem distant from the needs of the governed, as Abraham Lincoln famously observed, such “disregard for the law” alienates even the best citizens from faith in law, in the Constitution, and in the nation’s republic.<sup>24</sup>

This essay presents its argument in three parts. Part I examines the Constitutionalist’s philosophy in some detail. Part II details the above three examples of Anti-Constitutionalist policymaking in the context of Title IX. Part III describes how to restore the Constitutionalist Title IX.

### I. THE CONSTITUTIONALIST CREED

Our term “Constitutionalist Creed” signifies the common-sense principles that ground the content of the United States Constitution. The United States Constitution solidifies these ideas in writing to impose reliable constraints on leaders and the People, by articulating the legitimate *ends* of government *and* the acceptable *means* of achieving those goals. The Constitution requires certain actions of leaders (i.e., the People’s Agents), prohibits others, and sets up the guardrails within which those who govern, and the People may act. There are also some ends that the government may never pursue, such as laws or regulations that violate the essential liberties enumerated in the Article I, the Bill of Rights, and the Thirteenth, Fourteenth, Fifteenth, Nineteenth, and Twenty-Sixth Amendments. Other ends—such as the goals articulated in the Constitution’s preamble—are required, at least implicitly. The ways in which the Legislature, the Executive, and the Judiciary may act to ensure these ends are enumerated in Articles I, II, and III of the Constitution, and Article V establishes how the Constitution’s means and ends may be amended.

The Creed not only requires government officials limit their exercise of authority to the space between what is prohibited and what is required, elected and appointed officials must only exercise authority in the manner prescribed by the Constitution. In practice, public officials must adhere to the

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24. Abraham Lincoln, *The Perpetuation of Our Political Institutions* (Lyceum Address) (Jan. 27, 1838) available at <https://teachingamericanhistory.org/library/document/lyceum-address/>.

constitutionally mandated separation of powers, sharing of powers, enumeration of limited powers, and the prohibitions imposed in the body of the Constitution, the Bill of Rights, and in the Amendments. Appointees must also follow laws passed by Congress to clarify the processes and procedures that must be used, like the Administrative Procedures Act, the law that governs how Executive Branch agencies promulgate regulations.<sup>25</sup> These procedures do not exist to annoy or frustrate lawmakers or individuals seeking justice or protections, rather, process matters because it helps to ensure fair treatment under the law.<sup>26</sup> For example, the Administrative Procedure Act's required "notice and comment" procedures enable public participation by the People who share concerns that might ultimately strengthen or limit a law.<sup>27</sup> And, if these legal mandates become too pernicious, elected lawmakers can vote to change them or to initiate an amendment to the U.S. Constitution.

#### *A. Human Nature Determines Constitutional Goals and Means*

This section outlines the Constitution's authors' view of human nature and explains how they derive from this view their understanding tyranny—the thing to be avoided—as well as the appropriate end goals of government and legitimate means for achieving those goals.

A fixed and universal conception of human nature, which is prone to error though capable of moderating itself, determines the Constitutionalist Creed. Citing the authority of "Laws of Nature and Nature's God" as the spring of human entitlements and duties, the signers of the Declaration of Independence and of the Constitution developed their view of human nature from Enlightenment thinkers like Thomas Hobbes, John Locke, and Baron de Montesquieu, while "religious sentiments" motivated others to safeguard their rights as "derived to them from the God of Nature."<sup>28</sup> Locke and Hobbes famously spoke of a "state of nature" in which operable and inoperable "laws of nature" ultimately give way to disorder, "depravity," and danger, leading humans to desire government.<sup>29</sup> The Declaration's "Laws of Nature" follow Hobbes' and Locke's logic, beginning with a barebones definition of political ends appropriate to human beings, as well as the proper way to devise and design political organization, given their nature. While the founding documents' depiction of human nature does not require nor rely on religious faith, their

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25. Administrative Procedure Act, 5 U.S.C.A. §§ 551-559 (2022).

26. Health Freedom Def. Fund, Inc. v. Biden, 599 F. Supp. 3d 1144, 1166-67 (M.D. Fla. 2022).

27. 5 U.S.C.A. §§ 551-559.

28. Letter from John Adams to Hezekiah Niles (Feb. 13, 1818) (on file with the National Archives, Founders Online).

29. THE FEDERALIST NO. 55 (James Madison or Alexander Hamilton).



notion of humanity's proneness to error is consistent with humanity's fallen nature as depicted in biblical texts. The Constitutionalist conception of human nature is general and broad enough to appeal to individuals with or without various religious faiths.

Human nature is the only appropriate absolute, universal, and fixed foundation for human organization and serves as the foundation for the purpose (end goals) and process (appropriate means) of government. Without an agreed-upon authority to settle disputes, Locke's "state of nature" reveals "pride, ambition, and turbulence" of passions<sup>30</sup> as well as "negligence, and unconcernedness"<sup>31</sup> for others. Similarly, the Old Testament shows Samuel warning that human leaders will inevitably fight unjust wars, seize property, abuse individual rights, and apply confiscatory taxes in pursuit of their own glory.<sup>32</sup> Even with existing governments, James Madison describes humans' "self-love" and "fallible" reason leading to perpetual "clashing interests,"<sup>33</sup> proneness towards "wicked project[s],"<sup>34</sup> and general "depravity."<sup>35</sup> The Declaration counsels "prudence" in the exercise of rights and in the design of government to counteract the inclination towards tyranny.

The People may design government in whatever form they believe will serve this end. Both the secular view of a selfish human nature and the religious doctrine of a fallen nature create the need for a written set of rules to mediate such negative proclivities. Such a codification of law must assume that "there is never a moment in human history when that which is human can be trusted blindly as a force for good."<sup>36</sup> Similar to Locke's assertion that "the greater part [of humans are] no strict observers of equity and justice"<sup>37</sup> and Madison's recognition that humans' "sinister designs" and "proneness to corruption" must be taken into account,<sup>38</sup> an Augustinian or Calvinist distrust of "any entity exercising power"<sup>39</sup> "creates the conceptual ground for political freedom."<sup>40</sup> Recognizing humanity's sinful, or in Lockean/Madisonian terms, imperfect

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30. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 116 (C.B. Macpherson ed., 1980).

31. *Id.* at 66.

32. 1 *Samuel* 8:10-18 (English Standard Version).

33. THE FEDERALIST NO. 10 (James Madison).

34. *Id.*

35. THE FEDERALIST NO. 55, *supra* note 29.

36. Marci A. Hamilton, *The Calvinist Paradox of Distrust and Hope at the Constitutional Convention*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 293, 295 (Michael W. McConnell et al. eds., 2001).

37. LOCKE, *supra* note 30, at 65-66.

38. THE FEDERALIST NO. 10, *supra* note 33.

39. Hamilton, *supra* note 36, at 293.

40. James R. Rogers, *Lessons for America from Europe's Christian Democracy*, LAW & LIBERTY (July 28, 2020), <https://lawliberty.org/lessons-for-america-from-europes-christian-democracy>.

nature, power and responsibility must not be concentrated in any person or groups of persons.

Stable, settled laws and procedures are necessary to moderate the human inclination towards tyrannical and arbitrary behavior, for “[w]herever law ends, tyranny begins.”<sup>41</sup> The alternative to tyranny, the rule of law, has two components—orientation towards a proper end (the protection of property in Locke’s case) and a structure for devising law towards that end. Two notions of tyranny correspond to these two notions of law—the violation of the law’s end goals and violation of the process or set parameters mandated to make and enact law. King George’s “absolute tyranny” failed on both counts.

### *B. Constitutionalist Ends*

Regarding the purpose, the Declaration asserts humans’ equal possession of certain unalienable rights, among which are life, liberty, and the pursuit of happiness, which humans have a right and duty to protect. A government or constitution only has the authority “to secure these rights.”<sup>42</sup> The Constitution’s Preamble adds the responsibility to “establish Justice, ensure domestic Tranquility, provide for the common defense, [and] promote the general Welfare.”<sup>43</sup> The Constitution also protects these individual rights by requiring the writ of habeas corpus and banning titles of nobility, Bills of Attainder, and ex post facto laws. The later added Bill of Rights also include enumerated rights that are to be protected from government intrusion. As grounded in permanent truths, all these enumerated rights guide the content of public law.

The Constitutionalist Creed recognizes human nature as the spring of the Declaration’s listed rights of life, liberty, and the pursuit of happiness as well as others that flow from these, such as the implied right to own property. To violate these is to “exercise of power beyond right, which nobody can have a right to.”<sup>44</sup> Because all humans have a right to life, liberty, and property (or the pursuit of happiness), no leader can violate these. So, failing to serve the end the law (i.e., the protection of unalienable rights, or property in Locke’s view), or acting erratically/selfishly (that is, based upon mere passion) rather than for the end the leader was selected both constitute violations of end goals, i.e., *tyranny of ends*.

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41. LOCKE, *supra* note 30, at 103.

42. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

43. U.S. CONST. pmb1.

44. LOCKE, *supra* note 30, at 101.

*C. Constitutionalist Means*

Equally important is the need to construct, exercise, and protect human rights in the properly set procedures. For Locke, governmental violations of the laws, processes, or means of achieving political goals would also properly be called “tyranny.”<sup>45</sup> He explains that tyranny emerges “if the breach of the law brings harm to someone else; and anyone in authority who exceeds the power given him by the law, using the force at his disposal to do to the subject things that aren’t allowed by the law.”<sup>46</sup> Breaking an agreed upon law resulting in harm, exercising power beyond that which is allocated, or forcing things that are not permitted by law, all constitute tyrannical actions. He uses the term “tyranny” to indicate the gravity of violations to standing law and procedures.<sup>47</sup>

The Declaration, the Constitution, statutes passed by a legislature, and written regulations promulgated by the executive prevent human depravity from becoming a tyranny that undermines human rights.

The purpose of writing down a law is to fix its meaning. If you are going to live under a government of laws rather than a government of arbitrary power, then you must know what benefits and privileges the law confers upon you and what duties and prohibitions it imposes on you.<sup>48</sup>

The means of protecting rights must therefore also reflect human nature, necessitating an elaborate system to contain both leaders and the governed. The People of the United States “deliberately rejected the British model when they decided to adopt a written Constitution.”<sup>49</sup> In the United Kingdom, the “Crown in Parliament” can “make or unmake any law whatsoever” and no court can “override or set aside” a parliamentary act.<sup>50</sup> Recognizing England’s failure to limit the monarch “brought civil war, a king’s execution, the Cromwellian regime, restoration, and a bloodless revolution.”<sup>51</sup> During the Seventeenth

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45. *Id.* at 103.

46. *Id.*

47. Locke does allow exceptions to this steadfast rule. His chapter on “prerogative” elaborates on times when a leader may need to violate the letter of the law to uphold its spirit. *Id.* at 101-03.

48. Kevin D. Williamson, *Why We Write Our Laws Down*, NAT’L REV. (July 6, 2022, 6:30 AM), <https://www.nationalreview.com/2022/07/why-we-write-our-laws-down/>.

49. NEIL GORSUCH, *A REPUBLIC, IF YOU CAN KEEP IT* 117 (2019).

50. MARTIN LOUGHLIN, *THE BRITISH CONSTITUTION: A VERY SHORT INTRODUCTION* 32 (2013).

51. A.E. DICK HOWARD, *THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA* 9 (Univ. of Va. Press 2015).

Century and reflecting the enduring influence of the 1215 Magna Carta,<sup>52</sup> We the People devised an “untouchable, fundamental law, to be interpreted not by Congress, still less by the President, but by Justices of the Supreme Court.”<sup>53</sup> Our imperfect human nature must be reined in by the limitations placed on governing officials and public institutions.

The Constitutionalist understands that a government of imperfect leaders governing an imperfect People requires a design that “first enable[s] the government to control the governed and in the next place to oblige[s] it to control itself.”<sup>54</sup> Because human nature is fixed, but will at times incline in negative directions, government must be limited, and so should the People. Set procedures by which that end may be secured are needed to prevent leaders from violating their allocated authority or breaking the law. Neither the People nor their leaders are angels,<sup>55</sup> but all theoretically have the capacity to aspire to the “better angels of our nature” if governed by the proper design and incentives.<sup>56</sup>

Drawing from Lockean principles and Montesquieu’s theories, the *Federalist Papers* describe three protective layers. First, the compound republic of America divide sovereignty between the national and state units. Second, the powers of both the state and national governments are divided amongst three separate branches. Third, the actions of government must be constrained by a written constitution and statutes that have a fixed meaning.

If the meaning of the law is not fixed—if, for example, you insist that your government is organized according to the principles of a “living constitution”—then you cannot know what the law *is*, because the law is only what some judge or functionary says it is at any particular moment.<sup>57</sup>

Each of these deserves further elaboration.

## 1. Federalism

The ratification debate between the Federalists and Anti-Federalists focused on which form the written Constitution would take. Both agreed to a republican

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52. *Id.* at 14-98 (discussing the influence of Magna Carta in the Colonial Charters, the New England Covenants, the Proprietary Colonies, and Pennsylvania).

53. DAVID STARKEY, *MAGNA CARTA: THE MEDIEVAL ROOTS OF MODERN POLITICS* 154 (2015).

54. THE FEDERALIST NO. 51 (James Madison).

55. *Id.*

56. Abraham Lincoln, President, First Inaugural Address (Mar. 1861).

57. Williamson, *supra* note 48.

form, yet its size and operation was a matter of serious dispute. In Federalist 39, Madison finds it “ESSENTIAL” that a republic “derives all its powers directly or indirectly from the great body of the people.”<sup>58</sup> This criteria appears to be consistent with Montesquieu’s argument that “in a free state, every man, considered to have a free soul, should be governed by himself, the people as a body should have legislative power.”<sup>59</sup> Yet, Montesquieu elaborates, “as this is impossible in large states and is subject to many drawbacks in small ones, the people must have their representatives do all that they themselves cannot do.”<sup>60</sup> Because it would be impractical for the entire citizen body to enact all legislation, representatives should be selected to administer government. Direct governing is not only impossible in large states, but “many [unnamed] drawbacks” make it undesirable in general for the body of the people to legislate.<sup>61</sup> Montesquieu recommends local governing and inclusive suffrage, for “it is proper for the inhabitants of each principal town to choose a representative from it.”<sup>62</sup>

The purpose of representation is to moderate the public. Madison seemingly diverges from Montesquieu, finding it “SUFFICIENT for such a government” to directly or indirectly appoint persons for limited terms or good behavior.<sup>63</sup> While perhaps not proposing an identical formulation to Madison, Montesquieu also has reservations about the people’s ability to govern themselves. He allows certain citizens to be excluded from suffrage;<sup>64</sup> expresses concern with the fitness of the people for direct governing;<sup>65</sup> and asserts that execution of the laws “altogether exceeds the people’s capacity.”<sup>66</sup> The people themselves must be moderated by the form of representation itself. Madison later reveals why indirect consent or even appointment of leaders is adequate—humans are not to be trusted with power—even with the power to select leaders.<sup>67</sup>

Republicanism alone is inadequate to protect against despotism, so the sovereignty must also be divided between state and nation. Responding to the

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58. THE FEDERALIST NO. 39 (James Madison).

59. CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 159 (Thomas Nugent trans., 1752) (1748).

60. *Id.*

61. *Id.*

62. *Id.*

63. THE FEDERALIST NO. 39, *supra* note 58.

64. He states that “all citizens in the various districts should have the right to vote except those whose estate is so humble that they are deemed to have no will of their own.” MONTESQUIEU, *supra* note 59, at 160.

65. “The people are not at all appropriate for such discussions; this forms one of the great drawbacks of democracy” *Id.* at 159.

66. *Id.* at 160.

67. THE FEDERALIST NO. 51, *supra* note 54.

Anti-Federalist desire to preserve state sovereignty, Madison explains that the “powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.”<sup>68</sup> The national government “will be most extensive and important in times of war and danger; those of the State governments, in times of peace and security.”<sup>69</sup> Because times of peace should outnumber the times of war, presumably the states will hold more authority over the daily lives of citizens than will the national government. Madison further argues that the “more adequate” the national powers are with respect to national defense, “the less frequent will be those scenes of danger which might favor their ascendancy over the governments of the particular States.”<sup>70</sup> Above all, the national government is “to guard them against those violent and oppressive factions which embitter the blessings of liberty, and against those military establishments which must gradually poison its very fountain,” not to dictate the daily lives of individuals living within the many states.<sup>71</sup>

## 2. Separation of Powers

The Constitution’s next innovation is the separation and blending of the major institutions of government—the legislative, executive, and judicial powers. “The accumulation of all powers, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”<sup>72</sup> Madison calls the merging of these powers “tyranny” to convey his distrust that any individual or group would consistently direct such power towards the common good. This definition derives from Montesquieu’s observation that “[a]ll would be lost if the same man or the same body of principal men, either of nobles, or of the people, exercised these three powers: that of making the laws, that of executing the laws, and that of judging the crimes or the disputes of individuals.”<sup>73</sup> A similar notion of tyranny can also be found in Locke’s *Second Treatise of Government*. Indeed, when the whole power of two or more branches is held by one set of hands, “the fundamental principles of a free constitution are subverted.”<sup>74</sup>

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68. THE FEDERALIST NO. 45 (James Madison).

69. *Id.*

70. *Id.*

71. *Id.*

72. THE FEDERALIST NO. 47 (James Madison).

73. MONTESQUIEU, *supra* note 59, at 157.

74. THE FEDERALIST NO. 47, *supra* note 72.

The viciousness of human nature requires multiple layered constraints be added to the separation of powers. Montesquieu intimated the even laypeople themselves need to be checked or limited,<sup>75</sup> and elected officials even more so, for “it has eternally been observed that any man who has power is led to abuse it; he continues until he finds limits.”<sup>76</sup> Madison concurs:

[i]t may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.<sup>77</sup>

Thus, “in framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.”<sup>78</sup> Typically called “checks and balances,” Madison refers to these tools as a blending of powers. The blending of legislative, executive, and judicial authority is how government will control itself. Each branch will be allocated the necessary tools by which to exercise their own authority and to control the misdeeds of others. That is, each will be provided with a measure of the other branches’ authority to prevent any one branch from usurping the others power.

For example, the Executive has a role in the legislative process—the veto to check the policy choices of the legislature the lawmaking authority. However, the Legislature can override the veto. The blending allows these two branches to mutually check one another and keep each other in their own respective lanes. The Judicial branch can declare a law unconstitutional, but Congress can respond by passing a similar law that is constitutional or simply proposing a constitutional amendment. These are some practical ways in which “power must check power.”<sup>79</sup>

This elaborate design aims to ensure that the Constitution, rather than the despotism of will and caprice, rules. Locke had similarly recognized the need for the blending of legislative and executive power. When the “executive power is placed anywhere but in a person who has also a share in the legislature, it is

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75. MONTESQUIEU, *supra* note 59, at 160.

76. *Id.* at 155.

77. THE FEDERALIST NO. 51, *supra* note 54.

78. *Id.*

79. MONTESQUIEU, *supra* note 59, at 155.

visibly subordinate and accountable to it [the legislature], and may be at pleasure changed and displaced.”<sup>80</sup> Both Locke and the Federalists feared that the legislature would predominate without such a blending of powers.<sup>81</sup>

### 3. Limitations of a Written Constitution

Laws of course are not manufactured out of thin air, but are made by men, and more specifically, the legislature. Locke stresses the importance of establishing the specific form of government and detailing the limited functions of each part by asserting though representatives will make the laws, “[t]he people alone can appoint the form of the commonwealth, which is by constituting the legislature and appointing in whose hands that shall be.”<sup>82</sup> One of the many ways to prevent legislators’ wills from replacing the rule of law is Locke’s stipulation that “the legislature can have no power to transfer their authority of making laws and place it in other hands.”<sup>83</sup> The law specifies the kind of power those in authority have and what they may and may not do with that authority.

The power to enforce the law, the “Executive Power,” is “vested in a President of the United States of America.”<sup>84</sup> The President enforces the laws made by Congress, serves as both the nation’s primary diplomat and Commander and Chief of the armed forces, and takes an oath to “preserve, protect and defend the Constitution of the United States.”<sup>85</sup> It might surprise some to know that the unwieldy ambition of an Executive is not to be regarded as problematic because it would require a strong leader to stand up to the House, the body of the people’s representatives, and the Senate, the states’ representatives. Therefore, the President has a role in lawmaking — the veto power. The veto provides protection against the possibility of a bad law (unconstitutional, violating the public interest, or endangering national security) being passed and a major tool to be wielded against corrupt or unwise legislators.

The President primarily enforces the law through its bureaucratic agencies. Though constitutionally part of the executive branch of government, the federal bureaucracies have been called a “fourth branch of government” because they have historically exercised a great deal of freedom to interpret and to enforce

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80. LOCKE, *supra* note 30, at 79.

81. THE FEDERALIST NO. 48 (James Madison).

82. LOCKE, *supra* note 30, at 74-75.

83. *Id.*

84. U.S. CONST. art. II, § 1, cl. 1.

85. *Id.* at cl. 8.



laws with the degree of vigor that they (or the President who appointed them) choose. Anti-Constitutionalists assert, “[e]lections have consequences,” by which it is implied that if Congress does not act speedily, the President or appointees (when of the political party one prefers) are to issue Executive Orders, to stop enforcing laws of which they disapprove, and activate any other means available to achieve the desired end.<sup>86</sup> Though the bureaucracy is restricted by the Administrative Procedures Act, Anti-Constitutionalist administrations have violated the Act with impunity.

The Judiciary and its courts have “a vital responsibility to enforce the rule of [the Constitution], which is critical to a free society.”<sup>87</sup> Because judges are also human, and therefore prone towards “the folly and wickedness of mankind,” there must be meaningful limits on how the judiciary interprets the Constitution. Justices “should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them.”<sup>88</sup> Despite what appears to be a great deal of authority, Hamilton notes that judicial actions cannot endanger “the general liberty of the people [as long as this branch remains] distinct from both the legislature and Executive.”<sup>89</sup> Judges exercise “neither FORCE nor WILL, but merely judgement.”<sup>90</sup> Hamilton’s uncharacteristic optimism regarding judicial action may be overshadowed by the last few decades of judicial creativity and activism, particularly in the administration of Title IX.

Constitutionalists recognize the potential danger of “the dictatorship of a shifting Supreme Court majority” and find its remedy in a reliance on the text of the Constitution and in grounding judicial opinions in a “consistently applied principle.”<sup>91</sup> This is why Hamilton argues for “judicial discretion,” that judges should rarely overturn laws made by the People’s agents, except when a statute clearly “contravenes the Constitution.”<sup>92</sup> When “interpreted, as it ought to be interpreted,” then “the Constitution is a glorious liberty document.”<sup>93</sup> Courts should reject “the conviction that the Constitution’s meaning *changes* over time and that *judges* should determine what changes should be made based on

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86. Chuck McCutcheon & David Mark, ‘Elections Have Consequences’: Does Obama Regret Saying That Now?, CHRISTIAN SCI. MONITOR (Nov. 21, 2014), <https://www.csmonitor.com/USA/Politics/Politics-Voices/2014/1121/Elections-have-consequences-Does-Obama-regret-saying-that-now>.

87. Amy Coney Barrett, Supreme Court Justice, Opening Statement at Senate Judiciary Committee Hearing (Oct. 12, 2020).

88. THE FEDERALIST NO. 78 (Alexander Hamilton).

89. *Id.*

90. *Id.*

91. *McCreary Cnty. v. Am. Civ. Liberties Union* 125 S. Ct. 2722, 2751 (2005) (Scalia, J., dissenting).

92. THE FEDERALIST NO. 78, *supra* note 88.

93. Frederick Douglass, What to the Slave Is the Fourth of July (July 5, 1852).

external policy considerations.”<sup>94</sup> While there may be circumstances where constitutional actors are entitled to great deference, such as the conduct of military operations in wartime, judges should avoid the temptation to ignore the Constitution and simply defer to the judgment of legislators or the executive branch.

Contemporary Americans often view the Supreme Court’s vigorous enforcement of the Bill of Rights and Equal Protection Clause as the primary mechanism for preserving liberty and equality, but such a view is contrary to the original constitutional vision and most of American history. The Constitution, which was ratified by eleven states in 1787–1788, did not contain a Bill of Rights.<sup>95</sup> As Madison made clear in Federalist 51, the Constitution preserved liberty and equality through structural mechanisms such as federalism, separation of powers, and the enumeration of powers described above.<sup>96</sup> Although the first Congress quickly proposed and the States quickly ratified the ten amendments that we know as the Bill of Rights, these provisions did not apply to the States or local governments.<sup>97</sup> Indeed, it was not until 1897 that the Supreme Court found any portion of the Bill of Rights applied to the States or local government.<sup>98</sup> While the Court, over a period from the 1920s until the twenty-first century, “eventually incorporated almost all provisions of the Bill of Rights,”<sup>99</sup> this emphasis on the Federal Bill of Rights should not diminish the importance of federalism,<sup>100</sup> separation of powers,<sup>101</sup> enumeration of powers,<sup>102</sup> and the provisions of the State Constitutions.<sup>103</sup> Because human beings, either individually or collectively, are prone to abuse power, it is imperative to respect all of the constitutional guardrails, including those relying on particular processes or spheres of responsibility.<sup>104</sup>

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94. GORSUCH, *supra* note 49, at 110.

95. See generally PAULINE MAIER, *RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION 1787-88* (2010).

96. THE FEDERALIST NO. 51, *supra* note 54.

97. *Barron v. City of Balt.*, 32 U.S. 243, 250 (1833).

98. *Chi., B., & Q.R. Co. v. City of Chi.*, 166 U.S. 226, 244-45 (1897).

99. *McDonald v. City of Chi.*, 561 U.S. 742, 764 (2010).

100. *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2096-97 (2018).

101. *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1656 (2020).

102. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 534-35 (2012).

103. See JEFFREY S. SUTTON, *51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAWS* (2018).

104. THE FEDERALIST NO. 10, *supra* note 33.

*D. Constitutionalist Title IX*

This section outlines the Constitutionalist understanding of Title IX interpretation and enforcement. This is an application the Constitutionalist Creed's understanding of both appropriate ends and appropriate means. First, according to these principles, textualism/originalism is the appropriate manner of interpreting Title IX and the Constitution. Second, there are three possible means of altering Title IX: elected legislators may pass a law or amendment, the executive department may propose formal regulations compliant with both the requirements of the Administrative Procedure Act and the Major Questions Doctrine,<sup>105</sup> and judges may interpret the law in accordance with the text, ensuring that it comports with the United States Constitution.

### 1. Title IX's Text and End Goals

Title IX began as a thirty-seven-word statute, signed by Richard Nixon into law as part of the Educational Amendments of 1972. Co-sponsored by Senator Birch Bayh and Congresswoman Patsy Mink, the law states, “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”<sup>106</sup> Title IX bans sex discrimination based upon the notion that an individual's immutable characteristics (race, color, sex, or national origin) should not preclude that individual's opportunities.

Constitutionalists understand the language of the law itself to constitute its meaning. Since 535 federal lawmakers (100 Senators and 435 Members of Congress) potentially shape the meaning of any individual law, it can be misleading to speak of a law's “intent.” What matters is the original public meaning of the text enacted by the legislature.<sup>107</sup> The clear meaning of the words comprising a law at the time the law was adopted tells us exactly what rules the lawmakers were signing into law. One can glean some insights into the law's original public meaning from the congressional hearings and the narratives of the participants who had a hand in shaping the law, but those pronouncements are not more significant than other contemporary interpretation. The text of a law thus provides a stable foundation for both interpretation and precedent.

The language utilized in the statute itself, and the 1975 Regulations did not employ the term “gender,” which was not typically used at the time, but used the term “sex,” understood as an individual's male or female biology at birth

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105. *West Virginia v. EPA*, 142 S. Ct. 2587, 2595 (2022).

106. 20 U.S.C. §§ 1681-1688 (2022).

107. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79-80, 82 (1998).

(XX or XY chromosomal designation). Title IX prohibits discrimination based on such immutable sex chromosomes. The text's ban against sex discrimination means that no educational institution may treat one individual differently from another individual due to their biological (chromosomal) sex.

The original public meaning of Title IX was negative in nature, in that it banned "intentional," "purposeful," or "invidious" discrimination against males and females.<sup>108</sup> The statute sought to eliminate "preferential or disparate treatment to the members of one sex" in admissions, financial aid, academic class, extra-curricular programming, or other activities.<sup>109</sup> Preferential treatment on the basis of sex would violate the statute's purpose to ban discrimination on the basis of sex. Title IX also permits but does not require schools to "take affirmative action to overcome the effects of conditions which resulted in limited participation therein by persons of a particular sex."<sup>110</sup>

Title IX's original text is based on "equal treatment theory," which is also termed "equity feminism"<sup>111</sup> or "liberal feminism."<sup>112</sup> Equal treatment theory promotes the identical treatment of the sexes, and often stresses the similarities between males and females, to eliminate both discriminatory restrictions and special protections for males and females. For example, Title IX's statutory language describes sex discrimination in admissions as "treat[ing] one individual differently from another on the basis of sex."<sup>113</sup> Identical treatment of males and females or non-discriminatory procedural practices would theoretically be sufficient to uphold the statute. Equal treatment theorists favor procedural equality, or the equality of opportunity for males and females, understood as non-discriminatory practices and procedures.

There are areas where Title IX is not applicable, as the statute's implementing guidelines include several caveats or exceptions to the law.<sup>114</sup> First, the law's text permits single sex institutions, religious institutions, single-sex social fraternities or sororities, single-sex boys' or girls' clubs, and mother-daughter or father-son activities. Institutions may also provide "separate toilet, locker room, and shower facilities on the basis of sex," "separate living facilities for the different sexes," as well as "separate athletic teams for members of each

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108. *Title IX Legal Manual*, U.S. DEP'T OF JUST., <https://www.justice.gov/crt/title-ix> (Aug. 21, 2021).

109. 20 U.S.C. § 1681 (2022).

110. *Nondiscrimination on the Basis of Sex Under Federally Assisted Educated Programs and Activities*, 40 Fed. Reg. 24,137, 24,138 (June 4, 1975).

111. CHRISTINA HOFF SOMMERS, *WHO STOLE FEMINISM? HOW WOMEN HAVE BETRAYED WOMEN* 22 (1994).

112. NANCY LEVIT & ROBERT M. VERCHICK, *FEMINIST LEGAL THEORY: A PRIMER* 16 (2006).

113. *Nondiscrimination on the Basis of Sex Under Federally Assisted Educated Programs and Activities*, 40 Fed. Reg. at 24,140.

114. 20 U.S.C. §§ 1681-1688 (2022).

sex,” as long as “such facilities provided for students of one sex shall be comparable to such facilities for students of the other sex.”<sup>115</sup> Such segregated activities have come under recent scrutiny, as has the meaning of the word “sex.”<sup>116</sup>

Sex segregation is permitted under Title IX for two reasons: (1) due to the consequences of biological differences between the sexes and (2) due to the privacy rights of males and females.<sup>117</sup> First, separate athletic teams are permitted because the biological differences between males and females concerning physical strength, vulnerability to injury, and bone density impact physical competition. Second, Title IX may also permit separate but equal accommodations for males and females because of privacy rights. As Justice Ginsburg observed, equality between the sexes does not necessitate the elimination of sex segregation, as privacy rights must be protected.<sup>118</sup> Such privacy rights explain why Title IX does not require that the sexes use the same restrooms, dressing rooms, residence halls, or living facilities, and permits separate fraternities, sororities, and boys and girls organizations.<sup>119</sup> With the original public meaning of Title IX in mind, one can understand its enforcement paradigm.

## 2. Title IX’s Implementation Means and Enforcement Paradigm

Senator Birch Bayh modeled Title IX’s text on Title VI of the 1964 Civil Rights Act. The two statutes’ language is identical, except that Title IX replaces Title VI’s prohibition against discrimination “on the basis of race, color, or national origin” with discrimination “on the basis of sex.” While Title VI exempted educational institutions, Title IX explicitly covers all educational institutions receiving federal funds. Like Title VI, Title IX only permitted an administrative remedy in cases of discriminatory practices.<sup>120</sup> The Office for

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115. Nondiscrimination on the Basis of Sex Under Federally Assisted Educated Programs and Activities, 40 Fed. Reg. at 24,141-43.

116. *President Biden Has Issued Two Executive Orders Regarding His Administration’s Policy on Sex-Based Discrimination*, LCW (Apr. 1, 2021), <https://www.lcwlegal.com/news/president-biden-has-issued-two-executive-orders-regarding-his-administrations-policy-on-sex-based-discrimination/>; Nondiscrimination on the Basis of Sex in Education Programs Receiving Federal Financial Assistance, 87 Fed. Reg. 41,390 (July 12, 2022).

117. Though there is dispute today regarding whether only two sexes—male and female—exist, at the time of Title IX’s adoption, the law was predicated on the two most dominant sexes designated by either an xx chromosome or an xy chromosome.

118. Ruth Bader Ginsburg, *The Fear of the Equal Rights Amendment*, WASH. POST, Apr. 7, 1975, at A21.

119. Nondiscrimination on the Basis of Sex Under Federally Assisted Educated Programs and Activities, 40 Fed. Reg. 24,137, 24,139-42 (June 4, 1975).

120. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 729 (1979) (changing the requirement of the administrative remedy alone by finding a private right of action under Title IX).

Civil Rights in the Department of Education ensures Title IX compliance by institutions of learning by conducting investigations when they receive complaints, making recommendations through publishing formal or informal guidance, and threatening the removal of federal funding in cases on noncompliance. Typically, when a complaint is made, the Department investigates, and if found to be in violation, the Department will recommend steps to be taken by the institution.

### 3. Altering Title IX

Title IX can be altered in three basic ways: the OCR (previously HEW) may publish formal regulations if they comply with Administrative Procedure Act and the Major Questions Doctrine,<sup>121</sup> Congress may repeal, alter, or amend a law, or judges may interpret a statute's text to ensure it complies with the U.S. Constitution. Congress delegated enforcement responsibility for Title IX to the Department of Education. Specifically, enforcement is vested in the Department's Office of Civil Rights, whose mission is to "ensure equal access to education through vigorous enforcement of civil rights . . ."<sup>122</sup> The Department can enforce the statute through the promulgation of regulations, which have the force and effect of law. Additionally, the Department may issue informal guidance that can easily be altered.<sup>123</sup> Informal guidance does not have the force of law, but in practice the Department often acts as if it were formal law.

The OCR's authority to issue recommendations outside of compliance investigations is limited by the 1946 Administrative Procedure Act,<sup>124</sup> which was passed to prevent the encroachment of a "fourth branch" of government as well as the "unconstitutional usurpation of power" by the executive department.<sup>125</sup> The Act provides guidance on how laws are to be enforced when the U.S. Constitution is silent. As dictated by the Act, any Education Department interpretation of Title IX must be consistent with the public

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121. *West Virginia v. EPA*, 142 S. Ct. 2587, 2608-09 (2022).

122. *OCR Correspondence Notification*, U.S. DEP'T OF EDUC., OFF. FOR CIV. RTS., <https://www2.ed.gov/about/offices/list/ocr/index.html> (last visited Dec. 30, 2022).

123. This authority has also been "specifically affirmed" by the Supreme Court in *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 292 (1998).

124. Administrative Procedure Act, 5 U.S.C. §§ 551-559 (2022).

125. Gerhard Peters & John T. Woolley, *Summary of the Report of the Committee on Administrative Management*, AM. PRESIDENCY PROJECT (Jan. 12, 1937), <https://www.presidency.ucsb.edu/documents/summary-the-report-the-committee-administrative-management>.

meaning of the law's text, and if formal regulations are promulgated, they must adhere to the notice and comment procedure.<sup>126</sup>

The Major Questions Doctrine, articulated in *West Virginia v. Environmental Protection Agency*,<sup>127</sup> also limits the Department. The doctrine requires the executive branch "to point to 'clear congressional authorization' when they claim the power to make decisions of vast 'economic and political significance' . . . Like many parallel clear-statement rules in the law, this one operates to protect foundational constitutional guarantees."<sup>128</sup> With respect to Title IX, if the OCR wishes to promulgate a new regulation, there must be a clear indication in the text of the 1975 implementing guidelines, or in any congressionally approved amendments that authorize such major changes.

If, for example, the federal government chose to require affirmative action policies or a numerical parity requirement for intercollegiate athletics, the easiest way would be for Congress to pass a law because such policies would likely generate significant financial responsibilities and are explicitly not permitted to be required by the text of Title IX. Alternately, the Education Department could promulgate official regulations in compliance with the Administrative Procedure Act and the Major Questions Doctrine, but such regulations would be open to scrutiny if they were broad and costly.

The executive department has only enacted two formal regulations of note over Title IX's history:<sup>129</sup> the 1975 and the 2020 regulations concerning the adjudication of campus sexual misconduct. The first, the 1975 implementing regulations, were drafted by Department of Health, Education and Welfare as required by the statute.<sup>130</sup> The draft regulations were released for comment in June of 1974, which led to nearly ten thousand comments before Congress ratified the final guidelines.<sup>131</sup>

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126. 5 U.S.C. § 552 (2022).

127. *West Virginia v. EPA*, 142 S.Ct. 2587, 2608-09 (2022).

128. *Id.* at 2616 (Gorsuch, J., joined by Alito, J., concurring).

129. The Task Force on Federal Regulation of Higher Education notes two additional "technical clarifications on discrete issues" in 2000 and 2006, *Recalibrating Regulation of Colleges and Universities*, *supra* note 13, at 36.

130. Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefitting from Federal Financial Assistance, 40 Fed. Reg. 24,128, 24,128 (June 4, 1975). It should be noted that Congress passed the Civil Rights Restoration Act, which significantly expanded the scope of Title IX, but this was the legitimate action of elected representatives. Moreover, while the Supreme Court has also transformed Title IX, these actions are not the focus of this essay. *See* BUSCH & THRO, *supra* note 8, at 21-43.

131. *See* Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefitting from Federal Financial Assistance, 40 Fed. Reg. at 24,128.

The second was enacted in 2020<sup>132</sup> through the Administrative Procedure Act notice and comment process.<sup>133</sup> The new rule, titled *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, required minimal due process protections for students accused of sexual misconduct. These regulations are difficult to overturn because they comport with standing law, followed the Act's requirements, and comported with Supreme Court precedent.<sup>134</sup> Nevertheless, the 2020 regulations may be inconsistent with the Major Questions Doctrine, because they assume the responsibility of colleges and universities to implement parallel justice systems to decide sexual misconduct allegations. This enormously expensive mandate was never delegated in the 1975 implementing guidelines, nor added through a congressional amendment.

Congress has only once passed a statute to alter Title IX substantively, with the Civil Rights Restoration Act of 1987.<sup>135</sup> Title IX's text describes its jurisdiction as applicable to "any education program or activity receiving Federal financial assistance."<sup>136</sup> The Supreme Court held in *Grove City College v. Bell* that, as written in 1972, Title IX's protections extended only to a specific program or activity that directly received federal funding.<sup>137</sup> In response, Congress overruled the Supreme Court's narrow Title IX interpretation by passing—over the veto of President Reagan—the Civil Rights Restoration Act of 1987.<sup>138</sup> The law expanded the definition of "program or activity" to include "all the operations" of an educational institution receiving federal funding,<sup>139</sup> but not limited to, "traditional educational operations, faculty and student housing, campus shuttle bus service, campus restaurants, the bookstore, and other commercial activities . . ."<sup>140</sup> The Civil Rights Restoration Act requires any public or private educational institution that receives any amount of federal funding in any program, to be bound by Title IX's provisions.

Other than the 1975 implementing regulations, the 1987 Civil Rights Restoration Act, and the 2020 regulations, all other Title IX changes have

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132. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,026 (May 19, 2020).

133. *Id.*

134. See Jonathan Taylor, *DeVos-Era Title IX Regulations Go Five for Five in Federal Court*, TITLE IX FOR ALL (Aug. 9, 2021), <https://titleixforall.com/devos-era-title-ix-regulations-go-five-for-five-in-federal-court/>.

135. Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, § 1681, 102 Stat. 28 (1988).

136. 20 U.S.C. § 1681(a) (2022).

137. *Grove City Coll. v. Bell*, 465 U.S. 555, 574 (1984).

138. Civil Rights Restoration Act of 1987, § 1681.

139. 20 U.S.C. § 1687 (2022).

140. S. Rep. No. 64 at 17, *reprinted in* 1988 U.S.C.C.A.N. at 19.



occurred through sub-regulatory guidance, such as guidance documents, clarifications, or Dear Colleague Letters, some of which contain controversial and transformative interpretations of the statute.<sup>141</sup> The Administrative Procedure Act does not grant Dear Colleague Letters or sub-regulatory guidance the force of law, but educational institutions have tremendous incentives to follow the directives of the Department, owing to the Department's ability to investigate and remove federal funding. Unless such recommendations are formally approved by Congress, as were the initial 1975 regulations; passed by Congress, as was the Civil Rights Restoration Act; promulgated in a manner compliant with the Administrative Procedure Act as in 2020, or affirmed by the Supreme Court; they do not carry the full force of the law. Instead, they are generally regarded as good advice for any school that does not wish to be investigated.

The Constitutionalist looks to the text of Title IX to determine its practical meaning, which must comply with the guarantees of the U.S. Constitution's text. Permanent and substantive changes to Title IX's meaning made by bureaucratic agencies should only occur through the Administrative Procedures Act's mandated procedures, which also must comport to the U.S. Constitution's separation of powers. Such procedures combined with constitutional and statutory compliance have proven to be high bars for Education Department appointees, who may perceive such requirements as burdensome and time-consuming impediments to justice. Congress has also historically had difficulty achieving compromise on laws relating to the topic of sex equality, which may explain why both bodies have infrequently implemented formal alterations to Title IX.

## II. THE ANTI-CONSTITUTIONALIST TITLE IX

The most controversial changes to Title IX interpretation and enforcement have been implemented unilaterally through sub-regulatory guidance and Dear Colleague Letters. According to a bipartisan congressional task force, such sub-regulatory guidance is at minimum "problematic," or worse, "exceeds legislative intent and creates new standards and requirements without public comment . . . ," leading to unintended consequences.<sup>142</sup> After describing the Anti-Constitutionalist method of choice, this section examines three of the Department's most consequential informal guidance documents—The Athletics Three-Prong Test,<sup>143</sup> the requirement of a parallel justice system to adjudicate

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141. *Recalibrating Regulation of Colleges and Universities*, *supra* note 13, at 36.

142. *Id.*

143. *See* Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,414 (Dec. 11, 1979).

student sexual misconduct,<sup>144</sup> and the attempted 2016 Dear Colleague Letter on Transgender Students.<sup>145</sup>

These measures are each Anti-Constitutionalist in their method of implementation (means) issued in violation of the Administrative Procedure and the Major Questions Doctrine to enact substantive changes to Title IX. The substance (end goals) of these three changes is Anti-Constitutionalist in promulgating requirements that fall outside of the text of Title IX, such as mandating equitable outcomes in sports, requiring campus justice systems, or ending sex segregation in sport; or in violating protections guaranteed in the U.S. Constitution, such as due process rights of students at public institutions.<sup>146</sup> While the Supreme Court has, at times, also transformed Title IX's goals beyond the statute's scope, such as creating the private right of action under *Cannon*<sup>147</sup> and transforming Title IX jurisdiction to include adjudication over peer sexual misconduct in *Davis*,<sup>148</sup> this essay focuses on the federal bureaucracy's actions.

Appointees in the Department of Education have failed to follow the procedures mandated by the Administrative Procedures Act and have enforced their sub-regulatory guidance documents and Dear Colleague Letters as if those documents had the full force of laws.<sup>149</sup> The minimal role of Congress in the transformation of Title IX indicates a lack of concern for the Constitution's institutions and requirements, which is why we term these procedures "Anti-Constitutionalist."

The Anti-Constitutionalist method of choice has primarily been the Dear Colleague Letter, informal policy "interpretation," or "guidance" document. In 1979, HEW adopted an athletics policy interpretation mandating equitable outcomes in the number of athletic participation spots.<sup>150</sup> A Dear Colleague Letter constitutes official communication of an executive agency's interpretation of the statute it enforces. The "colleague" referred to in the letter is the president or chief administrator of an educational institution that falls under Title IX jurisdiction. A guidance document is not a formal regulation, but

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144. Russlynn Ali, Assistant Sec'y for Civ. Rts., *Dear Colleague Letter: Sexual Violence (Rescinded)*, U.S. DEPT. OF EDUC., OFF. FOR CIV. RTS. (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

145. Lhamon & Gupta, *supra* note 22.

146. Because private institutions are not constitutional actors, the Due Process Clause does not apply. However, many private institutions have pledged to adhere to Due Process as part of their contractual agreements with students and employees.

147. *See Cannon v. Univ. of Chi.*, 441 U.S. 677, 717 (1979).

148. *See Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 648 (1999).

149. *See Recalibrating Regulation of Colleges and Universities*, *supra* note 13, at 35.

150. *See* Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,415 (Dec. 11, 1979).

nevertheless often includes additional requirements or changes to the meaning or scope of Title IX. These guidance documents technically are not law, but the Department often treats them as such. The Department enforces its guidance documents and Dear Colleague Letters by threatening to pull the federal funding of noncompliant institutions.<sup>151</sup> Dear Colleague Letters and Policy Guidance do not constitute actual statutes or regulations that have the force and effect of laws, but they often operate as such.

There is a crucial difference between a guidance document and an official regulation. The Department's guidance can be changed at any time, while a regulation cannot. This means that guidance is not fixed and is, therefore, neither a stable nor settled Title IX law. They can be rescinded at any time because they are not law and do not have the force of the public or elected officials behind them. This explains why the Department's 2011 and 2014 Dear Colleague Letters on Sexual Violence,<sup>152</sup> as well as the 2016 Dear Colleague Letter focusing on Transgender Students were so easily overturned. Regulations go through formal rule-making procedures in compliance with the Administrative Procedure Act and, therefore, have the force and effect of law.

The 1979 Athletics Interpretation is not a regulation, but a "Policy Interpretation."<sup>153</sup> While it was published in the Federal Register for notice and comment, it still did not replace or revise the Department's 1975 Regulation, nor is it entitled to the same weight as a regulation. Similarly, the 2011 Dear Colleague Letter on Sexual Assault and 2016 Dear Colleague Letter on Transgender Students are also mere interpretations. However, these documents are further removed from the public. The Department unilaterally issued these documents without publishing them in the Federal Register for notice and comment, without input from congressional lawmakers, and without public debate.

Despite the 2011 Dear Colleague Letter on Sexual Assault bringing much-needed attention to the mismanagement of sexual violence allegations on campus, administrators in the Department did not adhere to the Administrative Procedure Act, diverged from the Supreme Court's *Davis* standard, and violated the Major Questions Doctrine, which will be discussed in detail below. Similarly, the 2016 Dear Colleague Letter on Transgender Students raised a serious question regarding Title IX requirements with respect to the accommodation of transgender students but did so without following the legal protocols.

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151. Interestingly, the Department has never withheld federal funding.

152. *2011 Dear Colleague Letter*, supra note 21.

153. See Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,413.

In contrast, administrators cannot unilaterally rescind, nor alter, formal regulations, which can only be changed through formal notice and comment and additional procedures mandated by the Administrative Procedures Act. Theoretically, the Administrative Procedure Act's requirements ensure the integrity, respectability, and promulgation of a settled law. Notice and comment gives stakeholders an ability to engage in debate and to raise relevant criticisms or support of a proposed change, thus ensuring the voice and consent of the people is included. The slow-moving and painstaking process intends changes to occur rarely, but only when necessary, ensuring stability and knowledge of the law. While such processes may appear to frustrate policy goals, or needed actions, they must be followed to ensure the public trust of the government's institutions and the respectability of the law itself.

Having established the Anti-Constitutionalist process utilized by the Executive Branch, the next section examines Anti-Constitutionalist nature of the substantive changes to Title IX policy.

#### *A. 1979 Athletics Policy Interpretation and Subsequent Reinterpretations*

The statutory text of Title IX states, as a condition of receiving federal funds, universities and schools will not engage in sex discrimination in educational programs and activities.<sup>154</sup> Although conditions on the receipt of federal funds must be clearly stated in the statutory text,<sup>155</sup> *nothing* in the statute requires women receive an equal number of opportunities or a fixed number of opportunities to participate in educational programs. Indeed, the statutory text explicitly prohibits quotas.<sup>156</sup>

Similarly, if a university chooses to offer intercollegiate sports, the 1975 Title IX Regulations mandate that each sex have "equal athletic opportunities."<sup>157</sup> There is *nothing* in the regulatory text about the number of participation opportunities being equal for both sexes or about participation opportunities being "substantially proportionate" to each sex's representation in

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154. Historically, intercollegiate and interscholastic athletics teams have been regarded as "education programs" for Title IX purposes, but recent developments suggest intercollegiate athletics at the NCAA Division I level may be a "business" rather than an "education program." First, the General Counsel of the National Labor Relations Board has issued a memorandum stating that student-athletes at private institutions are "employees" for purposes of the National Labor Relations Act. See Jennifer A. Abruzzo, *Memorandum GC 21-08*, NLRB (Sept. 29, 2021), <https://www.akingump.com/a/web/fj79W4f637mkQupWaoC8V/3beRb3/memorandum.pdf>. Second, in a concurring opinion, Justice Kavanaugh questions whether universities "can [continue to] justify not paying student athletes a fair share . . ." of the income generated by the business of intercollegiate athletics. *NCAA v. Alston*, 141 U.S. 2141, 2168 (2021) (Kavanaugh, J., concurring).

155. See *Nat'l Fed'n of Indep. Bus. v. Sibelius*, 567 U.S. 519, 583 (2012).

156. 20 U.S.C. § 1681(b) (2022).

157. 34 C.F.R. § 106.41 (2022).

the student body. Determining whether there are “equal athletic opportunities” requires the consideration of at least *ten* separate factors.<sup>158</sup> Although one of those ten factors is “whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes,” *nothing* in the regulatory text suggests this factor is determinative of compliance or this factor is more important than the other nine factors.<sup>159</sup> The regulatory text requires the consideration of *all* ten factors. Presumably, a weakness in one factor cannot be offset by strength in another factor. Just the opposite, the regulation focuses not on quotas or technicalities but on a university’s investing in and building a successful, genuinely supported women’s athletics program.

Nevertheless, in 1979, the Department adopted an interpretation of the 1975 Regulations.<sup>160</sup> Under that Interpretation, the Executive Branch opines an institution must do one of three things to comply with Title IX in the context of athletics participation:

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

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158. 34 C.F.R. § 106.41(c) (2022). The regulatory text leaves upon the possibility that factors other than the ten listed will be considered. “In determining whether equal opportunities are available, the Director will consider, among other factors . . .” *Id.*

159. 34 C.F.R. 106.41(c)(1) (2022).

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

been fully and effectively accommodated by the present program.<sup>161</sup>

If any *one* of the three parts is satisfied, the Department considers the institution in compliance with Title IX. This is traditionally referred to as the “Three-Part” or “Three-Prong” test. Each of the three parts requires greater elaboration.<sup>162</sup>

First, under the “Substantial Proportionality Test,” each sex’s representation in varsity athletics must be substantially proportionate to its full-time undergraduate representation in the student body. In 1996, the Department of Education Office for Civil Rights issued a reinterpretation of the 1979 Interpretation, which provides that athletic opportunities are “substantially proportionate when the number of opportunities that would be required to achieve proportionality would not be sufficient to sustain a viable team, i.e., a team for which there is a sufficient number of interested and able students and enough available competition to sustain an intercollegiate team.”<sup>163</sup> In plain English, the 1996 Reinterpretation provides that the Department first determines how many additional opportunities are required for the underrepresented sex to achieve perfect proportionality. If this number is sufficient to field a viable team, then the Department takes the position the institution is not substantially proportionate and must add a team.

According to the terminology in the 1996 Guidance, the first prong is the default standard, or “safe harbor,” for ensuring compliance with Title IX. Theoretically, an institution can comply by satisfying any single prong of this test, however, as we have argued elsewhere, in practice, schools are vulnerable to lawsuits unless they comply with the first prong.<sup>164</sup> Essentially, this option requires that the percentage of intercollegiate athletes who are female must closely mirror the percentage of full-time students at the school who are female.

To illustrate how the Substantial Proportionality Test works under the Department’s current reinterpretation of its 1979 Interpretation, suppose a university’s student population is fifty-five percent female and the university presently offers 700 athletic participation opportunities. Men have 385 athletic participation opportunities and women have 315 participation opportunities. This means women represent forty-five percent of the athletes (315 divided by

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161. *Id.* at 71,418. The 1979 Interpretation is not a regulation. While it was published in the Federal Register for notice and comment, the 1979 Interpretation is a “Policy Interpretation.” It did not replace or revise the Department’s 1975 Regulation, nor is it entitled to the same weight as a regulation.

162. This discussion of each component of the three-part test is adapted from BUSCH & THRO, *supra* note 8, at 29-32.

163. Cantú, *supra* note 20.

164. BUSCH & THRO, *supra* note 8, at 38-39.

700) although women represent fifty-five of the full-time undergraduates. The first step is to determine how many opportunities are required for women to achieve perfect proportionality of fifty-five percent. If male participation remains constant at 385, which is the assumption employed by the Department, the university must add 156 participation opportunities for women. If the university did so, it would have 471 female opportunities (315 current + 156 additional) and 385 male opportunities (all current). The second step is to determine whether the number of new participation opportunities required, 156 in this example, is sufficient to field a viable team. Obviously, it would be sufficient. In short, under the Department's interpretation, if one sex is fifty percent of the student body, its representation among varsity athletes must approximate fifty percent.

Second, for Prong II, under the Department's current reinterpretation of the "History & Continuing Practice of Program Expansion" test, if an institution has not achieved substantial proportionality, an institution may demonstrate compliance by showing that it has a continuing history of expanding opportunities for the underrepresented sex. In other words, it is acceptable for female representation among athletes to be substantially below their representation in the student body if the institution has consistently added new teams or opportunities for women and intends to do so in the future. In evaluating "history," the Department looks at the institution's record for adding teams, the institution's record of increasing participants on existing teams, and the institution's response to requests to add teams. In assessing "continuing practice," the Department examines the institution's current policy for adding teams.<sup>165</sup> While not specifically referenced in the 1996 Reinterpretation of the 1979 Interpretation, the Department will not find a program to be following this test if its expansion of programs for the underrepresented sex coincides with continued expansion of programs for the overrepresented sex. In practical terms, to comfortably rely upon this prong, an institution must have consistently added new teams for the underrepresented sex, must refrain from eliminating any teams for the underrepresented sex, should not have been concurrently adding programs for the overrepresented sex, and must have a plan for adding new teams in the future.<sup>166</sup>

Third, for Prong III, under the "Fully and Effectively Accommodating Interests & Abilities" test, an institution may demonstrate that it is currently meeting all "interests and abilities of the institution's students who are members

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165. Cantú, *supra* note 20.

166. *Id.* (providing institutions cannot achieve compliance where they cut teams for the unrepresented sex even if also cutting teams for the overrepresented sex and that the Department will consider an institution's current implementation of a plan of program expansion).

of the underrepresented sex—including students who are admitted to the institution though not yet enrolled.”<sup>167</sup> This aspect of the three-part test is the subject of multiple Reinterpretations. In 2003 and 2005, the Department issued additional Reinterpretations allowing colleges and universities to demonstrate compliance by relying on surveys of the student body.<sup>168</sup> Critics argued that the “model survey” included in the 2005 Reinterpretation was based on flawed methodology, was burdensome for students to complete, was drafted to encourage responses of “not interested,” allowed schools to count non-responses as affirmative statements of non-interest, and did not require any minimum response rate in order to validate the survey. In 2010, the Department withdrew the 2005 Reinterpretation and issued a new Reinterpretation reformulating the inquiry.<sup>169</sup>

After the 2010 Reinterpretation, the Department determines interest by examining (1) survey data; (2) requests by students to add a particular sport; (3) participation rates in club or intramural sports; (4) participation rates in sports in high schools, amateur athletic associations, and community sports leagues that operate in areas from which the school draws its students; and (5) interviews with students, coaches, and administrators.<sup>170</sup> Moreover, in assessing competitive opportunities, the Department evaluates (1) the athletic experience and accomplishments of students and admitted students interested in playing the sport; (2) opinions of coaches, administrators, and athletes at the institution regarding whether interested students and admitted students have the potential to sustain a varsity team; (3) participation in other sports, intercollegiate, interscholastic, or otherwise that may demonstrate skills or abilities that are fundamental to the particular sport in which there is interest; and (4) competitive opportunities offered by other schools against which the institution competes

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167. Russlynn Ali, Assistant Sec’y for Civ. Rts., *Dear Colleague Letter*, U.S. DEP’T OF EDUC., OFF. FOR CIV. RTS. 4 (Apr. 20, 2010), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-20100420.pdf>. The requirement that an institution “fully” accommodate interest and ability as opposed to “effectively” accommodate it is an invention of the 1979 Interpretation and Reinterpretations. Nothing in the regulation uses the word “fully,” referring only to the “effective” accommodation of interests and abilities.

168. See Margaret Spellings & James F. Manning, Sec’y & Delegated the Authority of Assistant Sec’y for Civ. Rts., *Additional Clarification of Intercollegiate Athletics Policy: Three-Part Test – Part Three*, U.S. DEP’T OF EDUC., OFF. FOR CIV. RTS. (Mar. 17, 2005), <https://www2.ed.gov/about/offices/list/ocr/letters/200503017-additional-clarification-three-part-test.pdf>; see also Gerald Reynolds, Assistant Sec’y for Civ. Rts., *Further Clarification of Intercollegiate Athletics Policy Guidance Regarding IX Compliance*, U.S. DEP’T OF EDUC., OFF. FOR CIV. RTS. (July 11, 2003), <https://www2.ed.gov/about/offices/list/ocr/title9guidance/Final.html>.

169. *Intercollegiate Athletics Policy Clarification: The Three-Part Test—Part Three*, U.S. DEP’T OF EDUC., OFF. FOR CIV. RTS. (Apr. 20, 2010), <https://www2.ed.gov/about/offices/list/ocr/docs/title9-qa20100420.html>.

170. *Id.*



and those offered by other schools in the relevant geographic area against which the institution does not now compete.<sup>171</sup>

Still, as noted in the 1996 Reinterpretation and reiterated in the 2010 Reinterpretation, while such indicators may be “helpful to [the Department] in ascertaining likely interest of an institution’s students and admitted students in particular sports” the actual test remains “whether an institution is meeting the actual interest and abilities of its students and admitted students.”<sup>172</sup> In effect, the Department’s Interpretation elevated one factor (interests and abilities) above the other nine factors enumerated in the 1975 federal regulation and effectively mandated a quota. As such, it is a violation of Constitutionalist end goals, which ban quotas.

### *B. 2011 Dear Colleague Letter on Sexual Violence*

On April 4, 2011, Assistant Secretary for Civil Rights Russlynn Ali issued a Dear Colleague Letter<sup>173</sup> to respond to “universities’ botched responses to sexual harassment and sexual violence.”<sup>174</sup> The letter brought needed attention to the failure by numerous institutions to respond appropriately to sexual assault,<sup>175</sup> but also created significant controversy in mandating parallel justice systems be created on campus to adjudicate sexual misconduct on college campuses. At the time it was promulgated, the letter’s list of required procedures in cases of peer sexual misconduct signified single most expansive transformation of Title IX without congressional oversight, without legal precedent, and without input from college administrators.<sup>176</sup> The content of the 2011 Dear Colleague Letter on Sexual Assault is Anti-Constitutionalist in its violation of the Major Questions Doctrine as well as numerous legal precedents and standing laws.

The letter’s mandated disciplinary procedures had two primary purposes—to minimize survivors’ stress and to punish perpetrators through a campus justice system. First, the 2011 Dear Colleague Letter on Sexual Violence sought to protect the victim/survivor by requiring several resources and procedures to

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171. *Id.*

172. *Id.*

173. Ali, *supra* note 144.

174. Ebuz, *OCR “Dear Colleague” Letter Addresses Sexual Harassment in Schools*, TITLE IX BLOG (Apr. 6, 2011, 8:00 AM), <http://title-ix.blogspot.com/2011/04/ocr-dear-colleague-letter-addresses.html>.

175. Nancy Chi Cantalupo, *Burying Our Heads in the Sand: Lack of Knowledge, Knowledge Avoidance, and the Persistent Problem of Campus Peer Sexual Violence*, 43 LOY. U. CHI. L.J. 205, 214-17 (2011).

176. The only Title IX legal precedent cited in support of the 2011 procedures for deciding sexual assault is *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999), a case that does not specify any required adjudication procedures for sexual assault cases.

be employed. While not constitutionally required, such measures are compassionate. To the extent that an educational institution can minimize the stress of the ordeal by providing counseling or permitting schedule and housing adjustments, it should do so even before a hearing. These suggestions were relatively uncontroversial.

Other requirements to minimize stress focused specifically on the campus trial. According to the letter, the hearing should be prompt, the victim's identity should be shielded from the campus community, if desired by the complainant, and the complainant should be informed during all stages of the process. Another recommended measure was to screen the victim/survivor separately from the alleged perpetrator during the hearing. In order to make the process as safe as possible, a school "must not require a complainant to be present at the hearing," nor require "that the school allow a complainant to be present for the entire hearing," and should "make arrangements so that the complainant and the alleged perpetrator do not have to be present in the same room at the same time."<sup>177</sup> In sum, focusing on the needs of the complainant, the Department's 2011 Dear Colleague Letter *did not* require a formal hearing, cross-examination of the accuser, or an appeals process.<sup>178</sup>

Second, the letter sought to punish the perpetrators of sexual assault through a parallel campus justice system. The 2011 Dear Colleague Letter required the establishment of a mechanism within the university, independent of the criminal justice system, by which university would determine whether alleged perpetrators are guilty of sexual assault and, if so, to punish them.

The 2011 Dear Colleague Letter violated Title IX's Constitutionalist goals in two ways—it altered the legal standard for liability for known acts of sexual harassment under Title IX and violated the due process rights of accused students.

First, the 2011 Letter, like the 1997 Sexual Harassment Guidance that preceded it,<sup>179</sup> altered the legal precedents operating under Title IX, by altering the standard of liability established in *Gebser v. Lago Vista Independent School District* and *Davis v. Monroe County Board of Education*,<sup>180</sup> which required that schools respond to known patently offensive and repeated offenses between peers without deliberate indifference. The "deliberate indifference" standard of liability previously set by the Supreme Court mandated that institutions must

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177. Lhamon, *supra* note 21, at 30 (emphasis added).

178. Ali, *supra* note 144, at 12.

179. Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034, 12,034-51 (Mar. 13, 1997).

180. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998); *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 644-47 (1999).

respond in a manner that is not deliberately indifferent, once it learns of a campus sexual assault.<sup>181</sup> Deliberate indifference to “known acts of student-on-student sexual harassment” may create liability for schools receiving federal funding.<sup>182</sup> While under the *Davis* standard, the university could have satisfied its Title IX obligations simply by establishing a system to try sexual assaults. The 2011 Dear Colleague requires far more. Institutions must implement a specific set of procedures into their campus investigations to investigate, prosecute, and punish each claim of sexual misconduct.<sup>183</sup> Moreover, such investigations were required to be rapid and to utilize procedures that were significantly less protective of the accused than those of the criminal justice system.

The 2001 Guidance contained no such requirement, but permitted schools the flexibility to adopt a “common sense” approach, as there “may be more than one right way to respond” to sexual harassment claims.<sup>184</sup> Under these 2001 standards, many state schools opted to use the “clear and convincing” standard (i.e., it is highly probable or reasonably certain that the sexual harassment or violence occurred).<sup>185</sup> The 2011 Dear Colleague Letter, however, removes this flexibility by requiring schools to adopt a “preponderance of the evidence” standard in campus investigations under Title IX,<sup>186</sup> which means that “it is more likely than not that sexual harassment or violence occurred.”<sup>187</sup> In doing so, the 2011 Letter created potential conflicts with the laws of many states. The Department’s letter rejected both the “beyond a reasonable doubt” and the “clear and convincing” standards as “inconsistent with the standard of proof established for violations of the civil rights laws.”<sup>188</sup> In contrast, the preponderance standard makes a conviction more easily attainable for campus investigators, which may be a motivation behind the new guidance.

Second, the Dear Colleague Letter’s mandated procedures and evidentiary standard together violated established due process protections. While a student disciplinary hearing is not a criminal trial, since the landmark decision in *Dixon v. Alabama State Board of Education*,<sup>189</sup> it has been clear the Constitution

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181. *Davis* 526 U.S. at 644-47.

182. *Id.*

183. Ali, *supra* note 144, at 1-19; Lhamon, *supra* note 21, at 2-4.

184. *Revised Sexual Harassment Guidance: Harassment of Students School Employees, Other Students, or Third Parties (Rescinded)*, U.S. DEP’T OF EDUC., OFF. FOR CIV. RTS., at ii-iii, 7 (Jan. 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

185. Ali, *supra* note 144.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150 (5th Cir. 1961).

requires due process before a public university expels a student or imposes a lengthy disciplinary suspension.<sup>190</sup> It is not sufficient that the university believes the student committed sexual assault; the university must prove these allegations in a proceeding that comports with due process.<sup>191</sup> While the exact contours of due process depend upon the context, the stakes are enormously high when a student is accused of sexual assault.<sup>192</sup> In some states, the student's transcript will carry a scarlet letter notation that the student was expelled for sexual assault.<sup>193</sup> Given the potential liability of admitting a known sex offender, it will be difficult for students to transfer to other institutions.

Given the enormous stakes for accused students, due process in the sexual assault context requires (1) a strict separation of investigative, prosecutorial, adjudication, and appellate roles; (2) a hearing with adequate procedural safeguards; and (3) meaningful appellate review. Unfortunately, the 2011 Letter did not provide these protections to the accused. As a result, schools pressured to comply with the Department's 2011 guidelines for disciplinary procedures have found themselves embroiled in over seven hundred lawsuits filed by accused students.<sup>194</sup> The violation of Title IX's end goals in the form of weak due process requirements culminated in its "systematic[] fail[ure] to protect the rights of all students."<sup>195</sup>

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190. *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 633-37 (6th Cir. 2005).

191. Unfortunately, institutions often fail in this regard. As Professor Bernstein observed most campus tribunals ban attorneys for the parties (even in an advisory capacity), rules of procedure and evidence are typically ad hoc, and no one can consult precedents because records of previous disputes are sealed due to privacy considerations. Campus "courts" therefore have an inherently kangarooish nature. Even trained police officers and prosecutors too often mishandle sexual assault cases, so it's not surprising that the amateurs running the show at universities tend to have a poor record.

DAVID E. BERNSTEIN, *LAWLESS: THE OBAMA ADMINISTRATION'S UNPRECEDENTED ASSAULT ON THE CONSTITUTION AND THE RULE OF LAW* 124 (2015).

192. As the Supreme Court explained, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

*Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976).

193. VA. CODE ANN. § 23.1-900 (2022).

194. Taylor, *supra* note 9.

195. Nedda Black et al., *Due Process and the Sex Police*, NCHERM GRP., LLC 3 (2017), <https://cdn.tngconsulting.com/website-media/ncherp.org/unoffloaded/2017/04/TNG-Whitepaper-Final-Electronic Version.pdf>.

The 2011 Dear Colleague Letter on Sexual Assault and its 2014 follow up were easily rescinded by Secretary DeVos, who proposed, opened the formal Notice and Comment Period, and ultimately issued the first major new Title IX regulations since 1975.<sup>196</sup> Both the regulations and the voluminous explanation for the new regulations describe the due process responsibilities of schools in cases of peer sexual harassment allegations. To correct the Anti-Constitutionalist content of the 2011 Dear Colleague Letters, the new regulations permit but do not require the “clear and convincing” evidentiary standard, clarify appropriate investigation formats, and add procedural protections such as the presumption of innocence, a live hearing, an appeals process, and a cross examination of witnesses.<sup>197</sup> These regulations comport with standing law and followed the Administrative Procedure Act, but assume Title IX’s jurisdiction over peer sexual misconduct as well as the need for campus adjudication systems for trying such allegations.

Notwithstanding the improved due process protections enumerated in the 2020 regulations, they are heavily influenced by the Anti-Constitutionalist 2011 Dear Colleague Letter in assuming colleges’ responsibility to maintain parallel justice systems on campus. This assumption of a major responsibility by all institutions of higher learning may ultimately violate the Major Questions Doctrine because it is both extremely costly and requires major new campus policies. Unlike the 2011 Dear Colleague Letter and 2014 Question and Answer, however, these official regulations are difficult to overturn because they comport with standing law, followed the Administrative Procedure Act’s requirements, and comported with the Supreme Court’s decision in *Davis*.<sup>198</sup>

### C. 2016 Dear Colleague Letter on Transgender Students

Often neglected in the discussion of Title IX’s transformation is the 2016 “*significant guidance*” jointly issued by the Department of Education and the Department of Justice.<sup>199</sup> The letter required schools to “treat a student’s gender identity as the student’s sex for purposes of Title IX.”<sup>200</sup> The letter had two goals. First, the directive aimed to provide broader Title IX protections to transgender students who identify as a sex other than their biological sex.

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196. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,028 (May 19, 2020).

197. *Id.*

198. Taylor, *supra* note 132.

199. Lhamon & Gupta, *supra* note 22, at 1.

200. *Id.*

Second, the letter intended to influence a pending court case that was likely to be heard by the Supreme Court.<sup>201</sup>

The 2016 Dear Colleague Letter on Transgender Students expanded the authority of the statute and eliminated previous protocol under Title IX by redefining “sex,” a key term comprising Title IX’s thirty-seven word statute. Twenty-one states reacted by filing two separate lawsuits alleging that the federal government both “bypassed the necessary procedures” and “twisted the meaning of Title IX.”<sup>202</sup> In response to these disputes, Education Secretary DeVos rescinded the transgender letter in 2017. However, even after being rescinded, the letter ushered in the national debate over whether transgender women should be permitted to compete on female teams and what the Constitution and Title IX require in terms of transgender student accommodation in athletics, bathrooms, or locker rooms.<sup>203</sup>

The 2016 Dear Colleague Letter on Transgender Students altered the goals of Title IX by redefining the term “sex” in Title IX, or “biological sex,” as “sex assigned at birth,” which is “the sex designation recorded on an infant’s birth certificate.”<sup>204</sup> With this assertion, the Office for Civil Rights and DOJ transformed a term indicating a genetic designation (sex) into a concept signifying a choice based upon mutable traits “assigned at birth.” The administrators in the Department of Education and the Department of Justice employed this new conception of sex (“sex assigned at birth”), not due to a new consensus in the scientific or medical community, but to achieve a policy goal of broadening the protections of transgender students under Title IX.

To clarify, the World Health Organization distinguishes between the terms “sex” and “gender.” As defined by the World Health Organization<sup>205</sup> and utilized by the Council of Europe and the European Institute for Gender Equality,<sup>206</sup> “sex” refers to whether one is “born either male or female,” that is, the “biological and physiological characteristics” of males and females, typically focusing on the distinct reproductive functions or biological structures

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201. Complaint at 1, *G.G. v. Gloucester Cnty. Sch. Bd.*, No. 4:15cv54 (E.D. V.A. June 11, 2015).

202. Balingit, *supra* note 10.

203. Laine Higgins, *Debate Over Transgender Athletes Sweeps Through U.S. Statehouses*, WALL ST. J. (Apr. 30, 2021, 8:00 AM), <https://www.wsj.com/articles/debate-over-transgender-athletes-sweeps-through-u-s-statehouses-11619762614>.

204. Lhamon & Gupta, *supra* note 22, at 1.

205. *Taxing Sex and Gender into Account in Emerging Infectious Disease Programme: An Analytical Framework*, WHO 2 (Dec. 23, 2013), <https://www.who.int/publications/i/item/9789290615323>.

206. *Sex and Gender*, COUNCIL OF EUR., <https://www.coe.int/en/web/gender-matters/sex-and-gender> (last visited Dec. 30, 2022).

(gonads, sexual organs, chromosomes, hormones).<sup>207</sup> In contrast, “gender” refers to “the socially constructed roles, behaviors, activities, and attributes that a given society considers appropriate for men and women.”<sup>208</sup> The term “gender” includes the stereotypes and social meanings that society attaches to being a male, female, or other. As the World Health Organization explains, gender is fluid, as it is determined by choice and opinion; sex is determined by physiology, biology, and chromosomes.

Of course, the small number of intersex individuals (X, XXY, XYY, XXXY) may need to “be assigned” a sex when one does not clearly emerge upon birth. So, the concept “sex assigned at birth” is more inclusive in accounting for intersex individuals, but it is an altogether different concept from “sex.” Given the different meanings of the terms “sex” and “gender,” the Dear Colleague Letter’s attempt to redefine or substitute the term “gender identity” or “sex assigned at birth” for “sex” would not be consistent with Title IX’s text, nor with the legal precedent. In proceeding as if “sex,” “gender,” and “sex assigned at birth” are interchangeable, the 2016 Dear Colleague Letter on Transgender Students conflates the concepts and proceeds as if genetically determined sex does not exist. The goal was to alter the text of Title IX to change its requirements. And while many today confuse the terms “sex” and “gender” because government officials, advocates, and laypersons erroneously use them interchangeably, such was not the case when Title IX was drafted. Indeed, the term “gender” was not uttered in the congressional debate over Title IX.

The 2016 Dear Colleague Letter on Transgender Students is rarely scrutinized because some erroneously believe the matter was settled by *Bostock v. Clayton County*, which ruled that the prohibition of discrimination “because of . . . sex” under Title VII of the Civil Rights Act of 1964 also bans gender identity and sexual orientation discrimination.<sup>209</sup> In *Bostock*, the Court addressed whether Title VII, a statute prohibits employment discrimination “because of . . . sex.” barred an employer from firing someone simply for being a homosexual or transgender.<sup>210</sup> Emphasizing that the word “sex” means the biological distinctions between males and females,<sup>211</sup> the Court concluded an “employer violates Title VII when it intentionally fires an individual employee based in part on sex.”<sup>212</sup> Because “homosexuality and transgender status are

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207. *Taxing Sex and Gender into Account in Emerging Infectious Disease Programmes: An Analytical Framework*, *supra* note 203, at 2.

208. *Id.*

209. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1754 (2020).

210. *Id.* at 1738-39.

211. *Id.* at 1734.

212. *Id.* at 1741.

inextricably bound up with sex,”<sup>213</sup> it becomes “impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”<sup>214</sup> Thus, if an employer discriminates based on sexual orientation or gender identity, then the employer is engaged in sex discrimination.<sup>215</sup> Accordingly, under Title VII, “employers are prohibited from firing employees on the basis of homosexuality or transgender status.”<sup>216</sup>

Yet the matter of *Bostock*'s potential application to Title IX is not settled law. The Court clarified that *Bostock* does not apply to “sex-segregated bathrooms, locker rooms, and dress codes” because “none of these other laws are before us.”<sup>217</sup> Athletics was also not addressed by the court. The Court explicitly emphasized its holding did not “sweep beyond Title VII to other federal or state laws that prohibit sex discrimination.”<sup>218</sup> Indeed, the Court refused to “prejudge” any issues or statutes not before it and observed “whether other policies and practices might or might not qualify as unlawful discrimination or find justifications under other provisions of Title VII are questions for future cases.”<sup>219</sup>

Although the Court confined the decision to Title VII in the context of firing employees for being gay or transgender, President Biden ignored the Court's efforts to cabin the scope of *Bostock*.<sup>220</sup> Upon taking office in 2021, President Biden issued two Executive Orders<sup>221</sup> declaring that federal statutes which prohibit sex discrimination also prohibit gender identity and sex orientation discrimination.<sup>222</sup> Both the Department of Education and the EEOC then issued guidance documents reinterpreting Title IX<sup>223</sup> and Title VII.<sup>224</sup> Neither of these guidance documents went through the notice and comment process.<sup>225</sup> They are

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213. *Id.* at 1742.

214. *Id.* at 1741.

215. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1742 (2020).

216. *Id.* at 1753.

217. *Id.*

218. *Id.*

219. *Id.*

220. Exec. Order No. 13988, 86 Fed. Reg. 7,023 (2021).

221. *Id.*; Exec. Order No. 14021, 86 Fed. Reg. 13,803 (2021).

222. Exec. Order No. 13988, 86 Fed. Reg. 7,023 (2021).

223. Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination on Sexual Orientation in Light of *Bostock v. Clayton County*, 86 Fed. Reg. 32,637, 32,637 (June 22, 2021).

224. *Protections Against Employment Discrimination Based on Sexual Orientation and Gender Identity*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (June 15, 2021), <https://www.eeoc.gov/laws/guidance/protections-against-employment-discrimination-based-sexualorientation-or-gender>.

225. *Tennessee v. U.S. Dep't of Educ.*, No. 3:21-cv-308, 2022 WL 2791450, at \*21 (E.D. Tenn. July 15, 2022) (granting preliminary injunction against enforcement of the guidance documents).



therefore not law, and they do not deserve the deference of settled law under Title VII or Title IX.

None of these developments has settled the question of what Title IX requires. For example, the first of Biden's orders, Executive Order 13988, interprets *Bostock* to mean Title IX, "prohibit[s] discrimination on the basis of gender identity or sexual orientation, so long as the laws do not contain sufficient indications to the contrary."<sup>226</sup> However, this broad application to Title IX conflicts with the Court's refusal "to say anything about other statutes whose terms mirror Title VII's."<sup>227</sup> Justice Alito's dissent predicts confusion regarding the "over 100 federal statutes [that] prohibit discrimination because of sex," which this decision "waves . . . aside."<sup>228</sup>

The 2016 Dear Colleague Letter on Transgender Students was only enforced for a few weeks, but this guidance exemplifies the way in which Title IX has been transformed over the last fifty years, particularly in the last decade. Federal agencies like the Department of Education bypass the required processes to create and enforce new rules under Title IX because the required legal processes may derail their attempt to serve justice, however conceived. Appointees of the Executive Branch may view the Constitutional limits on making and altering laws, such as bicameralism, separation of powers, and federalism as impediments to policy goals. It is more efficient to have a sympathetic bureaucrat or appointed expert issue a Dear Colleague Letter than to go through the strict notice and comment requirements of the Administrative Procedure Act. Such unilateral actions, as Justice Alito observes, "categorically . . . impede[]—and perhaps effectively end[]—any chance of a bargained legislative resolution."<sup>229</sup>

These "new irregular pathway[s] of power"<sup>230</sup> are Anti-Constitutional in their means and in their ends, leading a bipartisan task force to recommend that Congress "order an independent review of the Department of Education's organizational practices with respect to issuing regulations."<sup>231</sup> The Anti-Constitutionalist transformation of the statutory text beyond clear inferences in athletics, sexual harassment, and transgender applications, has become the Education Department's standard operating procedure for over a decade. New

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226. Exec. Order No. 13988, *supra* note 218.

227. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1778 (2020) (Alito, J., joined by Thomas, J., dissenting).

228. *Id.*

229. *Id.* Though Alito's dissent is referring to the Supreme Court, his argument applies to any unilateral action to change law without appropriate debate, bargaining, and from the People's representatives in Congress.

230. *Abusing the Power of the Purse*, LAW & LIBERTY TALK (Oct. 15, 2021), <https://lawliberty.org/podcast/purchasing-submission-philip-hamburger/>.

231. See *Recalibrating Regulation of Colleges and Universities*, *supra* note 13, at 41.

obligations constitute new law, which may or may not comport to the text of a given law or the U.S. Constitution.

Moreover, the three-part test, the 2011 Dear Colleague Letter and the 2016 Dear Colleague Letter on Transgender Students raise serious issues under the Major Questions Doctrine. As explained below, the Major Questions Doctrine requires explicit Congressional authorization whenever an Executive Branch agency claims the power to make decisions of vast economic and political significance. Directing colleges and universities to set up a parallel criminal justice system or mandating that transgender individuals be allowed to violate the privacy rights of others or skew the competitive level of sport are decisions of vast economic and political significance.

The Constitutionalist method of amending law allows “the legislative process to take its course,” which affords Congress “the opportunity to consider competing interests” and possibly to determine a path to accommodate some of them.<sup>232</sup> Sub-regulatory guidance should be used sparingly in order to maintain the integrity of law and lawmaking.<sup>233</sup> While Constitutionlists may differ on their personal views regarding a specific policy, such as the specific guidelines for campus investigations, the extent to which colleges should police student sexual behavior, or the appropriate evidentiary standard for investigations, they share “common ground”<sup>234</sup> regarding the proposition that the rule of law, separation of powers, and other constitutional safeguards are nonnegotiable. Without these, no one’s rights are adequately protected, as the experience with the 2011 Dear Colleague Letter has demonstrated.

Congress is the body entrusted with “all legislative Powers” to make policy, while the responsibility of agencies like then Education Department’s to “use regulations to effectuate those [congressional] policies.”<sup>235</sup> While it may seem expedient for the President of the United States or for bureaucratic agencies like the Education Department to “use those processes to pursue its own policy,” such a move creates inadvertent constitutional conflicts, unintended legal consequences, and partisan controversy.

### III. RESTORING THE CONSTITUTIONALIST TITLE IX

Before discussing how to restore the Title IX’s constitutional integrity, we reiterate what we mean by the Constitutionalist Title IX. The Constitutionalist

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232. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1778 (2020).

233. See *Recalibrating Regulation of Colleges and Universities*, *supra* note 13, at 10.

234. Joe Cohn, *NCHERM’s Open Letter on Campus Sexual Assault Reveals Common Ground*, FIRE (May 30, 2014), <https://www.thefire.org/ncherms-open-letter-on-campus-sexual-assault-reveals-common-ground/>.

235. See *Recalibrating Regulation of Colleges and Universities*, *supra* note 13, at 14.

Title IX focuses on the constitutionality of the means as well as ends of lawmaking. The Constitutionalist Title IX does not prohibit or require a specific policy. Subject to the limitations of the Constitution, the National Government can require or refuse to require alignment between sports participation and enrollment, the establishment of a parallel criminal justice system, and the role of biology in policies concerning restrooms, locker rooms, and sports participation. Rather, the Constitutionalist Title IX insists that a particular process be used to make those decisions. Instead of policy revolution by or guidance documents reinterpreting previous interpretations, Title IX policy would be made by Congress or by the Department of Education promulgating regulations. In other words, the Constitutionalist Title IX requires respect for the democratic process mandated by the Constitution and an end to policy making by epistles from an Assistant Secretary.

Restoring the constitutional integrity of Title IX requires two things. First, Congress must legislate on major policy question rather than allowing the Executive Branch to make policy through Dear Colleague Letters and informal guidance documents. Second, when Department of Education promulgates regulations, they must adhere to the Major Questions Doctrine and the Administrative Procedure Act rather than simply issuing guidance documents. These changes require a change in culture. Fortunately, two recent Supreme Court decisions have the effect of encouraging a restoration of the constitutionalist model in all contexts, but particularly Title IX.

The first decision, *West Virginia v. Environmental Protection Agency*, the Court explicitly recognized the Major Questions Doctrine.<sup>236</sup> Under the Major Questions Doctrine, the executive branch “must be able to point to “clear congressional authorization”” when they claim the power to make decisions of vast “economic and political significance.”<sup>237</sup> “Like many parallel clear-statement rules in our law, this one operates to protect foundational constitutional guarantees.”<sup>238</sup>

The second decision, *Kisor v. Wilkie*, narrowed the circumstances where federal courts defer to the executive branch’s interpretation of its regulations.<sup>239</sup> As a result, instead of offering guidance documents, which can be changed at a moment’s notice, an agency will be more likely to use the formal notice and comment process.

The remainder of this Part offers a more extensive explanation of these points. First, it examines why it is important for Congress to legislate and why

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236. *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022).

237. *Id.* at 2616.

238. *Id.* (Gorsuch, J., joined by Alito, J., concurring).

239. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414-15 (2019).

the Major Questions Doctrine in forcing Congress to do its job. Second, it explores why it is imperative for the executive branch to promulgate regulations and why *Kisor* may force such a change.

*A. The Major Questions Doctrine Will Encourage Congress to Legislate*

The vision of the Framers is clear.<sup>240</sup> “All legislative powers . . . shall be vested in a Congress.”<sup>241</sup> While the passage of legislation requires the consent of representatives of the majority of the population, senators from a majority of the States, and the agreement of the President, the Framers viewed this need for a broad consensus and compromise as vital to the preservation of liberty.<sup>242</sup> This allocation of legislative power is “vital to the integrity and maintenance of the system of government ordained by the Constitution.”<sup>243</sup> The Framers did not want policy made by a few unelected and unaccountable “ministers,”<sup>244</sup> but by many elected representatives directly accountable to the People.<sup>245</sup>

Yet, in an era when Americans are divided on so many issues and our elected representatives reflect those divisions, it can be extraordinarily difficult to forge the broad consensus and compromises necessary to pass legislation.<sup>246</sup> There is a temptation for the Executive Branch to simply use regulations, guidance documents, or executive orders to accomplish policy objectives. The Major Questions Doctrine prevents this Anti-Constitutionalist behavior and reinforces the Constitutionalist norm.

To explain further, in most cases, the question of whether Congress has authorized the agency to act turns on whether there is a “plausible textual basis for the agency action.”<sup>247</sup> Yet, “there are ‘extraordinary cases’ that call for a different approach—cases in which the ‘history and the breadth of the authority that [the agency] has asserted,’ and the ‘economic and political significance’ of that assertion, provide a ‘reason to hesitate before concluding that Congress’ meant to confer such authority.”<sup>248</sup> In these instances, the Major Questions Doctrine requires “something more than a merely plausible textual basis.”<sup>249</sup>

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240. *West Virginia*, 142 S. Ct. at 2617 (Gorsuch, J., joined by Alito, J., concurring).

241. U.S. CONST. art. I, § 1.

242. THE FEDERALIST NO. 48, *supra* note 81; THE FEDERALIST NO. 73 (Alexander Hamilton).

243. *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892).

244. *West Virginia v. EPA*, 142 S. Ct. 2587, 2617 (2022) (Gorsuch, J., joined by Alito, J., concurring).

245. *See generally* THE FEDERALIST NO. 52 (James Madison).

246. *West Virginia*, 142 S. Ct. at 2618 (Gorsuch, J., joined by Alito, J., concurring).

247. *Id.* at 2609.

248. *Id.* at 2608 (citations omitted).

249. *Id.* at 2609.

The agency “instead must point to ‘clear congressional authorization’ for the power it claims.”<sup>250</sup>

Consequently, Congress must “speak clearly” if it wishes to assign to an executive agency decision “of ‘vast “economic and political significance.”<sup>251</sup> In the absence of such clarity, the agency has no authority to make such decisions.<sup>252</sup> Because our constitution prevents “government by bureaucracy supplanting government by the people,<sup>253</sup> such decisions are “the responsibility of those chosen by the people through democratic processes.”<sup>254</sup>

The Major Questions Doctrine “ensures that the national government’s power to make the laws that govern us remains where Article I of the Constitution says it belongs—with the people’s elected representatives.”<sup>255</sup> There is a presumption that Congress intends to make major policy decisions itself, not leave those decisions to agencies.<sup>256</sup> “If administrative agencies seek to regulate the daily lives and liberties of millions of Americans, the doctrine says, they must at least be able to trace that power to a clear grant of authority from Congress.”<sup>257</sup> Indeed, if Congress intends to grant authority to make “radical or fundamental change,”<sup>258</sup> it will not use “modest words,” “vague terms,” or “subtle device[s].”<sup>259</sup>

Because Congress does not “hide elephants in mouseholes,”<sup>260</sup> the Major Questions Doctrine prevents “unintentional, oblique, or otherwise unlikely delegations of the legislative power.”<sup>261</sup> The mere fact Congress passed a broadly worded statute while allowing the Executive Branch to work out details of implementation does not empower the Executive Branch “to assume responsibilities beyond its initial assignment.”<sup>262</sup> “Administrative agencies are

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250. *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022).

251. *Ala. Ass’n of Realtors v. Dep’t of Health and Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (per curiam).

252. *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab., Occupational Safety and Health Admin.*, 142 S. Ct. 661, 665-66 (2022) (per curiam).

253. *Id.* at 669 (Gorsuch, J., joined by Thomas, J. & Alito, J., concurring).

254. *Id.* at 666.

255. *Id.* at 668.

256. *Id.* (quoting *United States Telecomm Ass’n v. FCC*, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc) (Gorsuch, J., joined by Thomas, J. & Alito, J., concurring)).

257. *Id.* (Gorsuch, J., joined by Thomas, J. & Alito, J., concurring)

258. *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 229 (1994).

259. *Whitman v. Am. Trucking Assn’s., Inc.*, 531 U.S. 457, 468 (2001).

260. *Id.*

261. *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab., Occupational Safety and Health Admin.*, 142 S. Ct. 661, 669 (2022) (per curiam) (Gorsuch, J., joined by Thomas, J. & Alito, J., concurring).

262. *Id.*

creatures of statute. They accordingly possess only the authority that Congress has provided.”<sup>263</sup>

Recent cases illustrate the operation of the Major Questions Doctrine.<sup>264</sup> First, in *Alabama Association of Realtors v. Department of Health and Human Services*, the Court held the Centers for Disease Control and Prevention could not, under its authority to adopt measures “necessary to prevent the . . . spread of . . . disease” institute a nationwide eviction moratorium in response to the COVID–19 pandemic.<sup>265</sup> Second, in *National Federation of Independent Business v. Occupational Safety and Health Administration*, the Court invalidated Occupational Safety and Health Administration’s mandate that “84 million Americans . . . either obtain a COVID–19 vaccine or undergo weekly medical testing at their own expense” because the agency had never attempted to impose such a broad measure.<sup>266</sup> Third, in *West Virginia*, the Court rejected the notion that the EPA new rule requiring existing coal-fired power plant to “reduce their own production of electricity, or subsidize increased generation by natural gas, wind, or solar sources.”<sup>267</sup>

Although the Court only recently explicitly recognized the Major Questions Doctrine, recent “cases supply a good deal of guidance about when an agency action involves a major question for which clear congressional authority is required.”<sup>268</sup> First, the Major Questions Doctrine “applies when an agency claims the power to resolve a matter of great ‘political significance,’ . . . or end an ‘earnest and profound debate across the country.’”<sup>269</sup> Second, “an agency must point to clear congressional authorization when it seeks to regulate ‘a significant portion of the American economy,’” or require “‘billions of dollars in spending’ by private persons or entities.”<sup>270</sup> Third, the Major Questions Doctrine “may apply when an agency seeks to ‘intrud[e] into an area that is the particular domain of state law.’”<sup>271</sup> “While this list of triggers may not be exclusive,” it does offer significant guideposts.<sup>272</sup>

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263. *Id.* at 665.

264. See generally *West Virginia v. EPA*, 142 S. Ct. 2587 (2022). Although the Court applied the Major Questions Doctrine analysis, it did not use the term “Major Questions Doctrine” until *West Virginia*.

265. *Ala. Ass’n of Realtors v. Dep’t of Health and Hum. Servs.*, 141 S. Ct. 2485, 2489–90 (2021) (per curiam).

266. *Nat’l Fed’n of Indep. Bus.*, 142 S. Ct. at 665–66.

267. *West Virginia*, 142 S. Ct. at 2599.

268. *Id.* at 2620 (Gorsuch, J., joined by Alito, J., concurring).

269. *Id.* at 2621 (Gorsuch, J., joined by Alito, J. concurring).

270. *West Virginia v. EPA*, 142 S. Ct. 2587, 2621 (2022) (Gorsuch, J., joined by Alito, J. concurring).

271. *Id.*

272. *Id.*

If the Court determines that the Major Questions Doctrine applies, then the Court must determine if there is “a clear congressional statement authorizing [the] agency’s action.”<sup>273</sup> Consistent with the Court’s jurisprudence in other areas, this involves several considerations. First, “courts must look to the legislative provisions on which the agency seeks to rely “with a view to their place in the overall statutory scheme.”<sup>274</sup> Second, “courts may examine the age and focus of the statute the agency invokes in relation to the problem the agency seeks to address.”<sup>275</sup> Third, “courts may examine the agency’s past interpretations of the relevant statute.”<sup>276</sup> Fourth, “skepticism may be merited when there is a mismatch between an agency’s challenged action and its congressionally assigned mission and expertise.”<sup>277</sup>

The Anti-Constitutionalist aspects of Title IX implicate the Major Questions Doctrine. Title IX is a thirty-seven-word statute prohibiting sex discrimination in education programs. It does not clearly authorize the Three-Part Test, which assumes varsity sports participation will mirror enrollment; requires expansion of opportunity for one sex but not the other; and mandates deference to the interests and abilities of one sex. Indeed, as applied to public schools and state universities, the Three-Part Test interferes with state sovereignty over educational programs. As applied to NCAA Division I athletics, it represents an attempt to regulate what the Supreme Court called “a massive business.”<sup>278</sup>

Nor does Title IX clearly authorize the establishment of a parallel criminal justice system to deal with sexual assault on campus. To be sure, the prohibition on sex discrimination requires schools to change the culture so that sexual assault is less common, support those who experience sexual assault, and assist their pursuit of justice.<sup>279</sup> However, those requirements are far less than what the current or proposed regulations require.

Title IX does not clearly authorize the imposition of a policy requiring that individuals be allowed to use the restroom and locker rooms of their choice and to allow individuals with Y chromosomes to dominate women’s sports. Of course, given the Supreme Court’s expansive definition of sex to include sexual

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273. *Id.* at 2622.

274. *Id.*

275. *Id.* at 2623.

276. *West Virginia v. EPA*, 142 S. Ct. 2587, 2623 (2022).

277. *Id.* at 2624.

278. *NCAA v. Alston*, 141 S. Ct. 2141, 2150 (2021).

279. William E. Thro, *No Clash of Constitutional Values: Respecting Freedom and Equality in Public University Sexual Assault Cases*, 28 REGENT U.L. REV. 197, 199, 204-11 (2015).

orientation and gender identity in the context of Title VII,<sup>280</sup> it is likely that Title IX's definition of sex also includes gender identity.<sup>281</sup> Yet, there is a distinct difference between saying transgender individuals cannot be excluded from educational activities and saying that transgender individuals may invade the privacy rights of others or skew the competitive levels of sports.

Although the Major Questions Doctrine casts serious doubt on the Anti-Constitutionalist aspects of Title IX, this does not mean that the policy objectives of the Three-Part Test, the parallel criminal justice system, or the transgender guidance are unconstitutional ends. Rather, it simply means that the process of achieving those ends—regulations or guidance instead of legislation—is constitutionally problematic. If Congress were to pass legislation mandating these policies as part of Title IX, the constitutional issues would be non-existent or significantly diminished.

*B. Kisor Will Encourage the Executive Branch to Promulgate Regulations Rather Than Informal Guidance*

In the Constitutionalist vision, “important subjects . . . must be entirely regulated by the legislature itself,” but Congress may leave the Executive “to act under such general provisions to fill up the details.”<sup>282</sup> Yet, because executive branch actors are not angels,<sup>283</sup> it is necessary to “provide a ‘surrogate political process’ that takes some of the sting out of the inherently undemocratic and unaccountable rulemaking process” of the Executive Branch.<sup>284</sup>

The Administrative Procedure Act<sup>285</sup> provides this “surrogate political process.”<sup>286</sup> The notice and comment process ensures “public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies.”<sup>287</sup> It enables “interested parties to criticize projected agency action before that action is embedded in a final rule and allows the agency to benefit from the parties’ suggestions.”<sup>288</sup> Before taking final action, the Executive Branch must “consider and respond to significant comments

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280. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1738-39 (2020).

281. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616-17 (4th Cir. 2020).

282. *Wayman v. Southard*, 23 U.S. 1, 42-43 (1825).

283. THE FEDERALIST NO. 51, *supra* note 54.

284. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1929 n.13 (2020) (Thomas, J., concurring in part and dissenting in part).

285. 5 U.S.C. § 503 (2022).

286. *Health Freedom Def. Fund v. Biden*, 599 F. Supp. 3d 1144, 1166 (M.D. Fla. 2022).

287. *Batterton v. Marshall*, 648 F.2d 694, 703 (D.C. Cir. 1980).

288. *Council of S. Mountains, Inc. v. Donovan*, 653 F.2d 573, 580 (D.C. Cir. 1981) (per curiam).



received during the period for public comment.”<sup>289</sup> This is why the Trump Administration’s final rule on Title IX sexual assault ran hundreds of pages in the Federal Register.<sup>290</sup>

Yet, in an era where each new Administration desires to act quickly to deal with perceived emergencies, there is a temptation for the Executive Branch to simply reinterpret existing statutes and regulations to accomplish its objectives. Yet, “our system does not permit agencies to act unlawfully even in pursuit of desirable ends.”<sup>291</sup> To prevent the Executive Branch from engaging in creative interpretations to justify its policy objectives, the Supreme Court, in *Kisor*, limited the deference given to an agency’s interpretation.<sup>292</sup>

To explain further, after *Kisor*, deference is appropriate only if three conditions are met.<sup>293</sup> First, the regulation at issue must be ambiguous.<sup>294</sup> In determining whether a regulation is ambiguous, a court “must exhaust all the ‘traditional tools’ of construction . . . only when that legal toolkit is empty, and the interpretive question still has no single right answer can a judge conclude that it is ‘more [one] of policy than of law.’”<sup>295</sup> Consequently, “a court cannot wave the ambiguity flag just because it found the regulation impenetrable on first read.”<sup>296</sup> Although “agency regulations can sometimes make the eyes glaze over[,] . . . hard interpretive conundrums, even relating to complex rules, can often be solved”<sup>297</sup> by examination of the “text, structure, history, and purpose of the regulation.”<sup>298</sup> Put another way, the court must approach interpretation of a seemingly ambiguous regulation in the exact same way that it would approach a seemingly ambiguous statute. It must apply the canons of statutory Constitution.<sup>299</sup>

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289. *Perez v. Mortgage Bankers Ass’n*, 575 U.S. 92, 96 (2015).

290. *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,026-01 (May 19, 2020).

291. *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485, 2490 (2021). *Cf.* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582, 585-86 (1952) (concluding that even the Government’s belief that its action “was necessary to avert a national catastrophe” could not overcome a lack of congressional authorization).

292. Although *Kisor* concerned deference to an agency’s interpretation of its own regulations, presumably the same principles apply to deference of the agency’s interpretation under *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

293. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414-15 (2019).

294. *Id.* at 2415.

295. *Id.*

296. *Id.*

297. *Id.*

298. *Id.* (citations omitted).

299. *See* ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012).

Second, if the regulation is ambiguous, the agency's interpretation must be reasonable.<sup>300</sup> The agency's interpretation must come within the zone of ambiguity the court has identified after employing all its interpretive tools.<sup>301</sup> Note that serious application of those tools therefore has use even when a regulation turns out to be truly ambiguous. The text, structure, history, and so forth at least establish the outer bounds of permissible interpretation. In making this assessment, the agency's interpretation of an ambiguous regulation receives the same deference as an agency's interpretation of an ambiguous statute.<sup>302</sup> The agency's "reading must fall 'within the bounds of reasonable interpretation.' . . . And let there be no mistake: That is a requirement an agency can fail."<sup>303</sup>

Third, if the regulation is ambiguous and if the agency's interpretation is reasonable, "a court must make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight."<sup>304</sup> The controlling weight inquiry "does not reduce to any exhaustive test," but the Court has "laid out some especially important markers for identifying when . . . deference is and is not appropriate."<sup>305</sup> Interpretation "must be the agency's 'authoritative' or 'official position,' rather than any more ad hoc statement not reflecting the agency's views."<sup>306</sup> "[T]he agency's interpretation must in some way implicate its substantive expertise."<sup>307</sup> And, "[the] agency's reading of a rule must reflect 'fair and considered judgment' to receive . . . deference."<sup>308</sup>

*Kisor* has profound implications for the Anti-Constitutionalist Title IX. For example, the Three-Part Test is not a formal regulation, but an interpretation of the 1975 Title IX Regulations mandating that each sex have "equal athletic opportunit[ies]."<sup>309</sup> There is *nothing* in the regulatory text about opportunities being equal for both sexes and about opportunities being "substantially proportionate" to each sex's representation in the student body. Indeed, such a regulatory requirement would contradict the statutory text's prohibition on quotas.<sup>310</sup> Determining whether there are "equal athletic opportunities" requires

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

301. *Id.*

302. *Id.* at 2415-16.

303. *Id.* at 2416.

304. *Id.*

305. *Id.*

306. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2416 (2019)

307. *Id.* at 2417.

308. *Id.*

309. 34 C.F.R. § 106.41 (2022).

310. 20 U.S.C. § 1681(b) (2022).

the consideration of at least *ten* separate factors.<sup>311</sup> Although one of those ten factors is “whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes,” *nothing* in the regulatory text suggests this factor is determinative of compliance or this factor is more important than the other nine factors.<sup>312</sup> In effect, the Department’s Interpretation elevated one factor (interests and abilities) above the other nine factors and effectively mandated a quota. Moreover, the Department of Education has consistently reinterpreted its 1979 Interpretation to support the policy objectives of the current Administration.<sup>313</sup>

If the *Kisor* factors are applied faithfully, the Three-Part Test does not receive deference. First, the 1975 regulation is not ambiguous.<sup>314</sup> Second, even if it is ambiguous, the interpretations and subsequent reinterpretations are not reasonable.<sup>315</sup> Third, even if the regulation is ambiguous and the interpretation

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311. 34 C.F.R. § 106.41(c) (2022). The regulatory text leaves upon the possibility that factors other than the ten listed will be considered. 34 C.F.R. § 106.41(c) (“In determining whether equal opportunities are available, the Director will consider, among other factors . . .”).

312. *Id.*

313. For example, in 1996, the Department of Education issued a reinterpretation of the 1979 Interpretation, which provided that athletic opportunities are “substantially proportionate when the number of opportunities that would be required to achieve proportionality would not be sufficient to sustain a viable team, i.e., a team for which there is a sufficient number of interested and able students and enough available competition to sustain an intercollegiate team.” In plain English, the 1996 Reinterpretation provides that the Department first determines how many additional opportunities are required for the underrepresented sex to achieve perfect proportionality. If this number is sufficient to field a viable team, then the Department takes the position the institution is not substantially proportionate and must add a team. *See Cantú, supra* note 20.

Similarly, the Department has issued multiple reinterpretations of the “Fully Accommodating Interests and Abilities prong. In 2003 and 2005, the Department issued additional Reinterpretations allowing colleges and universities to demonstrate compliance by relying on surveys of the student body. *See Reynolds, supra* note 168; Spellings & Manning, *supra* note 168. Critics argued that the “model survey” included in the 2005 Reinterpretation was based on flawed methodology, was burdensome for students to complete, was drafted to encourage responses of “not interested,” allowed schools to count non-responses as affirmative statements of non-interest, and did not require any minimum response rate to validate the survey. In 2010, the Department withdrew the 2005 Reinterpretation and issued a new Reinterpretation insisting the inquiry is broader. *See Ali, supra* note 167.

314. While the meaning of some of the terms may vary depending upon the context, the overall regulation is clear. If an institution chooses to have sports and chooses to acknowledge the inherent physical differences between the sexes by having sex-segregated teams, then the institution must provide equal athletic opportunities. In determining whether an institution is providing equal athletic opportunities, the Department will consider at least ten separate factors, none of which is identified as determinative or even entitled to greater weight. Logically, weakness in one of the factors can be offset by strength in another factor. There is no ambiguity.

315. This is true for several reasons. First, the Department’s Interpretation ignores the unique nature of NCAA Division I athletics. The same three-part test applies to all interscholastic and intercollegiate athletics. There is no distinction between a public middle school and an NCAA Division I athletic program. It treats NCAA Division III, where there are no athletic scholarships, and NCAA Division I, where many students are

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receiving tuition, room, board, cost of attendance, and academic awards. This one-size-fits-all approach is inherently unreasonable. It makes no sense to treat children playing for the love of the game and scholarship athletes playing on a national stage in the same way.

Second, although the statute explicitly prohibits quotas, the Department of Education's Interpretation that requires "substantial proportionality" has the long-term effect of mandating a quota. To explain, if an institution achieves substantial proportionality, then the federal government expects the institution to *maintain* substantial proportionality. Any elimination of teams must maintain that delicate balance. Similarly, if an institution is short of substantial proportionality, then the federal government expects the institution to take measures to increase participation among the underrepresented sex to eventually achieve substantial proportionality. Part two of the three-part test requires expansion of opportunities for the underrepresented sex. This expansion continues until the school achieves substantial proportionality. Part three of the three-part test requires an assessment of the campus, the wider community from which students are drawn, and the practices of traditional rivals to gauge the interests of the underrepresented sex. As interest develops, the institution must add teams until it achieves substantial proportionality. The question is not *whether* the quota of substantial proportionality will be reached, but *when*.

Third, the Interpretation's three-part test encourages discrimination against the overrepresented sex. If an institution wishes to satisfy the first part of the test, substantial proportionality between the sexes, it may eliminate positions for the over-represented sex with impunity. However, the institution dares not eliminate positions for the underrepresented sex. Consequently, one way institutions achieve compliance is not by expanding opportunities for the underrepresented sex, but by cutting opportunities for the overrepresented sex. Similarly, if an institution is pursuing compliance through the second option, continuous expansion, it will be adding teams for the underrepresented sex while freezing or even cutting teams for the overrepresented sex. Moreover, if an institution is pursuing compliance through the third option, meeting every need of the underrepresented sex, it will be creating new opportunities for the underrepresented sex whenever there is interest and ability in a particular sport and ignoring the unmet interests and abilities of the overrepresented sex. In effect, the federal government's interpretation gives a preference to the underrepresented sex and mandates discrimination against the overrepresented sex.

Fourth, the Interpretation's three-part test's emphasis on varsity athletics, rather than club and intramural sports, means the legal inquiry into a university's compliance is limited to an elite group. The overwhelming majority of college students do not participate in college sports. While the percentage of high school students is higher, it is still only a small portion of the high school population. Limiting the inquiry to such a small elite is unusual. The judiciary would never limit its inquiry into whether a school district was unitary by focusing exclusively on the composition of gifted and talented classes. Similarly, compliance with Title IX should not turn on the sex representation of only the elite athletes.

Fifth, the Interpretation's three-part test imposes artificial constraints on participation. Some schools have opted to ensure compliance via the substantial proportionality test by instituting a system of roster management. Such schools have set target squad numbers for their coaches so that the school can predict the number of male and female participants. Both the federal government and the courts have reviewed these target numbers carefully to ensure the rosters are reasonable and consistent with the average squad sizes in the conference and at the national level, and sometimes also with coaches' expectations and wishes.

Sixth, implicit in the Office for Civil Rights' Interpretation is the assumption that there is a direct relationship between the desire of men and women to attend a particular institution and their interests and ability in playing intercollegiate sports. If women constitute forty percent of the total enrollment, the Office for Civil Rights assumes that there will be sufficient interest and ability among women so that they compose forty percent of the athletes. Conversely, if an institution has an enrollment of women who constitute sixty percent of the total enrollment, the Office for Civil Rights assumes that women will constitute sixty percent of the varsity athletes. Of course, if the percentage of women enrolled increases, the percentage of women in the athletic program must also increase. The same would be true if these percentages were applied to men who have the interest and ability to participate in intercollegiate sports. If a school has 10,000 undergraduates and offers 500 participation opportunities, the respective sex bases for enrollment should not matter.

and reinterpretations are reasonable, the interpretation and reinterpretations are not entitled to controlling weight.<sup>316</sup>

Similarly, prior to the adoption of new regulations in 2020, it is doubtful the Department's guidance regarding sexual assault would survive the *Kisor* analysis.<sup>317</sup> Moreover, until the Biden Administration finalizes its new regulations, the Department's insistence that transgender individuals may invade the privacy rights of others in restrooms and locker rooms or participate in women's sports is unlikely to survive *Kisor* analysis.<sup>318</sup>

Although *Kisor* constrains the Department's ability to creatively interpret regulations, it does not mean that the Department cannot accomplish its policy objectives through the promulgation of new regulations. There is a significant difference between pursuing a constitutional end through constitutional means and pursuing a constitutional end through an unconstitutional end. The Anti-Constitutionalist Title IX falls into the latter category.

### CONCLUSION

A half-century after the enactment of Title IX, America is profoundly changed. Young people are no longer told they cannot enroll in a particular course because "girls do not take X" or "boys do not take Y." Women have gone from being less than forty percent of all undergraduate students to almost sixty percent. Indeed, a growing concern is the underrepresentation of men both in terms of enrollment and degree completion. Interscholastic and intercollegiate sports for women, which were a novelty in the early 1970s, are now a major part of the American landscape. Indeed, it is difficult for most Americans to imagine or remember the conditions prior to the enactment of Title IX. This is the Constitutionalist Title IX—the achievement of a constitutional end (eliminating

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316. This is so for two reasons. First, the Department's 1979 Interpretation does not involve the Department's substantive expertise. The Department of Education's area of substantive expertise is education, not the administration of intercollegiate athletics. While the Department has expertise in why participating in competitive athletics is educationally beneficial, it has no expertise in running an intercollegiate athletics program.

Second, given the constant Reinterpretations of the 1979 Interpretation, neither the Department's 1979 Interpretation nor its Reinterpretations reflect the Department's Fair and Considered Judgment. As explained above, the Department's 1979 Interpretation has not remained constant. Indeed, there were Reinterpretations in 1996, 2003, 2005, and 2010. An interpretation that gets reinterpreted whenever the presidency changes parties cannot be considered the Department's fair and considered judgment. The meaning of the Department's 1979 Interpretation shifts with the political winds.

317. Of course, as suggested *supra* notes 240-281, the mandate for a parallel criminal justice system likely violates the Major Questions Doctrine.

318. To be sure, after the regulations are finalized, there are still significant issues under the major questions doctrine.

sex discrimination) through constitutional means (passage of a statute and promulgation of regulations consistent with the statute).

Yet, there is another side of Title IX. Officials in the U.S. Department of Education have used Anti-Constitutionalist means to achieve their desired policy ends, some of which are constitutionally dubious. Although the statute and regulations require equal treatment of both sexes, nothing in the statute or regulation to empower the Department of Education to regulate the multi-billion-dollar business of intercollegiate sports, which the Supreme Court called a “massive business.” While the statute certainly requires an educational entity to respond to sexual harassment by its employees, it cannot support the establishment of a parallel criminal justice system that resembles the English Star Chamber of Henry VIII. The statutory text certainly prohibits denying educational benefits because an individual is gay or transgender, but it does not require schools and colleges to ignore privacy interests or permit people with X chromosomes to play on women’s sports teams. This is the Anti-Constitutionalist Title IX—the achievement of a constitutionally dubious or anti-constitutional end through anti-constitutional means.

If we are to keep our Constitutional Republic, we must return to the practice mandated by the Constitution—the pursuit of constitutional ends through constitutional means. Restoring the Constitutionalist Title IX is but one step in that process.