

THE ODD EVOLUTION OF THE CIVIL RIGHTS STATE

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Law reviews are filled with sophisticated and often impassioned debates over the use of racial and gender preferences in employment, education, and electoral districting. As a political scientist I am particularly interested in a puzzle that has received far less attention in the legal literature: How have such highly unpopular programs become so well entrenched in public policy and in the practices of employers and educational institutions? In this Article, I will suggest that part of the answer lies in the nature of the peculiar regulatory regime that has evolved since 1964 to interpret and enforce nondiscrimination rules relating to race, gender, and disability. This regulatory regime, which governs the conduct of nearly every employer, school, and unit of state and local government in the country, is notable for its lack of transparency and accountability—features that, for better or for worse, insulate it from ordinary politics.

That the use of racial and gender preferences lacks public support is hard to deny. A recent Century Foundation report noted that:

Racial preferences in higher education remain highly unpopular among voters, who consistently register opposition by a two-to-one margin. Anti-racial preference referenda have been put to voters in six states—both “blue” and “red”—and prevailed in five of those: California (1996), Washington (1998), Michigan (2006), Nebraska (2008), and Arizona (2010).¹

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This article was adapted from panel remarks given at the 2013 Federalist Society Annual Student Symposium on March 2, 2013, at the University of Texas School of Law in Austin, Texas.

1. RICHARD D. KAHLENBERG & HALLEY POTTER, *A BETTER AFFIRMATIVE ACTION: STATE UNIVERSITIES THAT CREATED ALTERNATIVES TO RACIAL PREFERENCES* 4 (2012), <http://tcf.org/assets/downloads/tcf-abaa.pdf>.

The most comprehensive political science analyses of the subject, Paul Sniderman and Thomas Piazza's *The Scar of Race* and Sniderman and Edward Carmines' *Reaching Beyond Race*, found that opposition to affirmative action is so intense that the mere mention of the topic early in a polling interview increased the prevalence of negative racial stereotypes and decreased support for programs designed to help racial minorities later in the interview.² Recognizing these political realities, colleges and graduate schools have gone to great lengths to obscure the size of the boost given to minority candidates in the admissions process.³ In American politics one rarely finds such a huge and persistent gap between public policy and public opinion.

A possible explanation for the creation and survival of these unpopular policies is that they have been imposed by unelected judges who use constitutional interpretation to circumvent the political process. This was certainly true of busing to achieve school desegregation in the 1970s, but it does not explain the persistence of affirmative action in employment, college admission, or electoral districting, where federal regulation is based on federal statutes rather than on the Constitution. In these areas, the Supreme Court often has tried to tamp down use of gender and racial preferences only to see its decisions overridden by Congress or circumvented by regulators. The most important examples are the Civil Rights Act of 1991,⁴ which reversed a number of Supreme Court interpretations of Title VII of the Civil Rights Act of 1964 that had made it more difficult for plaintiffs to win "disparate impact" suits,⁵ and the the Voting Rights Act Amendments of 1982,⁶ which overturned

2. PAUL M. SNIDERMAN & THOMAS PIAZZA, *THE SCAR OF RACE* 102-04 (1993); see also PAUL M. SNIDERMAN & EDWARD G. CARMINES, *REACHING BEYOND RACE* 38-40 (1997).

3. RICHARD SANDER & STUART TAYLOR, JR., *MISMATCH: HOW AFFIRMATIVE ACTIONS HURTS STUDENTS IT'S INTENDED TO HELP, AND WHY UNIVERSITIES WON'T ADMIT IT* chs. 10, 15 (2012).

4. Pub. L. No. 102-166, 105 Stat. 1071 (1991).

5. See *id.* § 3(3)-(4), 105 Stat. at 1071. The most important of these decisions was *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), *superseded by statute*, Civil Rights Act of 1991. For a full discussion of the cases and the legislation see generally Reginald C. Govan, *Honorable Compromises and the Moral High Ground: The Conflict Between the Rhetoric and the Content of the Civil Rights Act of 1991*, 46 RUTGERS L. REV. 1 (1993).

6. Pub. L. No. 97-205, 96 Stat. 131 (1982).

Supreme Court decisions that had reduced federal pressure to create "majority minority" electoral districts.⁷ Far from demonstrating the strength of the "imperial judiciary," affirmative action illustrates the limits of the Supreme Court's control over policymaking and the extent to which Congress has been willing to step in to defend the status quo.

John Skrentny, the author of the most thorough and convincing explanation of the creation of affirmative action policies under Title VII,⁸ has offered a number of explanations for their persistence.⁹ Most importantly, opposition to affirmative action is broad but diffuse. It is not a top priority of many voters or of any significant political organizations.¹⁰ Supporters of affirmative action, in contrast, care deeply about the issue, are well organized, and are quick to mobilize against threats to the status quo.¹¹ And in American politics, it is always far easier to defend the status quo than to promote policy change.¹² We also know that in politics people are most likely to take action to oppose losses; potential gains are usually too speculative to generate as much political passion, especially among those who are not well organized.¹³ Those subject to government regulation, most importantly employers and educational institutions, have not tried to mobilize opponents of affirmative action. Business likes the certainty provided by the legal status quo, which in effect offers a "safe harbor" to those who hire by the numbers, and it is reluctant to appear insensitive to the concerns of racial minorities and

7. See *id.* § 3, 96 Stat. at 134. The key Supreme Court decision was *City of Mobile v. Bolden*, 446 U.S. 55 (1980). For a review of congressional action on the 1982 extension of the Voting Rights Act, see generally ABIGAIL M. THERNSTROM, WHOSE VOTES COUNT? AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS 79–136 (1987).

8. See generally JOHN DAVID SKRENTNY, THE IRONIES OF AFFIRMATIVE ACTION: POLITICS, CULTURE, AND JUSTICE IN AMERICA (1996).

9. See John David Skrentny, *Republican Efforts to End Affirmative Action: Walking a Fine Line*, in SEEKING THE CENTER: POLITICS AND POLICYMAKING AT THE NEW CENTURY 132, 132–71 (Martin A. Levin et al. eds., 2001) [hereinafter Skrentny, *Republican Efforts to End Affirmative Action*].

10. See *id.* at 133, 141–42.

11. See *id.* at 147–48.

12. FRANK R. BAUMGARTNER ET AL., LOBBYING & POLICY CHANGE: WHO WINS, WHO LOSES, AND WHY ch. 2 (2009).

13. PAUL PIERSON, DISMANTLING THE WELFARE STATE? REAGAN, THATCHER AND THE POLITICS OF RETRENCHMENT 17–19 (1994).

women. Moreover, the human resources departments of many large corporations have been at least as enthusiastic about affirmative action as federal regulators.¹⁴ Most colleges and graduate schools, of course, are deeply committed to the continuation of racial preferences in admissions.¹⁵ Republican presidential candidates and members of Congress have been wary of taking the lead in opposing affirmative action, lest they appear lacking in empathy for the plight of Hispanics and women,¹⁶ two groups of voters they have been losing in recent elections. When it comes to electoral districting, moreover, Republicans are more than happy to create majority-minority districts when "packing" of reliable Democratic voters leaves surrounding districts whiter and more Republican.¹⁷ This means, in short, that there are few potential entrepreneurs with the ability or the resources to mobilize the large number of voters who generally oppose the use of racial and gender preferences but do not put the issue high on their list of priorities.

Mobilizing opposition to an entrenched, well-defended policy usually requires an issue that is simple and easy for the average person to understand. That is one reason why the nature of the regulatory regime for interpreting and enforcing civil rights laws is particularly important. Civil rights regulation contains few clear-cut, publicly proclaimed rules. It rests instead on layer after layer of administrative guidelines, interpretive memos, suggestions included in enforcement handbooks, judicial interpretations of statutes and of agency rules, and even more esoteric judicial doctrines on burden of proof. The sources of these multiple rules and standards are often obscure. Agencies claim to rely on the authority of courts; courts claim to rely on the expertise of administrators; and both judges and administrators claim to follow the commands of Congress. Congress, in turn, usually insists that it is merely following the

14. See FRANK DOBBIN, *INVENTING EQUAL OPPORTUNITY* 138–39 (2009).

15. See, e.g., Brief of Amherst College et al. as Amici Curiae Supporting Respondents, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345) (37 universities); Brief of Brown University et al. as Amici Curiae Supporting Respondents, *Fisher*, 133 S. Ct. 2411 (No. 11-345) (14 universities).

16. See Skrentny, *Republican Efforts to End Affirmative Action*, *supra* note 9, at 146–48.

17. MAURICE T. CUNNINGHAM, *MAXIMIZATION, WHATEVER THE COST: RACE, REDISTRICTING, AND THE DEPARTMENT OF JUSTICE* 104–10 (2001).

constitutional interpretation of the Supreme Court. All three branches do what they can to avoid taking responsibility for the choices they make. This makes understanding civil rights policy a real challenge. The remainder of this article offers a brief glimpse at this convoluted regulatory world by focusing on two of its most important parts: federal supervision of educational institutions under Title VI of the 1964 Civil Rights Act¹⁸ and Title IX of the Education Amendments of 1972.¹⁹

Title VI states that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”²⁰ To carry out this prohibition, Title VI gives all federal funding agencies two key powers. The first is the power to terminate the flow of federal money to any “particular program” that engages in discrimination.²¹ The second is the power to issue “rules, regulations, or orders of general applicability” to “effectuate the provisions” of this section of the Civil Rights Act.²² The most important governmental unit to exercise these powers has been the Office for Civil Rights (OCR), lodged first in the old Department of Health Education and Welfare (HEW) and, since 1979, in the Department of Education.²³

The historian Hugh Davis Graham has noted that although “[a]lmost no attention was paid to Title VI” during the lengthy 1964 congressional debate, it “would become by far the most powerful weapon of them all . . .”²⁴ That was in part because the amount of money distributed by the federal government—

18. Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 601–05, 78 Stat. 241, 253–54 (1964) (codified as amended at 42 U.S.C. § 2000d et. seq. (2006)).

19. Pub. L. No. 92-318, §§ 901–07, 86 Stat. 235, 373–75 (1972) (codified at 20 U.S.C. §§ 1681–88 (2006)).

20. 42 U.S.C. § 2000d (2006).

21. 42 U.S.C. § 2000d-1 (2006).

22. *Id.*

23. Nearly every federal department has its own Office for Civil Rights. Part of HEW’s OCR was moved to the Department of Education in 1979, but HHS retained its own civil rights office. In this Article, “OCR” refers to the unit that regulates educational institutions.

24. HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 1960–1972*, at 83 (1990).

particularly aid to public schools—skyrocketed after 1965.²⁵ Once its potential was unlocked, Title VI was quickly “cloned” to cover gender discrimination in educational programs (Title IX), as well as discrimination on the basis of handicap or age in any program receiving federal financial assistance.²⁶ But enforcement of Title VI (and its clones) was never quite as simple or straightforward as its original proponents had assumed. Its effectiveness depended on its transformation from an administrative alternative to constitutional litigation to a novel form of statute-based litigation that combined broad administrative rulemaking authority with judicial enforcement through private suits.

The Kennedy Administration presented Title VI as a quick and efficient alternative to the frustratingly slow and costly process of desegregating schools through litigation. President Kennedy explained that “indirect discrimination, through the use of Federal funds, is just as invidious” as direct discrimination, “and it should not be necessary to resort to the courts to prevent each individual violation.”²⁷ The only changes that the House and Senate made to the Administration’s bill were procedural in nature, designed above all to circumscribe the authority of federal agencies. The law provides state and local governments with the right to a public hearing prior to termination of funds and to judicial review after the fact.²⁸ It requires federal agencies to give Congress thirty days advance warning of terminations (thus giving members of Congress whose districts are affected time to pressure the agency to change its mind), and it specifies that the termination of funds “shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found,”²⁹ rather than to the entire institution receiving funding. Congress also added the unusual provision that no “rule, regulation, or order” is-

25. GARY ORFIELD, *THE RECONSTRUCTION OF SOUTHERN EDUCATION: THE SCHOOLS AND THE 1964 CIVIL RIGHTS ACT* 4 (1969).

26. See Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794 (2006) (amended 1978); Age Discrimination Act of 1975 § 303, 42 U.S.C. § 6102 (2006); Hugh Davis Graham, *Since 1964: The Paradox of American Civil Rights Regulation*, in *TAKING STOCK: AMERICAN GOVERNMENT IN THE TWENTIETH CENTURY* 187, 197–99 (Morton Keller & R. Shep Melnick eds., 1999).

27. H.R. DOC. No. 88-124, at 12 (1963).

28. 42 U.S.C. §§ 2000d-1, 2000d-2 (2006).

29. 42 U.S.C. § 2000d-1.

sued by a federal agency under Title VI "shall become effective unless and until approved by the President."³⁰ A few years later, Congress prohibited agencies from using "deferrals" to avoid these restrictions. Having delegated substantial power to federal administrators, Congress wanted some assurance that they would not wield it arbitrarily or precipitously.³¹

In marked contrast to Title VII of the 1964 Act, which authorizes *only* private enforcement suits, there was no discussion of private enforcement of Title VI during the congressional debate, and there is no authorization of private suits in the statute itself.³² This is not surprising given that the purpose of Title VI is to empower federal agencies to pursue an administrative alternative to litigation. Because it is unconstitutional for state and local governments to discriminate on the basis of race, §1983 already provided a cause of action for aggrieved individuals. But such suits were generally deemed too cumbersome to be effective.

It is often claimed that HEW's aggressive use of the funding sanction under Title VI was responsible for the rapid desegregation of southern schools in the late 1960s and early 1970s.³³ HEW and Title VI certainly played an important role in this saga, but not because of the funding threat. It did not take long for administrators throughout the federal government to discover that termination of funding for state and local governments is too blunt and extreme a sanction to be politically palatable or administratively attractive except under the most extraordinary circumstances. In a 1996 report critical of federal agencies' enforcement of Title VI, the United States Commission on Civil Rights identified a central dilemma facing funding agencies: "[A]lthough fund termination may serve as an effective deterrent to recipients, it may leave the victim of discrimination without a remedy. Fund termination may elimi-

30. *Id.*

31. See Elementary and Secondary Education Amendments of 1966, Pub. L. No. 89-750, § 182, 80 Stat. 1191, 1209-10 (1966) (codified as amended at 42 U.S.C. § 2000d-5).

32. For an extensive discussion of the debate over enforcement of Title VII, see SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* ch 4 (2010).

33. See, e.g., GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 46-54 (2d ed. 2008).

nate entirely the benefit sought by the victim."³⁴ Just as importantly, funding cut-offs threaten to damage relations between the federal agency and those state and local officials with whom they worked on a regular basis—not to mention to antagonize the members of Congress upon whom administrators rely for appropriations.

Statistics provided by Beryl Radin vividly demonstrate the weakness of this sanction. Between 1964 and 1970, the period in which it most aggressively and successfully attacked southern school segregation, the Office for Civil Rights (OCR) within HEW initiated administrative proceedings against only 600 of the thousands of school districts in the South. Federal funding was "terminated in 200" districts and "in all but four of these 200 districts, federal aid was subsequently restored, often without a change in local procedures."³⁵ Not only was the termination process procedurally cumbersome and politically hazardous, but some of the most recalcitrant rural districts were willing to forgo federal funds rather than desegregate.³⁶ At that point, litigation was the only option.

At the heart of what Gary Orfield has described as "the reconstruction of southern education"³⁷ lay a subtle division of labor between administrators in OCR and federal judges. The key enforcement tool was not the funding cut-off, but the structural injunction. The Fifth Circuit revised a number of procedural rules to allow for what essentially became the mass production of highly detailed desegregation orders and expedited appellate review of district court rulings.³⁸ These orders spelled out exactly what school officials needed to do to meet federal

34. U.S. COMM'N ON CIVIL RIGHTS, FEDERAL TITLE VI ENFORCEMENT TO ENSURE NONDISCRIMINATION IN FEDERALLY ASSISTED PROGRAMS 40 (1996). Beryl Radin adds that the Office of General Counsel and the Office of the Secretary within a funding department will usually make the final decision on termination, not the Office of Civil Rights. The former are usually less willing to cut off funds than is the latter. See BERYL A. RADIN, IMPLEMENTATION, CHANGE, AND THE FEDERAL BUREAUCRACY: SCHOOL DESEGREGATION POLICY IN H.E.W., 1964-1968, at 125-26 (1977).

35. *Id.* at 14.

36. GARY ORFIELD, THE RECONSTRUCTION OF SOUTHERN EDUCATION: THE SCHOOLS AND THE 1964 CIVIL RIGHTS ACT 252-56 (1969).

37. *Id.* at 305.

38. FRANK T. READ & LUCY S. MCGOUGH, LET THEM BE JUDGED: THE JUDICIAL INTEGRATION OF THE DEEP SOUTH 185-88 (1978).

mandates.³⁹ Public officials who violated these injunctions could be found in contempt of court, a powerful weapon for compelling compliance.

What courts needed from administrators were guidelines to make their task manageable. Agency rules that merely tracked previous court rulings defining racial discrimination under the Fourteenth Amendment would have been of little help or policy significance. But agency rules under Title VI went far beyond what the courts previously had deemed constitutionally required. To provide specific guidance to recipients of federal funding, agency rules essentially created a presumption in favor of racial balance. OCR's 1966 desegregation guidelines, the most important set of rules ever issued by that organization, set specific targets for the percentage of black students enrolled in formerly white schools.⁴⁰ The Fifth Circuit's embrace of these guidelines coupled with its directive for district courts to follow *future* OCR guidelines not only broke the logjam on school desegregation, but also constituted a major step in the redefinition of "desegregation."⁴¹ Although the Civil Rights Act of 1964 specifically stated that "'desegregation' shall not mean assigning children to particular schools to achieve racial balance,"⁴² OCR took the first step in that direction and the courts, claiming to defer to agency expertise,⁴³ took many more. Together they established the expectation that all school districts that had previously engaged in segregation must reconstitute their schools so that none of them were "racially identifiable"—

39. *Id.*

40. 45 C.F.R. § 181.54(f) (1967); see also STEPHEN C. HALPERN, ON THE LIMITS OF THE LAW: THE IRONIC LEGACY OF TITLE VI OF THE 1964 CIVIL RIGHTS ACT 52–58 (1995); RADIN, *supra* note 34, at 110–11; ALLAN WOLK, THE PRESIDENCY AND BLACK CIVIL RIGHTS: EISENHOWER TO NIXON 146–48 (1971).

41. *United States v. Jefferson Cnty. Bd. of Educ.*, 372 F.2d 836, 847, 857 (5th Cir. 1966) (requiring 5th Circuit courts to give "great weight" to HEW guidelines, which fall within the "scope of the congressional and executive policies embodied in the Civil Rights Act of 1964" and holding that desegregation requires integration, overruling previous courts that held the Constitution did not require integration), *aff'd en banc*, 380 F.2d 385, 389 (5th Cir. 1967).

42. Pub. L. No. 88-352, § 401(b), 78 Stat. 241, 246 (1964).

43. See, e.g., *Jefferson Cnty.*, 372 F.2d at 851–52.

which in effect meant that the racial composition of each school must reflect the racial composition of the district as a whole.⁴⁴

This pattern repeated itself in many other policy areas, including bilingual education and intercollegiate athletics, as will be discussed below. OCR's primary role morphed from terminating funding for programs engaged in court-defined discrimination, to using its rulemaking authority to define standards that could then be enforced by the courts through injunctive relief. A mechanism designed to enforce constitutional norms became a font of much more extensive prohibitions—ostensibly based on a federal statute—that went well beyond the U.S. Constitution.

Given the centrality of administrative rulemaking in this evolving regulatory regime, one might have expected OCR to use the standard rulemaking procedures laid out by the Administrative Procedure Act (APA) and to submit its rules to the president as required by Title VI.⁴⁵ But it did not do that in the 1960s, and it has rarely done so since. Virtually all its rules have taken the form of "guidelines" or "interpretive memos" issued without opportunity for public comment and without the type of detailed explanation offered by regulatory agencies that comply with the APA.⁴⁶ In fact, OCR announced its pivotal 1965 guidelines on school desegregation not in a government document, but in a *Saturday Review of Literature* article written by one of OCR's consultants.⁴⁷

On the rare occasion that OCR has used the standard APA notice-and-comment rulemaking process, it has encountered serious push-back. It took OCR nearly three years to promulgate rules under Title IX, and the rules barely survived opposition from HEW, the White House, and Congress.⁴⁸ In 1980, the fledgling Department of Education (OCR's new home) proposed but never promulgated bilingual education rules.⁴⁹ Its notice of pro-

44. See *Green v. Cnty. Sch. Bd.*, 391 U.S. 430, 442 (1968); *Kemp v. Beasley*, 423 F.2d 851, 857 (8th Cir. 1970) (holding that racially identifiable schools must "shed their racial identification").

45. Civil Rights Act of 1964, § 602, 42 U.S.C. § 2000d-1 (2006).

46. See R. SHEP MELNICK, *REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT* 65–66, 86–96, 259–94 (1983).

47. ORFIELD, *supra* note 36, at 87–89; RADIN, *supra* note 34, at 104–07.

48. JOHN D. SKRENTNY, *THE MINORITY RIGHTS REVOLUTION* 251–55 (2002).

49. Betsy Levin, *An Analysis of the Federal Attempt to Regulate Bilingual Education: Protecting Civil Rights or Controlling Curriculum?*, 12 J.L. & EDUC. 29, 39, 49–50 (1983).

posed rulemaking likewise came under heavy attack from other units within the Department, from the Carter White House, and from Congress. Congress approved an appropriations rider prohibiting the Department from publishing the regulations until after the presidential election. Upon taking office, the Reagan Administration promptly withdrew the regulations.⁵⁰ OCR responded to these harsh political realities by avoiding the rulemaking process altogether, and instead issuing guidance documents that it expects federal courts to recognize as legally binding and recipients of federal funds to follow. The courts' willingness to defer to OCR's "interpretive memos," "clarifications," and "guidelines" has allowed the agency to limit political controversy by using truncated rulemaking procedures.

The structure of Title IX of the Education Amendments of the Civil Rights Act is nearly identical to that of Title VI, and the same division of labor between courts and agencies has developed under it. Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."⁵¹ Like Title VI, it authorizes federal agencies to terminate funding to programs that violate this prohibition, and to write rules to carry out the law, provided that the rules are first approved by the president. One difference between Title VI and Title IX is that the former targets activity that is unconstitutional—racial discrimination violates the Equal Protection clause—but the latter covers a significant amount of activity that is not unconstitutional. Unlike racial discrimination, gender discrimination is not a suspect classification, but is only "disfavored" by the Supreme Court.⁵² This created an awkward question for judges helping federal agencies enforce Title IX: Given that Title IX contains no private right of action, on what basis can private parties sue to enforce OCR's rules? After ignoring this question for several years, the Supreme Court decided that because Title IX is so similar to Title VI and because so many lower courts had already recog-

50. *Id.* at 49–50 (1983).

51. 20 U.S.C. § 1681(a) (2006).

52. *See* *Craig v. Boren*, 429 U.S. 190, 217 (1976) (Burger, C.J., dissenting).

nized a Title IX private right of action, the Supreme Court should follow suit.⁵³

For both Title VI and Title IX, the result was a back-and-forth form of policymaking I have described as institutional “leapfrogging.”⁵⁴ The process begins when either the courts or federal agencies take the initiative on a race- or gender-related issue. The other branch adds to the regulation and sends it back to the first, which in turn makes the regulation a bit more demanding. This pattern was first established in the intense battle over school desegregation during the second half of the 1960s. As Stephen Halpern has noted in his detailed examination of southern school desegregation, “the synergistic power of the bench and bureaucracy’s working together was apparent” as federal judges “lauded HEW’s ‘expertise’ in writing the Guidelines, and HEW officials, in turn, extolled and relied on the ‘objective’ policies of the courts.”⁵⁵ This division of labor not only provided judges with judicially and administratively manageable standards, but offered political cover to OCR, which could shift the focus in defending desegregation regulations to the courts. As Halpern puts it:

HEW officials realized that federal courts were a good ally, and the agency had few allies in beginning the politically touchy task of enforcing Title VI . . . [I]n meetings with angry southern educators HEW officials could claim that their hands were tied—that court decisions and hence, indirectly, the Constitution itself, required HEW to be as insistent as it was.⁵⁶

This was no aberration: One finds a similar leapfrog pattern in the development of federal rules on bilingual education and intercollegiate athletics.

53. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 688–89, 702–03 (1979).

54. E.g., R. Shep Melnick, *Silverstein’s Allure*, 35 LAW & SOC. INQUIRY 1053, 1055 (2010). For examples, see R. Shep Melnick, *Entrepreneurial Litigation: Advocacy Coalitions and Strategies in the Fragmented American Welfare State*, in REMAKING AMERICA: DEMOCRACY AND PUBLIC POLICY IN AN AGE OF INEQUALITY 51 (Joe Soss et al. eds., 2007). I first saw the term used in St. John Barrett, *The New Role of the Courts in Developing Public Welfare Law*, 1970 DUKE L.J. 1, 8 (1970). See also GORDON SILVERSTEIN, *LAW’S ALLURE: HOW LAW SHAPES, CONSTRAINS, SAVES, AND KILLS POLITICS* 39 (2009).

55. HALPERN, *supra* note 40 at 67, 74.

56. *Id.* at 73.

In 1970, OCR issued a memo noting that Title VI prohibits discrimination based on "national origin" and announcing that "[w]here inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students."⁵⁷ Over the next four years, OCR did almost nothing to enforce this rule. By 1974, it had reviewed only four percent of covered school districts.⁵⁸ It found more than half of the reviewed districts out of compliance.⁵⁹ Some of these districts agreed to a remedial plan. Others refused to negotiate at all.⁶⁰ Only once did the OCR take even the first step towards termination of federal funds.⁶¹

In 1974, the Supreme Court handed down *Lau v. Nichols*,⁶² holding that Title VI provided OCR with legal authority to issue rules on bilingual education.⁶³ The Court interpreted Title VI to require schools to provide some sort of support for non-English speaking students, but emphasized that it did not mandate any particular pedagogical approach, leaving the details to local schools.⁶⁴ Despite its limited holding, *Lau* gave new visibility, legitimacy, and immediacy to the cause of bilingual education. A few lower courts went beyond the Supreme Court's *Lau* opinion to mandate a particular form of instruction for the English language learner, one that makes extensive use of the child's native tongue and includes instruction in the child's ethnic heritage.⁶⁵

57. Identification of Discrimination and Denial of Services on the Basis of National Origin, 35 Fed. Reg. 11,595 (July 18, 1970).

58. GARETH DAVIES, *SEE GOVERNMENT GROW: EDUCATION POLITICS FROM JOHNSON TO REAGAN* 157 (2007).

59. *Id.*

60. *Id.*

61. *Id.*

62. 414 U.S. 563 (1974).

63. *Id.* at 566–67.

64. *Id.* at 564–65.

65. See, e.g., *Serna v. Portales Mun. Sch.*, 499 F.2d 1147, 1151–54 (10th Cir. 1974); *Cintron v. Brentwood Union Free Sch. Dist.*, 455 F. Supp. 57, 64 (E.D.N.Y. 1978); *Rios v. Read*, 480 F. Supp. 14, 22–24 (E.D.N.Y. 1978).

In 1975, OCR responded to *Lau* by convening a task force to develop more specific guidance for state and local school systems. No attempt was made to represent a variety of points of view. The task force was comprised solely of educators and activists committed to making extensive use of the home language and to teaching students about their ethnic heritage.⁶⁶ The result, generally referred to as the "*Lau Remedies*" or the "*Lau Guidelines*," was a far cry from OCR's tentative 1970 memo.⁶⁷ The new rules required school systems with a significant number of English language learners to adopt a bilingual-bicultural approach in elementary school; established a methodology for classifying limited English proficiency students; required middle and high schools to institute classes that recognize the contribution of ethnic minorities; and strongly encouraged them to extend bilingual-bicultural education beyond the elementary level.⁶⁸

With the help of lower federal court judges, OCR was able to negotiate agreements with 500 school systems, including virtually all of those with large numbers of limited English proficiency students.⁶⁹ Some of these agreements took the form of consent decrees.⁷⁰ At about the same time, though, the Department of Education released studies indicating that bilingual education did not produce better results than other alternatives.⁷¹ This precipitated fierce opposition to OCR's guidelines. Although OCR pulled back on bilingual education during the 1980s, few of the agreements already in place were ever renegotiated. In fact, when Mayor Michael Bloomberg tried to terminate the bilingual education decree for New York City that

66. ROSEMARY C. SALOMONE, TRUE AMERICAN: LANGUAGE, IDENTITY, AND THE EDUCATION OF IMMIGRANT CHILDREN 132-33 (2010); Rachel F. Moran, *The Politics of Discretion: Federal Intervention in Bilingual Education*, 76 CALIF. L. REV. 1249, 1280-81 (1988).

67. See Levin, *supra* note 49, at 37.

68. OFFICE FOR CIVIL RIGHTS, TASK FORCE FINDINGS SPECIFYING REMEDIES AVAILABLE FOR ELIMINATING PAST EDUCATIONAL PRACTICES RULED UNLAWFUL UNDER *LAU V. NICHOLS* (1975), reprinted in BILINGUAL EDUCATION: A REAPPRAISAL OF FEDERAL POLICY 213, 213-19 (Keith A. Baker & Adriana A. de Kanter eds., 1983).

69. Levin, *supra* note 49, at 37.

70. See *id.* at 37-39.

71. Moran, *supra* note 66, at 1299-1300.

had been established three decades before, he lost.⁷² Similarly, the consent decree governing San Francisco's schools, negotiated in the wake of *Lau v. Nichols*, remains in effect.⁷³

Rules on intercollegiate athletics issued under Title IX provide another example of this institutional leapfrogging. When HEW wrote its initial Title IX regulations, it was clear that intercollegiate sports would be one of the most contentious issues it faced. The rules it announced in 1975 allowed separate male and female teams for contact sports, but insisted that schools must "provide equal athletic opportunity for members of both sexes."⁷⁴ In determining "whether equal opportunities are available," OCR would examine not just the tangible resources devoted to men's and women's teams, but also "[w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes." The regulations assured schools that "unequal aggregate expenditures" on male and female teams would "not constitute non-compliance," and gave them three years to comply with federal mandates.⁷⁵

In 1979 the recently formed Department of Education responded to colleges' clamor for more specific guidance and to women's groups' demand for more support for female sports teams by issuing an interpretive memo that established a new three-prong test.⁷⁶ This interpretive memo soon became the touchstone of federal regulation on the subject. The first and most important prong provided that schools could demonstrate compliance by showing that "intercollegiate level participation opportunities for male and female students are provided in numbers *substantially proportionate to their respective enrollments*."⁷⁷ Schools that did not meet this test could avoid sanctions by showing "a history and continuing practice of program *expansion* which is demonstrably responsive to the developing

72. JAMES CRAWFORD, *EDUCATING ENGLISH LEARNERS: LANGUAGE DIVERSITY IN THE CLASSROOM* 382 (5th ed. 2004).

73. Rachel F. Moran, *The Story of Lau v. Nichols: Breaking the Silence in Chinatown*, in *EDUCATION LAW STORIES*, 111, 139-40 (Michael A. Olivas & Ronna Greff Schneider eds., 2008).

74. 34 C.F.R. § 106.41(c) (1980).

75. 34 C.F.R. § 106.41(c)-(d).

76. See Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,418 (Dec. 11, 1979).

77. *Id.* (emphasis added).

interest and abilities" of the "underrepresented" sex⁷⁸—in other words, they could show that expansion of teams for women were moving them closer to proportionality. Third, schools that flunked both tests could still hope to be ruled in compliance with Title IX by "demonstrat[ing] that the interests and abilities of the members of that [underrepresented] sex have been *fully and effectively accommodated by the present program.*"⁷⁹ This interpretive memo created very strong incentives for schools to create more intercollegiate teams for their female students. Proportionality had become the key to compliance, the goal toward which all schools should be moving.⁸⁰ How much wiggle room would be accorded to schools, though, remained unclear.

For several years the issue remained in limbo while Congress debated the so-called "*Grove City* bill." The Supreme Court's 1984 decision in *Grove City College v. Bell*⁸¹ had interpreted Title IX to apply only to the particular programs that receive federal funding, not to the entire educational institution.⁸² Because sports programs rarely receive direct federal financial support, the issue became moot until Congress overturned the *Grove City* decision in 1988, and expanded the reach of Title IX.⁸³

In the 1990s, the federal courts and OCR reengaged with the issue, this time with the courts taking the lead. The First Circuit handed down two decisions that not only acknowledged the authority of OCR's "three-prong test," but also adopted a stringent interpretation of the now-crucial third prong.⁸⁴ These cases did not involve a big-time football school, but rather Brown University, a school generally known for its academic excellence, liberal politics, and athletic incompetence. Brown, like many other colleges facing a financial crunch at the time, had reduced its expenditures on intercollegiate sports, cutting

78. *Id.* (emphasis added).

79. *Id.* (emphasis added).

80. See Earl C. Dudley, Jr. & George Rutherglen, *Ironies, Inconsistencies, and Intercollegiate Athletics: Title IX, Title VII, and Statistical Evidence of Discrimination*, 1 VA. J. SPORTS & L. 177, 197–98 (1999).

81. 465 U.S. 555 (1984).

82. *Id.* at 573–74.

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

84. *Cohen v. Brown Univ.*, 101 F.3d 155 (1st Cir. 1996); *Cohen v. Brown Univ.*, 991 F.2d 888, 897–98 (1st Cir. 1993).

men's teams more sharply than women's teams.⁸⁵ This meant it could no longer rely on prong two. The court ruled that Brown could not fall back on prong three by claiming that women are less interested in intercollegiate sports than men: "We view Brown's argument that women are less interested than men in participating in intercollegiate athletics, as well as its conclusion that institutions should be required to accommodate the interests and abilities of its female students only to the extent that it accommodates the interests and abilities of its male students, with great suspicion."⁸⁶ Brown's position "ignore[s] the fact that Title IX was enacted in order to remedy discrimination that results from stereotyped notions of women's interests and abilities [S]tatistical evidence purporting to reflect women's interest instead provides only a measure of the very discrimination that is and has been the basis for women's lack of opportunity to participate in sports."⁸⁷ Several other circuit courts followed the First Circuit's lead.⁸⁸

In 1996, OCR incorporated the First Circuit's constricted reading of prong three into a new document, "Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test."⁸⁹ This memo made it clear that schools could not rely on prong three if there was evidence that *any* women's team eliminated as the result of general cutbacks in the athletic budget had support among the current—or even prospective—student body.⁹⁰ In other words, if budget cuts were unavoidable, it would be men's teams that absorbed them all.

The Bush administration tried to provide schools with more leeway to assess the relative interest of male and female students. To that end, in 2005, OCR issued yet another policy memo, this one with the wonderfully bureaucratic title "Additional Clarification of Intercollegiate Athletics Policy: Three-

85. See *Cohen*, 991 F.2d at 892.

86. *Cohen*, 101 F.3d at 178.

87. *Id.* at 179.

88. Dudley & Rutherglen, *supra* note 80, at 204–05.

89. Department of Educ., Office for Civil Rights, Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (Jan. 16, 1996), available at <http://www2.ed.gov/about/offices/list/ocr/docs/clarific.html>.

90. See *id.*

Part Test, Part Three.⁹¹ This "Clarification" and a new "User's Guide to Student Interest Surveys under Title IX" allowed schools to use surveys to gauge student interest and to apportion athletic resources according to the relative strength of demand from male and female students.⁹² In 2010, the Obama Administration withdrew the "Additional Clarification" memo, distributing a 13-page "Dear Colleague" letter that created a virtually irrebuttable presumption that elimination of a women's team constitutes a violation of Title IX: "[I]f an institution recently has eliminated a viable team for the underrepresented sex from the intercollegiate athletics program, . . . there would be a presumption that the institution is not in compliance with Part Three."⁹³ This presumption can be overcome, OCR explained, only "if the institution can provide strong evidence that interest, ability, or competition no longer exists."⁹⁴ But "failure by students to express interest during a survey" does not constitute "evidence sufficient to justify the elimination of a current or viable intercollegiate team."⁹⁵ As long as there are students currently participating in a sport, surveys cannot be used "to nullify that expressed interest" among the "underrepresented sex."⁹⁶ This saga is indicative of the current state of affairs: so many tests, so many prongs, so much clarification and reinterpretation of the meaning of each prong, so little use of standard rulemaking procedures, so few opportunities for public participation, and so little forthright discussion of the purposes of federal regulation.

Meanwhile, suits by student athletes and their coaches whose teams had been cut and by schools arguing that they had complied with Title IX led to another round of court rulings. In one instance a federal district court was asked to rule on this important civil rights issue: whether "competitive

91. U.S. Commission on Civil Rights, *TITLE IX ATHLETICS: ACCOMMODATING INTERESTS AND ABILITY*, app. B (2010), available at <http://www.usccr.gov/pubs/TitleIX-2010.pdf>.

92. *Id.* app. B at 110.

93. Department of Educ., Office for Civil Rights, Letter Addressed to Dear Colleague (Apr. 20, 2010), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-20100420.html>.

94. *Id.*

95. *Id.*

96. *Id.*

cheer," also known as "competitive stunt and tumbling," can be considered an "intercollegiate sport" under Title IX.⁹⁷ In a ruling reminiscent of the Supreme Court's determination of the essential rules of golf,⁹⁸ the federal court's answer was no, competitive cheer is not an intercollegiate sport.⁹⁹ With each round of "clarification," the demands on schools ratcheted up, and the expectation of equal resources for males and females in intercollegiate athletics grew stronger.

If you think that achieving racial balance in urban schools is the best way to reduce the achievement gap between white and minority students; if you believe that bilingual-bicultural education is the best way to help English language learners; if you are convinced that increasing the number of female varsity athletes is an effective way to improve the educational opportunities of women; and if you believe that such policies must be insulated from political opposition, then you are likely to applaud the unorthodox regulatory regime that has developed under Titles VI and IX. This was the position taken by Justice John Paul Stevens in 2001, when he composed the following ode to the "integrated remedial scheme" that the courts, Congress, and agencies had developed under Title VI:

This legislative design reflects a reasonable—indeed inspired—model for attacking the often-intractable problem of racial and ethnic discrimination. On its own terms, the statute supports an action challenging policies of federal grantees that explicitly or unambiguously violate antidiscrimination norms (such as policies that on their face limit benefits or services to certain races). With regard to more subtle forms of discrimination (such as schemes that limit benefits or services on ostensibly race-neutral grounds but have the predictable and perhaps intended consequence of materially benefiting some races at the expense of others), the statute does not establish a static approach but instead empowers the relevant agencies to evaluate social circumstances to determine wheth-

97. *Biediger v. Quinnipiac Univ.*, 728 F. Supp. 2d 62, 82, 94–95 (D. Conn. 2010), *aff'd*, 691 F.3d 85, 91 (2d Cir. 2012); *see also* ASSOCIATED PRESS & Zach Schonbrun, *Cheerleading Loses a Title IX Ruling*, N.Y. TIMES, August 8, 2012, <http://www.nytimes.com/2012/08/08/sports/cheerleading-loses-a-title-ix-ruling-not-a-sport-court-says.html>.

98. *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001).

99. *Biediger*, 728 F. Supp. 2d at 64.

er there is a need for stronger measures. Such an approach builds into the law flexibility, an ability to make nuanced assessments of complex social realities, and an admirable willingness to credit the possibility of progress.¹⁰⁰

In the case then before the Court, the state of Alabama had refused to comply with Department of Justice rules requiring drivers' tests to be conducted in Spanish as well as English. The Department claimed that Alabama's English-only rule would have a disproportionate impact on those born outside the U.S. and therefore violated Title VI.¹⁰¹ For Justice Stevens, this federal rule reflected "the considered judgment of the relevant agencies" that had addressed a "significant social problem[]" that might be "remedied, or least ameliorated, by the application of a broad prophylactic rule."¹⁰²

There can be little doubt but that the current set of arrangements under Titles VI and IX do indeed "credit the possibility of progress" by "empowering" courts and agencies to announce "broad prophylactic rules" designed to attack "subtle forms of discrimination" and other "often-intractable problem[s]" with "flexibility." At the same time, this is a regulatory process that is unusually poor at encouraging public participation, gathering information from a variety of sources, explaining public policy in a straightforward manner, encouraging evaluation of existing rules in light of experience, ensuring that administrative action follows statutory requirements, and strengthening democratic accountability. Justice Stevens' "inspired model" utilizes administrative practices that in other circumstances would draw cries of protest from judges, public interest groups, the media, and many members of Congress.

What might be done to create a system that encourages more debate and clearer thinking about these crucial civil rights issues? One possibility would be to revert to the original purpose and structure of Titles VI and IX, that is, to require federal agencies to use the funding cut-off instead of handing the job of enforcement over to the courts. If agencies had to take responsibility for enforcing the rules they announce and if they were

100. *Alexander v. Sandoval*, 532 U.S. 275, 306–07 (2001) (Stevens, J., dissenting).

101. *Id.* at 279.

102. *Id.* at 307.

required to spend their own political capital in the enforcement process, then they would be far more cautious in their rule-making. It is also likely that presidents, department secretaries, and the Office of Management and Budget would pay much more attention to the activities of civil rights agencies.

In the last decade of the twentieth century and the first decade of the twenty-first, the Supreme Court seemed intent upon accomplishing this by banishing implied private rights of action to the dustbin of legal history.¹⁰³ In fact, in the very decision in which Justice Stevens praised the "integrated remedial scheme" developed under Title VI, a five member majority of the Court led by Justice Scalia declared that Title VI included no private right of action to enforce agency rules that go beyond the letter of Title VI's prohibitions.¹⁰⁴ But this has done little to curb the use of private rights of action under Title VI or Title IX, in large part because the Supreme Court has been so inconsistent on the issue. In a 2005 Title IX "retaliation" case, for example, a closely divided Court retreated from *Sandoval's* narrow interpretation of the judicially enforceable rights contained in these cross-cutting federal mandates.¹⁰⁵

The Court's caution is understandable. Not only has it allowed such suits for nearly half a century, but Congress has often overturned the Court when it restricted access to the federal courts on civil rights matters.¹⁰⁶ Denying those who claim they have been the victims of discrimination their day in court is a highly unpopular position for politicians to adopt.

A more politically feasible and defensible reform would be to insist that civil rights agencies utilize the standard notice-and-comment rulemaking process established by the APA and followed by almost all regulatory agencies. Just as importantly, these agencies should be expected to abide by the provisions of

103. See, e.g., *Gonzaga Univ. v. Doe*, 536 U.S. 273, 276 (2002); *Blessing v. Free-stone*, 520 U.S. 329, 333 (1997); *Suter v. Artist M.*, 503 U.S. 347, 350 (1992).

104. *Alexander*, 532 U.S. at 293.

105. See *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 171 (2005).

106. Examples include the Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 1-5, 123 Stat. 5, 5-7 (codified at 29 U.S.C. § 626(d), 42 U.S.C. § 2000e-5(e)), and the Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, § 1-4, 100 Stat. 796, 796-98 (codified at 20 U.S.C. § 1415). On the latter see R. SHEP MELNICK, *BETWEEN THE LINES: INTERPRETING WELFARE RIGHTS* 175-79 (1994).

Title VI and Title IX that require rules be approved by the President. That such a clear statutory requirement has been ignored for years is astounding.

It is sometimes difficult to force regulatory agencies to use APA rulemaking procedures instead of offering more informal "guidance." But given the courts' key role in enforcing Titles VI and IX, they could simply refuse to defer to agency rules, interpretive memos, and guidelines that have not gone through the process specified by law. This procedural requirement would be easy for federal judges to impose and difficult for members of Congress to oppose.

When it comes to protecting fundamental rights of citizenship, we should not expect public policy to mirror or bow to public opinion. But many of the issues the contemporary civil rights regime addresses are far afield from the protection of fundamental rights. What are the most effective ways to teach students who lack proficiency in English? What is the relationship between intercollegiate sports and providing equal educational opportunity to female students? The odd institutional arrangements that have evolved under Title VI and Title IX limit the range of opinions regulators hear and allow them to ignore information that challenges their assumptions. Small changes in administrative procedures could enlarge the public debate.

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