Major Questions Regarding Sexual Assualt: A Case Study Regarding Title IX Federal Rule Making and the Major Questions Doctrine

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Abstract

This academic case study delves into the complex interplay between the political backlash surrounding evolving Title IX regulations and the application of the Major Questions Doctrine within the context of higher education. As controversies surrounding Title IX, a federal law prohibiting sex-based discrimination in education, have intensified in recent years, the intersection of legal interpretation and political consequences has become increasingly pronounced. Employing a focused examination of specific instances and legal analyses, this study investigates the intricate dynamics between shifting Title IX regulations and the invocation of the Major Questions Doctrine as a means to brunt political backlash. By illuminating these dynamics, this research contributes to a deeper understanding of how changing regulations and legal doctrines interact, shape institutional responses, and impact the broader landscape of gender equity in education. This case study serves as a lens through which to explore the intricate relationships between law, politics, and social policy within the higher education domain.

Introduction

In recent years, controversies surrounding Title IX, the federal law aimed at combating gender-based discrimination in education, have reached a boiling point, sparking intense debates and scrutiny (Boshert, 2022). This academic case study delves into the heart of these debates, exploring the intricate interplay between political backlash, evolving Title IX regulations, and the application of the Major Questions Doctrine within the realm of higher education.

Title IX, originally enacted in 1972, stands as a cornerstone of gender equity in education, prohibiting discrimination "on the basis of sex" in educational programs and activities receiving federal financial assistance. However, as societal norms, administrative priorities, and legal interpretations have evolved, so too have the complexities surrounding its implementation and enforcement (e.g., Timotija, 2024). Against a backdrop of shifting regulations and heightened political tensions, understanding the nuanced dynamics at play becomes paramount.

Through a focused examination of specific instances and legal analyses, this study seeks to unravel the complexities inherent in the application of Title IX regulations and the invocation of the Major Questions Doctrine, a legal principle used to navigate uncertainties in agencies' interpretation of statutes. By shining a light on these intricacies, this research aims to deepen the understanding of how changes in regulations and legal doctrines intersect, influence institutional responses, and shape the broader landscape of gender equity in higher education.

At its core, this case study serves as a critical lens through which to explore the dynamic relationships between law, politics, and social policy within the domain of higher education. Specifically, this research endeavors to consider whether the application of the Major Question Doctrine to pressing Title IX questions could both curb the ongoing political backlash as well as ensure an equitable environment for all students, faculty, and staff.

Title IX

Origins

Enacted as part of the Education Amendments of 1972, Title IX states: "No 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." While Title IX is often associated with its impact on women's sports, its implications extend far beyond athletics, influencing various aspects of educational and professional opportunities for women and girls (Boshert, 2022).

The origins of Title IX can be traced back to the broader context of the women's rights movement in the United States, which gained momentum in the late 19th and early 20th centuries (Williams and Green, 2023). Throughout this period, women advocated for greater access to education, employment, and political rights (Willams and Greeen, 2023). However, systemic discrimination and gender-based barriers persisted, particularly in educational institutions (Cantalupo, 2020).

The push for Title IX gained traction during the 1960s and early 1970s, a time of significant social and political upheaval in the United States (Cantalupo, 2020). The civil rights movement, along with other social justice movements, inspired activists to address various forms of discrimination, including gender inequality (Boshert, 2022). Women's rights advocates, in particular, highlighted disparities in educational opportunities and resources between male and female students (Cantalupo, 2020).

A crucial factor was the increasing participation of women in higher education during the 1960s. As more women pursued college degrees, they encountered institutional barriers and discriminatory practices that limited their opportunities for academic and professional

advancement (Willams and Greeen, 2023). Simultaneously, the broader civil rights movement was gaining momentum, leading to legislative victories such as the Civil Rights Act of 1964, which prohibited discrimination on the basis of race, color, religion, sex, or national origin in employment, public accommodations, and federally funded programs (Civil Rights Act, 1964). The passage of this landmark legislation demonstrated the potential for federal intervention to address systemic discrimination and inequality.

In this climate of activism and social change, Congresswoman Edith Green, a Democrat from Oregon, emerged as a key proponent of gender equity in education (Rose, 2015). Green introduced an early version of Title IX in 1970 as part of the Higher Education Act, aiming to address gender disparities in higher education institutions receiving federal funding (Rose, 2015). While this initial attempt was unsuccessful, it laid the groundwork for future legislative efforts to promote gender equality in education. The momentum for Title IX continued to build, fueled by grassroots organizing, public awareness campaigns, and advocacy from women's rights organizations, educators, and students (Rose, 2015).

In 1972, Congress passed the Education Amendments of 1972, which included Title IX as one of its provisions (Education Amendments, 1972). President Richard Nixon signed the bill into law on June 23, 1972, marking a historic milestone in the fight for gender equality (Rose, 2015). Following its enactment, Title IX sparked significant changes in educational institutions across the United States. Schools and colleges were required to take proactive measures to ensure equal opportunities for male and female students, including in admissions, financial aid, athletics, and academic programs (Cantalupo, 2020).

One of the most visible impacts of Title IX was its influence on women's sports (Staurowsky, 2003). Before Title IX, female athletes faced limited opportunities for participation

and inadequate resources compared to their male counterparts. Title IX's mandate for equal treatment in athletics led to a dramatic expansion of women's sports programs and increased investment in facilities, coaching staff, and scholarships for female athletes (Staurowsky, 2003).

Recent Title IX History

As other authors have noted, in recent years, Title IX has transformed from a law that was typically related to college athletics to a major subject of intense political debate pitting (1) concerns related to the due process rights of the accused against (2) protection and justice for victims (Melnick, 2018). Moreover, this debate has only been exacerbated by new questions related to whether "based on sex" now includes gender identity and sexual orientation (Stanford, 2022). As shown below, the politicization of Title IX has resulted in ongoing rule changes and public discourse surrounding their application, with different administrations and interest groups advocating for contrasting interpretations and enforcement priorities.

In 2011, President Obama's Department of Education's Office for Civil Rights (OCR) released "comprehensive guidance" regarding Title IX enforcement in higher education (Ali, 2011). Specifically, the 2011 Dear Collegue Letter (DCL) clarified that sexual harassment and sexual violence, including sexual assault, are forms of discrimination prohibited by Title IX (Ali, 2011). It emphasized schools' obligations to promptly respond to and investigate allegations of sexual misconduct using a preponderance of the evidence, meaning that they must determine whether it is more likely than not that the alleged misconduct occurred (Ali, 2011). Furthermore, the DCL highlighted the importance of providing supportive measures to victims of sexual misconduct, such as counseling, academic accommodations, and changes in housing or class schedules (Ali, 2011). It also emphasized the need for confidentiality to the extent possible during investigations and underscored that retaliation against individuals who report sexual

misconduct is strictly prohibited (Ali, 2011). In addition to addressing sexual violence, the 2011 DCL also provided guidance on preventing and responding to other forms of sex discrimination, including gender-based harassment, pregnancy discrimination, and unequal treatment in athletics and academic programs (Ali, 2011). The DCL was publicly promoted by Vice President Joe Biden at colleges across the country, where he identified ending sexual assault on college campuses as one of his "signature issues" (Lee, 2011).

In 2014, the OCR released a follow-up guidance document known as the Q&A on Title IX and Sexual Violence, which provided additional clarification and addressed common questions from schools and stakeholders (Lhamon. 2014). This document emphasized the importance of conducting fair and impartial investigations, protecting the rights of both the complainant and the respondent, and ensuring due process for all parties involved (Lhamon, 2014). Finally, in 2016, the OCR issued further guidance interpreting sex-based harassment to prohibit schools from treating students inconsistent with their gender identity including in the use of on-campus restrooms, locker rooms, and housing (Lhamon & Gupta., 2016). Specifically, regarding sex-segregated restrooms, showers, and housing, the guidance both acknowledged that Title IX's implementing regulation permitted schools to provide such facilities, but instructed schools that "transgendered students must be allowed to . . . access such facilities consistent with their gender identity" (Lhamon & Gupta 2016, p. 3).

The Obama Administration's strategy to highlight these efforts was met with forceful and publicly visible resistance, evident in the Republican Party's 2016 platform. While supporting "orignal" interpretations of Title IX and efforts to provide equal opportunities for girls and women, the platform alleged:

> That same provision of law is now being used by bureaucrats — and by the current President of the United States — to impose a social and cultural revolution upon the American people by wrongly redefining sex discrimination to include sexual orientation or other categories. Their agenda has nothing to do with individual rights; it has everything to do with power. They are determined to reshape our schools — and our entire society — to fit the mold of an ideology alien to America's history and traditions. Their edict to the states concerning restrooms, locker rooms, and other facilities is at once illegal, dangerous, and ignores privacy issues.

(Republican Party Platform, 2016, p. 35). The platform goes on to argue that sexual assault, while a terrible crime, should not be addressed in the "faculty lounge," but investigated and prosecuted by law enforcement with appropriate due process protections (Republican Party Platform, 2016, 35).

Then, in 2017, the OCR under then-President Trump rescinded all of the Dear Colleague Letters issues under President Obama's administration and issued new interim guidance related to addressing sexual misconduct on college campuses pending a formal rule-making process according to the Administrative Procedures Act (Kreighbaum, 2017). This interim guidance emphasized the importance of due process protections for respondents accused of sexual misconduct and, if they so desired, allowed schools to use a higher evidentiary standard, such as clear and convincing evidence, in Title IX proceedings (Kreighbaum, 2017).

In May 2020, the OCR issued new Title IX regulations for the first time in over 40 years via the notice-and-comment rulemaking process and having considered over 124,000 public comments related to the proposed changes (US ED, 2023). This new set of regulations (the "Final Rule") replaced all previous interim guidance and introduced significant changes to how

schools handle sexual misconduct allegations. Some of the key provisions of the Title IX Final Rule include:

- Narrowing the definition of sexual harassment to include only conduct that is severe, pervasive, and objectively offensive that occurs within a university's "programs and activities";
- Requiring schools to provide live hearings with cross-examination conducted by advisors (which may be legal counsel) for the parties involved in Title IX investigations;
- Allowing schools to use either the preponderance of the evidence or the clear and convincing evidence standard;
- Providing both parties with equal rights to appeal the outcome of Title IX proceedings; and
- Ensuring that schools offer supportive measures to complainants and respondents throughout the investigation and adjudication process.

(US ED, 2023).

Since the implementation of the Title IX Final Rule, some stakeholders have argued that the new regulations provide necessary protections for respondents and promote fairness in Title IX proceedings (Johnson, 2019). However, many others raised concerns that the Final Rule deters survivors from reporting sexual misconduct and undermines efforts to address campus sexual violence (Patel, 2023).

In June 2022, the U.S. Department of Education, under the Biden administration, proposed new rules to replace the Final Rule implemented by the previous administration (US ED, 2023). As a part of that notice-and-comment period, the OCR received over 240,000 public comments on these new proposed rules (US ED Blog, 2023). According to OCR, these

"proposed amendments will restore vital protections for students in our nation's schools which were eroded by controversial regulations implemented during the previous Administration . . . . [which] weakened protections for survivors of sexual assault and diminished the promise of an education free from discrimination" (US ED Fact Sheet, 2023). Specifically, some of these proposed changes include:

- Clarifying that Title IX's protections against discrimination based on sex apply to discrimination based on sexual orientation and gender identity;
- Expanding the current definition of the university's "educational program and activity" to include sex-based harassment that occurs outside that context or even in another country but then creates a hostile environment on campus;
- Expanding protection for students and employees who are pregnant or have pregnancy-related conditions;
- Allowing universities to offer students the ability to informally resolve sex discrimination complaints without the need for a formal complaint or live hearing with cross-examination; and
- Requiring a school to use the preponderance of the evidence standard of proof unless they use a higher standard with all other comparable proceedings.

(US ED Fact Sheet, 2023).

During 2023, OCR announced several dates when the new rules would be finalized, but that has yet to happen. In February 2024, the proposed rules were sent to the Office of Management and Budget in hopes of being released sometime this spring with an anticipated effective date of early fall (Timotija, 2024).

These looming changes are likely to be a central theme in the upcoming presidential election based on the past attention both the presumptive candidates have given to Title IX as well as the culture-war issues surrounding transgender rights (Anderson, 2021). In short, it's likely that unless challenged in the courts and/or addressed by Congress, the administrative back-and-forth and political backlash surrounding Title IX will only continue.

The Major Questions Doctrine

Introduction

The Major Questions Doctrine (MQD) is a legal principle used to interpret statutes and regulations, particularly in the context of U.S. administrative law (Bowers, 2022). This doctrine addresses the question of whether Congress has clearly delegated authority to an administrative agency to make significant policy decisions or interpretations of law (Bowers, 2022). In other words, the doctrine seeks to determine whether an agency's actions fall within the scope of its delegated authority or if they exceed the bounds set by Congress. At its core, MQD focuses on the threshold question of whether an agency's interpretation or action involves a "major question" of policy or law. If an issue is deemed to be a major question, the doctrine suggests that Congress should explicitly address it in the statute or regulation, rather than leaving it to agency discretion (Bowers, 2022). This approach reflects the separation of powers principles inherent in the U.S. Constitution, which allocates authority between the legislative, executive, and judicial branches of government. While this general concept is not a new one, recent Supreme Court cases have directly named, acknowledged, and applied this doctrine (e.g., *West Virginia v. EPA*).

Formal Recognition and Recent Application of MQD

West Virginia v. EPA

In 2022, the case of *West Virginia v. EPA* epitomizes the intricate interplay between legal interpretation, regulatory power, and attempts at environmental stewardship. At issue was a regulatory initiative stemming from a little-known “backwater” provision within the text of the Clean Air Act (West Virginia v. Environmental Protection Agency, p. 26). At the heart of the dispute was Section 111 of the Clean Air Act, which tasked the Environmental Protection Agency (EPA) with identifying and implementing the "best system of emission reduction" for such plants (West Virginia v. Environmental Protection Agency). The Biden-led EPA argued that this provision furnished ample legal backing for its proposed plan (West Virginia v. Environmental Protection Agency). Based on their new interpretation of this provision, the EPA sought to compel utilities away from reliance on fossil fuels, particularly coal, in a bid to mitigate carbon emissions and combat climate change (West Virginia v. Environmental Protection Agency).

However, the Court saw things differently. It contended that the cited provision was overly broad, raising concerns about the potential for regulatory overreach (West Virginia v. Environmental Protection Agency). Chief Justice Roberts, delivering the majority opinion, delineated four factors that shaped the court's deliberations and application of the MQD:

1. The recognition of the profound economic and political implications of the EPA's assertion of regulatory authority;
2. The unprecedented nature of the regulatory intervention itself was underscored, departing from conventional pollution control measures and venturing into uncharted legal terrain;
3. The obscurity of the provision invoked by the EPA was previously overlooked until leveraged by the EPA to advance its policy priorities; and

4. The historical context played a significant role, with past legislative attempts to address similar environmental concerns serving as a backdrop against which the court's decision was cast. In short, because Congress had the opportunity to take action and had not, the Court assumed that the provision could not mean what the EPA wanted it to mean.

(West Virginia v. Environmental Protection Agency)

Biden v. Nebraska

Biden v. Nebraska involved a question of whether the United States Secretary of Education had the authority to cancel $430 billion of student loans under the Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act) (*Biden v. Nebraska*). Specifically, this case stems from the Secretary's decision, near the end of the pandemic in 2022, to reduce the debt of borrowers making less than $125,000 by $10,000 and those who previously received the Pell Grant by $20,000 (*Biden v. Nebraska*). The relevant portion of the HEROES Act permitted the Secretary to "waive or modify any statutory or regulatory provisions applicable to the student financial assistance programs under title IV of the [Education Act] as the Secretary deems necessary in connection with a . . . national emergency" (*Biden v. Nebraska*, p.1). Following a lawsuit by six states questioning the Secretary's statutory authority, a lower appeals court issued a nationwide injunction, and the Supreme Court decided to hear the case (*Biden v. Nebraska*). In determining that the Secretary exceeded his authority by in effect rewriting the statute, the Court (1) held that the comprehensive debt forgiveness program was not a simple modification or waiver as properly understood in the relevant statutory language and (2) pointed to its holding in *West Virginia v. EPA* concluding there is a lack of clear congressional authorization in the statute to justify the challenged program (*Biden v. Nebraska*).

The concurrence by Justice Coney-Barret provides a more comprehensive discussion of the MQD, which she describes as "a tool for discerning . . . the text's most natural interpretation," a "clarity-tax" that requires "Congress to speak unequivocally in order to grant [agencies] significant rule-making power," and a common sense tool for determining if "Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency" (*Biden v. Nebraska,* Concurrence, p. 2, 4-5). In further explaining the MQD, Justice Coney-Barrett articulates that courts should be skeptical when:

1. An agency claims "extravagant statutory power" unless overcome by "text directly authorizing an agency action or context demonstrating that the agency's interpretation is convincing" (*Biden v. Nebraska,* Concurrence, p, 10-11);
2. Mismatches exist between an agency's broad invocation of power and relatively narrow statutes purporting to delegate such power (*Biden v. Nebraska,* Concurrence, p. 12);
3. An agency regulates outside its usual domain or "wheelhouse" (i.e, an unusual form of authority outside the agency's typical day-to-day work) (*Biden v. Nebraska,* Concurrence, p. 13); and
4. An agency discovers "newfound authority" to regulate a significant portion of the
    a. American economy in a "long-extant statute" (*Biden v. Nebraska,* Concurrence, p. 13).

Justice Coney-Barrett concludes that the MQD do not require all these indicators to be present, but that the "more indicators . . . that are present, the less likely that Congress would have delegated the authority in questions to the agency without sayings so more clearly" (*Biden v. Nebraska,* Concurrence, p. 15).

Application of Major Question Doctrine to Potential Challenges to Title IX

Mediating Effects

Before addressing the application of the MQD to the pending Title IX rules changes, it's important to first recognize the potential mediating effects that have already occurred with regard to the Court's recent MQD precedent (as well as continued political backlash). An example of this can be seen in the Obama and Biden administration's evolving approach to transgendered students.

As previously discussed, in 2016, the Obama-era OCR issued guidance recognizing a university's ability to utilize single-sex facilities including locker rooms, bathrooms, and residence facilities (Lhamon & Gupta, 2016). However, it also required, without citing additional legislative or legal support, that institutions must allow transgender students to access such facilities consistent with their gender identity (Lhamon & Gupta, 2016). In other words, the statute specifically permitted universities to continue having separate male and female bathrooms, locker rooms, and residential facilities, but OCR advised against prohibiting transgender students from using facilities that aligned with their sexual identity.

The Trump administration withdrew this guidance in February 2017, but in 2020, towards the end of the Trump administration, the Supreme Court's ruling in *Bostock v. Clayton County* raised new questions related to the definition of "sex" under Title IX (Bostock v. Clayton, 2020). In that case, the Court held that workplace discrimination against an individual because of their sexual orientation or gender identity is inherently discrimination based on "sex" under Title VII (Bostock v. Clayton, 2020). Following the ruling in *Bostock*, the Acting Assistant Secretary of OCR issued a memorandum in January 2021 emphasizing that Bostock's interpretation does not extend to Title IX (Rubenstein 2021). Notably, aligning with Justice Alito's analysis in his

dissent on Title VII in *Bostock*, the OCR's memorandum asserted that the Department of Education's historical interpretation of "sex" in Title IX as biological sex, encompassing male or female, remains the sole interpretation consistent with the common understanding of "sex" at the time of Title IX's inception in 1972 (Rubenstein, 2021).

Later the same year, President Biden issued an executive order entitled Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation, which applied and expanded the Supreme Court's holding in *Bostock v. Clayton* to other statutory regimes that involved "sex." (Biden, 2021). Specifically, with regard to Title IX, the order states: "Under Bostock's reasoning, laws that prohibit sex discrimination — including Title IX . . . along with [its] respective implementing regulations — prohibit discrimination on the basis of gender identity or sexual orientation, so long as the laws do not contain sufficient indications to the contrary" (Biden, 2021). It went on to order a program review of all agency actions that might be impacted by the order (Biden, 2021).

Three months later, in March 2021, President Biden issued a more specific executive order entitled Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity (Biden, March 2021). This executive action directed the Secretary of Education, in collaboration with the Attorney General, to conduct a comprehensive review of all existing regulations, orders, guidance documents and policies to ensure alignment with Title IX and other relevant laws, with a primary focus on eliminating discrimination on the basis of sex, sexual orientation, or gender identity within educational settings (Biden, March 2021).

In June 2021, the OCR issued a Notice of Interpretation confirming that Title IX protects students from discrimination based on sexual orientation and gender identity based on the

holding in *Bostock* (Goldberg, 2021). While the interpretation did not specifically address intimate single-sex spaces like bathrooms, locker rooms or residential facilities, it more generally stated that "OCR will open an investigation of allegations that an individual has been discriminated against because of their sexual orientation or gender identity in education programs or activities [including] allegations of individuals being . . . denied the benefits of . . . programs or activities, or otherwise treated differently because of their sexual orientation or gender identity" (Goldberg, 2021). However, in July 2022, a District Court in Tennessee enjoined the implementation of this interpretation from taking effect in twenty states based on challenges related to the 10th Amendment and the failure to comply with the Administrative Procedures Act (Brink, 2022).

The Supreme Court heard *West Virginia v. EPA* in early 2022 and issued a ruling by June of that year relying on the MQD in its ruling. In mid-July, the OCR filed its notice of proposed rulemaking related to Title IX (Nondiscrimination on the Basis of Sex, 2022). While the final rules are still pending, the proposed rules included a significant change from Obama-era guidance regarding the treatment of transgender students. Specifically, while the proposed rules make it clear that "preventing any person from participating in an education program or activity consistent with their gender identity would subject them to more than de minimis harm on the basis of sex and therefore be prohibited," the rules go on to "recognize that, despite Title IX's general prohibition on sex discrimination against an individual, there are circumscribed situations in which Title IX . . . permit a recipient to separate students on the basis of sex, even where doing so may cause some students more than de minimis harm" (Nondiscrimination on the Basis of Sex, 2022, p. 41535-6). According to the rules, this includes prohibiting transgender

students from sex-segregated living facilities that do not align with their biological sex (Nondiscrimination on the Basis of Sex, 2022).

This proposal seems odd in light of the trajectory of guidance and interpretations following *Bostock.* Even before *Bostock*, the Obama-era OCR confidently declared that transgender students should not be limited in their preference for sex-segregated housing (Lhamon & Gupta, 2016). The guidance that followed *Bostock* in the Biden era seemed to only strengthen and expand those protections to any discrimination based on gender identity (Nondiscrimination on the Basis of Sex, 2022). Following *Bostock* but prior to *West Virginia v. EPA,* some even felt that based on the ruling in *Bostock*, "the major questions doctrine could play a unique role in determining whether administrative agencies may act to achieve a statute's ulterior and perhaps 'major' purpose within the confines of the statute's text" (Pismarov, 2021, p. 38). However, after *West Virginia v. EPA*, it now seems apparent that the current Supreme Court has foreclosed that possibility. Moreover, the current administration apparently understands that is the case based on the way they have turned to the de minimis harm analysis in this instance. For this reason, it seems that even before being applied to the actual regulations, the MQD is impacting the administration's proposals related to transgender protections.

Major Questions Related to the Scope of Proposed Title IX Regulations

Proposed Change in Scope

In addition to Title IX's applicability to prohibit discrimination based on gender identity, the scope of the proposed rules is likely to be impacted by the Major Questions Docrtine. Specifically, this relates to whether Title IX applies to incidents originating from off-campus activities that are not part of a university's "programs or activities" or outside the United States. Both of these categories are beyond the scope of the current regulations and a plain reading of

the text of the Title IX: "No 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." The proposed rules provides this helpful summary of the current rules:

> Current § 106.44(a) defines an "education program or activity" for purposes of §§ 106.30, 106.44, and 106.45 to include locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution. Current §§ 106.8(d) and 106.44(a) limit the geographic scope of a recipient's obligation to address sexual harassment to incidents that occurred against a person while that person was in the United States. In addition, current § 106.45(b)(3)(i) requires a recipient to dismiss a formal complaint of sexual harassment if the alleged conduct did not occur against a person while that person was in the United States.

(Nondiscrimination on the Basis of Sex 2022, p. 41400-01).

Additionally, the proposed rules clearly set out a significant change to the current approach:

> The Department proposes amending § 106.11, to clarify that Title IX's prohibition on sex discrimination applies to all sex discrimination occurring both under a recipient's education program or activity and in the United States. The proposed regulations would make clear that conduct that occurs under a recipient's education program or activity includes but is not limited to . . . conduct that is

> subject to the recipient's disciplinary authority. It would also specify that a recipient has an obligation to address a sex-based hostile environment under its education program or activity, even if sex-based harassment contributing to that hostile environment occurred outside the recipient's education program or activity or outside the United States.

(Nondiscrimination on the Basis of Sex 2022, p. 41401).

To justify this change, the OCR creates a parallel between where a university enforces its code of conduct in cases that do not involve discrimination and its statutory obligations under Title IX. Specifically, in this regard, it provides the following rationale and examples:

> In addition, some schools have codes of conduct that address interactions, separate from discrimination, between students that occur off campus. If a school has such a code of conduct, then it may not disclaim responsibility for addressing sex discrimination that occurs in a similar context. If the school responds when, for instance, one student steals from another at an off-campus location, or when a student engages in a nonsexual assault of another student at an off-campus location, it must likewise respond when a student engages in sexual assault or sex-based harassment of another student off campus.

(Nondiscrimination on the Basis of Sex 2022, p. 41402).

The proposed regulations, therefore, greatly expand the current regulations regarding what determines an institution's programs and activities from a definition related to the location of the parties within that program or activities to a relationship with the parties being all that is required. In other words, where the current definition relates to an

institution having control over the program or activity where the conduct occurs, the proposed definition is based more generally on responding to related parties for incidents occurring anywhere.

Application of the MQD

The following chart considers the proposed change of scope in light of the MQD. It focuses on the various factors outlined by both the majority opinion in *West Virginia v. EPA* and Coney-Barrett's concurrence in *Biden v. Nebraska*.

Factors	Application	Major Question?
West Virginia v. EPA		
Economic and Political Significance - The recognition of the profound economic and political implications of the asserted regulatory authority	Based on the last fifteen years of debate and administrative backlash surrounding Title IX regulations, it seems likely that the scope of Title IX would be considered politically significant. Moreover, the cost associated with a larger scope for all educational institutions across the country including the cost of investigating and providing supportive measures for those claims seems to be significant. However, universities are likely to address off-campus complaints of wrongdoing through a code of conduct regardless of Title IX.	Yes
Uncharted - The unprecedented nature of the regulatory intervention itself, which departs from conventional measures and ventures into uncharted legal terrain	This expansion of scope would be the first time that the regulations would require institutions to assume responsibility for activities that they do not actually control or could have prevented. While previous Dear Colleague Letters took a similar approach, they did not exist as formal regulations. Moreover, the civil negligence standards does not impose a duty on institutions to control off-campus activities despite the code of conduct applying to off-campus incidents.	Yes
Obscure - The obscurity of the provision invoked by the	Since the language being interpreted (programs and activities) is part of the rather short statute,	No

administration was previously overlooked until leveraged to advance its policy priorities	it is not obscure.	
Past Legislative Attempts- The historical context played a significant role, with past legislative attempts to address similar environmental concerns serving as a backdrop against which the court's decision was cast. In short, because Congress had the opportunity to take action and had not, the Court assumed that the provision could not mean what the administration wanted it to mean.	Title IX Take Responsibility Act of 2021 sought for institutions to address sexual harassment "regardless of where the harassment occurs" and failed to advance with only six sponsors in the House of Representatives (Gravely, 2021).	Yes
Biden v. Nebraska		
Extravagant Power - An agency claims "extravagant statutory power" unless overcome by "text directly authorizing an agency action or context demonstrating that the agency's interpretation is convincing"	The expanded scope would require institutions to be responsible for incidents anywhere so long as their code of conduct applies to incidents in those settings. Simply exercising jurisdiction over off-campus conduct violations does not seem to fall under an institution's "activities" as defined by the statute unless the violation occurs as a part of that disciplinary process. A key part of the statute also seems to be the phrase "under any education program or activity receiving Federal financial assistance". It does not seem like an off-campus student would still be subject to programs or activities receiving federal support simply by the code of conduct applying to some off-campus conduct.	Yes
Mismatch - Mismatches exist between an agency's broad invocation of power and relatively narrow statutes purporting to delegate such power	There does seem to be a mismatch between the authority established to combat sexual harassment in institutions receiving federal funds and incidents occurring off-campus, where no such funds are being implicated and law enforcement has primary authority.	Yes
Unusual - An agency regulates outside its usual	Again, if consideration is given to the purpose of Title IX and its scope to address sex-based	Yes

domain or "wheelhouse" (i.e, an unusual form of authority outside the agency's typical day-to-day work)	discrimination inside institutions receiving federal financial assistance, it does seem unusual to also require institutions to be responsible for incidents that occur off-campus and not within the control of the university.	
New Approach - An agency discovers "newfound authority" to regulate something significant in a "long-extant statute"	This authority to expand the scope of Title IX to off-campus conduct based on the application of the student code of conduct does seem to qualify as new-found authority that stretches the previous understanding of an "education program or activity receiving Federal financial assistance," which has been part of the statute since its enactment.	Yes

Discussion

The foregoing illustrates the impact the MQD has had and will likely have on OCR's attempts to regulate sexual harassment in institutions of higher education. Once the final rules are released, they will likely be challenged on several fronts including whether OCR's actions fall within the scope of its delegated authority or if they exceed the bounds set by Congress. However, even if a court finds that they have exceeded that authority under the MQD, the political backlash and administrative back and forth is likely to continue especially with the possibility of a new administration this fall unless Congress decides to address some of the controversial issues surrounding Title IX. In short, the MQD might be able to limit OCR from exceeding the bounds of its delegated authority, it cannot make Congress do its job.

For some this is not a problem in that they view this "shifting administrations process" related to Title IX as "the democratic process in action" (Bagentos. 2020, p. 1059). However, this seems to ignore the reality that *"*[t]oday's deadlocked Congress . . . embolden[s] agencies to reinterpret the gaps and ambiguities in outdated statutes rather than relying on the legislature for

change" (Pismarov, 2021, p, 49). Still, while it is easy to say that Congress should act, there are little indication that they will without pressure from voters.

Up to this point, voters who are concerned about these issues have engaged in the repeated rounds of negotiated rule-making. As this political back-and-forth continues, some have questioned whether these individuals and interest groups have the ability to withstand the waves of political backlash necessary to stay engaged and ensure the effectiveness of Title IX (Brodsky, 2023). It is possible that the application of the MQD could put a stop to the administrative back and forth and signal to those interested parties that they need to turn their attention not to the OCR but to Congress. Specifically, one interest group that has remained relatively quiet in this process is institutions of higher education themselves. While some national organizations representing such institutions, like the American Council for Education, have provided comments as a part of this process, they are largely responding to the political winds of then-current administration as opposed to serving in a leadership role (e.g., Mitchell, 2022).

One possible approach is for a select group of concerned institutions to work together to develop a proposal for fair and equitable processes related to addressing sexual assault that could then be taken up by Congress. However, as the political debate surrounding Title IX has continued, one factor complicating possible consensus is the impact of new Title-IX-like statutory regimes that are emerging in several states (Barrientos, 2023). In recent years, California, Connecticut, Delaware, Illinois, Louisiana, Maine, Minnesota, Nevada, Pennsylvania, Texas and Vermont have all passed legislation related to addressing campus sexual violence introducing a patchwork of state reporting, training, and related requirements (Barrientos, 2023).

These divergent political perpectives only serve to complicate an already difficult policy landscape.

Conclusion

This paper has traced the recent development of Title IX regulations and the MQD. It highlighted how the current proposed Title IX rules have and might be impacted by the Supreme Court's current recent focus on the MQD. In short, while the future of Title IX is still very uncertain, what seems likely is that the MQD will serve to limit OCR's role in making substantial changes to the traditional application of Title IX. Moreover, it's possible that the application of the MQD could shift the focus of the current political backlash surrounding Title IX away from the OCR to Congress. However, it seems unlikely that Congress will be able to find consensus around some of these controversial policy issues without leadership from those most impacted by Title IX, students, and the institutions they attend.

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