

AN ADMINISTRATIVE RIGHT TO BE FREE FROM SEXUAL VIOLENCE? TITLE IX ENFORCEMENT IN HISTORICAL AND INSTITUTIONAL PERSPECTIVE

KAREN M. TANI†

ABSTRACT

One of the most controversial administrative actions in recent years is the U.S. Department of Education's campaign against sexual assault on college campuses. Using its authority under Title IX of the Education Amendments of 1972 (mandating nondiscrimination on the basis of sex in all educational programs and activities receiving federal funds), the Department's Office for Civil Rights (OCR) has launched an enforcement effort that critics denounce as aggressive, manipulative, and corrosive of individual liberties. Missing from the commentary is a historically informed understanding of why this administrative campaign unfolded as it did. This Article offers crucial context by reminding readers that freedom from sexual violence was once celebrated as a national civil right—upon the enactment of the Violence Against Women Act of 1994—but then lost that status in a 5–4 decision by the U.S. Supreme Court. OCR's recent campaign reflects a legal and political landscape in which at least some potential victims of sexual violence had come to feel rightfully connected to the institutions of the federal government, and then became righteously outraged by the endurance of such violence in their communities. OCR's campaign also reflects the unique role of federal administrative agencies in this landscape. Thanks to the power of the purse and the conditions that Congress has attached to funding streams, agencies enjoy a powerful

† Assistant Professor of Law, University of California, Berkeley. J.D., Ph.D. (History). For productive conversations and critiques, I thank Kathryn Abrams, Charisma Acey, Catherine Albiston, Andrew Bradt, Ming Hsu Chen, Michele Landis Dauber, Sean Farhang, Serena Mayeri, Joy Milligan, Tejas Narechania, Anne Joseph O'Connell, Eloise Pasachoff, Claudia Polsky, Philip Rocco, Bertrall Ross, Andrea Roth, Elena Schneider, Neil Siegel, Sharmila Sohoni, Avani Mehta Sood, Rachel Stern, Lisa Trever, and the editors of the *Duke Law Journal*. Kristen Lombardi, Ken Marcus, Terry Steinberg, and Art Zeidman—all speaking in their capacities as private citizens, not as representatives of current or former employers—provided invaluable insights into some of the history I chronicle here. Kavitha Iyengar, Sean Litteral, Eunice Park, and Shneur Wolvovsky contributed excellent research assistance.

form of jurisdiction over particular spaces and institutions. Attempts to harness this jurisdiction in service of aspirational rights claims should not surprise us; indeed, we should expect such efforts to continue. Building on this insight, the Article concludes with a research agenda for other scholars seeking to understand and evaluate OCR's handiwork.

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INTRODUCTION

He said “he ‘like[d] to get girls drunk and”¹ Christy Brzonkala attributed these words to Antonio Morrison, several months after he and a fellow member of the Virginia Tech football team allegedly raped her in her college dormitory. The full quote bespoke deep disregard for women’s bodily integrity.² Its effect,

1. United States v. Morrison, 529 U.S. 598, 602 (2000) (alteration in original).

2. The full quote, according to Brzonkala, was: “I like to get girls drunk and fuck the shit out of them.” Brzonkala v. Va. Polytechnic & State Univ., 935 F. Supp. 779, 784 (W.D. Va. 1996), *rev’d*, 132 F.3d 949 (4th Cir. 1997), *rev’d on reh’g en banc*, 169 F.3d 820 (4th Cir. 1999), *aff’d sub nom. Morrison*, 529 U.S. 598 (2000). Morrison allegedly made this statement to fellow students in

Brzonkala later recalled, was to prompt her to disclose for the first time her experience of sexual violation.³ Later, that experience became the basis for *Brzonkala v. Virginia Polytechnic and State University*,⁴ in which Brzonkala sued the university, the state comptroller, and three Virginia Tech students under state and federal law.⁵

Brzonkala brought one of her claims under Title IX of the Education Amendments of 1972,⁶ a statute whose current administrative enforcement is the subject of this Article. Best known for its role in redressing gender disparities in college athletics, Title IX in fact prohibits sex discrimination in *all* educational programs and activities receiving federal financial assistance.⁷ Virginia Tech's response to Brzonkala's complaint of sexual assault was so flawed, she alleged, as to create a hostile environment and deprive her of equal access to education. Brzonkala and Virginia Tech ultimately settled the Title IX claim, resulting in modest compensation for Brzonkala but leaving no obvious mark on the institution.⁸

A second and more famous claim, against Morrison, came from the Violence Against Women Act of 1994 (VAWA), enacted in the very fall of the alleged rapes. VAWA created a federal civil cause of action for victims of gender-motivated crimes of violence, irrespective of where in the nation the crime occurred or whether the perpetrator

the dormitory dining room. *Id.* Morrison's only stated concern for her body, Brzonkala averred, was that it not transmit any "fucking diseases" to him during the rapes. *Id.*

3. Patrick Tracey, *Christy's Crusade*, Ms., Apr.–May 2000, at 53, 58–59.

4. *Brzonkala v. Va. Polytechnic & State Univ.*, 935 F. Supp. 779 (W.D. Va. 1996), *rev'd*, 132 F.3d 949 (4th Cir. 1997), *rev'd on reh'g en banc*, 169 F.3d 820 (4th Cir. 1999), *aff'd sub nom. Morrison*, 529 U.S. 598 (2000).

5. *Id.* at 781. As with many cases of sexual assault, no criminal charges were filed, owing in part to the time lag between the alleged assault and Brzonkala's formal report. Tracey, *supra* note 3, at 54. On the typicality of failure to report sexual violence, see generally Michelle J. Anderson, *Women Do Not Report the Violence They Suffer: Violence Against Women and the State Action Doctrine*, 46 VILL. L. REV. 907 (2001).

6. Education Amendments of 1972, tit. IX, 20 U.S.C. §§ 1681–1688 (2012).

7. *Id.*

8. See W. SCOTT LEWIS, SAUNDRA K. SCHUSTER & BRETT A. SOKOLOW, *GAMECHANGERS: RESHAPING CAMPUS SEXUAL MISCONDUCT THROUGH LITIGATION*, NAT'L CTR. FOR HIGHER EDUC. RISK MGMT. 5 (2010), <https://www.ncher.org/documents/2010NCHERMWhitepaperFinal.pdf> [<https://perma.cc/P73P-9QU3>] (confirming the settlement amount and describing it as "not enough to get some lawyers out of bed in the morning"); *Virginia Tech Settles Lawsuit with Brzonkala*, VA. TECH NETLETTER (Mar. 2000), <http://www.vtmonthly.vt.edu/march00/lawsuit.html> [<https://perma.cc/JA4W-AFYX>] (reporting that the case settled for \$75,000, a mere fraction of the \$4.3 million damage award Brzonkala initially sought).

was a “state actor.”⁹ Brzonkala’s VAWA claim formed the basis for *United States v. Morrison*,¹⁰ in which the Supreme Court struck down VAWA’s civil rights remedy.¹¹ The partial quote at the start of this Article—including the awkward ellipsis—comes from *Morrison*’s majority opinion, in which Chief Justice William Rehnquist noted what the alleged rapist “like[d] to [do]” to women, but deemed Morrison’s precise words too “debased,” “vulgar,” and “offen[sive]” to include.¹² Chief Justice Rehnquist omitted, too, Congress’s careful documentation of the role of such words and actions in depriving women of their basic rights and freedoms. These omissions eased the way for the majority’s ultimate conclusion—that in attempting to create and enforce a national right to be free from sexual violence, Congress had overstepped even its most generous constitutional grants of authority.¹³

Americans seeking greater federal attention to sexual violence now have a different set of words to rally behind, and this phrase is harder to circumnavigate: *one in five*. According to a 2007 study commissioned by the U.S. Department of Justice (DOJ), one in every five undergraduate women—20 percent—will have experienced attempted or completed sexual assault between the moment she sets foot on campus and the end of her college career.¹⁴ Organizers have

9. Violence Against Women Act of 1994, Pub. L. No. 103-322, tit. IV, § 40302, 108 Stat. 1902, 1941–42 (codified at 42 U.S.C. § 13981 (2012)), *invalidated by* *United States v. Morrison*, 529 U.S. 598 (2000).

10. *United States v. Morrison*, 529 U.S. 598 (2000).

11. *Id.* at 602.

12. *Id.*

13. *See id.* at 617 (holding that Congress overstepped its authority under the Commerce Clause, which the Court had interpreted broadly since the New Deal, and Section 5 of the Fourteenth Amendment).

14. CHRISTOPHER P. KREBS ET AL., *THE CAMPUS SEXUAL ASSAULT (CSA) STUDY* at xii (2007). Studies predating and postdating this study have produced similar findings. For previous studies, see BONNIE S. FISHER, FRANCIS T. CULLEN & MICHAEL G. TURNER, *THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN* 10–11, 15–16 (2000); Catherine G. Harder, *Rape on Campus: Description, Concerns, and Intervention Strategies*, 1986 J. IND. U. STUDENT PERSONNEL ASS’N. 16, 16; Mary P. Koss, Christine A. Gidycz & Nadine Wisniewski, *The Scope of Rape: Incidence and Prevalence of Sexual Aggression and Victimization in a National Sample of Higher Education Students*, 55 J. CONSULTING & CLINICAL PSYCHOL. 162, 162 (1987). For post-2007 studies (some of which suggest an even higher rate than one in five), see DAVID CANTOR ET AL., *REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT* at xiii–xiv (2015); CHRISTOPHER KREBS ET AL., *CAMPUS CLIMATE SURVEY VALIDATION STUDY: FINAL TECHNICAL REPORT*, at ES-6 to ES-7 (Jan. 2016); Christopher P. Krebs et al., *College Women’s Experiences with Physically Forced, Alcohol- or Other Drug-Enabled, and Drug-Facilitated Sexual Assault Before and Since Entering College*, 57 J. AM. C. HEALTH 639, 639 (2009); Nick Anderson & Scott Clement, *College Sexual Assault: 1 in 5 College*

also found a new institution to champion their cause: the U.S. Department of Education (DOE), through its Office for Civil Rights (OCR). Citing the “deeply troubling” one-in-five statistic, an April 4, 2011 “Dear Colleague Letter” (DCL) from OCR reminded educational institutions that failure to respond to sexual violence could create a hostile environment for protected classes of students, thus running afoul of Title IX and triggering a loss of federal funds.¹⁵ Pushing OCR’s interpretation of the law well beyond where it was when Brzonkala filed suit, the letter then clarified the steps that schools should take to ensure full compliance with Title IX. These included implementing particular procedures for the “prompt and equitable” resolution of complaints of sexual assault, as well as taking proactive and corrective measures to combat the problem.¹⁶ OCR’s subsequent

Women Say They Were Violated, WASH. POST (June 12, 2015), <http://www.washingtonpost.com/sf/local/2015/06/12/1-in-5-women-say-they-were-violated> [<http://perma.cc/CYH8-YDHE>]; Glenn Kessler, *One in Five Women in College Sexually Assaulted: An Update on This Statistic*, WASH. POST (Dec. 17, 2014), https://www.washingtonpost.com/news/fact-checker/wp/2014/12/17/one-in-five-women-in-college-sexually-assaulted-an-update/?utm_term=.3bd54145e045 [<https://perma.cc/UMR9-3C4Q>]. Some scholars have questioned the accuracy of these studies. See, e.g., R. Shep Melnick, *Sexual Harassment and the Evolving Civil Rights State 5–6* (Apr. 15, 2016) (unpublished manuscript), http://caps.gov.harvard.edu/files/caps/files/sexual_harassment_and_evolving_civil_right_state.pdf [<https://perma.cc/Y4PR-PHF7>]. But in public discourse, these critiques have been overshadowed by a wealth of anecdotal evidence that appears to confirm the widespread nature of the problem. See, e.g., Walt Bogdanich, *Reporting Rape and Wishing She Hadn’t*, N.Y. TIMES, July 13, 2014, at A1; Richard Pérez-Peña, *Account of Rape Brings Tension to Forefront at College*, N.Y. TIMES, Oct. 27, 2012, at A15; THE HUNTING GROUND (Weinstein Co. 2015); Vanessa Grigoriadis, *Meet the College Women Who Are Starting a Revolution Against Campus Sexual Assault*, N.Y. MAG. (Sept. 21, 2014, 9:00 PM), <http://nymag.com/thecut/2014/09/emma-sulkowicz-campus-sexual-assault-activism.html> [<https://perma.cc/ZD7A-YKN7>].

15. Letter from Russlynn Ali, Assistant Sec’y for Civil Rights, Office for Civil Rights, U.S. Dep’t of Educ., to Colleagues (Apr. 4, 2011) [hereinafter 2011 DCL], <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [<https://perma.cc/JZ9J-WTX9>]. Title IX mandates 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.” Educational Amendments of 1972, tit. IX, 20 U.S.C. § 1681(a) (2012). Title IX technically does not govern all colleges and universities, only those that receive federal funding. In practice, however, the vast majority of such institutions—both public and private—accept federal funding and thus fall within the law’s ambit. *Id.* §§ 1681–1688. As with Title VI of the Civil Rights Act of 1964, the DOE is the agency in charge of initiating defunding under Title IX. Civil Rights Act of 1964, tit. VI, 42 U.S.C. § 2000(d) (2012); 20 U.S.C. §§ 1681–1688 (2012).

16. 2011 DCL, *supra* note 15, at 6. OCR described the 2011 DCL as a “significant guidance document,” one that signaled how the agency would evaluate schools’ compliance with their legal obligations. *Id.* at 1 n.1. “Significant guidance document” is a legal term of art. See OFFICE OF MGMT. & BUDGET, FINAL BULLETIN FOR AGENCY GOOD GUIDANCE PRACTICES 7–9 (Jan. 18, 2007), <https://whitehouse.gov/sites/default/files/omb/memoranda/fy2007/m07-07.pdf> [<https://perma.cc/L3TK-A4SM>] (defining the term).

enforcement campaign—implicating over 330 institutions of higher education to date—surprised many observers with its breadth and intensity and has resulted in significant changes to campus policies and practices.¹⁷

Most scholarly accounts of OCR's efforts focus on these more recent (post-2011) events. Many proceed from there to sharp criticisms. Legal scholars have been especially alert to the due process, legitimacy, and accountability concerns that have long been central to administrative law. For example, they have questioned OCR's attentiveness to the civil liberties of individuals affected by its policies; they have critiqued OCR's reliance on informal guidance documents rather than binding, notice-and-comment rulemaking; and they have accused OCR of abusing its power over the institutions it regulates, by placing them in a position where, realistically, they cannot question OCR's legal interpretations.¹⁸ As for OCR's motivations, more supportive accounts perceive a good-faith effort to enforce the government's commitment to educational equality in the face of striking new empirical evidence of campus sexual assault. Less supportive accounts have suggested a power-hungry federal bureaucracy, eager to expand into new domains,¹⁹ as well as an agency fallen prey to identity politics.²⁰

Without trivializing such concerns, this Article places OCR's recent enforcement work in a different, more historical context in order to help explain the power and appeal of the agency's efforts. Part I connects OCR's recent handiwork to an older campaign—a campaign to recognize women's vulnerability to sexual violence as a marker of inequality and to make freedom from sexual violence a nationally recognized civil right. Proponents of this right have fought for it in Congress and the courts, with a mixed record of success. More recently

17. *Title IX: Tracking Sexual Assault Investigations*, CHRON. HIGHER EDUC., <http://projects.chronicle.com/titleix> [<https://perma.cc/V26N-6EKD>].

18. For a fuller account of these critiques, see *infra* Part III. OCR's approach to transgender access to school bathrooms has produced many of the same critiques.

19. The most prominent expression of this view is Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CALIF. L. REV. 881 (2016). Elsewhere I have critiqued that view, on the ground that federal regulation of sexuality is nothing new. See Melissa Murray & Karen Tani, *Something Old, Something New: Reflections on the Sex Bureaucracy*, 7 CALIF. L. REV. ONLINE 122, 122–27 (2016).

20. See, e.g., KC JOHNSON & STUART TAYLOR, JR., *THE CAMPUS RAPE FRENZY: THE ATTACK ON DUE PROCESS AT AMERICA'S UNIVERSITIES* 36 (2017); Laura Kipnis, *Sexual Paranoia Strikes Academe*, CHRON. HIGHER EDUC. (Feb. 27, 2015), <http://www.chronicle.com/article/Sexual-Paranoia-Strikes/190351> [<https://perma.cc/CXC2-E4U9>].

they have made headway within the administrative state, thanks to administrative power over spaces where sexual violence is manifest (college campuses) and to the evolving expectations of some regulatory beneficiaries (college-age women). To be clear, this is not an argument about internal agency decisionmaking or about the sincerity of OCR officials' commitment to educational equality. The claim is that for a number of people involved in OCR's enforcement campaign—ranging from former Vice President Joseph Biden to prominent Title IX litigators to leading campus activists—that campaign is bound up with a deeper hope. It is the hope that America's governing institutions might yet make good on VAWA's promise—recognizing the role of sexual violence in constructing and perpetuating gendered forms of inequality and affirming the incompatibility of such inequality with American citizenship.²¹

Part I, standing alone, makes an important contribution to the literature on this topic because it suggests that the convictions underlying OCR's current campaign are not going away—no matter how much law professors question the legal legitimacy of OCR's actions. It also suggests that OCR may remain an appealing site for claims-making and advocacy, even with a dramatic change in executive leadership and notwithstanding the criticisms flagged above.

This Article goes beyond historical contextualization and reframing, however, to identify productive ways for scholars to explore the vista that Part I opens up. To that end, Part II highlights other historical examples of federal administrative agencies developing and advancing novel rights claims. These examples suggest a particular set of research questions for those interested in the rights-generating aspect of OCR's campaign against sexual assault. Part III explores—but does not resolve—three such questions. First, what are the implications of filtering aspirational rights claims through regulated entities (here, colleges and universities) rather than through courts or other governmental adjudicative bodies? This question flows from the observation that although agencies have various ways of advancing new rights, their ability to *enforce* those rights is often legally or pragmatically constrained. Second, what are the implications of

21. See Nancy Chi Cantalupo, *For the Title IX Civil Rights Movement: Congratulations and Cautions*, 125 *YALE L.J. F.* 281, 281 (2016) (linking OCR's efforts to "a new civil rights movement" comprised of "smart, courageous survivors of gender-based violence—virtually all of whom are current undergraduates or recent college graduates"—and "multiple generations of anti-gender-based violence activists, attorneys, leaders, and scholars").

advancing such rights using a form of lawmaking (administrative interpretation of statutes) that is arguably more vulnerable to change than other forms of lawmaking (statutory enactment and judicial decisionmaking)? The flexibility that allows for agencies to be rights pioneers calls into question the durability and strength of the rights they articulate. Third, does it matter that administratively created rights tend to implicate only pockets of a population that may wish to claim the right (here, only those attending institutions of higher education)? This unevenness follows from agencies' limited jurisdiction and is therefore not surprising, but it is in tension with the ideals of equal protection and uniform treatment. The Article concludes with ruminations on the paradigm of governance and citizenship that appears to be at stake.

I. FREEDOM FROM SEXUAL VIOLENCE AS A CIVIL RIGHT: THE PATH TOWARD THE ADMINISTRATIVE STATE

Twenty-five years ago, in an underacknowledged law review article, lawyer Terry Nicole Steinberg drew on her legal training and her disturbing experience with an attempted acquaintance rape to propose a novel solution to the problem of campus sexual assault: the DOE should treat a university's failure to address this problem as a form of discrimination against women students, and therefore a violation of Title IX.²² Given the violence-against-women legislation that had just been introduced in Congress, the proposal was timely and appropriate.²³ It did, however, entail "sweeping change" in the existing approach to Title IX.²⁴

In 1991, such a change would have been not only "sweeping," but also "radical," in Steinberg's own words.²⁵ Courts had recognized sexual harassment in the workplace as a form of illegal sex discrimination, but the wider American public was only just becoming acquainted with this notion. And although lawmakers were alert to forcible, stranger rape on college campuses—as evidenced by Congress's response to the rape and murder of Jeanne Clery in her

22. Terry Nicole Steinberg, *Rape on College Campuses: Reform through Title IX*, 18 J.C. & U.L. 39, 39–40 (1991).

23. *Id.* at 66–67.

24. *Id.* at 41.

25. *Id.* at 42.

college dormitory in 1986²⁶—they barely registered the many other coercive sexual encounters that were part of campus culture.²⁷ Indeed, such encounters were uncontroversial plot points in some of that era’s most beloved portrayals of young adult dating life.²⁸

Today, however, Steinberg’s article appears prescient. This Part provides an account of developments between then and now, when Steinberg’s proposal went from an outside-the-box solution for the newly recognized phenomenon of campus sexual assault to become the actual response of the DOE’s Office for Civil Rights. The resulting narrative reframes OCR’s current enforcement campaign, by describing how freedom from gender-motivated sexual violence became a national civil right—under VAWA—and then lost that status at the hands of a bare majority of the Supreme Court. This Part also explains why, well before 2011, the DOE became a relatively appealing site for claiming a right to be free from sexual violence—and why the agency will likely remain a repository for such aspirational claims.

A. The Recognition of Sexual Imposition as Sex Discrimination and the Enactment of the Violence Against Women Act

Many accounts of the DOE’s enforcement campaign against sexual assault begin in 2011, with OCR’s Dear Colleague Letter. But there is another origin story that deserves attention: the decades-long push for a federal response to sexual violence, culminating in the enactment of VAWA in 1994. VAWA has multiple facets and is the

26. Congress’s response was the enactment of the Crime Awareness and Campus Security Act, popularly known as the Clery Act. Crime Awareness and Campus Security Act of 1990, Pub. L. 101-542, tit. II, § 204, 20 U.S.C. § 1092(f) (2012 & Supp. 2014). The legislation dates back to 1987, when it was introduced to Congress as the “Student Right-to-Know and Campus Security Act.” CAROL BOHMER & ANDREA PARROT, *SEXUAL ASSAULT ON CAMPUS: THE PROBLEM AND THE SOLUTION* 168–69 (1993).

27. See BOHMER & PARROT, *supra* note 26, at 168–69 (describing the enactment of the Ramstad Amendment to the Higher Education Act (1992), which broke new ground by encouraging institutions of higher education to have formal policies regarding sexual assault and to include in those policies attention to acquaintance rape and nonforcible sex offenses).

28. See LAURA L. FINLEY, *DOMESTIC ABUSE AND SEXUAL ASSAULT IN POPULAR CULTURE* 45 (2016) (“*Sixteen Candles* [1984] glamorizes nonconsensual sex between a sober guy and a drunk girl when the uber-popular Jake tells nerdy Ted he could do whatever he wanted with his passed out girlfriend, and then hands the keys over to the freshman and wishes him good luck.”); Adam Lankford, *Are There Reasons for Optimism in the Battle Against Sexual Assault?*, 10 SOC. COMPASS 38, 44 (2016) (“Going on a ‘panty raid’ through a dorm full of screaming women, using hidden cameras to film a girl showering, or wearing a mask and tricking a woman into having sex was seen as the stuff of comedy for *Animal House* (1978) and *Revenge of the Nerds* (1984).”).

product of many hands, but one of the driving forces behind it was the conviction of feminist activists and their allies that freedom from sexual violence ought to be a nationally recognized right — a *civil* right — rather than a privilege bestowed by state and local actors.²⁹

A civil rights framing (as opposed to a more conventional criminal law or tort law framing) was not intuitive to all policymakers in the late twentieth century. But the logic is consistent with the nation's earliest civil rights laws, as well as with the experiences of Americans who lived through the Civil War and Reconstruction, the founding era of modern American civil rights.³⁰ Civil rights are about citizenship, in the broadest sense of that word. In the United States, citizenship has come to mean the ability to participate in public life on full and equal terms; equal access to public resources and decisionmaking bodies; equal opportunity to earn a living; and equal protection from those wielding public power. For a generation of feminist scholars and activists, sexual violence implicated precisely these public rights and obligations. By 1994, they had spent decades making the case.

Feminist advocacy around sexual harassment was an early battle in this long campaign. In the 1970s, when the concept of sexual harassment entered the mainstream, it was hardly a new phenomenon, but it was a new *problem*. Feminists made it so, by documenting its prevalence and showing its harmful effects.³¹ By the mid-1970s, some feminists had gone further, arguing that sexual harassment was in fact already illegal, at least when it occurred in workplaces covered by Title VII of the Civil Rights Act. As feminist theorist Catherine MacKinnon explained in 1975, in a law school paper that would become the core of her influential 1979 book, sexual harassment systematically disadvantaged women in the workplace in much the same way that racial harassment disadvantaged those who were nonwhite. It therefore constituted discrimination on the basis of sex, even when that

29. As this last sentence suggests, this historical excavation could easily go deeper, to include numerous failed efforts to reform the criminal justice process at the state and local levels.

30. See generally HANNAH ROSEN, *TERROR IN THE HEART OF FREEDOM: CITIZENSHIP, SEXUAL VIOLENCE, AND THE MEANING OF RACE IN THE POSTEMANCIPATION SOUTH* (2006) (detailing the central role of sexual violence in white resistance of African Americans' claims to equal citizenship in the decades after the Civil War and arguing that, in speaking out about sexual violence, black women asserted their rights and identities as U.S. citizens).

31. FRED STREBEIGH, *EQUAL: WOMEN RESHAPE AMERICAN LAW* 218–45 (2009). For an exhaustive account of this history, see generally CARRIE N. BAKER, *THE WOMEN'S MOVEMENT AGAINST SEXUAL HARASSMENT* (2007).

discrimination did not result in tangible, negative employment consequences.³²

By 1980, lower federal courts had embraced this expansive reading of Title VII, as had the U.S. Equal Employment Opportunity Commission (EEOC).³³ Both victories stemmed in part from black women plaintiffs' willingness to embody the race–sex analogy at the heart of MacKinnon's argument.³⁴ It also surely mattered that Eleanor Holmes Norton was then head of the EEOC: Holmes Norton was a protégé of one of the great feminist and civil rights lawyers of the twentieth century, Pauli Murray, and had spent much of her career exploring legal responses to racial and sex inequality.³⁵ In 1986, the Supreme Court endorsed that interpretation as well, in a case in which bank employee Mechelle Vinson alleged years of unwelcome sexual contact by her direct supervisor but no adverse impact on her employment status or pay.³⁶

Vinson's suit touched a nerve for some conservatives because it appeared to involve a “voluntary” sexual relationship,³⁷ while for feminists that same relationship looked utterly nonconsensual.³⁸ Bridging that distance in understanding was another aspect of feminists' work during these years. They did so by documenting women's routine experiences with sexual coercion, including the

32. CATHERINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 4–7 (1979); STREBEIGH, *supra* note 31, at 230–41, 249–50.

33. STREBEIGH, *supra* note 31, at 241–80.

34. SERENA MAYERI, *REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION* 144–45 (2011); Judy Trent Ellis, *Sexual Harassment and Race: A Legal Analysis of Discrimination*, 8 J. LEGIS. 30, 41–44 (1981).

35. See BAKER, *supra* note 31, at 116–17 (documenting Norton's connection to Murray and her work at the EEOC and elsewhere in furtherance of women's equality); STREBEIGH, *supra* note 31, at 230–32 (noting that in the early 1970s, Norton taught one of the earliest known courses on women and the law, and that in 1975, as a member of the New York City Commission on Human Rights, she encouraged attention to the issue of sexual harassment). For an overview of Pauli Murray's contributions and references to other scholarly work on Murray, see generally Serena Mayeri, *Pauli Murray and the Twentieth-Century Quest for Legal and Social Equality*, 2 IND. J.L. & SOC. EQUALITY 80 (2013).

36. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

37. STREBEIGH, *supra* note 31, at 276–78.

38. Vinson connected all of her sexual interactions with her supervisor to her fear of losing her job and characterized several encounters as forcible rape. *Meritor Sav. Bank*, 477 U.S. at 60. For a fuller account of the facts alleged, see STREBEIGH, *supra* note 31, at 209–17. On the involvement of feminists, including MacKinnon, in the case, see *id.* at 279–99.

underacknowledged phenomenon of “acquaintance rape.”³⁹ They also showed how difficult it was for victims of sexual assault to achieve legal redress, both because of the disadvantageous ways that state law defined sex crimes and the biases that pervaded the justice system.⁴⁰ Paired with a growing literature on domestic violence, these findings painted a picture in which violence against women was common and legal redress rare.

There were many ways of making sense of this picture, but one powerful interpretation came, again, from Catherine MacKinnon. She characterized sexual violence as a means of constructing and enforcing gender difference—a way of subordinating women to men.⁴¹ “What is wrong with rape,” MacKinnon explained in a canonical 1989 text, “is that it . . . expresses and reinforces women’s inequality to men.”⁴² Echoing critiques that black women in particular had long voiced,⁴³

39. See, e.g., SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN, AND RAPE* 352–53 (1975); ROBIN WARSHAW, *I NEVER CALLED IT RAPE: THE MS. REPORT ON RECOGNIZING, FIGHTING, AND SURVIVING DATE AND ACQUAINTANCE RAPE* 11–12 (1988).

40. See generally SUSAN ESTRICH, *REAL RAPE: HOW THE LEGAL SYSTEM VICTIMIZES WOMEN WHO SAY NO* (1987) (documenting biases within the legal system that discourage and disadvantage women rape victims); H. FIELD & L. BEINEN, *JURORS AND RAPE* (1980) (analyzing the effects of juror, victim, defendant, and case characteristics on rape convictions and acquittals); Vivian Berger, *Man’s Trial, Women’s Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1 (1977) (documenting biases against rape victims held by juries and police); Lynn Hecht Schafran, *Documenting Gender Bias in the Courts: The Task Force Approach*, 70 JUDICATURE 280 (1987) (examining indications of gender bias in the judicial system).

41. For examples of sources that characterize sexual violence in this way, see generally BROWNMILLER, *supra* note 39; ANDREA DWORKIN, *PORNOGRAPHY: MEN POSSESSING WOMEN* (1981); CATHERINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987); MACKINNON, *supra* note 32; CATHERINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989) [hereinafter MACKINNON, *TOWARD A FEMINIST THEORY*]; DIANA E.H. RUSSELL, *THE POLITICS OF RAPE: THE VICTIM’S PERSPECTIVE* (2d. ed. 1984); Diana Scully & Joseph Marolla, “*Riding the Bull at Gilley’s*”: *Convicted Rapists Describe the Rewards of Rape*, 32 SOC. PROBS. 251 (1985). This brand of scholarship is sometimes referred to as “dominance feminism.” On the emergence of dominance theory and its place in the broader landscape of feminist legal theory, see generally Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304 (1995).

42. MACKINNON, *TOWARD A FEMINIST THEORY*, *supra* note 41, at 182.

43. See, e.g., Angela Y. Davis, *Rape, Racism and the Capitalist Setting*, 9 BLACK SCHOLAR 24, 25 (1978) (describing the rape of black women in the post–Civil War period as publicly sanctioned “attempts to thwart the drive for black equality” and noting that in 1978, black women rape victims continued to receive “little if any sympathy from . . . men in uniforms and robes”). See generally DANIELLE L. MCGUIRE, *AT THE DARK END OF THE STREET: BLACK WOMEN, RAPE, AND RESISTANCE—A NEW HISTORY OF THE CIVIL RIGHTS MOVEMENT FROM ROSA PARKS TO THE RISE OF BLACK POWER*, at xviii–xx (2010) (recapping black women’s long history of speaking out about sexual assault and connecting sexual violence to state-sanctioned white supremacy).

MacKinnon also connected sexual violence directly to civic standing, by emphasizing the message sent when the state responded—or failed to respond—to acts of sexual violation. Stated simply, “[r]ape with legal impunity” creates “second-class citizens.”⁴⁴

From this scholarship and from the recognition of sexual harassment in the workplace as illegal employment discrimination, it was not a leap to ask lawmakers to recognize sexual violence as a civil rights violation—something that undermined the victim’s inclusion in the polity just as surely as being denied the vote or access to public space. Victoria Nourse, a lawyer for the Senate Judiciary Committee (now a law professor), served as an important conduit between feminist thinking and legislative drafting. In 1990, Senator Joseph Biden, then chair of the committee, tasked her with thinking through how Congress might address violence against women.⁴⁵ Though not previously familiar with feminist legal theory, Nourse had a “Brandeisian” approach to research—that is, one that went well beyond case law and doctrine⁴⁶—and it led her directly to feminist legal scholars.⁴⁷ A second important conduit between feminist thinking and Capitol Hill was Sally Goldfarb, an attorney at the National Organization for Women’s Legal Defense Fund (NOW LDF) and a former student of MacKinnon’s. After Biden green-lighted the idea of framing sexual violence as a civil rights violation, akin to the race-based violence targeted by landmark Reconstruction-era statutes, Nourse brought NOW LDF into the drafting process. Goldfarb engaged MacKinnon herself in their work.⁴⁸

Many drafts preceded the bill that ultimately became VAWA, but the civil rights remedy was always at the core. The final text explicitly

44. MACKINNON, *TOWARD A FEMINIST THEORY*, *supra* note 41, at 182.

45. Biden had reportedly been troubled by the issue since at least 1981, when he unsuccessfully urged the committee to do something about marital rape. STREBEIGH, *supra* note 31, at 312–13; *see also Panel One: Present at the Creation: Drafting and Passing the Violence Against Women Act (VAWA)*, 11 *GEO. J. GENDER & L.* 511, 518 (2010) (comment by Victoria Nourse) (discussing her collaboration with Biden in drafting VAWA).

46. *Panel One*, *supra* note 45, at 518 (comment by Victoria Nourse).

47. Nourse encountered such sources as Susan Estrich’s powerful 1986 *Yale Law Journal* article, entitled *Rape*, in which Estrich drew on her own experience of sexual violation to elucidate the deep antivictim biases that pervaded the criminal law of rape and sexual assault. STREBEIGH, *supra* note 31, at 315 (citing Susan Estrich, *Rape*, 95 *YALE L.J.* 1087 (1986)). Nourse’s research also led her to a more recent article by Robin West, in which West framed state law marital rape exemptions as contrary to women’s constitutional right to equal protection of the laws and thus an appropriate target of congressional action. STREBEIGH, *supra* note 31, at 328 (citing Robin West, *Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment*, 42 *FLA. L. REV.* 45 (1990)).

48. STREBEIGH, *supra* note 31, at 343–44.

incorporated the idea of a national right to be free from sexual violence: “All persons within the United States shall have the right to be free from crimes of violence motivated by gender”⁴⁹ VAWA’s drafters and supporters were under no illusions about the novelty of what they had done, even if they had identified historical analogues to support their cause. The civil rights remedy was “unprecedented,” Nourse conceded, and represented “the creation of [a] new substantive right.”⁵⁰

B. A Right Without a (Judicial) Remedy

In an essay drafted around 1998, feminist legal scholar Robin West made an astute observation about the sexual demands that the powerful had long made on those with less power: almost overnight, such behavior had transformed from “an unnamed, pervasive, natural, and hence invisible” feature of public life, unlikely to sustain even a private tort action, to “a clear cut deprivation of civil and constitutional rights.”⁵¹ By the time West’s essay was published six years later, the phrase “clear cut” no longer seemed so apt, thanks to the federal judiciary.

That members of the federal bench would give careful scrutiny to VAWA was no surprise. In 1991, the Judicial Conference of the United States (the official voice of the federal judiciary) formally opposed VAWA’s civil rights remedy; Chief Justice Rehnquist remained a vocal opponent even after VAWA’s enactment.⁵² But it was also the case, by 1994, that doctrine supported the idea of freedom from sexual violence as a civil right. Supreme Court precedents recognized that violent and harassing sexual conduct could constitute sex discrimination, both for

49. Violence Against Women Act of 1994, Pub. L. No. 103-322, tit. IV, § 40302, 108 Stat. 1902, 1941–42 (codified at 42 U.S.C. § 13981(b)), *invalidated by* United States v. Morrison, 529 U.S. 598 (2000). The Act defines a “crime of violence motivated by gender” to mean “a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim’s gender.” 42 U.S.C. § 13981(d), *invalidated by Morrison*, 529 U.S. 598.

50. Victoria F. Nourse, *Where Violence, Relationship, and Equality Meet: The Violence Against Women Act’s Civil Rights Remedy*, 11 WIS. WOMEN’S L.J. 1, 5, 7 (1996).

51. Robin West, *Unwelcome Sex: Toward a Harm-Based Analysis*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 138, 138 (Catherine A. MacKinnon & Reva B. Siegel eds., 2004). The essays in this collection were originally drafted for a 1998 conference at Yale Law School.

52. Judith Resnik, *Drafting, Lobbying, and Litigating VAWA: National, Local, and Transnational Interventions on Behalf of Women’s Equality*, 11 GEO. J. GENDER & L. 557, 559–83 (2010). For a fuller account of the judiciary’s posture toward this legislation, see STREBEIGH, *supra* note 31, at 352–448 (documenting the resistance from key members of the judiciary, as well as the support that VAWA received from women judges).

purposes of Title VII (as mentioned in Part I.A)⁵³ and for purposes of Title IX.⁵⁴ These decisions also gave credence to the idea of victims of sexual violence staking federal claims in federal court.

Within just four years of VAWA's enactment, however, the doctrinal landscape had changed in important ways. Although the Supreme Court continued to broaden its understanding of the behaviors that could constitute illegal sexual harassment,⁵⁵ a pair of decisions in 1998 and 1999 narrowed the circumstances under which a student complaining of sexual harassment could sue a school for monetary damages. The first case, *Gebser v. Lago Vista Independent School District*,⁵⁶ involved teacher-student sexual harassment. There, the Court held that monetary damages under Title IX were only available if an official who had authority to address the alleged harassment had "actual knowledge" of it and, in addition, demonstrated "deliberate indifference" in responding.⁵⁷ In the second case, *Davis v. Monroe County Board of Education*,⁵⁸ the Court extended that holding to complaints of peer-to-peer sexual harassment.⁵⁹ Taken together, these cases suggested that women in educational settings did have a right to be free from sexual imposition, but also that colleges and universities had little to fear if they failed to take that right seriously.⁶⁰ Indeed, the cases arguably incentivized institutions to "bury their heads in the sand" rather than actively

53. See, e.g., *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 73 (1986).

54. *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 75 (1992). As early as 1977, a federal district court had recognized that sexual harassment could be a valid ground for a private action against a university under Title IX, see *Alexander v. Yale Univ.*, 459 F. Supp. 1, 4-5 (D. Conn. 1977), but the *Franklin* case was the Supreme Court's first statement on this issue.

55. See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79-80 (1998) (holding that sex discrimination consisting of same-sex sexual harassment is actionable under Title VII).

56. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998).

57. *Id.* at 290.

58. *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999).

59. *Id.* at 643.

60. See Anne Lawton, *The Emperor's New Clothes: How the Academy Deals with Sexual Harassment*, 11 *YALE J.L. & FEMINISM* 75, 114 (1999) (noting that, in theory, "Title IX plaintiffs still have the right to recover money damages after *Gebser*," but that "[a]s a practical matter few, if any, Title IX plaintiffs will actually recover such damages under the burdensome standard created"); Pamela Y. Price, *Eradicating Sexual Harassment in Education*, in *DIRECTIONS IN SEXUAL HARASSMENT LAW*, *supra* note 51, at 60, 63 (explaining how *Gebser* and *Davis* "effectively neutralized" Title IX as a weapon in the fight against sexual harassment in education, and noting that, "[i]n the wake of *Gebser*, [she] lost two Title IX cases in short order").

prevent rights violations, lest they accrue the kind of knowledge that might trigger liability.⁶¹

Most significant of all was the Supreme Court's treatment of VAWA in *United States v. Morrison*,⁶² referenced in the Introduction. VAWA's civil rights remedy was never unproblematic,⁶³ even to its proponents, but it was deeply symbolic. *Morrison* was thus symbolic as well. Prior to the decision, MacKinnon went so far as to call the case "women's Civil War"—a war over "women's full citizenship in the federal union."⁶⁴ A "wrong" decision would mean going "back to fighting things out one at a time" in state court, explained Professor Deborah Rhode, where women were highly unlikely to win the rights recognition they wanted.⁶⁵

A majority of the Court emphasized a different set of stakes, sounding in the sanctity and survival of American federalism, and concluded that VAWA's civil rights remedy was unconstitutional.⁶⁶ That conclusion required the rejection of two plausible constitutional bases for Congress's authority, the Commerce Clause and Section 5 of the Fourteenth Amendment.⁶⁷ Under the Court's recent decision in *United States v. Lopez*,⁶⁸ a Commerce Clause justification for this particular provision required the Court to believe that gender-

61. Nancy Chi Cantalupo, *Burying Our Heads in the Sand: Lack of Knowledge, Knowledge Avoidance, and the Persistent Problem of Campus Peer Sexual Violence*, 43 LOY. U. CHI. L.J. 205, 205, 227, 232–33 (2011).

62. *United States v. Morrison*, 529 U.S. 598 (2000).

63. Most obviously, the efficacy of the civil rights remedy depended upon private individuals taking the initiative to sue. The remedy itself—monetary damages—also arguably meant nothing to a judgment-proof perpetrator.

64. Tracey, *supra* note 3, at 61.

65. The specific analogy Rhode invoked was to "fighting the battle against slavery plantation by plantation." *Id.* This powerful analogy is one more reminder of the deep interconnections between battles for women's rights and battles for racial equality, including feminists' long and complicated history of "reasoning from race." On the phenomenon of "reasoning from race," see generally MAYERI, *supra* note 34. On how efforts to combat racial inequality implicated gender inequality and vice versa, see generally LAURA F. EDWARDS, *GENDERED STRIFE AND CONFUSION: THE POLITICAL CULTURE OF RECONSTRUCTION* (1997); ROSEN, *supra* note 30.

66. *Morrison*, 529 U.S. at 601. There are many ways to interpret the majority opinion in *Morrison*. Some of VAWA's defenders certainly saw gender bias and resistance to the gains of feminism. But other Rehnquist Court decisions suggest that the majority's federalism concerns were not disingenuous, or at the very least, that they reflected broader disagreements with liberal politics and policymaking. For a useful overview of the Rehnquist Court's "new federalism," see generally Kathleen L. Sullivan, *From States' Rights Blues to Blue States' Rights: Federalism After the Rehnquist Court*, 75 FORDHAM L. REV. 799 (2006).

67. *Morrison*, 529 U.S. at 607.

68. *United States v. Lopez*, 514 U.S. 549 (1995).

motivated violence “substantially affect[ed] interstate commerce.”⁶⁹ The argument could be made, Chief Justice Rehnquist’s majority opinion conceded, but it had no logical stopping point⁷⁰ and thus, if accepted, promised to erode the constitutionally mandated distinction “between what is truly national and what is truly local.”⁷¹ As for the Fourteenth Amendment, which Congress had expressly invoked in enacting VAWA’s civil rights remedy, the majority reaffirmed the Court’s commitment to the state action requirement.⁷² Yes, there was arguably state action here, in the form of gender-biased state and local law enforcement, but VAWA’s civil rights remedy went well beyond remedying this public conduct.⁷³ Taken together, these pronouncements left a shell of a statute: VAWA remained standing (largely in the form of funding streams for violence prevention, victims’ services, and law enforcement),⁷⁴ but the aspirations at its core had received a significant blow.

C. *Rediscovering Rights Through Administrative Regulation?*

In the wake of *Gebser*, *Davis*, and *Morrison*, a flare of resistance shot up from one corner of the administrative state—from OCR, an agency with jurisdiction over spaces where many women experienced sexual violation and where young people of all types internalized the

69. *Morrison*, 529 U.S. at 610 (quoting *Lopez*, 514 U.S. at 560).

70. *Id.* at 615–16.

71. *Id.* at 617–18. Scholars would sharply dispute these assertions, especially Chief Justice Rehnquist’s suggestion that gender-motivated violence was somehow a species of “family law,” and that “family law” was a “truly local” matter. See, e.g., Sally F. Goldfarb, *The Supreme Court, the Violence Against Women Act, and the Use and Abuse of Federalism*, 71 *FORDHAM L. REV.* 57, 84–86 (2002) (noting that one rationale for VAWA’s civil rights remedy was the inability of state and local governments to address gender-motivated violence—a shortcoming that forty-one attorneys general conceded); Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 *YALE L.J.* 619, 621 (2001) (showing that “the very areas characterized in the VAWA litigation as ‘local’—family life and criminal law—have long been subjected to federal lawmaking”). See generally Kristin A. Collins, *Federalism’s Fallacy: The Early Tradition of Federal Family Law and the Invention of States’ Rights*, 26 *CARDOZO L. REV.* 1761 (2004) (documenting federal involvement in “domestic relations” in the pre-Civil War era). But the votes were on Chief Justice Rehnquist’s side, likely because of broader support among the Justices for a reorientation in the Court’s federalism jurisprudence.

72. *Morrison*, 529 U.S. at 619–24. The Court first articulated the state action requirement during Reconstruction, in a set of decisions that many commentators now revile and that some of Rehnquist’s brethren seemed eager to overturn.

73. *Id.* at 624–27.

74. On VAWA’s post-2000 life, see generally Robin R. Runge, *The Evolution of a National Response to Violence Against Women*, 23 *HASTINGS WOMEN’S L.J.* 429 (2013); Tara McGraw Swaminatha, *The Violence Against Women Act*, 5 *GEO. J. GENDER & L.* 269 (2004).

values and patterns of thought that would guide their adult lives. In January of 2001, on the very last day of the Clinton administration, OCR issued informal “Revised Guidance” on sexual harassment.⁷⁵

Consistent with previous OCR communications, the 2001 guidance reminded schools that sexual harassment of students could constitute sex discrimination and that an institution’s failure to respond to sexual harassment (whether by students, school employees, or others) could therefore place it in violation of Title IX.⁷⁶ Breaking new ground, however, the 2001 guidance signaled that the Supreme Court’s interpretation of Title IX in the private-right-of-action context did not govern the *agency’s* dealings with schools. Had OCR been inclined to simply follow the Court’s lead, “actual knowledge” and “deliberate indifference” would have become the new watchwords of administrative enforcement. The 2001 guidance instead offered twenty pages of OCR’s own position on how a school could recognize harassment-based sex discrimination and what schools ought to do to address it.⁷⁷ Notably, and in contrast to *Gebser* and *Davis*, the 2001 guidance made clear that a school might receive notice of a sexually hostile environment in various ways, including constructively, and that “fail[ure] to take immediate and effective corrective action” would place a school “in violation of the Title IX regulations.”⁷⁸

These strong words attracted little attention at the time, probably because OCR seemed unlikely to enforce them.⁷⁹ In fact, Bush appointees to the agency quickly “deep-sixed” the new guidance document.⁸⁰ But the thrust of that document would gain importance

75. OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (2001), <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.html> [<https://perma.cc/NB5W-QJHY>].

76. *Id.* at 5–15.

77. *Id.*

78. *Id.* at 14–15.

79. On OCR’s weak enforcement record with regard to sexual harassment, see generally AAUW LEGAL ADVOCACY FUND, A LICENSE FOR BIAS: SEX DISCRIMINATION, SCHOOLS, AND TITLE IX (2000); Julie Davies, *Assessing Institutional Responsibility for Sexual Harassment in Education*, 77 TUL. L. REV. 387, 436–38 (2002).

80. NAT’L WOMEN’S LAW CTR., SLIP-SLIDING AWAY: THE EROSION OF HARD-WON GAINS FOR WOMEN UNDER THE BUSH ADMINISTRATION AND AN AGENDA FOR MOVING FORWARD 17 (2004). Critics interpreted the decision to shelve the 2001 guidance as evidence of hostility toward civil rights, and women’s civil rights in particular. *Id.* C. Todd Jones, a former Bush administration OCR official, has attributed that decision instead to concerns about faulty process—specifically, failure to provide “an adequate public comment period”—and “legal analysis errors.” CTR. FOR PUB. INTEGRITY, SEXUAL ASSAULT ON CAMPUS: A FRUSTRATING

over the following years, as victims of sexual harassment and sexual violence became aware of their rights under existing federal laws and more pessimistic about any kind of legislative replacement for what was lost in *Morrison*.⁸¹ The 2001 guidance became a reminder that OCR had jurisdiction over the issue of sexual violence and that, with respect to the other branches of the federal government, it might be willing to go its own way.⁸²

Understanding why OCR did ultimately go its own way requires piecing together what happened in the early 2000s. Three developments stand out. First, this was an era of high-profile sexual assault scandals, many involving college-age women victims. Professional basketball star Kobe Bryant, for example, made news for this reason,⁸³ as did the University of Colorado Boulder football program⁸⁴ and the U.S. Air Force Academy.⁸⁵ National media coverage of these and similar scandals shined a light on the general lack of legal consequences—civil or criminal—for those accused of wrongdoing, as well as the role of colleges and universities in shielding wrongdoers.⁸⁶

Second, this was a time of continuing and dramatic public disinvestment from higher education, even as demand for higher education grew; those trends affected the messages that students

SEARCH FOR JUSTICE 82 (2010), <https://cloudfront-files-1.publicintegrity.org/documents/pdfs/Sexual%20Assault%20on%20Campus.pdf> [<https://perma.cc/5NSK-YQRM>]. For the record, OCR did not ignore complaints of sexual violence during the Bush administration. For example, in 2002, OCR investigated Harvard University over a sexual assault policy that allegedly discouraged victims from reporting. But, notably, the agency found no Title IX violation. Eric Hoover, *Harvard's Sexual-Assault Policy Does Not Violate Students' Rights*, *U.S. Inquiry Concludes*, CHRON. HIGHER EDUC. (Apr. 3, 2003), <http://www.chronicle.com/article/Harvards-Sexual-Assault/110446> [<https://perma.cc/4RSJ-QWHG>].

81. Cf. Melnick, *supra* note 14, at 39 (noting that “OCR’s 2001 abandonment of the standard tort/liability regulatory approach made it easier for the agency to move from the individual malfeasor to the inequality/subordination understanding of the underlying problem”—the understanding that undergirds OCR’s post-2011 enforcement campaign).

82. This observation draws on the work of political scientist R. Shep Melnick, who has characterized *Gebser*, *Davis*, and the 2001 guidance as a break from the collaborative “leapfrogging” approach taken by civil rights agencies and federal courts in the previous decades. *Id.* at 9–11.

83. See Jeff Benedict, *Athletes and Accusations*, N.Y. TIMES, Aug. 5, 2003, at A15; Tom Weir & Erik Brady, *In Sexual Assault Cases, Athletes Usually Cleared; Conviction Rate Much Lower Than Other Defendants*, USA TODAY, Dec. 22, 2003, at A01.

84. David Wharton, David Kelly & Chris Dufresne, *University of Colorado Is a Study in Sports Scandal*, L.A. TIMES, Feb. 20, 2004, at A1.

85. Michael Janofsky & Diana Jean Schemo, *Women Recount Life as Cadets: Forced Sex, Fear and Silent Rage*, N.Y. TIMES, Mar. 16, 2003, at N1.

86. See, e.g., Benedict, *supra* note 83, at A15; Weir & Brady, *supra* note 83, at A01; Wharton, Kelly & Dufresne, *supra* note 84, at A1.

received. As for-profit models of higher education rose to the fore and tuition costs rose, students heard themselves described as private consumers of a market commodity, not recipients of a public benefit.⁸⁷ Moreover, according to this new model, the good they were purchasing extended well beyond educational content to include a safe environment, a positive experience, and a supportive community. The result, post-*Morrison*, was a landscape in which freedom from sexual violence was *not* a national civil right—and yet for college students, such freedom was hardly an illegitimate expectation.

Third, the early 2000s saw the nonprofit watchdog Security on Campus, Inc. (SOC) come of age, succeeding as never before in connecting isolated incidents of campus sexual assault to the guarantees and protections of federal law. SOC was founded in 1987 by the family of college student Jeanne Clery, whose rape and murder led to the enactment of the campus crime reporting mandate known as the Clery Act. A decade into the group's existence, SOC was making a name for itself by vigilantly monitoring college and university newspapers, and when it caught wind of campus crime, demanding compliance with the Clery Act's underenforced disclosure requirements. In 2001, for example, SOC stood by the side of William and Mary student Samantha Collins after the college shut down her efforts to publicize an alleged rape at a campus fraternity party.⁸⁸ In 2002, SOC was in the news again, highlighting sexual assault reporting flaws at Moravian College in Pennsylvania⁸⁹ and Saint Mary's College

87. See generally MICHAEL FABRICANT & STEPHEN BRIER, *AUSTERITY BLUES: FIGHTING FOR THE SOUL OF PUBLIC HIGHER EDUCATION* (2016) (charting the decline in public investment in higher education since the 1980s and the rise of privatization and other for-profit approaches to education); Rudy Fichtenbaum, *The Crisis is Real*, EUROPEAN (Feb. 27, 2015), <http://www.theeuropean-magazine.com/rudy-fichtenbaum/9691-higher-education-crisis-causes-and-solutions> [<https://perma.cc/BAE5-6RDV>] (noting that the pace of public defunding accelerated after 2000); STARVING THE BEAST: THE BATTLE TO DISRUPT AND REFORM AMERICA'S PUBLIC UNIVERSITIES (Violet Crown Films, 2016) (documenting the defunding of public higher education over the past thirty-five years and the rise of market-oriented reforms).

88. Brian Whitson, *W&M Rape Victim Refuses to Hide*, DAILY PRESS (Newport, Va.), Aug. 4, 2003, at C1. SOC was also in the news that year for its activism at Penn State University and Duke University. See Kevin Lees, *Education Department Answers Duke Student's Complaint*, CHRON. (June 21, 2001), <http://www.dukechronicle.com/article/2001/06/education-department-answers-student-complaint> [<https://perma.cc/6UYY-ME6L>] (reporting that in 2001 SOC filed a Clery Act complaint against Duke University on behalf of a recent graduate who claimed sexual assault by a peer); Angela Pomponio, *Penn State Urged to Expel Criminal*, CENTRE DAILY TIMES (State College, Pa.), Nov. 28, 2001, at 1A (reporting that in the wake of the criminal prosecution of a former Penn State wrestler for sexual assault, SOC joined activists in demanding that the university take stronger measures to respond to sexual assault on campus).

89. Genevieve Marshall, *Group Faults Timing of Report on Rape*, MORNING CALL (Apr.

of California.⁹⁰ In the Saint Mary's case, SOC even filed a formal complaint with the DOE.⁹¹ The following year, it shifted its attention to Florida State University,⁹² Columbus State University,⁹³ and Georgetown University.⁹⁴

The Georgetown incident is particularly significant. It began with a sexual assault allegation that student Kate Deiringer leveled against a fellow student.⁹⁵ Following a campus disciplinary proceeding and a finding of wrongdoing, Georgetown initially expelled the other student (an upperclassman whom Deiringer accused of drugging and raping her mere weeks into her freshman year). Deiringer was outraged to learn that university officials later reduced the sanctions to a one-year suspension, and that according to the nondisclosure policy Georgetown had her sign, she could not discuss the proceedings or reveal her assailant's identity. Ultimately, she spoke out anyway. Not long thereafter, SOC Vice President S. Daniel Carter reached out to inform her that although Georgetown's nondisclosure policy did have some basis in federal law, under the Family Education Rights and

10, 2002), http://articles.mcall.com/2002-04-10/news/3412476_1_sexual-assault-campus-college-women [<https://perma.cc/XU7R-S9E8>].

90. Paul T. Rosynsky, *College Faces Violation Charges*, ARGUS (Fremont-Newark, Cal.), Nov. 27, 2002, at A1; Carrie Sturrock, *St. Mary's Complaints Not Unique*, CONTRA COSTA TIMES (Walnut Creek, Cal.), Nov. 27, 2002, at A01.

91. Rosynsky, *supra* note 90, at A1; Sturrock, *supra* note 90, at A1.

92. Donna Koehn & David Wasson, *FSU Case Puts Spotlight on Rape Report Policies*, TAMPA TRIB., Aug. 22, 2003, at 1.

93. Jim Houston, *Storm Brews over Rape Report*, LEDGER-ENQUIRER (Columbus, Ga.), Nov. 14, 2003, at A1.

94. Juhie Bhatia, *Georgetown Ruling Breaks Silence on Campus Rape*, WOMEN'S ENEWS (Sept. 7, 2004), <http://womensenews.org/2004/09/georgetown-ruling-breaks-silence-campus-rape> [<https://perma.cc/VT2D-Q5EA>]. SOC's activism continued throughout the 2000s. For example, in 2004, after author Naomi Wolf and journalist Emily Bazelon publicized Yale University's inattention to complaints of sexual harassment and sexual violence, SOC filed an official complaint about Yale with the DOE. See Emily Bazelon, *Lux, Veritas, and Sexual Trespass*, YALE ALUMNI MAG. (July/Aug. 2004), <https://yalealumnimagazine.com/articles/3719-updates> [<https://perma.cc/7VKA-5U5U>]; Kim Martineau, *Reports of Sex Crimes at Yale Are Up*, HARTFORD COURANT, Nov. 1, 2004, at B1; Naomi Wolf, *The Silent Treatment*, N.Y. MAG. (Mar. 1, 2004), http://nymag.com/nymetro/news/features/n_9932 [<https://perma.cc/R4UJ-RN79>]. In 2004, SOC also reportedly filed a complaint on behalf of victims of rape at the University of Virginia. Cantalupo, *supra* note 61, at 264 n.236. In 2006, SOC's S. Daniel Carter was the one to inform University of Wisconsin-Madison student Laura Dunn of her rights under Title IX. CTR. FOR PUB. INTEGRITY, *supra* note 80, at 76. Dunn has gone on to become a lawyer and a prominent advocate for survivors of sexual assault.

95. *How One Student Changed Georgetown's Sexual Assault Policy*, GEO. VOICE (Sept. 16, 2014), <http://georgetownvoice.com/2004/09/16/how-one-student-changed-georgetown-s-sexual-assault-policy> [<https://perma.cc/LG7W-7F49>].

Privacy Act, the Clery Act required colleges and universities to keep students apprised of criminal activity on and around campus—including, in this case, Deiringer’s alleged rape.⁹⁶ Deiringer filed official complaints with the DOE under both the Clery Act and Title IX.⁹⁷

The case resulted in two important statements from OCR, albeit ones that lacked the finality of a formal adjudication or binding rulemaking. First, in response to the Clery Act complaint, OCR ruled that Georgetown could not require victims to sign nondisclosure agreements, even if this practice was a good-faith effort to comply with federal privacy protections.⁹⁸ In other words, OCR reminded institutions that accused students were not the only ones with federally protected rights. Second, in response to the Title IX complaint, OCR offered a glimpse of the potential reach of its powers. In fact, one of the demands it made of Georgetown, as a condition of resolving the complaint, was the very one that critics today find most concerning: a “preponderance of the evidence” standard for sexual assault adjudications (as opposed to a higher standard, such as “clear and convincing” evidence).⁹⁹ OCR’s resolution agreement became public—SOC made sure of that—and other colleges took note.¹⁰⁰

No rash of OCR investigations followed in the wake of the Georgetown resolution, and many of the investigations that did emerge were disappointing, at least to those who hoped to see OCR assume a more forceful role. Subsequent Freedom of Information Act requests would reveal that between 1998 and 2008, the agency resolved only

96. *See id.*

97. *Id.*; see BRETT A. SOKOLOW, INSIDE AN OCR TITLE IX INVESTIGATION 2, https://www.nchem.org/pdfs/INSIDE_TITLE_IX_INVESTIGATION.pdf [<https://perma.cc/V7V4-DNYJ>].

98. SOKOLOW, *supra* note 97, at 1.

99. *Id.* at 3. For critiques of the preponderance-of-the-evidence standard, see *infra* note 177. In general, critics fear that a “more likely than not” standard is not protective enough of the accused for a charge that may result in significant consequences for the accused’s reputation and life prospects.

100. *See* SOKOLOW, *supra* note 97, at 1; Lauren Sieben, *Education Dept. Issues New Guidance for Sexual-Assault Investigations*, CHRON. HIGHER EDUC. (Apr. 4, 2011), <http://www.chronicle.com/article/Education-Dept-Issues-New/127004> [<https://perma.cc/ED5A-23DE>]. *But see* Cantalupo, *supra* note 61, at 26 (noting that as late as 2009, college administrators were citing the Family Education Rights and Privacy Act as a reason for requiring victims to sign nondisclosure agreements). OCR also required a preponderance standard in 1995, in a settlement agreement with Evergreen State College. *See* Michelle J. Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 YALE L.J. 1940, 1986 n.255 (2016). But unlike with Georgetown, the Evergreen State agreement was not widely publicized.

twenty-four investigations into the handling of sexual assault on college campuses.¹⁰¹ Those twenty-four investigations resulted in findings of violations in just five cases, and in no instance did the agency administer punishment, even when investigators concluded that campus officials retaliated against students who reported assault.¹⁰²

Nonetheless, students, legal advocates, and academics were becoming more aware of the administrative avenue and its possibilities. One indication is a 2007 Harvard Law School conference on Title IX, which included prominent gender violence expert Diane Rosenfeld. Rosenfeld had formerly served as Senior Counsel to the DOJ's Office on Violence Against Women and had since moved into advocacy and law teaching. Part of her teaching portfolio was a seminar at Harvard Law School on Title IX; informally, she advised student groups seeking to convince the Harvard administration to take the issue of sexual assault more seriously.¹⁰³ Several years later, Rosenfeld would serve as a consultant to OCR when it drafted the 2011 DCL¹⁰⁴—a turn of events that might have surprised her in 2007, given OCR's disappointing track record. What she could and did say at that earlier date was that, at a minimum, a Title IX complaint to OCR was a “more accessible” avenue “than private litigation” for a victim of sexual assault on campus; used strategically and systematically, such complaints could be “a great way to force a change.”¹⁰⁵ (Prior to the release of the 2011

101. CTR. FOR PUB. INTEGRITY, *supra* note 80, at 74. For more on the results of individual investigations, see *id.* at 77–78, 80–81.

102. *Id.*

103. *Interview with Diane Rosenfeld* (CTR. FOR WOMEN IN TRANSITION), Summer 2015, at 1, <https://cwitmi.org/wp-content/uploads/2015/07/Summer15-newsletter.pdf> [<https://perma.cc/D7WV-979K>].

104. *Rosenfeld Consults on Federal Effort Targeting Sexual Assaults at Colleges*, HARV. L. TODAY (Aug. 29, 2011), <https://today.law.harvard.edu/rosenfeld-consults-on-federal-effort-targeting-sexual-assaults-at-colleges> [<https://perma.cc/TC5X-M8NT>].

105. *Comments from the Spring 2007 Harvard Journal of Law & Gender Conference*, 31 HARV. J.L. & GENDER 378, 381 (2008); see also *id.* at 384 (summary of remarks by Holly Hogan) (describing the OCR complaint process as an avenue that victims and activists ought to use more). This is not to say that advocates and victims had abandoned private lawsuits—to the contrary. See Aisha Sultan, *Plaintiffs Are Using Title IX in Campus Sexual Assault Cases*, ST. LOUIS POST-DISPATCH, July 10, 2002, at C4. Risk-management professionals went so far as to describe a “boom” in sexual-misconduct-based civil suits against colleges and universities in the 2000s. John L. Pulley, *Risk-Management Lawyer Says Boom in Sexual-Harassment Lawsuits Should Make Colleges Handle Cases Carefully*, CHRON. HIGHER EDUC. (Sept. 28, 2005), <http://www.chronicle.com/article/Risk-Management-Lawyer-Says/120170> [<https://perma.cc/N68Q-CSUB>]. But see LAUREN B. EDELMAN, *WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS* 82 (2016) (noting that in the workplace discrimination context, compliance professionals tend to “characterize the legal landscape as favorable to employees” and to flag

DCL, she would go on to test this theory, when she advised the lead complainant in a highly publicized Title IX complaint against Yale University.¹⁰⁶)

Forcing change would have been beside the point, of course, if people on the ground perceived the problem as discrete and local—a matter of individual “bad apples.” But that was not the case. By the mid-2000s, activists on campuses were portraying sexual assault as the kind of problem that ought to command the attention of national policymakers and administrators. In their framing, sexual violence was a society-wide “epidemic.”¹⁰⁷ Popularizing a term that anthropologist Peggy Sanday coined decades earlier,¹⁰⁸ they blamed not only

“high-profile multimillion-dollar class action settlements,” even though “employers prevail in the vast majority of cases”). However, both Title IX doctrine and state-level tort law continued to pose significant hurdles for plaintiffs. In egregious cases, colleges and universities settled; other cases failed. *See generally* LEWIS, SCHUSTER & SOKOLOW, *supra* note 8 (discussing high-profile settlements from this era). And regardless of the outcome, litigation seemed unlikely to effect systemic change. *See* Cantalupo, *supra* note 61, at 235 (noting that when it comes to changing institutional behavior, “a private suit for damages at best will only make such changes indirectly”).

106. *See* Christina Huffington, *Yale Students File Title IX Complaint Against University*, YALE HERALD (Mar. 31, 2011), <http://yaleherald.com/homepage-lead-image/cover-stories/breaking-news-yale-students-file-title-ix-suit-against-school> [<https://perma.cc/S27D-BCGD>] (interviewing several of the complainants and describing some of the incidents that formed the basis for the Title IX complaint against Yale); Diane L. Rosenfeld, *Uncomfortable Conversations: Confronting the Reality of Target Rape on Campus*, 128 HARV. L. REV. F. 359, 362 n.13 (2015) (disclosing that Rosenfeld represented Alexandra Brodsky, the lead complainant in the case). Another advocate who pushed for greater utilization of Title IX in the early and mid-2000s was prosecutor-turned-professor Wendy J. Murphy. In 2002, she filed an OCR complaint against Harvard University, over a policy that demanded “sufficient independent corroboration” from students alleging sexual assault. Cynthia L. Cooper, *Women Lawyers Spur a Call to Action on Campus Sexual Assault*, 22 PERSPECTIVES 8, 14 (2014).

107. *See, e.g.*, Akilah Imani Nelson, *Shippensburg*, PUB. OPINION (Chambersburg, Pa.), Apr. 2, 2004, at 3A; Renée Petrina, *Students Rally Against Assault*, COLLEGIAN (Apr. 19, 2001), http://www.collegian.psu.edu/archives/article_d3246874-bd6b-5d50-ac29-b2392ccfd810.html [<https://perma.cc/F4PQ-EA4T>]; Bryan Proffitt, *No Means Know*, TECHNICIAN (Raleigh), Oct. 23, 2000, <https://global.factiva.com/factiva/login/login.asp?productname=global> [<https://perma.cc/8779-BJFW>]; Megan H. Scott, *Safety Issues Addressed*, CRUSADER U., Feb. 11, 2000, at 1; Carrie Sturrock, *Rape Reporting Policy Is Caring, Helps Raise Student Awareness*, S.F. CHRON., Dec. 13, 2007, at B1; Amanda McGrath, *Week of Take Back the Night Events Begins*, HOYA (Nov. 6, 2001), <http://www.thehoya.com/week-of-take-back-the-night-events-begins> [<https://perma.cc/7YW9-33TB>].

108. Patricia Yancey Martin, *The Rape Prone Culture of Academic Contexts: Fraternities and Athletics*, 30 GENDER & SOC. 30, 33 n.3 (2016). *See generally* PEGGY REEVES SANDAY, *FRATERNITY GANG RAPE: SEX, BROTHERHOOD, AND PRIVILEGE ON CAMPUS* (1990) (discussing the sociocultural context of rape); Peggy Reeves Sanday, *The Socio-Cultural Context of Rape: A Cross-Cultural Study*, 37 J. SOC. ISSUES 5 (1981) (same).

individual perpetrators, but also a broader “rape culture.”¹⁰⁹ This was a theme, for example, of Rosenfeld’s various classes and speaking engagements, including a 2005 lecture at the University of Wisconsin Law School (her alma mater). After showing a documentary on the normalization of rape in American culture, Rosenfeld offered her audience a MacKinnon-esque take on the relationship between sexual violence and citizenship: “Rape is a denial of [women’s] equal citizenship status.”¹¹⁰ In short, years after *Morrison*, the concerns that animated VAWA had not gone away, nor had the desire for a national, civil rights-based solution — at least when it came to women on campus.

D. Administrative Enforcement of the Right To Be Free from Sexual Violence

By 2009, the legal and political landscape had changed in several important ways. The presidency was in the hands of Democrat Barack Obama; his vice president was none other than Senator Biden, a moving force behind VAWA. Strong signals emanated from the White House about women’s right to be free from sexual violence. Within his first 100 days, President Obama proclaimed April to be “Sexual Assault Awareness Month.”¹¹¹ Six months into assuming office, he had appointed a White House advisor on violence against women, Lynn Rosenthal.¹¹² And by September of that year, the administration had

109. Kathy Redmond, founder of the National Coalition Against Violent Athletes, was particularly vocal in her use of the term “rape culture.” See *Advocate: “Rape Culture” Exists at University of Colorado*, PHILA. DAILY NEWS, Apr. 13, 2004, at 59; Bob Cohn, *Athletic Advantage? Sports Stars Have Winning Record in Court*, WASH. TIMES, June 3, 2004, at C01; Stan Grossfield, “*Nobody Is Going to Do This on My Watch*” – Anger Drives Victim to Help Women Attacked by Athletes, BOS. GLOBE (June 20, 2004), http://archive.boston.com/sports/other_sports/articles/2004/06/16/a_voice_for_the_victims [<https://perma.cc/QG3W-NMNN>]. Other campus activists also began employing the term during these years. See, e.g., Mary Butler, *Campus Culture Questioned*, DAILY CAMERA (Boulder, Colo.), Feb. 29, 2004, at A1; Laura Crimaldi, *Harvard Women: No Doggs Allowed!*, BOS. HERALD, Apr. 14, 2005, at 5; Eric Ferreri, *Playboy Draws Protest, Interest*, CHAPEL HILL HERALD (N.C.), Apr. 6, 2004, at 1; Gregory Phillips, *Sex Draws Most Focus at NCCU Forum*, HERALD-SUN (N.C.), Oct. 11, 2006, at C1.

110. Shira Nanus, *U. Wisconsin: ‘Rape Culture’ Persists, U. Wisconsin Alumna Says*, U. WIRE, Oct. 21, 2005, <https://global.factiva.com/factualogin/login.asp?productname=global> [<https://perma.cc/8779-BJFW>].

111. Amanda Cuda, *Sexual Assault Awareness Could Get Boost*, NEWS-TIMES (Danbury, Conn.) (Apr. 15, 2009), <http://www.newstimes.com/news/article/Sexual-assault-awareness-could-get-boost-119906.php> [<https://perma.cc/3WMN-HDZQ>].

112. Christine Simmons, *White House Appoints Domestic Violence Adviser*, BOSTON.COM (June 26, 2009), http://archive.boston.com/news/nation/washington/articles/2009/06/26/obama_appoints_domestic_violence_adviser [<https://perma.cc/R89R-SZ23>].

created a White House Council on Women and Girls, to “ensure that American women are treated fairly in all matters of public policy.”¹¹³

September 2009 also marked VAWA’s fifteenth anniversary, which Vice President Biden celebrated with an event at his home.¹¹⁴ But Biden’s interest in combatting violence against women was not merely retrospective. Indeed, he seemed to perceive the situation much like fellow VAWA supporter Judith Resnik—as “*in media res*, in the middle of the story.”¹¹⁵ Rosenthal recalls that one of her first assignments that year—received from Biden himself—was “to look at all the data about violence against women and girls” and see what, if anything, had changed since VAWA’s enactment in 1994.¹¹⁶ Rosenthal did, and reported that women in the sixteen-to-twenty-four age bracket appeared particularly vulnerable.¹¹⁷ This demographic corresponded nicely with a pocket of federal jurisdiction. As Senator Claire McCaskill has shrewdly noted, “The federal government has no jurisdiction over rape. . . . But it has jurisdiction over campus sexual assault via Title IX.”¹¹⁸

Another crucial development around 2009 was the interest of the Center for Public Integrity (CPI), a nonprofit investigative reporting organization “famous for digging up dirt on influence-peddling and corruption.”¹¹⁹ As CPI reporters turned their attention to the issue of sexual assault on college campuses, they initially focused on the actions and inactions of colleges and universities, including lack of

113. Mimi Hall, *Administration Pushes Women’s Issues to Fore*, USA TODAY, Sept. 14, 2009, at A4.

114. Christine Simmons, *Biden Commemorates Violence Against Women Act*, NEWSDAY (Sept. 30, 2009), <http://www.newsday.com/news/nation/biden-commemorates-violence-against-women-act-1.1486928> [<https://perma.cc/35X4-AAX8>].

115. Resnik, *supra* note 52, at 569.

116. Richard Dorment, *Occidental Justice: The Disastrous Fallout When Drunk Sex Meets Academic Bureaucracy*, ESQUIRE (Mar. 25, 2015), <http://www.esquire.com/news-politics/a33751/occidental-justice-case> [<https://perma.cc/P8BU-CX39>].

117. *Id.*

118. *Id.*

119. Mariah Blake, *Something Fishy?*, COLUM. JOURNALISM REV. (July/Aug. 2012), http://www.cjr.org/feature/something_fishy.php [<https://perma.cc/53JH-BZVW>]. On the timeline of CPI’s investigation and how it unfolded, see *Sexual Assault on Campus: About This Project*, CTR. FOR PUB. INTEGRITY, <https://www.publicintegrity.org/2010/02/24/8932/about-project> [<https://perma.cc/CD8B-82LL>].

transparency,¹²⁰ underreporting,¹²¹ inattention to repeat offenders,¹²² and failure to impose meaningful consequences for sexual assault¹²³—the kind of institutional behavior that journalists had exposed in recent investigations of the Catholic Church.¹²⁴ By early 2010, however, CPI had zeroed in on “lax enforcement of Title IX” as perhaps the most significant factor contributing to continuing sexual assault on college campuses. Bluntly, OCR was a “feeble watchdog.”¹²⁵ Prominent national media outlets, such as National Public Radio, further publicized CPI’s findings.¹²⁶

The result was a public response from OCR’s new head, Obama appointee Russlynn Ali. In communications with CPI, Ali agreed with activists that sexual violence in schools had become an “epidemic” and

120. Kristen Lombardi, *Sexual Assault on Campus Shrouded in Secrecy*, CTR. FOR PUB. INTEGRITY (Dec. 1, 2009, 12:01 AM), <https://www.publicintegrity.org/2009/12/01/9047/sexual-assault-campus-shrouded-secrecy> [<https://perma.cc/JJH4-G998>].

121. Kristen Lombardi, *Campus Sexual Assault Statistics Don’t Add Up*, CTR. FOR PUB. INTEGRITY (Dec. 2, 2009, 12:01 AM), <https://www.publicintegrity.org/2009/12/02/9045/campus-sexual-assault-statistics-don-t-add> [<https://perma.cc/3K8H-GD78>]; see also Kristin Jones, *Barriers Curb Reporting on Campus Sexual Assault*, CTR. FOR PUB. INTEGRITY (Dec. 2, 2009, 11:02 AM), <https://www.publicintegrity.org/2009/12/02/9046/barriers-curb-reporting-campus-sexual-assault> [<https://perma.cc/29ZP-BD4S>] (discussing the barriers that impede reporting of sexual assault on campuses).

122. Jennifer Peebles & Kristen Lombardi, *‘Undetected Rapists’ on Campus: A Troubling Plague of Repeat Offenders*, CTR. FOR PUB. INTEGRITY (Feb. 26, 2010, 12:00 PM), <https://www.publicintegrity.org/2010/02/26/4404/undetected-rapists-campus-troubling-plague-repeat-offenders> [<https://perma.cc/VRD7-ZBU5>].

123. Kristen Lombardi, *A Lack of Consequences for Sexual Assault*, CTR. FOR PUB. INTEGRITY (Feb. 24, 2010, 12:00 PM), <https://www.publicintegrity.org/2010/02/24/4360/lack-consequences-sexual-assault> [<https://perma.cc/4SJQ-7JB8>].

124. CPI reporter Kristen Lombardi, then with the *Boston Phoenix*, was one of the reporters who originally broke this story. Subsequent investigations garnered a Pulitzer Prize for reporters at the *Boston Globe*. Kyle Scott Clauss, *Out of the Spotlight: Does the Phoenix Deserve Credit for the Globe’s Scoop?*, BOS. MAG. (Oct. 30, 2015, 1:08 PM), <http://www.bostonmagazine.com/news/blog/2015/10/30/phenix-globe-spotlight> [<https://perma.cc/VY3T-7YCL>].

125. Kristin Jones, *Lax Enforcement of Title IX in Campus Sexual Assault Cases*, CTR. FOR PUB. INTEGRITY (Feb. 25, 2010, 12:00 PM), <https://www.publicintegrity.org/2010/02/25/4374/lax-enforcement-title-ix-campus-sexual-assault-cases-0> [<https://perma.cc/52MG-UPV4>]. CPI compiled this article and others into one large digital report. CTR. FOR PUB. INTEGRITY, *supra* note 80, at 4–5. By 2010, OCR was no stranger to allegations of lax enforcement of Title IX, but previous critiques had focused mostly on athletics.

126. In collaboration with CPI, National Public Radio ran a special series of articles on this issue. *Seeking Justice for Campus Rapes*, NAT’L PUB. RADIO, <http://www.npr.org/series/124073905/seeking-justice-for-campus-rapes> [<https://perma.cc/3ER4-EEG7>]. The series gained additional attention when it won the prestigious Peabody Award for excellence in broadcasting. *Seeking Justice for Campus Rapes*, PEABODY AWARDS, <http://www.peabodyawards.com/award-profile/seeking-justice-for-campus-rapes> [<https://perma.cc/4WT5-S338>].

she committed her agency to doing better.¹²⁷ Ali was in fact already alert to the issue,¹²⁸ but the exchange with CPI signaled her intentions going forward: “[W]here universities . . . don’t comply with civil rights laws” and prove “unwilling to look to find a resolution,” Ali told CPI, OCR would use “all of the tools at [its] disposal . . . to ensure that women are free from sexual violence.”¹²⁹ “[W]e are a rubber stamp for no one,” Ali insisted.¹³⁰

In April of 2011, OCR issued its now-famous Dear Colleague Letter. This guidance document differed from its predecessors in its explicit focus on sexual violence, which it defined to include rape, sexual assault, sexual battery, and sexual coercion.¹³¹ In keeping with longer-term trends in progressive rape law reform, this definition foregrounded the value of sexual autonomy and rejected physical force as the dividing line between cognizable and noncognizable sexual violence.¹³² The 2011 DCL also demanded more of colleges and universities than previous guidance documents. It took an expansive view of colleges’ and universities’ jurisdiction, noting that “off-campus” conduct by members of the community could very well affect a student’s learning environment on campus.¹³³ It clarified the duties of the campus “Title IX coordinator,” a compliance officer whose existence had long been mandated but whose qualifications and precise

127. CTR. FOR PUB. INTEGRITY, *supra* note 80, at 84. On the influence of CPI’s reporting on OCR, see also Kristen Lombardi, *Continuing Impact from Center Series*, CTR. FOR PUB. INTEGRITY (Apr. 7, 2010, 5:01 AM), <https://www.publicintegrity.org/2010/04/07/2702/continuing-impact-center-series> [<https://perma.cc/3VYJ-8PBZ>].

128. See Joey Seiler, *Women’s Law Association Conference to Take Interdisciplinary Look at Equality*, HARV. L. RECORD (Jan. 31, 2011) <http://hlrecord.org/2011/01/womens-law-association-conference-to-take-interdisciplinary-look-at-equality> [<https://perma.cc/2GM3-STHV>] (reporting that Ali attended Diane Rosenfeld’s Title IX seminar at Harvard Law School in 2009 and that the two women “collaborated to raise awareness of schools’ roles in preventing sexual violence on campus”); Robin Wilson, *How a 20-Page Letter Changed the Way Higher Education Handles Sexual Assault*, CHRON. HIGHER EDUC. (Feb. 8, 2017), <http://www.chronicle.com/article/How-a-20-Page-Letter-Changed/239141> [<https://perma.cc/K9FZ-9CLZ>] (noting that early in her tenure at OCR, Ali expressed concern about sexual violence in the nation’s schools).

129. CTR. FOR PUB. INTEGRITY, *supra* note 80, at 75; see also *id.* at 78 (“Where there is recalcitrance . . . we will aggressively enforce.”).

130. *Id.* at 84; see also Kristen Galles, *Title IX and the Importance of a Reinvigorated OCR*, HUMAN RIGHTS MAG. (Summer 2010), http://www.americanbar.org/publications/human_rights_magazine_home/human_rights_vol37_2010/summer2010/title_ix_and_the_importance_of_a_reinvigorated_ocr.html [<https://perma.cc/M4MT-SY56>] (documenting Ali’s assurances of a “reinvigorated OCR”).

131. 2011 DCL, *supra* note 15, at 1–2.

132. For more information on these trends, see Anderson, *supra* note 100, at 1950–53.

133. 2011 DCL, *supra* note 15, at 4.

role had never been spelled out in such explicit terms.¹³⁴ And it required a number of measures that some observers have interpreted as procomplainant (and others have interpreted as a balancing of the scales), such as protective measures for students during the processing of complaints and a “preponderance of the evidence” standard of proof for adjudicatory hearings (rather than the higher standards that some institutions had been using).¹³⁵ Last, but not least, the document recommended numerous “proactive measures” that schools should take to train and educate community members.¹³⁶

In a subsequent wave of investigations, OCR made clear that the 2011 DCL meant what it said and more.¹³⁷ Responding to formal complaints and sometimes opening investigations on its own initiative, OCR officials descended on dozens of schools.¹³⁸ No institution was presumptively secure. Targets of investigation ranged from obscure community colleges to highly specialized professional schools to the tip-top of the Ivy League. Formal resolution agreements appeared on OCR’s website, signaling to other institutions the kind of responses that the agency wished to see.¹³⁹

A robust grassroots movement developed alongside these efforts.¹⁴⁰ This movement built on a decades-long tradition of Take

134. *Id.* at 7–8.

135. *Id.* at 11. Another example: the 2011 DCL “strongly discourages” allowing an alleged perpetrator to personally question or cross-examine the complainant. *Id.* at 12.

136. *Id.* at 14.

137. Molly Redden, *U. of Notre Dame to Clarify Sexual-Harassment Policy in Settlement with Education Department*, CHRON. HIGHER EDUC. (July 1, 2011), <http://www.chronicle.com/article/U-of-Notre-Dame-to-Clarify/128128> [<https://perma.cc/79P9-8ZL2>] (describing OCR’s July 2011 settlement with the University of Notre Dame as a signal of how it intended to enforce the 2011 DCL).

138. See Sara Lipka, *Colleges Consider a New ‘Blueprint’ for Responding to Sexual Assault*, CHRON. HIGHER EDUC. (July 24, 2013), <http://www.chronicle.com/article/Colleges-Consider-a-New/140503> [<https://perma.cc/GRB7-25Z5>] (reporting that as of July 2013, the DOE was “investigating sexual misconduct at more than two dozen colleges under Title IX”); Redden, *supra* note 137 (noting OCR’s willingness to open investigations on its own initiative, as well as respond to formal complaints); Libby Sander, *Quiet No Longer, Rape Survivors Put Pressure on Colleges*, CHRON. HIGHER EDUC. (Aug. 12, 2013), <http://www.chronicle.com/article/Quiet-No-Longer-Rape/141049> [<https://perma.cc/L4BM-HKV2>] (“In a written statement to *The Chronicle*, the department [DOE] says that it has initiated a ‘record number’ of proactive investigations, and that agreements with colleges have included ‘robust, far-reaching remedies.’”).

139. See generally Title IX: *Tracking Sexual Assault Investigations*, *supra* note 17 (compiling data on the targets, timing, and resolution of OCR’s investigations since 2011).

140. Tyler Kingkade, *College Sexual Assault Survivors Form Underground Network to Reform Campus Policies*, HUFFINGTON POST (Mar. 21, 2013, 1:35 PM), http://www.huffingtonpost.com/2013/03/21/college-sexual-assault-survivors_n_2918855.html [<https://perma.cc/A46P-BBPR>].

Back the Night rallies, but its target audience extended all the way to Washington and it employed tools beyond campus consciousness-raising.¹⁴¹ End Rape on Campus (EROC) and Know Your IX (KYIX), two of the most prominent institutions to emerge, are representative. The individual founders of these organizations had experienced sexual violation by a peer, followed by unsympathetic treatment by campus bureaucracy.¹⁴² Both organizations have articulated bold aspirations and deployed Title IX as a primary vehicle.¹⁴³ And by 2013, they were grabbing national headlines—not only for organizing rallies, but also for petitioning the DOE for stricter enforcement and assisting “survivors” in filing formal civil rights complaints.¹⁴⁴

This movement appears to have helped inspire a further uptick in complaints and investigations after 2014.¹⁴⁵ So, too, did President Obama’s pledge to develop a “coordinated Federal response” to the issue of campus sexual assault.¹⁴⁶ Around that time, OCR raised the stakes even higher for colleges and universities by publishing the names of institutions under investigation.¹⁴⁷ In the words of OCR’s new

141. Sander, *supra* note 138.

142. See Dana Bolger, *Sexual Assault Survivor Activists Launch ‘Know Your IX’ Campaign*, HUFFINGTON POST (Apr. 18, 2013, 5:10 PM), http://www.huffingtonpost.com/dana-bolger/sexual-assault-survivor-a_b_3104714.html [<https://perma.cc/H82S-QJD7>].

143. *About KYIX*, KNOW YOUR IX, <http://knowyourix.org/about-ky9> [<https://perma.cc/L7SM-3AHA>]; *About Us*, END RAPE ON CAMPUS, <http://endrapeoncampus.org/our-team-1> [<https://perma.cc/2EKW-BWF4>].

144. Kathleen Megan, *Support of the Online Sort*, HARTFORD COURANT, Oct. 27, 2013 at A1; Sara Lipka, *Protesters Call for Stricter Sanctions on Colleges that Mishandle Sexual Assault*, CHRON. HIGHER EDUC. (July 16, 2013), <http://www.chronicle.com/article/Protesters-Call-for-Stricter/140375> [<https://perma.cc/8Z7D-JNLW>]; Jonah Newman & Libby Sander, *Promise Unfulfilled?*, CHRON. HIGHER EDUC. (Apr. 30, 2014), <http://www.chronicle.com/article/Promise-Unfulfilled-/146299> [<https://perma.cc/9BUL-ZBHM>]. On the significance of using the term “survivor,” rather than “victim,” see Parul Sehgal, *The Forced Heroism of the ‘Survivor,’* N.Y. TIMES (May 3, 2016), <https://www.nytimes.com/2016/05/08/magazine/the-forced-heroism-of-the-survivor.html> [<https://perma.cc/4GD4-NB5C>].

145. See generally Rachel Axon, *Colleges Under Fire for Handling of Sexual Assault*, USA TODAY (Apr. 24, 2014, 8:18 PM), <https://www.usatoday.com/story/sports/college/2014/04/24/sexual-assault-colleges-jameis-winston-president-obama/8122831> [<https://perma.cc/6AWT-UNBX>].

146. Press Release, White House Office of the Press Sec’y, Memorandum – Establishing a White House Task Force to Protect Students from Sexual Assault (Jan. 22, 2014), <https://www.whitehouse.gov/the-press-office/2014/01/22/memorandum-establishing-white-house-task-force-protect-students-sexual-a> [<https://perma.cc/8FH7-2JP7>].

147. Press Release, U.S. Dep’t of Educ., U.S. Department of Education Releases List of Higher Education Institutions with Open Title IX Sexual Violence Investigations (May 1, 2014), <http://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-ix-sexual-violence-investigations> [<https://perma.cc/BG42-D6UB>].

head, Catherine Lhamon, educators needed “to radically change [the] message” they sent to students who experienced sexual assault.¹⁴⁸ Should those educators fail, Lhamon warned, she would “go to enforcement” and was “prepared to withhold federal funds.”¹⁴⁹ Between the issuance of the 2011 DCL and the date of this Article, OCR has resolved sixty-two cases, most through resolution agreements; investigations into 327 colleges and universities remain open.¹⁵⁰

Perhaps the most striking feature of the 2011–16 era, at least for the purposes of this Article, is the way that some activists and advocates have chosen to engage with OCR and their capacious framing of the agency’s work.¹⁵¹ “Our goal is to show that there is a pervasive culture of sexual assault which needs to be addressed on a national level,” explained EROC cofounder and Title IX activist Annie Clark in 2013.¹⁵² Clark has also connected her organization’s work to a broader “movement to end gender-based violence.”¹⁵³ KYIX cofounder Alexandra Brodsky (the lead complainant in the 2011 complaint against Yale) has described her organization’s work in

148. Libby Sander, *Colleges Are Reminded of Federal Eye on Handling of Sexual-Assault Cases*, CHRON. HIGHER EDUC. (Feb. 11, 2014), <http://www.chronicle.com/article/Colleges-Are-Reminded-of/144703> [<https://perma.cc/NL3E-P8MK>].

149. *How Campus Sexual Assaults Came to Command New Attention*, NAT’L PUB. RADIO (Aug. 12, 2014, 5:53 PM), <http://www.npr.org/2014/08/12/339822696/how-campus-sexual-assaults-came-to-command-new-attention> [<https://perma.cc/8DT6-WXVG>].

150. *Title IX: Tracking Sexual Assault Investigations*, *supra* note 17.

151. This Article does not advance an argument about how OCR officials themselves have understood their work. Without additional research the most that can be said is that, in formal communications, top OCR officials have consistently tied their enforcement efforts to their statutory mandate under Title IX. In less formal communications, they have sometimes appeared more in sync with those who aspire toward cultural change. *See* Sam Dillon, *Biden to Discuss New Guidelines About Campus Sex Crimes*, N.Y. TIMES, Apr. 4, 2011, at A13 (noting that in discussing the 2011 DCL, Russlyn Ali emphasized the “terrible and alarming trend in the country of sexual violence”); Stephanie Haven, *Campus Sexual Assault: ‘Shouldn’t Have Waited This Long’ to Address, Official Says*, MCCLATCHYDC (July 31, 2014, 4:41 PM), <http://www.mcclatchydc.com/news/nation-world/national/article24771280.html> [<https://perma.cc/CMH4-4RMV>] (recording Catherine Lhamon’s disappointment in the “general cultural expectation that a [rite] of passage for students into adulthood will include sexual assault and sexual violence” and her aspiration for “a sea change for us as a country”); Robin Wilson, *2014 Influence List: Enforcer*, CHRON. HIGHER EDUC. (Dec. 15, 2014), <http://www.chronicle.com/article/Enforcer-Catherine-Lhamon/150837> [<https://perma.cc/5TS9-9QVY>] (noting that in Lhamon’s words, she aspired for a future in which young women’s experiences were “not marked by sexual violence”).

152. Kingkade, *supra* note 140.

153. Annie E. Clark, *‘The Hunting Ground’: Tackling Campus Sexual Assaults*, CNN (Nov. 22, 2015, 1:30 PM), <http://www.cnn.com/2015/11/22/opinions/clark-the-hunting-ground> [<https://perma.cc/M55P-QRRX>].

similar terms, using language that directly invokes the spirit of VAWA and the thinking of Catherine MacKinnon. The goal, Brodsky explained in a major news outlet in 2014, was a “national civil right to freedom from sexual violence” and an alternative to a “broken” criminal law system.¹⁵⁴ Post-*Morrison*, she continued, Title IX was “our only national model.”¹⁵⁵

II. THE RIGHTS-GENERATING HISTORY OF THE ADMINISTRATIVE STATE

That activists and advocates have looked to an administrative agency to articulate and enforce a “national civil right to be free from sexual violence” may strike some readers as unusual. When it comes to the creation and recognition of new, national rights, we often associate that process with the U.S. Supreme Court and U.S. Congress. In popular narratives, it is the Supreme Court that gave Americans the right to nonsegregated public spaces and schools, the right to an abortion, and the right to marry a partner of a different race or the same sex.¹⁵⁶ Likewise, Congress appears to have awarded Americans such novel guarantees as the right to the public disclosure of government information, the right to a modicum of security in old age, and the right to a safe and non-discriminatory workplace.¹⁵⁷

This Part reminds readers that modern American history is rife with examples of administrative agencies creating new rights, or at least

154. Alexandra Brodsky, *Don't Criminalize College Responses to Sexual Violence*, AL JAZEERA AM. (Feb. 13, 2014, 9:00 AM), <http://america.aljazeera.com/opinions/2014/2/title-ix-sexual-assaultcollegecampuscriminaljusticegatto.html> [<https://perma.cc/K39K-UQAZ>].

155. *Id.* On MacKinnon's influence, see Emily Bazelon, *The Return of the Sex Wars*, N.Y. TIMES MAG. (Sept. 10, 2015), <http://www.nytimes.com/2015/09/13/magazine/the-return-of-the-sex-wars.html> [<https://perma.cc/XR95-4B6G>] (“[MacKinnon] resonates with us for recognizing the way sexual violence holds back individuals and classes of marginalized people from flourishing,” said Alexandra Brodsky”); Alexandra Brodsky & Elizabeth Deutsch, *The Promise of Title IX: Sexual Violence and the Law*, DISSENT (Fall 2015), <https://www.dissentmagazine.org/article/title-ix-activism-sexual-violence-law> [<https://perma.cc/9PBH-85PA>] (invoking MacKinnon's work in explaining the genesis of today's student movement against sexual assault).

156. These rights are generally associated with the following canonical and well-known Supreme Court cases: *Brown v. Board of Education*, 347 U.S. 483 (1954); *Roe v. Wade*, 410 U.S. 113 (1973); *Loving v. Virginia*, 388 U.S. 1 (1967); and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

157. These rights appear to owe their existence to the following statutes: the Freedom of Information Act, Pub. L. No. 89-487, 80 Stat. 250 (1966) (codified at 5 U.S.C. § 552 (2012)), the Social Security Act, Pub. L. No. 74-271, 49 Stat. 620 (1935) (codified at 42 U.S.C. ch. 7), the Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, 78 Stat. 241, 255–266 (codified as amended at 42 U.S.C. §§ 2000e–2000e-17 (2012)), and the Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (codified at 29 U.S.C. §§ 651–678 (2012)).

playing significant roles in their generation, elaboration, and legitimization.¹⁵⁸ This appears to be especially so in the realm of equality rights, as Professor Olatunde Johnson has argued, where major statutes have laid the groundwork for a “proactive, affirmative,” “bureaucratic form of enforcement.”¹⁵⁹ The existing civil rights literature pays relatively little attention to this bureaucratic realm, Johnson notes.¹⁶⁰ But a growing body of historically informed administrative law scholarship has begun to fill the void.

Professor Sophia Lee, for example, has documented the role of the National Labor Relations Board (NLRB) and the Federal Communications Commission (FCC) in advancing the idea of a right to a workplace free of discrimination—years before the enactment of Title VII and at a time when the Supreme Court had never suggested such a right.¹⁶¹ Professor Ming Hsu Chen has made similar findings with

158. In addition to the examples cited below, see Anuj C. Desai, *Wiretapping Before the Wires: The Post Office and the Birth of Communications Privacy*, 60 STAN. L. REV. 553, 557 (2007) (“[I]t was the post office—not the Fourth Amendment of its own independent force—that originally gave us the notion of communications privacy that we now view as an abstract constitutional principle applicable to telephone conversations, e-mails, and the like.”); Jeremy K. Kessler, *The Administrative Origins of Modern Civil Liberties Law*, 114 COLUM. L. REV. 1083, 1164 (2014) (“[M]odern First Amendment doctrine emerged from a contest between administrative and judicial authority over civil-libertarian rights enforcement.”); Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897, 1897 (2013) (documenting “actions by federal administrative agencies to interpret and implement the U.S. Constitution”). For further discussion, see generally WILLIAM N. ESKRIDGE JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* (2010). Note, however, that agencies have at times also rejected novel rights claims and have narrowed the reach of established guarantees. See, e.g., Anjali S. Dalal, *Shadow Administrative Constitutionalism and the Creation of Surveillance Culture*, 2014 MICH. ST. L. REV. 59, 65 (describing national security agencies’ historical “instinct toward aggressive national security norms,” with a corresponding cost to individual constitutional rights); Joy Milligan, *The Reluctant State: Civil Rights, Administrative Constitutionalism, and Institutional Design* (Dec. 2016) (unpublished manuscript) (on file with the *Duke Law Journal*) (documenting the DOE’s resistance to expansive understandings of equal protection in the 1950s and 1960s); Karen M. Tani, *Administrative Constitutionalism at the “Borders of Belonging”*: Drawing on History to Expand the Archive and Change the Lens (Sept. 2016) (unpublished manuscript) (on file with the *Duke Law Journal*) (documenting the narrow constitutional interpretations of the Freedmen’s Bureau agents and federal immigration inspectors in the late nineteenth century).

159. Olatunde C.A. Johnson, *Beyond the Private Attorney General: Equality Directives in American Law*, 87 N.Y.U. L. REV. 1339, 1343–44 (2012).

160. *Id.* at 1344; see also Olatunde C.A. Johnson, *Lawyering That Has No Name: Title VI and the Meaning of Private Enforcement*, 66 STAN. L. REV. 1293, 1330 (2014) (noting that scholars have written extensively about private court enforcement of Title VI and very little about the way in which agencies have elaborated the meaning of that provision).

161. See, e.g., SOPHIA Z. LEE, *THE WORKPLACE CONSTITUTION FROM THE NEW DEAL TO THE NEW RIGHT* 42 (2015). Starting in the 1940s, the NLRB gave credence to the idea that racially segregated unions might run afoul of the constitutional guarantee of equal protection, at least if

regard to language rights. According to Chen, it was the U.S. Department of Health, Education, and Welfare (HEW) and the EEOC—more so than Congress or the courts—that established “a right to access government programs without regard to language ability.”¹⁶² Administrators located this right in the Civil Rights Act of 1964, which prohibited discrimination on the basis of “national origin” but made no reference to language ability.¹⁶³ Through the issuance of guidance documents and the undertaking of discrete enforcement actions, administrators “transformed language barriers into a legally redressable problem” and “concretized” a right that had been nebulous at best.¹⁶⁴

those unions held a “closed-shop” agreement with an employer (that is, one in which the employer agreed to hire only union members). *See id.* Lee shows how this idea cropped up in a 1945 decision by the NLRB’s chief trial examiner, as well as in the agency’s 1946 annual report. *Id.* The idea that racially segregated unions could violate the Equal Protection Clause survived inside the NLRB throughout the 1950s, even as dozens of fair employment laws died in Congress and as the Supreme Court carefully avoided deciding the issue. *Id.* at 102–05. Later, in 1964, the NLRB issued *Independent Metal Workers, Locals 1 & 2 (Hughes Tool Co.)*, which formally announced a right to antidiscrimination in collective bargaining. *Indep. Metal Workers, Locals 1 & 2 (Hughes Tool Co.)*, 147 N.L.R.B. 1573, 1576–77 (1964). Significantly, the decision took effect a full year before Title VII, which was enacted on the same day that *Hughes Tool Co.* came down, but gave employers a year-long grace period. *Id.* at 1578.

The FCC story is similar, but went beyond racial discrimination to implicate discrimination on the basis of sex. A year before the enactment of the Civil Rights Act of 1964, Lee notes, FCC attorneys recognized a right to nondiscrimination in employment and attempted to enforce that right through the FCC’s authority to grant or deny licenses to broadcasting companies. *See Sophia Z. Lee, Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 VA. L. REV. 799, 813–16 (2010). They maintained that stance even as the Attorney General rejected the constitutional underpinnings of their argument, and as Congress and the Supreme Court avoided clarifying the issue. *See id.* at 818–20. Lee also documents how, in the wake of the enactment of Title VII, the FCC went well beyond what the text of that statute required, adopting a rule that affirmatively required all broadcasters to “establish, maintain, and carry out, a positive continuing program of specific practices designed to assure equal opportunity in every aspect of station employment and practice.” *Id.* at 834. A year later, the FCC adopted the same rule for the telegraph and telephone companies it regulated. *Id.* at 834–36. By January of 1973, with the help of allies in the EEOC, the FCC had reshaped the employment practices of an entire industry, through a landmark settlement with AT&T. *Id.* at 842–43.

162. Ming Hsu Chen, *Governing by Guidance: Civil Rights Agencies and the Emergence of Language Rights*, 49 HARV. C.R.-C.L. L. REV. 291, 294 (2014).

163. *Id.*

164. *Id.* at 311, 340. In the case of the U.S. Department of Health, Education, and Welfare (HEW), administrators embedded this right in a key 1970 guidance document, issued pursuant to HEW’s authority under Title VI. *Id.* at 313. In Chen’s words, the document “required schools to take ‘affirmative steps’ to open up their instructional programs to language minority students wherever the ‘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.’” *Id.* at 314. Within just four years, the Supreme Court had upheld the agency’s

My own research on federal–state public assistance programs (authorized by the Social Security Act of 1935) offers yet another example. Starting in the late 1930s and continuing into the 1960s, federal administrators sought to embed a more robust idea of constitutional equal protection into the realm of social welfare, relying on a statute that said nothing about equality or rights. Indeed, many Americans at that time understood government welfare as little different from a charitable handout—something to be given on a discretionary basis, and only to the most deserving.¹⁶⁵ Federal welfare administrators nonetheless insisted that, when it came to behavior and morality, poor people be scrutinized only to the extent that the nonpoor were scrutinized.¹⁶⁶ These same administrators also insisted on equality across program beneficiaries: people who were equally needy should receive the same treatment.¹⁶⁷ Phrased differently, administrators advanced the view—controversial for the time—that *all* Americans, even ones who were not economically self-sufficient, had a right to equal protection of the laws.¹⁶⁸

The point of these diverse examples is this: in various policy areas, agencies have played an important role in articulating and legitimizing new rights—rights that could be described narrowly, but that also

understanding of national origin discrimination, and shortly thereafter, Congress enacted legislation codifying the agency’s informal directive. *Id.* at 317.

The EEOC narrative is more complicated, but cuts in the same direction. Through a general guidance document released in 1970 and a more specific guidance document issued ten years later, the EEOC declared that to deny an employment opportunity on the basis of “linguistic characteristics” was to violate the affected individual’s civil rights under Title VII. *Id.* at 323–26 (emphasis omitted). Judicial responses to the EEOC’s interpretation were mixed, but administrative enforcement actions ensured that the EEOC’s interpretation nonetheless “shaped the policies and practices of a variety of employers,” ranging from manufacturers to hair salons. *Id.* at 328–30.

165. See generally Karen M. Tani, *Administrative Equal Protection: Federalism, the Fourteenth Amendment, and the Rights of the Poor*, 100 CORNELL L. REV. 825 (2015) (drawing on internal communications from the Social Security Board and its successor agencies to document federal administrators’ unconventional approach to the equal protection rights of the poor).

166. *Id.*

167. *Id.*

168. *Id.* at 849–50. This proposition may sound uncontroversial today. Historically, however, an individual’s access to income support depended on such factors as the individual’s race, perceived morality, and compliance with community norms. See, e.g., *id.* at 886–87. As late as the 1930s, it was not uncommon to refer to poor individuals as “paupers,” people who by definition had abandoned their civil and political rights in exchange for public support. See generally KAREN M. TANI, *STATES OF DEPENDENCY: WELFARE, RIGHTS, AND AMERICAN GOVERNANCE, 1935–1972*, at 27–43 (2016) (describing the system of poor relief that reformers had attempted to displace in the mid-1930s).

seemed to harbor expansive potential.¹⁶⁹ It should not surprise us, then, to see twenty-first-century citizens attempting to harness OCR's power for such an end. To date, however, scholars have not thought about OCR's enforcement efforts in these terms.

These historical examples also inform this Article in a second regard—by suggesting new and important lines of research for those who are interested in OCR's campaign against campus sexual assault.

In general, each of these examples suggests how agencies can help new rights gain traction in political and institutional contexts where other authoritative lawmaking bodies are unwilling or unavailable to do this work. But these examples also showcase agencies' limits and vulnerabilities. For example, in Lee's account of antidiscrimination rights in workplace bargaining, a prominent theme is the NLRB's incomplete power to implement those rights. What the NLRB could do depended on the complaints that private parties brought to it for resolution and how the parties chose to frame those complaints.¹⁷⁰ Lee notes that during a period in which the NLRB took a more expansive view of workplace rights, the agency received only "a trickle of discrimination charges."¹⁷¹ Chen's work on language rights suggests that administratively generated rights may wax and wane over time, perhaps more so than rights generated in other ways. Tracing these rights forward in time, into the 1990s and 2000s, Chen finds that language rights became less robust in the public education context, where they first developed, even as they spread to other important policy areas, such as election law.¹⁷²

My work on "administrative equal protection" in federal-state welfare programs calls into question whether the ostensible holders of administratively created rights are even aware of those rights and, if so, whether they are able to exercise them. Welfare recipients did occasionally advance equal protection-type claims in the 1940s and

169. Others have documented this phenomenon more fully (and have taken a much stronger normative stance). *See, e.g.*, ESKRIDGE & FEREJOHN, *supra* note 158, at 33 (identifying executive officials as among "America's primary governmental norm entrepreneurs" and setting the stage for a detailed analysis of the ways in which they "advance[d] new fundamental principles").

170. LEE, *supra* note 161, at 105–06, 163 (discussing the significance of a complainant's decision to file unfair labor practice charges against a racially segregated union while declining to seek decertification, and noting that "NLRB and court actions relied on a complainant's stepping forward").

171. *Id.* at 189.

172. Ming Hsu Chen, *Language Rights as a Legacy of the Civil Rights Act of 1964*, 67 SMU L. REV. 247, 253–55 (2014).

1950s, when federal administrators were most interested in this issue,¹⁷³ but there seems to have been a wide gap between the confident assertions of federal welfare administrators and the actual experiences and perceptions of poor Americans.¹⁷⁴ Not until the mid-1960s did a national welfare rights movement emerge, and although federal administrators seem to have influenced that movement, it was not through direct legitimations of individual rights claims.¹⁷⁵

The same research also highlights the inevitable spottiness of administratively generated rights. The statute that federal welfare administrators were working with—the Social Security Act—authorized grants for only certain types of income support: Old Age Assistance, Aid to the Blind, and Aid to Dependent Children (in other words, the statute was not in the nature of “general relief”).¹⁷⁶ These aid programs encompassed millions of people but excluded many others, most notably able-bodied, nonelderly adults. The result was that federal administrators could exert unprecedented influence on how state and local governments treated some needy citizens, but had no control over how these same actors treated others. In addition, federal administrators’ jurisdiction was limited to public assistance. They had no say over the many other areas of state law (for example, family law and criminal law) that, in practice, continued to set poor people apart from their wealthier peers.

In summary, administrative articulations of rights appear to be a feature of modern American governance. But historically, these rights have had limitations, attributable at least in part to the institutional limitations of agencies themselves. This broad observation sets the stage for new lines of inquiry regarding OCR and its embrace by those who aspire toward a national right to be free from sexual violence. The following Part explains.

173. TANI, *supra* note 168, at 141–49, 200–01.

174. *Id.* at 113–49, (noting that although welfare recipients in the 1940s and 1950s claimed their legal rights more frequently than scholars have assumed, equal protection arguments remained rare; *id.* at 205–11 (documenting an onslaught of state-level policies in the 1950s that attempted to hold welfare recipients to higher standards of conduct than other members of the population).

175. On the complex relationship between the rights articulations of federal administrators and the modern welfare rights movement, see *id.* at 212–69.

176. Social Security Act, Pub. L. No. 74-271, 49 Stat. 620 (1935) (codified at 42 U.S.C. ch. 7). As amended in 1950, the Act also authorized grants for state-run programs of aid to the permanently and totally disabled. Social Security Act Amendments of 1950, Pub. L. No. 81-734, § 1401, 64 Stat. 477, 555 (codified at 42 U.S.C. § 1351 (2012)).

III. INTERROGATING THE ADMINISTRATIVE RIGHT TO BE FREE FROM SEXUAL VIOLENCE: A RESEARCH AGENDA

To date, much of the research on OCR's campaign against sexual assault has focused on conventional administrative law concerns, such as the legal process afforded to those affected by the agency's actions¹⁷⁷ and the agency's compliance with the letter and spirit of existing legal constraints.¹⁷⁸ This Part flags a different set of questions, informed by

177. Numerous articles explore OCR's influence on the procedural protections available to those accused of campus sexual assault, a context in which the stakes are high and the potential for racial and gender bias is real. See Gersen & Suk, *supra* note 19, at 915–17. See generally AM. ASS'N OF UNIV. PROFESSORS, *THE HISTORY, USES, AND ABUSES OF TITLE IX* 78–80 (2016), <https://www.aaup.org/file/TitleIXreport.pdf> [<https://perma.cc/RZ75-PXPF>] (criticizing OCR for its inadequate protection of the due process rights of the accused and raising concerns about the potential for biased enforcement of campus sexual misconduct policies); Janet Halley, *Trading the Megaphone for the Gavel in Title IX Enforcement*, 128 HARV. L. REV. F. 103 (2015) (suggesting the ways in which racial and cultural biases may creep into the complaint-handling processes that OCR has required); Stephen Henrick, *A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses*, 40 N. KY. L. REV. 49, 54 (2013) (arguing that the OCR-mandated process for adjudicating allegations of sexual assault on campus “is fundamentally unfair to the accused” and tends to result in inaccurate findings of responsibility); Barclay Sutton Hendrix, Note, *A Feather on One Side, A Brick on the Other: Tilting the Scale Against Males Accused of Sexual Assault in Campus Disciplinary Proceedings*, 47 GA. L. REV. 591 (2013) (discussing the procedural requirements that OCR has imposed on colleges and universities and arguing that these requirements unfairly disadvantage the accused—who, most often, are men); Elizabeth Bartholet, *Rethink Harvard's Sexual Harassment Policy*, BOS. GLOBE (Oct. 15, 2014), <https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqBM/story.html> [<https://perma.cc/62MG-V29T>] (documenting twenty-eight Harvard Law School professors' opposition to the university's revised sexual harassment policy, which was an effort to comply with OCR's guidance); Law Professors' Open Letter Regarding Campus Free Speech and Sexual Assault (May 16, 2016), <https://www.lankford.senate.gov/imo/media/doc/Law-Professor-Open-Letter-May-16-2016.pdf> [<https://perma.cc/YWL3-GLUM>] (registering twenty-one law professors' concerns about the imperilment of due process on campus). The critiques are not limited to academics. See Peter Berkowitz, *College Rape Accusations and the Presumption of Male Guilt*, WALL STREET J., Aug. 20, 2011, at A13 (arguing that OCR's directives have undermined the due process rights of men accused of sexual assault); Dorment, *supra* note 116, at 97–98, 124 (describing an incident where a school adjudicator treated an accused student unfairly, and suggesting the inappropriateness of a preponderance-of-the-evidence standard of proof); Charles M. Sevilla, *Campus Sexual Assault Allegations, Adjudications, and Title IX*, CHAMPION, Nov. 2015, at 16, 17–18 (arguing that colleges trying to comply with OCR's Title IX guidance have effectively eliminated due process guarantees); James Taranto, *An Education in College Justice*, WALL STREET J., Dec. 7, 2013, at A13 (arguing that OCR's actions left accused students vulnerable to false accusations and unfair procedures, with the effects being felt mostly by men); Emily Yoffe, *The College Rape Overcorrection*, SLATE (Dec. 7, 2014, 11:53 PM), http://www.slate.com/articles/double_x/doublex/2014/12/college_rape_campus_sexual_assault_is_a_serious_problem_but_the_efforts.html [<https://perma.cc/GH63-HL4N>] (arguing that many accused of sexual violence at schools are being treated unfairly).

178. Many scholars have raised the possibility of administrative overreach—that is, of OCR administrators going beyond their charge and circumventing the processes designed to hold them

the historical interpretation advanced in Part I (where the Article connects OCR's recent campaign to a longer battle for a right to freedom from sexual violence) and the historical parallels discussed in Part II: First, what happens when agencies articulate or otherwise advance novel rights, but when actual rights claims must proceed through regulated entities rather than through the regulator (or a court)? Second, how should we think about administratively created rights in a world of mutable administrative interpretations and enforcement schemes? And third, what happens to rights when they are pegged to an agency's incomplete jurisdiction?

accountable to Congress and the public. See Gersen & Suk, *supra* note 19, at 909 (explaining how OCR "achieved complete compliance with its nonbinding guidance document without ever having to defend its reasoning through public comments or judicial review"); Katie Jo Baumgardner, Note, *Resisting Rulemaking: Challenging the Montana Settlement's Title IX Sexual Harassment Blueprint*, 89 NOTRE DAME L. REV. 1813, 1816 (2014) (arguing that OCR has used compliance investigations to give informal guidance documents the same legal force as rules promulgated pursuant to the Administrative Procedure Act); Law Professors' Open Letter, *supra* note 177, at 2–3, 4 (same). See generally Richard A. Epstein, *The Role of Guidances in Modern Administrative Procedure: The Case for De Novo Review*, 8 J. LEG. ANALYSIS 47, 80 (2015) (criticizing OCR's use of guidance documents in the Title IX-sexual assault context and detailing what the author sees as OCR's more general "pattern of abusive guidance behavior"). Arguments about administrative overreach have also appeared in Congress and the courts. See *Examining the Use of Agency Regulatory Guidance: Hearing Before the Subcomm. on Regulatory Affairs and Fed. Mgmt. of the Comm. on Homeland Sec. and Governmental Affairs*, 114th Cong. 18–19, 31–33 (2015); Complaint at 3, *Doe v. Lhamon*, No. 1:16-cv-01158 (D.D.C. June 16, 2016).

A particularly egregious overreach, according to some commentators, is OCR's attempt to change campus climates in ways that override academic freedom and foster a toxic environment of identity politics. See AM. ASS'N OF UNIV. PROFESSORS, *supra* note 177, at 14–21 (documenting cases in which the administration of Title IX on college campuses has arguably intruded on academic freedom and free speech); Wendy Kaminer, *The SaVE Act: Trading Liberty for Security on Campus*, ATLANTIC (Apr. 25, 2011), <http://www.theatlantic.com/national/archive/2011/04/the-save-act-trading-liberty-for-security-on-campus/237833n> [<https://perma.cc/N7UY-446B>] (associating OCR's efforts to enforce Title IX with the decline of civil liberties on college campuses); Laura Kipnis, *My Title IX Inquisition*, CHRON. HIGHER EDUC. (May 29, 2015), <http://laurakipnis.com/wp-content/uploads/2010/08/My-Title-IX-Inquisition-The-Chronicle-Review-.pdf> [<https://perma.cc/8QY6-ZEP8>] (detailing the Title IX complaint leveled against her after she published the previously cited essay and noting the chilling effect that the current climate has on professors); Kipnis, *supra* note 20 (arguing that OCR's efforts to combat sexual misconduct on college campuses have contributed to a climate in which speech is silenced); Law Professors' Open Letter, *supra* note 177, at 3 (registering concerns about free speech). Some critics argue that OCR is encouraging students to assume the posture of children and victims rather than of capable, tolerant adults. Gersen & Suk, *supra* note 19, at 918–23 (noting that recent campus climate surveys—encouraged by OCR—have adopted expansive definitions of sexual violence and suggesting that such measurement devices shape the meaning that students give to their sexual experiences); Kipnis, *supra* note 20 (associating the administration of Title IX on campus with an unhealthy and unhelpful infantilization of adult students).

In a country in which rights remain “the coin of th[e] realm,”¹⁷⁹ these are the kinds of questions that demand consideration. Such consideration appears particularly urgent with regard to sexual violence—a topic that many women and their allies have forced into the news in recent months, following the election of a president accused of multiple incidents of sexual misconduct. This Part begins that exploratory work and sketches out paths for others to follow.

A. *Mediated Rights*

If OCR’s recent enforcement work is indeed bound up with the aspirations of generations of would-be rights claimers—people who believe in a national right to be free from sexual violence and have turned to OCR to advance it—an important question is what happens to actual rights claims when channeled through administrative machinery. Answering that question requires consideration of a more general trend in administrative law and practice: as Professor Kenneth Bamberger has observed, today’s administrative agencies have moved away from a top-down “command-and-control” model of enforcement and instead commonly rely on the expertise and judgment of the private entities that they regulate.¹⁸⁰ What that means for agency-articulated rights may be that rights claims proceed first, and perhaps only, through a regulated institution rather than through the agency itself.

To the extent that individuals are using administrative Title IX complaints to assert a right to be free from sexual violence, that right is filtered, or mediated, in precisely this way. When an individual student claims sexual violation, the key decisionmaker is the student’s college or university, not the federal agency.¹⁸¹ Once made aware of a

179. JAMES T. SPARROW, *WARFARE STATE: WORLD WAR II AMERICANS AND THE AGE OF BIG GOVERNMENT* 260 (2011).

180. See Kenneth A. Bamberger, *Regulation as Delegation: Private Firms, Decisionmaking, and Accountability in the Administrative State*, 56 *DUKE L.J.* 377, 386–99 (2006).

181. State courts are also a potential avenue for legal redress, but not one that victims have been able to rely upon. Only about 12 percent of reported sexual assaults result in arrests. WHITE HOUSE COUNCIL ON WOMEN AND GIRLS, *RAPE AND SEXUAL ASSAULT: A RENEWED CALL TO ACTION* 16–17 (2014). And even with a suspect in hand, prosecutors are notoriously reluctant to file charges. Megan A. Alderden & Sarah E. Ullman, *Creating a More Complete and Current Picture: Examining Police and Prosecutor Decision-Making When Processing Sexual Assault Cases*, 18 *VIOLENCE AGAINST WOMEN* 525, 528 (2012). Private civil suits are another option, and, notably, a handful of states have VAWA-like civil rights remedies on the books. Julie Goldscheid, *The Civil Rights Remedy of the 1994 Violence Against Women Act: Struck Down But Not Ruled Out*, 39 *FAM. L.Q.* 157, 165–71 (2005). But all civil suits require time, money, and a willing

flawed institutional response to such a claim, OCR could, of course, find a violation of the student’s right to equal educational opportunity, and as part of a subsequent resolution agreement with the institution, OCR could help secure such individual remedies as a new housing assignment, a modified class schedule, and reimbursement for the costs of counseling, tuition, and so on.¹⁸² But in terms of adjudicating the wrongfulness of the alleged sexual violation—of saying, “the actions that occurred here violated your bodily integrity and ought to trigger authoritative sanctions”—the formal power rests with the institution.

As for the actual outcomes of campus-level adjudications, research is sparse. Given the rise of the preponderance-of-the-evidence standard in campus disciplinary bodies and OCR’s more visible presence on campus,¹⁸³ some commentators assume that rights claimers now fare well.¹⁸⁴ Beyond scattered anecdotes, however, it is unclear whether institutions now vindicate such claims more frequently than before.¹⁸⁵ Meanwhile, other anecdotes suggest a rights-claiming

lawyer—resources that many victims do not have. Existing doctrine also continues to pose obstacles for plaintiffs. *See generally* Julie Goldscheid, *Elusive Equality in Domestic and Sexual Violence Law Reform*, 34 FLA. ST. U. L. REV. 732, 768–70 (2007) (explaining the challenges that civil claims pose to plaintiffs seeking redress for sexual violence).

182. Dana Bolger, *Gender Violence Costs: Schools’ Financial Obligations Under Title IX*, 125 YALE L.J. 2106, 2112 (2016). Bolger is a cofounder of the sexual assault survivor advocacy organization KYIX, discussed in the text accompanying note 143.

183. *See* Samantha Harris, *Campus Judiciaries on Trial: An Update from the Courts*, HERITAGE FOUND. (Oct. 6, 2015), <http://www.heritage.org/research/reports/2015/10/campus-judiciaries-on-trial-an-update-from-the-courts> [<https://perma.cc/4W4X-AT64>]. The word “rise” is used with caution. Research shows that in 2002—that is, before OCR’s current enforcement campaign—“only one in five colleges and universities identified any standard of proof in their codes [of campus conduct], and [of] those that did, eighty percent used a preponderance of the evidence standard.” Anderson, *supra* note 100, at 46–47.

184. *See, e.g.*, JOHNSON & TAYLOR, *supra* note 20, at 38 (“Obviously, lowering the standard of proof . . . will in and of itself increase the number of accused students found guilty.”); Epstein, *supra* note 178, at 78 (suggesting that “colleges, acting under pressure from the OCR, now commonly expel students accused of sexual harassment or assault,” including students “who are very likely innocent”). Other commentators have suggested that even with the change in the standard of proof, the problem is more likely leniency than over-punishment. *See, e.g.*, Deborah L. Rhode, *Rape on Campus and in the Military: An Agenda for Reform*, 23 UCLA WOMEN’S L.J. 1, 11 (2016).

185. Epstein bases his conclusion on an article from the conservative website *Liberty Unyielding*, which in turn bases its claim on a small sample of anecdotal evidence. Epstein, *supra* note 178, at 91. The *Huffington Post* has gathered data about the rate and severity of discipline, but only since 2011. Tyler Kingkade, *Fewer than One-Third of Campus Sexual Assault Cases Result in Expulsion*, HUFFINGTON POST (Sept. 29, 2014), http://www.huffingtonpost.com/2014/09/29/campus-sexual-assault_n_5888742.html [<https://perma.cc/JH3M-Z3XA>] (drawing on an original data set—records compiled from about three dozen universities—to document a 30 percent expulsion rate among students found responsible for sexual assault).

process that is hardly straightforward. Campus investigations and adjudications continue to take many months, sometimes extending beyond the graduation dates of one or more of the parties.¹⁸⁶ Individual complaints filed directly with OCR may take even longer to resolve,¹⁸⁷ and at least one prominent institution has reportedly offered financial settlements to students in exchange for dropping such complaints.¹⁸⁸ Some complainants describe feeling revictimized by the very process of asserting their rights.¹⁸⁹

These anecdotal findings call to mind research from a closely related field: workplace discrimination—which, recall, has been interpreted to include sexual harassment. Under Title VII of the Civil Rights Act of 1964,¹⁹⁰ an individual claims the right to nondiscrimination by filing a complaint against his or her employer with the EEOC or state-level equivalent; if the agency does not resolve the complaint (in most instances, it does not), the individual files a lawsuit in federal court.¹⁹¹ In practice, however, many more claims are

186. See, e.g., Alex Stuckey & Annie Knox, *Students Who Report Sexual Assaults to Utah Colleges Endure a Traumatic Process*, SALT LAKE TRIB. (May 27, 2016, 11:21 AM), <http://www.sltrib.com/home/3914771-155/not-just-byu-students-at-other> [<https://perma.cc/H5DP-YW7P>] (describing a case in which a university convened a panel nine months after the accusation, after the victim had graduated).

187. See Alyssa Peterson & Olivia Ortiz, *A Better Balance: Providing Survivors of Sexual Violence with “Effective Protection” Against Sex Discrimination Through Title IX Complaints*, 125 YALE L.J. 2132, 2137 (2016); Jake New, *Justice Delayed*, INSIDE HIGHER ED (May 6, 2015), <https://www.insidehighered.com/news/2015/05/06/ocr-letter-says-completed-title-ix-investigations-2014-last-ed-more-4-years> [<https://perma.cc/PQA8-B2WP>] (“It took the U.S. Department of Education’s Office for Civil Rights, on average, 1,469 days to complete campus sexual assault investigations in 2014 . . .”).

188. See Elena Kadvan, *Student: Stanford Offered Settlement for Sexual-Assault Case*, PALO ALTO ONLINE (Dec. 8, 2016, 12:05 PM), <http://paloaltoonline.com/news/2016/12/08/student-stanford-offered-settlement-for-sexual-assault-case> [<https://perma.cc/9VKH-88AW>].

189. Chris Caesar, *Emmanuel College Freshman Says She Won’t Return After School’s Handling of Sex Assault Case*, METRO (Boston, Mass.) (July 26, 2016), <http://www.metro.us/boston/emmanuel-college-freshman-says-she-won-t-return-after-school-s-handling-of-sex-assault-case/zsJpgz--uQHxeJDNMXDU> [<https://perma.cc/2CLE-TAZR>]; David Koon, *How Title IX Hurts the Sexual Assault Victims It’s Supposed to Protect at the University of Arkansas*, ARK. TIMES (July 14, 2016), <http://www.arktimes.com/arkansas/how-title-ix-hurts-the-sexual-assault-victims-its-supposed-to-protect-at-the-university-of-arkansas/Content?oid=4489932> [<https://perma.cc/8UBK-KP95>]; Stuckey & Knox, *supra* note 186; Sarah Schuch, *Lengthy UM-Flint Sex Assault Investigations Frustrate Students*, MLIVE (Aug. 14, 2015 5:00 AM), http://www.mlive.com/news/flint/index.ssf/2015/08/um-flint_students_frustrated_o.html [<https://perma.cc/A53T-FD63>].

190. Civil Rights Act of 1964, tit. VII, 42 U.S.C. § 2000e-2(a) (2012) (prohibiting employers from discriminating against any individual on the basis of “race, color, religion, sex, or national origin”).

191. EDELMAN, *supra* note 105, at 158.

resolved through employers' internal dispute resolution processes than through formal legal channels.¹⁹² In other words, claims of sexual harassment in the workplace are filtered through the institutions that the EEOC regulates, just as claims of sexual assault on campus are filtered through the colleges and universities regulated by OCR. Research into the former suggests that rights claims do not fare well in such settings.¹⁹³

The adjudication of individual rights violations is not the only way that a regulated entity might vindicate a right, however. The regulated entity could also support rights at the "front end" by fostering conditions under which violations are less likely to occur. Here again, research from the field of employment discrimination appears relevant. This research suggests that regulated entities *will* change their practices in order to conform to legal norms, but not necessarily because of any inherent commitment to those norms. Employers, at least, are motivated by the desire to appear legitimate and to minimize the law's encroachment on their power over employees.¹⁹⁴ The result is a heavy reliance on "symbolic structures," policies and procedures that "connote attention to law or legal principles, whether or not they contribute to the substantive achievement of legal ideals."¹⁹⁵ What this has meant in the context of workplace discrimination is a robust commitment to grievance procedures, formal antidiscrimination policies, and other institutionalized signals of good faith, but a thin commitment to establishing diverse and inclusive workplace environments.¹⁹⁶

The analogy to Title IX is imperfect—Title IX does not regulate employers but education providers, and the relationship between these

192. According to Professor Lauren Edelman, "less than 1 percent of perceived instances of employment discrimination proceed[] to trial." *Id.* at 158–59.

193. *Id.* at 128–33; see also Anna-Maria Marshall, *Idle Rights: Employees' Rights Consciousness and the Construction of Sexual Harassment Policies*, 39 *LAW & SOC. REV.* 83, 99, 105 (2005) (finding that when women employees utilized internal grievance procedures to complain about sexual harassment, managers wielded their discretion in ways that discouraged complaints and adopted narrow readings of employees' rights). "[T]o the extent that rights are mentioned," Edelman adds, "it is usually the privacy rights of the perpetrator." EDELMAN, *supra* note 105, at 131.

194. See generally Lauren B. Edelman, Howard S. Erlanger & John Lande, *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 *LAW & SOC. REV.* 497, 515, 530 (1993) (arguing that employers understand compliance with civil rights regulations as good management, and finding that internal complaint procedures strengthen employers' legitimacy and authority).

195. EDELMAN, *supra* note 105, at 5.

196. *Id.* at 100–23.

providers and their students is not (exclusively) “managerial,” even in this era of the corporatized university.¹⁹⁷ And yet the symbolic compliance frame may fit. Consider sociologist Chrysanthi Leon’s observations of her home institution, the University of Delaware, when it was the subject of an OCR investigation in 2014.¹⁹⁸ Leon notes that the university quickly adopted and implemented the kinds of symbolic structures that its lawyers believed OCR wanted to see, including improved procedures for collecting data and policies that adjusted the standard of proof in campus disciplinary proceedings.¹⁹⁹ Leon found little evidence, however, of an institutional commitment to “ending sexual violence.”²⁰⁰

All this is to say: there is a need for rigorous study of what institutions are and are not doing to make freedom from sexual violence a meaningful right on campus, and there are models for doing it. Such research matters because of the light it will shed on the efficacy of administratively created rights—a feature, as I have argued, of modern American governance. It matters, as well, because of what it could suggest about students’ understandings of their rights and what

197. See AM. ASS’N OF UNIV. PROFESSORS, *supra* note 177, at 89–90 (noting the “corporatization of the university” in recent decades).

198. Chrysanthi S. Leon, *Law, Mansplainin’, and Myth Accommodation in Campus Sexual Assault Reform*, 64 U. KAN. L. REV. 987, 988–989 (2016).

199. *Id.* at 1004–16; see also Julie Novkov, *Equality, Process, and Campus Sexual Assault*, 75 MD. L. REV. 590, 612–13 (2016) (stating that administrators, even while “genuinely embrac[ing] the ideological goals” of Title VII, devise policies more focused on “shield[ing] the university” from liability than “resolv[ing] underlying cultural issues and practices that contribute to sexual assault”).

200. Leon, *supra* note 198, at 1016; see also AM. ASS’N OF UNIV. PROFESSORS, *supra* note 177, at 90 (“[C]ollege and university efforts to comply with Title IX have followed the trail blazed by departments of human resources, where the establishment of reporting protocols and internal processes can take precedence over holistic challenges to prevailing gender and sexual norms.”). This critique loses force if we cannot imagine institutional responses that would make rights violations less likely to occur, but that exercise is not difficult in this context. According to multiple recent studies, men belonging to fraternities were three times more likely to commit rape than other men on college campuses. See Elizabeth A. Armstrong, Laura Hamilton & Brian Sweeney, *Sexual Assault on Campus: A Multilevel, Integrative Approach to Party Rape*, 53 SOC. PROBLEMS 483, 489–92 (2006) (linking campus sexual assault to the cultures that fraternities foster and the coercive practices they enable); Catherine Loh, Christine A. Gidycz, Tracy R. Lobo & Rohini Luthra, *A Prospective Analysis of Sexual Assault Perpetration: Risk Factors Related to Perpetrator Characteristics*, 20 J. INTERPERSONAL VIOLENCE 1325, 1339–40 (2005); see also John D. Foubert, Johnathan T. Newberry & Jerry L. Tatum, *Behavior Differences Seven Months Later: Effects of a Rape Prevention Program*, 44 J. STUDENT AFF. RES. & PRAC. 728, 730 (2007) (“Among men on college campuses, fraternity men are more likely to commit rape than other college men.”). To date, however, many institutions have done little to diminish fraternities’ power.

they will (or will not) demand of government institutions going forward.²⁰¹

B. *Mutable Rights*

We tend to see durability as a defining feature of rights, perhaps because we associate rights with the Constitution (difficult to change) and with the courts (bound by precedent). How should we think about rights that emerge from the modern administrative state, in which flexibility and mutability are—at least for now—a defining feature?²⁰² How should we think about the right to freedom from sexual violence, in particular?

To be sure, there are some aspects of OCR's efforts that seem likely to endure. One is the massive rise in Title IX coordinators, institutional employees whose job includes processing complaints of sexual violence and otherwise monitoring compliance with OCR's mandates.²⁰³ Four years after signing its resolution agreement with OCR, Yale University boasts not only a Lead Title IX Coordinator but also two Senior Deputy Title IX Coordinators and eighteen Deputy Title IX Coordinators.²⁰⁴ Three separate Title IX committees, comprised of faculty and staff, provide additional support.²⁰⁵ At smaller

201. For example, research from the domain of employment discrimination suggests that, over time, employees have tended to incorporate their employers' "understandings of law and rights into their own assessments," which in turn has encouraged them "to see rights mobilization as inappropriate." EDELMAN, *supra* note 105, at 160; *see also* Marshall, *supra* note 193, at 111 (describing how some female employees in her study anticipated their supervisors' likely responses to their complaints of sexual harassment and "incorporat[ed] the adversarial response into their own evaluation of the situation").

202. With the Republican Party in control of both Congress and the White House, lawmakers seem likely to attempt to rein in administrative agencies. One way of doing so would be to make it more difficult for agencies to do anything, including change direction. *See, e.g.*, H.R. REP. NO. 114-427 (2015) (requiring that any "major rule" (as defined by the statute) be approved by a joint resolution of Congress prior to taking effect); H.R. REP. NO. 114-185 (2015) (adding substantial procedural and documentation requirements to the informal rulemaking process). I thank Reuel Schiller for these citations and insights.

203. Anemona Hartocollis, *In Battling Sexual Misconduct, Colleges Build a Bureaucracy*, N.Y. TIMES, Mar. 30, 2016, at A1; Audrey Williams June, *Overseeing Sex-Assault Cases Is Now a Full-Time Job*, CHRON. HIGHER EDUC. (Oct. 31, 2014), <http://www.chronicle.com/article/Overseeing-Sex-Assault-Cases/149739> [<https://perma.cc/4WJG-KJCF>].

204. *Office of the Provost: Title IX Coordinators*, YALE UNIV., <http://provost.yale.edu/title-ix/coordinators> [<https://perma.cc/L4G8-C92Y>].

205. *Title IX Committees*, YALE UNIV., <http://provost.yale.edu/title-ix/committees> [<https://perma.cc/GP6T-DLG8>]; *see also* Hartocollis, *supra* note 203, at A1 ("At Yale, nearly 30 faculty and staff members work part time or full time in support of Title IX efforts, and twice as many faculty and staff members and students volunteer as advisers and committee members.").

institutions, the picture is not so different. For example, at Wheaton College in Massachusetts, a Lead Title IX Coordinator, four Deputy Coordinators, and a Sexual Misconduct and Assault Resource Team serve a student body of around 1600.²⁰⁶ There is now even a national organization of Title IX administrators, some 7000 members strong and with every reason to emphasize the value of those members' expertise.²⁰⁷ Extrapolating from the history of compliance officers in academia more generally, we should not expect these trends to reverse, even if signals from OCR change.²⁰⁸

But other aspects of OCR's handiwork seem more vulnerable to change. At the institutional level, much of what OCR has achieved has occurred through a robust use of its enforcement power, culminating in a bevy of resolution agreements. A resolution agreement is no guarantee, however, that a university will remain committed to its promises. Note, for example, OCR's multiple investigations of the University of Notre Dame, notwithstanding a 2011 resolution agreement.²⁰⁹ Note, too, the weakness of such resolution agreements if OCR signals that it will monitor them less rigorously or deploy its enforcement authority more modestly going forward.²¹⁰ Such a path seems likely under the Trump administration, whether because of budget cuts, leadership decisions, or both.²¹¹

206. See *Sexual Assault Information and Resources: Title IX Information*, WHEATON COLL., <https://wheatoncollege.edu/sexual-assault/titleix-information> [<https://perma.cc/K3DH-4CNM>].

207. ASS'N OF TITLE IX ADM'RS, <http://atixa.org> [<https://perma.cc/4DD4-J9GC>].

208. See Samuel R. Bagenstos, *What Went Wrong With Title IX?*, WASH. MONTHLY (Sept./Oct. 2015), <http://washingtonmonthly.com/magazine/septoct-2015/what-went-wrong-with-title-ix> [<https://perma.cc/MY68-AWBL>] (noting that the number of university administrators "has more than doubled in" recent decades, and that much of their work is related to compliance).

209. Tyler Kingkade, *There Are Far More Title IX Investigations of Colleges Than Most People Know*, HUFFINGTON POST (June 16, 2016, 4:49 PM), http://www.huffingtonpost.com/entry/title-ix-investigations-sexual-harassment_us_575f4b0ee4b053d433061b3d [<https://perma.cc/4L24-X2BC>].

210. OCR is committed by regulation to investigating every complaint it receives, 34 C.F.R. § 100.7(b)-(c) (2016), but the precise nature of that investigation is not specified. According to OCR's current Case Processing Manual, OCR has the discretion to dismiss a complaint without opening a formal investigation, and to close an existing investigation, for a number of reasons. See OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., CASE PROCESSING MANUAL 9-13 (2015), <http://www2.ed.gov/about/offices/list/ocr/docs/ocrspm.pdf> [<https://perma.cc/E377-YLMC>]. OCR is also committed by regulation to conducting "periodic compliance reviews," 34 C.F.R. § 100.7(a), but retains broad discretion in how and when it chooses to do so. See Catherine Y. Kim, *Presidential Control Across Policymaking Tools*, 43 FLA. ST. L. REV. 91, 115-20 (2015).

211. See Jake New, *Campus Sexual Assault in a Trump Era*, INSIDE HIGHER ED. (Nov. 10, 2016), <https://www.insidehighered.com/news/2016/11/10/trump-and-gop-likely-try-scale-back-title-ix-enforcement-sexual-assault> [<https://perma.cc/3SS7-TXZB>]; Robin Wilson, *Trump Administration May Back Away from Title IX, but Campuses Won't*, CHRON. HIGHER EDUC.

Consider, as well, the other key piece of OCR's recent campaign: informal guidance, as contrasted with binding, notice-and-comment rulemaking.²¹² A defining feature of informal guidance is that it is less fixed than formal rules and therefore easier to abandon. Recall how quickly the Bush administration shelved OCR's 2001 sexual harassment guidance. Note, as well, the revocation of OCR's controversial transgender bathroom guidance, shortly after the confirmation of Trump appointee Betsy DeVos as Secretary of Education.²¹³ Under DeVos's leadership, the DOE seems likely to emulate this move with regard to the 2011 DCL and other Obama administration sexual assault guidance.²¹⁴ Private lawsuits by

(Nov. 11, 2016), <http://www.chronicle.com/article/Trump-Administration-May-Back/238382> [<https://perma.cc/3YQN-9WJ>]. For a discussion of the susceptibility of OCR's enforcement discretion to presidential influence, as suggested by the Clinton and Bush II administrations' "significant political influence over the agency's exercise of enforcement discretion," see Kim, *supra* note 210, at 109, 116–20. See also James S. Murphy, *The Office for Civil Rights's Volatile Power*, ATLANTIC (Mar. 13, 2017), <https://www.theatlantic.com/education/archive/2017/03/the-office-for-civil-rights-volatile-power/519072> [<https://perma.cc/FNX4-5ZGQ>] (providing a journalistic account of the "pendulum swings" at OCR "between Republican and Democratic administrations").

212. This strategy is not unique to OCR. See Nina A. Mendelson, *Guidance Documents and Regulatory Beneficiaries*, 31 ADMIN. & REG. L. NEWS 8, 8 (2006) ("Federal agencies rely heavily on guidance documents, and their volume is massive."). See generally Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311 (1992) (documenting the use of informal guidance by the Food and Drug Administration, Occupational Safety and Health Administration, Environmental Protection Agency, and many other agencies). Nor is OCR's use of this strategy new. See Kim, *supra* note 210, at 114 (noting that "OCR has issued more than fifty guidance documents over the past twenty-five years" under both Republican and Democratic administrations).

213. Letter from Sandra Battle, Acting Assistant Sec'y for Civil Rights, Office for Civil Rights, U.S. Dep't of Educ., and T.E. Wheeler, II, Acting Assistant Attorney General for Civil Rights, U.S. Dep't of Justice, to Colleagues (Feb. 22, 2017), <https://www.justice.gov/opa/press-release/file/941551/download> [<https://perma.cc/J6DM-N23>].

214. Nick Anderson, *Under DeVos, Education Department Likely to Make Significant Shift on Sexual Assault*, WASH. POST (Jan. 18, 2017), https://www.washingtonpost.com/news/grade-point/wp/2017/01/18/under-devos-education-department-likely-to-make-significant-shift-on-sexual-assault/?utm_term=.20f925b4a90f [<https://perma.cc/4G59-F8FW>]; see also New, *supra* note 211 (noting the precarious status of OCR's sexual assault guidance in the face of both a Trump administration and a GOP-controlled Congress); Peter Schmidt, *Vocal Critic of the Office of Civil Rights Likely to Lead It*, CHRON. HIGHER ED. (Feb. 17, 2017), <http://www.chronicle.com/article/Vocal-Critic-of-Office-for/239225> [<https://perma.cc/2HA8-ENY7>] (reporting that under the Trump administration, the new head of OCR will likely be a vocal critic of the agency's recent approach to sexual assault). The 2013 Campus SaVE Act, which expands the scope of the Clery Act, will prevent a complete reversal, but the Act does not codify all aspects of OCR's recent guidance. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 304, 127 Stat. 54, 89–92. For example, the Act says nothing about the standard of evidence that should be employed in campus disciplinary proceedings. See Susan Hanley Duncan, *The*

disgruntled accused students, alleging violations of due process (and in some instances, violations of their own rights under Title IX), could also require OCR to modify its approach.²¹⁵

Even as to that army of Title IX coordinators—in which one scholar sees OCR’s “colonization” of colleges and universities²¹⁶—there is the possibility of change. Research suggests that many Title IX coordinators come to that role with no prior experience dealing with sexual misconduct,²¹⁷ that they often have substantial institutional responsibilities outside of Title IX,²¹⁸ and that turnover is common.²¹⁹ In other words, these do not appear to be the influential “mezzo-level” bureaucrats that, according to political scientists, have helped entrench policies in other contexts.²²⁰

Devil Is in the Details: Will the Campus SaVE Act Provide More or Less Protection to Victims of Campus Assaults?, 40 J.C. & U.L. 443, 452–53 (2014).

215. For a comprehensive list of these lawsuits, see the database maintained by TITLE IX FOR ALL, <http://www.titleixforall.com> [<https://perma.cc/T7M8-YCYN>]. For a recently published discussion of such suits, see Emily D. Safko, Note, *Are Campus Sexual Assault Tribunals Fair?: The Need for Judicial Review and Additional Due Process Protections in Light of New Case Law*, 84 FORDHAM L. REV. 2289, 2305–23 (2016). To be clear, I am not arguing that OCR has been inattentive to due process. See Anderson, *supra* note 100, at 32 (noting that OCR has consistently affirmed its commitment to the due process rights of parties accused of misconduct); see also Press Release, U.S. Dep’t of Educ., Students Accused of Sexual Misconduct Had Title IX Rights Violated By Wesley College, Says U.S. Department of Education (Oct. 12, 2016), <http://www.ed.gov/news/press-releases/students-accused-sexual-misconduct-had-title-ix-rights-violated-wesley-college-says-us-department-education> [<https://perma.cc/3BAM-VETM>] (publicizing OCR’s finding “that Wesley College violated Title IX by failing to provide accused students with essential procedural protections”). My point is that judicial guidance on this issue is likely to emerge and that it will affect OCR’s policies and practices.

216. R. Shep Melnick, *Adversarial Legalism Meets Political Polarization* (Feb. 29, 2016) (unpublished lecture) (on file with author).

217. Christine Paul, *Navigating Title IX and Gender Based Campus Violence: An Analysis of the Roles and Experiences of Title IX Coordinators* 51 (2016) (unpublished Ph.D. dissertation, University of California, Los Angeles), <http://escholarship.org/uc/item/422513r6> [<https://perma.cc/FRQ2-AYV6>]. *But see* June, *supra* note 203 (noting that among the wave of new Title IX coordinators are “former lawyers with the Office for Civil Rights and longtime equal-opportunity advocates”).

218. See Paul, *supra* note 217, at 90; see also Sarah Brown, *Many Title IX Coordinators Are New to the Job and Juggling Many Duties*, CHRON. HIGHER EDUC. (July 9, 2015), <http://www.chronicle.com/article/Many-Title-IX-Coordinators-Are/231457> [<https://perma.cc/N92U-XXMG>] (discussing the results of a survey conducted at over 400 universities finding that only 10 percent of coordinators and Title IX officials “had no other major responsibilities” outside of their official Title IX duties).

219. See Paul, *supra* note 217, at 99; see also Koon, *supra* note 189 (documenting a “revolving door” at the University of Arkansas’s Title IX coordinator’s office).

220. DANIEL P. CARPENTER, *THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862–1928*, at 19–21 (2001). If it turns out that turnover is not as common as is perceived, we might reach

Indeed, as explained below, Title IX coordinators seem more likely to implicate a different strand of political science research, on the phenomenon of “conversion.” The term refers to the often subtle process by which “political actors are able to redirect institutions or policies to new ends—that is, use them for purposes beyond their original intent”—or even to reverse course completely.²²¹ Conversion is particularly likely to appear in venues that are hard for outsiders to monitor, such as bureaucracies.²²² And notably, the process occurs without accompanying changes in formal policies.²²³

To be certain, not all structures are ripe for this kind of change, but the sexual assault policies and configurations that OCR has incentivized may well be. Conversion tends to occur when there is a “status quo bias” at the level of formal policymaking—as, for example, when the most authoritative decisionmaking body is politically polarized.²²⁴ Congress fits that description well,²²⁵ making a major amendment to Title IX unlikely. Conversion also tends to occur when there is a “well-organized and well-resourced” interest group that “lack[s] a large social base” and thus wishes to avoid a legislative battle, but which nonetheless seeks to undo or remake an existing policy.²²⁶ This might be an apt characterization of the most prominent opponent of OCR’s campus sexual assault policies, the civil libertarian

different conclusions. *See generally* Judith Taylor, *Who Manages Feminist-Inspired Reform? An In-Depth Look at Title IX Coordinators in the United States*, 19 GENDER & SOC. 358 (2005) (finding that although Title IX coordinators in a sample of public school districts did not tend to come to their jobs with a strong commitment to gender equality, some developed that commitment over time).

221. Jacob S. Hacker, Paul Pierson & Kathleen Thelen, *Drift and Conversion: Hidden Faces of Institutional Change 2* (Sept. 17, 2013) (unpublished manuscript), <https://ssrn.com/abstract=2303593> [https://perma.cc/85LW-SFWN].

222. *See id.* at 4, 8–9 (explaining that conversion occurs when “actors are (1) able to redirect an institution or policy to serve ends distinct from those of its creators while (2) leaving its formal rules in place”). In the United States, examples include businesses’ conversion of the Sherman Antitrust Act from a measure designed to regulate big business into a tool to limit union organization, *id.* at 2, and elite economists’ conversion of the Social Security program “from a hybrid compromise between private savings and social insurance” when it was initially enacted in 1935 “to a clear-cut concept of social insurance” by 1939. Daniel Béland, *Ideas and Institutional Change in Social Security: Conversion, Layering, and Policy Drift*, 88 SOC. SCI. Q. 20, 25 (2007).

223. *See* Hacker, Pierson & Thelen, *supra* note 221, at 3.

224. *Id.* at 11.

225. On political polarization and its effect on Congress’s ability to make policy, see generally AMERICAN GRIDLOCK: THE SOURCES, CHARACTER, AND IMPACT OF POLITICAL POLARIZATION (James A. Thurber & Antoine Yoshinaka eds., 2016); Geoffrey C. Layman, Thomas M. Carsey & Juliana Menasce Horowitz, *Party Polarization in American Politics: Characteristics, Causes and Consequences*, 9 ANN. REV. POL. SCI. 83 (2006).

226. Hacker, Pierson & Thelen, *supra* note 221, at 28–29.

Foundation for Individual Rights in Education (FIRE).²²⁷ As yet, no coherent grassroots social movement seeks to undo OCR's work on college campuses,²²⁸ but FIRE and its sympathizers are on the case.²²⁹

A final circumstance that appears to enable conversion is “institutional ambiguity,” the condition of having “multiple, noncomplementary logics or goals.”²³⁰ Such “mutable institutional meanings” create openings for manipulation.²³¹ The institutional configurations that OCR has incentivized on college campuses fit the bill. It is not clear whether these configurations exist primarily to guarantee educational equality, to protect students from sexual violation, to demand fair and equal treatment in campus disciplinary

227. Founded in 1999 by history professor Alan Charles Kors and attorney Harvey Silvergate, FIRE has long critiqued campus disciplinary procedures and their role in what Kors and Silvergate see as a narrowing of free expression and free inquiry on college campuses. *Mission*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., <https://www.thefire.org/about-us/mission> [<https://perma.cc/K4VB-W9NL>]. See generally ALAN CHARLES KORS & HARVEY A. SILVERGATE, *THE SHADOW UNIVERSITY: THE BETRAYAL OF LIBERTY ON AMERICA'S CAMPUSES* (1998) (emphasizing the importance of these rights and criticizing their erosion on college campuses).

228. Such a movement may be in the works, however. See, e.g., Novkov, *supra* note 199, at 607 (describing the activism of a “men’s rights movement” around this issue); Fred Barbash, *‘Toxic Environment’ for Sons Accused of Campus Sex Offenses Turns Mothers into Militants*, WASH. POST (Aug. 29, 2016), https://www.washingtonpost.com/news/morning-mix/wp/2016/08/29/toxic-environment-for-sons-accused-of-campus-sex-offenses-turns-mothers-to-militants/?utm_term=.4a1b3e28771e [<https://perma.cc/7ZTU-C3NJ>] (providing evidence of a nascent parents’ movement, committed to fair treatment for college-age children accused of assault); Charles Huckabee, *U. of Minnesota Football Team Calls a Boycott to Protest Players’ Suspensions*, CHRON. HIGHER EDUC. (Dec. 15, 2016), <http://www.chronicle.com/blogs/ticker/u-of-minnesota-football-team-calls-a-boycott-to-protest-players-suspensions/116162> [<https://perma.cc/2A6A-JVQK>] (documenting a college football team’s decision to boycott all team activities in protest of a sexual assault investigation that resulted in the university’s suspension of ten players); Caroline Kitchens, *Mothers for Due Process*, NAT’L REV. (Aug. 7, 2014, 8:00 AM), <http://www.nationalreview.com/corner/384780/mothers-due-process-caroline-kitchens> [<https://perma.cc/U5DB-RMS2>] (describing the founding of Families Advocating for Campus Equality by three women whose sons “experienced [a] nightmare of false accusations” of sexual assault and “subsequent railroading by university courts”); Max Kutner, *The Other Side of the College Sexual Assault Crisis*, NEWSWEEK (Dec. 10, 2015), <http://www.newsweek.com/2015/12/18/other-side-sexual-assault-crisis-403285.html> [<https://perma.cc/W9F4-XBRF>] (“‘Things are starting to snowball. There’s kind of a gathering storm of resistance,’ says Jonathan Taylor, founder of Boys and Men in Education.”).

229. See generally ROBERT L. SHIBLEY, *TWISTING TITLE IX* (2016) (detailing what the author views as government overreach in its use of Title IX); *FIRE Aims to Challenge Legality of Federal Sexual Misconduct Mandate*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (Apr. 4, 2016), <https://www.thefire.org/fire-aims-to-challenge-legality-of-federal-sexual-misconduct-mandate> [<https://perma.cc/VBU8-4QNA>] (inviting students to help it challenge the legality of OCR’s enforcement campaign).

230. Philip Rocco & Chloe Thurston, *From Metaphors to Measures: Observable Indicators of Gradual Institutional Change*, 34 J. PUB. POL’Y 35, 44 (2013).

231. *Id.* at 44–45.

proceedings, to shield the institution from legal liability, or to change norms around gender, sexuality, and risk-taking. In short, it would not be surprising, in just a few short years, to see campus Title IX bureaucracies as robust as ever but being deployed in a different way, with perhaps no commitment to a right to be free from sexual violence.

But, last, it bears noting how little we know about the relationship between OCR's handiwork and individuals' perceptions of their rights, and hence how little we can say about the consequences of the kinds of changes flagged here. Scholars should pursue this question, keeping in mind that rights consciousness and rights claiming may be as much about culture as they are about formal law and legal structures. Indeed, we should be alert to the possibility that OCR has not been leading here, but following. Understandings of sexual violence may have already shifted among a powerful segment of the population and Title IX may merely be a vehicle for "advanc[ing] the pace of cultural change."²³² If this is true, future policy changes coming from OCR may not matter as much as scholars assume.²³³

C. *Incomplete Rights*

Perhaps the most important aspect of administratively created rights is their incompleteness, owing to the incompleteness of agencies' jurisdictions. Formally, OCR's reach is limited to the educational institutions that accept federal funds. This jurisdiction is hardly trivial—it encompasses over twenty million enrollees in postsecondary

232. Novkov, *supra* note 199, at 608; *see also* Newman & Sander, *supra* note 144 (describing KYIX activists as seeking "culture change"); Emily Suran, Note, *Title IX and Social Media: Going Beyond the Law*, 21 MICH. J. GENDER & L. 273, 308 (2014) (contending that despite Title IX's "ineffective[ness]" as a legal tool, victims of sexual violence have been able to use it to "prompt[] a shift in culture," thanks in large part to savvy uses of social media).

233. A salient comparison here might be to the Food and Drug Administration's efforts to restrict the sale and marketing of cigarettes to youth in the 1990s, in a climate in which many Americans had come to see tobacco as extraordinarily addictive and dangerous. *See* Theodore Ruger, *The Story of FDA v. Brown & Williamson and the Norm of Agency Continuity*, in STATUTORY INTERPRETATION STORIES 334, 364 (William N. Eskridge, Jr., Philip P. Frickey & Elizabeth Garrett eds., 2011) (chronicling the Supreme Court's invalidation of these efforts and noting that "even without the binding force of the federal rules," the agency "almost met" its "bold desire to cut youth smoking in half within seven years"); *see also* Johnson, *supra* note 159, at 1400 (noting that once an agency issues an equality directive, even informally, that directive "can be sustained by [its] own political economy").

institutions and tens of millions more at the elementary and secondary levels²³⁴—but it is far from universal.

Such jurisdictional limits raise equality concerns. In this case, it means that individuals who are no longer, or have never been, part of educational communities have no access to the administratively created right. To the extent that such individuals want to assert a right to be free from sexual violence, they must do so in spaces (state courts) and through systems (state and local law enforcement) that have been notoriously unreceptive to such claims.²³⁵ Important reforms have occurred in recent decades,²³⁶ but scholars and activists continue to document shortcomings, ranging from failures to investigate complaints of sexual assault²³⁷ to disturbingly low arrest and prosecution rates.²³⁸ These state and local realities raise the prospect of a “dual system” of sexual assault law: one for relatively elite, educated young adults (the people who appear to be the prime beneficiaries of OCR’s current campaign) and the other for everyone else.²³⁹

Agencies’ limited jurisdiction may be problematic in another way, as well: it implies that agencies, or even different branches of the same agency, may adopt varying approaches to the same basic right, and that some administrative constituencies thus may have weaker rights than others.²⁴⁰ Over time, the right at issue might become uncontroversial, but so too might its variability.

234. *Digest of Education Statistics: 2015*, NAT’L CTR. FOR EDUC. STATISTICS (Dec. 8, 2016), http://nces.ed.gov/programs/digest/d15/tables/dt15_303.10.asp?referrer=report [<https://perma.cc/D9GQ-K9YG>].

235. Anderson, *supra* note 100, at 1959–62.

236. *Id.* at 1949–52.

237. *Id.* at 1959–62.

238. *Id.*; Alderden & Ullman, *supra* note 181, at 525–26.

239. The phrase “dual system” comes from the equal protection scholar Jacobus tenBroek. He famously documented one system of family law for the poor, articulated through public benefits laws and enforced by administrators, and another system for everyone else, embodied in the family law provisions of the state civil code. See generally Jacobus tenBroek, *California’s Dual System of Family Law: Its Origin, Development, and Present Status: Part I*, 16 STAN. L. REV. 257 (1964); Jacobus tenBroek, *California’s Dual System of Family Law: Its Origin, Development, and Present Status: Part II*, 16 STAN. L. REV. 900 (1964); Jacobus tenBroek, *California’s Dual System of Family Law: Its Origin, Development, and Present Status: Part III*, 17 STAN. L. REV. 614 (1965) [hereinafter tenBroek, *Dual System: Part III*]. Conventional family law had flaws, to be sure, but the family law of the poor was shot through with “punitive, repressive, discriminatory, [and] exclusionary” tendencies. tenBroek, *Dual System: Part III, supra*, at 680.

240. This is not a theoretical point: historical case studies have documented this phenomenon. Compare Tani, *supra* note 165 (arguing that administrators within HEW adopted a generous reading of welfare recipients’ right to equal protection in the 1950s), with Milligan, *supra* note 158 (arguing that, during the same period and in the same agency, administrators adopted a narrow

Regarding the right to be free from sexual violence, this disparity is already apparent. Compare OCR's efforts to protect the rights of college students to the policies and practices documented in the U.S. Department of Defense, which has jurisdiction over members of the armed forces. Like OCR, the Department of Defense has devoted increased attention to the issue of sexual assault in recent years. It now recognizes a broader array of behavior as sexual misconduct and encourages reporting and investigation.²⁴¹ According to critics, however, the agency's existing policies and procedures continue to enable retaliation against victims who disclose sexual assault. When victims do report, policies and procedures incentivize the investigator (the victim's commanding officer) to dismiss claims, often by deflecting blame onto the victim.²⁴²

Even more stark is the difference between these two groups and prisoners. Americans have a long tradition of according prisoners fewer and weaker rights, but if the Prison Rape Elimination Act of 2003²⁴³ is any indication (enacted with unanimous support from both parties), there is an emerging consensus around prisoners' right to freedom from sexual violence.²⁴⁴ The actual content of that right has depended largely on administrators, however—on the findings and interpretations of the National Prison Rape Elimination Commission, charged by Congress with developing national standards for correctional facilities; on the approval and enforcement discretion of the DOJ, charged with formally promulgating standards, monitoring compliance, and imposing sanctions for noncompliance; and on the

reading of the right to equal protection when it came to children and public education). *See generally* Lee, *supra* note 161 (documenting opposing approaches to the constitutional guarantee of equal protection in two agencies during the same era).

241. *See generally* Jessica A. Turchik & Susan M. Wilson, *Sexual Assault in the U.S. Military: A Review of the Literature and Recommendations for the Future*, 15 *AGGRESSION & VIOLENT BEHAV.* 267 (2010) (examining sexual assault within the military and assessing the adequacy of the military's response to these problems).

242. Rhode, *supra* note 184, at 21–23; Ann-Marie Woods, Note, *A "More Searching Judicial Inquiry": The Justiciability of Intra-Military Sexual Assault Claims*, 55 *B.C. L. REV.* 1329, 1350 (2014).

243. Prison Rape Elimination Act of 2003, Pub. L. No. 108-79, 117 Stat. 972 (codified as amended at 42 U.S.C. §§ 15601–15609 (2012)).

244. Prison Rape Elimination Act of 2003 § 3 (codified at 42 U.S.C. § 15602 (2012)) (establishing "a zero-tolerance standard for the incidence of prison rape in prisons the United States"). *See generally* Valerie Jenness & Michael Smyth, *The Passage and Implementation of the Prison Rape Elimination Act: Legal Endogeneity and the Uncertain Road from Symbolic Law to Instrumental Effects*, 22 *STAN. L. & POL'Y REV.* 489 (2011) (documenting the reform efforts that led to the enactment of the law, including the human rights framing adopted by key stakeholders).

day-to-day actions of federal, state, and local correctional authorities. The results have been sobering. Prisoners had to wait nearly ten years for the implementation standards to take effect.²⁴⁵ And although those standards do seem likely to endure changes in the political winds—because, unlike the 2011 DCL, the standards emerged from formal notice-and-comment rulemaking—prisoners’ advocates have already voiced sharp criticisms, with some noting the standards’ *adverse* effect on prisoners’ rights.²⁴⁶

Perhaps there are good reasons for allowing the right to freedom from sexual violence to vary from group to group. Perhaps not. But such inquiries will not proceed at all without the crucial first step—taken here—of acknowledging the existence of separate administrative tracks and treating these tracks as historical constructions rather than natural divisions.²⁴⁷

CONCLUSION

“Every woman and man has a God-given right to be free from sexual violence,” Vice President Biden insisted in 2014, twenty years after the enactment of VAWA’s novel civil rights remedy and fourteen years after the Supreme Court eviscerated the same.²⁴⁸ The setting for this remark, notably, was a press conference to announce OCR’s 2014 Title IX guidance for colleges and universities. Thanks in large part to OCR’s efforts, numerous colleges and universities have now translated

245. See National Standards to Prevent, Detect, and Respond to Prison Rape; Final Rule, 77 Fed. Reg. 37, 106, 37,106 (June 17, 2012) (providing an effective date of Aug. 20, 2012).

246. See Gabriel Arkles, *Prison Rape Elimination Act Litigation and the Perpetuation of Sexual Harm*, 17 N.Y.U. J. LEGIS. & PUB. POL’Y 801, 833 (2014) (arguing that the Prison Rape Elimination Act, “[d]espite its articulated goal of ending sexual abuse in detention,” has “often failed imprisoned survivors of sexual abuse in litigation, and has even been turned against them”); Lenny Gallo, *Human Rights and Prison Rape*, 2 21ST CENTURY SOC. JUST. 1, 4–5 (2015) (observing that the Prison Rape Elimination Act is often discriminatory in application, making it far from the human rights milestone that it appears to be); Giovanna Shay, *PREA’s Peril*, 7 NE. U. L.J. 21, 21 (2015) (seeing in the Prison Rape Elimination Act a danger of “creating more ‘LGBT-friendly’ ways of celling people without reducing our nation’s unprecedented reliance on incarceration”).

247. For a useful model, consider the scholarship by historians and social scientists on the “two-track” welfare state. TANI, *supra* note 168, at 9 & n.26.

248. Timothy M. Phelps, *Guidelines to Curb Campus Sexual Assaults Raise Concerns for Accused*, L.A. TIMES (Apr. 29, 2014, 7:12 PM), <http://www.latimes.com/nation/nationnow/la-nann-guidelines-to-curb-campus-sexual-assaults-20140429-story.html> [<https://perma.cc/F4XA-C9FF>]; see also Michele Richinick, *Obama Admin: Freedom from Sexual Assault a Basic Human Right*, MSNBC (Jan. 22, 2014, 12:30 PM), <http://www.msnbc.com/morning-joe-17> [<https://perma.cc/6F4V-U7GT>] (quoting Biden as describing “[f]reedom from sexual assault” as “a basic human right”).

Biden’s natural law claim into something more like positive law. In locations from Texas to Alaska, and in institutions ranging from small theological seminaries to major state universities, formal policies inform members of campus communities that they “have the right to be free from sexual violence.”²⁴⁹

The central claim of this Article is that scholars have not focused enough on this story—the story of how, in protecting the right to educational equality, OCR has become enmeshed in a decades-long campaign for a broader and arguably more fundamental right: the right of all Americans, in all pockets of the nation, to be free from sexual violence. Scholars will no doubt continue to explore OCR’s respect for due process and its fealty to congressional mandates—classic administrative law concerns. But my hope is that we never again lose sight of the social and political contexts excavated here, and that administrative scholarship more generally will consider the longer historical arcs that inform what happens inside the administrative state.

Other aspects of this Article are more in the nature of an invitation—to join me in exploring a set of research questions that, to me, feel urgent and understudied. No additional research is needed, however, to support one final observation. As I have written elsewhere,

249. See, e.g., *About Title IX*, TEX. A&M UNIV.–CENT. TEX., <https://www.tamuct.edu/departments/compliance/titleix.php> [<https://perma.cc/M6CH-7LJJ>]; *Campus Policies and Procedures*, WAKE TECH CMTY. COLL., <https://www.waketech.edu/student-services/catalog/campus-policies-and-procedures> [<https://perma.cc/9RE2-5BD2>]; *Campus Safety*, CENT. CHRISTIAN COLL. OF THE BIBLE, <https://www.cccb.edu/about/campus-safety> [<https://perma.cc/EKU9-KK7T>]; *Gender & Sexual Violence*, UNIV. OF W. FLA., <http://uwf.edu/offices/wellness-services/gender-and-sexual-violence/gender-and-sexual-violence-overview> [<https://perma.cc/BJA4-QX37>]; *Sexual Misconduct*, UNIV. OF COLO., BOULDER, <http://www.colorado.edu/studentaffairs/sexual-misconduct> [<https://perma.cc/YC85-4UAH>]; *Sexual Misconduct and Gender-based Violence Policy and Definitions*, VASSAR COLL., <http://security.vassar.edu/statistics/sexassault.html> [<https://perma.cc/XB4P-DDHD>]; *Sexual Misconduct and Title IX*, ARAPAHOE CMTY. COLL., <https://www.arapahoe.edu/campus-life/sexual-misconduct-and-title-ix> [<https://perma.cc/AW2H-BGSK>]; *Sexual Misconduct, Harassment, and Title IX*, CAÑADA COLL., <http://canadacollege.edu/student-services/sexualmisconduct.php> [<https://perma.cc/BWD7-ES9B>]; *Sexual Misconduct Information*, AMARILLO COLL., <https://www.actx.edu/forms/smi> [<https://perma.cc/H6BG-8H3E>]; *Sexual Misconduct Policy*, ASHLAND UNIV., <https://www.ashland.edu/student-affairs/student-services/title-ix/sexual-misconduct-policy-0> [<https://perma.cc/TZJ3-C376>]; *Sexual Misconduct Policy*, CARROLL UNIV., https://my.carrollu.edu/ICS/Departments/Office_of_Student_Conduct/Sexual_Misconduct.jnz [<https://perma.cc/J44H-HTBU>]; *Sexual Respect & Title IX*, OCCIDENTAL COLL., <http://www.oxy.edu/sexual-respect-title-ix/policies-procedures> [<https://perma.cc/75U2-5HA5>]; *Sexual Violence Prevention and Response*, UNIV. OF OR., <https://president.uoregon.edu/content/sexual-violence-prevention-and-response> [<https://perma.cc/2GFW-XXBK>]; *Title IX*, KODIAK COLL., <http://www.koc.alaska.edu/about/title-ix.cshtml> [<https://perma.cc/F3RC-6UF8>]; *Title IX*, NE. JUNIOR COLL., <http://www.njc.edu/Human-Resources/Title-IX> [<https://perma.cc/Z73Y-ENF8>].

rights language is not just a way for people to make claims on the state; it can also be a way for the state to make claims on people.²⁵⁰ When the state speaks to subjects in rights terms, it does not simply say, “I see you as a rights-bearing individual.” It makes a statement about *jurisdiction*, and invites the individual to invoke that jurisdiction, even as against other powerful actors. It says, “You are mine and I am yours. Come to me for protection, and hold me to account.” These are potent messages about the content of citizenship and the scope of state power. In the post–Civil War United States, this has been a prominent and important theme.²⁵¹

But the state is not a monolith, nor is its logic ever entirely stable,²⁵² so we should not be surprised to see pockets of the state, such as particular administrative agencies, pioneering new rights claims or salvaging rights claims that have been gained and lost in other venues. This, at the end of the day, may be the best way to understand OCR’s recent work in the realm of sexual violence, even if OCR itself has proclaimed much more modest aims. As with Congress’s enactment of VAWA, OCR’s enforcement campaign has sent signals about both the nature of American citizenship and the nature of American governance. It has signaled that vulnerability is not a disqualification from citizenship, and that vulnerability itself may be produced by the state. It has signaled that part of the work of the national government is to see across intra-jurisdictional boundaries, spotting recurring patterns of oppression. And it has signaled that individual instances of

250. TANI, *supra* note 168, at 278–79.

251. *Id.* See generally LAURA F. EDWARDS, A LEGAL HISTORY OF THE CIVIL WAR AND RECONSTRUCTION: A NATION OF RIGHTS (2015) (arguing that the Civil War and Reconstruction ushered in a new legal order, one in which Americans were encouraged to see themselves as holders of individual rights and to see the federal government as the protector of those rights, including against infringements by state and local officials); SPARROW, *supra* note 179 (documenting the new rights that the federal government offered Americans during the World War II era, a time when the federal government also claimed new powers and made bolder demands on citizens).

252. These are themes of my previous work, see generally TANI, *supra* note 168 (laying out my understanding of the modern American state), but I have drawn inspiration from many others. See, e.g., WILLIAM J. NOVAK, THE PEOPLE’S WELFARE: LAW & REGULATION IN NINETEENTH-CENTURY AMERICA 235–48 (1996) (describing a shift in the logic of American governance after 1877); KAREN ORREN & STEPHEN SKOWRONEK, THE SEARCH FOR AMERICAN POLITICAL DEVELOPMENT 108–18 (2004) (noting that broad transformations in governance do not happen seamlessly and therefore that, at any given juncture, different public authorities may not operate according to the same logic). See generally MARGOT CANADAY, THE STRAIGHT STATE: SEXUALITY AND CITIZENSHIP IN TWENTIETH-CENTURY AMERICA (2009) (showing how federal administrators in different corners of the modern administrative state have grappled with the existence of homosexuality).

violence and violation may have an aggregate meaning—that they may systematically disadvantage an entire segment of the political community, in ways that strike at the core of what it means to belong to the whole.

Whether those signals will fade or strengthen in the coming years, it is impossible to say. Clearly, however, many people have heard those signals and the promises they carry. I have heard those signals and am moved—even as I recognize the complexities and costs of translating them into concrete practices. If history is any indication, adherents to this vision of citizenship and governance will continue to pursue it, in whatever forum is available.