1/20,000TH OF A PERSON?: DEMOCRACY AND PROTECTING EQUAL RIGHTS IN NOTICE AND COMMENT RULEMAKING

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Abstract

Notice-and-comment rulemaking is a key function of the U.S. administrative state, thought to give members of the public access to the process of government decision-making. However, notice-and-comment rulemaking fails to accomplish that goal, and its deficiencies have critical implications for U.S. democracy and for the role of women and other traditionally underrepresented groups in that democracy.

This Article examines the many ways in which notice-and-comment rulemaking has fallen short of its central purpose through a case study of a 2018–19 rulemaking dealing with enforcement of Title IX's prohibition on sexual harassment. Members of the public, mobilized by activists, filed a historic 124,000+ comments in that rulemaking. This author created and led a "crowd-research" innovation to catalog ninety-four percent of those comments.

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Analysis of that rulemaking and its comments exposes rulemaking's oligarchic tendency to value technocratic practices above democratic ones, a tendency that is particularly problematic in the case of rulemakings that implicate civil rights and discrimination. This Article proposes a path for agencies to avoid notice-and-comment rulemaking's failings by supplementing traditional processes with a modified form of negotiated rulemaking.

INTRODUCTION

The years that the 45th President of the United States[1] was in office witnessed several developments that come together in this Article. First, the administration that came into power on January 20, 2017, launched a broad-based attack on the infrastructure of the federal government, what we generally refer to as "the administrative state." Second, and linked to this attack, was a concerted effort to undermine democratic institutions and values, culminating in 45's attempted coup on January 6, 2021.[2] Third, and perhaps most obvious, in light of much evidence of 45's racism, sexism, and xenophobia, including dozens of instances—both proven and highly credible—in which 45 reportedly sexually harassed and assaulted women, 45's administration attacked the civil and human rights of immigrants, non-white populations, women, and LGTBQ+ people, especially gender minorities.

Fourth, a "Resistance" to 45's administration launched, led primarily by women of color and mobilizing millions of primarily cisgender women who became visibly politically active in a way that the United States has not seen since the first and second "waves" of the women's movement.[3] This Resistance began with the Women's March the day after 45's inauguration, and within weeks and months it transitioned into widespread protests of 45's so-called Muslim travel ban, the #MeToo movement, and an unprecedented wave of women running for political office.[4] This Resistance also drew from other major movements that pre-date but achieved national visibility during 45's administration, including the student-

1 In solidarity with efforts to keep references to the name of 45th President of the United States to a minimum after he stopped being President but continued (and continues) to perpetuate "The Big Lie" regarding the election of President Biden, this Article will refer to the 45th President as "45" or through other terms and descriptions that do not use his name.

2 *Capitol Riots Timeline: What Happened on 6 January 2021?*, BBC NEWS (Aug. 2, 2023), https://www.bbc.com/news/world-us-canada-56004916 [https://perma.cc/A6LL-F7M5].

3 *See generally* Susan Chira, *Donald Trump's Gift to Feminism: The Resistance*, 149 DAEDALUS 72 (2020).

4 Sandro Galea, *Social Movements in the Trump Era*, BOS.UNIV. SCH. OF PUB. HEALTH (June 29, 2018), https://www.bu.edu/sph/news/articles/2018/social-movements-in-the-trump-era/ [https://perma.cc/NRQ6-8XKC].

led gun control movement, the DREAMer-led immigration reform movement, and, of course, Black Lives Matter.[5]

One series of actions launched by that Resistance—and those at the center of this Article—sought to counter all three of 45's attacks together. These actions responded to a specific move by 45's administration regarding Title IX of the Education Amendments of 1972 ("Title IX"), the civil rights law prohibiting federally-funded educational programs (including almost all of the United States' schools, from pre-kindergarten through graduate education) from engaging in gender-based discrimination. When 45's administration came into power, a robust civil rights movement of college campus sexual violence survivors and their allies had raised the profile of Title IX significantly, and the U.S. Department of Education ("ED") Office for Civil Rights ("OCR") under President Obama had responded with the most powerful enforcement measures against sexual harassment and gender-based violence in its history.[6]

However, as we have seen repeatedly since the 2016 election, the second time this century that a Presidential candidate won the national popular vote but lost the Electoral College (an institution created by slavery and the constitutional Three-Fifths Compromise),[7] the Resistance had to fight against some hurricane-force headwinds. These opposing forces would have been present had the Resistance chosen to counter any one of the three attacks being led by 45 by itself, so fighting all three together was that much more challenging. Like with the Electoral College, moreover, these headwinds are fed by undemocratic institutions—this time the undemocratic institutions of the administrative state—that were crafted to exclude all but a very few from equal, or indeed *any*, participation in the American state. These institutions then bolstered the attacks on equality, civil rights, and democracy itself during 45's years in power.[8]

5 *Id.*

6 The status of these activist efforts as a national "movement" is confirmed by much evidence, including a symposium at Yale Law that included many articles by activists in the movement, on which I commented. *See* Nancy Chi Cantalupo, *For the Title IX Civil Rights Movement: Congratulations and Cautions*, 125 YALE L.J.F. 281 (2016) [hereinafter *For the Title IX Civil Rights Movement*].

7 *See* Maya Francis, *How the Electoral College is Tied to Slavery and the Three-Fifths Compromise*, TEEN VOGUE (July 14, 2020), https://www.teenvogue.com/story/electoral-college-slavery-three-fifths-compromise-history [https://perma.cc/LAF3-YPJC].

8 John Cassidy, *Why It's Right to be Mad About Kavanaugh and the Supreme Court*, NEW YORKER (July 11, 2018), https://www.newyorker.com/news/our-columnists/why-its-right-to-be-mad-about-kavanaugh-and-the-supreme-court [https://perma.cc/G6LN-VFJY].

As a central example of such attacks, this Article considers the rulemaking dealing with Title IX's prohibition of sexual harassment and gender-based violence, conducted under the leadership of 45's ED Secretary Betsy DeVos ("DeVos rulemaking").[9] That rulemaking and the activism around it—including a new legal backstop of sorts that I created and led (named the "Big Comment Catalog" by some of the approximately 600 volunteers working on it)—exposed numerous problems and conflicts both within and surrounding the rulemaking process. These difficulties are both fundamental to rulemakings in general and disturbingly inequitable in the case of certain rulemakings, particularly those, like the DeVos rulemaking, which implicate discrimination and civil rights. These challenges mean that agencies—especially those regulating on issues involving equal protection of the law—should not solely follow traditional rulemaking processes. Agencies should instead, on appropriate and relatively discrete regulatory issues, opt to use a modified form of negotiated rulemaking that I propose and detail in this Article.

The DeVos rulemaking took place after approximately a half-decade of student survivor and ally organizing, especially at colleges and universities, against schools' indifference toward sexual harassment, gender-based violence, and their victims.[10] This "Title IX Movement" (or "Movement") accomplished and continues to prompt enormous changes in how we address sexual harassment and gender-based violence, inside and outside education. The DeVos rulemaking thus represents a distressingly efficient, multipronged form of backlash to the Title IX Movement's successes, since 45's administration collaborated with dark money-funded organizations and men's rights activists[11] to write regulations that violate Title IX itself. Unsurprisingly, therefore, the Notice of Proposed Rulemaking (the first step in the federal administrative law process generally referred to as "notice-and-

9 34 C.F.R. § 106 (2018).

10 Anna K. Danziger Halperin, *As Title IX Turns 50, Students Continue to Protest Sex Discrimination*, WASH. POST (June 10, 2022), https://www.washingtonpost.com/outlook/2022/06/10/title-ix-turns-50-students-continue-protest-sex-discrimination/ [https://perma.cc/4F2H-SVUY].

11 These collaborations have been documented by both myself and *The Nation*. *See* Hélène Barthélemy, *How Men's Rights Groups Helped Rewrite Regulations on Campus Rape*, THE NATION (Aug. 14, 2020), https://www.thenation.com/article/politics/betsy-devos-title-ix-mens-rights/ [https://perma.cc/R4SN-R4EL]; Nancy Chi Cantalupo, *Dog Whistles and Beachheads: The Trump Administration, Sexual Violence & Student Discipline in Education*, 54 WAKE FOREST L. REV. 303, 343–47 (2019) [hereinafter *Dog Whistles and Beachheads*]. Others have reported on how many men's rights groups, including those that have appeared on the Southern Poverty Law Center's "hate map," use "extreme misogyny" as a "gateway drug" to lure cisgender men into white supremacy. *See*, *e.g.*, Aja Romeno, *How the Alt-Right's Sexism Lures Men into White Supremacy*, VOX (Apr. 26, 2018), https://www.vox.com/culture/2016/12/14/13576192/alt-right-sexism-recruitment [https://perma.cc/6M8J-GL5W].

comment rulemaking") that began the DeVos rulemaking ("DeVos NPRM") was met with massive hostility.

Fortunately for Movement activists and others in the Resistance that joined them, notice-and-comment rulemaking provides an outlet for such hostility, via the "comment" part of the process. That is, once an agency has proposed a rule via an NPRM, it is required to give the general public a certain amount of time to file comments with the agency on that proposal. The agency is then required to read, consider, and make any changes to the proposed rule that the agency judges the comments to warrant, before finalizing the rule with an explanation of what the comments said, how they did or did not lead the agency to change the rule, and why.

In response to the DeVos NPRM, over 124,000 comments were filed—a deluge that research conducted for this Article confirms overwhelmingly opposed not only virtually all of the DeVos NPRM's content, but the very existence of the DeVos rulemaking in the first place.[12] This public participation—remarkable both because of its massive size and the fact that most of the commenters were ordinary civilians—resulted from a determined national organizing effort led by Title IX Movement activists and joined by those protesting sexual harassment via #MeToo and the Women's March, as well as many other allies.[13] Nevertheless, DeVos's ED ignored what is now *documented evidence* of intense public antagonism to its proposals,[14] finalizing them in May 2020 with no major changes from the DeVos NPRM. In addition, DeVos's ED was completely uninfluenced by the fact that the bulk of the comments were filed by commenters who do not fit the typical commenter profile (here, such typical "insider commenters" would include education industry groups,

12 See discussion *infra* Part I.

13 Nancy Chi Cantalupo, Matthew Cortland & Karen Tani, *Reclaiming Notice and Comment: Part II*, L. & POL. ECON. PROJECT (Aug. 2, 2019), https://lpeproject.org/blog/reclaiming-notice-and-comment-part-ii/ [https://perma.cc/G6SE-8D9H].

14 Thomas Dircks et al., Overwhelming Opposition: The American Public's Views on the Devos Title IX Rulemaking of 2018–2020 (July 2, 2022) (unpublished manuscript) (available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4152477 [https://perma.cc/AH5J-JGYA]). This Article reports on some of the data collected in the Big Comment Catalog. The data included in the "Overwhelming Opposition" report was selected by the co-authors of the report based on their determinations as to what data would be of most potential use to the public. However, the co-authors surmised that they would not anticipate all the data questions the public may have. As such, and in order to make the data available to other researchers, the full Big Comment Catalog database is included as an appendix to the "Overwhelming Opposition" report. Where this Article discusses data and analysis included in the "Overwhelming Opposition" report, it will cite to that report. Any such discussions herein can be further verified by going to Appendix B of the "Overwhelming Opposition" report, which contains the Big Comment Catalog data.

public interest organizations, and experts like individual faculty members who conduct relevant research),[15] commenters to whom agencies have at least given lip service in the past for wanting to be involved in rulemaking.

The DeVos rulemaking thus uncovered a fundamental contradiction between what rulemaking is supposed to be and do, at least in the eyes of "outsider commenters,"[16] and what it actually is—a contradiction best understood by returning to the oligarchic headwinds mentioned above, headwinds also present in the administrative state. Indeed, the administrative state has been plagued from its very inception by its lack of constitutional definition as a branch of government, preventing it from being subject to any constitutional check or balance.[17] As a result, through the Administrative Procedure Act ("APA"), Congress put in place various ways that all three constitutional branches can check administrative agencies, including one check held, according to one interpretation of the APA, directly by the American public, via what some call the "commenting power."[18]

The narrative surrounding the commenting power maintains that notice-and-comment rulemaking is structured to facilitate ordinary people's participation in national

15 Note that approximately 1,500 of the comments catalogued may fit into these categories, with a majority of these traditional comments also strongly opposing the DeVos NPRM. I base this estimate on the following analysis: Comments fitting the definition of traditional "insider comments" likely included an attachment. However, the Big Comment Catalog also tracked postcards which, because they were written by hand, were uploaded to regulations.gov as attachments. 18,640 comments were cataloged as having attachments, and 17,121 were cataloged as being postcard comments. The difference between the two numbers is 1,519. However, comments such as hand-written letters or short comments nevertheless filed as an attachment—i.e., comments that do not fit the definition of traditional "insider comments"—might be included in the 18,640 comments with attachments but not in the 17,121 postcard comments. In addition, the Big Comment Catalog was unable to access and/or catalog approximately 6,800 comments that ED indicated were filed.

16 Such outsiders include: (1) those not perceived as having technical expertise in the subject matter of the rulemaking; (2) those who use stories about their individual experiences to explain how proposed rules will affect their lives; and (3) those perceived as "clicktivists" who have been organized by "interest groups" to flood an agency with comments (often boilerplate) that mainly express a policy preference without explaining it using new and/or unique evidence, research, and analysis. *See Fake It Till They Make It: How Bad Actors Use Astroturfing to Manipulate Regulators, Disenfranchise Consumers, and Subvert the Rulemaking Process*: *Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Fin. Servs.*, 116th Cong. 139–69 (2020) [hereinafter *Astroturfing Hearings*] (statement of Beth Simone Noveck, Professor and Director, The Governance Lab, N.Y. Univ.).

17 Mark V. Tushnet, *The Administrative State in the Twenty-First Century: Deconstruction and/or Reconstruction*, 150 DAEDALUS: J. AM. ACAD. ARTS & SCIS. 5 (2021).

18 Donald J. Kochan, *The Commenting Power: Agency Accountability Through Public Participation*, 70 OKLA. L. REV. 601, 601–02 (2018).

policymaking, as well as hold the administrative state accountable. This rulemaking narrative is arguably at the core of President Obama's well-known Open Government Executive Order, signed his first day in office.[19]

In practice, however, at least until very recently, ordinary people have almost never participated in rulemaking. Traditionally, rulemakings have been dominated by the "regulated industry," as well as other occasional rulemaking insiders, such as public interest organizations, which file, at most, a few hundred comments per rulemaking, almost always written by lawyers.[20] Furthermore, on the agency staff's side, the arguable main function of rulemaking is to funnel to the agency previously-unidentified technical expertise and new "sophisticated" ideas regarding the subject matter of the regulation. So, for most of its existence and to this day, for the vast majority of rulemakings, the process has achieved only technocratic purposes, whereby insider commenters convince the agency to regulate in certain ways based on their analyses (especially economic ones) of proposed rules, often relying on support from expensive research conducted by the commenter.[21] Unsurprisingly, this reality means that commenters such as corporations that anticipate their profits being affected by the rulemaking become the most inside of the insiders, often leading to objections that an agency has been "captured" by the industry that it is supposed to regulate.

More recent rulemakings on certain topics, with the assistance of e-technologies, have led to the phenomenon of "mass commenting," which can generate comments in the thousands to the millions,[22] often through "boilerplate" comments (comments that use the same or virtually the same language). Initially, such mass commenting may seem like a positive method for encouraging more use by the public of the commenting power; however, it has been countered by a well-known convention amongst agencies, which treats boilerplate comments, no matter how many people have filed the same or virtually the same comment, as a single comment.[23]

19 Transparency and Open Government, 74 Fed. Reg. 4685, 4685 (Jan. 21, 2009) ("Executive departments and agencies should offer Americans increased opportunities to participate in policymaking . . .").

20 Reeve T. Bull, *Democratizing and Technocratizing the Notice-and-Comment Process*, BROOKINGS (Oct. 12, 2021), https://www.brookings.edu/blog/up-front/2021/10/12/democratizing-and-technocratizing-the-notice-and-comment-process/ [https://perma.cc/GV42-NB3X].

21 Daniel P. Carpenter et al., *Inequality in Administrative Democracy: Methods and Evidence from Financial Rulemaking*, HARV. UNIV. (July 20, 2023).

22 *See Dog Whistles and Beachheads*, *supra* note 11.

23 *Id.*

As a practical matter, then, even though mass commenting—and its seeming facilitation of Americans' use of their commenting power—would appear to be a democratizing force in rulemaking, conventions such as the boilerplate comment convention reduce hundreds to millions of people's views into that of a single person. Such a dilution amounts to a basic and complete dismissal of those commenters in a manner not only reminiscent of the Electoral College's connections to the Three-Fifths Compromise,[24] but also of campuses' treatment of sexual assault reports, as detailed in an op-ed by Catharine MacKinnon at the height of #MeToo. In that op-ed, MacKinnon discusses how she calculated, over decades of tracking of campus sexual assault cases, that, on average, four victims must accuse a campus harasser before a school would find a sexual assault, essentially counting survivors as one-fourth of a person.[25] In the case of the DeVos rulemaking, the Big Comment Catalog tracked about 80,000 comments as using some version of four boilerplate comments, meaning that, under this convention, those 80,000 comments reduce down to four comments, counting these commenters as less than 1/20,000th of a commenter.[26]

Thus, the DeVos rulemaking reveals the fiction at the heart of the commenting power and shows that rulemaking's reality has not only been undemocratic in the sense of not including significant percentages of the American public, but it has also been defined by serious inequalities that are undemocratic. Notice-and-comment rulemaking instead appears to serve largely oligarchic and technocratic purposes, despite the claims of the commenting power narrative.

Moreover, case law enables the technocratic and oligarchic approach by requiring agencies to consider and address only "significant" comments in their published justifications for final rules—the only version of the rules subject to judicial review.[27] "Significance" is based on a comment's ability to alert an agency to new problems or solutions relevant to the issues on which the agency seeks to regulate.[28] In contrast, the fact that thousands, hundreds of thousands, or even millions of people agreed with one point or

24 *See* Francis, *supra* note 7.

25 *See* Catharine A. MacKinnon, *#MeToo Has Done What the Law Could Not*, N.Y. TIMES (Feb. 4, 2018), https://www.nytimes.com/2018/02/04/opinion/metoo-law-legal-system.html [https://perma.cc/22KS-J2ED]; *see also* Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PENN. L. REV. 1 (2017).

26 *See* Dircks et.al., *supra* note 14.

27 Hewitt v. Comm'r, 21 F.4th 1336, 1347 (11th Cir. 2021); *see also* Oakbrook Land Holdings, L.L.C. v. Comm'r, 28 F.4th 700 (6th Cir. 2022), *cert. denied*, 143 S. Ct. 626 (2023).

28 Hewitt, 21 F.4th at 1347; *see also* Oakbrook Land Holdings, L.L.C, 28 F.4th at 713.

set of points regarding a rule—which is what boilerplate comments suggest when viewed in a democratic as opposed to technocratic light—has *not* been treated as "significant."

Most disturbingly, the boilerplate comment convention, as well as a general derision directed at mass commenting,[29] has the potential to particularly dilute the power of women.[30] On the most basic level, this is because women are not a minority population—women are a *subjugated majority*[31]—so if women mobilize as a group, their numbers potentially give them significant power. Women, especially women of color, also have a long history of leading successful mass protests,[32] even when that leadership is rendered invisible—with the Women's March and Black Lives Matter being two recent examples. Yet, the boilerplate comment convention virtually nullifies the power of such collective action.

This dismissal of mass commenting is moreover chillingly reminiscent of the United States' most undemocratic structures, which excluded women from voting—the baseline right of democratic participation—until only a little over 100 years ago and which still massively discriminate against people of color's ability to vote.[33] These systemic flaws enabled 45's presidency, despite his popular vote loss to Hillary Clinton in 2016 by a margin of nearly three million,[34] as well as providing 45 and confederates such as John Eastman and Rudy Guiliani with various structural vulnerabilities that they attempted to

29 There appears to be a much broader dismissal of comments from ordinary Americans, documented by administrative law researchers and scholars in the form of not only agency rulemakers' expressed annoyance with boilerplate comments, but also a much deeper and more systemic indifference to outsider comments. Muddying the picture—and potentially serving as an excuse for otherwise oligarchic attitudes—are the torrents of fake comments filed by bots and/or created via "astroturf" campaigns. *See Astroturfing Hearings*, *supra* note 16.

30 *Stepping up and Standing Out: Women's Political Participation in 2020*, GENDER ON THE BALLOT (2020), https://www.genderontheballot.org/women-voters-research/ [https://perma.cc/UMP9-SZWW].

31 REBECCA TRAISTER, GOOD AND MAD: THE REVOLUTIONARY POWER OF WOMEN'S ANGER 116 (2018).

32 Keisha N. Blain, *The Black Women Who Paved the Way for This Movement*, ATL. (June 9, 2020), https://www.theatlantic.com/ideas/archive/2020/06/pioneering-black-women-who-paved-way-moment/612838/ [https://perma.cc/P87S-BTAH].

33 *The Impact of Voter Suppression in Communities of Color*, BRENNAN CTR. FOR JUST. (Jan. 10, 2022), https://www.brennancenter.org/our-work/research-reports/impact-voter-suppression-communities-color [https://perma.cc/2LDJ-Z5AK].

34 *2016 Presidential Election Results*, N.Y. TIMES (Aug. 9, 2017), https://www.nytimes.com/elections/2016/results/president [https://perma.cc/W8B7-DJEU].

manipulate to overturn President Biden's Electoral College victory in 2020, despite Biden's seven million popular vote victory over 45.[35]

The DeVos rulemaking thus serves as a cautionary tale regarding how rulemaking structures can be used by an administration in its desire to attack and destroy the administrative state itself. Even more so, it shows how an obviously anti-civil rights administration can use structures like the boilerplate comment convention to undermine equal protection for already politically marginalized groups, even when—or perhaps especially when—the rulemaking deals with enforcement of a civil rights statute.

This cautionary tale urgently demands a better process than traditional notice-and-comment rulemaking currently provides. It also highlights the need to take advantage of the opportunity offered by the democratic engagement of more ordinary Americans in rulemaking via mass commenting (when not involving fake or abusive comments). Thus, in this Article, I propose a modified form of negotiated rulemaking that could be used by agencies on discrete regulatory questions to involve outsider commenters, including mass commenters, in a more meaningful way. This proposal would also facilitate agencies obtaining the kind of expertise that people develop living their everyday lives and that may not be illuminated by more technocratic experts. Such nontraditional expertise has the potential to be particularly useful in rulemakings involving discrimination and civil rights because marginalized groups that are most subject to discrimination are not only likely to be outsiders to the traditional rulemaking process, but are also less likely to have their experiences be visible to those in power. As I discuss when presenting my proposal, ED even has an opportunity to pilot the modified negotiated rulemaking process that I propose in a rulemaking that is in progress at this writing and seeks to correct the DeVos rulemaking ("2022 NPRM" or "2022 rulemaking").

Thus, this Article provides new perspectives on various scholarly and policy debates regarding notice-and-comment rulemaking's intertwined law, democracy, and equal protection failings through the lens of the DeVos rulemaking, then proposes a method to address those failings. It will first tell the story of the relevant events leading up to the DeVos NPRM as well as what happened during the DeVos rulemaking itself, including information on the comments collected by a crowd-research method detailed in this part. Part Two will then survey the various goals that have been advanced for the notice-and-comment process and explain both why the "commenting power" serves the most important

35 Burgess Everett, *At Least 12 GOP Senators to Challenge Biden's Win*, POLITICO (Jan. 2, 2021), https://www.politico.com/news/2021/01/02/ted-cruz-electoral-college-challenge-453430 [https://perma.cc/ZE53-5QYG].

purpose and why rulemaking should avoid serving technocratic and oligarchic purposes, especially for rulemakings involving equal protection of the law. Part Three focuses on boilerplate comments, mass commenting, and the undemocratic and unequal effects of the virtually total dismissals of these types of comments—not only by agencies but also by researchers and scholars who otherwise support the "commenting power" narrative. Finally, Part Four proposes a more equal and democratic alternative structure for large notice-and-comment rulemakings where mass comments are filed, modifying a pre-2000s technique: negotiated rulemaking.

I. What Happened During, Leading Up To, and After the DeVos Rulemaking

The 124,000+ comments filed in response to the DeVos NPRM were the result of a remarkable organizing effort (led primarily by student sexual harassment survivor activists but joined by many allies) to encourage commenting by people who rarely participate in such administrative lawmaking but who are profoundly affected by how ED enforces Title IX.[36] The number of comments this coalition facilitated during two months normally taken up by exams and holidays, and that ended up overlapping almost entirely with the longest federal government shutdown in United States history, led *Mother Jones* magazine to suggest, only a few weeks into the comment period, that "There's a Quiet #MeToo Movement Unfolding in the Government's Comments Section."[37]

This headline captures the perspective of most commenters' opposition to the proposed regulations. Indeed, the Big Comment Catalog gathered sufficient information from ninety-four percent of the comments to unequivocally show that the DeVos NPRM's proposals were overwhelmingly opposed by commenters. The project was able to catalog 117,358 of the 124,160 comments that regulation.gov says were filed in response to the NPRM (the project is unable to account for the missing 6,802), and, of those, nearly 115,000 opposed the proposed rules.[38] "Only 853 comments—less than one percent—of the cataloged-comments supported the DeVos NPRM's proposals."[39]

36 34 C.F.R. § 106 (2018).

37 Madison Pauly, *There's a Quiet #MeToo Movement Unfolding in the Government's Comments Section*, MOTHER JONES (Jan. 15, 2019), https://www.motherjones.com/politics/2019/01/betsy-devos-title-ix-sexual-assault-harassment-metoo/ [https://perma.cc/D2HN-6R5B].

38 *See infra* Section I.C.2. *See also* Dircks et al., *supra* note 14.

39 Dircks et al., *supra* note 14, at 5.

Despite this tremendous opposition, in May 2020 DeVos's ED issued final regulations ("Final Rules"), largely unchanged from the NPRM, which took effect in August 2020.[40] Within a week, the American Civil Liberties Union ("ACLU") filed a suit challenging the regulations on behalf of Know Your IX, Council of Parent Attorneys and Advocates, Inc., Girls for Gender Equity, and Stop Sexual Assault in Schools.[41] By July 1, 2020, three more lawsuits challenging the rules were filed, including lawsuits filed by Attorneys General in eighteen states and the District of Columbia in two separate challenges, and by a coalition including leading women's civil rights organizations, victims' rights legal services providers, and individual survivor plaintiffs ("Title IX Coalition").[42] The Title IX Coalition challengers filed a motion for a preliminary injunction in July that drew amici support from twenty-five civil rights organizations, twenty-five higher education organizations and associations (led by the American Council on Education, the association for college and university presidents), twenty-five survivors' rights organizations, the three main associations collectively representing thousands of K-12 public school districts, twelve men's organizations, twenty-seven administrative law and/or civil rights law professors, and over eighty members of Congress.[43] Nearly all these amici had also filed comments

40 34 C.F.R. § 106 (2018).

41 *ACLU Sues Betsy DeVos for Allowing Schools to Ignore Sexual Harassment and Assault,* ACLU (May 14, 2020), https://www.aclu.org/press-releases/aclu-sues-betsy-devos-allowing-schools-ignore-sexual-harassment-and-assault [https://perma.cc/GW3D-XTQ2]

42 *Id*. *See also NWLC Files Lawsuit Against Betsy DeVos, Trump Administration's Sexual Harassment Rules*, NAT'L WOMEN'S L. CTR. (June 10, 2020), https://nwlc.org/press-release/nwlc-files-lawsuit-against-betsy-devos-trump-administrations-sexual-harassment-rules/ [https://perma.cc/GZX6-Z6QW].

43 *See* Brief Amici Curiae of AASA, the School Superintendent's Association, The Council of the Great City Schools, and the National Association of Secondary School Principals in Support of Plaintiffs' Motion for Preliminary Injunction or Section 705 Stay, Victim Rts. L. Ctr. v. Cardona, 552 F. Supp. 3d 104 (D. Mass. July 28, 2021), *order clarified*, No. 20-11104-WGY, 2021 WL 3516475 (D. Mass. Aug. 10, 2021), *appeal dismissed sub nom*. Chi. All. Against Sexual Exploitation v. Cardona, No. 21-1773, 2022 WL 950944 (1st Cir. Feb. 7, 2022); Brief for the American Council on Education et al. as Amici Curiae Supporting Plaintiffs' Motion for Preliminary Injunction or 5 U.S.C. § 705 Stay, Victim Rts. L. Ctr. v. Cardona, 552 F. Supp. 3d 104 (D. Mass. July 28, 2021), *order clarified*, No. 20-11104-WGY, 2021 WL 3516475 (D. Mass. Aug. 10, 2021), *appeal dismissed sub nom*. Chi. All. Against Sexual Exploitation v. Cardona, No. 21-1773, 2022 WL 950944 (1st Cir. Feb. 7, 2022); Brief of the Civil Rights and Advocacy Amici as Amici Curiae in Support of Plaintiffs' Motion for Preliminary Injunction, Victim Rts. L. Ctr. v. Cardona, 552 F. Supp. 3d 104 (D. Mass. July 28, 2021), *order clarified*, No. 20-11104-WGY, 2021 WL 3516475 (D. Mass. Aug. 10, 2021), *appeal dismissed sub nom*. Chi. All. Against Sexual Exploitation v. Cardona, No. 21-1773, 2022 WL 950944 (1st Cir. Feb. 7, 2022); [Proposed] Brief of Members of Congress as Amici Curiae in Support of Plaintiffs' Motion for a Preliminary Injunction or Section 705 Stay, Victim Rts. L. Ctr. v. Cardona, 552 F. Supp. 3d 104 (D. Mass. July 28, 2021), *order clarified*, No. 20-11104-WGY, 2021 WL 3516475 (D. Mass. Aug. 10, 2021), *appeal dismissed sub nom*. Chi. All. Against Sexual Exploitation v. Cardona, No. 21-1773, 2022 WL 950944 (1st Cir. Feb. 7, 2022); Brief

opposing the new regulations during the NPRM's comment period.[44]

A. Evidence of Opposition Prior to the Rulemaking

However, even before the 124,000+ comments were filed and made clear their overwhelming opposition to the proposals in the NPRM, DeVos's ED had much evidence that its rulemaking—as well as the proposed and final versions of the rules that resulted—would not be supported by a wide swath of the American public. First, it was surely aware of the national Title IX Movement that had already been receiving significant public attention since 2013. There have been several written accounts of this movement coalescing around, primarily, college and university mishandling of sexual assault cases involving their students.[45] For instance, Karen Tani has postulated that the Title IX Movement is the latest iteration of a decades-long movement seeking to combat and end gender-based violence in

of Survivors of Sexual Violence as Amici Curiae in Support of Plaintiffs' Motion for a Preliminary Injunction of Section 705 Stay, Victim Rts. L. Ctr. v. Cardona, 552 F. Supp. 3d 104 (D. Mass. July 28, 2021), *order clarified*, No. 20-11104-WGY, 2021 WL 3516475 (D. Mass. Aug. 10, 2021), *appeal dismissed sub nom*. Chi. All. Against Sexual Exploitation v. Cardona, No. 21-1773, 2022 WL 950944 (1st Cir. Feb. 7, 2022); Amicus Brief of California Women's Law Center, Victim Rts. L. Ctr. v. Cardona, 552 F. Supp. 3d 104 (D. Mass. July 28, 2021), *order clarified*, No. 20-11104-WGY, 2021 WL 3516475 (D. Mass. Aug. 10, 2021), *appeal dismissed sub nom*. Chi. All. Against Sexual Exploitation v. Cardona, No. 21-1773, 2022 WL 950944 (1st Cir. Feb. 7, 2022); Amicus Curiae Brief of Law Professors, Victim Rts. L. Ctr. v. Cardona, 552 F. Supp. 3d 104 (D. Mass. July 28, 2021), *order clarified*, No. 20-11104-WGY, 2021 WL 3516475 (D. Mass. Aug. 10, 2021), *appeal dismissed sub nom*. Chi. All. Against Sexual Exploitation v. Cardona, No. 21-1773, 2022 WL 950944 (1st Cir. Feb. 7, 2022); Brief of Promundo, American Men's Studies Association: Connect, Inc., Jana's Campaign, Inc., Men Stopping Violence, Men's Story Project, Men and Masculinities Knowledge Community of the Student Affairs Administrators in Higher Education, North American Men Engage Network, Ten Men – Rhode Island Coalition Against Domestic Violence, and Vera House, Inc. as Amici Curiae in Support of Plantiffs' Motion for Preliminary Injunction or Section 705 Stay, Victim Rts. L. Ctr. v. Cardona, 552 F. Supp. 3d 104 (D. Mass. July 28, 2021), *order clarified*, No. 20-11104-WGY, 2021 WL 3516475 (D. Mass. Aug. 10, 2021), *appeal dismissed sub nom*. Chi. All. Against Sexual Exploitation v. Cardona, No. 21-1773, 2022 WL 950944 (1st Cir. Feb. 7, 2022); Amicus Curiae Brief of Law Professors, Victim Rts. L. Ctr. v. Cardona, 552 F. Supp. 3d 104 (D. Mass. July 28, 2021), *order clarified*, No. 20-11104-WGY, 2021 WL 3516475 (D. Mass. Aug. 10, 2021), *appeal dismissed sub nom*. Chi. All. Against Sexual Exploitation v. Cardona, No. 21-1773, 2022 WL 950944 (1st Cir. Feb. 7, 2022).

44 Brief for the American Council on Education et al. as Amici Curiae Supporting Plaintiffs' Motion for Preliminary Injunction or 5 U.S.C. § 705 Stay, Victim Rts. L. Ctr. v. Cardona, 552 F. Supp. 3d 104 (D. Mass. July 28, 2021), *order clarified*, No. 20-11104-WGY, 2021 WL 3516475 (D. Mass. Aug. 10, 2021), *appeal dismissed sub nom*. Chi. All. Against Sexual Exploitation v. Cardona, No. 21-1773, 2022 WL 950944 (1st Cir. Feb. 7, 2022).

45 *See, e.g.*, Karen M. Tani, *An Administrative Right to Be Free from Sexual Violence? Title IX Enforcement in Historical and Institutional Perspective*, 66 DUKE L.J. 1847 (2017).

the United States, one that looks to administrative legal mechanisms for a new path after the closure of other roads such as the civil rights remedy of the Violence Against Women Act.[46] My own account overlaps somewhat with Tani's, with more of a focus on the Title IX Movement as an outgrowth of legal theories that recognize sexual harassment and gender-based violence as forms of sex discrimination that are both causes and consequences of gender inequality in society as a whole.[47] Because anti-sexual harassment law and education civil rights laws rely at least in part on administrative agencies to enforce and protect those civil rights, both accounts involve administrative law.

Both accounts also delved into certain facets of the Title IX Movement that are relevant to the DeVos NPRM and the public's reaction to it. That is, since 2013, the Movement has involved many thousands of activists, usually students enrolled in colleges and universities and often survivors of sexual harassment and gender-based violence. Well before the Final Rules were announced, the 124,000+ comments were filed, or 45's administration even entered into office, these thousands of activists collected nearly two hundred thousand signatures on an online petition,[48] organized direct action protests in front of ED's D.C. headquarters,[49] filed dozens of lawsuits,[50] and sextupled the number of complaints filed with ED against schools for mishandling students' sexual harassment reports.[51] The Movement

46 *Id.*

47 *See, e.g.*, Nancy Chi Cantalupo, *The Title IX Movement Against Campus Sexual Violence: How a Civil Rights Law and a Feminist Movement Inspired Each Other*, *in* 2021 THE OXFORD HANDBOOK OF FEMINISM AND LAW IN THE UNITED STATES 240 (Deborah Brake, Martha Chamallas & Verna Williams eds., 2021) [hereinafter *Title IX Against Campus Sexual Violence*].

48 *See* Know Your IX, *Department of Education: Hold Colleges Accountable That Break the Law by Refusing to Protect Students from Sexual Assault*, CHANGE (2013), https://www.change.org/p/department-of-education-hold-colleges-accountable-that-break-the-law-by-refusing-to-protect-students-from-sexual-assault [https://perma.cc/HA6K-FKFT].

49 Alexandra Brodsky, *Title IX Enforcement is Getting Better, but the Education Department Needs to Do More*, FEMINISTING (Nov. 15, 2013), http://feministing.com/2013/11/15/title-ix-enforcement-is-getting-better-but-the-education-department-needs-to-do-more/ [https://perma.cc/T9SU-PVY4].

50 Greta Anderson, *More Title IX Lawsuits by Accusers and Accused*, INSIDE HIGHER ED (Oct. 2, 2019), https://www.insidehighered.com/news/2019/10/03/students-look-federal-courts-challenge-title-ix-proceedings [https://perma.cc/95T2-8D6P].

51 *Compare* Tyler Kingkade, *There Are Far More Title IX Investigations of Colleges Than Most People Know*, HUFFPOST (June 16, 2016), https://www.huffpost.com/entry/title-ix-investigations-sexual-harassment_n_575f4b0ee4b053d433061b3d [https://perma.cc/8237-2N2Y] (reporting 246 Office for Civil Rights sexual assault investigations of universities as of June 2016), *with* Tyler Kingkade, *55 Colleges Face Sexual Assault Investigations*, HUFFPOST (May 1, 2014), https://www.huffpost.com/entry/college-sexual-assault_n_5247267

also started three national 501(c)(3) organizations,[52] inspired a high-profile documentary that aired on CNN after months in theaters with a significant impact inside and outside the United States,[53] and convinced the Obama administration that it was worth starting a cross-government task force focused on sexual harassment in education.[54]

As a scholar and national expert on Title IX and sexual harassment, I am constantly contacted by people concerned about the problem, and I can attest to the breadth of the Title IX Movement's ranks by 2017. In addition to the student survivor activists who started the movement, those ranks included: thousands of college/university student, faculty, and staff allies; teachers' and graduate student unions; civil rights organizations and attorneys inside and outside the government; a significant slice of law enforcement (not only the predictable police and prosecutors committed to responding more effectively to gender-based violence but also less expected groups such as campus police); and a wide range of (former, soon to be former, and still current) federal officials and employees. This last group was led in key ways during the Obama administration by then-Vice President Biden and members of his staff such as Lynn Rosenthal, the first White House Advisor on Violence Against Women.[55] Rosenthal also co-chaired the White House Task Force to Protect Students from Sexual Assault with Valerie Jarrett, senior adviser to President Obama.[56] These individuals continued a good deal of that work and activity as they entered the private sector after the Obama administration left.[57]

Moreover, the American public's vocal furor over sexual harassment had overflowed the bounds of education well before the NPRM was announced. As DeVos's ED proceeded

[https://perma.cc/22SU-3GAU].

52 These organizations include Know Your IX, SurvJustice, and End Rape on Campus.

53 *The Hunting Ground Australia Project*, HUNTING GROUND (2015), https://thehuntinggroundaustralia.com.au/about-thg-australia/ [https://perma.cc/Z7DQ-7MWZ].

54 WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT, NOT ALONE: THE FIRST REPORT OF THE WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT (Apr. 2014), https://www.justice.gov/archives/ovw/page/file/905942/download [https://perma.cc/G8XB-559D].

55 *See* Lynn Rosenthal, *About Me*, LYNN ROSENTHAL WEBSITE (2017), https://www.lynnrosenthal.com/about-me [https://perma.cc/GMP9-8RKL].

56 *See* Randall Kennedy, *Valerie Jarrett's Winding Path to the Obama's Inner Circle*, WASH. POST (Apr. 11, 2019), https://www.washingtonpost.com/outlook/valerie-jarretts-winding-path-to-the-obamas-inner-circle/2019/04/11/acab2512-4595-11e9-8aab-95b8d80a1e4f_story.html [https://perma.cc/8SAJ-LFA2].

57 *See id.;* Rosenthal, *supra* note 55.

on the path to November 2018, 45 himself was named again and again as a sexual harasser and abuser, with over two dozen allegations of sexual assault publicly reported, and the Access Hollywood tape of then-private citizen, Donald Trump, bragging about grabbing women's genitalia without their consent playing at some frequency between "incessantly" and "regularly" over the airwaves.[58] The Women's March took its place in history as the world's largest single-day protest,[59] with sexual harassment and gender-based violence as clear themes—although hardly the only ones—among protesters. #MeToo exploded, with 19 million tweets (over 55,000 per day) using it in its first eleven-and-a-half months as a hashtag,[60] and 4,700,000 people discussing it twelve million times on Facebook in the hashtag's first twenty-four hours of life.[61] Beginning before #MeToo but fueled by #MeToo into a conflagration, long-time serial harassers began to lose their jobs and even end up in jail, including abusive doctors Larry Nassar and George Tyndall,[62] media figures such as Harvey Weinstein, Bill Cosby, Roger Ailes, Matt Lauer, and many other "Sh*tty Media Men,"[63] as well as politicians like Roy Moore and Al Franken.[64] Millions of dollars were raised in a couple of weeks for the TimesUp organization, including a Legal Defense Fund to help sexual harassment victims who do not have funds to hire lawyers and seek legal redress for harassment.[65] When the DeVos NPRM was published, the yells of the floods of

58 Meghan Keneally, *List of Trump's Accusers and their Allegations of Sexual Misconduct*, ABC NEWS (Sept. 18, 2020), https://abcnews.go.com/Politics/list-trumps-accusers-allegations-sexual-misconduct/story?id=51956410 [https://perma.cc/T62B-N5CX].

59 *See generally* WOMEN'S MARCH ORGANIZERS & CONDÉ NAST, TOGETHER WE RISE: BEHIND THE SCENES AT THE PROTEST HEARD AROUND THE WORLD (2018) [hereinafter WOMEN'S MARCH ORGANIZERS & CONDÉ NAST].

60 Monica Anderson & Skye Toor, *How Social Media Users Have Discussed Sexual Harassment Since #MeToo Went Viral*, PEW RSCH. CTR. (Oct. 11, 2018), https://www.pewresearch.org/fact-tank/2018/10/11/how-social-media-users-have-discussed-sexual-harassment-since-metoo-went-viral/ [https://perma.cc/4ZGN-9G9L].

61 Cassandra Santiago & Doug Criss, *#MeToo: An Activist, A Little Girl and the Heartbreaking Origin of 'Me Too,'* CNN (Oct. 17, 2017), https://www.cnn.com/2017/10/17/us/me-too-tarana-burke-origin-trnd/index.html [https://perma.cc/GG6V-TAPM].

62 Azza Abudagga, *States, Medical Regulators and Institutions Must Act to End Physician Sexual Abuse*, MS. MAG. (June 8, 2021).

63 Trina Jones & Emma E. Wade, *Me Too? Race, Gender, and Ending Workplace Sexual Harassment*, 27 DUKE J.L. & POL'Y 203, 205 (2020).

64 Lisa de Moraes, *Seth Meyers Tackles Al Franken, Updates Roy Moore Sex Misconduct Claims*, DEADLINE (Nov. 17, 2017), https://deadline.com/2017/11/seth-meyers-al-franken-roy-moore-donald-trump-sexual-misconduct-late-night-1202210506/# [https://perma.cc/4VVH-JXNS].

65 Amanda Arnold, *Time's Up Initiative Has Raised Nearly $16 Million*, THE CUT (Jan. 7, 2018), https://

protesters who descended on the United States Capitol and the steps of the Supreme Court during the hearings over accusations that Brett Kavanaugh had sexually harassed multiple women still reverberated in D.C.[66] Finally, just weeks before the DeVos NPRM was announced, voters elected 117 women to Congress in the second "Year of the Woman,"[67] the first having occurred in 1992 after the last Senate hearing over accusations that Supreme Court nominee Clarence Thomas had sexually harassed Professor Anita Hill.[68]

DeVos's ED also turned a blind eye to the overwhelming evidence that those involved with and concerned about sexual harassment in education approved of the Obama administration's rigorous administrative enforcement of Title IX's prohibition on sexual harassment and were pleading with 45's administration to continue it.[69] This position and the fact that it is widely held were well-known to ED when it issued the DeVos NPRM, because of the response to an earlier call for comments that DeVos's ED issued in June 2017. This call was unconnected to a rulemaking and asked generally about where ED should deregulate and therefore was not specifically about Title IX. Nevertheless, approximately 12,000 of the 16,000 comments filed addressed ED's enforcement of Title IX, ninety-nine percent of which urged DeVos's ED to continue enforcing Title IX as rigorously as the Obama administration had.[70] Only 137 comments, forty percent of which were anonymous,

www.thecut.com/2018/01/times-up-initiative-has-raised-nearly-usd16-million.html [https://perma.cc/Q5FH-9JX7].

66 Cheyenne Haslett, *Kavanaugh Protests Escalate, Over 120 Arrested on Capitol Hill*, ABC NEWS (Sept. 24, 2018), https://abcnews.go.com/Politics/kavanaugh-protests-escalate-120-arrested-capitol-hill/story?id=58048599 [https://perma.cc/Z8HX-R66W].

67 Maya Salam, *A Record 117 Women Won Office, Reshaping America's Leadership*, N.Y. TIMES (Nov. 7, 2018), https://www.nytimes.com/2018/11/07/us/elections/women-elected-midterm-elections.html [https://perma.cc/BH7S-3D6R].

68 Michael S. Rosenwald, *No Women Served on the Senate Judiciary Committee in 1991. The Ugly Anita Hill Hearings Changed That*, WASH. POST (Sept. 18, 2018), https://www.washingtonpost.com/history/2018/09/18/no-women-served-senate-judiciary-committee-ugly-anita-hill-hearings-changed-that/ [https://perma.cc/SU6W-P928].

69 Letter from Five Student Affairs Ass'ns to Kenneth L. Marcus, Ass't Sec'y for Civil Rights, Dep't of Educ. 7 (Jan. 29, 2019), https://www.regulations.gov/document?D=ED-2018-OCR-0064-11689 [https://perma.cc/AZ4K-39BB]; 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, 219 (2011) [hereinafter *Heads in the Sand*].

70 Tiffany Buffkin et al., *Widely Welcomed and Supported by the Public: A Report on the Title IX-Related Comments in the U.S. Department of Education's Executive Order 13777 Comment Call*, 9 CALIF. L. REV. ONLINE 71, 72 (2019).

asked for changes to the Obama administration's enforcement, which had been consistent with the historical approach of ED's OCR of enforcing Title IX over many administrations, both Democrat and Republican.[71] Rather than acceding to the pleas of nearly 11,900 comments, some of which were signed by multiple individuals—resulting in a total of 60,796 expressions of support for the Obama-era enforcement of Title IX by members of the public[72]—DeVos first rescinded the Obama-era agency guidance documents, then issued the DeVos NPRM and Final Rules.[73]

B. Excluding Those Opposed to DeVos's Proposed Rules During the Rulemaking

Not only did the DeVos ED willfully ignore the widespread support for the Obama-era and historical approach to enforcing Title IX, but it also actively sought out and almost entirely engaged only with the tiny number of organizations, many funded by dark money, that opposed the Title IX Movement the most.[74] For example, when *The Nation* looked at documents and email communications obtained via Freedom of Information Act requests, it found that DeVos ED staff and three "men's rights" groups collaborated with a very small group of constituents—ones who were on the record as being extremely hostile to Title IX and its beneficiaries—to write the DeVos NPRM's proposals.[75] This exclusionary process produced both proposed and Final Rules that are so diametrically opposed to the text, spirit, and previous administrative enforcement of Title IX (dating back decades) that they appear to have been deliberately written to get as close to the total elimination of Title IX protections as possible and to enable, even force, schools to discriminate against the very classes of people whom Title IX was passed into law to protect.

Moreover, even the regulated industry's hostility to the NPRM was not the usual

71 *See* Nancy Chi Cantalupo, *And Even More of Us Are Brave: Intersectionality & Sexual Harassment of Women Students of Color*, 42 HARV. J.L. & GENDER 1, 5 (2019) [hereinafter *And Even More of Us Are Brave*].

72 *See* Buffkin et al., *supra* note 70, at 89.

73 Phil McCausland, *DeVos Rescinds Obama-Era Title IX Protections, Drawing Mixed Reactions From Advocates*, NBC News (Sept. 22, 2017), https://www.nbcnews.com/news/us-news/devos-rescinds-obama-era-title-ix-protections-drawing-mixed-reactions-n803976 [https://perma.cc/QN9Y-6N7N]; Erica L. Green, *DeVos's Rules Bolster Rights of Students Accused of Sexual Misconduct*, N.Y. TIMES (May 6, 2020), https://www.nytimes.com/2020/05/06/us/politics/campus-sexual-misconduct-betsy-devos.html [https://perma.cc/58Z4-43G9].

74 *Dog Whistles and Beachheads*, *supra* note 11, at 307.

75 *See* Barthélemy, *supra* note 11.

discontent displayed when industries are informed of new or changed regulations. The standard objections to regulation[76] surely motivated some industry opponents of the DeVos NPRM and Final Rules, but even those objections were more intense and were complicated by the nature of education (higher education in particular), the size and diversity of the population impacted by a problem as widespread as sexual harassment, and the influence of the Title IX Movement on key sectors of American education.

First, because the branch of American education most heavily regulated by the Final Rules is higher education, that sector already had the greatest number of traditional reasons to oppose regulation.[77] Added to these typical factors was the nonprofit status of most of United States schools and the diversity of higher education, both in type of institution and in the internal diversity of each institution's population.[78] Educational institutions' non-profit status means that their policy positions are less consistently motivated by financial considerations because their central mission is not to increase profits for owners and investors. This lack of an all-consuming drive to maximize profit removes a barrier to research and intellectual activity on issues that are not moneymakers. In addition, largely because of how the institution of tenure protects faculty from being fired for unpopular ideas, higher education institutions have a relatively flat governance structure and less hierarchy than the for-profit corporations that make up most regulated industries.[79] Tenure also means that many colleges and universities house many members with significant expertise on even potentially fraught political topics such as sexual harassment.[80] Tenured faculty can be and are very vocal about their views on such issues and their voices are powerful because of their depth of knowledge and the professional protections tenure affords them.

Second, by the time the DeVos NPRM was issued, even those faculty and administrators

76 *See generally* Rachel F. Moran, *Bakke's Lasting Legacy: Redefining the Landscape of Equality and Liberty in Civil Rights Law*, 52 DAVIS L. REV. 2569 (2019).

77 *Id.*

78 *See generally* Andra Picincu, *What Is a 501(c)(3) Educational Organization?*, CHRON. (Aug. 10, 2020), https://smallbusiness.chron.com/501c3-educational-organization-60098.html [https://perma.cc/9HMT-MKSJ].

79 William O. Brown Jr., *University Governance and Academic Tenure: A Property Rights Explanation*, 153 J. OF INST. AND THEORETICAL ECON., 441, 459 (1997).

80 *See, e.g.*, *Professor Drobac Sought for Expertise in Sexual Harassment Law in Tri-West High School Case*, IND. UNIV. (Feb. 3, 2020), https://mckinneylaw.iu.edu/news/releases/2020/02/professor-drobac-sought-for-expertise-in-sexual-harassment-law-in-tri-west-high-school-case.html [https://perma.cc/4NC5-VK48].

who had not spent their careers researching, studying, or working to prevent sexual harassment and gender-based violence would have been increasingly confronted with the problem. Social scientists have documented high rates of primarily peer campus sexual harassment in the form of sexual assault as far back as the 1980s, with both national and institution-specific samples.[81] Although several studies documented that official reporting by student victims was extremely low, they also found that students often disclose victimization (along with other personal information) to faculty, especially female faculty and openly LGTBQ faculty.[82] In addition, the #MeToo revelations by women and gender-minority faculty, graduate students, and graduate school alumni exposed that faculty sexual harassment of students, staff, and more junior or untenured colleagues remains all too common, and often is equally or more severe and abusive than peer sexual assault.[83] Add to these facts the abuse perpetrated by some campus doctors who victimized hundreds, if not thousands, of their student patients, predation that later disclosures and litigation would show was known by at least some other employees at those schools.[84]

Third, the increasingly widespread demonstrations protesting sexual harassment that started in academic settings, especially on college campuses, and the Obama administration's response to the Title IX Movement,[85] made it impossible for anyone but the most determined to continue to bury their heads in the sand to remain unaware of these problems. Even more importantly, as I have traced in a chapter of the *Oxford Handbook of Feminism and Law in the United States*, the Title IX Movement's analysis educated wide swaths of people inside and outside education about sexual harassment as systemic discrimination, not just about individual "bad apples."[86] The Movement did so by articulating the many ways in which sexual harassment and gender-based violence is

81 *See* Kelly Cue Davis, et al., *How to Score the Sexual Experiences Survey? A Comparison of Nine Methods*, 4 PSYCH. OF VIOLENCE 445 (2014).

82 Kathryn A. Branche et al., *Professors' Experiences with Student Disclosures of Sexual Assault and Intimate Partner Violence: How "Helping" Students Can Inform Teaching Practices*, MDSOAR (2011), https://mdsoar.org/bitstream/handle/11603/5435/FemCrim_Branch%20et%20al.%202011-2.pdf?sequence=3 [https://perma.cc/8RRH-DBFM].

83 *See* Nancy Chi Cantalupo & William Kidder, *A Systematic Look at a Serial Problem: Sexual Harassment of Students by University Faculty*, 2018 UTAH L. REV. 671, 674 (2018).

84 *See* Abudagga, *supra* note 62.

85 *See Title IX Against Campus Sexual Violence*, *supra* note 47.

86 *Id.* at 247.

a violation of the civil and human right to equal educational opportunity.[87] Many officials and professionals—including those in law enforcement and those who do not identify as feminists—were so persuaded by the Movement that their associations and representatives adopted and repeated the Movement's tenets in their comments on the DeVos NPRM.[88]

Thus, DeVos's ED proposed and then finalized rules that both the regulated industry and a large grassroots movement, which included many intended beneficiaries of Title IX, were determined to stop. Exceptionally, while controversial rulemaking usually finds the industry (e.g., polluting factories) and the statutory beneficiaries (e.g., people who want to breathe clean air) on opposite sides, here the industry and the beneficiaries were mainly aligned both in their desire to stop the DeVos rules and in their reasons for opposing the rules.

C. Proving Opposition Post-Comment Period: The Big Comment Catalog Project

Given the circumstances described above, as well as 45 and his administration's general reputation for dishonesty and corruption,[89] a significant post-comment-period difficulty immediately emerged. How were civil society organizations going to read and track all 124,000+ comments on the DeVos NPRM? Which organization—or individual person—had the bandwidth to read, organize, and synthesize so many comments? The definitive answer was "none." Yet not knowing what the commenters said would hamstring the ability of challengers to make a case under APA §706(2)(A) that the Final Rules were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[90] Twenty-seven amici law professors pointed out this predicament in a brief supporting the Title IX Coalition's lawsuit:

> To determine whether an agency regulation is "arbitrary or capricious," the reviewing court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment" . . . To survive judicial scrutiny, the agency must have "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[91]

87 *See id.* at 241–47.

88 *See id.* at 252.

89 Glenn Kessler et al., *President Trump Has Made More Than 5,000 False or Misleading Claims*, WASH. POST (Sept. 13, 2018) https://www.washingtonpost.com/politics/2018/09/13/president-trump-has-made-more than-false-or-misleading-claims/ [https://perma.cc/5G6C-M2AZ].

90 The arbitrary and capricious standard is the standard by which judges review and potentially invalidate an agency regulation. Administrative Procedural Act § 706(2)(A).

Without an external, non-agency review of the comments, there was no way to know if whatever DeVos's ED said it had done to "examine the relevant data" or if the "facts [ED said it had] found" were even truthful.[92] Absent such a fact-check, evaluating whether DeVos's ED did actually "articulate a satisfactory explanation for its action" or a "rational connection" between those facts and the policy decisions in the Final Rules was essentially impossible.[93]

1. ED Reporting and Public Access to Comments During Agency Review of Comments

This problem was created in part by the legal requirements (or lack thereof) and conventional methods by which agencies deal with large numbers of comments, none of which assist the public in engaging in any independent review. There is no requirement that agencies provide any account of how they read and analyze comments received, nor are they required to make an organized and synthesized database of the comments available to the public.[94] With regard to the DeVos NPRM, the extent of the assistance that ED provided to anyone who might want to review the comments was a spreadsheet, available for download from regulations.gov. That spreadsheet included about 105,000 of the comments filed, and it provided (1) each commenter's name and the comment's URL, (2) whether each comment was filed on behalf of an organization, and (3) whether each comment included an attachment.[95]

91 Amicus Curiae Brief of Law Professors at 12, Victim Rts. L. Ctr. v. Cardona, 552 F. Supp. 3d 104 (D. Mass. July 28, 2021), *order clarified*, No. 20-11104-WGY, 2021 WL 3516475 (D. Mass. Aug. 10, 2021), *appeal dismissed sub nom*. Chi. All. Against Sexual Exploitation v. Cardona, No. 21-1773, 2022 WL 950944 (1st Cir. Feb. 7, 2022).

92 *Id.*

93 *Id.*

94 *See Dog Whistles and Beachheads, supra* note 11.

95 *See* DEP'T OF EDUC., *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, REGULATIONS.GOV, https://www.regulations.gov/document/ED-2018-OCR-0064-0001/comment [https://perma.cc/89WN-RNQ7] (displaying all comments posted by the Department of Education in response to the DeVos NPRM); DEP'T OF EDUC., *Bulk Data Download*, REGULATIONS.

Nearly 20,000 comments were inexplicably not in the ED spreadsheet, including comments with and without attachments.[96] In addition, although an October 2019 Senate report on *Abuses of the Federal Notice-And-Comment Rulemaking Process* makes clear that agencies have the ability to notify the public of how many comments in the agency's review were judged to use duplicate language (the Securities and Exchange Commission does this),[97] DeVos's ED made no attempt to pass this information along to the public. It simply uploaded all the comments, including tens of thousands of boilerplate comments, to regulations.gov without any particular ordering or identification of the boilerplate comments on the spreadsheet.

The information about organizations and attachments in ED's spreadsheet identified at least those comments (excluding the 20,000 not listed in the spreadsheet) that were lengthy and that were likely to provide the kind of sophisticated analysis associated with "insider" comments.[98] Because this group of comments—those with attachments, filed by organizations, or both—was a fraction of the total comments filed, anyone relying on ED's spreadsheet would have an incentive to find these comments on regulations.gov and to download, read, and review only those comments. Thus, not only were the tens of thousands of "outsider" comments filed by general members of the public likely dismissed by ED, but the ED's manner of making them available to the public rendered any outside, independent review that would even include and consider such outsider comments nearly impossible.

2. The Big Comment Catalog Project

Concerned about the inability to determine the truthfulness of the DeVos ED comment review and objecting to the undemocratic and unequal treatment of comments that was not only likely to be conducted by DeVos's ED but was being forced on any external review, I launched an interdisciplinary effort to "crowd-research" the 124,000+ comments and

GOV, https://www.regulations.gov/bulkdownload [https://perma.cc/3QX4-G4EV] [hereinafter DeVos NPRM Spreadsheet] (to download the DeVos NPRM comments from regulations.gov, follow the hyperlink; fill in the "Document" field with the DeVos NPRM number—ED-2018-OCR-0064-0001; check the "Download all available comments" box; enter your email; click "Submit."). *See also* Dirks et al., *supra* note 14, at 4 (detailing researchers' discovery of the 20,000 comment discrepancy and possible reasons for the discrepancy).

96 *See* Dirks et al., *supra* note 14, at 4.

97 *See* S. REP. NO. 117-1, (2021) [hereinafter Abuses of Federal Notice-And-Comment Rulemaking]; *See also Astroturfing Hearings*, *supra* note 16.

98 *See* DeVos NPRM Spreadsheet, *supra* note 95.

create a database that would code certain information about each comment.[99] The resulting Big Comment Catalog Project was very low-tech. It launched in June 2019, consisting of (1) approximately 500 volunteers and six law student Research Assistants, who together "hand-catalogued" 35,741 comments, (2) a web scraping program written by Kenneth R. Bundy, a volunteer cataloguer and University of Maine computer science professor, that, in conjunction with AI software analysis run in partnership with the law firm Steptoe & Johnson, identified over 80,000 comments that repeated one of four sets of boilerplate language.[100]

Because of the significant resource challenges faced by the almost entirely *pro bono* project, the Catalog took three years to complete and encountered several data gaps, highlighting the near-impossibility of comprehensive external reviews of the comments filed in such large rulemakings, at least when those rulemakings are managed in the way in which DeVos's ED did here.[101] Nevertheless, the Catalog "review[ed] the comments filed completely enough to confirm what circumstantial evidence . . . and . . . less comprehensive reviews of the comments" had indicated "prior to completion of the Catalog: the American public was almost unanimously opposed to the proposals in DeVos's NPRM."[102] "Of the 117,358 comments cataloged, nearly 114,817 opposed the proposed rules" and 1688 comments were not categorized as supporting or opposing, leaving "only 853 comments—less than one percent—of the cataloged-comments [in support of] the DeVos NPRM's proposals."[103] Although catalogers were unable to account for and catalog 6802 comments that ED included in its count of comments on regulations.gov, "even if all of the 6802

99 Dircks et al., *supra* note 14, at 2. See Section II of the Dircks et al. report for a comprehensive overview of the creation, conduction, and troubleshooting involved in the Big Comment Catalog Project. Special thanks to the Steptoe & Johnson team and the many volunteer cataloguers, whose efforts are chronicled throughout the Dircks et al. report.

100 *Id.* at 3.

101 *See id.* at 4–5 (describing research gaps resulting from missing comments, apparent template malfunctions causing some comments to be categorized as boilerplate, the AI software's inability to distinguish boilerplate and "boilerplate-plus" comments, and difficulties in capturing joint comments.)

102 *Id.* at 5.

103 *Id.*

. . . supported the proposed regulations," they "would still only add five percent (6802 / 124,160)" to the support column.[104] This overwhelming opposition was also true for every subgroup that catalogers tracked.[105]

The Catalog's findings also question any justifications of the Final Rules based on the technocratic and oligarchic purposes that are arguably reflected in the "significant" comment doctrine, the boilerplate comment convention, and the overall dismissal of mass comments. The significant comment doctrine defines significant comments as those which present the agency with new information or innovative solutions that the agency has not heard or considered already.[106] Therefore, significant comments are much more likely to cite to research studies and to contain legal analysis. Of the 35,741 hand-cataloged comments, volunteers cataloged 33,200 as opposing the DeVos NPRM and 853 as supporting it.[107] While a greater percentage of supporters, 18.6% (159 / 853), versus opposers, 6.2% (2,050 / 33,200), used legal arguments in their comments, only 9.3% (79 / 853) of supporters cited research, whereas 30.4% (10,077 / 33,200) of opposers cited research.[108] Since "legal arguments are generally strengthened by research-based support," when no more than half of the comments that advanced legal arguments in favor of the DeVos NPRM used any research or similar support for those arguments, the strength of and support for those arguments is weakened significantly.[109] In addition, note that in raw numbers, nearly 13 times as many opposers used legal arguments as supporters did (2,050 / 159 = 12.89).[110] Moreover, this difference pales in comparison to the raw number difference in NPRM opposers' versus supporters' use of research to substantiate the content of their comments.

104 *Id.*

105 Dircks et al.*, supra* note 14, at 5. Section III of the Dircks et al. report provides a thorough quantitative analysis of the results of the study, including a breakdown of identified subgroups and their strong opposition of the DeVos NPRM.

106 Oakbrook Land Holdings, L.L.C. v. Comm'r, 28 F.4th 700, 714 (6th Cir. 2022) (finding that "an agency must respond to comments 'that can be thought to challenge a fundamental premise' underlying the proposed agency decision" (quoting *Carlson v. Postal Regul. Comm'n*, 938 F.3d 337, 344 (D.C. Cir. 2019))); 5 U.S.C. § 553.

107 Dircks et al., *supra* note 14, at 8.

108 *Id.* at 9.

109 *Id.*

110 *Id.* at 8–9.

In fact, "*over 127 times* (10,077 / 79 = 127.56) as many DeVos NPRM-opposers cited research as did NPRM supporters."[111]

Even the boilerplate comment convention in all its technocratic and oligarchic glory is ultimately insufficient in diluting public hostility towards the DeVos NPRM to a level that justifies the Final Rules. If the 81,617 boilerplate comments—which uniformly opposed the DeVos NPRM proposals—are reduced to a mere five comments, as the boilerplate comment convention would do, of the 35,746 comment total (35,741 non-boilerplate comments + 5 boilerplate comments), the 853 comments filed by supporters are only two percent of the comments considered.[112] Furthermore, even if all the approximately 6,800 missing comments were not boilerplates and supported the DeVos NPRM, *and* the 81,617 boilerplates were still reduced to five, support for the DeVos proposals would still only reach twenty-one percent (7,655 (6,802 + 853) / 35,746).[113] If the 81,617 boilerplate comments were put back in the mix and not diluted, this speculative level of support would drop to six percent (7,655 / 124,160).[114] Thus, no matter what assumptions one makes, the opposition to the DeVos proposals negates any justification for the DeVos ED to have done anything other than scrapping its proposed rules entirely and starting anew with an almost completely different NPRM.

3. Anti-Democratic Consequences of Public Inability to Fact-Check Agencies

This account thus amply shows why the DeVos rulemaking and its aftermath serve as a cautionary tale. Most clearly and importantly, the public's opposition to the DeVos NPRM was so strong and so consistent with abundant other evidence of public antagonism that it could not have been more obvious that 45's administration was being both dishonest and anti-democratic when it finalized the rules. Yet, the Final Rules are still in effect at this writing, at least in part because the one court to render a decision on the merits of the numerous APA-based challenges to the Final Rules only invalidated one portion of those rules.[115]

111 *Id.* at 9.

112 *See id.* at 5.

113 *See* Dircks et al., *supra* note 14, at 5.

114 *See id.* at 5.

115 Victim Rts. L. Ctr. v. Cardona, 552 F. Supp. 3d 104 (D. Mass. 2021), *order clarified*, No. CIV 20-11104-WGY, 2021 WL 3516475 (D. Mass. Aug. 10, 2021), *appeal dismissed sub nom*. Chi. All. Against Sexual

That court did not have the findings of the Big Comment Catalog to consider because the technocratic/oligarchic structures of the rulemaking process (i.e., the lack of transparency regarding the agency's own review of the comments) necessitated an independent civil society review, and the economic inequalities that plague the individuals and organizations with the most interest in such a review slowed completion of the Catalog to a snail's pace. While there is no way to know whether the Catalog's findings would have made a difference to the court's analysis and decision, it certainly seems more likely that a court that saw these findings would have invalidated more, if not all, of the Final Rules. It certainly would have found it harder to uphold the DeVos ED's actions as not arbitrary and capricious because the Catalog's findings would have made it nearly impossible for the agency to show "a 'rational connection between the facts found and the choice made.'"[116]

These practical difficulties and their likely-unintended-yet-very-real inequitable and anti-democratic effects are potentially underscored by the current and ongoing Title IX rulemaking, where the number of comments almost doubles the DeVos rulemaking's comments.[117] Granted, this current rulemaking is preceded by much evidence, such as the extensive public hearings and informal comment period held in September 2021,[118] that the Biden-Harris administration's ED is making extra effort to hear what is of concern to the American public regarding sexual harassment and is carefully considering how the public's views should be integrated into Title IX regulations.[119] In other words, the current ED is doing the exact opposite of what 45 and DeVos's ED did: repeatedly shut its ears to the American public no matter how many urged it to change course, how many times its members protested, or the quality of the research and legal arguments that they cited

Exploitation v. Cardona, No. 21-1773, 2022 WL 950944, at *1 (1st Cir. Feb. 7, 2022).

116 Brief for Law Professors as Amici Curiae at 2, Victim Rts. L. Ctr. v. DeVos, 552 F.Supp.3d 104 (2021) (No. 1:20-cv-11104) (citing Marsh v. Oregon Nat. Res. Council, 490 U.S. 360, 378 (1989); Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983); Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962)).

117 *See Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, REGULATIONS.GOV, https://www.regulations.gov/docket/ED-2021-OCR-0166 [https://perma.cc/C9PN-CFUF].

118 *See The U.S. Department of Education Releases Proposed Changes to Title IX Regulations, Invites Public Comment*, DEP'T OF EDUC. (June 23, 2022), https://www.ed.gov/news/press-releases/us-department-education-releases-proposed-changes-title-ix-regulations-invites-public-comment [https://perma.cc/M6S3-2KJV].

119 *See id.*

in support of their opposition.[120] In addition, my preliminary research indicates that the large number of comments to the 2022 NPRM may be a reflection of an even greater number of boilerplate comments, and ones focused on a relatively specific issue not directly involving sexual harassment and gender-based violence.[121] Nevertheless, a more comprehensive examination of the comments may reveal greater significance to the 2022 Title IX rulemaking's mass commenting.

The Big Comment Catalog's experience thus highlights why a close consideration of notice-and-comment rulemaking's purposes and whether those purposes are being served by current rulemaking processes and conventions is imperative. On the one hand, any notion of the American public acting as a democratic and constitutional check on administrative agency power is laughable if it is difficult-to-impossible for the public to do an independent review of what commenters said and whether the agency told the truth in its §706(2)(A) explanation.[122] On the other hand, if these processes and conventions accurately show that notice-and-comment rulemaking is just about providing expert information to government technocrats,[123] then federal administrative law should dispense with the gloss—and ultimate fiction—of public accountability and keep ordinary Americans as well as stretched public interest organizations from wasting their time and too-few resources on writing and filing comments. It is to that examination of purposes and methodologies—and their alignment with each other—that this Article now turns.

II. Justifications for the American Administrative State Through the Lens of the DeVos Rulemaking

Those who study the United States' administrative state, even in introductory administrative law courses, learn quickly that it is bedeviled by legitimacy questions.[124]

120 For example, the process the Biden-Harris administration followed prior to issuing the 2022 NPRM varies drastically from the DeVos rulemaking. Instead of deliberately ignoring the expressed views of the public, as 45's administration did in 2017 (discussed in greater detail, *infra*), in June 2021, ED took *extra* steps to ask for information from the public before and as it was crafting its NPRM by holding a public hearing. The 2022 NPRM makes many references to that multi-day hearing, demonstrating its careful attention to what was said there, despite the hearing's lack of legal force.

121 *See, e.g.*, Sherry Boschert, *Comments on Title IX Regulations Hit Record*, 37 WORDS (Sept. 14, 2022), https://www.sherryboschert.com/comments-on-title-ix-regulations-hit-record/ [https://perma.cc/66QC-LTXT].

122 *See* Kochan, *supra* note 18, at 601–02.

123 *See id.* at 610.

124 *See, e.g.*, Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L.

Often referred to as the "fourth branch" of the federal government,[125] this massive modern bureaucracy made up of various agencies does not appear in the United States Constitution as the Article I (legislative),[126] Article II (executive),[127] and Article III (judicial)[128] branches do. Not appearing as an independent branch of the government in the Constitution means that agencies potentially have no constitutional check on their power, since the Constitution arguably only defines checks and balances within the federal government in terms of those three branches.[129] A related problem is how federal agencies are structured to combine legislative, executive, and judicial powers in opposition to the constitutional preference to separate government powers between both federal government branches and the federal and state governments.[130] Yet, it has been accepted for nearly as long as agencies have existed that without such agencies the United States—or any modern nation—would cease to function.[131] Nothing emphasizes our dependence on agencies like the COVID-19 pandemic, during which the effective functioning of the federal bureaucracy literally saved or sacrificed lives, depending on which part of the federal government one considered.[132]

The practical dependence that we all have on administrative agencies makes it understandable why many would ignore the agency legitimacy problem or accept some

REV. 1511, 1512–13 (1992).

125 Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, COLUM. L. REV. 573, 582 (1984).

126 U.S. CONST. art. I.

127 U.S. CONST. art. II.

128 U.S. CONST. art. III.

129 *But see* Blake Emerson, *The Departmental Structure of Executive Power: Subordinate Checks from Madison to Mueller*, 38 YALE J. ON REGUL. 90, 97–98 (2021).

130 Strauss, *supra* note 125, at 583.

131 *See, e.g.*, Gillian Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 7 (2017) (noting that "the administrative state is constitutionally obligatory, given the broad delegations of authority to the executive branch that represent the central reality of contemporary national government" and commenting that such "delegations are necessary given the economic, social, scientific, and technological realities of our day"); Bethany A. Davis Noll & Richard L. Revesz, *Presidential Transitions: The New Rules*, 39 YALE J. REG. 1100, 1104 (2022) (observing that "presidents have come to rely on the administrative state as a primary mechanism for accomplishing their policy objectives").

132 *See* Connor Raso, *Emergency Rulemaking in Response to COVID-19*, BROOKINGS (Aug. 20, 2020), https://www.brookings.edu/research/emergency-rulemaking-in-response-to-covid-19/ [https://perma.cc/C5LX-6Q4W].

justification for agencies' legitimacy that would collapse if subjected to any real scrutiny. However, crises involving the administrative state put significantly more stress on such justifications than mere scrutiny does. Thus, times of crisis can expose these justifications as ephemeral and require more careful thinking about legitimacy than is required in "normal" times.

The United States and its administrative state are (hopefully) emerging from such a crisis right now, the impact of which is possibly going to create certain permanent changes and, even if not, is going to remain with us for some time after the crisis is solidly in the rear-view mirror. The crisis was created in part by the moves of 45's administration. Despite the administration's claims that it wanted to shrink the administrative state through deregulation, it aggressively *regulated* in certain areas and did so in a manner designed to force the administrative state to dismantle accepted practices and processes developed over time through many previous administrations, both Democrat and Republican.[133]

The DeVos rulemaking can be put into this latter category. As a matter of substance, the DeVos rulemaking took every opportunity available to allow schools that do not wish to protect students from sexual harassment to withhold Title IX protections, and to make it harder, if not impossible, for schools that *do* wish to protect their students' Title IX rights to achieve that goal. The Final Rules also affirmatively discriminate against sexual harassment victims in at least two ways deserving of mention here. First, the Final Rules treat sexual harassment victims differently from students who face discrimination based on race, disability, etc.[134] Second, the rules force schools to adopt investigation procedures that rely on discriminatory stereotypes based in centuries-old criminal law doctrines claiming that sexual harassment victims—synonymous with women under these ancient doctrines—lie.[135] In these and many other ways, the Final Rules turn decades of previous, legally correct OCR Title IX enforcement inside out, eviscerate Title IX's abilities to fulfill its own purposes, and use a statute that prohibits discrimination to discriminate against the very classes of students that it is designed to protect.

133 Cary Coglianese, Natasha Sarin & Stuart Shapiro, *Deregulatory Deceptions: Reviewing the Trump Administration's Claims About Regulatory Reform*, PENN. PROGRAM ON REGUL. REP. 1, 9 (Nov. 1, 2020). https://www.law.upenn.edu/live/files/11017-coglianesesarinshapirotrumpderegulationreport11012 [https://perma.cc/AH9R-7BLF].

134 *Title IX Against Campus Sexual Violence*, *supra* note 45, at 243–45; Nancy Chi Cantalupo, *Title IX Symposium Keynote Speech: Title IX & the Civil Rights Approach to Sexual Harassment in Education*, 25 ROGER WILLIAMS UNIV. L. REV. 225, 235–36 (2020) [hereinafter Cantalupo Keynote Speech].

135 *Heads in the Sand*, *supra* note 69, at 34 (providing examples of how stereotypes about victims lead to the belief that victims lie).

It is precisely this aggressive use of administrative law to damage a civil rights statute and harm its intended beneficiaries that inspired the remarkable public response to the DeVos NPRM. In addition, the fact that the DeVos NPRM commenters expressed their opposition mainly through boilerplate or mass comments is very likely a reflection of the anti-Title IX purpose of the DeVos NPRM, which is obvious and one that even relatively "unsophisticated" commenters likely understood. In other words, it was blatantly obvious that the DeVos rulemaking was not about getting better and more technically sophisticated ideas for fulfilling the agency's mandate from Congress (to ensure that schools receiving federal funds do not discriminate on the basis of sex). Rather, the DeVos rulemaking was about denying that sexual harassment exists, denying that it is a form of sex discrimination, and denying that people who state that they have been harassed (overwhelmingly women, girls, and gender minorities) are telling the truth.

Moreover, as the data from the Big Comment Cataloged reviewed in Section I.C., *supra*, details, DeVos's team at ED did not have anything more than what *The Nation* called "junk science" to support their policy positions,[136] as hundreds of commenters with expertise in sexual harassment-related fields (such as criminology, civil rights law, or treatment of sexual trauma) asserted in their comments and supported with (conservatively estimated) thousands of pages of studies and data cited and/or attached to those comments.[137] Essentially, the DeVos NPRM offered a bare policy preference, a policy preference that was answered by nearly 115,000 expressions of disagreement by the American public.

A. The Formalist and Technocratic/Expertise Justification Models

The circumstances of the DeVos rulemaking thus expose the inadequacies of two of the three common justifications for why the American administrative state, although undefined as a separate branch in the Constitution, is nevertheless legitimate. The first of these models is called the Formalist Model and the second is the Technocratic or Expertise Model.[138] By some accounts, the Technocratic/Expertise Model is actually two separate models, one focused on the expertise of the agency in its particular field (environment, transportation, etc.) and the other on market justifications positing that delegating policymaking powers to agencies is efficient.[139] Both of these models have been rejected by scholars for so long

136 *See* Barthélemy, *supra* note 11.

137 *See* Dircks et al., *supra* note 14, at 8–9.

138 David Arkush, *Democracy and Administrative Legitimacy*, 47 WAKE FOREST L. REV. 611, 612 (2012).

139 Seidenfeld, *supra* note 124, at 1513–14.

that Harvard Law Professor Gerald E. Frug urged his readers in a 1984 issue of the *Harvard Law Review* not to skip his critique of these models just because "no one believes in them anymore."[140] Nevertheless, legal practice by agencies and the insiders who seek to influence agencies suggests that the Technocratic/Expertise Model is actually the dominant model.[141]

For these reasons, it is worth reviewing each model and why each has been so roundly rejected, both of which are well-summarized by Managing Director of Public Citizen's Climate Program, David Arkush. First, Arkush discusses the Formalist Model, explaining that this model justifies administrative agencies as being like courts: constrained by the law and merely applying the legal and policy choices made by Congress, but not making policy choices themselves.[142] This claim has been widely rejected for two reasons. First, it is practically impossible to separate law and policy-making authority from each other in delegations to agencies.[143] Second, Congress tends to grant policy-making authority explicitly to agencies anyway.[144]

Under the Technocratic/Expertise Model, in contrast, the claim is that "agency discretion is legally broad but constrained and channeled by sound science."[145] As Arkush points out, however, while sound science "can resolve questions of fact . . . the facts alone cannot make a decision."[146] Ultimately, the facts must be resolved through policy judgments. For instance, the "most prominent tool" associated with the Technocratic/Expertise Model, deriving from the model's concern with efficiency, is "cost-benefit analysis."[147] The use of this tool requires "assigning values to the objects of the analysis,"[148] which is unquestionably a policy decision.

The DeVos rulemaking provides a specific illustration of the problems Arkush

140 Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1297 (1984).

141 *See* Arkush, *supra* note 138, at 613.

142 *See id.* at 613–14.

143 *See id.* at 615.

144 *See id.*

145 *See id.* at 612.

146 *See id.* at 616.

147 *See* Arkush, *supra* note 138, at 616.

148 *See id.* at 618.

identifies in each of these models. Regarding the Formalist Model, the Final Rules, by engaging in discrimination against sexual harassment victims as previously noted, violate the statute they purport to enforce. Particularly if the Final Rules survive the numerous legal challenges filed, one of which is still outstanding, the DeVos rulemaking will make clear that agency power is not checked by law and add to the already ample evidence that the Formalist Model does not provide a workable justification for the existence and constitutionality of the American administrative state.

The DeVos rulemaking likewise confirms the failures of the Technocratic/Expertise Model as articulated by Arkush and regardless of which type of scientific expertise one believes the model uses as a constraint on agencies, the subject-matter expertise of the agency (environment, transportation, etc.), or expert economic analyses regarding efficiency. As already noted, if the rulemaking involved any subject-matter expertise regarding sexual harassment and its effects, it was not found on the side of DeVos's ED. Prior to issuing the DeVos NPRM, the DeVos ED was aware of scientific knowledge, such as thirty years of studies confirming high rates of sexual harassment inside and outside education,[149] and extensive research on the damage sexual trauma can do to victims.[150] In addition, hundreds of experts also filed comments informing the DeVos ED of such research. For instance, almost 1,000 medical and counseling professionals specializing in helping sexual trauma victims signed and submitted a comment opposing the proposed rules.[151] The comment was written by Dr. Judith Herman of Harvard Medical School, whose book *Trauma and Recovery*, first published in 1992, is canonical reading for those in the field.[152] As discussed more below with regard to the Madowitz Declaration, this science was roundly ignored by DeVos's ED in favor of discriminatory gender stereotypes.

149 *See* Nick Anderson & Scott Clement, *1 in 5 College Women Say They Were Violated*, WASH. POST (June 12, 2015), https://www.washingtonpost.com/sf/local/2015/06/12/1-in-5-women-say-they-were-violated/?utmterm=.fee7bdlb7921 [https://perma.cc/ZH9M-57EG]; David Cantor et al., *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct*, WESTAT 1, 1–2 (2017), https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/AAU-Campus-Climate-Survey-FINAL- 10-20-17.pdf [https://perma.cc/5STP-2Y35] (summarizing findings from research on the effects of sexual trauma).

150 *See* Cantalupo Keynote Speech, *supra* note 134, at 228–29; *see also For the Title IX Civil Rights Movement*, *supra* note 6, at 295 (discussing articles in the symposium issue by Dana Bolger, Alyssa Peterson, Olivia Ortiz, and Zoe Ridolfi-Starr).

151 Judith Herman, Comment on Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance (Jan. 30, 2019), https://www.regulations.gov/comment/ED-2018-OCR-0064-104087 [https://perma.cc/4AQ8-NWCN].

152 *See generally* JUDITH HERMAN, TRAUMA AND RECOVERY: THE AFTERMATH OF VIOLENCE – FROM DOMESTIC ABUSE TO POLITICAL TERROR (1992).

The DeVos rulemaking also exposes as ephemeral the view that agencies are supposedly constrained by the Technocratic/Expertise Model via the economic efficiency analysis. The cost-benefit analysis that DeVos's ED did, according to a declaration filed by an independent economist, Michael Madowitz, in the multi-state Attorneys General lawsuit,[153] provides multiple examples of the central problem Arkush identifies, as well as several other equal protection-oriented problems. In addition to pointing out that DeVos's ED did not provide "the public the required fundamental underlying information and the complete cost-benefit analysis methodology" needed to replicate the agency's analysis, Madowitz demonstrated the inaccuracy of several central numbers and claims in the DeVos ED's statutorily-required Regulatory Impact Analysis.[154] First, Madowitz examined the agency's claim that the Final Rules would be only modestly costly because they would significantly reduce sexual harassment investigations that schools would have to conduct, resulting in savings that Madowitz determined accounted for eighty-seven percent of the savings leading to the DeVos ED's moderate cost estimate.[155] However, Madowitz determined that this estimate was based on data sets that had been shown to be "incomplete, limited, and potentially inconsistent" with data such as the thirty years of studies mentioned above, which had repeatedly confirmed higher rates of sexual harassment in education than those in the data sets DeVos's ED used.[156] Commenters responding to the DeVos NPRM had repeatedly referred the agency to the correct datasets, yet DeVos's ED did not use them.[157]

Second, Madowitz points out that the DeVos ED did not factor into its cost-benefit analysis the likely effect that its regulations would have on rates of sexual harassment. The agency absolved itself of any responsibility for this omission by stating that it had "insufficient evidence" to determine such an effect, thus assigning a cost of zero to it.[158] Madowitz demonstrates how the many fewer investigations estimated by DeVos's ED will inevitably result in many fewer findings of responsibility for sexual harassment and many fewer sanctions. In the context of well-known studies on repeat perpetration, finding that "at least two-thirds of college students who commit rape are repeat offenders and are

153 Ex. 31, Decl. of Michael Madowitz at 5–7, Pa. v. DeVos, 480 F. Supp. 3d 47 (D.D.C. 2020) (No. 1:20-cv-01468) [hereinafter Madowitz Declaration].

154 *Id.* at 4.

155 *Id.* at 8.

156 *Id.* at 7.

157 *Id.* at 5–7.

158 *Id.* at 10.

responsible for over 90 percent of all campus rapes,"[159] fewer investigations must lead to more sexual harassment. In other words, if repeat perpetrators' actions are not investigated, they are likely to continue to perpetrate, so the precipitous drop in investigations about which DeVos's ED speculated would lead to more sexual harassment in comparison to a world in which investigations continued at the same level. Madowitz also points to the costs that would come from diminished deterrence of potential perpetrators who would be more likely to perpetrate if they were less likely to face investigation of their conduct.[160] Finally, Madowitz finds no citations or discussions by DeVos's ED of countervailing data or information that would negate this evidence and justify its "insufficient evidence" determination.[161]

Thus, in both examples, the DeVos ED did exactly what David Arkush warned that the Technocratic/Expertise Model of agency legitimacy enables: created the cost-benefit analysis that would justify its actions by selecting values that would lead to the conclusion it wanted. In addition, these examples expose a Technocratic/Expertise Model equal protection problem. In the background of the DeVos ED's economic efficiency analysis is its political position, based in longstanding stereotypes of sexual harassment victims that most of the conduct labeled as sexual harassment is overblown at best and a flat-out lie at worst.[162] Recall the words of Candice Jackson, 45's first Acting Assistant Secretary for Civil Rights, to the *New York Times*: "the accusations—90% of them fall into the category of 'we were both drunk,' 'we broke up, and six months later I found myself under a Title IX investigation because she just decided that our last sleeping together was not quite right.'"[163] Holding stereotypes about sexual harassment victims as liars enabled the administration to rationalize its position that fewer investigations will automatically lead to cost saving. "After all," the DeVos ED's stereotype-based rationale goes, "schools will no longer have to waste time investigating false allegations, a significant improvement to the efficiency of their Title IX compliance." Likewise, the DeVos ED's position reasons, the Final Rules will have little effect on rates of sexual harassment because there is not really any true sexual harassment or what little exists is negligible. Furthermore, in the DeVos

159 Madowitz Declaration, *supra* note 153.

160 *Id.* at 10–11.

161 *Id.* at 21.

162 *See Dog Whistles and Beachheads*, *supra* note 11, at 336.

163 Erica L. Green & Sheryl Gay Stolberg, *Campus Rape Policies Get a New Look as the Accused Get DeVos's Ear*, N.Y. TIMES (July 12, 2017), https://www.nytimes.com/2017/07/12/us/politics/campus-rape-betsy-devos-title-iv-education-trump-candice-jackson.html [https://perma.cc/TQ8K-B8VD].

ED's view, the evidence regarding rates of sexual harassment is insufficient because it is mainly based on victim's reports, which, again, the agency's stereotyping paints as false and therefore unreliable.[164]

Combine this stereotyping-based economic analysis with the Technocratic/Expertise Model's more obvious equality problem, arising from the cost of an independent analysis like Madowitz's (Madowitz was paid $400 per hour to do the analysis he did),[165] and the DeVos rulemaking illustrates how the model presents additional equal protection issues. Using invidious gender stereotypes such as the ones spouted by Candice Jackson to justify an agency's cost-benefit analysis means that only stereotyped groups will face this particular barrier—this *discrimination*—and receive less protection of their rights *by* the agency as well as *vis-à-vis* the agency. Again, particularly if all the legal challenges to the Final Rules are rejected by the courts and this stereotyping/discrimination is ultimately allowed, the DeVos rulemaking will simply confirm the inadequate legitimizing force of the Technocratic/Expertise Model.

B. The Democracy/Civic Republican Justification Model

Indeed, the DeVos rulemaking confirms why only the third model, commonly referred to as the Democracy or Civic Republican Model, has a chance of actually legitimating the American administrative state. Arkush describes the Democracy Model as one that "admits that discretion exists in administration and attempts to import a basic source of legitimacy—citizen preferences—into the process."[166] This Model "envisions a high degree of citizen participation in the administrative process, or at least strong democratic accountability for agency officials regarding whether they actively consider public views."[167] Moreover, a primary mechanism for such participation and accountability is the commenting power, which others have called "a brilliantly crafted check and balance on governmental regulation . . . [that] rests in the people," rather than another branch of government.[168] This power is in fact what the APA §706(2)(A) process described above appears aimed to facilitate, because it requires that "when an agency proposes a rule, individuals get a

164 *See Dog Whistles and Beachheads*, *supra* note 11, at 336.

165 *See* Madowitz Declaration, *supra* note 153, at 4.

166 Arkush, *supra* note 138, at 620–21.

167 *Id.* at 620.

168 Kochan, *supra* note 18, at 601–02.

chance to comment, and an agency must respond to significant comments raised during the rulemaking before the rule can become final and effective."[169]

The Democracy Model thus highlights the problems with certain rulemaking conventions like the one regarding boilerplate comments. If the commenting power comprises "one of the most fundamental, important, and far-reaching of democratic rights"[170] provided to the American public, then a convention such as the boilerplate comment convention should be summarily rejected as violative of democratic rights. It should be *prima facia* unacceptable to reduce millions, tens of thousands, or even dozens of comments down to one. Moreover, treating comments that express a bare policy preference without offering additional data or scientific expertise as virtually useless is an evisceration and perversion of the democratic right embodied by the commenting power. Doing so in the context of an anti-gender discrimination statute makes that evisceration and perversion *also* a violation of equal protection legal principles at least, if not a violation of anti-discrimination law itself. I therefore turn to these topics in the next section, beginning with the boilerplate comment convention. This convention serves as merely the tip of a large iceberg of problems created for technocratic and oligarchic approaches to rulemaking by various forms of "mass commenting," all of which highlight the democratic legitimacy tensions endemic to agency lawmaking generally and notice-and-comment rulemaking specifically.

III. Mass Commenting, Democracy and Equal Protection

Since at least as early as President Obama's first term in office, administrative law scholars have devoted significant and sustained attention to the problems with mass commenting, how agencies handle mass commenting, and the impacts on democratic legitimacy and the public's interest in civic participation.[171] Although their research, critiques, and recommendations for addressing these problems have been available for more than a decade, the DeVos rulemaking shows that no such work was attempted by 45's administration and possibly not by the Obama administration either.[172] In addition, the insights of the DeVos rulemaking and the Big Comment Catalog project have been

169 *Id.* at 601.

170 *Id.* at 602.

171 Aryamala Prasad, *Are Agencies Responsive to Mass Comment Campaigns?*, GEO. WASH. UNIV. REGUL. STUD. CENTER (Oct. 7, 2019), https://regulatorystudies.columbian.gwu.edu/are-agencies-responsive-mass-comment-campaigns [https://perma.cc/3X6P-AD6U].

172 When ED first invited comments on how it might "deregulate," it received nearly 61,000 comments for preserving a robust Title IX and only 137 comments opposed. *See* Buffkin et al., *supra* note 70.

joined by those resulting from congressional scrutiny in the form of an investigation by the Republican-controlled Senate in 2019 and invited testimony by Beth Simone Noveck before the Democrat-controlled House in 2020.[173]

In both instances, Congress was focused on abuses of the notice-and-comment rulemaking process that manifest in various forms of mass commenting, but the DeVos rulemaking is not mentioned in either the Senate report or Noveck's expert testimony.[174] This lack of attention could be due to the low rate of mass commenting abuses of most concern to Congress (and—apparently and justifiably—everyone else considering this issue), such as fake and/or bot-generated comments that are often profane, nonsensical, and falsely attributed to real people. While the Catalog does identify approximately 1,688 comments in which even support or opposition to the DeVos NPRM was hard for catalogers to glean,[175] and catalogers noted that many of these comments used profanity, slurs against Betsy DeVos, and other "trolling"-type content, 1,688 is a fairly minimal number of comments. In addition, as far as the Project Team could tell, the Catalog does not include any evidence that more sinister abuses such as "astroturfing," a practice whereby "interest groups mask their own identities and send comments on behalf of their members in order to create the appearance of grassroots support for or opposition to a proposed rule,"[176] occurred. While it is possible that bot-generated commenting, trolling, and/or astroturfing occurred—indeed, the 6,802 missing comments may have been excluded from regulations.gov for such reasons—not only could the Catalog find no evidence of bot-generated comments, astroturfing, or other abuses, there was not really a need for such abuses in the DeVos rulemaking.[177]

The DeVos rulemaking arguably did involve several other mass commenting problems that scholars began talking about in the early 2010s, however, including problems created or exacerbated by agencies themselves. In addition, many of those problems implicate issues of democratic participation, accountability, and legitimacy that were at the core of these scholars' concerns. Moreover, because the DeVos rulemaking dealt with sexual harassment, a civil rights issue that has been spurring American women's democratic participation for at least the last thirty years—as well as confronting us anew with the deep racial and

173 *See Astroturfing Hearings*, supra note 16.

174 *See* Buffkin et al., *supra* note 70.

175 *See* Dircks et al., *supra* note 14, at 5.

176 *See* Abuses of Federal Notice-And-Comment Rulemaking, *supra* note 97.

177 *See* Cantalupo et al., *supra* note 13.

gender inequalities that mar this democracy—the rulemaking adds issues of (in)equality to the democratic legitimacy concerns at the basis of all notice-and-comment rulemaking. This section will accordingly set out the concerns about mass commenting that are most relevant to democratic participation, accountability, and legitimacy and that scholars and others have been articulating for at least the last decade. It will also explain how those concerns played out in the DeVos rulemaking, then turn to the additional questions of equal protection for democratic rights raised by this rulemaking.

A. Mass Commenting's Origins and Use by Ordinary Americans

Prior to the advent of mass commenting, administrative law scholars mainly worried about the *lack* of participation by ordinary Americans in notice-and-comment rulemaking. These concerns were particularly acute because, as noted above, these scholars saw—and see—notice-and-comment rulemaking both as a method of shoring up the legitimacy of the administrative state and as doing so through requiring agencies to engage with and be accountable to the American public.[178] Instead, as already described and for the reasons described, the notice-and-comment rulemaking process had come to be dominated by the regulated industry, leading to "agency capture" by those industries and inadequate protection of the public's interests in agency rulemaking and enforcement. The struggle for these scholars, then, was to change the notice-and-comment rulemaking process to encourage more ordinary people to participate, leading to new rulemaking processes such as negotiated rulemaking. Indeed, "e-rulemaking" was the hot new thing back in the mid-2000s largely because of precisely this drive to make commenting easier and more attractive to the general public.[179] At the time, certain scholars were skeptical of whether e-rulemaking would have the intended effects, pointing to what they characterized as the failure of negotiated rulemaking to fulfill that goal.[180]

Enter mass commenting. The current focus on fake comments and astroturfing distracts from more genuine and non-manipulative uses of mass commenting. Indeed, evidence exists that mass commenting was first used by progressive political organizations seeking to amplify outsider voices and participation in politics. For instance, one of the earliest

178 *See, e.g.*, Nina A. Mendelson, *Foreword: Rulemaking, Democracy, and Torrents of E-mail*, 79 GEO. WASH. L. REV. 1343, 1343–44 (2011) [hereinafter Mendelson Foreword].

179 *See, e.g.*, Cary Coglianese, *Citizen Participation in Rulemaking: Past, Present, and Future*, 55 DUKE L.J. 943, 944-45 (2006); Beth Simone Noveck, *The Electronic Revolution in Rulemaking*, 53 EMORY L.J. 433, 442 (2004).

180 *See, e.g.*, Coglianese at 944–45; Noveck.

studies of mass commenting centered around a 2004 boilerplate comment campaign led and facilitated by MoveOn.org.[181] MoveOn.org was one of the most prominent progressive organizations in the country during the George W. Bush administration, with which it deeply and vociferously disagreed. As suggested by its name, MoveOn.org focuses on "innovating new ways digital tech can empower ordinary people from all walks of life to make their voices heard," and it "pioneered the field of digital organizing, innovating a vast array of tactics that are now commonplace in advocacy and elections, and shifting power toward real people and away from Washington insiders and special interests."[182] While MoveOn.org almost certainly funds its operations at least in part through donations from those who participate in its digital activism, it seems very unlikely that, particularly in 2004, it was using mass commenting "simply as an opportunity to recruit new members and solicit personal information for subsequent donation solicitations," as Noveck characterizes organizations engaged in what she calls "clicktivism."[183] It is much more likely that MoveOn.org was using a digital organizing strategy that it may have pioneered, and this strategy saw a large uptick in use during the years of 45's administration and the Resistance.

Disability rights lawyer Matthew Cortland and law professor Karen Tani have discussed the Resistance's use of this organizing strategy in a 2019 entry on the Law and Political Economy Project blog entitled "Reclaiming Notice and Comment."[184] They provide multiple examples of how various groups—some through formal organizations and some not—used notice-and-comment processes to try to protect Obama-era regulations from 45's "besieg[ing of] the administrative state."[185] Also, Cortland wrote an online guide instructing grassroots activists on how to write and file comments fighting against Medicaid work requirements that 45's Health and Human Services was encouraging states to adopt via Medicaid Section 1115 waivers.[186] In it, he notes that "[45] isn't going to stop attacking

181 *See* Stuart W. Shulman, *The Case Against Mass E-mails: Perverse Incentives and Low Quality Public Participation in U.S. Federal Rulemaking*, 1 POL'Y & INTERNET 23 (2009).

182 *A Short History of MoveOn*, MOVEON.ORG, https://front.moveon.org/a-short-history/ [https://perma.cc/2GMT-97HN].

183 *See Astroturfing Hearings*, *supra* note 16, at 11.

184 Matthew Cortland & Karen Tani, *Reclaiming Notice and Comment*, L. & POL. ECON. PROJECT (July 31, 2019), https://lpeproject.org/blog/reclaiming-notice-and-comment/ [https://perma.cc/CWL4-GF64].

185 *Id.*

186 *See* Matthew Cortland, *Comment on Trump's Attack on Medicaid*, PATREON (Aug. 8, 2018), https://www.patreon.com/posts/20618943 [https://perma.cc/XAW6-2ZG2].

Medicaid. But we're not trying to change his mind, or the mind of anyone who works for him . . . We're commenting because it will make a difference in court."[187]

The ethos of Cortland's advice was also very present in the Title IX Movement's comment organizing efforts in response to the DeVos NPRM. As Cortland and Tani note, Know Your IX, one of the organizations resulting from Movement organizing beginning in 2013, also had a guide explaining to commenters how to comment most effectively.[188] Know Your IX was also among the group of organizations represented by the ACLU that filed the first legal challenge against the Final Rules.[189]

Some of the rulemakings during 45's administration that drew the largest numbers of comments also suggest that many comments were filed in an effort to protect existing agency rules from being dismantled. Many of these rules had been originally created at least in part as a result of massive—and genuine—grassroots campaigns. The record-breaking second rulemaking on net neutrality, for instance, was initiated by 45's Federal Communications Commission (FCC) to undo the rules put in place during the first, Obama-era, rulemaking.[190] Both rulemakings saw massive participation from real Americans, alongside bots and other fake comment-generators, due perhaps to encouragement by people with very large media platforms such as political comedian John Oliver, who did one episode of his popular HBO show for each rulemaking, and in each episode explained what the FCC proposed rules would do and how to comment.[191] After each episode, so many comments flooded in that it led to speculation that Oliver's viewers were responsible for overwhelming the FCC's servers.[192]

Especially when motivated by a desire to defend existing regulations widely viewed as serving the public interest from changes equally broadly seen as against the public

187 *Id.*

188 *See Notice and Comment 101*, KNOW YOUR IX, https://knowyourix.org/wp-content/uploads/2018/03/Notice-and-Comment-101.pdf [https://perma.cc/9TYS-5JHY].

189 Know Your IX, *supra* note 48.

190 *See* Cecilia Kang, *F.C.C. Repeals Net Neutrality Rules*, N.Y. TIMES (Dec. 14, 2017), https://www.nytimes.com/2017/12/14/technology/net-neutrality-repeal-vote.html [https://perma.cc/9M76-LJEA].

191 *See Last Week Tonight with John Oliver: Net Neutrality* (aired on HBO June 1, 2014); *Last Week Tonight with John Oliver: Net Neutrality II* (aired on HBO May 7, 2017).

192 Tony Romm, *John Oliver Is Urging Internet Users to Defend Net Neutrality*, VOX (May 8, 2017), https://www.vox.com/2017/5/8/15577732/john-oliver-net-neutrality-fcc. [https://perma.cc/N3CH-C3PP].

interest, such massive responses could serve two protective purposes. First, they could be intended to show how much public support there is for the *existing* regulations, including for anticipated APA-based court challenges to any changes. Second, they could have the additional benefit—at least in resistors' minds—of slowing down the agency's ability to finalize their proposals because it must read and respond to comments. Such a slow-down is potentially increased if the comments are lengthy, use different enough language to avoid being identified and easily processed by AI software, present (and attach) research and other documentation to support the commenters' positions, and/or are snail-mailed to the agency.

Regarding Title IX, one can see both of these protective measures being used in commenters' responses to the 2017 de-regulation comment call and the DeVos NPRM. The overwhelming response of commenters urging DeVos's ED to keep the Obama administration's guidance documents in place in 2017 was clearly an effort to show how wide the public support for those Obama-era documents was.[193] It reflected the commenters' awareness that the DeVos ED had the power to rescind those documents with the stroke of a pen and underscored the difference that the legal requirements attached to notice-and-comment rulemaking make. DeVos's ED had no legal obligation to do what the commenters urged—or even to read and respond to those comments—as the agency confirmed by doing the exact opposite of what ninety-nine percent of the de-regulation comment call commenters who addressed Title IX urged it to do: announcing that it would rescind the documents even while comments begging the agency to keep them were still being filed.[194]

Once DeVos's ED escalated its attacks on Title IX using the rulemaking process, it had to meet the requirements of the APA, giving commenters even more reasons to use their comments to try to protect the historical (and legally correct) approach to Title IX enforcement that DeVos's ED was trying to dismantle. Here, not only would showing overwhelming opposition to the DeVos NPRM's proposals communicate the public's antipathy to 45's administration in the admittedly slim hopes that they would scrap the proposals, but doing so could also help convince a court to overturn any regulations finalized despite that impossible-to-ignore opposition. Because the APA required the ED to respond to the comments, inundating the agency with comments also meant its staff had many more comments to process before the regulations could be finalized, and processing those comments would lengthen the time until the rules could be finalized.

193 *See generally* Buffkin et al., *supra* note 70.

194 *See id.* at 74.

Furthermore, as I speculated with other faculty conducting research and writing on sexual harassment and/or other relevant topics, ED staff—especially those not politically appointed by 45's administration who might view the political appointees' actions as illegitimate and illegal—would potentially be able to use comments with lengthy attachments such as research studies to lengthen their review. With no idea how possible such moves might be for actual ED staff, I imagined myself, in such a position, using lengthy comments with even lengthier research studies and academic documents attached to slow the review and response process to a crawl as I read every page of each submission closely, meticulously, and as many times as I could get away with.

Returning briefly to MoveOn.org's use of boilerplate comments in 2004, it is entirely possible that some of the motivations animating various Resistance-led mass commenting efforts during 45's term were also involved in that early use of mass commenting by MoveOn.org. These mass commenting examples, spanning nearly 15 years, demonstrate that mass commenting can be and has been used in multiple genuine efforts to amplify the voices and participation of ordinary people and outsider commenters.[195] Lumping such efforts together with cynical and abusive uses of mass commenting such as bot-generated comments, astroturfing, and even genuine clicktivism as Noveck defines it, ends up dismissing the ordinary members of the public organized by legitimate mass comment efforts. Even when such efforts use boilerplate comments, as the 2004 MoveOn.org commenters and 80,000+ DeVos NPRM commenters did, virtually ignoring them by using conventions such as the boilerplate comment convention undercuts and devalues the public participation upon which the commenting power's democratic legitimating force depends.

B. Mixed Reviews of Mass Commenting

Indeed, even those who are highly critical and dismissive of mass commenting mainly object to it because of the abuses already noted, as well as their belief that mass commenting does not encourage the *right* kind of public participation.[196] Here, not only is the definition of "right kind" unclear, but there is evidence that, even though the scholars concerned about mass commenting indicate that they are supporters of the Democracy Model of agency

195 Nina Mendelson, *Democracy, Rulemaking, and Outpourings of Comments*, REGUL. REV. (Dec. 20, 2021), https://www.theregreview.org/2021/12/20/mendelson-democracy-rulemaking-and-comments/ [https://perma.cc/LX8Q-2YX4].

196 Michael Herz, *Mass Comments' Opportunity Cost*, REGUL. REV. (Dec. 21, 2021), https://www.theregreview.org/2021/12/21/herz-mass-comments-costs/ [https://perma.cc/R2E9-95MH].

legitimacy, they struggle with whether and how much notice-and-comment rulemaking should serve the values of the Technocratic/Expertise Model.

For instance, a group of scholars who ran the Regulation Room at Cornell University—"an experimental online public participation platform" on which certain agencies allowed the researchers to host live rulemakings and study the comments that were filed—observed "a fundamental incongruence between the ways that 'insiders' think and talk in rulemaking and the ways that novice commenters do."[197] These scholars define "insiders" as "agency and other executive branch staff involved in writing and reviewing new regulations; industry, trade associations, and national advocacy groups who routinely take part in the process . . . ; and reviewing courts."[198] The scholars describe the problem they observed thusly: "Rulemaking, as it has been legally constructed, emphasizes empirical 'objective' evidence in the form of quantitative data and premise-argument-conclusion analytical reasoning. By contrast, the behavior of novice commenters in Regulation Room confirms . . . [that] what rulemaking 'outsiders' tend to offer is highly contextualized, experiential information, often communicated in the form of personal stories."[199]

Although the rulemakings hosted by the Regulation Room do not appear to have involved mass commenting, these researchers address mass commenting in other articles, confirming that those who are concerned about facilitating public participation in rulemaking must consider mass commenting. For example, in an article published not long after sharing their Regulation Room observations, the researchers discuss the mismatch between the goals of rulemaking and mass commenting, which they view as limited to expressing commenters' policy preferences and liken to voting or plebiscites.[200]

197 Cynthia R. Farina et al., *Knowledge in the People: Rethinking "Value" in Public Rulemaking Participation*, 47 WAKE FOREST L. REV. 102 (Nov. 13, 2012) [hereinafter *Knowledge in the People*].

198 *See id.* at 103.

199 *Id.*

200 *See* Cynthia R. Farina et al., *Rulemaking vs. Democracy: Judging and Nudging Public Participation That Counts*, 2 MICH. J. ENV'T. & ADMIN. L. 123 (2012).

They explain the differences between mass commenting/voting/plebiscites and rulemaking thusly:

> Voters are asked for outcomes, not reasons . . . By contrast, decades of judicial elaboration have constructed rulemaking as a process in which outcome legitimacy turns on a formally transparent process of reasoned deliberation . . . the expression of outcome preferences, per se, has little value in this process: Participation that counts requires reason-giving, and this will inevitably privilege some types of preferences over others.[201]

In other words, "To the extent rulemaking is a 'democratic' process, we expect it to be a process of deliberative, rather than electoral, democracy."[202]

The Regulation Room researchers ultimately recommend that outsider comments, with the "situated knowledge" they offer, be viewed by agencies as a supplement to "the expertise of rulemaking insiders."[203] Unfortunately, such a recommendation basically accepts that these commenters are marginal outsiders. More discomforting, even though the Regulation Room researchers devote an entire study to showing the value in these outsider comments, they end up suggesting that agencies are almost as dismissive of these kinds of comments as they are of mass comments, even though there is no indication that such comments result from abuses such as bots, astroturfing, or clicktivism. That is, if agencies already take outsider comments seriously, why would these researchers need to demonstrate their value and then urge agencies to view them as a valuable supplement?

The researchers' recommendation does even less for those commenters who participate in some form of non-abusive and non-corrupted mass commenting (hereinafter "legitimate mass comments" or "legitimate mass commenting"), including via boilerplate language provided to individual commenters in an organized effort to facilitate outsider comments. Indeed, the researchers' recommendation really only applies to individually written comments, ones which provide no indication that they are a part of an organized effort. In this view, comments that do provide indications that they are part of a larger, organized effort—even if genuine and not attempting to abuse the process—are merely attempting to cast a vote and therefore appear not to be worthy of even supplemental status.

201 *Id.* at 135.

202 *Id.* at 139.

203 *See Knowledge in the People*, *supra* note 197, at 103.

To be clear, I am not arguing that every comment, including boilerplate comments, be treated as a "vote" or that rulemaking should adopt the mechanisms of electoral democracy. Even if I was convinced that such mechanisms could and should be used in rulemaking (I am thus far *not* so convinced), as the Regulation Room researchers point out, it is too late for such a change. Many years of judicial interpretation of the APA mean that rulemakings use (or at least *should* use) a different form of democratic engagement than an electoral system.

However, a system and process can show respect for and facilitate democratic purposes and principles without making everything a vote. The boilerplate comment convention could, for instance, take into account the size of the group using a particular boilerplate comment. Such an approach might not treat a boilerplate comment as having the same weight as a commenter who wrote a unique comment, as "vote" treatment arguably would. Comments that had particularly helpful or relevant content, such as by drawing the agency's attention to pertinent research or showing the agency how application of its proposed regulation would affect the commenter, a particular group of people, or the general public, might legitimately get even more agency attention.

Nevertheless, the number of commenters who submitted a particular boilerplate comment could be credited with some significance—certainly more significance than that given to them by the boilerplate comment convention. For example, if a boilerplate is submitted by fifty commenters, should not the fact that fifty people thought the content of the comment was worth publicly associating with their name give it some greater weight in the agency's considerations? Such a comment should be deserving of even more attention if 50,000 people sign onto the same content, or if the fifty commenters that submitted a particular boilerplate were all organizations with constituencies of a substantial size. A single comment signed petition-style by hundreds, thousands, tens of thousands, and so on, should also be taken seriously, with due weight given to the number of signatures.

This focus on taking legitimate mass comments seriously is not just mine. Law professor Jonathan Weinberg has suggested that public comments get so little serious attention from agencies that any meaningful change to the system will require recognition of a new right: a right to be taken seriously.[204] In fact, after a brief but effective review of the extensive scholarship and theorizing relating to rulemaking, deliberative democracy, and civic republicanism, Weinberg rejects the characterization of notice-and-comment

204 Jonathan Weinberg, *The Right to Be Taken Seriously*, 67 U. MIA. L. REV. 149 (2002).

rulemaking as a form of deliberative democracy.[205] At the heart of Weinberg's concern is that the "dialogic, discursive relationship in which government must show the citizenry the respect of explaining itself—of hearing public comments and responding to them directly" is *simulated*.[206] Although "that sort of relationship builds connection because it creates a sense that governors and governed are part of a shared community[,] it's not really true."[207]

Law professor Nina Mendelson shares Weinberg's concerns. Moreover, Mendelson worries that "to the extent members of the public perceive that the opportunities to participate are not authentic, they may be deterred from engaging in the government process."[208] For many people, especially outsider commenters, commenting is additional, uncompensated work. The vast majority of insider commenters and agency staff are, after all, involved in the commenting process as part of their jobs. Unlike legitimate mass commenters, these insider commenters receive a salary, a share of profits, or similar compensation for their work on the notice-and-comment rulemaking process. If outsider commenters perceive that their comments are not taken seriously, why would they make the uncompensated sacrifice required to participate in the process?

This point underlines another positive aspect of legitimate mass commenting that seems lost in the overwhelmingly negative view of mass commenting. Boilerplate comments along with, presumably, petitions filed as comments and joint comments (by significantly large groups of people) allow outsider commenters to reap the benefits of collective action. First, if the comment is written by one or several people within a potentially quite large group of uncompensated commenters, the labor can be spread around between multiple people, or one person with the time and energy to write the comments can share that benefit with the others. Second, if the comment is written by an organization, the organization provides the labor and other resources so that many commenters with busy lives and limited time who agree with the comment can use it. Third, when organizations like MoveOn.org encourage their members to comment, they often provide a digital platform in which members can start with the boilerplate language but can edit or add to it. These organizations also often alert members to the existence of a particular rulemaking and likely educate them on the rulemaking process and the roles that public comments play. Fourth, working in concert

205 *See id.* at 153.

206 *See id.*

207 *See id.*

208 Mendelson Foreword, *supra* note 178, at 1373.

with other like-minded people is energizing, generally encouraging greater participation, not less.

All these benefits were present in the organizing effort that generated the vast majority of the 124,000+ comments filed in response to the DeVos NPRM. Because I was in close communication with many of the Title IX Movement activists who were a part of the organizing effort, I closely observed just how many different campaigns were launched to encourage members of the public to comment on the DeVos NPRM. A coalition of Movement organizations such as Know Your IX, End Rape on Campus, and SurvJustice created the HandsOffIX website and comment-filing platform, along with links to Title IX-related research and publications, as well as educational materials about how to write a comment in a manner that would maximize the chances that the comment would be viewed as "significant" or otherwise taken seriously by the agency.[209] Alyssa Milano used her prominence in the #MeToo organizing efforts to encourage people to file comments via a video of her reading a Dr. Seuss parody holiday story called "One ShIXtty Gift."[210] Student organizations, sometimes using HandsOffIX's platform and sometimes on their own, did comment-writing pizza parties on campuses across the country, even though many campuses were holding final exams at the time.[211] Many college graduates did the same over wine.[212] Law students on at least two campuses encouraged classmates, coworkers, and others to use and modify a menu of comment-starting drafts created by students at Rutgers Law's International Human Rights Clinic under the leadership and supervision of Professor Penny Venetis. The National Women's Law Center created various online tutorials, factsheets, etc., to assist people in filing comments either electronically or via snail mail.[213] A California Women's March organization and the Enough is Enough Voter Project printed postcards to be distributed via various branches of the Resistance, thousands

209 *See, e.g.*, *Notice and Comment 101*, *supra* note 188; Press Release, Know Your IX, Student Survivors Urge Department of Education to Withdraw Their Proposed Regulation on Title IX (Jan. 31, 2019) https://knowyourix.org/press-room/press-releases/ [https://perma.cc/6GZ2-JN85] (describing the Hands Off IX campaign).

210 Pauly, *supra* note 37.

211 *See id.*

212 *Id.*

213 *See, e.g.*, *Here's an Effective Way to Challenge Betsy DeVos' Attacks on Survivors*, NAT'L WOMEN'S L. CTR. (Nov. 29, 2018), https://nwlc.org/heres-an-effective-way-to-challenge-betsy-devos-attacks-on-survivors/ [https://perma.cc/7KS8-N8VL].

of which were written out and mailed to ED, as the Big Comment Catalog confirmed.[214] All of these efforts are examples of both collective action and its benefits, as individual people and civil society organizations pooled their resources in various ways to generate as many comments—and as many *effective* comments—as possible.

Finally, collective action has and continues to be especially important when the action involves asserting civil and human rights. In countless ways, the various Title IX Movement efforts to facilitate as many comments as possible and to maximize their effectiveness are reminiscent of and draw from the United States' long history of civil rights collective action focusing on equal protection of the law: both in terms of protesting denials of and demanding equal protection. Such movements date back at least to the mid-19th century in the United States, when the movements for abolition of slavery, suffrage (for both women and formerly enslaved people), and American labor not only began around the same time but often worked in coalition with each other.[215] Without equal—often without *any*—rights and power, discriminated-against people and groups have always known that we need to pool our numbers, strength, and resources to make progress towards greater—and hopefully, someday full—equality.

C. Mass Commenting and Equal Democratic Participation

The discussion above should make clear why the dismissal of legitimate mass comments not only presents problems with democratic participation in general but particularly with *equal* democratic participation. Moreover, given the United States' past and present *de jure* and *de facto* discrimination against democratic participation by all people of color and by all women (with women of color being a part of both groups), discrimination demonstrated first and foremost in unequal voting rights,[216] such a dismissal is especially unacceptable. When added to the attacks on American democracy itself that have continued past even 45's January 6, 2021, attempted coup[217] and that have unquestionably focused on disenfranchising people of color, dismantling even—or perhaps especially—subtle anti-democratic conventions is more urgent at this writing than ever before.

214 *See* Dircks et al., *supra* note 14, at 4.

215 *See* TRAISTER, *supra* note 31, at 116–17.

216 Selwyn Carter, *African-American Voting Rights: An Historical Struggle*, 44 EMORY L.J. 859, 863–64 (1995).

217 *See Capitol Riots Timeline*, *supra* note 2.

1. Sexual Harassment and Women's Democratic Participation

As already noted, 45's years in office witnessed—even arguably caused—a level of democratic engagement by women not seen in the United States since the 1970s.[218] While the Title IX Movement started well before 45's administration, the scope of public participation in the DeVos rulemaking likely went well beyond Movement activists, especially in light of the DeVos NPRM's timing, with the #MeToo movement barely a year old[219] and the massive protests over the multiple sexual harassment allegations leveled at Brett Kavanaugh[220] still echoing on Capitol Hill and outside the Supreme Court. These events, as well as earlier eruptions of public anger over sexual harassment, provide multiple examples of the catalyzing effects of sexual harassment on women's democratic engagement.

These catalyzing effects are important beyond more equal participation for women, moreover, because equal voting rights for people of color especially, as well as democracy itself, *need* women's sustained engagement. This need, in turn, increases the stakes of heeding Mendelson's warning that agencies' pretense of paying attention to mass comments will cause disillusionment and disengagement with rulemaking and other democratic processes.[221]

Women's engagement is needed because, as already noted, women are not a minority population; we are a subjugated majority.[222] Therefore, when large numbers of women form coalitions with minoritized groups, such as people of color, our combined power

218 *See generally*, WOMEN'S MARCH ORGANIZERS & CONDÉ NAST, *supra* note 59; *See also* Why Is This Happening?, *Rebecca Traister Explains Why Women Are so Furious: Podcast & Transcript*, NBC NEWS (Oct. 2, 2018), https://www.nbcnews.com/think/opinion/rebecca-traister-explains-why-womenare-so-furious-podcast-transcript-ncna9l5646 [https://perma.cc/S8QY-2E6L].

219 Katie Underwood, *One Year After #MeToo, We're Only Just Starting to Have the Right Conversations*, FLARE (Oct. 3, 2018), https://www.flare.com/news/metoo-movement-anniversary/ [https://perma.cc/D98R-ETX6]; *See also* Riley Griffin et al., *#MeToo: One Year Later*, BLOOMBERG (Oct. 5, 2018), https://www.bloomberg.com/graphics/2018-me-too-anniversary/ [https://perma.cc/7PAD-YJZK].

220 Dana R. Fisher, *Here's Why the Protests Against Kavanaugh (and the Trump Administration) Won't Go Away*, WASH. POST (Oct. 6, 2018), https://www.washingtonpost.com/news/monkey-cage/wp/2018/10/06/heres-hythe-protests-against-kavanaughs-confirmation-and-trumps-administrationwont-go-away/ [https://perma.cc/PGK4-SNR4].

221 *See* Mendelson Foreword, *supra* note 178, at 1373.

222 *See* TRAISTER, *supra* note 31, at 116.

is significantly more likely to achieve the changes sought. Thus, the fact that sexual harassment—or rather victims' and allies' reaction to it, as well as the increasingly widespread recognition of how sexual harassment is entangled with gender and racial inequality—has often pushed women to increase their democratic engagement is critically important. Recall that both of the "Years of the Woman" referred to above occurred in the wake of accused sexual harassers being nominated and confirmed for the Supreme Court.[223] However, women's rage over sexual harassment—specifically Clarence Thomas's sexual harassment of Professor Anita Hill—in 1992 was not adequately sustained and almost three decades would pass until another multiply-accused sexual harasser spurred a second "Year of the Woman."[224]

2. Dangers of Allowing Suppression of Women's Democratic Participation

The experience of the decades between 1992 and 2020 show the difference that women's engagement in our democracy makes: as voters, as elected officials, as activists, and as supporters of elected officials. For instance, during the years when women were not particularly politically active, efforts to suppress non-white people's ability to participate in that most basic of democratic activities, voting, gained in strength and intensity.[225] The effects of this inactivity are especially salient in regards to white women, as much evidence suggests that women of color have remained consistently politically active over centuries,

223 Maya Salam, *A Record 117 Women Won Office, Reshaping America's Leadership*, N.Y. TIMES (Nov. 7, 2018), https://www.nytimes.com/2018/11/07/us/elections/women-elected-midterm-elections.html [https://perma.cc/FDZ3-ME9Z]; Michael S. Rosenwald, *Anita Hill Hearings Led to the 1992 Year of the Woman*, WASH. POST (Sept. 18, 2018), https://www.washingtonpost.com/history/2018/09/18/no-women-served-senate-judiciary-committee-ugly-anita-hill-hearings-changed-that/ [https://perma.cc/TUA6-QXRT]; Elaine Karmack, *2018: Another 'Year of the Woman*,' BROOKINGS (Nov. 7, 2018), https://www.brookings.edu/blog/fixgov/2018/11/07/2018-another-year-of-the-woman/ [https://perma.cc/AP8G-ANPP].

224 Note that in 2018, there were multiple multiply-accused harassers, not just Kavanaugh, whose abuses pushed previously non-politically-engaged women to activism. *See, e.g.*, Fiza Pirani, *#MeToo: A Timeline of 2018's Sexual Harassment Scandals*, Atlanta J.-Const. (May 25, 2018) https://www.ajc.com/news/national/metoo-timeline-2018-sexual-harassment-scandals/Lv8ftAS6o0EMSdmqfo2R1L/ [https://perma.cc/2TYJ-ZS6D] (chronicling timelines of #MeToo accusations in the first half of 2018, including many multiply-accused harassers); Nigel Chiwaya, *New Data on #MeToo's First Year Shows 'Undeniable' Impact*, NBC News (Oct. 11, 2018), https://www.nbcnews.com/news/us-news/new-data-metoo-s-first-year-shows-undeniable-impact-n918821 [https://perma.cc/54TJ-GAV8] (describing increases in sexual harassment lawsuits and other legal and political #MeToo activism that occurred in 2018).

225 Keith G. Bentele & Erin E. O'Brien, *Jim Crow 2.0? Why States Consider and Adopt Restrictive Voter Access Policies*, 11 PERSP. ON POL'Y 1088, 1089-–90 (2013).

even while their activism is consistently rendered invisible by a variety of forces.[226] Efforts to suppress non-white people's ability to participate in that most basic of democratic activities, voting, also gained in strength and intensity.[227] Thus, experience suggests that equality of democratic participation for multiple marginalized groups is, on balance, increased by women's greater democratic participation.

In this context, the disillusionment with democratic participation that could result from the anti-democratic aspects of rulemaking exposed by the DeVos rulemaking raises the specter of deterring future political engagement for other groups beyond women, causing widely harmful effects on equality of democratic participation in general. Most concerning is how democratic disengagement by women potentially removes large numbers of college-educated white women—and their significant resources—from the coalition of those fighting discrimination against voters of color of all genders.

Moreover, the view that it is far-fetched to believe women who commented in the DeVos rulemaking would disengage from American democracy more broadly "merely" because they realized their comments were essentially ignored by their government (including both the agency and the courts) fails to consider the ways women, especially white women, in the United States have historically been successfully discouraged from democratic participation. First of all, patriarchy's all-encompassing public-private structural divide has only partially been dismantled, and to the extent it remains, it sets up the private realm as the ideal and indeed only valuable place for women—even when economic realities mean and have long meant that, for the most part, only women who are white and connected to propertied white men could be confined on such a supposed pedestal.[228] This patriarchal scaffolding was key to the denial of women's right to vote that was amended out of the Constitution barely a hundred years ago.[229]

Once the 19th Amendment went into effect, moreover, the white, male, and propertied ruling class of the time quickly realized that they could retain power if white women voted with them.[230] However, white women's voting could not be diluted and/or controlled

226 *See And Even More of Us Are Brave*, *supra* note 71, at 54–69.

227 *Id.*

228 *Id.*

229 Steve Kolbert, *The Nineteenth Amendment Enforcement Power (But First, Which One Is the Nineteenth Amendment, Again?)*, 43 FLA. ST. U. L. REV. 507, 538 (2016).

230 *See* REBECCA TRAISTER, ALL THE SINGLE LADIES 490–91 (Simon & Schuster, 2016).

through the *de jure* methods[231] that diluted or eliminated entirely the votes of non-whites. White women, after all, were not segregated geographically from white men the way that communities of color were and often continue to be segregated—again through both *de jure* and *de facto* methods—from white communities.[232] Instead, the ruling minority of white, propertied men effectively got white women to vote *with them* for much of the subsequent hundred years, with some—if contested[233]—evidence that white women's voting patterns even in 2016 and 2020 fit this historical pattern.

3. Race, Economic Dependency, and Women's Democratic Participation

Furthermore, history teaches us that two of the most effective methods for getting white women to vote with white men were and are economic dependency and racism. For instance, research indicates that white women who are or have been married to men are much more likely to vote in favor of continuing white male dominance of the government and political spheres, as compared to white women who have never been married.[234] Because largely unabated economic gender discrimination such as massive pay inequity makes rejecting marriage impoverishing, even today, marriage is often a sign of economic dependency or at least co-dependency for women.[235] In such economic circumstances, the perception that what is good for white men will be good for their dependents, including

231 U.S. CONST. art. I, § 2, cl. 3 (in relevant part, the Three-Fifths Compromise reads: "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.").

232 *See* Segregated by Design, SILKWORM STUDIOS (April 2019), https://www.segregatedbydesign.com/ [https://perma.cc/JB53-3R82].

233 For instance, some rely on exit poll data, which others criticize as unreliable. *See. e.g.*, Jonathan Chait, *'White Women Voted for Trump' Is the Worst Election Trope*, INTELLIGENCER (Dec. 1, 2020), https://nymag.com/intelligencer/article/did-white-women-vote-for-trump-no.html [https://perma.cc/SQ2Y-MXG8]. The Pew Research Center developed a non-exit poll reliant research method, which shows that a majority of white women voted Democratic in 2016, 2018, and 2020. Ruth Igielnik et al., *Behind Biden's 2020 Victory*, PEW RSCH. CTR. (June 30, 2021), https://www.pewresearch.org/politics/2021/06/30/behind-bidens-2020-victory/ [https://perma.cc/B2VP-8ZYN].

234 *See* TRAISTER, *supra* note 31, at 123 (discussing Dara Z. Strolovitch, Janelle S. Wong & Andrew Proctor's research showing that "59 percent of never-married white women voted for Hillary Clinton, compared to the almost reverse majority of married white women, 57 percent, who voted for Donald Trump").

235 Christopher T. Stout et al., *Gender Linked Fate, Race/Ethnicity, and the Marriage Gap in American Politics*, 70 POL. RSCH. Q. 509, 511 (2017).

their wives, logically leads many white women to see it as in their interest to vote as their husbands do.[236]

With regards to racism, a long and plentiful history of white men using racism to divide white women from people of color includes such notable examples as what journalist Rebecca Traister has called "The Ballot Box Divide":[237] when the right to vote was used as a wedge to successfully divide the once strong coalition between the abolition and women's suffrage movements of the 19th century. That coalition fought for voting rights for all Black people during pre-Civil War efforts to abolish slavery and during part of the five years between Juneteenth, 1865, and the ratification of the 15th Amendment. However, the fight over whether the 15th Amendment would include women (of any race) ultimately fractured not only that coalition but also the women's suffrage movement itself.[238] It did so by pitting against each other those who felt that securing the right to vote for African American men was more important; those who were concerned that opposing a 15th Amendment for Black male votes would doom *any* expansion of voting rights; those who opposed voting expansions that excluded women; those who felt white women should get the right to vote before any African Americans did; and those in any number of variations between those positions.[239] Specific examples of the divide-and-conquer tactics used during those years include state ballot referenda,[240] presumably written by white men who had exclusive control of all levels of government at the time, which forced voters to choose between women's suffrage and Black male suffrage. A pro-slavery white man also offered funding to Elizabeth Cady Stanton and Susan B. Anthony to publish a suffragist publication, one that ultimately exposed these white women's willingness to spout deeply racist beliefs in

236 *See* Lucia Graves, *Why Hillary Clinton Was Right About White Women—And Their Husbands*, THE GUARDIAN (Sept. 25, 2017), https://www.theguardian.com/us-news/2017/sep/25/white-women-husbands-voting [https://perma.cc/X53B-UMZZ].

237 TRAISTER, *supra* note 31, at 116.

238 Margaret E. Johnson, *Lessons Learned from the Suffrage Movement*, 2 MD. BAR J. 115, 117 (2020); Women's Suffrage, HISTORY.COM (Mar. 9, 2022), https://www.history.com/topics/womens-history/the-fight-for-womens-suffrage [https://perma.cc/66EM-AHSG]; *Why the Women's Rights Movement Split over the 15th Amendment*, NAT'L PARK SERV., (Jan. 14, 2021), https://www.nps.gov/articles/000/why-the-women-s-rights-movement-split-over-the-15th-amendment.htm [https://perma.cc/MW47-FAS3].

239 *See generally* KYLA SCHULLER & BRITTNEY COOPER, THE TROUBLE WITH WHITE WOMEN: A COUNTERHISTORY OF FEMINISM (Pub. Affs. 2021). *See also* Virginia Sapiro, *The Power and Fragility of Social Movement Coalitions: The Woman Suffrage Movement to 1870*, 100 B.U. L. REV. 1557 (2020).

240 *See* TRAISTER, *supra* note 31, at 118.

order to secure their own rights and interests, which they were ultimately unsuccessful at doing, since both women died before the 19th Amendment was ratified.[241]

Another example comes from competing stories about the addition of "sex" to Title VII of the 1964 Civil Rights Act. One story is that "sex" was introduced by a white southern congressman, Howard W. Smith, who opposed Title VII, in order to defeat it and its anti-*race* discrimination provisions.[242] The competing version of the story[243] suggests that the addition of "sex" was a result of lobbying on the part of Alice Paul's National Women's Party, an organization whose history, founder, and membership at the time were hardly pro-racial equality. For instance, as a leader of the crucial 1913 Women's Suffrage Parade, Paul tried to force African American suffragist and anti-lynching activist, Ida B. Wells, to march at the back of the parade, where the other Black suffragists were segregated during the procession.[244] By the 1960s, the National Women's Party was made up mainly of elderly white women who did not support the civil rights movement or civil rights legislation.[245] According to the competing version of the story, these members lobbied Smith to propose the "sex" amendment because they objected to the way the legislation would leave white women unprotected from discrimination (unsurprisingly, they did not appear to recognize or care about how women of color might face discrimination based on sex).[246]

Regardless of which of these stories is more accurate, it seems clear that Smith would have seen proposing the addition of "sex" as a "win-win" situation for him and for the

241 *See id.* at 117–21.

242 Clay Risen, *The Accidental Feminist*, SLATE (Feb. 7, 2014), https://slate.com/news-and-politics/2014/02/the-50th-anniversary-of-title-vii-of-the-civil-rights-act-and-the-southern-segregationist-who-made-sure-it-protected-women.html [https://perma.cc/5KBZ-96MK]; *see also* John Feehery, *The Poison Pill*, THE HILL (Oct. 28, 2009), https://thehill.com/blogs/pundits-blog/lawmaker-news/65239-the-poison-pil [https://perma.cc/QR3J-6ALS]; Rebecca Onion, *The Real Story Behind "Because of Sex,"* SLATE (Jun. 16, 2020), https://slate.com/news-and-politics/2020/06/title-vii-because-of-sex-howard-smith-history.html [https://perma.cc/975W-PVB3].

243 Jo Freeman, *How Sex Got into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 LAW & INEQ. 163 (1991).

244 *See* TRAISTER, *supra* note 31, at 133.

245 *See e.g.*, COMBAHEE RIVER COLLECTIVE, THE COMBAHEE RIVER COLLECTIVE STATEMENT (1977), *reprinted in* HOW WE GET FREE: BLACK FEMINISM AND THE COMBAHEE RIVER COLLECTIVE, 15–27 (Keeanga-Yamahtta Taylor ed., 2017) (commenting, in part, on the exclusion of Black feminists from the white feminist movement of the 1960s).

246 *See* Freeman, *supra* note 243.

ruling white male minority to which he belonged. That is, either the addition would doom the bill and its protections against race discrimination, or it would ingratiate him with white women constituents who cared about sex discrimination and/or worried about having supposedly less legal protection than African Americans. (Smith likely assumed that white women constituents who did not care about such issues voted similarly to their white husbands, so Smith did not need to ingratiate himself with them.)

An even more recent example involving the use of racism to (attempt to) retain white women as voters for the ruling white male minority appeared in the 2020 Republican National Convention and 45's appeals to "suburban housewives." In a tweet on August 12, 2020, for instance, 45 claimed, "The 'suburban housewife' will be voting for me. They want safety & are thrilled that I ended the long running program where low income housing would invade their neighborhood. Biden would reinstall it, in a bigger form, with Corey Booker in charge!"[247]

45's references to "safety" and to an African American male Senator are clear references to another way in which white men have historically used race to convince white women that it is in their interests to politically support white men: by promoting stereotypes of black men as violent criminals, including through what civil rights leader Angela Davis long ago identified as the "Myth of the Black Rapist"[248] and what law professor Paul Butler has more recently named "The Thug"[249] stereotype. White men involved in white supremacist organizations like the Ku Klux Klan used the rapist myth as the primary excuse for lynching Black men in the Jim Crow South.[250] Although lynching was mainly perpetrated by men, white women certainly collaborated in both active and passive ways in lynching and other Jim Crow institutions.[251]

Indeed, white supremacists justified violence and discrimination against men of color by appealing to a pretext of protecting white women's bodies from Black men's sexual

247 Caroline Kitchener, *The Republican National Convention Is Targeting 'Suburban Housewives,'* THE LILY (Aug. 27, 2020), https://www.thelily.com/the-republican-convention-is-targeting-suburban-housewives-voters-ask-is-that-code-for-racist-white-woman/ [https://perma.cc/B7FA-VNY4].

248 *See generally* Angela Davis, *Rape, Racism and the Myth of the Black Rapist*, *in* WOMEN, RACE & CLASS 172 (1981).

249 *See generally* PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN (2017).

250 *See* Megan Armstrong, *From Lynching to Central Park Karen: How White Women Weaponize White Womanhood*, 32 HASTINGS L. J. 27, 37–38 (2021).

251 *Id.*

violence. This racist tactic was such a reliable strategy that it became a formula used repeatedly outside the lynching context. For instance, in an article about the campaign led by white male labor unions during the 1890s–1920s against Chinese restaurants, law professor Gabriel Chin and attorney John Ormonde discuss how Chinese restaurants were alleged to be sites of sexual exploitation and assault of white women by Chinese men.[252] This campaign resulted in various bills and legislation barring white women from working in Chinese restaurants, as well as police practices of ordering white women to leave Chinese restaurants.[253]

The more current "Thug" stereotype at the heart of 45's tweet does not limit the supposed violence to sexual violence, but simply paints all Black men as violent criminals and "a threat . . . [that t]he state—especially the police—is authorized to control . . . by any means necessary."[254] Indeed, the references to safety and Senator Booker cannot be considered dog-whistles only because their racism is so obvious.[255] Equally obvious is that the "suburban housewives" to whom the tweet is calling out are white women like those who have been filmed over the last few years threatening to or actually calling the police on African Americans for: selling water in a public park;[256] asking the white woman to leash her dog (as she was required to do by law);[257] barbecuing;[258] yelling instructions to their child during a soccer game;[259] and accidentally brushing the white woman with a backpack

252 *See* Gabriel Jackson Chin & John Ormonde, *The War Against Chinese Restaurants*, 67 DUKE L.J. 681 (2018).

253 *Id.* at 698–716.

254 *See* BUTLER, *supra* note 249, at 9.

255 *See* Jennifer Weiner, *Trump is Dog Whistling. Are 'Suburban Housewives' Listening?*, N.Y. TIMES (July 28, 2020), https://www.nytimes.com/2020/07/28/opinion/trump-white-women.html [https://perma.cc/U5EV-8PUJ].

256 Jessica Campisis et al., *After Internet Mockery, 'Permit Patty' Resigns from Her Position as CEO of Cannabis-Products Company*, CNN (June 26, 2018), https://www.cnn.com/2018/06/25/us/permit-patty-san-francisco-trnd/index.html [https://perma.cc/M7UF-RQS6].

257 April Siese, *White Woman Amy Cooper Fired from Her Job After She Called the Cops on a Black Man in Central Park*, CBS NEWS (May 27, 2020), https://www.cbsnews.com/news/central-park-karen-amy-cooper-white-woman-calls-cops-black-man-fired-franklin-templeton/ [https://perma.cc/DTT2-ZH4B].

258 Christina Zhao, *'BBQ Becky,' White Woman Who Called Cops on Black BBQ, 911 Audio Released: 'I'm Really Scared! Come Quick!*', NEWSWEEK (Sept. 4, 2018), https://www.newsweek.com/bbq-becky-white-woman-who-called-cops-black-bbq-911-audio-released-im-really-1103057 [https://perma.cc/C28L-AVKZ].

259 Antonia Noori Farzan, *BBQ Becky, Permit Patty and Cornerstore Caroline: Too 'Cutesy' for Those White Women Calling Police on Black People?*, WASH. POST (Oct. 19, 2018), https://www.washingtonpost.com/news/morning-mix/wp/2018/10/19/bbq-becky-permit-patty-and-cornerstore-caroline-too-cutesy-for-those-white-women-calling-cops-on-blacks/ [https://perma.cc/QC33-5W5Q].

while passing her in a convenience store.[260] It is an open question whether the majority of white American women voted for 45 in 2016,[261] whether they are of the "Cornerstore Caroline" (or the broader "Karen") variety, or whether they instead fueled the 2018 "Year of the Woman" and joined lines of white women standing between police and Black Lives Matter protesters.[262] Nevertheless, the history of white women voting for and supporting political white male dominance despite—or perhaps because of—its racist policies, is clear.

It is also important to recognize how the Thug stereotype and its consequences are actually a disenfranchisement twofer. They not only convince at least a significant minority of white women[263] to dilute their own potential power (had they been unified and/or working in coalition with non-white people) to do more than simply prop up the ruling white male minority, they also contribute to racist policing and the mass incarceration of African Americans that Michele Alexandre has characterized as "The New Jim Crow."[264] That is, because one of the collateral consequences of criminal convictions in many states is loss of the right to vote, the Thug stereotype, by enabling and justifying racist policing, criminal conviction and incarceration, enables disenfranchisement of black voters.

Indeed, the disenfranchisement of voters of color through the racially discriminatory

260 Kristine Phillips, *A Black Child's Backpack Brushed up Against a Woman. She Called 911 to Report a Sexual Assault.*, WASH. POST (Oct. 16, 2018), https://www.washingtonpost.com/nation/2018/10/13/black-childs-backpack-brushed-up-against-woman-she-called-report-sexual-assault/ [https://perma.cc/6QZ4-8RRG].

261 *See* Chait, *supra* note 233; *see also* Dora Mekouar, *Women Outnumber and Outvote Men, but They Don't Vote Alike*, VOA NEWS (May 5, 2021), https://www.voanews.com/a/usa_all-about-america_women-outnumber-and-outvote-men-they-dont-vote-alike/6205437.html [https://perma.cc/4MGZ-J6EN].

262 Jenna Amatulli, *'Wall Of Moms' in Portland Protects Protesters from Federal Agents*, HUFFPOST (July 20, 2020), https://www.huffpost.com/entry/wall-of-moms-portland-oregon_n_5f15a73ac5b6cec246c5990e [https://perma.cc/9HMD-9TKQ]; Savannah Eadens, *Viral Photo Shows Line of White People Between Police, Black Protesters at Thursday Rally*, LOUISVILLE COURIER J. (May 29, 2020), https://www.courier-journal.com/story/news/local/2020/05/29/breonna-taylor-photo-white-women-between-police-black-protesters/5286416002/ [https://perma.cc/EJL8-2M49].

263 Erin Delmore, *This is How Women Voters Decided the 2020 Election*, MSNBC (Nov. 13, 2020), https://www.nbcnews.com/know-your-value/feature/how-women-voters-decided-2020-election-ncna1247746 [https://perma.cc/9EER-AF7L].

264 *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010).

criminal legal system[265] and its collateral consequences joins a long list of other methods used to attack the voting rights of people of color. Recent years have drawn increasing and needed attention to a host of state law-based strategies to exclude non-white people from voting. The baldly discriminatory laws passed in several states after Americans of color—especially Black Americans—voted in large numbers in the 2020 election and the January 2021 Georgia runoff election are only the most recent examples.[266] Race-based gerrymandering, for instance, is accomplished by state governments exercising their constitutional powers to draw the boundaries of congressional districts.[267]

In addition, state laws awarding all of a state's electors in the Electoral College to whichever candidate wins the majority of votes in the state play into the racist history of the Electoral College and likely decrease the voting power of non-whites in presidential elections.[268] As already noted, the Electoral College was constructed as a part of the "Three-Fifths Compromise" in the original Constitution, which gave slave-holding states outsized federal voting power by treating enslaved African Americans as three-fifths of a person for determining the numbers of electors a state received—without allowing enslaved persons to vote, of course.[269] Nor has this history of both racist and general inequality been left behind by the current Electoral College, largely because the "winner take all" state laws cause the "worth" of a vote in one state to be as much as quadruple the power of a vote in another state.[270] Two of the most "underrepresented" states as a result of this combination (winner-take-all state laws plus the Electoral College)— California and Texas—are also the two most populous states of the four states in which the non-white population outnumbers the

265 Jeff Manza & Christopher Uggen, *Punishment and Democracy: Disenfranchisement of Nonincarcerated Felons in the United States*, 2 PERSP. POL. 491, 492 (2004).

266 *Voting Laws Roundup: October 2022*, BRENNAN CTR FOR JUST. (Oct. 6, 2022), https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-october-2022?_ga=2.43314341.1212300263.1665682698-323802553.1665682698 [https://perma.cc/MWQ6-Q2RS].

267 Adriane M. Kappauf, *Twin Flames: A Story of Racial Gerrymandering and Partisan Gerrymandering*, 28 WIDENER L. REV. 119, 127 (2022); Laura Odujinrin, *The Dangers of Racial Gerrymandering in the Frontline Fight for Free and Fair Elections*, 12 U. MIAMI RACE & SOC. JUST. L. REV. 164, 170 (2021).

268 David Schultz, *Minority Rights and the Electoral College: What Minority, Whose Rights?*, 55 GA. L. REV. 1621, 1643–44 (2021).

269 *Id.* at 1629–30.

270 Denise Lu, *The Electoral College Misrepresents Every State, but Not as Much as You May Think*, WASH. POST (Dec. 6, 2016), https://www.washingtonpost.com/graphics/politics/how-fair-is-the-electoral-college/?noredirect=on [https://perma.cc/TW26-YGEW].

white population.[271] Thus, the combination of these two facets of the system makes it even more likely that people of color are being underrepresented or are having their votes diluted disproportionately in presidential elections. This history and the current operation of state laws together have gifted the Electoral College with the negative distinction of being "one of the most fundamentally undemocratic parts of U.S. elections . . . [and] government."[272]

4. "Divide and Conquer" Tactics to Suppress Women's Democratic Participation under Title IX

In case such examples still seem too remote from the DeVos rulemaking, I have documented efforts by DeVos and her collaborators that rely on a similar divide-and-conquer playbook. They have tried to deploy a set of narratives that pit women (whom the narratives assume are all white) against people of color (whom the narratives assume are all men).[273] Unsurprisingly, given the Title IX Movement's focus on sexual harassment and gender-based violence, these narratives returned to the familiar "men of color sexually assault white women" myth. However, the tactics used by DeVos and her partners rely on this stereotype in a different way, deploying a narrative that accusations of sexual assault on college campuses are just another iteration of white women *falsely* accusing men of color of sexual assault, false accusations that are leading to discriminatory discipline directed at, especially, Black male students.[274] In two articles written during 45's term, I dissected this narrative and showed how it is not based on known or knowable facts, largely because no laws or regulations require colleges and universities to disclose demographic information on student discipline matters.[275] Rather, this narrative relies on intersectional racialized sex stereotyping that does an enormous amount of damage, notably to women of color, but also to men of color and white women.[276]

271 Hans Johnson et al., *California's Population*, PUB. POL'Y INST. OF CAL. (Jan. 2022) https://www.ppic.org/publication/californias-population/ [https://perma.cc/RS49-A7VG]; Alexa Ura, *Hispanic Texans May Now Be the State's Largest Demographic Group, New Census Data Shows*, TEX. TRIBUNE (Sept. 15, 2022) https://www.texastribune.org/2022/09/15/texas-demographics-census-2021/ [https://perma.cc/R79M-A4LC].

272 Alex Cohen, *The National Popular Vote, Explained*, BRENNAN CTR. FOR JUST. (Dec. 8, 2020), https://www.brennancenter.org/our-work/research-reports/national-popular-vote-explained [https://perma.cc/M357-LPPE].

273 *See Dog Whistles and Beachheads*, *supra* note 11, at 308.

274 *See id.*

275 *See Dog Whistles and Beachheads*, *supra* note 11; *And Even More of Us Are Brave*, *supra* note 71.

276 *See And Even More of Us Are Brave*, *supra* note 71, at 16–20.

Although the infinitesimally small amount of support expressed for the DeVos NPRM suggests that this narrative had little persuasive effect on comments filed, it remains impossible to know whether it dissuaded some from commenting at all and how large such a group may have been. After all, due to editing and publication schedules, neither of my pieces[277] was published before or during the short comment period for the DeVos NPRM, whereas prominent usages of the narrative I was calling out were published before the comment period closed in such venues as *The Boston Globe* and *The New York Times*.[278] Aside from what data might have shown, had it been even possible to gather it, logic suggests that the deterrent effect would likely have been strongest on women—white and non-white—if they were inclined to oppose or criticize the DeVos NPRM. First, the narrative reminds women of color of racist stereotypes faced by men with whom they may share a community. This reminder could dissuade them from openly opposing the proposed regulations so as to avoid potentially having their opposition interpreted as approval of such stereotypes.[279] Second, the narrative could dissuade white women from commenting in opposition because the narrative suggests that white women who oppose the proposals are doing so because they are racists, liars, or both.

These examples show how discrimination outside the rulemaking process can create inequalities within the rulemaking process, especially when the rulemaking takes on an issue that is politically complex and fraught, as many civil rights issues can be. This discrimination is piled on top of the already strong and pervasive economic inequality endemic to the rulemaking process and the unequal agency attention received by insider comments as compared to outsider comments.[280] In light of these inequalities, those from marginalized groups may have additional reasons to participate in commenting as a part of an organized, collective voice that uses some form of legitimate mass commenting. In this context, dismissing legitimate mass comments adds to discrimination already pervasive in the process and further dilutes the rights and democratic participation of certain classes of outsider commenters. A new way of valuing legitimate mass comments is needed, the topic to which the next and final section turns.

277 *See generally Dog Whistles and Beachheads*, *supra* note 11; *And Even More of Us Are Brave*, *supra* note 71.

278 *See Dog Whistles and Beachheads*, *supra* note 11, at 319–24.

279 *See id.* at 309.

280 *See* Daniel E. Walters, *Capturing the Regulatory Agenda: An Empirical Study of Agency Responsiveness to Rulemaking Petitions*, 43 HARV. ENVTL. L. REV. 175, 183–85 (2019).

IV. A Proposal: Equalizing Participation in Rulemaking via "Modified Negotiated Rulemaking"

Both the Senate committee report[281] and Noveck's 2021 testimony[282] provide multiple recommendations, mainly relying on technological solutions, for addressing the problems with mass commenting and increasing meaningful participation by more commenters, especially outsider commenters. Several of these recommendations, even if not implicated in the DeVos rulemaking, make eminent sense. For instance, both the Senate committee report and Noveck discuss agencies' failure to use bot-screening technology to prevent or eliminate fake comments from being filed, and thus recommend adoption of CAPTCHA technology as a solution.[283] The Senate committee report also recommends that: agencies develop protocols for screening and ensuring that fake or abusive comments are not posted; the APA be amended to "provide guidance to agencies on the degree to which they should consider the volume of comments they receive in favor of or against a proposed rule"; agencies sort and figure out how to avoid posting "duplicative comments"; and agencies prohibit damaging technology and use the threat of criminal penalties to prevent identity theft and comments from being filed under fake identities.[284] Noveck also provides numerous suggestions of other technologies and methods by which governments could encourage more meaningful citizen participation in comment processes.[285] Finally, Noveck emphasizes that "the real problem . . . is not astroturfing, but taking the value of public commenting seriously."[286]

With regard to boilerplate comments in particular, the Senate committee report recognizes as a problem that agencies publish "thousands of duplicate or near-duplicate comments that make a docket difficult or impossible for the public to review . . . for substantive information."[287] The report notes that, in contrast, the Securities and Exchange

281 Abuses of Federal Notice-And-Comment Rulemaking, *supra* note 97.

282 *Astroturfing Hearings*, *supra* note 16.

283 *See id.* at 21–22.

284 Abuses of Federal Notice-And-Comment Rulemaking, *supra* note 97, at 3–4.

285 *See Astroturfing Hearings*, *supra* note 16, at 6.

286 *Id.* at 4.

287 Abuses of Federal Notice-And-Comment Rulemaking, *supra* note 97, at 25. *See also id.* at 27.

Commission posts one sample of the boilerplate comment, with a number corresponding to how many times the same comment language was repeated.[288]

Though these suggestions contain valuable initial insights, they do not address the issue of how to deal with legitimate mass commenting, nor do any of the solutions address the loss of democratic participation or the unequal democratic participation involved in just eliminating all mass commenting, legitimate or not. To confront such issues, I return to Weinberg's *The Right to be Taken Seriously* and make a proposal for a new/adjusted notice-and-comment process.

A. Deliberative Democracy and the Proposed Modified Negotiated Rulemaking Method

In *The Right to be Taken Seriously*, Weinberg describes two kinds of deliberative-democracy:

> The first is deliberation among the people . . . It is marked by some measure of equality; no one person or advantaged group dominates. Participants engage with each other, trying to convince each other [in] an open-minded search for a larger public good, rather than the selfish goals of the participants . . . Alternatively, deliberation can be seen to take place not among ordinary people, but among elites with decision-making authority . . . The goal is the same as before, though: As the participants, somewhat shielded from democratic pressures, seek to reconcile their contrasting viewpoints, "a policy emerges that can serve a more universal consensus of the common good."[289]

Weinberg then confirms what anyone who has read this Article to this point already knows:

> Notice-and-comment is neither of those things. It is neither communication among members of the public nor communication among elites. Rather, it is communication across that line as members of the public seek to influence agency decision-makers. Even more importantly, it is not deliberative. There is . . . little opportunity for members of the public to engage with each other in any sustained way . . . Notice-and-comment does not facilitate consensus.[290]

288 *See id.* at 27.

289 Weinberg, *supra* note 204, at 172–73.

Rather, Weinberg concludes, "Each member of the public participating in a notice-and-comment process has the instrumental task of convincing the agency (an authoritative decision-maker) of the correctness of that participant's positions."[291]

While I agree with Weinberg's conclusion regarding the DeVos rulemaking and, indeed, regarding rulemaking generally, I know of—indeed, have participated in—a rulemaking that fits his deliberative-democracy description and thus shows that it is *possible* to achieve such deliberative democracy in a rulemaking proceeding. Specifically, in early 2014, during the Obama administration, I served as a Negotiator in a Negotiated Rulemaking that amended regulations under the Clery Act after the 2013 Violence Against Women Act (VAWA 2013) amended the statute.[292] Over four months, this Negotiated Rulemaking Committee—made up of negotiators who had been nominated by organizations and educational institutions and then selected by the ED officials that convened the rulemaking—met repeatedly in Washington, D.C., to negotiate a consensus set of regulations.[293]

I had been nominated by the Victim Rights Law Center, where I was serving as a research fellow, and ED selected me to represent off-campus advocacy organizations. Other negotiators represented a range of offices and organizations concerned with and working in campus crime prevention and response, including (as far as I can remember) campus police, campus women's and victims' advocacy centers, the National Association of College and University Attorneys, off-campus legal services organizations, off-campus student activist organizations, Student Affairs offices, and Title IX coordinator offices.[294] Trained facilitators and a range of agency staff from the Office of Postsecondary Education at ED, which implements and enforces the Clery Act, participated in the meetings. Staff from other parts of ED that had an interest in the negotiation, as well as possibly from the

290 *Id.* at 173–74.

291 *Id.* at 174.

292 *See Negotiated Rulemaking 2013-2014 Violence Against Women Act (VAWA)*, U.S. DEP'T OF EDUC. (Aug. 15, 2018) https://www2.ed.gov/policy/highered/reg/hearulemaking/2012/vawa.html [https://perma.cc/8ARP-UNNP].

293 *Id.*

294 *Violence Against Women Act (VAWA) Negotiated Rulemaking Committee 2013*, U.S. DEPT' OF EDUC. (Feb. 21, 2014) https://www2.ed.gov/policy/highered/reg/hearulemaking/2012/vawa-negotiators2014.pdf [https://perma.cc/UW3K-ALMW].

Office on Violence Against Women in the U.S. Department of Justice, which implements VAWA, observed. The meetings were open to the public, so there was also a group of non-agency observers at each meeting, including members of the trade press.

Although I am unsure if the VAWA 2013 Negotiated Rulemaking Committee's membership would fit Weinberg's definition of a deliberation among ordinary people or among elites, the process did have the marker of equality and the engagement between peers that Weinberg describes.[295] Also consistent with Weinberg's description, the Committee's goal was to reach a consensus about a common public good (i.e. rules that both fulfilled the statutory purposes of getting schools to better protect students from crimes committed on campus—especially the four "VAWA crimes" of dating violence, domestic violence, sexual assault, and stalking—and to set out workable compliance obligations).

By the conclusion of the four-month negotiation, the Committee had written proposed rules.[296] Agency staff added explanatory text and background information about the Negotiated Rulemaking and published the package as an NPRM on June 20, 2014. The public had thirty days to comment on the proposed rules, and the final rule with the required responses to comments filed was published in the Federal Register on October 20, 2014.[297]

Never having participated in a Negotiated Rulemaking before, despite having practiced administrative law for a brief time as a new attorney, I learned an enormous amount and am sure that the other participants did as well. The negotiators taught agency staff a lot about the problems that the VAWA 2013 amendments to Clery aimed to address.[298] At the same time, the negotiators—who were overwhelmingly not lawyers—never mind administrative lawyers—learned not only about how the rulemaking process worked but, more importantly, what could be accomplished through such a process. Finally, because almost all the negotiators worked on only a subset of the problems at the heart of the rulemaking, we all enhanced our knowledge of a topic on which we already had significant but often narrow expertise. The fact that no single person knew everything, combined with

295 *See* Weinberg, *supra* note 204.

296 Violence Against Women Act, 79 Fed. Reg. FR35418 (proposed June 20, 2014) (to be codified at 38 C.F.R. pt. 668).

297 Violence Against Women Act, 79 Fed. Reg.FR 62752 (Oct. 20, 2014) (to be codified at 38 C.F.R. pt. 668).

298 *See*, *e.g.* Lisa N. Sacco, *The Violence Against Women Act (VAWA): Historical Overview, Funding, and Reauthorization*, CONGRESSIONAL RESEARCH SERVICE, Apr. 2019, at 22–23.

the structure of the process (a negotiation), created the sense of equality (with regard to status and power) that Weinberg characterizes as deliberatively-democratic.

As a result of these deliberatively-democratic characteristics, I forged relationships with other negotiators that I retain to this day. And even though there were plenty of disagreements, several quite intense, and tactical maneuvering abounded, almost everyone involved in the negotiation worked hard to achieve the common goal of writing the best possible rules. Unsurprisingly, the subsequent comment period and the comments filed showed no evidence of the kind of animosity between the agency and the commenters that was pervasive in the DeVos rulemaking.

The stark contrast between these two rulemakings—combined with the larger challenges to democratic participation and equal protection endemic to rulemaking generally and especially acute with regard to mass commenting and surrounding attitudes—show a desperate need for a better strategy. I therefore propose that federal agencies engaged in rulemakings in which legitimate mass commenting occurs, or is anticipated to occur, use a version of negotiated rulemaking to engage legitimate mass commenters—alongside rulemaking insiders, both commenters and agency staff—in writing new rules.

This modified-negotiated rulemaking process would change the order that was used in the Clery Act rulemaking so that, instead of negotiators being nominated, selected, and then negotiating an NPRM that is released to the public for comment, the comments to the NPRM published by the agency would identify potential negotiators. Undoubtedly a fair number of those negotiators would end up being or representing the usual rulemaking insiders. However, legitimate mass commenters would get a place (or several, depending on how many legitimate mass commenters there are and how they are organized) at the negotiating table as well.

How would the representatives of the legitimate mass commenters be identified and selected? There are several potential methods. If a particular organization (e.g., MoveOn.org) organized a significant number of comments (e.g., over one thousand), for instance, the agency could ask the organization to nominate one of the members or constituents who commented. Alternatively, regulations.gov (or whichever platform is being used for comment submissions) could ask commenters to check a box indicating their willingness to participate in a committee that would help the agency amend or finalize the rules based on the comments after the comment period had closed. The agency could, for instance, select commenters who all filed the same boilerplate comment and checked the box expressing interest to serve as negotiators at random, and could thus issue invitations to

join the committee until one was accepted. If more screening is needed or preferred, the agency could email those that checked the box expressing interest and ask them to apply and provide further information needed for screening. Alternatively, the agency could invite commenters that changed or added to the boilerplate language in some way to join the rulemaking committee (an approach that would treat such changes as an indication that the commenter put extra thought into their comment and is less likely to be a "clicktivist").

Once the committee is convened, the agency could present the committee members with a set of questions, possible amendments, or additions suggested by the comments and ask the committee to come to a consensus decision on those questions. Meetings could be held via Zoom or a similar platform to make participation more accessible. The committee's decisions would then be incorporated into the final published rules.

Granted, this proposal currently consists of only broad brushstrokes. Many details still need to be fleshed out. But this proposal is not without precedent. Mendelson discusses a 1997 rulemaking that predates mass commenting, but in which 600 of the 700 comments filed came from the general public and collectively raised concerns which the agency took seriously.[299] As a result, the agency convened focus groups (which presumably included people who filed a critical comment or shared these commenters concerns) on the topic before finalizing the rule.[300]

This recommended change in the order of the negotiation, the NPRM, and the issuance of the final rules makes this proposal more inclusive, especially regarding its involvement of rulemaking outsiders. Under the existing order, as was the case with Clery Act rulemaking, when negotiators are convened to help write proposed rules, the negotiators are much more likely to be insiders of some sort. They are likely to be insiders because in order to become negotiators, they have to know about the rulemaking process, understand the importance of participation, likely get an organization of some sort to nominate them, and finally be perceived by the agency as having some expertise or subject matter knowledge that is relevant and valuable.

Negotiators identified in this traditional way are also much more likely to be participating as a part of their job, since serving in such a capacity is a significant time commitment and may require, as was the case for the Clery Act negotiated rulemaking, several trips to Washington, D.C., not entirely funded—if funded at all—by the government. With the

299 *See* Mendelson Foreword, *supra* note 178, at 1366.

300 *Id.*

exception of the two student representatives on the Clery Act rulemaking, I believe I was the only negotiator whose work on the Committee was not being compensated in some fashion by an employer, and my availability and geographical location in the D.C. metropolitan area were convenient coincidences that enabled my participation without major personal expenses. Such circumstances are unlikely to frequently recur—if they ever do.

By switching the order of the NPRM and the convening of the Committee, the comment process would allow rulemaking outsiders to identify themselves to the agency. It would also expand the pool of outsiders, so as to increase the chances that at least one will be in a situation similar to mine during the Clery Act rulemaking process. The potential negotiator or negotiators who thusly identify themselves will then have the time and geographic location necessary to participate without the support of an employer or some other compensation. Note that the pandemic's lessons about conducting business over Zoom alleviate some of the geographical concerns.

Because such Committees engage in a deliberative dialogue like Weinberg describes[301] and like I experienced, the agency is likely to learn valuable things from the rulemaking outsiders on the Committee. Moreover, those outsider insights are much less likely to be already known by the agency and other insiders. In turn, the rulemaking outsiders are likely to learn from the agency and from the rulemaking insiders on the Committee—most importantly, information about communicating effectively with and influencing the government. The likelihood of the agency learning new and worthwhile information is also increased exponentially in rulemakings involving the rights and lives of marginalized groups because such groups are outsiders multiple times over, which can render them virtually invisible to the government. Agencies especially need mechanisms that can help them identify and communicate with such extreme outsiders, or the agency could end up regulating in a manner that harms or facilitates violations of the marginalized group's rights.

With regard to topics like sexual harassment and gender-based violence, in which the victims for centuries (indeed, millennia) have been shamed and intimidated into silence, the need to include and listen to these groups' perspectives is especially acute. This acute need makes Title IX rulemaking a perfect area in which to experiment with this proposed approach. In addition to this general ideal fit, however, a specific issue about Title IX enforcement that (re-)emerged in the 2022 NPRM provides an especially appropriate opportunity in which to pilot this proposal. The next section turns to this potential pilot.

301 Weinberg, *supra* note 204, at 172–73.

B. Using Modified Negotiated Rulemaking to Write (Better) Rules for "Mandatory Reporting"

This particularly appropriate issue involves what is often referred to as "mandatory reporting," a term denoting, in this context, situations wherein employees of non-elementary and non-secondary schools must notify the school's Title IX Coordinator when they have information about conduct that may constitute sex discrimination under Title IX.[302] As I and others, mainly university faculty from a variety of disciplines, have argued, the 2022 NPRM unfortunately did not take the best, trauma-informed, and most non-discriminatory approach to mandatory reporting.[303] This failure appears to be caused by the incompatibility of ED's proposed approach with certain organizational realities of higher education institutions that can counteract and ultimately defeat the purposes of mandatory reporting.[304] Ironically, the motivation of the 2022 Title IX NPRM is clearly ED's wish to *encourage* sexual harassment and gender-based violence survivors to tell school employees when they have been victimized so that the survivors can access the wide range of remedies that schools are supposed to provide. Instead, the 2022 Title IX NPRM's proposal will almost certainly *chill* victim reporting.[305]

The reason why the 2022 Title IX NPRM's proposal will almost certainly chill victim reporting is that it requires the vast majority of campus employees to pass student disclosures of information about experiences with sexual harassment and gender-based violence on to the school's Title IX Coordinator, who then decides whether to investigate further based on this information.[306] Such an approach is harmful to survivors in numerous ways, but most importantly, it strips survivors of control over their private information and

302 Note that "mandatory reporting" is often used in the K-12 context to refer to the obligations of school employees under state laws that often require adults who suspect that a minor is being sexually or otherwise physically abused to report that information to local law enforcement. Such laws address minors' particular vulnerability to such abuse, but generally do not apply to postsecondary students who are adults.

303 I have argued this in a comment filed with ED in the 2022 Title IX rulemaking, in which I reference other comments filed by other faculty on this issue. *See* Nancy Chi Cantalupo, Comment Regarding Proposed Rule 106.44 on 'Mandatory Reporting' in the U.S. Department of Education's Rulemaking on Title IX (Docket #ED-2021-OCR-0166) (Sept. 27, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4230943 [https://perma.cc/2RS8-3PN6] [hereinafter Cantalupo Comment].

304 *Id.* at 1–2.

305 *Id.* at 2.

306 *Id.* at 4.

robs them of the ability to make decisions about what remedies to pursue and whether any further investigation into the events disclosed by the survivor should occur.

The easiest way to explain why this is harmful is in comparison to what happens in the typical criminal case. Once victims report sexual harassment or gender-based violence to law enforcement, police (and perhaps later, prosecutors) take over and make any and all decisions about whether to move forward and how. Law enforcement decides whether an investigation happens, what information from the survivor's disclosure should be shared with others (potentially including the reported harasser), whether the reported perpetrator should be criminally prosecuted, and how.[307] If the case goes to court, the prosecutor represents the state, not the survivor. So, the survivor cannot keep the prosecutor from sharing certain private information or otherwise exert any control over how the prosecutor proceeds with the case.[308]

Title IX cases, as civil rights matters, should and, when done correctly, *do* operate differently than the traditional criminal case, giving control over such decisions to survivors[309] *as long as* survivors' private information is not in the Title IX Coordinator's hands. Once the information has been shared with the Title IX Coordinator, however, survivors lose a certain amount of control over that information, including any ability to keep the Title IX Coordinator from sharing the information with others.[310]

Therefore, as a practical matter, "mandatory reporting" reduces (if not eliminates entirely) the number of employees on a campus to whom survivors can disclose what has happened to them and still maintain control over that private information.[311] That is, the greater number of employees designated "mandatory reporters," the fewer to whom a survivor can share information and be assured that it will not be disclosed without the survivor's consent. This loss of control causes many victims simply to not report or disclose to anyone—using what law professor Doug Beloof calls the "victim's veto."[312] Obviously,

307 Cantalupo Keynote Speech, *supra* note 134, at 230–31.

308 *See generally id.*

309 *See generally id.*

310 *Id.* at 231–32.

311 Cantalupo Comment, *supra* note 303, at 2–3.

312 *See* Cantalupo Keynote Speech, *supra* note 134, at 230.

using the victim's veto harms the survivors who use it, because they then cannot access other remedies that they may need in the aftermath of the violence.

I filed a comment in response to the 2022 Title IX NPRM explaining in some detail a method by which ED could alter the current proposed rule on mandatory reporting.[313] Using this method, ED would require campuses to designate confidential employees who are not mandatory reporters and who would have the skills and experience to help survivors access a range of resources and remedies provided by a campus and available to a survivor who wants to maintain control over their private information. In the comment, I pointed out how colleges and university organizational structures are incompatible with the mandatory reporting requirements that ED laid out in the 2022 Title IX NPRM—at least if ED's goal is what it appears to be: to get more survivors to come forward and thus be able to access multiple types of remedies.

Now, if ED were to follow the plan that I articulate in my comment on mandatory reporting, I would of course be very satisfied. Short of that, however, ED has a perfect opportunity to use this particular NPRM to experiment with my proposed modified-negotiated rulemaking method. While such a pilot would allow for this experiment, it would not be experimentation for experimentation's sake. Instead, it would give ED an opportunity to gain expertise and knowledge about how campuses actually work with regard to sexual harassment and gender-based violence reporting—knowledge that the misguided mandatory reporting approach in the 2022 Title IX NPRM suggests ED very much needs. In doing so, ED would be wisely taking the kind of step that the agency discussed by Mendelson took when it convened focus groups to educate itself more and delve more deeply into a particular issue that commenters from its initial NPRM flagged as seriously flawed.[314]

Here is how I suggest ED could undertake such a pilot. First, ED would convene a negotiated rulemaking committee on the relatively narrow topic of mandatory reporting, while finalizing the rest of its proposed rules (including any changes commenters have convinced ED to make to its proposals), so that this one issue would not delay finalizing the other rules. ED would then use the comments filed on the topic of mandatory reporting to identify a group of negotiators to meet and talk through the issue. Presumably, the negotiators selected would include people with particular, relevant expertise. In addition, non-experts—or folks with a different kind of expertise, such as that drawn from personal

313 *See generally* Cantalupo Comment, *supra* note 303.

314 *See* Mendelson Foreword, *supra* note 178, at 1366.

experience—could also be identified and invited to join the negotiation. The negotiators would start with the already-proposed rule, consider the whole range of comments filed on the rule, and then negotiate a final version of the rule. From my preliminary research, I did not find any mass or boilerplate comments dealing with mandatory reporting in the even larger number of comments filed in the 2022 rulemaking (238,000+). However, if there are any, those folks could be contacted and asked to nominate themselves or others to represent the position of the mass comment at the negotiating table. In this way, ED could not only try out my proposed modified-negotiated rulemaking to see if it will work but also use the process to fix a serious flaw in its original proposals on mandatory reporting.

CONCLUSION

In *Believing: Our Thirty-Year Journey to End Gender Violence,* Anita Hill makes explicit how American women's democratic participation and gender-based violence are intertwined. After noting that "early suffragists saw the vote as key to all women's personal as well as political autonomy," Hill states emphatically that "gaining the right to vote or run for office will not be enough" because "violence against women is an existential threat to our democracy" and "gender-based violence . . . limits our ability to exercise our rights as citizens."[315]

We cannot afford yet another existential threat to democracy. The fact that Title IX, a groundbreaking civil rights statute, could be enforced to not only perpetuate gender-based violence, but directly undermine democratic participation, rubs salt into the wound. What the DeVos rulemaking and its aftermath have exposed about notice-and-comment rulemaking's failings make its democratization urgent and imperative. Fortunately, the histories of civil rights movement-organizing and success in equalizing democratic participation, as well as efforts to democratize rulemaking (including through mass commenting), demonstrate how many Americans are willing and able to do the work required for such democratization. Using the modified form of negotiated rulemaking proposed here to seize the opportunities to further expand and equalize democratic participation presented by legitimate mass commenting, including boilerplate comments, is the clear and indispensable next step.

315 ANITA HILL, BELIEVING: OUR THIRTY-YEAR JOURNEY TO END GENDER VIOLENCE 205–10 (2021).