



Title IX and Athletics: A Primer

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Introduction

Title IX long ago ceased to be an effort to guarantee equal opportunities for all, and has instead become a crusade to impose quotas and gender preferences in schools.

At issue is not the Title IX statute itself, which simply outlaws discrimination in educational institutions on the basis of gender. The problem is the way in which Title IX has been applied. Feminists have used Title IX as their all-purpose vehicle to advance a radical agenda in our schools, and have imposed this agenda on a willing bureaucracy and the federal courts. As a result, current Title IX enforcement has demeaned the legitimate athletic and academic accomplishments of women and institutionalized discrimination against boys and men in schools.

Specifically regarding athletics, the Department of Education's policy of compliance through proportional participation rates is the crux of the problem. The government claims that if the percentage of female athletes is close to the percentage of all female students, a school has proved non-discrimination. If those numbers are not "proportional," schools may be out of compliance with Title IX. In simpler terms, under this view of Title IX, men can play sports only to the extent that women are interested in playing sports.

By demanding that women participate in athletics at the same rate as men, Title IX policy ignores not only legitimate differences between men and women but legitimate differences among women. We are not all athletes, and we are not all scholars. We look to ourselves, not the government, to know the difference.

Title IX policy also undermines equal opportunity by forcing colleges and universities to eliminate men's sports opportunities in order to provide few or no new opportunities for women. This is not fighting discrimination against women; this is enforcing quotas against men.

It is fashionable to attribute much of the progress that women have achieved in recent decades to the enactment of Title IX. After all, women have made significant gains and crediting them to a federal law only boosts the case that further progress demands more federal laws.

Yet this diminishes the real contribution of individual women and ignores the costs these policies have had on men. Therefore, policymakers should seek to return Title IX enforcement policy to what the statute was designed to do—end discrimination based on sex—for both sexes, and in doing so, guarantee equal opportunity for all.

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What is Title IX?

Passed in 1972 as an education amendment, Title IX simply states:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.¹

Congress further stated in Title IX that the intent of the act was not to establish quotas or grant preferential or disparate treatment to the members of one sex.² But a law intended to prevent discrimination in education based on sex has become a regulatory behemoth. The avalanche of regulations and court actions initiated by quota activists has buried these original tenets.

The problems with current Title IX enforcement largely stem from a 1979 Policy Interpretation that was supposed to clarify what the “interests and abilities” section of the regulations meant. The Policy Interpretation established what is known as the three-prong test. According to this policy, an educational institution offering athletics can demonstrate compliance with Title IX by the following:

1. Showing that intercollegiate participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
2. Showing a history and continuing practice of program expansion in response to the interest and abilities of the “underrepresented” sex; or
3. Demonstrating that the interests and abilities of members of the “underrepresented” sex have been fully and effectively accommodated by the school’s program.³

This three-prong test is at odds with the original statute because the test creates both a quota and a reparative punishment against men.

There are, in effect, two “Title IXs”: a law passed in 1972 by a Congress that wanted to prohibit sex discrimination in schools and a reinterpretation of that law, created by unelected bureaucrats at the Department of Education’s Office of Civil Rights (OCR). Unlike the vast majority of civil rights laws and regulations, the three-prong test was never presented to, debated in, or approved by Congress. Worse, the three-prong test functions as a strict quota law, clearly at odds with the statutory language. The OCR’s reinterpretation of Title IX has resulted in the wholesale devastation of several men’s sports at the collegiate level.



Background: An Athletics Policy Meltdown

Colleges and universities have tried to defend their decisions to cut men’s athletic programs by claiming that Title IX requires gender equity.⁴ Actually, neither the Title IX statute nor its regulations require such a thing. But the OCR has issued an interpretation of compliance stating that a school may demonstrate compliance with Title IX if the school can show that the gender breakdown in the athletic department mirrors the gender breakdown of full-time undergraduate students. This provision—the proportionality test—is known as prong one of the three-prong test. The other two prongs—showing a history of expansion of women’s sports or showing that all student interest has been accommodated—have no measureable ways to demonstrate compliance, and thus are simply holding patterns until prong one is met. Proportionality is the only quantitative measure in the three-prong test, and thus the only assurance to schools that they are safe from Title IX-related lawsuits.

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First, a Little History

Title IX was passed in 1972 as a simple anti-sex discrimination law—the language prohibits discrimination in educational programs.

The *Congressional Record* shows that when Congress passed Title IX of the Education Act in 1972, the sponsoring members assured both the House and the Senate that Title IX would not be a quota bill. Senate sponsor Birch Bayh stated that the gender quotas were “exactly what this amendment intends to prohibit,” and “[t]he thrust of the amendment is to do away with every quota.”⁵ He further stated, “It only requires that each individual be judged on merit without regard to sex.”⁶ Title IX House sponsor Rep. Albert Quie made it clear to his colleagues that Title IX “would provide that there shall be no quotas in the sex anti-discrimination title.”⁷ Their assurances that quotas would not be part of Title IX were critical to its passage.

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The Department of Health, Education, and Welfare (HEW) developed the regulations that would instruct educational institutions on Title IX compliance. In 1975, under the guidance of Secretary Caspar Weinberger, the first policies were released. For the first time, schools were given direction on accommodation of student interest in athletics, distribution of scholarships, and availability of facilities. The regulations written by HEW allowed for different needs by sport and by gender.⁸



The regulations weren't perfect, but they were a start. Congress allowed an administrative 45-day review period to pass without affirming or vetoing the regulations. At the time, the Supreme Court was weighing whether a failure by Congress to take a specific action on regulations was equivalent to Congress' tacit approval of the regulations in question. Months after the Title IX regulations passed through Congress without comment, the court ruled against the notion of tacit approval. Therefore, we do not know from the *Congressional Record* whether Congress would have approved the regulations pertaining to athletics.

But we do have living history on this issue. Twenty years later, in a 1996 *amicus curiae* brief to the Supreme Court in support of Brown University's Title IX appeal of a non-compliance ruling, former secretary Weinberger argued that the First Circuit's decision was squarely at odds with the terms and intent of the regulations, as well as the department's stated position at the time of their release. Weinberger felt that the proportionality test would prevent schools from choosing to provide opportunities in response to actual student interest. Instead, schools would be forced to allocate opportunities so as to equalize the rates of participation by men and women.⁹

If a quota law was not Congress' intent, then, one might ask, how did we get one? During the 1979 reorganization of HEW into the Department of Education (DOE) and the Department of Health and Human Services, the responsibility for Title IX and its regulatory language was thrown to the newly formed Office of Civil Rights (OCR) under the DOE. Schools had been anxiously awaiting further clarification on Title IX's intent and were treated to what has come to be known as the 1979 Policy Interpretation—a document hastily concocted before the department split. This policy interpretation was neither reviewed nor approved by Congress but was used extensively under the Clinton administration and in the courts to require strict adherence to a participation gender quota. Writing for the *Florida Law Review* in 1995, David Aronberg points to the expanded scope of Title IX:

The Policy Interpretation has taken on a life of its own, becoming the most powerful and controversial guidepost in the Title IX regulatory morass. It has expanded the scope of Title IX to the point of subverting the statute's original purpose of prohibiting educational discrimination against either sex. [T]he fact remains that Congress never reviewed, debated, or approved—either by an affirmative vote or a failure to act—what would become the most powerful and controversial component of its anti-discrimination law.¹⁰

Unlike other sex discrimination policies under Title VII, Title IX does not require that an injured party file a complaint with the OCR. If anyone files a complaint with the OCR, the agency is required to open an investigation. So, interest groups are free to file complaints with the OCR based on information collected from the Equity in Athletics Disclosure act, even if there are no student complaints on campus. This is a complete departure from traditional discrimination law and reflects another consequence of the failure of Congress to review the regulations created by the OCR.



Although Title IX affects all educational programs, complaints to the OCR and to the courts have predominantly fallen into two areas—athletics and sexual harassment. During the 1970s, complaints were virtually nonexistent because the regulations had not been written and implemented. During the early 1980s, new programs in athletics and academics were exploding for women and girls. No one had reason to complain. This explosion in opportunities was not driven by the presence of Title IX and the threat that the OCR could withhold federal funds from a school, but rather by a booming economy that made the addition of new programs feasible for many schools.

Early Legal History

A private right of action under Title IX was first recognized by the Supreme Court in 1979 under *Cannon v. University of Chicago*.¹¹ There was a small spattering of legal cases in which women filed and won lawsuits for discrimination, usually for egregious inequities. In these cases, the remedy was always specific to the university in question, and there were no personal gains for the complainants except an opportunity to play their sport if they were still in school by the time the case was decided.

In 1984, the Supreme Court disenfranchised athletics from Title IX in its *Grove City College v. Bell* ruling.¹² The court stated that only those university activities receiving direct federal funds were subject to Title IX. Since athletic programs do not receive any federal funds through direct channels, Title IX was no longer a vehicle to pursue discrimination complaints. Congress reversed the Supreme Court with the 1987 Civil Rights Restoration Act, specifically citing that athletic programs were an extension of universities receiving federal funds, and would therefore be subject to Title IX.¹³

In 1992, the Supreme Court opened the can of worms by ruling in *Franklin v. Gwinnett County Public Schools* (a *quid pro quo* sexual harassment case) that a Title IX complainant had the right to request unlimited damages and attorney’s fees in federal court.¹⁴ That ruling spawned a spate of Title IX lawsuits crafted by feminist organizations to promote the gender quota as the solution to inequities in women’s sports.

The Courts in the 1990s

Several key court cases in the 1990s effectively codified the 1979 Policy Interpretation, making it very difficult for men to claim discrimination:

*Cohen v. Brown University*¹⁵

- In 1992, Brown University was sued by gymnast Amy Cohen for demoting two women’s teams to donor-status, meaning that less than 50% of their operating budget would be provided by the university. (Two men’s teams were also demoted, but Cohen’s suit did not mention them.)
- Brown argued that the university met the third test of “accommodating interest and abilities” of the Policy Interpretation, and presented substantial evidence of



the school's high number of female athletic teams, polls taken of students indicating interest, and studies of interest levels in high schools. The school also felt it had successfully met the second test of "history of expansion" as Brown had been one of the most progressive schools in the nation for female athletes by expanding women's sports dramatically during the 1980s.

- The judge admitted that the OCR Policy Interpretation and the OCR Investigator's Manual did not carry the force of law, but he relied on them as important guides in ruling on the case. This left the proportionality test as the predominant guideline.
- Through a series of appeals and remands, the proportionality test was given more weight than the other factors in the Policy Interpretation. Ultimately, Brown's appeal to the Supreme Court was rejected, and the proportionality test stood as a non-binding legal guidance to other courts in Title IX compliance.

*Roberts v. Colorado State University*¹⁶

- In 1992, under severe financial strain, Colorado State University (CSU) cut the 18-member women's softball team and the 55-member men's baseball. Although the cuts increased the proportion of female athletes overall, the cuts did not bring the university into full compliance. In 1993, the softball team sued for reinstatement and monetary damages.
- In ruling for the plaintiffs, the judge adopted the holding in *Cohen* that the Policy Interpretation's three-prong test can, by itself, determine non-compliance with Title IX.
- In this case, the monetary damages were substantial, with each member of the softball team being awarded \$5,000 in damages.

*Kelley v. Board of Trustees of University of Illinois*¹⁷

- In 1993, members of the men's swimming team at the University of Illinois sought injunctive relief when it was announced that the team was being cut to meet budget constraints and Title IX proportionality.
- Although sympathetic to the plight of the men, the court relied on *Cohen* for the proposition that reducing men's participation was one way to achieve Title IX compliance.
- Two significant twists to Title IX took place. The court held that increasing women's opportunities was not necessary under the proportionality test. And the court further ruled that as long as the percentage of male athletes was substantially proportionate to male undergraduate enrollment, only women could wield the Title IX sword.



- The judge took pains to admit that the Title IX statute neither sanctioned nor anticipated the three-prong test that would later “covert Title IX from a statute which prohibits discrimination on the basis of sex...into a statute which provides ‘equal opportunity for members of both sexes.’” The judge recognized that “Congress, in enacting Title IX, probably never anticipated that it would yield such draconian results.” Nevertheless, he followed the leads of *Cohen* and *Roberts* by giving great deference to the OCR’s Policy Interpretation, Investigator’s Manual, and 1996 Clarification.

Judicial Skepticism

But were these courts correct to rely on the Policy Interpretation? In 1996, Judge Rebecca Doherty of the Western District Court of Louisiana challenged the legitimacy of the Policy Interpretation in *Pederson v. Louisiana State University*. She wrote in her opinion that the Policy Interpretation is an agency document not approved by Congress or the President, and that the Policy Interpretation “is also susceptible, in part to an interpretation distinctly at odds with the statutory language.”¹⁸

Judge Doherty also wrote:

Without some basis for such a pivotal assumption, this Court is loathe [sic] to join others in creating the ‘safe harbor’ or dispositive assumption for which defendants and plaintiffs argue. Rather, it seems much more logical that interest in participation and level of ability to participate as percentages of the male and female populations will vary from campus to campus and region to region and will change with time. To assume, and thereby mandate, an unsupported and static determination of interest and ability as the cornerstone of the analysis can lead to unjust results.¹⁹

Despite setbacks in many court cases, athletic supporters continue to engage in litigation in an attempt to save cut programs. Most recently, supporters of the University of Oregon wrestling team filed suit in the Oregon Circuit Court for Marion County, seeking to prevent the school from dropping the program.²⁰

Pushing a Gender Quota

The OCR insists that it does not require that schools comply with the proportionality test, and that the regulations are not causing schools to drop men’s sports. Norma Cantu, the former assistant secretary in charge of the OCR, wrote in *Insight* magazine, “Nothing in Title IX or OCR’s enforcement policy requires or encourages schools to cut men’s sports...A school can choose to drop a men’s team in order to provide substantially proportionate athletic opportunities for men and women students. But, neither Title IX nor OCR require or encourage this as a way to reach that goal.”²¹

The actions and publications from the OCR paint a very different picture. In a 1996



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Clarification of the three-prong test, the OCR designated proportionality as a “safe harbor” for schools, and then wrote interpretations clearly favoring a quota-based approach to gender equity.²² In numerous investigations, the OCR has required that schools meet prong one’s gender quota either by spending money the school doesn’t have to build new women’s teams or by cutting men’s teams. It is rare indeed that the OCR will accept prongs two or three as anything other than a temporary position as the school promises to reach proportionality at some future date.

Universities, colleges, and high schools governed by Title IX are being punished for failing to create or prove a level of interest in sports among women and girls that simply does not exist. The OCR is following a poorly-designed, outdated, and possibly illegal policy interpretation to dictate the number of female athletes at colleges and high schools regardless of the needs, interests, or priorities of an individual campus or an individual student.



Identifying the Problems

The problems with the current application of Title IX reflect a lack of consideration for the nature of sports, and for the natures of men and women. The primary problem with Title IX is that the gender quota is an inadequate and illegal measure of non-discrimination. These issues can be resolved fairly easily by either the OCR taking on the task of reforming outdated policies or by Congress (or the president) directing the agency to do so.

The Interest-level Problem: More Men than Women Pursue Athletics

Men and women are not the same; their interest in organized sports is not the same. Title IX should focus on the overall availability of opportunities to accommodate interest, not on the selections of those opportunities by one sex or the other. Ironically, Title IX policy ignores actual interest levels and capabilities of either sex as determining factors in whether the interests and abilities of students have been met.

A variety of research points to lower interest in sports, on a variety of levels, among girls compared to boys. Girls' participation rates and behaviors in all types of physical activity consistently lag behind those of boys.²³ Boys are more likely to participate on sports teams than girls.²⁴ Girls also join organized sports at later ages than boys and drop out earlier.²⁵

Many Title IX advocates say, "If you build it, they will come." But that hasn't proved true. When Brown University was sued in 1992 under Title IX, the varsity female teams at the university had more than 80 unfilled slots. The school had built it, but the women didn't come. Further, coaches of female teams have talked on camera about their difficulty in keeping female athletes who don't make the travel squad, even when they are receiving some financial aid. Coaches have also talked about their difficulty in filling the minimum number of positions desired by the athletic director to achieve proportionality, often because the minimum demands more players than the sport itself requires.

Men's teams, on the other hand, are often no longer allowed to keep any of the numerous men seeking walk-on positions. Further, many schools have capped the number of men on team rosters, usually at numbers far lower than a competitive program needs. For example, before the team was cut in 2007, the men's track and cross-country team at James Madison University was capped at 80 runners, while the women's team was allowed 130 slots. Coach Dave Rinker told *Inside Higher Ed* that he regularly had to turn away "pretty good guys who just want to walk-on and have the experience of college athletics."²⁶ The marginal cost of such players is small, so schools do not save a significant amount of money by capping rosters. The schools are simply afraid that such spots will

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skew the overall gender balance, putting the institutions at an increased risk of a Title IX compliance review or private lawsuit.

Physiological differences also contribute to men's and women's level of interest in organized sports. There is substantial research on testosterone to indicate that its presence will impact interest in sports as a participant, as well as a fan.²⁷ It stands to reason that if nature takes its course, there will always be more men than women pursuing varsity athletics.

Today's College Students: Factors That May Impact Whether a Student Participates in Athletics

Today's college students represent a diverse population, and are becoming more and more non-traditional. The proportionality test for Title IX compliance does not allow for schools to leave uninterested students out of the formulation. The full-time 50-year-old mother of adult children returning to school for the first time in 30 years is assumed to be as interested in playing varsity sports as an 18-year-old female coming from a high school varsity team.

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Gender:

- Of students attending a 4-year institution, 54.9% are female, and 45.1% are male.²⁸
- Of students attending more than one institution, 61.1% are female, and 38.9% are male.²⁹
- At all postsecondary institutions, 62.2% of independent students (most of whom are 24 or older) are women.

Age:

- 58.8% of undergraduates are between the ages of 19 and 23, typical of athletes.³⁰
- 8.7% of undergraduates are 30 to 39 years old.³¹
- 7.1% of undergraduates are 40 or older.³²
- At all postsecondary institutions, undergraduates 40 and older are more likely to be women, compared with undergraduates under 30. In fact, two-thirds (66.4%) of undergraduates age 40 and older are women.³³

Marriage/Children:

- 14.8% of undergraduates are married.³⁴
- 16% of students enrolled at 4-year schools have dependents.³⁵



- 7.1% of all undergraduates are single parents.³⁶
 - 76.1% of these students are women.³⁷

Employment:

- 69.5% of undergraduates work.³⁸
 - 46.7% work part-time.³⁹
 - 22.8% work full-time, 35 or more hours/week.⁴⁰
- 53.6% of undergraduates consider themselves to be “students who work.”⁴¹
- 16% of undergraduates consider themselves to be “employees who study.”⁴²

High School Students: Participation Rates in Extracurricular Activities

U.S. Department of Education data show that women are more likely than men to participate in various afterschool activities, except for athletics.⁴³ Among high school sophomores, 55% of men, compared to 42.5% of women, competed in interscholastic athletics.⁴⁴ But in other activities, women comprise the majority:

- 9.9% of women, compared to 6.8% of men, participate in academic clubs.⁴⁵
- 19.2% of women, compared to 8.1% of men, participate in cheerleading and drill team.⁴⁶
- 10.9% of women, compared to 8.1% of men, participate in hobby clubs.⁴⁷
- 26.8% of women, compared to 16.3% of men, participate in music programs.⁴⁸
- 9.1% of women, compared to 7.6% of men, participate in vocational clubs.⁴⁹

If the same strict proportionality standards applied to these extracurricular activities, women would likely face the same roster caps and program cuts that men face in athletics.

Men’s Losses in Collegiate Athletics

Proponents of Title IX constantly say that schools can comply with the law by increasing opportunities for women, without cutting opportunities for men. The data, however, point to significant across-the-board damage to men’s athletics since Title IX’s inception.

In spring 2007, the College Sports Council (CSC) launched a longitudinal study looking at 25 years of athletic participation data to determine program trends. The study confirmed that opportunities for men have faced consistent and significant decline under Title IX.

Past studies of athletic participation numbers show an increase in opportunities for both men and women, even while the percentage of schools sponsoring certain sports was decreasing. The flaw in such studies is that they failed to account for the number of NCAA

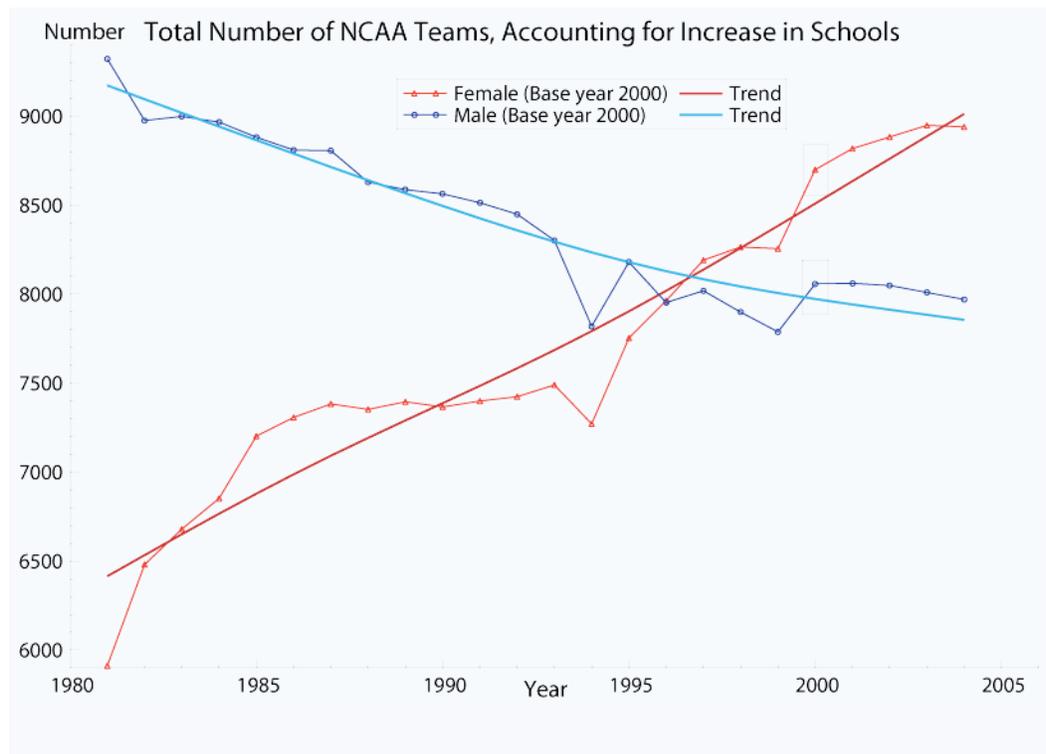


schools. Each year, the NCAA admits more schools as NCAA members, which inflates the program numbers. These are not new teams but rather existing teams that are now figured into the NCAA’s calculations. The College Sports Council study controlled for that variable using a fixed-year analysis (which is similar to how economists account for inflation).⁵⁰

Once the CSC controlled for that factor, the trend became clear: across the board, opportunities for women were increasing, while opportunities for men were decreasing. From 1981 to 2005, male athletes per school declined 6%, and men’s teams per school dropped 17%.⁵¹ Meanwhile, female athletes per school rose 34%, and women’s teams per school rose 34%.⁵² The total number of women’s teams has exceeded the number of men’s teams since 1995, as shown in Figure 1.⁵³

Every male sport, with the exception of baseball, has decreased or remained static. Non-revenue sports such as wrestling, tennis, and gymnastics have been the hardest hit.⁵⁴ As shown in Figure 2, men’s gymnastics is practically extinct, with fewer than 20 varsity programs left in the country.

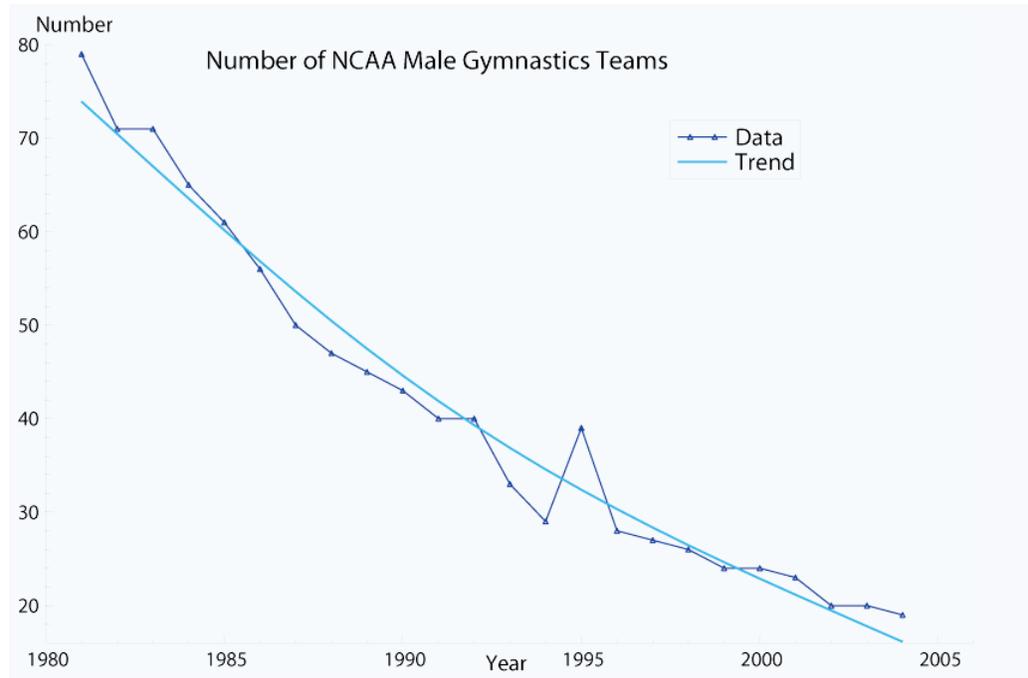
Figure 1



Source: The College Sports Council, *College Sports Council Longitudinal Study of NCAA Participation Data*, March 29, 2007. Available at: <http://savingsports.org/presentation/images/gifs/TotalTeamsAdjusted.gif>.



Figure 2



Source: The College Sports Council, *College Sports Council Longitudinal Study of NCAA Participation Data*, March 29, 2007. Available at: [http://savingsports.org/presentation/images/gifs/MaleGymTeams\[2\]\[1\].gif](http://savingsports.org/presentation/images/gifs/MaleGymTeams[2][1].gif).

Title IX at Historically Black Colleges and Universities

Enrollment and graduation rates at Historically Black Colleges and Universities (HBCUs) have long favored women and appear to be moving further in that direction. Currently, HBCUs have a nearly two-to-one female-to-male ratio, with 61% female enrollment.⁵⁵ This makes reaching the Title IX gender quota extremely difficult for HBCUs, especially those with football programs.

A February 2008 study by the College Sports Council examined HBCUs' struggle to meet Title IX's proportionality test. According to the study, 72 out of the nation's 74 HBCUs that are co-educational and have athletic programs were out of compliance with the proportionality standard. Only Allen University and Morris College were in compliance.⁵⁶

Wade Hughes, former coach of the now-extinct Howard University wrestling program, explains some of the adverse effects of being bound by proportionality:

Currently, HBCUs are struggling to increase male enrollment, and offering varsity athletic programs is one practical tool a college or university has to increase the number of male students on campus. At the time the wrestling and baseball teams were eliminated at Howard, the university was out of compliance with proportionality. Now here we are again, five years later, they've added bowling as a varsity sport for women and the university has still not achieved proportionality.⁵⁷



Hughes also points to the financial impact of athletics at HBCUs:

Many HBCUs are struggling financially. Adding sports teams for male athletes will not only attract more students to their campuses, but help to achieve a more balanced undergraduate student gender ratio. If these schools are forced to comply with Title IX's proportionality test, then adding sports teams to attract more male students is not an option.⁵⁸

The Football Issue

Proponents of the Title IX status quo would like us to believe that the reason so many schools are dropping non-revenue men's sports is because the schools want to keep their football teams, and that football eats up too many resources.⁵⁹

... when the resources are invested to create a competitive program, football helps women.

Additionally, feminists posit the false statistic that fewer than 20% of football teams are profitable, and suggest a radical overhaul of football to be less competitive and more feminine, i.e., less focused on winning and more focused on collaborative play.

The truth is, when the resources are invested to create a competitive program, football helps women. A *Social Science Quarterly* article by Patrick James Rishe concluded that women's sports at schools with big football programs fared better than women's sports at schools with smaller football programs. While Rishe's research does verify what the quota proponents tell us—expenditures are higher for football players than for any other sport—the research also calculates that where the football expenditures are highest, so, too, are the expenditures on female athletes.⁶⁰

In another study by Donald E. Agthe and R. Bruce Billings for the *Journal of Sport Management*, the authors concluded that football profits were a significant influence on achieving financial gender equity in athletic departments.⁶¹

The *Chronicle of Higher Education* found a similar pattern when it examined Division I schools with and without football programs:

While women's sports are clearly on the rise across the board, the rate of growth varies widely among the different kinds of colleges in Division I. Wealthy sports programs can subsidize new opportunities and greater spending for women, but those without revenue-producing football and basketball teams lag. And the gap between the haves and the have-nots is widening.⁶²

Some have suggested that schools should curtail football and scale the number of positions down to 65, or even down to the 45 carried by professional teams. This suggestion reveals an appalling lack of understanding of the game of football. The collegiate ceiling of 85 football scholarships is already too tight. It has forced coaches to play freshmen who are unaccustomed to the caliber of physical play and the psychological balance of becoming a college student and athlete. It affects the ability of coaches to run a full practice schedule, especially in the spring when the outgoing players are gone, and the incoming players are

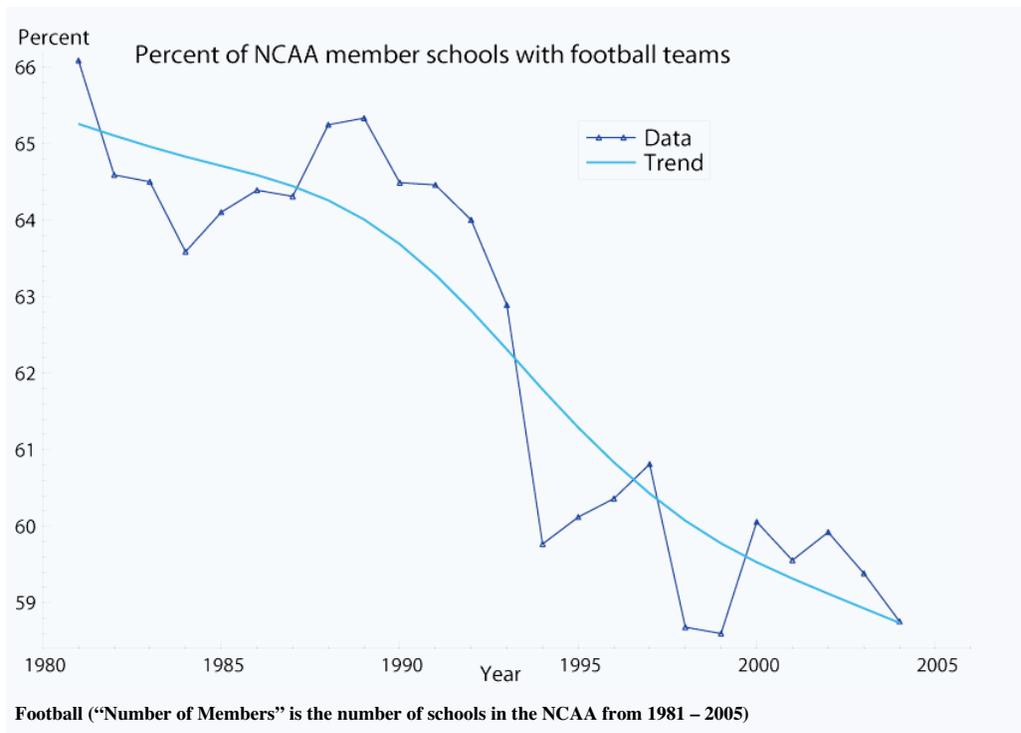


still in high school. The pros, on the other hand, command an unlimited supply of mature players. When an NFL player is injured or waived, management picks up the phone and brings in a replacement.

Football is not the issue causing schools to drop men's sports. The Title IX gender quota drives schools to drop men's programs despite the schools' best efforts and fervent wishes for keeping all teams intact. Even when there is no football team to blame, men still suffer. That is not equal opportunity.

The College Sports Council study shows that even football has seen a decline in the Title IX era. As shown in Figure 3, the percentage of NCAA member schools with football teams has declined since 1980.

Figure 3



Source: The College Sports Council, *College Sports Council Longitudinal Study of NCAA Participation Data*, March 29, 2007. Available at: <http://savingsports.org/presentation/pages/Football.html>.

How the Status Quo Shortchanges Women

This misapplication of Title IX undermines women as well as men.

When the *Kelley* court ruled that there was nothing in Title IX requiring schools to expand or add programs for women in order to comply with the gender quota, the court effectively allowed for the stagnation of women's sports. For example, a school with nine women's teams and 12 men's teams can meet the gender quota simply by cutting enough men to match the number of women on existing teams. There is no need to add any more women's teams, regardless of interest, ability, or market forces.



The OCR also encouraged the stagnation of women's sports in the 1996 Clarification of the three-prong test. In that document, the OCR defined prong two—history and expansion of women's sports—as only counting the addition of new women's teams. So, if a school has 10 women's teams that are all underfunded, it gains no credit with the government under prong two for expanding the funding or facilities of the 10 existing women's teams. The choice again seems to be eliminate enough men to reach the gender quota or add another women's team that will be underfunded as well.

By advocating a gender quota, feminists may be undermining true athletic progress for women. Allowing schools to find creative ways to build strong programs and strong marketplaces for women's sports would be better for all women.

By allowing, and even encouraging, schools to set high minimums for women's teams, coaches are finding themselves taking on some sub-standard players to beef up the roster. This affects the competitiveness of women's teams, as well as their morale. It cannot be good for women's sports markets in the long term to field non-competitive teams. This phenomenon is especially prevalent in sports such as crew, where the participants may have no varsity team experience and require more of the coach's attention just to learn basic skills.

The current application of Title IX also discourages the growth of women's sports in the overall marketplace. The adage that “if you build it, they will come” has not proved true. However, the OCR policies do not provide the flexibility for schools to truly be a part of building new markets for women's sports, including the establishment of club teams to build both interest and ability. Building a market for any sport takes time and some measure of creativity. The focus on participation quotas ignores the need to allow a market to grow. Today's collegiate and high school sports teams compete with the entire entertainment industry to attract players and fans.

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The Solution: Measuring Student Interest

In 2005, the OCR responded to schools' requests for more flexibility in showing compliance by attempting to provide a quantitative measure for prong three. The new OCR Clarification allows schools to use interest surveys to show that the schools are "effectively accommodating the interests and abilities of the underrepresented sex."⁶³

Measuring student interest seems like a reasonable place to start when designing an athletic program. It's hard to know what sports the student body wants to play if no one bothers to ask.

Speaking to *Inside Higher Ed*, Jim McCarthy of the College Sports Council pointed out the increased flexibility that surveys could provide: "Measuring interest was always so vague, schools didn't try to use it....Up until now schools have been under this dark threat of litigation from proportionality quotas. Now there's a common sense alternative to quotas."⁶⁴

Unfortunately, the interest surveys were met with intense hostility from the Title IX lobby, including many women's groups and the NCAA. Instead of praising the OCR for allowing schools to provide athletic programming that actually mirrors student preferences, groups such as the Women's Sports Foundation instead chose to investigate options for legal action to stop the surveys.⁶⁵

Testifying before the U.S. Civil Rights Commission in 2007, Jessica Gavora of the College Sports Council criticized women's groups that denounced the surveys:

Groups like the Women's Sports Foundation and the National Women's Law Center have long insisted that there are three equally valid ways to comply with Title IX, and that assessing the interests of women is in fact one of them. And yet their reaction to the Model Survey has been to refute interest as a measure of compliance on two fronts. They have argued, first, that women's interests cannot be discerned, and second, even when discerned, fulfilling the interests of women on campus is insufficient to comply with Title IX.

On the first objection, two prominent defenders of the Title IX status quo wrote that surveys can't gauge men's and women's relative interest in sports because 'culturally, men are simply more likely than women to profess an interest in sport.' Women, on the other hand, 'are less likely to profess an interest in sports, even if they are interested!'

In other words, women are as interested in sports as men, they just can't bring themselves to admit it.

The critics' second objection to the Model Survey is that surveying current students' interest in athletics only serves to freeze a school's sports program in the

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status quo. The theory is that women who are interested in a particular sport will not attend an institution that does not already offer that sport. Critics do not explain, however, why this same phenomenon does not likewise adversely impact men's college choices.⁶⁶

Women's groups were not the only vocal opponents of the Model Survey. In a more curious move, the NCAA was against surveying the student athletes it represents. The NCAA voiced strong opposition to the Model Survey, urging the OCR to rescind the Clarification and urging NCAA members not to use the Model Survey.⁶⁷

Many critics fixated on the fact that the survey could be administered via email, thinking that such a strategy would not garner a high response rate from students. Even if the Model Survey was flawed, it could certainly be improved and used as a valuable tool to capture the preferences of the key constituency in college athletics, the students. But instead of working with the OCR to improve the survey, proportionality supporters called for a full-scale elimination of the survey, effectively silencing the thoughts and opinions of the students they claim to support.

The real trouble of the Model Survey lies in prong three itself. Gavora explains:

Remember that Prong three applies only in cases where schools have not reached statistical proportionality. For these schools, it requires that they only accommodate the interests of the 'underrepresented sex'—in virtually all cases women. The unmet interest of men is not considered.

So if a school that has not reached statistical proportionality surveys its students and finds some unmet interest on the part of women and massive unmet interest on the part of men, it is obligated to fully accommodate only the women's interest. What's more, a school that is not proportional and has a women's club team that requests varsity status—regardless of how many men's club teams request the same—must accommodate that interest and that interest only.⁶⁸

A possible solution, as Gavora explains, is to truly accommodate student interest by expanding prong three to require that schools accommodate the interest of both sexes:

Prong three should be modified from its current requirement that only the interests of the underrepresented sex be accommodated, to a requirement that schools *equally accommodate the interests of both sexes*. Under this approach, the results of the Model Survey become the 'qualified pool' against which an equal accommodation standard is measured. So if a school finds that 40 percent of its current and prospective students who are interested in athletics are women, it would apportion 40 percent of its opportunities to women. In this way, student's who shouldn't be considered in a disparate impact determination of discrimination—such as older students, students with families, and students who simply lack the interest and ability to compete in sports—would rightly be excluded.⁶⁹



Conclusion

Women's achievements in the athletic arena are certainly something that society should be proud of. But as opportunities are expanded for women on campus, it is important that men be afforded the same chance to succeed.

Title IX's enforcement mechanisms are overdue for reform. Organized sports play an integral role in our culture and society, and we cannot afford to let these problems persist.

Certainly, sex discrimination has no place on the playing field. But the development and current enforcement of Title IX policies have succeeded only in replacing one form of discrimination with another.

Revisiting the proportionality rule, or any other aspect of Title IX, will not roll back the clock on women's athletic participation. In today's society, it is expected and applauded that girls and women will participate in an active lifestyle. But if Title IX is not changed, we will continue to punish boys and men for discrimination that occurred before many of today's athletes were even born.

Returning Title IX to its original intent is the only way to guarantee that the chance to play is offered equitably.



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