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**Title IX and Intercollegiate Athletics:**  
**An Analysis of The Extent to Which Title IX Has Fulfilled its**  
**Original Promise of Establishing Gender Equity Between Men and**  
**Women in Intercollegiate Athletics**

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**PUBLIC POLICY & LAW HONORS THESIS**

**BY CARA BRADLEY**

**Spring 2020**

**Trinity College, Hartford, CT**

**Advisor: Professor Adrienne Fulco**

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As a result of Title IX’s progress in establishing greater athletic opportunities for women, I was able to be a college athlete and continue playing the sport I love, field hockey. Through my four years as a college athlete, I was pushed to become the strongest version of myself. By firsthand experiencing the positive impact Title IX can have on a woman’s life, I have understood the vital importance for the legislation and am dedicated to improving gender equity in all areas of life.

## **ABSTRACT**

This thesis examines the extent to which Title IX has fulfilled its original promise of establishing gender equity between men and women in intercollegiate athletics. To evaluate the OCR's commitment to establishing gender equity in intercollegiate athletics, the evolution of Title IX from 1972-2020 is provided, demonstrating a disconnect between Title IX's intent in 1972 and how it is interpreted and enforced today by the OCR. The OCR's Three-Part Test is analyzed by each prong's ability to establish and measure gender equity, revealing the test's inconsistency with the core intent of Title IX, as well as the OCR's nonexistent enforcement of discriminatory practices despite the lack of institutional compliance. The substantial lack of equitable opportunities for female athletes, a consequence of both the OCR's unreliable interpretations and enforcement of Title IX, is demonstrated through analysis of institutional fulfillment of Title IX scholarship and Three-Prong Test requirements. To further investigate the deviation of Title IX interpretations from the legislation's original purpose, the effect of political ideology on Title IX policy is analyzed, demonstrating the politicization of Title IX over the course of six presidential administrations. Overall, this thesis reveals Title IX's immense progress in establishing greater athletic opportunities for women, as well as the lack of institutional compliance, due to the OCR's inconsistent commitment to providing nondiscriminatory athletic opportunities for all athletes. Ultimately, a five-point policy is proposed to update Title IX guidance and incentivize robust enforcement, consistent with the core value of the legislation.

# CHAPTER I: COMPREHENSIVE HISTORY OF TITLE IX

“Thirty-seven words that changed American sports” – Susan Ware<sup>1</sup>

## Introduction

Throughout the history of the United States, women have been routinely discriminated against on the sole basis of their sex. In 1769, women in English colonies were prohibited from owning property in their own name or keeping their personal incomes. In 1777, all states passed legislation making it illegal for women to vote; and in 1873, the Supreme Court decided that it was legal for states to ban women from practicing law. Despite early civil rights laws repeatedly failing to protect women against discrimination in education, women have courageously fought for their civil rights in nearly every aspect of life. From the ratification of the Nineteenth Amendment to the U.S. Constitution in 1920 to the passing of the Equal Pay Act of 1964, women have prevailed against sex discrimination.<sup>2</sup>

In the late 1960's and early 1970's, the women's civil rights movement started to grow and inspire change across the country. Despite the progress made by the wave of feminist activism, it became evident that widespread sex discrimination remained. One issue that became increasingly prevalent was sex discrimination in education, which emerged as one of the most pressing issues of the movement. Gender-based discrimination restricted the ability of women to receive the same educational opportunities as their male counterparts. Posing a detrimental threat to society, sex discrimination impacted women's opportunities in all facets of their education.

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<sup>1</sup> R. Shep Melnick, *The Transformation of Title IX: Regulating Gender Equality in Education* (Washington, D.C.: Brookings Institution Press, 2018), 39.

<sup>2</sup> Milligan, Susan, “Timeline: The Women's Rights Movement in the U.S.,” *U.S. News & World Report*, January 20, 2017, <https://www.usnews.com/news/the-report/articles/2017-01-20/timeline-the-womens-rights-movement-in-the-us>.

One crucial element of the educational experience that women were not receiving equitable opportunities in was athletics.

### Sex Discrimination in Athletics

In the 1970's, there was no state of equality between the representation and treatment of men and women in high school and college athletics. In 1971, 3.7 million boys participated in high school sports in comparison to only 294,000 girls.<sup>3</sup> One significant factor that contributed to this disparity in high school athletics was the fact that many states did not even sponsor sports for high school girls. The lack of athletic opportunities afforded to high school girls greatly impacted their representation at the collegiate level. In 1971, women represented only 15% of college athletes,<sup>4</sup> receiving 2% of institutions' athletic budgets, and even fewer athletic scholarships.<sup>5</sup> Additionally, it was not until 1980 that women's intercollegiate athletics were included in the "historically all-male" National Collegiate Athletic Association (NCAA), rather than the Association for Intercollegiate Athletics for Women (AIAW).<sup>6</sup> As a result of the lack of opportunities provided to women in high school and college, women were substantially underrepresented in athletics overall, facing widespread discrimination in the athletic arena as they were "simply not allowed in the gym or on the field."<sup>7</sup>

Women were not only participating in athletics at a far lower rate than men, but also experiencing harsh prejudice and discrimination when they did. The lack of female representation can be partially attributed to the stereotypes and discrimination female athletes

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<sup>3</sup> Jocelyn Samuels and Kristen Galles, "In Defense of Title IX: Why Current Policies Are Required to Ensure Equality of Opportunity," *Marquette Sports Law Review*, vol. 14 (2003): 33, <https://heinonline.org/HOL/P?h=hein.journals/mqslr14&i=17>.

<sup>4</sup> Melnick, *The Transformation of Title IX*, 87.

<sup>5</sup> Samuels and Galles, "In Defense of Title IX," 19.

<sup>6</sup> "About the NCAA: History," National Collegiate Athletic Association, last modified August 13, 2012, <https://web.archive.org/web/20131212033410/http://www.ncaa.org/wps/wcm/connect/public/ncaa/about%2Bthe%2Bncaa/history>.

<sup>7</sup> Samuels and Galles, "In Defense of Title IX," 19.

faced on the basis of their sex. These stereotypes included: women were less interested in athletics than men, sports were too dangerous an activity for women to partake in, and female athleticism signaled failed heterosexuality.<sup>8</sup> By the 1950's, nearly every female athlete was forced to endure stereotypes about their "mannishness" and sexuality.<sup>9</sup> Susan Cahn discusses the impact of gender stereotyping in the 1900's in her article, "Coming on Strong: Gender and Sexuality in Twentieth-Century Sports." Cahn states:

The destructive stereotype of the mannish lesbian athlete pressured women in sport to demonstrate their femininity and heterosexuality, viewed as one in the same. Many women adopted an apologetic stance about their athletic skill. Even as they competed to win, they made sure to display outward signs of femininity in dress and demeanor.<sup>10</sup>

These fictional stereotypes derived from the longstanding "association between athleticism and male virility."<sup>11</sup> For sports with a "masculine image" such as softball, basketball, and hockey, this lesbian stereotyping was especially prevalent.<sup>12</sup> As the women's rights movement grew, women involved in athletics became increasingly conscious of the injustices they faced on the basis of their sex. This awakening led to activism in Congress, which acknowledged the dire need to address sex discrimination and acted accordingly.

### Legislative History of Title IX

On June 23, 1972, Title IX of the Federal Education Amendments of 1972 was signed by President Nixon with the intent of limiting gender inequities in federally funded education programs.<sup>13</sup> Title IX, legally known as Title 20 U.S.C. Sections 1681-1688, states:

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<sup>8</sup> Nancy Hogshead-Makar and Andrew Zimablist, *Equal Play: Title IX and Social Change* (Philadelphia PA: Temple University Press, 2007), 11.

<sup>9</sup> Hogshead-Makar and Zimablist, *Equal Play*, 11.

<sup>10</sup> Hogshead-Makar and Zimablist, *Equal Play*, 11.

<sup>11</sup> Hogshead-Makar and Zimablist, *Equal Play*, 10.

<sup>12</sup> Hogshead-Makar and Zimablist, *Equal Play*, 12.

<sup>13</sup> "Overview of Title IX of the Education Amendments of 1972," The United States Department of Justice, accessed November 10, 2019, <https://www.justice.gov/crt/fcs/TitleIX-SexDiscrimination>.

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.<sup>14</sup>

Congresswoman Edith Green, a member of the House Committee on Education and Labor, was the “principal sponsor” of Title IX.<sup>15</sup> After taking time to strategize the most efficient way to pass the legislation, Green utilized her role on the Committee to include Title IX in an education bill going through Congress. Green’s strategy for passing the bill avoided lobbying for it directly in an attempt to not draw any opposition. Her approach proved effective, as the legislation was authored and added on the Senate floor by Senator Birch Bayh, the lead sponsor of the Equal Rights Amendment.<sup>16</sup> The bill passed in both houses of Congress after supporters of Title IX made their arguments. According to Elizabeth Kaufer Busch and William E. Thro, authors of *Title IX: The Transformation of Sex Discrimination in Education*, the language used in Title IX is based on the “equal treatment theory,” which supports the equal treatment of men and women.<sup>17</sup> Busch and Thro have found that this theory “often stresses the similarities between males and females, in an effort to eliminate both discriminatory restrictions and special protections for males and females.”

While Title IX applied to most aspects of education programs receiving federal funding, intercollegiate athletics was not the intended target of the legislation. However, Title IX’s most significant initial effect was on athletics, which quickly became the source of widespread debate. Critics of Title IX included the NCAA, whose executive director denounced the legislation as the “possible doom of intercollegiate sports” and lobbied to exclude all college sports from its

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<sup>14</sup> “Overview of Title IX of the Education Amendments of 1972.”

<sup>15</sup> Melnick, *The Transformation of Title IX*, 40.

<sup>16</sup> Melnick, *The Transformation of Title IX*, 41.

<sup>17</sup> Elizabeth Kaufer Busch and William E. Thro, *Title IX: The Transformation of Sex Discrimination in Education* (New York: Rutledge, 2018), 12.

jurisdiction.<sup>18</sup> Texas Senator John Tower (R) was another strong opponent to Title IX and attempted to pass a law that would exempt revenue-producing sports, such as men's football and basketball, from Title IX's jurisdiction. Known as the Tower Amendment, this law would have introduced the following exemption to Title IX: "This section shall not apply to an intercollegiate athletic activity insofar as such activity provides to the institution gross receipts or donations required by such institutions to support that activity."<sup>19</sup> While Tower failed to pass his amendment, Congress did enact a compromise after New York Senator Jacob Javits submitted an amendment guiding the Secretary of Health, Education and Welfare (HEW) to issue policy allowing for "reasonable provisions considering the nature of particular sports" so that sports with higher operating costs should not be held to the same standard as sports of lesser needs.<sup>20</sup> The "Javits Amendment" instructed HEW to develop guidelines for intercollegiate athletics, taking into consideration the significant difference between various sports. On July 21, 1975, HEW issued the department's final Title IX regulations. The first provision of the regulations concerns athletic scholarships and states the following:

(1) To the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics.

(2) Separate athletic scholarships or grants-in-aid for members of each sex may be provided as part of separate athletic teams for members of each sex to the extent consistent with this paragraph and § 106.41.<sup>21</sup>

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<sup>18</sup> Glenn B George, "Forfeit: Opportunity, Choice, and Discrimination Theory under Title IX," *Yale Journal of Law and Feminism* 22, no. 1 (2010): 6, [https://heinonlineorg.ezproxy.trincoll.edu/HOL/Page?public=true&handle=hein.journals/yjfem22&div=4&start\\_page=1&collection=journals&set\\_as\\_cursor=1&men\\_tab=srchresults](https://heinonlineorg.ezproxy.trincoll.edu/HOL/Page?public=true&handle=hein.journals/yjfem22&div=4&start_page=1&collection=journals&set_as_cursor=1&men_tab=srchresults).

<sup>19</sup> Hogshead-Makar and Zimablist, *Equal Play*, 59.

<sup>20</sup> George, "Forfeit," 6.

<sup>21</sup> Diane Heckman, "Scoreboard: A Concise Chronological Twenty-Five Year History of Title IX Involving Interscholastic and Intercollegiate Athletics," *Seton Hall Journal of Sport Law* 7, no. 2 (1997): 397, <https://heinonline.org/HOL/P?h=hein.journals/shjls17&i=397&a=dHJpbmNvbGwuZWR1>.

The second section, titled “Athletics,” is divided into four parts and begins with reiterating the language of Title IX, as written in 1972. The next part, “Separate teams,” clarifies the requirements for coed and single-sex athletic teams. The legislation permitted sex-segregated athletic teams if both sexes received equal athletic facilities, as stated below:

Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball, and other sports the purpose or major activity of which involves bodily contact.<sup>22</sup>

The next section, “Equal Opportunity,” outlines the requirements for a program to be in compliance by providing equitable athletic opportunities for all athletes. The regulations provided ten areas of athletics for schools to consider:

- (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes
- (2) The provision of equipment and supplies
- (3) Scheduling of games and practice time
- (4) Travel and per diem allowance
- (5) Opportunity to receive coaching and academic tutoring
- (6) Assignment and compensation of coaches and tutors
- (7) Provision of locker rooms, practice, and competitive facilities
- (8) Provision of medical and training facilities and services
- (9) Provision of housing and dining facilities and services
- (10) Publicity.<sup>23</sup>

In the final section, the regulation mandated the timeframe for compliance: providing elementary schools one year to comply and high schools and colleges three years. The guideline also further clarified that strict proportionality in participation numbers, scholarships, or financing is not a

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<sup>22</sup> Heckman, “Scoreboard,” 398.

<sup>23</sup> Heckman, “Scoreboard,” 399.

requirement of compliance. Although equal athletic opportunities for both sexes are a crucial element of the regulation, equal opportunity does not include an equal number of teams, types of teams, or team funding because of inherent differences between the sexes. Multiple attempts to reject the HEW regulations were made, including by John Fuzak, the President of the NCAA, who wrote to President Ford: “The HEW concepts of Title IX as expressed could seriously damage if not destroy the major men's intercollegiate athletic programs.”<sup>24</sup> Despite these efforts, the finalized regulations were implemented.

Later in the year, HEW issued additional guidelines in a “Letter to Chief State School Officers, Title IX Obligations in Athletics” (“Letter”). The Letter merely clarified the requirements of schools in response to concerns “raised about the immediate obligations of educational institutions to comply with certain sections of the Departmental Regulation as they relate to athletic programs.”<sup>25</sup> Overall, the main focus of the regulation was “the concept of reasonableness, not strict proportionality.”<sup>26</sup> Educational institutions and programs receiving federal funding are required to equitably support teams of both sexes, in nearly every aspect of the athletic experience, however the guidelines acknowledge the innate differences among sports. HEW stated that although different sports require varying expenses due to their nature, it “does not obviate in any way the responsibility of educational institutions to provide equal opportunity.”<sup>27</sup>

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<sup>24</sup> Ellen J. Staurowsky, “Title IX and College Sport: The Long Painful Path to Compliance and Reform,” *Marquette Sports Law Review* 14, no. 1, (Fall 2003): 102, [https://heinonlineorg.ezproxy.trincoll.edu/HOL/Page?public=true&handle=hein.journals/mqslr14&div=11&start\\_page=95&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults](https://heinonlineorg.ezproxy.trincoll.edu/HOL/Page?public=true&handle=hein.journals/mqslr14&div=11&start_page=95&collection=journals&set_as_cursor=0&men_tab=srchresults).

<sup>25</sup> U.S. Department of Education, Office for Civil Rights, “Letter to Chief State School Officers, Title IX Obligations in Athletics,” Policy Guidance, September 1975, <https://www2.ed.gov/about/offices/list/ocr/docs/holmes.html>.

<sup>26</sup> “Letter to Chief State School Officers.”

<sup>27</sup> “Letter to Chief State School Officers.”

In 1977, HEW published the report, *Title IX and Physical Education: A Compliance Overview*. The report examined the current state of physical education and athletics in school programs, and how they were impacted by Title IX legislation. HEW's study of public responses to Title IX resulted in the following analysis:

Title IX will mean little or no change to many who have embraced the concept of equal opportunity, created programs which are responsive to student needs, interests and abilities, and implemented them in a nondiscriminatory fashion. For others, however, Title IX may mean massive, perhaps traumatic change. Basic beliefs, attitudes, day-to-day practices and policies will be challenged. Change maybe slow, but change must occur, for there must be compliance with the law.<sup>28</sup>

The report offers a valuable perspective as it was written "based upon the premise that compliance with Title IX requirements is not only a legal responsibility but also an educational responsibility if physical education programs are to contribute optimally to the lives and development of all students."<sup>29</sup> The report also discussed the requirements of Title IX athletics guidelines, as well as HEW's predictions for the future of physical education and athletics.

Shortly after the 1975 policy interpretation was implemented, it was presumed that institutions would quickly attempt to be in compliance. Following the three-year transition period provided to institutions, HEW's Office for Civil Rights received over 100 complaints regarding athletics.<sup>30</sup> With no existing internal policy for investigating sex discrimination at schools, HEW consulted various parties and educational programs in search of the appropriate measure, and in December of 1978, they issued the Intercollegiate Athletics Policy Interpretation for public comment.<sup>31</sup> Exactly a year later, HEW revitalized Title IX by publishing the document

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<sup>28</sup> Department of Health, Education, and Welfare, *Title IX and Physical Education: A Compliance Overview*, Office of Education, 1977, 5.

<sup>29</sup> *Title IX and Physical Education*, 5.

<sup>30</sup> Samuels and Galles, "In Defense of Title IX," 1.

<sup>31</sup> Heckman, "Scoreboard," 402.

which is “from a legal standpoint, the most influential document issued to explain how gender equity should work in college sports.”<sup>32</sup> HEW’s purpose in publishing the policy interpretation was to clarify the policy, set forth a uniform process for resolving Title IX complaints, and further instruct schools on how to become compliant with Title IX standards. The Policy Interpretation includes the following three sections:

- Compliance in Financial Assistance (Scholarships) Based on Athletic Ability: Pursuant to the regulation, the governing principle in this area is that all such assistance should be available on a substantially proportional basis to the number of male and female participants in the institution's athletic program.
- Compliance in Other Program Areas (Equipment and supplies; games and practice times; travel and per diem, coaching and academic tutoring; assignment and compensation of coaches and tutors; locker rooms, and practice and competitive facilities; medical and training facilities; housing and dining facilities; publicity; recruitment; and support services): Pursuant to the regulation, the governing principle is that male and female athletes should receive equivalent treatment, benefits, and opportunities.
- Compliance in Meeting the Interests and Abilities of Male and Female Students: Pursuant to the regulation, the governing principle in this area is that the athletic interests and abilities of male and female students must be equally effectively accommodated.<sup>33</sup>

In the first section, the document sets forth the regulations for being in compliance for scholarships based on athletic ability. Equality in the number of scholarships granted to each sex is not required by the policy. Instead, the policy requires institutions granting students athletic scholarships to provide them in rates proportionate to the number of male and female students participating in intercollegiate athletics at the school. The second section, Compliance in Other Program Areas, mandates the equality of various aspects of male and female athletic programs. The policy states that:

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<sup>32</sup> Welch Suggs, *A Place on the Team: The Triumph and Tragedy of Title IX* (New Jersey: Princeton University Press, 2006), 78.

<sup>33</sup> Hogshead-Makar and Zimablist, *Equal Play*, 69.

The Department will assess compliance with both the recruitment and the general athletic program requirements of the regulation by comparing the availability, quality and kinds of benefits, opportunities, and treatment afforded members of both sexes. Institutions will be in compliance if the compared program components are equivalent, that is, equal or equal in effect. Under this standard, identical benefits, opportunities, or treatment are not required, provided the overall effects of any differences is negligible.<sup>34</sup>

According to this requirement, if an examination of men and women's programs shows that such program areas are "not equivalent in kind, quality or availability," compliance may only be reached if the differences are a product of "nondiscriminatory factors."<sup>35</sup> The final section of the interpretation established a Three-Part Test for measuring sex equality in athletics. Institutions are provided with the following three different ways to obtain compliance:

- 1) The number of male and female athletes is substantially proportionate to their respective enrollments; or
- 2) The institution has a history and continuing practice of expanding participation opportunities responsive to the developing interests and abilities of the underrepresented sex; or
- 3) The institution is fully and effectively accommodating the interests and abilities of the underrepresented sex.<sup>36</sup>

The first prong measures participation opportunities for men and women, seeking these opportunities to be "substantially proportionate" to their respective undergraduate enrollments. For example, if an institution's undergraduate enrollment is comprised of fifty-percent male and fifty-percent female students, then its student-athlete body must also be divided 50/50. This prong represents the "parity standard," which is based on the ratio of male and female varsity athletes to the total number of each male and female student populations.<sup>37</sup> This standard was implemented over the "relative interest standard," another proposed theory to compare the

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<sup>34</sup> "A Policy Interpretation: Title IX and Intercollegiate Athletics."

<sup>35</sup> "A Policy Interpretation: Title IX and Intercollegiate Athletics."

<sup>36</sup> U.S. Department of Education, Office for Civil Rights, "Intercollegiate Athletics Policy: Three-Part Test -- Part Three Q's & A's," Policy Guidance, last modified January 10, 2020, <https://www2.ed.gov/about/offices/list/ocr/docs/title9-qa-20100420.html>.

<sup>37</sup> Melnick, *The Transformation of Title IX*, 83.

athletic opportunities offered to male and female students.<sup>38</sup> The “relative interest” standard compares the number of male and female athletes by implementing a ratio based on each sexes’ “relative interest” in participating in athletics.<sup>39</sup> This standard follows the belief that there are sex differences in athletic interest, a contentious topic that will be further discussed later in this work.<sup>40</sup> The chart below demonstrates the differences between these two competing theories to assess gender equity in athletics.

**Figure 1.1: The Factions’ Preferred Fractions**

<u>Number of male varsity Athletes</u> Males in Student Body	"Parity" =	<u>Number of Female Varsity Athletes</u> Females in Student Body
	"Relative Interest"	
<u>Number of Male Varsity Athletes</u> Males in Student Body with Interest in Varsity Sports	=	<u>Number of Female Varsity Athletes</u> Females in Student Body with Interest in Varsity Sports

Source: Table by Melnick, *The Transformation of Title IX*, 83.

The second prong in the Three-Part Test examines an institution’s “history and continuing practice” of expanding athletic opportunities for the underrepresented sex, responsive to their developing interests and abilities, which is commonly female.<sup>41</sup> This prong is intended to promote the advancement of women’s athletic opportunities. As women were participating in athletics at increasing rates, this prong provides compliance for institutions which expand their athletic offerings for women to accommodate such “developing interests.” Lastly, the third prong

<sup>38</sup> Melnick, *The Transformation of Title IX*, 82.

<sup>39</sup> Melnick, *The Transformation of Title IX*, 82.

<sup>40</sup> Melnick, *The Transformation of Title IX*, 82.

<sup>41</sup> “Intercollegiate Athletics Policy.”

analyzes an institution's ability to "effectively accommodate the interests and abilities" of the underrepresented sex. This prong takes into account the differences between male and female interest in athletic participation, granting institutions compliance for accommodating the underrepresented sex, almost always female, even when there is not a substantially proportionate number of female and male athletes. While fulfilling any of the three prongs signifies compliance, the proportionality prong has become the preferred option by Title IX advocates due to its fully objective standard.

The purpose of this policy interpretation was to explain the policy, provide a framework to resolve Title IX complaints, and serve as additional guidance for institutions on the requirements for compliance with Title IX. The document implemented numerical parity as the new measure of determining equality between the sexes that had not been previously established in past policies. While the Three-Part Test first appeared as a clear and straightforward way of measuring compliance, it quickly sparked debate for a variety of reasons. Questions over the authority of the document were raised, as it was a policy interpretation simply proposing the Three-Part Test, as opposed to a legal document. The definition of equity set forth in the Three-Prong Test also led to great confusion, as different sports required varying accommodations and funding. Chapter 4 will further discuss the complexities revenue-producing sports have posed for institutions seeking compliance. The following year, the Department of Education was established and through the Office for Civil Rights (OCR), was assigned oversight of Title IX.<sup>42</sup>

The Civil Rights Restoration Act, passed in 1988, is one of the sole instances in which a formal congressional change was made to Title IX. This law will be discussed later in this

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<sup>42</sup> "History of Title IX," *Women's Sports Foundation*, 13 Aug. 2019, <https://www.womenssportsfoundation.org/advocacy/history-of-title-ix/>.

chapter as it was enacted in response to the *Grove City College v. Bell* decision in 1978. In 1990, the Title IX Investigators Manual was issued by the OCR in an effort to standardize the process of investigating claims of sex discrimination at educational institutions. The manual was developed for OCR investigators to use while conducting an investigation of Title IX compliance, and regulated the investigation process by providing a “clear, consistent direction for investigators to conduct a thorough investigation from receipt of a complaint through the issuance of a letter of findings.”<sup>43</sup> In the fall of 1994, the Equity in Athletics Disclosure Act (EADA) was passed, requiring co-educational schools to report annual data about their men’s and women’s athletic teams to the Department of Education.<sup>44</sup> The federal law required institutions to report on the athletic participation, staffing, revenues and expenses for all teams.<sup>45</sup> The EADA incentivized institutions to advance their current state of gender equity in athletics, as the data reported by institutions was included in the Department of Education’s mandatory report to Congress on gender equity in intercollegiate athletics.

In order to clarify the Three-Part Test, the OCR reaffirmed its enforcement in the “Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test,” (“Clarification”) in 1996.<sup>46</sup> The OCR provided an updated interpretation and amplification of the Three-Part Test by making clear that it provides schools with the following three separate ways to maintain compliance. The Clarification explained that the OCR provides three viable options

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<sup>43</sup> Paul M. Anderson and Barbara Osborne, “A Historical Review of Title IX Litigation,” *Journal of Legal Aspects of Sport* 18, no. 1 (Winter 2008): 145, [https://heinonlineorg.ezproxy.trincoll.edu/HOL/Page?public=true&handle=hein.journals/jlas18&div=9&start\\_page=127&collection=journals&set\\_as\\_cursor=1&men\\_tab=srchresults](https://heinonlineorg.ezproxy.trincoll.edu/HOL/Page?public=true&handle=hein.journals/jlas18&div=9&start_page=127&collection=journals&set_as_cursor=1&men_tab=srchresults).

<sup>44</sup> Heckman, “Scoreboard,” 413.

<sup>45</sup> “Equity in Athletics Disclosure Act,” U.S. Department of Education, last modified January 24, 2017, <https://www2.ed.gov/finaid/prof/resources/athletics/eada.html>.

<sup>46</sup> U.S. Department of Education, Office for Civil Rights, “Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test,” Policy Guidance, January 16, 1996, <https://www2.ed.gov/about/offices/list/ocr/docs/clarific.html>.

for institutions to prove their compliance with Title IX. To satisfy the first prong, substantial proportionality is achieved “when the number of opportunities that would be required to achieve proportionality would not be sufficient to sustain a viable team.”<sup>47</sup> For the second part of the test, the OCR explained “developing interests” to include those that existed at an institution previously. They further clarified that part two examines an institution’s history and current “remedial efforts to provide nondiscriminatory participation opportunities through program expansion,” with a focus placed on the participation opportunities available for the underrepresented sex.<sup>48</sup> The Clarification also stated there would be no set timeframe for institutions increasing participation opportunities or reaching a definite number of athletic teams in order to fulfill the second prong. Despite the OCR’s efforts in this Clarification to simplify all three parts of the test, the second and third prongs remained less desirable than the first, due to their relative lack of objectivity.

### Judicial History of Title IX

One case which led to Congress passing the Civil Rights Restoration Act was *Grove City College v. Bell* in 1978. Since its founding in 1876, the private institution refused to directly accept federal funding as it conflicted with their independent mission.<sup>49</sup> However, 140 of Grove City’s approximate 2,200 students received financial aid through the federal government’s Basic Educational Opportunity Grant (BEOG) program.<sup>50</sup> Therefore, the Department of Education required Grove City to complete an assurance of compliance with Title IX as a recipient of

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<sup>47</sup> “Clarification of Intercollegiate Athletics Policy Guidance.”

<sup>48</sup> “Clarification of Intercollegiate Athletics Policy Guidance.”

<sup>49</sup> “Grove City College v. Bell - Facts and Case Summary,” United States Courts, accessed December 1, 2019, <https://www.uscourts.gov/educational-resources/educational-activities/grove-city-college-v-bell-facts-and-case-summary>.

<sup>50</sup> “Grove City College v. Bell.”

federal financial support. Grove City refused to comply with the directive on the basis that they did not directly receive federal funding, resulting in the department initiating formal proceedings to terminate the students' federal financial aid. The college, along with BEOG grant recipients, sued, asking the court to order the Department of Education not to mandate an assurance of compliance and reverse their removal of student federal financial aid.<sup>51</sup> The Supreme Court held that Title IX only applies strictly to programs directly receiving federal funding.<sup>52</sup> This controversial Supreme Court decision found that Title IX requirements do not apply to an *entire institution*, but only to *individual programs* which benefit from the federal assistance.

The *Grove City* case had a sudden impact on Title IX cases as the OCR's enforcement of compliance effectively ceased. Immediately following *Grove City*, from 1984-1988, the Three-Prong Test was simply not in effect. The OCR dropped nearly forty cases pertaining to Title IX athletics and suspended cases where they had found discrimination to take place.<sup>53</sup> In 1988, the Civil Rights Restoration Act of 1987 was passed in response to the *Grove City* decision and in an attempt to restore Title IX to its original capacity. This amendment established that Title IX applies generally to an institution as a whole as opposed to applying only to programs which receive funding.<sup>54</sup> Overall, this amendment restored the OCR's enforcement of Title IX, resulting in the addition of record numbers of female teams by schools seeking compliance.

On January 19, 1979, *Leffel v. Wisconsin Interscholastic Athletic Association* was decided, finding the Title IX regulation which allows educational institutions to have all-male teams for contact sports to be unconstitutional.<sup>55</sup> The district court found that the Title IX

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<sup>51</sup> Anderson and Osborne, "A Historical Review of Title IX Litigation," 144.

<sup>52</sup> Anderson and Osborne, "A Historical Review of Title IX Litigation," 144.

<sup>53</sup> *Title IX Legal Manual*, The United States Department of Justice, 2015.

<sup>54</sup> Heckman, "Scoreboard," 405.

<sup>55</sup> Heckman, "Scoreboard," 401.

regulation in dispute was unconstitutional as it violated the Fourteenth Amendment Equal Protection Clause.<sup>56</sup> *Leffel v. Wisconsin Interscholastic Athletic Association* remains the only court decision to ever rule any Title IX regulation unconstitutional.<sup>57</sup> This case is significant as it laid the groundwork for great gender equity in athletics, as women were now able to participate in contact sports alongside men.

The Three-Part Test established in the OCR's 1979 guidance was applied for the first crucial time in the 1992 federal court case *Cohen v. Brown University*. At the time, women consisted of 47.6% of students at Brown University, but only 36.7% of the student-athletes.<sup>58</sup> In this case, Brown University dropped four sports: women's volleyball, women's gymnastics, men's golf and men's water polo as a result of budget restrictions. The female student-athletes promptly sued for reinstatement of their teams, contending that Brown's actions were not compliant with the Three-Part Test. Brown tried to prove its fulfillment of the second and third prongs, yet proved unsuccessful. Brown's attempt to demonstrate its history and continuing practice of program expansion failed after the Court found that Brown did not satisfy the requirements of the second prong as the majority of Brown's women's teams were added from 1971-1977.<sup>59</sup> The First Circuit Court held that "The very length of this hiatus suggests something far short of a continuing practice of program expansion."<sup>60</sup> In the U.S. District Court for the District of Rhode Island's decision, the court held that:

Given the difficulty of measuring the relative interests of men and women, it would be almost impossible for an institution to remain in compliance with Title IX by staying abreast of the ever-changing relative "interests" of its male and female students and adjusting its program offerings accordingly. Because defendants' interpretation would

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<sup>56</sup> Heckman, "Scoreboard," 401.

<sup>57</sup> Heckman, "Scoreboard," 401.

<sup>58</sup> Samuels and Galles, "In Defense of Title IX," 26.

<sup>59</sup> "Cohen v. Brown University, 879 F. Supp. 185 (D.R.I. 1995)," Justia Law, accessed February 10, 2020, <https://law.justia.com/cases/federal/district-courts/FSupp/879/185/2264922/>.

<sup>60</sup> "Cohen v. Brown University," Justia Law.

require substantial proportionality between the gender balance of its athletic program offerings and the gender balance of interested prospective student-athletes, constant rebalancing would be necessary to maintain compliance, thereby eliminating the ability of an institution to verify easily that it falls within the "safe harbor" that prong one provides.<sup>61</sup>

Additionally, *Cohen v. Brown* established that the OCR will not allow institutions to comply with the third prong if they eliminate women's teams, as that is "de facto evidence of unmet interest."<sup>62</sup> Therefore, *Cohen v. Brown* has guaranteed that women's teams cannot be cut at institutions which seek compliance with prong three.<sup>63</sup> In other words, if an institution recently cuts a varsity program, it cannot obtain compliance through the third prong as it is clear that there was existing interest in the sport which the institution eliminated.<sup>64</sup>

In their decision, the District Court found *Brown* to be in violation of Title IX, holding that:

*Brown* may achieve compliance with Title IX in a number of ways. It may eliminate its athletic program altogether, it may elevate or create the requisite number of women's positions, it may demote or eliminate the requisite number of men's positions, or it may implement a combination of these remedies.<sup>65</sup>

The court's assertion that the elimination of men's teams is a permissible way to obtain compliance with Title IX has since led to the cutting of men's teams rather than the addition of women's teams as an easier means to achieving compliance. The elimination of male teams and

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<sup>61</sup> "Cohen v. Brown University," Justia Law.

<sup>62</sup> Erin E. Buzuvis, "Survey Says..A Critical Analysis of the New Title IX Policy and a Proposal for Reform," *Iowa Law Review* 91, no. 3 (March 2006): 834, [https://heinonlineorg.ezproxy.trincoll.edu/HOL/Page?public=true&handle=hein.journals/ilr91&div=28&start\\_page=821&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults](https://heinonlineorg.ezproxy.trincoll.edu/HOL/Page?public=true&handle=hein.journals/ilr91&div=28&start_page=821&collection=journals&set_as_cursor=0&men_tab=srchresults).

<sup>63</sup> Buzuvis, "Survey Says," 834.

<sup>64</sup> George, "Forfeit," 17.

<sup>65</sup> "Cohen v. Brown University," Justia Law.

other unintended consequences of gaining compliance with Title IX will be discussed further in Chapter 4.

Overall, the Court’s application of the Three-Part Test in *Cohen v. Brown* supported the substantial proportionality prong as the only effective method of compliance. The court identified the first prong as a “safe harbor,” explaining that “a university which does not wish to engage in extensive compliance analysis may stay on the sunny side of Title IX simply by maintaining gender parity between its student body and its athletic lineup.”<sup>66</sup> The Court’s rejection of the second and third prongs as methods of Title IX compliance solidified the importance of substantial proportionality as a clear-cut method for obtaining compliance. The Court’s holding altered the future implementation of the second prong, acknowledging that although Brown “substantially expanded its athletic program for women in the 1970s,” and had “improved the quality of its women's program,” it remains out of compliance with the prong’s requirements.<sup>67</sup> The court noted that despite the school’s robust expansion of quality athletic programs for women, the lack of a continuing practice of program expansion was problematic. As a result, the *Cohen v. Brown* decision has been argued to guarantee compliance for institutions that expand women’s opportunities “according to a timetable instead of according to the interests of women athletes.”<sup>68</sup> In Jurewitz’s 2000 article, he maintained that the schools which promptly added women’s teams following 1972 are not protected by this prong as they are not continuing to expand women’s athletic opportunities. Under the Court’s application of the

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<sup>66</sup> “Cohen v. Brown University,” Justia Law.

<sup>67</sup> “Cohen v. Brown University,” Justia Law.

<sup>68</sup> Ross A. Jurewitz, “Playing at Even Strength: Reforming Title IX Enforcement in Intercollegiate Athletics,” *American University Journal of Gender, Social Policy & the Law* 8 no. 2 (2000): 316, [https://heinonlineorg.ezproxy.trincoll.edu/HOL/Page?public=true&handle=hein.journals/ajgsp8&div=24&start\\_page=283&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults](https://heinonlineorg.ezproxy.trincoll.edu/HOL/Page?public=true&handle=hein.journals/ajgsp8&div=24&start_page=283&collection=journals&set_as_cursor=0&men_tab=srchresults).

Three-Part Test in this case, Jurewitz argues that institutions that gradually increase women's athletic opportunities are rewarded.

For the third prong, the First Circuit's decision in *Cohen v. Brown* also determined that women's lower interest in athletics "reflects women's historical lack of opportunities to participate in sports."<sup>69</sup> The Court continued to refute the argument that women are inherently less interested in sports, stating that: "To assert that Title IX permits institutions to provide fewer athletics participation opportunities for women than for men, based upon the premise that women are less interested in sports," is "to ignore the fact that Title IX was enacted in order to *remedy discrimination that results from stereotyped notions of women's interests and abilities.*"<sup>70</sup> The Court explained that because interest and ability "evolve as a function of opportunity and experience," schools have a responsibility and "affirmative duty" to further the equality of opportunity for women in athletics.<sup>71</sup>

In 1994, one of the first significant male-initiated lawsuits, *Kelley v. Board of Trustees*, took place. In this case, male athletes at the University of Illinois alleged reverse discrimination because of the demotion of their men's swimming, fencing, and diving teams. They claimed that a violation of Title IX occurred, although the university cut these teams as well as the women's diving team because of budget constraints. The court denied the plaintiffs' allegations and their claim that the first prong of the Three-Part Test established "a gender based quota system."<sup>72</sup> The court dismissed the plaintiffs' claims that the proportionality standard created an "artificial

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<sup>69</sup> R. Shep Melnick, "The Strange Evolution of Title IX." *National Affairs, Inc.*, 2018, <https://www.nationalaffairs.com/publications/detail/the-strange-evolution-of-title-ix>.

<sup>70</sup> Melnick, "The Strange Evolution of Title IX."

<sup>71</sup> Melnick, "The Strange Evolution of Title IX."

<sup>72</sup> Andrew Santillo, "National Wrestling Coaches Association v. United States Department of Education: The Potential Takedown of the Current Application of Title IX to Intercollegiate Athletics," *Temple Political & Civil Rights Law Review* 13, no.1 (Fall 2003): 197, [https://heinonlineorg.ezproxy.trincoll.edu/HOL/Page?public=true&handle=hein.journals/tempcr13&div=11&start\\_page=187&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults](https://heinonlineorg.ezproxy.trincoll.edu/HOL/Page?public=true&handle=hein.journals/tempcr13&div=11&start_page=187&collection=journals&set_as_cursor=0&men_tab=srchresults).

quota,” adding that the objective of Title IX was the prevention of sex discrimination at institutions receiving federal funding.<sup>73</sup> The court held that the University of Illinois’ demotion of male athletic teams was constitutional as it was “substantially related” to creating equal educational opportunities for the underrepresented sex.<sup>74</sup>

Another monumental case in Title IX history was *National Wrestling Coaches Association et al. v. United States Department of Education*. In January of 2002, the National Wrestling Coaches Association (NWCA) filed suit against the U.S. Department of Education after wrestling and other non-revenue athletic programs were more frequently eliminated as a means of attaining institutional compliance. Along with three institutions which eliminated their wrestling programs, the NWCA claimed that the Department of Education’s Title IX interpretations “flagrantly violate” its rights afforded by the legislation, “resulting in the creation of a disparate impact that violates male collegiate athletes’ equal protection rights.”<sup>75</sup> According to Andrew Santillo, author of the article “*National Wrestling Coaches Association v. United States Department of Education: The Potential Takedown of the Current Application of Title IX to Intercollegiate Athletics*,” the substantial proportionality prong is the only way an institution can ensure compliance as it is “an unambiguous objective standard that possesses only one possible interpretation, proportionality with enrollment.”<sup>76</sup> Santillo claims:

Often, schools have met this standard by following the Department of Education's suggestion of eliminating certain lower profile men's athletic teams such as wrestling, swimming, track and field, gymnastics, baseball, and tennis. Such oppressive remedial measures may have been necessary during the late 1970s and early 1980s to address

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<sup>73</sup> Santillo, “National Wrestling Coaches Association,” 197.

<sup>74</sup> Santillo, “National Wrestling Coaches Association,” 197.

<sup>75</sup> Santillo, “National Wrestling Coaches Association,” 205.

<sup>76</sup> Santillo, “National Wrestling Coaches Association,” 208.

archaic stereotypes about women and their interests in athletics, but now, they are no longer needed and actually cause unnecessary harm to innocent individuals.<sup>77</sup>

The NWCA's primary claim was that the Department of Education has historically "abused" its "statutory authority by effectively mandating the very discrimination that Title IX prohibits."<sup>78</sup> Additionally, the plaintiffs alleged that institutions alone intentionally restricted men's athletic opportunities to achieve compliance required by the Department of Education. The U.S. District Court for the District of Columbia dismissed the case in its entirety in 2003. Despite this case's lack of success in holding the Department of Education legally responsible, it effectively revealed their role in eliminating men's athletic opportunities. According to Santillo, this lawsuit is very unique as it challenges "the authors of the regulations, rather than the individual institutions that have followed them." Santillo analyzes the legal approach of the NWCA, which argues that the Department of Education has "established a disparate impact standard and contradicts the original legislative intent of this amendment by encouraging institutions to eliminate opportunities for male athletes." Overall, this case presents a very persuasive argument in favor of updating Title IX policy to address the problematic practice of eliminating men's teams to gain compliance with Title IX. As Santillo states, "One can argue that the current state of Title IX's regulations represents a metamorphosis from the original meaning of this legislation, barely resembling the initial intent of its authors."<sup>79</sup>

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<sup>77</sup> Santillo, "National Wrestling Coaches Association," 188.

<sup>78</sup> Santillo, "National Wrestling Coaches Association," 205.

<sup>79</sup> Santillo, "National Wrestling Coaches Association," 206.

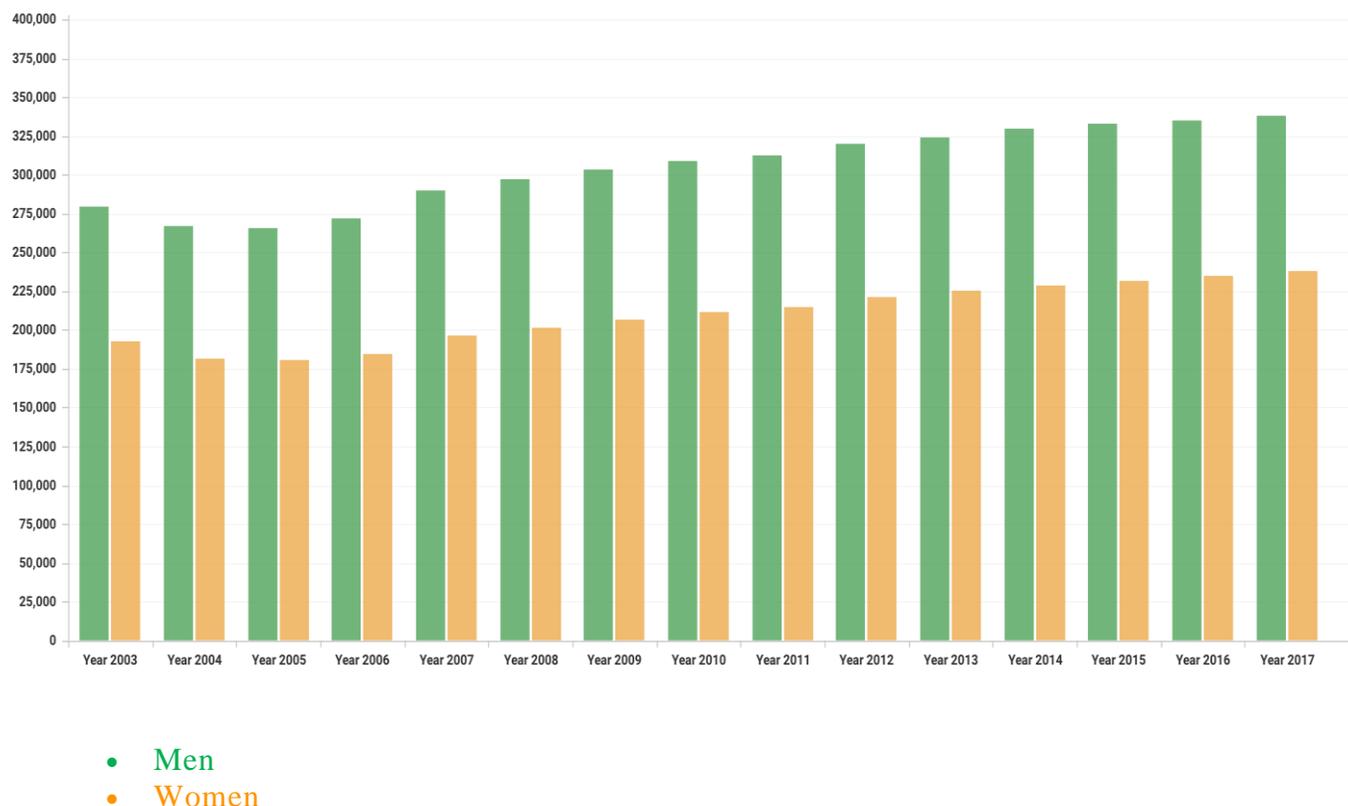
**Table 1.3: Changes in Number of Men's and Women's College Varsity Teams, 1988-2016.**

	<i>Division 1</i>	<i>Division 2</i>	<i>Division 3</i>	<i>Total</i>
Men's teams added	658	1,378	2,009	
Men's teams eliminated	986	783	1,249	
Net change, men	-330	+594	+751	+1,015
Women's teams added	1,268	1,836	2,502	
Women's teams eliminated	468	589	1,125	
Net change, women	+803	+1,253	+1,379	+3,435

Source: Melnick, *The Transformation of Title IX*, 87.

The chart above from Melnick provides a historical comparison of the addition and elimination of men's and women's athletic teams. The expansion of athletic teams from 1988-2016 is identified, with women experiencing the most increases in athletic opportunities and men experiencing the highest rates of teams eliminated. Overall, Division I male athletes have had more teams eliminated than added in this time period, while female athletes have seen vast athletic expansion.

**Figure 1.2: The Growth of Collegiate Athletes by Sex, 2003-2017.**



Source: U.S. Department of Education, Equity in Athletics Disclosure Act (EADA) survey.<sup>80</sup>

In this chart by the U.S. Department of Education, data from the EADA survey demonstrates the widespread growth of female participation in varsity athletics from 2003-2017. This chart displays the clear impact that Title IX has made in increasing athletic opportunities for women across the country. Conversely, this chart also exhibits the vast disparity that remains between men and women's athletic participation. Despite the growth of female participation in varsity athletics, men continue to constitute the majority of varsity athletes in every year between 2002 and 2017. The basic intent of Title IX was to increase athletic opportunities for women in order to establish gender equity in collegiate athletics. As previously discussed, it is often argued

<sup>80</sup> U.S. Department of Education, Equity in Athletics Disclosure Act Survey, "Generate Trend Data," accessed January 30, 2020, <https://ope.ed.gov/athletics/Trend/public/#/subjects>.

that women's lower interest in athletics is a mere product of their historical lack of opportunities. Similarly, as stated in the *Cohen v. Brown* decision, interest and ability "evolve as a function of opportunity and experience."<sup>81</sup> Therefore, the current disparity between men's and women's athletic participation seen in the chart above does not represent a lack of interest, but rather a lack of opportunity.

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<sup>81</sup> Melnick, "The Strange Evolution of Title IX."

**Figure 1.3: Timeline of Title IX, 1972-2003.**

June 23, 1972	Title IX of the Federal Education Amendments of 1972 is signed into law by President Nixon.
July 21, 1975	Congress approves HEW's final Title IX regulations, including the Javits Amendment, which developed guidelines for intercollegiate athletics.
September 1975	HEW releases additional guidelines in a "Letter to Chief State School Officers, Title IX Obligations in Athletics." The document provides schools with ten areas of athletics to consider for compliance. <sup>82</sup>
1978	The Supreme Court holds in <i>Grove City College v. Bell</i> that Title IX only applies strictly to programs directly receiving federal funding. <sup>83</sup>
1979	HEW establishes the Three-Part Test for measuring compliance in athletics in the Intercollegiate Athletics Policy Interpretation. <sup>84</sup>
1980	The Department of Education is established, and oversight of Title IX is handed to the OCR. <sup>85</sup>
1988	The Civil Rights Restoration Act is passed, establishing that Title IX should be interpreted generally to an institution as opposed to applying specifically to educational programs. <sup>86</sup>
1992	<i>The Cohen v. Brown University</i> holding affirms that the elimination of men's teams is a permissible way to obtain compliance with Title IX. <sup>87</sup>
1994	The Equity in Athletics Disclosure Act is passed, requiring co-educational schools to report annual data about their men's and women's athletic participation, staffing, revenues and expenses to the Department of Education. <sup>88</sup>
1996	OCR reaffirms its enforcement of Title IX by providing an updated interpretation of the Three-Part Test, clarifying that it provides schools with the following three separate ways to be in compliance. <sup>89</sup>

<sup>82</sup> "Letter to Chief State School Officers."

<sup>83</sup> "Grove City College v. Bell."

<sup>84</sup> "A Policy Interpretation."

<sup>85</sup> "History of Title IX."

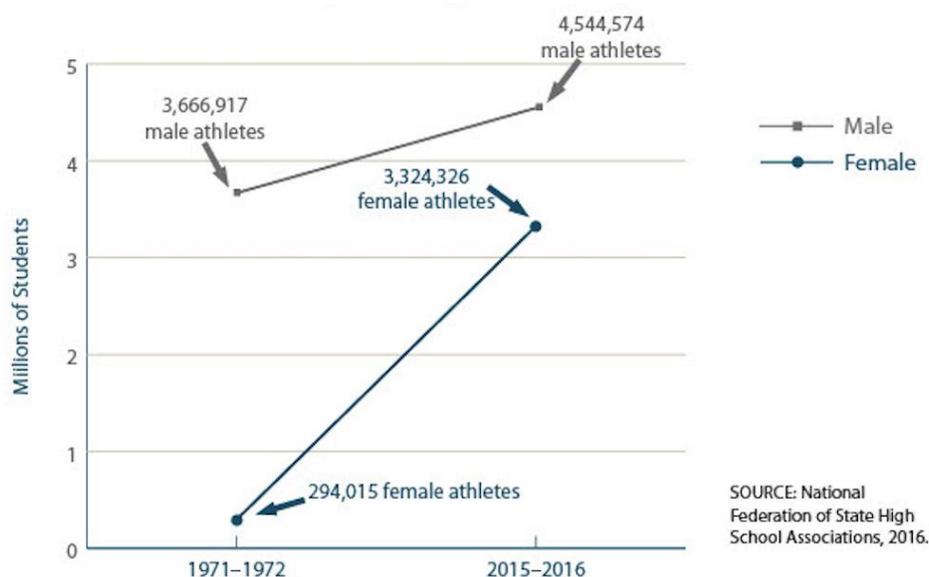
<sup>86</sup> Anderson and Osborne, "A Historical Review of Title IX Litigation," 144.

<sup>87</sup> "Cohen v. Brown University," Justia Law.

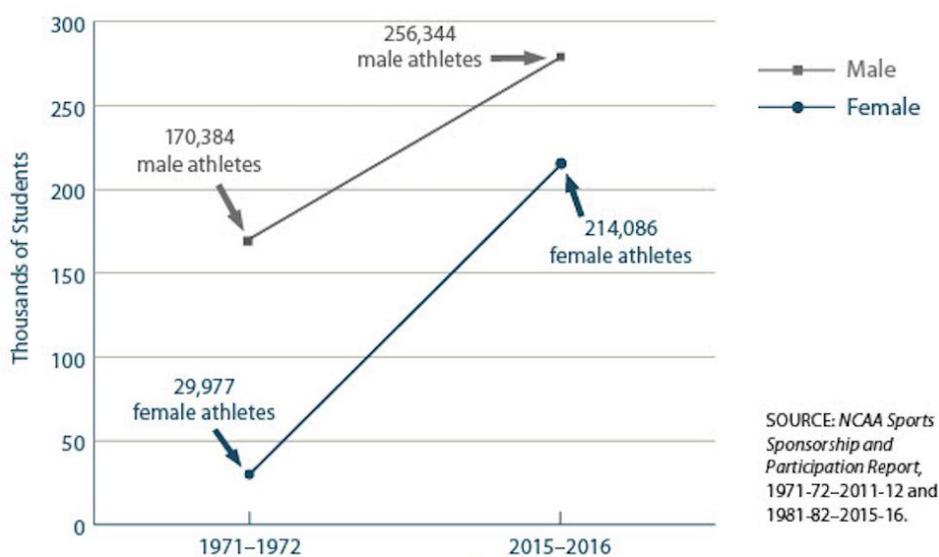
<sup>88</sup> U.S. Department of Education, "Equity in Athletics Disclosure Act."

<sup>89</sup> "Clarification of Intercollegiate Athletics Policy Guidance."

**Figure 1.4: Male and Female Participation in High School Sports, 1972-2016.**



**Figure 1.5: Male and Female Participation in College Sports, 1972-2016.**



Source: *Title IX at 45: Advancing Opportunity through Equity in Education*, National Coalition for Women and Girls in Education, 39.<sup>90</sup>

<sup>90</sup> “Title IX at 45: Advancing Opportunity through Equity in Education,” National Coalition for Women and Girls in Education, 2017, 39, <https://www.ncwge.org/TitleIX45/Title%20IX%20at%2045-Advancing%20Opportunity%20through%20Equity%20in%20Education.pdf>.

## Conclusion

As discussed in this first chapter, Title IX's application to athletics has evolved greatly since it was first enacted in 1972. While the law was intended to provide federal administrators with "primary enforcement authority," its enforcement has developed through the countless clarifications and interpretations over the past 48 years.<sup>91</sup> Additionally, the significant lawsuits discussed have dictated Title IX's place in athletics and narrowed the scope of the law and its requirements. In his book, *The Transformation of Title IX: Regulating Gender Equity in Education*, R. Shep Melnick examines the evolution of Title IX and discusses the process of "institutional leapfrogging" in which he defines as: "courts and agencies each taking a step beyond the other, expanding regulation without seeming to innovate." Due to this process, many scholars argue that a "disconnect" has been found between Title IX's intent in 1972 and how it is interpreted today.<sup>92</sup> Allison Kasic, a senior fellow at the Independent Women's Forum, argues that due to this unconventional process, Title IX as written in 1972 and its implementation today, "almost looks like two different laws."<sup>93</sup> This disparity has led to debate over whether the law is too outdated to continue to be enforced, as many scholars believe that Title IX "should be maturing beyond its one-dimensional and outdated beginnings."<sup>94</sup> The subsequent chapter of this thesis will examine the OCR's role in implementing and enforcing Title IX policy. To gain a deeper understanding of Title IX's evolution since 1972, the Three-Part Test will be analyzed according to its ability to effectively measure and promote gender equity in athletics.

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<sup>91</sup> Melnick, *The Transformation of Title IX*, 15.

<sup>92</sup> Chanan Tigay, "Women and Sports," *CQ Researcher* 21, no. 12 (March 2011): 270, <https://library.cqpress.com/cqresearcher/document.php?id=cqresrre2011032500>.

<sup>93</sup> Tigay, "Women and Sports," 270.

<sup>94</sup> George, "Forfeit," 4.

## **CHAPTER II: ENFORCEMENT AUTHORITY OF TITLE IX AND THE OCR**

### Introduction

Chapter 1 of this thesis outlined the history of Title IX legislation and judicial cases which dictated the path to gender equity in intercollegiate athletics. This chapter will analyze the OCR's interpretations and enforcement as a bureaucratic agency. Many questions have been raised over the enforcement power of Title IX due to the ambiguous nature of the statute itself and the interpretations which followed. This chapter will explore the legal status of OCR's interpretations and the consequences institutions face for not abiding by such requirements. While opinions differ on the weight of Title IX's guidance documents, the OCR's lack of enforcement since the enactment of Title IX is indisputable. To better understand the current lack of institutional compliance with Title IX, the Three-Prong Test will be examined according to each prong's ability to promote and measure gender equity in collegiate athletics. In analyzing each prong's requirements, emphasis will be placed upon where the Three-Prong Test falls short and could be improved for more robust compliance in the future. Additionally, analysis of the Three-Prong test will provide more insight on the OCR's ability to implement and enforce policy consistent with the core intent of Title IX.

### How Much Power Does the OCR Have?

According to Busch and Thro, the Constitution does not define the degree of authority a bureaucratic agency may have. Therefore, the language of Title IX dictates the OCR's authority to interpret and enforce Title IX. The OCR's power is provided through the language of Title IX and is: "the combination of legislative, executive, and judicial authority."<sup>95</sup> As granted by Congress, federal agencies which provide funding to educational institutions possess rulemaking authority. As long as these regulations are consistent with Title IX, the OCR is "authorized and directed" to issue them.<sup>96</sup> As detailed in Chapter 1, the OCR's authority has expanded greatly since 1972, effectively demonstrating the OCR's function "as a lawmaker, enforcer, and interpreter of Title IX law."<sup>97</sup> However, if the OCR interprets the law in a way that is not within its legislative authority, it is exceeding its authority as provided by Congress.

### What is the Legal Status of the OCR's Rules on Title IX?

The legal power of the OCR's rules on Title IX is a topic in wide dispute. While the OCR's Three-Part Test and the clarifications which followed have been upheld by federal appellate courts, many have highlighted their lack of enforcement power. One frequent criticism of OCR rules is that they lack the force of law and serve merely as guidance. Many arguments have been made over the OCR rules' lack of legitimacy because they are not grounded in a legislative act passed by Congress. According to Melnick, lawyers at the Department of Education and Department of Justice (DOJ) have been hesitant to provide a clear answer to this question, claiming that OCR documents are "merely expressions of the agencies' views as to what the law requires" and are not legally binding.<sup>98</sup> As a result, they assert that educational

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<sup>95</sup> Busch and Thro, *Title IX*, 105.

<sup>96</sup> Melnick, *The Transformation of Title IX*, 42.

<sup>97</sup> Busch and Thro, *Title IX*, 105.

<sup>98</sup> Melnick, *The Transformation of Title IX*, 43.

institutions do not face any new “legal requirements,” despite the OCR’s requirements for Title IX compliance.<sup>99</sup> On the other hand, Title IX advocates such as the National Women’s Law Center, have endorsed OCR guidances on Title IX as being, “simply clarifications of existing rights under Title IX.”<sup>100</sup> Overall, despite the widespread lack of clarity surrounding OCR policy, many institutions will not risk the consequences of an OCR investigation for being noncompliant, and the OCR continues to stress the importance of complying with these regulations as there are harsh consequences for discriminatory practices, which will be discussed later in this chapter.

### Analysis of the Three-Prong Test

As discussed in Chapter 1, HEW established the Three-Part Test for measuring compliance in athletics in the guidance “A Policy Interpretation: Title IX and Intercollegiate Athletics,” (“Guidance”) in 1979.<sup>101</sup> According to the Guidance, institutions are required to comply with only one of the three options and each prong sets forth a different mandate for schools to fulfill. While this test established a method for determining an institution’s compliance with Title IX guidelines, it has also created great debate as it has evolved in the past forty years. The First Prong, known as the substantial proportionality prong, is fulfilled when: “The number of male and female athletes is substantially proportionate to their respective enrollments.”<sup>102</sup> This option is often referenced as a “safe harbor” for institutions avoiding legal liability for being out of compliance with Title IX due to the “defined goal of substantial proportionality.”<sup>103</sup> This prong’s well-defined numerical standard for evaluating compliance with

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<sup>99</sup> Melnick, *The Transformation of Title IX*, 43.

<sup>100</sup> Melnick, *The Transformation of Title IX*, 44.

<sup>101</sup> U.S. Department of Education, Office for Civil Rights, “A Policy Interpretation: Title IX and Intercollegiate Athletics,” Policy Guidance, December 11, 1979, <https://www2.ed.gov/about/offices/list/ocr/docs/t9interp.html>.

<sup>102</sup> “A Policy Interpretation.”

<sup>103</sup> Jurewitz, “Playing at Even Strength,” 317.

Title IX has made it an extremely desirable method, which the courts have since adopted as “the legal standard for Title IX compliance.”<sup>104</sup>

One of the principal challenges this prong faces is the national rise in women’s college enrollment. As women are attending college at a higher rate, schools must match this number with a proportionate number of their athletes being women. However, it is argued that proportionality does not always reflect the actual interest levels of the men and women. As discussed in Chapter 1, “the relative interest standard” alleges that the biological differences between men and women which led intercollegiate athletic teams to be sex-segregated under Title IX in the first place also cause inherent differing interest levels between the sexes. This theory contends the sex differences in athletic interest cause women to be inherently less interested in athletic participation than their male counterparts. As a result, critics argue that prong one disproportionately creates opportunities for women that do not reflect their actual interest. For institutions facing budget constraints, this prong can be difficult to fulfill, leading many institutions to cut men’s teams in order to achieve proportionality. According to Buzuvis, these cuts to men’s athletic opportunities are “further decreasing the desirability of prong one.”<sup>105</sup> Conversely, also discussed in Chapter 1, it is held that women’s lower interest in athletics is merely a product of their “historical lack of opportunities to participate in sports.”<sup>106</sup> This belief is reflected in the “parity standard,” rather than the “relative interest standard.” Ninth Circuit judge Cynthia Holcomb Hall pushes back against arguments that women are inherently less interested in athletics. Citing the *Harvard Law Review* article, “Using Title IX to Fight Gender Role Oppression,” Hall explains that the position of the circuit courts “recognizes that

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<sup>104</sup> Jurewitz, “Playing at Even Strength,” 315.

<sup>105</sup> Buzuvis, “Survey Says,” 832.

<sup>106</sup> Melnick, “The Strange Evolution of Title IX.”

women's attitudes toward sports are socially constructed and have been limited by discrimination and gender stereotypes.”<sup>107</sup>

Another aspect of this prong which has led to confusion over its lack of clarity is the exact gap allowed between an institution's enrollment and participation rates to remain in compliance. The OCR's 1996 Clarification stated that this prong allows for “natural fluctuations in enrollment and participation rates” in the following year.<sup>108</sup> The OCR explained that if an institution is only a few percentage points away from compliance due to fluctuations in enrollment rates, they will still be in compliance with prong one. The following example is provided by the OCR:

For instance, if the institution's admissions the following year resulted in an enrollment rate of 51 percent males and 49 percent females, while the participation rates of males and females in the athletic program remained constant, the institution would continue to satisfy part one because it would be unreasonable to expect the institution to fine tune its program in response to this change in enrollment.<sup>109</sup>

According to a 1995 article, “anything other than trivial disparities will prevent a program from being substantially proportionate.”<sup>110</sup> However, the exact disparity between enrollment and participation rates has not been specified. For example, in *Roberts v. Colorado State Board of Agriculture*, Colorado State failed to obtain compliance through prong one as it had a 10.5 percent disparity between the female undergraduate population and female student-athlete population.<sup>111</sup> The district court suggested changes that Colorado State should have implemented to become compliant, discussing “an acceptable 1.7% gap between female athletic

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<sup>107</sup> Melnick, “The Strange Evolution of Title IX.”

<sup>108</sup> “Clarification of Intercollegiate Athletics Policy Guidance.”

<sup>109</sup> “Clarification of Intercollegiate Athletics Policy Guidance.”

<sup>110</sup> Robert C. Farrell, “Title IX or College Football,” *Houston Law Review* 32, no. 4 (1995): 1041, [https://heinonlineorg.ezproxy.trincoll.edu/HOL/Page?public=true&handle=hein.journals/hulr32&div=36&start\\_page=993&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults](https://heinonlineorg.ezproxy.trincoll.edu/HOL/Page?public=true&handle=hein.journals/hulr32&div=36&start_page=993&collection=journals&set_as_cursor=0&men_tab=srchresults).

<sup>111</sup> Farrell, “Title IX or College Football,” 1040.

participation and female undergraduate enrollment.”<sup>112</sup> While the exact percentage gap between the undergraduate enrollment and athletic participation of each sex remains unclear, many institutions do not risk the chance of being out of compliance.

The second prong is arguably the most difficult of the three parts to satisfy. This prong evaluates whether: “The institution has a history and continuing practice of expanding participation opportunities responsive to the developing interests and abilities of the underrepresented sex.”<sup>113</sup> There are many difficulties institutions face when attempting to fulfill this prong, including the considerable expenses that come with adding athletic opportunities. Budget constraints often limit a school’s ability to demonstrate this history and continued practice of expanding women’s athletic opportunities. As discussed in Chapter 1, this prong was substantially altered as a result of the *Cohen v. Brown* decision which asserted that eliminating men’s teams is a permissible means of achieving compliance with Title IX. While eliminating men’s teams may allow for room in an institution’s budget to add women’s teams, this practice directly conflicts with the core mission of Title IX: to establish equal opportunity among the two sexes. The OCR’s 1996 Clarification asserts that the OCR will not accept compliance with the second prong:

Where an institution increases the proportional participation opportunities for the underrepresented sex by reducing opportunities for the overrepresented sex alone or by reducing participation opportunities for the overrepresented sex to a proportionately greater degree than for the underrepresented sex.<sup>114</sup>

The OCR explains that the second prong takes into account a school’s “good faith remedial efforts through actual program expansion,” which does not include the elimination of male

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<sup>112</sup> Farrell, “Title IX or College Football,” 1041.

<sup>113</sup> “Intercollegiate Athletics Policy.”

<sup>114</sup> “Clarification of Intercollegiate Athletics Policy Guidance.”

opportunities.<sup>115</sup> Even when both the underrepresented and overrepresented sexes face program cuts, the OCR claims these efforts will not be considered remedial according to the Clarification because they “burden members of the sex already disadvantaged by the present program.”<sup>116</sup> However, the elimination of male opportunities has remained an unintended consequence of this prong and will be discussed more extensively in Chapter 4.

Another complication for complying with this prong is the vast growth of most institutions’ athletic programs since 1972. When Title IX was first enacted, this prong was more readily attainable as there were many women’s sports that schools did not offer. Now, the great majority of institutions have a history of program expansion for women’s athletic opportunities. As a result, it is increasingly difficult for institutions to continue adding athletic opportunities if they have already fully expanded their athletic offerings for women. In Jurewitz’s 2000 article, he maintained that the schools which promptly added women’s teams following 1972 are not protected by this prong as they are not continuing to expand women’s athletic opportunities.<sup>117</sup> Under the Court’s application of the Three-Part Test in *Cohen v. Brown*, Jurewitz argues that institutions are not in compliance with prong two if they are not currently increasing women’s athletic opportunities.<sup>118</sup> According to a 2001 article, seeking compliance with the second prong has become “difficult, if not impossible.”<sup>119</sup> The author, Erin Buzuvis, argues that it is impossible for an institution to demonstrate this continuing practice of expanding women’s participation opportunities “without eventually reaching a distribution of opportunities that complies with prong one.”<sup>120</sup> In other words, schools which have had a robust history of

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<sup>115</sup> “Clarification of Intercollegiate Athletics Policy Guidance.”

<sup>116</sup> “Clarification of Intercollegiate Athletics Policy Guidance.”

<sup>117</sup> Jurewitz, “Playing at Even Strength,” 316.

<sup>118</sup> Jurewitz, “Playing at Even Strength,” 316.

<sup>119</sup> Buzuvis, “Survey Says,” 832.

<sup>120</sup> Buzuvis, “Survey Says,” 825.

expansion will ultimately reach substantial proportionality. Neena Chaudhry, general counsel at the National Women's Law Center, recognizes the prong's flaws, stating: "Basically, no school can meet prong two. If you're not meeting prong one, then really it's about prong three, which is showing you're fully accommodating the interests and abilities of your female students."<sup>121</sup>

Therefore, it is frequently argued that this prong is a temporary fix for obtaining compliance that will not last in the long run. Overall, the second prong's lack of objectivity and clarity makes it a less appealing and difficult method for institutions seeking long-term compliance.

The third prong of the Three-Part Test assesses whether: "The institution is fully and effectively accommodating the interests and abilities of the underrepresented sex."<sup>122</sup> According to Buzuvis, this prong has become the "focal point" for schools seeking compliance, however the ambiguous language of the prong has long been a cause of contention. In the article "Title IX: Part Three Could Be the Key," author Peter Goplerud discusses the shortcomings of Title IX in reducing gender discrimination in athletics. Goplerud believes that prong three offers the most effective means for increasing women's athletic opportunities, stating: "Providing athletic opportunities to satisfy the unmet interests and abilities of women is the heart of Title IX and the key to compliance is the responsible, thorough use of Part Three of the Three-Part Test."<sup>123</sup>

However, the vagueness of this prong has led to various changes by the OCR in the methods institutions can use to measure the interests and abilities of the underrepresented sex. The OCR's modified interpretations of the prong can be seen during the course of various

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<sup>121</sup> Jenkins, Wesley. "Hundreds of Colleges May Be Out of Compliance With Title IX. Here's Why." *The Chronicle of Higher Education*, October 23, 2019, <https://www-chronicle-com.ezproxy.trincoll.edu/article/Hundreds-of-Colleges-May-Be/247396>.

<sup>122</sup> "Intercollegiate Athletics Policy: Three-Part Test -- Part Three Q's & A's."

<sup>123</sup> C. Peter III Goplerud, "Title IX: Part Three Could Be the Key," *Marquette Sports Law Review* 14, no. 1 (Fall 2003): 124, [https://heinonlineorg.ezproxy.trincoll.edu/HOL/Page?public=true&handle=hein.journals/mqslr14&div=12&start\\_page=123&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults](https://heinonlineorg.ezproxy.trincoll.edu/HOL/Page?public=true&handle=hein.journals/mqslr14&div=12&start_page=123&collection=journals&set_as_cursor=0&men_tab=srchresults).

presidential administrations. Victoria Jackson, a sports historian and clinical assistant professor of history at Arizona State University, has named this part of the test the “political prong,” as it is “subject to fluctuation based on the party in charge.”<sup>124</sup> Jackson explains that: “In an Obama White House, it’s hard to use the third prong,” however under the Trump administration, “it looks like you can use the third prong in ways that don’t get to the intent or heart of the law.”<sup>125</sup> Chapter 3 will further discuss the changes the OCR has made and the impact of different administration’s interpretations.

Another area of the third prong which has led to debate is the ambiguous standard a school can use to measure and accommodate the abilities of students. The ambiguity of this prong allows institutions to create their own methods for measuring “ability,” and decide independently which students meet such criteria. Leaving such decisions up to schools has proven harmful, as institutions can attain compliance while not fully accommodating student interest and ability. Cheryl Cooky, an associate professor at Purdue University, criticizes the use of surveys to measure student interest and ability.<sup>126</sup> Cooky states: “I imagine those who drafted the three prongs of compliance were not anticipating or envisioning institutions asking for specific performance requirements. Ability, in the spirit of the law, does not mean competing at the highest possible level.”<sup>127</sup>

One case which highlights the shortcomings of prong three takes place at the University of Kentucky. According to Wesley Jenkins’ article, “Hundreds of Colleges May Be Out of Compliance With Title IX. Here’s Why,” two students filed a federal lawsuit against the institution in September, alleging discriminating against female students. When members of the

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<sup>124</sup> Jenkins, “Hundreds of Colleges May Be Out of Compliance With Title IX.”

<sup>125</sup> Jenkins, “Hundreds of Colleges May Be Out of Compliance With Title IX.”

<sup>126</sup> Jenkins, “Hundreds of Colleges May Be Out of Compliance With Title IX.”

<sup>127</sup> Jenkins, “Hundreds of Colleges May Be Out of Compliance With Title IX.”

school's club field hockey team requested Kentucky officials to reinstate the team as a varsity sport, the students were told that a student survey by the institution the previous year demonstrated insufficient interest among students for field hockey to be raised to varsity status. As a result, the students filed a Title IX complaint, grounding their case on EADA data which shows that in addition to not accommodating student interest, Kentucky failed to meet the substantial proportionality prong in 2017. Proportionate to their respective enrollments, female students at Kentucky had 183 less participation opportunities in varsity athletics than male students. However, the university claims that they are in compliance with Title IX, as their current athletic opportunities fully accommodate the interests and abilities of their students as shown in student surveys.<sup>128</sup>

For lacrosse, the surveys conducted by the school demonstrated that 81 students had interest in establishing a varsity women's lacrosse team; nevertheless, Kentucky concluded that only one student had the "ability" to play. After asking students "if they believe they could play the sport at a Division I level," to "objectively demonstrate their ability," and other "objective criteria" including recruitment experiences, credentials, and skills, " Kentucky decided which respondents would be able to compete on the team.<sup>129</sup> Despite the abundance of student interest in playing women's lacrosse, Kentucky claims that according to this prong, they have met the "demonstrated interest" of their student body due to the lack of students meeting the ability required to play. Critics have pushed back against Kentucky's claims, arguing that their survey is a flawed, "self-selected sample." Cooky believes that "regardless of the methodology," surveys like the one used by Kentucky do not reflect the original intent of Title IX, to increase athletic

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<sup>128</sup> Jenkins, "Hundreds of Colleges May Be Out of Compliance With Title IX."

<sup>129</sup> Jenkins, "Hundreds of Colleges May Be Out of Compliance With Title IX."

opportunities for the underrepresented sex.<sup>130</sup> In 2010, the OCR established “multiple indicators” to evaluate “demonstrated interest,” rather than the single use of a survey. The OCR said that one of the factors considered would include “requests for the elevation of an existing club sport to intercollegiate status.”<sup>131</sup> Therefore, the outcome of this lawsuit will be very indicative of this prong’s ability to hold institutions accountable for discriminatory practices.

Additionally, as seen in the *Cohen v. Brown* decision, the OCR will not allow institutions to comply with the third prong if they eliminate women’s teams, as that is “de facto evidence of unmet interest.”<sup>132</sup> Therefore, since *Cohen v. Brown*, this prong was intended to safeguard the rights of women’s teams, guaranteeing that these teams cannot be cut at institutions seeking compliance with the second and third prongs.<sup>133</sup> In other words, if an institution recently cuts a varsity program, it cannot achieve compliance through the third prong as it is clear that there was existing interest in the sport which the institution eliminated.<sup>134</sup> Overall, when used effectively, this prong can be an “effective vehicle” for implementing the basic intent of Title IX.<sup>135</sup> However, according to Goplerud: “There must be a sincere willingness on the part of the schools to respond affirmatively with the launching of legitimate and well-supported new programs where the appropriate interest is present.”<sup>136</sup>

#### What Consequences do Institutions Face for Being Out of Compliance?

According to the federal statute, an institution’s fulfilment of Title IX’s requirements can result in the termination or suspension of federal funding or “by any other means authorized by

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<sup>130</sup> Jenkins, “Hundreds of Colleges May Be Out of Compliance With Title IX.”

<sup>131</sup> “Intercollegiate Athletics Policy.”

<sup>132</sup> Buzuvis, “Survey Says,” 834.

<sup>133</sup> Buzuvis, “Survey Says,” 834.

<sup>134</sup> George, “Forfeit,” 17.

<sup>135</sup> Goplerud, “Title IX: Part Three Could Be the Key,” 125.

<sup>136</sup> Goplerud, “Title IX: Part Three Could Be the Key,” 125.

law.”<sup>137</sup> According to Melnick, since 1972, the DOJ has scarcely used “other means” to enforce an institution’s noncompliance with Title IX, which entails enforcement through lawsuits initiated by the Department of Justice. Therefore, the termination of federal financial assistance has been the principal enforcement method utilized by the OCR. One of the main reasons behind this enforcement method is that the individuals behind Title IX believed that federal funds should not be given to institutions that engage in discriminatory behavior.<sup>138</sup> While this method appears to be a straightforward mechanism for discouraging discrimination at institutions receiving federal funds, in actuality it is very flawed.

One of the main reasons for the weak enforcement of Title IX by the OCR is the number of constraints Congress placed on agencies attempting to cut off an institution’s access to federal funds. According to Melnick, prior to initiating a termination hearing, voluntary negotiations must be conducted between the institution and federal administrators. The length of these negotiations varies on a case-by-case basis and may take up to a few years to resolve. Next, as established in Title IX, the following process must take place before an institution’s access to federal financial assistance can be terminated. First, the OCR must notify the recipient of federal funding that it is not in compliance with Title IX and that voluntary compliance cannot be reached. Next, the OCR must provide its evidence of discrimination to an independent administrative law judge along with the institution’s arguments.<sup>139</sup> After this time-consuming hearing, the judge will produce a decision accompanied by a written justification.<sup>140</sup> For the suspension or termination of funds to be upheld, the head of the OCR must approve the judge’s decision, and any person affected by the loss in federal funding may also seek judicial review.

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<sup>137</sup> Melnick, *The Transformation of Title IX*, 45.

<sup>138</sup> Melnick, *The Transformation of Title IX*, 45.

<sup>139</sup> Melnick, *The Transformation of Title IX*, 46.

<sup>140</sup> Melnick, *The Transformation of Title IX*, 46.

Another step in this process is the submission of a report by the head of the OCR to the House and Senate legislative committees which have jurisdiction over the programs involved.<sup>141</sup> This report must include “the circumstances and the grounds for such action” and the OCR must allow 30 days from the date of filing the report before terminating funds.<sup>142</sup> This 30-day period allows the committees time to formulate an appeal to the termination of funding. Lastly, Title IX mandates that the termination of funding “shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found.”<sup>143</sup>

Despite the existence of such extensive procedures for protecting equal athletic opportunities for both sexes, the federal government has *never* eliminated an institution’s access to federal funding. The OCR’s history of non-enforcement has presented an unavoidable challenge, as Title IX’s principal enforcement method has never been exercised. Due to the complex process of terminating an institution’s federal funding, the OCR has never done so. For institutions, the empty threat of losing access to federal funds has minimal impact. When examining the current state of institutional compliance with Title IX and OCR requirements, it is important to consider the impact of the OCR’s history of non-enforcement on schools’ compliance efforts.

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<sup>141</sup> Melnick, *The Transformation of Title IX*, 46.

<sup>142</sup> Melnick, *The Transformation of Title IX*, 46.

<sup>143</sup> Melnick, *The Transformation of Title IX*, 46.

## Conclusion

This chapter examined the role of the OCR in implementing and enforcing Title IX policy. To better understand the evolution of Title IX interpretations, the legal status of OCR's policies and enforcement mechanisms were evaluated. Analysis of the Three-Part Test revealed the inconsistencies of each prong's ability to effectively measure and promote gender equity. Consequently, the development of the Three-Part Test under the OCR was found to be inconsistent with the core intent of Title IX. The OCR's failed enforcement of Title IX was also discussed, as demonstrated by their failure to ever terminate an institutions' federal funding as a consequence of not complying with Title IX requirements. The findings of this chapter provide valuable insight on how the OCR can update Title IX policy and enforcement to more effectively eliminate sex discrimination in collegiate athletics. The next chapter will provide further clarity by assessing the effect of political ideology on the OCR's interpretations of Title IX.

## **CHAPTER III: THE POLITICS BEHIND TITLE IX**

### Introduction

Although Title IX was enacted to set forth a clear precedent, establishing equal educational opportunity between the sexes, political views can have a large impact on the OCR's policy. As seen through the various presidential administrations, a president's political ideology and views on Title IX can greatly affect the OCR's interpretations on Title IX. Since the Department of Education was not established until 1980 and there was minimal Title IX enforcement until after this time, this chapter is limited to the six different presidential administrations since 1981. Overall, this chapter will analyze the political effects on Title IX by examining each presidential administration's attempts to align the OCR's interpretation with their views and policy motives. Each presidential administration has approached the controversial legislation in a different way, with liberal administrations strengthening protections and conservative administrations loosening restrictions and regulations. From the extremely conservative Ronald Reagan to highly liberal Barack Obama, a president's ideology can lead to vast differences in the OCR's interpretation of Title IX.

### Reagan Administration: 1981-1989

Rooted in the belief of a limited federal government, President Ronald Reagan's campaign was centered around reducing federal regulation.<sup>144</sup> When compared to his predecessor, President Jimmy Carter, President Reagan was described as being "uniformly hostile."<sup>145</sup> President Reagan criticized many federal policies, including Title IX, and promised to reduce widespread federal regulations.<sup>146</sup> Within the first year of his presidency, Reagan's administration announced an investigation into women's sports and other areas of athletics, conducted by the Presidential Task Force on Regulatory Relief. Vice President Bush announced this review and stated it was taking place to determine if these regulations are among the "burdensome, unnecessary or counterproductive Federal Regulations" that President Reagan promised in his campaign he would abolish.<sup>147</sup> The Reagan administration attempted to eliminate many federal agencies including the Department of Education.<sup>148</sup> While they failed in doing so, they significantly cut the Department of Education's budget which had a dramatic impact on their caseload.<sup>149</sup>

Due to their diminished budget, the OCR dropped hundreds of complaints surrounding discrimination in athletics.<sup>150</sup> The Reagan administration rewrote administrative rules according to their limited interpretation of Title IX so that only specific programs which received federal funds were protected by antidiscrimination laws. The Reagan administration's limited interpretation of Title IX differed greatly from the previous Nixon, Ford, and Carter

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<sup>144</sup> Melnick, *The Transformation of Title IX*, 101.

<sup>145</sup> Melnick, *The Transformation of Title IX*, 101.

<sup>146</sup> Busch and Thro, *Title IX*, 32.

<sup>147</sup> Gordon S. White Jr., *REVIEW OF TITLE IX IS NO SURPRISE*, August 15, 1981, <https://www.nytimes.com/1981/08/15/sports/review-of-title-ix-is-no-surprise.html>.

<sup>148</sup> Hogshead-Makar and Zimablist, *Equal Play*, 99.

<sup>149</sup> Hogshead-Makar and Zimablist, *Equal Play*, 99.

<sup>150</sup> Hogshead-Makar and Zimablist, *Equal Play*, 100.

administrations, which had interpreted Title IX to apply to all institutions receiving federal funding.<sup>151</sup> This shift in interpretation had a direct impact on the lives of many female athletes, as seen through the case *University of Richmond v. Bell*, which illustrates the Reagan administration's stance on Title IX in intercollegiate athletics. In this case, female athletes at the University of Richmond sued after they failed to receive funding for their athletic programs. Since the university was the recipient of a federally funded Library Resource Grant, the OCR initially contended that the University of Richmond was under Title IX's jurisdiction, however the appellate court disagreed.<sup>152</sup> The court held that the institution did not need to send over athletic records to the OCR because its intercollegiate athletics program was not federally funded. The new administration's limited interpretation is revealed by its choice to not appeal the decision, therefore siding with the University of Richmond.<sup>153</sup> This case later made it to the U.S. Supreme Court, and in a six-to-three decision, the Court upheld the Reagan administration's interpretation that Title IX prohibited discrimination on the basis of sex only in specific programs directly receiving federal funding.<sup>154</sup> This case had a widespread direct impact on the lives of college athletes, as the Department of Education dropped nearly all of its complaints in addition to the courts.<sup>155</sup>

Within the year, Congress did introduce what became the Civil Rights Restoration Act, overturning the *Grove City* decision, and reversing Reagan's "limited interpretation" of Title IX. Despite President Reagan's veto of the law, which he described as a "dangerous bill," and "a power grab by Washington," the Civil Rights Restoration Act became law in 1988 after

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<sup>151</sup> Hogshead-Makar and Zimablist, *Equal Play*, 100.

<sup>152</sup> Hogshead-Makar and Zimablist, *Equal Play*, 100.

<sup>153</sup> Hogshead-Makar and Zimablist, *Equal Play*, 100.

<sup>154</sup> Hogshead-Makar and Zimablist, *Equal Play*, 101.

<sup>155</sup> Hogshead-Makar and Zimablist, *Equal Play*, 101.

Congress overrode the veto by a vote of two-thirds.<sup>156</sup> However, as a result of the Reagan administration's political ideology: "The rapid growth of women's sports across the country came to an end."<sup>157</sup> With the OCR's diminished budget, hundreds of cases were dropped and institutions practicing discriminatory measures were not penalized. As a bureaucratic agency, the OCR's lack of financial resources limited its ability to enforce Title IX compliance.

#### H. W. Bush Administration: 1989-1993

From the beginning of his presidency, George H. W. Bush was motivated to prove to his country that he was different than his predecessor, Ronald Reagan, and would establish a "kinder, gentler nation."<sup>158</sup> The OCR announced in 1991 under President Bush that they would place enforcement of Title IX at the top of their agenda.<sup>159</sup> According to Melnick, the OCR followed up on their statement by modifying their compliance manual, increasing compliance reviews, and advising college presidents not to eliminate women's athletic opportunities when facing budget constraints. Under the Bush administration, the OCR found the University of Maryland and Brooklyn College's athletic programs out of compliance with Title IX. Both institutions responded and eliminated the presence of sex discrimination in their programs. The OCR's enforcement throughout the Bush administration was described by a women's sports advocate as: "not bad, especially considering that they haven't done a damn thing for the last 10 years."<sup>160</sup> Overall, the Bush administration enforced Title IX more thoroughly than the previous Reagan administration,

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<sup>156</sup> Hogshead-Makar and Zimablist, *Equal Play*, 102.

<sup>157</sup> Hogshead-Makar and Zimablist, *Equal Play*, 101.

<sup>158</sup> Melnick, *The Transformation of Title IX*, 103.

<sup>159</sup> Melnick, *The Transformation of Title IX*, 103.

<sup>160</sup> Melnick, *The Transformation of Title IX*, 103.

bringing the OCR out of its “enforcement black hole.”<sup>161</sup> However, at this time Title IX policy still fell short in establishing an equal playing field for athletes of both sexes, as promised in 1972.

#### Clinton Administration: 1993-2001

From the beginning of his tenure, President Clinton promised to “more vigorously” enforce Title IX than the previous presidential administrations.<sup>162</sup> According to Busch and Thro, Clinton’s Assistant Secretary for Civil Rights, Norma Cantú, identified the shortcomings of Title IX and decided that change was necessary to provide equality in expenditures, participation rates, scholarships, facilities, and interest level. In order to achieve her policy goals, Cantú used the “unenforced” 1979 policy recommendations, and reinterpreted the Three-Part Test in the new 1996 Clarification. In the guidance, Cantú provided “an active enforcement regime,” and started to aggressively enforce it.<sup>163</sup> Throughout Clinton’s presidency, Secretary Cantú was committed to increasing the participation of women in athletics, through the enforcement of the Three-Part Test established in the 1996 Clarification. As a result of Cantú’s dedication to gender equity, she was inducted into the Women’s Institute on Sports and Education Hall of Fame.

In celebration of the 25<sup>th</sup> anniversary of Title IX, President Clinton announced his administration’s intent to expand and more thoroughly enforce the law.<sup>164</sup> President Clinton stated: “Every school and every education program that receives federal assistance in the entire country must understand that complying with Title IX is not optional. It is the law. And the law must be enforced.”<sup>165</sup> Overall, the OCR proved that they interpreted equity in athletics to mean

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<sup>161</sup> Melnick, *The Transformation of Title IX*, 103.

<sup>162</sup> Melnick, *The Transformation of Title IX*, 105.

<sup>163</sup> Busch and Thro, *Title IX*, 34.

<sup>164</sup> Jeanne Meserve, “Clinton: Expand, Enforce Title IX.” *AllPolitics*, June 17, 1997, <https://www.cnn.com/ALLPOLITICS/1997/06/17/women.title9/>.

<sup>165</sup> Meserve, “Clinton,” 1997.

“eventual numerical parity” in nearly all aspects of athletics.<sup>166</sup> The Clinton administration proved to be “far more aggressive” than the Bush administration in Title IX enforcement. However, the lack of athletics compliance reviews conducted by the OCR during this time is a clear shortcoming of the Clinton administration.<sup>167</sup> Despite the administration’s intentions to hold institutions more accountable than their predecessors had for Title IX compliance, they eventually discovered the difficulties of doing so. The Clinton administration’s deficiencies can be seen through both Secretary Cantú’s failed promise that the OCR would provide “clear, bright” guidelines for institutions and also the lack of action provided for the OCR when dealing with institutions that “dig in their heels,” during compliance reviews.

#### W. Bush Administration: 2001-2009

In 2002, the George W. Bush administration’s Secretary of Education Rod Paige established a Commission on Opportunity in Athletics, an eight-month long process to reassess the effectiveness of Title IX and to provide recommendations on how to modify enforcement of the law.<sup>168</sup> The Commission was assembled with conservative members and included “prejudicial” procedures, leading to public concern over the lack of validity and unbiased results. The Commission’s findings were presented in its final report, “Open to All: Title IX at Thirty,” to Secretary Paige on February 26, 2003. These findings recommended that the OCR weaken the enforcement of Title IX.<sup>169</sup> The report included twenty-three recommendations, including two which proposed the OCR’s use of a “stand-alone survey” to determine student interest and ability.<sup>170</sup> As a result of the correlation between the Commission’s findings and the Bush

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<sup>166</sup> Busch and Thro, *Title IX*, 35.

<sup>167</sup> Hogshead-Makar and Zimablist, *Equal Play*, 137.

<sup>168</sup> Hogshead-Makar and Zimablist, *Equal Play*, 284.

<sup>169</sup> Hogshead-Makar and Zimablist, *Equal Play*, 284.

<sup>170</sup> Hogshead-Makar and Zimablist, *Equal Play*, 284.

administration's conservative ideology, there was "a massive political outcry," leading to the administration's withdrawal of the report.<sup>171</sup> Education Secretary Paige proceeded to announce that the Department of Education would not modify its interpretation of Title IX. Later in the year, President Bush's Assistant Secretary for Civil Rights, Gerald Reynolds, released the "Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance" ("Clarification"). The Clarification reinforced the "validity and effectiveness" of Title IX's policies, and stated that the OCR understood the challenges institutions face in seeking Title IX compliance and supports the "flexibility to provide greater athletic opportunities for students of both sexes" that the Three-Part Test has provided for institutions.<sup>172</sup>

Following President Bush's reelection in 2004, the OCR issued the Dear Colleague Letter (DCL): "Additional Clarification of Intercollegiate Athletics Policy: Three-Part Test, Part Three," ("Additional Clarification") in 2005.<sup>173</sup> Less worried about the impact of their policies on public opinion, the Bush administration released this Additional Clarification without notice or public comment, less than two months after President Bush was inaugurated for his second term.<sup>174</sup> This guidance loosened Title IX requirements, placing the burden of proof on the OCR or the student providing the complaint. According to the DCL, "There must be actual evidence of unmet interests and abilities among the underrepresented sex."<sup>175</sup> The Bush administration also declared that the petitioner must prove by a preponderance of the evidence that the institution

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<sup>171</sup> Hogshead-Makar and Zimablist, *Equal Play*, 284.

<sup>172</sup> U.S. Department of Education, Office for Civil Rights, "Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance," Policy Guidance, July 11, 2003, <https://www2.ed.gov/about/offices/list/ocr/title9guidanceFinal.pdf>.

<sup>173</sup> U.S. Department of Education, Office for Civil Rights, "Additional Clarification of Intercollegiate Athletics Policy: Three-Part Test — Part Three," Policy Guidance, March 17, 2005, <https://files.eric.ed.gov/fulltext/ED491069.pdf>.

<sup>174</sup> Hogshead-Makar and Zimablist, *Equal Play*, 284.

<sup>175</sup> "Additional Clarification of Intercollegiate Athletics Policy," 4.

does not fulfill the third prong of the test. This DCL effectively made it easier for institutions to demonstrate their compliance with Title IX by raising the standard of proof one must meet to prove an institution's noncompliance. In order to prove noncompliance, the Additional Clarification requires "direct and very persuasive evidence of unmet interest sufficient to sustain a varsity team, such as the recent elimination of a viable team for the underrepresented sex or a recent, broad-based petition from an existing club team for elevation to varsity status."<sup>176</sup>

Furthermore, the Additional Clarification helped "reinforce the flexibility" of the Three-Prong Test by supporting the use of student surveys as an effective means of satisfying Part Three of the test. The Additional Clarification declared that effective immediately, the OCR would permit the use of an e-mail survey sent to students as the "*sole* determinant of their interest level in sports." Along with many other issues, the response rate of the e-mail survey was found to vary from 1 percent to 78 percent, according to a March 2006 report provided by the OCR to the Senate.<sup>177</sup> The report reviewed fifty-four schools, clearly identifying the vast differences in response rates at each school. At two-thirds of the institutions, less than 40 percent of students even responded. With such low response rates seen at institutions, a clear problem is identified with the Additional Clarification. Especially due to the fact that the DCL interprets nonresponses to the survey as a lack of interest, the Additional Clarification effectively made it easier for schools to comply with Title IX, and more difficult for students seeking athletic opportunities.<sup>178</sup>

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<sup>176</sup> "Additional Clarification of Intercollegiate Athletics Policy," 7.

<sup>177</sup> Hogshead-Makar and Zimablist, *Equal Play*, 284.

<sup>178</sup> Hogshead-Makar and Zimablist, *Equal Play*, 284.

The DCL was also issued with a User's Guide prepared by the National Center for Education Statistics and a "detailed technical report" prepared by the National Institute of Statistical Sciences. Analysis was conducted on 132 of OCR's cases from 1992-2002 in order to determine the most effective method for assessing student interest in athletics.<sup>179</sup> According to the Additional Clarification, two-thirds of the institutions involved in the 132 OCR investigations sought compliance with the Three-Prong Test through the third part. As expressed in the letter, the OCR believed that there is uncertainty surrounding the requirements considered for the third prong, leading some institutions to "mistakenly believe that part three offers less than a completely safe harbor."<sup>180</sup> As a result, the OCR stated that this letter along with the User's Guide should assist institutions in making their decision to determine which prong will best ensure compliance.

The Bush administration's policy, established in the Additional Clarification, was a significant switch from the previous administration. Critics of Bush's policy regarding e-mail surveys refer to it as "a damaging loophole to Title IX of the Education Amendments of 1972."<sup>181</sup> The implementation of student surveys as a permissible means of satisfying the third prong, along with the new preponderance of the evidence standard, demonstrates the Bush administration's lack of commitment to prohibiting sex discrimination at institutions. Despite the Bush administration's arguments in support of the use of surveys, the NCAA actively discouraged the use of student surveys, releasing a resolution asking the Department of

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<sup>179</sup> "Additional Clarification of Intercollegiate Athletics Policy," 3.

<sup>180</sup> "Additional Clarification of Intercollegiate Athletics Policy," v.

<sup>181</sup> Sander, Libby. "Education Department Nixes Bush-Era Policy on Title IX Compliance." *The Chronicle of Higher Education*, 20 Apr. 2010, <https://www.chronicle.com/article/Education-Department-Nixes/65170>.

Education to retract the Additional Clarification.<sup>182</sup> Along with other critics, the NCAA argued that they do not accurately assess the interests and abilities of all members of the student body. In 2006, Congress passed a bill which prohibited the single use of e-mail surveys to fulfill the third prong, specifying that such surveys can only be used in addition to other measures.<sup>183</sup> Due to the inconsistencies of such methods, the sole use of surveys has proven ineffective and inconsistent with the intent of Title IX.

#### Obama Administration: 2009-2016

Throughout Obama's presidency, his policies sought to strengthen Title IX protections, making it increasingly difficult for schools to continue to be out of compliance with such regulations. Differing greatly from the previous Bush administration, President Obama was committed to upholding equal educational opportunities and increasing participation for all students. In 2010, the OCR withdrew the George Bush administration's previous 2005 "Additional Clarification" through the publication of a "Dear Colleague Letter" (DCL). In the DCL, the administration stated that it no longer supported the previous administration's use of student surveys to fulfill the third prong. The Q&A released by the OCR stated that the letter specifically rescinded the "prototype survey instrument" that was implemented in the User's Guide that came with the 2005 Additional Clarification."<sup>184</sup> The Obama administration continued to explain that they did so as, "it was inconsistent with the nondiscriminatory assessment

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<sup>182</sup> Sue Ann Mota, "Title IX, the NCAA, and Intercollegiate Athletics," *Journal of College and University Law* 33, no. 1 (2006): 132, [https://heinonlineorg.ezproxy.trincoll.edu/HOL/Page?public=true&handle=hein.journals/jcolunly33&div=9&start\\_page=121&collection=journals&set\\_as\\_cursor=7&men\\_tab=srchresults#](https://heinonlineorg.ezproxy.trincoll.edu/HOL/Page?public=true&handle=hein.journals/jcolunly33&div=9&start_page=121&collection=journals&set_as_cursor=7&men_tab=srchresults#).

<sup>183</sup> Hogshead-Makar and Zimablist, *Equal Play*, 285.

<sup>184</sup> U.S. Department of Education, Office for Civil Rights, "Dear Colleague Letter," Policy Guidance, April 20, 2010, 2, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-20100420.pdf>.

methods set forth in the 1979 Policy Interpretation and the 1996 Clarification.”<sup>185</sup> This policy change therefore made it more difficult for institutions to comply with the Three-Part Test by requiring the use of “a broad range of indicators” to demonstrate the fulfillment of prong three.<sup>186</sup> By including more criteria for schools to assess when measuring student interest and ability, the Obama administration raised the standard of proof for proving an institution’s lack of compliance with the third prong, previously lowered by the Bush administration. Institutions now faced a more detailed procedure for demonstrating their full accommodation of student interest and ability. The letter set forth the following list of assessments to be used in demonstrating compliance with the third part of the test:

- Interviews with students, admitted students, coaches, administrators, and others regarding interest in a particular sport;
- Participation rates in sports in high schools, amateur athletic associations, and community sports leagues that operate in areas from which the institution draws its students;
- Tryouts or other direct observations of participation in the particular sport in which there is interest;
- complaints from the underrepresented sex with regard to a lack of athletic opportunities or request for the addition of new teams; and
- routine monitoring of participation of the underrepresented sex in club and intramural sports.<sup>187</sup>

Further, these assessments must take into consideration the: “nationally increasing level of women’s interests and abilities.”<sup>188</sup> The Obama administration’s focus on the evolving athletic interests of the underrepresented sex is a critical element of the policy. R. Shep Melnick, author of *The Transformation of Title IX*, contends that:

If the Bush survey policy was designed to assess *current* interest among a school’s undergraduates, the Obama “multiple indicators” policy was designed to *promote and*

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<sup>185</sup> “Dear Colleague Letter,” 2.

<sup>186</sup> Melnick, *The Transformation of Title IX*, 124.

<sup>187</sup> Melnick, *The Transformation of Title IX*, 124.

<sup>188</sup> Melnick, *The Transformation of Title IX*, 124.

*develop* interest both among current students and in the students the school can recruit, admit, and train in coming years.<sup>189</sup>

By emphasizing the relationship between opportunity and interest, the Obama administration supported the theory that if there are available athletic opportunities for women, the interest and ability will come. Another crucial element of the Obama administration's policy was the burden of proof schools which have recently eliminated women's teams must face. The DCL cautions schools which cut viable teams for the underrepresented sex, and states that if such a team has been eliminated, "OCR will find that there is sufficient interest, ability, and available competition to sustain an intercollegiate team in that sport and thus there would be a presumption that the institution is not in compliance with Part Three."<sup>190</sup> The letter does allow a school to comply with the third prong, if it "can provide strong evidence that interest, ability, or competition no longer exists."<sup>191</sup> However, the letter asserts that the OCR prioritizes the active participation of students on a "viable intercollegiate team" over survey results.<sup>192</sup> The OCR clarifies that it "does not consider the failure by students to express interest during a survey under Part Three as evidence sufficient to justify the elimination of a current and viable intercollegiate team for the underrepresented sex."<sup>193</sup> Overall, the Obama administration thoroughly raises the bar for schools seeking compliance with Title IX, meanwhile attempting to promote and expand women's interest and opportunities in collegiate athletics.

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<sup>189</sup> Melnick, *The Transformation of Title IX*, 125.

<sup>190</sup> "Dear Colleague Letter," 5.

<sup>191</sup> "Dear Colleague Letter," 5.

<sup>192</sup> "Dear Colleague Letter," 5.

<sup>193</sup> "Dear Colleague Letter," 5.

## Trump Administration: 2016-Present

While President Trump has not taken any formal action to alter the current Title IX athletics landscape, his administration has “seized on Title IX as an area in which to reverse the Obama administration’s positions.”<sup>194</sup> Due to President Trump’s opposition to his predecessor’s policies, it can be presumed that he will act on his criticism of the Obama administration’s policies and alter Title IX policy during his tenure. Under Betsy DeVos, the current Secretary of Education, the Department of Education has rescinded over twenty of the Obama administration’s anti-discrimination policies.<sup>195</sup> Secretary DeVos announced in 2017 that “the era of ‘rule by letter’ is over,” and replaced the Obama administration’s sexual harassment guidance.<sup>196</sup> From guidelines supporting schools’ use of affirmative action policies to protecting transgender students, the Trump administration has been quick to withdraw Obama administration policies.<sup>197</sup> Regarding sexual assault policy, DeVos’s proposals instruct schools to place the rights of the accused at the same standard as the rights of the complainant.”<sup>198</sup> Using the Trump administration’s proposed policies regarding sexual harassment as guidance, it is predicted that they will attempt to alter Title IX athletics policy to align more with their policy agenda and political ideology.

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<sup>194</sup> Jeannie Suk Gersen, “Assessing Betsy DeVos’s Proposed Rules on Title IX and Sexual Assault.” *The New Yorker*, February 1, 2019, <https://www.newyorker.com/news/our-columnists/assessing-betsy-devos-proposed-rules-on-title-ix-and-sexual-assault>.

<sup>195</sup> Gersen, “Assessing Betsy DeVos’s Proposed Rules on Title IX and Sexual Assault.”

<sup>196</sup> Andrew Kreighbaum, “DeVos to Replace Obama-Era Sexual Assault Guidelines,” *Inside Higher Ed*, September 8, 2017, <https://www.insidehighered.com/news/2017/09/08/devos-says-federal-title-ix-guidelines-have-‘failed’-will-see-public-input-new>.

<sup>197</sup> Gersen, “Assessing Betsy DeVos’s Proposed Rules on Title IX and Sexual Assault.”

<sup>198</sup> Gersen, “Assessing Betsy DeVos’s Proposed Rules on Title IX and Sexual Assault.”

## Conclusion

This chapter examined the effect of political ideology and policy motives on a president's Title IX interpretation and enforcement through the OCR. Throughout the six presidential administrations since 1981, their political preferences can be seen in their Title IX interpretation and enforcement, or lack thereof. Through analysis of these administrations, the four conservative presidents have shown a tendency to ease restrictions on Title IX in athletics. On the other hand, the actions taken by the two liberal presidents display their commitment to strengthening Title IX protections. While President Trump has not taken any formal action regarding his stance on gender equity in athletics, it can be presumed where his position will fall. The subsequent chapter will examine the current state of institutional compliance and discuss various proposed policies for modifying Title IX.

## **CHAPTER IV: CURRENT STATE OF COMPLIANCE & TITLE IX'S UNINTENDED CONSEQUENCES**

To gain a deeper understanding of the progress Title IX has made since 1972 in improving gender equity in athletics, this chapter will examine the current state of institutional compliance with Title IX. The rate of institutions' compliance with scholarship standards, as well as with the Three-Prong Test, will be assessed. As the only fully objective method of compliance, the substantial proportionality prong will be applied to evaluate fulfillment of the Three-Part Test. By analyzing the effectiveness of Title IX policy and the OCR's enforcement, more light will be shed on the factors which make compliance difficult for institutions and create unintended consequences as a result. Title IX has long faced criticism over its requirements, which have become increasingly unobtainable due to many factors. Various changes have been proposed to eliminate such unintended effects and make compliance more attainable for institutions. These proposals will be examined, with a focus on the policies' effectiveness and their alignment with the basic intent of Title IX.

### Current State of Compliance

This thesis assessed the current state of institutional compliance with Title IX policy by examining institutions' fulfillment of Title IX scholarship requirements as well as the Three-Part Test. The current Title IX scholarship requirements are in place to ensure that there are equitable athletic opportunities for male and female athletes. Many athletes are only able to attend institutions which provide athletic scholarships due to costly tuitions. Consequently, if female athletes are receiving a disproportionately low number of athletic scholarships compared to their male counterparts, a violation of Title IX policy, then they will continue to be underrepresented in intercollegiate athletics, a violation of the Three-Part Test. Overall, it is essential that institutions abide by Title IX scholarship regulations, so all athletes receive equitable access to athletic opportunities.

As discussed in previous chapters, to ensure nondiscriminatory access to athletic scholarships, Title IX requires scholarship dollars to be granted substantially proportionate to the number of each sex participating in intercollegiate athletics.<sup>199</sup> For the institutions that award athletic scholarships, the total amount of scholarship assistance provided to male and female athletes must be substantially proportionate to their overall participation rates at their school. Title IX scholarship requirements differ from the substantial proportionality prong of the Three-Part Test, which compares proportionality to the *entire* student body of an institution.<sup>200</sup> The OCR has final say over whether an institution is in compliance with scholarship rules, and its requirements are separate from the control of the NCAA or other athletic associations which also place various restrictions on the number and value of scholarships.<sup>201</sup>

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<sup>199</sup> Mota, "Title IX," 133.

<sup>200</sup> Mota, "Title IX," 133.

<sup>201</sup> Mota, "Title IX," 133.

In the article, “Failing to Fund Fairly: Title IX Athletics Scholarships Compliance,” UNC Professor Barbara Osborne, J.D., provides crucial findings on the current state of institutional compliance with Title IX’s scholarship requirements.<sup>202</sup> Osborne analyzed institutions’ fulfillment of scholarship regulations, gathering data on 664 NCAA institutions, 348 in Division I and 316 in Division II. Focusing on compliance, Osborne compared the institutions’ proportion of male and female scholarship dollars to their male and female student-athlete populations. After analysis, Osborne found out that out of the 644 institutions studied, only 15% of the institutions offering scholarships were in compliance with Title IX standards. Additionally, 22% of institutions were not in compliance with Title IX by disproportionately funding male athletes.<sup>203</sup> While women’s athletics have experienced many advances and achievements since 1972, the lack of gender equity in athletic scholarships reflected in Osborne’s findings demonstrates an unfortunate shortcoming of Title IX. Gender equity in athletic scholarships is essential to promoting the equal access to athletic opportunities for all athletes. The need for more robust OCR enforcement is clear and imperative to improving the state of gender equity in athletics.

It is difficult to estimate institutions’ current compliance with the second and third prongs due to their lack of objectivity. As a result, the first prong is often used as the sole test for estimating institutions’ compliance with Title IX. Currently, of all the 1,085 NCAA sanctioned institutions, 815 are believed to be out of compliance, according to Jenkins, author of the article, “Hundreds of Colleges May Be Out of Compliance With Title IX. Here’s Why.”<sup>204</sup> To further

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<sup>202</sup> Barbara Osborne, “Failing to Fund Fairly: Title IX Athletics Scholarships Compliance,” *Tennessee Journal of Race, Gender, & Social Justice* 6, no. 1 (Spring 2017): 91, [https://heinonlineorg.ezproxy.trincoll.edu/HOL/Page?public=true&handle=hein.journals/rgsj6&div=9&start\\_page=83&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults](https://heinonlineorg.ezproxy.trincoll.edu/HOL/Page?public=true&handle=hein.journals/rgsj6&div=9&start_page=83&collection=journals&set_as_cursor=0&men_tab=srchresults).

<sup>203</sup> Osborne, “Failing to Fund Fairly,” 91.

<sup>204</sup> Jenkins, “Hundreds of Colleges May Be Out of Compliance With Title IX.”

understand the current state of institutional compliance with Title IX requirements, this thesis evaluated athletics data from 499 NCAA institutions in 2018. The data, provided by the institutions as required by the EADA, was limited to Division I and III institutions only. This analysis focused only on institutions which have football programs to examine their impact on the gap in enrollment and participation rates. Since the permitted “natural fluctuations” in the proportionality gap have not been defined by the OCR, this analysis assessed institutions’ compliance at five different standards: 2%, 5%, 10%, 15%, and 20%. It is acknowledged that many of these institutions may have opted for compliance with the second or third prongs, instead of the first, and may still be compliant with Title IX. However, as the first prong has been called a “safe harbor” for being compliant and is arguably the only non-temporary fix for establishing non-discriminatory practices, the findings will provide useful insight into the current state of compliance.

**Figure 1.6: Institutional Compliance with the Substantial Proportionality Prong, 2018.**

Proportionality Gap	Number of Institutions in Compliance with Standard	Percent of Institutions in Compliance with Standard
2%	90	18%
5%	142	28%
10%	223	45%
15%	328	66%
20%	428	86%

*Source:* Equity in Athletics Disclosure Act, 2018.<sup>205</sup>

As displayed in the chart above, the majority of the 499 institutions examined are not within a 10% gap of being compliant with the first prong. These findings are very underwhelming, demonstrating the widespread lack of institutional compliance, from NCAA Division I to Division III institutions across the country. Nearly 50 years after the enactment of Title IX, women continue to be underrepresented in intercollegiate athletics, a clear shortcoming of the legislation. While there have been vast improvements since 1972, the current state of institutional compliance with Title IX’s scholarship requirements and Three-Part Test still has a long way to go.

It is also important to take into consideration the impact that football programs may have on the compliance rates displayed above. Due to the large roster sizes and costly expenditures, football programs often present a challenge for institutions seeking Title IX compliance. While

<sup>205</sup> Equity in Athletics Disclosure Act Survey, “Generate Trend Data.”

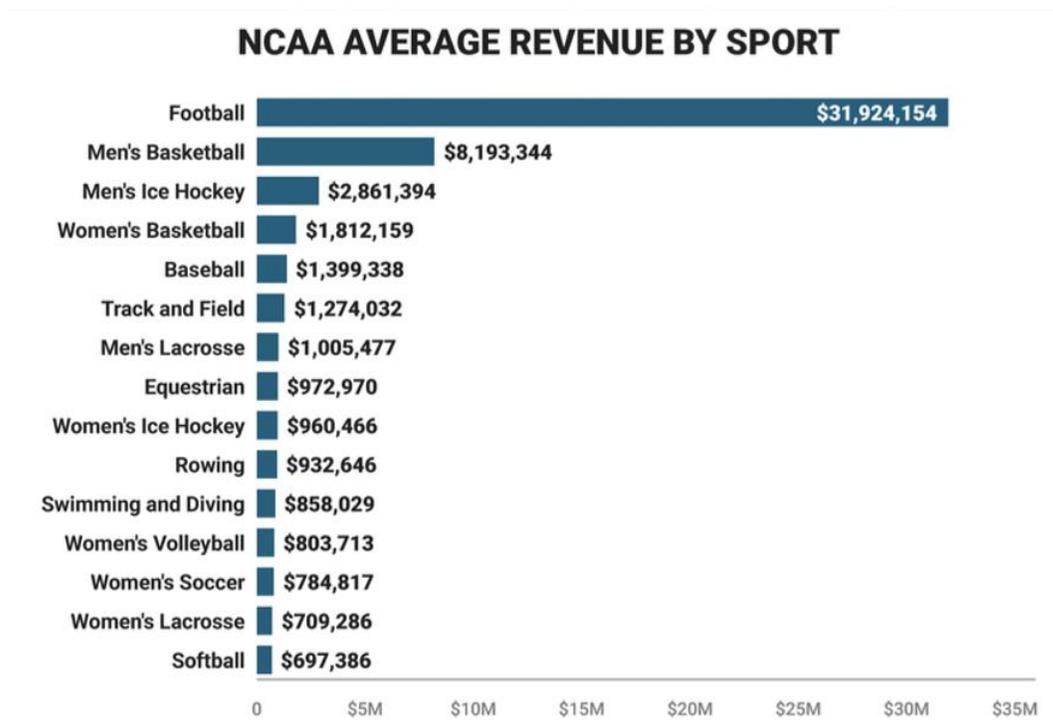
Title IX's overwhelming positive impact on female participation in intercollegiate athletics nationwide is indisputable, the law has been widely criticized for its unintended consequences which impact men's athletics. For decades, critics have advocated for modifications to Title IX policy in order to make compliance a more realistic goal for certain institutions and athletic programs, such as football and men's basketball.

As discussed in Chapter 1, in 1975, Texas Senator John Tower attempted to pass a law that would exempt revenue-producing sports from Title IX's jurisdiction. Although the Tower Amendment failed, the Javits Amendment which followed included "reasonable provisions considering the nature of particular sports."<sup>206</sup> The particular sports identified include sports with higher operating costs, which are not held to the same standard as sports that cost less. Due to the vast income they provide for their institutions, many people believe that revenue-producing sports should not be subject to Title IX's restrictions and regulations.

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<sup>206</sup> George, "Forfeit," 6.

**Figure 1.7: Average NCAA Revenue by Sport.**



Source: Department of Education based on average revenue from 127 FBS schools, reproduced by Senator Chris Murphy in the report: *How Everyone Is Getting Rich off College Sports – except the Players*.

This figure demonstrates the vast differences between the revenue produced by sports such as football and men's basketball and all other sports. With an average revenue of \$31,924,154, football dominates the college sports industry.<sup>207</sup> Men's basketball, following closely, also generates approximately five times as much revenue as women's basketball, the highest-producing women's sport.<sup>208</sup> In a series of reports assessing the problems with college athletics, Connecticut Senator Chris Murphy provided valuable data on the revenue produced by NCAA sanctioned sports. In his report, Senator Murphy revealed that the average Division I school with

<sup>207</sup> Murphy, Chris. *How Everyone Is Getting Rich off College Sports – except the Players*, March 2019, <https://www.murphy.senate.gov/download/madness-inc>.

<sup>208</sup> Murphy, *How Everyone Is Getting Rich off College Sports*, 5.

a football team generates more revenue from their football programs, \$31.9 million each year, than they do from the other 35 sports combined, \$31.7 million.<sup>209</sup> This stark difference in the revenue produced from football and all other sports has led to the argument in favor of excluding revenue-producing sports from Title IX's jurisdiction. Due to these differences, critics have proposed an exemption to Title IX, in order to take into consideration the revenue football and men's basketball provide for institutions.

Ellen Staurowsky's article, "Title IX and College Sport: The Long Painful Path to Compliance and Reform," evaluates the strengths and weaknesses of the argument to exclude revenue-producing sports from Title IX's jurisdiction. Staurowsky asserts that such proposals are "grounded in a belief that the saving grace for this business enterprise is its educational purpose in providing funds to sponsor lower level men's and women's sports and enhanced name recognition for institutions."<sup>210</sup> Staurowsky finds this argument to be unconvincing, claiming that: "The enduring resiliency of this line of reasoning is baffling given the ever-growing body of information regarding the state of college sport programs."<sup>211</sup> Critics of Title IX contend that revenue-producing sports should be exempt from the legislation due to the financial benefit they provide for women's sports and non-revenue-producing men's sports. However, Staurowsky is unpersuaded by such arguments, citing the large expenditures of revenue-producing sports which are precluded by Title IX requirements. Staurowsky explains:

The point of curiosity here is the readiness with which those who favor exemptions for revenue-producers assume that the money is being used for an educational purpose and, therefore, make the defense of revenue producers justifiable. Arguably, there is nothing in the financial practices of big-time intercollegiate athletics programs from which to infer that the "athletic arms race" encourages revenue-generators to be willing revenue-sharers with the less fortunate. This would

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<sup>209</sup> Murphy, *How Everyone Is Getting Rich off College Sports*, 5.

<sup>210</sup> Staurowsky, "Title IX and College Sport," 112.

<sup>211</sup> Staurowsky, "Title IX and College Sport," 112.

make them benevolent philanthropists rather than pragmatic providers. And big-time college sport is not in the business of gift-giving.<sup>212</sup>

Football, specifically, has created significant challenges for institutions due to large roster sizes, budgets, and coaching staff. In Division I, football teams are allotted eighty-five scholarships and the average roster size is 107.<sup>213</sup> In comparison, the largest Division I women's team is rowing, with an average size of sixty athletes and twenty scholarships available from the NCAA.<sup>214</sup> The disparity between the roster sizes of football and all women's teams prevents many institutions from being in compliance with the first prong. As a result, critics have called for the exclusion of football from Title IX, as "the regulations artificially limit the number of male athletes and essentially establish an illegal quota system in an effort to attain gender equity."<sup>215</sup> In most other sports, the roster sizes are comparable between men and women's teams. Due to the fundamental differences between football and nearly every other sport, institutions that have football programs struggle to achieve compliance, as seen in Figure 1.6. For the few institutions that are in compliance, their football programs benefit at the cost of other non-revenue sports. As female students continue to dominate undergraduate populations, institutions struggle to make room in their budgets to expand women's athletic opportunities. For these institutions facing budget constraints, Title IX compliance has posed a challenge for institutions, leading many institutions to eliminate men's teams to be able to expand women's athletic opportunities.

As discussed in previous chapters, many schools experiencing difficulty achieving compliance with the Three-Part Test have opted to cut men's teams. Despite the OCR's

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<sup>212</sup> Staurowsky, "Title IX and College Sport," 113.

<sup>213</sup> George, "Forfeit," 11.

<sup>214</sup> George, "Forfeit," 11.

<sup>215</sup> Goplerud, "Title IX: Part Three Could Be the Key," 124

disapproval for such unpopular practices, institutions continue to eliminate men's teams, predominately non-revenue programs such as men's wrestling, swimming, and gymnastics. As Eleanor Smeal, the former president of the National Organization for Women, stated, "Dropping men's teams is a violation of the spirit and the letter of Title IX. The purpose of saying you're not going to discriminate is not to limit opportunities of the other class. We should not be talking about a zero-sum game."<sup>216</sup> Although the OCR has repeatedly deemed the elimination of men's teams to reach Title IX compliance a "disfavored practice,"<sup>217</sup> the *Cohen v. Brown* decision permitted such actions. Critics of Title IX argue that Title IX's requirements force institutions to go to such lengths, a measure inconsistent with the legislation's true intent. This detrimental impact on male opportunities was not the intent of Title IX, as the legislation's authors strived for gender *equity*. However, despite Title IX's purpose, critics fault the legislation for the serious unintended consequence of eliminating men's athletic opportunities. As a result, questions have been raised over the current effectiveness of Title IX's regulations, which allow institutions to gain compliance through the elimination of men's athletic opportunities.

Conversely, the elimination of men's programs is often found to be the result of numerous other causes. According to Rich Haglund, author of the article "Staring Down the Elephant: College Football and Title IX Compliance," institutions typically eliminate teams "for reasons unrelated to Title IX compliance, though Title IX may indirectly influence those decisions." Haglund explains that:

Schools often cut programs simply because of the increasing number of student-athletes and rising tuition and fees. Efforts to keep up in the college athletics "arms race" efforts to build the latest and greatest facilities to lure top recruits-also lead to elimination of less popular sports. Athletic directors eliminate teams when they have been unsuccessful and/or unsupported for a long time. Reallocation of resources within an athletic

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<sup>216</sup> Melnick, "The Strange Evolution of Title IX."

<sup>217</sup> Melnick, "The Strange Evolution of Title IX."

department or conference-wide efforts to focus on certain sports at the expense of others may also lead to cuts.<sup>218</sup>

It is important to understand the difference between the elimination of men's teams unrelated to Title IX compliance, and the elimination of men's teams as a necessary means of gaining compliance. To ensure that institutions apply Title IX standards as intended and do not continue to eliminate men's teams as a means of avoiding compliance, further clarification by the OCR is required.

One proposed remedy to prevent the elimination of men's teams is the more effective allocation of budget costs. In the article "Title IX: The Technical Knockout for Men's Non-Revenue Sports," author Eric Bentley analyzes the ongoing issue of institutions eliminating men's athletic teams to reach compliance with Title IX.<sup>219</sup> Bentley offers a novel approach to prevent such unpopular practices while promoting Title IX compliance. Bentley proposes that rather than jumping to cut men's teams, institutions should first evaluate the efficiencies of their budget expenditures. Bentley has found that while the costs of adding a women's team can be "minimal," many institutions, "claim existing men's programs must be dropped, rather than adding women's programs to become compliant with the participation requirement of Title IX because the average athletic department operates with a \$600,000 deficit."<sup>220</sup> The costly salaries of coaches for revenue-producing teams cause many institutions to experience such deficits. Bentley states that it is tough to understand the necessity of cutting men's teams, rather than

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<sup>218</sup> Rich Haglund, "Staring Down the Elephant: College Football and Title IX Compliance," *Journal of Law & Education* 34, no. 3 (July 2005): 442, [https://heinonlineorg.ezproxy.trincoll.edu/HOL/Page?public=true&handle=hein.journals/jle34&div=36&start\\_page=439&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults](https://heinonlineorg.ezproxy.trincoll.edu/HOL/Page?public=true&handle=hein.journals/jle34&div=36&start_page=439&collection=journals&set_as_cursor=0&men_tab=srchresults).

<sup>219</sup> Eric Bentley, "Title IX: The Technical Knockout for Men's Non-Revenue Sports," *Journal of Law & Education* 33, no. 2 (April 2004): 142, [https://heinonline-org.ezproxy.trincoll.edu/HOL/Page?public=true&handle=hein.journals/jle33&div=18&start\\_page=139&collection=journals&set\\_as\\_cursor=1&men\\_tab=srchresults](https://heinonline-org.ezproxy.trincoll.edu/HOL/Page?public=true&handle=hein.journals/jle33&div=18&start_page=139&collection=journals&set_as_cursor=1&men_tab=srchresults).

<sup>220</sup> Bentley, "Title IX," 142.

expanding women's opportunities, when institutions can afford to pay such large salaries for their coaching staffs.

In 2019, the two highest paid Division I football coaches, Dabo Sweeney (Clemson University) and Nick Saban (University of Alabama) received salaries of \$9,315,600 and \$8,857,000, respectively.<sup>221</sup> The costly salaries seen across Division I athletics demonstrates the universities' abundant financial resources which should be more effectively allocated to provide equitable opportunities for all athletes.<sup>222</sup> According to Senator Chris Murphy:

The constant and urgent need to compete, either between big-time programs in the Power Five conferences or smaller programs hoping to make the jump onto the national stage, fuels an "arms race" that inflates staff salaries and rationalizes lavish facilities, among other spending meant to get the most out of their student-athletes rather than supporting their futures. The result is an industry with more money than it knows what to do with, and the need to grow revenues at all costs, regardless of what is in the best interests of the student-athletes who make college sports worth watching.<sup>223</sup>

In addition, institutions that do not efficiently allocate their budgets should not also be able to "suddenly claim that it must drop men's programs instead of adding women's programs in order to comply with Title IX."<sup>224</sup> Overall, the practice of cutting men's athletic programs has been found to be in direct conflict with the purpose of Title IX. As a result, such actions are highly contentious and disfavored.

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<sup>221</sup> James Crabtree-Hannigan, "Dabo Swinney, Nick Saban and the 10 Highest-Paid College Football Coaches in 2019." *SportingNews*, January 13, 2020, <https://www.sportingnews.com/us/ncaa-football/news/highest-paid-college-football-coaches-2019-dabo-swinney-nick-saban/1tm0hym5dtina1ms02d4davsfp>.

<sup>222</sup> Bentley, "Title IX," 142.

<sup>223</sup> Murphy, *How Everyone Is Getting Rich off College Sports*, 6.

<sup>224</sup> Bentley, "Title IX," 142.

## Conclusion

This chapter evaluated the current state of institutional compliance with Title IX, as well as the factors that make compliance difficult for athletic programs and create unintended consequences as a result. Analysis of Title IX's scholarship requirements and Three-Part Test revealed the lack of compliance across the country, from Division I to Division III institutions. As discussed in previous chapters, the frequent elimination of male athletic opportunities by institutions seeking Title IX compliance is a severe and undisputable problem. To gain a deeper understanding of Title IX's ability to promote gender equity for all athletes, the legislation's alleged disparate impact on men's athletics was examined, as well as policy solutions to prevent such unfavored practices. Arguments for exempting revenue-producing sports from Title IX's jurisdiction were also evaluated, weighing each proposal's ability to establish gender equity while making compliance more attainable for certain athletic programs. Overall, this chapter demonstrated the need for updated Title IX guidance, in order to provide an equitable playing field for all athletes. The subsequent chapter will reflect on this thesis' findings and provide a five-point policy for more effective Title IX interpretation and enforcement.

## **CHAPTER V: PROPOSED FIVE-POINT POLICY & CONCLUSIONS**

### Introduction

This thesis has examined the extent to which Title IX has fulfilled its original intent of gender equity between men and women in intercollegiate athletics. The previous chapters analyzed the OCR's ability to continue to reflect the core purpose of Title IX from 1972-2020. While Title IX's overwhelmingly positive impact on female participation in intercollegiate athletics nationwide was demonstrated, analysis revealed the current lack of institutional compliance with Title IX's requirements. The various inadequacies of Title IX policy were identified, including the flawed Three-Part Test and the OCR's ineffective enforcement. This final chapter proposes a five-point policy to update Title IX policy, in accordance with the core value of the legislation. The Three-Part Test and the OCR's principal enforcement mechanism will be modified to more vigorously address institutions' discriminatory behavior by enforcing Title IX requirements. As the United States approaches 50 years of Title IX, it is imperative that the legislation continues to evolve to reflect its original intent.

### Proposed Five-Point Policy

Women currently comprise the majority of undergraduate college students in the nation, an incredible improvement attributed to Title IX. However, even in 2020, women continue to be disproportionately represented in intercollegiate athletics. As a result, it is crucial that Title IX evolves over time in order to fulfill its original intent: enforcing and advancing gender equity in college athletics. While there have been many efforts to modify Title IX policy, few try to redirect Title IX policy to its basic intent. This thesis examined the extent to which Title IX has fulfilled its original promise of gender equity between men and women in intercollegiate athletics. After analysis, the following five-point policy is proposed. First, the Three-Part Test will be revised to address the current state of institutional compliance. The prongs will be updated to ensure that institutions have diverse and viable avenues for obtaining compliance. It is recommended that institutions first seek compliance with prong one, if possible, as it is the only fully objective measure. Next, the OCR's principal enforcement mechanism will be modified to provide more effective execution of Title IX requirements. Lastly, two policies will be proposed to ensure the promotion of equitable athletic opportunities for all athletes.

### Revised Three-Part Test

The Three-Prong Test, established in the 1979 Policy Interpretation, was developed to provide institutions with a clearer system for measuring gender equity in athletics. Developed over 40 years ago, the Three-Prong Test was created to establish equitable athletic opportunities for all athletes, and demonstrated substantial progress. Now, the test has proven to fall short in providing institutions with three objective ways to obtain compliance in accordance with the core value of Title IX.

In the 1996 Clarification, the OCR explained that the first prong allows for “natural fluctuations in enrollment and participation rates” in the following year.<sup>225</sup> As discussed in Chapter 2, an institution will satisfy the first prong even if it is a few percentage points away from compliance. However, there is a lack of clarity surrounding the acceptable fluctuations in enrollment and participation rates, as the OCR has failed to provide institutions with further instructions on the rates which are permissible “natural fluctuations.” The courts have attempted to address this lack of clarity, as seen in *Roberts v. Colorado State Board of Agriculture*, discussed in Chapter 2. In this case, the court proposed an “acceptable 1.7% gap between female athletic participation and female undergraduate enrollment” and rejected Colorado State’s gap of 10.5% as compliant with the first prong.<sup>226</sup> In order to ensure that institutions face the same standards, it is imperative that the first prong be revised to include the exact permissible gap in enrollment and participation rates allowed. Therefore, it is proposed that the Three-Prong Test be reinterpreted to clarify that the first prong allows for natural fluctuations in enrollment and participation rates in the following year, and greater than a 5% gap between enrollment and participation rates will not be accepted. A gap of 5% was found to be an equitable requirement for institutions to follow.

As discussed throughout this work, the second prong has proven a temporary and ineffective measure for assessing compliance. Currently, the vast majority of institutions have responded to the interests of women athletes, expanding their athletic offerings. After the *Cohen v. Brown* decision, this prong has evolved to offer compliance for institutions which expand women’s opportunities periodically rather than promptly.<sup>227</sup> Nearly fifty years after Title IX’s

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<sup>225</sup> “Clarification of Intercollegiate Athletics Policy Guidance.”

<sup>226</sup> Farrell, “Title IX or College Football,” 1041.

<sup>227</sup> Jurewitz, “Playing at Even Strength,” 316.

enactment, it should be expected that an institution have a history and continuing practice of expanding the participation opportunities for the underrepresented sex, which is most frequently female.<sup>228</sup> By rewarding institutions which gradually increase women's athletic opportunities with compliance, this prong has proven ineffective and flawed at promoting gender equity in athletics.<sup>229</sup> Consequently, it is proposed that the second prong be eliminated as it has proven to be inconsistent with the true purpose of Title IX. Established in 1979, this measure of evaluating gender equity has grown outdated and contradictory. By enforcing only the first and third prongs, the OCR will provide institutions with two diverse, yet just methods of proving their non-discriminatory practices.

In recent years, the third prong of the Three-Part Test has become the most popular option for schools seeking compliance. Due to the vagueness of this prong, the OCR has made various changes to the permissible methods institutions can use to measure the interests and abilities of the underrepresented sex. As discussed in Chapter 3, during the course of various presidential administrations the OCR modified its requirements for the third prong. These changes can make it easier for schools to attain compliance while not improving the state of gender equity. From the Bush administration's endorsement of e-mail surveys to the Obama administration's rejection of such methods, in just a five year span the measures implemented by the OCR can be vastly different, establishing disparate standards for schools to follow. As a result, it is proposed that the OCR should reinterpret the third prong to set forth a uniform method to assess whether institutions are "fully and effectively accommodating the interests and abilities of the underrepresented sex," as required by law.<sup>230</sup>

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<sup>228</sup> Jurewitz, "Playing at Even Strength," 316.

<sup>229</sup> Jurewitz, "Playing at Even Strength," 316.

<sup>230</sup> "Intercollegiate Athletics Policy: Three-Part Test -- Part Three Q's & A's."

In the article, “The Path of Most Resistance: The Long Road toward Gender Equity in Intercollegiate Athletics,” authors Deborah Brake and Elizabeth Catlin discuss the flaws of using surveys to assess relative interest. Brake and Catlin provide the following analysis:

In addition to the insurmountable problems of identifying an appropriate survey population, no objective and reliable measure of interest exists to quantify an individual's actual interest in participating in intercollegiate athletics. Survey questions cannot accurately determine whether a person who reports to have interest in a particular sport would actually participate in intercollegiate athletics if given the opportunity, nor can surveys differentiate between interest in participating in intramural, club, or intercollegiate athletic programs.<sup>231</sup>

Overall, the use of surveys to measure students' athletic interests has proven ineffective and an inadequate instrument. Due to the substantial inconsistencies in response rates to e-mail surveys, it is recommended that such methods carry minimal value. Nonresponses to surveys must not be misconstrued as a lack of interest, as there could be a plethora of reasons other than noninterest. In 2006, Congress passed a bill which prohibited the single use of e-mail surveys to fulfill the third prong, specifying that such surveys can only be used in addition to other measures. Therefore, it is proposed that the third prong be revised to reflect the criteria established in the Obama administration's 2010 DCL. The use of “a broad range of indicators” to demonstrate the fulfillment of prong three is the most thorough and effective means in accommodating and promoting quality athletic opportunities for women.

Due to the current lack of institutional compliance with Title IX's requirements, it is proposed that further steps be taken to incentivize compliance. As discussed in Chapter 2, the OCR's principal enforcement mechanism for the past forty years has been the termination of

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<sup>231</sup> Deborah Brake and Elizabeth Catlin, “The Path of Most Resistance: The Long Road toward Gender Equity in Intercollegiate Athletics,” *Duke Journal of Gender Law & Policy* 3 (1996): 80, [https://heinonline-org.ezproxy.trincoll.edu/HOL/Page?public=true&handle=hein.journals/djglp3&div=6&start\\_page=51&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults](https://heinonline-org.ezproxy.trincoll.edu/HOL/Page?public=true&handle=hein.journals/djglp3&div=6&start_page=51&collection=journals&set_as_cursor=0&men_tab=srchresults).

federal funding. However, as seen by the OCR's failure to ever cut off an institution's federal funding, the mechanism has proven an empty threat. The complexity of terminating an institution's access to federal funding has contributed to its failed practice. As a result, it is time for the OCR to update its enforcement method to more robustly enforce Title IX compliance and discourage discriminatory behavior.

It is proposed that the OCR change its enforcement mechanism to more frequently evaluate an institution's compliance with Title IX's Three-Part Test. As required by the EADA, co-educational schools must annually report data about their men's and women's athletic teams to the Department of Education. Institutions must report on the athletic participation, staffing, revenues and expenses for all teams.<sup>232</sup> It is proposed that along with reporting EADA data annually, institutions must provide a report detailing their fulfillment of the Three-Prong Test. The report must include the prong satisfied by the institution, as well as their detailed plan to promote and advance quality athletic opportunities for the underrepresented sex at their institution. Currently, schools must only prove their compliance with Title IX when facing a lawsuit or OCR investigation. Rather than "working to address participation inequality in sports, universities assume they'll get away with noncompliance until somebody sues or files a complaint."<sup>233</sup> By self-reporting their state of gender equity in athletics, institutions will be more incentivized to provide equal athletic opportunities for all athletes. In addition, the annual reporting of compliance with the Three-Prong Test will highlight institutions' discriminatory practices, assisting the OCR in enforcing Title IX requirements in a more robust manner. The report will be made available to the public, highlighting the institutions which promoted

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<sup>232</sup> U.S. Department of Education, "Equity in Athletics Disclosure Act."

<sup>233</sup> Jenkins, "Hundreds of Colleges May Be Out of Compliance With Title IX."

equitable athletic environments and the institutions which practiced discriminatory behaviors. Under this plan, the OCR will continue to enforce Title IX with the threat of cutting off federal funding. In addition, the annual self-reporting of compliance with the Three-Part test will more fully motivate institutions to not only abide by Title IX requirements, but also advance the quality of athletic opportunities women receive.

As previously discussed, many institutions have eliminated men's programs in order to become compliant with Title IX's requirements. Despite the OCR's repeated assertion that the elimination of men's teams to reach Title IX compliance is a "disfavored practice," many institutions continue to cut men's teams.<sup>234</sup> Therefore, it is proposed that institutions which eliminate men's teams must gain compliance through two prongs of the Three-Part Test. It is believed that the cutting of men's teams is not a necessary means to gain Title IX compliance and is inconsistent with the core intent with the legislation. Consequently, institutions which take such actions must also be able to thoroughly demonstrate their commitment to gender equity in athletics. Additionally, it is recommended that the OCR require institutions which have cut men's teams to provide a detailed report which specifies their plan to provide equitable athletic opportunities for all athletes. It is crucial that the OCR reaffirms their dedication to promoting quality athletic opportunities for both male and female athletes, absent of discrimination.

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<sup>234</sup> Melnick, "The Strange Evolution of Title IX."

## CONCLUSION

This thesis provided an analysis of Title IX's legislative and judicial history, explored the OCR's effectiveness in interpreting and enforcing Title IX, and evaluated the current state of institutional compliance with Title IX. The legislation's vast progress in establishing greater athletic opportunities for women is demonstrated, as well as the current lack of equitable athletic opportunities for all athletes. While Title IX was enacted to provide federal administrators with principal enforcement authority, the OCR has instead delivered Title IX guidance through countless interpretations, clarifications, and DCL's during the past 48 years. The OCR's "institutional leapfrogging" since 1972 proves how political ideology can greatly affect Title IX policy, as the OCR's interpretations and enforcement have been shifted by each presidential administration.<sup>235</sup> The current Three-Part Test has evolved over the past 40 years, no longer providing an effective method of promoting and enforcing gender equity, as exhibited by the OCR's nonexistent enforcement of Title IX. The proposed five-point policy is suggested for the OCR to more vigorously address institutions' discriminatory behavior and continue to promote gender equity in athletics. While the Trump administration has yet to provide an interpretation on Title IX in intercollegiate athletics, analysis of their stance on Title IX's sexual harassment policy predicts a conservative approach like the ones taken by the Bush administrations. Therefore, as Title IX turns 50, it is essential that the OCR reaffirms their commitment to eliminating sex discrimination in intercollegiate athletics.

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<sup>235</sup> Melnick, *The Transformation of Title IX*, 15.

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