# Manufacturing Equality: Title IX, Proportionality, & Natural Demand

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INTRODUCTION

In 1972 Congress enacted Title IX of the Education Amendments. Title IX prohibits discrimination based on sex in federally-funded educational institutions. Although the law is silent on the subject of athletics, over the years it has gained popular status as the law that made college sports accessible to women. Today, to achieve gender equity in the realm of college sports, schools that receive federal funding must show athletic participation that proportionally reflects their gender demographics.

In theory, this proportionality test mandates universities to expand athletic programs to ensure that female students have as many varsity athletic opportunities as their male counterparts. In reality, despite great effort over the nearly half a century since the enactment of Title IX, athletic programs at most major universities have not achieved proportional representation. Furthermore, in an attempt to reach such proportionality, schools are increasingly cutting back on male sports programs rather than adding female programs. This phenomenon

2. See H.R. REP. NO. 96-459, at 33, 35 (1979) (Conf. Rep.), as reprinted in 1979 U.S.C.C.A.N. 1612, 1614 (stating that the purpose for the Educational Amendments is to promote the general welfare of the United States, which includes preventing educational institutions from giving preferential or different treatment to members of one sex); S. REP. NO. 96-49, at 11 (1979), as reprinted in 1979 U.S.C.C.A.N. 1514, 1525 (noting that the need for equal access to educational activities is paramount and that Title IX is specifically designed to help end sex discrimination).
5. Take for example a hypothetical college with a 1:1 male to female undergraduate population. If prior to 1972 this college had ten varsity sports teams for males and two for females, then pursuant to Title IX, females would have to be granted eight new teams, expanding the school’s entire athletic program to twenty teams.
6. See Lee Sigelman & Paul J. Wahlbeck, Gender Proportionality in Intercollegiate Athletics: The Mathematics of Title IX Compliance, 80 SOC. SCI. Q. 518, 534 (Sept. 1999); see also Kimberly A. Yuracko, One for You and One for Me: Is Title IX’s Sex-Based Proportionality Requirement for College Varsity Athletic Positions Defensible?, 97 NW. U. L. REV. 731, 741 (2003) (noting that in light of the forty plus years since Title IX’s enactment, it is difficult for a school to show “a history and continuing practice of program expansion for women . . . .”).
7. Thinking back to our original example, see supra note 5, this means that rather than simply adding eight teams for females (and producing a total of twenty teams) the school would instead cut four male programs and add four female programs, resulting in only twelve teams—six for males and six for females.
has led to a number of “reverse discrimination” lawsuits. In these lawsuits, male athletes sue their school for dropping their team in favor of a female team, even if the female team is less popular or is struggling to attract membership. Further, in the face of budget cuts and fiscal crises, some schools are cutting their male programs without adding any female programs, and thereby achieving substantially proportional male-female representation.

In effect, Title IX is seemingly creating the exact problems it was intended to fix. The law’s purpose is to promote opportunity, but the law now either creates opportunities for some by restricting opportunities for others or, even worse, it forces schools to restrict opportunities for everyone. This raises the question of whether Title IX is serving a self-defeating purpose by being applied to college sports in the current manner—that is to say—whether the current approach and focus toward college sports, proportionality, and female representation in college athletic programs neglects the intended purpose of the law and whether such focus actually allows a new form of inequality among the sexes to persist.

This Note proposes that Title IX has not resolved sex discrimination in education in any meaningful way; it has only masked it, while also fostering an environment rife with new permutations of sex-based discrimination in education. The continued enforcement and application of Title IX necessitates invocation of the type of discrimination the law was enacted to prevent without legitimately addressing the problems lawmakers sought to solve nearly fifty years ago.

8. See, e.g., Nat’l Wrestling Coaches Ass’n v. Dep’t of Educ., 366 F.3d 930 (D.C. Cir. 2004) (affirming dismissal of case brought by wrestling coaches on the grounds that Title IX discriminates against males); Boulahanis v. Bd. of Regents, 198 F.3d 633, 641 (7th Cir. 1999) (finding no Title IX violation when university eliminated men’s wrestling and soccer programs), abrogation recognized by, Trentadue v. Redmon, 619 F.3d 648 (7th Cir. 2010); Neal v. Bd. of Trs., 198 F.3d 763, 765 (9th Cir. 1999) (finding no Title IX violation when university reduced number of roster spots available to male student-athletes to correct imbalance between each sex’s participation in varsity sports); Kelley v. Bd. of Trs., 35 F.3d 265, 270 (7th Cir. 1994) (university’s decision to terminate men’s swimming program while retaining women’s swimming program did not violate Title IX); see also Ryan T. Smith, Note, “Bull’s Eye”: How Public Universities in West Virginia Can Creatively Comply with Title IX Without the Targeted Elimination of Men’s Sports Teams, 110 W. VA. L. REV. 1373, 1389–90 (2008) (noting that participation opportunities for male athletes are being reduced to lower obligations to corresponding female athletes); Megan K. Starace, Reverse Discrimination Under Title IX: Do Men Have A Sporting Chance?, 8 VILL. SPORTS & ENT. L.J. 189, 205 (2001) (“Recently, both the Seventh and the Ninth Circuits have reviewed decisions addressing issues of reverse discrimination under Title IX.”). The author is aware of the negative connotations associated with the term “reverse discrimination,” but in this instance a more accurate term to describe the phenomenon could not be found.


10. Turning again to our original hypothetical school with ten male programs and two female programs, see supra note 5, we see that in this scenario administrators could cut eight of the male programs, leaving two programs for males and two for females and thereby achieve proportional representation. See, e.g., Kelley, 35 F.3d at 270 (ruling that the elimination of the men’s swimming team did not violate Title IX because men’s participation in athletics remained substantially proportionate).
This Note explores the underpinnings of Title IX’s proportionality test and whether there is a “natural demand” among the sexes in the context of sports or otherwise.\textsuperscript{11} If natural demand does exist, is that demand equal among the sexes? Part I of this Note provides a background on Title IX, with a discussion of Congress’ intent in passing the law, as well as the resulting litany of agency regulations and federal court cases that have shaped the law into its present form. This discussion demonstrates that Title IX was passed to end discrimination against women in all educational programs and especially in fields such as science, technology, engineering, and math (STEM). It was not until after its enactment that the focus shifted to school athletic programs.\textsuperscript{12}

Part II explores the two faces of Title IX as applied today. On the one hand, it is lauded as one of the greatest civil rights victories in history. On the other hand, its critics dismiss it as an outdated and self-defeating failure. The discussion in Part II concludes with the following question: is there a reason proportional representation in sports has essentially become the measure for equality in educational opportunity?

This question leads into Part III, which asks whether there is a natural demand for sports among the sexes and, if so, whether the demand is proportional to the demographics of the greater population. If demand for sports is indeed equal among males and females, then why has there not been a more meaningful push to mandate proportionality—especially among Division I schools in the National Collegiate Athletic Association (NCAA)?\textsuperscript{13} If demand is not equal, then why is achieving proportionality a measure of Title IX’s success? Part III ends by asking whether there is a better way to achieve equality, perhaps one that does not require a showing of athletic participation that is proportional to demographics (an approach that necessarily requires cost-shifting).\textsuperscript{14} After the survey in Part III is complete, this Note explores

\textsuperscript{11.} See Henk Erik Meier et al., Univ. of Munster, Inst. Sport & Exercise Sci., Gender Inequality and Demand for Women’s Sport: Re-Unified Germany as a Natural Experiment 3 (2013), http://www.free-project.eu/documents-free/Working%20Papers/Meier%20Konjer%20Leinwather%20Gender%20inequality%20and%20demand%20for%20women%20sport%20unified%20Germany.pdf [https://perma.cc/36H2-6AWL].

The concept of natural demand is rooted in the philosophical notion of where interests lie in the absence of social and cultural bindings. For a more complete discussion on the theory of natural demand, see infra Part III.

\textsuperscript{12.} See Nondiscrimination on the Basis of Sex in Education Programs and Activities, 40 Fed. Reg. 24,128, 24,134 (June 4, 1975) (noting that Title IX began to apply to intercollegiate athletics in 1974).

\textsuperscript{13.} The NCAA is a non-profit association that regulates the athletes and athletic programs of 1,121 colleges nationwide. See NCAA History, http://www.ncaa.org/about/resources/media-center/ncaa-101/what-ncaa [https://perma.cc/BKS8-B749]. The Association categorizes the colleges into three general divisions based on, among other things, the level of intercollegiate competition and athletics at the school. See id.

\textsuperscript{14.} The Title IX proportionality test is a classic example of an issue that is the subject of a criticism that has been applied to nearly all of the civil rights policies of the post-War Era. Lawmakers sought to create policy that harbored equality, but in a world rooted in disparity, someone necessarily would have to pay the cost of promoting opportunity. Although they are not otherwise a good analogy for gender discrimination, the quota systems in employment and education as a result of Title VI and VII of the
whether framing educational equality and the success of Title IX around college sports programs runs afoul of Title IX altogether.

Part IV presents a new way to apply Title IX, by focusing on policy that would take the original purpose of the law and apply it in a manner that is consistent with social science findings. This Part argues that Title IX’s “education program or activity” requirement leaves room for enforcement within many other areas of education that have yet to be meaningfully addressed. Part IV ultimately asks if the obsession with proportional representation in college sports has left other (more pervasive) inequalities in education overlooked. For example, women are still underrepresented in STEM fields as well as professionally in academia. These were some of the exact areas of education contemplated when lawmakers sought to promote equality among the sexes. Moreover, college entrance rates among males are in decline and men that do 1964 Act are indeed great illustrations of this systemic issue of cost-shifting to achieve equality. See CHARLES F. ABERNATHY, CIVIL RIGHTS AND CONSTITUTIONAL LITIGATION, CASES AND MATERIALS 709, 851 (5th ed. 2012).

15. After all, other than spectating and serving as a fan base, the vast majority of college students do not participate in their school’s varsity athletic programs. As of fall 2016, although there are an estimated 20.5 million college students in the United States, there are only about 460,000 college students participating in NCAA athletic programs, Back to School Statistics, NAT’L CTR. FOR EDUC. STATS. (2016), http://nces.ed.gov/fastfacts/display/asp?id=372 [https://perma.cc/TZL4-5JYP]; Current Student-Athletes, NCAA, http://www.ncaa.org/student-athletes [https://perma.cc/4JT4-A8QR]. Although an argument can be made for the inherent value attached to spectating and identifying with a team and its athletes, such consumer-based participation in athletics is not the subject of the modern athletic opportunity calculus. In short, Title IX compliance does not require a proportionate number of male-female sports program attendees or spectators.

16. For example, whether Title IX must be applied to end sex-based discrimination in vocational schools is an open question. Indeed, a call for such enforcement was made only a few years after the law’s enactment. See Dinah L. Shelton & Dorothy Berndt, Sex Discrimination in Vocational Education: Title IX and Other Remedies, 62 CALIF. L. REV. 1121, 1125 (1974) (noting that in 1972 there were over 37,000 males and only 34 females being trained as plumbers). Yet even today, the sex-based discrimination in vocational and technical schools is pervasive. See NAT’L WOMEN’S LAW CTR., TITLE IX AND EQUAL OPPORTUNITY IN VOCATIONAL AND TECHNICAL EDUCATION: A PROMISE STILL OWED TO THE NATION’S YOUNG WOMEN 4 (2002) (noting that males comprise 94 percent of the student body in training to be plumbers and electricians).

17. In this instance, imagine a sort of “before your very eyes” type scheme whereby policymakers and special interest groups consistently tout a law’s obvious successes to hide, in plain sight, the same law’s systematic failures. Title II of the Civil Rights Act of 1964 presents such an issue. See ABERNATHY, supra note 14, at 602–04 (arguing that Title II does not account for socioeconomic standing, or rather the poorest cross-section of America, and therefore is virtually inapplicable to the majority of those individuals it purports to protect).


19. See 118 CONG. REC. 5803 (1972) (statement of Sen. Bayh) (noting that “one of the great failings of the American educational system is the continuation of corrosive and unjustified discrimination against women”).

attend college are more likely than their female counterparts to drop out.\textsuperscript{20} Stepping even further back, one finds that only about two-thirds of all boys graduate high school in the United States.\textsuperscript{21} Does this amount to inequality in educational opportunity among the sexes?

To answer any of these questions, one must first understand the inception, creation, and evolution of the law. This requires examining forty years into the past to a different time and place in America’s history. This brings us to Part I, which not only serves to prime the reader on the scope and purpose of Title IX, but also to show the tumultuous life it has led.\textsuperscript{22}

\textbf{I. THE ROUGH AND TUMBLE HISTORY OF TITLE IX}

It was business as usual for President Richard Nixon on Friday, June 23, 1972, as he was getting ready to sign the Education Amendments of 1972 (1972 Amendments) into law. This was a landmark law that would provide direct federal aid to private and public schools throughout the United States so long as the recipient schools abided by the law’s provisions.\textsuperscript{23} However, in the moments after signing the 1972 Amendments, President Nixon was not praising the law.\textsuperscript{24} Instead, the President was hung up on the law’s shortcomings, especially relating to the provisions on the desegregation of school busing.\textsuperscript{25} He made his
disapproval clear in his Presidential Statement on Signing the Amendments of 1972 (Signing Statement). The President’s cheerless Signing Statement is particularly strange when another provision within the 1972 Amendments is taken into account.

Ubiquitously known simply as “Title IX,” this provision of the 1972 Amendments provides that, “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 . . . .” For the first time in the history of the United States, sex-based discrimination in education was federally outlawed—and not a word was spoken about it by the President.

The inclusion of Title IX in the 1972 Amendments was nothing more than an afterthought. Officially introduced nearly a decade after its civil rights policy predecessors, Title IX was hurriedly adopted as a floor amendment to the 1972 Amendments, without formal hearing or a committee report. As such, there is limited legislative history regarding the creation of the statute, which means that the statute’s purpose is unclear and there is virtually no guidance as to how it should be applied, leaving the boundaries of the law relatively undefined. Yet the concept of equal opportunity in education was not new in 1972 and had been discussed in the federal forum for nearly a decade before the official enactment of Title IX.

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28. See Signing Statement, supra note 24. Granted, the 1972 Amendments addressed busing desegregation, but it is unclear whether President Nixon understood of the gargantuan civil rights law he had just signed. If he did, why didn’t he mention Title IX in his Signing Statement? One reason for President Nixon’s silence on the matter could be that he felt Title IX was an inconsequential supplement to earlier civil rights laws—a sort of fail-safe to ensure equality in education. Another reason could be that perhaps a more pressing matter had become the center of the President’s universe that week. In fact, it was on June 23, 1972, that President Nixon and his then Chief of Staff, H.R. Haldeman, had a series of recorded conversations in which the President repeatedly ordered the Federal Bureau of Investigation to halt inquiries relating to a recent burglary at the Democratic National Committee headquarters in the Watergate Hotel. The burglary happened just one week earlier. This conversation between President Nixon and his Chief of Staff (which was recorded on tape) later became known as the “smoking gun” that brought the Watergate scandal to light and ultimately led to Nixon’s resignation. See Thomas J. Craughwell & M. William Phelps, Failures of the Presidents: From the Whiskey Rebellion and War of 1812 to the Bay of Pigs and War in Iraq, 223–27 (2008).
32. See Cohen, 991 F.2d at 894.
A. THE BIRTH OF TITLE IX: A STRUCTURALIST APPROACH TO CIVIL RIGHTS POLICY

The Civil Rights Act of 1964 is among the most important pieces of legislation passed in the twentieth century. It famously outlawed discrimination based on race, color, religion, national origin, or sex. These were, and arguably still are, the most severe and pervasive domestic issues affecting American society. Congress recognized that these problems were not the result of isolated instances of discrimination, but that discrimination was the result of a larger, overarching societal structure. The Act did not, however, specifically address sex-based discrimination in educational programs or activities. In fact, the issue was not touched upon by the federal government until the late 1960s, when the newly revived Women’s Rights Movement persuaded President Lyndon B. Johnson to address sex discrimination in colleges and universities around the country. The first real success relating to equality in education among the sexes occurred in 1967 when the National Organization for Women (NOW) persuaded President Johnson to execute a series of executive orders to clarify that the Civil Rights Act of 1964 included women as a specific class of

37. Id. There is some scholarship which posits that by falling silent on the topic of gender discrimination in education, the Civil Rights Act of 1964 served as a catalyst in reviving both the domestic and international women’s rights movement. In the United States, the modern women’s rights movements are conventionally categorized into three waves. See Astrid Henry, Not My Mother’s Sister: Generational Conflict and Third-Wave Feminism 24 (2004). First, there is the suffrage movement of the late nineteenth and early twentieth centuries, in which women gained the right to vote. Id. at 54. This movement came to be known as first-wave feminism. Id. After the passage of the Nineteenth Amendment, the first-wave feminists had achieved their goal and the movement lost momentum. Eventually there was a period of renewed domesticity for women, a result of the post-World War II boom. Id. By the mid-twentieth century, first-wave feminists were relics of the past. It was not until a report by the Presidential Commission on the Status of Women revealed the gender inequalities in education and employment that the next feminist movement truly proliferated. Sonia Pressman Fuentes, The Beginning of the Second Wave of the Women’s Movement and Where We Are Today: A Personal Account 1 (Cornell Law Faculty Working Papers, Paper 54, 2009), http://scholarship.law.cornell.edu/cslorps_papers/54/ [https://perma.cc/DGJ2-3JEJ]; see U.S. Dep’t of Labor, American Women: Report of the President’s Commission on the Status of Women (1963). This second-wave feminist movement focused on achieving equal opportunity in education and employment as well as equal protection under the law. See Peter Braunstein et al., The Sixties Chronicle 254–58 (David Aretha et al. eds., 2004). Second-wave feminism faded out in the 1980s, again during an era of prosperity and the embrace of perceived gender roles. This backslide was short-lived, as second-wave feminism was replaced by the women’s rights movement of today, which focuses on the need to change gender stereotypes, media portrayals, and among other things, the language used to define women. See generally Estelle B. Freedman, No Turning Back: The History of Feminism and the Future of Women 326–48 (2002). This current women’s rights movement is commonly known as third-wave feminism. Id.
38. See Henry, supra note 37, at 20.
individuals protected from discrimination. The most notable is Executive Order 11375.

The first person to recover for sex-based discrimination under Executive Order 11375 was Bernice R. Sandler, a part-time lecturer at the University of Maryland. By the summer of 1970, news of Sandler’s success reached Congresswoman Edith Green of Oregon, who chaired the House of Representatives subcommittee that dealt with issues surrounding higher education. With the help of several key people, including Sandler herself, Congresswoman Green drafted legislation prohibiting sex discrimination in education and held hearings relating to the education and employment of women in America. This original legislation proposed to amend Title VI and VII of the Civil Rights Act of 1964. The proposed law was described as a higher education bill with

40. Exec. Order No. 11375, 32 C.F.R. §14303 (1967). Executive Order 11375 expressly banned discrimination in hiring and employment on the basis of sex among all federally funded employers, institutions, and organizations. The Executive Order required federal agencies and their contractors to take active measures to ensure that all women had access to employment and educational opportunities equal to that of white men. Id.
41. See Bernice Resnick Sandler, Title IX: How We Got It and What a Difference It Made, 55 CLEV. ST. L. REV. 473, 474 (2007). When Sandler inquired about why she was overlooked, school administrators said, “you come on too strong for a woman.” Id. What is remarkable is that by Sandler’s own account, she accepted the school’s reasoning, and it was not until her husband pointed it out as sex discrimination that she decided to pursue the matter further. Id. According to Sandler, it was at this point when she “made the connection... that, since most universities and colleges had federal contracts, they were forbidden from discriminating in employment on the basis of sex.” Valentin, at 2. She subsequently filed a complaint against the University of Maryland as well as over 200 other colleges and universities nationwide. See Sandler, supra, at 476. Sandler’s landmark success in applying Executive Order 11375 prompted Congresswoman Martha Griffiths to give the first speech in Congress concerning discrimination against women in education. 1 SUZANNE O’DEA SCHENKEN, FROM SUFFRAGE TO THE SENATE: AN ENCYCLOPEDIA OF AMERICAN WOMEN IN POLITICS 222 (1999). Note that the University of Maryland was one of approximately 250 colleges and universities that Sandler filed a complaint against, and “[d]espite the fact that most of the formal complaints that [she] filed were subsequently ‘lost’ by the government... the United States government was now directly involved in investigating and remedying sex discrimination in colleges and universities.” See Sandler, supra, at 476.
42. Sandler was a member of the Women’s Equity Action League (WEAL), which had several members of the U.S. House of Representatives on its Advisory Board. Congresswoman Green was one of these Advisory Board members, and had long been interested in the crisis of sex discrimination in education. After filing the complaints against Maryland (and other schools), Sandler sent copies of the complaints to Congresswoman Green. See Sandler, supra note 41, at 475–77.
43. See Valentin, supra note 41, at 2. One such key person was Congresswoman Patsy Mink, who coauthored Title IX, and whose famous coalition-building skills helped get the necessary votes to push the bill into law. As the first woman of color to serve on the United States Congress, Representative Mink was a civil rights icon in her own right. JUDITH A. LEAVITT, AMERICAN WOMEN MANAGERS AND ADMINISTRATORS: A SELECTIVE BIOGRAPHICAL DICTIONARY OF TWENTIETH-CENTURY LEADERS IN BUSINESS, EDUCATION, AND GOVERNMENT 184 (1985).
44. See Valentin, supra note 41, at 2. Strangely enough, much of the pushback for the original version of the law came from leaders in the black community and their allies. Id. These individuals
provisions regarding equal opportunity among the sexes in educational institutions nationwide. Congresswoman Green attempted to include it in the Education Amendments of 1971. Her attempt was unsuccessful and the proposed policy was not included. It would not be included until a year later, when a similar bill mandating equal opportunity in federally-funded educational institutions would find a sponsor in the United States Senate and ultimately become the law.

B. THE SCOPE AND PURPOSE OF TITLE IX

1. Introducing “Title X”

The law now known as Title IX was introduced on the Senate floor as “Title X—Prohibition on Sex Discrimination.” Senator Birch Bayh’s introduction of the bill suggests that Title IX was intended to have an expansive breadth and scope, and by his own account “the impact of [Title IX] would be far-reaching.” Senator Bayh did not once specifically mention the need for equal representation among the sexes in school athletic programs.

In addition to outlining the problem areas the bill sought to solve, Senator Bayh also proposed studies and analysis be done on educational institutions. First, he proposed that the Commissioner of Education conduct an “immediate study of sex discrimination” in education, similar to the studies conducted under Title IV of the Civil Rights Act of 1964. Second, Bayh’s “Title X” empowered the United States Commission on Civil Rights to conduct regular studies and

45. See id. at 2.
47. Id.
48. Id.
49. 118 CONG. REC. 5803 (1972) (statement of Sen. Bayh) (“[O]ne of the great failings of the American educational system is the continuation of corrosive and unjustified discrimination against women. It is clear to me that sex discrimination reaches into all facets of education—admissions, scholarship programs, faculty hiring and promotion, professional staffing, and pay scales.”) Designating the bill as “Title X” instead of “Title IX” was likely the result of the original intention to amend Titles VI and VII. See Valentin, supra note 41, at 2.
50. See 118 CONG. REC. 5808 (1972) (statement of Sen. Bayh). The first two data tables Senator Bayh presented on record in promoting the bill pertained to student enrollment and earned-degree statistics. See id. at 5804. The Senator then addressed three “fundamental” problem areas: discrimination in hiring and promotion of faculty and administration, discrimination in scholarships, and discrimination in admissions. Id. at 5804. Senator Bayh further went on to talk about women’s underrepresentation in biochemistry departments, medical schools, and vocational programs. Id. at 5805.
51. Id at 5807. The only explanation for not discussing sports is that at the time athletic programs typically did not receive any federal funding. The first mention of sports came in the form of a response to the concerns of several senators who feared that such an expansive law would lead to, among other things, gender-blended college football teams. See 117 CONG. REC. 30,407 (1972). Of course, Senator Bayh assured these worried legislators that Title IX was not a threat to college football. Id.
53. Id. at 5808.
promulgate laws pertaining to equal protection of law on the basis of sex.54

2. The Javits Amendment and a Special Interest in Sports in the Early Years

Brenden v. Independent School District 742 was the first federal court case in which Title IX was mentioned,55 but there would ultimately only be a handful of sports related Title IX lawsuits in the 1970s.56 Yet in the initial years after the enactment of Title IX, members of Congress almost exclusively focused on how the new law would affect athletic programs that produced revenue and were geared exclusively for males—especially football.57 Special interests, including the NCAA, also voiced concern.58 As a result, some congressmen introduced bills that would exempt men’s revenue producing athletic teams from Title IX enforcement.59 One of these proposed amendments was introduced by Senator John Tower.60 A slightly different amendment was introduced by Senator Jacob K. Javits.61 The Javits amendment would not exempt revenue-producing sports, but instead proposed that the executive branch issue Title IX regulations with
respect to intercollegiate athletic programs. Eventually, a compromise was struck, the Tower amendment was rejected, and the Javits amendment became law.

The Javits amendment required the Department of Health, Education, and Welfare (HEW) to promulgate regulations relating to sex discrimination in education programs receiving federal funding, including athletic programs. Once again the primary focus was on college athletic programs, and when HEW published their proposed regulations for notice and comment, most of the over 10,000 comments received related to athletics. HEW issued its final regulations and President Gerald Ford signed them into law on May 27, 1975. In the following months, a handful of congressmen disapproved of the regulations and specifically criticized the provisions relating to athletics. Despite these protests, the regulations became effective on June 21, 1975.

There may have been many underlying reasons as to why there was immediate concern for sports upon Title IX’s enactment, but the greatest reason for concern probably relates to the amount of money produced by college sports. For example, in 2014 the NCAA reported nearly a billion dollars in generated revenue. Additionally, NCAA research staff have estimated that college sports generate nearly twelve billion dollars for America’s universities, if you combine the revenues from tickets and other sales with revenue that has been allocated to sports programs. Perhaps this is the reason for the initial pushback on Title IX’s application to sports. The rationale being that any alteration to the landscape of athletics would stifle revenue production, or even spell out the

63. Id. After 1979 HEW was separated into the Department of Education (ED) and the Department of Health and Human Services (HHS).
64. NICOLE MITCHELL & LISA A. ENNIS, ENCYCLOPEDIA OF TITLE IX AND SPORTS, at xxi (2007).
65. See supra Section I.B.2.
68. 34 C.F.R. §§106.1–106.71 (2015). Once effective, the regulations provided elementary schools one year (while giving secondary schools and colleges three years) to comply with the law. Id. at § 106.41(d). The biggest hurdle for compliance was, and still is, abiding by a law that is so expansive that it permeates every element of education. The criticism being that without proper guidance such a boundless law would be impossible to follow.
71. See supra Section I.B.2.
“possible doom of intercollegiate sports.”  

3. The “Three-Part Test”

In 1979 the Department of Education’s Office of Civil Rights (OCR) divided its Title IX policy interpretation into three distinct parts: (1) compliance in financial assistance based on athletic ability; (2) compliance in other program areas; and (3) compliance in meeting the interests and abilities of male and female students. It is the third part of OCR’s interpretation that has become both the most important and controversial element of Title IX compliance. This part mandates that schools provide both sexes with the equal opportunities in educational programs or activities. To be in compliance, schools must satisfy just one prong of the following “Three-Part Test”:

(1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or

(2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or

(3) Whether it can be demonstrated that the interests and abilities of the members of [the underrepresented] sex have been fully and effectively accommodated by the present program.

OCR has deemed the first prong, known as the “proportionality test,” to be a safe harbor for universities. In practice however, schools will most likely seek

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72. See CAHN, supra note 58, at 254 (quoting the Executive Director of the NCAA lobbying against the enactment of Title IX).

73. See 44 Fed. Reg. 71,413–14 (Dec. 11, 1979) (to be codified at 45 C.F.R. pt. 26). To comply with part one, institutions must make scholarship aid available to men and women in “substantially equal amounts,” although a dollar-to-dollar split is not required. 44 Fed. Reg. 71,415 (1979). Relating to part two, “identical benefits, opportunities, or treatment,” are not required, so long as “the overall effect of any differences is negligible.” Id.

74. Id.


76. Norma V. Cantu, Assistant Sec’y for Civ. Rights, Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test, Dear Colleague Letter, OFFICE FOR CIV. RIGHTS, U.S. DEP’T OF EDUC. (Jan. 16, 1996), http://www2.ed.gov/about/offices/list/ocr/docs/clarific.html [https://perma.cc/57YH-8U3D]. If proportionality is satisfied, the school will be found in compliance with Title IX. In theory, if proportionality is too difficult to achieve, then an institution has two alternative options to pursue to establish compliance: (1) showing a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the underrepresented sex; and (2) showing that the interests and abilities of the members of the underrepresented sex have been fully and effectively accommodated. See 44 Fed. Reg. 71,415 (1979).
to satisfy the proportionality test rather than the other two prongs.\textsuperscript{77} This means that for all intents and purposes, the safe harbor of proportionality is ostensibly the only way schools show compliance with Title IX.\textsuperscript{78} The following landmark cases have established that educational institutions are essentially bound to the proportionality test to abide by the law.

4. Landmark Cases

The inability to achieve proportionality has fostered an incredible losing streak for Title IX defendants. However, in light of the other two (virtually unattainable) benchmarks provided by OCR, educational institutions have historically had a proclivity towards proportionality. Further, over the years, there have been several critical moments in which Title IX enforcement and jurisdiction have expanded.

The first such expansion of Title IX's power came with the holding in \textit{Cannon v. University of Chicago}.\textsuperscript{79} \textit{Cannon} stands for the proposition that there is a private right of action under Title IX.\textsuperscript{80} Next, in \textit{Grove City College v. Bell}, the Court held that Title IX could be applied to a private school that did not directly receive federal funding, but had a large number of its students receive federal scholarships.\textsuperscript{81} Years later in \textit{Jackson v. Birmingham Board of Education}, the Court found that retaliation against an individual for raising a Title IX...
claim is equivalent to the intentional discrimination prohibited by the law.  

Finally, in *Fitzgerald v. Barnstable School Committee*, the Court held that a Title IX claim does not preclude a simultaneous and related constitutional claim.  

It was in *Cohen v. Brown University* that the Court gave great deference to the proportionality prong of the Three-Part Test. *Kelley v. Board of Trustees of University of Illinois*, reinforced this holding, and was one of the first suits in which male plaintiffs claimed sex-based discrimination. Another first came with *Gebser v. Lago Vista Independent School District*, which was the earliest case to deal with a sexual harassment claim brought by a high school student against her teacher. There, the Court held that to be liable in such circumstances, a school must be on actual notice of such harassment and be deliber-
ately indifferent to it. All of these landmark cases have shaped the definition of Title IX as it is applied today. However, as you will see in the next section, whether Title IX is defined as a failure or success depends primarily on who is providing the definition.

II. A TALE OF TWO NINES

Title IX has at least two faces. On the one hand, it has been lauded as a civil rights success by promoting female representation in sports at unprecedented levels. On the other hand, it has also restricted many opportunities for male athletes, and is often “gamed” to produce nothing more than equality on paper. This Part explores the two conflicting views of Title IX and asks whether either side of the argument has merit.

A. NINE NUMBER ONE: CIVIL RIGHTS SUCCESS

In 1971 fewer than 300,000 girls participated in high school sports, meaning that fewer than 7.42 percent of all high school athletes were girls. In 2011 nearly 3.2 million—or 41 percent—of all high school athletes were female. Furthermore, in 1971 less than 30,000 women participated in college sports; by 2011 that number increased to around 190,000. Moreover, in 1972 women received an average of only 2 percent of their school’s athletic budget—and athletic scholarships for women were unheard of. By contrast, in recent years women have received nearly half of the total nonfootball athletic scholarship amount awarded by Division I schools.

These results are to be celebrated, especially when one considers the short and long-term benefits of participation in sports, including: (1) better overall health; (2) better academic performance; and (3) lessons in teamwork, leadership and confidence. For example, note that nearly 85 percent of female business executives played a varsity sport in high school or college, the majority

87. Id. at 277. The school had failed to implement the proper grievance procedure, but the court would not award damages to plaintiff “unless an official of the school district who at a minimum has authority to institute corrective measures on the district’s behalf has actual notice of, and is deliberately indifferent to, the teacher’s misconduct.” Id.


89. Id.


of which say that their time on the field contributed greatly to their success. Such participation would be unheard of in the pre-Title IX era. The gains women have achieved from Title IX cannot be overstated, but to talk about Title IX as a law that solely affects women would be to only give half the story.

B. NINE NUMBER TWO: CIVIL RIGHTS CATASTROPHE

Title IX was enacted to prohibit discrimination in educational institutions on the basis of sex. This necessarily required the creation of opportunities for women in areas where there previously were none. Today, women arguably have the same educational opportunities as men, and in some respects, women are faring much better than their male counterparts. Nonetheless, when it comes to athletics, the pursuit of proportionality has led some schools to cut men’s teams in order to comply with the law. In short, Title IX was enacted to create opportunities and eliminate discrimination, but it has become a law that creates opportunities for women by reducing opportunities for men—solely because they are men. By cutting back on athletic opportunities for men, universities are able to game the system and avoid coming up with new and dynamic ways to promote opportunities for women.

The current regulations have been in place for decades, and thus educational institutions know what they must do to comply with the law. However, despite the many years since Title IX’s inception, proportionate representation in athletic programs has only been achieved in a few schools nationwide. Furthermore, no school has ever lost its federal funding for failing to comply with Title IX. Thus, not only is the current Title IX compliance system ineffective in reaching its goal of proportionality, it also causes a disparate impact. See generally, Philip Zimbardo, Man, Interrupted: Why Young Men Are Struggling & What We Can Do About It (2016). In fact, for the past 35 years, “women have outnumbered men in American colleges.” See Nick Anderson, The Gender Factor in College Admissions: Do Men or Women Have an Edge?, WASH. POST (Mar. 26, 2014), http://www.washingtonpost.com/local/education/the-gender-factor-in-college-admissions/2014/03/26/4996e988-b4e6-11e3-8020-b2d790b3c9e1story.html [https://perma.cc/5C7A-C9K3]. In the past decade alone women accounted for 57 percent of the enrollment at degree-granting institutions. See id.

95. See 130 CONG. REC. S 4601 (statement of Sen. Stevens).
96. See supra note 2 and accompanying text.
97. See Bracken & Rick, supra note 92, at 73 (The inference drawn here is that certain sports received funding for women but the equivalent was not offered for men.).
100. See Michael J. Cozzillo et al., Sports Law: Cases and Materials 913 (2d ed. 2007) (cutting back on athletic programs allows universities to skirt the real issue of opportunity “rather than develop creative ideas to level the playing field . . . The [question is] whether this approach comports with the letter and spirit of Title IX”).
101. Id.
impact on male athletes. According to opponents, Title IX is a civil rights disaster that sets forth arbitrary benchmarks and has proven to ultimately be self-defeating.

Whether one looks at Title IX as a success or failure, the argument naturally turns on where interest or demand would lie, if equal opportunity was granted. Thus, to truly determine the efficacy of Title IX, one must search for what the natural demand for various educational programs or activities among the sexes is.

III. THE THEORY OF NATURAL DEMAND

Since the inception of the proportionality test, opponents have argued that the goal of proportionality is flawed because it does not account for stronger interest in organized sports among men than among women. Proponents of the test quickly rebut such arguments, pointing to over two millennia’s worth of patriarchal despotism as the cause of such disparity and stating that demand would be equal if women were given the opportunity. Proponents often point to the spike in sports participation among females in the last forty years as the chief example to support their claim. Opponents respond by recognizing the spike in participation but also pointing out that eventually interest plateaued. Further, opponents of the law claim that the proportionality test has embellished interest in sports (as represented in high school and college varsity sports) because the very objective of compliance with the law has become a showing of proportional representation. For nearly half a century, then, the two sides have gone back and forth, but ultimately each side’s argument turns on what demand would be in a natural state.

In promulgating its policy interpretations, OCR has, time and again, held the assumption that equal opportunity to educational activities or programs necessarily means proportional opportunity to educational activities or programs. In short, the underlying rationale for the proportionality test is that, given equal opportunity, demand for educational programs or activities would be equal.
among the sexes. This Part asks whether indeed there is such a thing as natural demand among the sexes. The search for the existence of natural demand necessarily requires inquiry into what current demand is (and how it compares to demand before Title IX), what the underlying cause for that demand is, as well as whether demand is being satisfied. After searching for the answer of whether natural demand exists, this Part concludes by asking whether in light of the findings, OCR’s current proportionality test makes sense.

A. DEMAND FOR SPORTS AMONG THE SEXES

In recent years, there have been some studies that seem to at least support the foundation for an argument that men and women have different degrees of interest in, and thus demand for, organized sports. Proponents of the proportionality test have dismissed these studies as either irrelevant or the symptom of thousands of years of female repression, and thus the very reason for a push toward proportional representation.

1. Evolutionary Predispositions for Physical Competition

In 2016 Professor Robert O. Deaner and his colleagues published a study that stresses the importance evolution plays in creating demand for sports among the sexes. Although the researchers cite many studies, their most controversial contention is that prenatal hormones influence sports interest. The researchers point to several studies that correlate male-typical childhood play and activity patterns with prenatal testosterone. Further, Deaner and his colleagues cite “lower second-to-fourth digit ratio” as being “reliably associated with participation in competitive sports.” Finally, the study notes that “females with congenital adrenal hyperplasia, a disease characterized by heightened prenatal androgen exposure, are more likely than unaffected females to show strong interest in stereotypically masculine sports.” Although the researchers state that there is compelling evidence that prenatal hormones contribute to interest in

112. See generally Russlynn Ali, Assistant Sec’y for Civil Rights, Dear Colleague Letter: Intercollegiate Athletics Policy Clarification: The Three-Part Test–Part Three, OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC. (Apr. 20, 2010), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-20100420.html [https://perma.cc/H4PM-8LXG] (explaining that one of the tests the OCR uses to demonstrate equal opportunity in athleticism is via proportionality).


114. Grasgreen, supra note 106.
116. Id. at 86.
117. Id.
118. Id.
119. Id.
competitive sports, they do not rule out the role of socialization.120

a. Interest in Sports in Contemporary America. In an earlier paper, published in 2012, Deaner and his colleagues conducted three studies to test whether men are evolutionarily predisposed to have a greater interest in sports than women.121 The first study analyzed data from the American Time Use Survey (ATUS).122 The second study was based on observations of unorganized sports and exercise participation at various public parks in four states.123 The third study involved a survey of intramural sport participation on college campuses nationwide.124

The findings from all three studies supported Deaner’s hypothesis that there is greater demand for sports among men as compared to women. According to the first study (ATUS data), females made up only 24 percent of those individuals who reported playing sports on a daily basis.125 The second study (observation of public parks) revealed that females comprised only 12 percent of those individuals who played sports in public parks.126 Finally, the third study (survey of intramural sports participants) revealed that females comprised only 26 percent of those individuals who participated in intramural sports.127 These numbers are in stark conflict with statistics regarding varsity athletic participation in American high schools.128

The studies also revealed that men played for longer durations and more frequently than women.129 Additionally, the studies showed that the difference in sport participation was greater among the sexes in individual sports than it was in team sports.130 Despite these disparities, Deaner and his colleagues found that men and women spend approximately the same amount of time engaging in general exercise.131 For men, “15% of their physical activities involved team sports and 10% involved individual sports.”132 On the other hand, for women, “4% [of their physical activities] involved team sports and 5% involved individual sports”.133

120. Id. at 73.
121. Deaner et al. (2012), supra note 113.
122. “The ATUS is a large, representative sample survey of all U.S. residents age 15 and older that was conducted continuously from 2003–2010 and included responses from 112,000 individuals” nationwide. Deaner et al. (2012), supra note 113, at 3.
123. See Deaner et al. (2012), supra note 113, at 5. The public park observations were conducted in Grand Rapids, Michigan; State College, Pennsylvania; Tallahassee, Florida; and New Paltz, New York. The observations occurred during the summer of 2011 and spring of 2012.
124. Id.
125. Id. at 9.
126. Id. at 5.
127. Id. at 9.
128. In 2012, women comprised 42 percent of individuals participating in high school athletics. BRACKEN & IRICK, supra note 92, at 9.
130. Id.
131. Id.
132. Id. at 10.
133. Id.
b. The Limitations of Deaner’s Studies. Deaner’s 2012 studies suffer from several limitations. For example, in the first study, the data obtained from the ATUS involved self-reports of physical activity. Such reports typically show low or moderate criterion validity, meaning that respondents may have just selected what they felt was the right answer, perhaps responding to gender norms or expectations. Additionally, the second study was potentially limited in that researchers looked at physical activity occurring in only four states. Such a concentrated regional study may have skewed results. Consider, for example, the culture of athletics in Seattle as opposed to El Paso. Finally, the third study only looked at participation in intramural sports across college campuses. In a sense, this weakens the findings because these individuals are not so interested in sports to the point that they have achieved varsity participation, but it could also strengthen the findings, since these individuals have no incentive (i.e. scholarship money, fame, or external pressure to participate) other than their sincere interest to participate in the sport. Although limitations are present in all three studies, none of them go as far as to discredit the findings completely. Thus, if we are to accept Deaner’s findings, we can suggest that whereas interest in general exercise is virtually equal, American males are more interested in participating in sports than their female counterparts.

2. Differences in How Boys and Girls Spend Their Time Around the World

Turning away from Deaner’s studies, it may also be useful to look at the differences in how boys and girls spend their time in various countries around the western world. By doing so, we can determine whether there is something uniquely American about the disparity in interests, or if these differences can be attributed to either an underlying biological predisposition or a larger social structure present throughout most of Western society. Indeed, there have been various studies conducted which pose this question.

a. The Australian Study. Researchers from the University of Australia conducted a study in 2007 that sought to achieve a greater understanding of time use among the sexes. These researchers surveyed 2200 Australian adolescents, asking them to recall their time use during a twenty-four hour period. The study found that Australian boys spent 17.7 percent of their time engaging

134. Id. at 3.
136. Seattle, Washington has been regarded as having the highest percentage of people engaged in physical activity, whereas El Paso, Texas has been regarded as having the lowest percentage of people engaged in physical activity. See Richie Bernardo, 2016’s Best and Worst Cities for an Active Lifestyle, WALLET HUB (Jan. 24, 2016), http://wallethub.com/edu/best-and-worst-cities-for-an-active-lifestyle/88177 [https://perma.cc/343F-W7JZ].
137. Deaner et al. (2012), supra note 113, at 5.
139. Id.
in screen-based activities. During the same time-period girls spent 14.2 percent of their time engaging in screen-based activities. Similarly, the study revealed that boys spent 10.7 percent of their day participating in physical activities, and girls spent 9.2 percent of their time doing the same. On the other hand, the same study found that girls spent 4.7 percent of their day socializing, and boys spent 3.4 percent of their daily time doing the same. Girls were also found to have spent more time studying than boys (2.0 compared to 1.7 percent) and doing household chores (4.7 as opposed to 3.4 percent). The researchers thus concluded that “[t]here are gender-specific differences in time use behavior among Australian adolescents,” and that these “results . . . reinforce existing time use [gender-based] stereotypes.”

b. The Danish Study. Researchers in Denmark conducted a similar survey to explore the daily activities of Danish children. Accelerometer data of various physical activities as well as questionnaire data was collected from 500 children at the pre-school and third grade levels. The study revealed that boys that were six to seven years old were more physically active than girls, by a margin of 18 percent. The study concluded that the difference in physical activity was due to the differences in the amount of self-organized physical activity, such as getting together to play a game of soccer.

3. Who Wants to be a Star Athlete Anyway?

Before Title IX was enacted, Professor James S. Coleman conducted a study, which asked high school students how they would like to be remembered. He crafted the survey with predetermined options from which the students could choose. Coleman found that participating in athletics was the most important predictor of how boys would like to be remembered. Among those surveyed, boys ranked highest that they would like to be remembered as an “athletic star.” Athletic opportunities were extremely limited for girls when this study was conducted. As such, instead of presenting “athletic star” as an option from
which girls could choose, Coleman presented “being cheerleader” as the comparable option. In their response, girls ranked “being a leader in activities,” highest.

Since the enactment of Title IX, and in many other subsequent surveys, several scholars have attempted to replicate Coleman’s original study. However, the researchers conducting these studies recognized the dramatic increase in athletic opportunities for girls since 1972. As such, these researchers no longer substituted “athletic star” with “being cheerleader.” Instead, these studies posed the same four options for all high school students that were surveyed. The revised possible responses were: (1) brilliant student; (2) most popular; (3) athletic star; and (4) leader in activities. Despite the rise in both female opportunity and participation in athletic programs, a majority of high school girls wanted to be remembered as either “leaders in activities” or “brilliant students” (depending on the study), but a majority of high school boys continued to want to be remembered as “athletic stars.” Furthermore, in a 1989 survey, more than half of the high school males who responded identified being an outstanding student and outstanding athlete as codeterminants of future status. In contrast, “only 20 [percent] of the females [surveyed] viewed the dual roles of student and athlete as important, while 34 [percent] identified the single category of student as the primary determinant for future status.”

4. Hegemony in Sport: Is this a Man’s World?

Participation in sports has been described as a product of culture and “a reflection of the ideologies of dominant values and ideals, as portrayed in what sport means, how play is structured, who may participate, and notions of ideal athletes.” In this sense, sports appear to be regarded as a social institution that propels male dominance and female subordination. As such, scholars

153. See id. at 47–48.
154. Id. at 47.
156. See Kane, supra note 155, at 254.
157. Id. at 256–57.
158. See generally supra note 155 and accompanying text.
159. See Goldberg & Chandler, Role of Athletics, supra note 155, at 242–43, 244–45.
160. Id. at 244.
have linked the concept of male dominance in sports as a result of the perceived biological and physical superiority of males, ultimately manifested in dominance and power in society at large.\textsuperscript{163} These scholars argue that it is the values that exist within sports that serve to reinforce such dominance. For example, traditional contact sports reinforce characteristics such as risk, aggression, toughness, and strength—characteristics that historically have been perceived as masculine.\textsuperscript{164}

Such a structure arguably reinforces the more widespread inequalities that exist among the sexes in society today,\textsuperscript{165} which ultimately harms both women and men. On the one hand, women are driven to abandon a perceived feminine identity and the traits that have historically been considered feminine to achieve success in athletics.\textsuperscript{166} On the other hand, men who wish to be successful in sports must suppress their sensitivities and subscribe to structural gender-roles.\textsuperscript{167} In fact, scholars have recognized that “systems of inequality and exclusion exist as effects of a dominant group ideology of an elite minority who control the major factions of sports: economic, political, and cultural.”\textsuperscript{168} Men who wish to be successful in sports are expected to embrace their societal imposed gender roles, whereas women who wish to be successful in sports must reject the historical feminine identity and replace it with one that resembles the traditional male characteristic. Thus, the patriarchal nature of athletics has harmed and limited both men and women.
a. Sports in Light of Gender Norms. In 2009, Professor Marie Hardin conducted a survey of 340 college students in America and found that even students who grew up with Title IX perceive most sports as masculine.\textsuperscript{169} Predictably, respondents categorized sports that emphasized aggression, risk, and strength (football, hockey) as masculine, and categorized sports that emphasized aesthetics (figure skating, gymnastics) or sports that were traditionally dominated by women (volleyball) as feminine.\textsuperscript{170} Furthermore, team sports (with the exception of volleyball and soccer) were overwhelmingly viewed as masculine.\textsuperscript{171} Remarkably, the study found that these viewpoints were not notably different than those of individuals who were surveyed forty years ago.\textsuperscript{172}

This study also revealed that, for the most part, men and women view the masculinity of sports similarly.\textsuperscript{173} The exception to this is with sports, such as basketball, which are dominated by men, but have rapidly growing female participation rates.\textsuperscript{174} In this instance, men tended to see the sport as masculine whereas women tended to see it as gender neutral.\textsuperscript{175} The “[r]esearch suggests that if women perceive themselves as being able to participate in [the] . . . sport, they would tend to see it as [gender] neutral (as opposed to masculine)”—but they would not view the sport as purely feminine.\textsuperscript{176}

Perhaps the most compelling findings of this study were in the area of action sports.\textsuperscript{177} These sports were included in the survey because of their unique position in history as newly minted sports, as well as their incorporation of both perceived masculine elements (risk/danger) and feminine elements (aesthetics/style).\textsuperscript{178} When presented with these sports, male and female respondents to the survey categorized them as masculine sports.\textsuperscript{179} This result is compelling because these sports became popular among a new generation of athletes, who came into existence many years after the passing of Title IX. The result is even more compelling when one considers that these sports are individual (as opposed to team-based) and judged on aesthetics, much like gymnastics or figure skating.\textsuperscript{180} These findings suggest that although action sports came into existence after Title IX (in an era of heightened sensitivity toward gender equality), they are expanding the definition of masculinity to include historically per-

\textsuperscript{170}. Id. at 209, 221.
\textsuperscript{171}. Id. at 209, 221.
\textsuperscript{172}. See id. at 220.
\textsuperscript{173}. Id. at 221.
\textsuperscript{174}. Id.
\textsuperscript{175}. Hardin & Greer, supra note 169, at 221.
\textsuperscript{176}. Id.
\textsuperscript{177}. Id. at 222. Action sports include skateboarding, snowboarding, BMX, motocross and any other activity that is typically broadcasted during the ESPN “X-Games.” Id. at 214–15.
\textsuperscript{178}. Id. at 222.
\textsuperscript{179}. See id. at 223.
\textsuperscript{180}. Hardin & Greer, supra note 169, at 222.
ceived feminine traits, which ultimately constricts the definition of femininity.

b. Participation vs. Media Consumption and Socialization. The results of Hardin’s study are twofold: First, these results suggest that, on the one hand, participation in sports seems to (at least to some degree) neutralize the perceptions of certain sports as masculine—but increased female participation does not change the perception of sports to feminine. On the other hand, individuals who reported participation in sports with traits that were previously perceived as neutral and feminine now view them as being more masculine. One reason behind this paradox may be that “participation informs individuals about the necessity for the strength, power and stamina required for a broad range of sports, even those that may not overtly display these attributes.”

Second, following sports through media coverage also seems to impact the sex-typing of sports, and therefore relative interest among the sexes. According to Professor Michael Messner’s “manhood formula,” sports coverage in the media reinforces traditional gender roles through an emphasis on toughness and dominance in mediated images. Therefore, Hardin posits that it is not so much the adherence to traditional gender roles and values in sports that reinforces these perceptions, as much as it is the consumption of “ubiquitous images of men” participating in sports. Thus, even those individuals who do not participate (or follow sports coverage for that matter) cannot escape the presentation of male dominance in sports on television, as well as in magazines and newspapers. Yet this could also mean that with enough repetition of an activity, and enough consumption of media at critical phases of development, the gender designation of a sport—and therefore relative interest in a sport—could be changed.

181. Id. This phenomenon should be worrisome to any advocate of gender equality because it necessarily means the exclusion of women in sports that were created even in a purported “post-gender” world.
182. Hardin & Greer, supra note 169, at 222.
183. Id. at 210.
184. Id. at 222.
185. Id. “[C]onsider the power behind a hit across the net in a volleyball game or the force behind moving a ball downfield during a soccer match. Because sporting attributes such as strength are considered masculine, those who have participated are more likely to type even sports that don’t ‘look’ masculine as, indeed, more masculine.” Id. at 222–23.
186. Id. at 223. Michael Messner is a professor of sociology and gender studies at the University of Southern California, and has identified ten recurrent themes in televised sports (including aggression, militarism, and violence) that become entrenched in young boys to produce a portrayal of masculinity to the outside world. See Michael A. Messner et al., The Televised Sports Manhood Formula, 24 J. SPORT & SOC. ISSUES 380, 380–94 (2000).
187. Hardin & Greer, supra note 169, at 223.
188. The argument follows that repeated depictions of men performing gymnastics might well make the sport seem more “masculine.” Conversely, repeated imagery of women playing football might make the sport seem more “feminine.”
5. What Does This Mean in the Context of Natural Demand?

Although it is not clear what natural demand for sports among the sexes would be, what is clear is that, according to the studies cited above, men currently have a greater interest in sports than women. Such disparity in interest exists not only in the United States, but internationally, and the disparity has survived even with the existence of Title IX.189 Furthermore, it is evident that it is not necessarily participation in sports that changes the perception of a sport’s gender designation, but actually the consumption of mediated images.

The clearest example of this can be seen with soccer. By all accounts, soccer is deemed to be a contact sport. It requires aggression, strength, and speed.190 However, soccer has been embraced by girls in American society.191 Using Messner’s theory, we could attribute this spike in interest to achievements such as the 1999 Women’s World Cup, which made Mia Hamm and Brandi Chastain household names.192 A similar argument can be made with the popularity of women’s basketball.193 This raises the question of whether Messner’s theory is limited to interest in sports. More importantly, these findings beg us to revisit the proportionality test because, as the studies reveal, interest in sports participation is not proportional and an opportunity to participate, without more, is not enough to foster interest.

B. REVISITING THE PROPORTIONALITY TEST IN LIGHT OF THE SOCIAL SCIENCE RESEARCH

Perhaps much of the social science findings mentioned above are intuitive or common sense. Women and men are inherently different, and whereas opportunity to participate in various varsity sports should be equal, the demand to participate is not. This conclusion necessarily requires addressing the somewhat paradoxical question of whether proportionality and parity are the same thing. Although the intentions behind the lawmaking of the 1970s were good, they were not based on social science research.194 In fact, it was not until September of 2015 that President Obama called for the inclusion of social science research

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189. For example, The Women’s Sport Foundation has found that by middle school, more girls are dropping out of sports than boys, and by the time they graduate high school, more girls than boys have never participated in organized sports. Women’s Sports Found., Go Out and Play: Youth Sports in America 128–29 (2008), http://www.womenssportfoundation.org/Content/Research-Reports/Go-Out-and-Play.aspx [https://perma.cc/HW9B-7FNG].
190. Hardin & Greer, supra note 169, at 211.
194. See supra Section I.B.
in the legislative process. Finally, remember that OCR operates under the assumption that interest in sports is equal among the sexes. Despite this fact, approximately 80 percent of all educational institutions are not in compliance with Title IX, and yet federal money has never been withdrawn from any institution. The next Part of this Note revisits Title IX and proposes a revision to its application in light of the social science.

IV. TITLE IX REDUX

Having reviewed the history of Title IX and the corresponding social science research, it is important to ask whether the system currently in place is effective. In light of the findings in the previous Parts of this Note, this Part criticizes the current application of Title IX and offers a new way to approach Title IX issues to achieve the desired result of gender equity in education. This Part first focuses on the shortcomings of OCR’s proportionality test, and then moves on to see if Title IX can be better applied to achieve equality in STEM programs and academia, as well as to suppress sexual harassment and assault across college campuses.

A. THE PROPORTIONALITY TEST IS OUTDATED, INEFFECTIVE, AND MUST BE DISCARDED

The underlying assumption of OCR’s proportionality test is that the interests of men and women are equal. The agency’s position has repeatedly been that way since interest is equal, representation must be proportional to the given population. However, the social science research suggests otherwise. In fact, men and women have different degrees of interest in sports. The root cause of such interest is not exactly clear. Although any effort to find what demand for sports is in the state of nature is futile, what we do know is that socialization, exposure to mediated images, and, to some extent, participation shape interest. Thus, OCR’s goal should be to measure interest, and then seek to create opportunity based on that interest. Furthermore, if the goal is indeed to create proportional interest in sports, then parents, educators, and society at large must begin to foster that interest at critical stages of child development.

196. Through its policy interpretations, OCR has time and again accepted this view. See generally Bonnette, supra note 111, at 24; Ali, supra note 112; Roma Stewart & Patricia Roberts, A Policy Interpretation: Title IX and Intercollegiate Athletics, OFFICE FOR CIV. RIGHTS, DEP’T OF EDUC. (Dec. 11, 1979), http://www.ed.gov/about/offices/list/ocr/docs/t9interp.html [https://perma.cc/FLQ5-VKTH].
197. See Glover, supra note 103, at 117.
198. See Ali, supra note 112, at 1.
199. Id.
200. See supra Section III.A.
201. Id.
202. See supra Part III.
When OCR promulgated the proportionality test in 1974, it made an assumption as to where the interests of male and female students lie. Rather than first determining where interests lie, and then promulgating a rule, OCR did essentially the opposite. The agency promulgated a rule to determine where it believed interests should lie, given equal opportunity. By doing so, OCR put the cart before the horse. This “if you build it, they will come,” approach is misguided.\(^{204}\) Instead, OCR should first target where demand lies and then establish a rule around the existing demand.\(^{205}\)

Since interest is not equal among the sexes, the proportionality test should be discarded. Instead, a policy that caters to the interests of each sex should be adopted and that policy should be coupled with a movement to foster interest as well. Opponents to this position will likely say that it will harbor an environment of segregation and disparate treatment. Yet on the subject of gender and sex, the United States Supreme Court has repeatedly held that when “real differences” exist, disparate treatment may be justified.\(^{206}\)

1. Proportionality was Deemed to be the Measure of Equality in a Time When Male College Students Outnumbered Female Students

A law that is rooted in structuralism should adapt to the changes in society. In the decade preceding the adoption of the Three-Part Test, male students outnum-

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204. Of course, this is an allusion to a variation of the now famous mantra that was popularized in Universal Pictures’ *Field of Dreams* (1989). Title IX scholars have used the mantra to support their argument for proportionality. See, e.g., Brake, supra note 109, at 94 (explaining that the holding in Cohen was correct and stating that “if you build it, they will come”). Professor Dionne Koller argues that this Field of Dreams narrative (in which more opportunities to participate in “the male model for sport” would inspire more female athletes) is an essentialized view of what women want from sports, and neglects that some women may prefer a model that does not emphasize characteristics traditionally perceived as masculine but rather caters to their own experience. Dionne L. Koller, *Not Just One of the Boys: A Post-Feminist Critique of Title IX’s Vision for Gender Equity in Sports*, 43 Conn. L. Rev. 401, 456 (2010).

205. In theory, the “interests and abilities” prong of the Three-Part Test already takes this into account, and if a college does not provide proportional opportunities, or does not have a history of program expansion, it can still adhere to the law by demonstrating that interests and abilities have been fully accommodated. In practice however, as noted supra in Section I.B.3, proportionality has become the only way schools comply with Title IX in the realm of varsity sports.

206. See, e.g., Dothard v. Rawlinson, 433 U.S. 321, 336–37 (1977) (ruling that female prison guards were more susceptible to male sexual attack, and therefore unqualified to hold close contact job positions in an all-male maximum security prison); Phillips v. Martin Marietta Corp., 400 U.S. 542, 546–47 (1971) (Marshall, J., concurring) (noting that discrimination based on business necessity for jobs that require specific physical characteristics may be justified). The rationale behind such disparate treatment may also be explained with the example of “potty parity.” Literally speaking, equal access to public toilets would mean a 1:1 female–male ratio of toilets in public restrooms. However, anyone who has attended any public event is familiar with the notoriously long lines at the women’s restroom. This may be because women spend more time in restrooms (whether that be for physiological or cultural reasons). Some studies even suggest that women spend twice as long as men in the restroom. See Kathryn H. Anthony & Meghan Dufresne, *Potty Parity in Perspective: Gender and Family Issues in Planning and Designing Public Restrooms*, 21 J. Planning Literature 267, 278–79 (2007). Thus, state legislatures throughout the country have enacted regulations that require a 3:2 or even 2:1 female–male ratio of toilets. See id. at 278–79.
bered female students, and thus any push for proportionality in educational programs would necessarily reflect that. 207 Today however, female students greatly outnumber their male cohort. 208 Therefore, proportional representation in sports would create a reality where there would be more female NCAA athletes than male athletes, even though there is greater demand among males to participate in sports. Thus, a proportionality test that was crafted in an era when male students outnumbered female students should be re-examined.

This is particularly notable when you take the social science research into account. Any push for proportional representation in college sports necessarily means that the interests of males will not be fully satisfied, whereas the interests of females in sports will be overcompensated for. 209 Such a system is not a push for equality, but rather a push for political correctness, and it fails to see that parity and proportionality may not necessarily be the same thing. In short, OCR is treating the interests of male and female students the same, even though the data suggest that interest, and therefore demand, is different.

Opponents to this argument will further suggest that the exact reason that women have a lesser interest in sports is why Title IX is needed. 210 These individuals would argue that it is generations of oppression and gender conformity that has led to this discrepancy in interest, and it is the reason why equal opportunity is desperately needed. The response to these individuals is that instead of taking the top-down approach to establishing equal interest, we must look for an approach that works from the ground floor. Studies have shown that participation alone is not enough to alter perceptions of masculinity in sports. 211 What is needed is a paradigm shift, a movement towards changing the mediated images that society consumes, and furthermore, a movement towards changing society’s outdated norms. This type of movement must come from society itself, and should not necessarily be led by a federal agency or any singular institution. It is high time we acknowledge that virtually all sports were “defined without the benefit of women’s voices or experiences, but only with the needs and desires of male athletes, and men, in mind,” and that any policy that pushes proportional representation in sports, still does so under the male dominated model. 212 Such a paradigm requires female athletes to assimilate into this model

207. When Title IX was adopted in 1972, there were an estimated 3,791,000 male college students and 2,655,000 female college students enrolled in a full-time program. See U.S. DEP’T OF COMMERCE BUREAU OF THE CENSUS, SCHOOL ENROLLMENT—SOCIAL AND ECONOMIC CHARACTERISTICS OF STUDENTS: OCTOBER 1979, at 2 (1980). Interestingly, by the fall of 1979 (nearly one year after OCR promulgated its Three-Part Test), female college students (5,900,000 total) outnumbered male college students (5,480,000) for the first time since World War II. See id.

208. The National Center for Education Statistics estimates that there were nearly three million more female students (11,700,000) enrolled full-time in colleges and universities nationwide than male students (8,800,000) in 2016. NAT'L CTR. FOR EDUC. STATS., http://nces.ed.gov/fastfacts/display.asp?id=372# [https://perma.cc/TZL4-5JYP].


210. See Grasgreen, supra note 106.

211. See supra Section III.A.4.

212. See Koller, supra note 204, at 456.
rather than allow them to use their own experience to define what it means to be an athlete.

2. We Must Acknowledge the Disparity in Interest in Sports Among the Sexes and Search for Programs or Activities that Satisfy the Female Interests that Presumably Lie Somewhere Else

The studies in Part III suggest that there are differences in interest for various activities or programs among male and female students. One example is competitive cheerleading. Although modern cheerleading shares more in common with gymnastics than anything else, the NCAA has failed to recognize it as a sport. By recognizing cheerleading as a sport, the NCAA will effectively recognize that there are more sports that exist outside of the historical male athlete’s domain. In doing so, the NCAA will take the first step in recognizing that although female students may have interests that lie elsewhere, those interests can still be regarded as interests in sports. Thus, the current list of NCAA Division I athletic programs must be altered to include more programs that exist outside the perceived male athlete’s domain.

B. THERE IS A LARGE SECTOR OF EDUCATION (OUTSIDE OF SPORTS) THAT DESPERATELY NEEDS TO BE “TITLE NINED”

Over the years, the focus on Title IX enforcement in college sports has been distracting from the historical, and much needed, focus on Title IX enforcement in the other areas of education that are plagued with inequality. Specifically, Title IX should be more aggressively applied in the areas of STEM, academia, and protection against sexual harassment. These were among the first areas of education lawmakers sought to affect with the enactment of Title IX. Today, almost fifty years after Title IX became the law of the land, these areas are still...
in desperate need of being “Title Nined.” Women are either greatly underrepresented or disproportionally impacted by the areas mentioned above. As we look toward the next fifty years of Title IX’s existence, we must ask whether discrimination in these areas can be eliminated.

1. The Suppression of Girls in STEM Fields

Recently, organizations like the National Science Foundation, as well as the Department of Energy, have set up programs to investigate sexual discrimination at universities in the context of federal grants for the STEM fields. Proponents of these investigations say that there is evidence that women face discrimination in the sciences. Opponents of this movement claim that women’s interest in the science is not the same as men’s. Whatever the case may be, women make up approximately “half of medical students, 60 percent of biology majors, and 70 percent of psychology Ph.D.’s.” Although women earn “the majority of doctorates in both the life sciences and social sciences,” they remain a minority in the physical sciences and engineering.

In 2015, the Department of Education conducted a study that sought to find the difference in interest in STEM among high school graduates. The study revealed that among high school graduates, 50 percent of boys indicated that math was one of their favorite subjects in school, whereas 43 percent of girls felt the same way. In the same study, 48 percent of boys and 34 percent of girls indicated that science was one of their favorite subjects. This difference in interest is apparent among virtually all racial/ethnic groups. The study also found that a “[v]ariation existed in the percentages of male and female 2009 high school graduates who earned credits for STEM courses.” However, although there is a difference in interest in STEM among young adults, these differences are not necessarily apparent among younger boys and girls.

219. Id.
220. See id.
222. See Tierney, supra note 218.
223. Id.
225. Id.
226. See id. at 6.
227. Id. at 7. Compared to males, higher percentages of females earned credits in algebra II, pre-calculus, advanced biology, chemistry, and health science/technologies. However, higher percentages of males earned credits in physics, engineering, engineering/science technologies, and computer/information science. Id.
In contrast, among elementary school students, interest in STEM is essentially equal among the sexes. A study of American fourth-graders revealed that approximately two-thirds of boys and girls reported liking math and science. However, when these students were asked to draw what a scientist looks like, “most portray[ed] a white male in a lab coat.” Furthermore, compared to the depiction of male scientists, any portrayal of a female scientist made the scientist “look[] severe and not very happy.” These perceptions are coupled with the implicit bias teachers often have when interacting with boys and girls during STEM lessons. In light of such perceptions and stereotypes, it is no wonder that by the eighth grade, boys are nearly twice as interested in “STEM careers” as girls.

a. The Gender Gap in STEM Translates to Fewer Advanced Degrees and Fewer Careers in STEM for Women. The gender gap that is evident at the high school level remains deeply entrenched in college and graduate school. Although at both college and graduate levels women have “earned more STEM degrees each year,” they are merely keeping “pace—rather than catching up—with their male counterparts.” “In 2014, only 6 percent of associate degrees and 13 percent of bachelor’s degrees granted to females were in a STEM field.” On the other hand, “20 percent of associate degrees and 28 percent of bachelor’s degrees granted to males were in STEM fields.” This disparity carries over to the graduate level, where only “10 percent of degrees earned by females were in STEM,” compared to “24 percent of graduate degrees granted to males.” What is worse is that ultimately, although women comprise 48 percent of the workforce in the United States, they comprise only 24 percent of STEM workers in the country. These numbers will disturb anyone who

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229. Id.
230. Id.
231. Id.
232. Id. “Biases are persistent, and teachers often interact more with boys than with girls in science and math. A teacher will often help a boy do an experiment by explaining how to do it, while when a girl asks for assistance the teacher will often simply do the experiment, leaving the girl to watch rather than do. Research shows that when teachers are deliberate about taking steps to involve the female students, everyone winds up benefiting.” Id.
233. Id.
235. Id.
236. Id.
237. Id.
knows that women with careers in STEM earn nearly 33 percent more than women in non-STEM careers.\textsuperscript{239}

\textit{b. Fewer STEM Careers Means Fewer STEM Mentors.} Mentors are essential for encouraging STEM careers.\textsuperscript{240} For example, although 80 percent of teens surveyed by Lemelson-MIT responded that they felt prepared to pursue a career in STEM, two-thirds indicated lack of exposure and understanding of a particular STEM field as reason not to pursue the career path.\textsuperscript{241} This study suggests that teens need to be able to identify with a particular field to be interested enough to pursue it and is in some ways similar to the consumption of mediated images discussed earlier in Part III.\textsuperscript{242} In 2014, the Bureau of Labor and Statistics announced that STEM careers are expected to grow to more than 9 million between 2012 and 2022.\textsuperscript{243} One of the ways to encourage interest among the next generation of STEM workers is by linking them with individuals currently working in STEM fields.\textsuperscript{244}

The disparity in current STEM workers necessarily means that there are fewer STEM mentors out there for women when compared to men.\textsuperscript{245} In this regard, the White House has also recognized a need for the focus on linking girls with STEM mentors especially.\textsuperscript{246} The reality is that the fewer women there are in STEM careers today, the less likely girls are to see themselves in these careers in the future.\textsuperscript{247} Studies have shown that in the United States, girls and boys are equally interested in STEM, and thus there is some argument to be made that demand for STEM in the state of nature is equal among the sexes.\textsuperscript{248}

\begin{thebibliography}{99}
\bibitem{239} Id.
\bibitem{240} See Ilana Schoenfeld, \textit{Teens Prepared for Math, Science Careers, Yet Lack Mentors: Lemelson-MIT Invention Index Uncovers Teens’ Views}, MIT NEWS (Jan. 7, 2009), news.mit.edu/2009/lemelson-teens-0107 [https://perma.cc/7HMT-RYE4] (“Despite interest and feelings of preparedness, nearly two-thirds of teens indicated that they may be discouraged from pursuing a career in [STEM] because they do not know anyone who works in these fields (31 percent) or understand what people in these fields do (28 percent).”).
\bibitem{241} Id.
\bibitem{242} See supra Section III.A.4.b.
\bibitem{244} Million Women Mentors, Advancing Women and Girls in STEM Careers Through Mentoring, Facts, www.millionwomenmentors.org/facts [https://perma.cc/6LYN-4V66].
\bibitem{247} See Back to School, supra note 228.
\bibitem{248} Id.
\end{thebibliography}
2. Representation in Academia

One of the original stated purposes of Title IX was to promote the representation of women in academia.249 Think back to Bernice Sandler’s experience with the University of Maryland, and Senator Bayh’s statements as he sponsored Title IX on the senate floor.250 Almost fifty years later, women comprise only 24 percent of all full (tenure or tenure-track) professors in the United States.251 In New Jersey, women actually outnumber men at the assistant professor rank (51 percent compared to 49 percent).252 Furthermore, a 2005 study revealed that only 10 percent of physics faculty members in universities nationwide are women.253 Thus, although women and men are represented in roughly equal numbers in lower faculty positions, women are outnumbered by men three to one in leadership positions in academia.

3. Demand for Protection Against Sexual Harassment

Although Title IX has gained popularity as the law that governs college sports, it is important to keep in mind that Title IX is virtually the only federal law that protects against sexual harassment and assault in schools. OCR’s 1997 advisory letter on sexual harassment recognizes two types of sexual harassment in educational institutions.254 The first is quid pro quo harassment which involves requests for sexual favors, usually by a school employee to a student, in exchange for some type of educational participation or benefit.255 The second is hostile environment harassment, which involves sexually-driven conduct that is so severe, persistent or pervasive that it limits a student’s ability to benefit from educational activities.256 Courts have held schools liable for student-to-student and teacher-to-student sexual harassment under Title IX.257 In the context of student-to-student harassment, the Supreme Court stated in Davis v. Monroe County Board of Education that the term “sexual harassment” applied only to misconduct that is so severe, pervasive, and objectively offensive that it deprives the harassed student access to educational opportunities.258 To hold a school liable for monetary damages, the victim of harassment must demonstrate that school officials had actual knowledge of the harassment and

249. See supra note 49 and accompanying text.
250. See supra Section I.A.
252. Id.
255. Id.
256. Id.
were deliberately indifferent to it.259

A 2005 study focusing on sexual harassment at the college-level revealed that colleges and universities throughout the country still have much work to do to create an educational atmosphere that is free from bias and harassment.260 Such a harassment-free environment is fundamental to ensuring that all students are given an equal opportunity to excel in their studies. According to this study, most college students fall victim to some type of sexual harassment.261

a. Most Harassment Goes Unreported. Approximately two-thirds of college students suffer from some type of sexual harassment.262 However, only 10 percent of these students report their experience to the proper university authorities.263 Furthermore, even a fewer percentage of those who report their experience pursue Title IX claims.264 Sexual harassment occurs in every college in the country and nearly everywhere on campus, including common spaces, university housing, and even in the classroom.265

b. Men and Women are Equally Likely to be Harassed, but Women are Much More Likely to be Assaulted. Although they are being harassed in different ways, approximately 62 percent of women and 61 percent of men in college reported that they experienced some type of sexual harassment while in school.266 Female students are more likely to be victims of physical harassment and male students are more likely to be called a derogatory or homophobic name.267 Further, an equal percentage of male and female students reported that they were forced by a harasser to do something sexual other than kissing.268 Turning specifically to sexual assault, it is estimated that one in five women and one in sixteen men are sexually assaulted in college.269

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259. Id.
261. Id.
262. Id. at 2.
263. Id. “More than one-third of college students do not tell anyone about their experiences with sexual harassment. Those who do confide in someone usually tell a friend. Female students are more likely to talk to someone about their experiences than are male students . . . . “ “[T]he top reason that students give for not reporting sexual harassment is that their experience was not serious or ‘not a big deal.’” Id. at 4.
264. Id. at 2.
265. HILL & SILVA, supra note 260, at 2.
266. Id. at 17.
267. Id. at 3, 17.
268. Id. at 3.
c. Men are More Likely than Women to be Harassers. The majority of male students admit to have sexually harassed someone while in college. In fact, 51 percent of male college students reported that they harassed someone at some point during their college career. It has also been estimated that 99 percent of all sexual assault is perpetrated by men, a majority of whom are white. Moreover, in a survey on male sexual coercion, 23 percent of men admitted getting a date intoxicated to engage in otherwise unwanted sex, and three percent openly admitted to raping their date. Of the students that responded, one-fifth reported being harassed by female students. Furthermore, approximately 31 percent of female students admitted to committing some type of harassment. These numbers suggest that female students commit a significant percentage of the harassment occurring on campuses. Thus, although men are more likely to be perpetrators of sexual assault, both men and women behave in ways that are viewed by others as unwanted and sexually charged.

CONCLUSION

Title IX was enacted into law in 1972, and for nearly 50 years OCR, judges, legislators, and school administrators have grappled with how to apply the law. Years after the law’s enactment, OCR promulgated the proportionality test: a policy interpretation that, in light of the available social science research, seems arbitrary and capricious. Studies have shown that interest in sports is not equal among the sexes, yet OCR still treats it as such. To revive the true spirit of Title IX (that is, to halt sex discrimination in educational institutions) we must first dispose of the proportionality test. Otherwise, male athletes with sincere interest in sports will continue to be neglected in favor of female athletes who may not share the same degree of interest. Furthermore, and more importantly, we must shift our focus away from sports altogether, as higher education’s prioritization of athletics over education has become nothing short of alarming. There must be a greater focus on eliminating discrimination and promoting equal opportunity in the areas of STEM and academia, as well as a push towards increasing protection against sexual harassment and assault. Tragically, as the studies presented in this Note have shown, inequality in these areas still exists.

Thirty years ago Edward S. Herman and Noam Chomsky proposed an idea that the mass media and communication industries in the United States operate under a model that distorts facts to promote the agenda of those in power. In
their now renowned book, *Manufacturing Consent*, Herman and Chomsky state that this distortion of facts to match politics is done to produce a type of synthetic consent, allowing for the adherence to desired normative strictures (rather than meritoriously achieve the consent of a fully informed public).  

Analogously, in the last forty-five years of Title IX’s history, the law has been applied pursuant to a model that has served to do little more than fabricate the perception of equality, rather than actually achieve equality in both a meaningful and meritorious manner.  

In the next forty-five years, Title IX must be applied in a manner that actively identifies and addresses real inequalities, rather than focus on a symbolic rally point to superficially affirm the legitimacy of an otherwise outdated and self-defeating law. It is this author’s sincere hope that, someday soon, Title IX will have gained popular status not simply as the law that made college sports accessible to women, but as the law that eradicated sex-based discrimination in education.

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