Accidental Equality: How Public and Political Backlash to the Expansion of Title IX Drove Gender Equality into Athletics

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When Title IX was first proposed on the Senate floor in 1972, Senator Birch Bayh introduced the bill as a solution to gender disparities in "admissions procedures, scholarships and faculty employment, with limited exceptions."[1] Title IX passed through Congress and was signed by Republican President Richard Nixon on this restricted premise. However, a limited exception that wasn't discussed on the Senate floor, or in the Title IX statute, was gender equality in athletics. Despite this, in late 1974 the Secretary of Health, Education and Welfare (HEW) claimed that athletics had become by far the "single most controversial issue of Title IX based upon public and Congressional interest."[2] After the Title IX regulations of 1975 were released by HEW, almost all subsequent Title IX controversies, clarifications, and cases pertained to the application of Title IX to athletics rather than to admissions or financial aid.

What might have caused this seemingly unexpected shift in the focus of Title IX? Concurrently in 1972, the Equal Rights Amendment had passed through both Houses of Congress for the first time under the guidance of Bayh, the soon-to-be Title IX sponsor. One historian, Jessica Gavora, argues that while the Equal Rights Amendment was waiting on ratification from state legislatures, feminist movements decided to employ Title IX as their vehicle for change. Gavora believes that active supporters of gender equality, who viewed athletics as the epitome of patriarchal oppression, intentionally used political leverage to focus Title IX policy on athletics.[3] From a different perspective, historian Amanda Ross Edwards claims that the impact of Title IX on athletics is rooted in independent decisions made by the three

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branches of government, which accumulated to create an initially unintentional precedent of how the government should mandate gender equality in athletics.[4]

However, the most logical explanation of Title IX's shift of focus rests in three instances where Congress and HEW responded to public and political backlash against the application of Title IX to athletics by explicitly expanding the scope of Title IX in that area. First, before the preliminary regulations were released, Senator John Tower proposed an amendment exempting athletics from Title IX. Second, once the final regulations were released, HEW received many complaints about the possible requirement of equal aggregate expenditures between men and women's athletic programs. Finally, President Reagan tried to take advantage of the regulations' ambiguity by pressuring the Supreme Court to set a precedent of program-specific Title IX application. Congress and HEW successfully responded to this resistance by expanding the effects of Title IX beyond what they were prior to these challenges.

Feminists Take Action

One theory is that feminist movements influenced government decisions to expand the breadth of Title IX in an effort to break down the long-standing patriarchy in athletic programs. The Women's Equity Action League (WEAL), founded in 1968, wrote the Women's Educational Equity Act (WEEA) and convinced Senator Patsy T. Mink to propose it to Congress.[5] Consequently, feminists were indirectly responsible for the passage of the WEEA in 1974. The bill gave the Secretary of HEW the power to give financial grants to activities designed to provide educational equality for women. Feminists indirectly opened the door for HEW to withhold federal funding from institutions not in compliance with Title IX, providing incentive for universities to comply with HEW's Title IX athletic regulations in the future.

The WEEA statute planted the seed for athletics being included in educational opportunity, setting it within the scope of Title IX as

established in the Title IX statute and on the Senate floor. Senator Walter Mondale introduced the WEEA as a "logical complement to Title IX" because it would provide funding to relieve existing gender inequities in education.[6] The WEEA of 1974 statute states that the funds should be given to programs that promote gender equality in "vocational education, career education, [and] physical education."[7] Although vocational and career education parallel the expressed goals of Title IX, the feminists from the WEAL also included physical education in the statute. In the context of educational equity, a broad interpretation of physical education would encompass athletic programs at educational institutions, providing evidence that the WEAL indirectly opened the door for Title IX to be applied to athletics.

Additionally, the involvement of feminist and tennis superstar Billie Jean King with the WEEA hearings shined a light on athletics as a source of gender inequality in public schools, and propagandized the benefit of athletics for women. She testified that HEW should use educational expenditures as the vehicle for gender equality in athletics.[8] A few months before her testimony, Billie Jean King triumphed over Bobby Riggs in a tennis match nicknamed "The Battle of the Sexes." The match was then one of the most publicized tennis matches of the twentieth century. As a result, one senator even mentioned the victory while questioning her during her testimony, and there were national news stories written on the hearings.[9] Her star power exemplified to senators the possibilities of gender equality in athletics and focused their attention on the lack of federal funding given to it. It is possible that Congress later redefined their initial intentions for Title IX when faced with backlash because feminists swayed their attention to gender disparities in athletics.

But the leverage of feminist interest groups on Title IX application through the WEEA was not the primary cause of Title IX's impact on athletics. Other pieces of legislation and decisions of Congress and HEW came into play. It was the opposition, not the supporters, of the expansion of Title IX that ultimately caused Congress and HEW to widen the bill's scope to athletics.

Let's Keep Athletics Out of This

Title IX's expansion to athletics was actually in part caused by a failed legislative reaction to rumors that sports were going to be included in the preliminary Title IX regulations. Before the regulations were released, Senator John Tower proposed an amendment to exclude all sports from Title IX but modified his amendment on the Senate floor, right before proposing the bill, to instead exclude only revenue-producing sports.[10] This caused Congress to categorize the Tower Amendment as being in direct opposition to expanding gender equality, rather than consider it under its proposed goal to help women's sports. While introducing his amendment on the Senate Floor, Tower insisted "upon [a] detailed investigation" and he "did not believe that Congress intended Title IX to extend to intercollegiate athletics."[11] By challenging congressional intent, Tower encouraged Congress to clarify the objectives of Title IX. The questionable motives and unseemly confrontations of legislative opposition caused Congress to directly confront efforts attempting to limit the impact that Title IX had on gender equality.

Because Tower prompted Congress to redefine how Title IX would affect athletics, Congress required HEW to include an explicit athletics section in the Title IX regulations. The Javits Amendment replaced the Tower Amendment in subsequent conference committees. The Javits Amendment required that HEW release the Title IX regulations within a month and that they include "reasonable provisions considering the nature of particular sports."[12] Before Tower proposed his amendment, there were only rumors of Title IX potentially encompassing athletics. Because the Tower Amendment confronted the intent of Congress head on, Congress definitively encompassed athletics within the scope of Title IX through the 1975 Title IX regulations.[13]

But We Don't Want to Pay

Although the Tower Amendment led to athletics being included in the regulations, backlash to the later 1975 Title IX regulations resulted in a policy interpretation that heightened Title IX's effects on women's athletics.

Because the Title IX regulations were vague, coaches and educational administrators had no clear strategy for Title IX implementation. Although the 1975 regulation states that unequal aggregate expenditures "will not constitute noncompliance" with the athletics portion of Title IX regulations, it also states that the failure to have equal expenditures will be considered when assessing compliance.[14] This ambiguity exemplifies how the regulations were insufficiently clear as the only existing guidelines for Title IX implementation. When HEW released their preliminary draft of 1979 Policy Interpretation, they clarified that if "average per capita expenditures" for male and female athletes were equal or if "benefits were comparable," then the university would be found in compliance with Title IX.[15] Some coaches complained that this standard of compliance was unfair, because many colleges couldn't afford a new split in aggregate expenditures or benefits.[16]

The complaints of coaches and administrators caused HEW to respond by reissuing the policy interpretation of 1979 in a finalized version. The new policy interpretation set higher standards for Title IX compliance. Because public comments reflected a misunderstanding of the tests of compliance, HEW got rid of the equal expenditures standard.[17] They replaced the requirement of equal expenditures with a prescriptive list of specific aspects of how men and women's athletic programs would be directly compared, such as the modes of transportation or the qualifications of the tutors hired for athletes.[18] These new standards rendered made it difficult for athletic programs to manipulate budget reports to pretend to be in Title IX compliance ineffective. The complaints of college coaches about the possibility of equal expenditures resulted in compliance standards that further forced institutions to legitimately increase gender equality in athletics, not just manipulate budget reports to pass through compliance investigations.

Overriding the Unwritten Precedent

Although the Tower Amendment and public backlash led to clarifications on the expanding scope of Title IX, there was still an unwritten precedent that had been previously undisputed by the three presidential administrations since Title IX was passed. There

was tacit agreement between the three branches of government with regards to a broad application interpretation of Title IX, meaning that if any aspect of an education institution received federal funding, all entities of that institution were subject to federal regulation. However, when conservative Ronald Reagan was inaugurated in 1981, his administration announced that federal regulations to eliminate gender discrimination in intercollegiate sports would be reviewed.[19] He took advantage of the fact that while this was a de facto precedent, it had not been codified into law, and tried to use the Supreme Court to create his own legal standard to establish a program-specific interpretation of Title IX.

President Reagan spread his laissez-faire ideals into the Supreme Court, leading to the conservative verdict of Grove City v. Bell, limiting the scope of Title IX. In 1974, Grove City College in Pennsylvania refused to sign an "assurance of compliance" form promising to abide by Title IX, because the administration did not want to inadvertently become subject to all federal regulation, not just Title IX, by signing an "assurance of compliance" with any kind of federal regulation. HEW claimed Grove City was already subject to federal regulation and therefore must sign the "assurance of compliance" because the college received indirect federal funding through Pell Grants, which are government-issued financial aid given to individual students.[20] The Grove City v. Bell case eventually reached the Supreme Court in 1983, where Deputy Solicitor General Paul M. Bator told the Supreme Court that the Reagan administration supported a program-specific reading of Title IX where it would apply on the financial aid department.[21] In 1984, the Supreme Court ruled that Pell Grants made the Grove City Financial Aid Department, and no other entities of the institution, subject to Title IX. This decision overrode the broad-application interpretation that the three previous administrations had supported but had never constructed into law. As a result, the Grove City v. Bell decision ironed out the previously vague legal mandates on how to implement Title IX in athletic programs that received indirect federal funding. Most college-level athletic programs did not receive direct federal funding. As a result, both the Department of Education and the courts dropped almost all of their complaints about gender disparities in athletics.[22]

Congress responded to the Grove City v. Bell decision by passing the Civil Rights Restoration Act in 1987, which explained that Title IX had a broad application to all aspects of an institution. The broad application standard specified that a recipient of federal funding must obey civil rights laws in all areas of the recipient, not just the one program receiving direct funding. This bill, dubbed the Grove City Bill, overturned the precedent set by the Grove City v. Bell decision. Reagan vetoed the bill in the first presidential veto of a civil rights bill since Andrew Johnson vetoed the Civil Rights Act of 1866. Reagan opposed "governmental interference and control" and as a result proposed a new bill called the Civil Rights Protection Act, which validated the Grove City v. Bell decision to mandate the program-specific scope of Title IX.[23] Despite this executive opposition, Congress overrode the veto and passed the bill. By attempting to limit the expansion of federal power, the conservative Executive Branch unintentionally created the opportunity for the liberal congress to pass the Civil Rights Restoration Act. This bill confirmed the expanding scope of Title IX by eliminating the potential exemption of athletic programs that didn't receive direct federal funding.

Unintended Consequences

The far-reaching ramifications Title IX had on women in athletics were the unintentional result of public and political resistance. Direct opposition included the Tower Amendment, public complaints about standards of compliance, and the Grove City v. Bell decision. Because Congress and HEW issued legislation and clarifications in response to this resistance that expanded the parameters of Title IX application to athletics, opposition inadvertently instigated the expansion of Title IX to athletics.

Similarly, Representative Howard Smith of Virginia unintentionally initiated gender equality by amending the Civil Rights Act of 1964 to include the prohibition of discrimination against women. He did not believe in the possibilities for gender equality and only advocated for it in effort to garner more resistance for the Civil Rights Act of 1964 because it also outlawed racial discrimination. Smith believed that gender equality was such a ridiculous proposition that it would cause

the Civil Rights Act of 1964 to fail. Despite the fact that the United States had no equal rights amendment, Smith inadvertently set a new legislative precedent that women could not be discriminated against.

For both the Civil Rights Act of 1964 and Title IX, the contradiction between the motivation behind the opposition and the resulting increased gender equality from disapproving efforts supports the APUSH maxim: results do not equal the evidence of one's intentions. The modern conception of the idealized female athlete, empowered by Title IX, is in part the indirect result of poorly executed opposition rather than the sought after reward for feminists overpowering the patriarchy. ●

Notes

1. Cong. Rec. 5803-06 (Feb. 28, 1972) (statement of Sen. Birch Bayh).

2. Amanda Ross Edwards, "Why Sport? The Development of Sport as a Policy Issue in Title IX of the Education Amendments of 1972," *The Journal of Policy History* 22, no. 3 (2010): 310. Amanda Ross Edwards received her Ph.D. from the University of Connecticut in 2002 and is a currently a professor of public policy and American politics at North Carolina State University.

3. Jessica Gavora, *Tilting the Playing Field: Schools, Sports, Sex and Title IX* (San Francisco, CA: Encounter Books, 2002), 4, 6. Jessica Gavora is a former senior policy advisor for the United States Department of Justice and received her masters in American foreign policy and international economics from Johns Hopkins University.

4. Edwards, "Why Sport? The Development," 302.

5. Andrew Fishel and Janice Pottker, *National Politics and Sex Discrimination in Education* (Lexington, MA: Lexington Books, 1977), 68-71. Andrew Fishel was a policy analyst in the HEW secretary's office and has his doctorate in American politics and education from Columbia University. Janice Pottker was conducting a project funded under the WEEA for US Office of Education. She has her Ph.D. in sociology and education from Columbia University.

6. Edwards, "Why Sport? The Development," 316.

7. Women's Educational Equity, Pub. L. No. 93-380, § 408, Stat. (1974).

8. *Women's Educational Equity Act: Hearings on S. 2518 Before the Committee on Labor and Public Welfare*, 93d Cong., 1st Sess. 76-85 (1973) (statement of Billie Jean King).

9. Ibid.; Fishel and Pottker, *National Politics and Sex Discrimination*, 76.

10. Cong. Rec. 15322-23 (May 20, 1974)
(statement of Sen. John Tower).

11. Ibid.

12. Provisions Relating to Sex Discrimination, Pub. L. No. 93-380, § 844, Stat. (1974).

13. Department of Health, Education and Welfare, General Administration, 40 Fed. Reg. (June 4, 1975) (to be codified at 45 C.F.R.).

14. Ibid.

15. A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. (Dec. 11, 1979) (to be codified at 45 C.F.R. pt. 26).

16. "Colleges Mystified by Title IX Fund Rules," *The New York Times*, December 15, 1978.

17. A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. (Dec. 11, 1979) (to be codified at 45 C.F.R. pt. 26).

18. Ibid.

19. "Review of Title IX Is No Surprise," *The New York Times*, August 15, 1981.

20. David M. Lascell, "Grove City College v. Bell: What the Case Means Today," *The Grove City College Journal of Law and Public Policy* 1, no. 1 (2010): 2. David Lascell received his bachelor of laws from Cornell University and received honorary Doctor of Laws degree from Grove City College

21. Linda Greenhouse, "High Court Backs Reagan's Position on Sex Bias Law," *The New York Times*, February 29, 1984.

22. Nancy Hogshead-Makar and Andrew Zimbalist, eds., *Equal Play: Title IX and Social Change* (Philadelphia, PA: Temple University Press, 2007), 101. Nancy Hogshead-Makar is a professor at the Florida Coastal School of Law, a gold medalist Olympian, and a former expert witness in Title IX cases. Andrew Zimbalist received his Ph.D. in Economics from Harvard University and currently teaches Economics at Smith College.

23. Ronald Reagan, "Message to the Senate Returning Without Approval the Civil Rights Restoration Act of 1987 and Transmitting Alternative Legislation," March 16, 1988.

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