

Waste Land

The Tale of Title IX

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NATIONAL
ASSOCIATION
of SCHOLARS

Introduction

Title IX is the 1972 Congressional ban on sex discrimination in federally funded K-12 schools and higher education institutions. The statute, which extended 1960s race discrimination bans to prohibit sex discrimination as well, was originally intended to protect access to education for women. Title IX's core text states:

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.¹

Title IX seemed to be straightforward and well-defined, so it easily passed Congress and was signed into law by President Richard Nixon.

Original Intent

The postwar American civil rights movement inspired Congress to enact major nondiscrimination legislation during the 1960s, most notably the Civil Rights Act of 1964.² These statutes' focus was prohibiting race discrimination. Congress intended to guarantee equal opportunity for American blacks in key areas such as voting, education, public accommodations, employment, and housing. These laws became known as "equal access" or "equal opportunity" laws.

By the 1970s, other groups also began to lobby for discrimination bans. Accordingly, Congress began to add categories to the prohibitions. Those categories are now called *protected classes* and include not only race but also color, national origin and religious affiliation.

Women's organizations were among the groups lobbying for new antidiscrimination laws. They succeeded, for example, in having "sex" included as a protected class in Title VII of the Civil Rights Act, which bans discrimination in employment. And in 1972, they succeeded in having Congress pass the Title IX Education Amendments to ban sex discrimination in federally funded education.

Diminishing Necessity

Title IX initially seemed both benign and innocuous—perhaps more symbol than substance. After all, women historically had dominated education as teachers at the primary and secondary level. As the [National Center on Education Statistics](#) reports, the overwhelming majority of teachers in America were and are women – approximately 70%, since the creation of [public or common schools](#) in the mid to late 1800s.³ That majority persists to this day with the percentage of women teachers now almost 80% and with women also comprising 54% of school principals.

Women also have outnumbered men in higher educational institutions for many decades. The [National Center for Education Statistics](#) further reports that the number of women began to exceed the number of

men for Associate's Degrees in 1977; for Bachelor's and Master's Degrees in 1981; and for Doctor's Degrees in 2004.⁴ In 2019, women had “earned 13 million more college degrees than men at all levels (associate's, bachelor's, master's and doctor's degrees) over the last 36 years.”⁵

Title IX also seemed less important in 1972 because a far smaller proportion of Americans then attended institutions of higher education—and even that proportion was far higher than it had been in previous generations. In 1945, only 14.1 % of male high school graduates and 8.2% of female high school graduates went on to higher education.⁶ Those percentages swiftly changed in the years following the second World War: the 1944 Serviceman's Readjustment Act, or “GI Bill,” provided veterans federal financial aid to pursue education, and millions took advantage of the opportunity.⁷ The proportion of college graduates in the total American population has risen steadily since World War II: in 1947, 6.2% of men and 4.7% of women; in 1973, 15.4% of men and 9% of women; in 2002, 28.5% of men and 25.1% of women; and in 2022, 36.2% of men and 39% of women.⁸

Most veterans were men and so the GI Bill temporarily boosted male enrollment over female enrollment. In 1949-1950, for example, the percentage of women enrolled for Bachelor's and Master's Degrees was comparatively low – 23.9% and 29.2%, respectively; but 20 years later, those figures jumped to 43.1% and 38.8%.⁹ Even with the GI Bill, then, the proportion of women in higher education rose steadily from 1960 to 1974, from 35.3% of undergraduates to 45.3%—without the need of government intervention such as Title IX.¹⁰

One need not settle the question of whether discrimination against women existed in education, or to what degree. But one can certainly see that the numbers reflect a steady rise in the proportion of women both before and after the passage of Title IX. By 1982, when more women than men were receiving bachelor's and master's degrees, any alleged need for government intervention to prevent sex discrimination in education—the necessity for Title IX—would seem to have disappeared.

College Degrees Replace Employment Tests

Higher education has become more central to American society since 1972—not least due to the effects of the Supreme Court decision *Griggs v. Duke Power Company* (1971).¹¹ That opinion forbade employers from using intelligence tests for prospective employees because of their “disparate impact” – which is to say, such tests tended to disfavor certain ethnic and racial groups. The result was that the college degree became a very expensive – and time consuming – proxy for such intelligence tests and came to be seen as a necessary credential for employment opportunity and, by extension, financial success.

Griggs is therefore a key contributor to the continued rise in college attendance since 1971. It also made higher education a central venue for feminist activism. As a college degree became a prerequisite to remunerative employment and to wealth, women's groups refocused their political agenda upon women's educational opportunity.

But as women's groups became more radical and adopted a militant feminism characterized by anti-male sentiment and an ideological focus upon “marginalized groups” and “intersectionality,” they gave Title IX a new mission. This mission had nothing to do with the statute's original intent. Radical feminists now sought to use Title IX as a tool of progressive activism.

Bureaucratic Transformations of Title IX

The elected officials who gave their assent to Title IX had no idea how swiftly American bureaucrats would transform it. Officials within the federal Education Department (before 1980, the Health, Education, and Welfare Department), and especially those in its Office for Civil Rights (“OCR”), as well as local school administrators, have distorted the original intent of the law almost from the start. They have done this by constant expansion and manipulation of the law’s terms and scope.¹²

These expansions mostly involve redefinitions. Federal officials either have interpreted the law to apply to areas not originally contemplated by Congress, such as sports, or have interpreted it to include actions or individuals not intended by Congress and not supported by the public. This latter category of unwarranted bureaucratic expansion includes applying Title IX to same sex orientation or to “gender identity”/“gender expression,” including those who claim to have changed their sex (“transgender”).

These bureaucratic expansions of Title IX have come ever more frequently via agency actions called “agency guidance” or “Dear Colleague Letters” (“DCLs”). Such *informal* agency action (sometimes called “sub-regulation”) sidesteps the Administrative Procedures Act’s (APA) requirements for public notice and comment, mandatory steps for *formal* agency rule-making.

However, since 2017, both the Trump and Biden Administrations have followed formal rulemaking requirements prescribed by the APA to change interpretation of Title IX law—the Trump administration to rescind the Education Department’s bureaucratic overreach during the previous generation,¹³ the Biden administration to reverse the Trump administration and effectively codify those bureaucratic expansions in regulations.¹⁴ Even so, federal and local bureaucrats continue to have the option to redefine Title IX law by bureaucratic fiat.

Title IX’s expansion began in the 1980s when federal officials reinterpreted it to mandate equal *funding* for women’s sports, not just equal *opportunity* to participate. In the 1990s, federal officials then claimed that Title IX banned a new and more loosely defined form of discrimination, sexual harassment, rather than just the clearcut *quid pro quo* proposition (e.g., where a teacher might demand sex in exchange for good grades). To define sexual harassment as a form of discrimination was already a novel concept, including in federal courts. Novelty would be piled on novelty: soon federal officials argued that sex discrimination included a “hostile environment based on sex”—a phrase whose meaning and scope was unclear, and which therefore gave arbitrary enforcement power to both federal and school Title IX administrators.

Due Process Nightmares and Redefining the Basic Term “Sex”

During the Obama administration’s terms from 2009 to 2017, Education Department officials announced, by informal but powerful guidance, that Title IX applied to yet another new form of supposed sex discrimination – *sexual violence*, including rape and assault. Such offenses were matters of state criminal law, not federal civil rights law. But officials rationalized this expansion by claiming that American college campuses were suffering from a “rape epidemic.” Those claims have not withstood scrutiny from serious scholars, who found that too many schools and students defined the term “rape” to mean sexual relations that were later regretted rather than sexual relations that were nonconsensual.¹⁵ Nevertheless, Obama education officials encouraged both schools and students to report any suspected sexual misconduct as Title

IX offenses. They also encouraged swift punishment, including suspension and expulsion, often without basic due process protections for those accused.¹⁶

Biden administration Education Department officials continued the arbitrary expansion of Title IX by redefining its most basic term - the word “sex” itself. The Biden Title IX rule of April 2024 states that “sex” includes not only same sex orientation but also gender expression and gender identity. This means that objections to men in women’s locker rooms or bathrooms, including both moral objections and objections based on the rational fear of physical danger, also can be treated as Title IX offenses.

Federal courts have prevented the Biden Title IX rule from taking effect. As of January 9, 2025, the injunction against it is nationwide. That means the rule issued under Trump’s first term is now in effect throughout the country, though that could change if any federal appellate court reverses the nationwide injunction. However, the Trump administration’s first executive orders in January of 2025, as well as its initial guidance on Title IX on February 4, 2025, have reversed many of the Obama and Biden administration initiatives, including the Biden Title IX rule already enjoined by the courts.

Original Intent Ignored

All these bureaucratic initiatives justified under Title IX law have nothing to do with the statute’s original intent.

Most Title IX school policies scarcely even mention either “access” or “educational opportunity.” In so doing, they depart not only from original intent but also from judicial precedent. In the 1980s and 1990s, federal courts interpreting Title IX consistently affirmed that a party could only claim a Title IX offense if access to education had been denied because of sex. Indeed, the United States Supreme Court’s last word on Title IX in 1999 defined actionable conduct—conduct that can give rise to a Title IX complaint—to be only those actions that are “so severe, pervasive and objectively offensive,” that they effectively deny access to education in violation of the law’s guarantee. Indeed, this standard was incorporated into the Trump administration’s 2020 Title IX regulation.

Yet not only do many women’s groups now call this standard controversial and too narrow but schools themselves also omit any reference to it or to educational access in their Title IX policies.

Two Virginia universities illustrate the point:¹⁷ At James Madison University in Harrisonburg, sexual misconduct of any type is said to be a form of sex discrimination banned by Title IX, with no reference at all to educational access. James Madison University only refers to “adverse effect” from the conduct. George Mason University in Fairfax similarly has no reference to educational access or opportunity in its Title IX policy, only that educational conditions are “altered.”

By these redefinitions, unmoored from any reference to educational access or educational opportunity, radical activists have transformed any action in a dating or romantic context that causes upset or discomfort into an alleged federal offense of violating Title IX.

This departure from original intent is what has allowed campus Title IX offices to act as “campus kangaroo courts” and “the campus sex police.” Similar departures from the textual warrants of educational *access* or *opportunity* have allowed radical activists to refashion Title IX as a tool to redefine a host of progressive policy goals, including fringe sexual politics far removed from what the American citizenry ever desired or American elected officials ever authorized, as requirements of federal civil rights law, to be enforced without traditional due process protection.

Reforming Title IX to Restore Its Original Purpose

Federal and campus bureaucrats have misused Title IX law as a weapon to promote and impose radical gender-activist goals on students, although Congress never authorized these goals and the public has never supported them. They have accomplished these expansions by bureaucratic redefinitions of statutory vocabulary and tendentious misinterpretation of statutory intent. This bureaucratic abuse has persisted from before the Education Department's founding in 1980 to 2025.

A compelling case can be made to rescind Title IX completely. Women now earn more degrees than men at every level of higher education, so educational opportunity for women would not appear to need federal protection. Title IX's actual abuse by the political left is a precedent for yet more abuse: so long as Title IX is on the books, it invites perpetual progressive perversion to impose a radical political agenda. Even reform-minded federal administrations will have to invest substantial time simply policing against further abuse of Title IX law by federal and campus bureaucrats.

That said, until such time as Title IX is rescinded, reform-minded federal administrations should be able to use Title IX law to protect American citizens from radical activist attempts to impose policies informed by "gender ideology" and other progressive ideologies. These policies actually do harm educational opportunity for men and women, and Title IX would be an appropriate mechanism for the federal government to use in defense of both liberty and equality of opportunity.

Education reformers, for example, might use Title IX to defend women in the "bathroom wars." Gender activists now claim that transvestites (men who dress as women) or transsexuals (men or women who clinically or chemically attempt a sex change) are actually "transgender"—that their subjective claim of "gender identity" or "gender expression" is a legally enforceable claim.

A particular flashpoint in ED has been to impose regulations on educational institutions requiring that "transgender" individuals be allowed to use restrooms or locker rooms of their choice, rather than those which comport with their biological sex. To require women to share restrooms with men, which abridges both privacy rights and a reasonable sense of physical security, is precisely the sort of burden on equal educational opportunity that Title IX was created to combat. Many cases have already gone to court, or are being processed by regional offices of civil rights, where complainants, especially women, argue that such regulations violate Title IX. ED might usefully support these cases with Title IX enforcement. Where educational institutions are imposing such requirements of their own volition, ED defense of individual members of these institutions could be valuable contribution to American liberty.

The Trump Administration should be commended for reinstating its 2020 Title IX Rule. In February 2025, ED issued a [Dear Colleague Letter](#) stating that it was following the federal courts in vacating the Biden 2024 Title IX Rule and returning to the Trump 2020 Title IX Rule—that only actions which are "so serious, pervasive and objectively offensive that they deny someone access to education" qualify as Title IX offenses. That definition restores the focus of Title IX to educational access and precludes the use in Title IX law of "subjective offense," a meaningless standard which automatically renders Title IX arbitrary. This welcome change should be made more permanent. ED should once again re-enter this rule via the regular rule-making process. It also should call on Congress to enact statutes that write this reform into federal law.

Education reformers should further amend the 2020 Title IX Rule to remove from Title IX’s remit any allegation of “sexual assault, dating violence, domestic violence, and stalking,” as defined in the Clery Act and in the Violence Against Women’s Act.¹⁸ These are crimes worthy of severe punishment in court—but Title IX as currently written does not require proof that these crimes, even if proved in a court of law, affect education or educational access. Their introduction into Title IX also encourages educational institutions to use the weaker evidentiary standards of Title IX law to justify punishment for these offenses—a practice which imposes substantial risks of wrongful punishment of innocents accused of these offenses. This category of prohibited conduct should be severed from Title IX.

Education reformers finally should generally take the initiative to prevent Title IX abuses. More intensive information gathering should be required of Title IX coordinators at educational institutions. Education reformers should drop all ED legal cases seeking to defend or impose wrongful Title IX regulations and interpretations. They also should rescind all Resolution Agreements based upon wrongful Title IX regulations and interpretations.

All these initiatives will do a great deal to ensure that Title IX, if it is to be preserved at all, actually fulfills its original function to protect access to education for women.

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- 1 20 U.S. Code sec. 1681 et seq. at <https://www.govinfo.gov/content/pkg/USCODE-2019-title20/html/USCODE-2019-title20-chap38-sec1681.htm>.
 - 2 42 U.S. Code sec 2000 et seq at <https://www.govinfo.gov/content/pkg/USCODE-2008-title42/html/USCODE-2008-title42-chap21-subchapV.htm>.
 - 3 National Center for Education Statistics, “National Teacher and Principal Survey,” at https://nces.ed.gov/surveys/ntps/tables/ntps1718_21011201_t1n.asp.
 - 4 *Id.*, Table 310, “Degrees Conferred by Degree Granting Institutions by level of Degree and Sex of Student, 1869-2022” at https://nces.ed.gov/programs/digest/d12/tables/dt12_310.asp.
 - 5 Mark Perry, American Enterprise Institute, “Chart of the Day: The Incredible 13M Gender College Degree Gap,” at <https://www.aei.org/carpe-diem/chart-of-the-day-the-incredible-13m-gender-college-degree-gap-since-1982-favoring-women/> (Feb. 20, 2019).
 - 6 Statista, “Percentage of the U.S. Population who have completed four years of college or more, 1940 to 2022, by gender,” at <https://www.statista.com/statistics/184272/educational-attainment-of-college-diploma-or-higher-by-gender/>.
 - 7 38 U.S. Code 101 at <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title38-section101&num=0&edition=prelim#:~:text=A%20person%20who%20has%20been,cus-tody%20of%20the%20adopting%20parent>.
 - 8 Statista, “Percentage of the U.S. Population who have completed four years of college or more, 1940 to 2022, by gender,” at <https://www.statista.com/statistics/184272/educational-attainment-of-college-diploma-or-higher-by-gender/>.
 - 9 *Supra* note 4 at https://nces.ed.gov/programs/digest/d12/tables/dt12_310.asp.
 - 10 *Id.*
 - 11 401 U.S. 424 (1971) at <https://www.loc.gov/item/usrep401424/>.
 - 12 Teresa R. Manning, Dear Colleague: The Weaponization of Title IX (2020) at <https://www.nas.org/reports/dear-colleague>.
 - 13 34 C.F.R. Part 106, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, Final Rule, 5/19/2020 at <https://www.federalregister.gov/documents/2020/05/19/2020-10512/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal>.
 - 14 *Id.* Final Rule, 5/29.2024 at <https://www.federalregister.gov/documents/2024/04/29/2024-07915/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal>.
 - 15 Stuart Taylor, Jr. and K.C. Johnson, *The Campus Rape Frenzy: The Attack on Due Process at America’s Universities* (2017).
 - 16 *Supra* note 12.
 - 17 *Id.*
 - 18 Teresa R. Manning, *amicus* (friend of the court) brief in the United States District Court, for the District of Columbia, in *Commonwealth of Pennsylvania, et. al, v. Elisabeth DeVos*, Case No. 1:20-cv-01468 at <https://www.nas.org/storage/app/media/New%20Documents/FINAL%20NAS%2028%20Dec%20amicus%20brief%20PA%20v%20DeVos.pdf>.