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# Giving the Bat Back to Casey: Suggestions to Reform Title IX's Inequitable Application to Intercollegiate Athletics

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## GIVING THE BAT BACK TO CASEY: SUGGESTIONS TO REFORM TITLE IX'S INEQUITABLE APPLICATION TO INTERCOLLEGIATE ATHLETICS

### I. INTRODUCTION

“I support the law’s intent of promoting equal opportunities to all students in a manner that does not unfairly penalize or limit opportunities for any students. I am hoping . . . we can work together to find ways to make Title IX work to accomplish its original intent without causing the elimination of athletic programs.”<sup>1</sup>

There is no doubt that during the last quarter of a century Title IX has forever changed, both positively and negatively, women’s sports, the public perception toward women, and also the composition of athletics in general.<sup>2</sup> Today, there are women’s leagues in basketball, soccer, and softball.<sup>3</sup> It is extremely unlikely that Pierre de Coubertin, founder of the modern Olympics, could ever have envisioned such enormous popularity for women’s sports.<sup>4</sup>

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1. *Q & A: The Candidates on College Issues*, 25 CHRONICLE OF HIGHER EDUC. A32, Feb. 25, 2000. (quoting Senator John McCain when asked whether the federal government has gone too far in its enforcement of Title IX). *See id.* For other quotes dealing with opposing views of Title IX, see Ed Sherman, *New Athletic Rivalry: Men v. Women*, CHICAGO TRIBUNE, Jan. 24, 1993, at C1.

2. JAMES P. ROHR, AN APPRAISAL OF PRACTICES & POLICIES IN INTERCOLLEGIATE ATHLETICS IN THE MID AMERICAN CONFERENCE ESSENTIAL FOR COMPLIANCE WITH TITLE IX OF THE EDUCATIONAL AMENDMENTS OF 1972 28 (1978).

3. Ellen M. Zavian, *Work Injuries & Legal Aspects of the Sports Industry 2000*, 591 P.L.I./PAT. 321, 323-28 (2000) (listing the opportunities for women in professional sports: Women’s basketball, Professional Softball League, Professional Soccer, Professional Football League, Professional Golfing, Women’s Tennis Association, Professional Volleyball, Professional Hockey, Professional Baseball League). *See also* Ellen E. Dabbs, *Intentional Fouls: Athletes and Violence Against Women*, 31 COLUM. J.L. & SOC. PROBS. 167, 194 n.160 (1998).

4. He believed that “the Olympic games must be reserved for men . . . we must . . . achieve the following definition: the solemn and periodic exaltation of male athleticism, with internationalism as a base . . . and female applause as a reward.” GRETA L. COHEN, *WOMEN IN SPORT: ISSUES AND CONTROVERSIES* 169 (1993). *See also* SUSAN BIRRELL & CHERYL L. COLE, *WOMEN, SPORT, & CULTURE* 112 (1994) (discussing the growth of women’s sports); D. MARGARET

Despite the advancing popularity for women's sports, Title IX has now become inadequate and static and will remain this way unless change is swiftly mandated.<sup>5</sup> Because of this recent transformation, numerous "unintended consequences" permeate the statute's surface when courts attempt to apply Title IX.<sup>6</sup> The most notable of these negative consequences is the ever-increasing popularity of eliminating low revenue men's athletic teams.<sup>7</sup>

Instead of promoting equality, Title IX is driven to attain equality even if young men and minority women have their dreams and aspirations shattered.<sup>8</sup> The feeling of many athletic directors, both male and female, is summed up in one quote: "I'm for gender equity, but not at the expense of cutting opportunities for men."<sup>9</sup>

These unintended circumstances arrive from the courts' obsessive and incorrect focus on "strict proportionality" and the undergraduate population of the institution.<sup>10</sup> Compounding the problem is that the

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COSTA & SHARON R. GUTHERIE, *WOMEN IN SPORT: INTERDISCIPLINARY PERSPECTIVES* 325-26 (1994) (talking about how the growth in women's sports has led to a decline of women in leadership positions).

5. Matthew L. Daniel, *Title IX and Gender Equity in College Athletics: How Honesty Might Avert a Crisis*, 1995 ANN. SURV. AM. L. 255, 256 (1995). This inadequacy label arises from the fact that a majority of institutions, after all these years, still do not comply with Title IX. *NCAA Study: More Women Playing Sports*, USA TODAY, Feb. 16, 1995, at 10C.

6. Crista D. Leahy, *The Title Bout: A Critical Review of the Regulation and Enforcement of Title IX In Intercollegiate Athletics*, 24 J.C. & U.L. 489, 503 (1998).

7. Ross A. Jurewitz, *Playing at Even Strength: Reforming Title IX Enforcement in Intercollegiate Athletics*, 8 AM. U. J. GENDER SOC. POL'Y & L. 283, 351 n.17 (2000) (showing several examples of men's teams being cut). For examples of men's teams being eliminated because of Title IX and budget constraints see Mike Decourcy, *UC Will Cut 3 Men's Sports; Women's Programs Adjusted for Equity*, CINCINNATI ENQUIRER, May 7, 1998, at A1, Eric Noland, *Nothing Easy for CSUN: Athletic Department Faces Tough Choices*, L.A. DAILY NEWS, Nov. 25, 1997, at S1 and Ryan White, *PSU Closes Door on Baseball*, PORTLAND OREGONIAN, May 30, 1998, at C1.

8. Jessica Gavora, *Quota System Hurts Team*, USA TODAY, July 23, 1996, at 14A. Ms. Gavora notes that the teams added to an institution under a Title IX claim are teams that have very little minority participation and greatly benefit only Caucasian women. *Id.* Sports such as softball, lacrosse, crew and tennis are sports not frequently played in the inner city. *Id.* Caucasian women participate in these sports at an alarmingly higher rate than do minority women. *Id.*

9. Sherman, *supra* note 1, at C1 (quoting Notre Dame Athletic Director Dick Rosenthal). At the time, Mr. Rosenthal was a member of the NCAA's Gender Equity Task Force. *Id.* Rev. E. William Beauchamp, the executive vice president of Notre Dame, correctly stated the intended purpose of Title IX when he said "we don't tell our engineering department it has to have the same number of men and women, we don't do anything like that anywhere in our institution. It's based on interest." *Id.*

10. See *infra* notes 90-113 and accompanying text. If the courts wish to employ the original intent of the statute to a Title IX complaint, they need to apply the correct "qualified applicant pool." See *infra* notes 195-213 and accompanying text (showing the correct comparison is between the opportunities available to women and those women who have the interest and ability to compete

Office of Civil Rights (OCR) never took into account the need for budget constraints within an athletic department.<sup>11</sup> This monetary limitation on athletic departments has led institutions to eliminate male athletic teams as the only way to comply with Title IX.<sup>12</sup>

Part II discusses the purpose behind Title IX, its legislative history, and its “flawed” modern day application to intercollegiate athletics.<sup>13</sup> Part III critically examines how the majority of courts have incorrectly construed Title IX, and also focuses upon the shocking results between the success rate of male and female plaintiffs.<sup>14</sup>

Part IV supplies reasoning and analysis why Title IX is inapplicable to athletics, notwithstanding the Civil Rights Restoration Act of 1987.<sup>15</sup> Finally, as an alternative to Part IV, Part V offers several suggestions that institutions and courts can experiment with in hope of complying with Title IX without the need to eliminate athletic teams.<sup>16</sup>

## II. HISTORY AND INTERPRETATION OF TITLE IX

The development of Title IX, as a component to the Educational Amendment of 1972,<sup>17</sup> came about because of the overwhelming desire for a continuation of the Civil Rights legislation that flooded America throughout the 1960’s and early 1970’s.<sup>18</sup> Title IX’s ultimate purpose,

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in intercollegiate athletics).

11. Cf. Charles P. Beveridge, Note, *Title IX and Intercollegiate Athletics: When Schools Cut Men’s Athletic Teams*, 1996 U. ILL. L. REV. 809, 810 (1996).

12. *Id.* For a general discussion on budget constraints see John C. Weistart, *Can Gender Equity Find a Place in Commercialized College Sports?*, 3 DUKE J. GENDER L. & POL’Y 191 (1996).

13. See *infra* notes 17-82 and accompanying text.

14. See *infra* notes 83-168 and accompanying text.

15. See *infra* notes 169-94 and accompanying text. See also 20 U.S.C. § 1687 (1994).

16. See *infra* notes 195-276 and accompanying text. This Comment in no way objurgates the progress that women have made while constantly confronted with obstacles in pursuit of equality in athletics. The progress over the past several decades has been beneficial for sports as a whole; however, this Comment concludes that Title IX’s modern application is a detriment to sports in general and a crippling force to future male athletes. This Comment proposes the reformation of Title IX so courts can carry into effect its original intent. This reformation will in turn expurgate the unintended consequences that plague today’s male athlete and their respective institutions. At the same time, it will keep intact the hopes and dreams of female students by providing them with the opportunities needed to participate in athletics.

17. 20 U.S.C. § 7232 (1994). The basic goals of the Amendment are to (1) promote gender equity, (2) promote financial assistance, and (3) promote equity in education for women and girls. § 7232.

18. Daniel, *supra* note 5, at 262. See also KAREN TOKARZ, *WOMEN, SPORTS, AND LAW: A COMPREHENSIVE RESEARCH GUIDE TO SEX DISCRIMINATION IN SPORTS I* (1986) (talking about the Civil Rights Act of 1964 producing results in employment); Stephen J. Shapiro, *Section 1983*

whether stated or unstated, is to prevent sex discrimination against people in programs that receive federal funding.<sup>19</sup> However, because the legislative history of Title IX is almost completely void of hearings and committee reports, little is known about the statute other than its primary purpose.<sup>20</sup>

The statute, in pertinent part, 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 educational program or activity receiving Federal Financial Assistance.”<sup>21</sup>

The prohibition against sex discrimination closely mirrors the provisions of Title VI of the Civil Rights Act of 1964.<sup>22</sup> One aspect evident from a reading of Title VI’s history and case law is that it finds the use of quotas, as a means to attain the statute’s goal, to be reprehensible and prohibited.<sup>23</sup> This dislike for quotas carried over into Title IX.<sup>24</sup>

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*Claims to Redress Discrimination in Public Employment: Are They Preempted by Title VII?*, 35 AM. U. L. REV. 93, 95 (1985).

19. Deborah Brake & Elizabeth Catlin, *The Path of Most Resistance: The Long Road Toward Gender Equity in Intercollegiate Athletics*, 3 DUKE J. GENDER L. & POL’Y 51, 53 (1996) (stating Title IX’s enactment was in response to the overwhelming discrimination that women were experiencing in all levels and activities of education). See also Rikki Ades, *The Opportunity to Play Ball: Title IX, University Compliance and Equal Pay*, 13 N.Y.L. SCH. J. HUM. RTS. 347, 349 (1997); ELLEN J. VARGYAS, *BREAKING DOWN BARRIERS: A LEGAL GUIDE TO TITLE IX* 6 (1994).

20. See generally Jill K. Johnson, *Title IX and Intercollegiate Athletics: Current Judicial Interpretation of the Standards for Compliance*, 74 B.U. L. REV. 553 (1994). The hearings that did take place were lead by Representative Edith Green in 1970. Daniel, *supra* note 5, at 290. Throughout the hearings, numerous witnesses testified that a number of sex discrimination complaints came from educational institutions. *Cannon v. University of Chicago*, 441 U.S. 677, 696 n.16 (1979) (talking about Rep. Green’s involvement in one of the only hearings on Title IX).

21. 20 U.S.C. §1681(a) (1994). The statute exempts several institutions from compliance with Title IX, parochial schools, military schools, and single sex schools. § 1681(a)(3)-(5). However, a further reading of the statute reveals that Congress intended the majority of the schools to be regulated by this law. § 1681(c).

22. Walter B. Connolly, Jr., & Jeffrey D. Adelman, *A University’s Defense to a Title IX Gender Equity in Athletics Lawsuit: Congress Never Intended Gender Equity Based on Student Body Ratios*, 71 U. DET. MERCY L. REV. 845, 849 (1994). See also *Haffer v. Temple Univ.*, 678 F. Supp. 517, 539 (E.D. Pa. 1987). The language of Title VI states that “no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal Financial Assistance.” 42 U.S.C. § 2000(d) (1994).

23. Connolly, *supra* note 22, at 849-50. The author notes that nowhere in the case law, regulations, or history is there found any statement that promotes the use of “affirmative action, quotas, or the meeting of a specified percentage of participation for universities. . .” *Id.*

24. See *infra* notes 25-28 and accompanying text. See also Darryl C. Wilson, *Title IX’s Collegiate Sport Exception Raises Serious Questions Regarding the Role of the NCAA*, 31 J. MARSHALL L. REV. 1303, 1306 n.27 (1998). Senator Bayh, the Senate sponsor, stated “this

To ensure that Title IX did not require a certain number of each gender in a program or activity, Congress added §1681(b) to the statute.<sup>25</sup> Representative Quie, the House sponsor, also expressed his concern and dislike toward the use of quotas as applied to Title IX.<sup>26</sup> Taking into account these concerns, the House Committee on Education and Labor voted affirmatively for the use of §1681(b) by a vote of 90 to 1.<sup>27</sup> Finally, on July 1, 1972, Title IX went into effect.<sup>28</sup>

Amidst the debates and conferences on the use of quotas, the most controversial question concerned Title IX's scope.<sup>29</sup> The language of

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amendment is not designed to require specific quotas . . . what we are saying is that we are striking down quotas. The thrust of the amendment is to do away with every quota." 117 CONG. REC. 30, 409 (1971). Senator Bayh's statement was in response to a question posed on whether Title IX would require a school to maintain specific numeric proportions (50% men and 50% women). Donald C. Mahoney, *Taking a Shot at the Title: A Critical Review of Judicial and Administrative Interpretations of Title IX as Applied to Intercollegiate Athletic Programs*, 27 CONN. L. REV. 943, 945-46 (1995).

25. Mahoney, *supra* note 24, at 946. Section 1681(b) reads in part:

Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving benefits of any federally supported program or activity, in comparison with the number or percentage of persons of that sex in any community, State, section, or other area.

26. In support of § 1681(b), Representative Quie stated "that to make absolutely certain there will not be a requirement of quotas in the graduate institutions and employment in the institutions of higher education similar to the prohibition against preferential treatment for minorities under the Civil Rights Act, I believe this legislation is necessary." 117 CONG. REC. 39, 261-62 (1971). In addition to Quie's statements, Edith Green, acting as chairperson of a Special House Subcommittee on Education, stated with respect to subsection (b) that in "my way of thinking, a quota system would hurt our colleges and universities. I am opposed to it even in terms of attempting to end discrimination on the basis of sex." Mahoney, *supra* note 24, at 947. Senator John Beall, when speaking on Title IX stated "I hope it is the intent of the Senate in adopting the amendment that we are desirous of eliminating the sex discrimination that has taken place in education. As we eliminate this, I hope that we are not establishing still another form of bias . . ." *Id.* at 948. Senator Bayh's statement in response to Julian H. Levi declared "I did not include such a provision as part of the Senate amendment because I believe my amendment already states . . . no person, *male or female*, shall be subjected to discrimination. The language of my amendment does not require reverse discrimination." *Id.* (emphasis added). Finally, Senator Claiborne Pell stated "we must be sure that this type of amendment is not used to establish quotas for sex . . ." *Id.*

27. 117 CONG. REC. 39,262 (1971).

28. Charlie James Harris, Jr., *Message to the Judiciary: The Proper Application of Title IX May Save Our Children*, 63 UMKC L. REV. 429, 432 (1995). See also David Aronberg, *Crumbling Foundations: Why Recent Judicial and Legislative Challenges to Title IX May Signal its Demise*, 47 FLA. L. REV. 741, 747 (1995).

29. Jeffrey P. Ferrier, *Title IX Leaves Some Athletes Asking, "Can We Play Too?,"* 44 CATH. U. L. REV. 841, 846 (1995). See also Joseph E. Krakora, Note, *The Application of Title IX to School Athletic Programs*, 68 CORNELL L. REV. 222, 223 (stating that "the legislative history of Title IX does not clarify the proper scope of the application of Title IX to a school's athletic program").

Title IX is filled with broad strokes of “legalese,” rendering the legislative history insufficient to decipher its exact meaning and scope.<sup>30</sup> Because athletics is sparsely mentioned within Title IX’s legislative history, significant debate arose as to whether Congress originally intended Title IX to apply to intercollegiate athletics.<sup>31</sup>

The problem in the interpretation lies with the phrase “any educational program or activity receiving Federal Financial Assistance.”<sup>32</sup> Significant debate emanated from these words because very few athletic programs directly receive federal financial aid.<sup>33</sup> What ultimately arose from Congress’s inability to pass a statute with clarity were two views on whether the mandates of Title IX cover intercollegiate athletic programs.<sup>34</sup> One view, and the view applicable today, is the “institutional-wide” approach,<sup>35</sup> while the other, more narrowly construed view, is the “program-specific” approach.<sup>36</sup>

30. Claudia S. Lewis, Note, *Title IX of the 1972 Educational Amendments: Harmonizing its Restrictive Language With its Broad Remedial Purpose*, 51 *FORDHAM L. REV.* 1043, 1049-50 (1983) (deciphering Title IX’s statutory language). Because of the ambiguous meaning, the legislative history and definition of Title IX came about through “litigation” and “administrative policy interpretations.” Andrea M. Giampetro-Meyer, *Recognizing and Remediating Individual and Institutional Gender-Based Wage Discrimination In Sport*, 37 *AM. BUS. L.J.* 343, 362 (2000).

31. Thomas A. Cox, *Intercollegiate Athletics and Title IX*, 46 *GEO. WASH. L. REV.* 34, 36 n.11 (1977) (“[T]itle IX provides little indication whether Congress intended the statute to apply to athletic programs.”). Senator Bayh stated that:

Title IX’s purpose was to provide equal access for men and women students to the educational process and the extracurricular activities in a school, *where there is not a unique facet such as football involved*. We are not requiring that intercollegiate football be desegregated, nor that the men’s locker room be desegregated.

*Id.* (emphasis added).

32. B. Glenn George, *Miles to Go and Promise to Keep, A Case Study of Title IX*, 64 *U. COLO. L. REV.* 555, 556 (1994). See 20 U.S.C. § 1681(a) (1994) for the complete statutory language.

33. Deidre G. Duncan, *Gender Equity in Women’s Athletics*, 64 *U. CIN. L. REV.* 1027, 1030 (1996). Most of the athletic departments do not directly receive federal financial aid. Krakora, *supra* note 29, at 223.

34. See generally Jennifer Lynn Botelho, *The Cohen Courts’ Reading of Title IX: Does it Really Promote a De Facto Quota Scheme?*, 33 *NEW. ENG. L. REV.* 743 (1999); Note, *Bump, Set, Spiked: Determining Whether the National Collegiate Athletic Association is a Recipient of Federal Funds under Title IX*, 65 *MO. L. REV.* 773 (2000); Stephanie M. Greene, *Regulating the NCAA: Making the Calls Under the Sherman Antitrust Act and Title IX*, 52 *ME. L. REV.* 81 (2000).

35. Brian L. Porto, *The More Things Change, the More They Stay the Same: Title IX and the Batter For Gender Equity In College Sports*, 41 *NOV. RES GESTAE* 26, 28 (1997). See also Denise K. Stellmach, *Title IX: The Mandate for Equality in Collegiate Athletics*, 41 *WAYNE L. REV.* 203, 204-05 (1994).

36. Ted Riley Cheesebrough, *Cohen v. Brown: I Am Woman, Hear Me Score*, 5 *VILL. SPORTS & ENT. L.J.* 295, 298-99 (1998). See also Curtis L. Hollinger, Jr., *Are Male College Sports in Jeopardy? A Look at Kelly v. Board of Trustees of the University of Illinois*, 21 *S.U. L. REV.* 151, 154-56 (1994); Sue Ann Mota, *Title IX and Intercollegiate Athletics- the First Circuit Holds Brown*

The concept of the “institutional-wide” approach is that if any part of the institution received federal funds, the whole institution is required by law to comply with Title IX.<sup>37</sup> On the other hand, the “program-specific” approach focuses only upon the specific program or activity that receives the federal funding.<sup>38</sup> Unlike the institutional approach, this approach only requires the specific recipient program or activity to comply with Title IX.<sup>39</sup> If the “program-specific” approach is followed, it would not affect athletic departments because the majority of intercollegiate athletic programs do not receive federal funding.<sup>40</sup>

Unfortunately, the text of Title VI is ambiguous, and any reference to that statute is of little, if any, assistance in determining which approach to apply.<sup>41</sup> While opponents of the “program-specific” approach argue that this uncertainty of application disadvantaged women athletes, studies show an opposite conclusion.<sup>42</sup>

Following the enactment of Title IX, the public demanded to know whether Title IX applied to intercollegiate athletics.<sup>43</sup> After several

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*University not in Compliance*, 14 U. MIAMI ENT. & SPORTS L. REV. 152, 162-63 (1997).

37. See, e.g., Jennifer L. Henderson, *Gender Equity in Intercollegiate Athletics: A Commitment to Fairness*, 5 SETON HALL J. OF SPORT L. 133, 136 (1995). The institutional-wide approach, also known as “free-up,” bases its foundation on the fact the whole school is the beneficiary of federal funds. P. Michael Villalobos, *The Civil Rights Restoration Act of 1987: Revitalization of Title IX*, 1 MARQ. SPORTS L.J. 149, 159 (1990). The benefit arises because the university frees up money from a variety of other sources for collective uses. *Id.* This concept follows the notion that if one part of the institution receives funding then Title IX covers the whole institution. Porto, *supra* note 35, at 28. Even though the majority of athletic departments do not receive federal funds, this theory would cover their department along with the rest of the departments at the institution. *Id.*

38. Henderson, *supra* note 37, at 136.

39. *Id.*

40. Duncan, *supra* note 33, at 1030.

41. Dianne M. Piche, *Grove City College v. Bell and Program-Specificity: Narrowing the Scope of Federal Civil Rights Statutes*, 34 CATH. U. L. REV. 1087, 1097 (1985). However, there is some evidence that early judicial decisions regarding the scope and application of Title VI point to a institutional wide approach. *C.f.* *Lau v. Nichols*, 414 U.S. 563 (1974) (holding that since the district received federal funds, the whole system must comply with Title VI); *Marable v. Alabama Mental Health Bd.*, 297 F. Supp 291 (M.D. Ala. 1969) (holding that a mental hospital can have its funding terminated for violations of Title VI); *Flanagan v. President & Dirs. of Georgetown College*, 417 F. Supp. 377 (D.D.C. 1976) (holding that receipt of money for law school required entire college to comply with Title VI).

42. Within the first four years of Title IX’s passage, participation in women’s athletics increased at a rate of 600%. Joan O’Brien, *The Unlevel Playing Field*, SALT LAKE TRIBUNE, Sept. 4, 1994, at A1. In fact, women’s athletics and participation grew substantially over the first several years of Title IX’s application, even without applying the institutional wide approach. *Id.*

43. Diane M. Henson & Boyce E. Cabaniss, *It’s not Whether You Win or Lose, but Whether You Get to Play: Title IX Finally Expands Participation Opportunities for Female Athletes in the 90’s*, 13 REV. LITIG. 495, 500 (1994).

years of hearings and debates, it appeared a foregone conclusion that Title IX would now cover athletics.<sup>44</sup> Because of this perception, a number of amendments were proposed.<sup>45</sup>

The amendment that gathered the most force in Congress was the Tower Amendment, proposed by Senator John Tower.<sup>46</sup> This amendment was the only amendment to gain approval within the Senate.<sup>47</sup> However, it eventually met its demise at the hands of a House-Senate Conference Committee.<sup>48</sup>

As a compromise to both views, Congress enacted the Javitz Amendment.<sup>49</sup> This amendment required the Department of Health, Education, and Welfare (HEW) to finish regulations for Title IX that “shall include with respect to intercollegiate athletics . . . reasonable provisions considering the nature of particular sports.”<sup>50</sup>

In 1975, the HEW proposed its regulations dealing with Title IX, and within the next several months the HEW received 9700 comments and complaints dealing with the ambiguity of the regulations.<sup>51</sup> Due to

44. Leahy, *supra* note 6, at 495-97.

45. Cox, *supra* note 31, at 36 n.13 (noting that the Senate-passed version of the 1974 Education Amendments excluded intercollegiate activity that produces some percentage of revenue). The Amendments called either for an exemption of athletics as a whole or for certain revenue producing sports. *Id.*

46. PAUL C. WEILER & GARY R. ROBERTS, *SPORTS AND THE LAW* 624 (1993); *See also* 120 CONG. REC. 15,322 (1974). The original intent of the amendment was to exempt intercollegiate athletics as a whole, but when it was certain this plan would fail miserably, it was limited to an exception for certain revenue producing sports. Aronberg, *supra* note 28, at 751. Many believed that the amendment was necessary because revenue producing sports cause the largest disparity between the two sexes. Johnson, *supra* note 20, at 586; *See also* 120 CONG. REC. 15,322 (1974).

47. Cox, *supra* note 31, at 36 n.15

48. Mahoney, *supra* note 24, at 950. The Committee claimed that the Amendment was too broad in scope, as it exempted not only revenues that the sport produces, but also any donations that both private and public donors wished to give. Philip Anderson, *Football School's Guide To Compliance*, 2 *SPORTS L.J.* 75, 98 (1995).

49. Mahoney, *supra* note 24, at 950. For a general history on the Javits Amendment see Charles Spitz, *Gender Equity in Intercollegiate Athletics as Mandated by Title IX of the Educational Amendments Act of 1972: Fair or Foul?*, 21 *SETON HALL LEGIS. J.*, 621, 627 (1997). The Javits Amendment better suited the “intent” of Congress by disallowing certain sport exemptions. Jodi Hudson, *Complying With Title IX of the Education Amendments of 1972: The Never Ending Race to the Finish Line*, 5 *SETON HALL J. SPORT L.* 575, 578 (1995).

50. Education Amendments of 1974, Pub. L. No. 93-380, § 884, 88 Stat. 484 (1974) (codified at 20 U.S.C. § 1681). *See, e.g.*, Mahoney, *supra* note 24, at 950. For an opposing viewpoint, see Janet Lammersen Kuhn, *Title IX: Employment and Athletics are Outside HEW's Jurisdiction*, 65 *GEO. L.J.* 49 (1976), concluding that Title IX does not apply to employment or intercollegiate athletics.

51. Mahoney, *supra* note 24, at 977 n.33 (citing 39 Fed. Reg. 22,228-38 (1974)). *See also* SALLY HATTIG, *A STUDY OF PROGRESS TOWARD GENDER EQUITY IN THE INTERCOLLEGIATE ATHLETIC PROGRAM AT A MAJOR RESEARCH INSTITUTION* 55 (1994).

this overwhelming response, the HEW deleted two provisions<sup>52</sup> before the final regulations became effective in July of 1975.<sup>53</sup> These regulations gave an institution three years to comply with Title IX or face a possible loss of future federal funding.<sup>54</sup>

From 1975 to early 1979, the HEW received numerous complaints stating that the regulations were extremely ambiguous and of little help in solving the gender-equity dilemma.<sup>55</sup> In response to these complaints, the OCR published a “Policy Interpretation” to help clarify the provisions within the regulations that dealt with intercollegiate athletics.<sup>56</sup> The “Interpretation” set forth the “Effective

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52. The first provision entitled, “Determination of Student Interest,” stated “a school which operates or sponsors athletics shall determine at least annually, using a method to be selected by the recipient which is acceptable to the Director of the HEW, in what sports members of each sex would desire to compete.” Jurewitz, *supra* note 7, at 295-96; 39 Fed. Reg. 22,236 (1974). The second provision entitled “affirmative efforts” stated that:

A recipient which operates or sponsors athletic activities shall, with regard to member of a sex for which athletic opportunities previously have been limited, make affirmative efforts to: (1) Inform member of such sex of the availability for them of the athletic opportunities available for member of the other sex and of the nature of those opportunities, and (2) provide support and training activities for members of such sex designed to improve and expand their capabilities and interest to participate in such opportunities.

*Id.*

53. 34 C.F.R. § 106.1 (2000) (“purpose and effective date”).

54. 34 C.F.R. § 106.41(d). *See also* Duncan, *supra* note 33, at 1031. To comply with the requirements of Title IX the institution must provide “equal opportunity” for all persons involved. 34 C.F.R. § 106.41(c). The regulations list 10 factors to evaluate in determining whether an institution is in full compliance. These factors are:

Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of both sexes;

The provisions of equipment and supplies;

Scheduling of games and practice time;

Travel and per diem allowance;

Opportunity to receive coaching and academic tutoring;

Assignment and compensation of coaches and tutors;

Provision of locker rooms, practice and competitive facilities;

Provision of medical and training facilities and services

Provisions of housing and dining facilities and services;

Publicity.

34 C.F.R. § 106.41(c). *See also* ROHR, *supra* note 2, at 10. It is clear that the HEW saw Title IX as applying to any athletic program run by the institution regardless if federal funding given to the institution ever reached the athletic program. Porto, *supra* note 37, at 361 (noting that the sound defeat of the Tower Amendment clearly shows that Title IX covers all sports, regardless if federal funding ever reaches the athletic department). *See also* 45 C.F.R. § 86.2(h) (2000) (defining recipient in a manner that allows it to be applied to the institution as a whole).

55. Spitz, *supra* note 49, at 627-29. *See generally* MARY JO FESTLE, PLAYING NICE: POLITICS AND APOLOGIES IN WOMEN’S SPORTS 167 (1996).

56. 44 Fed. Reg. 71,413 (1979). The goal of the interpretation was to assist those governed by Title IX and to ensure a greater rate of compliance. Mahoney, *supra* note 24, at 954; Duncan, *supra*

Accommodation” section, which if followed, ensures compliance with Title IX.<sup>57</sup> This section applies a three-part test to which the institution must satisfy one of three prongs.<sup>58</sup>

Prong I permits an institution “which does not wish to engage in extensive compliance analysis to stay on the sunny side of Title IX by maintaining gender parity between its student body and its athletic body.”<sup>59</sup> This requires athletic participation for male and female athletes to be substantially proportionate to their specific enrollment at the institution.<sup>60</sup>

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note 33, at 1031.

57. Beveridge, *supra* note 11, at 820; Spitz, *supra* note 49, at 629. The effective accommodation test has been the most litigated section of the “Policy Interpretation.” Jerry R. Parkinson, *Grappling With Gender Equity*, 5 WM. & MARY BILL RTS. J. 75, 78-89 (1996). The Interpretation set for three categories that it examined in conjunction with a Title IX complaint: (1) Effective Accommodation of Student’s Interests and Abilities, (2) Equivalence in Athletic Benefits and Opportunities, and (3) Athletic Financial Assistance and Scholarships. 44 Fed. Reg. 71,413 (1979).

58. Parkinson, *supra* note 57, at 86-87. To comply with the Effective Accommodation Test, an institution must satisfy one of the following:

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

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

Where the members of one sex are unrepresented among intercollegiate athletes, and the institution

cannot show a history and continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

*Id.* VALARIE BONNETTE, *ACHIEVING GENDER EQUITY: A BASIC GUIDE TO TITLE IX & GENDER EQUITY IN ATHLETICS FOR COLLEGES AND UNIVERSITIES* II-5, II 23-29 (1996). The three-part test has become the most controversial aspect of Title IX. James C. Hanks et al., *Recent Developments in Public Education Law*, 29 URB. LAW. 837, 869 (1997).

59. Cohen v. Brown Univ., 991 F.2d 888, 897-98 (1st Cir. 1993). *See infra* note outlining the prior and subsequent history (labeling this prong as a “safe harbor”). *See, e.g.*, Robert H. Hunt, *Implementation and Modification of Title IX Standards: The Evolution of Athletics Policy*, 1999 BYU EDUC. & L.J. 51, 73 (1999).

60. Beveridge, *supra* note 11, at 820. If the plaintiff fails to show a large enough disparity, using percentages, the institution is presumed to be in compliance with the law. Cohen v. Brown Univ., 879 F. Supp. 185, 200 (1995). Judge Pettine stated “I conclude that an institution satisfies prong one provided that the gender balance of its intercollegiate athletic program substantially mirrors the gender balance of its student enrollment.” *Id.* As will be discussed in Part V of this article, the majority of criticism comes from the fact that the interpretation of this prong requires an institution to install a quota system to comply with Title IX. *See* Eugene G. Bernardo II,

If the institution fails to comply with Prong I (Substantial Proportionality), it will next have the opportunity to comply with Prong II (Program Expansion).<sup>61</sup> The major concern with satisfying Prong II is that there is no definition as to what “historic” or “continuing” expansion means or encompasses.<sup>62</sup> The OCR considers several factors in making its determination whether an institution complies with Prong II.<sup>63</sup> However, because such deference is given to Prong I as establishing institutional compliance, it seems unlikely that an institution failing to satisfy Prong I will be able to satisfy Prong II.<sup>64</sup>

Finally, Prong III (Full Accommodation) allows a school to satisfy Title IX by showing a “full and effective” accommodation of women’s interests.<sup>65</sup> A court will take into account whether there exists (a) an unmet interest in a particular sport, (b) sufficient ability to sustain a team in that sport, and (c) a reasonable expectation of competition for that team.<sup>66</sup> If one of these factors is present, it is *prima facie* evidence that an institution has failed in its attempt or lack thereof to comply with Title IX.<sup>67</sup>

The athletic success that women enjoyed from 1979 to 1984 came to an abrupt halt with the Supreme Court’s decision in *Grove City College v. Bell*.<sup>68</sup> The Court finally had the opportunity to address the

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*Unsportsmanlike Conduct: Title IX and Cohen v. Brown University*, 2 ROGER WILLIAMS U. L. REV. 305, 341 (1997). See also *infra* notes 194-212 and accompanying text. This quota system would be unnecessary if the courts would use the correct statistical pool in determining whether substantial proportionality exists. *Id.*

61. See *supra* note 58 (listing the prongs of the three part test).

62. Jurewitz, *supra* note 7, at 300. But see *Cohen*, 991 F.2d at 898 (stating that Prong II is clear in its requirement of what continuous expansion of women’s athletic teams means).

63. U.S. DEP’T OF EDUC., CLARIFICATION OF INTERCOLLEGIATE ATHLETIC POLICY GUIDANCE: THE THREE -PART TEST 6 (1995). These factors include, but are not limited to, a school’s history in adding teams, and the overall number of participants who are part of the unrepresented sex. *Id.*

64. Botelho, *supra* note 34, at 784-85. Courts have held that when a school cuts a woman’s team it fails Prong II of the Effective Accommodation Test. Connolly, *supra* note 24, at 846 n.1; *Roberts v. Colorado State Univ.*, 998 F.3d 824, 830 (10th Cir. 1993) (stating that “we recognize that in time of economic hardships, few schools will be able to satisfy Title IX’s effective accommodation requirement by continuing to expand their women’s athletic programs”). But see U.S. DEP’T OF EDUC., *supra* note 63, at 8 (showing an example of a school cutting a woman’s team and still complying with Prong II).

65. See *supra* note 58 (listing the prongs of the three part test).

66. 44 Fed. Reg. 71,417-71,418 (1979). See also Beveridge, *supra* note 11, at 821.

67. Spitz, *supra* note 49, at 631.

68. *Grove City College v. Bell* 465 U.S. 555 (1984). Grove City declined to participate in direct institutional aid programs and federal student assistance programs. *Id.* at 559. The College has several students that receive a Basic Educational Opportunity Grant. *Id.* The HEW determined that Grove City was a recipient of federal funds under Title IX. *Id.* at 560. HEW request Grove

issue of whether Title IX applied a “program specific” or an “institutional-wide” approach.<sup>69</sup> The Court also had the opportunity to put to rest the indecision that had plagued the lower courts for several years.<sup>70</sup> The Court held that only the specific program that receives federal financial aid is subjected to the regulations imposed by Title IX.<sup>71</sup> In compliance with the Court’s decision, HEW withdrew from Title IX investigations against several institutions.<sup>72</sup>

Angered by the decision in *Grove City College*,<sup>73</sup> Congress knew swift measures were needed to ensure the progression of gender equity throughout the athletic world.<sup>74</sup> To accomplish this goal, Congress needed to alter the meaning of “program and activity.”<sup>75</sup> The final product was the Civil Rights Restoration Act of 1987.<sup>76</sup> Although

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City to execute an assurance to comply, but when it refused HEW instituted proceedings to have the College and students declared ineligible to receive BEOG’s. *Id.* at 560-61. Grove City and several students filed suit in the Western District of Pennsylvania. *Id.* at 561. For an excellent discussion of the case see FESTLE, *supra* note 55, at 219-22.

69. Daniel, *supra* note 5, at 265.

70. Rice v. Harvard College, 663 F.2d 331, 338-39 (1st Cir. 1981) (holding that Title IX requires a program specific approach); University of Richmond v. Bell, 543 F. Supp. 321 (E.D. Va. 1982) (denying a Title IX claim against an athletic department because it was not a recipient of federal funds); Haffer v. Temple Univ., 688 F.2d 14 (3rd Cir. 1982) (implementing an institutional wide approach to Title IX claims), *aff’d* 678 F. Supp. 517 (E.D. Pa. 1987).

71. *Grove City College*, 465 U.S. at 573-74.

72. Cohen v. Brown Univ. 991 F.2d 888, 894 n.5 (1993). Other sources vary significantly on the actual number of investigations that were suspended after the *Grove City College* decision. One commentator found twenty-three investigations were already pending litigation. DONNA A. LOPIANO & CONNIE ZOTUS, EQUALITY ISSUES & POLICY PROBLEMS IN WOMEN’S INTERCOLLEGIATE ATHLETICS, in THE RULES OF THE GAME 31, 32 (Richard E. Lapchick & John B. Slaughter eds., 1989). Others say that HEW dropped sixty-nine investigations. Craig Neff, *Equity at Last, Part II*, SPORTS ILLUSTRATED, Mar. 21, 1988, at 70. The only thing that is clear is that the actual number of investigations dropped is still unknown today.

73. *Grove City College*, 465 U.S. at 555.

74. 117 CONG. REC. 30,155-56; 39,261-62 (1971). Congress believed that the *Grove City College* decision was indeed contrary to Title IX’s original intent, and if *Grove City College* remained binding, Title IX would become useless. *Id.*

75. 20 U.S.C. § 1687 (1994). See also 130 CONG. REC. 25,602 (1984) (discussion by Sen. Hatch) (“I personally do not know if any Senator in the Senate . . . who does not want Title IX implemented so as to continue to encourage women throughout America to develop into . . . athletes.”).

76. 20 U.S.C. § 1687 (1994). The Statute states in pertinent part:

For the purpose of this chapter, the term “program or activity” . . . mean all of the following operations of-

- (1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or
- (2)(A) a college, university, or other post secondary institution, or a public school system of higher education; or (B) a local educational agency . . . system of vocational education, or other school system.

President Reagan vetoed the proposed Act, Congress overrode his veto.<sup>77</sup> With the passage of this Act came the anticipated arrival of the “institutional-wide” approach.<sup>78</sup> However, as mentioned above, this approach is contrary to the historic intent and judicial decisions concerning Title VI and Title IX.<sup>79</sup>

In 1990, the OCR, in promoting guidance for Title IX Investigators, published the Title IX Athletics Investigators Manual.<sup>80</sup> Included within the Manual is a list of questions and statistics that an investigator may ask and subsequently discover from an institution in order to conduct a thorough Title IX investigation.<sup>81</sup> However, the Manual contains several material inconsistencies that are in direct opposition with the Policy Interpretation and with the history of Title IX.<sup>82</sup>

### III. JUDICIAL AND ADMINISTRATIVE CONSTRUCTION OF TITLE IX

#### A. Enforcement of Title IX by Private Individuals

Shortly after the widespread acceptance of the HEW’s regulations, the Supreme Court decided *Cannon v. University of Chicago*.<sup>83</sup> The

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20 U.S.C. § 1687. Located in the history of the Act, Congress found that “(1) certain aspects of recent decisions of the Supreme Court have unduly narrowed or cast doubt upon the broad application of Title IX . . . and (2) legislative action is necessary to restore the prior consistent and long-standing and executive branch interpretation.” Data supplied by the U.S. Dep’t of Justice, Pub L. 100-259, 102 Stat. 28 (1988). Although the Act did not mention athletics, courts have interpreted the act as “creating a more level playing field for female athletes.” *Cohen*, 991 F.2d at 894.

77. Andrew A. Ingram, *Civil Rights: Title IX and College Athletics: Is there a Viable Compromise*, 48 OKLA. L. REV. 755, 761 (1995).

78. Melody Harris, *Hitting ‘em Where it Hurts: Using Title IX Litigation to Bring Gender Equity to Athletics*, 72 DENV. U. L. REV. 57, 62 (1994).

79. See *infra* notes 169-83 and accompanying text.

80. *Cohen v. Brown Univ.*, 809 F. Supp 978 (D.R.I. 1992). See also R. Lindsay Marshall, *Cohen v. Brown University: The First Circuit Breaks New Ground Regarding Title IX’s Application to Intercollegiate Athletics*, 28 GA. L. REV. 837, 845 (1994); LYNDON B. JOHNSON SCHOOL OF PUBLIC AFFAIRS, GENDER EQUITY IN INTERCOLLEGIATE ATHLETICS: THE INADEQUACY OF TITLE IX ENFORCEMENT BY THE U.S. OFFICE OF CIVIL RIGHTS 9 (1993) (stating that manual lacked input from persons actively involved in groups promoting gender equity).

81. VALERIE M. BONNETTE & LAMAR DANIEL, U.S. DEP’T OF EDUC., TITLE IX ATHLETICS INVESTIGATORS MANUAL 23-24 (1990).

82. Diane Heckman, *Women & Athletics: A Twenty Year Retrospective on Title IX*, 9 U. MIAMI ENT. & SPORTS L. REV. 1, 16 n.64 (1992). The most prevalent example is the word “second-class status” used in the 1990 Manual where the word equivalence is used in the Policy Interpretation. *Id.* Another example of an inconsistency is the failure to include the interviewing of non-athletes in the 1990 Manual. *Id.*

83. *Cannon v. University of Chicago*, 441 U.S. 677 (1979). Female plaintiff sued for alleged

Court's holding permitted aggrieved individuals to "skip" the standard administrative procedures<sup>84</sup> and proceed with an implied private right of action.<sup>85</sup> However, as the dissent correctly argues, it is improper for a Federal court to imply a right of action and extend its jurisdiction when Congress intended not to provide for one.<sup>86</sup>

A second Supreme Court case that strengthened the bite of Title IX was *Franklin v. Gwinnett County Public Schools*.<sup>87</sup> The Court allowed the plaintiffs to recover monetary damages upon a finding of an intentional violation of Title IX.<sup>88</sup>

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sex discrimination because of her failure to be accepted into medical school. *Id.* She also claimed that this program was a recipient of federal aid at the time of her rejection. *Id.* The District Court dismissed the complaint because Title IX did not expressly authorize a private right of action. *Id.* The Court of Appeals affirmed the decision of the District Court. *Id.*

84. Education, 34 C.F.R. § 110.30-.31 (2000). Section 110.30 allows the Education Department (ED) to conduct "compliance reviews" and § 110.31 permits a "person . . . to file a complaint with the ED alleging discrimination prohibited by the Act." 34 C.F.R. § 110.30.

85. *Cannon*, 441 U.S. at 689-709. The Cannon Court analyzed the four-part test used in *Cort v. Ash*, 422 U.S. 66 (1974). The four factors are: (1) whether the statute was enacted for the benefit of a special class of which the plaintiff is a member, (2) the legislative history of the statute, (3) whether or not the private remedy being implied from the statute will frustrate the statute's original intent, and (4) whether implying a remedy is "inappropriate because the subject matter involves an area basically of concern to the States." *Id.* at 689, 694, 703, 708. See generally Robert H. Hunt, *Implementation and Modification of Title IX Standards: The Evolution of Athletics Policy*, 1999 BYU EDUC. & L.J. 51, 68 (1999).

86. *Cannon*, 441 U.S. at 731-32 (Powell, J., dissenting). Justice White, in his dissent stated: Rather, the legislative history, like the terms of Title VI itself, makes it abundantly clear that the Act was and is mandate to federal agencies to eliminate discrimination in federally funded programs. Although there was no intention to cut back on private remedies existing under 42 U.S.C. § 1983 to challenge discrimination occurring under color of state law, there is no basis for concluding that Congress contemplated the creation of private remedies either against private parties who previously had been subject to no constitutional or statutory obligation not to discriminate, or against federal officials or agencies involved in funding allegedly discriminatory program. The Court argues that because funding termination, authorized by . . . 42 U.S.C. § 2000f-1, is a drastic remedy, Congress must have contemplated private suits in order to directly and less intrusively to terminate the discrimination allegedly being practiced by the recipient institutions. *Id.* at 719.

87. *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992). Plaintiff sued the school district for alleged sexual harassment by a teacher. *Id.* The alleged harassment included sexual conversations and questions into her sexual experiences, not only with her boyfriend, but with an older man. *Id.* at 63. The teacher, Andrew Hill, resigned upon the condition that any investigation into the matter cease. *Id.* at 60. The School investigated earlier complaints but did nothing to prevent future occurrences. *Id.* at 63. The Court held that the equitable remedy of prospective relief was inadequate in this case and awarded monetary damages to the student. *Id.* at 60.

88. *Franklin*, 503 U.S. at 60. The premise of this holding was that all remedies are permissible "unless Congress has expressly indicated otherwise." *Id.* at 66. The Court also held "that a statute does not authorize the remedy at issue in so many words is no more significant than the fact that it does not in terms authorize execution to [an] issue on a judgment." *Id.* at 68 (quoting *Deckert v. Independence Shares Corp.*, 311 U.S. 282, 288 (1940)). See also VARGYAS, *supra* note

## B. Recent Title IX Cases

### 1. Women as Plaintiffs<sup>89</sup>

#### a. Cohen v. Brown University<sup>90</sup>

*Cohen*, looked upon by many as the landmark case of Title IX, construed the Effective Accommodation section in the manner it is applied today.<sup>91</sup> *Cohen* was a class action suit against Brown University for violating Title IX.<sup>92</sup> Members of the women's volleyball and gymnastics teams sued because the University demoted their teams to intercollegiate club status.<sup>93</sup>

Cohen's primary argument focused upon the "interest and abilities" factor found in the regulations, and therefore argued that the three-part

19, at 32. What this decision did is to place extreme fear in the minds of institutions and to require a quicker compliance with Title IX. Brake, *supra* note 19, at 60-61. The authors also note that a plaintiff's claim does not become moot even upon graduation. *Id.* at 61.

89. When Title IX is discussed, several cases automatically come to mind. These cases are *Cohen v. Brown Univ.*, 809 F. Supp. 978 (D.R.I. 1992) (Cohen I), *aff'd* 991 F.2d 888 (1st Cir. 1993) (Cohen II), *aff'd on remand*, 879 F. Supp. 185 (D.R.I. 1995) (Cohen III), *aff'd* 101 F.3d 155 (1st Cir. 1996) (Cohen IV), *Roberts v. Colorado State Univ.*, 814 F. Supp. 1507 (D. Colo. 1993), *aff'd in part and rev'd in part*, 998 F.2d 824 (10th Cir. 1993), *cert. denied*, 510 U.S. 1004 (1993) and *Favia v. Indiana Univ. of Pennsylvania*, 812 F. Supp. 578 (W.D. Pa. 1993), *aff'd* 7 F.3d 332 (3rd Cir. 1993).

90. *Cohen v. Brown Univ.*, 809 F. Supp. 978 (D.R.I. 1992) (Cohen I), *aff'd* 991 F.2d 888 (1st Cir. 1993) (Cohen II), *aff'd on remand*, 879 F. Supp. 185 (D.R.I. 1995) (Cohen III), *aff'd in part, rev'd in part* by 101 F.3d 155 (1st Cir. 1996) (Cohen IV).

91. Hunt, *supra* note 85, at 70; Thomas E. Evans, *Title IX and Intercollegiate Athletics: Primer on Current Legal Issues*, 5 KAN. J.L. & PUB. POL'Y 55 (1996). *Cohen* is held as most responsible for using the overall student enrollment as an indispensable factor in a Title IX investigation. Earl C. Dudley, Jr., & George Rutherglen, *Ironies, Inconsistencies, And Intercollegiate Athletics: Title IX, Title VII, And Statistical Evidence Of Discrimination*, 1 VA. J. SPORTS & L. 177, 202 (1999). Beginning with the present case (*Cohen I*), the District Court of Rhode Island and the First Circuit rendered four decisions that established the three-part test as the standard for Title IX claims. See *supra* note 90 (listing the decisions in the *Cohen* case).

92. *Cohen I*, 809 F. Supp. at 979. The plaintiff's class consists of "all present and future Brown University women students and potential students who participate, seek to participate, and/or are deterred from participating in intercollegiate athletics funded by Brown." *Id.*

93. *Id.* at 981. Along with the women's athletic teams, Brown also demoted men's golf and men's water polo. *Id.* The plaintiff's sought injunctive relief to reinstate the women's athletic teams to varsity status and to prohibit Brown from reducing the number of women's teams in the future. *Id.* at 980. The requested relief would prohibit Brown from eliminating any more teams would apply unless the percentage of "opportunities to participate in intercollegiate athletics equals the percentage of women enrolled in the undergraduate program." *Id.* During the academic year of 1990-91 Brown provided men and women with 31 varsity teams. *Id.* Fifteen sports were available to females while men could participate in sixteen. *Id.*

test should govern.<sup>94</sup> Of the 894 athletes at Brown, 328 were women (36.7%) and 566 were men (63.3%).<sup>95</sup> Although Judge Pettine correctly noted that the Policy Interpretation and Investigators Manual do not carry significant judicial weight, she incorrectly gave deference to the three-part test and stated that a finding of non-compliance under Title IX can be established by this method.<sup>96</sup>

Judge Pettine held that Brown failed to satisfy the three-part test because of the substantial difference between the percentage of undergraduate women and the percentage of athletic opportunities available to them.<sup>97</sup> She ordered the injunction, which required Brown to reinstate the women's teams to varsity status.<sup>98</sup>

On appeal, the First Circuit (*Cohen II*)<sup>99</sup> affirmed the District Court's ruling and held that the Policy Interpretation is entitled to "substantial deference," as is the three-part test.<sup>100</sup> Perhaps the most disturbing aspect of the *Cohen* decision is the affirmative endorsement

94. *Id.* at 985. See also Education, 34 C.F.R. § 106.41(c)(1) (2001).

95. *Cohen I*, 809 F. Supp. at 981. The undergraduate population at Brown was 2951 men (52.4%) and 2683 (47.6%). *Id.*

96. *Id.* at 988. Judge Pettine stated that "the Policy Interpretation and the unpublished Investigator's Manual do not carry the force of law or establish controlling standards for this Court . . . I believe the Policy Interpretation, and to a slightly lesser extent the Investigators Manual, are important guides in unraveling the requirements of the athletic regulation." *Id.* At first blush, this method looks promising; however, this decision now gives the three-part test power to establish a Title IX violation without looking at any other factors listed in the regulations. Aronberg, *supra* note 28, at 774. Judge Pettine stated "in my opinion the three-part test is the point of departure for evaluating compliance under § 106.41(c)(1)." *Cohen I*, 809 F. Supp. at 991.

97. *Cohen I*, 809 F. Supp. at 991-93. The Court in deciding Prong I, examined the difference in the percentages of opportunities and undergraduate population. *Id.* at 991. For Prong II, the Court held that "Brown does not have a continuing practice of program expansion even though it can point to impressive growth in the 1970's." *Id.* The Court noted that since 1977 Brown has added only women's track to sports available to women. *Id.* As for Prong III, the Court found "in denying full varsity status to women . . . Brown has not accommodated the interests and abilities of women . . . under existing athletic programs." *Id.* Brown's only defense was to show there were no other women who desired to compete at that level, which they could not do. *Id.* at 992.

98. *Cohen I*, 809 F. Supp. at 1001 (stating that "Brown University is ordered to take the following actions immediately: (1) Restore women's gymnastics and women's volleyball to their former status as fully funded intercollegiate varsity teams in Brown's intercollegiate athletic program.").

99. *Cohen v. Brown Univ.*, 991 F.2d 888 (1st Cir. 1993) (*Cohen II*).

100. *Id.* at 896-97 (citing *Martin v. OSHRC*, 499 U.S. 144 (1991)). Although the Court found Brown in violation of Title IX, the Court stated "it seems unlikely, even in this day and age, that the athletic establishments of many co-educational universities reflect the gender balance of their student bodies." *Id.* at 898. Although the Court had to adhere by the regulation, it held out an indirect token of sympathy when it stated "whether Brown's concept might be thought more attractive, or whether we, if writing on a pristine page, would craft the regulation in a manner different than the agency, are not very important considerations." *Id.* at 899.

of eliminating male teams as a way to meet the compliance requirements of Title IX.<sup>101</sup>

Upon remand, the District Court (*Cohen III*) rejected Brown's argument that the "three-part test" is in direct contradiction with the intent of Title IX.<sup>102</sup> The Court determined that a numerical definition of "substantial proportionality" was not needed and concluded that an institution can only attain compliance if "... intercollegiate athletic programs mirrors the student enrollment as closely as possible."<sup>103</sup>

Based upon common sense and logic, Brown argued that the number of women enrolled at the institution is an incorrect standard to apply Title IX.<sup>104</sup> While obvious to many that men and women do not share equal interest in athletics,<sup>105</sup> the Court rejected this argument on the notion that no person could continuously keep track and summarize "students interests and abilities."<sup>106</sup>

In *Cohen IV*, Brown challenged the lower Court's reliance upon and use of the three-part test on both statutory and constitutional grounds.<sup>107</sup> Brown's key argument was that the panel's decision handed down in *Cohen II* did not bind this Court.<sup>108</sup> The Court ultimately

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101. *Id.* at 898 n.15. The opinion stated that:

[T]itle IX does not require that a school pour ever increasing sums into its athletic department. If a university prefers to take another route, it can also bring itself into compliance with the first benchmark of the accommodation test by subtraction and downgrading, that is, by reducing opportunities for the over represented gender while keeping opportunities stable for the unrepresented gender (or reducing them to a much lesser extent).

*Id.*

102. *Cohen v. Brown Univ.*, 879 F. Supp. 185, 199 (D.R.I. 1995) (*Cohen III*).

103. *Id.* at 202.

104. *Id.* at 204-05. Brown's argument would have the court examine the proportionality between the opportunities available and those students who evince an interest and ability to participate in intercollegiate athletics. *Id.*

105. *See infra* note 208 and accompanying text (talking about the percentage of male and female participants in interscholastic competition).

106. *Cohen III*, 879 F. Supp. at 205-06. The court acknowledged that: given the difficulty of measuring the relative interests of men and women, it would be almost impossible for an institution to remain in compliance with Title IX by staying abreast of the ever-changing relative "interests" of its male and female students and adjusting its programs accordingly. Because defendants' interpretation would require substantial proportionality between the gender balance of its athletic program . . . and the gender balance of interested prospective student-athletes, constant rebalance would be necessary to maintain compliance . . . .

*Id.* at 206 n.44. The court ordered Brown to submit a complete compliance plan for the university within 120 days. *Id.* at 211-12.

107. *Cohen v. Brown Univ.*, 101 F.3d 155 (1st Cir. 1996) (*Cohen IV*). *See infra* notes 108-13 and accompanying text.

108. *Cohen IV*, 101 F.3d at 162. *Id.* at 162. The court stated "in the first appeal, a panel of this court elucidated the applicable legal framework, upholding the substance of the district court's

followed the rulings handed down in *Cohen II*.<sup>109</sup>

As in the previous cases, the majority gave the Policy Interpretation great deference.<sup>110</sup> The Court also rejected Brown's arguments dealing with the interest of male and female students<sup>111</sup> and their Equal Protection challenge to Title IX's statutory scheme.<sup>112</sup> However, Chief Justice Torruella vehemently disagreed and crucified the majority for not abiding by the applicable law present at the time of appeal.<sup>113</sup>

b. *Roberts v. Colorado State University (CSU)*<sup>114</sup>

In 1992, CSU dropped its women's varsity softball team.<sup>115</sup> The plaintiffs claimed that the decision to terminate the team violated Title IX because there was no effective accommodation of the interests and abilities of the unrepresented sex.<sup>116</sup> CSU argued that it did not violate Title IX because it also eliminated the men's baseball team and by doing

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interpretation and applicability of the law in granting plaintiff's motion for a preliminary injunction, and rejecting essentially the same legal arguments Brown makes here." *Id.*

109. *Id.* at 169. The court made clear that the rule of law handed down in *Cohen II* is the law that applied to the present case. *Id.* It also noted "nothing in the record subsequently developed at trial constitutes substantially different evidence that might undermine . . . rulings of law." *Id.* Finally, the court found that Brown failed to show any substantive reason to disregard the rulings in *Cohen II*. *Cohen IV*, 101 F.3d at 169.

110. *Id.* at 171-72. The Court acknowledged that the construction given to the Interpretation came from the original enforcing agency. *Id.* See also *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837 (1984) (holding that if Congress gave an agency power to create provisions of a statute, the resulting regulations are given controlling weight unless contrary to statute).

111. *Cohen IV*, 101 F.3d at 174. The court stated that under *Cohen II*, the institution must provide full and effective accommodation. *Id.*

112. *Id.* at 181-85. Brown argued that the interpretation of the regulations require the imposition of quotas and preferential treatment. *Id.* Brown also argued that the court disregarded the applicable law in *Adarand Constructors*. *Id.* at 183.

113. *Id.* at 188-91. Chief Justice Torruella relied upon both *Adarand* and *Virginia* as the applicable law at the time of the decision. See *infra* notes 216-31 and accompanying text (arguing that the level of scrutiny that the majority in *Cohen* applied was too lenient and the result was the incorrect application of Equal Protection law).

114. *Roberts v. Colorado State Univ.*, 814 F. Supp. 1507 (D. Colo. 1993), *aff'd in part, rev'd in part sub nom* by *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824 (10th Cir. 1993).

115. *Id.* at 1509. The plaintiffs sought to reinstate the softball team and prayed for damages. *Id.*

116. *Id.* at 1511-12. In 1991-92, there were seventeen varsity teams at the institution. *Id.* at 1512. The year in which the plaintiffs filed the claim women athletes made up 37.7% of the total number of athletes, whereas women totaled 48.29% of the undergraduate population. *Id.* The plaintiffs entered evidence that showed the gap between the percentage of female athletes and the percentage of female undergraduates. *Id.* From 1980-81 to the present time of the case the percentage gaps are: 7.6%, 12.6%, 15.6%, 15%, 12.3%, 16.5%, 14.8%, 15.6%, 16.7%, 14.9%, 12.7% and 10.6%. *Roberts v. Colorado State Univ.*, 814 F. Supp. 1507, 1512 (D. Colo. 1993).

so brought the percentage of difference closer together.<sup>117</sup> The Court quickly dismissed this argument and found that CSU failed to satisfy the three-part test.<sup>118</sup>

Judge Weinshienk adopted the reasoning of *Cohen* and determined that the three-part test alone can establish non-compliance.<sup>119</sup> The Court relied heavily upon the finding in *Cohen* that the 11.6% disparity did not satisfy Title IX<sup>120</sup> and held that CSU's disparity of 10.5% was fatal to the University's claim.<sup>121</sup> CSU appealed to the 10<sup>th</sup> Circuit, but the Court affirmed the injunction upon the University.<sup>122</sup>

### c. *Favia v. Indiana University of Pennsylvania (IUP)*<sup>123</sup>

This action originated in response to the University's decision to cut the women's gymnastics and field hockey teams.<sup>124</sup> In 1990-91, IUP had an undergrad population of 6,003 women (55.61%) and 4,790 men (44.39%).<sup>125</sup> After the cutback, the number of female athletes numbered only 149 or 36.51% of the total number of athletes at the University.<sup>126</sup>

The Court entered judgment for the plaintiff with respect to the injunction and ordered the restoration of the women's teams back to

117. *Id.* at 1514.

118. *Id.* at 1511-19. The Court also noted that the average disparity between male and female participation during the time from 1980 to 1991 was 14.1%. *Id.* at 1512. CSU also failed to show any expansion for women's athletics during the 1970's. *Id.* at 1514. The Court relied heavily upon this fact and stated "the Court cannot accept defendant's conclusion that the mere fact that CSU now offers women's teams is evidence of program expansion for women." *Id.* The Court finally dismissed CSU's argument for compliance with Prong III and found that because several women had the desire to participate in intercollegiate softball, and because the sport was no longer offered at the institution, CSU failed to accommodate their interests and abilities. *Roberts v. Colorado State Univ.* 814 F. Supp. 1507, 1517 (D. Colo. 1993).

119. *Id.* at 1511 (stating that "the Court's findings of fact and conclusions of law will be limited to 34 C.F.R. § 106.41").

120. *Cohen I*, 809 F. Supp at 991.

121. *Roberts*, 814 F. Supp. at 1512-13.

122. *Roberts*, 998 F.2d at 833-34. The court agreed with the district court that *Roberts* did not satisfy the three-part test. *Id.* The court did overrule the district court on the issue of burden of proof and held that the plaintiff's bore this burden but that the plaintiffs in this case satisfied that burden. *Id.* at 831-32.

123. *Favia v. Indiana Univ. of Pa.*, 812 F. Supp. 578 (W.D. Pa. 1993), *aff'd* 7 F.3d. 332 (3rd Cir. 1993).

124. *Id.* at 580. The school, faced with a significant budget problem, also cut men's soccer and men's tennis. *Id.*

125. *Id.*

126. *Id.* Before the cutback, 503 students participated in which 313 were male and 190 were female. *Id.* After the decision to eliminate teams, the total number of athletes totaled 397 with 248 males participating. *Id.* at 580.

varsity status.<sup>127</sup> The Court gave the Interpretation great deference and subsequently found that IUP failed to satisfy the three-part test.<sup>128</sup>

What may be the most important point of the case is the Court's denial of the "financial hardship defense."<sup>129</sup> The Court, quoting from *Haffer v. Temple University*,<sup>130</sup> stated "financial concerns alone cannot justify gender discrimination."<sup>131</sup> On appeal, the Circuit Court affirmed the granting of the injunction against the university and the finding that IUP did not comply with Title IX requirements.<sup>132</sup>

## 2. Men as Plaintiffs

What *Cohen*,<sup>133</sup> *Roberts*,<sup>134</sup> and *Favia*<sup>135</sup> demonstrate is the success that women as Title IX plaintiffs have experienced throughout the years.<sup>136</sup> On the other hand, no male plaintiff bringing a Title IX claim has been successful.<sup>137</sup> This lack of success is due to the court's reliance on the three-part test and the fact that males are the overrepresented gender at the majority of institutions.<sup>138</sup> Because of Title IX and

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127. *Favia v. Indiana Univ. of Pa.*, 812 F. Supp 578, 585 (N.D. Pa. 1993). The court based the granting of the injunction on public policy and stated that the "public has a strong interest in the prevention of any violation of Constitutional rights." *Id.*

128. *Id.* at 584-85. IUP failed Prong I because even before the cuts were made, women only possessed 37.7% of the athletic opportunities, whereas their undergraduate population was 55.61%. *Id.* IUP did not satisfy Prong II as the Court noted that "you can't replace programs with promises." *Id.* at 585. Finally, Prong III was not satisfied because the promise to add new teams does not satisfy the interest of the present students. *Id.* at 584-85.

129. *Favia*, 812 F. Supp at 585.

130. *Haffer v. Temple Univ.* 678 F. Supp. 517 (E.D. Pa. 1987).

131. *Favia*, 812 F. Supp. at 585 (citing *Haffer*, 678 F. Supp. at 530). *C.f.* *Frontiero v. Richardson*, 411 U.S. 677 (1973) (holding that saving money by using a gender based military regulation is not allowable). IUP had to cut back its athletic budget by \$350,000. *Favia*, 812 F. Supp. at 580.

132. *Favia v. Indiana Univ. of Pa.*, 7 F.3d. 332, 340-45 (3d Cir. 1993).

133. *Cohen v. Brown Univ.*, 809 F. Supp. 978 (D.R.I. 1992) (*Cohen I*), *aff'd* 991 F.2d 888 (1st Cir. 1993) (*Cohen II*), *aff'd* on remand, 879 F. Supp. 185 (D.R.I. 1995) (*Cohen III*), *aff'd* 101 F.3d 155 (1st Cir. 1996) (*Cohen IV*).

134. *Roberts v. Colorado State Univ.* 814 F. Supp. 1507 (D. Colo. 1993), *aff'd sub nom. Roberts v. Colorado State Board of Agriculture*, 998 F.2d 824 (10th Cir. 1993).

135. *Favia v. Indiana Univ. of Pa.*, 812 F. Supp. 57 (W.D. Pa. 1993), *aff'd*, 7 F.3d. 332 (3d Cir. 1993).

136. Joseph P. Williams, *Lower Pay for Women's Coaches: Refuting Some Common Justifications*, 21 J.C. & U.L. 643, 646 (1995) (claiming that women who bring Title IX claims have had almost "universal success").

137. *Kelley v. University of Ill.*, 832 F. Supp. 237 (C.D. Ill. 1993), *aff'd*, 35 F.3d 265 (7th Cir. 1994); *Harper v. Illinois State Univ.*, 35 F. Supp. 2d 1118 (C.D. Ill. 1999); *Gonyo v. Drake Univ.*, 837 F. Supp. 989 (S.D. Iowa 1993).

138. *Jurewitz*, *supra* note 7, at 313. See also Alexander Wolff, *The Slow Track*, SPORTS

increasing budget constraints, institutions must cut men's teams while at the same time forced by courts to retain women's teams.<sup>139</sup>

a. Kelley v. University of Illinois<sup>140</sup>

In 1993, the University of Illinois determined that it would eliminate men's swimming and fencing varsity teams and the men and women's diving teams.<sup>141</sup> During the 1992-1993 school year, there were 25,846 students; 14,427 (56%) of the students were men.<sup>142</sup> Of the 474 athletes, 363 were male (76.58%).<sup>143</sup> The plaintiffs, who were members of the now defunct men's swimming team, claimed that the University violated Title IX by cutting their team while at the same time retaining the women's team.<sup>144</sup>

The Court granted judgment on the Title IX claims to the University because "even though the elimination of the program excluded them from varsity participation as individuals, the percentage of all men participating in the varsity program is more than substantially proportionate to the percentage of men represented by the undergraduate population."<sup>145</sup>

The Court also dismissed the plaintiff's Equal Protection claim because attaining Title IX compliance qualified as an "important governmental interest" and is "substantially related" to eliminating the historic discrimination towards women.<sup>146</sup> Insultingly, the Court stated

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ILLUSTRATED, Sept. 28, 1992, at 52; Carol Herwig, *Title IX: 20 Years After, a New Call for Action*, USA TODAY, June 8, 1992, at C10.

139. For examples of different men's teams being cut because of budget constraints and Title IX see Mark Blandschun, *The Ax Falls on Some: BU Baseball Program Getting Cut*, BOSTON GLOBE, Apr. 12, 1995, at 37; John Maher, *Out of the Running*, AUSTIN-AMERICAN STATESMAN, Jan. 22, 1995, at A1; Jamison Hensley, *Terps Cut Men's Scholarships*, BALTIMORE SUN, Dec. 19, 1993, at 5C; Bill Jauss, *NU Adds Varsity Women's Soccer; Men's Fencing Clubbed*, CHICAGO TRIBUNE, Aug. 9, 1993, § 3, at 11.

140. Kelley v. University of Ill., 832 F. Supp. 237 (C.D. Ill. 1993).

141. *Id.* at 239-40. The University claimed that the reason for the cutback of its sports was to comply with the serious budget constraints it experienced. *Id.* at 240.

142. *Id.* at 240.

143. *Id.*

144. *Id.* at 239. This claim put forth by the plaintiffs was the first of its kind in Title IX litigation. *Id.* at 241.

145. Kelley, 832 F. Supp. at 242. The court noted that this over representation did not change even after the elimination of the teams. *Id.*

146. *Id.* at 242-43. The court applied the intermediate standard of scrutiny test. See Craig v. Boren, 429 U.S. 190, 197-98 (1977). "To withstand constitutional challenge . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." Craig, 429 U.S. 190 at 197.

that innocent victims are needed to bear the burden in an attempt to remedy “the effects of a historical de-emphasis on athletic opportunities for women.”<sup>147</sup> The Seventh Circuit Court affirmed the decision of the District Court.<sup>148</sup>

b. *Gonyo v. Drake University*<sup>149</sup>

Drake University discontinued its men’s varsity wrestling team for two reasons: (1) financial constraints, and (2) other schools within their conference eliminated their wrestling teams.<sup>150</sup> As was the norm throughout America, Drake possessed an undergraduate population of 57.2% female and 42.8% male.<sup>151</sup> Within the spectrum of athletics, males comprised 60.6% of the total number of athletes, whereas the women made up only 39.4%.<sup>152</sup> Gonyo’s claim focused upon a violation of Title IX and the Equal Protection Clause.<sup>153</sup> Based upon the same reasoning as the cases before, the Court denied the plaintiff’s request for an injunction to reinstate the athletic program.<sup>154</sup>

Unfortunately, these decisions show an alarming trend that will forever change the face of intercollegiate athletics. Courts permit, and in fact endorse, team elimination as a way to comply with Title IX instead of focusing the efforts of the University to promote women’s athletics.<sup>155</sup>

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147. *Kelley*, 832 F. Supp at 244. The court foreshadowed the inequitable results of Title IX litigation when it stated it was “not unsympathetic to the plight of the members of the men’s swimming team and recognized that Congress, in enacting Title IX, probably never anticipated it would yield such draconian results.” *Id.* at 243.

148. *Kelley v. University of Ill.*, 35 F.3d. 265 (7th Cir. 1994). The court used substantially the same arguments, reasoning and policy as the district court did to affirm the granting of defendant’s motion for summary judgment. *Id.* at 269-73.

149. *Gonyo v. Drake Univ.*, 837 F. Supp. 989 (S.D. Iowa 1993).

150. *Id.* at 992. The University justified its decision by explaining that the students of Drake showed no interest in the program, it is not a revenue producing sport, and that other schools have eliminated the program when faced with a similar situation. *Id.*

151. *Id.* (findings relating to monetary expenditures and non-scholarships funding).

152. *Id.*

153. *Gonyo v. Drake Univ.*, 837 F. Supp. 989, 990 (S.D. Iowa 1993). Another claim made by the plaintiff is that the University breached a contract between the plaintiffs and the University. *Id.* The court dismissed this claim because Drake is still honoring its scholarship commitments to the plaintiffs. *Id.* at 994-95.

154. *Id.* at 995-96. The court also dismissed the Equal Protection Clause violation because there existed no evidence that showed the University was “acting under the color of law.” *Id.* at 994. The court also took into account the public interest at stake and permitted “colleges and universities to chart their own course in providing athletic opportunities . . . absent a claim showing that they are in violation of the law.” *Id.* at 996.

155. Spitz, *supra* note 49, at 654. See also *Harper v. Illinois State Univ.*, 35 F. Supp. 2d 1118 (C.D. Ill. 1999) (plaintiffs claiming that the elimination of intercollegiate soccer and wrestling is a

What the majority of courts have failed to realize is that the goal of Title IX is to expand and promote women's participation, not to sound the death knell of men's sports.<sup>156</sup>

Recently, there seems to be a small flickering of light in the distance for male intercollegiate athletics. At least in one case to date, the court has ignored the pressure and politicking from Civil Rights and feminist groups, and as time may tell, this trend may be the "savior" of intercollegiate athletics.<sup>157</sup>

In *Pederson v. Louisiana State University*,<sup>158</sup> two classes of female students that were interested in participating in soccer and softball sued to require the University to establish these teams, because failure to do so violates Title IX.<sup>159</sup> While the Court ultimately ruled that LSU was in violation of Title IX, it did so without following the "incorrect" *Cohen* application of the three-part test.<sup>160</sup>

violation of Title IX). The court held that the University could cut men's programs without violating the statute because men's interests and abilities are presumptively met when substantial proportionality exists. *Id.* at 1122.

156. Dr. Christine H.B. Grant, *A Basic Title IX Presentation: Title IX and Gender Equity* (1995), available at <<http://www.baliwick.lib.uiowa.edu/ge/present.html>> (presenting a study on Title IX compiled by the University of Iowa). The pertinent information for this article is found on pages 10 and 11 of the presentation. Most notably, the severe decrease in men's gymnastics and wrestling between the years of 1982-1994.

157. See *infra* notes 158-68 and accompanying text.

158. *Pederson v. Louisiana State Univ.*, 912 F. Supp. 892 (M.D. La. 1996), *aff'd in part & rev'd in part*, 201 F.3d 388 (5th Cir. 2000), *reh'g granted*, 213 F.3d 858 (5th Cir. 2000). At the time of this suit, the undergraduate population was 51%-49% male and the athletic program was 71%-29% male. *Id.* at 915. This decision did several novel things never seen before in Title IX litigation. First, the court rejected the "substantial proportionality" prong as a "safe harbor" for institutions to meet for Title IX compliance. Jurewitz, *supra* note 7, at 344. Second, the court breathed new life into Prongs II and III of the test. *Id.* By shifting some of the focus from Prong I, institutions may not have the opportunity to come into compliance with Title IX by showing evidence of "expansion" and "full accommodation." *Id.* While it is assumed that all three prongs apply, it is hard to find a court that has found compliance by using Prong II and III. *Id.* Finally, the court gives the institution more choices in how to serve the interests of its students by rejecting *Cohen's* interpretation of Prong III. *Id.* In essence, the court eliminated the "full" out of Prong III. *Id.* at 344. This decision is similar to Brown's argument to promote "relative interests" instead of "full accommodation." *Cohen v. Brown Univ.*, 101 F.3d 155, 169-71 (1st Cir. 1996) (*Cohen IV*). Although this ground-breaking decision has not yet received the praise *Cohen* originally did, its mandates and rulings are starting to influence other courts throughout the nation. Jurewitz, *supra* note 7, at 345. See, e.g., *Neal v. Board of Tr. of the California State Univ.*, 1999 WL 1569047 (E.D. Cal. 1999), *rev'd* 198 F.3d 763 (9th Cir. 1999).

159. *Pederson*, 912 F. Supp. at 897-98. The plaintiffs claim their interests and abilities were not satisfied. *Id.*

160. *Id.* at 914. The Court stated that "to the extent that the Policy Interpretation suggests by use of the disjunctive "or" that mere reliance upon substantial numerical proportionality between the sexes suffices, is contrary to the explicit language in 20 U.S.C. § 1681(b) and will not be followed herein." *Id.*

Justice Rebecca F. Dougherty did not follow *Cohen*<sup>161</sup> or *Roberts*<sup>162</sup> and their use of numerical percentages<sup>163</sup> because those cases assumed that both men and women have the same interest and ability to participate in sports.<sup>164</sup> Justice Dougherty also distinguished this court by not giving complete deference to the Policy Interpretation.<sup>165</sup>

The Interpretation only provided the Court with a “helpful guide to a thoughtful analysis of the mandate of Title IX.”<sup>166</sup> By correctly understanding the policy and intent behind Title IX, Justice Dougherty had the insight to foresee what will occur if future reliance is based upon *Cohen*.<sup>167</sup> According to Justice Dougherty, application of Title IX would lead to “an unsupported and static determination of interest” and “unjust results.”<sup>168</sup>

#### IV. TITLE IX SHOULD NOT APPLY TO INTERCOLLEGIATE ATHLETICS

##### A. Congress Intended a Program-Specific Approach

Title IX has applied to intercollegiate athletics for over twenty-five years. While the positive results are nothing short of remarkable, there are shortcomings in its modern interpretation. If the intent of Title IX were interpreted correctly, it would demonstrate that Title IX does not apply to athletics.

The first reason why athletics are not within the “long-armed reach” of Title IX is that the history behind the conception of the statute

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161. See *supra* notes 95 and 97 (26.6% differential between male and female participation in athletics).

162. See *supra* note 121 (24.6% differential between male and female participation in athletics).

163. *Pederson*, 912 F. Supp. at 913. The Fifth Circuit at that time had not resolved or even addressed this highly litigated issue. *Id.*

164. *Id.* at 913-14. The court correctly noted that athletic ability and interest will invariably differ from each town, city and state across the United States. *Id.*

165. *Id.* at 914. This is because the “numerical proportionality” standard that earlier courts applied is not found anywhere within the language of the statute. *Id.* Justice Dougherty argues that this standard is loosely inferred from the Interpretation and it completely fails to recognize other language within the statute that the plaintiffs’ standard contradicts. *Pederson v. Louisiana State Univ.*, 912 F. Supp. 892, 914 (M.D. La 1996).

166. *Id.*

167. For an explanation on the future effects of the *Cohen* application see *infra* note 168 (continuing an elimination of non-revenue men’s athletic teams), and see *infra* notes 214-32 and accompanying text (discussing the incorrect application pool and how the interpretation set forth in *Cohen* violates the Equal Protection Clause).

168. *Pederson*, 912 F. Supp. at 913-14.

demands a “program-specific” approach.<sup>169</sup> Notwithstanding the Civil Rights Restoration Act of 1987,<sup>170</sup> Title IX’s “program-specific” approach is mirrored after the “program-specific” approach of Title VI.<sup>171</sup> In fact, Congress intended Title IX to function and apply in the same manner as Title VI.<sup>172</sup>

Judicial interpretation of Title VI, before the passage of Title IX, clears up any remaining ambiguity as to the original intent of Congress.<sup>173</sup> The legislative history of Title VI shows the intention of Congress to limit the word “program” to those programs which directly receive “specific federal grants.”<sup>174</sup>

169. Johnson, *supra* note 20, at 553 (noting that the final version of Title IX was significantly different than the original form that Senator Bayh proposed). The original version included language that would extend Title IX to any “program or activity conducted by a public institution of higher education . . . which is a recipient of federal financial assistance.” *Id.* at 562. *See also* 117 CONG. REC. 30, 156; Paul J. Van de Graaf, *The Program Specific Reach of Title IX*, 83 COLUM. L. REV. 1210 (1983).

170. 20 U.S.C. § 1687 (1994).

171. Van de Graaf, *supra* note 169, at 1221-22. 42 U.S.C. § 2000(d) (1994), has the program specific language that is also found in 20 U.S.C. § 1681 (1994). *Id.* at 1244 n.88. The only major difference is that Title IX prohibits discrimination based upon sex, while Title VI prohibits discrimination premised upon a person’s race, origin, or color. *Id.* The Rehabilitation Act in 29 U.S.C. § 794 (1994), is modeled on the same framework of Title VI. *Id.* Numerous courts have found that § 794 is program-specific. *See generally* Brown v. Sibley, 650 F.2d 760 (5th Cir. 1981); Ferris v. University of Tex., 558 F. Supp. 536 (W.D. Tex. 1983).

172. North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 526-28 (1982) (stating that the floor debates are the most significant indicator of what the actual intent of Congress was in respect to Title IX). Although the legislative history of Title IX with respect to athletics is limited in scope, the available history supports the theory that the statute is not to be read in an “over-expansive” and broad manner. Van de Graaf, *supra* note 169, at 1224-25.

173. Van de Graaf, *supra* note 169 at 1229. *See also* Cannon v. University of Chicago, 441 U.S. 677, 696 (1979) (stating that the “drafters of Title IX explicitly assumed it would be interpreted as Title VI had been during the preceding eight years”).

174. Note, *Title VI, Title IX, and the Private University: Defining “Recipient” and “Program or Part Thereof,”* 78 MICH. L. REV. 608 (1980) (arguing that the change from the original version to the modern day version evinces the program specific interpretation because Congress eliminated the word “indirect”). *See also* *Civil Rights: Hearings Before the Subcommittee No.5 of the House Comm. on the Judiciary*, 88th Cong., 1st Sess. 730 (1963) (defining program in relation to a specific grant). Both the Senate floor debates and the House reports provide a comprehensive list of both grant statutes and the programs covered by Title IX. Van de Graaf, *supra* note 169, at 1229 (referring to Deputy Attorney General Nicholas Katzenbach’s letter that was given to the Chairman of the House Judiciary Committee listing the specific grant statutes and their programs). Congress defined “program” as encompassing both the grant statute and the recipient of the grant statute. *Id.* at 1230 (arguing that it cannot refer to the statute itself because a person cannot be excluded from a grant statute). *See also* 42 U.S.C. § 2000(d), 20 U.S.C. § 1681(a). The goal of this legislation was to end discrimination, not at the administrative level, but at the specific recipient’s level. 110 CONG. REC. 6544-45 (1964). *Cf.* Soberal-Perez v. Schweiker, 549 F. Supp. 1164 (1982) (holding that Title VI is not triggered in respect to social security payments because discrimination can only take place at the level of administration).

Existing case law provides substantial credence to Congress' true intent. In 1969, the Fifth Circuit handed down its ruling in *Board of Public Instruction v. Finch*.<sup>175</sup> The department's main argument was that "program" does not refer to individual grants, but to a much broader category.<sup>176</sup> The Court, however, held that this argument was misplaced, and to correctly effectuate the intent of Congress, the Fifth Circuit interpreted "program" to refer to the specific grant statute.<sup>177</sup>

This case becomes even more important because the legislative history of Title IX is at best slightly ambiguous.<sup>178</sup> The decision in *Finch*<sup>179</sup> is the only judicial decision, before the enactment of Title IX, that defines what specifically "program" encompasses.<sup>180</sup> While Senator Bayh never explicitly mentioned the *Finch* decision in the debates leading to the passage of Title IX, he did place substantial emphasis on the Court's decision and stated that it reflected Congressional intent.<sup>181</sup>

Although the modern day application of Title IX to athletics is unquestioned, Congress erred in passing the Civil Rights Restoration Act of 1987.<sup>182</sup> Congress misinterpreted the legislative history of Title IX, and by doing so, overruled the decision handed down in *Grove City*

175. *Board of Pub. Instruction v. Finch*, 414 F.2d 1068 (5th Cir. 1969). The school operated eight public schools where 2900 whites students and 975 black students attended. *Id.* at 1070. No white student was allowed to attend class with a black student and vice versa. *Id.* The school submitted to the HEW a plan for desegregation, but the HEW was not pleased with the pace of compliance. *Id.* at 1070-71. The HEW ruled that the school was no longer entitled to federal funds. *Id.*

176. *Id.* at 1076. The HEW argued that "program" meant "not an individual grant statute, but to such general categories such as road programs or school programs." *Board of Pub. Instruction v. Finch*, 414 F.2d 1068 (5th Cir. 1969).

177. *Id.* at 1077-78. The court relied heavily upon the intended purpose and the legislative history of Title VI to render its decision. *Id.* The Court stated "termination shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found." *Id.* at 1076. See generally Kuhn, *supra* note 49. The court also found the discussions within the Congressional debates dispositive. *Finch*, 414 F.2d at 1077. Reference was made to individual programs, not broad based categories (referring to farm-to-market road program, vocational agricultural teaching). *Id.*

178. Comment, *HEW's Regulation Under Title IX of the Education Amendments of 1972: Ultra Vires Challenges*, 1976 BYU L. REV. 133 (1976).

179. *Board of Pub. Instruction v. Finch*, 414 F.2d 1068 (5th Cir. 1969).

180. Van de Graaf, *supra* note 169, at 1230-31 (noting that no other court had the opportunity to decide what exactly program actually meant).

181. *Sex Discrimination Regulations: Hearings Before the Subcomm. on Post Secondary Education of the House Comm. on Education and Labor*, 94th Cong., 1st Sess. 184 (1975).

182. By passing the Civil Rights Restoration Act of 1987, Congress blatantly disregarded a Supreme Court case, several Appellate and District Court cases, and the original intent of Title IX as evidenced by reference to Title VI. For a more thorough discussion of the above listed factors see *supra* notes 68-72, 169-81.

*College*.<sup>183</sup> While it is not likely that Title IX's application to athletics will subside in the near future, its application relies upon misconstrued interpretations.

### *B. Athletics Have No Place In Civil Rights Legislation*

The history of Title IX shows that it is included under the general definition of Civil Rights Legislation, as it came in part from the Civil Rights Act of 1964 and gained "teeth" under the Civil Rights Restoration Act of 1987.<sup>184</sup> Civil Rights have long been a cornerstone for the advancement and ethical treatment of minorities in our country.<sup>185</sup>

Although this country continues to view women as a minority, courts can no longer maintain this view.<sup>186</sup> Women constitute a majority of the general population and a majority of the undergraduate enrollment at institutions.<sup>187</sup> It is hard to conceive that sports could be part of Civil Rights legislation. Sports are a "past time" and do not hold the same level of importance as do the issues of employment, health care, and

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183. See *supra* notes 75-78 and accompanying text. The court in *Grove City College* held that Title IX used a "program-specific" approach in dealing with Title IX and its violations. See *supra* note 71.

184. Darryl C. Wilson, *Parity Bowl IX: Barrier Breakers v. Common Sense Makers: The Serpentine Struggle for Gender Diversity in Collegiate Athletics*, 27 CUMB. L. REV. 397, 419 (1996-97). The author refers to Theodore Greenberg and his work CIVIL RIGHTS LEGISLATION which discusses several examples of Civil Rights legislation. *Id.* at 441 n.83 (citing THEODORE GREENBERG, CIVIL RIGHTS LEGISLATION (3d. ed. 1991)). The accepted definition of Civil Rights (civil liberties) is "personal [or] natural rights guaranteed and protected by [the] Constitution; e.g., freedom of speech, press . . . . Body of law dealing with natural liberties, shorn of excesses which invade equal rights of others. Constitutionally, they are restraints on the government. . . . State law may recognize liberty interests more extensive . . ." BLACK'S LAW DICTIONARY 168 (6th ed. 1991). See also Wilson, at 419 n.84 (pointing out that the Civil Rights Restoration Act also dealt with much more than intercollegiate athletics). It promoted the application of Title IX, Title VI, the Age Discrimination in Employment Act and the Rehabilitation Act. *Id.* at 419.

185. Compare Wilson, *supra* note 184, at 420 n.89 (stating that Civil Rights primary focus is on the African-American population and more specifically affirmative action), with Leroy D. Clark, *New Directions for the Civil Rights Movement: College Athletics as a Civil Rights Issue*, 36 HOWARD L.J. 259 (1993) (arguing that sports fall under the umbrella coverage of Civil Rights).

186. See *infra* note 187 and accompanying text.

187. In 2000, women averaged 54.9% of the undergraduate population, whereas men composed 45.1% of the undergraduate population. Wesley R. Habley, *First Year Students: The Year 2000*, available at <<http://www.artsci.ccsu.edu/Planning/Students2000.html>>. Cf., *Frontiero v. Richardson*, 411 U.S. 677, 686 n.17 (1973) (stating "women do not constitute a small and powerless minority"). For an opposing view to the thought that women are no longer a minority see, e.g., Connie Chang, *Immigrants Under the New Welfare Law: A Call for Uniformity, A Call for Justice*, 45 UCLA L. REV. 205, 276 n.268 (1997), including women and minorities within the gamut of "politically powerless segments of society."

housing.<sup>188</sup>

What arises from the use of Title IX, as a piece of Civil Rights legislation, is exactly what Civil Rights in general seeks to prohibit.<sup>189</sup> The “majority (women)” claim protection under the statute, which in turn hinder the “minority,” who should be protected by Civil Rights legislation.<sup>190</sup>

The sports that typically cause a Title IX violation at an institution are football, basketball, and sometimes track.<sup>191</sup> Caucasian women file the majority of the Title IX claims in the courts.<sup>192</sup> The addition of women’s athletic teams usually involves sports not played by inner city children, and more specifically African-Americans.<sup>193</sup>

To allow Civil Rights legislation to apply to intercollegiate athletics will shackle the advancement of the minority in favor of the “majority.” In reality, it sets back decades of progress made by those who continuously benefit from “true Civil Rights” legislation.<sup>194</sup>

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188. NEIL D. ISAACS, *JOCK CULTURE USA* 22 (1978) (realizing that sport’s role in society is one of leisure). *See also* Allen Guttman, *From Ritual to Record*, in *THE NATURE OF MODERN SPORTS* (1978) (explaining how the role of athletics has changed significantly over time).

189. Leti Volpp, *Righting Wrongs*, 47 *UCLA L. REV.* 1815, 1833 (2000) (arguing that the goal of civil rights is to protect the powerless and bring about equality to all the citizens of the United States). *See also* Gerald S. Janoff, *Adarand Constructors, Inc. v. Pena: The Supreme Court to Decide the Fate of Affirmative Action*, 69 *TULANE L. REV.* 997, 1010 (1995) (arguing that if equality is desired we need more than “formal equality” as we must strive for “equal opportunity”).

190. Wilson, *supra* note 184, at 421-22. *See also supra* note 189 and accompanying text.

191. Clark, *supra* note 185, at 267 (using statistics and reports to show that more than seventy percent of all basketball players, fifty percent of football players and a majority of the participants in track and field are African-American); Wilson, *supra* note 183, at 422 n.98.

192. Wilson, *supra* note 184, at 422.

193. *Cohen v. Brown Univ.*, 809 F. Supp 978 (D.R.I. 1992) (bringing claim for gymnastics and volleyball teams); *Roberts v. Colorado State Univ.*, 814 F. Supp. 1507 (D. Colo. 1993) (bringing a claim for women’s softball team); *Favia v. Indiana Univ. of Pennsylvania*, 812 F. Supp. 578 (W.D. Pa. 1993) (claim for gymnastics and field hockey teams); *Pederson v. Louisiana St. Univ.*, 912 F. Supp. 892 (M.D. La. 1996) (bringing claim for softball and soccer teams), *aff’d in part, rev’d in part*, 201 F.3d 388 (5th Cir. 2000), *reh’g granted*, 213 F.3d 858 (5th Cir. 2000).

194. *See, e.g.*, Justice Clarence Thomas, *Personal Responsibility*, 12 *REGENTS U. L. REV.* 313 (1999-2000). Civil Rights legislation opened up “doors” that were shut to minorities, specifically African-Americans. Marvin Lazerson, *The Disappointments of Success: Higher Education After World War II*, 559 *ANNALS AM. ACAD. POL. & SOC. SCI.* 64, 71 (1998).

## V. ALTERNATIVES AVAILABLE TO INCREASE THE EFFECTIVENESS OF TITLE IX WITHOUT CUTTING MEN'S ATHLETIC TEAMS

### A. *Cohen* Requires Affirmative Action/Application of the Qualified Applicant Pool

Since the passage of Title IX twenty-eight years ago, there has been no other issue as widely debated among judges, commentators, and those directly involved in athletics than the interpretation that *Cohen* gave to the Effective Accommodation Test.<sup>195</sup> The suggestions listed below do not encapsulate an exhaustive list.<sup>196</sup> While disadvantages may accompany each alternative listed, they provide benefits to everyone involved.

The first and perhaps most important alternative to the modern day application of Title IX is for the courts to eliminate the *Cohen* interpretation. *Cohen* formulated the basic interpretation of Title IX.<sup>197</sup> The Court decided the case by examining only the "Effective Accommodation" provision and disregarding the other nine factors that the courts may use in consideration of the final judgment.<sup>198</sup>

195. See Brian L. Porto, *Title IX, Gender Equity, and the Future of College Sports*, 25-MAR. VT. B.J. & L. DIG. 37, 37 (1999) (arguing there is substantial controversy over the reliance on the Effective Accommodation test as the "test" for Title IX compliance).

196. For additional ideas to reform Title IX to meet its original intent see ACHIEVING GENDER EQUITY, *supra* note 58, at V1-V13. An option that deals directly with the day-to-day operations of the athletic department is the correction of fund mismanagement and the establishment of specific accounting procedures that will determine exactly where the money is going. Connolly, *supra* note 22, at 929. In practice, the department should make sure that their records reflect what is spent on men's sports and what is spent on women's sports. *Id.* See also Mike McGraw, et al., *Money Games Inside the NCAA: Revenues Dominate College Sports World*, KANSAS CITY STAR, Oct. 5, 1997, at A1. Institutions repeatedly over spend in certain sports and while this faux pas may allow that sport greater success, it negatively influences the chances of meeting any Title IX requirement. *Id.* While revenue has increased substantially over the past years the majority of the time it that revenue is given back to the sport that produced it originally. *Id.* Studies have shown that "for every dollar in revenue earned by sports like football and basketball, only five cents is spent on non-revenue sports." Mark Hammond, *Substantial Proportionality Not Required: Achieving Title IX Compliance Without Reducing Participation in Collegiate Athletics*, 87 KY. L.J. 793, 811 (1999). While this type of "ludicrous" spending will please the donors, alumni, and the students in the short run, it will hamper and possibly prevent colleges and universities from obtaining Title IX compliance in the foreseeable future. *Id.*

197. *Cohen* II, 991 F.2d at 897 (holding that an "institution that offers women a smaller number of athletic opportunities than the statute requires may not rectify that violation simply by lavishing more resources on those women or achieving equivalence in other respects").

198. *Cohen* III, 879 F. Supp. at 200 (focusing upon the first of ten factors listed at 34 C.F.R. § 106.41(c)(1)). See *supra* note 56. It was of no concern to the court whether the University accomplished this goal by satisfying prong one, two or three (stating that if Brown University fails

By using the substantial proportionality method, the Court found that Brown University retained an improper disparity between male and female athletes.<sup>199</sup> In essence, the *Cohen* Court requires an institution to offer or create a specific number of opportunities for the unrepresented sex.<sup>200</sup>

While incorrectly placing significant importance on the first prong, the Court in *Cohen* went on to interpret the “substantial proportionality” language as requiring “gender balance of an institution’s athletic program to substantially mirror the gender balance of its student enrollment.”<sup>201</sup> The proportionality test erroneously assumes that the percentage of men and women who are interested in intercollegiate athletics is equal to the percentage of men and women enrolled at the particular institution.<sup>202</sup>

Senator Bayh (D-Ind.) was extremely concerned that future judges and legislators would interpret the statute to require affirmative action.<sup>203</sup> Section 1681(b) is concrete evidence of the distaste for the application of quotas.<sup>204</sup> This section of Title IX also follows the “blueprint” of Title VII.<sup>205</sup> During the Senate debates of 1964, Senator Clark and Senator Case presented a memorandum interpreting Title VII.<sup>206</sup> Courts interpret

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the first two tests, or does not try to comply with these tests . . . it must comply with the third benchmark). *Id.*

199. *Cohen* III, 879 F. Supp. at 201-02.

200. *Cohen* II, 991 F.2d at 906 (requiring Brown University to “fully and effectively accommodate the underrepresented gender. . . even if that requires it to give to the underrepresented gender . . . what amounts to a larger slice of a shrinking athletic-opportunity pie”) (emphasis added).

201. *Cohen* III, 879 F. Supp. at 200. See also *supra* notes 90-110.

202. George A. Davidson & Carla A. Kerr, *Title IX: What is Gender Equity?*, 2 VILL. SPORTS AND ENT. L.J. 25, 29-30 (1995). Now institutions will create athletic opportunities with no assurance that the women who fill the spots will have the ability or the interest to compete at such a high level of competition. Leahy, *supra* note 7, at 529. Leahy also raises the concern that the creation of spots by addition and subtraction is arbitrary because “there is no basis” from which to establish actual student interest and ability. *Id.* This interpretation of the statute unfortunately leads to the creation of a quota system and produces affirmative action. Mahoney, *supra* note 27, at 944. Mahoney argues that because opportunities are created based on gender, Title IX has become a statute that requires “sex-based discrimination.” *Id.*

203. 117 CONG. REC. 30,406-07 (1971).

204. See *supra* notes 25-27 (discussing statements showing extreme dislike for the use of quotas in the legislation).

205. 42 U.S.C. § 2000e-2(j) (1994). Judicial decisions that have involved Title VII and the issue of preferential treatment based upon a single characteristic have established a strong prohibition against quotas. See, e.g., *West Virginia Univ. Hosps. v. Casey*, 499 U.S. 83 (1991).

206. 110 CONG. REC. 7212 (1964). See 42 U.S.C. § 2000e-2(j) (stating that “nothing contained in this subchapter shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex or national origin of such

42 U.S.C. §2000e-2(j) as not requiring an employer to “adopt quotas or preferences simply because of a racial imbalance.”<sup>207</sup> The law does not require an institution to make the athletic program “mirror the general population of that school.”<sup>208</sup>

While discrimination may be one of the causes of low female participation at the interscholastic level, it is unfathomable to require intercollegiate institutions to provide 54.9% of athletic spots when only 40.8% of athletes in high school are women.<sup>209</sup> The proper inquiry to determine if a school complies with the mandates of Title IX is a comparison to the “qualified applicant pool.”<sup>210</sup>

This pool is the number of male and females that have the ability and the desire to participate in intercollegiate sports and the number of male and female athletes at the institution.<sup>211</sup> Common sense should inform people that not all students have the ability to become involved in athletics and it is highly unlikely that people not participating in interscholastic sports will be able to compete intercollegiately.<sup>212</sup>

By focusing upon the willing and able participants that enroll at an institution, instead of comparing the number of athletes to the total number of undergraduates of the unrepresented sex, both the courts and the schools benefit by applying a legally correct analysis and a greater statistical opportunity to achieve compliance under a Title IX inquiry.<sup>213</sup>

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individual . . .”).

207. *Local 28 of the Sheet Metal Workers Int’l Ass’n v. E.E.O.C.*, 478 U.S. 421, 463 (1986).

208. *Cf. International Bros. of Teamsters v. United States*, 431 U.S. 324, 339-40 n.20 (1977) (stating that Title VII does not mandate the work force to “mirror the general population”).

209. In 1999, there were 6,504,298 participants in high school athletics. Bruce Howard & John Gillis, *High School Athletics Participation Reaches All-Time High available at* <<http://www.nfhs.org/topstories.htm#participation>> (released Sept. 14, 1999). Women accounted for 2,652,796 of those participants. *Id.* In 2000, women averaged 54.9% of the undergraduate population. Habley, *supra* note 185, at 3.

210. *See infra* note 210-12 and accompanying text.

211. Beveridge, *supra* note 11, at 831. The analysis behind this inquiry comes logically from two Supreme Court cases. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (rejecting in theory the substantial proportionality test to one that takes into account the most important qualification: ability to participate); *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299 (1977) (taking into account the ability of teachers in the St. Louis area).

212. Leahy, *supra* note 6, at 532, n.239 (showing that some people have the ability to compete in sports either do not have sports at their high schools or enroll in “private academies”).

213. *Id.* *But see* Felice M. Duffy, *Twenty-Seven Years Post Title IX: Why Gender Equity in College Athletics Does not Exist*, 19 QLR 67, 82-94 (2000) (arguing that if the opportunities were available, women would take part in athletics at a greater rate than at the present time).

*B. Cohen's Application of the Three Part Test is Invalid under the Equal Protection Clause*

The United States Supreme Court has held that there is a constitutional requirement that “no person shall be treated differently by others” because of gender.<sup>214</sup> It is unfortunate that the victory claimed by women under Title IX has been “achieved by sacrificing Constitutional value.”<sup>215</sup> The question confronting institutions that provide athletic programs is whether it can comply with the decision in *Cohen* and not violate the Equal Protection Clause in the process.<sup>216</sup>

The lawyers for Brown University argued that the accommodation of the unrepresented gender, women, disadvantaged male athletes, and therefore violated the Equal Protection Clause found in the Fifth Amendment.<sup>217</sup> The Court ultimately rejected this argument, and in fact, every court confronted with this Equal Protection Claim brought by “disadvantaged” male athletes has emphatically rejected the argument.<sup>218</sup>

Between the decision in *Cohen II* and *Cohen IV*, the Supreme Court ruled on the *Virginia* and *Adarand Constructors (Adarand)* cases.<sup>219</sup> When arguments for *Cohen IV*<sup>220</sup> took place, Brown argued that both *Virginia* and *Adarand* made the District Court's ruling in *Cohen* in direct contradiction with the present law.<sup>221</sup> However, the Court determined

214. See *infra* notes 219-32 and accompanying text (examining in greater depth the holdings and reasoning behind the Court's decision in each case).

215. William E. Thro & Brian A. Snow, *The Conflict Between the Equal Protection Clause and Cohen v. Brown University*, 123 ED. LAW. REP. 1013, 1016 (1998). The constitutional value that is sacrificed is the right given to people that no one can be treated differently just because of their gender. *Id.* See also *infra* notes 239-50.

216. Thro, *supra* note 215, at 1016. The Equal Protection Clause is only applicable to public institutions. *Id.* at n.8. Unfortunately, this is legally impossible. See *infra* notes 223-32 and accompanying text.

217. *Id.* at 1018. While the text of the Constitution says nothing about the Equal Protection Clause in the Fifth Amendment, its interpretation mandates the same restrictions on the federal government as the Fourteenth Amendment does upon the individual states. U.S. CONST. amend. XIV (equal protection as applicable to the states); *Bolling v. Sharpe*, 347 U.S. 497 (1954) (applying the Due Process clause of the 5th Amendment to guarantee the equal protection of the laws).

218. See, e.g., Brian A. Snow & Stephanie Clemente, *Wrestling with Title IX*, 145 ED. LAW REP. 1, 20 (2000). The authors state that although courts have rejected the Equal Protection Claims, many commentators and scholars have in fact disagreed with the *Cohen* decisions. *Id.* at 20 n.55.

219. *United States v. Virginia*, 518 U.S. 515 (1996); *Adarand Constructors, Inc., v. Pena*, 515 U.S. 200 (1995). *Cohen II* was decided in 1993 and the First Circuit's affirmance was early in 1996.

220. *Cohen v. Brown Univ.* 101 F.3d 155 (1st Cir. 1996), *cert. denied*, 520 U.S. 1186 (1997).

221. Thro, *supra* note 215, at 1021. Brown University argued four points: (1) The interpretation that the district court put on the three-part test resulted in Title IX applying as an affirmative action statute; (2) the court should follow the “new” law found in *Adarand* and *Virginia*

that neither *Virginia* nor *Adarand* had any substantive effect on the earlier decisions given in *Cohen*, and quickly dismissed the argument.<sup>222</sup> This Court obviously failed to give *Virginia* and *Adarand* their appropriate due as the ruling in *Cohen IV* violates the Equal Protection Clause.<sup>223</sup>

Properly passed legislation is presumed to be valid and will usually be sustained if the classification drawn is rationally related to a legitimate governmental interest.<sup>224</sup> Although this general rule applies in the majority of situations, the Court applies a heightened standard of scrutiny if the statute involves a “suspect or quasi suspect” classification.<sup>225</sup>

The Court in *Adarand*, although not explicitly deciding on the standard of scrutiny in respect to gender, determined that the standard for all race-based classifications, even benign ones, should be based upon strict scrutiny.<sup>226</sup> Before the *Virginia* case, all gender classifications were “quasi suspect.”<sup>227</sup>

*Virginia* heightened the standard for gender classifications,

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and disregard the law handed down in the earlier decisions of *Cohen*, (3) the standards of Title VII should apply to the present case, and (4) the district court was in error by requiring Brown University to follow a stated course of compliance. *Id.* See also *Cohen IV*, 101 F.3d at 185 (explaining the reasoning behind the court’s decision to reject Brown’s arguments).

222. Thro, *supra* note 215, at 1022. *Cohen IV*, 101 F.3d at 183 (stating that *Virginia* “adds nothing to the analysis of equal protection challenges to gender-based classifications” because it did not deal with the present issue).

223. The basic notion expressed by the Equal Protection Clause is that its protection encompasses persons. *Id.* at 1029 n.101 (listing numerous cases that lend direct support and several that provide inferential support). Equal Protection also requires that all persons situated in a similar position must be treated alike. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). The similar situation at issue is the men and women who are denied the right to participate in intercollegiate athletics.

224. *City of Cleburne*, 473 U.S. at 440. See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 40 (1973).

225. *City of Cleburne*, 473 U.S. at 440.

226. *Adarand*, 515 U.S. at 225-29. The Court held that courts should be precluded from lowering their standards of scrutiny for benign classifications. *Id.* The rule only works correctly when the courts admit an “individual suffers an injury when he or she is disadvantaged by the government because of his or her race, whatever that race may be.” *Id.* at 230.

227. See generally *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (stating that the classification is upheld if it (1) serves an important governmental objective and (2) is substantially related to the achievement of those objectives); *Craig v. Boren*, 429 U.S. 190, 197 (1976). Using this standard, many courts have upheld statutes that give one gender an advantage in response to the historic and inequitable discrimination levied upon them by society. See, e.g., *Califano v. Webster*, 430 U.S. 313 (1977) (allowing women under the Social Security Act to eliminate low earning years from calculation of retirement benefits because historically they have never been able to earn as men).

upholding gender classifications only if (1) an exceedingly persuasive justification for the classification exists, (2) the classification served an important governmental objective, and (3) the classification is substantially related to the achievement of those objectives.<sup>228</sup> In his dissent, Justice Scalia noted that the “exceedingly persuasive justification” standard was indistinguishable from “strict scrutiny.”<sup>229</sup>

It appears from the Court’s ruling that the exceedingly persuasive justification is interchangeable with “compelling state interest” required for race classifications.<sup>230</sup> Under this analysis, the reasoning of *Cohen* and its application of the three-part test would surely fail.<sup>231</sup> The only time a court may examine a Title IX claim under the *Cohen* analysis is where there is a showing of intentional discrimination; however, the fact that a gender is unrepresented at an institution, after using the “correct applicant pool,” is not intentional discrimination and has been dismissed accordingly in court.<sup>232</sup>

Because the three-part test and the substantial proportionality interpretation are contrary to Equal Protection principles, neither retains credence in a court of law. Congress should develop a new standard to achieve a more precise application of Title IX’s original intent.

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228. *United States v. Virginia*, 518 U.S. 515, 533 (1996). This standard will apply regardless of what gender is favored by statute and regardless if it is to rectify historical discrimination. Thro, *supra* note 215, at n.115 (listing of cases that support proposition); *See, e.g., Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 718 (1981).

229. *Virginia*, 518 U.S. at 596 (Scalia, J., dissenting).

230. Thro, *supra* note 215, at 1032. The author made the analogy by stating:

Thus, if something is a compelling state interest for purposes of a racial classification, it also would be regarded as an exceedingly persuasive justification for purposes of a gender classification. Conversely, if something were not a compelling state interest for purposes of a racial classification, it generally would not be regarded as an exceedingly persuasive justification for purposes of a gender classification.

*Id.* The only compelling state interest to date is the need to remedy historical intentional discrimination by the government. *Id.* at n.123.

231. Jurewitz, *supra* note 7, at 330-31. *Cohen v. Brown Univ.*, 101 F.3d 155, 188-192 (1st Cir. 1996) (*Cohen IV*) (Torruella, C.J., dissenting) (explaining that the majority did not apply the “exceedingly persuasive justification” correctly in the case). Chief Justice Torruella wanted to subject “benign” governmental actions to the same standard of scrutiny as any other gender classifications. *Id.* at 190. Because *Virginia* and *Adarand* were decided between *Cohen* appeals, the court must now subject the classification to the “exceedingly persuasive justification” test, which the majority failed to accomplish. *Id.* at 191.

232. 3 RONALD R. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 18.4 (2 ed. 1992) (stating that statistical proof of impact on racial groups is not enough to establish a racial classification).

*C. Certain Sports Should Be Classified As Profit Centers/Business Ventures*

While it is beneficial to the “American spirit” that people create a connection between athletics and higher education, most athletic departments function separately from the institution.<sup>233</sup> In reality, the purpose of athletics is not to provide lifelong skills for the student, but to operate as a “profit center” for the institution.<sup>234</sup> The major premise behind this alternative is that an institution may designate those sports that produce revenue as “businesses” and those that do not produce revenue as “amateur.”<sup>235</sup>

This distinction would give the university a more realistic chance of coming into compliance with Title IX. Sports that fall under the label of “businesses” would be exempt from calculations in determining whether a violation of Title IX exists.<sup>236</sup> The athletes participating on these teams are employees rather than students (athlete-students instead of student-athletes).<sup>237</sup> In fact, studies show that students who participate in “major sports” view themselves as employees of the institution rather than an enrolled student playing sports, and are therefore entitled to the benefits that come with being an employee, specifically wages.<sup>238</sup>

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233. B. Glenn George, *Who Plays and Who Pays: Defining Equality in Intercollegiate Athletics*, 1995 WIS. L. REV. 647, 663-64; *But see* 1997-98 NCAA DIVISION I MANUAL, art. 2, § 2.9 (stating the NCAA seeks to maintain amateurism and promote a relation between education and athletics).

234. Daniel, *supra* note 5, at 292. *See also* Ernest L. Boyer, *Foreword*, in *THE RULES OF THE GAME* ix, xi (Richard E. Lapchick & John B. Slaughter eds., 1989) (saying “Big Time Sport, collegiate and professional, is becoming the new civil authority in our culture. It draws . . . pride and unifies the community in the same ways the great cathedrals did in earlier times.”); Stephen M. Schott, *Give Them What They Deserve: Compensating the Student-Athlete for Participation in Intercollegiate Athletics*, 3 *SPORTS L.J.* 25, 26 (1996) (claiming that two-thirds of all professional basketball and football players never receive their college degree). *But see* Anthony Skillen, *Sport Is For Losers*, in *ETHICS & SPORTS* 169-81 (M.J. McNamee & S. J. Parry eds., 1998) (arguing sports are part of education, but not in the textbook way). *But see* Steve Brisendine, *Most Div. I & II Athletic Programs Lose Money, NCAA Study Says Revenue Isn't Meeting Expenses*, *MILWAUKEE J.-SENTINEL*, Oct. 18, 1998 (no page numbers) (stating that 62.5 % of all male athletic programs lost money in 1997, compared to over 92% of women's athletic programs that lost money over the same time period).

235. Sudha Setty, *Leveling the Playing Field: Reforming the Office of Civil Rights to Achieve Better Title IX Enforcement*, 32 *COLUM. J.L. & SOC. PROBS.* 331, 352 (1999).

236. Daniel, *supra* note 5, at 306-07.

237. *Id.* at 307.

238. Players over the years have demanded a portion of the money they generate from their play. Jack Carey, *Drake Gets One-Year Probation for Violation*, *USA TODAY*, July 20, 1995, at 12C (quoting Joe Smith, former University of Maryland basketball standout, saying “players around the country have made basketball exciting . . . we should receive a cut of that money.”). *But see*

The general definition of an amateur is one who plays sports because of an inner desire to compete without the need for compensation.<sup>239</sup> The normal “student-athlete” receives numerous forms of compensation for his participation in intercollegiate athletics.<sup>240</sup> It is obvious that the modern day intercollegiate athlete cannot fall within the definition of an “amateur.”<sup>241</sup>

To supplement this theory, Congress has acknowledged that college athletics extend beyond the education provided at an institution.<sup>242</sup> Even the NCAA has taken steps to show its acceptance of the profit center theory.<sup>243</sup>

For this theory to achieve maximum success, several groups must take action. First, the institution should retain the sole right to decide which sports are “business” and which sports are “amateur.”<sup>244</sup> To facilitate this “freedom of choice,” Congress can enact new legislation that requires an institution to take affirmative steps to label each individual sport with one of the two permissible labels.<sup>245</sup> Some

Edward H. Whang, *Necessary Roughness: Imposing a Heightened Duty of Care on Colleges for Injuries of Student-Athletes*, 2 SPORTS L.J. 25, 38 (1995) (arguing that college athletes should not be paid because most institutions consistently lose money each year on athletics).

239. Kenneth L. Shropshire, *Legislation for the Glory of the Sport: Amateurism and Compensation*, 1 SETON HALL J. OF SPORT L. 7, 10 (1991).

240. Generally, students receive room and board, tuition, books and other necessities needed for attendance at college. See also Michael P. Acain, *Revenue Sharing: A Simple Cure for the Exploitation of College Athletes*, 18 LOY. L.A. ENT. L.J. 307, 331 (1998). The author of this article received many of the same forms of “compensation” for his participation in intercollegiate athletics at Malone College.

241. *C.f.*, Steve Wulf, *Tote That Ball, Lift That Revenue: Why Not Pay College Athletes, Who Put in Long Hours to Fill Stadiums and Coffers?*, TIME, Oct. 21, 1996, at 84 (stating that college athletes should be paid, and the inference logically drawn is that if a person is paid for athletic competition he is no longer an amateur). See, e.g., Leonard M. Shulman, Comment, *Compensation for Collegiate Athletes: A Run for More Than The Roses*, 22 SAN DIEGO L. REV. 701 (1995). But see Timothy Davis, *Reply to Sack and Staurowsky*, 10 MARQ. SPORTS L.J. 123 (1999) (claiming that the author is not ready yet to concede that college athletes are no longer amateurs, although it may become that way in the near future).

242. Daniel, *supra* note 5, at 300. Congress promulgated the 1954 Tax Code to permit a college to collect a return on its sports investments. *Id.* In 1954, college athletics were exempted from the federal admission tax. *Id.* Finally, the NFL was prohibited from televising games on stations within seventy-five miles of an intercollegiate game. ARTHUR A. FLEISHER III, ET AL., THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION; A STUDY IN CARTEL BEHAVIOR 155 (1992).

243. See, e.g., Steve Weiberg, *Final Four Feats Also Will Flatten SEC's Wallets*, USA TODAY, Apr. 6, 1994, at O1C.

244. Daniel, *supra* note 5, at 312. In order to determine which sports fall into what categories, it seems that some external standards must be put in place. *Id.* Daniel suggests that the university should have the burden of either showing that the institution benefits academically or financially. *Id.*

245. *Id.* at 313. Author also suggests that OCR could amend its regulations to reflect the goals

commentators view this theory as circumventing Title IX, achieved by labeling each sport as a “business” and therefore exempting it from a Title IX investigation.<sup>246</sup> However, policies are in place that will deter an institution from designating non-revenue teams as businesses.<sup>247</sup>

First, while the IRS has stated that scholarships are not taxable income, the tax consequence of an institution may increase and subject it to an “unrelated business income tax.”<sup>248</sup> Second, an athlete on a team classified as a business is seen as an employee of the institution and under this view, the institution could face additional consequences.<sup>249</sup> The institution may acquire unlimited exposure through vicarious liability for illegal actions committed by the athletes during the progression of the sporting event.<sup>250</sup> In addition, these employees may request the institution to provide the same benefits that teachers and maintenance persons receive.<sup>251</sup>

While there are disadvantages to the use of the “profit center” theory, the advantages significantly outweigh the pitfalls. By correctly utilizing this theory, many sports teams will remain in existence.<sup>252</sup>

#### D. Football Teams<sup>253</sup>

Another controversial issue within Title IX is how to promote

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of this policy; however, this idea seems highly improbable. *Id.* The legislation would statutorily exclude the sports that the institution labeled as businesses from Title IX investigation. *Id.*

246. Setty, *supra* note 235, at 352-53. By removing these sports from the equation, the institution in effect is applying the Tower amendment. *Id.* Congress rejected this amendment in the 1970’s. *Id.*

247. See *infra* notes 248-51 and accompanying text.

248. Mark R. Whitmore, *Denying Scholarship Athletes Worker’s Compensation: Do Courts Punt Away a Statutory Right?*, 76 IOWA L. REV. 763, 779 n.94 (1991) (examining Rev. Ru. 77-263, 1977-31 I.C.B. 8); Erik M. Jensen, *Taxation, The Student Athlete, and the Professionalization of College Athletics*, 1987 UTAH L. REV. 35 (maintaining that colleges will be subject to UBIT if they professionalize their athletic programs incorrectly).

249. Daniel, *supra* note 5, at 315-16.

250. *Id.*

251. Daniel Nestel, *Athletic Scholarships: An Imbalance of Power Between the University and the Student-Athlete*, 53 OHIO ST. L.J. 1401, 1418 (1992). The author notes that some of benefits that athletes could request include: “group life and dental insurance.” *Id.*

252. See *infra* note 283 (needing to eliminate the nagging unintended consequence of cutting men’s sports, which the courts have failed to accomplish).

253. While the majority of institutions would never drop their football teams, several institutions have been forced to disband the team in order to comply with Title IX. Larry von Dyke, *The Clock Runs Out On Vermont Football*, CHRONICLE OF HIGHER EDUC. 10, Nov. 25, 1974 (noting that other schools have followed Vermont’s route: Xavier University, University of San Francisco, Northern Washington University, Marquette University and University of Detroit).

compliance within schools that maintain football programs.<sup>254</sup> The problem arises because the size of the football squad (an average Division IA team retains over 100 players) has no comparable women's counterpart.<sup>255</sup> While efforts have failed to exempt football from the strictures of Title IX,<sup>256</sup> several alternatives are available to athletic departments that will allow increased compliance with Title IX.<sup>257</sup>

First, the athletic department can cap the maximum number of players that may participate on the team.<sup>258</sup> Presently, the NCAA allows up to eighty-five athletic scholarships.<sup>259</sup> The basis for this argument is that the National Football League, which plays on the average five to six more games a year, limits the size of their roster.<sup>260</sup>

However, proponents of this theory may not comprehend why these rules allow college teams to maintain a larger squad. While an NFL team places an injured player on the injured reserve list and not counted as a member of the team, the collegiate squad counts everyone, including injured players.<sup>261</sup>

Second, not all freshman who arrive on the college campus at age 17 or 18 are ready for full contact their first year.<sup>262</sup> By reducing the size of the squad, freshman brought in to redshirt and prepare for the subsequent years prematurely play a substantial role and significantly increase the risk of serious injury.<sup>263</sup>

A second option available to an institution is to limit the scholarships available for the football team.<sup>264</sup> By lowering the number

254. Susan M. Shook, *The Title IX Tug-Of-Way And Intercollegiate Athletics in the 1990's: NonRevenue Men's Teams Join Women Athletes in the Scramble for Survival*, 71 IND. L.J. 773, 814 (1996) (stating there are two alternatives for a school when they have a football team: (1) eliminate it and go on without it or (2) decrease the size of the team to allow compliance with Title IX).

255. *Id.* See also Robert C. Farrell, *Title IX Or College Football?*, 32 HOUS. L. REV. 993, 1052 (1995).

256. See *supra* notes 45-48 (allowing all sports to be exempt from Title IX or in the alternative to allow football to fall outside the calculation made to determine Title IX compliance).

257. See *infra* notes 258-68 and accompanying text. However, it will be several years before the actual effects of these options are widely known.

258. See generally Ferrier, *supra* note 29, at 877-78; Setty, *supra* note 235, at 351-52; Farrell, *supra* note 255, at 1055 (arguing that the institution can lower the limit of football players even lower than the NCAA).

259. 1995-96 NCAA DIVISION I MANUAL, BYLAWS art. 15.5.5.1.

260. NFL COLLECTIVE BARGAINING AGREEMENT 1993-2000, art. XXXIII (the NFL permits a team to carry a maximum of fifty-three players during the season).

261. Setty, *supra* note 235, at 352; Blaine Newnham, *College Football Blocks Way to Obtaining Gender Equity*, SEATTLE TIMES, June 11, 1993, at C1.

262. Setty, *supra* note 235, at 352.

263. *Id.*

264. Farrell, *supra* note 255, at 1057.

of scholarships from the NCAA maximum of eighty-five to an agreed-upon number, athletic departments could use the excess cash to add a women's team or increase the availability of new equipment or facilities to other teams.<sup>265</sup>

Third, a school could limit the number of coaches present on the staff in proportion to the number of players on the team after a reduction occurs.<sup>266</sup> Finally, the athletic department can restrict the amount of wasteful spending done by the football team. There is no reason a football team needs to stay in a luxury hotel the night before a home game.<sup>267</sup> As noted above, the hundreds of thousands of dollars in savings can benefit newly added or already existing teams.<sup>268</sup>

#### *E. Club and Intramural Teams*

Another viable option that may increase compliance with Title IX is the expansion of club and intramural teams to varsity status.<sup>269</sup> By promoting a club team to varsity level, it increases the chance of compliance with Title IX while using a very small portion of the overall athletic budget.<sup>270</sup>

Athletic directors can also demote certain male teams, which continually struggle or draw miniscule interest to club level, as these teams will still be able to participate in a variant form of intercollegiate competitiveness.<sup>271</sup> However, as the Court in *Cohen* notes, teams will ultimately lose in priority rights to available practice times and practice

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265. *Id.* Farrell also suggests that scholarships in general should be eliminated and only used for those in financial need. *Id.* His argument draws support from the American Council stating to the NCAA that the elimination of scholarships will bring back the amateur model and will correspond with the wishes of the majority of school presidents. NY TIMES, Jan. 12, 1988, at D24.

266. 1995-96 NCAA OPERATING BYLAWS art. 11.7.2 limits the number of coaches to 12, which consists of one head coach, two graduate assistants and nine assistant coaches.

267. Farrell, *supra* note 255, at 1058. Ed Sherman, *Cost Crunching Crushing Colleges*, CHICAGO TRIBUNE, Mar. 3, 1997, S4 at 1, 3 (saying that Purdue University, Ohio State University and the University of Wisconsin have built practice facilities at costs in excess of nine million dollars).

268. *Cf. supra* note 265.

269. Wilson, *supra* note 184, at 436-37.

270. *Id.* This option appears unlikely to be sufficient because the majority of the schools already are over-budget for the fiscal year or do not have enough money under their present budget to take on another team. *See supra* notes 11-12.

271. *Cohen v. Brown Univ.*, 809 F. Supp at 978 (D.R.I. 1992) (*Cohen I*) (stating that the teams were still allowed to participate in intercollegiate competition if they could fund their needs and conform to both Ivy League and NCAA rules . . . and since they raised the required funds, the teams continued to be eligible for postseason and championship tournaments.).

areas.<sup>272</sup>

#### F. Additional Sources of Revenue

Finally, with a little imagination, there are additional sources of revenue available to the institution. First, the government could implement a system that provides bonuses to schools that have or have significantly progressed towards ultimate compliance with Title IX.<sup>273</sup> Second, a school could contract with a local corporation to donate money in which all athletic programs can use at their discretion.<sup>274</sup>

Third, much to the dismay of students, institutions can raise student's fees and ticket prices to athletic events by a small percentage.<sup>275</sup> Fourth, and most controversial, is to establish a "melting pot" for private athletic donations in which a greater percentage of the "pot" is given to teams in dire need or for the establishment of new teams.<sup>276</sup>

As we know, there is no foolproof way to increase compliance with Title IX. However, the previously mentioned suggestions are starting blocks an institutional can utilize to increase the chances of compliance with Title IX without eliminating men's athletics.

### VI. CONCLUSION

As stated throughout this paper, the increase in the participation of women in intercollegiate athletics is beyond staggering. But what most people fail to see, or choose not to see, is that this statute is failing miserably in promoting gender equity in athletics. If Congress or the

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272. *Id.* at 982. These athletic teams can also lose rights to athletic/medical staff, the use of locker rooms, and the best equipment.

273. Ferrier, *supra* note 29, at 883 (focusing on the University of Iowa and their ideas to promote compliance within the athletic system). Ferrier states that besides giving direct money, the school could be provided with "government grants," research grants or additional financial aid. *Id.* See also Mark Brosley, *Gender Equity is Forcing the Sexes to Take Sides*, THE ATLANTA J. & CONST., May 22, 1993, at C1.

274. B. G. Brooks, *CU Would Show War Without Nike*, ROCKY MTN. NEWS, Apr. 15, 2000 at 18C. Colorado University negotiated with Nike to supply outfits for players & coaches, and "provide annual compensation to the athletic department." *Id.*

275. O'Brien, *supra* note 42, at A1 (declaring that Utah State raised over \$200,000 by this method). The increased revenue collected from ticket prices should be earmarked for direct use by women's athletics. Ferrier, *supra* note 29, at 884.

276. Travis T. Tygart, *Title IX: The Monitoring of Private Athletic Donations*, 53 OKLA. L. REV. 57, 73-75 (2000). However, a private donor may be reluctant to contribute money to an institution of choice, if he may suspect that the donation will not go to the intended recipient. *Id.* at 75.

courts fail to take immediate action, modern day intercollegiate sports could cease to exist.<sup>277</sup>

Luckily, several options are readily available to reconstruct the application of the statute to provide a genuinely equitable future for both genders. The most important of these options is to eliminate the *Cohen* interpretation of the Policy Interpretation and the three-part test.<sup>278</sup> Courts should either discard this present interpretation or reform it so it includes the correct “qualified applicant pool.”<sup>279</sup> Presently, the courts seem to care less about the percentage of women undergraduates that could not play or indicate no desire play athletics when it takes into account the whole undergraduate population for calculation.

By reforming Title IX, the Courts and Congress can return Title IX to an anti-discrimination statute.<sup>280</sup> Presently, Title IX operates a quota system which is in direct contradiction to the original intent and legislative history of the statute.<sup>281</sup> This quota system is also inconsistent with established Equal Protection case law.<sup>282</sup> The present system places the interests and abilities of women in higher regard than the same interests and abilities of men.<sup>283</sup>

Unfortunately, due to extreme pressure from activist and Civil rights groups, easily persuaded judges have forgotten that both Equal Protection and Title IX apply to both genders. There can be no disagreement as to whether gender equity is beneficial for our citizens, athletics and morality as a whole. However, things must change, and they must change quickly.

The alternatives examined throughout this comment are not “sure-fire” methods of compliance; nor are they certain to change the biased application of Title IX. What they can do is open people’s eyes to the atrocious inequity that is starting to plague male intercollegiate athletics. Men’s teams are not “sacrificial lambs” so the hopes and dreams of others may be realized. Applying incorrect standards of evaluation to allow the elimination of one team for the formation of another is

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277. *But see* John Hawkins, *Major College Reform Backed*, WASHINGTON TIMES, Mar. 20, 1991, at D1 (stating that a majority of people would support reform of college athletics).

278. *See supra* notes 195-13.

279. *See supra* notes 210-13.

280. Cheesebrough, *supra* note 36, at 300.

281. *See supra* notes 22-28 & 195-213.

282. *See supra* notes 214-32.

283. *See supra* Part III and notes 90-156 & 194-31 (dealing with the cases brought by women and men and their success rate in court).

illogical and grossly unfair.<sup>284</sup>

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