

PLAYING AT EVEN STRENGTH: REFORMING TITLE IX ENFORCEMENT IN INTERCOLLEGIATE ATHLETICS

ROSS A. JUREWITZ*

I.	INTRODUCTION.....	284
II.	THE LEGISLATIVE HISTORY AND REGULATORY FRAMEWORK OF TITLE IX.....	290
A.	<i>The Enactment of Title IX and Its Application to Athletics</i>	290
1.	The Tower and Javitz Amendments—Title IX Applied to Athletics.....	292
B.	<i>Regulatory Framework of Title IX Enforcement</i>	295
C.	<i>Legal Application of Title IX—The Birth, Death, Rebirth, and Supercharging of the Act</i>	302
D.	<i>Judicial Interpretation of Title IX Compliance and the Adoption of the Three-Part Test</i>	305
1.	Cohen v. Brown University	306
2.	<i>Cohen I's Progeny: Exchanging Critical Analysis for Expediency</i>	310
3.	Left in <i>Cohen's</i> Wake: Unsuccessful Title IX Lawsuits Brought by Male Athlete Plaintiffs	313
E.	<i>Cohen's Application of the Three-Part Test: Establishing the Supremacy of Substantial Proportionality</i>	315
F.	<i>Extending Cohen: OCR's Clarification of the Policy Interpretation</i>	320
III.	THE NEED TO MODIFY TITLE IX TO BETTER APPLY TO INTERCOLLEGIATE ATHLETICS.....	323

* J.D. Candidate, May 2000, Washington College of Law, American University; B.A., University of California at San Diego (1997). I would like to thank Nancy Brown-Kobil, Lee A. Ippolito, and my parents, John and Linda Jurewitz, for their input, comments, and support; Kimberly Schuld, Director of the Independent Women's Forum, Play Fair program, for her critical advice and assistance; and, finally, Rachel Schaeffer, Publication's Editor, and the Editorial Board and Staff at the *American University Journal of Gender, Social Policy & the Law* for their efforts and hard work in ensuring the academic quality of this Comment.

A.	<i>Substantial Proportionality: An Impermissible Determinative Standard</i>	324
1.	Title IX's Legislative History and Plain Text Forbid Substantial Proportionality to Test Compliance.....	325
2.	<i>Adarand and Virginia</i> : The Supreme Court Raises the Standard of Scrutiny	329
3.	Substantial Proportionality's Incorrect Underlying Assumption	331
B.	<i>OCR Regulations Disregard Key Structural Differences Among Athletic Programs and Institutions</i>	333
IV.	REPLACING COHEN'S APPLICATION OF THE THREE-PART TEST WITH A SYSTEM THAT WORKS	340
A.	<i>Restoring Title IX's Intent: The Wisdom of Pederson</i>	341
B.	<i>Ensuring Flexibility: Meeting Each Sex's Relative Interests and Abilities</i>	345
C.	<i>Acknowledging Differences Among Teams and Programs</i>	347
D.	<i>Title VII's Qualified Applicant Pool: Bringing Common Sense to Substantial Proportionality</i>	348
V.	CONCLUSION.....	350

I. INTRODUCTION

During the last thirty years, women have made significant progress towards gender equity in traditionally male dominated fields.¹ Few fields have witnessed as great an increase in opportunities for women to participate and to succeed as athletics. For example, the 1999 Women's World Cup of Soccer generated unprecedented American enthusiasm and support for women's athletics.² American women athletes also participated in unprecedented numbers at the 1996 Summer Olympic Games in Atlanta.³ In addition, the nation's

1. Remarks on Signing a Memorandum Strengthening Enforcement of Title IX, 33 PUB. PAPERS 894, 895 (1997). President Clinton paid homage to the advancement of women since the passage of Title IX in 1972. *Id.* He noted statistics that showed that women have increased their percentage share of medical and law degrees issued from 9 to 38%, and from 7 to 43%, respectively. *Id.* at 895.

2. See Grahame L. Jones, *America the Bootiful*, L.A. TIMES, July 11, 1999, at D1 (reporting that 90,185 people attended the Women's World Cup final, the largest crowd forever a women's sporting event).

3. See Charles Spitz, Note, *Gender Equity in Intercollegiate Athletics as Mandated by Title IX of the Education Amendments Act of 1972: Fair or Foul?*, 21 SETON HALL LEGIS. J. 621, 648-49 (1997) (observing that American women made up 42.9% of the 1996 U.S. Olympic Team, the largest representation rate ever); Christine Brennan, *U.S. Women Look Good in Gold*, WASH. POST, Aug. 5, 1996, at C5 (noting that U.S. women athletes won 38 of the 101 Olympic medals won by all U.S. athletes). In addition to winning 38 of the U.S. Olympic Team's 44 gold medals, women

enthusiasm for women's college basketball is stronger than ever,⁴ generating the birth of two professional women's basketball leagues.⁵ Women athletes now compete in significant numbers in traditionally male-only sports,⁶ and have even gained national recognition through numerous marketing campaigns historically offered only to male athletes.⁷

Many authorities argue that the enactment of Title IX of the Education Amendments of 1972 ("Title IX")⁸ caused the growth of opportunities for women athletes.⁹ Undoubtedly, the passage of Title

athletes were involved in some of the most memorable moments of the 1996 Summer Olympic Games. See *id.* (noting the performances of the U.S. Women's Basketball Team and Amy Van Dyken's four gold medals in swimming).

4. See Karen Dillon, *Women's Coaches Finish Second*, KAN. CITY STAR, Oct. 9, 1997, at A21 (noting that tickets to the 1997 women's Final Four sold out—a year in advance—in less than a day); Jill R. Dorson, *All Aboard for 1998, The Post-Olympic Women's Athletic Boom Continues to Gather Steam*, DEN. POST, Dec. 30, 1997, at D10 (noting that the attendance at women's college basketball games rose from 1 million in 1982 to 4.2 million in 1996, and that 15 million women and girls participate in organized basketball).

5. In 1996, the American Basketball League ("ABL") began its first season of competition, while a second women's professional basketball association, the Women's National Basketball Association ("WNBA"), began competition in the summer of 1996. See *Backers See Bright Future for Women's Athletics*, PORTLAND OREGONIAN, Apr. 30, 1997, at A16 (noting the sudden rise of women's professional basketball through the creation of the WNBA and the ABL). However, in December 1998, the ABL disbanded its teams, citing financial difficulties. See Earl Gustkey, *Women's League is Calling it Quits*, L.A. TIMES, Dec. 23, 1998, at D1 (reporting that lack of attendance, competition with the WNBA for players, and inadequate television coverage were key factors in the ABL closing down).

6. See Matthew J. McPhillips, *"Girls of Summer": A Comprehensive Analysis of the Past, Present, and Future of Women in Baseball and a Roadmap to Litigating a Successful Gender Discrimination Case*, 6 SETON HALL J. SPORT L. 301, 302 (1996) (noting the emergence of a professional women's baseball team, the Colorado Silver Bullets); Ashley H. Grant, *Another League of Their Own*, MILWAUKEE J. & SENTINEL, Dec. 23, 1998, at 2 (reporting the formation of the Women's Professional Football League); Dave McKibben, *Sport Rings True for Carillo Boxing*, L.A. TIMES, May 31, 1998, at C17 (observing women's professional boxing as an emerging sport with dedicated participants).

7. See Marco Commisso, *The New MVPs*, S. FLA. BUS. J., May 8, 1998, at 1A (reporting that marketing companies have recently realized the potential of women athletes to promote advertisers' products); Cyndee Miller, *Marketers Look to Score with Women's Sports*, MARKETING NEWS, Aug. 4, 1997, at 1 (noting WNBA basketball star Sheryl Swoops' endorsement contract with Nike shoes). Various television advertisements featuring female athletes have become quite popular recently. For example, recent commercials featuring Cammi Granato of the U.S. Women's Ice Hockey Team, Mia Hamm of the U.S. Women's Soccer Team, Olympic Gold-Medal skier Picabo Street, professional beach-volleyball player Gabrielle Reece, and numerous stars of the WNBA have helped create female athletes as cultural icons in much the same way as the marketing of male athletes. See, e.g., Suzanne Bultmeyer, *Playing to Women*, SPORTING GOODS BUS., June 1, 1994, at 70 (finding that sporting goods companies have discovered that using female athletes to promote their products can be very effective); Mark Tedeschi, *Super Models*, FOOTWEAR NEWS, July 10, 1995, at 14S (observing the rise of female athletes as product spokespeople).

8. Pub. L. No. 92-318, §§ 901-907, 86 Stat. 235, 373-75 (codified as amended at 20 U.S.C. § 1681-1688 (1994) [hereinafter Title IX]).

9. Following the 1996 Summer Olympics, President Clinton invited members of the U.S. Olympic Team to the White House, where he stated that "[o]ver 20 years ago, in a complete, bipartisan commitment here in Washington, the United States Congress passed something

IX played a key role in the expansion of athletic opportunities for women athletes. The number of women athletes in high school and college athletic programs has increased dramatically since the enactment of Title IX.¹⁰ In fact, today, women athletes garner the majority of new athletic opportunities in intercollegiate athletics.¹¹ Yet, Title IX is mistakenly viewed by these authorities and the public as either the primary cause of the improvement of conditions for female athletes,¹² or the sole catalyst for their success as athletes.¹³

Despite the positive effects for women athletes produced by Title IX, the Act has also created severe "unintended consequences."¹⁴ Increasingly, due to shrinking university budgets, university administrators are demanding that athletic directors reduce their

called Title IX, which made it possible for a lot of the women athletes to be here today." Warren P. Strobel, *Clinton Fetes Olympians at White House, Credits Title IX for Women's Finish*, WASH. TIMES, Aug. 8, 1996, at A4.

10. See *Hearing on Title IX of the Education Amendments of 1972: Hearing Before the House Subcomm. on Postsecondary Educ., Training and Life-long Learning of the House Comm. on Economic and Educ. Opportunities*, 104th Cong., 353 (1995) [hereinafter *Hearing*] (opening statement of Mr. Williams of Montana) (noting that participation rates for female athletes rose from 2% of the nation's college athletes prior to the enactment of Title IX to 35% in 1995). The number of female athletes in high school also rose from 300,000 to over 2 million. *Id.* See also Brian L. Porto, *Completing the Revolution: Title IX as Catalyst for an Alternative Model of College Sports*, 8 SETON HALL J. SPORT L. 351, 352 (1998) (noting that 1 in 27 women students participated in athletics in 1972, while 1 in 3 women students participated in athletics in 1996).

11. See U.S. GENERAL ACCOUNTING OFFICE, INTERCOLLEGIATE ATHLETICS: COMPARISON OF SELECTED CHARACTERISTICS OF MEN'S AND WOMEN'S PROGRAMS (GAO/HEHS-99-3R) 4 (1999) [hereinafter *GAO REPORT*] (finding that women's student participation in National Collegiate Athletic Conference ("NCAA") Division I athletic programs increased by 29% between 1984-85 and 1996-97, and 16% among all NCAA divisions). Mary C. Curtis & Christine H.B. Grant, *Gender Equity in Sports* (last modified June 29, 1999) <<http://bailiwick.lib.uiowa.edu/ge/>>. The study reports that between the 1984-85 and 1994-95 academic years, women's athletic programs within NCAA institutions gained over 32,000 participants, including a 5.1% increase between 1992-93 and the following year. *Id.* On the other hand, men's athletic programs experienced a decline of nearly 2,000 participants. *Id.* While this decline is perhaps negligible, it is worth noting that between 1984-85 and 1989-90, participation in men's athletic programs within the NCAA dropped by almost 24,000 participants, a 12% decline. *Id.* During the same period, women's athletic programs declined by only 2,000 participants, a 2% decline. *Id.*

12. See David Aronberg, *Crumbling Foundations: Why Recent Judicial and Legislative Challenges to Title IX May Signal Its Demise*, 47 FLA. L. REV. 741, 767 n.184 (1995) (arguing that in addition to Title IX, societal attitudes toward women increased subsidies for women's sports by the NCAA; and, the introduction of championships in women's sports by NCAA in order to compete with the Association for Intercollegiate Athletics for Women ("AIAW") for member institutions, led to the increase in opportunities for women athletes).

13. See Barry Flynn, *Players, Not Title IX, Won World Cup* available at <<http://www.academia.org>> (disputing the contention that the U.S. Women's Soccer Team's 1999 World Cup victory would not have been possible without Title IX).

14. See *Hearing*, *supra* note 10, at 10 (statement of Rep. J. Dennis Hastert) (arguing that Title IX has produced "unintended consequences"). However, in her statement, Representative Cardiss Collins noted that when she chaired the House Subcommittee on Commerce, Consumer Protection, and Competitiveness, no "unintended consequences" were found. *Id.* at 22-23.

athletic budgets.¹⁵ Meanwhile, both the courts and the Department of Education's Office of Civil Rights ("OCR"), which enforces Title IX, has demanded that institutions increase the proportion of athletic opportunities for female athletes to comply with the regulations implementing Title IX.¹⁶ Due to these conflicting mandates to cut athletic program expenditures while expanding athletic programs for women, athletic directors have chosen the only viable mechanism to achieve both requirements—eliminating men's athletic programs and opportunities, particularly in nonrevenue-producing sports.¹⁷

Thus, in attempting to provide equal athletic opportunities for women athletes, Title IX has instead created a battle for scarce resources between male and female athletes, and between revenue and nonrevenue-producing sports.¹⁸ This fight has led to distrust and closed communications between partisan groups seeking to further the interests of their members.¹⁹

15. See Charles P. Beveridge, Note, *Title IX and Intercollegiate Athletics: When Schools Cut Men's Athletic Teams*, 1996 U. ILL. L. REV. 809, 810 (1996) (arguing that campus-wide cost cutting has led many universities to cut their athletic budgets).

16. See *Hearing*, *supra* note 10, at 101 (statement of David J. Jorns, Ph.D., President, Eastern Illinois University) (testifying that OCR sent a settlement agreement, indicating that Eastern Illinois University must add four additional women's sports following an OCR compliance review). Two of the sports ordered to be added, women's gymnastics and field hockey, did not have a demonstrated pool of interested and able athletes from which the university could field teams. *Id.*

17. See INDEPENDENT WOMEN'S FORUM, MEN'S LOSSES IN COLLEGIATE ATHLETICS (listing a total of 342 NCAA men's athletic programs, in 18 different categories, that have been cut as a result of Title IX between 1992 and 1997); Curtis & Grant, *supra* note 11 (observing the number and kind of athletic activities educational institutions have removed and added). The vast majority of men's teams that have been cut are nonrevenue-producing sports, such as baseball, wrestling, diving, swimming, water polo, crew, and gymnastics. See, e.g., Michael D. Clark, *Men's Teams at Miami Face Gender Gap Ax*, CINCINNATI ENQ., Apr. 14, 1998, at 3A (describing the elimination of the University of Miami of Ohio's men's wrestling and outdoor track teams); Mike Decourcy, *UC Will Cut 3 Men's Sports; Women's Programs Adjusted For Equity*, CINCINNATI ENQ., May 7, 1998, at A1 (describing the elimination of the University of Cincinnati's men's tennis, rifle, and indoor track teams); Randy McNutt, *Miami (Ohio) Eliminates Three Men's Programs*, GANNETT NEWS SERV., Apr. 16, 1999 (available at 1999 WL 6966029) (reporting that Miami University of Ohio decided to eliminate its men's wrestling, soccer, and tennis teams to comply with Title IX); Peter Monaghan, *Providence College to Cut 3 Men's Sports Teams to Comply With Title IX*, CHRON. OF HIGHER EDUC., Oct. 9, 1998, at A4 (describing the removal of men's baseball, golf, and tennis teams); Eric Noland, *Nothing Easy For CSUN: Athletic Department Faces Tough Choices*, L.A. DAILY NEWS, Nov. 25, 1997, at S1 (noting that California State University Northridge cut men's baseball, soccer, volleyball, and swimming teams in June 1997); *Northern Arizona Drops Men's Swimming, Diving*, ARIZ. REPUBLIC, June 8, 1999, at C2 (stating that Northern Arizona University elected to disband its men's swimming and diving programs to help achieve Title IX compliance); Ryan White, *PSU Closes Door on Baseball*, PORTLAND OREGONIAN, May 30, 1998, at C1 (describing the elimination of the Portland State University men's baseball team).

18. See John C. Weistart, *Can Gender Equity Find a Place in Commercialized College Sports?*, 3 DUKE J. GENDER L. & POL'Y 191, 194-95 (1996) (arguing that under the current Title IX enforcement mechanism, a "we/they," "men vs. women" dichotomy is created because athletic funding is limited and a gender-based argument about the allocation of funds inevitably arises).

19. See, e.g., Bernie Miklasz, *Title IX Twenty-Five Years Later, Posturing and Defensiveness Continue to Make the Dialogue Difficult*, HOUS. CHRON., June 22, 1997, at 8 (arguing against the

Much of the blame lies with the OCR Policy Interpretation²⁰ of Title IX regulations. As it has been applied, the Policy Interpretation's three-part test for Title IX compliance forces institutions, *inter alia*, to distribute athletic opportunities among members of both sexes based upon each sex's proportion within the student body. This requirement, known as substantial proportionality, runs counter to Congress' intent in passing Title IX.²¹ This is true for three reasons. First, Congress clearly disapproved of using statistical balancing, quotas, and reverse discrimination in order to prohibit sex discrimination against women in educational institutions.²² Second, the implicit definition of gender equity contained in the Policy Interpretation is an inaccurate gauge of an institution's compliance with Title IX. Under this definition, equality of opportunity is determined by comparing the proportion of athletic opportunities provided to each sex, to each sex's proportion within the student body.²³ However, the substantial proportionality requirement incorrectly determines Title IX compliance because each sex's proportion within the student body is a much larger pool of applicants than the qualified applicant pool—those students from each sex with the interest and ability to compete in intercollegiate athletics.²⁴ Third, OCR and the courts' decision to treat revenue-producing sports similar to nonrevenue-producing sports is contrary

narrow interpretation of the progress of opportunities for women athletes following the release of the NCAA 5-year Gender Equity Study ("NCAA Study") by supporters of women's athletics). The NCAA Study's interpretation argues that, although women's participation in athletics has increased, the spending disparity between men's and women's teams overshadows any progress that had been made. See NCAA Gender-Equity Task Force, Final Report (July 26, 1993). Mr. Miklasz argues that this position severely misinterprets the progress that female athletes have made over the last twenty-five years. *Id.* at 8.

20. 44 Fed. Reg. 71,413-23 (1979) (setting forth the factors to be examined in determining an institution's compliance with Title IX).

21. See *infra* Part II (arguing Congress expressly disapproved quotas).

22. See *infra* Part III.A (arguing against the primacy of the "substantial proportionality" prong under the Policy Interpretation's three-part test). See also Aronberg, *supra* note 12, at 747-51 (detailing the legislative history of Title IX's enactment and the clear Congressional intent that quotas and statistical balancing should not be used to enforce Title IX); 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 (1995) (arguing that Title IX's legislative history is unambiguously against using quotas to remedy past discrimination).

23. 44 Fed. Reg. 71,418 (1979) (compliance may also be assessed on the basis of under representation, an institution's historical record of improving opportunities, and availability of intercollegiate competition).

24. See 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, 880-82 (1994) (noting that the three-part test uses irrelevant data to assess Title IX compliance because the qualified pool of applicants is too large).

to Title IX's regulations,²⁵ which specifically mandate OCR to consider the unique characteristics of each sport.²⁶ Accordingly, OCR and the courts do not take into account the economic, social, and administrative factors that affect university athletic departments' selection of athletic offerings, including sponsoring revenue-producing sports.²⁷

This Comment examines the pursuit of gender equity in intercollegiate athletics under Title IX and its regulatory framework. Ultimately, this Comment concludes that Congress should revise Title IX to protect male students from the unintended consequences of Title IX's enforcement, while continuing to provide female students with a fair opportunity to participate in athletics. Part II describes the formation and enactment of Title IX and its regulatory framework. In addition, Part II summarizes the federal courts' treatment of private rights of action brought under Title IX and critiques the federal courts' adoption, and subsequent application, of the Policy Interpretation as the legal standard of proof in Title IX athletics cases. Part III argues that OCR and the federal courts' application of the Policy Interpretation's three-part test to determine Title IX compliance is improper because Congress explicitly rejected statistical balancing to enforce Title IX. Furthermore, the three-part test cannot accurately determine whether discrimination has occurred in the distribution of athletic opportunities because it cannot account for significant differences between the sexes, structural differences among various activities, and differences among institutions with diverse, nondiscriminatory goals for their

25. See 44 Fed. Reg. 71,415-16 (1979) (limiting different treatment for revenue-producing sports by permitting greater expenditures of revenue to operate competitive events). The Policy Interpretation outlines several acceptable reasons that expenditures for revenue-producing sports could be greater than expenditures for other athletic activities, including managing greater crowd size, operating larger facilities, and the maintenance of these competitive facilities. *Id.*

26. See *id.* (stating that unique aspects of particular sports may need to be accommodated to a greater degree than other sports). Provided that disparate benefits are reflected equally in men's and women's programs, OCR will determine the differences in particular program components to be justifiable. *Id.* at 71,416. The Policy Interpretation recognizes that this problem often arises within institutions offering football and that the disparate benefits often favor men. *Id.* See also Phillip Anderson, *A Football School's Guide to Title IX Compliance*, 2 SPORTS L.J. 75, 82-83 (1995) (noting that the Policy Interpretation provides two nondiscriminatory justifications for disparate benefits for football: the unique aspects of the sport and the greater financial cost of event management of football games).

27. See Matthew L. Daniel, *Title IX and Gender Equity in College Athletics: How Honesty Might Avert a Crisis*, 95 ANN. SURV. AM. L. 255, 259 (1995) (arguing that Title IX litigation has wrongly presumed that all college sports are intended to provide student athletes with educational benefits). Certain college sports are not operated to provide an educational purpose, but instead serve as a profit center for the university. *Id.*

athletic programs. Finally, Part IV discusses possible solutions to the inequitable application of Title IX to intercollegiate athletics.

II. THE LEGISLATIVE HISTORY AND REGULATORY FRAMEWORK OF TITLE IX

Several legal authorities claim that the legislative history of Title IX is ambiguous.²⁸ Unfortunately, most authorities only briefly examine Title IX's legislative history before reaching this conclusion.²⁹ Indeed, Title IX's legislative history is fraught with confusion and uncertainty, not only from the sparsity of legislative history, but also the disjointed enactment of Title IX.³⁰ To overcome this confusion and to determine Congress' intent, it is necessary to study the enactment of Title IX and its subsequent application to intercollegiate athletics.

A. *The Enactment of Title IX and Its Application to Athletics*

The genesis of Title IX can be found in a set of hearings chaired by Representative Edith Green during the summer of 1970.³¹ During these hearings, witnesses testified before the Special House Subcommittee on Education that a significant number of sex discrimination complaints involved educational institutions.³² The Subcommittee also received recommendations that new civil rights protections should be enacted that apply to sex discrimination and parallel Title VI of the Civil Rights Amendments³³ prohibition of racial discrimination.³⁴ The following year, Representative Green and

28. See *Grove City College v. Bell*, 465 U.S. 555, 570-71 (1984) (holding that Title IX's legislative history is ambiguous); *Haffer v. Temple Univ.*, 524 F. Supp. 531, 534 (E.D. Pa. 1981) (finding that the legislative history of Title IX is ambiguous); Mahoney, *supra* note 22, at 945 (observing that few courts have examined the legislative history of Title IX's application to athletics, and concluding that the legislative history is "ambiguous").

29. See *Haffer*, 524 F. Supp. at 534 (concluding that the legislative history of Title IX is ambiguous after finding little congressional debate of the 1972 Title IX bills). The Court came to this conclusion after briefly summarizing the congressional debate of the 1971 Title IX measures, which were nearly identical to the 1972 bills that became Title IX. *Id.*

30. *Id.*

31. See *Hearings Before the Special Subcomm. on Educ. of the House Comm. on Educ. and Labor on § 805 of H.R. 16098*, 91st Cong. (1970) [hereinafter *1970 House Hearings*] (considering § 805 of H.R. 16098, which would have included sex discrimination under Title VI's protections); see also *Cannon v. University of Chicago*, 441 U.S. 677, 696 n.16 (1979) (detailing the sparse legislative history of Title IX); 118 CONG. REC. 5804 (1972) (statement of Sen. Bayh) (tracing the beginnings of Title IX and the details of the *1970 House Hearings* by Representative Green).

32. See *Cannon*, 441 U.S. at 696 n.16 (noting that the Subcommittee received testimony identifying educational institutions as the primary source of Title IX complaints).

33. The Civil Rights Act of 1964 (Title VI), Pub. L. No. 88-352, §§ 601-605, 78 Stat. 301 (codified at 42 U.S.C. § 2000d (1995)).

Senator Bayh attempted to add these anti-discrimination principles to the 1971 Education Amendment bills.³⁵ Although Congress engaged in substantial debate, neither bill was adopted.³⁶

In a renewed effort, Senator Bayh and Congresswoman Green reintroduced the same bills in early 1972 as additions to the Education Amendments of 1972.³⁷ Congress hardly debated either bill's scope of application or intent before it enacted the Senate bill in June 1972.³⁸ However, because the bill that became Title IX is substantially identical to the 1971 Title IX bills,³⁹ congressional debate of the 1971 bills provides additional guidance in determining legislative intent.⁴⁰ From the debate of the 1971 bills and the limited congressional debate of the 1972 bill, it is clear that Congress' unstated purpose was to prohibit sexual discrimination by denying federal funds to educational institutions in violating the law.⁴¹

34. See *Cannon*, 441 U.S. at 696 n.16 (observing the recommendations of the Justice Department and the United States Commission on Civil Rights that a new provision be created that would parallel Title VI, but would be more limited in its application).

35. See H.R. 32, 92d Cong., Title IX (1971). Although H.R. 16098 was not enacted during the 91st Congress, H.R. 32 took the earlier provisions and modified them as suggested by the 1970 House Hearings. See *Cannon*, 441 U.S. 677, 696 n.16 (1979) (noting that the Bayh Amendment adopted similar language to Title VI of the Civil Rights Amendment and only added the word "sex" to the existing law); Aronberg, *supra* note 12, at 748 (arguing that the 1971 Bayh Amendment was similar to the adopted final Title IX amendment).

36. See 118 CONG. REC. 5808 (1972) (statement of Sen. Bayh) (recognizing that the 1971 version of the Title IX bill that Senator Bayh introduced was ruled "nongermane" to the 1971 Education Act Amendments).

37. Pub. L. No. 92-318, 86 Stat. 278 (1972). See also S. 659, 92d Cong., 118 CONG. REC. 2808 (1972).

38. *Haffer v. Temple Univ.*, 524 F. Supp. 531, 534 (E.D. Pa. 1981) (noting that the legislative history indicates obvious Congressional approval of Title IX's scope and application).

39. See 118 CONG. REC. 5808 (1972) (statement of Sen. Bayh) (stating that the 1972 Title IX bill introduced in the Senate adopted the key provisions of the 1971 bill).

40. See, e.g., Aronberg, *supra* note 12, at 747-51 (using the legislative history of both the 1971 and 1972 Title IX bills to reach the conclusion that Congress intended to prohibit the use of quotas in implementing Title IX); Christa D. Leahy, Note, *The Title Bout: A Critical Review of the Regulation and Enforcement of Title IX in Intercollegiate Athletics*, 24 J.C. & U.L. 489, 529-32 (1998) (arguing that the legislative history of the 1971 and 1972 Title IX bills demonstrates that Congress did not intend for Title IX to require quotas or affirmative action); Mahoney, *supra* note 22, at 945-49 (supplementing Title IX's legislative history with the 1971 congressional debates of the unenacted Title IX bills to argue that Congress did not intend for the Act to require quotas).

41. See 117 CONG. REC. 30,403 (1971) (statement of Sen. Bayh) (noting that women seeking admission to universities are often held to a higher standard); 118 CONG. REC. 5804-07 (1972) (statement of Sen. Bayh) (detailing the unfair discrimination against women seeking higher education); Andrew A. Ingram, *Civil Rights: Title IX and Collegiate Athletics: Is There a Viable Compromise?*, 48 OKLA. L. REV. 755, 757 (1995) (citing *Cannon v. University of Chicago*, 441 U.S. 677, 704 (1979)). "Athletics" was mentioned only twice during the Title IX debates and only as an example of the limits of the legislation. See 117 CONG. REC. 30,407 (1971) (statement of Sen. Bayh) (arguing that Title IX will not require the desegregation of football or men's locker rooms); 118 CONG. REC. 5807 (1972) (statement of Senator Bayh) (stating that sports facilities will not be subject to Title IX in instances where personal privacy must be

However, Congress never intended Title IX to require institutions to take affirmative action to ensure the equal distribution of educational opportunities.⁴²

1. The Tower and Javitz Amendments—Title IX Applied to Athletics

Following the enactment of Title IX in 1972, Congress charged OCR, then part of the Department of Health, Education, and Welfare ("HEW"),⁴³ to issue regulations to implement Title IX.⁴⁴ Prior to publishing the proposed Title IX regulations for public comment, HEW stated that the proposed regulations would include the regulation of athletics.⁴⁵ HEW's assertion surprised many Congressmen because athletics was only mentioned twice during the Congressional debate of the 1971 and 1972 Title IX bills.⁴⁶ Moreover, these sections of the Congressional debate did not directly address the regulation of athletics, but instead concerned invasions of privacy and integration of single-sex teams.⁴⁷

In an effort to circumvent HEW's surprising assertion of regulatory power, Congress devoted significant time during the debate of the Education Amendments of 1974⁴⁸ to define Title IX's application to

preserved).

42. See, e.g., 118 CONG. REC. 5808 (1972) (statement of Sen. Bayh) (asserting that the 1972 Senate version of the Title IX bill includes language from the best anti-discrimination bills that Congress has introduced); 117 CONG. REC. 39,262 (1971) (statement of Rep. Quie) (submitting an amendment to the 1971 House version of the Title IX bill that is similar to the prohibition against the preferential treatment of minorities under the Civil Rights Act); *id.* (statement of Rep. Green) (opposing the preferential treatment for women under the 1971 House version of the Title IX bill, even in the attempt to end sex discrimination). For further discussion of Title IX's legislative intent, see *infra* Part III.A.

43. At the time of the enactment of Title IX, OCR was part of the Department of Health, Education, and Welfare ("HEW"). However, after Congress split HEW into the Department of Education ("DED") and the Department of Health and Human Services ("HHS"), OCR was incorporated as part of the Department of Education. Pub. L. No. 96-88, §§ 101-511, 93 Stat. 669 (codified at 20 U.S.C. §§ 3401-3510); 20 U.S.C. § 3441(a)(1), (a)(3) (1995). Throughout Title IX's existence, OCR has always administered its provisions, either as part of HEW or DED.

44. 20 U.S.C. § 1682 (1994).

45. See Mahoney, *supra* note 22, at 950 (describing OCR's initial attempts to regulate athletics under Title IX between the enactment of the Education Act Amendments of 1972 and 1974); 120 CONG. REC. 15,323 (1974) (statement of John Tower) (recognizing that HEW, OCR's parent agency, believed it had authority to promulgate regulations enforcing Title IX in athletics).

46. See 117 CONG. REC. 30,407 (1971) (statement of Sen. Bayh) (declaring that the proposed Title IX bill would not require the integration of intercollegiate football or the desegregation of men's locker rooms); 118 CONG. REC. 5807 (1972) (statement of Sen. Bayh) (stating that the Act would allow for segregation of facilities and differential treatment in cases where it is absolutely essential for the benefit of the program or where personal privacy is concerned, such as the treatment of locker rooms).

47. See 117 CONG. REC. 30,407 (1971).

48. Pub. L. No. 93-380, 88 Stat. 541 (1974).

athletics.⁴⁹ In particular, Congress considered two bills intended to guide the application of the Title IX regulations to athletics. The first bill, introduced by Senator John Tower, was designed to exclude revenue-producing sports from Title IX's scrutiny, provided that the sport support itself in the absence of university funding.⁵⁰ Senator Tower stated that the amendment was necessary to preserve the viability of these sports, as well as the entire athletic program.⁵¹ He argued that altering the operating guidelines for revenue-producing sports would lead to the erosion of the financial base for the entire athletic program because revenue-producing sports often generate sufficient revenue to fund additional sports within the athletic program.⁵² Ironically, Senator Tower argued, similar treatment of revenue and nonrevenue-generating sports under Title IX would reduce the revenues needed for creating and elevating competitive opportunities for women.⁵³ Following minor modification, the Senate agreed to the Tower Amendment, and sent the amendment to the joint conference committee for further consideration.⁵⁴

49. When Congress learned of HEW's intention, intense debate occurred regarding whether Title IX should apply to all sports or whether some sports should be excluded. *See* 120 CONG. REC. 15,323 (1974) (statement of Sen. Tower) (arguing that revenue-producing sports should be excluded from the scope of Title IX's powers).

50. *See* 120 CONG. REC. 15,322 (1974) (proposing amendment 1343 to exclude intercollegiate athletic programs from Title IX's application). The original version of the Tower Amendment, reprinted on the same page of the Congressional Record, would have completely excluded intercollegiate athletic programs from Title IX's application. *Id.* Senator Tower argued that Title IX, as debated and enacted, was not intended to apply to athletic programs. *Id.* at 15,323. Senator Tower was also against allowing HEW to promulgate regulations pertaining to athletics without Congressional authority. *Id.* Tower argued that only if the Senate Committee on Labor and Public Welfare reached a determination that legislation is necessary, should Congress legislate in this area. *Id.*

51. *See* 120 CONG. REC. 15,323 (1974) (statement of Sen. Tower) (arguing that the impairment of the financial base of revenue-producing sports threatens the viability of the sport and the athletic program itself). The Tower Amendment is often understood to apply only to traditional revenue-producing sports such as football and basketball. *See* Porto, *supra* note 10, at 361 (mentioning only men's football and basketball as the typical revenue-producing sports). However, Senator Tower actually argued for a more flexible standard that would take into consideration the uniqueness of regional athletic markets. *See* 120 CONG. REC. 15,323 (1974) (statement of Sen. Tower) (mentioning men's football and basketball as revenue-producing sports, as well as other regional sports at particular institutions). For example, Senator Tower argued that ice hockey may be covered under his amendment at certain universities where it produces revenue. *Id.* Likewise, women's basketball at select institutions may be exempted from the application of Title IX if its gross receipts or donations could sustain the team. *Id.*

52. *See* 120 CONG. REC. 15,323 (1974) (statement of Sen. Tower) (observing that nonrevenue-producing sports often depend on the surplus revenue generated by revenue-producing sports, and, therefore, a reduction in this surplus revenue would ultimately harm nonrevenue-producing sports).

53. *See id.* (recognizing that revenue-producing athletic activities mostly involve male competitors, Sen. Tower argued that female athletes have just as great of a stake in the financial base created by these activities, because the surplus revenue generated by these sports helps fund women's athletics).

54. *See id.* at 15,322-23 (containing two amendments to the original Tower Amendment).

However, the Tower Amendment was abandoned during the Senate-House Conference Committee.⁵⁵ In its place, Congress enacted a compromise bill, known as the Javitz Amendment.⁵⁶ The Javitz Amendment authorized HEW to "[implement] the provisions of Title IX of the Education Amendments of 1972 relating to the prohibition of sex discrimination in federally assisted education programs which shall include, with respect to intercollegiate athletic activities, reasonable provisions considering the nature of particular sports."⁵⁷

Title IX supporters generally interpret the rejection of the Tower Amendment, and the subsequent enactment of the Javitz Amendment, as evidence that Congress intended HEW to regulate intercollegiate athletic activities in a uniform manner, with only limited exceptions.⁵⁸ Additionally, these supporters argue that, because Congress rejected the Tower Amendment, the Javitz Amendment does not permit special considerations for the unique nature of revenue-producing sports.⁵⁹ Yet, the Javitz Amendment's explicit grant of power for HEW to regulate athletics indicates that Congress intended for athletics to be regulated with greater care and

The first amendment limited the Tower Amendment's original scope of application by excluding only those sports that were able to generate enough revenue to maintain the sport. *Id.* at 15,322. The second amendment inserted a subsection granting HEW the power to regulate athletics under the Tower Amendment. *Id.* at 15,323. However, Senator Tower stated that the subsection did not provide HEW with greater regulatory authority than was already conferred by Title IX. *Id.* Senator William Dodd Hathaway agreed with this statement, saying that the second amendment was proposed to clarify OCR's authority to regulate the Tower Amendment. *Id.*

55. See Jodi Hudson, Comment, *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) (arguing that Congress abandoned the Tower Amendment in favor of the Javitz Amendment, which better reflected Congress' disapproval of exempting revenue-producing sports from Title IX enforcement). Following the defeat of the Tower Amendment in the joint conference, several attempts were made to prohibit the application of Title IX to revenue-producing sports and athletics generally. See H.R. 8394, 94th Cong. (1975) (intending to protect revenues produced by a team from use by any other team unless the producing team did not need the funds for itself); S. 2106, 94th Cong. (1975) (intending to exempt revenue-producing sports from Title IX).

56. Education Amendments of 1974 (Title VIII), Pub. L. No. 93-380, § 844, 88 Stat. 484 (1974) (codified at 20 U.S.C. § 1681(1994)).

57. See *id.*

58. See Porto, *supra* note 10, at 361 (stating that the defeat of the Tower Amendment meant that Title IX would apply to all college sports); Hudson, *supra* note 55, at 578 (arguing that the enactment of the Javitz Amendment evidenced Congressional intent for revenue-producing sports to be subject to Title IX enforcement).

59. See 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, 54-55 (1996) (asserting that Congress intended for Title IX to apply similarly to revenue and nonrevenue-producing sports, while recognizing that certain sports may require greater expenditures to provide equivalent competitive opportunities).

consideration than the regulation of other educational programs. Under the Education Amendments of 1972, Congress had already authorized HEW to promulgate regulations implementing Title IX generally, subject only to Constitutional limitations.⁶⁰ Because the Javitz Amendment contains additional explicit limitations to HEW's previously unrestricted authority to regulate athletics under Title IX, Congress may have intended the Javitz Amendment to instruct HEW to regulate athletics with a higher standard of care than other Title IX issues.⁶¹ Yet, Title IX regulations affecting intercollegiate athletics exhibit little flexibility or understanding of athletics and athletic programs.⁶²

B. Regulatory Framework of Title IX Enforcement

OCR published its proposed Title IX regulations on June 20, 1974.⁶³ While only two sections of the proposed regulations pertained to athletics, the majority of the public comments OCR received addressed these sections.⁶⁴ Despite the significant concern demonstrated by these comments, OCR eliminated only two subsections from the proposed sections regulating athletics prior to issuing the final Title IX regulations.⁶⁵

60. See 20 U.S.C. § 1682 (1994) (charging each federal agency empowered to provide federal financial assistance to any educational institution with the authority to issue regulations consistent with Title IX in order to achieve the Act's objectives).

61. See Mahoney, *supra* note 22, at 950 (stating that Congress' grant of regulatory authority to HEW to regulate athletics was duplicative because HEW already had broad regulatory authority to promulgate Title IX regulations from the 1972 Education Act Amendments). Accordingly, because HEW already had broad authority to regulate Title IX, the inference that should be drawn from the limiting text of the Javitz Amendment is that Congress intended HEW to use care when regulating athletics. *Id.* See also Thomas A. Cox, *Intercollegiate Athletics and Title IX*, 46 GEO. WASH. L. REV. 34, 36 (1977) (arguing that Congress intended that HEW regulate athletics with particular care).

62. See *infra* Part III.C (discussing Title IX's regulatory structure's inability to fairly address the various differences among athletic activities and institutions).

63. See generally 39 Fed. Reg. 22,228-40 (1974) (codified at 45 C.F.R. pt. 86 (1997)). Following the division of HEW into HHS and DED in 1980, OCR adopted an identical set of Title IX regulations when it became part of DED, while keeping in place the Title IX regulations issued by HEW. 45 Fed. Reg. 30,803, 30,960-62 (1980) (codified at 34 C.F.R. pt. 106 (1997)). See also *Cohen v. Brown Univ.*, 991 F.2d 888, 895 (1st Cir. 1993) (calling the duplicate Title IX regulations a "wonderful example of bureaucratic muddle," noting that each set of regulations is "identical, save only for changes in nomenclature reflecting the reorganization of the federal bureaucracy"). For the sake of simplicity, further discussion of the Title IX regulations will cite the DED regulations instead of the HEW regulations.

64. See *Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Educ. of the Comm. on Educ. and Labor*, 94th Cong. 7 (1975) (reporting that the majority of comments received by HEW addressed the impact of the regulations upon intercollegiate athletics); Mahoney, *supra* note 22, at 950 (noting that HEW received 9,700 comments during the comment period, the majority of which concerned athletics).

65. See 40 Fed. Reg. 24,132 (1975) (deleting the "Determination of Student Interest" and the "Affirmative Efforts" subsections of the proposed Title IX regulations); *id.* at 24,134 (noting

The first eliminated subsection, entitled the "Determination of Student Interest,"⁶⁶ required educational institutions to determine the athletic activities each sex preferred.⁶⁷ Many institutions interpreted this subsection to require an annual polling of student interest. The institution would then sponsor or eliminate athletic activities based upon the findings of the poll.⁶⁸ OCR, on the other hand, stated that the Determination of Student Interest subsection was merely intended to require institutions to consider the interests of both sexes in determining what sports to offer.⁶⁹ To avoid criticism that an annual poll would unfairly interfere with an institution's selection of its athletic offerings, OCR eliminated the Determination of Student Interest subsection and inserted a new subsection that required institutions to select "sports and levels of competition which effectively accommodate the interests and abilities of members of both sexes."⁷⁰

The second proposed, and subsequently eliminated subsection, entitled "Affirmative Efforts,"⁷¹ required institutions to "make affirmative efforts to inform students" of the previously underrepresented sex "of the availability of equal opportunities for them, and to provide support and training to enable them to participate in those opportunities."⁷² Many institutions interpreted this subsection to require affirmative steps to promote gender equity, and, therefore, conflicted with § 106.3 of the regulations, which limits the circumstances where OCR can require institutions to take

that institutions voiced concern that the eliminated subsections would require an annual polling of student interest and affirmative action in providing athletic opportunities for women). In addition to deleting these two subsections, HEW added new provisions to the regulations, such as the so-called "laundry-list" of 10 non-exclusive factors to consider when evaluating "equal athletic opportunity." 34 C.F.R. § 106.41(c) (1997). Yet, this additional text did not substantively alter the remaining athletic regulations. See also Mahoney, *supra* note 22, at 950-52 (discussing the deletion of the two subsections and the addition of the "laundry list" of factors); *infra* note 80 (listing the factors contained in the "laundry list").

66. See 39 Fed. Reg. 22,228, 22,236 (1974).

67. See *id.* at 22,230 (stating that recipients of federal funds must determine, under the "determination of student interest" subsection, what athletic activities students of each sex wish to undertake).

68. See 40 Fed. Reg. 24,134 (1975).

69. See *id.*

70. See *id.* (noting the replacement of the determination of student interest subsection and issuing the final regulations stating that institutions use a reasonable method that the institutions deem appropriate for considering the interests of both sexes); 34 C.F.R. § 106.41(c)(i) (replacing the determination of student interest subsection). While eliminating the determination of student interest subsection, in issuing the final regulations, HEW stated that institutions should use a reasonable method that the institutions deem appropriate to consider the interests of both sexes. 40 Fed. Reg. 24,134 (1975).

71. 39 Fed. Reg. 22,228, 22,236 (1974).

72. See *id.* at 22,230.

affirmative action.⁷³ As a result, OCR eliminated this subsection to avoid confusion regarding when institutions would be required to take affirmative action.⁷⁴

Absent these two subsections, OCR's final regulations impose three requirements upon athletic programs subject to Title IX.⁷⁵ First, the regulations require that "[n]o person shall, on the basis of sex, be excluded from participating in, denied the benefits of, be treated differently from another person or otherwise be discriminated against" in virtually any athletic program offered by the institution.⁷⁶ Second, while the regulations do not require institutions to establish separate sports teams for each sex in order to comply with the Act, it strictly limits the circumstances where an institution may offer an athletic activity for only one sex.⁷⁷ Under the regulations, institutions may offer an athletic activity for only one sex if participants are chosen by competitive skill or if the activity is a contact sport.⁷⁸ However, if institutions offer a non-contact sport to only one sex, it must allow members of the other sex to try-out for the team.⁷⁹ Third, the regulations provide institutions with a laundry list of criteria that OCR will examine to determine whether equal athletic opportunity is available.⁸⁰

73. 40 Fed. Reg. 24,128, 24,134 (1975). *See also* 34 C.F.R. § 106.3 (1997) (limiting the criteria for requiring educational institutions to utilize affirmative action). 34 C.F.R. § 106.3(a) requires institutions to take affirmative action when OCR finds that an institution receiving federal funds has engaged in sex discrimination. *Id.* The institution would be required to take affirmative steps to overcome this determination. *Id.* However, where an institution has not been found to engage in sex discrimination, that institution may engage in affirmative action if it so chooses, under § 106.3(a), to overcome the effects of conditions that have limited the participation of the underrepresented sex. *See id.* § 106.3(b).

74. *See* 40 Fed. Reg. 24,128, 24,134 (1975).

75. *See* 34 C.F.R. § 106.41(a)-(c) (1997).

76. *See id.* § 106.41(b). The regulation applies to "any interscholastic, intercollegiate, club or intramural athletics offered by the recipient" institution. *Id.*

77. *See* 34 C.F.R. § 106.41(b) (1997) (detailing the circumstances where institutions may offer a sport for only one sex, notwithstanding the broad requirements of § 106.41(a)).

78. *See id.* According to the regulations, "contact sports include boxing, wrestling, rugby, ice hockey, football, basketball, and other sports the purpose or major activity of which involves bodily contact." *Id.* One federal judge has argued that, because contact sports may be limited to participants from only one sex, their participants should not be included in a numeric comparison of athletic opportunities provided by the institution. *But see* *Cohen v. Brown Univ.*, 101 F.3d 155, 192-93 (1st Cir. 1996) (Torruella, C.J., dissenting) (arguing that because contact sports may be limited to participants from only one sex, their participants should be included in numeric comparison of athletic opportunities provided by the institution).

79. *See id.*

80. *See* 34 C.F.R. § 106.41(b) (1997). The regulations provide a non-exclusive list of 10 factors to be considered by the director. These are:

- (i) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
- (ii) The provision of equipment and supplies;

Although women's athletic programs steadily expanded following the publication of the final regulations,⁸¹ many institutions were concerned that their athletic programs would not comply with Title IX⁸² once the adjustment period set by the regulations had expired.⁸³ To address these concerns, in 1979 OCR issued a Policy Interpretation⁸⁴ to clarify the enforcement of three issues affecting athletic programs: scholarships; equivalence in "other athletic benefits and opportunities," which describes the enforcement of the so-called "laundry list" factors; and the effective accommodation of student interests and abilities.⁸⁵

The Policy Interpretation has been generally criticized by numerous parties.⁸⁶ It was issued without approval from Congress, the President, or OCR,⁸⁷ but has nonetheless become the key

- (iii) Scheduling of games and practice time;
- (iv) Travel and per diem allowance;
- (v) Opportunity to receive coaching and academic tutoring;
- (vi) Assignment and compensation of coaches and tutors;
- (vii) Provision of locker rooms, practice and competitive facilities;
- (viii) Provision of medical and training facilities and services;
- (ix) Provision of housing and dining facilities;
- (x) Publicity.

Id.

In addition, although OCR shall consider whether the institution failed to provide necessary funds for teams of each sex in determining Title IX compliance, "unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams . . . will not constitute noncompliance." *Id.*

81. See Joanie M. Schrof, *A Sporting Chance?*, U.S. NEWS & WORLD REP., Apr. 11, 1994, at 51, 52 (reporting that the proportion of women participating in NCAA intercollegiate athletics programs increased from 7% in 1972 to nearly 33% in 1979).

82. See Jill K. Johnson, Note, *Title IX and Intercollegiate Athletics: Current Judicial Interpretation of the Standards of Compliance*, 74 B.U. L. REV. 553, 558 (1994) (stating that institutions complained that the regulations were vague and inadequate, prompting the need for clarification); Melody Harris, *Hitting 'Em Where it Hurts: Using Title IX Litigation to Bring Gender Equity to Athletics*, 72 DENV. U. L. REV. 57, 60 (1994) (noting that institutions demanded a clarification of the Act's vague requirements because violation called for the removal of federal funds from the violating institution).

83. See 34 C.F.R. § 106.41(d) (1997) (giving athletic programs at elementary schools until 1976, and until 1978 for secondary and post-secondary institutions, to comply with Title IX).

84. See 44 Fed. Reg. 71,413, 71,413-23 (1979).

85. See *id.* The intent of the Policy Interpretation was to clarify the meaning of "equal opportunity" consistent with the Act and the regulations. *Id.* at 71,414.

86. See Aronberg, *supra* note 12, at 745-58, 782-88 (calling the Policy Interpretation "the most powerful and controversial guidepost in the Title IX regulatory morass"); Mark Hammond, *Substantial Proportionality Not Required: Achieving Title IX Compliance Without Reducing Participation in Collegiate Athletics*, 87 KY. L.J. 793 (calling the policy interpretation "the cornerstone of a substantial portion of Title IX litigation"); Harris, *supra* note 82, at 61 (stating that the policy interpretation is the "definitive, published interpretation of the agency charged with implementing Title IX").

87. See *Cohen v. Brown Univ.*, 991 F.2d 888, 896 (1st Cir. 1993) (failing to find any record that OCR formally adopted the Policy Interpretation). The Policy Interpretation was issued just months before the HEW split, and was subsequently adopted by OCR. See Aronberg, *supra* note

regulatory provision for Title IX compliance.⁸⁸ The Policy Interpretation is particularly criticized for the test to determine compliance with the effective accommodation of student interests and abilities requirement.⁸⁹ Commonly known as the "Three-Part Test,"⁹⁰ it was intended to determine Title IX compliance during OCR reviews⁹¹ and to provide institutions with a way to evaluate their own compliance efforts.⁹² However, the "three-part test," as it is commonly used, is a misnomer. It actually consists of two tests: the three-part test itself, consisting of three independent prongs, and the "levels of competition" test.⁹³ But, because failure of the three-part test precludes the application of the levels of competition test, the three-part test dominates the nomenclature.

According to the Policy Interpretation, institutions must meet at least one prong of the three-part test to comply with Title IX.⁹⁴ The first prong, known as the "Substantial Proportionality" requirement, states that institutions comply with Title IX if they provide athletic participation opportunities for male and female students substantially proportionate to each gender's respective enrollment.⁹⁵ Both supporters and critics of Title IX agree that this prong ultimately requires gender equity in athletic programs premised upon proportionate balancing of athletic opportunities.⁹⁶ However, critics

12, at 754 (arguing that OCR adopted the HEW Policy Interpretation "as a matter of course, without engaging in any formal process for adopting the document").

88. See Leahy, *supra* note 40, at 524 (observing that the federal courts have given the Policy Interpretation substantial deference).

89. See, e.g., *Hearing, supra* note 10, at 78 (statement of Vartan Gregorian, President, Brown University) (declaring his outrage that Brown's "Model for the Nation" women's athletic program could not satisfy any of the three prongs of the three-part test); Connolly, Jr. & Adelman, *supra* note 24, at 880-82 (arguing that the three-part test is invalid because it uses irrelevant data, the proportion of each sex within the student body, to measure an institution's efforts to provide equal athletic opportunities for members of each sex); Jeffrey P. Ferrier, Comment, *Title IX Leaves Some Athletes Asking, "Can We Play Too?"*, 44 CATH. U. L. REV. 841, 865-870 (1995) (analyzing the unfeasibility of the three-part test).

90. See *Hearing, supra* note 10, at 36 (statement of Norma Cantu, Secretary of the Office of Civil Rights, DED) (stating that her testimony will focus on the "three-part test").

91. See *Hearing, supra* note 10, at 36 (acknowledging that OCR uses the three-part test to determine Title IX compliance).

92. See 44 Fed. Reg. 71,413, 71,414 (1979) (noting that the Policy Interpretation may be used for guidance by administrators of athletic programs and to provide guidance in determining whether any disparities between men's and women's athletic programs are "justifiable and nondiscriminatory").

93. *Id.* at 71,418. The accommodation of interests test determines whether the athletic interests of each gender have been equally met.

94. See *id.* (stating that compliance will be assessed in any one of the three ways contained in the three-part test).

95. See *id.*

96. See Loretta M. Lamar, *To Be an Equitist or Not: A View of Title IX*, 1 SPORTS L.J. 237, 271 (1994) (noting that Washington State University has achieved gender equity under the three-

of Title IX argue that this prong essentially requires institutions to implement a quota roughly equal to the proportion of women students at the institution.⁹⁷ Moreover, although OCR provides an example of substantial proportionality,⁹⁸ most institutions remain uncertain whether its athletic program satisfies this prong.⁹⁹ The reason for this uncertainty is that the Policy Interpretation does not define "substantially proportionate," even though it is the primary test for Title IX compliance.¹⁰⁰

The second prong of the three-part test, the "Program Expansion" requirement, states that institutions comply with Title IX if they demonstrate a "history *and* continuing practice" of expanding athletic activities for women athletes.¹⁰¹ Unfortunately, the program expansion prong also does not define either "historic" or "continuing expansion."¹⁰² In addition, the Policy Interpretation does not provide an example of a hypothetical program that satisfies the program expansion prong.¹⁰³ Accordingly, the program expansion prong

part test by being "within one percent" of the male to female student body ratio); Leahy, *supra* note 40, at 497 (citing the rationale of the court in *Cohen v. Brown Univ.*, 991 F.2d 888, 897 (1st Cir. 1993), that the substantial proportionality prong is a "safe harbor" because statistical parity is viewed as equivalent to equal opportunity).

97. See Leahy, *supra* note 40, at 528 (arguing that the "substantial proportionality" prong's requirement that the proportion of women athletes must be substantially proportional to the proportion of women within the student body is equivalent to imposing employment quotas upon employers based on aggregate population statistics); Eugene G. Bernardo II, Note and Comment, *Unsportsmanlike Conduct: Title IX and Cohen v. Brown University*, 2 ROGER WILLIAMS L. REV. 305, 341 (1997) (arguing that the *Cohen* court's interpretation of the Policy Interpretation "transforms Title IX into an affirmative action, quota based scheme").

98. See DEPARTMENT OF EDUCATION, OFFICE OF CIVIL RIGHTS, CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY GUIDANCE: THE THREE-PART TEST (DRAFT) (1995) [hereinafter CLARIFICATION] (providing several examples of hypothetical institutions that satisfy substantial proportionality).

99. See Aronberg, *supra* note 12, at 761-62 (reporting that university administrators in 1995 were so concerned that their athletic programs did not comply with the vague standards set by OCR, that Representatives Howard "Buck" McKeon and Steve Gunderson directed OCR to provide more specific rules for compliance, or be subject to Congressional intervention). In response to this demand, OCR issued its Clarification in January 1996. *Id.* at 763. However, the Clarification did little more than reinforce the vague standards under which OCR conducted Title IX compliance reviews. *Id.* at 763.

100. See Leahy, *supra* note 40, at 497 (stating that no standard exists for what distribution of athletic opportunities satisfies "substantial proportionality").

101. 44 Fed. Reg. 71,413, 71,418 (1979) (emphasis added). The program expansion must also be responsive to the developing interests and abilities of the members of the underrepresented sex. *Id.*

102. See *id.* However, while the Policy Interpretation does not define either of these terms, several courts have interpreted them to mean a longstanding and perpetual expansion of athletic opportunities for women athletes. See also *Cohen v. Brown Univ.*, 991 F.2d 888, 898 (1st Cir. 1993) (interpreting the second prong to require a continual expansion of athletic opportunities for women athletes).

103. See 44 Fed. Reg. 71,413, 71,418 (1979). OCR finally provided examples of hypothetical athletic programs that would comply with the second prong in its Clarification in 1996. CLARIFICATION, *supra* note 98, at 8.

alone cannot effectively guide OCR investigators and educational institutions in determining Title IX compliance by empirical standards.¹⁰⁴

The third prong, or the "Accommodation of Interest" requirement, states that institutions comply with Title IX once they have "fully and effectively accommodated" the interests and abilities of the underrepresented sex.¹⁰⁵ The Policy Interpretation implicitly suggests that the third prong may be used to demonstrate Title IX compliance after an institution fails to meet the first or second prong of the three-part test.¹⁰⁶ Thus, the third prong's scope of protection from Title IX liability includes institutions which have not met the substantial proportionality or program expansion prongs, but have nevertheless accommodated the full interests and abilities of the underrepresented sex.¹⁰⁷

Although the Policy Interpretation was intended to clarify the existing regulations and provide guidance to institutions that were uncertain whether their athletic programs complied with the Act, it failed miserably.¹⁰⁸ The Policy Interpretation failed to adequately address several of the most challenging problems facing the application of Title IX to athletics.¹⁰⁹ In fact, inherent enforcement

104. See Leahy, *supra* note 40, at 498 (arguing that the second prong is ambiguous); Aronberg, *supra* note 12, at 785 (noting that the uncertainty of meeting the second prong of the three-part test—no school had yet met the benchmark in any Title IX case—contradicted the claim that the three-part test is a flexible standard). Although nearly all defendant institutions have been unable to meet the program expansion prong, at least one institution was able to satisfy it. See *Boucher v. Syracuse Univ.*, 1998 WL 167296 (N.D.N.Y. Apr. 3, 1998) (holding that Syracuse University demonstrated a historic and continual program expansion of women's athletic opportunities, despite failing to add any women's sports between 1982 and 1995).

105. 44 Fed. Reg. 71,413, 71,418 (1979).

106. See VALERIE M. BONNETTE & LAMAR DANIEL, U.S. DEP'T OF EDUC., TITLE IX ATHLETICS INVESTIGATOR'S MANUAL 24-25 (1990) (explaining the process for determining Title IX compliance under an OCR compliance review). The Investigator's Manual instructs OCR personnel to only proceed to a subsequent prong of the three-part test if they have determined that the institution has not satisfied the previous prong. *Id.* Thus, the third prong is only applied if the institution has failed to meet the previous two prongs.

107. See 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, 432 (1996-1997) (noting that institutions may still comply with Title IX if the disproportionate athletic opportunities for women athletes fully and effectively accommodate their interests and abilities).

108. See Aronberg, *supra* note 12, at 754-58 (criticizing the impossibility of meeting the three-part test due to the inability to reach the required proportion of female participation); Leahy, *supra* note 40, at 529-30 (arguing that the Policy Interpretation requires institutions to implement an affirmative action plan, contrary to the legislative history of the Act).

109. See 44 Fed. Reg. 71,419-423 (1979) (noting the problematic issues raised through public comments). In the appendices to the Policy Interpretation, OCR included findings of the historical patterns of intercollegiate development, as well as comments received from the public. *Id.* at 71,419. OCR reported several key concerns voiced by commentators, such as the treatment of football and other revenue-producing sports, the treatment of the rights of

problems overlooked by the Policy Interpretation have produced harmful results for athletic programs.¹¹⁰ This occurred following the federal courts' adoption of the Policy Interpretation as the legal framework for determining liability in Title IX lawsuits.

C. Legal Application of Title IX—The Birth, Death, Rebirth, and Supercharging of the Act

Originally, Title IX was enacted as a public remedy statute granting federal agencies the authority to withdraw federal funds from educational institutions violating the Act.¹¹¹ During this time, institutions were insulated from the threat of outside litigation by private individuals.¹¹² However, in 1979, the Supreme Court in *Cannon v. University of Chicago*¹¹³ held that Title IX granted an implied private right of action to individuals harmed by sex discrimination in federally funded educational institutions.¹¹⁴ Supporters of Title IX celebrated *Cannon* for providing victims of sex discrimination with the means to enforce their rights in the courtroom and for bolstering the efforts of overburdened administrative agencies.¹¹⁵

Following the Court's recognition of a private right of action in *Cannon*, another debate regarding the scope of Title IX's protections arose in the federal courts. Due to the sparse legislative history of Title IX, a question existed since its enactment regarding whether Title IX compliance was specifically levied against individual programs within the institution that received federal funds, or against

individuals; the difficulty of comparing the benefits and opportunities given to the programs of each sex, and the difficulty of imposing objective standards on athletic programs that are inherently different from institution to institution. *Id.* Although OCR rejected these concerns, the comments demonstrate that OCR should have been aware that the proposed regulations were capable of greatly disrupting intercollegiate athletic programs.

110. See *infra* Part III.B-C (discussing the three-part test's inadequate treatment of institutions with different competitive goals, inherent differences between men's and women's interests, and structural differences among various athletic activities).

111. See Harris, *supra* note 82, at 65 (reporting that the federal courts limited relief under Title IX to public remedies, prohibiting any private right of action).

112. *Id.*

113. 441 U.S. 677 (1979). *Cannon* did not consider an implied right of action for the equal right to participate in athletics. In *Cannon*, the Court considered arguments from a woman petitioner that Title IX implies a private right of action. *Id.* at 680. The woman was denied admission to two medical schools receiving federal funds, and alleged that the denial of admission was a result of sex discrimination. *Id.* Overturning the ruling of the Court of Appeals, the Court found that the plaintiff stated a valid cause of action under Title IX in her complaint when she alleged that she was denied admission from the medical schools due to her sex, and that both schools received federal funding. *Id.*

114. See *id.* at 709 (holding that the words, history, and subject matter of Title IX are sufficient to imply a cause of action).

115. See Harris, *supra* note 82, at 65 (noting that the decision in *Cannon* finally empowered women to enforce their rights in court).

the institution as a whole.¹¹⁶ The Supreme Court answered this question definitively in *Grove City College v. Bell*.¹¹⁷ In *Grove City College*, the Supreme Court adopted the program-specific view of Title IX, and held that when an institution receives federal funds in only one program, Title IX's application is limited to that program only.¹¹⁸ The Supreme Court's decision restricted Title IX's application to the few institutions that did receive federal funding for their athletic programs.¹¹⁹ Reflecting the new restrictive application of Title IX, OCR chose to abandon all pending complaints against athletic programs not meeting the program-specific test.¹²⁰

In 1988, however, Congress reinstated Title IX's application to athletic programs by enacting the Civil Rights Restoration Act of 1987.¹²¹ The Act vacated the program-specific interpretation by the Supreme Court in *Grove City College*¹²² in favor of a broad institution-wide application of Title IX.¹²³ Under the Act, Title IX now applied to all post-secondary institutions where federal funds were granted to any part of the institution.¹²⁴ With this broad application of Title IX

116. See *Rice v. Harvard College*, 663 F.2d 336, 338-39 (1st Cir. 1981) (adopting the program-specific approach to Title IX enforcement, and refusing to find a cause of action under Title IX without a claim arising in a program that received federal funds); *University of Richmond v. Bell*, 543 F. Supp. 321 (E.D. Va. 1982) (holding that Title IX does not cover an athletic department that does not receive federal funds). But cf. *Haffer v. Temple Univ.*, 688 F.2d 14, 16 (3d Cir. 1982) (per curiam) (adopting the institution-wide approach, holding that an athletic department is subject to Title IX's provisions when the university as a whole received federal funds).

117. 465 U.S. 555 (1984). *Grove City College*, a private institution, attempted to retain autonomy by consistently refusing state and federal financial assistance. Four of its students sued to enjoin DED from forcing *Grove City College* to execute an Assurance of Compliance under 34 C.F.R. § 106.4 (1982), following DED's finding that the college was subject to Title IX's provisions. *Id.* at 558-61. DED based its finding on the fact that *Grove City College* students had accepted Basic Educational Opportunity Grants ("BEOGs"). *Id.* at 559.

118. See *id.* at 573-74 (holding that Title IX cannot be applied institution-wide if only limited programs within the institution accepted federal funds). The Supreme Court based its holding on *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512 (1982), which held that the Department of Education's ability to promulgate regulations and to terminate funds pursuant to Title IX was subject to program-specific limitations. *Id.* at 539.

119. See *Harris, supra* note 82, at 61 (observing that, following the Court's decision in *Grove City College*, "lower courts refused to apply Title IX to athletic programs because few, if any, receive direct federal funding").

120. See *Aronberg, supra* note 12, at 767 (explaining OCR's reaction to the *Grove City College* decision taking a narrow program-specific reading of Title IX, and noting the lower courts' refusal to provide relief for disparate treatment as a result of this reaction).

121. Pub. L. No. 100-259, 102 Stat. 28 (1988) (codified at 20 U.S.C. § 1687). Congress enacted the Civil Rights Restoration Act of 1987 over a presidential veto by President Ronald Reagan.

122. 465 U.S. 555, 573-74 (1984) (holding that Title IX cannot be applied to the institution as a whole if an individual department, other than the athletic department, accepts federal funds).

123. 20 U.S.C. § 1687 (1994).

124. See *id.* This section specifically applies Title IX to "all the operations of . . . a college,

in hand, OCR revived its enforcement of Title IX in athletic programs, and private litigants launched a new wave of litigation addressing equal opportunities to participate in athletics.¹²⁵

The intensity of Title IX enforcement was supercharged in 1992 by the Supreme Court's ruling in *Franklin v. Gwinnett County Public Schools*.¹²⁶ In *Franklin*, a female high school student sued the school district for monetary damages over continual sexual harassment by her tenth grade sports coach and teacher.¹²⁷ Overturning the Court of Appeals ruling, the Court held that a private litigant can collect monetary damages from a defendant institution where the discrimination is shown to be an intentional violation of Title IX.¹²⁸ In so ruling, the Court upheld the general rule that "all appropriate relief is available in an action brought to vindicate a federal right when Congress has given no indication of its purpose with respect to remedies."¹²⁹

The Court's ruling in *Franklin* changed Title IX litigation in two respects. First, the possibility of obtaining damages from a Title IX suit encouraged plaintiffs and their attorneys to bypass filing a complaint with OCR against an institution, in favor of pursuing a private right of action in court.¹³⁰ Thus, although OCR still investigates institutions following a complaint filed with the agency, the federal courts now have a substantial role in administering Title IX proceedings. Second, the possibility that an institution may be required to pay compensatory damages, attorney's fees, and punitive damages, encourages defendant institutions to capitulate and settle Title IX lawsuits.¹³¹ These two factors collectively create significant

university, or other post-secondary institution, or a public system of higher education . . . any part of which is extended Federal financial assistance." *Id.*

125. See Aronberg, *supra* note 12, at 767 (observing the increase in OCR's measures to enforce Title IX following the enactment of the Civil Rights Restoration Act of 1987); Johnson, *supra* note 82, at 565 (stating that following the enactment of the Civil Rights Restoration Act of 1987, Title IX suits by female intercollegiate athletes increased significantly).

126. 503 U.S. 60 (1992).

127. *Id.* at 63.

128. *Id.* at 76.

129. *Id.* at 68 (citing *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964)). The Court in *J.I. Case Co.* held that the federal courts "have the power to grant all necessary remedial relief" for violations of a federal act. 377 U.S. at 435.

130. See Johnson, *supra* note 82, at 556 n.19 (recognizing the incentive created by *Franklin* for female athletes and their attorneys to litigate Title IX claims in order to receive punitive damages following a court's finding of intentional discrimination).

131. Brief of Former Secretary of Health, Education, and Welfare, Caspar W. Weinberger, as Amicus Curiae in Support of Petitioner's Brief at 3, *Brown Univ. v. Cohen*, 520 U.S. 1186 (1997) (No. 96-1321), *cert. denied*. See also Sal Roibal & Carol Herwig, *North Carolina Boss to Head Association*, USA TODAY, June 21, 1993, at 11C (describing the process for settlement of a Title IX claim filed by female soccer players against Auburn University). As a result of the suit by the

legal leverage for Title IX plaintiffs to alter an institution's athletic offerings through either settlements or judicial decisions.

D. Judicial Interpretation of Title IX Compliance and the Adoption of the Three-Part Test

Following the 1992 *Franklin* Court's grant of legal leverage to Title IX plaintiffs, female athlete plaintiffs have won almost all Title IX suits alleging an unequal opportunity to participate.¹³² Faced with this losing track record, institutions have increasingly taken steps to comply with Title IX.¹³³ Despite these steps to "stay on the sunny side of Title IX,"¹³⁴ the majority of institutions still cannot meet the standard of Title IX compliance established by the Title IX case law decided after *Franklin*.¹³⁵

18 female soccer players, Auburn University paid \$140,000 in damages and legal fees and agreed to sponsor the women's varsity soccer team with a guaranteed team budget of \$200,000 for the first two seasons of competition. *Id.*

132. See, e.g., *Cohen v. Brown Univ.*, 101 F.3d 155, 180 (1st Cir. 1996) (holding that Brown University violated Title IX when it eliminated the women's gymnastics and volleyball teams); *Roberts v. Colorado State Univ.*, 998 F.2d 824, 828-33 (10th Cir. 1993) (holding that the university violated Title IX when it eliminated the men's baseball and women's fast-pitch softball teams in the absence of statistical proportionality); *Daniels v. School Bd.*, 985 F. Supp. 1458, 1463 (M.D. Fla. 1997) (granting plaintiff's motion for preliminary injunction after finding that the school board violated Title IX based upon the disparities between the girls' softball and boys' baseball programs); *Beasley v. Alabama State Univ.*, 966 F. Supp. 1117, 1131 (M.D. Ala. 1997) (denying Alabama State University's motion to dismiss finding that the plaintiff's claims were not barred by the statute of limitations or standing requirements for injunctive relief); *Pederson v. Louisiana State Univ.*, 912 F. Supp. 892, 917 (M.D. La. 1996) (holding that the university violated Title IX when it delayed creating women's soccer and fast-pitch softball teams); *Favia v. Indiana Univ. of Pa.*, 812 F. Supp. 578, 584-85 (W.D. Pa. 1993) (granting an injunction to reinstate the eliminated women's field hockey and gymnastics teams after finding that the university violated Title IX when it eliminated the teams). *But cf.* *Boucher v. Syracuse Univ.*, 1998 WL 167296 (N.D.N.Y. Apr. 3, 1998) (dismissing plaintiff's claim that Syracuse University had violated Title IX because defendant sufficiently expanded participation opportunities for female student athletes, thereby meeting the second prong of the three-part test).

133. See Laurie Tarkan, *Unequal Opportunity*, in *WOMEN'S SPORTS & FITNESS*, Sept. 1995, at 25-26 (noting that between 1992 and 1995, member institutions added over 800 women's athletic teams); Curtis & Grant, *supra* note 11 (finding that the NCAA has added over 600 women's athletic teams from 1994-1995 to the next academic year); GAO REPORT, *supra* note 11, at 6 (reporting that over 870 women's athletic teams were formed in a 12 year period, a 17 % increase).

134. *Cohen v. Brown Univ.*, 991 F.2d 888, 898 (1st Cir. 1993) (stating that any institution that does not wish to review student interests and abilities in athletics may "stay on the sunny side of Title IX simply by maintaining gender parity between its student body and its athletic lineup").

135. See Chronicle of Higher Education, EADA Reports and Chronicle of Higher Education Interviews of NCAA Division I Institutions (1997) (unpublished manuscript on file with the *American University Journal of Gender, Social Policy, & the Law*) [hereinafter EADA Reports] (finding that only 51 of the 306 NCAA Division I member institutions have athletic programs with a proportion of women athletes within five percent of the proportion of women within the student body, or greater). Only 10 NCAA Division I member institutions have athletic programs with a proportion of women athletes that is equal to or greater than the proportion of women within the institution's student body. *Id.*

The first series of Title IX cases, brought to enforce the "equal opportunity to participate," were decided in the absence of pre-existing case law at approximately the same time.¹³⁶ The courts deferred to OCR's three-part test as the legal burden of proof in reaching their decisions.¹³⁷ Beginning with *Cohen v. Brown University*,¹³⁸ the federal courts established a dominant interpretation of the three-part test as the applicable legal framework.¹³⁹

1. *Cohen v. Brown University*

In *Cohen*, members of the women's gymnastics and volleyball teams sued Brown University ("Brown"), its President, and its Athletic Director, alleging that Brown had discriminated against women in the operation of its athletic programs.¹⁴⁰ The suit arose in response to Brown's demotion of the teams, along with the men's golf and water polo teams, to "intercollegiate club" status.¹⁴¹ As a club team, these teams could continue to compete as they had before, provided that all operating costs were paid by private sources.¹⁴² Beginning with

136. See *Cohen v. Brown Univ.*, 809 F. Supp. 978, 980 (D.R.I. 1992) (remarking that the case presented "novel issues concerning Title IX and athletic programs" because there was "virtually no caselaw on point"). The district court was mistaken in its assertion, ignoring the decisions of three previous cases. See Aronberg, *supra* note 12, at 772 n.214 (reporting the decisions in *Blair v. Washington State Univ.*, 740 F.2d 1379 (Wash. 1987) (en banc); *Cook v. Colgate Univ.*, 802 F. Supp. 737 (N.D.N.Y. 1992); *Haffer v. Temple Univ.*, 688 F.2d 14 (3d Cir. 1982)).

137. See *Cohen*, 809 F. Supp. at 989-90 (finding that the appropriate method to determine Title IX compliance must be determined through the three-part test). The court in *Cohen* stated that compliance would be judged first through the three-part test, and then under the "levels of competition" test. *Id.* Later decisions appear to have adopted this interpretation of the legal standard for Title IX compliance as a matter of course. See *Roberts v. Colorado State Univ.*, 998 F.2d 824, 828-32 (10th Cir. 1993) (relying heavily on *Cohen's* application of the Policy Interpretation in deciding that Colorado State University had violated Title IX). However, at least one court has rejected the *Cohen* application of the three-part test and adopted its own interpretation of the legal standard for Title IX compliance. See *Pederson v. Louisiana State Univ.*, 912 F. Supp. 892, 913-14 (M.D. La. 1996) (disagreeing with *Cohen's* assertion that the "substantial proportionality" prong is a "safe harbor" for institutions, protecting them from Title IX violation).

138. 809 F. Supp. 978 (D.R.I. 1992) (*Cohen I*), *aff'd*, 991 F.2d 888 (1st Cir. 1993); 879 F. Supp. 185 (D.R.I. 1995) (*Cohen II*), *aff'd*, 101 F.3d 155 (1st Cir. 1996), *cert. denied*, 117 S. Ct. 1469 (1997). All four decisions stemmed from the same factual setting and litigation. The first two cases involved the plaintiff's motion for preliminary injunction, while the latter two concerned the trial on the merits.

139. See *Cohen I*, 809 F. Supp. at 990 (adopting the three-part test as the measure of Title IX compliance).

140. *Cohen II*, 101 F.3d at 161.

141. *Id.* Brown anticipated a savings of over \$77,000 per year following the demotion of these four teams. *Cohen II*, 879 F. Supp. at 187 n.2. Brown expected to save over \$62,000 and over \$15,000 from the demotion of the women's and men's teams, respectively. *Id.*

142. *Cohen II*, 991 F.2d 888, 892 (1st Cir. 1993). In addition to raising their own operational expenses, intercollegiate club teams are not provided other benefits granted to full varsity teams. *Id.* Some of these benefits include salaried coaches, prime training times and facilities, office support, and admission preferences. *Id.*

Cohen I, the U.S. District Court for the District of Rhode Island and the First Circuit handed down four opinions between 1992 and 1996 that established the dominant application of the three-part test for judicial enforcement of Title IX.

Recognizing the absence of existing case law, the First Circuit in *Cohen II* held that the Policy Interpretation is entitled to substantial deference from the court as the responsible agency's interpretation of its implementing regulations.¹⁴³ The First Circuit concluded that, as the court would apply the three-part test, the plaintiffs carried the burden of proving that Brown had not satisfied the "substantial proportionality" and "accommodation of interests" prongs.¹⁴⁴ If the plaintiffs met this burden, Brown then bore the burden of showing that it met the "program expansion" prong.¹⁴⁵

Applying the "substantial proportionality" prong, the First Circuit upheld the district court's finding in *Cohen II* that, prior to and following the demotion of the teams, Brown failed to provide athletic opportunities for women athletes substantially proportionate to the proportion of women students within the university's student body.¹⁴⁶ Brown argued that the substantial proportionality prong, as the

143. 101 F.3d 155 at 172-73. The court in *Cohen II* cited both *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984) and *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144 (1991), which establish the threshold requirements for deference to an enforcing agency's interpretation. *Id.* at 173. The Court in *Chevron* held that when Congress has delegated regulatory power to an agency, the resulting regulations should be given "controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." 467 U.S. at 844. In addition, the Court in *Martin* held that the Court "presume[s] that the power authoritatively to interpret [the agency's] own regulations is a component of the agency's delegated lawmaking powers." 499 U.S. at 151.

144. See *Cohen I*, 991 F.2d at 901-02 (establishing this burden of proof, the court declined to adopt the Title VII burden setting and shifting model advocated by Brown University). Instead, the court claimed that the adoption of the Title VII model was unnecessary because "the controlling statutes and regulations are clear." *Id.* at 991 (emphasis added). However, at least two courts found a different allocation of the burden of proof through their interpretation of the statute and regulations. See *Favia v. Indiana Univ. of Pa.*, 812 F. Supp. 578, 584 (W.D. Pa. 1993) (holding that the defendant institution bears the burden of proof on the second and third prongs); *Cook v. Colgate Univ.*, 802 F. Supp. 737, 743 (N.D.N.Y. 1992) (applying Title VII process analysis to Title IX cases at the urging of the parties), *rev'd on other grounds*, 992 F.2d 17 (2d Cir. 1993).

145. *Cohen I*, 991 F.2d 888, 902 (1st Cir. 1993).

146. See *Cohen II*, 879 F. Supp. 185, 192 (D.R.I. 1995) (finding that women students represented 52.14% of Brown's undergraduate enrollment, but only 38.13% of student athletes). For the purposes of determining the proportion of women athletes within Brown's athletic program, the court interpreted "participation opportunities" strictly to mean the number of actual participants in the athletic program. *Id.* at 202. The court rejected Brown's interpretation that "participation opportunities" also included all opportunities left unfilled. *Id.* at 203. The court also rejected Brown's argument that a Title VII scheme should be applied that would compare the proportion of women athletes to the proportion of women from the university's "qualified applicant pool" of women athletes, not the proportion of women in the student body as a whole, in analyzing the substantial proportionality prong. *Cohen II*, 101 F.3d at 176-78.

district court applied it in *Cohen II*, turned Title IX into an affirmative action statute that required universities to impose quotas for women's athletic opportunities in excess of their relative interests and abilities.¹⁴⁷ In addition, Brown contended that the case was subject to review under the recently decided *Adarand Construction, Inc. v. Peña*.¹⁴⁸

The First Circuit disagreed. The court first held that Brown's argument that *Cohen II*'s application of the three-part test effectively requires affirmative action was without merit.¹⁴⁹ The First Circuit narrowly construed the term "affirmative action" finding that courts historically limited its meaning to voluntary undertakings to remedy past discrimination through specific group based preferences and numeric goals.¹⁵⁰ Under this definition, the First Circuit stated that the case did not present an affirmative issue and that Brown's "talismanic" characterization was incorrect.¹⁵¹

The First Circuit then stated that the district court's application of the three-part test under *Cohen II* did not impose a quota system.¹⁵² Despite the substantial proportionality prong's requirement that schools provide athletic opportunities in proportion to each gender's representation within the student body, the First Circuit concluded that this was not a quota because a defendant must also fail the other two prongs of the three-part test before the court could find liability.¹⁵³ Therefore, the court held, the existence of the second and third prongs of the three-part test forecloses the possibility that the three-part test imposes a quota system.¹⁵⁴ The court further held that substantial proportionality is merely the starting point for Title IX

147. See *Cohen II*, 101 F.3d at 169-72 (addressing Brown's argument that the district court's application of substantial proportionality amounted to affirmative action and a gender-based quota). The First Circuit narrowly construed the meaning of "affirmative action" and found that Brown's concern was unfounded. *Id.* at 169-70. The court also stated that substantial proportionality did not require the imposition of gender-based quotas. *Id.* at 170. The First Circuit ruled that substantial proportionality presented a flexible standard, not a hard quota, and was also only the beginning of a Title IX compliance review. *Id.* at 171.

148. *Id.* at 181. See also *Adarand*, 515 U.S. 200, 236 (1995) (stating that the imposition of quotas, preferential treatment, and disparate treatment require a compelling state interest and that the remedial measure must be narrowly tailored to serve that interest).

149. *Cohen II*, 101 F.3d at 172 (concluding that "[f]rom the mere fact that a remedy flowing from a judicial determination of discrimination is gender-conscious, it does not follow that the remedy constitutes affirmative action!").

150. See *id.* at 170, 172 (stating the court's limited definition of "affirmative action").

151. *Id.* at 170.

152. *Id.* at 176.

153. *Id.*

154. *Cohen v. Brown Univ.*, 101 F.3d 155, 176 (1st Cir. 1996).

analysis, providing a “safe harbor” for institutions by establishing a rebuttable presumption of compliance.¹⁵⁵

Turning next to its analysis of the third prong, the court held that Brown failed to “fully and effectively” accommodate the interests and abilities of its women students.¹⁵⁶ The First Circuit held that, because the gymnastics and volleyball teams were competitive prior to their demotion,¹⁵⁷ sufficient evidence was present to demonstrate that Brown had not fully accommodated the members of the women’s teams’ competitive interests.¹⁵⁸ Brown argued that OCR had not defined the meaning of the term “fully and effectively.”¹⁵⁹ As Brown read the term in the context of the Act and the Policy Interpretation, the term could reasonably be interpreted to mean that institutions are required to meet the interests and abilities of the underrepresented gender only to the same extent that those institutions meet the interests and abilities of the overrepresented gender.¹⁶⁰ The First Circuit rejected this argument and upheld the district court’s exclusion of evidence, which would have demonstrated the relatively lower interest of women students to compete in intercollegiate athletics.¹⁶¹

After determining that the burden of proof shifted to Brown, the First Circuit upheld the district court’s holding that Brown had not met the second prong.¹⁶² While Brown took great steps between 1971 and 1977 to expand athletic offerings for female students,¹⁶³ Brown

155. *Id.* at 178 (citing *Kelley v. Board of Trustees*, 35 F.3d 265, 271 (7th Cir. 1994)).

156. *Id.* at 180.

157. *Id.* The district court in *Cohen II* noted that, when plaintiffs are members of a competitively viable team, the burden of proving the third prong of the three-part test is considerably easier. *Cohen II*, 879 F. Supp. 185, 212 (D.R.I. 1995). In cases where plaintiffs are seeking the formation or the elevation of a team, the identification of the plaintiffs’ interests and abilities is considerably more difficult. *Id.* at 211 (citing *Cohen I*, 991 F.2d at 904).

158. See *Cohen II*, 101 F.3d at 180 (adopting the reasoning of the Clarification). The First Circuit, quoting the Clarification, held that the university bears the burden of providing “strong evidence” that the presumed interest of the eliminated team’s members, their ability, or available competition no longer exist following the elimination of the team. *Id.* (quoting the Clarification at 8-9 n.2).

159. *Id.* at 174.

160. *Id.*

161. See *id.* (citing *Cohen I*, 991 F.2d at 898, holding that the third prong requires “not merely some accommodation, but full and effective accommodation”). But see *Cohen II*, 101 F.3d at 194-95 (Torruella, C.J., dissenting) (arguing that “full and effective” is open to two reasonable interpretations and that the First Circuit’s reading of the term creates a “perhaps impossibly” high requirement for institutions to meet and would make the third prong an “irrelevant addition to the test”). For further discussion of Chief Judge Torruella’s dissent in *Cohen II*, see *infra* Part IV.B and accompanying notes.

162. See *Cohen II*, 101 F.3d at 173.

163. See *Cohen II*, 879 F. Supp. at 211 (holding that Brown had improved the quality of its women’s athletic programs); *Hearing, supra* note 10, at 78 (statement of Vartan Gregorian,

could not satisfy the second prong because it had not continuously expanded opportunities for women athletes.¹⁶⁴ The court also held that Brown's downsizing of its men's athletic program was not equivalent to program expansion under the second prong, despite increasing the proportion of women athletes in its athletic program.¹⁶⁵

2. *Cohen I's* Progeny: Exchanging Critical Analysis for Expediency

Between the district court's decision in *Cohen I* and the First Circuit's ruling in *Cohen II*, two significant Title IX cases were decided: *Favia v. Indiana University of Pennsylvania*¹⁶⁶ and *Roberts v. Colorado State University*.¹⁶⁷ These cases adopted the district court's reasoning in *Cohen I*, granted the Policy Interpretation substantial deference, and applied the three-part test consistent with *Cohen I's* holding in reaching their decisions.¹⁶⁸ Not surprisingly, both courts cited *Cohen I* extensively throughout their opinions in support of their holdings.¹⁶⁹ Interestingly, however, the First Circuit in turn relied extensively on *Favia* and *Roberts*, and its adoption of *Cohen I*, to demonstrate the correctness of its own reasoning in *Cohen II*.¹⁷⁰

In *Favia*, members of the women's gymnastics and field hockey teams sued to have the university reinstate their teams, which were

President, Brown University) (stating that Brown University offers 18 varsity sports for women, more than double the national average).

164. *Id.* Although Brown offered 14 varsity teams for men and 13 for women at the time of the suit, the court found that Brown had failed to add a women's team since women's indoor track was added in 1982. *Id.* at 189, 211. Subsequent to the filing of the original lawsuit, Brown also added women's skiing in 1994. *Id.* at 211.

165. *Cohen II*, 879 F. Supp. at 211. The district court held that increasing the proportion of Brown's women students participating in intercollegiate athletics was also relevant, and was not accomplished by downsizing the men's program. *But see Cohen II*, 101 F.3d 155, 193 (1st Cir. 1996) (Torruella, C.J., dissenting) (arguing that, because the three-part test is based upon relative participation rates, as evidenced by the substantial proportionality prong, the district court's application of the second prong requires institutions to increase both the relative and absolute participation rates of its women students in intercollegiate athletics). For further discussion of Chief Justice Tourella's dissenting opinion, see *infra* Part IV.B and accompanying notes.

166. 812 F. Supp. 578 (W.D. Pa. 1993), *appeal to modify injunction denied*, 7 F.3d 332 (3d Cir. 1993).

167. 998 F.2d 824 (10th Cir. 1993), *aff'g* 814 F. Supp. 1507 (D. Colo. 1993).

168. See *Roberts*, 998 F.2d at 828-29 (adopting the Policy Interpretation's delineation of the three general areas of Title IX compliance and the three-part test); *Favia*, 812 F. Supp. at 583-84 (granting the Policy Interpretation great deference and adopting the Policy Interpretation's three-part test).

169. *Roberts*, 998 F.2d at 829-33; *Favia*, 7 F.3d at 342.

170. See generally *Cohen II*, 101 F.3d 155 (1st Cir. 1996) (containing multiple citations to *Favia* and *Roberts*).

discontinued following budgetary cutbacks.¹⁷¹ Granting the plaintiff's motion for a preliminary injunction to reinstate the discontinued women's teams, the court held that Indiana University of Pennsylvania ("IUP") failed to meet any portion of the Policy Interpretation's three-part test.¹⁷² However, unlike *Cohen (I or II)*, following the court's decision against IUP, the university moved to modify the preliminary injunction to replace the women's gymnastics team with a new women's soccer team.¹⁷³ IUP argued that the modification would allow substantial progress toward the equal opportunity to participate by increasing the proportion of female athletes from 38.97% to 43.02%.¹⁷⁴ The district court denied the motion to modify the injunction and IUP appealed to the Third Circuit.¹⁷⁵ The Third Circuit upheld the lower court's ruling, holding that, even if modifying the injunction would increase the proportion of women athletes, the university would still not meet the substantial proportionality prong.¹⁷⁶ Therefore, the Third Circuit concluded, IUP could not elect to replace viable teams with replacement teams until substantial proportionality was attained, even if the replacement of the gymnastics team with a new soccer team provided more opportunities for women athletes.¹⁷⁷

171. See *Favia*, 812 F. Supp. at 579-80 (noting that the plaintiffs sued for a preliminary injunction to prevent IUP from eliminating two women's sports due to an athletic budget cutback of \$350,000). In a move similar to the facts in *Cohen*, Indiana University of Pennsylvania discontinued the men's soccer and tennis teams along with both women's teams. *Id.*

172. *Id.* at 584-85. Under the first prong, the court found that the proportion of women athletes actually dropped from 37.77% to 36.51% following the program cutbacks. *Id.* Because neither figure was substantially proportional to the proportion of women students, the university failed to meet the first prong. *Id.* at 584. The university also failed to meet the second prong because the 1991 budget cuts eliminated participation opportunities for women. *Id.* Finally, IUP could not satisfy the third prong of the three-part test because the eliminated women's teams were viable and competitive prior to their elimination. *Id.* The court also rejected IUP's argument that financial considerations justified the elimination of the teams, instead holding that financial considerations alone cannot justify gender discrimination. *Id.* (quoting *Haffer v. Temple Univ.*, 678 F. Supp. 517, 530 (E.D. Pa. 1987)).

173. See *Favia v. Indiana Univ. of Pa.*, 7 F.3d 332, 336 (3d Cir. 1993) (reporting that IUP argued that the inclusion of the women's soccer team would successfully further the goals of Title IX by providing more opportunities for women athletes and providing greater recruiting funds for women athletes because of the lower operation cost of women's soccer). The district court initially denied the motion to modify the preliminary injunction because it would amount to vacating the original injunctive order. *Id.* at 336-37.

174. See *id.* at 343 (recognizing that exchanging a women's soccer team for the women's gymnastics and field hockey teams could result in a greater proportion of women athletes). IUP also argued that replacement of the 15 member women's gymnastics team with a 50 member soccer team would also save \$100,000 in operating expenses per year that IUP could then use to enhance recruitment of women athletes. *Id.* at 343 n.21.

175. *Id.* at 336-37.

176. *Id.* at 343-44.

177. See *Favia*, 7 F.3d 332, 343-45 (3d Cir. 1993) (citing the court's holding in *Cohen II* that

Similarly, the defendants in *Roberts* presented an appeal to the Tenth Circuit after the district court granted a permanent injunction to reinstate the Colorado State University ("CSU") women's varsity fast pitch softball team, which CSU discontinued as part of cutbacks in its athletic department.¹⁷⁸ The Tenth Circuit upheld the district court's granting of the permanent injunction after determining that CSU violated Title IX,¹⁷⁹ but rejected the district court's attempt to "micromanage" CSU's method of complying with the injunction.¹⁸⁰ Applying the three-part test, the Tenth Circuit held that CSU failed to meet any prong.¹⁸¹ CSU argued that the plaintiffs failed to prove that CSU had not adequately met the interests and abilities of women athletes because the university eliminated more athletic opportunities for men than women during the cutbacks.¹⁸² The Tenth Circuit rejected this claim, holding that an institution cannot defend itself once the plaintiffs establish a *prima facie* case under the three-part test by arguing that the elimination of athletic opportunities fell disproportionately on the overrepresented gender.¹⁸³

an institution must either satisfy the substantial proportionality or accommodation of interests prongs, in the absence of program expansion).

178. See *Roberts v. Colorado State Univ.*, 998 F.2d 824, 826, 831 (10th Cir. 1993). (discussing, like *Cohen* and *Favia*, the elimination of men's ball teams at each university).

179. See *id.* at 827-33 (holding that CSU violated the first and third prongs, and could not demonstrate a continuous or historic expansion of women's athletic opportunities).

180. See *Roberts*, 998 F.2d at 834-35 (holding that the district court has the power to ensure that the reinstated varsity women's softball team has the same benefits of other varsity sports teams offered by the institution, but does not have the power to require CSU to field a women's softball team for a fall exhibition season in addition to the standard spring season). The Tenth Circuit rejected CSU's claim that the district court had exceeded its powers by requiring that the women's softball team receive all the benefits of varsity status. *Id.* However, the Tenth Circuit found that the district court did exceed its power by requiring that the team play a fall exhibition season in addition to the regular spring season required for varsity competition. *Id.* at 835. See also *Cohen II*, 101 F.3d 155, 187-88 (1st Cir. 1996) (holding that the district court exceeded its powers by rejecting Brown's plan to comply with Title IX, thereby granting Brown another opportunity to submit a plan).

181. See *Roberts*, 998 F.2d at 828-32 (applying the three-part test and explaining its reasoning that CSU had failed to satisfy any prong). The court first determined that the number of women athletes was not substantially proportionate to the undergraduate enrollment, finding a 10.5% disparity. *Id.* at 830. The court also found that CSU could not satisfy the program expansion prong noting that the university had not added a women's athletic team since 1977. *Id.* Finally, the Tenth Circuit rejected CSU's argument that the full interests and abilities of women athletes had been met. *Id.* at 832.

182. See *id.* at 831-32 (noting CSU's argument that plaintiffs could not demonstrate a violation of the interest and ability prong of the three-part test when CSU had accommodated the interests of male athletes to the same extent as it had female athletes). In the last round of cutbacks, the women's softball team was eliminated along with the men's baseball team. *Id.* Thus, CSU argued that Title IX was not violated because the university was only obligated to accommodate the interests of female athletes to the same extent as they accommodated male athletes' interests. *Id.*

183. See *id.* at 831 (rejecting CSU's argument that it cannot be liable under Title IX because more male athletes suffered as a result of athletic cutbacks than female athletes).

3. Left in *Cohen's* Wake: Unsuccessful Title IX Lawsuits Brought by Male Athlete Plaintiffs

While *Cohen*, *Favia*, and *Roberts* illustrate the near invincibility of female athlete plaintiffs in Title IX cases,¹⁸⁴ male athlete plaintiffs have not been as successful.¹⁸⁵ In fact, no male plaintiff has ever prevailed.¹⁸⁶ Under *Cohen's* application of the substantial proportionality prong, the proportion of male athletes within a typical institution's athletic program is disproportionately high, thus precluding standing to bring a Title IX lawsuit.¹⁸⁷

For example, in *Kelley v. Board of Trustees*,¹⁸⁸ members of the men's swimming team alleged that the University of Illinois violated Title IX and the Equal Protection Clause¹⁸⁹ when it terminated the men's swimming program but retained the women's program.¹⁹⁰ Although

184. See *Cohen v. Brown Univ.*, 101 F.3d 155, 180 (1st Cir. 1996) (holding that Brown University violated Title IX following the elimination of the women's gymnastics and volleyball teams); *Roberts v. Colorado State Univ.*, 998 F.2d 824, 828-33 (10th Cir. 1993) (holding that CSU violated Title IX when it eliminated the women's fast-pitch softball team); *Daniels v. School Bd.*, 985 F. Supp. 1458, 1462 (M.D. Fla. 1997) (finding that the school board violated Title IX due to unreasonable disparities between the girls' softball and boys' baseball programs); *Beasley v. Alabama State Univ.*, 966 F. Supp. 1117, 1131 (M.D. Ala. 1997) (finding that plaintiff's Title IX claims were not barred by the statute of limitations or standing requirements for injunctive relief); *Favia v. Indiana Univ. of Pa.*, 812 F. Supp. 578, 584-85 (W.D. Pa. 1993) (reinstating the eliminated women's field hockey and gymnastics teams after finding that the university violated Title IX). But cf. *Boucher v. Syracuse Univ.*, No. 95-CV-620, 1998 WL 167296, at 4 (N.D.N.Y. 1998) (dismissing female athlete plaintiff's Title IX claim after determining that the university had established a historic and continuous expansion of women's athletic programs).

185. See generally *Kelley v. University of Ill.*, 832 F. Supp. 237, 243-44 (C.D. Ill. 1993) (rejecting male athletes' claims brought under Title IX and the Equal Protection Clause), *aff'd*, 35 F.3d 265 (7th Cir. 1994), *reviewed on merits*, 837 F. Supp. 989, 995-97 (S.D. Iowa 1993) (denying plaintiff's motion for a preliminary injunction requiring that the university reinstate its intercollegiate wrestling program); *Gonyo v. Drake Univ.*, 879 F. Supp. 1000, 1005-06 (S.D. Iowa 1995) (denying plaintiff's Title IX claim on its merits); Aronberg, *supra* note 12, at 782 (attributing the near perfect track record of female Title IX plaintiffs to the almost impossible burden imposed by the three-part test, arguing that the substantial proportionality prong of the three-part test is the only prong that the courts genuinely apply).

186. See Ferrier, *supra* note 89, at 868 (citing the examples of *Kelley* and *Gonyo*). But cf. *Neal v. Board of Trustees*, No. CV-F-97-5009 (E.D. Cal. filed Dec. 26, 1997) (preserving male plaintiffs' Title IX violation claim following defendant's motion to dismiss).

187. See *Gonyo*, 879 F. Supp. at 1004-05 (stating that the substantial proportionality prong forecloses plaintiff's suit because the proportion of male athletes is disproportionately high).

188. 35 F.3d 265 (7th Cir. 1994), *aff'd* 832 F. Supp. 237 (C.D. Ill. 1993).

189. U.S. CONST. amend. XIV, § 1.

190. See *Kelley*, 35 F.3d at 267 (summarizing the plaintiffs' complaint). The University of Illinois cut the men's swimming team, along with three other athletic teams, due to a significant deficit in the university's athletic budget. *Id.* at 269. On appeal from the district court's decision, the Seventh Circuit found that, at the time the suit was filed, the proportion of women athletes was only 23.4% while women represented 44% of the student body. *Id.*

the district court stated that it was sympathetic to the unfortunate loss of men's opportunities from the implementation of Title IX, it felt bound to rule against the plaintiffs.¹⁹¹ The Seventh Circuit upheld the lower court's decision, rejecting the plaintiffs' argument that substantial proportionality improperly mandates statistical balancing of male and female athletes in proportion to their enrollment.¹⁹² The appellate court held that the three-part test simply creates a presumption of compliance when the defendants satisfy substantial proportionality.¹⁹³ The court also denied the plaintiffs' Equal Protection claim because, under the intermediate scrutiny test,¹⁹⁴ the law permits discriminatory remedial measures provided that they are substantially related to prohibiting gender discrimination.¹⁹⁵ Accordingly, the court held that Title IX permits institutions to terminate athletic programs on the basis of sex if the determination is related to ending sex discrimination in athletics.¹⁹⁶

The district court in *Gonyo v. Drake University*¹⁹⁷ also held that members of the discontinued men's wrestling team were not entitled to relief under either Title IX or the Equal Protection Clause.¹⁹⁸ Like *Kelley*, in *Gonyo*, male athletes disproportionately outnumbered female athletes.¹⁹⁹ However, *Gonyo* differed from *Kelley*, and other previous Title IX cases, because female athletes received a disproportionate number of athletic scholarships, thereby presenting

191. See *Kelley*, 832 F. Supp. at 243-44 (stating that "the Court is not unsympathetic to the plight of members of the men's swimming team and recognizes that Congress, in enacting Title IX, probably never anticipated that it would yield such draconian results"). Nonetheless, the district court felt compelled to follow the judicial development of Title IX because the statute provided equal access to educational and athletic facilities for both sexes. *Id.*

192. See *Kelley*, 35 F.3d at 271 (rejecting the defendant's claim that the Policy Interpretation established a gender-based quota system).

193. See *id.* (arguing that the alleged quota system under the substantial proportionality requirement was merely one way that an institution could achieve compliance with Title IX). Therefore, the court held that the Policy Interpretation did not create a gender-based quota system because institutions can comply with Title IX through program expansion or accommodation of interests. *Id.*

194. See *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 728 (1982) (observing that remedial measures mandated by Congress are constitutionally permissible if they serve important governmental objectives and the means are substantially related to achieving that goal). Under intermediate scrutiny, statutory classifications must be "substantially related" to an "important government objective." *Id.* at 721.

195. See *Kelley*, 35 F.3d at 272 (following the Court's holding in *Hogan*, 458 U.S. at 728).

196. See *id.* (finding that cutting men's teams is permissible under Title IX because it is substantially related to protecting the interests of women athletes).

197. 879 F. Supp. 1000 (S.D. Iowa 1995).

198. See *Gonyo*, 879 F. Supp. at 1001 (summarizing the plaintiffs' claim).

199. See *id.* at 1004 (finding that male athletes represented 75% of Drake's athletes but only 42% of its students).

a second consideration for Title IX compliance.²⁰⁰ Under the Policy Interpretation, institutions violate Title IX if athletic scholarships and financial aid are not allocated in “proportion to the number of students of each sex participating in intercollegiate athletics.”²⁰¹ In granting the university’s motion for summary judgment, the court ruled that the three-part test superceded the athletics scholarship test²⁰² in determining Title IX compliance.²⁰³ Accordingly, under the three-part test, the court found that the majority of benefits provided by the university favored male athletes, even though female athletes may have received more scholarship funding.²⁰⁴ Thus, the court held that the plaintiffs were precluded from relief under Title IX because they were members of the overrepresented sex.²⁰⁵

E. Cohen’s Application of the Three-Part Test: Establishing the Supremacy of Substantial Proportionality

Several observations become clear after analyzing *Cohen I* and its progeny. First, by accepting *Cohen’s* application of the three-part test, the courts have established the substantial proportionality prong as the legal standard for Title IX compliance.²⁰⁶ Under *Cohen’s* application of the three-part test, both the program expansion and accommodation of interests prongs are consumed and negated by

200. See *id.* at 1004 (noting that plaintiffs correctly distinguished previous Title IX cases as not addressing the question of disparate scholarship allocation).

201. 44 Fed. Reg. 71,415 (1979) (quoting 45 C.F.R. § 86.37(a)).

202. See *Gonyo*, 879 F. Supp. at 1004-05. The scholarship test does not require that institutions provide a proportional number of scholarships to members of each sex or that the amount of each award be similar. *Id.* at 1005. The test simply requires that the total amount of financial aid given to each sex must be proportional to each sex’s enrollment. *Id.*

203. See *id.* at 1005-06 (stating that the finding of a Title IX violation under the three-part test would preclude relief for disparate scholarship allocation). However, the court acknowledged that the plaintiffs had distinguished previous cases because those cases did not address the scholarship disparity issue. *Id.* at 1005. Nonetheless, the court found that although the athletic scholarships served as a significant aspect for athletic opportunity, this aspect was still subordinate to the equal athletic opportunity requirement in determining Title IX compliance. *Id.* at 1006.

204. See *id.* at 1006 (holding that the athletic scholarship test is subordinate to the athletic opportunities test).

205. *Id.* at 1004-05.

206. See Aronberg, *supra* note 12, at 782 (rejecting OCR’s contention that the substantial proportionality prong is a “safe harbor” to protect institutions from Title IX liability, arguing that it is the only standard that the courts analyze in determining Title IX compliance); Bernardo, *supra* note 97, at 342 (arguing that the substantial proportionality prong has become the sole benchmark for compliance “given the absence of other conformity avenues”); Leahy, *supra* note 40, at 527 (noting that substantial proportionality is the essence of each of the three-part test’s prongs, thereby elevating substantial proportionality to a higher significance than the other two prongs). In fact, if an institution decides to reduce the size of its athletic program, the substantial proportionality prong is the only possible means of Title IX compliance. *Id.*

the substantial proportionality prong.²⁰⁷ As a result, the court has transformed Title IX from an anti-discrimination statute intended to prevent sex discrimination in education, into an affirmative action statute that requires institutions to implement gender-based quotas.²⁰⁸

For example, three problems arise under *Cohen's* application of the three-part test when a university attempts to put forth a program expansion defense. First, few institutions can meet the standard of "historic and continued expansion" established in *Cohen*.²⁰⁹ Because the *Cohen* application arose more than twenty years after the enactment of Title IX, only institutions that fortuitously expanded their women's athletics programs consistent with *Cohen's* reading of the Policy Interpretation can satisfy the program expansion defense.²¹⁰ Ironically, *Cohen's* application of the second prong actually protects institutions that add women's teams according to a timetable, instead of according to the interests of women athletes.²¹¹ In fact, institutions that ambitiously expanded their women's athletic program following the enactment of Title IX cannot satisfy the second prong under *Cohen*, if they have not continued to expand women's athletic opportunities up to the present day.²¹² Institutions

207. See Bernando, *supra* note 97, at 342-43 (stating that the second prong of the three-part test is "wholly dependent" upon the substantial proportionality statistical balance, and that the third prong is reduced to an assessment of substantial proportionality and is clearly not an "independent means of compliance").

208. See *Cohen v. Brown Univ.*, 101 F.3d 155, 193 (1st Cir. 1996) (Torruella, C.J., dissenting) (arguing that the First Circuit's opinion sets an extremely difficult standard to meet by forcing institutions to historically and continually increase the total number of women athletes, not simply the proportion of women athletes necessary to satisfy the second prong); Mahoney, *supra* note 22, at 944 (asserting that the substantial proportionality prong's requirement of statistical balancing of athletic opportunities "is a 'quota system'—in every sense of the words"); George A. Davidson & Carla A. Kerr, *Title IX: What is Gender Equity?*, 2 VILL. SPORTS & ENT. L.J. 25, 30 (1995) (proposing that substantial proportionality is significantly different than Title IX's original purpose—to identify discrimination in varsity athletics).

209. See *Roberts v. Colorado State Univ.*, 998 F.2d 824, 830 (10th Cir. 1993) (recognizing that only a few schools will be able to satisfy Title IX's effective accommodation requirement by expanding their women's athletic programs); Aronberg, *supra* note 12, at 784-86 (observing that the second prong of the three-part test is impossible to satisfy without expanding an institution's athletic budget for funding new athletic teams, which is an unattractive proposition at a time when athletic budgets are being reduced); Ferrier, *supra* note 89, at 867 (noting that the courts have been unable to explain how to satisfy the second prong of the three-part test without huge additional expenditures).

210. See *Hearing*, *supra* note 10, at 79 (statement of Vartan Gregorian, President, Brown University) (asserting that Brown was unable to satisfy the second prong of the three-part test because it provided too many opportunities for women athletes too quickly and was, therefore, unable to satisfy the "continuous" requirement of the prong).

211. See Ferrier, *supra* note 89, at 888 n.298 (illustrating how a hypothetical university could satisfy the second prong simply by adopting a plan to add one women's athletic team every two years). *But cf. Cohen I*, 991 F.2d 888, 903 (1st Cir. 1993) (stating that the second prong requires universities to adhere to the pace of student interest in providing opportunities).

212. See *Hearing*, *supra* note 10, at 79 (statement of Vartan Gregorian, President, Brown University) (suggesting that the court's interpretation of the second prong in *Cohen* essentially

that have periodically added a women's athletic team every few years will satisfy the program expansion prong under *Cohen's* analysis.²¹³ Finally, the program expansion prong under *Cohen* serves merely as a rest stop for an institution moving toward meeting substantial proportionality.²¹⁴ As a result of the problems with *Cohen's* application of the second prong, institutions will elect to meet the defined goal of substantial proportionality.²¹⁵

Substantial proportionality under the *Cohen* application of the three-part test also absorbs the accommodation of interests prong.²¹⁶ While these decisions did not address the issue of a plaintiff seeking to create new athletic opportunities,²¹⁷ the courts have silently adopted a per se rule that educational institutions cannot satisfy the accommodation of interests prong in cases involving an eliminated program.²¹⁸ The courts' reasoning is that every eliminated program necessarily demonstrates that sufficient interest and ability were present prior to elimination.²¹⁹ Unfortunately, this rule is so powerful

ignored Brown's immediate creation of numerous athletic opportunities for women athletes while encouraging other institutions to take their time and only provide incremental changes).

213. See Bernardo, *supra* note 97, at 343 n.266 (noting that the *Cohen* court's interpretation of the second prong is "poor policy" because it grants compliance to schools that drag their feet and satisfy Title IX with periodic additions of women's teams).

214. See *id.* at 343 (arguing that the program expansion prong is not independent of the substantial proportionality prong because the *Cohen* court's interpretation of the program expansion prong requires institutions to demonstrate that they are moving to substantial proportionality); Aronberg, *supra* note 12, at 786 (stating that the only way that an institution can be certain that it has satisfied the second prong is to expand opportunities for women athletes until it has reached substantial proportionality). *Cohen's* application of both the substantial proportionality prong and the program expansion prong ultimately requires gender parity, the former requiring it in a single bound but the latter allowing for incremental steps. Bernardo, *supra* note 97, at 343.

215. See Aaronberg, *supra* note 12, at 785-86 (explaining that the collapsing of the program expansion prong into the substantial proportionality prong has led some institutions to elect substantial proportionality as their method of complying with Title IX). In choosing substantial proportionality to comply with Title IX, institutions generally will eliminate men's teams rather than add women's teams to the athletic program in order to remain within budgetary restraints. *Id.*

216. See Aaronberg, *supra* note 12, at 786 (noting that unless and until female participation rates are substantially proportionate, no expansion of an athletic program can reliably be said to have satisfied the interests and abilities of student athletes).

217. Cf. *Pederson v. Louisiana State Univ.*, 912 F. Supp. 892, 901-02 (M.D. La. 1996) (deciding whether to grant an affirmative injunction against the university to implement proposed women's fast-pitch softball and soccer teams).

218. See Davidson & Kerr, *supra* note 208, at 42 (observing that if the "full and effectively accommodated" language of the third prong is applied literally, every institution that eliminates a viable, competitive women's athletic program will necessarily violate the prong); CLARIFICATION, *supra* note 98 (finding that the elimination of a viable women's athletic team will violate the second and third prongs, unless the elimination is accompanied by a reduction in the number of opportunities for male athletes so that substantial proportionality is met).

219. See *Cohen II*, 879 F. Supp. 185, 212-13 (D.R.I. 1995) (holding that Brown violated the third prong when it downgraded four viable women's teams that had been competing at the varsity level). The court held that Brown violated the third prong in two regards: first, by failing

that the First Circuit in *Cohen II* upheld the district court's rejection of surveys of student interests, statistical evidence, and questionnaires given to incoming students that demonstrated that Brown had fully and effectively accommodated the interests and abilities of its female students.²²⁰ Because *Cohen* indicates that institutions may not present statistical evidence that they have met the third prong, the *Cohen* line of decisions eliminated the accommodation of interests prong as a method of Title IX compliance.²²¹

Thus, under *Cohen's* application of the three-part test, substantial proportionality is the only available method to comply with Title IX.²²² Not surprisingly, Title IX has been transformed from an anti-discrimination statute into an affirmative action statute, finding violations only where athletic participation is not statistically balanced.²²³ This transformation cannot be legally supported because Congress clearly prohibited statistical balancing and sex based determinations in educational programs receiving federal funds.²²⁴

In addition, *Cohen's* application of the three-part test benefits women athletes by protecting them from athletic budget cuts, leaving male athletes to bear the burden of absorbing these cuts.²²⁵ Title IX supporters argue that men's athletic programs historically enjoyed an

to increase the number of women athletes in its athletic program by elevating teams with a demonstrated interest and ability to compete on the varsity level, and, second, by failing to maintain the varsity teams that it had downgraded. *Id.*

220. See *Cohen II*, 101 F.3d 155, 179 (1st Cir. 1996) (holding that statistics and surveys may be used to demonstrate student interest but could not be used as a lack-of-interest defense to a Title IX suit). The First Circuit stated that "even if it can be empirically demonstrated that, at a particular time, women have less interest in sports than do men, such evidence, standing alone, cannot justify providing fewer athletic opportunities for women than for men." *Id.* at 179.

221. See Bernardo, *supra* note 97, at 343 (asserting that the third prong is a shield against Title IX liability only if the institution can be excused from meeting substantial proportionality due to "insufficient female interest and ability").

222. See Mahoney, *supra* note 22, at 967 (arguing that by strictly applying the three-part test, the courts have imposed statistical balancing of athletic opportunities between the sexes).

223. See Leahy, *supra* note 40, at 531-32 (arguing that proportionality is equivalent to affirmative action because the three-part test is premised on the unrealistic and unsupported assumption that athletic interest among women is proportional to their enrollment at an undergraduate institution). Ironically, the court's application of Title IX would not find discrimination within the athletic programs of institutions with a long-standing history of gender-based discrimination. For example, both the Citadel and the Virginia Military Institute are Title IX compliant under *Cohen* because both meet the court's application of substantial proportionality. *Participation: Proportion of Female Students on Athletic Teams* (visited Aug. 4, 1999) <<http://www.chronicle.com>>.

224. See Leahy, *supra* note 40, at 522 (discussing the legislative intent of Title IX); Mahoney, *supra* note 22, at 944 (observing that the statutory language and the legislative history dictate that Title IX is not an affirmative action statute and that quota systems should not be used to implement the law).

225. See Daniel, *supra* note 27, at 258 (noting that men are not afforded the same protections from athletic budget cuts as women because Title IX protections are rationalized to be unavailable to male athlete plaintiffs).

unreasonable share of opportunities and resources because they did not have to compete with women's athletic programs for resources until recently.²²⁶ Furthermore, supporters of Title IX argue that men's athletic programs, particularly revenue-producing sports, must bear the cost of eliminating "wasteful spending" to comply with Title IX.²²⁷ However, while institutions attempt to comply with Title IX, they are reluctant to restrict men's revenue-producing sports because of the financial and social benefits they produce.²²⁸ Because institutions wish to retain the benefits of men's revenue-producing sports, and must support women's athletic programs armed with *Cohen's* application of the three-part test, men's non-revenue-producing sports bear the brunt of the athletic departments' budgetary woes.²²⁹ The unfair burden placed on men's non-revenue-producing sports is exacerbated by *Cohen's* and OCR's acceptance of eliminating men's athletic programs and opportunities, in order for schools to meet the substantial proportionality prong.²³⁰ To many institutions, this solution—commonly referred to as Title IX's "unintended consequences"—appears to be the easiest, most clearly defined, and most cost-effective method to comply with Title IX.²³¹

226. See Weistart, *supra* note 18, at 199 (stating that men's athletic programs have had a 100-year head start over women's athletics in building interest and ability and in generating financial support).

227. See Weistart, *supra* note 18, at 248 (arguing that because most athletic budget expenditures pay for the costs of men's revenue-producing sports, those sports should reduce the injury to women's sports by reducing their operating costs).

228. See Daniel, *supra* note 27, at 303 (arguing that the "profit center" theory of commercialized intercollegiate athletics holds that certain popular sports generate revenue for the university and promote "increased student and alumni cohesion"). In addition to a greater sense of community within the student body and its alumni, universities benefit from the "visibility, publicity, and fund-raising services from their athletic programs." Mark R. Whitmore, *Denying Scholarship Athletes Worker's Compensation: Do Courts Punt Away a Statutory Right?*, 76 IOWA L. REV. 763, 782 (1991). But cf. Porto, *supra* note 10, at 397 (stating that the commercial model of college sports exacts disproportionately high costs for the benefits that the university receives); Weistart, *supra* note 18, at 201 (arguing that university administrators help perpetuate higher expenditures for men's revenue-producing sports because they come from a background that accepts the hierarchy of intercollegiate athletics).

229. See Susan M. Shook, Note, *The Title IX Tug-of-War and Intercollegiate Athletics in the 1990s: Nonrevenue Men's Teams Join Women Athletes in the Scramble for Survival*, 71 IND. L.J. 773, 773-74 (1996) (observing that institutions have turned to reducing their men's athletic programs to satisfy Title IX, and that, consequently, many non-revenue-producing sports have been indirectly injured through program elimination).

230. See *Cohen II*, 991 F.2d 888, 898 n.15 (1st Cir. 1995) (stating that universities may comply with Title IX by downgrading and eliminating opportunities for the overrepresented sex to achieve substantial proportionality); Letter from Norma V. Cantu, DED's Assistant Secretary for Civil Rights, to interested parties 3-4 (Jan. 16, 1996) [hereinafter Cantu] (asserting that institutions may cap or eliminate men's athletic programs to comply with substantial proportionality).

231. See *Roberts v. Colorado State Univ.*, 998 F.2d 824, 830 (10th Cir. 1993) (stating that "[f]inancially strapped institutions may still comply with Title IX by cutting athletic programs such that men's and women's athletic participation rates become substantially proportionate to

F. Extending Cohen: OCR's Clarification of the Policy Interpretation

In addition to the federal courts that have followed *Cohen's* application of the three-part test and substantial proportionality, OCR also adopted *Cohen* as its official method for determining Title IX compliance.²³² The OCR extension grants *Cohen* government approval and nationwide application, moving it far beyond the jurisdictions of the four circuit courts that originally adopted its holding.

Following the Republican party's takeover of Congress in November 1994, and shortly after the district court rendered its opinion in *Cohen II*, the House Subcommittee on Post-secondary Education, Training and Life-long Learning held hearings on Title IX and its unintended consequences.²³³ During the hearing, the Subcommittee heard testimony from numerous parties criticizing the vagueness of the three-part test and pleading for OCR to clarify how to comply with the three-part test.²³⁴ Also testifying at the hearing was Norma V. Cantu, the Department of Education's Assistant Secretary for Human Rights, who defended OCR's enforcement of Title IX.²³⁵

After the hearing, Representatives Howard "Buck" McKeon and Steve Gunderson instructed Cantu to provide further guidance for Title IX compliance or possibly face legislative clarification by Congress.²³⁶ Cantu agreed to provide greater clarification, and on September 20, 1995, OCR released a draft Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test for public comment.²³⁷ Cantu emphasized that the Clarification was not an attempt to modify either Title IX's regulation or the Policy Interpretation, but instead was an attempt to illustrate how OCR will

their representation in the undergraduate population"); Aronberg, *supra* note 12, at 785-86 (noting that cutting men's athletic programs may serve as the most cost-effective and reasonable way to achieve Title IX compliance under the substantial proportionality prong); Davidson & Kerr, *supra* note 208, at 43-44 (stating that the message from the court in *Roberts* clearly advocates that "[i]nstitutions should comply by cutting men's teams without regard to men's interests and abilities for varsity competition or how short the men's program falls from equally accommodating the abilities and interests of male students").

232. Cantu, *supra* note 230.

233. See generally *Hearing, supra* note 10.

234. See *Hearing, supra* note 10, at 9-120. The Subcommittee heard testimony from Congressman J. Dennis Hastert, Vartan Gregorian, President of Brown University, and David L. Jorns, President of Eastern Illinois University, regarding the difficulty of complying with OCR's enforcement of Title IX. *Hearing, supra* note 10, at 9-120.

235. See *Hearing, supra* note 10, at 101-20 (arguing that OCR was doing the best job possible).

236. Curtis & Grant, *supra* note 11.

237. CLARIFICATION, *supra* note 98.

consider compliance “in concrete terms.”²³⁸ However, the draft Clarification did little more than repeat OCR’s current procedures, which were consistent with *Cohen*’s application of the three-part test.²³⁹

After receiving more than 200 comments from interested parties, OCR issued a final Clarification on January 16, 1996, just before the First Circuit’s decision in *Cohen II*.²⁴⁰ Mostly unchanged from the draft Clarification, the final Clarification failed to reflect the numerous suggestions OCR received during the thirty-day comment period.²⁴¹ These suggestions included a proposal from several parties to incorporate “opportunity slots” into the evaluation of substantial proportionality.²⁴² Under this proposal, OCR’s method of calculating participation opportunities by strictly counting the number of students actually participating in athletic programs would expand to include open participation slots left unfilled due to low interest and/or ability level among the student body.²⁴³

The Clarification maintained OCR’s policy of rejecting “cookie cutter” standards for compliance, but did little to provide the needed clarification that the Subcommittee requested.²⁴⁴ In a letter accompanying the Clarification, Cantu maintained that “OCR does not *require* quotas.”²⁴⁵ However, while stating that OCR will make compliance determinations under substantial proportionality “on a case-by-case basis,” OCR provided several concrete examples that indicated the existence of a five percent quota.²⁴⁶ Describing a hypothetical institution with an enrollment of fifty-two percent women and an athletic program comprised of forty-seven percent women students and 600 total athletes, Cantu indicated that the institution would not comply with Title IX because the five percent disparity represented sixty-two additional women that could be accommodated—enough to field an additional viable women’s team.²⁴⁷ This hypothetical indicates that a disparity of five percent

238. Letter from Norma V. Cantu, DED’s Assistant Secretary for Civil Rights, to interested parties 1 (Sept. 20, 1995).

239. See Aronberg, *supra* note 12, at 763 (stating that the draft Clarification simply maintained the status quo).

240. See Aronberg, *supra* note 12, at 763; see also CLARIFICATION, *supra* note 98.

241. See Aronberg, *supra* note 12, at 763 (describing the Clarification as “relatively unchanged,” despite 200 public comments).

242. See Aronberg, *supra* note 12, at 763.

243. See Aronberg, *supra* note 12, at 763.

244. Aronberg, *supra* note 12, at 763.

245. Cantu, *supra* note 230, at 3-4 (emphasis added).

246. CLARIFICATION, *supra* note 98, at 5.

247. CLARIFICATION, *supra* note 98, at 5.

between the proportion of women in the student body as a whole and the institution's athletic program is a per se violation of substantial proportionality.²⁴⁸ On the other hand, an institution may meet substantial proportionality if the disparity is less than five percent and no additional viable women's team could be added.²⁴⁹

Although the Clarification simply maintained the status quo, it demonstrates some of OCR's incorrect assumptions in enforcing Title IX in athletics.²⁵⁰ The Clarification maintains the Policy Interpretation's unproven and unsubstantiated assumption that men and women college students have the same interest and ability to compete in intercollegiate athletics.²⁵¹ In addition, the Clarification does not accurately reflect the economic and logistic realities that face athletic programs. The Clarification, which is consistent with *Cohen*, expects institutions to achieve proportionality by creating the requisite additional number of opportunities for women athletes.²⁵² This "expanding pie" method, however, ignores economic reality.²⁵³ Educational institutions, like other organized entities, face finite budgets and must meet their desired goals within these budgets. Educational institutions are highly unlikely to increase their athletic budgets to meet substantial proportionality.²⁵⁴ Instead, institutions are more likely to eliminate opportunities for male students or transfer them to female students.²⁵⁵

Despite Congressional oversight and the threat of legislative intervention, the unintended consequences created by *Cohen's* application of the three-part test have continued after the publication of the Clarification. These unintended consequences continue to harm educational institutions in general,²⁵⁶ and athletic departments

248. Aronberg, *supra* note 12, at 764 & n.159.

249. Aronberg, *supra* note 12, at 764 & n.159.

250. See Aronberg, *supra* note 12, at 764 & n.159 (asserting that, for example, OCR's assumption that men and women share the same level of interest in sports is questionable).

251. Aronberg, *supra* note 12, at 765.

252. See Aronberg, *supra* note 12, at 765 (arguing that the Clarification assumes that institutions will be able to supply the necessary opportunities to satisfy substantial proportionality); Welch Suggs, *Colleges Consider Fairness of Cutting Men's Teams to Comply with Title IX*, CHRON. OF HIGHER EDUC., Feb. 19, 1999, at A53 (quoting Donna Lopiano, Executive Director, Women's Sports Foundation, as saying that the "easiest solution is [for an institution] to double [its] resources and give the women the same opportunities as men").

253. Aronberg, *supra* note 12, at 765.

254. Weistart, *supra* note 18, at 200.

255. Weistart, *supra* note 18, at 200.

256. See Daniel, *supra* note 27, at 298-306 (arguing that the "profit center" theory of college sports utilizes college sports as a vehicle for the institution to make money). Accordingly, calls for cutbacks of the funding of revenue-producing sports threaten to diminish the amount of revenue produced by these sports. Cf. Porto, *supra* note 10, at 384-88 (stating that successful

in particular.²⁵⁷ Moreover, men's nonrevenue-producing sports, the core of the United States Olympic Team, may have already been irreparably harmed by numerous athletic program cutbacks initiated in the name of Title IX compliance.²⁵⁸ Clearly, modification is necessary to restore fairness and common sense.

III. THE NEED TO MODIFY TITLE IX TO BETTER APPLY TO INTERCOLLEGIATE ATHLETICS

Title IX's prohibition against gender discrimination in educational programs²⁵⁹ undeniably serves a legitimate purpose that should be supported. Unfortunately, the application of Title IX to intercollegiate athletics has created a hostile environment that is ill-suited to further this legislative purpose.²⁶⁰ By not resolving the factors that led to Title IX's unintended consequences, a battle for scarce athletic resources has arisen among revenue and nonrevenue-producing sports and men's and women's athletic programs.

To end this competition for resources, two problems created by *Cohen's* application of the three-part test must be addressed. First, enforcement of Title IX through substantial proportionality's quota system must be recognized as legally impermissible. Second, the three-part test must take into consideration structural differences between men's and women's athletics teams and the various

athletic teams do not financially benefit the colleges they represent).

257. See Daniel, *supra* note 27, at 257 (noting that the mandate for institutions to comply with Title IX has generated fears that the financial stability of college athletics will be adversely affected by cutbacks of revenue-producing sports); EADA Reports, *supra* note 135 (reporting the economic earnings of NCAA Division I athletic and football programs during the 1995-96 and 1996-97 academic years). The economic earnings reported by the Chronicle of Higher Education survey appear to support the fear that altering the operating standards for football would have a direct effect on the financial health of the entire athletic program. Of the 45 NCAA Division I institutions reporting that their athletic program did not suffer a financial loss during the 1995-96 academic year, 36 of these institutions reported a profit by their football program. EADA Reports, *supra* note 135. During the 1996-97 academic year, 70 of the 96 institutions not reporting a financial loss also reported a profit by their football program. EADA Reports, *supra* note 135.

258. See Shook, *supra* note 230, at 774 (stating that men's nonrevenue-producing sports have become increasingly endangered and extinct as institutions attempt to comply with the *Cohen* interpretation of the three-part test).

259. 20 U.S.C. § 1681(a) (1994). In pertinent part, § 1681(a) states that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." *Id.*

260. See Weistart, *supra* note 18, at 194-95 (observing that the pursuit of limited resources for the funding of athletic opportunities has created a "them vs. us," "men vs. women"-type of rivalry that encourages a highly defensive and suspicious atmosphere, which is not conducive to reaching a viable solution to the Title IX problem).

competitive goals of institutions—particularly in operating revenue-producing sports.²⁶¹

A. Substantial Proportionality: An Impermissible Determinative Standard

Substantial proportionality gained prominence as the enforcement mechanism for Title IX due to its simplicity and efficiency in administration. However, any benefit provided by substantial proportionality is outweighed by the corresponding loss of equity and fairness. In addition, legal support for substantial proportionality does not exist for at least three reasons. First, although the legislative history of Title IX is generally ambiguous,²⁶² Congress explicitly forbid the use of quotas, statistical balancing, and reverse discrimination to implement Title IX.²⁶³ Accordingly, the plain text of the substantial proportionality prong, as well as *Cohen's* application of the entire three-part test, does not carry legal weight because it directly contradicts Congress' legislative intent.²⁶⁴ Secondly, *Cohen's* application of the three-part test violates the Equal Protection standard enunciated by the Supreme Court in two recent cases: *Adarand Constructors, Inc. v. Peña*²⁶⁵ and *United States v. Virginia*.²⁶⁶ Finally, substantial proportionality's implicit assumption regarding the relative interests and abilities of each sex to compete in intercollegiate athletics has never been substantiated, and is,

261. See Connolly & Adelman, *supra* note 24, at 846 (noting that the courts have ignored both the Javitz Amendment and OCR's determination that the unique nature of the sport should be examined before assessing Title IX compliance); see also Daniel, *supra* note 27, at 293 (noting that Title IX's assumption that athletic programs are merely an extension of the university's educational efforts does not accurately reflect the complexities and forms that an intercollegiate athletic program may take). The ramification of treating all sports equally is that institutions will choose to retain those athletic programs that are most valuable to the institution, i.e., men's revenue-producing teams, and eliminate other opportunities for male athletes in order to satisfy the substantial proportionality prong. Daniel, *supra* note 27, at 293.

262. See *infra* Part III.A (analyzing the legislative treatment of quotas during the Title IX debate).

263. See, e.g., Aronberg, *supra* note 12, at 748-51 (outlining numerous statements of legislative intent and efforts by Congress to prohibit the use of quotas, affirmative action, and reverse discrimination to achieve Title IX's goals); Mahoney, *supra* note 22, at 945 (observing that the legislative history of Title IX is "replete with comments" from members of Congress that the Act would not require a quota system); Bernardo, *supra* note 97, at 341 (stating that the statistical balancing of opportunities runs contrary to the explicit text of § 1681(b), which prohibits the use of quotas to prohibit sex discrimination); Leahy, *supra* note 40, at 530-31 (arguing that the substantial proportionality prong is contrary to the legislative history of the statute, which clearly eliminated statistical balancing as a required method for Title IX compliance).

264. Aronberg, *supra* note 12, at 748-51.

265. 115 S. Ct. 2097 (1995), *vacating and remanding* 16 F.3d 1537 (10th Cir. 1994), *aff'g* 790 F. Supp. 240 (D. Colo. 1992).

266. 852 F. Supp. 471 (W.D. Va. 1994), *aff'd*, 44 F.3d 1229 (4th Cir. 1995), *reh'g denied*, 52 F.3d 90 (4th Cir. 1995), *rev'd*, 116 S. Ct. 2264 (1996).

therefore, legally unjustifiable for enforcing substantial proportionality.

1. Title IX's Legislative History and Plain Text Forbid Substantial Proportionality to Test Compliance

In *Cohen*, the court granted substantial deference to the Policy Interpretation, holding that it is not "arbitrary, capricious, or manifestly contrary to the statute."²⁶⁷ In doing so, the court applied the three-part test in a manner that required institutions to ultimately achieve substantial proportionality.²⁶⁸ However, *Cohen*'s deference to the Policy Interpretation is erroneous because the substantial proportionality prong and the court's entire application of the three-part test is inconsistent with Title IX. Both the Act's legislative history and its plain language clearly prohibit using quotas, statistical balancing of the sexes, and reverse discrimination to remedy sex discrimination in educational institutions.²⁶⁹

Congress was aware during the debate of the Title IX measures that quotas might be used to implement Title IX in the absence of a clear legislative statement against their use.²⁷⁰ Accordingly, Congress debated the use of quotas at length.²⁷¹ For example, during debate of the 1971 Senate bill, Senator Bayh faced strong concerns that Title IX require educational institutions to maintain sex-based quotas.²⁷² To address this concern, Senator Bayh explicitly stated that Title IX intended to do away with all sex-based quotas in determining educational opportunities.²⁷³

267. See *Cohen II*, 101 F.3d 155, 173 (1st Cir. 1996) (citing the standard set by the Court in *Chevron*). While the decision in *Chevron* concerned whether an agency's regulations were constitutionally valid, the Court in *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144 (1991), applied the same standard to an agency's construction of its own regulations. *Id.* at 150.

268. See *Cohen II*, 101 F.3d at 170 (stating that *Cohen* pushes substantial proportionality).

269. See generally 117 CONG. REC. 30,406-09 (1971); 117 CONG. REC. 39,261-62 (1971); 118 CONG. REC. 5813 (1972); 118 CONG. REC. 18,437-38 (1972).

270. *Id.*

271. *Id.*

272. 117 CONG. REC. at 30,406-11 (addressing concerns that the bill would require the establishment of sex-based ratios in educational institutions).

273. See *id.* at 30,406 (statement of Sen. Bayh) (confirming that the use of quotas by educational institutions was precisely "the very thing this amendment is trying to prohibit"); see also *id.* at 30,409 (statement of Sen. Bayh)

(reemphasizing that "the amendment is not designed to require specific quotas The basis for determining compliance would not be an arbitrary ratio Let me emphasize again that we are not requiring quotas What we are saying is that we are striking down quotas. The thrust of the amendment is to do away with every quota.").

To eliminate any concern that quotas would be required, Representative Albert Quie sponsored an amendment to the House Title IX measure that prohibited educational institutions from "grant[ing] preferential or disparate treatment to the members of one sex" when an historic disparity of educational opportunity existed between the two sexes at the institution.²⁷⁴ Representative Quie clearly stated that the purpose of the amendment would be to

provide that there shall be no quotas in this sex anti-discrimination title To make it absolutely certain there will not be a requirement of quotas in the graduate institutions and employment in institutions of higher education similar to the prohibition against preferential treatment of minorities under the Civil Rights Act. I believe this legislation is necessary.²⁷⁵

Following the introduction of the Quie amendment, Representative Green, the House sponsor of the Title IX measure and the Chairman of the 1970 House hearings, gave her support for the Quie anti-quota amendment.²⁷⁶ Representative Green stated that she was "opposed to quotas To 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."²⁷⁷ Shortly thereafter, the Quie anti-quota amendment was agreed to by the House Committee on Education and Labor.²⁷⁸ Although both the 1971 House and Senate Title IX measures were rejected for being nongermane to the proposed bill,²⁷⁹ these statements illustrate Congress' unambiguous intent to prohibit

Senator Bayh debated with Senator Peter Dominick extensively regarding what kind of quotas, if any, would be appropriate for educational institutions to implement to maintain an ideal gender balance. *Id.* at 30,406-08. Repeatedly, Senator Bayh stated that he would be against the Act requiring any imposition of quotas. *Id.*

274. 117 CONG. REC. 39,261 (1971) (codified at 20 U.S.C. § 1681(b)). Representative Quie's amendment reads in pertinent part:

Nothing contained in subsection (a) of this section shall be interpreted to require any educational institutional [sic] to grant preferential treatment or disparate 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 the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area

Id.

275. 117 CONG. REC. 39,261-62 (1971) (statement of Rep. Quie).

276. 117 CONG. REC. 39,262 (1971) (statement of Rep. Green).

277. *Id.*

278. *See id.* (roll call vote on the Quie amendment).

279. *See* Aronberg, *supra* note 12, at 748 (stating that the Green and Bayh amendments to the Education Amendments of 1971 were rejected in the Senate as nongermane to the bill); *see also* 118 CONG. REC. 5808 (1972) (statement of Sen. Bayh) (noting that the Senate rejected the Bayh Amendment as nongermane to the 1971 Educational Act Amendments).

quotas from Title IX enforcement. In addition, the Quie anti-quota amendment was later included in the 1972 Title IX measure and enacted into law.²⁸⁰

Following the re-introduction of the Title IX measures in 1972, concern again arose that quotas would be used to enforce the Act's provisions.²⁸¹ Once more, Senator Bayh insisted that, similar to his 1971 measure, the 1972 Title IX bill neither required nor established quotas.²⁸² Following the introduction of the measure, Senator John Beall agreed that quotas should not be used to enforce Title IX.²⁸³ In denouncing the use of quotas, Senator Beall directly addressed the problem of reverse discrimination, arguing that Title IX is not intended to be affirmative action legislation that would require statistical balancing of the sexes.²⁸⁴ Senator Bayh added "that [the] amendment [sic] does not require a 3 percent or a 55 percent balance."²⁸⁵

To further underscore Congress' disapproval of quotas, the Senate reprinted a letter from Julian H. Levi of the University of Chicago and a written response from Senator Bayh in the record of the Senate debate.²⁸⁶ Mr. Levi's letter stated that:

This is always a temptation in these matters for examining agents to turn to a statistical report and then, purely on the basis of percentages, to thrust the burden upon the institution. This has

280. 20 U.S.C. § 1681(b) (1994).

281. See Mahoney, *supra* note 22, at 945 (observing that the legislative history is replete with Congressional comments concerned with quotas).

282. See 118 CONG. REC. 5812 (1972) (statement of Sen. Bayh) (stating that the amendment sets no quota, but only requires providing an equal opportunity).

283. See *id.* at 5813 (statement of Sen. Beall) (stating his hope that the amendment would only require that people would be treated equally and fairly in the requirements for admission to educational institutions or employment); see also 118 CONG. REC. 5812 (1972) (statement of Sen. Beall) (acknowledging that, at the time of the debate, quota systems were used against women in higher educational institution admissions).

284. See 118 CONG. REC. 5813 (1972) (statement of Sen. Beall) (indicating that support for the amendment would not be given if statistical balancing would be required); see also Mahoney, *supra* note 22, at 947-48 (quoting Sen. Beall's statement to the Senate). Senator Beall hoped it was

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 what we are not establishing is that we want everyone to be treated fairly and equally so far as the requirements for admission or employment are concerned. We do not answer that by saying that we want to have the faculty composed 50 percent of women and 50 percent of men.

118 CONG. REC. 5813 (1972) (statement of Sen. Beall).

285. 118 CONG. REC. 5813 (1972) (statement of Sen. Beall) (emphasizing that Title IX is not intended to be affirmative action legislation for the purpose of requiring a statistical balance of the sexes).

286. *Id.* at 18,437-48 (1972).

resulted in some places responding somewhat akin to the reasoning in the busing cases, that past discrepancies now justify reverse discrimination. Thus, some of us are now in receipt of letters from other institutions asking not that we suggest candidates for faculty appointment without discrimination, but rather confining the inquiry to either women or Blacks.²⁸⁷

Senator Bayh responded to Mr. Levi's concern by concluding that § 1681(b), which incorporated the Quie anti-quota amendment in the House bill, specified that

the legislation would not require specific quotas. I did not include such a provision as part of the Senate amendment because I believe that my amendment already states clearly that *no person, male or female, shall be subjected to discrimination. The language of my amendment does not require reverse discrimination.*²⁸⁸

Following the submission of both letters into the record, Senator Claiborne Pell stated that the clear message from this written exchange was that the proposed amendment "must be sure that this type of amendment is not used to establish quotas for sex In the past, quotas have been used to bar admissions at some of the better schools of our country. I would not like to see them reinstituted in the name of fairness."²⁸⁹

These passages clearly establish Congress' unwillingness to enact Title IX if it could require gender quotas for admission to undergraduate universities. This broad reservation against the use of quotas necessarily prohibits sex-based quotas, including proportionality, to determine access to athletic opportunities.²⁹⁰ While the substantial proportionality prong of the three-part test does not proscribe a specific number of athletic opportunities for women athletes that an institution must provide, it nonetheless establishes an arbitrary quota for the proportion of women athletes within an institution's athletic program.²⁹¹

The First Circuit in *Cohen II* sidestepped Title IX's legislative history when it rejected Brown's argument that the three-part test itself, or at least the district court's application of it, imposed an impermissible quota. Chastising Brown for resorting to inflammatory and

287. *Id.* at 18,437.

288. *Id.* (emphasis added).

289. *Id.* at 18,438.

290. See Leahy, *supra* note 40, at 529-30 (arguing that the substantial proportionality prong requires the imposition of a quota in allocating athletic opportunities, which is clearly contrary to the Act's legislative history).

291. See Mahoney, *supra* note 22, at 944 (stating that substantial proportionality establishes a quota system, despite the arguments of Title IX supporters).

“talismanic” terms, the First Circuit held that the case did not present issues that fit under the narrow legal definition of affirmative action.²⁹² Rationalizing that the three-part test and the district court’s application of it provided institutions with three separate methods to comply with the Act, the court held that nothing in the Policy Interpretation “mandates gender-based preferences or quotas.”²⁹³ The court also stated, similar to the Clarification, that the three-part test was entirely consistent with the Quie anti-quota amendment codified in § 1681(b) because the test did not “require preferential or disparate treatment.”²⁹⁴

In his dissent in *Cohen II*, Chief Judge Torruella rebuked the court for its strict definition analysis of Brown’s argument. The dissent correctly focused its attention on whether the characteristics that made quotas impermissible existed in this case, finding them “present here in spades.”²⁹⁵ Addressing the court’s “mandates” and “requires” arguments, the dissent found no logical reason to support the court’s conclusion.²⁹⁶ Not only did the dissent find that the substantial proportionality prong necessarily required statistical balancing, but also that the other two prongs, as applied by the court, served as surrogates for statistical balancing.²⁹⁷ For the dissent, the three-part test directly contradicted the Act’s legislative intent, even though the test did not specifically set or mention a quota, because the three-part test had a quota-setting effect.²⁹⁸

2. *Adarand* and *Virginia*: The Supreme Court Raises the Standard of Scrutiny

Between the district court’s decision in *Cohen II* and the First Circuit’s affirmation, the Supreme Court heard two cases that cast significant doubt on *Cohen*’s application of the three-part test and substantial proportionality. In 1995, the Supreme Court held in *Adarand Constructors, Inc. v. Peña* that strict scrutiny was the appropriate standard of review for all race based classifications, even those deemed to be “benign.”²⁹⁹ The Court recognized that

292. *Cohen II*, 101 F.3d at 170.

293. *Id.* (emphasis added).

294. *Id.* at 175 (emphasis added); Cantu, *supra* note 230, at 3-4 (stating that the “OCR does not require quotas”).

295. *Cohen II*, 101 F.3d at 195.

296. *Id.* at 196.

297. *Id.*

298. *Id.* at 195.

299. *Adarand*, 500 U.S. at 225-29.

maintaining different standards for benign and discriminatory classifications would leave courts with the difficult task of determining whether a "so-called preference is in fact benign."³⁰⁰ Thus, the Court held that the courts should be precluded from lowering their standard of scrutiny for purportedly benign classifications even in race-based affirmative action cases, finding that consistency is served only once the courts realize that "any individual suffers an injury when he or she is disadvantaged by the government because of his or her race, whatever that race may be."³⁰¹

However, *Adarand* left open whether strict scrutiny would also apply to cases involving gender-based classifications.³⁰² In 1996, in *United States v. Virginia*, the Court was presented with the opportunity to answer this question when the United States sued the Commonwealth of Virginia to admit women students to the then all-male Virginia Military Institute (VMI).³⁰³ Following two previous defeats in lower courts, the Clinton Administration increased the stakes involved by imploring the Supreme Court to extend strict scrutiny to gender-based classifications.³⁰⁴ While the Court did not explicitly adopt the government's argument, it did raise the standard of review to a higher level than intermediate scrutiny. In the Court's opinion, parties who seek to defend gender-based government action must demonstrate an "exceedingly persuasive justification" for that action.³⁰⁵ Simply meeting traditional intermediate scrutiny—demonstrating an important government interest and means substantially related to achieving that goal—was not enough.

United States v. Virginia, though, may have actually extended strict scrutiny to gender-based classifications. In his dissenting opinion, Justice Scalia argued that the Court effectively adopted the government's plea for strict scrutiny review, despite making no reference to it in its opinion.³⁰⁶ Justice Scalia concluded that the new "exceedingly persuasive justification" was virtually "indistinguishable

300. *Id.* at 226 (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 298 (1978)).

301. *Id.* at 230.

302. *See id.* at 247 (Stevens, J., dissenting) (observing that unless strict scrutiny was also extended to gender-based classifications, government affirmative action programs would be more difficult to enforce for blacks than for women, even though the Equal Protection Clause was primarily designed to end discrimination against blacks).

303. 518 U.S. 515, 523 (1996).

304. Jeffrey Rosen, *Separate But Equal at VMI: Like Race, Like Gender?*, NEW REPUBLIC, Feb. 19, 1996, at 26-27.

305. *Virginia*, 518 U.S. at 533.

306. *Id.* at 571 (Scalia, J., dissenting).

from strict scrutiny.”³⁰⁷

Under the new “exceedingly persuasive justification” standard, *Cohen*’s application of the three-part test, as well as the three-part test itself, is likely prohibited by the Equal Protection Clause. Although the First Circuit in *Cohen II*³⁰⁸ stated that *Adarand* and *Virginia* did not affect its review of the district court’s opinion under the “law of the case” doctrine,³⁰⁹ Chief Judge Torruella argued in his dissent that the First Circuit erred in not considering the effect of these holdings.³¹⁰ Observing that the standard of review had changed since the First Circuit’s previous opinion in *Cohen I*, the dissent stated that the law of the case doctrine was improperly applied because *Cohen I* applied “a lenient version of intermediate scrutiny” in violation of *Adarand* and “because it did not apply the ‘exceedingly persuasive justification’ test of *Virginia*.”³¹¹

Thus, because *Cohen II* did not follow the Supreme Court’s holdings that raised the standard for Equal Protection review of gender-based classifications, subsequent courts should not grant *Cohen* and its progeny significant legal weight.

3. Substantial Proportionality’s Incorrect Underlying Assumption

Even if the three-part test did not ignore the Act’s legislative history and plain text—and the Supreme Court did not heighten the standard for review of gender-based classifications—*Cohen*’s application of the three-part test is still an inaccurate method to determine Title IX compliance. In order for *Cohen*’s application of the three-part test to effectively gauge Title IX compliance, substantial proportionality’s implicit assumption—that each sex has the same interest and ability to compete in intercollegiate athletics, at every institution—must be valid.³¹² While this assumption has never been proven, *Cohen* and its progeny nonetheless adopted it without question.³¹³ Yet, basic logic and common sense argue against its validity.³¹⁴

307. *Id.* at 596 (Scalia, J., dissenting).

308. *Cohen v. Brown Univ.*, 101 F.3d 155 (1st Cir. 1996).

309. *Id.* at 162.

310. *Id.* at 188-92 (Torruella, C.J., dissenting).

311. *Id.* at 191 (Torruella, C.J., dissenting).

312. *Pederson v. Louisiana State Univ.*, 912 F. Supp. 892, 913 (M.D. La. 1996).

313. *Id.*

314. *Id.* at 913-14 (calling *Cohen*’s interpretation of substantial proportionality into doubt and stating that it is “more logical that interest in participation and levels of ability to participate as percentages of the male and female populations will vary from campus to campus and region to region and will change with time”).

First, it is unlikely that male and female college students have identical interests and abilities to participate in intercollegiate athletics. Title IX proponents argue that the dramatic increase in the number of women athletes since the enactment of Title IX demonstrates that the interests and abilities of women are equal to those of men.³¹⁵ In 1971, only 294,015 women athletes participated in high school sports.³¹⁶ That number increased to over 1.8 million in 1989-90, and over 2.4 million in 1996-97.³¹⁷ The number of women athletes in NCAA institutions also increased from over 91,000 in 1984-85 to almost 124,000 in 1995-96.³¹⁸ These supporters argue that, given proper support and a non-discriminatory environment, the proportion of women athletes within an institution's athletic program would be equal to that of male athletes.³¹⁹

Yet, ample evidence exists that women students are presently not as interested in participating in intercollegiate athletics as male students.³²⁰ In *Cohen*, Brown University produced evidence that eight times as many male students participated in its intramural program, which does not require any prerequisite skill level to participate.³²¹ Nationally, Brown reported, four times as many men participate in intramural programs.³²² Men also continue to compete in athletics at all levels of competition in far greater numbers than women. For example, during the 1995-96 academic year, 75,000 more male athletes competed in intercollegiate athletics than female athletes, and 1.2 million more competed in interscholastic athletics.³²³

Furthermore, despite the impressive growth of women's athletic opportunities, the proportion of women among intercollegiate

315. See Spitz, *supra* note 3, at 648-49 (citing the growth of numerous women's athletic teams as evidence that unmet athletic interests are being satisfied following the enforcement of Title IX).

316. Curtis & Grant, *supra* note 11.

317. Curtis & Grant, *supra* note 11.

318. Curtis & Grant, *supra* note 11. In addition, over 18,000 women athletes competed intercollegiately at National Amateur Intercollegiate Association ("NAIA") institutions, and almost 15,000 at National Junior College Athletic Association ("NJCAA") institutions in 1995-96. Curtis & Grant, *supra* note 11.

319. See Davidson & Kerr, *supra* note 208, at 26 (noting that the *Cohen*, *Roberts*, and *Favia* courts held that participation opportunities should substantially mirror the proportion of each sex within an institution's student body). In other words, if women represent 50% of the student body, then women should generally represent 50% of an institution's athletes. *Id.*

320. See Davidson & Kerr, *supra* note 208, at 29 (discussing the types of evidence available that indicate men are more interested in athletics than women).

321. Appellant's Brief in Appeal from the District Court at 7, *Cohen II*, 101 F.3d 155 (1st Cir. 1996).

322. *Id.* at 7 n.10.

323. Curtis & Grant, *supra* note 11.

athletes has not changed much since 1979.³²⁴ In fact, the overall athletic interests of women athletes appears to be adequately met by intercollegiate athletic programs.³²⁵ Women athletes currently represent more than thirty-nine percent of high school athletes and over thirty-eight percent of intercollegiate athletes.³²⁶ The substantial similarity between the proportion of women athletes in intercollegiate and interscholastic athletics, the primary supplier of athletics for intercollegiate athletics, suggests that intercollegiate athletic programs reflect the athletic interests and abilities of their women students.³²⁷

Secondly, even if each sex was equally interested and qualified for intercollegiate athletic competition, there is simply no evidence that equal competitive interest would be reflected in the student body of every institution offering intercollegiate athletics. Just as the student body of a particular institution tends to reflect its unique character, the athletic interests of student bodies will also differ from institution to institution. Substantial proportionality disregards this difference. In effect, OCR and the federal courts ignored the relationship between the institution's emphasis on athletics and the athletic interests of its prospective and current students in favor of substantial proportionality's expediency.

B. OCR Regulations Disregard Key Structural Differences Among Athletic Programs and Institutions

In addition to substantial proportionality's negative effects, *Cohen's* application of the three-part test is flawed because it is inherently incapable of determining equal athletic opportunity. Advocates of the three-part test argue that it provides institutions with a flexible and malleable standard for Title IX compliance.³²⁸ These advocates

324. GAO REPORT, *supra* note 11, at 4. During the 1996-97 academic year, women athletes represented nearly 39% of all intercollegiate athletes, approximately the same proportion as they did in 1979; see also Aronberg, *supra* note 12, at 766-68 (noting that the proportion of women athletes in college athletics only rose 3% between 1979 and 1992, rising from 33% to nearly 36%).

325. See Davidson & Kerr, *supra* note 208, at 28 (stating that the proportion of women in intercollegiate athletics appears to meet the athletic interests of women athletes because the proportion of women intercollegiate athletes is significantly similar to the proportion of women interscholastic athletes, the primary feeder pool for intercollegiate athletics).

326. Curtis & Grant, *supra* note 11. However, the National Women's Sports Foundation has determined through a survey of 767 of 902 NCAA Division I, II, and III schools that women athletes represent 37% of all intercollegiate athletes. Curtis & Grant, *supra* note 11.

327. See Bernardo, *supra* note 97, at 353 (noting that male athletes comprised 61% of all high school student athletes and 66% of all college student athletes, while women athletes comprised 39% and 34% of high school and college student athletes, respectively).

328. See CLARIFICATION, *supra* note 98 (stating that the three-part test provides institutions

suggest that the three-part test can be applied to all institutions, regardless of the athletic program's competitive level, athletic budget, or sponsored athletic teams because institutions need only meet one of three different prongs.³²⁹ Additionally, advocates of the three-part test accept its implicit rationale that institutions should not weigh the extrinsic benefits of intercollegiate athletic activities, such as promoting the institution or generating revenue,³³⁰ but should instead view each athletic activity as equally valuable.³³¹ Unfortunately, due to the different structures of men's and women's athletic activities, and the inherent differences between NCAA Division I, II, and III athletic programs,³³² the three-prong test does not provide sufficient flexibility to optimally manage athletic programs.³³³

First, one test cannot fairly evaluate equal opportunity to participate for both sexes because men's and women's athletic programs are significantly different from one another. The three-part test erroneously assumes that men's and women's athletic teams are sufficiently similar to each other such that comparing the proportion of participants from each sex is an accurate measure of Title IX compliance.³³⁴ However, this assumption is flawed in several ways. For example, men's athletic teams generally have larger squad

with three standards to choose from in meeting Title IX requirements).

329. See Cantu, *supra* note 230, at 3-4 (arguing that the three-part test provides three separate methods to comply with Title IX); Brake & Catlin, *supra* note 59, at 90 (arguing that the large size of a football team does not make compliance with Title IX an insurmountable task; rather, institutions can meet either the second or third prongs of the three-part test to comply with Title IX).

330. See Daniel, *supra* note 27, at 298-305 (noting the capability of revenue-producing sports to generate revenue and notoriety for the institution).

331. See Brake & Catlin, *supra* note 59, at 90 (suggesting that Congress' rejection of the Javitz Amendment indicates that Congress did not intend Title IX to treat revenue-producing sports differently).

332. NCAA divides intercollegiate athletics into three divisions. GAO REPORT, *supra* note 11, at 5. Division I is the highest level of intercollegiate competition and institutions are required to sponsor the greatest number of sports and provide the most athletic scholarships. Both Division II & III athletic programs perform at a lower level of competition, but are not required to provide as many athletic scholarships or teams as Division I. In fact, Division III institutions do not give any athletic scholarships.

333. See Daniel, *supra* note 27, at 259 (arguing that the three-part test does not adequately distinguish between revenue and non-revenue producing sports); Davidson & Kerr, *supra* note 208, at 27 (noting that the three-prong test does not properly address the large number of players needed for football teams).

334. See *Football Coaches Take Aim at Title IX*, USA TODAY, Jan. 12, 1995, at 4C (reporting American Football Coaches Association's ("AFCA") position on Title IX). The AFCA maintains that the proportionality test strictly applied "could lead to a school being found in violation even if the school offers the same sports to men and to women, but fewer women choose to participate than men." *Id.* Cf. Brake & Catlin, *supra* note 59, at 89-90 (dismissing the validity of treating football different than any other sport).

sizes than women's athletic teams.³³⁵ To comply with substantial proportionality, an institution must do at least one of three things: increase the squad size for every women's athletic team while decreasing the squad size for every men's athletic team, sponsor more women's athletic teams,³³⁶ or eliminate men's athletic teams.³³⁷ All of these options discriminately affect male athletes. If an institution increases the size of each women's athletic squad to exceed the natural squad size for that sport, the interests of women athletes are accommodated to a greater extent than their male counterparts.³³⁸ Similarly, if the number of women's teams is increased, the interests of women athletes are better served because the women's athletic program would sponsor a more diverse selection of competitive sports than the men's program. Finally, reducing the size or quantity of men's athletic teams clearly harms male athletes because participation opportunities are then eliminated solely on the basis of sex.³³⁹

In addition, the presence of teams offered for only one sex, such as men's football or women's field hockey, makes the three-part test's gender equity equation infinitely more difficult. In particular, the larger squad size of men's football teams makes it nearly impossible for an institution to satisfy the three-part test without drastically limiting the number of other men's athletic teams it sponsors.³⁴⁰ The typical men's football team is four to five times the size of a typical

335. See Davidson & Kerr, *supra* note 208, at 27 (stating that several factors contribute to the larger squad size of men's athletic teams, including the necessity of larger squad sizes for male athletic teams for physical contact sports in order to remain competitive following athletic injuries); Brake & Catlin, *supra* note 59, at 92 (stating that proponents assert that men exhibit a greater interest in intercollegiate competition than do women); *cf. id.* (noting that even in women's athletic activities that have an equivalent male athletic activity, such as softball and baseball, inherent differences between the activities require larger squad sizes for some men's athletic teams).

336. See Mike Recht, *U.N.H. Plans Full Gender Equity in '98*, VALLEY NEWS, June 22, 1997, at B3 (reporting that the University of New Hampshire (UNH) announced a plan to achieve gender equity in athletics during the 1997-98 academic year by reducing the number of men's teams in order to meet substantial proportionality). In its plan, UNH announced that it would offer men five sports—ice hockey, basketball, skiing, soccer, and football—while women athletes would participate in eleven sports—ice hockey, basketball, volleyball, soccer, field hockey, lacrosse, swimming, cross country/track, skiing, crew, and tennis. *Id.*

337. See Davidson & Kerr, *supra* note 208, at 30 (arguing that the three-part test forces institutions to select one of these choices in order to be Title IX compliant).

338. See Davidson & Kerr, *supra* note 208, at 30 ("[T]hese additions and subtractions are not only arbitrary, but are in themselves discriminatory and contrary to the intent of Title IX.").

339. See Davidson & Kerr, *supra* note 208, at 29-30 (arguing that reducing athletic opportunities for male athletes to satisfy Title IX is discriminatory).

340. See Davidson & Kerr, *supra* note 208, at 27 (noting that the size of the average men's football team is four to five times the size of the average women's athletic team). Thus, in order to satisfy substantial proportionality, an athletic program with a football team must provide five women's sports teams before they may provide another men's team.

women's athletic team, and, therefore, an institution must offer at least four women's sports to equal the number of participation opportunities provided by men's football alone.³⁴¹ Title IX advocates disregard the effect this has on an athletic program's efforts to comply with Title IX, arguing that athletic programs must provide whatever resources and create as many women's athletic teams as it takes to comply with the three-part test.³⁴² However, this argument ignores economic reality. Athletic programs have finite budgets and can only fund as many teams and athletic opportunities as their budgets provide.³⁴³ As a result, institutions that offer intercollegiate football are forced to reduce the number of men's athletic teams, creating a disproportionate gap in the diversity of athletic teams offered for each sex, to reach substantial proportionality under *Cohen*.³⁴⁴

Second, *Cohen's* application of the three-part test does not effectively accommodate the different competitive goals and financial commitments of individual athletic programs.³⁴⁵ NCAA athletic programs operate at different levels of competition and funding, and are accordingly divided into Division I, II, or III.³⁴⁶ Division I is the highest level of intercollegiate athletic competition, offering institutions the greatest potential for television exposure and revenue.³⁴⁷ Not surprisingly, Division I athletic programs have different goals than Division II and III athletic programs, which do not provide the necessary resources to compete at the Division I level.³⁴⁸ Typically, Division II and III athletic programs epitomize the amateur model of college sports,³⁴⁹ while Division I athletic programs include some sports that operate purely to provide a source of

341. Davidson & Kerr, *supra* note 208, at 27.

342. See Recht, *supra* note 336, at B3 (describing the example set by the University of New Hampshire).

343. Recht, *supra* note 336, at B3.

344. Recht, *supra* note 336, at B3.

345. See Daniel, *supra* note 27, at 259 (complaining that the three-part test fails to recognize the revenue generating ability of certain sports, treating all intercollegiate sports as educational opportunities).

346. In addition, an institution's Division I football program may be either Division I-A or I-AA, depending on the number of scholarships that the institution is allowed to provide for its football program.

347. See Davidson & Kerr, *supra* note 208, at 44 n.100 (noting that Division I institutions must provide seven varsity sports).

348. See Daniel, *supra* note 27, at 293-306 (disagreeing with the contention that there is one true model of a college athletic program, distinguishing between the "amateur model" and the "profit center model").

349. See Daniel, *supra* note 27, at 295-98 (discussing the amateur model of college athletics).

revenue and promote the institution's prominence.³⁵⁰ Yet the three-part test disregards these different goals because it does not consider an institution's level of athletic competition when determining Title IX compliance.³⁵¹

The three-part test also does not consider a sport's economic costs and benefits, or the economic function of the athletic program, in evaluating Title IX compliance.³⁵² While it is a general rule that intercollegiate athletic programs lose money,³⁵³ some athletic programs are able to profit from revenue generated from select sports.³⁵⁴ These revenue-producing sports—typically men's basketball and football—are able to recover their operating costs through outside revenue. Some revenue-producing sports even generate enough revenue to support the entire athletic program and to provide a profit for the institution.³⁵⁵ Prominent athletic programs eagerly support revenue-producing sports teams as a way to recover increasing athletic program costs, including the cost of creating new women's athletic teams needed for Title IX compliance.³⁵⁶ As the three-part test is applied, special considerations are not made for the unique role of revenue-producing sports.³⁵⁷ Because revenue-producing sports provide institutions with financial and promotional benefits,³⁵⁸ they should be examined differently under Title IX.

Title IX supporters are particularly critical of special treatment for revenue-producing sports, arguing that once special treatment is

350. See Daniel, *supra* note 27, at 293-306 (comparing the profit center theory of college athletics to the amateur model).

351. See Daniel, *supra* note 27, at 295.

352. See Daniel, *supra* note 27, at 295.

353. See EADA Reports, *supra* note 135 (providing the amount of revenue produced by each reporting school's men's and women's athletic programs, as well as revenue generated by men's football). For example, during the 1996-97 academic year, over 68% of all reporting athletic departments lost money. *Id.* However, only 62.75% of men's athletic programs lost money, compared to over 92% of all women's athletic programs. *Id.*

354. EADA Reports, *supra* note 135. For example, during the 1996-97 academic year, the University of Alabama at Tuscaloosa made a profit of over \$8 million from its athletic program. *Id.* Most of this profit can be traced to the success of the men's athletic program, which produced an overall profit of \$13,192,000. *Id.* This figure is almost entirely accounted for by the profit generated by Alabama's men's football program, which generated a gross profit of over \$21.4 million and a net profit of over \$13 million. *Id.*

355. See, e.g., EADA Reports, *supra* note 135.

356. See Brake & Catlin, *supra* note 59, at 90 (noting the reluctance to tamper with revenue-producing sports, like football).

357. See Brake & Catlin, *supra* note 59, at 90 (disregarding the arguments from football supporters that special treatment is necessary); see also Education Amendments of 1974, Pub. L. No. 93-380, § 844, 1974 U.S.C.A.N. (88 Stat.) 695 (setting forth the Javitz Amendment).

358. See Daniel, *supra* note 27, at 298-306 (summarizing the benefits revenue-producing sports provide an institution).

granted, institutions will excessively fund men's football and basketball programs while women's and men's non-revenue sports will remain severely under-funded. There is some support for this conclusion. Nearly seventy percent of all Division I-A, and almost all Division I-AA and II, football programs lose money.³⁵⁹ Some studies also argue that athletic programs fund revenue-producing sports as if in an "athletics arms race," funding revenue-producing sports at an increasingly higher level than competing institutions in an effort to obtain the highest amount of profit.³⁶⁰ Additionally, Title IX supporters argue that Congress' rejection of the Tower Amendment indicates that revenue-producing sports should be similarly treated in determining Title IX compliance.³⁶¹

However, data gathered in 1996 and 1997 under the EADA does not support this bleak picture of revenue-producing sports. More than forty percent of Division I football programs generate revenue, and, in some cases, the amount of revenue is substantial.³⁶² Moreover, there is a high correlation between the profitability of an institution's football program and the profitability of the athletic program as a whole.³⁶³ On the other hand, more than ninety-one percent of all Division I women's athletic programs lost money.³⁶⁴ Clearly, the profit generated by revenue-producing sports is vital to the promotion and development of women's athletics and the athletic program as a whole.³⁶⁵ Without these profits, the number of athletic

359. See Porto, *supra* note 10, at 385 (finding that almost 30 of 103 Division I-A football programs generate revenue; the rest barely break even). Other reports find that more than 44% of all Division I football programs turn a profit or break even. See EADA Reports, *supra* note 135 (finding that 94 of the 212 (44.34%) Division I football programs, responding to the *Chronicle of Higher Education* survey during the 1996-97 academic year, either reported a profit or no financial loss).

360. See Harry Edwards, *The Collegiate Arms Race: Origins and Implications of the "Rule 48" Controversy*, 8 J. SPORT & SOC. ISSUES 4, 7 (1984) (describing the increasing athletic budgets of certain teams hoping to outspend their competitors in order to achieve better competitive results as the "athletic arms race").

361. See Brake & Catlin, *supra* note 59, at 90 (suggesting that the rejection of the Tower Amendment precludes different treatment of revenue-producing sports).

362. See EADA Reports, *supra* note 135 (reporting that 44.34% of all reporting Division I men's football teams made a profit or reported no financial losses during the 1996-97 academic year). Moreover, some football programs generate substantial revenue. For example, the University of Michigan made a net profit of over \$12 million dollars from its men's football team, and Ohio State University made a net profit of over \$14 million. *Id.*

363. EADA Reports, *supra* note 135. During the 1995-96 academic year, 36 of the 45 (80%) athletic programs reporting that they had not suffered a financial loss, also reported a profit by their football program. In 1996-97, 70 of the 96 (72.92%) athletic programs reported the same results. *Id.*

364. See EADA Reports, *supra* note 135 (stating that during the 1996-97 academic year, 8.74% of Division I women's athletic programs reported that they had not suffered a financial loss).

365. See 120 CONG. REC. 15,323 (1974) (statement of Sen. Tower) (arguing that the revenue

opportunities for all athletes would be severely diminished by budget constraints.

Furthermore, special treatment of revenue-producing sports does not contradict Congress' rejection of the Tower Amendment. While the Tower Amendment explicitly granted special treatment to revenue-producing sports, the Javitz Amendment instructed OCR to consider the unique characteristics of all sports.³⁶⁶ While revenue-producing sports were not explicitly mentioned as they were in the Tower Amendment, strong policy considerations warrant special treatment for these sports—particularly football.³⁶⁷ The large team size required for football distorts any numeric evaluation of the equal opportunity to participate because it inevitably produces a finding of disproportionality.³⁶⁸ Moreover, the economic function of revenue-producing sports should be considered a unique characteristic because the fundamental nature of these sports is to provide revenue and other ancillary benefits for the university.³⁶⁹

These ignored differences among teams and athletic programs undermines the argument that the three-part test is a fair and flexible measure of Title IX compliance. Because any evaluation of Title IX compliance must permit athletic departments to operate and manage numerous teams with different organizational structures under various competitive and funding levels, the three-part test's "one size fits all" approach to regulating intercollegiate athletics³⁷⁰ does not provide athletic departments with sufficient flexibility to achieve diverse competitive goals.³⁷¹ To ensure fairness for all institutions, the enforcement process must account for both the inherent differences between men's and women's athletic programs, and the diverse competitive goals and financial considerations.

generated from revenue-producing sports is essential to ensure the expansion of women's athletic programs).

366. See Education Amendments of 1974, Pub. L. No. 93-380, § 844, 1974 U.S.C.C.A.N. (88 Stat.) 695 (stating that regulations "shall include with respect to intercollegiate athletic activities' reasonable provisions considering the nature of particular sports").

367. See Connolly & Adelman, *supra* note 24, at 846 (stating that OCR ignored the Javitz Amendment's clear mandate to consider the unique nature of each sport before publishing regulations pertaining to intercollegiate athletics).

368. See Ferrier, *supra* note 89, at 875-77 (discussing the "three-sex approach"—excluding football from the substantial proportionality analysis so as to avoid "the problem created by the football team").

369. Daniel, *supra* note 27, at 259.

370. Cf. Cantu, *supra* note 230, at 2-3 (arguing that OCR does not use a "cookie cutter" approach for regulating intercollegiate athletics).

371. See Daniel, *supra* note 27, at 258-59 (arguing that Title IX litigation has assumed that all athletic teams and programs are inherently educational, a view not universally shared). Specifically, this assumption ignored the presence of athletic programs to provide financial benefits and recognition upon their host university. Daniel, *supra* note 27, at 259.

IV. REPLACING *COHEN'S* APPLICATION OF THE THREE-PART TEST WITH A SYSTEM THAT WORKS

Title IX is applied in a manner inconsistent with the Act's statutory language and legislative intent, to the detriment of interested and able athletes. What is not so clear is how to resolve this inequity. Ideally, two solutions should be adopted. First, substantial proportionality, and *Cohen's* application of the three-part test, should be abolished as a method of gauging compliance with the statute. Statistical balancing was never intended by Congress.³⁷² Moreover, no method of statistical comparison can fairly and equitably account for all of the differences between men's and women's teams, each sex's interest and ability to compete, and variations among athletic programs at hundreds of institutions.³⁷³

Second, compliance mechanisms that allow for the natural development of athletic interests and abilities of both men and women should be adopted to replace the three-part test. Current Title IX enforcement disproportionately focuses upon the outcome of an athletic program's efforts to comply with the Act. Yet, by searching for a discriminatory outcome rather than a discriminatory process, which Title IX is concerned about, the current compliance mechanisms fail to enforce the Act's intent.³⁷⁴ U.S. intercollegiate athletic programs have come a long way from 1972, when women represented only seven percent of intercollegiate athletes.³⁷⁵ Today, institutions provide athletic teams for women in all the major activities in which they have shown an interest in competing, and women athletes represent thirty-nine percent of all intercollegiate athletes.³⁷⁶ Whether women increase their proportional share of athletic opportunities in the absence of cutting opportunities for male athletes will, and should, depend on the slow and methodical formation of interest and ability at the early stages of athletic development, not affirmative action.

These ideal solutions may never be adopted. Title IX has been widely misunderstood as a godsend for U.S. women.³⁷⁷ Moreover, any

372. See *supra* Part III.A.

373. See *supra* Part III.D.

374. See *supra* Part III.A.

375. See Schrof, *supra* note 81, at 52 (noting that the proportion of women participating in NCAA intercollegiate athletic programs increased to 33% by 1979).

376. GAO REPORT, *supra* note 11, at 4.

377. See, Flynn, *supra* note 13 (reporting that Senate Majority Leader Trent Lott, Tim

member of Congress wishing to legislatively alter current enforcement mechanisms risks political death by being labeled "sexist."³⁷⁸ Significant change, in the form of these ideal solutions, is unlikely to occur until public awareness of Title IX's full effect on intercollegiate athletics is understood. In the meantime, several methods or alterations to Title IX's current enforcement mechanism are available and may help restore equity to the process.

A. Restoring Title IX's Intent: The Wisdom of Pederson

Shortly before the First Circuit ruled in *Cohen II*, the United States District Court for the Middle District of Louisiana decided another Title IX case, *Pederson v. Louisiana State University* (LSU),³⁷⁹ which rejected *Cohen's* application of the three-part test.³⁸⁰ Nonetheless, the court held that LSU violated Title IX.³⁸¹ *Pederson* is an important rebuttal to *Cohen*, and an essential addition to Title IX jurisprudence, because it demonstrates that Title IX can be effectively enforced by a framework other than *Cohen's* three-part test.

In *Pederson*, two classes of women students interested in forming intercollegiate soccer and softball teams sued for injunctive relief, alleging that LSU violated Title IX by not providing equal athletic opportunities for its women students.³⁸² In reaching her decision, Judge Rebecca F. Doherty properly held that where plaintiffs attempt to create a new athletic activity, standing must be satisfied prior to trial;³⁸³ the Policy Interpretation was not entitled to judicial deference in its entirety;³⁸⁴ *Cohen's* application of the three-part test directly contradicted the plain text and intent of both the Act and the controlling regulations;³⁸⁵ and, finally, substantial proportionality was

Russert of NBC's "Meet the Press", and Cokie Roberts of ABC's "Face the Nation" came out in support of Title IX following the U.S. Women's Soccer Team's participation in the 1999 World Cup).

378. See Clarence Page, *Bad Call*, CHI. TRIB., July 14, 1999, at 15 (calling Title IX a "third-rail" issue for politicians, causing political death for any who touch it).

379. 912 F. Supp. 892 (M.D. La. 1996).

380. *Id.* at 914.

381. *Id.* at 917 (citing LSU's Title IX violations as not "accommodating the interests and abilities of its female students," and not demonstrating a "history and continuing practice of expanding athletic opportunities for its female athletes nor an adequate plan to redress its violations.>").

382. *Id.* at 897-99.

383. *Id.* at 905-08.

384. *Pederson v. Louisiana State Univ.*, 912 F. Supp. 892, 914 (M.D. La. 1996).

385. *Id.*

an impermissible method for determining compliance under the Act.³⁸⁶

Finding that LSU provided athletic opportunities for its male students, the court recognized that LSU must provide equal athletic opportunity for its female students to comply with Title IX.³⁸⁷ Prior to addressing the merits of each class' Title IX claim, Judge Doherty first separated the claims into their implicit components. The court stated the key concepts behind the plaintiffs' claims as "exclusion from participation" because of their sex and "equal athletic opportunity."³⁸⁸ In order to show exclusion, the court stated that a plaintiff must demonstrate an interest and ability to participate in an athletic program to meet the exclusion from participation requirement.³⁸⁹ In other words, the plaintiff must meet the preliminary standing requirement.³⁹⁰ The equal athletic opportunity requirement provides both sexes with the "possibility of participation" in an athletic program, but does not guarantee participation.³⁹¹ Utilizing these concepts, the court held that the soccer plaintiffs did not satisfy the standing requirement and dismissed their suit.³⁹² The court found that the members of the class were not personally affected by LSU's failure to field a women's soccer team because the plaintiffs did not possess the requisite skill to compete above the club level, and none of the plaintiffs had an interest in competing in another sport.³⁹³

Turning to the softball plaintiffs' claim, the court inquired into the proper role the Policy Interpretation should play in analyzing Title IX claims. The court found that the Policy Interpretation was useful in "identifying issues which arise under Title IX and establishing an analytical framework" for assessing Title IX claims.³⁹⁴ However, the *Pederson* court disagreed with *Cohen* and its progeny, holding that the Policy Interpretation only provided "a helpful guide to a thoughtful analysis of the mandate of Title IX."³⁹⁵ While recognizing that the

386. *Id.*

387. *Id.* at 905.

388. *Id.*

389. *Pederson v. Louisiana State Univ.*, 912 F. Supp. 892, 905 (M.D. La. 1996).

390. *See id.* at 905-06 (stating that the question of standing must first be addressed because the right to bring suit under Title IX is distinct from the right to obtain relief).

391. *Id.* at 905.

392. *Id.* at 907-08.

393. *Id.*

394. *Pederson v. Louisiana State Univ.*, 912 F. Supp. 892, 911 (M.D. La. 1996).

395. *Id.* at 914. The court rejected the "jurisprudential emphasis" on substantial proportionality and refused to give it "safe harbor" status. *Id.* The court held that a proper

Policy Interpretation should play a role in the court's analysis, the court rejected *Cohen's* holding that it should be given substantial deference for two reasons. First, the Policy Interpretation could not be given binding effect because it was never approved by the President or Congress.³⁹⁶ To give the Policy Interpretation binding effect would circumvent § 1682, a unique provision of Title IX that requires all rules and regulations enforcing the Act to be signed by the President before they become effective.³⁹⁷ Second, the *Pederson* court found that the Policy Interpretation's provisions were subject to multiple interpretations, some of which directly contradict the Act's statutory language.³⁹⁸

Finding that proportionality is not found within the Act or the implementing regulations, the court held that the idea of proportionality as a "safe harbor" is not required for Title IX compliance.³⁹⁹ The court rejected *Cohen's* reliance upon substantial proportionality within its application of the three-part test as a "safe harbor," finding that such an application was precluded by the Quie amendment codified in § 1681(b).⁴⁰⁰ Moreover, the court found that *Cohen's* underlying assumption that men and women have equal interests and abilities to compete in intercollegiate athletics on all campuses to be unsupported.⁴⁰¹ Instead of focusing upon substantial proportionality, the court held that a proper reading of the Policy Interpretation considers all the factors detailed within it to determine if an institution has effectively accommodated the athletic interests of each sex.⁴⁰²

analysis of compliance goes beyond mere proportionality to determine whether the institution excluded participants based upon their sex. *Id.*

396. *See id.* at 910 n.45 (noting that the Policy Interpretation was never submitted to the President for approval as required by § 1682 of Title IX).

397. *Id.*

398. *Id.* at 911-12.

399. *Pederson v. Louisiana State Univ.*, 912 F. Supp. 892, 914 (M.D. La. 1996). While Judge Doherty rejected proportionality as a stand-alone method for determining Title IX compliance or violation, she stated that "percentages should be considered as 'tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of the one sex.'" *Id.*

400. *Id.*

401. *See id.* at 913-14 (stating that *Cohen's* assumption of equal interests and abilities is unsupported because no evidence was submitted).

402. *Id.* at 914. Just prior to holding that all factors will be considered in determining Title IX compliance, the court underlined its rejection of the "safe harbor" of substantial proportionality by writing:

While the safe harbor concept has the virtue of being simplicity itself, this Court will not join in assuming that athletic directors in this country are incapable of meeting the burden of Title IX and its regulations which incorporates a knowledge regarding their student body, effective analysis of and meeting student's needs, and filling those

The court replaced the *Cohen* analysis with one drawn from the Act, regulations, and Policy Interpretation. The court held that it would look to whether [LSU's] policies are discriminatory in language or effect, whether substantial and unjustified disparities exist within the program as a whole between opportunities afforded male and female students, or whether substantial disparities exist in individual segments between opportunities afforded male and female students such as to deny equal athletic opportunity.⁴⁰³

Following this broad statement of its analysis, the court stated that the primary focus for determining compliance would be upon LSU's efforts to meet each sex's interests and abilities.⁴⁰⁴ Finding that LSU had made no attempt to gauge the interests and abilities of its student population, the court held that LSU failed to "effectively accommodate" the interests and abilities of its female students.⁴⁰⁵ In addition, the court stated that LSU did not demonstrate a practice of expanding opportunities in response to the developing interests and abilities of its female students.⁴⁰⁶ Consequently, the court found LSU in violation of Title IX as to the softball plaintiffs.⁴⁰⁷

Pederson's analysis of Title IX compliance is significant for three reasons. First, while courts may examine each sex's proportion among an institution's intercollegiate athletes, the court properly rejected substantial proportionality as a "safe harbor" in analyzing Title IX compliance. Second, by deviating from the *Cohen* analysis of Title IX compliance under the three-part test, the court elevated the usefulness of the other two prongs of the three-part test. No longer dependent upon substantial proportionality to define their application, both prongs now provide institutions with additional viable methods by which they may satisfy Title IX. Finally, the court disregarded *Cohen's* interpretation of the third prong requiring full accommodation of the interests of female students in the absence of substantial proportionality.⁴⁰⁸ Instead, *Pederson* only analyzes the effective accommodation of the interests of each sex. By reading "the 'full' out of . . . 'full and effective'" accommodation,⁴⁰⁹ *Pederson*

needs in a nondiscriminatory fashion.

Id.

403. *Id.* at 914-15.

404. *Pederson v. Louisiana State Univ.*, 912 F. Supp. 892, 915 (M.D. La. 1996).

405. *Id.* at 915-16.

406. *Id.* at 916-17.

407. *Id.* at 917-18.

408. See *id.* at 913-14 (holding that *Cohen's* substantial proportionality standard lacked evidence to support its claimed purpose).

409. See *Cohen I*, 991 F.2d at 899 (arguing that *Brown's* interpretation of the third prong,

provides institutions with much needed flexibility in determining the activities, and the proportion of athletic opportunities, it offers to each sex.

While *Pederson* was not followed by a stampede of cases adopting its holding like *Cohen* was,⁴¹⁰ it appears that the courts are becoming receptive to its analysis. Recently, the United States District Court for the Eastern District of California followed *Pederson* in partially denying California State University at Bakersfield's motion for summary judgment in a suit brought by a class of male wrestlers facing the elimination of their athletic program.⁴¹¹ The court rejected *Cohen* and its progeny's characterization of substantial proportionality as a "safe harbor" for institutions wishing to comply with Title IX.⁴¹² The court agreed with *Pederson* that such a viewpoint clearly conflicted with the text of the Act and its implementing regulations.⁴¹³ While the outcome of this case has yet to be decided, the court's treatment of *Pederson* may signal the judicial embrace of an alternative to *Cohen*.

B. Ensuring Flexibility: Meeting Each Sex's Relative Interests and Abilities

One of the many problems with *Cohen* is that its interpretation of the third prong eliminates it as a viable method to comply with Title IX.⁴¹⁴ Under *Cohen*, institutions must fully meet the athletic interests of their female students, provided that a viable team can be formed, until substantial proportionality is met.⁴¹⁵ In *Cohen II*, Brown argued that the third prong is satisfied "when (1) the interests and abilities of members of the proportionately underrepresented gender (2) are accommodated to the same degree as the proportionately over represented gender."⁴¹⁶ Brown's "relative interests" approach to the third prong was rejected by the appellate court for "[reading] the

which is embodied in *Pederson*, ignores important language within the Policy Interpretation).

410. See *Horner v. Kentucky High Sch. Athletic Ass'n*, 43 F.3d 265 (6th Cir. 1994) (demonstrating a successful argument by twelve female student athletes that there was a failure to support equal athletic opportunity because there was a failure to field female fast-pitch softball).

411. *Neal v. Board of Trustees of the Cal. State Univ.*, No. 97-5009, at 31-32 (E.D. Cal. Dec. 26, 1997) (order granting in part and denying in part defendant's motion for summary judgment).

412. *Id.* at 29-32.

413. *Id.* at 28.

414. See *Cohen v. Brown Univ.*, 101 F.3d 155, 183 (1st Cir. 1996) (stating that "prong three is not implicated unless a gender-based disparity with respect to athletics participation opportunities has been shown to exist").

415. *Id.* at 194 (Torruella, C.J., dissenting).

416. *Id.*

'full' out of the duty to accommodate 'fully and effectively'" the interests and abilities of the underrepresented gender.⁴¹⁷ However, further analysis shows that the "relative interests" approach is the correct interpretation of the third prong.

In his dissent, Chief Judge Torruella argued that the meaning of "full" in the third prong is subject to more than one reasonable interpretation.⁴¹⁸ While "full" may mean every athletic interest in an absolute sense, as the First Circuit held, it may also reasonably mean that the institution must meet the interests and abilities of female students "as fully as it meets those" of male students.⁴¹⁹ This latter interpretation is the crux of the relative interests approach. The dissent cited the Policy Interpretation's opening statement that "the governing principle in [intercollegiate athletics] is that the interests and abilities of male and female students be equally and effectively accommodated."⁴²⁰ The majority's opinion, the dissent argued, went beyond this requirement, requiring that the athletic interests of female students be fully and absolutely met.⁴²¹ Moreover, application of the majority's opinion contradicted the explicit text of § 1681(b). If an institution met the relative interests of one sex to a greater degree than it met the relative interests of the other, it would violate § 1681(b)'s proscription against preferential or disparate treatment.⁴²² The dissent stated that these problems with the majority's application of the accommodation of interests prong argued against its validity as a reasonable interpretation.⁴²³ Finally, the dissent chided the majority for adopting the lower court's interpretation of the third prong without "review[ing] the district court's reading de novo."⁴²⁴

Adopting the relative interests approach to the third prong breathes new life into a much unused test for Title IX compliance. Examination of each sex's relative interest provides flexibility to institutions where each sex's proportion of interested and able athletes does not directly correspond to that sex's proportion among

417. *Id.* at 174 (quoting *Cohen I*, 991 F.2d 888, 899 (1st Cir. 1993)).

418. *Id.* at 194 (Torruella, C.J., dissenting).

419. *Cohen v. Brown Univ.*, 101 F.3d 155, 194 (1st Cir. 1996) (Torruella, C.J., dissenting).

420. *Id.* at 194 (Torruella, C.J., dissenting).

421. *Id.* (citing 44 Fed. Reg. 71,413-14 (1979)).

422. *Id.* at 194-95.

423. *See id.* at 195 (calling the court's interpretation of the third prong "troublesome").

424. *See Cohen v. Brown Univ.*, 101 F.3d 155, 195 (1st Cir. 1996) (Torruella, C.J., dissenting) (arguing against the court's deference to the interpretation of the third prong where the interpretation was made by the district court and not the agency). Chief Judge Torruella stated that proper review of the interpretation should be made *de novo* because it was reviewing the interpretation of the district court, not the agency. *Id.*

the institution's student body. Moreover, it provides institutions with a stopping point in their expansion of athletic opportunities beyond substantial proportionality and the inability to field a viable athletic team.

C. Acknowledging Differences Among Teams and Programs

Whether or not the three-part test is ultimately rejected, Title IX must provide special consideration for the unique characteristics of the activities it regulates. For example, revenue-producing sports, contact sports offered for only one sex, and activities with abnormally large squad sizes must be specially considered when examining Title IX compliance. Currently, Title IX enforcement does not distinguish between the economic nature of revenue-producing sports and the educational nature of other sports,⁴²⁵ nor does it address the proper method for comparing athletic opportunities where sports may be offered for only one sex or where an activity has a disproportionate number of participants.⁴²⁶ The absence of consideration for these factors contributes to the inequity of substantial proportionality.

Yet, these inequities can be resolved by looking to unused portions of Title IX's regulations and the Javitz Amendment. For example, one commentator has argued that the large squad size of football teams contributes to Title IX's unintended consequences by providing a disproportionate number of athletic opportunities for male athletes.⁴²⁷ By incorporating both the Javitz Amendment and the contact sports exception, this problem can be minimized, if not eliminated. As Chief Justice Torruella suggested in his dissent in *Cohen II*, contact sports should be excluded from substantial proportionality's calculation because an institution may permissively limit participation in these sports to one sex.⁴²⁸ If the number of participants engaging in contact sports was ignored by substantial proportionality analysis, the disproportionate effect that football's large squad size places on current Title IX enforcement would be

425. See Mahoney, *supra* note 22, at 949-50, 975 (stating that the "courts and implementing agencies have strayed from the legislation that gave them their original authority" and that the Javitz Amendment was meant to apply to intercollegiate and revenue-producing sports).

426. See Janet Judge, David O'Brien, & Timothy O'Brien, *Gender Equity in the 1990s: An Athletic Administrator's Survival Guide to Title IX and Gender Equity Compliance*, SETON HALL J. SPORT L. 313, 321 (1995) (stating that single sex sports and inequities in gender participants in sport are not ameliorated by Title IX and that Title IX violations are infrequent).

427. See John K. Wilson, *Female Athletes*, CHI. TRIB., July 18, 1999, at 16 (identifying football as the "real villain" in eliminating opportunity for male athletes).

428. *Cohen v. Brown Univ.*, 101 F.3d 155, 192-93 (1st Cir. 1996) (Torruella, C.J., dissenting).

reduced.⁴²⁹

Revenue-producing sports may be specially treated under Title IX through either the Javitz Amendment, or a new congressional amendment similar to the one introduced by Senator Tower. Because the Javitz Amendment was enacted in place of the Tower Amendment, but in addition to Congress' previous grant of regulatory power in § 1682, the Javitz Amendment's provision for special consideration for the unique nature of activities includes special consideration of revenue-producing sports.⁴³⁰ Furthermore, by providing special consideration for revenue-producing sports that are entirely self-sufficient, financial responsibility will be encouraged. Institutions will, in turn, preserve more athletic program capital for the formation or expansion of other athletic teams and opportunities.⁴³¹

D. Title VII's Qualified Applicant Pool: Bringing Common Sense to Substantial Proportionality

Although Title IX is significantly patterned after Title VII and other civil rights amendments, the courts have refused to look to Title VII's case law for jurisprudential guidance.⁴³² However, this statute may lend appropriate guidance for two reasons. First, Title VII's use of a "qualified applicant pool" for statistical analysis of disparate impact is applicable to substantial proportionality analysis under Title IX. Second, current enforcement of Title IX mirrors efforts to prohibit discrimination in employment in Title VII "disparate impact" cases, where the plaintiff has the burden of proving a *prima facie* case of discriminatory intent through statistical disparity.

429. Contact sports are currently offered for both sexes. For example, men's and women's basketball are considered contact sports under Title IX's regulations. 34 C.F.R. § 106.41(b) (1997). These sports would offset each other in the number of participation opportunities provided because of their similar squad sizes. On the other hand, football, which has no equal in squad size, would directly lower the number of men counted under substantial proportionality by more than 90 participants. See GAO REPORT, *supra* note 11, at 20 (reporting that the average NCAA football program had 91.3 participants during the 1996-97 academic year, for those institutions belonging to the same NCAA Division as they had during the 1985-86 academic year).

430. See Mahoney, *supra* note 22, at 950 (arguing that, because the Javitz Amendment's grant of authority to regulate athletics was duplicative, Congress intended all sports to be regulated with the highest degree of care and consideration for their unique nature and characteristics).

431. See 120 CONG. REC. 15,323 (1974) (statement of Sen. Tower) (arguing that the expansion of athletic programs and opportunities depends, in part, on the promotion and maintenance of revenue-producing sports and the funds they generate).

432. See *Cohen v. Brown Univ.*, 101 F.3d 155 (failing to review any Title VII case law for direction in the implementation of civil rights statutes).

Title IX and its regulatory structure disregard the importance of a qualified applicant pool in determining sex discrimination. Substantial proportionality simply examines whether each sex's proportion within the institution's athletic program is proportionate to each sex's enrollment in the student body. This requirement sweeps too broadly by considering all students as interested and potential intercollegiate athletes. Common sense indicates that not all students have the interest or the ability to compete in intercollegiate athletics. It is also unlikely that students who did not compete in interscholastic sports would then have the interest or ability to compete intercollegiately.

If the courts adopted Title VII's qualified applicant pool, some of the problems arising from substantial proportionality's overbroad applicant pool would be eliminated. Male college students appear to be more interested and able than their female colleagues to compete in intercollegiate athletics. More men than women participate in interscholastic sports and intramural sports in college.⁴³³ Thus, a higher proportion of male intercollegiate athletes would reflect a higher proportion of male students within the institution's qualified applicant pool and would not, by itself, be sufficient to find a violation of the Act.

Title IX jurisprudence should also expose itself to Title VII "disparate impact" case law as a resource for determining discrimination where discriminatory intent cannot be proven through extrinsic evidence.⁴³⁴ In disparate impact cases arising under Title VII, the plaintiff bears the burden of proof. First, the plaintiff

433. See GAO REPORT, *supra* note 11, at 13 (noting that 37% of student athletes in 1995 were female).

434. At least one court has looked to Title VII for support in deciding a Title IX claim in intercollegiate athletics. In *Roberts*, CSU argued that the plaintiffs must prove discriminatory intent as part of their Title IX claim against the university. *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824, 832 (10th Cir. 1993). CSU based its argument on the fact that Title IX was modeled after Title VII of the Civil Rights Act of 1964, which requires proof of discriminatory intent. *Id.* The Tenth Circuit rejected this argument, holding that Title VII "is the most appropriate analogue when defining Title IX's substantive standards, including the question of whether 'disparate impact' is sufficient to establish discrimination under Title IX." *Id.* Relying on the Supreme Court's holding that Title VII does not require overt proof of discrimination, the Tenth Circuit held that the district court did not err in not requiring proof of discriminatory intent. *Id.* at 833. However, the Tenth Circuit in *Roberts* ignored significant Title VII requirements in reaching its decision. First, although statistical analysis demonstrating a disparate impact can act as a substitute for discriminatory intent, the level of disparity must be a statistically significant deviation. Robert D'Augustine, *A Loosely Laced Buskin? The Department of Education's Policy Interpretation for Applying Title IX to Intercollegiate Athletics*, 6 SETON HALL J. SPORT L. 469, 489 (1996). Second, the *Roberts* court ignored the fact that a defendant in a Title VII claim has the opportunity to rebut the plaintiff's *prima facie* case of discrimination by putting forth a non-discriminatory reason for the practice that allegedly led to the disparate impact. *Id.* at 486.

must show that the defendant's facially neutral practice had a disparate impact on a group.⁴³⁵ At this point, the burden shifts to the defendant to produce a non-discriminatory reason related to the opportunity the plaintiff sought.⁴³⁶ The plaintiff may then prevail only if he can prove that the defendant's reason was a pretext for discrimination.

By adopting Title VII's disparate treatment standards, the courts could provide institutions with a shield against Title IX claims—a non-discriminatory reason for the institutions' actions. As applied to the facts in *Cohen*, the plaintiffs may be able to demonstrate a *prima facie* case by showing that Brown's elimination of four of its athletic teams had a disparate impact on interested female students. However, Brown University could defend itself from suit by stating that the women's teams were eliminated due to budget concerns, not because their participants were women. This would also be supported by the fact that two men's teams were also eliminated. Accordingly, Brown could defend itself from suit because the plaintiffs would not be able to show that its reason for eliminating the teams was a pretext for discrimination.

V. CONCLUSION

The enforcement of Title IX does not live up to the Act's goal to provide each sex with equal educational opportunity. Much of the blame for this unfortunate result lies squarely with the three-part test and OCR's and *Cohen*'s application of it. By focusing upon substantial proportionality instead of the accommodation of each sex's relative athletic interest, OCR and the courts have abandoned fairness for efficiency. As Norma Cantu so wisely pointed out, Title IX cannot be fairly enforced through "cookie-cutter" formulas that require statistical equality.⁴³⁷ Yet, "cookie-cutter" formulas have been used, and inequities have arisen, most notably with the elimination of men's non-revenue producing teams, to increase the proportion of women within athletic programs.

Congress should instruct OCR to eliminate the three-part test and draft new regulations that consider the unique qualities of

435. See *Roberts*, 998 F.2d 824, 832 (outlining the burdens of proof in disparate impact claims).

436. *Id.*

437. Letter from Norma V. Cantu, Assistant Secretary of Civil Rights, to Colleges and Universities explaining the Education Department's final version of its report, "Clarification of Intercollegiate Athletics Policy Guidance," at 2 (Jan. 19, 1996).

intercollegiate athletics. Simply removing substantial proportionality is not enough. The three-part test, even absent substantial proportionality, does not accurately or clearly reflect the various goals of intercollegiate athletics. Drafted in response to a time when few opportunities existed for female students in intercollegiate athletics, the three-part test's methods for compliance reflect circumstances and assumptions that no longer exist. Moreover, the three-part test acts as a *de facto* quota system that equates equality with proportionality.⁴³⁸

At a minimum, the substantial proportionality prong must be eliminated. Congress must reaffirm its original intent to prohibit the courts and OCR from requiring statistical balancing and quotas for institutions to comply with Title IX. Statistical balancing is not necessary, was never intended by Congress, and is not helpful in determining sex discrimination within an institution's athletic program. Any investigation of discrimination should address only whether the relative athletic interests and abilities of one sex have been met to the same extent as those of the other sex. Meaningless comparisons between the proportion of each sex in an institution's athletic program and student body add nothing to this evaluation.

Title IX must return to its origins as an anti-discrimination statute. Congress never intended to promote a statistical balancing of educational interests among the sexes in the form of admission quotas to institutions or set-aside programs in educational programs within the institution. Congress never intended Title IX to allocate half of all spaces in theatre or literature classes for men, or half of all spaces in science and math classes for women. Congress merely intended for students of each sex, free from discrimination, to select the educational programs in which they wished to participate. Title IX was never intended to require, or even permit, statistical balancing in educational programs. Eliminating the three-part test, or at least substantial proportionality, would help to restore the original, and non-discriminatory, promise of Title IX.

438. See generally Jennifer Lynn Botelho, Comment, *The Cohen Courts' Reading of Title IX: Does it Really Promote a De Facto Quota Scheme?*, 33 NEW ENG. L. REV. 743 (1999).

