# THE PATH OF MOST RESISTANCE: THE LONG ROAD TOWARD GENDER EQUITY IN INTERCOLLEGIATE ATHLETICS

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While sports have long played an important role in educating boys and young men in leadership, physical fitness and competitive skills, only recently have girls and young women had the chance to benefit from athletic opportunities. Over two decades of experience with a federal statute prohibiting sex discrimination in school sports programs have brought important successes in opening doors for female athletes. However, enforcement of equal opportunity in this area has encountered strong resistance from the athletic establishment, which has fought efforts to equalize resources and opportunities for young women.

Heightened enforcement of equal athletic opportunity in the 1990s has rekindled old opposition to basic notions of gender fairness in sports. Reacting to the recent successes of female athletes in the courts, both college football and other men's sports advocates have taken the offensive in challenging the law's requirements, arguing that men are more interested in sports than women and therefore deserve the lion's share of resources and opportunities. While such challenges have not succeeded, future progress toward gender equity in sports requires a renewed commitment to the underlying principle that female athletes are as deserving of sports opportunities as their male counterparts.

This Article discusses the recent backlash against the legal requirements governing sex discrimination in intercollegiate athletic programs in the context of the history and enforcement of the law. Part I discusses the requirements of the law, its legislative and interpretive history, and recent advances in enforcement. Part II discusses the recent backlash against the law and debunks the myths underlying the arguments relied upon by those opposing further steps toward legal enforcement. Part II also examines the treatment of these arguments by the courts. Part III concludes with a brief discussion of the value judgments underlying the backlash against gender equity in sports.

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## I. AN OVERVIEW OF TITLE IX

Title IX of the Education Amendments of 1972[1] is the federal law prohibiting discrimination on the basis of sex in education programs, including sports programs, by any school receiving federal financial assistance. Title IX has been the primary vehicle for asserting the right of women and girls to equal opportunity in high school and college athletics, and has played a vital role in opening competitive sports to female athletes over the last twenty-four years.

### A. Women's Sports Before Title IX

For many young women, it is difficult to believe that our nation's high schools and colleges have not always provided athletic opportunities to their female students. After all, these young women have grown up with fully developed female sports programs in their schools and can see women and girls playing competitive sports in unprecedented numbers. In 1994, there were over 2.12 million female high school athletes and over 105,000 female college athletes.[2] The inclusion of sports in the education of young women is currently so normal that it is hard to imagine a different scenario.

The history of women's participation in competitive athletics is remarkably brief, however. As in many other arenas, society's beliefs about appropriate pursuits for women severely restricted women's participation in sports before the 1970's. The public and aggressive nature of athletic competition made it difficult to reconcile women's participation with the common perceptions of women as delicate, private, and passive creatures. Furthermore, and somewhat ironic given what we now know about the benefits of regular exercise, women were deemed too weak and fragile for competitive sports.[3] Of particular concern was the possibility of injury to reproductive functions of women participants, which reflected a larger preoccupation with the threat of athletics to women's femininity. Because competitive sports were such an exclusively male bastion, women who played them were perceived as something less than female — women trying to be men, men-haters, or lesbians.

As a result of these societal impediments, the opportunities for women to play high school and college sports were limited. Before the passage of Title IX in 1972, only 32,000 women per year played college sports.[4] Athletic scholarships for women were virtually non-existent, and many colleges had no women's sports program at all.[5] At the high school level, fewer than

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1. 20 U.S.C. §§ 1681-1688 (1994). The text of Title IX is as follows: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance." 20 U.S.C. § 1681(a)

2. National College Athletic Ass'n, *College Sports Participation Up for Women, Men* Feb. 15, 1995 (news release) (on file with the National Women's Law Center) [hereinafter *NCAA News Release*].

3. *See* Wendy Olson, *Beyond Title IX: Toward an Agenda for Women and Sports in the 1990's*, 3 YALE J.L. & FEMINISM 105, 109–11 (1991).

4. 44 Fed. Reg. 71,413, 71,419 (1979).

5. *See* UNITED STATES COMM'N. ON CIVIL RIGHTS, PUB. NO. 63, MORE HURDLES TO CLEAR:

300,000 girls competed in sports each year, representing only 7% of interscholastic athletes nationwide. Girls who did play sports in high school received dramatically different treatment in equipment, coaching, practice times, and sports offerings.[6]

These numbers illustrate a degree of explicit discrimination against the female athlete that, for the most part, is currently difficult to imagine. While most interscholastic and intercollegiate sports programs today still have far to go in achieving gender equity, they have come a long way in the past two decades. Prior to Title IX's enactment, high schools and colleges simply ignored the athletic potential of their female students entirely, or supplied them with extremely limited programs that offered young female athletes little chance to develop. Girls could not look to older women for inspiration as they too had been continually denied access to meaningful athletic participation. The same social pressures that had kept women out of boardrooms and courtrooms throughout the history of our country had also kept them off the nation's playing fields.

B. Title IX's Legal History

1. *Enactment of Title IX and the Emergence of Athletics as a Point of Controversy.* Title IX was passed in 1972 as a response to overwhelming evidence of widespread discrimination against women at all levels of education.[7] The language of Title IX, which provides that "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance . . . ,"[8] is modelled on the prohibitions against race and national origin discrimination contained in Title VI of the Civil Rights Act of 1964.[9] Although Title IX was originally proposed as an amendment to Title VI that would have added the word "sex" to its prohibited forms of discrimination,[10] the prevalence of discrimination in education resulted in a more narrowly tailored bill specifically aimed at educational programs.

While Title IX itself does not mention athletics, the issue of discrimina-

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WOMEN AND GIRLS IN COMPETITIVE ATHLETICS (1980) (describing the absence of athletic programs for women and the lack of opportunities for female athletes historically).

6. *See, e.g.*, 117 CONG. REC. 25,508 (1971) (statement of Rep. Bella Abzug (D-N.Y.)) (noting that in many physical education classes, boys get to play more frequently, play with more formal rules, and play on marked fields).

7. Representative Edith Green (D-Or.) held hearings on sex discrimination in the summer of 1970 that were to serve as the foundation of the Title IX legislation. *See Discrimination Against Women: Hearings on Section 805 of H.R. 16,098 Before the Special Subcomm. of the House Comm. on Education and Labor*, 91st Cong., 2d Sess. (1970). Referring to the hearings, Senator Birch Bayh (D-Ind.), sponsor of the Title IX bill, noted "[o]ver 1,200 pages of testimony document the massive, persistent patterns of discrimination in the academic world." 118 CONG. REC. 5804 (1972).

8. 20 U.S.C. § 1681 (1994).

9. 42 U.S.C. § 2000d (1994) ("No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal assistance.").

10. ELLEN J. VARGYAS, BREAKING DOWN BARRIERS: A LEGAL GUIDE TO TITLE IX 7 (1994).

tion against women in sports programs was briefly addressed in the original debates on the legislation,[11] reflecting an expectation that athletics would be covered. Soon after Title IX was enacted, prompted by strenuous lobbying by the National Collegiate Athletics Association (NCAA) which feared that Title IX signalled the demise of men's sports programs, several bills and amendments were introduced in Congress in an effort to exempt revenue-producing sports from coverage under Title IX.[12] The debates that ensued over these efforts to limit the application of Title IX, as well as their subsequent defeat, reinforced the intent of Congress to end discrimination in college and high school sports.

In May of 1974, Senator John Tower (R-Tex.) made the first strike against Title IX in what became known as the Tower Amendment.[13] Through this amendment, Senator Tower sought first to exempt all intercollegiate athletics, but then modified his amendment to exempt "intercollegiate athletic activity to the extent that such activity does or may provide gross receipts or donations to the institution necessary to support that activity."[14] His basic argument was that sports such as football provided a crucial revenue base for the entire athletic program of many schools, and that any interference with these teams in the name of gender equity would spell disaster for both the male athletes already playing and the female athletes who were seeking a chance to play.[15] Senator Bayh, sponsor of the Title IX legislation, argued vociferously against the Tower Amendment, pointing out that it inappropriately "focused on the ability of certain intercollegiate sports to withstand the financial burdens imposed by the equal opportunity requirements of Title IX" rather than on discrimination against women.[16] Nevertheless, arguments in favor of the amendment prevailed and the Tower Amendment was passed by the Senate.

When the Tower Amendment reached the conference committee on the Education Amendments of 1974, however, it was deleted in favor of a far different provision requiring the Department of Health, Education and Welfare (HEW) to promulgate interpretive regulations.[17] This new provision, now known as the Javits Amendment, named after Senator Jacob Javits (R-N.Y.), instructed the Secretary of HEW to prepare regulations for implementing Title IX that included "with respect to intercollegiate athletics reasonable provisions considering the nature of particular sports."[18] This language confirmed that Congress intended Title IX to apply to athletic programs and

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11. Senator Bayh mentioned athletics only twice — once to say that Title IX would not mandate the desegregation of football, 117 CONG. REC. 30,407 (1971), and once to state that personal privacy in sports facilities should be maintained, 118 CONG. REC. 5807 (1972).

12. *See infra* notes 13–20 and accompanying text.

13. 120 CONG. REC. 15,322–23 (1974) (statement of Sen. John Tower).

14. S. 1539, 93d Cong., 2d Sess. § 536 (1974).

15. *Id.*

16. *Prohibition of Sex Discrimination: Hearings Before the Subcomm. on Education of the Senate Comm. on Labor and Public Welfare*, 94th Cong., 1st Sess. 46–47 (1975) [hereinafter *Sex Discrimination Hearings*].

17. *See* S. REP. NO. 1026, 93d Cong., 1st Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 4271.

18. Gender and Athletics Act, Pub. L. No. 93–380, § 844, 88 Stat. 612 (1974).

acknowledged that certain sports may require greater expenditures to provide the same quality of competitive opportunities. The Javits Amendment became law in 1974, and remains controlling today.[19]

Several other attempts to limit Title IX's coverage were made after the Javits Amendment, but all were defeated.[20] The continued resistance of Congress during the mid-1970's to restrict Title IX's protections provided further evidence of its commitment to end discrimination against women in college and high school athletic programs.

2. *Issuance and Adoption of Title IX's Regulations.* HEW issued its proposed Title IX regulations in June of 1974, followed by a lengthy period for public comment that produced almost 10,000 responses.[21] The proposed regulations included a requirement that institutions make affirmative efforts to accommodate the interests and abilities of women athletes — an indication of HEW's strong commitment to carrying out the objectives of Title IX.[22] Unfortunately, this requirement was dropped in response to pressure from the NCAA and others who feared the impact of Title IX on men's athletic programs.[23]

HEW issued final regulations early in the summer of 1975, incorporating many of the suggestions received during the comment period.[24] Shortly thereafter, Congress held extensive hearings on the issue of the athletic regulations that included testimony from the sponsors of Title IX and many others who offered evidence of the pervasive discrimination against women in intercollegiate athletics and competitive sports generally.[25] One of the more egregious examples cited was Ohio State University, which spent 1,300 times more money on its male athletes than on its female athletes.[26] The hearings established an extensive record of the nature and degree of discrim-

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19. *Id.*

20. For example, Representative James O'Hara (D-Mich.) introduced a bill which would have protected revenues produced by a team from use by any other team unless the first team did not need the funds for itself. H.R. 8394, 94th Cong., 1st Sess. (1975). Additionally, Senator Tower, joined by Senators Dewey Bartlett (R-Okla.) and Roman Hruska (R-Neb.), tried again in 1975 to exempt revenue-producing sports from Title IX. *See* S. 2106, 94th Cong., 1st Sess. (1975).

21. *Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor*, 94th Cong., 1st Sess. 436-42 (1975) [hereinafter *Hearings*] (testimony of Casper Weinberger, Secretary of the Department of Health, Education and Welfare (HEW)). While not all of these comments focused on sports, the number of responses on discrimination in intercollegiate athletics caused HEW Secretary Weinberger to testify before a House committee that "the most important issue in the United States today is intercollegiate athletics, because we have an enormous volume of comments about them." *Id.* at 439.

22. 39 Fed. Reg. 22,230, 22,230 (1974). "Affirmative efforts" were defined as both informing women of their participation opportunities and providing them with training and support, as well as assessing the interest of each sex in various sports. *Id.*

23. *See* 40 Fed. Reg. 24,134, 24,134 (1975); *see also* Christina Johnson, *The Evolution of Title IX: Prospects for Equality in Intercollegiate Athletics*, 11 GOLDEN GATE U. L. REV. 759, 776 (1981).

24. 40 Fed. Reg. 24,128, 24,128 (1975).

25. *Sex Discrimination Hearings, supra* note 16.

26. *Sex Discrimination Hearings, supra* note 16, at 197 (testimony of Rep. Stewart McKinney (R-Conn.)).

ination that women faced when seeking athletic opportunities.

After HEW issued the final regulations, Congress had forty-five days to disapprove them by concurrent resolution. During this period, bills were introduced seeking both disapproval of the regulations in their entirety[27] and as they applied to athletics specifically.[28] The impetus behind these bills was the continued lobbying of the NCAA, football interests, and those who feared that giving women equal opportunities would work too great a change on the athletic system that men had traditionally enjoyed as theirs alone. Recognizing that this was their last chance to formally derail Title IX as a vehicle for equal athletic opportunity, these groups fought especially hard to defeat HEW's regulations. Despite their concerted efforts, they did not succeed — none of the bills passed and the Title IX regulations went into effect on July 21, 1975.[29]

3. *The Title IX Policy Interpretation.* The three year transition period for compliance with the regulations expired in July of 1978,[30] and HEW's Office for Civil Rights (OCR) had received nearly one hundred complaints alleging discrimination in athletics programs by that date. Based on these comments, OCR determined the need for further guidance "so as to provide a framework within which complaints can be resolved and to provide institutions of higher education with additional guidance on the requirements of compliance with Title IX."[31] On December 11, 1978, OCR issued a proposed policy interpretation of the athletics regulations to assist schools in complying with Title IX.[32]

As with the Title IX regulations, HEW received a large number of comments on the proposed Title IX athletics guidance.[33] HEW staff also visited eight universities during the summer of 1979 to determine "how the proposed policy and other suggested alternatives would apply in actual practice."[34] Following the comment period, representatives of OCR met with interested groups, including women's groups, for additional discussions of the impact of Title IX guidance.[35] After this extensive consideration, the final Policy Interpretation was issued in December of 1979. It provided a detailed set of "factors and standards"[36] for determining whether a school

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27. *See* S. Con. Res. 46, 94th Cong., 1st Sess. (1975); H.R. Con. Res. 310, 94th Cong., 1st Sess. (1975).

28. *See, e.g.*, S. Con. Res. 52, 94th Cong., 1st Sess. (1975); H.R. Con. Res. 311, 94th Cong., 1st Sess. (1975).

29. *See* 34 C.F.R. § 106 (1995).

30. Acknowledging the dramatic discrimination that existed in most intercollegiate athletic programs in 1975, the Title IX regulations gave schools three years to come into compliance with its equal opportunity requirements. 34 C.F.R. § 106.41(d) (1995) ("[A] recipient which operates or sponsors . . . athletics at the secondary or post-secondary school level shall comply fully with this section as expeditiously as possible but in no event later than three years from the effective date of this regulation.").

31. 44 Fed. Reg. 71,413, 71,413 (1979).

32. 43 Fed. Reg. 58,070–76 (1978).

33. *Id.* (noting that over 700 comments were received).

34. *Id.*

35. *Id.*

36. *See* 44 Fed. Reg. 71, 413, 71,414. The factors and standards were enumerated for com-

had complied with Title IX in the area of intercollegiate athletics and also provided additional documentation of the historical and continuing discrimination against female college athletes.[37]

While the Policy Interpretation does not have the force of law, it is the clearest statement of the enforcing agency's interpretation of the regulatory criteria for statutory compliance and therefore is accorded substantial deference by the courts.[38] Thus, the 1979 Policy Interpretation has played a central role in the efforts of individual plaintiffs to force schools into compliance with Title IX.

4. *Title IX in the 1980's.* By the end of the 1970's, the struggles over Title IX appeared to be over. The law had survived numerous attempts to weaken its standards, the interpretive regulations had been implemented, the policy guidance was issued, and schools had been given three full years to comply with the regulation's athletic requirements.[39] Title IX's promise of equal athletic opportunity for women and girls seemed on the brink of becoming a reality. The next decade, however, held a host of unpleasant surprises and battles for proponents of Title IX.

The first blow to the law came in a major Supreme Court decision, *Grove City College v. Bell*,[40] which resulted in the virtual cessation of Title IX athletics claims both in the courts[41] and through the Department of Education's (DOE) Office of Civil Rights (OCR).[42] In a second setback, DOE's OCR, taking direction from the conservative Reagan and Bush Administrations, made little effort to enforce Title IX through compliance reviews or complaint investigations. In response, major legislative campaigns had to be

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pliance in scholarships, accommodation of interest and abilities, and other program areas such as equipment, travel, tutoring, coaching and recruitment.

37. The Policy Interpretation includes an appendix enumerating the ways in which athletic programs have developed to favor male participation and the levels of discrimination against female athletes that existed in the late 1970's. 44 Fed. Reg. at 71,419 (1979).

38. *See, e.g.*, Kelley v. University of Ill., 832 F. Supp. 237, 242 (C.D. Ill. 1993), *aff'd*, 35 F.3d 265 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 938 (1995) ("[T]he Court must give deference to the regulations and interpretations promulgated under the authority of Congress.").

39. Title IX plaintiffs had also secured an important victory in the Supreme Court in Cannon v. University of Chicago, 441 U.S. 677 (1979). The Court held that Title IX included an implied private right of action that permitted a plaintiff to proceed directly to court with a Title IX grievance without first having to bring it before an administrative agency. *Id.* at 678. The Court found that a private right of action was necessary to achieve Title IX's goal of providing individuals with protection from discrimination. *Id.* at 704. The Court also recognized that the limitations of the administrative process as well as inadequate resources at HEW supported the existence of a private Title IX enforcement mechanism. *Id.* at 706 n.41, 708 n.42.

40. 465 U.S. 555 (1984).

41. However, the provision of athletic scholarships was still covered by Title IX after *Grove City* if the institution's financial aid office received federal financial assistance. *See* Haffer v. Temple Univ., 688 F.2d 14, 16 (3rd Cir. 1982) (per curiam), *modified*, 678 F. Supp. 517 (E.D. Pa. 1987).

42. HEW was split into the Department of Education and the Department of Health and Human Services in 1979. *See* 20 U.S.C. §§ 3401-3510 (1994). OCR, with authority over Title IX enforcement, became part of DOE.

mounted to try to restore Title IX's muscle in the athletics area, requiring years of effort from advocates and legislators who supported Title IX's non-discrimination objectives.

a. *The* Grove City *Decision.* In the early 1980's, courts divided over the question whether Title IX's language covered only those programs within an institution directly receiving federal funds or whether the receipt of funds in *any* program resulted in coverage for the entire institution.[43] The *Grove City* decision resolved this question in favor of the more narrow interpretation of Title IX's reach, holding that the statute applied only to those programs or activities that actually received federal funds.[44] In so doing, the Court effectively removed most college athletic programs, which rarely are direct recipients of federal funds, from Title IX's purview.[45]

The impact of *Grove City* on efforts to eradicate discrimination in athletics programs was substantial. DOE's OCR immediately dropped or narrowed almost forty pending Title IX athletics investigations.[46] For example, DOE's OCR had already found "discrimination in the accommodation of women athletes' interest and abilities as well as in travel allowances, per diems and support services in the athletics program at the University of Maryland."[47] One week after the *Grove City* decision, DOE's OCR dropped the Title IX charges against the University because the program did not receive federal funds.[48] *Grove City* also resulted in the suspension of cases where discrimination had been found and enforcement was being monitored by DOE's OCR.[49] Furthermore, DOE's OCR simply disregarded the complaints of Title IX violations that continued to flood the office unless the athletic program at issue could be shown to be a direct recipient of federal funds.

*Grove City* also affected the first class action Title IX suit brought against a university for discriminating against women in all aspects of its athletics program. *Haffer v. Temple University*[50] was filed in 1981 as a Title IX action, but lawyers were forced to rely on the Equal Protection Clause of

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43. *Compare* Rice v. Harvard College, 663 F.2d 336, 338–39 (1st Cir. 1981) (refusing to apply Title IX without a claim that sex discrimination occurred in program receiving federal funds) *and* University of Richmond v. Bell, 543 F. Supp. 321 (E.D. Va. 1982) (holding that an athletic department which receives no federal funds is not covered by Title IX) *with Haffer*, 688 F.2d 14, 16 (holding that an athletic department is subject to Title IX when university as a whole received federal funds).

44. *Grove City*, 465 U.S. at 572. Grove City College had tried to preserve its autonomy by refusing to accept money from state or federal government. Its sole source of federal financial assistance was education grants given its students by the government. *Id.* at 559.

45. Some athletic scholarships were an exception, *see* cases cited *supra* note 43.

46. P. Michael Villalobos, *The Civil Rights Restoration Act of 1987: Revitalization of Title IX*, 1 MARQ. SPORTS L.J. 149, 159 (1990).

47. *See* S. REP. NO. 64, 100th Cong., 1st Sess. 11 (1987), *reprinted in* 1988 U.S.C.C.A.N. 3.

48. *Id.*

49. For example, OCR stopped monitoring compliance proceedings at Ball State and Western Michigan universities after *Grove City*. Villalobos, *supra* note 46, at 162.

50. 524 F. Supp. 531 (E.D. Pa. 1981), *aff'd*, 688 F.2d 14 (3rd Cir. 1982) (per curiam), *modified*, 678 F. Supp. 517 (E.D. Pa. 1987).

the Fourteenth Amendment[51] and the state equal rights amendment[52] to support their claims after the decision in *Grove City* removed Temple's athletic program from the reach of Title IX. Once the Civil Rights Restoration Act[53] was passed in 1988, the Court restored the application of Title IX claims to most athletic programs. Ultimately, *Haffer* settled in favor of the plaintiffs in 1988, eight years after a remedy for gross inequities in athletic opportunities had first been sought.[54]

b. *Legislative Response to* Grove City. Congress acted immediately to correct the narrowing of Title IX that the *Grove City* decision had accomplished, recognizing that the limitation of Title IX coverage to programs directly receiving federal funds would severely impede its objective of eradicating sex discrimination in education. The Civil Rights Restoration Act of 1984, introduced in both the Senate and the House, sought to replace the statutory language "program or activity" with "recipient," thereby restoring coverage of athletic departments under Title IX.[55]

After several years of debate, the Act was passed as the Civil Rights Restoration Act of 1987 and enacted over presidential veto in 1988.[56] Although the statutory language was modified over the course of debate, it served the purpose of overruling *Grove City*. As enacted, the Act broadened Title IX's definition of "program or activity" to include "all operations of a [institution] . . . any part of which is extended federal financial assistance . . . ."[57] The Civil Rights Restoration Act therefore clarified that an entire institution is covered by Title IX if any of its programs or activities is a recipient of federal funds. Congress included specific findings indicating that the Act was intended to correct the limitations imposed by *Grove City* and to restore "an institution-wide application" of Title IX.[58]

Unlike the debates surrounding Title IX regulations, the debates that occurred over the Civil Rights Restoration Act did not dispute whether or not intercollegiate athletic programs should come within the scope of Title IX.[59] In fact, these debates revealed a consensus among lawmakers that discrimination against women athletes is a significant civil rights problem deserving remedy under Title IX.[60] A number of the members of Congress

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51. U.S. CONST. amend. XIV, § 1.

52. PA. CONST. art. I § 28.

53. Civil Rights Restoration Act of 1987, ch. 38, 102 Stat 28 (1988) (codified as amended at 20 U.S.C. § 1687 (1994).

54. *Haffer*, 678 F. Supp. at 517.

55. Senator Edward Kennedy (D-Mass.) introduced the bill in the Senate, S. 2568, 98th Cong., 2d Sess. (1984), and Representative Paul Simon (D-Ill.) introduced it in the House. H.R. 5490, 98th Cong., 2d Sess. (1984).

56. 20 U.S.C. § 1687 (1994).

57. *Id.*

58. *Id.* Congress found that "certain aspects of recent decisions and opinions of the Supreme Court have unduly narrowed or cast doubt upon the broad application of Title IX" and that "legislative action is necessary to restore the prior consistent and long-standing executive branch interpretation. . . . " *Id.* at 636.

59. A major point of contention that delayed passage of the Act was its implications for university funding of abortion services. *See Senate Votes to Remove "Abortion Rights" from Civil Rights Bill*, Business Wire, Jan. 28, 1988, *available in* LEXIS, Nexis Library, AP File.

60. *See, e.g.*, 130 CONG. REC. S11,448 (daily ed. Sept. 19, 1984) (statement of Sen. Orrin

referred explicitly to the ongoing sex discrimination in competitive athletics as a compelling reason for restoring the broad application of civil rights laws.[61] These statements serve as important evidence of the remedial objectives of Title IX and the intent of Congress that the statute's protections provide a strong guarantee of equality in the area of athletics.

Title IX therefore emerged from the 1980's in much the same posture with which it had entered that decade - with strong congressional support and clear application to intercollegiate athletic programs, but with its promise of ending discrimination against female athletes still unfulfilled. The combination of the *Grove City* decision with the low priority given to enforcement by DOE's OCR undermined the impact of Title IX in changing the face of our country's athletic programs.

C. Recent Enforcement of Title IX

The passage of the Civil Rights Restoration Act and settlement of *Haffer* in 1988 appeared to herald a renaissance for Title IX enforcement. With the law's coverage of athletic programs restored, Title IX proponents had reason to feel optimistic that more schools would voluntarily come into compliance with Title IX in order to avoid being sued by private plaintiffs.[62]

This optimism changed to conviction after the 1992 decision by the Supreme Court in *Franklin v. Gwinett County Public Schools*.[63] In *Franklin*, the Court armed plaintiffs with the powerful weapon of the right to money damages for an intentional violation of Title IX.[64] Until *Franklin*, plaintiffs bringing suit under Title IX could only seek compliance with the law, a remedy that often held little attraction for students who would graduate before any changes were made. Giving plaintiffs access to individual relief made the prospect of a contentious lawsuit more appealing both to plaintiffs and to the lawyers needed to represent them. The threat of having to pay

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Hatch (R-Utah)) ("I personally do not know of any Senator in the Senate—there may be a few, but very few—who does not want Title IX implemented so as to continue to encourage women throughout America to develop into Olympic athletes.").

61. *See, e.g.*, 134 CONG. REC. S168 (daily, ed. Jan 27, 1988) (statement of Sen. Robert Packwood (R-Or.)) ("Prior to the Grove City case everyone . . . thought that the Title IX regulations meant institution-wide coverage. And this, very frankly, is how we were finally able to get universities and . . . high school, to give equal treatment to women in athletics. This was the opening wedge."); 130 CONG. REC. 18,534 (1984) (remarks of Rep. Coleman (R-Mo.)) ("One of the best examples of women gaining equal access in education thanks to Title IX has been in the area of athletics.").

62. The threat of private litigation provided a stimulus for change in the absence of pressure from OCR. Because OCR had continued to de-emphasize Title IX enforcement, schools had little reason to fear an agency investigation until the Clinton administration prioritized enforcement in 1993. With the advent of private litigation, however, schools could no longer remain sanguine about inequities in their athletic programs.

63. 503 U.S. 60 (1992).

64. *Id.* The Court held unanimously that monetary damages were available under Title IX for intentional sex discrimination, basing its decision on the principle that all remedies are available in a federal action "unless Congress has expressly indicated otherwise." *Id.* at 1066. *Franklin* was not an athletics case, but rather a suit brought under Title IX challenging teacher-student sexual harassment. Its holding, however, applies to any intentional violation of Title IX, a category into which most athletics discrimination falls. *See* ELLEN J. VARGYAS, BREAKING DOWN BARRIERS: A LEGAL GUIDE TO TITLE IX 32 (1994).

out large damage awards also promised to operate as a powerful incentive for schools to bring their athletic programs, as well as their other educational programs, into compliance with Title IX. Perhaps even more importantly, the availability of damages avoided the problem of student-plaintiffs graduating from their respective schools and thereby making their legal claims moot. By including a claim for damages, plaintiffs would still have a justiciable Title IX claim even after graduation. Thus, *Franklin* represented a major step forward in Title IX enforcement.[65]

The elimination of certain women's varsity teams ushered in by shrinking university budgets in the early 1990s has resulted in a surge of Title IX litigation in recent years. Without exception, the plaintiffs in these cases have won decisive victories against their schools and contributed to substantial progress toward equity in intercollegiate athletics. The courts' interpretation and legal analysis of Title IX in these cases has been remarkably consistent, providing Title IX proponents with a strong and uniform body of law upon which to rely.

1. *Major Court Decisions.* Since 1992, federal courts in the First, Third, Sixth, and Tenth Circuits have awarded victories to female student athletes in Title IX cases.[66] Additionally, courts in the Seventh and Second Circuits have interpreted Title IX favorably for female athletes. Each of these decisions has focused on discrimination in the allocation of participation opportunities between male and female athletes, the primary area emphasized in recent Title IX athletics challenges.[67] In analyzing participation opportunities, courts have adopted the three-prong test set out in the Title IX Policy Interpretation.[68] If a school can satisfy any one of the test's three prongs, it

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65. *See generally* Peggy Kellers, *Breaking the Silence: Twenty Years of Title IX Litigation*, 11 SPORTS LAW. 1, 6 (Nov./Dec. 1992) (arguing that no decision has done more to promote Title IX litigation and change institutions' athletic priorities); Diane Heckman, *Women & Athletics: A Twenty Year Retrospective on Title IX*, 9 U. MIAMI ENT. & SPORTS L. REV. 1, 25 (1992) (noting that, for most of Title IX's history, withholding federal funds was "more of a threat than actuality.").

66. *See* Horner v. Kentucky High Sch. Athletic Ass'n, 43 F.3d 265 (6th Cir. 1994); Favia v. Indiana Univ., 7 F.3d 332 (3rd Cir. 1993); Roberts v. Colorado State Bd. of Agric., 998 F.2d 824 (10th Cir. 1993); Cohen v. Brown Univ., 991 F.2d 888 (1st Cir. 1993) (*Cohen II*).

67. The prohibition against discrimination in participation opportunities derives from the Title IX regulations, which require that "the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes." 34 C.F.R. § 106.41(c)(1) (1995). Many Title IX litigants made a strategic choice to focus on this aspect of Title IX compliance as a means of opening the door to future compliance suits in other areas. Once equal participation has been guaranteed, they reason, then the battles over athletic scholarships and equal treatment can be waged.

Schools violate Title IX if they do not provide financial aid in proportion to rate of participation. The Title IX regulations state that if an institution provides athletic financial aid, "it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in . . . intercollegiate athletics." 34 C.F.R. § 106.37(c) (1995).

Schools also can violate Title IX by discriminating in athletic benefits such as equipment and supplies, scheduling, travel and per diems, coaching, tutoring, locker rooms and publicity. 34 C.F.R. § 106.41(c) (1995). This area is often referred to as the "equal treatment" area.

68. 44 Fed. Reg. 71,413, 71,418. For a comprehensive discussion of why courts rely on the

is in compliance with Title IX's requirement to provide proportionate participation opportunities.

Under the first prong, the court examines whether athletic participation opportunities are provided to each sex in numbers substantially proportionate to their enrollment. If a school cannot meet this prong, the court then determines whether the school can demonstrate a history and continuing practice of program expansion for the underrepresented sex. If a school fails the second prong, the court finally asks whether the athletic interests and abilities of the underrepresented sex have been fully and effectively accommodated by the school. If the plaintiffs can show that the school also fails on this third prong, then the court must find the school out of compliance with Title IX.

In applying this three-prong test, courts have arrived at the same conclusion: that the schools that have been challenged to date have failed to provide adequate opportunity to their female athletes and thereby are violating federal law.

a. Cohen v. Brown University.[69] In 1991, Brown University decided to cut two women's teams and two men's teams from its athletics program, changing the status of these teams from varsity to club and removing all of their funding. Members of the women's teams brought a class action suit against Brown, claiming that the demotion of the women's teams violated Title IX because the university provided disproportionate participation opportunities to men and women.[70] The plaintiffs sought injunctive relief to reinstate the two dropped teams and to prevent Brown from eliminating any other women's varsity teams.[71]

The district court granted the plaintiff a preliminary injunction, which Brown immediately appealed to the court of appeals.[72] In both courts, Brown argued that Title IX compliance should be measured by comparing participation opportunities with the relative interests of male and female students, as measured by Brown, rather than the percentage of each sex in the undergraduate enrollment.[73] In effect, Brown asked the courts to overlook the fewer opportunities it provided to female athletes because neither men nor women are fully accommodated, even though men enjoyed almost twice as many participation opportunities as women.[74]

The First Circuit rejected Brown's arguments using the same legal analysis as the district court. Applying the three-prong test outlined above

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three-prong test, see *Cohen II*, 991 F.2d at 888.

69. 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 III*) (collectively referred to as *Cohen*).

70. *Cohen I*, 809 F. Supp. at 978; *Cohen III*, 879 F. Supp. at 185.

71. *Cohen I*, 809 F. Supp. at 980.

72. *Cohen II*, 991 F.2d at 888.

73. *Cohen I*, 809 F. Supp. at 987; *Cohen II*, 991 F.2d at 899. For a fuller discussion of Brown's arguments and their weaknesses, see *infra* notes 155–61 and accompanying text.

74. In 1991–92, Brown had 529 male athletes (63.4%) and 305 female athletes (36.6%). *Cohen I*, 809 F. Supp. at 981. During that same year, the undergraduate enrollment was 51.8% male and 48.2% women. *Id.* at 991.

and rejecting Brown's attempts to rewrite Title IX policy, both courts reasoned that Brown failed all three prongs and therefore did not effectively accommodate the interests and abilities of its female athletes.[75] The First Circuit labelled Brown's construction of Title IX "myopic," stating that "the fact that the overrepresented gender is less than fully accommodated will not, in and of itself, excuse a shortfall in the provision of opportunities for the underrepresented gender."[76]

At the subsequent trial on the merits, Brown lost again under the application of the three-prong test.[77] The creativity of Brown's arguments could not mask the fact that it had neither substantially equivalent participation opportunities for men and women nor a continuing history of program expansion for women, and the school further could not demonstrate that the athletic interests and abilities of its female students had been met. Brown has appealed the district court's decision.[78]

b. Roberts v. Colorado State University[79]. In 1992, Colorado State University (CSU) dropped its women's varsity softball team. Team members sued for reinstatement of their team and for compensatory damages, alleging CSU failed to provide equivalent participation opportunities to female athletes under Title IX.[80] CSU argued that it had not violated Title IX because it had also dropped men's baseball when cutting the softball team, and that the cuts had had a larger negative impact on male athletes.[81]

The district court did not accept CSU's argument, finding that the university failed each prong of the three-prong test.[82] While most of its legal

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75. The district court, after establishing that the three-prong test was the proper one to apply in the case, examined each prong separately. Because women represented 48.2% of the undergraduate population but were only 36.6% of varsity athletes, Brown clearly could not win under the first prong. *Id.* at 991. The court also found that Brown failed the second prong because its participation numbers had remained at roughly 60% men and 35% women for over 10 years, indicating no continuing practice of program expansion. *Id.* Finally, the court found that Brown had "cut off varsity opportunities where there is great interest and talent *and* where Brown still has an imbalance between male and female athletes in relation to their undergraduate enrollments" and therefore could not satisfy the third prong of the test. *Id.* at 992.

In affirming the decision of the district court, the court of appeals firmly endorsed the use of the three-prong test as the controlling Title IX analysis and rejected Brown's alternative test, noting that "Brown's approach cannot withstand scrutiny on either legal or policy grounds." *Cohen II*, 991 F.2d at 900.

76. *Cohen II*, 991 F.2d at 899.

77. *Cohen III*, 879 F. Supp. at 185. The district court's opinion carefully set out the legal framework of Title IX, its regulations and the Policy Interpretation before explaining its interpretation of the requirements of the three-prong test. After considering Brown's alternative approaches, the court found that none of them provided Brown with an escape hatch from Title IX's mandate and therefore Brown was in violation of the law.

78. William C. Rhoden, *A Partisan Spin on Title IX*, N.Y. TIMES, Apr. 22, 1995, at 31.

79. 814 F. Supp. 1507 (D. Colo. 1993) (*Roberts I*), *aff'd sub nom.* Roberts v. Colorado State Bd. of Agric., 998 F.2d 824 (10th Cir. 1993) (*Roberts II*), *cert. denied*, 114 S. Ct. 580 (1993) (*Roberts III*) (collectively referred to as *Roberts*).

80. *Roberts I*, 814 F. Supp. at 1507.

81. *Id.* at 1514.

82. *Id.* at 1518–19.

analysis followed the same path as that of the *Cohen* court, the district court in *Roberts* emphasized several important principles in Title IX jurisprudence. First, the court held that a school cannot satisfy the second prong, a history and continuing practice of program expansion for women, by simply pointing to an initial spurt of expansion in opportunities for women shortly after Title IX was enacted. It also cannot claim to have "expanded" women's share of opportunities by cutting more from its men's than its women's athletic programs.[83] Second, the court held that a disparity of 10.6% between the percentage of female athletes and the percentage of female students did not meet the "substantially proportionate" standard of the first prong.[84] Thus, while it remains unclear where the outer boundaries of the "substantially proportionate" measure lie, a disparity of 10% was too great for this court.

On appeal, the Tenth Circuit affirmed both the district court's use of the three-prong test as the appropriate measure of effective accommodation and its conclusion that CSU could satisfy none of the prongs.[85] The appeals court did overrule the district court on one point, agreeing with the First Circuit's ruling in *Cohen* that the plaintiffs bear the burden of proving a lack of accommodation of female athletes' interests and abilities under the test's third prong.[86] Under this new standard, the Tenth Circuit found that plaintiffs had met their burden and therefore CSU failed the third prong as well as the first two and were not in compliance with Title IX.[87]

c. Favia v. Indiana University of Pennsylvania[88]. Factually, the *Favia* case is very similar to *Cohen*. Indiana University of Pennsylvania (IUP) demoted two men's and two women's varsity teams to club status and cut off their funding. As in *Cohen*, the women's team members sued as a class for reinstatement of their teams.[89]

Legally, the court had no difficulty in concluding that IUP was likely to be found in violation of Title IX because of failure to satisfy any of the prongs of the three-prong test. In a succinct opinion, the court found that IUP did not offer women athletic opportunities in substantial proportion to their enrollment, would not be likely to demonstrate a practice of continuing

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83. *Id.* at 1514. The court states that:

> CSU cannot show program expansion for women solely by pointing to increases in percentages of women athletes caused by the reduction of male athletes. CSU must either demonstrate actual expansion . . . or establish that it has considered and improved upon the underrepresented status of women athletes when reductions in athletic programs became necessary in the past.

*Id.*

84. *Id.* at 1513. The court used *Cohen*, where the disparity between the percentage of female athletes and percentage of female students was 11.6%, as guidance on the meaning of "substantially proportionate." *Id.*

85. *Roberts II*, 998 F.2d at 829–32.

86. *Id.* at 831.

87. *Id.* at 832. After losing on appeal, CSU appealed to the Supreme Court, but certiorari was denied. *Roberts II*, 998 F.2d 824 (10th Cir. 1993), *cert. denied*, 114 S. Ct. 580 (1993).

88. 812 F. Supp. 578 (W.D. Pa. 1992), *motion to modify denied*, 7 F.3d 332 (3d Cir. 1993).

89. *Id.*

expansion of women's opportunities, and would not be able to show that the athletic interests and abilities of it female students had been fully and effectively accommodated.[90] The court therefore granted a preliminary injunction to the plaintiffs restoring their two teams and preventing IUP from making any further cuts to women's varsity athletic opportunities.[91]

Although IUP did not appeal the district court's decision, it later sought modification of the district court's order to replace one of the reinstated teams with a different women's sport.[92] When the court denied the modification on procedural grounds, IUP appealed to the Third Circuit. Declining to alter the original injunction, the Third Circuit noted that substituting one team for the other did not "substantially ameliorate what the district court decided was likely to be a violation of Title IX."[93] The court of appeals also adopted the district court's application of the three-part test, citing *Cohen* approvingly.[94]

d. Horner v. Kentucky High School Athletic Association[95]. In one of the few Title IX decisions involving high school athletes, twelve female softball players filed a Title IX discrimination suit when their state athletic association refused to sanction fast-pitch softball for girls despite sanctioning fewer sports for girls than for boys overall. After losing on summary judgment in the district court, the plaintiffs appealed to the Sixth Circuit.[96]

Reversing the award of summary judgment, the Sixth Circuit first confirmed that Kentucky's high school programs came within reach of Title IX's protections because they received federal financial assistance.[97] The court then looked to the three-prong test to analyze whether the state high schools had complied with Title IX's mandate of equal opportunity. Citing *Cohen* and *Roberts* for support, the court outlined the elements of the test and concluded that genuine issues existed as to whether the state provided equal athletic opportunity to its female students.[98] The court therefore remanded the case to the district court. Although it is not a decision on the merits, *Horner* provides further support for the application of the three-prong test in

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90. *Id.* at 584–85. The court found that IUP could not satisfy the first prong because female students comprised only 36.5% of the school's varsity athletes yet 55.6% of the undergraduate population. IUP also failed the second prong because it had cut women's teams, taking "the level of opportunities for women to compete [from] low to lower." The court found that IUP could not meet the third prong either and rejected the school's defense of financial constraints. *Id.* at 585.

91. *Id.* at 585.

92. *Favia*, 7 F.3d at 336.

93. *Id.* at 343. The court of appeals denied the modification on the grounds that "the University had failed to meet its burden of demonstrating a 'significant' change in facts . . . ." *Id.* at 344.

94. *Id.* at 343–44.

95. 43 F.3d 265 (6th Cir. 1994).

96. *Id.*

97. *Id.* at 271–72.

98. Horner v. Kentucky High Sch. Athletic Ass'n, 43 F.3d 265, 272–75 (6th Cir. 1994). The case was remanded for trial on the Title IX claim.

evaluating participation opportunities and endorses the legal reasoning used by the First and Tenth Circuits in deciding such cases.

e. *Other Court Decisions.* Both the Second and the Seventh Circuits have also applied consistent standards for interpreting Title IX's requirements in recent cases. While these cases involve somewhat different legal analyses than the circuit cases described above, they further elucidate the approach of federal courts to Title IX in the area of nondiscriminatory participation opportunities.

In *Cook v. Colgate University*,[99] the plaintiffs went to court seeking elevation of the women's club ice hockey team to varsity status after the college had repeatedly denied their requests to do so. Pointing to the vast inequities between the women's club ice hockey team and the men's varsity ice hockey team, the plaintiffs argued that Title IX required the college to have a women's varsity team so as to provide equality of opportunity.[100] Colgate argued in defense that Title IX did not mandate equality on a sport-by-sport basis, but rather required proportionality in the men's and women's programs as a whole.[101]

The district court sided with the plaintiffs, finding that because there were gross inequities in the opportunities available to male and female hockey players, Colgate had violated Title IX.[102] Although the district court's analysis stands alone in choosing to compare opportunities on a sport-specific level,[103] its finding of discrimination was certainly merited. On a program-wide basis, Colgate clearly failed the three-prong test in much the same way Brown University, Colorado State University and Indiana University at Pennsylvania had. It did not offer substantially proportionate athletic opportunities to women, did not have a continuing history of expansion, and had not fully and effectively accommodated its female athletes.[104]

The Seventh Circuit had occasion to interpret Title IX in *Kelley v. Board of Trustees of the University of Illinois*.[105] The reverse-discrimination case was brought by members of the men's varsity swimming team that had recently been eliminated at the University of Illinois. The plaintiffs claimed discrimination because the women's swimming team had not been cut in the institutional effort to reduce expenses. Applying the three-prong test, the district

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99. 802 F. Supp. 737 (N.D.N.Y. 1992), *vacated as moot*, 992 F.2d 17 (2nd Cir. 1993).

100. *Cook*, 802 F. Supp. at 744–45.

101. *Id.* at 742.

102. *Id.* at 751. The court voiced strong sentiments in support of Title IX, stating that "many institutions of higher education apparently hold the opinion that providing equality to women in athletics is both a luxury and a burden. The feeling seems to be that to afford such equality to women is a gift and not a right. The women's ice hockey players do not want a gift. They obviously do not consider equivalent treatment to be a luxury. The women only want equal athletic opportunities. That is what the law demands." *Id.* at 750.

103. For a discussion of why the district court's reasoning contravenes the general principles of Title IX, see *infra* note 227 and accompanying text.

104. *Cook*, 802 F. Supp. at 742–45.

105. 832 F. Supp. 237 (C.D. Ill. 1993), *aff'd*, 35 F.3d 265 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 938 (1995).

court did not find a Title IX violation because, even after the cuts, women continued to receive a lesser share of the school's athletic opportunities.[106] On appeal, the Seventh Circuit affirmed the decision, once again deferring to the Policy Interpretation's three-part test for Title IX compliance in this area.[107]

2. *Major Settlements.* Numerous Title IX suits brought by student plaintiffs since *Franklin* have settled without a final ruling on the merits by a court.[108] While these settlements do not have the same precedential value as the decisions discussed above, they further reflect the momentum Title IX has gained over the last few years.

In a Title IX challenge against the University of Texas at Austin, the plaintiffs obtained a landmark settlement requiring the university to greatly increase women's share of athletic opportunities at the institution. Female student athletes at UT-Austin filed a class action suit against the university seeking elevation of four club teams to varsity status. At the time, women represented 47% of the undergraduate enrollment and only 23% of the varsity athletes. The students alleged violations of Title IX based on discrimination in participation opportunities.

In July of 1993, the University settled with the plaintiffs, agreeing to bring the women's varsity participation rate up to 44% by the end of the 1995–96 school year and to maintain that rate thereafter.[109] The University also agreed to elevate two of the women's club teams, soccer and softball, to varsity status, and to review its program to gauge the necessity of adding other varsity teams.[110] The settlement included a requirement that the percentage of athletic scholarships given female athletes be within two percentage points of their participation rate and a requirement that the facilities for women's teams be of the quality necessary to attract top athletes.[111]

The *Sanders* settlement served as a model for the later settlement of a Title IX challenge to Virginia Polytechnical Institute. In March 1995, student athletes obtained a settlement in a class action challenge to the university's failure to provide sufficient varsity opportunities for women athletes. The university agreed to bring women's athletic participation rates within 3% of their enrollment rates by 1998 and to add lacrosse and softball as varsity women's sports. The school also agreed to bring the percentage of scholar-

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106. *Kelley*, 832 F. Supp. at 269–70.

107. *Kelley*, 35 F.3d at 272–75. For a more extensive discussion of *Kelley*, see *infra* notes 181–82 and accompanying text.

108. In addition to the settlements discussed in detail below, Cornell University, University of California at Los Angeles, University of New Hampshire, Auburn University, University of Texas at Austin, California State University at Fullerton, and University of Massachusetts have all settled suits with female student athletes in the last three years. *See* T. Jesse Wilde, *Gender Equity in Athletics: Coming of Age in the 90's*, 4 MARQ. SPORTS L.J. 217, 240–45 (1994). The first major Title IX case to be litigated, Haffer v. Temple Univ., 688 F.2d 14 (3d Cir. 1982) also ended in a settlement favorable to the plaintiffs eight years after filing. *See supra* notes 49–50 and accompanying text.

109. Sanders v. University of Tex. at Austin, No. A–92-CA–405 (W.D. Tex. Oct. 25, 1993) (order approving settlement agreement).

110. *Id.*

111. *Id.*

ship money flowing to female athletes to within 5% of their enrollment rates.[112]

D. Continuing Resistance to Equality in Athletics

Despite Title IX's many victories over the last several years, equality for female athletes remains an unmet goal at most schools. The combined threat of private suits and more vigorous enforcement by DOE's OCR has not had the motivating effect one might expect on the vast majority of institutions. The rapid gains made by female athletes in the 1970's have not been matched in the 1990's, and the opportunities for women's athletic participation continue to be limited.

While women today represent over half the undergraduates in our colleges and universities, schools continue to limit female athletes to approximately one-third of our country's varsity slots. A 1992 survey conducted by the NCAA showed that women in Division I colleges receive less than one-third of athletic scholarship dollars, one-sixth of recruiting dollars and only one-fifth of overall athletic budgets.[113] *The Chronicle of Higher Education* recently reported that at the end of the 1993–94 school year, only sixteen Division I colleges provided athletic opportunities to women in proportion to their enrollment.[114] Each year, male athletes receive $179 million more in scholarship money than female athletes.[115] Furthermore, since the enactment of Title IX, for each new dollar spent on women's programs, two new dollars were spent on men's programs.[116]

Notwithstanding the slow progress toward achieving gender equity in college sports at the national level, some schools have chosen to take a leadership role in the area of Title IX compliance rather than wait to be the subject of legal proceedings. For example, in 1993, Stanford University created a Women's Sports Enhancement Program to add three new varsity women's sports and twenty-nine additional scholarships for female athletes by 1997.[117] The program also increases the number of trainers, academic advisors, and publicity staff available to the women's teams.[118] Stetson University has also worked hard to meet Title IX's goal of gender equity - in the last three years, the number of varsity athletic slots for women has gone from 37% to 53%, and scholarship money has increased by over 12%.[119]

A law passed by Congress in 1994 should facilitate the identification of both violators of Title IX and those who have come into compliance. The

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112. James v. Virginia Polytechnic Inst., No. 94-0031-R (W.D. Va. Apr. 12, 1995) (order approving settlement agreement).

113. NATIONAL COLLEGE ATHLETIC ASS'N, GENDER EQUITY SURVEY (1992).

114. Debra E. Blum, *Slow Progress on Equity*, CHRON. HIGHER EDUC. (Washington, D.C.), Oct. 26, 1994, at A47.

115. *Id.*

116. *Id.*

117. Don Bosley, *Stanford Will Bolster Its Women's Programs*, SACRAMENTO BEE, Mar. 31, 1993, at E2. Carolyn White, *Stanford's Plan Sets Example*, USA TODAY (Arlington, Va.), Nov. 7, 1995, at 3C.

118. *Id.*

119. Debra E. Blum, *Stetson University Works Hard to Meet Its Goal of Gender Equity*, CHRON. HIGHER EDUC. (Washington, D.C.), Oct. 26, 1994, at A47.

Equity in Athletics Disclosure Act[120] requires schools to publish data such as the number of male and female athletes in their programs each year, starting in October 1996.[121] These numbers will allow female athletes to evaluate where they will receive the most equitable treatment[122] and will assist the public in encouraging schools to treat athletes in a non-discriminatory fashion.

As the recent history of Title IX enforcement demonstrates, unless most institutions increase the pace of the progress toward gender equity, they are subjecting themselves to a substantial risk of court-ordered changes and damages through Title IX litigation. In light of current legal climate, the expansion of women's athletic opportunities should be a top priority for college sports programs.

## II. THE BACKLASH AGAINST TITLE IX

Largely as a result of the long-overdue progress toward gender equity ushered in by the recent court successes, a vocal and organized backlash has developed in which opponents seek to turn back the clock on Title IX enforcement. Led by a coalition of football coaches and spokespersons for other men's sports (often referred to as men's "minor" sports or non-revenue producing sports), these forces have launched a full scale assault on Title IX through grassroots organizing, lobbying of Congress and the Department of Education, and the marketing of their message to the press.[123]

### A. Anti-Title IX Efforts in Congress

With the changed political climate after the 1994 elections, Title IX opponents are hoping to find a renewed opportunity to slow or even stop the progress towards gender equity that has been made over the past two decades. While past Congresses have safeguarded Title IX's protections,[124] the

120. Pub. L. No. 103-382, § 360B, 108 Stat. 3969, 3969-71 (1994).

121. The Act also requires schools to provide a listing of the varsity teams. For each team, the school must disclose the number of participants, the total operating expenses, whether the head coach was male or female and full or part-time, and the number, sex and employment status of assistant coaches. The school must also report the total amount of athletically-related student aid for men's teams and women's teams, the revenues generated by men's and women's teams, and the average institutional coaching salaries (for both head and assistant coaches) for men's and women's teams. *Id.* § 360(B)(g).

122. The Act includes a finding that "knowledge of an institution's expenditures for women's and men's athletic programs would help prospective students and prospective student athletes make informed judgments about the commitments of a given institution of higher education to providing equitable athletic benefits to its men and women students." *Id.* § 360 (B)(b)(8).

123. The two most prominent organizations representing college football interests in this battle are the American Football Coaches Association and the College Football Association. They have been joined by a number of organizations representing other men's sports programs, including the National Wrestling Coaches Association, the National Association of College Gymnastics Coaches, the National Soccer Coaches' Association of America, United States Swimming and United States Water Polo.

124. *See, e.g., supra* notes 55-58 and accompanying text (discussing the Civil Rights Restoration Act and the Civil Rights Remedies Equalization Act, and their effects on Title IX litiga-

new Congress is now being tested by those who would like to reduce the power and effectiveness of Title IX, and they are using the politically charged "quota" label to bolster their chances.[125] In using the "quota" label, Title IX opponents are attempting to tap into the anti-quota sentiment that is now in the forefront of the affirmative action debate, regardless of the inapplicability of that label. One of most vocal champions of the Title IX opponents is Representative Dennis Hastert (R-Ill.), who is a former men's wrestling coach and the former president of the National Wrestling Coaches Association. Although Representative Hastert had previously been an outspoken advocate for men's sports interests in Congress,[126] his efforts have only recently generated any noticeable support from his colleagues.[127]

As in the past, some of the most emphatic voices lobbying against Title IX today are spokespersons for college football interests, who maintain that current Title IX interpretations threaten the future of college football because schools will be forced to cut football budgets in order to fund more opportunities for women.[128] In late 1994, the College Football Association (CFA) and the American Football Coaches' Association (AFCA) requested congressional hearings on gender equity in athletics, with an eye toward exempting football from the law's requirements, eliminating proportionality as any part of the three-prong test for participation opportunities, or otherwise weakening Title IX.[129]

Some spokespersons for men's non-revenue producing sports, which have borne the brunt of financial cuts at many universities, are joining ranks

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125. *See, e.g.*, Kevin Merida, *Rights Debate: Both Sides Uneasy*, WASH. POST, Feb. 23, 1995, at A13 (noting that congressional Republicans calling to revisit affirmative action "use the term interchangeably with 'quotas' and 'set-asides.'").

126. *Amateur Sports and the Olympic Committee: Hearings before the Senate Comm. on Commerce, Science and Transportation*, 103d Cong., 2d Sess. (1994) (testimony of Rep. Hastert, Former President of the National Wrestling Coaches Association) (arguing that Title IX hurts men's sports opportunities). Representative Hastert also circulated to his colleagues in Congress a letter dated October 6, 1994, with an attached survey and Title IX position paper, conveying that same message.

127. In a letter dated June 8, 1995, Rep. Hastert asked his colleagues in the House to join him in urging the DOE to amend its 1979 Policy Interpretation to make prongs two and three of the three-part test more lenient. He ultimately obtained signatures from 133 of his colleagues on a letter dated June 7, 1995, addressed to Norma V. Cantu, the Assistant Secretary for Civil Rights in the DOE, requesting that the Department weaken Title IX. Thirty-seven of these signatories are first-term representatives, reflecting the change in the political climate ushered in by the new Congress.

In contrast, a letter dated July 21, 1995, sent by Rep. Patsy J. Mink (D-Haw.) and Rep. Lynn C. Woolsey (D-Cal.) to Secretary Cantu supporting Title IX as currently interpreted included signatures by 94 House members, only two of which were first-term members of Congress.

128. *See, e.g.*, Athelia Knight, *Title IX Scrutinized at Hearings*, WASH. POST, May 10, 1995, at B1. Specifically, many football coaches blame Title IX for NCAA actions to trim the maximum number of football scholarships per school from an unlimited number to the current limit of 85. *See, e.g.*, John Henderson, *Title IX Battle Rages On; Football Bosses Go On Offensive*, DENV. POST, Jan. 22, 1995, at 7B.

129. Athelia Knight, *Football Coaches Put Title IX on Defensive*, WASH. POST, Feb. 1, 1995, at C1.

with the football coaches in blaming Title IX for their losses.[130] Pointing to a trend among some universities to drop men's teams in certain sports, the coalition is claiming that the future of some men's sports, such as gymnastics, is now in jeopardy because of the high demands of female athletes for equity.[131] Rather than criticizing bloated football and men's basketball budgets, which together consume over 70% of the total men's athletic operating budgets, these groups have made the calculated decision that gender equity is an easier opponent.[132] By pitting women's sports against men's non-revenue sports, this coalition is placing women against certain male athletes, leaving football and men's basketball free to continue their excesses.[133]

At the request of the AFCA and the CFA, in conjunction with the minor men's sports coalition, the Post-Secondary and Lifelong Learning Subcommittee of the Economic and Educational Opportunities Committee in the U.S. House of Representatives held hearings on Title IX on May 9, 1995. Representatives of the football coaches, men's minor sports groups, and two universities found in violation of Title IX, Brown University and Eastern Illinois University, gave testimony expressing their grievances with Title IX as applied by the DOE and the courts.[134]

While legislation weakening the substantive standards of Title IX and the three-part test has not yet emerged from these hearings, such efforts may be on the horizon. After the May hearings, the Chair of the Subcommittee, Representative Howard P. ("Buck") McKeon (R-Cal.), joined by Representative Steve Gunderson (R-Wis.), a member of the subcommittee, asked DOE's OCR to issue policy guidance "clarifying" prongs two and three of the three-part test, and suggesting that such guidance might obviate the need for

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130. *See Gender Equity in Intercollegiate Athletics: Hearings before the Subcomm. on Postsecondary Education, Training and Lifelong Learning of the House Comm. on Economic and Educational Opportunities*, 104th Cong., 1st Sess. 148 (1995) (testimony of T.J. Kerr, President of the National Wrestling Coaches Association) (stating that over one hundred college wrestling programs have been dropped as a result of Title IX) [hereinafter *Gender Equity Hearings*].

131. Richard Sandomir, *Brown Is Told Program Cheats Women*, N.Y. TIMES, Mar. 30, 1995, at A1.

132. *See, e.g., Scorecard: The Third Sex*, SPORTS ILLUSTRATED, Feb. 6, 1995, at 15 (citing Rep. Hastert's reluctance to blame football for cutbacks on more low-profile men's sports because he does not want to "take on a national shrine").

133. Examples of excess expenditures on the part of these programs include the regular practice of paying for football teams to stay in hotels the night before *home* games, *see, e.g., id.*; spending millions to buy out the contracts of losing coaches and replacing them with new ones, *id.*; the practice of coaches accompanying recruits back home after on-campus visits (until the NCAA recently banned such practice), *see, e.g.*, Tom Witosky, *New Battle Erupts in War of Sexes*, DES MOINES SUNDAY REG., Feb. 5, 1995, at 1D; and the allocation of 85 football scholarships when a comparable team could be supported by 50 scholarships divided among 85 players and supplemented by non-athletic need-based financial aid, *see, e.g.*, Donna Lopiano, *Sportsviews: Problems Solvable Without Damaging Success of Football*, USA TODAY (Washington, D.C.), May 9, 1995, at 2C.

134. The witness list also included strong advocates for gender equity, including spokespersons from the Women's Sports Foundation, the National Association of Collegiate Women Athletic Administrators, and the Athletic Director at Washington State University, which has achieved gender equity without cutting men's sports. *Gender Equity Hearings, supra* note 130 (witness list).

legislative action.[135] In response, DOE's OCR promised to issue additional policy guidance by the Fall of 1995.[136]

Rather than wait for DOE's OCR to issue policy guidance, the House Appropriations Committee included a restriction in an appropriations bill that would forbid DOE's OCR from spending any funds to enforce Title IX in athletics unless the Department issued policy guidance by December 31, 1995, which includes "objective criteria" clarifying prongs two and three of the three-part test.[137] Although the restriction, on its face, simply required OCR to "clarify" the three-part test, leading supporters of the amendment intended it to be a first step toward weakening Title IX.[138] A last minute compromise brokered by Representative Nancy Johnson (R-Conn.) and Representative Hastert made the restriction less objectionable to Title IX supporters by changing the word "objective" to "specific."[139] This change was made in response to protestations from Title IX supporters that the former language would allow schools to challenge the forthcoming policy guidance as being not sufficiently "objective" if they disagreed with its substantive standards. This was less of a danger with the modified language, as any new policy guidance would add more specificity to the agency's earlier pronouncements. The final bill, which passed in the House, included the Title IX restriction with the compromise language.

After the House passed the appropriations bill[140] with the Title IX restriction, DOE's OCR issued a proposed policy guidance clarifying the three-part test on September 20, 1995. The agency allowed a thirty day comment period for interested organizations to comment on the proposed draft before it issued the guidance in final form in January of 1996.

The policy guidance provides further clarity on how institutions may comply with prongs two and three of the test, and reaffirms the Department's commitment that a school may comply with Title IX by meeting any one of the three parts of the test. The guidance includes specific examples of fact patterns which would and would not comply with prong two, and clari-

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135. Letter to Secretary Cantu from Rep. McKeon and Rep. Gunderson, May 24, 1995 (on file with the National Women's Law Center).

136. Letter to Rep. McKeon and Rep. Gunderson from Secretary Cantu, June 9, 1995 (on file with the National Women's Law Center).

137. *See, e.g.*, Douglas Lederman, *House Bill Targets Enforcement of Federal Sex-Bias Law in College Sports*, CHRON. HIGHER EDUC. (Washington, D.C.), Aug. 4, 1995, at A26. The proposed policy guidance was issued on September 20, 1995, and issued in final form in January 1996. See *infra* text accompanying note 140.

138. A factsheet circulated by Rep. Ernest J. Istook, Jr. (R-Okla.), who introduced the amendment in the appropriations committee, attacked Title IX for hurting men's opportunities to participate in sports (on file with the National Women's Law Center). Rep. Istook introduced the amendment at the behest of the football and wrestling associations. *See* Letter to the Honorable Ernest Istook from Grant Teaff, Director of the American Football Coaches' Association, July 20, 1995 (on file with the National Women's Law Center); Letter to the Honorable Ernest Istook from Charles M. Neinas, Executive Director of the College Football Association, July 20, 1995 (on file with the National Women's Law Center); Letter to the Honorable Ernest Jim Istook from T.J. Kerr, President of the National Wrestling Coaches Association, July 20, 1995 (on file with the National Women's Law Center).

139. H.R. 2127, 104th Cong., 1st. Sess. § 308 (1995).

140. *Id.*

fies the criteria DOE's OCR will examine in determining unmet interest and ability on the part of the underrepresented sex under prong three. Those critics of DOE's OCR who are truly concerned with the need for clarity should be satisfied by the Department's new guidance. However, because the policy guidance does not retreat from the principles established in the Department's 1979 three-part test for compliance, it will not satisfy the football and men's minor sports advocates or their supporters in Congress, who contend that Title IX is hurting men's opportunities.[141]

The policy clarification should change the debate over whether the final appropriations law will include a restriction on spending to enforce Title IX similar to that passed by the House. At the time of this writing, no such restriction had been included in the Senate's companion appropriations bill[142], although such an amendment could still be added when the Senate considers the bill on the floor. It remains to be seen whether a similar or modified Title IX restriction will be added to the Senate bill before final passage, or, if added, whether such a restriction will become law.[143]

Most likely, the real war against Title IX will be fought not in the appropriations process through spending restrictions on DOE's OCR, but in the substantive arena over proposed legislation to weaken Title IX and its regulatory standards. Already the battle lines are being drawn with members of both the House and Senate taking sides on Title IX in dueling letters expressing support or concern for Title IX's application to intercollegiate athletics. Competing letters by Representative Hastert and members of the House Women's Caucus led by Representatives Mink and Woolsey have circulated in the House. Representative Hastert's letter urges House members to sign a letter to Norma V. Cantu, DOE's Assistant Secretary for Civil Rights, asking the Department to weaken the three-part test while the Women's Caucus' letter urges the Department not to retreat in its interpretations and enforcement of Title IX.[144]

Similar letters criticizing or supporting Title IX were also circulated in the Senate by Senator John B. Breaux (D-La.), with twenty-two Senate signatures, and Senators Bill Bradley (D-N.J.) and Ted Stevens (R-Alaska), with twenty-three Senate signatures.[145] The letter initiated by Senator Breaux ex-

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141. *See, e.g.*, Douglas Lederman, *U.S. Civil-Rights Office Attempts to Clarify Gender Equity in Sports*, CHRON. HIGHER EDUC. (Washington, D.C.), Sept. 29, 1995, at A65.

142. S. Rep. No. 145, 104th Cong., 1st Sess. (1995).

143. If a Title IX restriction were included in the final bill passed by the Senate, there would still be two opportunities to prevent the restriction from becoming law. First, it could be omitted during the House-Senate conference on the bill, and second, the President could veto the entire Labor-HHS appropriations legislation, as he has promised to do. *See, e.g.*, Robert C. Johnston & Mark Pitsch, *Senate Spending Bill Blocked; Loan Cuts Advance*, EDUC. WK. (Washington, D.C.), Oct. 4, 1995, at 17 (noting that President Clinton has threatened to veto both the House and Senate versions of the Labor-HHS appropriations bill because of cuts in education spending).

144. *See* Letter to Secretary Cantu from Rep. Hastert and 135 additional members of the House of Representatives, June 7, 1995 (on file with the National Women's Law Center); Letter to Secretary Cantu from Rep. Mink, Rep. Woolsey and 92 additional members of the House of Representatives, July 21, 1995 (on file with the National Women's Law Center).

145. *See* Letter to Secretary Richard W. Riley from Senator John Breaux and twenty-one additional Senators, Dec. 22, 1994 (on file with National Women's Law Center); Letter to Sec-

pressed concern that continued enforcement of the three-part test would harm college football programs, and that DOE's OCR mandates proportionality while ignoring prongs two and three of the three-part test. Secretary Cantu responded with a letter to Senator Breaux dated January 10, 1995, reassuring the Senators that DOE's OCR continues to equally apply all three parts of the test, and that schools may comply with any one of the three parts of the test to comply with Title IX. Although Senator Breaux indicated that he was satisfied with this response, at least one other Senator seemed less than convinced.[146] Senators Stevens and Bradley, joined by twenty-one other Senators, responded to the concerns raised by the Breaux letter in their own letter to Department of Education Secretary Richard W. Riley. The Bradley/Stevens letter expressed strong continued support for Title IX and addressed claims that Title IX has hurt men's sports programs.

It is unclear whether the anti-Title IX forces will generate enough support in Congress or the DOE to weaken Title IX's regulatory enforcement scheme. Although legislation modifying Title IX's substantive standards has not yet been introduced, such legislation may take the form of the changes proposed by Representative Hastert in his June 7, 1995 letter to Secretary Cantu. Representative Hastert proposed to weaken the three-part test by making prongs two and three of the test easier for schools to satisfy. For example, he suggested that institutions should be found to be in compliance with prong two if they have added an average of one sport for women every three years since Title IX was enacted. Under this formula, any institution that had added seven women's sports after 1972 would automatically comply with the law. Because most schools had few if any teams for women prior to 1972, and because most institutions now offer at least seven women's sports, this interpretation would render the three-part test virtually meaningless. In addition, Representative Hastert suggested that student interest under prong three be measured by college entrance exams. Under Representative Hastert's proposal, an institution would not be out of compliance under prong three if such exams did not show unmet interest, even if other more reliable measures, such as a thriving women's club sport which had been repeatedly denied varsity status, did demonstrate unmet interest on the part of the underrepresented sex. Overall, Representative Hastert's proposals would eviscerate the three-part test and halt any expansion of women's athletic opportunities required under Title IX.

While the specific terms of the debate over whether to weaken Title IX have not been set, the continuing controversy surrounding this issue ensures that the issue will not soon be forgotten. The anti-Title IX forces are preparing for a long battle, and congressional interest in revisiting Title IX remains uncertain.

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retary Richard W. Riley from Senators Bill Bradley, Ted Stevens and 21 additional Senators, May 15, 1995 (on file with the National Women's Law Center).

146. Knight, *supra* note 129, at C4 (noting Senator Breaux's satisfaction with the Cantu letter but quoting Senator J. James Exon (D-Neb.) as stating that he "wasn't particularly reassured").

B. Myth Meets Backlash: Quotas, Reverse Discrimination and Special Treatment for Football

A central tenet of the philosophy of the opponents of Title IX, and the primary argument invoked against the three-part test's use of "substantially proportionate" participation rates as a measure of compliance, is the argument that men are more interested in sports than women and so deserve to compete in greater numbers. This argument presupposes that interest levels can be accurately measured in a manner that does not simply reflect existing disparities in the opportunities available to male and female athletes.[147] Accepting that premise, the argument continues, any substantially proportionate requirement that does not take into account women's lesser interest in sports turns Title IX into a quota that enforces reverse discrimination against men. The football coaches and minor men's sport advocates are advancing this argument in the halls of Congress, hoping to benefit from the emotional impact of "quota" language that implies arbitrariness or lack of merit, paralleling the strategy of affirmative action opponents.[148]

Another major argument advanced in support of revising the three-part test or otherwise weakening Title IX is that football deserves special treatment, and that the DOE never properly implemented the Javits Amendment by taking into account the unique features of this sport.[149] The size of the sport, the fact that it is played only by men, and its unique potential to produce revenue are all advanced as justifications for treating football differently. Some men's minor sports groups have supported this strategy, believing that once football is exempted, their sports will no longer feel the squeeze of Title IX.

Neither argument survives scrutiny as a justification for weakening Title IX.

1. *The "Quota" Argument and the Myth of Reverse Discrimination.* In a cynical effort to benefit from the affirmative action debate in Congress and across the country, the leaders of the backlash against gender equity in sports are arguing that Title IX, as it has been applied by the courts and DOE's OCR, mandates reverse discrimination against men because the three-part test does not take into account men's relatively greater interest in sports than women's. The primary strategy of the Title IX opponents has been to emphasize proportionality as the single or the most important test applied by the courts and DOE's OCR, and then equate "substantially proportionate"

147. In support of the assertedly greater levels of athletic interest among men, Title IX opponents cite national data on participation ratios at the high school and college level, as well as studies asking young men and women if they plan to participate in sports at the college level. *See, e.g., Gender Equity Hearings, supra* note 130 at 200-07 (statement of Charles M. Neinas, Executive Director, College Football Association). None of the studies or data cited can accurately measure how men's and women's interest levels would compare if they were provided with equal opportunities to participate in athletics.

148. *See, e.g.,* Peter Applebome, *The Debate on Diversity in California Shifts,* N.Y. TIMES, June 4, 1995, at A1; Holly Idelson, *Pressure Builds for Retreat on Affirmative Action,* 1995 CONG. Q. WKLY. REP. 1578, 1578 (1995).

149. Gender and Athletics Act, *supra* note 18 and accompanying text.

with "quotas".[150]

a. *The Misplaced Focus on Substantial Proportionality.* The emphasis on the substantial proportionality test is not borne out by the facts. In actuality, all three parts of the test count equally both in the courts and in DOE's OCR enforcement actions.[151] Every single court decision to address the equal accommodation of athletic interest and ability has equally applied all three parts of the Policy Interpretation's three-part test.[152] Universities have lost these cases not because the courts have only looked at proportionality, but because they have failed to prevail on any one of the three parts of the test. DOE's OCR also looks at all three parts of the test, as is demonstrated by the fact that some universities have been found in compliance under prongs two and three even when they do not meet proportionality.[153]

A variation on the Title IX opponents' emphasis on proportionality as the primary measure of compliance is the assertion that, regardless of whether DOE's OCR and the courts currently apply all three prongs of the test, institutions which choose to comply with prongs two or three will eventually be forced to reach proportionality.[154] This would occur, the argument continues, because prongs two and three require an institution to continually add programs to keep pace with women's athletic interest. Only when a school reaches proportionality will it be free from its obligation to add new women's opportunities. However, if the underlying assumption of this argument is true - that women's interest will continue to outpace existing opportunities - it is difficult to see how the three-part test works an injustice because the very intent of Title IX was to open up opportunities for women as their interest increased.

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150. *See, e.g., Gender Equity Hearings, supra* note 130 at 151 (statement of T.J. Kerr, President of the National Wrestling Coaches Association) (mistakenly stating that DOE's OCR emphasizes proportionality and that the proportionality rule is a "gender quota"); Craig L. Hymowitz, *Losers on the Level Playing Field: How Men's Sports Got Sacked By Quotas, Bureaucrats and Title IX*, WASH. POST, Sept. 24, 1995, at 5 (Outlook); Lederman, *supra* note 140 at A65 (quoting a lawyer representing Brown University as calling the DOE's OCR's new policy guidance "an effort to 'strengthen the quota system' imposed by the courts in the Brown case.").

151. *See* Horner v. Kentucky High Sch. Athletic Ass'n, 43 F.3d 265 (6th Cir. 1994); *Roberts*, 998 F.2d 824 (10th Cir. 1993); *Cohen II*, 991 F.2d 888 (1st Cir. 1993); *Cohen III*, 879 F. Supp. 185 (D.R.I. 1995); Favia v. Indiana Univ., 812 F. Supp. 578 (W.D. Pa. 1992); *Gender Equity Hearings, supra* note 130 at 40 (statement of Secretary Cantu) (explaining that OCR applies all three prongs of the test equally).

152. *See* sources cited *supra* note 149.

153. *See, e.g.*, Tom Witosky, *Legal Action Possible Against ISU*, DES MOINES REG., Feb. 14, 1995, at 4S (discussing OCR ruling that Iowa State University complied with Title IX based on "its historic effort and commitment to meeting the interest expressed by women for athletic programs" despite the lack of substantially proportionate athletic opportunities for women compared to women's enrollment); *see also Gender Equity Hearings, supra* note 130 at 38, 40 (statement of Secretary Cantu) (stating that OCR applies all three prongs of the three-part test equally).

154. *See generally* Jeffrey H. Orleans, *An End to the Odyssey: Equal Athletic Opportunities for Women*, 3 DUKE J. GENDER L. & POL'Y 129 (1996) (discussing how institutions will eventually reach proportionality under Title IX).

At the heart of this argument is the belief that once a university has complied with prong two or three of the test, it should not have to make any additional changes in its athletic offerings to ensure that it stays in compliance. Such a result is neither possible nor desirable. A static test for compliance would fail to capture the core of Title IX - that men and women deserve equal athletic opportunity. The meaning of equal athletic opportunity for any given institution depends on the changing circumstances at that institution. It would hardly be equitable if a school were allowed to maintain compliance with Title IX simply because it had complied with prong two earlier by adding women's teams, but then subsequently halted expansion of women's opportunities despite growing interest among women to play sports. Indeed, the prong two standard, which permits an institution to come into compliance merely by making progress toward equalization of women's opportunities, is unusually lenient among civil rights laws. Similarly, if an institution fully accommodated women's athletic interest ten years ago under prong three, this fact alone should not render an institution in compliance if women currently have unmet athletic interests and receive disproportionately fewer athletic opportunities. Even compliance with prong one is not static, as enrollment may fluctuate or athletic offerings may change, requiring institutions who choose to comply under prong one to accommodate those changes in order to stay in compliance.

Rather than providing any valid reasons for altering the three-part test, the argument that prongs two and three ultimately will require proportionality is simply another effort to make proportionality, and by extension quotas, the focus of the debate.

b. *The Misuse of the "Quota" Label.* Even if substantially proportionate participation rates were the single or primary measure of compliance, the quota label would still be inappropriate. The argument that requiring substantially proportionate participation rates establishes a quota system which grants preferential treatment to women has been heavily relied upon by Title IX opponents without regard to its inapplicability to intercollegiate athletics. Advocates of this position have relied on analogies to other educational benefits to attack the use of proportionality in athletics. They argue that the use of proportionality as a measure of equity in intercollegiate athletics is tantamount to invoking quotas requiring a particular racial or gender balance in academic departments, band, or other academic or extracurricular activities.[155] This argument obscures the fundamental reality that competitive athletics stands alone as virtually the only educational program or activity covered by Title IX which offers separate opportunities on the basis of sex.[156]

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155. *See, e.g., Gender Equity Hearings, supra* note 130 at 14-17 (testimony of Rep. Hastert); Amicus Curiae Brief for Baylor Univ. et al. at 28, *Cohen III*, 879 F. Supp. 185 (D.R.I. 1995); *appeal docketed*, No. 95-2205 (1st Cir. Nov. 6, 1995) (mistakenly stating that Title IX's substantial proportionality test in athletics would "presumably" apply to college course and seminars with limited enrollment).

156. *See* Kelley v. University of Ill., 35 F.3d 265, 270 (7th Cir. 1994) ("Congress itself recog-

Virtually all intercollegiate athletic programs sponsor sex-segregated teams. Unlike in employment, where men and women compete against one another for the same jobs, male and female college athletes compete separately for slots on male and female teams. While there are no inherent limits on the percentage of women or men who may fill the jobs available in a particular workplace, the nature of intercollegiate athletics itself sets gender-based limits on the percentage of men and the percentage of women who may participate in the program. Because intercollegiate athletic programs offer sex-separate teams, the selection of teams, hiring of coaches, budgeting, and recruiting together set a quota by determining the percentage of male and female athletes who will be allowed to participate in the program.[157] Consequently, while the use of the word quota to describe the substantially proportionate participation rate measure in intercollegiate athletics makes for provocative rhetoric, it is not accurate because the university itself sets a quota for the percentage of males and females who may participate in intercollegiate athletics. The relevant question is not whether there should be a gender-based quota in intercollegiate athletics, but whether universities should continue to reserve 67% of their varsity athletic slots for men and only 33% for women, or whether it should more closely parallel the percentages of men and women attending the university.

c. *The Relative Interest Argument.* The implicit assumption underlying the quota or reverse discrimination argument is that the three-part test is unfair to men because it assumes that men and women are equally interested in sports. If it can be shown that men are more interested in playing sports than women, the argument continues, then the three-part test actually discriminates against men. This argument has repeatedly surfaced in the *Cohen* litigation, where Brown has attempted to use surveys to show that its provision of fewer athletic opportunities for women reflects women's lesser interest in sports, so that increasing women's share of opportunities would discriminate against men.[158] In the argument advanced by Brown, if 500 men and 250 women are interested and able to play sports, the university should only have to accommodate both genders in proportion to their respective interest. Under this scenario, offering 100 slots for men to play sports and 50 to women would comply with Title IX.[159]

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nized that addressing discrimination in athletics presented a unique set of problems not raised in areas such as employment and academics."). The Title IX regulations specifically permit sex separate athletic teams where team selection is based on competitive skill or where contact sports are involved. 34 C.F.R. § 106.41(b) (1995). The only other sex-separate educational programs or activities contemplated by Title IX are participation in contact sports during physical education, sex education at the elementary and secondary level, and choirs. *Id.*

157. *See Cohen III*, 879 F. Supp. 185, 202–03 (D.R.I. 1995) (recognizing that Brown "predetermines" the gender balance of its intercollegiate athletics program through the selection of sports, recruiting of athletes, hiring of coaches with preferences for team sizes, budgeting of teams, and use of admissions preferences for athletes).

158. *See Cohen II*, 991 F.2d 888 (1st Cir. 1993); *Cohen III*, 879 F. Supp. at 185.

159. This analogy was explicitly rejected by the Court of Appeals for the First Circuit in *Cohen II*, 991 F.2d at 899.

The rejection of this argument by the courts in *Cohen*, both by the First Circuit during the preliminary injunction stage of the litigation[160] and by the district court during the trial on the merits,[161] demonstrates a number of its failings. First, and most significantly, there is no conceivable measure of interest that fully accounts for the fact that women have had, and continue to have, significantly fewer opportunities to participate in interscholastic and intercollegiate sports in this country. As the First Circuit observed in *Cohen*:

> Given that the survey of interests and abilities would begin under circumstances where men's athletic teams have a considerable head start, such a rule would almost certainly blunt the exhortation that schools should 'take into account the nationally increasing levels of women's interests and abilities' and avoid 'disadvantag[ing] members of an underrepresented sex . . . .'"[162]

Any measure that purports to compare the interest of women and men in participating in sports will be affected by the present mix of opportunities for men and women. For example, the answers given by high school students to questions about what college sports they want to participate in will inevitably be affected by what sports they have had a chance to play in high school. These answers, in turn, will have been influenced by their opportunities for college athletic scholarships and the mix of sports offered at the college level.

No survey population avoids this problem. For example, as the district court recognized in *Cohen*, any survey of the student body will be driven by the university's athletic offerings, recruiting practices, admissions preferences, and athletic scholarships, if available. Particularly at Division I schools that rely on recruiting to select their intercollegiate athletes, the results of a survey of athletic interest in the student body is predetermined by the university's selection of sports and recruiting practices. For example, if a university recruits twice as many men as women for its intercollegiate athletic offerings, a survey which finds more men than women who claim to be interested in participating in intercollegiate athletes is not a true measure of relative interest. Similarly, a survey of student applicants to a university will be skewed by that university's existing opportunities. Students who want to participate in a sport not offered at a particular university may not apply there.[163]

The largest potential survey pool, all high school graduates qualified for admission to a university, is also inadequate as a survey population. In addition to the difficulties involved in identifying and surveying such a potentially large population, this grouping does not escape problems inherent in the use of such surveys as an objective measure of interest. Because

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160. *Id.* at 888.
161. *Cohen III*, 879 F. Supp. at 185.
162. *Cohen II*, 991 F.2d at 900 (quoting 44 Fed. Reg. 71,413, 71,417 (1979)).
163. *Cohen III*, 879 F. Supp. at 206.

opportunities for girls in interscholastic athletics continue to be limited at the high school level, a comparative survey of the relative athletic interest in this pool by gender will reflect the disparity in opportunities provided at both the high school and college level. In a world where men receive nearly twice as many college athletic scholarships as women, the incentive for sports participation at the high school and college levels cannot be considered equal.[164] Adopting a relative interest standard, which cannot take into account the discriminatory differences in athletic opportunities provided to men and women, will only solidify existing inequities in opportunity.

In addition to the insurmountable problems of identifying an appropriate survey population, no objective and reliable measure of interest exists to quantify an individual's actual interest in participating in intercollegiate athletics.[165] Survey questions cannot accurately determine whether a person who reports to have interest in a particular sport would actually participate in intercollegiate athletics if given the opportunity, nor can surveys differentiate between interest in participating in intramural, club, or intercollegiate athletic programs.[166] Even if a survey specifically asked respondents to differentiate between interest in varsity and other levels of sports competition, the results would not be reliable indicators of who would actually participate at each level.[167] Moreover, interest surveys cannot account for gender differences in reporting degrees of interest, such as men being more likely to report milder interest in athletics, and women more likely to report only serious interest.[168] Persons who report no interest in participating in intercollegiate athletics may well decide to participate in a sport when given the opportunity, particularly if athletic scholarships are available.

As a practical matter, requiring student-plaintiffs to first assess relative athletic interest among men and women in some survey population before bringing a Title IX claim would create an unworkable standard.[169] Applying this requirement, student-plaintiffs would have to first assess the relative interest between men and women on their campus before filing a Title IX complaint. The existing three-part test, on the other hand, enables student-plaintiffs to rely on outwardly visible indicia of unmet interest, such as a successful women's club program, to demonstrate unmet interest under the

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164. *See* Debra E. Blum, *Slow Progress on Equity: Survey of Division I Colleges Show Little Has Changed for Female Athletes*, CHRON. HIGHER EDUC. (Washington, D.C.), Oct. 26, 1994, at A45 (reporting results of a survey finding that women receive only 35.7% of the money spent on athletic scholarships).

165. The district court in *Cohen III* recognized the lack of such a measure. *Cohen III*, 879 F. Supp. at 205 n.43.

166. *Id.* at 206 n.45 (noting that Brown's survey could not differentiate between interest in varsity athletics, as opposed to club, intramural, and recreational sports).

167. *Id.* at 205 n.43 (noting that Brown's expert on interest surveys acknowledged "that there is no single factor by which to measure th[e] degree of athletic interest that will reliably be acted upon when the opportunity is present.").

168. *See id.* at 206 n.46 (citing acknowledgment by Brown's expert that only a small minority of those indicating an interest in varsity sports will actually participate given the opportunity, and that differences in the seriousness of interest reported by men and women can result in major shifts in female/male interest ratios).

169. *See Cohen II*, 991 F.2d 888, 900 (1st. Cir. 1993) (recognizing quantification problems such a standard would present for student-plaintiffs and universities monitoring self-compliance).

third prong without conducting a campus-wide relative interest survey. Students will typically be unable to afford the cost of such surveys and analysis, and may have difficulty finding legal representation that will pay the costs of expert witnesses required to assess relative interest.[170]

The argument that relative interests of men and women in sports can be accurately measured independent of disparities in existing opportunities is also contrary to the intent and purposes underlying Title IX, as well as past experience. Congress enacted Title IX against a backdrop of overwhelming evidence of sex discrimination in education.[171] Shortly after Title IX was enacted, intercollegiate athletics became a focal point in congressional debates over Title IX. Congressional debates on the Title IX regulations in 1975 focused on the athletics regulations and recognized persistent and widespread discrimination against women in intercollegiate athletics.[172] In documenting this discrimination, Congress recognized that women's athletic interest and ability had been, and was being, suppressed by their limited opportunities. For example, as Senator Birch Bayh, the primary Senate sponsor of Title IX, observed that, ". . . [i]nasmuch as we are trying to compensate for generations of stereotype[s], I think it is going to take us some time before women really are going to be able to develop full potential of their skills."[173] Again, when Congress undertook to reverse the Supreme Court's decision in *Grove City*, the congressional debate reflected a remarkable consensus in recognizing sex discrimination in intercollegiate athletics as a serious problem.[174]

Similarly, the Policy Interpretation, which was the product of an extensive notice and comment period during which the agency received over

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170. Hiring an expert to assess relative interest on campus can be extremely costly. Brown University, for example, reportedly spent over $100,000 on surveys attempting to assess men's and women's relative athletic interest at Brown. Richard Sandomir, *Brown is Told Sports Program Cheats Women*, N.Y. TIMES, Mar. 30, 1995, at B13. Because expert fees are excluded from attorney's fees and costs recoverable from a losing defendant, very few, if any, plaintiffs' attorneys would be willing to undertake such an expense. *See* Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987) (refusing to award plaintiffs the costs of expert witness fees as part of recoverable costs and fees in civil rights cases).

171. *See, e.g.*, 44 Fed. Reg. 71,413, 71,423 (1979) ("[t]he legislative history of Title IX clearly shows that it was enacted because of discrimination that currently was being practiced against women in educational institutions."); 118 CONG. REC. 5804 (1972) (remarks of Sen. Birch Bayh describing Title IX as "a strong and comprehensive measure [that would] provide women with solid legal protection from the persistent, pernicious discrimination which is serving to perpetuate second-class citizenship for American women.").

172. *See, e.g., Hearings, supra* note 21 at 165 (testimony of Rep. Patsy Mink) ("[s]uch an exemption [of intercollegiate athletic programs from Title IX] would permit sports programs to continue to discriminate against women"); *id.* at 175 (testimony of Sen. Birch Bayh) ("no one making the argument that athletics should not be covered under Title IX does so on the premise that there is no discrimination"); *id.* at 197 (testimony of Rep. Stewart McKinney) (recognizing that in 1975, the women's total intercollegiate athletic budget was only 2% of the men's total).

173. *Id.* at 179.

174. *See Cohen II*, 991 F.2d 888, 894 (1st Cir. 1993) (observing that "the record of the floor debate leaves little doubt that the enactment was aimed, in part, at creating a more level playing field for female athletes.").

For a discussion of the *Grove City* decision and subsequent legislative action, see *supra* Part I(B)(4)(a) and (b).

10,000 comments, also recognizes the link between interest and opportunity, stating that "[p]articipation in intercollegiate sports has historically been emphasized for men but not women. Partially as a consequence of this, participation rates of women are far below those of men."[175] Limiting women's athletic opportunities to their present levels based on some measure of the current relative interest between men and women, where women's interest continues to be suppressed by limited opportunities, would contravene this recognition.

Women have experienced and continue to experience discrimination in all of the elements of intercollegiate athletic programs that develop interest and ability — recruitment among high school athletes, scholarships, prestige, operational support, publicity, and the opportunity to participate in a competitive program. Consequently, without a level playing field, any measure purporting to compare men's and women's interest in intercollegiate athletics will simply reinforce the existing disparity in opportunities.

History has proven that athletic interest and ability expand as new opportunities are created. The refrain from the movie FIELD OF DREAMS[176] could well describe the history of women's athletics in this country - if you build it, they will come. As schools began to create women's athletic programs in response to Title IX, participation by female students in organized sports soared, increasing by 600% at the high school level between 1971 and 1978.[177] Women's athletic participation at the college level also sustained huge increases as Title IX created new athletic opportunities for women. In 1971, prior to the enactment of Title IX, less than 32,000 women played varsity sports at the college level.[178] In 1993–94, over 105,000 college women competed in NCAA sports.[179] Women's interest in participating in sports has always kept pace with expansions in women's athletic opportunities.

d. *Reverse Discrimination Claims in the Courts.* Every court to date that has considered reverse discrimination claims challenging the three-part test has rejected these claims.[180] Such claims have been brought by male athletes where, for budgetary reasons, universities have sought to downsize their athletic programs but have been unable to cut women's teams without

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175. 44 Fed. Reg. 71,413, 71,419 (1979). The Policy Interpretation also documents extensive discrimination against women in intercollegiate athletics, noting that "disproportionately more financial aid has been made available for male athletes than for female athletes . . . . Likewise, substantial amounts have been provided for the recruitment of male athletes, but little funding has been made available for the recruitment of female athletes." *Id.*

176. FIELD OF DREAMS (Universal Studios, 1989).

177. *See id.* During this same time period, women's participation in varsity athletics at the college level increased 102%.

178. *Id.*

179. *NCAA News Release, supra* note 2.

180. *See* Kelley v. University of Ill., 35 F.3d 265 (7th Cir. 1994); *Roberts II*, 998 F.2d 824 (10th Cir. 1993); Gonyo v. Drake Univ., 879 F. Supp. 1000 (S.D. Iowa 1995). At least one such challenge was settled out of court without any court decision in the case. *See* Caruso v. Broyles, No. 93-5089 (W.D. Ark. filed May 27, 1993). In *Caruso*, male swimmers sued the University of Arkansas for dropping the men's swimming team. The University quickly settled the case by reinstating the team. *Id.*

bringing themselves further out of compliance with Title IX.[181] Such claims have also arisen where universities, in defending against Title IX suits by female athletes brought under the three-part test, have challenged the three-part test as sanctioning reverse discrimination against male athletes.[182] In both contexts, the reverse discrimination claims have alleged violations of the rights of male students under both Title IX and the Equal Protection Clause of the Fourteenth Amendment.[183] Where an institution provides male students with a disproportionately greater share of athletic opportunities than female students, neither Title IX nor the Equal Protection Clause will support a claim that dropping a men's team or adding a women's team constitutes unlawful discrimination against men.

i. *Reverse discrimination claims under Title IX.* Claims by male athletes challenging the elimination of a men's sport under Title IX are subject to the same three-part test that courts have applied to Title IX claims by female athletes. However, because the three-part test focuses on the opportunities provided to the underrepresented sex, at most institutions discrimination claims brought by male athletes will not succeed under Title IX. For example, male athletes who sue their university for dropping a men's sport will not be able to carry their burden of proof on the first prong if the athletic opportunities allocated to men overall are not substantially fewer than men's share of enrollment. Because a school need only comply with one of three parts of the test to comply with Title IX, reverse discrimination claims will fail under prong one of the test where men are not the underrepresented sex, without regard to prongs two or three.

Court decisions have applied this analysis in rejecting Title IX challenges brought by male athletes to university decisions eliminating men's teams. For example, in *Kelley v. University of Illinois*,[184] male swimmers challenged the University's decision to eliminate varsity men's swimming, while retaining the varsity women's swimming program, under both Title IX and the Equal Protection Clause of the Fourteenth Amendment. The decision had been motivated, in part, by the University's $600,000 deficit in its athletic budget. Men's swimming was selected for termination specifically because it was a historically weak program, was not widely offered at high schools, and did not have a large spectator following. Because the University recognized that dropping a women's sport would place it at risk of violating Title IX given the disproportionately fewer athletic opportunities available to women at the University, it chose not to eliminate women's swimming.[185]

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181. *See Kelley*, 35 F.3d at 265; *Gonyo*, 879 F. Supp. at 1000; *Caruso*, No. 93–5089.

182. *See Roberts*, 998 F.2d at 824; *Cohen II*, 991 F.2d 888, 890 (1st. Cir. 1993).

183. U.S. CONST., amend. XIV, § 1.

184. 35 F.3d 265 (7th Cir. 1994).

185. Had the University eliminated women's swimming, it would have been out of compliance with Title IX under the three-part test. *Id.* at 269. In 1993, female students comprised 44% of the undergraduate enrollment, but only 23.4% of varsity athletes at the University. In addition, dropping women's swimming would have put the school out of compliance with prong three, as the University would not be fully and effectively accommodating the athletic interests of the underrepresented sex. Finally, although no court has explicitly ruled on this

In applying the three-part test to the plaintiffs' Title IX claim, the Seventh Circuit ruled that the male swimmer's rights were not violated because men were not the underrepresented sex, and therefore could not succeed on prong one of the test.

Similar reasoning was applied to reject a Title IX claim by male athletes in *Gonyo v. Drake University*.[186] In *Gonyo*, male wrestlers challenged their University's decision to discontinue its men's varsity wrestling team on both Title IX and equal protection grounds.[187] Drake had dropped its men's wrestling program as part of a plan to reduce its athletic budget. Like the University of Illinois, Drake's decision to drop the men's sport was made in the context of an athletic program that provided substantially more athletic opportunities for men than women. Men were 42.8% of the student body at Drake, yet received 75.3% of the total varsity athletic slots at the University.[188] In granting summary judgment against the plaintiffs, the court ruled that Drake's elimination of a men's team did not establish a Title IX violation because men were significantly overrepresented in the total athletic program.[189]

The courts' rejection of Title IX claims by male athletes challenging the elimination of a particular men's sport where men remain overrepresented in the overall athletics program properly reflects Title IX's focus on the rights of men and women as athletes, rather than as members of particular teams.[190] This balance reflects the policy determination that an overall program comparison is a superior and more flexible test than requiring team-by-team equivalence — a standard which would require the men's and women's athletic programs to mirror one another. A team-by-team approach would frequently disadvantage women because the greater opportunities and benefits provided to men who play football would have no counterpart in the women's athletics. Moreover, men and women may have differing levels of interest in particular sports, and a team-by-team comparison may not properly reflect those different interests.[191] For example, at a particular in-

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question, dropping women's swimming in itself probably would have placed the University in violation of prong two because the elimination of a women's team, despite continuing interest in the program, would be inconsistent with a history of continuing program expansion for the underrepresented sex. As the Seventh Circuit observed, the University's decision not to cut women's swimming was "extremely prudent." *Id.*

186. 879 F. Supp. 1000 (S.D. Iowa 1995).

187. *Id.* at 1001.

188. *Id.* at 1002.

189. The court also rejected the plaintiffs' Title IX challenge to the University's allocation of a greater share of athletic financial assistance to female than male athletes. Men at Drake were 75.3% of varsity athletes, but received 47% of athletic scholarships. *Id.* at 1002. The court ruled that the scholarship disparity did not violate the Title IX regulations, which require reasonable opportunities for the awarding of athletic scholarships for each gender in proportion to their athletic participation, 34 C.F.R. § 106.37 (1995). *Gonyo*, 879 F. Supp. at 1005. In rejecting this claim, the court ruled that the scholarship regulation "was never intended to prevent schools from allocating resources in a way designed to encourage participation by an underrepresented gender." *Id.*

190. *See* 44 Fed. Reg. 71,413, 71,422 (1979) (observing that the Title IX regulation requires equal opportunity between men and women on a program-wide basis, and that "Title IX protects the individual as a student-athlete, not as a basketball player, or swimmer.").

191. *See* Kelley v. University of Ill., 35 F.3d 265, 271 (7th Cir. 1994) (recognizing that it was not unreasonable for HEW to reject a team-by-team comparison as "a rigid approach that

stitution, women may have more interest in playing volleyball than soccer, while men may prefer soccer to volleyball. Rather than requiring that institution to offer the same sport to both groups, the current standard permits the school to offer volleyball to women and soccer to men, while treating both sets of athletes comparably. Consequently, male athletes challenging their university's decision to drop their sport under Title IX will not succeed where the opportunities provided to male athletes overall are underrepresentative.

Courts have also rejected reverse discrimination arguments by universities challenging the three-part test itself as a violation of Title IX in defending against Title IX suits by female athletes. In defending such cases, universities have argued that courts should reject the DOE's three-part test as a valid interpretation of Title IX because it violates § 1681(b) of the Act. Section 1681(b) provides that:

> Nothing contained in subsection (a) of this section shall be interpreted to require any education institution to grant preferential 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. *Provided*, That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence 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 one sex.[192]

Both Brown University and Colorado State University argued that the three-part test mandates statistical balancing in violation of this provision. But both the First and Tenth Circuits rejected this argument on the ground that the three-part test provides three independent avenues for Title IX compliance and does not mandate proportionality.[193]

In addition to the reasoning of the First and Tenth Circuits, the argument that the three-part test constitutes preferential treatment in violation of § 1681(b) should be rejected for another reason. This section was designed to prohibit quotas in university admissions and hiring,[194] and does not apply to the use of substantial proportionality as a measure of equity in the con-

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denies schools the flexibility to respond to the differing athletic interests of men and women.").

192. 20 U.S.C. § 1681(b) (1994).

193. *See Roberts II*, 998 F.2d 824, 829 nn. 5–6 (10th Cir. 1993); *Cohen II*, 991 F.2d 888, 895 (1st Cir. 1993); *see also* Kelley v. University of Ill., 35 F.3d at 271 (rejecting plaintiffs' argument that the three-part test establishes a gender-based quota system contrary to the mandates of Title IX, although not specifically addressing § 1681(b)).

194. HOUSE CONF. REP. NO. 798, 92d Cong., 1st Sess. (1971), *reprinted in* 1972 U.S.C.C.A.N. 2608, 2671; *see also* 117 CONG. REC. 39,261–62 (remarks of Rep. Albert H. Quie (R-Minn.).

text of intercollegiate athletics, which by virtue of offering sex-separate teams itself requires a particular gender ratio of participants.[195] An institution which provides intercollegiate athletic opportunities for each gender in numbers substantially proportionate to enrollment is not granting preferential or disparate treatment to the members of either sex, as prohibited under § 1681(b). Because intercollegiate athletics is a sex-segregated activity, gender is already a requirement for participation on an athletic team. Rather than requiring preferential or disparate treatment based on gender, requiring the offering of substantially proportionate opportunities in this context is a measure of equal treatment and nondiscrimination.

ii. *Reverse discrimination claims under the Equal Protection Clause.*[196] Claims that Title IX's three-part test requires reverse discrimination against male athletes are also unsupported by the Equal Protection Clause of the United States Constitution. Both male plaintiffs alleging that a university decision to discontinue their team violates equal protection,[197] and institutions claiming in defense of Title IX suits that the application of the three-part test discriminates against men, have raised such claims.[198] Neither challenge is consistent with equal protection principles, and courts have rejected such claims in both contexts.

In equal protection challenges by male athletes whose teams have been eliminated, courts have ruled that the application of Title IX to a university program which results in the elimination of a men's team, with no corresponding elimination of a women's team, does not violate equal protection. For example, in *Kelley*, the Court of Appeals for the Seventh Circuit upheld the three-part test as applied to the University based on Congress' broad powers to remedy past discrimination.[199] The court concluded that, to the extent that the three-part test requires a school to consider gender in reducing its athletic offerings, such consideration of gender is substantially related to the important government interest of remedying sex discrimination in intercollegiate athletics and therefore complies with equal protection.[200] Similarly, the court in *Gonyo* rejected the equal protection claim of the male wrestlers, holding that the consideration of gender in decreasing athletic programs complies with equal protection because it properly assists members of the underrepresented sex, as is permissible under the Supreme Court's decision in *Mississippi University for Women v. Hogan*.[201]

Institutions defending Title IX claims have also failed to establish that the three-part test violates equal protection.[202] In *Cohen*, Brown argued that

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195. *See Cohen III*, 879 F. Supp. at 202 (crediting testimony of plaintiffs' expert that "a university 'predetermines' the approximate number of athletic participants and the male to female ratio" through its athletic offerings).

196. U.S. CONST., amend. XIV, § 1.

197. *Kelley*, 35 F.3d at 265; Gonyo v. Drake Univ., 879 F. Supp. 1000 (S.D. Iowa 1995).

198. *See Cohen II*, 991 F.2d at 900.

199. *Kelley*, 35 F.3d at 272 (citing Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 565–66 (1990)).

200. *Id.*

201. 458 U.S. 718 (1982); *see also Gonyo*, 879 F. Supp. at 1006.

202. *See Cohen II*, 991 F.2d at 900.

by requiring the full and effective accommodation of the athletic interests of the underrepresented sex, without regard to whether the institution is fully accommodating the interests of overrepresented sex, the three-part test accords preferential treatment to women in violation of equal protection.[203] The Court of Appeals for the First Circuit rejected this argument for two reasons. First, the court rejected Brown's view of the three-part test as conferring preferential treatment. The court observed that Brown's characterization of the test as preferential treatment assumes that, given equal opportunity, women are less interested in participating in varsity sports than men.[204] The court explicitly rejected this assumption. Second, the court held that even if the test did constitute a gender preference, it would still pass constitutional muster because it fits within Congress' design to remedy extensive discrimination against women in intercollegiate sports.[205] Like the courts in *Kelley* and *Gonyo*, the First Circuit relied on *Metro Broadcasting v. FCC*[206] in support of its deference to Congress' broad powers to remedy past discrimination.[207]

Both rationales relied on by courts in rejecting reverse discrimination challenges to the propriety of the elimination of men's teams and to the three-part test are justified under equal protection principles. First, neither the three-part test nor its application to a university's decision to reduce its athletic offerings constitutes a gender-based classification which disadvantages men as a group under the Equal Protection Clause. In the world of intercollegiate athletics, a decision to drop a team will always have a gender-based component because of the existence of sex-separate teams. Because reverse discrimination claimants do not challenge the sex-based classification of separate men's and women's athletic teams,[208] their challenge rests on the characterization of a decision to drop a men's team as a gender-based classification that disadvantages men.[209] However, dropping a men's athletic team is not a gender-based classification that disadvantages men when men continue to retain the lion's share of athletic opportunities. Rather, such a decision is a gender-based classification that lessens the existing gender-based preference in favor of men, and therefore does not discriminate against men under the Equal Protection Clause.

Second, even if the three-part test or its application to athletic cutbacks was viewed as a gender-based classification that disadvantages men for equal protection purposes, it would still be constitutionally permissible be-

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203. *Id.*

204. *Id.*

205. *Id.* at 901.

206. 497 U.S. 547 (1990).

207. *Cohen II*, 991 F.2d at 901.

208. *See* Kelley v. University of Ill., 35 F.3d 265, 270–71 (7th Cir. 1994); Gonyo v. Drake Univ., 879 F. Supp. 1000, 1002 (S.D. Iowa 1995). Moreover, the provision of sex-separate intercollegiate athletic teams would easily survive such a challenge as it is directly related to ensuring that women have a meaningful opportunity to compete in intercollegiate athletics. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 728 (1982) (gender-based classifications may be upheld where justified by a compensatory purpose).

209. *Hogan*, 458 U.S. at 724 (requiring gender-based classifications which disadvantage members of one sex to be substantially related to an important government interest to pass constitutional muster).

cause it is designed to remedy past discrimination against women in intercollegiate sports.[210] Courts rejecting reverse discrimination claims on this ground have relied in part on Congress' broad powers to remedy discrimination upheld under *Metro Broadcasting*.[211] This past term, in *Adarand Constructors, Inc. v. Peña*,[212] the Supreme Court overruled its holding in *Metro Broadcasting* that Congress is entitled to greater deference than state and local governments in enacting race-based affirmative remedial measures. However, the Court's recent decision in *Adarand* should not change the result in reverse discrimination challenges to the three-part test or its applications.

As an initial matter, *Adarand* should have no effect on the analysis of gender-based classifications designed to remedy discrimination against women. In *Adarand*, the Court applied strict scrutiny to race-based affirmative remedial measures enacted by Congress, which is the standard used by courts to evaluate racial discrimination. As long as gender-based classifications which discriminate against women are subjected to a lesser standard of intermediate scrutiny, it would defy common sense to apply strict scrutiny to gender-based classifications designed to remedy discrimination against women.[213]

Moreover, even if strict scrutiny were extended to gender-based discrimination against women,[214] the use of gender as a factor in determining how to decrease athletic offerings in an athletics program that provides more offerings to men should easily survive even strict scrutiny. Analyzed under strict scrutiny, a gender-based classification would be permissible if it was narrowly tailored to serve a compelling government interest.[215] Remedying ongoing discrimination against women in an athletics program is undoubtedly a compelling state interest.[216] Unlike the race-based affirmative action plan in *Croson*, which did not survive strict scrutiny because it was premised

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210. *Id.* at 728 ("A gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened.").

211. 497 U.S. at 565–66.

212. 115 S. Ct. 2097 (1995).

213. Despite the lack of a legal basis for applying strict scrutiny to gender-based affirmative action programs, however, some courts have arguably incorrectly extended the Supreme Court's decision in City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), which applied strict scrutiny to municipal race-based affirmative action plans, to gender-based affirmative action plans as well. *See* Brunet v. City of Columbus, 1 F.3d 390 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 1190 (1994); Conlin v. Blanchard, 890 F.2d 811 (6th Cir. 1989); Cone Corp. v. Hillsborough County, 723 F. Supp. 669 (M.D. Fla. 1989). *But see*, Associated Gen. Contractors, Inc. v. City & County of San Francisco, 813 F.2d 922, 941 (9th Cir. 1987) (refusing to interpret *Croson* as requiring strict, rather than intermediate scrutiny, in evaluating gender-based affirmative action plan).

214. *See* J.E.B. v. Alabama, 114 S. Ct. 1419, 1425 n.6 (1994) (finding it unnecessary to decide whether gender-based classifications should be subject to strict scrutiny); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 n.9; Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 373 (1993).

215. *See, e.g., Adarand*, 115 S. Ct. 2097, 2117 (1995) ("When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the 'narrow tailoring' test this Court has set out in previous cases.").

216. *See, e.g.*, United States v. Paradise, 480 U.S. 149, 167 (1987) (state interest in remedying past discriminatory conduct was sufficiently compelling).

on correcting general societal discrimination rather than discrimination in the affected industry,[217] the use of gender in this context directly addresses the discrimination by the affected institution itself.

The use of gender in cutting athletic offerings which are already slanted toward men is also narrowly tailored toward furthering the compelling state interest in remedying the school's discrimination against women athletes. Because intercollegiate athletics, unlike the construction industry involved in *Croson*, provide sex-segregated opportunities, gender is a necessary component of any plan to redress discrimination in the allocation of athletic opportunities between men and women.[218] Indeed, where an institution has decided to reduce athletic offerings in a program that provides more opportunities to men, the fit between the use of a gender-based classification to reduce men's rather than women's opportunities, and the goal of remedying ongoing institutional discrimination against women, could not be closer.

Despite widespread allegations of reverse discrimination by opponents of Title IX's three-part test for compliance, such claims are not supported by legal principles. The frustration and hardship experienced by male athletes who have lost their sports in budget cuts that have not similarly eliminated women's teams is entirely understandable, but so is the frustration and hardship suffered by female athletes who have never had the opportunities afforded their male counterparts. Cuts in men's programs do not amount to reverse discrimination when men retain the lion's share of athletic opportunities. While allegations of reverse discrimination are to be expected in an environment of program cutbacks, especially if the university making the cuts blames gender equity as the culprit behind such eliminations, such claims and allegations are both legally and factually untenable.

2. *Football is Unique: The Third Sex Rationale.* Another argument advanced by Title IX opponents to weaken the standards that have been applied by the DOE and the courts is that the three-part test does not take into account the unique particularities of the sport of football.[219] Because the average football squad has between 85 and 100 players, football's large numbers are blamed for the failure of many schools to satisfy the substantial proportionality prong of Title IX compliance.[220] In addition, football propo-

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217. *See Croson*, 488 U.S. at 499–504 (striking down a municipal set-aside program requiring contractors to award 30% of the dollar amount of city contracts to minority-owned businesses because it found that the City Council had failed to make specific findings of race discrimination in the local construction industry).

218. *Cf. Croson*, 488 U.S. at 507 (finding race-based plan not narrowly tailored to ending discrimination where race-neutral alternatives were not considered).

219. *See* Letter from Charles M. Neinas, Executive Director, College Football Association, to Cedric W. Dempsey, Executive Director, National Collegiate Athletic Association (Oct. 10, 1994) (arguing that OCR has not taken into account the unique size and cost of football in interpreting the Title IX regulations) (on file with the National Women's Law Center); *Football Coaches Take Aim at Title IX*, USA TODAY (Washington, D.C.), Jan. 12, 1995, at C4.

220. *Football Coaches Take Aim at Title IX*, *supra* note 219, at C4 (arguing that meeting proportionality would jeopardize football); *see also Scorecard: The Third Sex*, *supra* note 132, at 15 (noting efforts by football lobby to use large size of football squads to argue for exemption of football from Title IX).

nents claim that football's ability to generate revenue, coupled with the size of the squads and the fact that it is a sport played only by men, justifies taking football out of the mix in calculating whether substantially proportionate opportunities are available to women.[221]

Neither the large size of football teams nor the fact that the sport is played primarily by men justifies treating it differently than any other sport. The large size of a football squad does not make football players a third sex.[222] Institutions can offer an equivalent number of opportunities for women to participate in athletics by offering several women's teams. Precisely because football provides so many opportunities for men to play sports, many institutions will have to offer more sports for women than men to provide an equal opportunity for men and women to participate in athletics. Moreover, while football is played primarily by men, there are a number of sports now played primarily by women in this country, including volleyball, field hockey, and synchronized swimming with which to counter such imbalance. There is no shortage of sports for women to play to balance out the opportunities provided to male athletes by football. Indeed, the three-part test is sufficiently flexible to take into account the different sizes of sports and different sports interests of men and women by evaluating equal opportunity on a program-wide basis, rather than on the basis of a team-by-team comparison.[223]

Finally, the argument that football's revenue-producing capabilities justify an exemption from Title IX is also unpersuasive. In fact, the vast majority of NCAA football programs lose more money than they bring in.[224] Over 80% of football programs run a net deficit.[225] Even in Division I-A and I-AA, the most competitive divisions which are beneficiaries of lucrative television contracts, 62% of football programs on average have annual deficits of $1 million in Division I-A and $664,000 in Division I-AA.[226] Moreover, it is unclear why the capacity of an educational program to earn a profit should entitle it to special treatment under Title IX. Congress rejected precisely such a rationale in 1975 in defeating the Javits Amendment.[227]

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221. *Football Coaches Take Aim at Title IX*, *supra* note 219, at C4 (advocating the exemption of football from the "proportionality" test); Knight, *Football Coaches Put Title IX on Defensive*, *supra* note 129, at C4.

222. *See Scorecard: The Third Sex*, *supra* note 132, at 15 (criticizing efforts by the College Football Association and the American Football Coaches Association to exempt football from Title IX, and characterizing such efforts as treating football as a third sex).

223. *See* Kelley v. University of Ill., 35 F.3d 265, 271 n.8 (7th Cir. 1994) (approving of agency's rejection of team-by-team comparison as the measure of compliance, and noting that such a standard would either result in the elimination of football, or requiring schools to provide a football program for women, regardless of whether women would prefer to participate in other sports).

224. *Scorecard: The Third Sex*, *supra* note 132, at 15.

225. *Id.*

226. DANIEL L. FULKS, REVENUES AND EXPENSES OF INTERCOLLEGIATE ATHLETICS PROGRAMS: FINANCIAL TRENDS AND RELATIONSHIPS - 1993 at 4 (1994).

227. The substitute Javits Amendment required the regulating agency to take into account the unique characteristics of individual sports in promulgating regulations. *See supra* notes 18–19 and accompanying text. Although the football associations are now arguing that the

C. Behind the Backlash: the Continuing Bias Against Female Athletes

The intensity of the current backlash against Title IX enforcement, and the tenacity with which institutions have defended against Title IX challenges, indicate an entrenched and persistent resistance among some proponents of the status quo to gender equity in athletics. The financial investments institutions have made in fighting gender equity alone demonstrates their commitment to the status quo. Colorado State University spent over $500,000 in attorney's fees in their unsuccessful defense of a lawsuit instead of reinstating women's varsity softball at a fraction of the cost.[228] Brown has spent over $100,000 in expert witness fees alone seeking to prove that men are inherently more interested in sports than women, independent of the fewer sports opportunities available to women.[229]

The grudging reluctance with which schools are only now, slowly and over twenty years after the passage of Title IX, reallocating their priorities and resources to provide women with more equitable opportunities reflects a deeply imbedded view that sports participation for men is a right, while for women it is a privilege. As one district court astutely recognized "[m]any institutions of higher education apparently hold the opinion that providing equality to women in athletics is both a luxury and a burden. The feeling seems to be that to afford such equality to women is a gift and not a right."[230] This view is so entrenched in our popular culture that its expression goes virtually unnoticed. For example, in reporting the victory of the women student-athletes in the recent decision against Brown University, the *New York Times* stated that the decision "could prompt new challenges by women's programs at other Universities. *More important,* it could lead to streamlining or outright elimination of some men's sports to bring support for male and female athletic programs into proportion."[231] The assessment of the *New York Times* of the relative importance of men's and women's sport opportunities reflects a value judgment of which the reporter who made it may not have been consciously aware. The consistently hostile reaction to the progress of women in gaining increased athletic opportunities reflects deeply held views of gender stereotypes - strong women athletes don't fit with the image of women as vulnerable sex objects[232]. Only

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Javits Amendment was never properly implemented because of football's unique size, as discussed above, this is not a legitimate reason for treating the sport differently. In fact, the existing regulations recognize and account for the legitimate differences between football and other sports by permitting institutions to spend more on football uniforms, equipment and facilities as long as the money spent buys comparable quality for the men's and women's athletic programs overall. Consequently, the regulations recognize that football uniforms will cost more than swimsuits, and that money spent on a stadium and crowd control for football games will exceed that spent for volleyball. *See supra* note 31 and accompanying text.

228. Jennifer Gavin, *State's Legal Costs Swell*, DENV. POST, Dec. 26, 1993, at 1A.

229. Sandomir, *supra* note 131, at A1.

230. Cook v. Colgate, 802 F. Supp. 737, 750 (N.D.N.Y. 1992), *vacated as moot*, 992 F.2d 17 (2nd Cir. 1993).

231. Sandomir, *supra* note 131, at A1 (emphasis added).

232. *See generally*, Mary Jo Kane *Media Coverage of the Post Title IX Female Athlete: A Feminist Analysis of Sports, Gender, and Power*, 3 DUKE J. GENDER L. & POL'Y 95 (1996) (arguing that the media portrays female athletes in ways that enforce oppressive stereotypes).

through continued exposure to female athletes will these stereotypes and the hostility to the gains of women under Title IX give way to acceptance of real equality for women in intercollegiate athletics.

## III. CONCLUSION

In the past few years, women have made significant and long-awaited progress in achieving an equal opportunity to participate in intercollegiate athletics. Courts have unanimously adopted the DOE's three-part test for compliance with Title IX. As a result, women have succeeded in obtaining court orders requiring their schools to add additional women's teams and preventing their schools from cutting teams. But because of these successes, and a more conservative political environment in Congress, Title IX has come under attack by proponents of college football and other men's sports claiming that, as interpreted by the DOE and the courts, the law discriminates against men. Their argument is premised on the assertion that men are more interested in sports than women, and therefore deserve disproportionately more athletic opportunities. This assertion is unsupported by the evidence and has been soundly rejected in the courts.

Nevertheless, it remains to be seen whether arguments for weakening Title IX will succeed in the new Congress. If history is any guide, proponents of gender equity will ultimately prevail in maintaining strong legal protections for women in intercollegiate athletics. It will not be an easy battle, however. The primary advocates of weakening Title IX, organizations representing college football interests, have strong supporters in Congress, and the continuing emphasis of society on the importance of sport opportunities for men as opposed to women will only help their cause. In the final round, the battle will depend on the political strength of female athletes and their parents, a group that will not easily relinquish its hard-won progress toward gender equity. Given the enormous health, confidence, and other benefits female athletes obtain from sports competition,[233] much more is at stake than mere access to the playing field.

233. *See, e.g.*, Carol Krucoff, *Exercise and Breast Cancer*, WASH. POST, Feb. 7, 1995 (Health), at 16 (citing 1988 study finding that former college athletes had a 35% less chance of developing breast cancer and a 61% less chance of developing reproductive cancer compared to non-athletes); WOMEN'S SPORTS FOUND., MINORITIES IN SPORTS: THE EFFECT OF VARSITY SPORTS PARTICIPATION ON THE SOCIAL, EDUCATIONAL, AND CAREER MOBILITY OF MINORITY STUDENTS 23–23 (1989) (documenting correlation between participation in high school athletics and higher self-esteem, higher grades, higher standardized test scores and lower drop-out rates).