Florida Law Review

Volume 47 | Issue 5 Article 2

December 1995

Crumbling Foundations: Why Recent Judicial and Legislative Challenges to Title IX May Signal Its Demise

David Aronberg

Follow this and additional works at: https://scholarship.law.ufl.edu/flr

 Part of the Law Commons

Recommended Citation

David Aronberg, *Crumbling Foundations: Why Recent Judicial and Legislative Challenges to Title IX May Signal Its Demise*, 47 Fla. L. Rev. 741 (1995).
Available at: https://scholarship.law.ufl.edu/flr/vol47/iss5/2

This Article is brought to you for free and open access by UF Law Scholarship Repository. It has been accepted for inclusion in Florida Law Review by an authorized editor of UF Law Scholarship Repository. For more information, please contact kaleita@law.ufl.edu.

CRUMBLING FOUNDATIONS: WHY RECENT JUDICIAL AND LEGISLATIVE CHALLENGES TO TITLE IX MAY SIGNAL ITS DEMISE

David Aronberg[*]

* Associate, Steel Hector & Davis LLP. B.A., 1993, Harvard; J.D., 1996, Harvard Law School. Special thanks to the following for their invaluable help with this Article: Amy Cohen, Craig Gibian, Bill Kelley, Jan Kelley, Daniel Kinsella, John Paschke, and Professor Paul Weiler. This Article is dedicated to my parents, Hank and Sue Aronberg, and in memory of my grandmother, Sadie Aronberg.

Published by UF Law Scholarship Repository, 1995

I. INTRODUCTION: THE TWO FACES OF TITLE IX

A. *Amy Cohen*

Amy Cohen is the face of Title IX.[1] Intelligent and athletic, she was the prototypical "scholar-athlete" during her four years as a Brown University undergraduate. A talented and dedicated gymnast, Cohen helped the Brown varsity women's gymnastics team win its first Ivy League title in 1990; one year later, she was named the team's co-captain.[2] As a second-semester junior leading a thriving varsity squad, Cohen's affection for her university equaled her love of gymnastics.[3] Thus, Cohen felt devastated, as if by a fratricide, when she heard that her beloved university would be taking her beloved sport away.[4]

Rumors became reality when Brown athletic director David Roach told Cohen that the university needed to cut 2.7%, or roughly $115,500, from its athletic budget.[5] To do so, he decided to reduce women's

1. Education Amendments of 1972 (Title IX) §§ 901-909, 20 U.S.C. §§ 1681-1688 (1994).

2. Telephone Interview with Amy Cohen (Jan. 21, 1996) (on file with author).

3. *Id.*

4. *Id.* Cohen repeatedly emphasized that she "loved Brown. To bring a lawsuit against the university was not something I wanted to do." *Id.*

5. *Id.*; Cohen v. Brown Univ., 809 F. Supp. 978, 981 (D.R.I. 1992), *aff'd*, 991 F.2d 888 (1st Cir. 1993).

gymnastics and volleyball, and men's golf and water polo, from intercollegiate varsity athletic status to "intercollegiate club" status.[6] Stunned, Cohen pleaded with the athletic director to ask all the varsity teams to trim 3% of their budgets, rather than force these four, low-revenue sports to assume all the costs of budget-cutting themselves.[7] According to Cohen, the more she persisted, the angrier Roach became.[8] Finally, Roach dismissed Cohen by asserting that his decision was final and there was nothing his office could do to help.[9]

Thus, as co-captain of a fledgling club team with no university support, Cohen worked all summer to raise approximately $20,000 to fund the squad; this included, among other things, performing flips for donations during Brown's graduation festivities.[10] The fundraising campaign succeeded, but upon returning to Brown in the fall, the realities of the team's new status set in: the squad was permanently locked out of the varsity weight room and locker room; the varsity trainers were not allowed to provide medical attention, except in rare emergencies. The event operations staff was no longer available on the weekends, forcing the team to schedule all its meets on weekdays, which often resulted in squad members missing classes.[11]

Finally, after the athletic department's continued refusal to ease the team's transition from varsity to club status, Cohen turned to the courts.[12] "I had never even heard of Title IX at the time," Cohen said recently, "[until] coaches from other schools began talking to us about it."[13] Indeed, as soon as she learned that Title IX prohibits gender-based discrimination by any educational institution that receives federal financial support, she thought "it was very obvious that Brown was in violation."[14] Cohen filed for a preliminary injunction to reinstate the women's gymnastics and volleyball teams to full varsity status, and to

---

6. Telephone Interview with Amy Cohen (Jan. 21, 1996); *see also Cohen*, 809 F. Supp. at 979.

7. Telephone Interview with Amy Cohen (Jan. 21, 1996).

8. *Id.*

9. *Id.*

10. *Id.* Cohen also set up gymnastics clinics, organized a letter drive, asked competing teams for contributions, solicited corporate sponsorships, sold t-shirts, and contacted every alumnus who had ever given her team money. *Id.*

11. *Id.*

12. *Id.* Cohen said that after the gymnastics team was cut, Roach refused to help or even show sympathy for the team's plight: "[Roach] basically turned to me and said 'Your team is gone as far as I'm concerned. We got rid of you. We're not going to help you.' . . . And he didn't help us, and we fought for every one of those little nit-picky things." *Id.*

13. *Id.*

14. *Id.*; *see* 20 U.S.C. §§ 1681(a), 1687 (1994); Cohen v. Brown Univ., 991 F.2d 888, 893 (1st Cir. 1993).

stop Brown from cutting any other women's varsity athletic team until the percentage of women athletes participating in varsity sports equaled the percentage of women enrolled at Brown.[15] When the dust finally settled in April 1993, the women's teams were reinstated, and the landmark case of *Cohen v. Brown University*[16] had shifted control over a university's athletic budget from school administrators to Washington regulators.[17]

B. *William Kelley*

William "Bill" Kelley is the other face of Title IX. As co-captain of the men's varsity swimming team at the University of Illinois, Kelley led a competitive squad within the Big Ten Conference—the "fastest swimming conference in the nation."[18] As the state's flagship educational institution, the University of Illinois had the most prominent and successful swimming program in the state.[19] A second-semester junior, Kelley looked forward to his final year of intercollegiate competition on a team that would feature ten talented freshmen.[20] Kelley, who gave half his time at the University of Illinois to his beloved sport, relished the prospect of his team's future success. Although his squad would be inexperienced, Kelley excitedly believed that it "had the potential to move up in the standings in the upcoming years."[21]

For Bill Kelley, however, the most important event for the future of his team was not the infusion of young talent in 1993, but rather a vote by the Big Ten Conference one year earlier. Unbeknownst to Kelley, his athletic conference had sealed his team's fate in May 1992 by deciding, in effect, to eliminate 640 male athletes from the conference's varsity teams.[22] Far away from the varsity swimming pool at Urbana-Cham-

---

15. *Cohen*, 809 F. Supp. at 980.

16. 991 F.2d 888 (1st Cir. 1993), *aff'g* 809 F. Supp. 978 (D.R.I. 1992).

17. *See, e.g.*, R. Lindsay Marshall, Comment, Cohen v. Brown University*: The First Circuit Breaks New Ground Regarding Title IX's Application to Intercollegiate Athletics*, 28 GA. L. REV. 837, 854-61 (1994) (concluding that by assuming "interests and abilities" existed unmet by university programs, the courts merely relied on proportionality tests to determine which new women's athletic programs the university should offer).

18. Telephone Interview with William Kelley (Jan. 29, 1996) (on file with author); electronic mail from William Kelley to the author (Jan. 30, 1996) (on file with author). The Big Ten Conference is "a group of 11 universities who associate together for the purpose of competing in intercollegiate athletics." Kelley v. Board of Trustees of Univ. of Ill., 832 F. Supp. 237, 240 (C.D. Ill. 1993), *aff'd*, 35 F.3d 265 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 938 (1995).

19. Telephone Interview with William Kelley (Jan. 29, 1996); electronic mail from William Kelley to the author (Jan. 30, 1996).

20. Electronic mail from William Kelley to the author (Jan. 30, 1996).

21. *Id.*

22. Carol Herwig, *Big Ten Gives Women's Sports a Boost*, USA TODAY, May 13, 1992,

paign, representatives from all eleven Big Ten schools voted 10 to 1 in favor of a proposal requiring at least 40% female athletes at member institutions by August 1, 1997.[23] Realizing that only 30.5% of its varsity athletes were female despite a 50-50 male-to-female ratio among its students, the Big Ten hoped its pre-emptive strike would stave off a future Title IX onslaught.[24]

Conference officials also were cognizant of the budget constraints that faced Big Ten schools, and, for that matter, universities throughout the country.[25] In an era of shrinking budgets and increasing demands for gender equity, the Big Ten settled on the most cost-effective way to solve the problem of disproportionate athletic participation rates: the conference told its schools to cut men's sports.[26]

As with Amy Cohen, Bill Kelley was devastated when he heard that his team would be eliminated.[27] The men's swimming coach told Kelley that financial problems, along with the Big Ten's new 60-40 plan, were forcing the university's hand.[28] As with Amy Cohen, Kelley

---

at 1C. Big Ten Commissioner Jim Delaney noted that with 6640 athletic opportunities in the conference at the time of the vote, "It's going to require about 640 opportunities on the male side transferred over to the female side." Indiana University athletic director Charles Doninger said that "increasing participation by women will increase costs. The ways of reducing costs will have to come from the men's program." *Id.*; *see also* Catherine Pieronek, *A Clash of Titans: College Football v. Title IX*, 20 J.C. & U.L. 351, 369 (1994) (noting that athletic directors voted to implement proportionality criterion to achieve gender equity that might cost men 640 participation slots).

23. Herwig, *supra* note 22.

24. *See* Carol Herwig, *Big Ten Eyes Student-Athlete Parity in Gender*, USA TODAY, May 11, 1992, at 7C; Pieronek, *supra* note 22, at 369.

25. *See* Herwig, *supra* note 24, at 76. I use the term "universities" throughout this Article to refer to all institutions of higher learning, including colleges.

26. *See, e.g.*, Transcript of Big Ten Gender Equity Task Force Meeting, May 1992 (unpublished document obtained by John Otto, counsel for Bill Kelley, during discovery of the files of University of Illinois Athletic Director Karol A. Kahrs; on file with the author) (listing "Steps to achieve gender equity . . . 1. Encourage women to join athletic teams even if they do not receive an athletic scholarship. 2. Identify women's sports which can be upgraded from club status. 3. *Limit the size of men's teams.* 4. Identify the sports that hold the greatest appeal for female athletes, and create Junior Varsity teams. 5. *Eliminate Mens [sic] teams.* 6. Hold out for NCAA Financial Aid Restrictions.") (emphasis added); *cf.* George A. Davidson & Carla A. Kerr, *Title IX: What Is Gender Equity?*, 2 VILL. SPORTS & ENT. L.F. 25, 26 (1995) ("In this era of tight budgets, achieving a varsity participation ratio that is proportionate to enrollment would require most institutions to eliminate men's teams and to create women's teams.").

27. Telephone Interview with William Kelley (Jan. 29, 1996). On May 7, 1993, the University of Illinois announced that it intended to cut the varsity programs for men's swimming, fencing and diving, and women's diving. *Kelley*, 832 F. Supp. at 240. The women's swimming team was preserved. *Id.*

28. Telephone Interview with William Kelley (Jan. 29, 1996).

never thought that his treasured program would be taken away.[29] As with Amy Cohen, Kelley had never heard of Title IX until his team was eliminated.[30] And as with Amy Cohen, when his pleading and protests were met by deaf ears at Illinois, Bill Kelley turned to the courts.[31]

But here is where their paths diverged, for while Kelley and his 27 teammates received sympathy from the federal trial judge,[32] the court countenanced what it called the sacrifice of "innocent victims of Title IX's benevolent attempt to remedy the effects of an historical deemphasis on athletic opportunities for women."[33]

Some of Kelley's teammates did not wait for the court's adverse ruling to be affirmed on appeal by the Seventh Circuit, choosing instead to transfer to other schools.[34] Transfer was not a viable option for Kelley, who was nearing graduation. After three years of representing his university in competitions against its Big Ten rivals, his own university unexpectedly became his rival in a game of winner-take-all.

C. *Roadmap*

Part II of this Article examines the history of Title IX and its effects on intercollegiate athletics. The section shows how the legislators who drafted the antidiscrimination statute neither intended nor expected Title IX to be transformed by administrative fiat into an affirmative action statute that mandates gender quotas. The section also shows how Title IX has transformed the world of intercollegiate athletics both for the better—female athletic participation rates have skyrocketed since Title IX's passage—and for the worse—low-revenue men's teams such as wrestling and gymnastics are being eliminated at an astonishing rate. Part III of this Article examines why, after a string of major successes in the courts and Congress, Title IX can no longer count on either branch of government for support. In fact, the section posits that a newfound skepticism towards Title IX in Congress and the judiciary—along with a recent, unintended threat from the Clinton administration—is likely to culminate in either an overhaul of the venerable antidiscrimination statute, or its elimination. Part IV of this Article briefly concludes that Title IX's future prospects look bleak. Its

---

29. *Id.*
30. *Id.*
31. *Id.*
32. *Kelley*, 832 F. Supp. at 243-44.
33. *Id.* at 244.
34. Telephone Interview with William Kelley (Jan. 29, 1996); electronic mail from William Kelley to the author (Jan. 30, 1996). One of the talented freshmen on the team went on to star at rival University of Minnesota, where he broke a Big Ten swimming record. *Id.*

legislative foundations shaky, its bureaucratic creators unknown, its legitimacy now questioned, the statute is losing its adherents and is facing extinction.

II. PAVED WITH VAGUE INTENTIONS: THE HISTORY AND EFFECTS OF TITLE IX

On June 23, 1972, Congress enacted Title IX to ensure equal opportunity for men and women at educational institutions that receive federal funds.[35] The vagueness of this goal is underlined by the fact that Title IX was adopted in a congressional conference without any formal hearings or committee reports.[36] Indeed, Congress was generally opposed to placing intercollegiate athletics under the auspices of Title IX,[37] and sports were only mentioned twice in the entire congressional debate.[38] The ostensibly hollow legislative foundation for Title IX has allowed its supporters and critics to impute different motivations to Congress. The result has been an interpretive free-for-all among universities, litigants, commentators, regulators, and judges.[39]

A. *Title IX's Legislative History*

Billed by advocates as " 'the most significant event in the history of sports,' "[40] and "the cornerstone of federal statutory protection for female athletes and prospective female athletes in the United States,"[41] Title IX provides in pertinent part: "No person in the United States

35. *See* Pieronek, *supra* note 22, at 351.

36. Courtney W. Howland, Note, *Sex Discrimination and Intercollegiate Athletics: Putting Some Muscle on Title IX*, 88 YALE L.J. 1254, 1255 n.11 (1979).

37. Glenn M. Wong & Richard J. Ensor, *Sex Discrimination in Athletics: A Review of Two Decades of Accomplishments and Defeats*, 21 GONZ. L. REV. 345, 361 (1985-86).

38. Howland, *supra* note 36, at 1255 n.11 (citing 118 CONG. REC. 5807 (1972) (Sen. Bayh) (personal privacy to be respected in sports facilities); 117 CONG. REC. 30, 407 (1971) (Sen. Bayh) (intercollegiate football and men's locker rooms)).

39. *See, e.g.*, Alexandra Polyzoides Buek & Jeffrey H. Orleans, *Sex Discrimination—A Bar to a Democratic Eduction: Overview of Title IX of the Education Amendments of 1972*, 6 CONN. L. REV. 1, 1 (1973) (advocating a broad reading of Title IX by quoting Alexis de Tocqueville to impute Tocquevillian motivations to Congress, namely that "Title IX was designed to ensure that sex discrimination would no longer restrict any person from obtaining a 'democratic education' "); Note, *Sex Discrimination and Intercollegiate Athletics*, 61 IOWA L. REV. 420, 457 (1975) (proclaiming Title IX as the manifestation of a congressional crusade to end sex discrimination in collegiate sports).

40. Steve Wyche, *Title IX Means Entitlement*, MIAMI HERALD, Apr. 20, 1995, at D1 (quoting Ann Marie Lawler, associate athletic director for women's sports at the University of Florida).

41. Diane Heckman, *Women & Athletics: A Twenty Year Retrospective on Title IX*, 9 U. MIAMI ENT. & SPORTS L. REV. 1, 2 (1991-92).

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. . . ."[42] Although the statute's combination of broad language and limited legislative history has given rise to many views of what Title IX is, Congress has already told us what Title IX is not. Contrary to popular belief, the legislative history that does exist is not "ambiguous"[43] about prohibiting the use of quotas as a means of compliance.[44]

Title IX germinated in the summer of 1970 during a set of hearings on discrimination against women before a special House Subcommittee on Education chaired by Representative Edith Green.[45] Representative Green unsuccessfully attempted to add the antidiscrimination principles of Title IX to the Education Amendments of 1971. The Senate rejected the amendment as nongermane to the bill under consideration.[46]

During Senate debate on the unsuccessful measure, the amendment's sponsor, Birch Bayh of Indiana, explained that he was submitting the amendment to "guarantee that women, too, enjoy the educational opportunity every American deserves."[47] Senator Peter Dominick asked Senator Bayh whether the amendment would affect universities that "try to keep a certain quota or a certain ratio as between male and female

---

42. 20 U.S.C. § 1681(a) (1995).

43. *See, e.g.*, Haffer v. Temple Univ., 524 F. Supp. 531, 534 (E.D. Pa. 1981) (stating that Title IX's legislative history is ambiguous), *aff'd*, 688 F.2d 14 (3d Cir. 1982); Jeffrey P. Ferrier, *Title IX Leaves Some Athletes Asking, "Can We Play Too?,"* 44 CATH. U. L. REV. 841, 846 (1995) (finding "Title IX contained broad language but very little legislative history to clarify its scope").

44. Donald C. Mahoney, Note, *Taking a Shot at the Title: A Critical Review of Judicial and Administrative Interpretations of Title IX as Applied to Intercollegiate Athletic Programs*, 27 CONN. L. REV. 943, 945 (1995) (recognizing that Title IX's legislative history is "replete with comments" from members of Congress who sought to ensure that a quota system would not be required).

45. Cannon v. University of Chicago, 441 U.S. 677, 694-95 n.16 (1979); Heckman, *supra* note 41, at 9 n.30.

46. *Haffer*, 524 F. Supp. at 534; Heckman, *supra* note 41, at 9 n.30. The proposed amendment stated in pertinent part:

> No person in the United States shall, on the ground of sex, be excluded from participation in, be denied the benefits of or be subject to discrimination under any program or activity conducted by a public institution of higher education, or any school or department of graduate education, which is a recipient of Federal financial assistance for any education program or activity. . . .

117 CONG. REC. 30,404 (1971).

47. 117 CONG. REC. 30,403 (1971) (statement of Sen. Bayh).

students. . . ."[48] Senator Bayh responded that university gender quotas were "exactly what this amendment intends to prohibit. . . . The amendment does not contain, nor does the Senator from Indiana feel it should contain, a quota which says there has to be a 50-50 ratio to meet the test."[49] Later in the debate, Senator Bayh reiterated that "[t]he amendment is not designed to require specific quotas. . . . Let me emphasize again that we are not requiring quotas. . . . What we are saying is that we are striking down quotas. The thrust of the amendment is to do away with every quota."[50]

Senator Birch Bayh reintroduced the amendment in its current form one year later, stating that the new bill was a "comprehensive approach which incorporates . . . the key provisions of my earlier amendment. . . ."[51] The new Title IX was patterned after Title VI of the 1964 Civil Rights Act, which prohibited racial discrimination in public facilities.[52] Some members of Congress, however, still feared that the amendment "would [ ] be construed to require a set number of males or females in any educational endeavor."[53] Thus, the amendment's House sponsor, Representative Albert Quie successfully added a section (b) to Title IX that provides:

> (b) Nothing contained in subsection (a) of this section shall be interpreted to require any educational institutional [sic] 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 title of statistical evidence tending to show that such an imbalance

---

48. *Id.* at 30,406.

49. *Id.* at 30,406-07.

50. *Id.* at 30,409.

51. *Haffer*, 524 F. Supp. at 534 (quoting 118 CONG. REC. 5808 (1972) (Statement of Sen. Bayh)).

52. "This is identical language, specifically taken from title [sic] VI of the 1964 Civil Rights Act. . . ." *Cannon*, 441 U.S. at 694-95 n.16 (quoting 117 CONG. REC. 30,407 (1971) (statement of Sen. Bayh-Senate sponsor) (error in original)). Title VI states: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." The Civil Rights Act of 1964 (Title VI), 42 U.S.C. § 2000d (1995).

53. Mahoney, *supra* note 44, at 946.

> exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex."[54]

During debate on his amendment in the House Committee on Education and Labor, Representative Quie made clear that it "would provide that there shall be no quotas in this sex antidiscrimination title."[55] Just before the vote, Representative Quie emphasized that "[t]o make it absolutely certain there will not be a requirement of quotas in the graduate institutions and employment in institutions of higher education similar to the prohibition against preferential treatment for minorities under the Civil Rights Act I believe this legislation is necessary."[56] Representative Edith Green, the woman responsible for the birth of Title IX, then took the floor to say she was "opposed to quotas," since quotas "would hurt our colleges and universities. I am opposed to [them] even in terms of attempting to end discrimination on the basis of sex."[57] Immediately after Representative Green's comments, the committee approved Representative Quie's antiquota provision by a vote of 90 to 1.[58]

During Senate debate, Senator Bayh said the impetus for Title IX was to combat "the continuation of corrosive and unjustified discrimination against women" in the American educational system.[59] Demonstrating that Title IX was not intended to be, as some have later characterized it, "the most significant event in the history of sports,"[60] Senator Bayh introduced the measure by decrying the "sex discrimination [that] reaches into all facets of education—admissions, scholarship programs, faculty hiring and promotion, professional staffing, and pay scales."[61]

Senator John Beall agreed with Senator Bayh's portrayal of rampant sex discrimination in America's universities, and said that the Republican minority was "willing to accept the amendment" as long as "we are not establishing still another form of bias."[62] In particular, Senator Beall hoped that Title IX would not mandate a faculty ratio of 50%

---

54. 117 CONG. REC. 39,261 (1971) (codified as 20 U.S.C. § 1681(b) (1994)).

55. *Id.*

56. *Id.* at 39,262.

57. *Id.*

58. *Id.*; *see also* Mahoney, *supra* note 44, at 947.

59. 118 CONG. REC. 5803 (1972) (statement of Sen. Bayh).

60. Wyche, *supra* note 40.

61. 118 CONG. REC. 5803 (1972) (statement of Sen. Bayh). Unless "scholarship programs" are understood as encompassing intercollegiate athletics, the latter is conspicuously absent from the specific list of all "facets of education" remedied by Title IX.

62. *Id.* at 5813 (statement of Sen. Beall).

women to 50% men.[63] Easing his colleague's fears, Senator Bayh said he "appreciate[d] the Senator's bringing out that point," but that his amendment did "not require a 3 percent or a 55 percent balance."[64]

Three months later, in a written response to an educator's concern about quotas, Senator Bayh referred to Representative Quie's amendment:

> As you know, the House attached a floor amendment specifying that the legislation would not require specific quotas. I did not include such a provision as part of the Senate amendment because I believe my amendment already states clearly that no person, male *or* female, shall be subjected to discrimination. The language of my amendment does not require reverse discrimination. It only requires that each individual be judged on merit, without regard to sex.[65]

Senator Bayh's repeated assurances on the issue of quotas helped to secure Title IX's passage. The law went into effect on July 1, 1972.[66]

B. *Title IX's Regulatory Framework*

1. The 1975 Regulations

Because Title IX became law without much debate about its effects on intercollegiate athletics, Senator John Tower in 1974 proposed an amendment that would have excluded revenue-producing sports from coverage.[67] After the Tower Amendment died in a Senate-House conference committee, Congress approved an amendment by Senator Jacob Javits as a compromise.[68] The Javits Amendment required the Department of Health, Education, and Welfare (HEW) to publish Title IX regulations " 'which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports.' "[69]

---

63. *Id.*

64. *Id.*

65. 118 CONG. REC. 18,437 (1972) (letter from Sen. Bayh) (emphasis in original); *see also* Mahoney, *supra* note 44, at 948-49.

66. *See* Mahoney, *supra* note 44, at 949.

67. Howland, *supra* note 36, at 1255, 1255 n.13 (citing 120 CONG. REC. 15,322 (1974)); *see also* PAUL C. WEILER & GARY R. ROBERTS, SPORTS AND THE LAW 624 (1st ed. 1993).

68. *See* Mahoney, *supra* note 44, at 950.

69. *Id.* at 950 (quoting Pub. L. No. 93-380, § 844, 88 Stat. 484 (1974) (codified at 20 U.S.C. § 1681 (1988)).

HEW submitted its final regulations on May 27, 1975 to President Gerald Ford for authorization.[70] After authorization, President Ford submitted the regulations to Congress, which, under federal law, had 45 days to exercise a "legislative veto" if it found the regulations " 'inconsistent with the Act from which [HEW] derives its authority. . . .' "[71] Although resolutions of disapproval were introduced in both Houses of Congress, none were adopted, and the regulations became effective on July 21, 1975.[72]

The Supreme Court has noted that "Congress' failure to disapprove the HEW regulations does not necessarily demonstrate that it considered those regulations valid and consistent with the legislative intent."[73] In fact, Congress knew that rejecting the long-awaited regulations would leave the intended beneficiaries of Title IX without any remedy for an extended period of time.[74] Although Congress believed that more specificity was warranted, this concern was "outweighed by the need to fulfill reasonable expectations of a timely remedy."[75] The First Circuit Court of Appeals has similarly rejected HEW's claim that congressional inaction towards the Title IX regulations means congressional approval.[76] Indeed, only four months after the regulations were promulgated, Congress passed an amendment to the General Education Provisions Act that provides:

> Failure of the Congress to adopt such a concurrent resolution [of disapproval] with respect to any such final regulation . . . shall not represent, with respect to such final regulation, an approval or finding of consistency with the Act from which it derives its authority for any purpose, n[or] shall such failure to adopt a concurrent resolution be construed as evidence of an approval or finding of consistency necessary to establish a prima facie case, or an inference or presumption, in any judicial proceeding.[77]

---

70. Heckman, *supra* note 41, at 12-13.

71. North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 531-32 (1982) (quoting the General Education Provisions Act, Pub. L. No. 93-380, 88 Stat. 567 (codified as amended at 20 U.S.C. § 1232(d)(1), *replaced by* Pub. L. No. 103-382, § 247, 108 Stat. 3913, 3923 (1994)).

72. *Id.* at 532-33.

73. *Id.* at 533-34.

74. Howland, *supra* note 36, at 1262, 1262-63 n.61.

75. *Id.* at 1262-63 n.61 (citing Letter from Caspar W. Weinberger, Secretary of HEW, to Carl B. Albert, Speaker of the House of Representatives (June 4, 1975)).

76. Islesboro Sch. Comm. v. Califano, 593 F.2d 424, 428 n.3 (1st Cir.) (finding that "congressional inaction should not lightly be construed as approval"), *cert. denied*, 444 U.S. 972 (1979).

77. 20 U.S.C. § 1232(d)(1) (1976), *replaced by* Pub. L. No. 103-382, § 247, 108 Stat.

Still, once the new regulations went into affect, and HEW had the power to terminate all federal funding to rogue institutions, quotas became the norm. HEW used its regulations to order universities to provide athletic scholarships to "members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics."[78] Moreover, and more vaguely, HEW's regulations required "equal athletic opportunity for members of both sexes" at schools operating interscholastic, intercollegiate, club or intramural athletics.[79] As to what constituted "equal athletic opportunity," the regulations provided a list of ten non-exclusive factors to consider:

(1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
(2) The provision of equipment and supplies;
(3) Scheduling of games and practice time;
(4) Travel and per diem allowance;
(5) Opportunity to receive coaching and academic tutoring;
(6) Assignment and compensation of coaches and tutors;
(7) Provision of locker rooms, practice and competitive facilities;
(8) Provision of medical and training facilities and services;
(9) Provision of housing and dining facilities and services;
(10) Publicity.[80]

The amorphous "interests and abilities" factor atop this list—which soon would become the most important area of inquiry—exemplified the ambiguity of the regulations. To make matters worse, HEW explicitly disavowed any clear-cut monetary expenditure test to determine university compliance, stating that "[u]nequal aggregate expenditures for members of each sex . . . will not constitute noncompliance with this section, but the Assistant Secretary may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex."[81] Further, HEW gave schools three years

3913, 3923 (1994).

78. 34 C.F.R. § 106.37(c)(1) (1995).

79. 34 C.F.R. § 106.41(c) (1995). This Article discusses Title IX's relevance only to intercollegiate athletics, even though Title IX's scope reaches beyond America's colleges and universities to "any education program or activity receiving Federal financial assistance." 34 C.F.R. § 106.1 (1995).

80. 34 C.F.R. § 106.41(c) (1995).

81. *Id.*

to comply with Title IX or face a loss of federal funds.[82] Thus, with the stakes so high, and with such little guidance as to what Title IX exactly required for compliance, university administrators greeted HEW's regulations with exasperation.[83]

Adding to the confusion, in 1979 Congress split HEW into the Department of Health and Human Services (HHS) and the Department of Education (DED), transferring all the education functions of HEW to DED. Title IX administration, in turn, was assigned to DED's Office of Civil Rights (OCR).[84] The HEW regulations, however, were left with HHS while OCR created its own, nearly identical, Title IX regulations.[85]

2. The 1979 Policy Interpretation

Although the three-year transition period for Title IX compliance expired on July 21, 1978, HEW responded to university complaints about the vagueness of its new regulations by issuing a Policy Interpretation on December 11, 1979—only months before the effective date of the HEW split.[86] After OCR took over Title IX administration, it began to follow HEW's Policy Interpretation, seemingly as a matter of course, without engaging in any formal process for adopting the document.[87]

Neither reviewed nor approved by Congress or the President—and not formally approved by OCR itself[88]—OCR's Policy Interpretation was only meant to clarify the meaning of "equal opportunity" consistent with the 1972 statute and subsequent regulations.[89] In reality, however, the Policy Interpretation has taken on a life of its own, becoming the most powerful and controversial guidepost in the Title IX regulatory morass.[90] It has expanded the scope of Title IX to the point of subvert-

---

82. 34 C.F.R. § 106.41(d) (1995); 20 U.S.C. § 1682.

83. Jill K. Johnson, *Title IX and Intercollegiate Athletics: Current Judicial Interpretation of the Standards for Compliance*, 74 B.U. L. REV. 553, 558 (1994).

84. *See* Pub. L. No. 96-88, §§ 101-511, 93 Stat. 669 (codified at 20 U.S.C. §§ 3401-3510); 20 U.S.C. § 3441(a)(1), (a)(3) (1995); *Cohen*, 991 F.2d at 895 n.7.

85. *See* 45 C.F.R. 86 (1995); *Cohen*, 991 F.2d at 895 (decrying this "wonderful example of bureaucratic muddle," and noting that the two sets of regulations are "identical, save only for changes in nomenclature reflecting the reorganization of the federal bureaucracy").

86. Johnson, *supra* note 83; OCR Policy Interpretation, 44 Fed. Reg. 71,413-23 (1979); *see Cohen*, 991 F.2d at 896.

87. *See Cohen*, 991 F.2d at 896. Since OCR in practice adopted HEW's entire Policy Interpretation as its own, this Article will henceforth attribute the document to OCR.

88. *See id.*

89. *See* OCR Policy Interpretation, 44 Fed. Reg. 71,413-14 (1979); Melody Harris, *Hitting 'Em Where It Hurts: Using Title IX Litigation to Bring Gender Equity to Athletics*, 72 DENV. U. L. REV. 57, 61 (1994).

90. *See infra* pt. III.

ing the statute's original purpose of prohibiting educational discrimination against either sex.[91] Although Title IX was originally crafted by the elected representatives of those subject to its dictates, it was dramatically altered seven years later through the Policy Interpretation, by unelected, anonymous bureaucrats, unaccountable to the public at large. As a result, a statute that had been designed to prohibit discrimination on the basis of sex was now transformed by the Policy Interpretation into an affirmative action law that mandated gender quotas.[92]

Perhaps most disturbing is the possibility, suggested by some commentators, that the Policy Interpretation was a deliberate "attempt by the agency to rewrite the regulations and to bypass the legislative-veto procedure."[93] But regardless of whether OCR intended that its Policy Interpretation do more than "clarify" Title IX and its regulations, the fact remains that Congress never reviewed, debated or approved—either by an affirmative vote or by a failure to act—what would become the most powerful and controversial component of its antidiscrimination law. In reality, since it is only an interpretive statement and not a regulation, the Policy Interpretation "is not entitled to any more deference than is warranted by whatever inherent persuasiveness it may have."[94] But as this Article shows, the courts have overlooked this principle in Title IX cases.

OCR divided its Policy Interpretation into three parts: (1) compliance in financial assistance (scholarships) based on athletic ability;[95] (2) compliance in other program areas (i.e., addressing factors two through ten of the aforementioned list of ten compliance factors from the regulations);[96] (3) compliance in meeting the interests and abilities of male and female students (i.e., addressing the first factor from the aforementioned list of ten compliance factors from the regulations).[97]

---

91. *See* Mahoney, *supra* note 44, at 953.

92. *See, e.g., Kelley*, 832 F. Supp. at 241 ("Quite frankly, these [policy] interpretations have converted Title IX from a statute which prohibits discrimination on the basis of sex (defined as the elimination of or exclusion from participation opportunities), into a statute which provides 'equal opportunity for members of both sexes.' ") (citation omitted); Mahoney, *supra* note 44, at 954.

93. *E.g.*, Howland, *supra* note 36, at 1260 n.50.

94. Davidson & Kerr, *supra* note 26, at 34 (citing Drake v. Honeywell, Inc., 797 F.2d 603, 607 (8th Cir. 1986)). "It [Policy Interpretation] carries 'no more weight on judicial review than [its] inherent persuasiveness commands.' " *Id.* at 34 n.48 (quoting Batterton v. Marshall, 648 F.2d 694, 702 (D.C. Cir. 1980)).

95. OCR Policy Interpretation, 44 Fed. Reg. 71,414, 71,415 (1979); 34 C.F.R. 106.37(c)(1) (1995).

96. OCR Policy Interpretation, 44 Fed. Reg. 71,414, 71,415-17 (1979); 34 C.F.R. 106.41(c)(2)-(10) (1995).

97. OCR Policy Interpretation, 44 Fed. Reg. 71,414, 71,417-18 (1979); 34 C.F.R.

To comply with the first part of the Policy Interpretation, educational institutions must make scholarship aid available to men and women in "substantially equal amounts," although a strict dollar-for-dollar split of scholarship money is not required.[98] OCR also will accept two nondiscriminatory factors that result in disparities in financial assistance: (1) the difference between in-state and out-of-state tuition costs for students at public institutions, and (2) "reasonable professional decisions concerning the awards most appropriate for program development."[99]

As with the financial assistance rules, the second part of the Policy Interpretation does not require "identical benefits, opportunities, or treatment," as long as "the overall effect of any differences is negligible."[100] This second area, which deals with equivalence in other athletic benefits and opportunities, specifically defines "equivalence" as meaning "equal or equal in effect."[101] Among the nondiscriminatory factors that will justify disparate treatment is the "football exception," which recognizes that some aspects of certain sports may be unique.[102] Among other things, the football exception allows universities to pay more for crowd control at men's sporting events than women's sporting events if the crowd size necessitates it.[103] Such disparities, however, are acceptable only if "any special demands associated with the activities of sports involving participants of the other sex are met to an equivalent degree."[104]

By far the most important and controversial component of the Policy Interpretation, the third part measures the effective accommodation of student interests and abilities.[105] This section requires schools to provide athletes of both sexes with the same opportunity to compete in

---

106.41(c)(1) (1995).

98. OCR Policy Interpretation, 44 Fed. Reg. 71,415 (1979).

99. *Id.* The Policy Interpretation explains that this second factor acknowledges that team development may at first require the spreading of scholarships over four years of student athletes, rather than all at once. *Id.*

100. *Id.*

101. *Id.*

102. *See id.* at 71,415-16. The policy interpretation states that such unique aspects "may include rules of play, nature/replacement of equipment, rates of injury resulting from participation, nature of facilities required for competition, and the maintenance/upkeep requirements of those facilities." *Id.*; *see also* Philip Anderson, *A Football School's Guide to Title IX Compliance*, 2 SPORTS L.J. 75, 81-83 (1995).

103. OCR Policy Interpretation, 44 Fed. Reg. 71,416 (1979).

104. *Id.*

105. *See, e.g.*, *Cohen*, 809 F. Supp. at 989 ("There is little question that this factor is the most important criteria listed in [34 C.F.R.] § 106.41(c)"); Chuck Neinas, *Yes: Purpose of Statute Lost When Focus Put on Proportionality*, USA TODAY, May 9, 1995, at C2 (discussing the "misuse" of this crucial section).

intercollegiate athletics, and with a level of competition that equally reflects their abilities.[106] To comply with these dictates, a university must meet *any one* of the following tests:

> (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers *substantially proportionate* to their respective enrollments; or
>
> (2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or
>
> (3) . . . [W]hether it can be demonstrated that the interests and abilities of the members of . . . [the underrepresented] sex have been fully and effectively accommodated by the present program.[107]

OCR has maintained that the first of the three alternate tests [hereinafter the "proportionality test"] for compliance under the third part of the Policy Interpretation, provides universities with a "safe harbor" for establishing that they offer nondiscriminatory athletic participation opportunities.[108] In reality, however, an analysis of these three benchmarks reveals the extent of the bureaucratic capture of Title IX. In direct contravention of Title IX's legislative history, the proportionality test has been used to mandate gender quotas in intercollegiate athletics.[109] As the last two parts of the test have lost their significance by their utter infeasibility, the proportionality test has engulfed the other benchmarks and has dominated Title IX litigation.[110] In the eyes of supporters and detractors alike, the proportionality test has become Title IX and vice versa.[111]

---

106. OCR Policy Interpretation, 44 Fed. Reg. 71,418 (1979).

107. *Id.* (emphasis added).

108. Letter from Norma V. Cantú, DED's Assistant Secretary for Civil Rights, to interested parties 2 (Jan. 16, 1996) (transmitting the final version of OFFICE FOR CIVIL RIGHTS, CLARIFICATION OF INTER-COLLEGIATE ATHLETICS POLICY GUIDANCE: THE THREE-PART TEST) (on file with the author).

109. Mahoney, *supra* note 44, at 954.

110. *See* Ferrier, *supra* note 43, at 865-68; J. Dennis Hastert, Title IX, p.1 (1995) (unpublished paper, on file with the author).

111. *E.g.*, Neinas, *supra* note 105; *Hearing on Title IX of the Education Amendments of 1972: Hearing Before the House Subcomm. on Postsecondary Education, Training and Life-Long Learning of the House Comm. on Economic and Educ. Opportunities*, 104th Cong., 1st Sess. 353 (1995) [hereinafter *Hearing*] (statement of Margaret A. Jakobson, principal complainant in U.S.

This convergence has spelled disaster for universities in court. The inability to reach the requisite female participation numbers has spurred a remarkable losing streak for Title IX defendants: more than 30 Title IX cases have been brought to court over the past three years, with the plaintiffs prevailing in every case.[112] Without doubt, this trend will continue if Title IX remains unchanged, as a recent survey found that 645 out of 646 NCAA[113] schools would fail the proportionality test.[114] Thus, rather than serving as a safe harbor for wayward educational institutions, the proportionality test has more closely resembled a regulatory Bermuda Triangle.

3. The 1990 *Investigator's Manual*

Adding another layer of regulation to the bureaucratic mix, OCR issued the *Title IX Athletics Investigator's Manual* (*Investigator's Manual*) in 1990.[115] The manual was designed to assist OCR investigators in their investigations of Title IX violations at interscholastic and

---

Dep't of Education Case #05-92-2099 against Minnesota's Moorhead State University); Jennifer L. Henderson, *Gender Equity in Intercollegiate Athletics: A Commitment to Fairness*, 5 SETON HALL J. SPORT L. 133, 152 (1995) (incorrectly claiming that Title IX requires universities to satisfy a "fifty-fifty" proportionality ratio).

112. Women's Sports Foundation, *Gender Equity in Athletics/Title IX* (1996) (downloaded by author from World-Wide Web; <http://www.mcs.net/~sluggers/titleixfaq.html>); *see also* Joan O'Brien, *The Unlevel Playing Field: Women Athletes Still Run On*, SALT LAKE TRIB., Sept. 4, 1994, at A1. Among the schools that have recently lost Title IX cases or settled out of court are Brown University, Colorado State University, Cornell University, Auburn University, the California State University system, and Temple University. *See id.*

113. The National Collegiate Athletic Association (NCAA) is a private organization comprised of a voluntary membership of approximately 900 colleges and universities. It was formed early in the twentieth century at the behest of President Theodore Roosevelt, who brought together the heads of major universities to develop playing rules for the dangerous game of college football. Member schools agree to be bound by a lengthy and complex set of NCAA rules and regulations designed to ensure "equity in competition" and other objectives. The NCAA has four divisions: I-A, II, III and I-AA, with different standards of entry for each. For example, Division I-A membership requires schools to have a minimum of six varsity sports, while Division II-A schools must sponsor four varsity sports. *See* WEILER & ROBERTS, *supra* note 67, at 496-97; Wong & Ensor, *supra* note 37, at 345 n.1; James Delaney, *Round Table Discussion on Collegiate Athletics Reform*, 22 J.C. & U.L. 96, 98 (1995); Deborah E. Klein & William Buckley Briggs, *Proposition 48 and the Business of Intercollegiate Athletics: Potential Antitrust Ramifications Under the Sherman Act*, 67 DENV. U. L. REV. 301, 304 nn.13-15 (1990).

114. Doug Bedell, *Line of Skirmish: Title IX Gathers Force, but Football Powers Huddle to Fight Back*, DALLAS MORNING NEWS, May 18, 1995, at B1. "The one school in compliance was not disclosed." *Id. But see* Erik Brady, *Weighing Equality: College Sports Still Tip Scale Toward Men*, USA TODAY, Nov. 7, 1995, at C1 (stating that a USA Today survey of 94 Division I-A football schools found that nine would pass Title IX's proportionality test).

115. VALERIE M. BONNETTE & LAMAR DANIEL, U.S. DEP'T OF EDUC., TITLE IX ATHLETICS INVESTIGATOR'S MANUAL (1990).

intercollegiate athletic programs.[116] With regard to the Policy Interpretation's third part—effective accommodation of student interests and abilities—the *Investigator's Manual* stops short of defining exactly what male-to-female athletic participation ratio satisfies the proportionality test.[117] The manual states that if a school is 52% male and 48% female, "then, ideally, about 52% of the participants in the athletics program should be male and 48% female. . . ."[118] But the manual then emphasizes that "[t]here is no set ratio that constitutes 'substantially proportionate' or that, when not met, results in a disparity or a violation."[119]

The 166-page *Investigator's Manual* provides a thorough checklist of all the questions that OCR investigators should ask, and all the statistics they should obtain, to determine whether a university complies with Title IX.[120] Unfortunately, length does not always translate into clarity, as the manual provides few concrete examples to elucidate the ambiguous gender equity tests described in the OCR regulations and in the Policy Interpretation.[121] More distressingly, the *Investigator's Manual* is occasionally inconsistent with the regulations and the Policy Interpretation. In turn, as stated earlier, the regulations and Policy Interpretation are both inconsistent with the text and legislative history of the Title IX statute itself.[122]

For example, the manual uses "second-class status" as the yardstick for ascertaining whether a Title IX violation has occurred,[123] rather than "equivalence" which is the standard used in the Policy Interpretation.[124] In addition, the *Investigator's Manual* introduces a new "offsetting factor" approach, which has no basis in either the statute, regulations or Policy Interpretation.[125] This *sui generis* provision requires the investigator to analyze the number and significance of disparities favoring the men's athletic program with the disparities

116. *Id.* at [i].

117. *Id.*

118. *Id.* at 24.

119. *Id.*

120. *Id.* For example, under the "Accommodation of Interests and Abilities" part, investigators are told to ask coaches whether the level of competition is "appropriate for the[ir] team[s.]" The investigator is then advised to "[d]etermine the division level of each opponent, if unable to obtain information from NCAA or other directory sources." *Id.*

121. *See* Heckman, *supra* note 41, at 16 n.64.

122. *See supra* text accompanying notes 48-66, 78, 92; *see also* Heckman, *supra* note 41, at 16, 16 n.64.

123. BONNETTE & DANIEL, *supra* note 115, at 10; *see* Heckman, *supra* note 41, at 16 n.64.

124. *See* Heckman, *supra* note 41, at 16 n.64 (citing 44 Fed. Reg. 71,413, 71,415 (1979) (setting forth "equivalence" as the proper standard for compliance)).

125. *See id.*; BONNETTE & DANIEL, *supra* note 115, at 8.

favoring the women's program. According to the manual, "[i]f these disparities offset each other, a finding of compliance is made."[126] The manual does not say how much weight this "offsetting factor" approach gives to each specific disparity.[127] Rather, the manual gives each OCR regional office the discretion to fill in such gaps.[128]

Another problem with the 1990 *Investigator's Manual* was that OCR never fulfilled its promise to revise the document periodically.[129] In addition, the manual was prepared without any form of congressional guidance or approval, as well as without any input from interested groups.[130] Neither approved nor recommended by Congress, the *Investigator's Manual* is an internal agency document that gave no public notice and sought no public comments, and thus is entitled to little, if any, deference from the courts.[131]

4. The 1996 Clarification of the Three-Part Test

University officials, dissatisfied with OCR's 166-page *Investigator's Manual*, found a receptive audience for their complaints when the Republican Party won both houses of Congress in November 1994. In a matter of months, the House Subcommittee on Postsecondary Education, Training and Lifelong Learning was holding hearings on Title IX and its regulatory deficiencies.[132]

---

126. BONNETTE & DANIEL, *supra* note 115, at 8; *see* Heckman, *supra* note 41, at 16 n.64.

127. See generally Heckman, *supra* note 41, at 32 n.143 for a discussion of the weighting problem. For example, under the *Investigator Manual's* "offsetting factor" approach, a university with a 50-50 male to female ratio might still comply with Title IX if its athletic participation ratio is 65% male to 35% female, as long as the university spent 65% of its athletic budget on women's sports. While this hypothetical university could achieve compliance based on the *Investigator's Manual*, it clearly would fail Title IX under the Policy Interpretation's proportionality test.

128. BONNETTE & DANIEL, *supra* note 115, at 4; Heckman, *supra* note 41, at 16 n.64.

129. Heckman, *supra* note 41, at 16 (citing *Oversight Hearing: Office for Civil Rights, Department of Education, Hearing Before the Comm. on Labor & Human Resources*, 102d Cong., 1st Sess. 105-06 (1991) (statement of Michael L. Williams, Assistant Secretary of OCR)).

130. *Id.* at 16 n.64. In contrast, the Policy Interpretation received more than 700 public comments, and was developed after HEW staff surveyed eight universities to see how the proposed rules would apply in practice. OCR Policy Interpretation, 44 Fed. Reg. 71,413 (1979).

131. *See, e.g.*, Batterton v. Marshall, 648 F.2d 694, 701 (D.C. Cir. 1980) ("Advance notice and public participation are required for those actions that carry the force of law."); Flagstaff Medical Ctr., Inc. v. Sullivan, 773 F. Supp. 1325, 1343-44 (D. Ariz. 1991) ("Interpretative rules, by definition, do not have the force of law. They are not binding on the agency, private parties, or the courts. . . . Since interpretative rules are not binding on anyone, they, unlike legislative rules, should not be given controlling significance."), *rev'd in part on other grounds*, 962 F.2d 879 (9th Cir. 1992); *see also supra* note 94 and accompanying text.

132. *Hearing, supra* note 111 (occurring six months after the November 1994 congressional election).

At the hearings, Brown University President Vartan Gregorian—widely known as a progressive leader of one of America's foremost bastions of liberal thought—echoed the frustration felt by many university officials when he complained of the difficulty encountered in measuring female "interests and abilities" in sports in accordance with the Policy Interpretation's crucial third part.[133] Charles M. Neinas, Executive Director of the College Football Association, beseeched the House subcommittee to require that OCR issue new guidelines, since "[t]he current Policy Interpretation . . . is outdated and lacks the necessary clarification by . . . OCR."[134] David Jorns, president of Eastern Illinois University (EIU), testified that OCR continually refused to offer any guidance as to how EIU could improve its compliance efforts.[135] Jorns stated that even after OCR conducted a compliance check, the agency refused to disclose its findings to EIU, despite repeated requests from the university.[136] According to Jorns, OCR instead sent the university an extensive settlement proposal that the parties had never discussed previously.[137] With the investigative process shrouded in secrecy, Jorns could only interpret OCR's settlement proposal as a requirement that EIU add four women's sports almost immediately, regardless of the university's financial constraints.[138] In the proposal, OCR also required that the university pull out its gymnasium bleachers two rows further for women's events, in order to make the amount of bleacher rows equal for men's and women's sports.[139]

In response to complaints from confused university administrators such as Jorns, Representatives Howard "Buck" McKeon and Steve Gunderson told Norma V. Cantú, the DED's assistant secretary for civil rights, to provide more specific rules for Title IX compliance or else

133. John E. Mulligan, *Gregorian: Brown Is a Loser Under Title IX*, PROVIDENCE J.-BULL., May 10, 1995, at A1. During questioning, Gregorian mocked a college board survey of high school girls' sports interests, which revealed that 800 girls were interested in equestrian sports. *Id.* An exasperated Gregorian exclaimed that "We don't have stables! Maybe in Newport. . . ." *Id.*

134. *Hearing*, *supra* note 111, at 207.

135. *Id.* at 102-03.

136. *Id.* at 102.

137. *Id.*

138. *See id.* at 102-03.

139. *Id.* at 103. In the end, EIU was forced to eliminate its men's swimming and wrestling teams to pay for the addition of the four new women's teams. *Id.* Among the new teams mandated by OCR was women's field hockey, a sport "not even played in Illinois to any extent . . . ," thereby requiring EIU to import players from the northeastern part of the country where the sport is more prevalent. *Id.* at 102-03.

face possible congressional intervention.[140] On June 9, 1995, Secretary Cantú agreed to provide the requested clarifications, and on September 20, 1995, OCR released a draft of its latest attempt to clear up the ambiguities surrounding Title IX.[141]

The document, entitled *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test* [hereinafter *Clarification*],[142] was released with the expressed purpose of elaborating upon the three-part test of the Policy Interpretation's third part, used to measure the effective accommodation of student interests and abilities.[143] In a letter accompanying the *Clarification*, Cantú emphasized that "OCR is not revisiting the Title IX regulation or the Title IX Policy Interpretation," but instead was distributing the document "to demonstrate in concrete terms how [compliance] factors will be considered."[144] Cantú's letter specifically disavowed the use of "strict numerical formulas or 'cookie cutter' answers to the issues that are inherently case- and fact-specific."[145]

In so doing, OCR reaffirmed its policy of embracing flexibility over the clarity that comes with drawing bright-lines. The *Clarification* repeated OCR's longstanding position that the proportionality test does not require exact proportionality of enrollment to athletic participation, and that "nothing in the three-part test requires an institution to eliminate participation opportunities for men."[146] The *Clarification*

---

140. Mary C. Curtis & Christine H.B. Grant, *Gender Equity in Sports* (last modified Mar. 22, 1996) <http://www1.arcade.uiowa.edu/proj/ge/up-to-date.html #102>.

141. *Id.*

142. Office for Civil Rights, Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (Draft) (Sept. 20, 1995).

143. Letter from Norma V. Cantú, DED's Assistant Secretary for Civil Rights, to interested parties 1 (Sept. 20, 1995) (on file with the author); OCR Policy Interpretation, 44 Fed. Reg. 71,414, 71,417-18 (1979); 34 C.F.R. 106.41(c)(1) (1994).

144. Cantú, *supra* note 143.

145. *Id.*

146. *Clarification of Intercollegiate Athletics Policy*, *supra* note 142, at 2, 9. The hypotheticals in OCR's *Clarification*, however, seem to give universities little wiggle room in case exact proportionality is not achieved. As the following hypothetical from the *Clarification* demonstrates, a disparity of one percentage point between female enrollment rates and female athletic participation rates may be all that OCR anticipates for complying institutions:

> [I]f an institution's enrollment is 52 percent male and 48 percent female and 52 percent of the participants in the athletic program are male and 48 percent female, then the institution would clearly satisfy part one. However, OCR recognizes that natural fluctuations in an institution's enrollment and/or participation rates may affect the percentages in a subsequent year. For instance, if the institution's admissions the following year resulted in an enrollment rate of 51 percent males and 49 percent females, while the participation rates of males and females in the

kept the formula for determining participation opportunities under the proportionality test, which is to count the number of athletes actually *participating* in the athletic program, rather than the potential athletes who are left out.[147]

Since the *Clarification* essentially just reiterated the status quo, reaction to the document was predictable: Brown University athletic director David Roach complained that "[i]t really didn't clarify a heck of a lot. . . . What a lot of athletic directors want to know is: What is substantial proportionality? Is it 5 percentage points? Is it 7? Is it one standard deviation?"[148] Some Title IX supporters, however, lamented that the *Clarification* did not go far enough to protect women's sports.[149] All in all, OCR received comments from more than 200 interested parties in the 30-day comment period after the agency circulated its draft.[150]

In particular, one of the most popular suggestions from Title IX critics was to recommend that "opportunity slots" be incorporated into the proportionality test.[151] This would enable a university to determine participation opportunities by counting the number of athletes who could be supported if they showed up to play on a team.[152] That is, unlike the current policy, where proportionality is analyzed by counting the number of athletes actually participating in sports, the "opportunity slots" proposal would include unfilled positions when calculating participation rates.

In the end, this suggestion was not incorporated into OCR's final *Clarification*.[153] Relatively unchanged from the draft in spite of the comments received by the agency, the final version of the document was distributed to 4500 interested parties on January 16, 1996.[154] In an

---

> athletic program remained constant, the institution would continue to satisfy part one because it would be unreasonable to expect the institution to fine tune its program in response to this unexpected change in enrollment.

Id. at 4.

147. *See id.* at 4.

148. Erik Brady, *Federal Law Still Being Defined 23 Years Later: Department of Education Drafting Clarifying Document*, USA TODAY, Nov. 8, 1995, at C4.

149. Cantú, *supra* note 108, at 1.

150. *Id.*

151. *Id.* at 4.

152. Letter from J. Dennis Hastert, Member of Congress, to Norma V. Cantú, DED's Assistant Secretary for Civil Rights 1 (Oct. 30, 1995) (on file with the author).

153. *See* OFFICE FOR CIVIL RIGHTS, CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY GUIDANCE: THE THREE-PART TEST (1996).

154. Letter from Kay Casstevens, DED's Assistant Secretary for Legislation and Congressional Affairs, to all members of Congress (Jan. 16, 1996) (on file with the author).

accompanying letter, Secretary Cantú asserted that "OCR does not require quotas," but admitted that "[a]n institution can choose to eliminate or cap teams as a way of complying with part one of the three-part test."[155]

Although OCR had expressly disavowed quotas, the *Clarification* offered several curious hypotheticals that seemed to mandate a fairly rigid quota to satisfy the proportionality test.[156] In particular, while the final *Clarification* stated that proportionality determinations are made "on a case-by-case basis, rather than through use of a statistical test," one hypothetical—added to the revised *Clarification*—seemed to establish that a disparity of five percentage points is a *per se* violation of Title IX:[157]

> For instance, Institution A is a university with a total of 600 athletes. While women make up 52 percent of the university's enrollment, they only represent 47 percent of its athletes. If the university provided women with 52 percent of athletic opportunities, approximately 62 additional women would be able to participate. Because this is a significant number of unaccommodated women, it is likely that a viable sport could be added. If so, Institution A has not met part one.[158]

This example seems to require universities to establish a quota for female athletic participation that is within five percentage points of male athletic participation. According to the hypothetical, as long as a "significant number" of women are unaccommodated (essentially the third prong of the three-part test) and a "viable sport" could be added, a disparity of five percentage points between female enrollment and female athletic participation is a *per se* violation of the proportionality test.[159]

Aside from the questionable assumption that women and men share the same level of interest in sports,[160] the hypothetical is also noteworthy for its dubious prediction that an increase in female participation

155. Cantú, *supra* note 108, at 3-4.

156. *See, e.g.*, *supra* note 146.

157. Cantú, *supra* note 108, at 3-4.

158. CLARIFICATION, *supra* note 153, at 5.

159. OCR Policy Interpretation, 44 Fed. Reg. 71,418 (1979). A sport is "viable" if "there is a sufficient number of interested and able students and enough available competition to sustain an intercollegiate team," regardless of the team's financial costs to a university. CLARIFICATION, *supra* note 153, at 4-5.

160. *See infra* notes 295-96 and accompanying text.

will have no effect on male participation rates.[161] In other words, OCR's hypothetical assumes that the effect of achieving exact proportionality is to enable 62 additional women to participate in athletics.[162] The problem is that this "expanding pie" prediction does not reflect the zero-sum realities of university budget constraints. As the following section will show, universities do not follow the hypothetical "Institution A" in keeping male participation rates constant, but have instead moved towards proportionality by giving women many positions formerly occupied by men. Thus, while the ideal "Institution A" might create 62 extra positions for women, today's real "Institution A" would create only 31 positions for women while taking away 31 positions from men to reach the same proportionality goal.[163]

Furthermore, the final version of the *Clarification* strikes a blow against privately funded intercollegiate teams, such as the Princeton University wrestling squad. In determining participation opportunities under the proportionality test, the *Clarification* specifically includes "athletes who compete on teams sponsored by the institution even though the team may be required to raise some or all of its operating funds."[164] Thus, even though a Princeton alumni group has pledged to raise the entire $2.3 million cost to revive the school's defunct wrestling

---

161. *See supra* note 158. The following calculation demonstrates how the *Clarification*'s hypothetical requires male participation rates to remain constant in order to conclude that approximately 62 additional women would participate if women comprised 52%, as compared to 47%, of athletes at an institution of 600 students.

Step 1 (determining the amount of male and female athletes): 600 x .47 = 282 women; 600 - 282 = 318 men.

Step 2 (determining how many additional female athletes are needed to raise the percentage of female athletes to 52%): 282 + Addt'l Women / 600 + Addt'l Women = .52. The numerator in the preceding equation represents the new total number of women participating, while the denominator represents the new total number of athletes. This assumes that the number of male athletes remains the same.

Step 3 (completing the preceding equation): 312 + .52(Addt'l Women) = 282 + Addt'l Women.

Step 4 (completing the preceding equation): 30 = .48(Addt'l Women).

Step 5 (completing the preceding equation): Addt'l Women = 62.5

162. *See supra* note 161.

163. *See, e.g.*, Transcript of Big Ten Gender Equity Task Force Meeting, *supra* note 26; William Kelley, Title IX Press Release, 1993 (unpublished document, on file with author) (quoting Anne Goodman James, women's swimming coach at Northern Michigan University: "[W]omen's [o]pportunities are not being increased much because proportionality is being achieved by dropping men's sports, rather than adding opportunities for women. It's become anti-men, instead of pro-women"); *supra* note 26 and accompanying text.

164. CLARIFICATION, *supra* note 153, at 3; *see also* Cohen v. Brown Univ., 879 F. Supp. 185, 201, 201 n.32 (D.R.I. 1995) [hereinafter *Cohen II*] (including varsity level, donor-funded teams as intercollegiate teams for purposes of the proportionality test).

program, the university would still have to fund additional female athletic positions to match the male slots provided by the private donors.[165] Not surprisingly, then, Princeton has repeatedly refused the donations.[166]

C. *Title IX's Effects on Male and Female Participation in Intercollegiate Athletics*

Between 1972, when Title IX was passed, and 1978 the proportion of female NCAA intercollegiate athletes skyrocketed from 7% to approximately 33%.[167] After 1978, this rapid growth stalled, due to the expiration of the three-year compliance period,[168] economic stagnation,[169] and the realization among universities that "overburdened federal agencies lacked the resources to make inspections or enforce the law."[170] By 1984, female participation in NCAA intercollegiate athletics had regressed to 30.8%.[171]

Immediately after Title IX's passage, universities also spent more on women's athletics. NCAA Division I schools gave female athletes only $27,000 in financial aid in 1973-74. By the 1981-82 academic year, NCAA Division I schools were expending an average of $400,000 on female athletes.[172]

All these gains, however, were placed in jeopardy in 1984 when the Supreme Court effectively removed intercollegiate athletics from Title IX's reach.[173] In *Grove City College v. Bell*,[174] the Court took a narrow view of Title IX's prohibition of sex discrimination in " 'any education program or activity receiving Federal financial assistance.' "[175] Noting that petitioner Grove City College was a private

---

165. Vic Feuerherd, *Title IX Sparks Gender Battle: Participation Balance Focus of Concern*, WIS. ST. J., May 14, 1995, at D1; Carol Innerst, *Feminist Paglia Takes Stand for Male Victims of Bias Law: She Argues for Bringing Back Princeton Wrestling Team*, WASH. TIMES, Feb. 22, 1996, at A2.

166. Innerst, *supra* note 165.

167. Joannie M. Schrof, *A Sporting Chance?*, U.S. NEWS & WORLD REP., Apr. 11, 1994, at 51, 52.

168. 34 C.F.R. § 106.41(d) (1995).

169. Miriam Horn, *1973: Face to Face with Demons; The Way We Were*, U.S. NEWS & WORLD REP., Oct. 25, 1993, at 47, 49. Quite obviously, a poor economy inhibits a university's ability to develop new teams and expand existing ones.

170. Schrof, *supra* note 167, at 52.

171. Wong & Ensor, *supra* note 35, at 347.

172. *Id.* Male athletes received an average $1.2 million in financial aid from NCAA Division I schools in 1973-74, and $1.7 million in 1981-82. *Id.*

173. *See* Johnson, *supra* note 83, at 564.

174. 465 U.S. 555 (1984).

175. *Id.* at 557 (quoting 20 U.S.C. § 1681(a)).

college that refused state and federal financial assistance,[176] the Court held that only the college's financial aid program—from which students received DED Basic Educational Opportunity Grants (BEOGs)—fell under the auspices of Title IX.[177] In so doing, the Court rejected the "institution-wide" view that since money is fungible, an entire educational institution becomes subject to Title IX whenever any of its departments receive federal funds.[178] In lieu of the institution-wide view, the Court deemed its narrower "program specific" reading of Title IX more consistent with congressional intent.[179]

The *Grove City* decision had an immediate impact on Title IX enforcement. Because few intercollegiate athletic programs received direct federal funding, OCR circumscribed or discontinued its investigation of gender discrimination in athletics, and lower courts refused to provide relief for disparate treatment.[180]

Five years later, Congress breathed new life into the moribund antidiscrimination statute by passing the Civil Rights Restoration Act of 1987 over a presidential veto.[181] The Act replaced the Court's program-specific approach with the broader institution-wide approach by defining "program or activity" as "all the operations of . . . a college, university, or other postsecondary institution, or a public system of higher education . . . any part of which is extended Federal financial assistance. . . ."[182]

Congress' action reinvigorated OCR's enforcement efforts and precipitated another rise in Title IX litigation regarding female participation in intercollegiate sports.[183] As Table 1 indicates, women now comprise more of the new entrants in intercollegiate athletics than do men. And while female participation rates continue to rise after OCR renewed its Title IX enforcement efforts in 1988, male participation rates appear to have peaked immediately after the *Grove City* decision.

---

176. *Id.* at 559.

177. *Id.* at 573-74.

178. *See id.* at 573.

179. *Id.* at 572-73.

180. Harris, *supra* note 89, at 61, 61 n.25 (citing Bennett v. West Tex. State Univ., 799 F.2d 155, 159 (5th Cir. 1986) (holding that the "ministerial relationship between financial aid department . . . and athletic program" was too attenuated "to bring the latter under Title IX")); *but see Haffer*, 688 F.2d at 17 (holding that since Temple University received non-earmarked federal aid, the entire university is to be considered the "program or activity" for Title IX purposes, and thus its athletic department is covered by Title IX).

181. Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988) (codified at 20 U.S.C. § 1687 (1994)); *see, e.g.*, Johnson, *supra* note 83, at 564.

182. 20 U.S.C. § 1687.

183. *See* Johnson, *supra* note 83, at 565.

TABLE 1

Participation Rates Among Males and Females at NCAA Schools[184]

YEAR	MALE PARTICIPANTS	FEMALE PARTICIPANTS	TOTAL PARTICIPANTS	MALE TO FEMALE RATIO
1984-85	201,063	91,669	292,732	68.7% - 31.3%
1989-90	177,156	89,212	266,368	66.5% - 33.5%
1990-91	184,593	92,778	277,371	66.5% - 33.5%
1991-92	186,045	96,467	282,512	65.9% - 34.1%
1992-93	187,041	99,859	286,900	65.2% - 34.8%
1993-94	189,642	105,532	295,174	64.2% - 35.8%

Gains in female participation after 1992 can be attributed in part to the Supreme Court's ruling in *Franklin v. Gwinnett County Public Schools*.[185] In *Franklin*, the Court held that a private litigant can collect monetary damages for an intentional violation of Title IX.[186] Indeed, at least 800 women's intercollegiate teams have been added since 1992.[187] Still, statistics reveal that, if gender equity is measured by the male-to-female ratio in intercollegiate sports, a proverbial "glass sneaker" continues to exist.[188] Women comprise only about 36% of intercollegiate athletic participants and receive only one-third of all

184. Curtis & Grant, *supra* note 140. Title IX, however, should not be solely credited for the rise in participation and funding of women's athletics. Other factors include a change in societal attitudes towards women, and increased subsidies for women's sports by the NCAA since 1981. *See* Wong & Ensor, *supra* note 37, at 348. In the 1981-82 sports season, the all-male NCAA began holding championships in women's sports for the first time. Association for Intercollegiate Athletics for Women v. National Collegiate Athletic Ass'n, 735 F.2d 577, 580 (D.C. Cir. 1984). The NCAA's entry into women's athletics diminished the role of the Association for Intercollegiate Athletics for Women (AIAW), the governing body for women's athletics. *Id.* Although the AIAW had grown to 961 colleges and universities in 1980-81, competition from the larger, wealthier and older NCAA drove the AIAW out of existence on June 30, 1982. *Id.* Two years later, the District of Columbia Circuit rejected the AIAW's antitrust suit against the NCAA for violations of the Sherman Act. *See id.* at 590.

185. 503 U.S. 60 (1992).

186. *Id.* at 75 n.8. In 1979, the Supreme Court first recognized a private right of action under Title IX. Cannon v. University of Chicago, 441 U.S. 677, 709 (1979).

187. Laurie Tarkan, *Unequal Opportunity*, WOMEN'S SPORTS & FITNESS, Sept. 1995, at 25, 26.

188. Heckman, *supra* note 41, at 63.

scholarship money,[189] despite making up more than half of all undergraduate enrollments.[190] A 1992 NCAA survey of Division I-A schools revealed that men's sports account for 80% of operating budgets, and 84% of recruiting budgets.[191]

But although these statistics seem to indicate a continued bias towards men in the way money and participation opportunities are allocated at America's universities, not all male athletes benefit from this ostensibly favorable treatment. As Bill Kelley's experience demonstrates, the costs of Title IX have been thrust upon men in less popular, low-revenue sports. Division I-A athletic departments on average spend 52% of their total operating budgets, 52% of their total scholarship budgets, and 65% of their total recruiting budgets on football,[192] even though 67% of Division I-A football programs and approximately 86% of all football programs lose money.[193] Division I-A football schools have an average of 108.07 football players, as compared to a Division I-A average of 111.71 participants in all women's sports combined.[194]

Meanwhile, low-revenue sports with smaller squads, such as wrestling, have been pinned into a corner. Since Title IX's passage in 1972, more than 250 colleges and universities have eliminated their wrestling programs.[195] Similarly, there are now 64 fewer men's swimming teams and 46 fewer water polo teams than there were when Title IX was enacted; these losses have occurred even though NCAA membership has swelled to more than 900 institutions, compared to 704 members in 1974.[196] And while Title IX prevented Brown University from cutting Amy Cohen's gymnastics team,[197] Title IX has not been a savior for men's gymnastics squads. After losing more than 100 teams since 1974, men's gymnastics can be found at only 31 sponsoring schools—below the forty-school minimum required to hold an NCAA championship.[198]

---

189. Women's Sports Foundation, *supra* note 112.

190. O'Brien, *supra* note 112.

191. Women's Sports Foundation, *supra* note 112.

192. Anderson, *supra* note 102, at 76-77.

193. Women's Sports Foundation, *supra* note 112. When Division II and III schools are included, football lost money at 454 out of 524 institutions in 1992—or 86% of all schools. Henderson, *supra* note 111, at 152, 152 n.116 (citing Alexander Wolf, *Trickle-Down Economics*, SPORTS ILLUSTRATED, Oct. 10, 1993, at 84).

194. Anderson, *supra* note 102, at 76.

195. Andy Baggot, *Wrestling's Fate Enjoys Reversal*, WIS. ST. J., Feb. 2, 1996, at D1.

196. J. Dennis Hastert, The Unintended Consequences of Title IX (1995) (unpublished paper, on file with the author).

197. *See Cohen*, 991 F.2d at 907.

198. Bonnie DeSimone, *Declining Sports Get Partial Save: All Championships Stay, for*

The decline of these venerable sports has given little satisfaction to Title IX advocates, who see football as the real culprit and Title IX as the scapegoat.[199] Indeed, the argument against football has merit. As a potentially lucrative, traditional activity that can engender enormous school spirit, prestige, and national media attention for a university, football has remained a sacred cow among athletic directors, alumni, and avid fans.[200] While other sports are starved for funds, football players continue to eat well—literally. Many schools give football players allowances of $15 for breakfast and $25 for dinner,[201] and sometimes take the entire team to a pre-game movie and put the players up in a hotel on the night before home games.[202] Some football coaches make two to three times the salary of their university presidents.[203] Football teams receive a maximum of 85 scholarships and usually take on more than 20 walk-on players.[204] And although schools can earn millions of dollars when their teams play in an annual bowl game, for most schools not all of these earnings reach the school's treasury.[205] Members of athletic conferences split the largesse with other members, and many schools send upwards of 100 players on charter flights to these extravaganzas and spend freely—within NCAA guidelines—while there.[206]

Now, PLAIN DEALER (Cleveland), Jan. 10, 1996, at D1. Recognizing the impact of budget cuts and gender equity requirements, the NCAA in a close vote gave a three-year waiver for championships in sports contested in the Olympics, such as men's gymnastics. *Id.*; *see also* Hastert, *supra* note 110; Hastert, *supra* note 196.

199. *See, e.g.*, *Hearing*, *supra* note 111, at 121 (statement of Christine H.B. Grant, University of Iowa Representative of the National Association of Collegiate Women Athletics Administrators); Donna Lopiano, *No Problems Solvable Without Damaging Success of Football*, USA TODAY, May 9, 1995, at C2 ("Football asking for special relief under Title IX is a lot like IBM asking for an antitrust exemption!").

200. *See, e.g.*, Ivan Maisel, *CFA Officials Going After Title IX*, CHARLESTON GAZETTE & DAILY MAIL, May 13, 1995, *available in* 1995 WL 11639448 ("College football has a long history of believing a bootstrap-God-and-country message. That sort of rhetoric is politically incorrect on college campuses these days. But so too is the message of the Republican Party, and it's had a winning season. . . .").

201. *See* Tarkan, *supra* note 187, at 27.

202. Henderson, *supra* note 111, at 153. The cost of hotel rooms on the night before home games ranges from $4000 to $7000 a night. *Id.* University presidents voted down a proposal at the 1994 NCAA Convention to bar football teams from undertaking this unnecessary expense. *Id.* (citing John Feinstein, *Power Play Penalizes Both Sides*, WASH. POST, Jan. 15, 1994, at D7).

203. Kevin B. Blackistone, *Title IX Isn't About Male Slashing*, DALLAS MORNING NEWS, May 18, 1995, at B9.

204. *See* Bedell, *supra* note 114; *see also Hearing*, *supra* note 111, at 192 (statement of Wendy Hilliard, president of the non-profit Women's Sports Foundation).

205. *See* Heckman, *supra* note 41, at 44 n.197.

206. *Id.*; Blackistone, *supra* note 203. One of the more notorious examples was the 1984

Still, the arguments against football should not be overstated, as cutting football alone would not be the antidote for Title IX unfairness. Title IX proponents who argue that trimming football's excesses would allow universities to satisfy gender equity rules ignore the realities of the proportionality test.[207] Even if football were excluded altogether from the Title IX equation, approximately 55% of Division I-A institutions still would fail the proportionality requirements.[208]

It is true, however, that with today's budget constraints and gender equity requirements, the refusal of university athletic directors to pare down football expenditures has forced the costs of Title IX compliance onto the less popular men's sports.[209] Due to the intransigence of athletic directors towards cutting football budgets, Title IX has instigated a battle among the have-nots. The Amy Cohens and Bill Kelleys have been left to fight for whatever resources football leaves behind. As the respective verdicts in the *Cohen* and *Kelley* cases show, Title IX's regulations make this fight a no-contest brawl.[210]

In reality, then, both sides of today's heated Title IX debate are right. Yes, the nondiscrimination statute has been the prime mover in the rise of female participation in intercollegiate sports. But at the same time, it has been largely responsible for curtailing opportunities for men by causing the demise of many men's teams. Paved with good, albeit vague, intentions, the statute itself should not be blamed for the languishing state of "minor" men's sports. Title IX, after all, was

---

Aloha Bowl in Hawaii, where Southern Methodist University earned $400,000 for participating in the event. Heckman, *supra* note 41, at 44 n.197. By the time the team returned home from the trip, only $16,699 remained. *Id.* (quoting DAVID WHITFORD, A PAYROLL TO MEET: A STORY OF GREED, CORRUPTION AND FOOTBALL AT SMU 135 (1989)).

207. *See* Bedell, *supra* note 114 (stating that women's groups have recommended limiting football perks in lieu of squad cutbacks as a way to satisfy Title IX); *Hearing, supra* note 111, at 194 (statement of Wendy Hilliard) (testifying that, at many institutions, cutting football scholarships from 85 to 50 would achieve Title IX compliance).

208. Peter Brewington, *Big-Time Football Major Focus of Numbers Game: Women's Leaders Target Sport; Coaches Say Enough on Cuts*, USA TODAY, Nov. 9, 1995, at C8. Of 94 Division I-A schools responding to the *USA Today* survey, only 42 would meet the proportionality test if football were excluded from the calculus. *Id.*

209. *UM Drops Men's Golf*, MIAMI HERALD, Aug. 15, 1992, at D7. Although the University of Miami's football team has enjoyed enormous popularity and gridiron success since 1983, its athletic department eliminated its 50-year old men's golf team in 1992, citing "money and Title IX requirements. . . ." *Id.* The golf team had won the Big East Conference tournament the previous year. *Id.*; *see also* Wyche, *supra* note 40, at D5 (discussing the University of Miami football team's impact on the school's Title IX compliance).

210. *See Cohen*, 991 F.2d at 900; *Kelley*, 35 F.3d at 245. Norma V. Cantú, DED's assistant secretary for civil rights, bluntly acknowledges that OCR has taken sides in the battle among the have-nots: " 'Congress did not pass a civil rights law for the over-represented group.' " Brady, *supra* note 148 (quoting Norma V. Cantú).

designed to prohibit discrimination in education, not to establish mass quotas for female athletes.

The truly culpable parties are the high-profile, high-expense football programs, and, to a greater extent, HEW, DED and the courts that presided over Title IX's metamorphosis. High-profile, high-expense football programs are blameworthy because they have diverted money and resources away from both female and male athletes in lower-revenue sports. HEW, DED and the courts, meanwhile, are guilty of complicity in rewriting Title IX into a rule book that has required intercollegiate athletics to become a zero-sum game.

With the exception of the *Grove City* ruling in 1984, those in charge of administering Title IX have erected a bureaucratic house of cards. So far, that house has withstood scrutiny from all three branches of government. As this Article shows, it is a house that is poised for collapse.

III. THE CRUMBLING FOUNDATIONS OF TITLE IX

A. *A Paean to Proportionality: The Judiciary's Initial Embrace of the Three-Part Test*

1. *Cohen v. Brown University*[211]

There was good reason why Amy Cohen had never even heard of Title IX when her cause of action accrued.[212] After all, by 1991, Title IX remained somewhat of a mystery to the universities themselves, let alone their students. The courts, meanwhile, had little opportunity to clarify matters or even signal Title IX's importance. Although there had been many Title IX complaints after Congress overruled *Grove City* in 1987, few of them had been litigated fully.[213] Indeed, the district court in *Cohen* remarked that the case raised "novel issues concerning Title IX and athletic programs," since there was "virtually no caselaw on point."[214] Two months later, when Brown University appealed the

211. 809 F. Supp. 978 (D.R.I. 1992), *aff'd*, 991 F.2d 888 (1st Cir. 1993).

212. *See supra* note 13 and accompanying text.

213. *Cohen*, 991 F.2d at 893 n.4. Private complainants had more incentive to pursue litigation after the Supreme Court's ruling in *Franklin*, where the Court unanimously held that monetary damages were available in Title IX actions. 503 U.S. at 75 n.8; *see supra* note 186 and accompanying text.

214. *Cohen*, 809 F. Supp. at 980. In reality, there had been three previous cases where the courts addressed substantive elements of sports-related complaints under Title IX or analogous state statutes. In *Blair v. Washington State Univ.*, the Washington Supreme Court refused to exclude the Washington State University football program from the scope of the state's antidiscrimination law and Equal Rights Amendment of the state constitution. 740 P.2d 1379,

court's adverse decision, it marked the first Title IX case ever to reach a federal court of appeals on the statute's substantive issues.[215]

In *Cohen*, the plaintiffs sought a preliminary order to reinstate the Brown University women's gymnastics and volleyball teams to varsity status, and to prohibit Brown from eliminating or reducing the status of any other women's intercollegiate team as long as Brown continued to fail the proportionality test.[216] During the 1990-91 academic year,

---

1382-83 (Wash. 1987) (en banc). This meant that football had to be included in calculations of participation opportunities, scholarships and distribution of nonrevenue funds. *Id.* at 1383. The court also affirmed the trial court's proportionality order, in which the university was required to raise the female athletic participation rate until it "reached a level commensurate with the proportion of female undergraduate students." *Id.* at 1381. The court, however, approved "revenue retention," which allows a university to exclude sports-generated revenue from the calculations of university financial support; this allowed each Washington State team to "reap the benefit of the revenues it generate[d]." *Id.* at 1383.

In *Cook v. Colgate Univ.*, a magistrate judge at the district court level held that Colgate's refusal to upgrade its women's club ice hockey team to varsity status violated Title IX. 802 F. Supp. 737, 750-51 (N.D.N.Y. 1992). Finding that the men's varsity hockey team received 50 times the financial support from the university as the women's hockey team, the court ordered Colgate to grant varsity status to its women's hockey program, and to provide the team with amenities equivalent to the men's program. *Id.* at 744, 751. On appeal, however, the Second Circuit vacated the lower court's order because of mootness. Cook v. Colgate Univ., 992 F.2d 17, 19 (2d Cir. 1993). The Second Circuit's ruling—rendered 11 days after the First Circuit decided *Cohen*—was based on the plaintiffs' decision to sue on behalf of themselves individually, and not as part of a class action. *Id.* at 20. Since all of the complaining parties would have graduated before the district court's order took affect, their Title IX action became moot. *Id.*

In Favia v. Indiana Univ. of Pa., 812 F. Supp. 578 (W.D. Pa. 1993), members of the women's gymnastics and field hockey teams brought a Title IX class action suit against the Indiana University of Pennsylvania (IUP) seeking a preliminary injunction ordering IUP to reinstate their teams. *Id.* at 579-80. The university had cut their teams, along with the men's soccer and tennis teams, to allay a budget crisis. *Id.* The district court, one month before *Cohen*, 809 F. Supp. at 986, issued the injunction after determining that IUP failed the Policy Interpretation's three-part "interests and abilities" test. *Favia*, 812 F. Supp. at 584-85. On appeal, the Third Circuit found no abuse of discretion and affirmed the district court's order. Favia v. Indiana Univ. of Pa., 7 F.3d 332, 334-35 (3d Cir. 1993). The Third Circuit, however, did not independently analyze Title IX, preferring instead to rely on the First Circuit's endorsement of the Policy Interpretation's three-part test in the landmark *Cohen* litigation. *Id.* at 343-44; *see also* Davidson & Kerr, *supra* note 26, at 41-42.

In a fourth case, Haffer v. Temple Univ., 688 F.2d 14 (3d Cir. 1982), *aff'g* 524 F. Supp. 531 (E.D. Pa. 1981), the Third Circuit required Temple's athletic department to comply with Title IX, even though the athletic program received no direct federal assistance. *Id.* at 17; *see supra* note 180 and accompanying text. But the parties subsequently reached a settlement agreement before the case could be tried on its merits. *See* Henderson, *supra* note 111, at 138-39.

215. *Cohen*, 991 F.2d at 893 n.4.

216. *Cohen*, 809 F. Supp. at 980. The plaintiffs represented a class "of all present and future Brown university women students and potential students who participate, seek to participate, and/or are deterred from participating in intercollegiate athletics funded by Brown."

Brown funded 16 athletic teams for men and 15 for women, for a total of 566 male participants (63.3% of all athletes) and 328 female participants (36.7% of all athletes).[217] The Brown student body, however, was comprised of 2951 men (52.4% of all students) and 2683 women (47.6% of all students).[218] In 1991, after the university ordered it to reduce its budget, Brown's athletic department eliminated funding for 4 of its 31 varsity teams—men's golf and water polo, and women's gymnastics and volleyball—and demoted them to club status.[219] The cuts caused male athletic participation to drop to 529 students (63.4% of all athletes), while female participation fell to 305 students (36.6% of all athletes).[220]

The *Cohen* plaintiffs argued that since they based their Title IX claim almost exclusively on the "interests and abilities" factor from the regulations, the Policy Interpretation's three-part test should be applied to determine Brown's compliance.[221] Although admitting that the Policy Interpretation and "Investigator's Manual do not carry the force of law or establish controlling standards for this court," Judge Pettine of the United States District Court for the District of Rhode Island relied on the two OCR documents as "important guides in unraveling the requirements of the athletic regulation."[222]

Judge Pettine then gave great deference to the Policy Interpretation's three-part test by holding that a finding of noncompliance could be based solely on the " three-part framework" found in the regulations.[223] This meant that not only was OCR's three-part test relevant to determining Title IX compliance, but the test alone could represent the start and finish of an entire Title IX inquiry, without any consideration of the other nine factors set forth in the regulations. As a result, enormous weight was suddenly transferred to the first step of the three-part test: the controversial proportionality rule. In *Cohen*, after finding that Brown had failed all three parts of the Policy Interpretation's test,[224] Judge Pettine held that Brown did not effectively accommodate the interests

---

Id. at 979. For additional facts about the *Cohen* case, see *supra* notes 1-17 and accompanying text.

217. *Cohen*, 809 F. Supp. at 980-81.

218. *Id.* at 981.

219. *Id.*

220. *Id.*

221. *Id.* at 985; *see* 34 C.F.R. § 106.41(c)(1) (1995); OCR Policy Interpretation, 44 Fed. Reg. 71,414, 71,417-18 (1994).

222. *Cohen*, 809 F. Supp. at 988.

223. *See id.* at 989; *see* 34 C.F.R. § 106.41(c)(1) (1995); OCR Policy Interpretation, 44 Fed. Reg. 71,414, 71,417-18 (1994).

224. *Cohen*, 809 F. Supp. at 991-93.

and abilities of female athletes, and issued a preliminary injunction requiring the university to reinstate the women's gymnastics and volleyball teams to varsity status.[225]

Referring to *Cohen* as a "watershed case," the United States Court of Appeals for the First Circuit affirmed the district court decision.[226] The appellate court agreed that the Policy Interpretation deserved "substantial deference" as a document interpreting OCR's own regulations.[227] The court thus endorsed the Policy Interpretation's three-part test, including its proportionality test, despite recognizing that "[i]t seems unlikely, even in this day and age, that the athletic establishments of many coeducational universities reflect the gender balance of their student bodies."[228] The court also specifically sanctioned the elimination of men's teams as a way to achieve gender equity under the Policy Interpretation's proportionality test:

> Title IX does not require that a school pour ever-increasing sums into its athletic establishment. If a university prefers to take another route, it can also bring itself into compliance with the first benchmark of the accommodation test by subtraction and downgrading, that is, by reducing opportunities for the overrepresented gender while keeping opportunities stable for the underrepresented gender (or reducing them to a much lesser extent).[229]

On remand, Judge Pettine rejected Brown's claim that the three-part test, and its proportionality test in particular, were inconsistent with the Title IX regulations.[230] Refusing to proffer a numerical definition of "substantial proportionality," the court determined that the proportionality test is satisfied "only where the institution's intercollegiate athletic program mirrors the student enrollment as closely as possible."[231] The court then found that Brown "predetermine[d]" the gender balance of its athletic program through the selection of sports it offered, coaches it

225. *Id.* at 999.

226. *Cohen*, 991 F.2d at 891.

227. *Id.* at 896-97 (citing Martin v. OSHRC, 499 U.S. 144 (1991); Gardebring v. Jenkins, 485 U.S. 415, 430 (1988)).

228. *Id.* at 898. The court's endorsement of the three-part test, however, was not enthusiastic: "[W]hether we, if writing on a pristine page, would craft the regulation in a manner different than the agency, are not very important considerations. Because the agency's rendition stands upon a plausible, if not inevitable, reading of Title IX, we are obligated to enforce the regulation according to its tenor." *Id.* at 899.

229. *Id.* at 898 n.15.

230. Cohen v. Brown Univ. [Cohen II], 879 F. Supp. 185, 199-200 (D.R.I. 1995).

231. *Id.* at 202.

hired, and recruiting and admissions practices it implemented.[232] Any resulting disparities therefore could not be explained by nondiscriminatory factors.[233]

Moreover, the court rejected Brown's argument that proportionality should measure the participation ratio of men to women among students who are *interested* in athletic participation rather than the participation ratio among all students.[234] Brown's position would have contradicted the proportionality test's assumption that males and females share the same rates of interest in athletics.[235] Instead, the court held that Brown's position was untenable because it was impossible to quantify "latent and changing interests."[236] Concluding that Brown failed the three-part test, and thus violated Title IX, the court ordered the university to submit a comprehensive compliance plan within 120 days.[237]

When Brown submitted its proposed plan, the court rejected it and fashioned its own remedy.[238] On appeal after remand, the First Circuit upheld the district court based on the "law of the case" doctrine, which bound the First Circuit to its interpretation of Title IX in *Cohen*.[239] As to the specific relief ordered by the district court, the First Circuit reversed, holding "that the district court was wrong to reject out-of-hand Brown's alternative plan to reduce the number of men's varsity teams"[240] because "[i]t is clear . . . that Brown's proposal to cut men's teams is a permissible means of effectuating compliance with the statute."[241]

---

232. *Id.*

233. *Id.*

234. *Id.* at 204-05.

235. *Id.*

236. *Id.* at 205, 206 n.44.

237. *Id.* at 210-13, 214.

238. *See* Cohen v. Brown Univ. [Cohen II], 101 F.3d 155, 162 (1st Cir. 1996) (summarizing the district court's findings).

239. *Id.* According to the law of the case doctrine, "issues decided on appeal should not be reopened unless the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice." *Id.* at 168 (internal quotation marks omitted).

240. *Id.* at 187.

241. *Id.* at 186-87.

2. *Roberts v. Colorado State University*[242]

During the 1991-92 school year, women comprised 35.2% of the total athletes at Colorado State University (CSU), even though women represented 47.9% of the undergraduate student population.[243] In 1992, facing fiscal problems due to state cutbacks in aid,[244] CSU eliminated its 18-member women's softball team and its 55-member men's baseball team.[245] As a result, in the 1992-93 academic year, CSU's female participation percentage rose to 37.7% of total athletes, while women comprised 48.2% of the student body.[246] The members of the defunct varsity softball team then sued the university under Title IX, seeking their team's reinstatement along with monetary damages.[247]

Ruling for the plaintiffs, Judge Weinshienk of the United States District Court for the District of Colorado adopted Judge Pettine's holding in *Cohen* that the Policy Interpretation's three-part test can by itself determine noncompliance with Title IX.[248] Confining his Title IX analysis to the "interests and abilities" factor from the regulations, Judge Weinshienk concluded that CSU failed the crucial three-part test and granted a permanent injunction requiring the reinstatement of the softball program.[249] In particular, the district court found that the 10.5% disparity between women's athletic participation and women's enrollment failed the proportionality test.[250] The court based its decision largely on *Cohen*'s holding that Brown's 11.6% disparity was fatal to the university.[251]

The Court of Appeals for the Tenth Circuit agreed with the district court and affirmed the injunction.[252] Rejecting CSU's argument that the district court ruling implicitly required the university to "maintain parity" between women's athletic participation and women's enrollment,

---

242. 814 F. Supp. 1507 (D. Colo.), *aff'd in part, rev'd in part*, Roberts v. Colorado State Bd. of Agric., 998 F.2d 824 (10th Cir.), *cert denied*, 114 S. Ct. 580 (1993).

243. *Id.* at 1512.

244. *Id.* at 1518.

245. *Id.* at 1514; Renee Forseth et al., Comment, *Progress in Gender Equity?: An Overview of the History and Future of Title IX of the Education Amendments Act of 1972*, 2 VILL. SPORTS & ENT. L.F. 51, 77 (1995).

246. *Roberts*, 814 F. Supp. at 1512.

247. *Id.* at 1509.

248. *Id.* at 1511.

249. *Id.* at 1519.

250. *Id.* at 1513. The court mistakenly referred to the 10.5% disparity as 10.6%.

251. *Id.*; *see Cohen*, 809 F. Supp. at 991.

252. *Roberts*, 998 F.2d at 834-35. The appellate court, however, found that the lower court exceeded its authority in demanding that the reinstated softball team play a fall 1993 exhibition season. *Id.* at 835. The Tenth Circuit thus reversed this small part of Judge Weinshienk's opinion. *Id.*

the court stated that the proportionality test was only one of three methods for complying with Title IX.[253]

3. *Kelley v. Board of Trustees of University of Illinois*[254]

In a new twist to Title IX litigation, members of the *men's* swimming team sought a preliminary injunction to force the University of Illinois to reinstate their squad.[255] On May 7, 1993, the university announced it was eliminating varsity men's swimming, men's fencing, and men's and women's diving.[256] The cuts were motivated by budget constraints, Title IX proportionality requirements, and the Big Ten Conference's new policy requiring schools to reach a 60%-40% goal for male-female athletic participation.[257] Before the cuts, male students made up 363 (76.6%) of the university's 474 varsity athletes, although they comprised only 14,427 (56%) of the 25,846-member student body.[258]

While sympathetic to the athletes' plight, Judge McDade of the United States District Court for the Central District of Illinois denied relief under Title IX and the Fourteenth Amendment's Equal Protection Clause, and granted summary judgment for the defendants.[259] Noting that this case was one of first impression, the court relied on *Cohen* for the proposition that reducing men's participation was one way to achieve Title IX compliance.[260] Increasing women's opportunities, the court held, was therefore not necessary under the proportionality test.[261] As to the male students' claim for relief, the court ruled that as long as the percentage of male athletes was substantially proportionate to male undergraduate enrollment, only women could wield the Title IX

253. *Id.* at 829 n.6.

254. 832 F. Supp. 237 (C.D. Ill. 1993), *aff'd*, 35 F.3d 265 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 938 (1995).

255. *Kelley*, 832 F. Supp. at 238-39. For additional facts about the *Kelley* case, see *supra* notes 18-34 and accompanying text.

256. *Kelley*, 832 F. Supp. at 240.

257. *Id.*; *see* Letter from Phyllis L. Howlett, Assistant Commissioner of the Big Ten Conference, to Karol A. Kahrs, Associate Director of Athletics at the University of Illinois, and Jack Weidenbach, Interim Director of Athletics at the University of Michigan (Dec. 17, 1991) (on file with the author) (discussing the "impossib[ility]" of reaching Title IX requirements without "wip[ing] out significant opportunities for male student-athletes"); Transcript of Big Ten Gender Equity Task Force Meeting, *supra* note 26 (advising that limiting and eliminating men's teams are ways to achieve gender equity).

258. *Kelley*, 832 F. Supp. at 240.

259. *Id.* at 243.

260. *Id.* at 241-42; Forseth et al., *supra* note 245, at 83.

261. *Kelley*, 832 F. Supp. at 241-42; Forseth et al., *supra* note 245, at 83.

sword.[262] In fact, the court mentioned that the University of Illinois may have violated Title IX when it eliminated the one-member women's diving team—but the sole diver was not a plaintiff in this case.[263]

Notably, Judge McDade took pains to admit that the Title IX statute neither sanctioned nor anticipated the three-part test that would later "convert[] Title IX from a statute which prohibits discrimination on the basis of sex . . . into a statute which provides 'equal opportunity for members of both sexes.' "[264] Labeling the men's swimming team "innocent victims," Judge McDade recognized that "Congress, in enacting Title IX, probably never anticipated that it would yield such draconian results."[265] Nevertheless, although Judge McDade conceded that the regulations and interpretations could have been written differently, he followed the leads of *Cohen* and *Roberts* by giving great deference to OCR's Policy Interpretation, *Investigator's Manual*, and *Clarification*.[266]

Affirming the district court, the United States Court of Appeals for the Seventh Circuit agreed that cutting the teams of the overrepresented sex was a reasonable way to meet the proportionality requirement.[267] In fact, the court rejected the oft-stated view of Title IX supporters that Title IX was designed to increase women's athletic opportunities.[268] Instead, the Seventh Circuit said that the statute's "avowed purpose is to prohibit educational institutions from discriminating on the basis of sex," which meant that the proportionality test is neutral as to which is the preferred route to Title IX compliance: a university can either increase women's teams or cut men's teams, all with the blessing of the courts.[269]

In response to the plaintiffs' claim that the proportionality test wrongfully mandated a gender-based quota, the court maintained that the first part of the three-part test establishes only a safe harbor, not a rigid numerical requirement.[270] Without mentioning the budget constraints plaguing American universities, the Seventh Circuit endorsed the Policy

262. *Kelley*, 832 F. Supp. at 242.
263. *Id.* at 242 n.6.
264. *Id.* at 241 (citing 20 U.S.C. § 1681 and 34 C.F.R. § 106.41).
265. *Id.* at 243-44.
266. *See id.* at 242.
267. *See Kelley*, 35 F.3d at 269-70.
268. *Id.* at 272; *see, e.g.*, 141 CONG. REC. E1706-03 (Sept. 6, 1995) (statement of Rep. Lantos) (supporting Title IX as "the landmark law that opened the door to women's participation in school sports").
269. *Kelley*, 35 F.3d at 272.
270. *Id.* at 271 (citing *Roberts*, 998 F.2d at 828).

Interpretation's three-part test as a flexible, reasonable approach to measuring Title IX compliance.[271]

4. *Gonyo v. Drake University*[272]

In a case similar to *Kelley*, members of the men's wrestling team sought a preliminary injunction to force Drake University to reinstate the defunct squad.[273] Unlike the University of Illinois in *Kelley*, Drake explained its decision to cut the wrestling squad as a purely financial one, without any reference to Title IX.[274] When Drake announced its decision to cut the wrestling program, 75.3% of the school's athletes were male, although men constituted only 42.8% of the entire student body.[275]

Judge Vietor of the United States District Court for the Southern District of Iowa denied the plaintiffs' motion.[276] Although the court focused more on the standard for issuing a preliminary injunction than the merits of the Title IX claim, it held that the mere fact that men were overrepresented on Drake's athletic teams demonstrated that Drake had already effectively accommodated the wrestlers' "interests and abilities."[277] Thus, even though the plaintiffs had lost their particular team, the court found that the disproportionate number of male athletes in the overall athletic program precluded a finding that Drake violated Title IX.[278]

Undaunted, the wrestlers went ahead with their substantive Title IX claim against the university in *Gonyo v. Drake University* (*Gonyo II*).[279] On March 10, 1995, Judge Vietor granted summary judgment for the defendants, holding that the proportionality test foreclosed the plaintiffs' suit.[280] Citing the First Circuit in *Cohen*, the court determined that the Policy Interpretation, as "a considered interpretation of the regulation by the administering agency," deserved substantial deference.[281]

---

271. *See id.*; *see* Forseth et al., *supra* note 245, at 86 n.225 ("The court seemingly ignored the constraints of athletic budgets and ignored the practical lesson taught by all of the Title IX cases: constriction of male athletic programs is the only safe way to comply with Title IX.").

272. 837 F. Supp. 989 (S.D. Iowa 1993).

273. *Id.* at 990.

274. *Id.* at 992.

275. *Id.*

276. *Id.* at 996.

277. *See id.*

278. *Id.*

279. 879 F. Supp. 1000 (S.D. Iowa 1995) [Gonyo II].

280. *Id.* at 1004.

281. *Id.* at 1003 (citing *Cohen*, 991 F.2d at 896-97).

In *Gonyo II*, the plaintiffs raised a novel claim under Title IX's first compliance area: the wrestlers claimed discrimination since male athletes received a smaller share of Drake's athletic scholarships than did female athletes.[282] Although 75.3% of Drake athletes were male, men received 47% of the school's athletic scholarships in the 1992-93 academic year.[283] Acknowledging that the Policy Interpretation did not address a situation where the equal scholarship provision conflicts with the proportionality test,[284] the court nevertheless held that the proportionality test alone determined the result in this case.[285] In so doing, Judge Vietor elevated the "safe harbor" provision of proportional participation into the overriding and defining test of Title IX. Stating that "the paramount goal of Title IX is equal opportunity to participate," Judge Vietor concluded that the proportionality test "more comprehensively serves the remedial purposes of Title IX than does the scholarship test and must prevail."[286]

B. *Analysis of the Judiciary's Construction of Title IX and Its Regulatory Framework*

Although nothing in Title IX's language or legislative history supports the use of proportionality as a measure of gender equity, most Title IX cases since 1992 have relied on *Cohen* to exalt the Policy Interpretation's three-part test and its proportionality "safe harbor" into the *sine qua non* of Title IX compliance.[287] As a result, the courts have sanctioned and even perpetuated the bureaucratic capture of the 1972 antidiscrimination measure into an affirmative action statute that mandates gender quotas at America's colleges and universities.

---

282. *Id.* at 1003-04; OCR Policy Interpretation, 44 Fed. Reg. 71,415 (1979); 34 C.F.R. § 106.37(c)(1).

283. *Gonyo II*, 879 F. Supp. at 1004.

284. *Id.* The regulations explicitly require that scholarship opportunities be provided to "members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics." 34 C.F.R. § 106.37(c)(1). Taken literally, this rule would mandate the disproportionate distribution of scholarships in favor of the overrepresented sex. *See id.* In addition, although the court was correct that the Policy Interpretation does not address this conflict between the scholarships area in 34 C.F.R. § 106.37(c)(1) and the "interests and abilities" area in 34 C.F.R. § 106.41(c)(1), the court overlooked the *Investigator's Manual sui generis* provision that requires OCR investigators to offset disparities favoring one sex with the disparities favoring the other sex. *See supra* notes 125-28 and accompanying text.

285. *Gonyo II*, 879 F. Supp. at 1004.

286. *Id.* at 1005-06.

287. *See* Walter B. Connolly, Jr. & Jeffrey D. Adelman, *A University's Defense to a Title IX Gender Equity in Athletics Lawsuit: Congress Never Intended Gender Equity Based on Student Body Ratios*, 71 U. DET. MERCY L. REV. 845, 890-91 (1994).

Quite simply, the main problem with the current Title IX compliance regime is it is nearly impossible to satisfy.[288] The reason why female Title IX plaintiffs have a perfect record in court[289] is largely attributable to the almost impossible burden imposed by the Policy Interpretation's three-part test. Although OCR continues to maintain that the proportionality test is a safe harbor independent of the other two prongs of the three-part test, in truth the proportionality requirement engulfs the other two provisions, destroying the flexibility ostensibly offered by OCR's regulatory framework.[290]

1. Benchmark One of the Three-Part Test: The Problem with Proportionality

The Policy Interpretation itself recognizes, and in some ways accommodates, football's unique need for more resources than other sports.[291] But while OCR's "football exception" gives schools some leeway to spend more to meet football's "special demands" such as crowd control during games,[292] this acknowledgment of football's uniqueness is not compensated for in the calculation of the proportionality benchmark. In fact, the proportionality test penalizes schools with football teams, as no women's sport comes close to fielding a team that matches the average 108-member football squad at Division I-A schools.[293] As long as football is included in the proportionality calculation, universities have almost no chance to meet proportionality without eliminating other men's sports.[294]

Underlying the proportionality requirement is the assumption that women share the same interest in athletics as men do. Although the Policy Interpretation, *Investigator's Manual* and recent *Clarification* readily accept this view, at least two considerations undermine this proposition. First, the United States Supreme Court has repeatedly recognized that when "real differences" exist between the sexes—including mere cultural differences—disparate treatment may be justified.[295]

---

288. *See* Ferrier, *supra* note 42, at 864-68.

289. *See supra* note 110 and accompanying text.

290. Cantú, *supra* note 108, at 3-4.

291. *See supra* notes 102-04 and accompanying text.

292. OCR Policy Interpretation, 44 Fed. Reg. 71,416 (1994).

293. Anderson, *supra* note 102, at 76.

294. Even if all Division I-A football programs were eliminated, approximately 55% of schools still would fail the proportionality test. Brewington, *supra* note 208.

295. *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321, 336-37 (1977) (holding that Alabama prison system imposed a bona fide occupational qualification by setting restrictions on female correctional counselors; male preference for females as sexual assault victims reflected a real

Second, and perhaps most importantly, OCR has never publicly released any data supporting the dubious assumption that males and females are equally interested in athletics. The evidence that does exist points to the contrary proposition. As Table 2 indicates, the 1993 Scholastic Aptitude Test (SAT) Student Descriptive Questionnaire shows that males are nearly twice as likely as females to want to participate in intercollegiate athletics.[296]

TABLE 2

Results of the 1993 Scholastic Aptitude Test's Student Descriptive Questionnaire

	STUDENTS ANSWERING THE QUESTIONNAIRE	STUDENTS PARTICIPATING IN HIGH SCHOOL ATHLETICS	STUDENTS INTERESTED IN PARTICIPATING IN INTERCOLLEGIATE ATHLETICS
MALES	484,810	275,192 (56.76%)	216,760 (44.71%)
FEMALES	555,568	225,070 (40.51%)	133,338 (24%)

Since men are more interested in participating in intercollegiate athletics than their female counterparts, the effect of the proportionality test is to allocate a disproportionately high number of participation slots to women. By using a university's total enrollment as the relevant population group for comparing athletic participation rates, rather than the population of students interested in athletic participation, the proportionality test ensures that male athletes have a smaller chance to obtain a participation slot than female athletes. This in itself may violate Title IX's prohibition of sex discrimination in 20 U.S.C. § 1681(a), and Title IX's much-overlooked provision prohibiting affirmative action in

difference between the sexes); Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971) (per curiam) (stating that conflicting family obligations may be more relevant to a woman's job performance than a man's job performance); *see also* Ann E. Freedman, *Sex Equality, Sex Differences, and the Supreme Court*, 92 YALE L.J. 913, 944 (1983) ("[I]t is clear from the cases . . . that [the Court is] willing to include cultural behavior patterns . . . as sources of 'real' differences.").

296. Scholastic Aptitude Test's Student Descriptive Questionnaire, Educational Testing Service, Princeton, N.J. (May 5, 1993) (unpublished profiles of SAT and Achievement Test takers; on file with the author).

20 U.S.C. § 1681(b), and goes against congressional intent demonstrated by the statute's legislative history.[297]

2. Benchmark Two of the Three-Part Test:[298] The Economic Realities of Expanding Athletic Opportunities

As stated earlier, the budget constraints plaguing American universities make it exceedingly difficult for schools to comply with the second prong of the three-part test. To satisfy this prong, a university must show that its athletic program is in the process of expanding and that this continuing expansion has been increasingly responsive to the interests and abilities of the underrepresented sex.[299] Although the First Circuit in *Cohen* maintained that "Title IX does not require that a school pour ever-increasing sums into its athletic establishment,"[300] no court has said how a university can meet the "continuing expansion" test without making additional expenditures that it cannot afford in lean economic times.[301] In *Cohen*, the First Circuit admitted that "in an era of fiscal austerity, few universities are prone to expand athletic opportunities."[302]

For example, after Title IX's passage in 1972, Brown created 14 women's varsity teams—more than double the number of teams most universities have today.[303] But as Brown President Vartan Gregorian observed, the university's immediate surge towards Title IX compliance actually undermined its chance to meet the three-part test's second benchmark: "If you move too fast and too far, it's too bad. If you had paced yourself, gone slowly, providing only incremental changes, you would have been better off."[304] While a slower approach would have reduced women's athletic opportunities during the 1970s and 1980s, ironically, it would have increased Brown's chances of satisfying the "continuing expansion" test, and its inability to satisfy the nearly impossible proportionality test would not have mattered.

Indeed, because Brown's rapid expansion of women's athletic opportunities in the 1970s slowed considerably in the 1980s and 1990s, the First Circuit found that the university failed the continuing expansion

---

297. Brief for *Amici Curiae* at 17, Cohen v. Brown Univ., 101 F.3d 155 (1st. Cir. 1996) (No. 95-2205); *see also supra* notes 40-66 and accompanying text.

298. *See* OCR Policy Interpretation, 44 Fed. Reg. 71,418 (1979).

299. *See supra* note 107 and accompanying text.

300. *Cohen II*, 991 F.2d at 898 n.15.

301. Ferrier, *supra* note 43, at 867.

302. *Cohen*, 991 F.2d at 898.

303. *Id.*; *Cohen II*, 991 F.2d at 892; *Cohen*, 809 F. Supp. at 981.

304. *Hearing*, *supra* note 111, at 78-85 (statement of Vartan Gregorian, President of Brown University).

test.[305] While lauding the "impressive growth" of Brown's athletic offerings in the 1970s, the court said that "a university must design expansion in whatever form and at whatever pace to respond to the flux and reflux of unserved interests."[306] And even though the number of women's teams at Brown rose to 18 in the 1994-95 athletic year, the district court in the 1995 trial still found the university deficient under the second benchmark.[307]

Brown University's experience demonstrates that the continuing expansion test adds little to the three-part test's ostensible "flexibility." Rather than providing schools with a feasible alternative to the proportionality test, the three-part test exceeds the draconian safe harbor in difficulty—no school has yet met the benchmark in any litigated Title IX case. The courts have been quick to recognize the near impossibility of satisfying the continuing expansion test, but also have been quick to defer to the Policy Interpretation. In *Roberts*, the Tenth Circuit stated that it "recognize[d] that in times of economic hardship, few schools will be able to satisfy Title IX's effective accommodation requirement by continuing to expand their women's athletics programs,"[308] but it still upheld the validity of the benchmark and found that Colorado State failed to meet it.[309]

For universities, then, the choice between the proportionality test and the continuing expansion test resembles a choice between death by sword or death by hanging. The courts have stated that a school can survive the second benchmark only through a systematic, fluid athletic expansion, regardless of the cost.[310] But the same courts also have stated that Title IX does not require schools to find an endless supply of money to pour into their increasingly ravenous athletic departments.[311] The exasperating question, then, is how can a school show a fluid history of expansion without engaging in the spendthrift behavior that the courts have deemed unnecessary?[312] Perhaps there is a way for schools to increase sports funding gradually while meeting all unmet athletic interests along the way, and, at the same time, not break their banks. But any such solution cannot involve cutting men's sports, since

---

305. *Cohen*, 991 F.2d at 903.

306. *Id.*

307. *Cohen II*, 879 F. Supp. at 211.

308. *Roberts*, 998 F.2d at 830; *see also Gonyo*, 837 F. Supp. at 992 ("Cutting athletic budgets because of total school budget constraints has been common throughout the United States in recent years.").

309. *Roberts*, 998 F.2d at 830.

310. *See Cohen*, 991 F.2d at 903.

311. *See id.* at 898 n.15.

312. *See* Ferrier, *supra* note 43, at 867.

the second benchmark cannot be satisfied "by reducing opportunities for the over represented sex alone or by reducing participation opportunities for the over represented sex to a proportionately greater degree than for the underrepresented sex."[313]

The proportionality test, however, can be satisfied by the elimination of men's sports, thereby making the first benchmark the most feasible one of the three.[314] As the Tenth Circuit advised in *Roberts*, "[f]inancially strapped institutions may still comply with Title IX by cutting athletic programs such that men's and women's athletic participation rates become substantially proportionate to their representation in the undergraduate population."[315]

Another troubling way in which the proportionality test consumes the "continuing expansion" test involves how much a school's athletic program must expand to meet the second benchmark. OCR refuses to specify how much expansion is enough, or the rate at which the expansion must take place.[316] Presumably, then, the only way schools can be assured of compliance is by continually expanding its female athletic program until participation rates reach proportionality. Unless and until female participation rates are substantially proportionate to female enrollment rates, no expansion of an athletic program can reliably be said to have satisfied the interests and abilities of student athletes. Regardless of the speed with which a school like Brown develops its women's athletic program, as long as there are unserved athletic interests, the school's expansion is likely to be found wanting—unless of course proportionality is met. In short, with vague rules on how the second benchmark can be satisfied, the courts have collapsed the proportionality test into the "continuing expansion" test, as the latter provides the only sure-fire, feasible way to satisfy the former.

3. Benchmark Three of the Three-Part Test:[317] Title IX's *Fait Accompli*

If the second benchmark can be described as nearly impossible to satisfy, the third benchmark can be described as nearly invisible. In essence, the third benchmark adds little or nothing to the previous two tests, as it asks whether the interests and abilities of the underrepresented sex have been "fully and effectively accommodated by

313. CLARIFICATION, *supra* note 153, at 6.
314. Cantú, *supra* note 108, at 4.
315. *Roberts*, 998 F.2d at 830.
316. CLARIFICATION, *supra* note 153, at 5-8.
317. *See* OCR Policy Interpretation, 44 Fed. Reg. 71,418 (1979).

the present program."[318] In reality, such an inquiry is merely rhetorical, as it is answered by the existence of the Title IX suit itself. By definition, the interests and abilities of female athletes—assuming they are the underrepresented sex—are not being fully and effectively met whenever a school cuts an existing team. Thus, "the only time courts will have to grapple with benchmark three will be when a small group of athletes sues for the creation of a new team."[319]

For example, in *Cohen*, the First Circuit found Brown's defense under the third benchmark to be foreclosed by the very existence of the Title IX lawsuit.[320] Noting that the full and effective accommodation issue may be "complicated" when athletes seek a new team, the court found that "there is unlikely to be any comparably turbid question as to interest and ability where, as here, plaintiffs are seeking merely to forestall the interment of healthy varsity teams."[321] Similarly, in *Roberts*, the Tenth Circuit distinguished the easy case from the hard one: "Questions of fact under this third prong will be less vexing when plaintiffs seek the reinstatement of an established team rather than the creation of a new one."[322] Since the plaintiffs in *Roberts* were members of a recently terminated varsity softball team, the court's decision that Colorado State failed the third benchmark was a *fait accompli.*

Another way in which the courts have written benchmark three effectively out of existence is by blurring the distinction between it and the proportionality test. The First Circuit in *Cohen* set the standard by rejecting Brown's argument that a school fully and effectively accommodates female athletes if it allocates athletic opportunities in accordance with the ratio of interested and able women to interested and able men, rather than the ratio of women athletes to the university's total female population.[323] The First Circuit explained how the third benchmark closely resembles the proportionality test by using the example of a hypothetical university with a student body of 1000 men and 1000 women, which include 500 able and interested male athletes, and 250 able and interested female athletes.[324]

According to the court, to satisfy the proportionality test, this hypothetical university would have to provide a roughly equal number of participation slots for men and women, since the student body is

318. *See id.*
319. *See* Ferrier, *supra* note 43, at 867 (citing *Roberts*, 998 F.2d at 832).
320. *See Cohen*, 991 F.2d at 904.
321. *Id.*
322. *Roberts*, 998 F.2d at 832.
323. *Cohen*, 991 F.2d at 899.
324. *Id.*

equally divided.[325] In the alternative, the university could satisfy the third benchmark instead of the proportionality test. According to the court, to satisfy the third benchmark the university must provide at least 250 participation slots for women.[326] In a footnote, the court admitted that this approach also would force a university to attain proportionality, since the hypothetical university under benchmark three also would have to provide at least 250 slots for men to match the 250 slots for women.[327]

Astonishingly, then, in an attempt to demonstrate the independence of the third benchmark, the court's example does exactly the opposite. In the court's example, if the hypothetical university cannot accommodate at least 500 athletes, the school must allocate the participation slots in proportion to the ratio of males to females in the student body—thus writing the third benchmark out of existence. Only if the hypothetical university can accommodate more than 500 athletes can the school depart from the proportionality test—and only as long as every woman who wants to participate gets the opportunity to do so.[328] Hence, under the *Cohen* court's interpretation of the third benchmark, female athletes will be accommodated at a far higher rate than male athletes in contravention of Title IX's prohibition against sex discrimination and affirmative action.[329]

C. *A Plague on Proportionality: The Judiciary's Emerging Skepticism Towards the Proportionality Test*

Since the landmark *Cohen* case, courts have followed lockstep behind the First Circuit's decision to elevate the regulations' "interests and abilities" factor, and the Policy Interpretation's corresponding three-part test, into the sole area of inquiry when ascertaining Title IX compliance.[330] And as the cases demonstrate, the proportionality test has dominated the three-part test because it is both ascertainable and feasible. Unlike the continuing expansion test, universities can meet the proportionality test without spending enormous sums of money that they

---

325. *Id.*

326. *Id.*

327. *Id.* at 899 n.16.

328. In reality, the *Clarification* emphasizes that not every woman who wants to participate must be satisfied under the third benchmark. A university will fail to meet the third benchmark if there is (1) an unmet interest in a particular sport, (2) sufficient ability to sustain a team in a particular sport, and (3) a reasonable expectation of competition for the team. CLARIFICATION, *supra* note 153, at 9.

329. *See* 20 U.S.C. § 1681(a) & (b) (1990); Connolly & Adelman, *supra* note 287, at 915.

330. *See, e.g., supra* notes 223-28, 248-49, 287 and accompanying text; 34 C.F.R. § 106.41(c)(1) (1995); OCR Policy Interpretation, 44 Fed. Reg. 71,417-18 (1979).

do not have: the courts have explicitly authorized the elimination of men's sports as a way to comply with proportionality.[331] The proportionality test also gives schools the only articulated way to satisfy the second benchmark. In addition, the full and effective accommodation test, the third benchmark, cannot be satisfied whenever a women's team seeks reinstatement and proportionality has not been reached. The third benchmark is also collapsed into the proportionality test when female athletes demand the creation of a new team, but the school cannot afford it.[332]

Still, this is not to say that the proportionality test is more legitimate than the other two inquiries within the three-part test. In fact, the proportionality test has been most responsible for authorizing sex discrimination and affirmative action in violation of Title IX and its legislative history.[333] Strangely, though, the courts have done nothing but defer to this controversial agency rule that has radically changed the original 1972 antidiscrimination statute into an affirmative action measure. That is, the courts have done nothing until recently.

1. *Pederson v. Louisiana State University*[334]

At first glance, *Pederson* did not seem like a case that would shake the foundations of Title IX. After all, the plaintiffs looked the part of the sympathetic, courageous athletes yearning to compete, while the defendant, Louisiana State University (LSU), had arguably exhibited disturbing callousness towards the complaining parties in particular, and women's intercollegiate sports in general.

In *Pederson*, the plaintiffs represented a class of female students, enrolled at LSU since 1993, seeking injunctive relief under Title IX when their athletic interests were not accommodated by the university.[335] In 1993, LSU decided to add varsity women's soccer and softball to its complement of seven women's varsity teams, but by 1995 the university had recruited few athletes, awarded few scholarships, and had not even secured a facility in which the new teams could play.[336] In reality, adding softball was only a feeble act of reinstatement, as LSU previously had fielded a successful women's varsity softball team until

331. *See, e.g.*, *Cohen*, 991 F.2d at 898-99 n.15 (authorizing the elimination of men's sports as a way to comply with the proportionality test); *Roberts*, 998 F.2d at 830 n.9 (quoting *Cohen*, 991 F.2d at 898-99 n.15).

332. *See supra* notes 317-29 and accompanying text.

333. *See supra* pt. II.A.

334. 912 F. Supp. 892 (M.D. La. 1996).

335. *Id.* at 900.

336. *Id.* at 901, 901 n.20.

its elimination in 1983.[337] The university never gave a "credible" reason for its original abandonment of the team.[338]

Judge Rebecca F. Doherty of the United States District Court for the Middle District of Louisiana[339] immediately dismissed with prejudice the claims of three of the plaintiffs—including the named plaintiff, Beth Pederson—due to their lack of standing.[340] The court held that even though LSU provided greater athletic opportunities for male students than female students, these plaintiffs were not excluded from athletic participation because they did not have the requisite ability to play women's soccer above the club level; the three plaintiffs also had not expressed a desire to participate in other sports at LSU.[341]

Turning to the merits of the remaining plaintiffs' Title IX claim, Judge Doherty quickly challenged the legitimacy of the Policy Interpretation as an agency document not approved by Congress or the President, that "is also susceptible, in part, to an interpretation distinctly at odds with the statutory language."[342] Instead of imitating *Cohen* and its progeny, the court cited a United States Supreme Court case that said that such administrative interpretations can provide guidance, but not controlling power.[343] The court then reviewed the three-part test, noting that both the plaintiffs and defendants propounded that the proportionality test was the primary test of Title IX compliance.[344]

---

337. *Id.* at 901.

338. *Id.*

339. Judge Doherty presides in the Western District Court of Louisiana, but was assigned this case after the two sitting judges of the Middle District recused themselves. The case, however, remained filed within the Middle District of Louisiana. *Id.* at 897.

340. *Id.* at 908.

341. *Id.* at 907. In particular, the court noted that Beth Pederson was cut from the fledgling varsity soccer team because of a knee injury and lack of skill. *Id.*

342. *Id.* at 911-12.

343. *Id.* at 912 n.51 (citing Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)). In *Skidmore*, the Supreme Court rejected an administrative interpretation of the Fair Labor Standards Act as erroneous:

> "We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."

Id. (quoting *Skidmore*, 323 U.S. at 140).

344. *Pederson*, 912 F. Supp. at 912-13. During the period in question, LSU's student population was approximately 51% male and 49% female, but the school had a 71%-29% male-to-female athletic participation ratio. *Id.* at 915.

In a stunning rebuke of *Cohen* and its progeny, Judge Doherty "most emphatically" rejected the entire concept of proportionality, and found the judiciary's previous interpretations of Title IX to be "erroneous in this regard."[345] The court explained that the proportionality test is based on the faulty assumption that "interest and ability to participate in sports is equal as between all men and women on all campuses."[346] Noting that neither of the parties in this case, nor the courts in *Cohen* or *Roberts*, had offered evidence in support of this dubious proposition, the court refused to accept it blindly:[347]

> Without some basis for such a pivotal assumption, this Court is loathe to join others in creating the "safe harbor" or dispositive assumption for which defendants and plaintiffs argue. Rather, it seems much more logical that interest in participation and levels of ability to participate as percentages of the male and female populations will vary from campus to campus and region to region and will change with time. To assume, and thereby mandate, an unsupported and static determination of interest and ability as the cornerstone of the analysis can lead to unjust results.[348]

Judge Doherty then turned once again to the issue of administrative deference, and determined that, contrary to previous Title IX holdings, the entire concept of proportionality is not found within the statute or regulations, and actually runs counter to the mandate of the original antidiscrimination statute.[349] Noting that 20 U.S.C. § 1681(b)[350] specifically prohibits the kind of proportionality mandated by the Policy Interpretation and subsequent court decisions, Judge Doherty held that the proportionality requirement is an overly mechanical, utterly baseless rule that contradicts Title IX and thus cannot serve as either a safe harbor or a test of Title IX compliance.[351]

Instead, Judge Doherty said that a proper "effective accommodation" analysis requires a court to examine whether a school has "select[ed] [ ] sports appropriate to the student body's interests and that the level of

345. *Id.* at 913.
346. *Id.*
347. *Id.*
348. *Id.* at 913-14.
349. *Id.* at 914.
350. Judge Doherty's opinion mistakenly refers to this provision as 20 U.S.C. § 1681(a). *Id.*
351. *Id.*

competition reflect[s] the ability of athletes available to participate."[352] The court based this inquiry on the dictates of the Policy Interpretation, which, before it sets out its controversial three-part compliance test, states that to accommodate the interests and abilities of male and female athletes, institutions must provide both the *opportunity* for participation and a level of *competition* that adequately reflects the athletes' abilities.[353]

To determine compliance under these two requirements, the court looked at the remaining two prongs of the three-part test. Beginning with the full and effective accommodation prong, the court found it crucial that a school attempts to discover, through such methods as interviews and questionnaires, the interests and abilities of its students.[354] According to the court, LSU never tried to learn what the interests and abilities of its student population were.[355] Moreover, at least with respect to softball, this was not one of the tough cases under the third benchmark where a small group of students demanded the creation of a new team.[356] The court found that LSU inexplicably had disbanded a successful women's softball team, and that student interest in softball had increased rather than decreased following the cut.[357] Thus, under the third prong of the three-part test, LSU failed to comply with Title IX.

The court then decided that LSU failed the second prong of the three-part test by failing to add any women's teams for 14 years.[358] Even though LSU made a verbal commitment in 1993 to add women's softball and soccer, the court determined that LSU failed to live up to its word.[359] In addition, not only had LSU failed to demonstrate a continuing expansion of women's athletics on its own campus, but the university had led a minority movement within the NCAA to resist proposed gender equity rules for all member institutions.[360]

Concluding that LSU violated Title IX, Judge Doherty chastised the university for its "arrogant ignorance, confusion regarding the practical

---

352. *Id.* at 915.

353. OCR Policy Interpretation, 44 Fed. Reg. 71,418 (1979); *see also supra* notes 104-06 and accompanying text (discussing the interests and abilities accommodation requirement described in the Policy Interpretation).

354. *Pederson*, 912 F. Supp. at 915 n.61. Judge Doherty developed a non-exclusive list of six acceptable methods for gathering the information. *Id.*

355. *Id.* at 915.

356. *Id.*

357. *Id.*

358. *Id.* at 916.

359. *Id.*

360. *Id.* at 917.

requirements of the law, and a remarkably outdated view of women and athletics."[361] But since LSU's violations stemmed from ignorance and not intentional discrimination, the court denied the plaintiffs' request for monetary damages.[362] Instead, the court ordered LSU to produce a "reasonable and adequate" plan to enable the school's athletic program to comply with Title IX.[363]

2. *Adarand Constructors, Inc. v. Peña*[364]

While *Pederson* represents the first time a court has weakened the foundations of Title IX by explicitly rejecting the proportionality test,[365] the incipiency of a Title IX collapse may actually have come one year earlier in a case arising under the Fifth Amendment's Equal Protection guarantee.[366]

In *Adarand*, a division of the United States Department of Transportation (DOT) awarded a prime highway construction contract to Mountain Gravel & Construction Company, which in turn solicited bids from subcontractors for a portion of the contract.[367] Adarand Constructors submitted the low bid, but the subcontract was awarded instead to Gonzales Construction Company, which qualified as a small business controlled by " 'socially and economically disadvantaged individuals.' "[368] Mountain Gravel admitted that Adarand would have won the

---

361. *Id.* at 918.

362. *Id.*; *see Franklin*, 503 U.S. at 75 n.8 (recognizing the availability of monetary damages under Title IX for intentional discrimination). Judge Doherty mentioned that one example of LSU's ignorance was its athletic director's continued belief that his women's athletics program was "wonderful." *Pederson*, 912 F. Supp. at 919. To demonstrate the sincerity of the athletic director's ignorance, the court noted that the athletic director went so far as to invite an OCR investigator to assess his program. *Id.* According to Judge Doherty, "[w]hen one is intentionally breaking the law, one does not invite those who enforce that law to come and look over your shoulder." *Id.*

363. *Pederson*, 912 F. Supp. at 922.

364. 115 S. Ct. 2097 (1995).

365. *See Pederson*, 912 F. Supp. at 913-14.

366. *See Adarand*, 115 S. Ct. at 2097. The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution applies only to the states, but the Supreme Court has held that the Fifth Amendment's Due Process Clause guarantees the same equal protection to the federal government. *See id.* at 2108, 2111 (citing Buckley v. Valeo, 424 U.S. 1, 93 (1976)); Brian C. Eades, Casenote, *The United States Supreme Court Goes Color-Blind:* Adarand Constructors v. Peña, 29 CREIGHTON L. REV. 771, 772 (1996).

Section 1 of the Fourteenth Amendment states in part: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. The Fifth Amendment states in part: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. V.

367. *Adarand*, 115 S. Ct. at 2102.

368. *Id.* (quoting the Appendix at 24).

subcontract had the contractor not received additional compensation from the federal government for hiring a socially and economically disadvantaged subcontractor such as Gonzales;[369] the relevant regulations allowed certain minority groups to enjoy a "presumption of social *and* economic disadvantage."[370] Claiming that this congressionally-mandated program constituted race discrimination in violation of the Fifth Amendment, Adarand sued the federal government.[371]

In a 5-4 opinion, the United States Supreme Court adopted strict scrutiny as the appropriate standard of review for all race-based classifications, even when the racial classification is ostensibly "benign."[372] Writing for the Court, Justice O'Connor extended the holding in *Richmond v. J.A. Croson Co.*[373]—which imposed strict scrutiny of all race-based actions by state and local governments—to race-based actions taken by the federal government.[374] According to the Court, since the Fifth and Fourteenth Amendments protect persons and not groups, any governmental action based on the group classification of race must be subject to "detailed judicial inquiry" to preserve the personal right to equal protection of the laws.[375]

Perhaps most relevant to gender classifications in Title IX cases, Justice O'Connor emphasized that the difficulty of determining what "so-called preference is in fact benign,"[376] precludes courts from lowering their exacting standard of inquiry, even in race-based affirmative action cases.[377] In fact, the Court clearly conveyed its skepticism towards the zero-sum nature of all race-based affirmative action programs at all levels of government by stating that "[c]onsistency *does* recognize that any individual suffers an injury when he or she is disadvantaged by the government because of his or her race, whatever that race may be."[378]

---

369. *Id.*; *see* 15 U.S.C. §§ 631-656 (1994); Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, § 106(c), 101 Stat. 132 (1994).

370. *Adarand*, 115 S. Ct. at 2103 (citing 48 C.F.R. §§ 19.001, 19.703(a)(2) (1994)); *see* 13 C.F.R. § 124.105(b)(1) (1994); 49 C.F.R. § 23.62 (1994).

371. *See id.* at 2104.

372. *Id.* at 2112. To pass constitutional muster under strict scrutiny, classifications must be "narrowly tailored measures that further compelling governmental interests." *Id.* at 2113.

373. 488 U.S. 469 (1989).

374. *Adarand*, 115 S. Ct. at 2110.

375. *Id.* at 2112-13.

376. *Id.* at 2112 (quoting Regents of Univ. of California v. Bakke, 438 U.S. 265, 298 (1978)).

377. *Adarand*, 115 S. Ct. at 2112-13.

378. *Id.* at 2114.

In the end, the Court concluded that the court of appeals had erred in analyzing the case in terms of intermediate scrutiny.[379] The Court remanded *Adarand* to the lower courts in light of its new, stricter standard of inquiry.[380]

In dissent, Justice Stevens observed an irony in the Court's decision.[381] Unless *Adarand* is extended to gender-based classifications, government will find it more difficult to enact affirmative action programs for blacks than for women—even though the Equal Protection Clause was designed primarily to end discrimination against former slaves.[382] Indeed, since gender-based classifications continued to warrant only intermediate scrutiny,[383] the effect of *Adarand* was to subject benign race classifications to a more stringent inquiry than the one applied to the most invidious gender discrimination.[384]

3. *United States v. Commonwealth of Virginia*[385]

In *Virginia*, the United States District Court for the Western District of Virginia held that Virginia's refusal to admit women to its Virginia Military Institute (VMI) satisfied the intermediate scrutiny test for gender-based classifications.[386] The United States had argued that the Equal Protection Clause required Virginia to admit women into its all-male military college.[387] Ruling for the Commonwealth, the court held that the Equal Protection Clause required only that Virginia create a state-supported all-female college program that will enable women to "attain an outcome . . . that is comparable to that received by young men upon graduation from VMI."[388] The court concluded that the

379. *Id.* at 2118.

380. *Id.*

381. *Id.* at 2122 (Stevens, J., dissenting).

382. *Id.*

383. *Id.* The Supreme Court established intermediate scrutiny as the standard of review for sex classifications in Craig v. Boren, 429 U.S. 190, 197 (1976). In contrast to strict scrutiny, *Craig* held "that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Id.* Intermediate scrutiny also has been applied when the federal government is responsible for the gender-based classification, *see* Califano v. Westcott, 443 U.S. 76, 85-89 (1979), or when the classification is remedial in nature. *See* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723-24 (1982); *see also* John Galotto, Note, *Strict Scrutiny for Gender, Via* Croson, 93 COLUM. L. REV. 508, 510-29 (1993) (reviewing the evolution of the standard of review for gender-based classifications).

384. *See Adarand*, 115 S. Ct. at 2122 (Stevens, J., dissenting).

385. 852 F. Supp. 471 (W.D. Va. 1994), *aff'd*, 44 F.3d 1229 (4th Cir. 1995), *reh'g denied*, 52 F.3d 90 (4th Cir. 1995), *rev'd*, 116 S. Ct. 2264 (1996).

386. *Virginia*, 852 F. Supp. at 473.

387. *Id.* at 473 n.2.

388. *Id.* at 473.

Commonwealth's proposed all-female alternative to VMI—the Virginia Women's Institute for Leadership (VWIL) at nearby Mary Baldwin College[389]—would not be a mirror image of VMI, but would still offer a satisfactory "all-female program that will achieve substantially similar outcomes in an all-female environment."[390]

By focusing on outcomes rather than the process, the district court acknowledged that men and women are not always similarly situated individuals, but instead have real differences.[391] The court explicitly rejected the government's argument that any all-female alternative to VMI must be "separate but equal" so that it "closely resembles, if not clones, the physical plant, the curriculum, the methodology, the prestige, and many of the other attributes of VMI."[392] Thus, even though VWIL would use "a cooperative method which reinforces self-esteem rather than the leveling process used by VMI," this was justifiable based on the district court's finding that "most women reaching college generally have less confidence than men."[393]

Affirming the district court, the United States Court of Appeals for the Fourth Circuit applied "a heightened intermediate scrutiny test

---

389. *See* Jeffrey Rosen, *Separate But Equal at VMI: Like Race, Like Gender?*, NEW REPUBLIC, Feb. 19, 1996, at 24. Mary Baldwin College is located in Staunton, Virginia, approximately 35 miles from the Lexington, Virginia home of VMI. *Id.*

390. *Virginia*, 852 F. Supp. at 481. Emphasizing that it was concerned more with the ends of single-sex education than the means, the court opined that "[i]f VMI marches to the beat of a drum, then Mary Baldwin marches to the melody of a fife and when the march is over, both will have arrived at the same destination." *Id.* at 484.

391. *Id.* at 476. "In the end, distinctions in any separate facilities provided for males and females may be based on real differences between the sexes, both in quality and quantity, so long as the distinctions are not based on stereotyped or generalized perceptions of differences." *Id.* (quoting Faulkner v. Jones, 10 F.3d 226, 232 (4th Cir. 1993)); *see supra* note 295 and accompanying text.

392. *Id.* at 475.

393. *Id.* at 476. One commentator has noted that VWIL's less demanding environment not only reflects a belief in the real differences between men and women, but also serves as "an explicit rejection of everything that makes VMI unique." Rosen, *supra* note 389, at 25. Only months after VWIL's establishment, this commentator lamented:

> As a result, the VWIL program is not even plausibly equal to VMI. Students in the program live in the ordinary dorms of Mary Baldwin College; attend most of their classes with Mary Baldwin students; are not required to wear uniforms except during ROTC; and are generally supported rather than harassed. And Mary Baldwin suffers in comparison to VMI in other, more intractable ways: 100 points lower average SAT scores, lower faculty salaries, no engineering program for the B.S. degree, and so forth. All in all, the argument goes, Mary Baldwin is to VMI as Pine Manor (rather than Wellesley) is to Harvard.

Id.

specially tailored to the circumstances" of this case.[394] The court's "heightened" intermediate scrutiny test included "the additional step of carefully weighing the alternatives available to members of each gender denied benefits by the classification."[395] In this case, this meant inquiring into the "substantive comparability" of the two separate military programs provided by the Commonwealth of Virginia.[396]

According to the court, this extra step was necessary in all "case[s] where the classification [was] not directed per se at men or women, but at homogeneity of gender."[397] The Fourth Circuit explained that such situations warranted a more searching inquiry because when the classification is "directed at homogeneity of gender,"[398] the classification and the objective merge and the second prong of the traditional intermediate scrutiny test is rendered toothless.[399] The first prong of this test inquires into whether the state's objective in creating a gender-based classification is " 'legitimate and important.' "[400] The second prong examines whether the gender-based classification " 'substantially and directly furthers' that objective."[401] When the objective requires homogeneity of gender, once the first prong is satisfied, the gender-based classification, *by definition*, not only furthers the objective, but is logically necessary.[402] Thus, to give meaning to the traditional test, the court added a third prong that required homogeneous gender classifications to confer "substantively comparable" benefits to both sexes.[403]

After determining that Virginia met the first two parts of the heightened intermediate scrutiny test, the Fourth Circuit turned to its third prong and held that the Equal Protection Clause's requirement of comparable opportunities for each sex did not mandate identical programs at VMI and Mary Baldwin.[404] The Fourth Circuit said that the substance of each military program must be comparable, although not necessarily "in form and detail."[405] Implicitly accepting the real

394. United States v. Commonwealth of Va., 44 F.3d 1229, 1232 (4th Cir. 1995).

395. *Id.* at 1237.

396. *Id.*

397. *Id.*

398. *Id.*

399. *Id.* For a more complete description of the intermediate scrutiny test and its origins, see *supra* note 383.

400. *Virginia*, 44 F.3d at 1236.

401. *Id.* at 1237.

402. *Id.*; *see also id.* at 1239 ("[T]he only way to realize the benefits of homogeneity of gender is to limit admission to one gender.").

403. *Id.* at 1237 ("We will call this third step an inquiry into the *substantive comparability* of the mutually exclusive programs provided to men and women." (emphasis added)).

404. *Id.* at 1240-41.

405. *Id.* at 1240.

differences doctrine, the court concluded that the "adversative and pervasive military regimen"[406] of the men's school need not be duplicated at the women's school—unless "it is true that women, subjected to the same grating of mind and body, respond in the same way men do. . . ."[407] Because the government did not offer sufficient evidence to prove that men and women would respond in the same way to the same stimuli, the Fourth Circuit held for Virginia.[408]

Trying one final time to make VMI co-educational, the Clinton administration appealed the Fourth Circuit's ruling to the United States Supreme Court, where it pursued a startling strategy.[409] Attempting to close the gap between judicial treatment of gender and racial classifications, the government asked the Supreme Court to extend strict scrutiny to all sex-based classifications.[410] In an attempt to create new opportunities for women, "[t]he Clinton administration . . . dramatically raised the stakes"[411] in its war against VMI, and in so doing, unintentionally imperiled Title IX.

Although the government had not called for strict scrutiny in the previous six years of litigating this case through lower courts,[412] its brief submitted to the Supreme Court declared "that strict scrutiny is, in fact, the correct constitutional standard for evaluating differences in official treatment based on sex, and that the complete exclusion of women from VMI's unique and valued public educational program should be reviewed under that standard."[413] Cognizant that the Court

---

406. *Id.*

407. *Id.* at 1241. Underscoring the court's apparent acceptance of the real differences between men and women, the court had quoted, Dr. Heather Anne Wilson, the Dean of Students at Mary Baldwin as saying that

> "the VMI model is based on the premise that young men come with [an] inflated sense of self-efficacy that must [be] knocked down and rebuilt. . . . What [women] need is a system that builds their sense of self-efficacy through meeting challenges, developing self-discipline, meeting rigor and dealing with it, and having successes."

Id. at 1234 (quoting Dr. Heather Anne Wilson). According to Dr. Wilson, who also was on the task force charged with developing VWIL, women do not need their sense of self-efficacy knocked down, as " 'women had that leveling experience already in their lives, and they do not need more of that in college.' " Rosen, *supra* note 389, at 25 (quoting Dr. Wilson).

408. *Virginia*, 44 F.3d at 1241.

409. Petitioner's Brief at 33-36, United States v. Virginia, 116 S. Ct. 2264 (1996) (No. 94-1941).

410. *See* Rosen, *supra* note 389, at 26-27.

411. *Id.*

412. Frank J. Murray, *Justices Tackle VMI Case; U.S. Seeks "Strict Scrutiny,"* WASH. TIMES, Jan. 17, 1996, at A6.

413. Petitioner's Brief at 33, *Virginia* (No. 94-1941).

recently had extended the scope of strict scrutiny for racial classifications in *Adarand*, the petitioners asserted that "sex, like race, is an immutable and highly visible characteristic,"[414] thus rendering gender classifications "illegitima[te]"[415] and " 'inherently suspect.' "[416]

In its brief, the government roundly attacked the lower courts' notion that real differences between men and women justify the preservation of Virginia's single-sex military colleges.[417] Condemning the "stereotyping"[418] motivating the lower courts' acceptance of the "real differences" doctrine, the petitioners proclaimed that "VMI stands as an official monument to the discredited view that women are categorically different from, and in many respects inferior to, men."[419] Because VWIL was based not on VMI's rigorous program, but rather on "archaic sex-based stereotypes and generalizations about the sociological and psychological characteristics of women and men,"[420] the government concluded that equal protection means opening up VMI to female students.[421]

Fortunately for Title IX, the Supreme Court was swayed only so far. Reversing the Fourth Circuit, the Court agreed with the government that the separate education offered to women at VWIL was "substantially different and significantly unequal" from that offered at VMI.[422] But, most importantly for the future of Title IX, the Court resisted the Clinton administration's pleas to extend strict scrutiny to all gender-based classifications.[423]

Title IX, however, may not have escaped unscathed, as Justice Ginsburg's majority opinion could provide ammunition for future attacks on the venerable antidiscrimination statute in at least two ways. First, although the Court did not expressly apply strict scrutiny to the sex-based classification in *Virginia*, it seemed to deviate from the traditional intermediate scrutiny standard. The majority repeatedly emphasized that "[p]arties who seek to defend gender-based government action must demonstrate an '*exceedingly persuasive justification*' for that ac-

414. *Id.* at 34.
415. *Id.* at 36.
416. *Id.* at 35 (quoting Frontero v. Richardson, 411 U.S. 677, 684-85 (1973) (plurality opinion)).
417. *Id.* at 37.
418. *Id.*
419. *Id.* at 24.
420. *Id.* at 33.
421. *Id.* at 15-16.
422. United States v. Virginia, 116 S. Ct. 2264, 2286 (1996).
423. *See id.* at 2276 n.6.

tion."[424] In so doing, the Court criticized the "deferential review in which the Court of Appeals engaged," which was "inconsistent with the more exacting standard our precedent requires."[425] Although the Court agreed with the Fourth Circuit that a "heightened" scrutiny test was necessary in this case,[426] the Supreme Court determined that the Fourth Circuit's idea of height—in the form of the "substantive comparability" test—was not high enough, as it was too deferential for the gender-based classifications of today.[427]

The fact that the Court's "exceedingly persuasive justification" language differed from the traditional intermediate scrutiny standard for gender-based classifications was not lost on Justices Rehnquist and Scalia. For Justice Rehnquist, the concern was precision, as he wrote separately to express that it was "unfortunate that the Court thereby introduce[d] an element of uncertainty respecting the appropriate test."[428] For Justice Scalia, however, the suspicion was that the "exceedingly persuasive justification" requirement was a subtle attempt to refashion the intermediate scrutiny test into a more searching inquiry.[429]

In a passionate dissent, Justice Scalia accused the majority of "sweep[ing] aside the precedents of this Court" by "drastically revis[ing] our established standards for reviewing sex-based classifications."[430] Noting that the government had urged the Court to apply strict scrutiny to sex-based classifications, the dissent stated that the Court, "while making no reference to the Government's argument, effectively accepts it."[431] Justice Scalia concluded that the Court's adoption of the "exceedingly persuasive justification" requirement constituted a "de facto abandonment of the intermediate scrutiny" test in favor of an amorphous new test that is "indistinguishable from strict scrutiny."[432]

The second way in which *Virginia* could undermine Title IX is through the majority's reaffirmation of the real differences doctrine. Recognizing that "inherent differences" are no longer accepted as a ground for race or national origin classifications, the Court nonetheless

---

424. *See, e.g., id.* at 2274 (emphasis added).
425. *Id.* at 2286.
426. *Compare* 44 F.3d at 1232 *with* 116 S. Ct. at 2286.
427. *Virginia*, 116 S. Ct. at 2286.
428. *Id.* at 2288 (Rehnquist, J., concurring).
429. *Id.* at 2291 (Scalia, J., dissenting).
430. *Id.* (Scalia, J., dissenting).
431. *Id.* at 2294 (Scalia, J., dissenting).
432. *Id.* at 2294-95, 2306 (Scalia, J., dissenting). Among other proof that the majority's "exceedingly persuasive justification" language was more than mere dicta, Justice Scalia noted that the Court invoked the phrase nine times in its opinion. *Id.* at 2294.

stated that "[p]hysical differences between men and women . . . are enduring: '[T]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both.' "[433] In a sentence that could provide fodder for both sides of the Title IX debate, Justice Ginsburg then emphasized that the "inherent differences" between men and women "remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity."[434]

D. *Analysis of the Recent Judicial Challenges to Title IX*

Had there been no rumblings beneath Title IX's regulatory surface for more than a decade, the *Pederson* ruling might be dismissed as *sui generis* and forgotten.[435] But Judge Doherty's stinging rebuke of the proportionality test capitalized on, and added to, the anti-quota momentum building in the courts and Congress.[436] At the very least, Judge Doherty's opinion offers a judicial imprimatur to the growing voices of protest against the draconian proportionality test, and has given hope to exasperated university administrators whose pleas for clear, feasible gender equity requirements had fallen on deaf ears in the courts.[437] Although it is too early to know *Pederson*'s full impact on Title IX law, Judge Doherty's opinion may already have had lasting ramifications beyond the LSU campus. Indeed, her words seem to have resonated among some judges and government officials, who may be heeding *Pederson*'s warnings to proceed with caution when applying the proportionality test.

For example, in a surprising move six weeks after the *Pederson* ruling, OCR agreed to suspend its investigation of the University of Minnesota's athletic department, even though the university made no promises to meet proportionality.[438] The university contended that

---

433. *Id.* at 2275 (quoting Ballard v. United States, 329 U.S. 187, 193 (1946)).

434. *Id.*

435. Indeed, this was the immediate public reaction of at least one surprised Title IX advocate, who announced that Judge Doherty appeared to misunderstand the three-part test, but still ruled consistently with previous Title IX cases. Bill Campbell, *Judge May Have Erred in Case: Legal Analyst Says LSU Got Off Easy*, NEW ORLEANS TIMES-PICAYUNE, Jan. 20, 1996, at D7.

436. *See, e.g., supra* notes 364-83 and accompanying text (discussing *Adarand*, 115 S. Ct. at 2097); *infra* notes 472-94 and accompanying text.

437. After the *Pederson* ruling, Walter B. Connolly, one of Brown University's lead attorneys, exemplified the newfound optimism among Title IX opponents: "Plaintiffs have to be scared," he said. Mike Szostak, *Brown University, Athletes Wrestle with Title IX-Related Decision at LSU*, PROVIDENCE SUNDAY J., Feb. 11, 1996, at C6.

438. Gregor W. Pinney, *Government Suspends Gender Equity Inquiry at "U,"* STAR TRIB.

exact proportionality was not required, and OCR agreed, accepting the school's promise to bring female athletic participation up to 44% of all athletes; women comprise 49% of the university's total undergraduate enrollment.[439] Interestingly, for reasons unknown, in this case OCR decided to depart from its stated policy: the agency's January 1996 *Clarification* indicates that a 5% disparity between female participation and enrollment may be a *per se* violation of the proportionality test.[440]

In addition, although she was ultimately successful, Amy Cohen's Title IX lawsuit encountered judicial resistance for the first time while on appeal after remand. Three months after *Pederson*, during oral argument before the United States Court of Appeals for the First Circuit, Chief Judge Juan R. Torruella expressed "some basic problem" with the March 1995 district court decision finding Brown in violation of Title IX.[441] Judge Torruella would later put his Title IX concerns in writing, as he issued a fervent dissent from the two-person majority opinion in *Cohen*.

Judge Torruella's dissent first challenged the majority's application of the "law of the case" doctrine, stating that *Adarand* changed the law on "so-called 'benign' gender-conscious governmental actions" since the prior panel's ruling in the first *Cohen* appeal.[442] Refusing to rubber stamp the earlier panel's deference to the proportionality test as a benign affirmative action measure, Judge Torruella stated that *Adarand* shows that the earlier panel was wrong in assuming "that a regulation slanted in favor of women would be permissible."[443]

Second, the dissent argued that the Supreme Court's recent decision in *Virginia* also rendered the law of the case doctrine inapplicable to this case. According to Judge Torruella, the Supreme Court in *Virginia* elevated its intermediate scrutiny test for gender-based classifications to require a more searching, "skeptical scrutiny of official action denying rights or opportunities based on sex . . . which requires that parties who seek to defend gender-based government action demonstrate "an '*exceedingly persuasive justification*' for that action."[444] Thus, the dissent maintained that the prior panel's holding in *Cohen* is flawed

---

(Minneapolis-St. Paul), Feb. 24, 1996, at B2.

439. *Id.*

440. *See supra* notes 156-59 and accompanying text. The *Clarification* even indicates that a disparity of only 1% may also be a violation of the proportionality test. *See supra* note 146.

441. Mike Szostak, *Title IX: Brown Renews Its Battle with Female Athletes*, PROVIDENCE J.-BULL., Apr. 2, 1996, at D3.

442. *Cohen II*, 101 F.3d at 190 (Torruella, J., dissenting).

443. *Id.* at 189 (citing *Cohen*, 991 F.2d at 901) (Torruella, J., dissenting).

444. *Id.* at 190 (quoting *Virginia*, 116 S. Ct. at 2274) (Torruella, J., dissenting) (emphasis added).

"both because it applies a lenient version of intermediate scrutiny that is impermissible following *Adarand* and because it did not apply the 'exceedingly persuasive justification' test of *Virginia*."[445]

Judge Torruella then proceeded to attack the district court's interpretation of the three-part test. Deeming the three-part test a "quota scheme" as adopted by the district court, the dissent noted correctly that "Congress, if anything, expressed an aversion to quotas as a method to enforce Title IX,"[446] and found that the appellees failed to meet their burden under *Virginia* to demonstrate an "exceedingly persuasive justification" for Title IX's benign, gender-based classification.[447]

Whether or not *Pederson* is directly responsible for the sudden change in attitude by OCR and the misgivings expressed by the Chief Judge of the First Circuit towards the three-part test, it is clear that Judge Doherty's ruling represents the first sign of judicial discontent with the bureaucratic transformation of Title IX from an antidiscrimination statute into a license for discrimination against male athletes. In the long run, *Pederson* may be the spark that ignites the courts into rejecting the entire three-part test as inconsistent with Title IX's express prohibition against preferences for either sex.[448] While *Cohen* paved the way for extensive judicial deference to an agency interpretation that was neither reviewed nor approved by Congress or the President, *Pederson* may signal that the courts are ready to reign in OCR and assert greater control over the compliance process.

Moreover, by rejecting the proportionality test, Judge Doherty has bestowed new independence on the remaining two benchmarks of the three-part test. Confining her analysis to the "continuing expansion" and "effective accommodation" inquiries, Judge Doherty demonstrated how the second and third benchmarks need not depend on the proportionality test for meaning.[449]

In the past, courts had rendered the "continuing expansion" benchmark nearly impossible to satisfy by ordering universities to increase participation opportunities at an unlimited pace to satisfy unserved athletic interests, with only proportionality standing in the way of unlimited expenditures.[450] As a result, the significance of the "continuing expansion" test was diminished.[451] Proportionality engulfed the test because it offered the only feasible, apparently sure method for schools

445. *Id.* at 191 (Torruella, J., dissenting).
446. *See* 20 U.S.C. § 1681(b); *supra* pt.II.A.
447. *Id.* at 197 (Torruella, J., dissenting).
448. *See* 20 U.S.C. § 1681(b); *supra* pt. II.A.
449. *See Pederson*, 912 F. Supp. at 914-17.
450. *See supra* notes 307-16 and accompanying text.
451. *See id.*

to comply with Title IX.[452] In rejecting the proportionality test, Judge Doherty has forcibly separated it from the second benchmark, and, in the process, has given schools real flexibility in meeting the three-part test.

Spurning mechanical rules and rigid statistical tests, Judge Doherty engaged in a fact-specific inquiry that focused on the good faith of the institution. Thus, in addition to LSU's failure to add any women's teams for 14 years, the court found it highly probative that LSU had engaged in such egregious conduct as lying about its expansion plan, attempting to lead a minority revolt against proposed NCAA gender equity rules, and demonstrating a sexist attitude overall.[453] In short, but for LSU's apparent disdain for its female athletes, its failure to add a certain number of women's teams or to meet a certain participation quota would probably not have been dispositive of a Title IX violation.

Similarly, the *Pederson* court divorced the "effective accommodation" benchmark from the proportionality test, and thus gave form to the "invisible" provision.[454] Unlike the Court in *Cohen*, the *Pederson* court did not make its decision as to "effective accommodation" based on LSU's failure to divide its limited resources in a proportional way.[455] Instead, Judge Doherty found it crucial that LSU never made an effort to ascertain the athletic interests and abilities of its students either through surveys, simple interviews, or for that matter, any other means.[456] Employing a fact-specific inquiry, the court held for the plaintiffs, but provided the university the flexibility to consider alternatives other than proportionality to satisfy Title IX.[457]

Judge Doherty also gave meaning to this third benchmark by ensuring that the plaintiffs actually had the abilities to compete on the teams they sought to establish. Since none of the plaintiff soccer players in *Pederson* had the requisite skill to participate at the intercollegiate varsity level, the court found that LSU's failure to provide equal opportunities for women could not have injured them.[458] This was not

---

452. *See id.*

453. *Pederson*, 912 F. Supp. at 916-20. Judge Doherty freely expressed her disgust for LSU's "arrogant ignorance" and "remarkably outdated view of women and athletics" throughout her opinion. *Id.* at 918. The editorial board of the local newspaper said the decision was a "scathing denouncement of [Athletic Director Joe] Dean and his department. . . . Dean came out looking like a sexist, whose testimony conflicted on significant points with that of other LSU officials." *LSU Victory Claim Sham*, BATON ROUGE ADVOC., Jan. 17, 1996, at B6.

454. *See supra* pt. III.B.3.

455. *See Cohen*, 991 F.2d at 899; *supra* notes 323-29 and accompanying text.

456. *Pederson*, 912 F. Supp. at 915.

457. *Id.* at 914, 916, 922.

458. *Id.* at 907-08.

one of the "easy" cases under the third benchmark in which a recently defunct team sues for reinstatement,[459] as LSU had only recently promoted the soccer team to varsity status. Nevertheless, Judge Doherty's searching inquiry into the athletic skills of each plaintiff should encourage future courts in such "hard" cases to ask if the would-be athlete has the requisite ability to go along with her interest. As *Pederson* demonstrates, if universities have to accommodate the interests and abilities of their athletes, then plaintiffs should have to show conclusively that they have the abilities to begin with.

All in all, while *Pederson* may be the catalyst for increased judicial skepticism towards Title IX, and its proportionality test in particular, *Pederson* alone is unlikely to cause Title IX's downfall. But coupled with *Adarand*, *Virginia*, and a growing resentment towards Title IX in Congress, *Pederson* may certainly contribute to the statute's demise. If *Pederson*'s undermining of the proportionality test is not enough to convince OCR, Congress or the courts to revisit the statute begin anew, then perhaps *Adarand* or *Virginia* will.

Adarand also may operate to undermine the proportionality test. Although the Supreme Court spoke about racial, not gender, classifications, both benign and discriminatory, the remedial policy at issue in *Adarand* somewhat resembled Title IX. In *Adarand*, the Court questioned a remedial program created by Congress that compelled a specific result through the use of a "race-based rebuttable presumption"[460] in the hiring of "disadvantaged subcontractors."[461] Despite the great deference usually afforded Congress, the Court, by remanding for application of "strict scrutiny" review, essentially overturned the congressionally-mandated program.[462] By comparison, at issue in Title IX cases is a gender-based, administratively-created remedial program that compels a specific result in intercollegiate athletics: an increase in women's athletic participation rates until they are substantially proportionate to female enrollment.[463] But unlike *Adarand*, the classification system at issue in Title IX cases emanates not from Congress but from an agency's interpretative document that was never reviewed or approved by Congress or the President—a document that is inconsistent with the wording of the underlying statute and its legislative history.[464] Thus, even if Justice Scalia is wrong about the Supreme Court's

459. *See Cohen*, 991 F.2d at 904.

460. *Adarand*, 115 S. Ct. at 2105.

461. *Id.* at 2118.

462. *See id.*; *see also id.* at 2123-25 (Stevens, J., dissenting) (arguing that precedent requires giving great deference to Congress in this area); Hastert, *supra* note 152, at 4.

463. *See* Hastert, *supra* note 152, at 4.

464. *See id.*

extension of *Adarand*'s strict scrutiny to sex-based classifications in *Virginia*,[465] *Adarand* still cautions against excessive deference when group-based affirmative action is at issue—especially when the affirmative action was established by an unelected federal agency rather than an elected national legislature.

Equally threatening to Title IX is the possibility that Justice Scalia is right that the *Virginia* Court furtively extended *Adarand*'s standard of review to all gender classifications. Indeed, as an administrative agency's sex-based classification that disadvantages male athletes, it is doubtful that Title IX could survive strict scrutiny.[466] As Justice Thurgood Marshall recognized in a racial classification case, strict scrutiny is "strict in theory, but fatal in fact."[467] The last racial classification to survive the Supreme Court's strict scrutiny test was the infamous Japanese internment case of *Korematsu v. United States* in 1944.[468]

In addition, even if Title IX escapes the grasps of strict scrutiny, it is uncertain whether its leading benchmark can withstand the skepticism

---

465. *See supra* notes 431-32 and accompanying text.

466. Cognizant of the potential repercussions from a government victory in *Virginia*, some women's rights advocates formed an unlikely coalition with VMI to fight against the government's co-educational plans. *See, e.g.*, David G. Savage, *Separate But Equal, Part II: As the All-Male Virginia Military Institute Defends Itself in Court, It is Getting Some Support from Women's Rights Advocates*, AUSTIN AM.-STATESMAN, Jan. 7, 1996, at C1 ("[A] surprising number of prominent female lawyers and educators say that [strict scrutiny] would not be a final victory but a setback for many young women. . . . What about women's and men's prisons, they ask. What about battered women's shelters? What about high school and college sports, where 'separate but equal' is the prevailing philosophy?").

Realizing that if VMI went the way of strict scrutiny, so goes Title IX, the Independent Women's Forum filed an amicus brief urging the Supreme Court to reject the Clinton administration's arguments as potentially harmful to women. Murray, *supra* note 412; *Women's Group Urges Supreme Court to Keep Virginia Military Institute All Male*, PR NEWSWIRE, Dec. 15, 1995, *available in* Westlaw, ALLNEWSPLUS File. The Independent Women's Forum is a non-profit, non-partisan organization based in Washington, DC. *Id.* Asserting that "real differences" exist between men and women, the group asked the Court to keep the traditional intermediate scrutiny standard for gender classifications. *Id.*

467. Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., dissenting). Curiously, however, the majority opinion in *Adarand* included a paragraph devoted solely to "dispel[ling] the notion that strict scrutiny is strict in theory, but fatal in fact." *Adarand*, 115 S. Ct. at 2117 (internal quotation marks omitted). The *Adarand* Court decried the "unhappy persistence" of racial discrimination and maintained that "government is not disqualified from acting in response to it." *Id.* Whether this passage indicates a new, more lenient strict scrutiny standard in the future is not currently known.

468. 323 U.S. 214 (1944) (upholding the internment of people of Japanese ancestry during World War II); *see* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-6, at 1451-52; *see also* Girardeau A. Spann, *Color-Coded Standing*, 80 CORNELL L. REV. 1422, 1497 n.52 (1995) (discussing the difficulty of surviving strict scrutiny analysis).

of judges that believe in the "real differences" between the sexes: *Pederson* provides an example of what can happen to the proportionality test when a court believes that men and women do not automatically share the same interest in sports.[469]

E. *OCR's November Nightmare: Congress' New Skepticism Towards Title IX*

"Say goodbye to the OCR and Norma [Cantú]," gloated one Title IX critic months after Republicans took control of both houses of the 104th Congress in November 1994.[470] Indeed, with enormous momentum and political capital, the GOP seemed capable of delivering the "bold, dramatic and immediate change" it long promised.[471] Especially troubling to Title IX supporters were reports that the Republican revolution was fueled by "angry white males" suspicious of big government and resentful of affirmative action.[472] Not surprisingly, Republicans responded to the electorate—of which white men comprised 40 percent and voted Republican by a 63%-37% margin[473]—by immediately seizing on the issue of affirmative action and, in particular, Title IX.

Not long after House Speaker Newt Gingrich vowed "cooperation, yes; compromise, no" on the Republican agenda,[474] his House troops scheduled hearings on the abuses of Title IX.[475] Ominously for Title

---

469. *See supra* notes 334-63 and accompanying text.

470. Dale Anderson, *Say Goodbye to the OCR and Norma* (visited July 31, 1996) <http://www.coe.uncc.edu/~jrlareau/etc/title9/anderson.html>. On November 8, 1994, Republicans gained 52 seats in the House of Representatives and 8 seats in the Senate to win both houses of Congress for the first time since 1952. After the election, the House of Representatives featured 230 Republicans, 204 Democrats and 1 independent, while the Senate had 53 Republicans and 47 Democrats. *See* Gerald F. Seib & John Harwood, *Shift in Power: Big Republican Gains Bring the Party Close to Control of Congress*, WALL ST. J., Nov. 9, 1994, at A1; *Campaigns of '94 Senate: GOP Grabs Control with 52 Seats*, AM. POL. NETWORK HEALTH LINE, Nov. 9, 1994, at 5; *Campaigns of '94 House: Dem Cmte. Leaders Win Races, Lose Gavels*, AM. POL. NETWORK HEALTH LINE, Nov. 9, 1994, at 6.

471. Seib & Harwood, *supra* note 470, at A16 (quoting Rep. Bill Paxon of New York, who led the GOP House campaign committee).

472. *See* David Jackson, *Male Call at the Polls*, DALLAS MORNING NEWS, Dec. 28, 1994, at A1 ("The typical angry white male is generally regarded as fearful of the evolving global economy, resentful of affirmative action, and alienated from politics and government."); Jessica Gavora, *College Women Get More than Their Sporting Chance*, INSIGHT MAG., Jan. 22, 1996, *available in* WESTLAW, ALLNEWS file (recognizing that Title IX has alienated white males).

473. Peter A. Brown, *White Male Voters Receptive to GOP Message*, PLAIN DEALER (Cleveland), Nov. 27, 1994, at A8.

474. Nancy Mathis, *Democrats Told: Forget Compromise; But Gingrich Open to "Cooperation,"* HOUS. CHRON., Nov. 12, 1994, at 1.

475. Ana Puga, *GOP Targets Sports Funds for Women; Equal Opportunity Measure*

IX supporters, leading the charge was Illinois Republican Representative J. Dennis Hastert, a former high school football and wrestling coach and the 104th Congress' new Chief Deputy Majority Whip.[476] During four hours of hearings on May 9, 1995 before the House Subcommittee on Postsecondary Education, Training and Lifelong Learning, Representative Hastert decried Title IX as "the only civil rights law I know of where innocent bystanders are punished. The unintentional consequences has [sic] been the cutback of men's sports and not the growth of women's sports. It's a trend across the country and we want to stop it."[477]

After the hearings, the chairman of the subcommittee, Representative Howard "Buck" McKeon, wrote to DED's assistant secretary for civil rights, Norma Cantú, seeking clarification of the Policy Interpretation. The letter, co-authored by fellow Republican Steve Gunderson, contained a subtle threat of congressional intervention if Secretary Cantú refused to comply: "It might obviate the need for a legislative clarification if the Department [of Education] provided a clear signal as to the parameters of the obligation of colleges and universities to provide equal athletic opportunities."[478] In response, OCR began drafting a document that would eventually become the *Clarification*.[479]

The prospect of congressional intervention into the Title IX compliance process is not illusory: by June 1995, many members of Congress had the will to change Title IX, and their numbers kept growing. On June 30, 1995, Representative Hastert sent OCR a letter co-signed by 146 House members that criticized the agency's Title IX stance.[480] In contrast, three weeks later, a rival letter supporting OCR's Policy Interpretation garnered only 94 signatures.[481]

By August of 1995, the Republican Congress posed its greatest challenge yet to Title IX when it accepted an amendment by GOP Representative Ernest Istook that strips OCR of all federal funding used for Title IX enforcement if the agency did not create additional Title IX guidelines by December 31, 1995.[482] The amendment was first intro-

---

Attacked by Men's Interests, PHOENIX GAZETTE, Apr. 18, 1995, at A1.

476. Andrew Gottesman, *Backlash from Title IX Leads to Congressional Hearings; Schools Are Eliminating Men's Sports*, SALT LAKE TRIB., May 8, 1995, at C1.

477. Feuerherd, *supra* note 165.

478. Curtis & Grant, *supra* note 140.

479. *Id.*; *see also supra* notes 142-58 and accompanying text.

480. Curtis & Grant, *supra* note 140.

481. *Id.*

482. *See* Robert Marshall Wells, *Appropriations: Delving into Realm of Policy, Panel OKs Labor-HHS Bill*, CONG. Q. WKLY. REP., July 29, 1995, at 2280; Oscar Dixon, *Representative Seeks Title IX Guidelines*, USA TODAY, July 26, 1995, at C3. The Istook Amendment stated:

duced in the House of Representatives as a rider to a controversial GOP appropriations bill that cut $9.3 billion from education programs for disadvantaged children and job training for workers, while increasing spending for military weapons.[483]

Even among the other controversial provisions in the appropriations bill, the Istook Amendment was far from overlooked, as a heated debate ensued over the provision. Skeptical of Representative Istook's intentions, Title IX supporters accused the amendment's sponsor of trying "to force the Office of Civil Rights to weaken its enforcement standards."[484] Democratic Representative Tom Lantos urged Congress to "condemn[] the meanspirited and utterly sexist" attempt at derailing Title IX.[485]

An attempt by Democratic Representative Patsy Mink to strike the Istook Amendment from the appropriations bill failed.[486] This prompted Democratic Representative Cardiss Collins, Title IX's most vocal supporter in Congress and Representative Hastert's most prominent adversary during the subcommittee hearings in May, to plead with Congress to resist the Istook "sneak attack on Title IX" that "represents an attack on Title IX and an effort to ensure that it is not enforced."[487] Representative Collins then vowed to "continue to make sure that Title IX is defended and upheld."[488]

Ultimately, the controversial appropriations bill passed on a near party-line vote of 219-208.[489] After the vote, one newspaper's editorial board complained that "[u]nder the guise of balancing the federal

---

> None of the funds made available in this Act may be used by the Office of Civil Rights of the Department of Education after December 31, 1995, to enforce Title IX of the Education Amendments of 1972 (20 U.S.C. 1681 *et seq.*) with respect to gender equity in intercollegiate athletic programs, except when it is made known to the Office that the Department has issued updated policy guidance to institutions of higher education which includes specific criteria clarifying how such institutions can demonstrate a history and continuing practice of program expansion for members of the under-represented sex and full and effective accommodations of the interests and abilities of the under-represented sex.

Curtis & Grant, *supra* note 140.

483. H.R. 2127, 104th Cong., 1st Sess. (1995). Karen Hosler, *Spending Bill Passes House in Close Vote*, BALTIMORE SUN, Aug. 4, 1995, at A1; *GOP's Cuts Pass House; Democrats Attack Bill that Slashes Social Programs*, STAR-TRIB. (Minneapolis-St. Paul), Aug. 4, 1995, at A1 [hereinafter *GOP's Cuts*].

484. 141 CONG. REC. H8194-02, H8206 (1995) (statement of Rep. Mink).

485. *Id.* at E1706-03 (statement of Rep. Lantos).

486. *See id.* at E1648-02 (statement of Rep. Collins); *id.* at H8194-02.

487. *Id.* at E1648-02 (statement of Rep. Collins).

488. *Id.*

489. *GOP's Cuts, supra* note 483.

budget, the Republican-led House last week mounted an assault on women, working-class families and the poor that is contrary to this nation's tradition of equality, compassion and fair play."[490] The editorial's first illustration of the legislation's "poisoned apples in this bag of goodies" was the House's attempt to undermine Title IX.[491]

The appropriations bill, however, died in the Senate when a Democratic filibuster precluded the Senate from considering the measure.[492] Because of the many controversial provisions in the bill, it is unclear whether the Title IX amendment contributed to the bill's demise in the Senate.[493] Still, the actions by the House "marked the most ambitious attack to date on Title IX," and demonstrated that Title IX opponents have the upper hand in the House for the first time since the antidiscrimination law was enacted in 1972.[494]

Indeed, as long as the GOP controls both houses of Congress, the legislative branch will likely remain hostile to Title IX. Future legislative measures to alter or destroy Title IX may find a more receptive Senate audience once the bill is unencumbered by a host of radical social and economic provisions. Perhaps most distressing for Title IX advocates is that the next Congress will be without Title IX's chief supporter, for Representative Cardiss Collins has announced her retirement after 23 years on Capitol Hill.[495] Whether another House

---

490. *Editorial: An Assault on America*, HARTFORD COURANT, Aug. 6, 1995, at D2.

491. *Id.*

492. *See* John Boehner, *Balanced Budget Downpayment Act II*, Government Press Releases, Mar. 6, 1996, *available in* Westlaw, 1996 WL 8783648; Don Nickles, *47 Filibusters and 12 Vetoes: Minority Tactics Bring Return of the "Gridlock Index,"* Government Press Releases, Mar. 12, 1996, *available in* Westlaw, 1996 WL 8783855.

493. Among other provisions, the bill would have allowed states to deny Medicaid funds for abortions for poor women in cases of rape or incest; curtailed the ability of the Occupational Safety and Health Administration (OSHA) to enforce worker safety rules; and banned federal funds for human embryo research. *GOP's Cuts, supra* note 483; *An Assault on America, supra* note 490. After the House passed the bill, a group of Democratic female lawmakers told a press conference that " 'It's payback time for the religious right . . . and rollbacks for women's rights.' " *GOP Waging War on Women, Democrats Say; House Majority Leader's Spokesman Calls Claims "Overblown Rhetoric,"* ROCKY MOUNTAIN NEWS (Colorado), Aug. 4, 1995, at A50 (quoting Rep. Pat Schroeder).

494. Andrew Gottesman, *Hastert Bandstands for Revisions in Title IX; Illinois Pol Thinks Men's Sports Are Hit Too Hard*, CHI. TRIB., May 10, 1995, at § 4-1; *see* Jonathan S. Landay, *Scrimmage Match in Congress Over Money for Sports*, CHRISTIAN SCI. MONITOR, May 11, 1995, at 1 ("[A] Republican-controlled Congress may give opponents the upper hand for the first time since the law [Title IX] was passed in 1972.").

495. Steve Daley & Thomas Hardy, *Collins Joining the '96 Exodus from Congress After 23 Years, Lawmaker Says She Won't Run Again*, CHI. TRIB., Nov. 9, 1995, at 1.

member will be able to fill the void left by this highly respected "political power" is unknown.[496]

IV. CONCLUSION

Since its passage in 1972, Title IX has been the catalyst for massive growth in women's intercollegiate athletics, and has delivered a measure of justice to spurned athletes such as Amy Cohen who were treated unfairly by cost-cutting athletic administrators. But as male athletes like Bill Kelley have learned, Title IX's regulatory framework has forced low-revenue men's sports to pay the entire cost of gender equity. While athletic directors continue to treat football as a sacred cow, men's wrestling, gymnastics, and swimming teams have become the ultimate losers of Title IX's zero-sum game.

By promulgating a three-part test that is dominated by a stringent proportionality provision, the Department of Education's Office of Civil Rights has transformed the 1972 statute from a law that prohibits discrimination into a law that requires affirmative action in direct contravention of Title IX's language and its legislative history. Based on the dubious assumption that women and men share the exact same interest in sports on all campuses, OCR's proportionality test has set a rigid quota for female participation in intercollegiate athletics. And although OCR has maintained that its three-part test provides "flexibility" in complying with Title IX,[497] in reality, the proportionality requirement is the only feasible choice for universities facing budget constraints. The proportionality test is the only provision that allows schools to comply with Title IX by eliminating men's teams instead of spending unlimited amounts of money to fund women's teams. In addition, the proportionality test engulfs the other two benchmarks, as both the "continuing expansion" and the "effective accommodation" tests depend on proportionality to give them meaning.

Although OCR's three-part test was neither reviewed nor approved by Congress or the President, and is inconsistent with Title IX's language and legislative history, exasperated university administrators and frustrated male athletes received no relief from the courts. *Cohen* and its progeny sanctioned the dominance of the draconian proportionality test, and gave great deference to an administrative agency's ability to promulgate interpretations of its own regulations.[498]

But just as men's intercollegiate gymnastics and wrestling neared extinction, the tide has turned in the ongoing battle over Title IX. A

496. *Id.*
497. Cantú, *supra* note 108, at 3-4.
498. *Cohen*, 991 F.2d at 896-97.

federal district court in Louisiana startled many observers by emphatically rejecting the proportionality test and the *Cohen* line of Title IX cases.[499] Refusing to defer to an agency interpretation that had no grounding in "the explicit language" of the statute or its legislative history, the *Pederson* case signaled an emerging judicial skepticism towards the regulatory foundations of the venerable antidiscrimination law.[500] By challenging the legitimacy of the proportionality test, *Pederson* essentially challenged the legitimacy of Title IX itself: since *Cohen*, the proportionality test had become the *sine qua non* of Title IX and its primary, if not sole, test of compliance. It is left to be seen whether Title IX can survive with a weakened proportionality test in the close cases where a university's conduct was not egregious.

In any event, this question may be moot, as *Adarand* demonstrates the Supreme Court's skepticism towards remedial classifications that result in reverse discrimination.[501] Ironically, however, perhaps the greatest recent threat to Title IX came from its supporters in the Clinton administration: if the government in *Virginia* had succeeded in persuading the Supreme Court to apply strict scrutiny to all gender classifications, Title IX could have been an unintended casualty. It is possible, and even likely, that the Clinton administration will once again attempt to extend *Adarand*'s strict scrutiny standard to a future case involving gender-based classifications.[502]

Lastly, even if Title IX escapes the scrutiny of an increasingly critical judiciary, it may not survive Congress' new hostility to the statute. Although the most recent Republican attempt to derail Title IX fell short in the Senate, the GOP controlled House—and its Chief Deputy Whip who is a former wrestling coach—have both the opportunity and political resolve to try again.

Twenty-five years after it was signed into law, Title IX is entering a period of transition. Faced with an emerging skepticism from the judiciary, a newfound hostility from the national legislature, and a possible repeat of an unintentional, yet considerable threat from the executive branch, Title IX may have to change to survive. Unless OCR revamps the Policy Interpretation's three-part test to free Title IX from its proportionality albatross, the antidiscrimination statute may not be

499. *See supra* text accompanying notes 345-63.

500. *See supra* text accompanying notes 334-63.

501. *See Adarand*, 115 S. Ct. at 2114 ("Consistency *does* recognize that any individual suffers an injury when he or she is disadvantaged by the government because of his or her race, whatever that race may be." (emphasis in original)).

502. *See supra* notes 413-19 and accompanying text; *see also Virginia*, 116 S. Ct. at 2293 (Scalia, J., dissenting) (noting the Court's use of " 'exceedingly persuasive justification' " at nine locations in its opinion, and interpreting the phrase inconsistently with previous caselaw).

able to withstand the intensifying pressure from all three branches of government. Thus, in the end, the continuing, emotional debate over which is the true face of Title IX may actually be irrelevant—because Title IX itself may soon be irrelevant.