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Successful Challenge, Ruling Reversed: Why the OCR Survey Proposal May be Well-Intentioned But Misguided

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**Successful Challenge, Ruling Reversed:
Why the OCR Survey Proposal May be Well-Intentioned But Misguided**

Robin M. Preussel

Abstract

The paper details the history and development of Title IX and its implementing regulations as applied to intercollegiate athletics, highlighting the inequities that have often resulted from its interpretation and application to college programs. It then analyzes the recent Office of Civil Rights’ (the division of the Department of Education that interprets and implements Title IX’s regulatory structure and oversees collegiate adherence to Title IX) proposal to allow institutions to use electronic surveys to comply with prong three of the (in)famous Three Prong Test. The paper concludes that the survey scheme is a good step forward in correcting inequities while preserving opportunities for women, but underlines some weaknesses in the OCR’s proposal and suggests some ways to correct these shortcomings. Ultimately, the paper concludes that schools should be allowed to measure genuine interest in athletic participation among both male and female undergraduates and develop appropriate programs to meet these needs without adhering to the strictures of proportionality so prevalent in institutions today.

Introduction.....1

I. History of Title IX and the Evolution of Title IX Application by Courts.....6

 A. Legislative History.....6

 B. Agency Interpretation.....10

 C. Application of Title IX by the Courts.....12

II. Present-Day Effects of Title IX as Applied to Intercollegiate Athletics.....20

 A. Gains for Women.....21

 B. Losses for Men.....22

 C. “Creation” of Women’s Programs and Other Problems.....24

III. Previously Proposed Solutions..... 30

IV. Using a “Measure of Genuine Interest” as a Solution.....39

 A. The OCR’s Recent Survey Proposal.....40

B. Where the OCR Proposal Went Wrong.....	42
C. A Better Solution—Genuinely Measuring Interest.....	46
V. Criticisms.....	51
A. There Will Be a Backslide in Women’s Progress.....	51
B. Interest as a Phenomenon of Social Values.....	53
C. It’s Not Substantial Proportionality’s Fault.....	56
D. Recruiting for Interest?.....	57
VI. Conclusion.....	59

Successful Challenge, Ruling Reversed: Why the OCR Survey Proposal May be Well-Intentioned but Misguided

Robin M. Preussel¹

Introduction

Enacted as part of the Education Amendments of 1972, Title IX has unquestionably led to the unprecedented growth in women's athletic programs in colleges and universities over the last thirty years. The statute started as an innocent aperture in the old world of male-dominated athletic programs, and quickly transformed the world of intercollegiate athletics. Within a decade of Title IX's enactment, female participation levels in school sports increased by 500%.² Undoubtedly, this has resulted in several benefits and opportunities for women, including the physical benefits of participation in sports, the psychological benefits of team-building and accomplishment, and the social benefits of increased gender equity. However, there are also grave consequences of the current interpretation of Title IX by the courts and the Department of Education's Office of Civil Rights' compliance test for educational institutions. According to some scholars, the same statute that has given so many wonderful opportunities to women in athletics has simultaneously (albeit perhaps unintentionally) taken away many of these opportunities from their male colleagues.³

In 2002, the Bush Administration formed the Commission on Equal Opportunity in Athletics under the auspices of the Secretary of Education in order to investigate school compliance with Title IX regulations and recommend how to improve the standards for

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² Amy Bauer, Note, *If You Build It, They Will Come: Establishing Title IX Compliance in Interscholastic Sports as a Foundation for Achieving Gender Equity*, 7 Wm. & Mary J. Women & L. 983, 983 (2001).

³ See JESSICA GAVORA, *TILTING THE PLAYING FIELD: SCHOOL, SPORTS, SEX AND TITLE IX* (2002); Andrew J. Boyd, Comment, *Righting the Canoe: Title IX and the Decline of Men's Intercollegiate Athletics*, 37 J. MARSHALL L. REV. 257 (2003); David Klinker, *Why Conforming with Title IX Hurts Men's Collegiate Sports*, 13 SETON HALL J. SPORT L. 73 (2003); Donald E. Shelton, *Equally Bad Is Not Good: Allowing Title IX "Compliance" by the Elimination of Men's Collegiate Sports*, 34 U. MICH. J.L. REFORM 253 (2001); and Megan K. Starace, *Reverse Discrimination Under Title IX: Do Men Have a Sporting Chance?*, 8 VILL. SPORTS & ENT. L. J. 189 (2001).

measuring compliance with Title IX. This was largely in response to an outcry from universities and male student-athletes, the former unsure of how to comply with the broad regulations and the latter aggrieved after their sports had been demoted to intramural or club status or eliminated entirely. After holding four town meetings and taking testimony from a variety of scholars, expert witnesses, parents, athletes, and school administrators, the Commission made recommendations to the Secretary of Education.⁴ Taking these recommendations into consideration, the Assistant Secretary for Civil Rights issued a Further Clarification, which made no substantive changes to Title IX regulations and stated that the three-prong test issued by the Office of Civil Rights in its 1979 Policy Interpretation had worked well.⁵ Specifically, the Clarification emphasized that an institution would be compliant if it met any of the three prongs of the test, not only the “safe harbor” proportionality provision of the first prong.⁶

Two years after the Commission Report, little has changed in university interpretation of what Title IX requires.⁷ Thus, more non-marquee sports are eliminated each year to comply with the proportionality requirement, more student-athlete scholarships, particularly those dedicated to male sports, are eliminated, and more women’s programs are created with little or no demand for them. I believe this is not what the framers of Title IX intended—they envisioned equal opportunity, equal access, but not necessarily equal numbers. They wanted to promote female athletics on college campuses and give female students the opportunity to receive the benefits that come with participation in intercollegiate sports. They did not anticipate the elimination of

⁴ U.S. DEP’T OF EDUC., SEC’Y’S COMM’N FOR OPPORTUNITY IN ATHLETICS, *Open to All: Title IX at Thirty* (2003), available at <http://www.ed.gov/about/bdscomm/list/athletics/title9report.pdf> (last accessed Mar. 1, 2005) [hereinafter DOE 2003 Report]. See also Danielle M. Ganzi, Note, *After the Commission: The Government’s Inadequate Responses to Title IX’s Negative Effect on Men’s Intercollegiate Athletics*, 84 B.U. L. Rev. 543, 562-67 (2004).

⁵ Letter from Assistant Secretary Gerald Reynolds, U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS 1-3 (July 11, 2003), available at <http://www.ed.gov/about/offices/list/ocr/title9guidanceFinal.html> (last accessed Mar. 1, 2005) [hereinafter Further Clarification]. See also Ganzi, *supra* note 4, at 569-70.

⁶ Further Clarification, *supra* note 5.

⁷ Telephone Interview with Marie Robbins, Associate Athletic Director and Senior Woman’s Administrator, University of Alabama, Tuscaloosa (Mar. 17, 2005).

these same opportunities for male students. Thus, those interpreting and applying Title IX regulations and reviewing institutional compliance with them should return to the spirit in which the law was written.

As the Further Clarification stated, schools should be able to steadfastly rely upon the two other “prongs” of the compliance test, both in proving compliance to regulators and during litigation, giving them more leeway to develop an equitable and balanced athletic program without the unreasonable strictures of the de facto quota system now in effect.⁸ However, upon a closer examination of the three prongs, this becomes a vacuous statement. First of all, without the elimination of the first prong of the test—the proportionality requirement—this may be an unrealistic goal.⁹ Many critics, including those within the Bush Administration, have called for the elimination of this requirement altogether, but without an argument sufficient to convince Congress or the Department of Education.¹⁰ The reason is clear—courts interpreting Title IX consistently rely on the proportionality requirement in litigation.¹¹ It is a more straightforward test for them to apply and an easier way for the plaintiff to prove discrimination. Even courts that have considered examining the other two prongs of the test usually take a school’s violation of the first prong to be prima facie evidence of discrimination.¹²

Removing the proportionality requirement as an option would force courts to interpret and apply the remaining two prongs of the test, which have more nebulous requirements. The second prong calls for an historical inquiry into the school’s discriminatory practices and

⁸ Further Clarification, *supra* note 5, at 2.

⁹ See Ganzi, *supra* note 4, at 566-69.

¹⁰ See Andrew Murr, *Title IX: Is It Time for a Change?*, 32 J.L. & EDUC. 557, 557 (2003); see also Erik Brady, *Major Changes Debated for Title IX*, USA TODAY, Dec. 19, 2002, at A1.

¹¹ See, e.g., *Cohen v. Brown Univ.*, 991 F.3d 155 (1st Cir. 1996) (finding Brown University to be in violation of Title IX after using proportionality prong of the three-prong OCR test).

¹² See, e.g., *Favia v. Indiana Univ.*, 7 F.3d 332 (3d Cir. 1993) (citing that Indiana University’s failure to meet the proportionality prong of the OCR test could be taken as prima facie evidence of gender discrimination in its athletic programs).

requires proof that the situation is “improving.”¹³ This would be an easy test for any institution to meet, and thus would overcompensate for the harm done to institutions and male athletics under the present system, possibly threatening the gains that female athletics have made. The third prong insists that all needs must be met¹⁴—logically, this leads to the conclusion that a plaintiff would almost automatically win any action brought against a school, since this would be evidence that there is a need and it is not being met. Additionally, because the remaining two prongs are ill-defined and have not been generally interpreted by courts, institutions may be forced to expend more resources defending lawsuits.

Thus, it seems that in order to interpret and apply Title IX requirements equitably, the three-prong test needs to be eliminated. I propose replacing it with a measure of genuine interest in the student body—a measure which the OCR has recently endorsed as a way for schools to comply with the third prong of the three-part compliance test.¹⁵ Under my approach, the test would still be proportional, in a sense, but the proportionality requirement would require opportunities for those who have a genuine interest in intercollegiate competition in a sport (a kind of combination of the first and third prongs). Practical implementation of such a measure may be more difficult to institute at first, but some type of survey or application section would suffice for the data set. Using this data, a school could devise a series of programs and participation rules for all programs, such that a decline in interest or participation in any program could cause the program to be cut and the resources reallocated. This measure would benefit institutions by allowing them more flexibility in the structuring of their programs, while still

¹³ 44 Fed. Reg. 71,413-23 (Dec. 11, 1979) (to be codified at 34 C.F.R. pt. 106) (setting forth the three prong test used to determine a school’s compliance with Title IX)[hereinafter Policy Interpretation].

¹⁴ *Id.*

¹⁵ Letter from James F. Manning, Delegated Authority for the Assistant Secretary for Civil Rights, U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS (Mar. 17, 2005) (on file with author) [hereinafter Survey Letter]. This indicator would measure genuine interest in *participation*, not the public interest in *watching* a sport. This has often sparked confusion amongst academics, courts, and, especially, in friendly conversation. See Part IV *infra*.

encouraging the development of athletic opportunities for female student-athletes and allowing for the preservation of those opportunities already in existence for males. My proposal may seem to be moot since the OCR has already implemented such a survey system. However, I will argue that the OCR's proposal is grossly inadequate in that it only requires that university women be surveyed, it allows for an unrepresentative sample of women by relying on surveys distributed via electronic mail, and, despite the fact that the new guidelines exceed 150 pages, the OCR fails to effectively guide a school in its accommodations of these interests once they have been detected. In short, the OCR's survey may materially threaten the gains that women have made over the past thirty years under Title IX, as it provides large institutions (especially Division I schools seeking to compensate for their football teams) with a mechanism to eviscerate the mandate of Title IX by using an ineffective and inequitable survey—in essence over-compensating for the inequities already present in Title IX application to intercollegiate athletics. I will criticize the shortcomings of the OCR survey proposal and suggest some reforms in its practical application, which, considering its recent revelation, could still be assimilated into the survey's structure. I predict that this could prevent backlash from feminist and social scholars as well as smaller institutions who may view this new proposal as incomplete, misguided, and a capitulation to the demands of Division I schools and the NCAA.

This paper begins with a brief history of Title IX in Part I, and traces the evolution of the application of Title IX by various courts. Part II highlights the various effects of the statute in practice, citing the inequities that sometimes result from a strict interpretation of the proportionality requirement. Part III describes some other solutions previously proposed by other scholars, analyzing each in turn and explaining why each may be ineffective or inappropriate. Part IV details my proposal of using a measure of genuine interest in lieu of the

OCR's three prong test to determine compliance with Title IX. Part V addresses some anticipated criticisms of my analysis of Title IX, its current application to intercollegiate athletics, and my proposed solution to the problems inherent in the current application. Most of these criticisms come from the literature of feminism and social change, and most of these critics would argue that to change the current application of Title IX in any way would undermine its efficacy and allow for a reversion back to male-dominated athletic programs. I argue that most of these criticisms are extreme in predicting the worst possible scenario and otherwise ignore the fact that a stricter test for compliance could be preserved at the grade and high school levels, where most students first become interested in sports. This Part will also explore similar criticisms made by the courts. Finally, the paper will look at the OCR's recent electronic survey implementation, highlight its faults, and make suggestions to correct its method so that the survey tool could be an effective tool in evaluating genuine interest among collegiate athletes and potential athletes. I conclude that even if there is some danger of institutional abuse of the new interest test or of initial marginal reductions in female participation in athletics, the implementation of this alternative test for university compliance with Title IX will produce more equitable results for all involved—the institutions and the athletes—both male and female.

I. History of Title IX and the Evolution of Title IX Application by Courts

A. Legislative History

Title IX was designed to foster gender equity in educational programs and activities that received federal funding. The bill developed as a response to the drastic under-representation of college women in intercollegiate athletics. In the early 1970s, just prior to the passage of Title IX, only a small percentage of student-athletes were female and they received just two percent of

the athletic budget.¹⁶ Excluded from the National Collegiate Athletic Association, which governed men's sports, women's sports came within the purview of the severely under-funded Association of Intercollegiate Athletic Women (AIAW).¹⁷ A growing public outcry for a more equal treatment of men and women in the context of public education and other federally funded programs grew out of the broader civil rights and women's movements.¹⁸ In response, and relying upon its spending power to enforce the vision of equality enshrined in the Fourteenth Amendment,¹⁹ Congress passed and President Nixon signed an Education Amendment Act of 1972 that included Title IX, which reads, in pertinent part:

No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefit of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.²⁰

However, it was initially unclear as to whether the statute would apply to intercollegiate athletics. What was clear from the legislative history surrounding the adoption of Title IX was Congress's plain intention that it not be used as a quota system or type of affirmative action program.²¹ While desiring to give women equal access and opportunity to the country's

¹⁶ PAUL C. WEILER & GARY R. ROBERTS, *SPORTS AND THE LAW: TEXTS, CASES PROBLEMS* 904 (3d ed. 2004). See generally Brian A. Snow & William E. Thro, *Still on the Sidelines: Developing the Non-Discrimination Paradigm Under Title IX*, 3 DUKE J. GENDER L. POL'Y 1 (1996).

¹⁷ See ROBERTS & WEILER, *supra* note 16, at 904.

¹⁸ B. Glenn George, *Fifty/Fifty: Ending Sex Segregation in School Sports*, 63 OHIO ST. L.J. 1107, 1107 (2002). See generally GAVORA, *supra* note 3; Note, *Cheering on Women and Girls in Sports: Using Title IX to Fight Gender Role Oppression*, 111 HAR. L. REV. 1627 (1997).

¹⁹ See U.S. CONST. art. I, § 8, cl. 1; see *id.* amend. XIV, § 1.

²⁰ 20 U.S.C. § 1681(a). The Act is codified in its entirety in 20 U.S.C. §§ 1681-88 (2002).

²¹ Senator Bayh went to great lengths during the Senate hearings on the statute in both 1971 and 1972 to emphasize that the law sought to provide women with an equal opportunity but not preferential treatment of women or quotas requiring that women fill a certain number of spots in an institution. In response to a question about whether the bill would require a school such as MIT, which might have a gender ratio of 90-10 male to female, to change its admissions in order to have a student body that is 50-50 women to men, Senator Bayh responded:

The amendment is not designed to require specific quotas I do not see how a 90-10 ratio has any relevance. The basis for determining compliance would not be an arbitrary ratio but the qualifications of the students who have made application. That would be the question—how many qualified men students were admitted and whether the institution required significantly higher standards for women students. 117 Cong. Rec. 30,409 (1971). Again, during the debate on the 1972 Education Amendments, Senator Bayh emphasized that the bill would require only equal opportunity based on the *existing abilities and interests* of women and men. He again explained that the bill did not require a quota of women either among faculty members or

educational institution, the legislative history is replete with an aversion to mandated quotas or proportional percentages, which led to the addition of § 1681(b).²² The legislative history at the time of enactment being sparse,²³ the application of Title IX to intercollegiate athletics would be developed in a series of amendments to the original statute.

students at schools receiving federal funds. *See* 118 Cong. Rec. 5,812 (1972). *See also* 118 Cong. Rec. 5,808 (1972) (Remarks of Sen. Bayh) (“According to the statute’s senate sponsor, Title IX was intended to ‘provide for the women of America something that is rightfully theirs—an equal chance to attend the schools of their choice, to develop the skills they want, and to apply those skills with the knowledge that they will have a fair chance to secure the jobs of their choice with equal pay for equal work.’”). Senator Beal remarked:

I hope it is the intent of the Senate in adopting the amendment that we are desirous of eliminating the sex discrimination that has taken place in education. As we eliminate this, I hope that we are not establishing still another form of bias. I hope that what we are saying is that we want everyone to be treated fairly and equally

118 Cong. Rec. 5,813 (1972). Senator Pell stated, “To put it succinctly, we must be sure that this type of amendment is not used to establish quotas for sex” 118 Cong. Rec. 18,438 (1972). *See also* Donald C. Mahoney, Note and Comment, *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) (stating “the legislative history contains no . . . ambiguity on the issue of . . . quotas as a means of compliance. Indeed, the legislative history surrounding Senator Birch Bayh’s 1971 amendment is replete with comments from Senators and Representatives who wished to ensure that Title IX would not require a quota system.”). Senator Bayh’s stated in response to Julian Levi’s criticism that there was no explicit prohibition of quotas in the amendment, “I did not include such a provision as part of the Senate amendment because I believe my amendment already states . . . no person, male or female, shall be subjected to discrimination. The language of my amendment does not require reverse discrimination.” *Id.* at 948.

²² 20 U.S.C. § 1681(b) reads in relevant part:

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

This amendment was proposed by Senator Quie during the 1971 hearings. *See* 117 Cong. Rec. 39,261-62 (1971) (Sen. Quie’s amendment) (stating “that to make absolutely certain there will not be a requirement of quotas in the graduate institutions and employment in the institutions of higher education similar to the prohibition against preferential treatment for minorities under the Civil Rights Act, I believe this legislation is necessary”). In addition to Quie’s statements, Edith Green, acting as chairperson of a Special House Subcommittee on Education, stated with respect to subsection (b) that in “my way of thinking, a quota system would hurt our colleges and universities. I am opposed to it even in terms of attempting to end discrimination on the basis of sex.” 117 Cong. Rec. 39,262 (1971).

²³ *See* David Aronberg, *Crumbling Foundations: Why Recent Judicial and Legislative Challenges to Title IX May Signal Its Demise*, 47 FLA. L. REV. 741, 747 (1995) (noting that there is little legislative history from the adoption of Title IX because it was adopted in congressional conference as a floor amendment without formal hearings or committee reports); Charles Spitz, *Gender Equity in Intercollegiate Athletics as Mandated by Title IX of the Education Amendments Act of 1972: Fair or Foul?*, 21 SETON HALL. LEGIS. J. 621, 627 (1997). *See also* Cohen v. Brown Univ., 991 F.2d 888, 893 (1st Cir. 1993) (noting the lack of legislative history on the application of Title IX to intercollegiate athletics presents a problem for courts trying to interpret Title IX; noting also that the completed legislation was not accompanied by a Committee Report); Jeffrey P. Ferrier, Comment, *Title IX Leaves Some Athletes Asking, ‘Can We Play Too?’*, 44 CATH. U. L. REV. 841, 884 n. 4 (1995) (noting that there are only two statements directly relating to Title IX application to intercollegiate athletics); Susan M. Shook, Note, *The Title IX Tug-of-War and Intercollegiate Athletics in the 1990’s: Nonrevenue Men’s Teams Join Women Athletes in the Scramble for Survival*, 71 IND. L.J. 773, 814 n.9 (noting that these are the only two statements on record on the issue

In 1974, Congress rejected an amendment that would have exempted revenue-producing sports from Title IX scrutiny by excluding these activities from the definition of Title IX's coverage of "education program or activity."²⁴ The amendment was proposed by Senator John Tower of Texas (and therefore known as the "Tower Amendment") and was pressed for by NCAA leadership,²⁵ but was abandoned in favor of the Javits Amendment of 1974.²⁶ The Javits Amendment made Title IX applicable to intercollegiate sports by authorizing the then Department of Health, Education and Welfare (HEW) to "implement the provisions of Title IX of the Education Amendments of 1972 relating to the prohibition of sex discrimination in federally assisted education programs which shall include, with respect to intercollegiate athletic activities, reasonable provisions considering the nature of particular sports."²⁷

of Title IX application to athletics). The entirety of the discussion surrounding Title IX's application to intercollegiate athletics seems to be limited to a few isolated statements in the legislative history. Senator Bayh did indicate that the bill would not prohibit sex segregated athletic teams. He explained during the 1971 hearings:

I do not read this as requiring integration of dormitories between the sexes, nor do I feel it mandates the desegregation of football fields. What we are trying to do is provide equal access for women and men students to the educational process and the extracurricular activities in a school, where there is not a unique facet such as football involved. We are not requiring that intercollegiate football be desegregated, nor that the men's locker room be desegregated.

117 Cong. Rec. 30,407 (1971). *See also* 118 Cong. Rec. 5,807 (1972) (statement of Sen. Bayh) (reiterating that locker facilities should remain private with respect to males and females).

²⁴ WEILER & ROBERTS, *supra* note 16, at 905. *See also* Amend. 1343 to S. 1539, 129 Cong. Rec. 15,322 (1974).

Relating to the interpretation of this clause is the debate pitting the "institutional-wide" approach versus the "program-specific" approach to Title IX application. The "institutional-wide" approach claims that if any part of the institution received federal funds, the whole institution is required by law to comply with Title IX, while the "program-specific approach" would only require the specific recipient program or activity to comply with Title IX. Although the view adhered to by regulators and courts, and therefore applicable today, is clearly the "institutional-wide approach" (*see* Parts II.B and II.C *infra*), if the "program-specific" approach were adopted, Title IX may not apply to athletic departments because the majority of intercollegiate athletic programs do not receive federal funding. Christopher Paul Reuscher, *Giving the Bat Back to Casey: Suggestions to Reform Title IX's Inequitable Application to Intercollegiate Athletics*, 35 AKRON L. REV. 117, 122-23. Further Amendments were proposed later, but failed to pass. *See* H.R. 8394, 82nd Cong. (1975); S. 2106, 84th Cong. (1977).

²⁵ WEILER & ROBERTS, *supra* note 16, at 905.

²⁶ Senator Tower reasoned that the exemption of revenue-producing sports was necessary to sustain an entire athletic program, fearing that if revenue-producing sports were forced to alter their operating guidelines, the financial base of the entire athletic department would be eroded, as he believed that such sports generate enough revenue to fund additional sports within the athletic department. *See* 120 Cong. Rec. 15,323 (1974) (statement of Sen. Tower). *See also* Kristin Rozum, Comment, *Staying Inbounds: Reforming Title IX in Collegiate Athletics*, 18 WIS. WOMEN'S L.J. 155, 158-59 (2003).

²⁷ Education Amendments of 1974, Pub. L. 93-380, § 844, 88 Stat. 484, 612 (Aug. 21, 1974) (codified as amended at 20 U.S.C. § 1681 (2001)). It has been argued that the Javits Amendment reflected Congress's disapproval of exempting revenue-producing sports. *See* Jodi Hudson, Comment, *Complying with Title IX of the Education*

B. Agency Interpretation

Initially, HEW's Office of Civil Rights (OCR) was the sub-agency responsible for issuing regulations enforcing Title IX. On July 21, 1975, HEW issued its "Final Title IX Regulation" in its first attempt to clarify what Title IX required for institutional compliance, allowing a three-year window for most schools to comply.²⁸ The next few years brought chaos in the nation's institutions of higher education, as more than one hundred complaints of gender discrimination had been filed against over fifty institutions in only three years²⁹ and colleges and universities clamored about the ambiguous nature of these regulations.³⁰ In response to the turmoil, the newly-formed Department of Education (DOE),³¹ acting through the OCR, issued the 1979 final "Policy Interpretation: Title IX and Intercollegiate Athletics",³² which mandated that an educational institution must "accommodate effectively the interests and abilities of students to the extent necessary to provide equal opportunity in the selection of sports and levels of competition available to members of both sexes."³³ The Policy Interpretation gave only vague guidance as to how that plan was to be carried out but went on to provide the infamous "Three Prong Test" to assess whether an institution is providing nondiscriminatory participation opportunities for members of each sex. The Three Prongs are as follows:

Amendments of 1972: The Never-Ending Race to the Finish Line, 5 Seton Hall J. Sport L. 575, 578 (1995). *See also* Part III *infra*. *But see* J. Brad Reich, *All the Athletes are Equal, But Some Are More Equal Than Others: An Objective Evaluation of Title IX's Past, Present, and Recommendations for Its Future*, 108 PENN. ST. L. REV. 525, 531 n. 26 (arguing that Congress was not specifically directing HEW to apply Title IX to intercollegiate sports, but rather it was directing HEW to draft regulations to identify if, when, and how Title IX might be applicable to intercollegiate athletics).

²⁸ 40 Fed. Reg. 24,128 (June 4, 1975) (codified at 34 C.F.R. § 106.41). The rule was signed by President Ford on May 27, 1975 and became effective as law on July 21, 1975. *Id.* at 24,137.

²⁹ Reich, *supra* note 27, at 531. *See also* Cohen v. Brown University, 991 F.2d 888, 896 (noting that in the three years following the initial issuance of the regulations, HEW received over one hundred discrimination complaints involving over fifty schools).

³⁰ Rozum, *supra* note 26, at 159.

³¹ In 1979, the HEW split into the Department of Health and Human Services (HHS) and the Department of Education (DOE). The HEW's former Office of Civil Rights (OCR) was transferred to the DOE. The OCR became primarily responsible for administering Title IX. *See* 20 U.S.C. § 3401-3510 (2002).

³² *See* Policy Interpretation, *supra* note 13.

³³ *Id.* at 71,415.

Prong I: Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments.

Prong II: 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 interests and abilities of the members of that sex.

Prong III: Where the members of one sex have been and are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be fully demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.³⁴

Nominally, an institution passes Title IX scrutiny by meeting any of the three prongs of the test. However, in 1996, the DOE issued another policy interpretation or “Dear Colleague” letter that underscored the Department’s approval of the three-part test and referred to the first prong, or the substantial proportionality test, as a “safe harbor” for institutional compliance with Title IX.³⁵ It went further to dictate that an institution would only be afforded such a “safe harbor” for Title IX compliance if the percentage gap between male and female participation in athletics proportional to the composition of the student body were 5% or less.³⁶ Thus, substantial proportionality became the *de facto* test for modern Title IX compliance and has persisted, even after public outcry caused the Bush Administration to revisit the issue in sanctioning the Report of the Commission on Opportunity in Athletics, as the OCR’s response to the Commission’s suggestions was the Further Clarification Letter issued in 2004, which retained the three-prong

³⁴ *Id.* at 71,418. The regulations surrounding and interpreting Title IX also include other specific requirements. For example, the statutory requirement of equality is not necessarily violated by “unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams.” 51 Fed. Reg. 20,524 (1986). However, scholarships for each sex must be substantially proportionate to the number of athletic participants in the institutions athletic programs. 44 Fed. Reg. 74,414 (1979). Furthermore, in the determination of whether “equal athletic opportunity” is provided by an institution, ten program factors must be taken into account. 34 C.F.R. § 106.41(c) (1990). With all of the various interpretations, guidelines, and tests, it is easy to see why confusion remained for several years.

³⁵ DOE 2003 Report, *supra* note 4, at 16. This “safe harbor” language evolved out of a line of court cases that will be considered in the next section. *See also* Tshaka C. Randall, Comment, *A (Not So) Safe Harbor: Substantial Proportionality as a Measure of Effective Accommodation*, 5 TEX. REV. ENT. & SPORTS L. 79 (2003).

³⁶ DOE 2003 Report, *supra* note 4, at 37.

test, only half-heartedly noting that schools may rely on the second and third prongs as well.³⁷ So it seems that the DOE's preferred method to achieve gender equity turns administrative law on its head, by enforcing Title IX through a series of internal agency interpretations and policy statements rather than through properly enacted regulations.³⁸ Furthermore, this agency policy seems to have strayed far beyond what Congress originally intended in 1972 and arguably goes further than Congress anticipated when it permitted Title IX application to athletics per the Javits Amendment. Moreover, since the ultimate adjudicators of Title IX liability are courts, the courts have consistently deferred to the questionable OCR interpretations of Title IX in its regulations, explanations, and policy statements under the *Chevron* doctrine.³⁹ Consequently, although it may appear that the OCR has over-stepped its authority, all three branches of government seem either unwilling or unable to remedy the situation: both the OCR and the DOE have refused to alter its policies, even at the behest of the highest levels of the Executive, Congress has declined to revisit the issue in new legislation, and the courts have bound themselves to the stringent and dubious test laid out by the OCR.

C. Application of Title IX by the Courts

Title IX's development through agency guidelines in some cases shaped its interpretation by the courts, but sometimes further agency action was catalyzed by individual court opinions. The following section will briefly trace the evolution of Title IX in the court system, highlighting some interactions between the judiciary and the legislature and the judiciary and the OCR.

³⁷ See Introduction, *supra*, and *supra* notes 4-5.

³⁸ Joshua Ryan Heller, Note, *Stepping Back to Punt: Favoring Internal Agency Interpretations Over Title IX and Its Regulations*, 12 U. FLA. J.L. & PUB. POL'Y 179 (2000). See also VALERIE M. BONNETTE & LAMAR DANIEL, U.S. DEP'T OF EDUC., TITLE IX ATHLETICS INVESTIGATOR'S MANUAL 22-27 (2d. ed. 1990) (listing factors for officials to consider when investigating an institution for a possible Title IX violation). Since these investigating officials often decide which institutions the OCR will sanction for Title IX compliance, these internal regulations seem to have the force of law.

³⁹ *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) (holding that courts must defer to interpretations of a statute by the agency to whom Congress has delegated administrative responsibility, unless the agency's reading is "arbitrary, capricious, or significantly contrary to the statute").

The United States Supreme Court first encountered Title IX in 1979 when it held in *Cannon v. University of Chicago* that there was an implied private right of action under Title IX.⁴⁰ The Court has often been criticized for finding this right despite the absence of an express statutory provision allowing a private party to bring suit to enforce Title IX compliance.⁴¹ After considering the later cases in this line of jurisprudence, *Cannon* may have been an early signal that the courts would be willing to expand Title IX application beyond the language of the statute.

Five years later, the Court seemed to take a step back from its expansive view of Title IX in *Grove City College v. Bell*.⁴² In *Grove City College*, the Court read Title IX as governing only the specific college programs that received federal financial assistance, which usually did not include athletic departments.⁴³ Thus, the Court adopted the narrow “program-specific” view of the statute’s application,⁴⁴ reasoning that since athletic departments did not receive federal funding, they could not be brought under the purview of the statute enacted on the authority of the congressional spending power—no monies received meant no federal authority to intrude. Congressional reaction was rapid, as it enacted the Civil Rights Restoration Act in 1988 over the veto by then President Reagan.⁴⁵ Clearly seeking to overrule *Grove City College*, the Act explicitly extended Title IX’s coverage to all the programs of an educational institution that

⁴⁰ 441 U.S. 677, 709 (1979). This private right of action allowed an individual to bring suit to force Title IX compliance on an institution, although the question of whether compensatory damages would be allowed would be decided in a future case. *See Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), *infra*. If a private right of action were not found to exist, or if an individual were not entitled to recover damages and instead was limited to injunctive relief, the remedy for non-compliance would be that the federal government could terminate funds going to the non-complying institution and often suits would be initiated by the federal government.

⁴¹ *See Reich, supra* note 27, at 533-34.

⁴² 465 U.S. 555 (1984).

⁴³ *Id.* at 570-71. *See also Weiler & Roberts, supra* note 16, at 905.

⁴⁴ *See* discussion of “program-specific” approach versus “institutional-wide” approach in note 24, *supra*.

⁴⁵ 20. U.S.C.A. § 1681, et. seq. (1988).

received any federal aid, either directly or indirectly through grants or loans to its students.⁴⁶ This brought virtually every public and private two and four year institution under the governance of Title IX as most institutions of higher education have at least one student that receives federal financial assistance.⁴⁷ Critics have argued that Congress erroneously overruled *Grove City College*, as it misinterpreted the scant legislative history of Title IX when drafting the Civil Rights Restoration Act.⁴⁸ Mistakenly or not, Title IX application was here to stay, and its precise application by courts would be fully developed by the next decade.

In 1992, mindful of Congress's direction, the Court held in *Franklin v. Gwinnett County Public Schools* that any woman who could prove that she had been personally harmed by the school's violation of Title IX could sue to recover damages and attorney's fees.⁴⁹ Until *Franklin*, it was generally believed that private litigants were limited to equitable relief under *Cannon*.⁵⁰ Thus, the OCR gained a powerful ally in the fight against gender discrimination in the school system—the plaintiff's bar.⁵¹

Unquestionably the most important case in the development of Title IX jurisprudence is *Cohen v. Brown University*.⁵² Although not a Supreme Court case, this First Circuit opinion has been the template for the majority of Title IX cases since it was decided, as other courts are

⁴⁶ See *id.* See also Karen Czapanskiy, *Grove City College v. Bell: Touchdown or Touchback?*, 43 MD. L. REV. 379 (1984).

⁴⁷ See U.S. GEN. ACCT. OFF., GENDER EQUITY: MEN'S AND WOMEN'S PARTICIPATION IN HIGHER EDUCATION 6 (Dec. 2000) (stating that because most post-secondary schools have students who receive federal financial assistance, such as federal or federally-backed student loans, Title IX applies to the vast majority of two and four year institutions, both public and private).

⁴⁸ See Reuscher, *supra* note 24.

⁴⁹ 503 U.S. 60, 66 (1992).

⁵⁰ See Reich, *supra* note 27, at 534-35.

⁵¹ See U.S. GEN. ACCT. OFF., *supra* note 47, at 5 (noting that in addition to the activities of the OCR private lawsuits may have helped to enforce Title IX). The Equity in Athletics Disclosure Act (EADA) made private Title IX suits even more attractive. See 20 U.S.C. § 1092(g) (2002). The EADA requires all institutions of higher education to provide specific information about the gender composition of their athletic programs, and "one glance at a school's EADA submission shows a would-be plaintiff's attorney whether or not a school is vulnerable to a Title IX lawsuit." Gavora, *supra* note 3, at 44.

⁵² 101 F.3d 155 (1996).

quick to adopt the *Cohen* court’s analysis and rationale.⁵³ The case is actually a series of cases and memorandum decisions that established the OCR’s three part test as the standard for Title IX claims.⁵⁴ The case was brought as a class action suit against Brown University for violations of Title IX. Members of the women’s volleyball and gymnastics teams, which Brown had demoted to intercollegiate club sport status, sought injunctive relief to reinstate their teams to varsity status and prohibit Brown from reducing the number of women’s teams in the future.⁵⁵ Judge Pettine held that the three-part test should be given deferential weight and that a finding of non-compliance under Title IX can be established by this method.⁵⁶ She went on to find Brown in violation of Title IX because it failed the three-part test, most notably the first prong requiring substantial proportionality, because of the substantial difference between the percentage of undergraduate women and the percentage of athletic opportunities available to them.⁵⁷ She ordered the injunction requiring Brown to reinstate the women’s teams to varsity status,⁵⁸ and

⁵³ See, e.g., *Horner v. Ky. High Sch. Athletic Ass’n*, 206 F.3d 685 (6th Cir. 2000); *Roberts v. Colo. State Univ.*, 998 F.2d 824 (10th Cir. 1993); *Beasley v. Ala. State Univ.*, 996 F. Supp. 1117 (M.D. Ala. 1997); *Bryant v. Colgate Univ.*, 1996 WL 328446 (N.D.N.Y. 1996).

⁵⁴ The most important decision in the *Cohen* line of cases are the following: *Cohen v. Brown Univ.*, 809 F. Supp. 978 (D.R.I. 1992) (“*Cohen I*”), *aff’d* 991 F.2d 888 (1st Cir. 1993) (“*Cohen II*”), *aff’d* on remand, 879 F. Supp. 185 (D.R.I. 1995) (“*Cohen III*”), and, *aff’d* in part, *rev’d* in part by 101 F.3d 155 (1st Cir. 1996) (“*Cohen IV*”). The lineage appears to end with *Cohen v. Brown Univ.*, No. CIV. 99-485-B, 2003 WL 2151123, (D.N.H., Jun 27, 2003), which decided the final rehearing regarding attorney’s fees.

⁵⁵ *Cohen v. Brown Univ.*, 809 F. Supp. At 980-81. Along with the women’s athletic teams, Brown had also demoted men’s golf and men’s water polo. The requested relief would prohibit Brown from eliminating any more teams unless the percentage of “opportunities to participate in intercollegiate athletics equals the percentage of women enrolled in the undergraduate program.” *Id.* During the academic year of 1990-91, Brown provided men and women with 31 varsity teams—15 for women and 16 for men. *Id.*

⁵⁶ *Id.* at 988. Judge Pettine stated that although “the Policy Interpretation and the unpublished Investigator’s Manual do not carry the force of law or establish controlling standards for this Court . . . [,] I believe the Policy Interpretation, and to a slightly lesser extent the Investigator’s Manual, are important guidelines in unraveling the requirements of the athletic regulation.” *Id.* The decision goes on to establish the three-part test as the *only* test for determining Title IX compliance, without looking at any other factors listed in the regulations. See Aronberg, *supra* note 23, at 774. See also note 34, *supra*, discussing the other regulations embedded in Title IX.

⁵⁷ *Cohen I*, 809 F. Supp. At 991-993. In deciding liability under the first prong, the Court examined the difference in percentages of opportunities and undergraduate population. Under the second prong, the Court held that “Brown does not have a continuing practice of program expansion even though it can point to impressive growth in the 1970’s.” *Id.* at 991. As to prong three, the Court found “in denying full varsity status to women . . . Brown has not accommodated the interests and abilities of women . . . under existing athletic programs.” *Id.*

⁵⁸ *Id.* at 1001.

this approach was affirmed by the First Circuit in *Cohen II*.⁵⁹ On remand, the District Court rejected Brown’s argument that the three-part test is in direct contradiction to the intent of Title IX and determined that there was no need to numerically-define “substantial proportionality”, as an institution could only attain compliance if “. . . [its] intercollegiate athletic programs mirror[] the student enrollment as closely as possible.”⁶⁰ It rejected Brown’s suggestion that the Court test proportionality between the number of athletic opportunities provided and the number of students interested in participating in athletics.⁶¹ On the final substantive appeal in *Cohen IV*, the majority once again gave the Policy Interpretation deference and affirmed the District Court.⁶²

Thus, the *Cohen* test for Title IX compliance prevails today. Not only does it adopt the three-prong test of the 1979 OCR Policy Interpretation as a test for liability, but it also clearly favors the first prong of that test and places great weight on strict numerical proportionality. The Court’s cursory review of Brown’s actions under the other two prongs of the test makes it clear that what the Court really did was to create a single Prong I test to determine Title IX compliance.⁶³ Furthermore, *Cohen* is held most responsible for using the overall student

⁵⁹ *Cohen v. Brown Univ.*, 991 F.2d 888 (1st Cir. 1993). Although the Court found Brown in violation of Title IX, the Court stated “it seems unlikely, even in this day and age, that the athletic establishments of many co-educational universities reflect the gender balance of their student bodies.” *Id.* at 898. It went on to hold out a token of sympathy to Brown, stating “whether Brown’s concept might be thought more attractive, or whether we, if writing on a pristine page, would craft the regulation in a manner different than the agency, are not very important considerations.” *Id.* at 899.

⁶⁰ *Cohen v. Brown Univ.*, 879 F. Supp. 185, 199-202 (D.R.I. 1995).

⁶¹ *Id.* at 205-206. The court acknowledged that:

given the difficulty of measuring the relative interests of men and women, it would be almost impossible for an institution to remain in compliance with Title IX by staying abreast of the ever-changing relative “interests” of its male and female students and adjusting its programs accordingly. Because defendants’ interpretation would require substantial proportionality between the gender balance of its athletic program . . . and the gender balance of interested prospective student-athletes, constant rebalance would be necessary to maintain compliance

Id. at 206 n.44. See Part IV *infra* for my attempt to allay the Court’s concerns.

⁶² *Cohen v. Brown Univ.*, 101 F.3d 155 (1st Cir. 1996).

⁶³ Reich, *supra* note 27, at 536.

enrollment as an indispensable factor in a Title IX investigation,⁶⁴ instead of requiring that athletic opportunities be available in substantially proportional terms to some other benchmark of the student population. Title IX's framers' worst nightmare has come true—by elevating Prong I's substantial proportionality to preeminent status, by making it a “safe harbor” for institutions seeking to comply with Title IX and avoid liability, Title IX has clearly become a *de facto* quota system.⁶⁵ Yet perhaps the most unfortunate aspect of the *Cohen* line of cases is the Court's explicit endorsement of eliminating male teams as a way to meet the compliance requirements of Title IX.⁶⁶

The cases that followed in the aftermath of *Cohen* repeatedly affirmed the holding of that case, instantiating the use of the three-part test, and often relying on statistical evidence to find liability of the defendant institution under the first prong, which alone became sufficient. In *Roberts v. Colorado State University*,⁶⁷ female students sued to reinstate the female softball team. CSU argued that it had also eliminated the men's baseball team, thus bringing the percentage difference between male and female athletic opportunities closer together.⁶⁸ The Court hastily dismissed this argument and found that CSU failed to satisfy the three-prong test.⁶⁹ The same year, in *Favia v. Indiana University of Pennsylvania*,⁷⁰ the pattern repeated itself. IUP

⁶⁴ Reuscher, *supra* note 24, at 131 n.91. See also Earl C. Dudley, Jr. & George Rutherglen, *Ironies, Inconsistencies, and Intercollegiate Athletics: Title IX, Title VII, and Statistical Evidence of Discrimination*, 1 VA. J. SPORTS & L. 177, 202 (1999).

⁶⁵ Reich, *supra* note 27, at 539. See also *id.* at 561 n. 221.

⁶⁶ *Cohen v. Brown Univ.*, 991 F.2d 888, 898 n.15 (1st Cir. 1993). The opinion stated that:

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

Id.

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

⁶⁸ *Id.* at 1514.

⁶⁹ *Id.* at 1511-19.

⁷⁰ 812 F. Supp. 578 (W.D. Pa. 1993), *aff'd* 7 F.3d 332 (3d. Cir. 1993).

had cut the women’s gymnastics and field hockey teams.⁷¹ Giving the Policy Interpretation great deference and rejecting the university’s “financial hardship” defense, the Court found that IUP failed to satisfy the three-part test as its athletics programs were not substantially proportional to the gender composition of the student body.⁷²

One District Court, however, rejected *Cohen*’s reliance on the first prong of the OCR’s three-prong test. In *Pederson v. Louisiana State University*, two classes of female students that were interested in participating in soccer and softball sued to require LSU to establish these teams, alleging that the failure to do so violated Title IX.⁷³ Justice Rebecca Dougherty emphatically rejected reliance on the substantial proportionality requirement of the three-prong test and held that prior court decisions were erroneous in that regard.⁷⁴ The Court determined that the substantial proportionality requirement and the three-prong test do not issue from Title IX, but from the OCR’s Policy Interpretation, which should not have been given such considerable deference as it was not akin to an agency regulation or legislative statute.⁷⁵ Reasoning that in order to either elevate substantial proportionality or cease investigation after analyzing a program under that prong a court must assume that the interest and ability to participate in sports is equal between men and women, the Court noted the absence of evidence supporting such an assumption in prior cases.⁷⁶ The Court went on to recognize that making such an unsupported assumption the cornerstone of Title IX compliance analysis may lead to unjust results.⁷⁷ On

⁷¹ *Id.* at 580. Confronting a substantial budget problem, the school had also cut men’s soccer and tennis. *Id.*

⁷² *Id.* at 584-85.

⁷³ 912 F. Supp. 892 (M.D. La. 1996), *aff’d in part & rev’d in part*, 201 F.3d 388 (5th Cir. 2000), *reh’g granted*, 213 F.3d 858 (5th Cir. 2000).

⁷⁴ *Id.* at 914.

⁷⁵ *Id.*

⁷⁶ *Id.* See also Reich, *supra* note 27, at 540-41.

⁷⁷ *Id.* See also, Elizabeth A. Haggerty, Note, *Constitutional Law—Civil Rights—Title IX—Federally Funded Educational Institution Failed to Effectively Accommodate Female Student Athletes Due to Intentional Discrimination Based Upon Stereotypes Assuming Their Interests and Abilities; However, Female Student Athletes*

appeal, the Fifth Circuit reversed on several grounds,⁷⁸ and much of the District Court's analysis of substantial proportionality has been treated as mere dicta since the Court ultimately concluded the university was in violation of Title IX, albeit unintentionally.⁷⁹ Thus far, no other court has adopted the *Pederson* Court's reasoning.⁸⁰

While women have had recurring success as Title IX plaintiffs, only one male plaintiff bringing a Title IX claim has been successful, and in that case a male coach brought the action on behalf of his female basketball team.⁸¹ As plaintiffs suing on their own behalf, men, being the overrepresented gender in the athletic programs at the majority of institutions, find themselves victims of the courts' strict application of the three-prong test, especially the substantial proportionality prong.⁸² In *Kelley v. Board of Trustees, University of Illinois*, the Court held that UI's decision to cut the men's swimming team, but not the women's team, did not pervert Title IX, and furthermore did not violate the Equal Protection Clause of the U.S. Constitution.⁸³ Although they had secured a preliminary injunction from the District Court, the male plaintiffs in *Neal v. Board of Trustees of California State Universities* were defeated in the Ninth Circuit,

Lacked Standing—*Pederson v. Louisiana State University*, 213 F.3d 858 (5th Cir. 2000), 11 SETON HALL J. SPORT L. 373 (2001).

⁷⁸ *Pederson v. Louisiana State Univ.*, 201 F.3d 388 (5th Cir. 2000), reh'g granted, 213 F.3d 858 (5th Cir. 2000).

⁷⁹ See *Pederson v. Louisiana State Univ.*, 912 F. Supp. 892 (M.D. La. 1996).

⁸⁰ At least one part of the *Pederson* analysis was adopted by the United States District Court for the Eastern District of California, but the decision was reversed on appeal to the 9th Circuit. See *Neal v. Bd. of Trs. of Cal. State Universities*, 198 F.3d 763 (9th Cir. 1999). See also Reich, *supra* note 27, at 541.

⁸¹ See Reuscher, *supra* note 24, at 136-37. The one case where a man has prevailed on a Title IX claim was decided by the Supreme Court last month. *Jackson v. Birmingham Bd. of Educ.*, No. 02-1672 2005, 2005 WL 701076 (U.S. Mar 29, 2005). In *Jackson*, a former high school girls' basketball coach sued the Birmingham Board of Education after being fired from his coaching position when he complained about the unequal treatment of the girls' basketball team and inadequate facilities. The Court, in an opinion by Justice O'Connor, held that (1) retaliation against a person because that person has complained of sex discrimination is a form of intentional sex discrimination encompassed by Title IX's private cause of action; (2) coach stated claim of discrimination on the basis of sex that was actionable under Title IX; (3) coach could assert retaliation claim even though he was not victim of discrimination that was subject of his original complaints (as this was the treatment of the girls' team); and (4) Board of Education had sufficient notice that it could be subjected to private suits for intentional sex discrimination in form of retaliation.

⁸² See Ross A. Jurewitz, *Playing at Even Strength: Reforming Title IX Enforcement in Intercollegiate Athletics*, 8 AM. U. J. GENDER SOC. POL'Y & L. 283, 313 (2000).

⁸³ 35 F.3d 265 (7th Cir. 1994).

which allowed California State University, Bakersfield to use caps on available spots in male athletic programs to comply with Title IX requirements.⁸⁴ Finally, in *National Wrestling Coaches Association v. U.S. Department of Education*, the District Court dismissed a suit by the NWCA against the DOE alleging injury from the OCR's 1996 Policy Interpretation making proportionality a safe harbor for Title IX compliance.⁸⁵ Many of the Association's members had lost their jobs as universities were forced to cut men's wrestling programs in order to achieve substantial proportionality and, thus, Title IX compliance.⁸⁶ The coaches argued that they had lost their jobs due to this discriminatory interpretation, but the Court dismissed the suit largely on the grounds that it found that the plaintiffs lacked standing to bring the action because they did not prove a causal connection between the regulations and the elimination of men's sports teams.⁸⁷ The Court must have ignored the unmistakable trends in intercollegiate athletics from the 1980s to present, which clearly show a sharp decline in men's non-revenue sports.

II. Present-Day Effects of Title IX as Applied to Intercollegiate Athletics

Title IX has ushered in a new era of intercollegiate athletics since its passage in 1972. Women's sports have enjoyed unprecedented gains, with female participation rates from junior high school to the professional level skyrocketing. Their male colleagues have not fared so well, especially on the collegiate level post-*Cohen* under the oppressive regime of substantial proportionality. This section will celebrate the more positive effects of Title IX on intercollegiate athletics and bring to light some of its darker consequences.

⁸⁴ 191 F.3d 763 (9th Cir. 1999).

⁸⁵ 263 F. Supp. 2d 82 (D.D.C. 2003).

⁸⁶ *Id.*

⁸⁷ *Id.* For support of the coaches' position, see Andrew Santillo, *National Wrestling Coaches Association v. United States Department of Education: The Potential Takedown of the Current Application of Title IX to Intercollegiate Athletics*, 13 TEMP. POL. & CIV. RTS. L. REV. 187 (2003). For support of the Court's opinion and the outcome of the case, see Suzanne Eckes, *Commentary, Another Pin for Women: The National Wrestling Coaches Association's Title IX Case is Dismissed*, 182 ED. LAW REP. 683 (2004).

A. Gains for Women

Women's sports have reached remarkable levels of participation and general popularity since the passage of Title IX. Prior to Title IX, less than 2% of all intercollegiate athletes were female;⁸⁸ as of 2003, women represent 44% of all intercollegiate athletes. The average number of women's sports teams has increased from 2 per school in 1977 to 8.14 per school.⁸⁹ Women have also have the benefit of gains at the high school level—whereas females represented less than 7% of all students participating in high school sports before Title IX, by 2001 that figure rose to 41.5%.⁹⁰ Women's sports have also seen increased participation at the amateur and professional levels, most notably in soccer, volleyball, and basketball.⁹¹ Women's gymnastics is unquestionably one of the Summer Olympic must-sees. Finally, not only have women's sports seen gains on the playing field, but they have also put more fans in the bleachers and at home in front of their televisions. Any avid basketball spectator is just as anxious to watch the Lady Huskies of UCONN play the Lady Vols of Tennessee at the season's end as he is to witness the UNC Tarheels upset the Fighting Illini of UI.

Undoubtedly, Title IX helped women to achieve many of these gains in the world of sports and athletics.⁹² However, much of the credit is owed to the larger women's movement itself, which has spurred society's increasing recognition of equality between the sexes and the debunking of stereotypical gender roles. Furthermore, at least one scholar has argued that

⁸⁸ Boyd, *supra* note 3, at 267. See also *Gender Equity in Athletics and Sports: Interesting Facts About Athletics, Sports, and Title IX*, Feminist Majority Foundation, at <http://www.feminist.org/sports/titleIXfactsheet.asp#sources> (last accessed April 5, 2005) [hereinafter Feminist Majority Foundation Report]; NCAA PARTICIPATION: 1981-82—2003-04 SPORTS SPONSORSHIP AND PARTICIPATION REPORT 82-109 (National Collegiate Athletic Association, Dec. 2004) [hereinafter NCAA PARTICIPATION REPORT]. See generally NCAA 2002-2003 GENDER EQUITY REPORT, (National Collegiate Athletic Association, Sep. 2004) [hereinafter NCAA GENDER REPORT]. Measured in absolute numbers, female participation rose from 32,000 to over 150,000, which is a gain of over 400%.

⁸⁹ Boyd, *supra* note 3, at 266-67. See also NCAA PARTICIPATION REPORT, *supra* note 88, at 82-209. See generally NCAA GENDER REPORT.

⁹⁰ Feminist Majority Foundation Report, *supra* note 88.

⁹¹ *Id.*

⁹² See *id.* See also DOE 2003 Report, *supra* note 4.

another fundamental catalyst of the expansion of women's sports is in the home: parents have taken a more active role in encouraging their daughters to participate in athletics.⁹³ As these women enter college, they carry with them their continued interest in athletic endeavors, which by that time firmly established from past involvement. Another scholar has criticized that over-emphasizing the importance of Title IX in the expansion of women's sports takes credit away from where it is due—with the female athletes themselves.⁹⁴

B. Losses for Men

While women are clearly the winners in the Title IX game, men's sports, particularly non-revenue sports, are most aptly termed the victims. Since the implementation of Title IX and its substantial proportionality requirement, and especially since the NCAA's guidelines for reviewing Division I athletic programs adopt the first prong of the OCR test as the sole criterion for granting gender equity certification⁹⁵, men's intercollegiate sports programs have lost over 400 teams.⁹⁶ Included in this number are 171 wrestling teams, 84 tennis teams, 56 gymnastics teams, 27 track teams, and 25 swimming teams.⁹⁷ Forced to conform to the strictures of substantial proportionality and the realities of budget constraints, athletic departments have repeatedly cut viable male programs as a final solution.⁹⁸ As noted above, this was done with the acquiescence, nay, even the blessings of the judiciary.⁹⁹ In a grand stroke of irony, the NCAA reduced the permissible number of men's basketball scholarships to thirteen, leaving the

⁹³ Kathryn Jean Lopez, *Spoiled Sports, Title IX Today*, NAT'L REV., July 1, 2002, at 37.

⁹⁴ GAVORA, *supra* note 3, at 4-5.

⁹⁵ WEILER & ROBERTS, *supra* note 16, at 950. The authors assert that this fact most definitely makes all members of the NCAA (read all college athletic programs) conform to the substantial proportionality requirement, since the NCAA requires gender statistics from each member institution and publishes them each year, which are in addition to the school's EADA reporting requirements discussed earlier.

⁹⁶ Boyd, *supra* note 3, at 269. *See also* DOE 2003 Report, *supra* note 4, at 18; NCAA PARTICIPATION REPORT, *supra* note 88, at 176-188.

⁹⁷ Boyd, *supra* note 3, at 257; *see also* NCAA PARTICIPATION REPORT, *supra* note 88, at 176-188.

⁹⁸ *See* Brian A. Snow & Stephanie Clemente, *Wrestling with Title IX*, 145 EDUC. L. REP. 1, 13-15 (Aug. 17, 2000).

⁹⁹ *See, e.g.*, *Cohen v. Brown Univ.*, 991 F.2d 888, 898 n.15 (1st Cir. 1993) and note 66, *supra*.

women's teams with fifteen, while simultaneously securing a \$1.75 billion contract from CBS to telecast the NCAA Men's Basketball Championships for the 2001-02 season.¹⁰⁰

As women have outpaced men in the total undergraduate population over the past decade,¹⁰¹ it becomes increasingly more difficult for colleges and universities to meet the ever-elusive goal of substantial proportionality, which is usually interpreted as allowing no more than a 5% gender gap between the student athletes and the composition of the overall student body.¹⁰² In addition to the loss of full programs, some universities have chosen to cap the number of positions on men's teams in order to comply, reducing the total number of positions available to men.¹⁰³ Other schools have simply demoted several men's sports programs to club or intramural status, causing these programs to lose the financial and administrative support of their institutions, including coaching, facilities, and equipment.¹⁰⁴ Since football accounts for over one-fourth of male participation in intercollegiate athletics and there is no equivalent female team that requires the depth and number of players as this sport,¹⁰⁵ many non-marquee men's programs suffer the consequences of sparse rosters, although even marquee sports are not immune to elimination. For example, in 1997 Boston University terminated its football program just a few years after

¹⁰⁰ WEILER & ROBERTS, *supra* note 16, at 946. *See also*, 2004-05 NCAA DIVISION I MANUAL: CONSTITUTION, OPERATING BYLAWS, ADMINISTRATIVE BYLAWS 203-214 (National Collegiate Athletics Association, Aug. 2004) [hereinafter NCAA Division I Manual].

¹⁰¹ NCAA GENDER REPORT, *supra* note 88, at 11. Women are now 54.4% of the total undergraduate population and men only 46.6%. *Id.* As a woman, I am personally more proud of this figure than upset by the imbalance in female and male athletic participation.

¹⁰² *See* BONNETTE & DANIEL, *supra* note 38. *See also* Neal v. Bd. of Trs. of Cal. State Universities, 198 F.3d 763 (9th Cir. 1999) (ultimately resulting in a consent decree to bring the proportion of female athletes within 5% of the female student body population, which was 64% of undergraduates, while males constituted 61% of all athletes before the decree).

¹⁰³ California State University at Bakersfield is one example, as the university chose to cap all of its men's programs in order to try to prevent their elimination after a lawsuit by the California Chapter of the National Organization for Women that resulted in a draconian consent decree. Neal v. Bd. of Trs. of Cal. State Universities, 198 F.3d 763 (9th Cir. 1999).

¹⁰⁴ *See* Ganzi, *supra* note 4, at 558 (noting several strategies that universities have implemented to cut costs while attempting to maintain opportunities for male athletes). Male teams most often demoted to club status are crew, soccer, rugby, hockey, golf, and tennis.

¹⁰⁵ WEILER & ROBERTS, *supra* note 16, at 949-50.

cutting its NCAA champion men’s hockey team; in 1998, Providence College abolished its successful baseball program; and, in 2000, the University of Miami cut its men’s swimming and rowing teams, despite the rise of several Olympic athletes from these programs.¹⁰⁶ With no relief from their universities, the Courts, the Bush Administration’s Commission, or the OCR, many male athletes and coaches for their teams are in despair—the inequitable application of Title IX as it is currently interpreted is making women’s sports seem more like usurpers than colleagues. Equal opportunity turned equal numbers¹⁰⁷ is hurting innocent young men just as much as it is helping deserving young women, despite the language of the statute that insures equal protection to all.¹⁰⁸

C. “Creation” of Women’s Programs and Other Problems

In addition to the overwhelming loss of male sports programs, other nonsensical effects have surfaced from university attempts at Title IX compliance. While at first blush the fact that there are now over 300 more women’s sports teams¹⁰⁹ than men’s may seem like real progress for female athletes and their supporters, a closer look raises doubts. In response to Title IX, the NCAA recommended that schools add “emerging sports” to create women’s athletic opportunities and thus bring the member institutions within the percentages prescribed by substantial proportionality.¹¹⁰ Instead of a sincere attempt to promote the inclusion of more sports programs for women in which there was a demonstrated interest, this prompting by the NCAA more closely resembled an attempt to manufacture women’s teams in order to

¹⁰⁶ *Id.* at 945-46.

¹⁰⁷ See Part I.A and accompanying notes discussing the legislative history of Title IX and Congress’s clear intent that it not be used as a quota system or affirmative action program.

¹⁰⁸ 20 U.S.C. § 1681(a). See also, Eric Bentley, *Title IX: The Technical Knockout for Men’s Non-Revenue Sports*, 33 J.L. & EDUC. 139, 139-44, 153-60 (2004).

¹⁰⁹ DOE 2003 Report, *supra* note 4, at 18.

¹¹⁰ Emerging Sports for Women, National Collegiate Athletic Association, at http://www1.ncaa.org/membership/membership_svcs/emerging_sports/home.html (last accessed Apr. 6, 2005). See also Reich, *supra* note 27, at 542. These “emerging sports” included team sports of crew, ice hockey, handball, water polo, and synchronized swimming, and the individual sports of archery, badminton, bowling, and squash. *Id.*

numerically balance male programs.¹¹¹ For example, in 1994—the year after the NCAA recommended that universities add women’s crew programs--there were only thirty-six women’s high school crew teams in the United States.¹¹² The University of Massachusetts women’s crew coach explained, “The reason we’re here is Title IX, everyone knows it.”¹¹³ Quickly running out of recruiting options for its crew team, Ohio State put an ad in the student newspaper, “Tall athletic women wanted. No experience necessary.”¹¹⁴ Arizona State University, which is set in a landlocked desert region, flooded a two mile gulch to create a place for its newly-formed women’s crew team to practice,¹¹⁵ which was understandably composed of entirely novice oarspeople.¹¹⁶ The women’s varsity crew team at the University of Southern California was composed almost exclusively of inexperienced rowers, and, in order to balance the funding disparities between the men’s and women’s sports teams (which is also required, albeit much less stringently, by Title IX and the NCAA), USC provided all the rowers with top-of-the line equipment, facilities, and each woman received several Nike warm-up suits and uniforms.¹¹⁷ As one former USC rower pointed out, “I received over \$500 retail value of Nike merchandise without ever getting on a boat.”¹¹⁸ Meanwhile the men’s club team had to raise funds for travel

¹¹¹ See David Tell, *The Myth of Title IX*, at http://www.boundless.org/2000/departments/campus_culture/a0000169.html (last accessed Mar. 29, 2005) (“The vast majority of major colleges already offer the most popular women’s sports, so to boost their varsity female totals, a fair number of them, with the NCAA’s connivance, have begun conferring full ‘team’ status on exotic hobbies or outright trivia. New horseback riding and women’s bowling “programs” have been the fashion for some time now. . . . [M]any American universities cannot find enough women for the sports-team rosters they already have let alone afford to create still more of them.”)

¹¹² GAVORA, *supra* note 3, at 66.

¹¹³ *Id.* But see Julia Lamber, *Gender and Intercollegiate Athletics: Data and Myths*, 34 U. MICH. J.L. REFORM 151, 210 (2001) (arguing that, as an empirical fact, “No school asserts that it has tried to expand the athletic opportunities for women athletes but has been unable to find interested and skilled women athletes.”).

¹¹⁴ *Id.* at 67.

¹¹⁵ *Id.*

¹¹⁶ Tell, *supra* note 111.

¹¹⁷ Interview with Jessica Roberts, USC graduate and former women’s varsity crew team member, Yale Law School, J.D. Candidate, 2006 (Feb. 18, 2005).

¹¹⁸ *Id.* Jessica noted that she was clearly a member of the roster for Title IX purposes since, although she attended practices for one year, the crew “A” team, composed of a few women with prior rowing experience, were the focal point of the coaches and the “real crew team.” Other rowers, like Jessica, were informally recruited to fill slots for purposes of meeting Title IX’s substantial proportionality requirements, and often only stayed on the team for one

expenses and was often unable to practice except in the early morning hours, when the public use facilities and women's facilities were less crowded.¹¹⁹

Even more disturbing is the high turnover rates among female athletes involved in such “non-traditional” sports and other more-established female sports programs.¹²⁰ For example, the University of Alabama has no problem recruiting for its women's gymnastics, basketball, and softball teams, but often finds it difficult to keep women's crew members involved in the program for more than one year.¹²¹ When Brown University was sued in 1992, the varsity female teams at the university had a combined total of eighty-five unfilled slots for females.¹²² High turnover rates among female athletes in such sports makes sense if the women do not have a genuinely sustainable interest in these sports and value other activities and pursuits more highly. But then the schools' support of these programs becomes questionable—why spend hundreds of thousands of dollars on women's sports programs that the majority of participants view as a hobby, when there are other men's club programs to which participants dedicate themselves for four hours a day, six days a week, fifty weeks a year, for four years?¹²³ The Independent Women's Forum suggests that by creating teams without an existing interest in the schools' female student body, “coaches are finding themselves taking on some sub-standard players to beef up the roster[s].”¹²⁴ Coaches also complain that fewer women than men are willing to “ride the bench,” so that if they are not one of the starting line-up, women often do not

year, leaving to pursue other interests, such as their majors and other activities besides athletics. *Id.* See also the discussion of high turnover rates in female athletic programs in the next paragraph.

¹¹⁹ *Id.*

¹²⁰ Interview with Barbara Chesler, Senior Associate Athletic Director, Yale University (Apr. 15, 2005).

¹²¹ Interview with Marie Robbins, *supra* note 7. It is important to note, however, that the women's crew program is currently only offered at the club level, although it is the primary candidate for elevation to varsity status in the near future so that the school can achieve Title IX compliance under the substantial proportionality prong of the OCR test.

¹²² Rozum, *supra* note 26, at 170.

¹²³ See Part IV *infra*.

¹²⁴ Independent Women's Forum, *Title IX Athletics: Issue In-Depth: Background and Analysis of Government Policy Governing Sports in Schools* (June 2000), at 21.

stay involved in a sport.¹²⁵ It seems inequitable and senseless to deprive those who are more dedicated to their sport the resources and support of their institutions, while simultaneously creating programs for participants who have little interest or superficial interest in the sport. But the OCR does not view this as a problem. As their Title IX Investigator’s Manual indicates, an investigator need not assess the interests and abilities of an institution’s student body when examining a school for Title IX compliance unless the school has elected to comply under the third prong using the new survey system.¹²⁶ The courts appear unconcerned with the actual interests and abilities of students as well. As at least one court has indicated, the relevant portions of the student body for Title IX purposes are the gender composition of the entire student body and of the school’s athletic teams—the portion of the student body actually *interested* in participating in competitive intercollegiate athletics would be impossible to determine and is not an important indicator for compliance purposes.¹²⁷

Even more frustratingly, the OCR does not include all women’s sports programs in its definition of “athletic opportunity” for Title IX compliance purposes. In determining whether an activity is a sport, the OCR reviews the following criteria for the activity on a case-by-case basis:

1. Whether selection for the team is based upon objective factors related primarily to athletic ability;
2. Whether the activity is limited to a defined season;
3. Whether the team prepares for and engages in competition in the same way as other teams in the athletic program with respect to coaching, recruitment,

¹²⁵ GAVORA, *supra* note 3, at 68. “‘There’s an expectation that there are all these women out there to choose from now. They’re all coming out of high school where they participated in sports,’ CSUN head softball coach Janet Sherman told PBS. ‘But they don’t want to sit on the bench. I can’t get these women to come out. I can’t change that.’” *Id.* But see Nancy Hogshead-Makar, *A Critique of Tilting the Playing Field: Schools, Sports, Sex and Title IX*, 13 UCLA WOMEN’S L.J. 101, 123-131 (2003). University of Maryland Athletic Director Deborah Yow expressed a similar sentiment, mentioning how hard it is “to get athletes for their NCAA Championship women’s lacrosse team, but have to turn away men from wrestling and other sports. She noted that ‘it doesn’t take money to get men on the field. When [asked] about what it is like telling men wrestlers that they can’t be on the team, Yow responded, ‘They cry, a number of them do, because it is so devastating to them to not be able to participate.’” Gary Abbott, *60 Minutes Wrestles with Title IX Controversy on Its Sunday, Dec. 1 Show*, available at <http://www.themat.com/pressbox/pressdetail.asp?aid=5982> (Dec. 2, 2002) (last accessed April 2, 2005).

¹²⁶ See BONNETTE & DANIEL, *supra* note 38, at 22-27.

¹²⁷ *Cohen v. Brown Univ.*, 879 F. Supp. 185, 199-202 (D.R.I. 1995). See Part I.C *supra*, especially note 61.

- budget, tryouts and eligibility, and length and number of practice sessions and competitive opportunities;
4. Whether the activity is administered by the athletic department; and
 5. Whether the primary purpose of the athletic activity is athletic competition and not the support or promotion of other athletes.¹²⁸

Clearly, this exempts some popular female sports programs from the definition of “athletic opportunity” for Title IX purposes, therefore disallowing a school to use this in their compliance calculations. Examples of such sports include competitive cheerleading and competitive dance teams, both of which the OCR have refused to recognize as “athletic opportunities,”¹²⁹ finding them to be “support organizations.” However, clearly, both of these sports require dedication,

¹²⁸ Letter from Dr. Mary Frances O’Shea, National Coordinator of Title IX Athletics, Office of Civil Rights, to Mr. David Stead, Executive Director, Minnesota State High School League (Apr. 11, 2000), *available at* <http://www.ed.gov/print/about/offices/list/ocr/stead.html> (last accessed Apr. 1, 2005). The OCR may also choose to review “other evidence relevant to the activity,” such as:

1. whether organizations knowledgeable about the activity agree that it should be recognized as an athletic sport;
2. whether the activity is recognized as part of the interscholastic or intercollegiate athletic program by the athletic conference to which the institution belongs and by organized state and national interscholastic or intercollegiate athletic associations;
3. whether state, national, and conference championships exist for the activity;
4. whether a state, national, or conference rule book or manual has been adopted for the activity;
5. whether there is state, national, or conference regulation of competition officials along with standardized criteria upon which the competition may be judged; and,
6. whether participants in the activity/sport are eligible to receive scholarships and athletic awards (e.g., varsity awards).

Id.

¹²⁹ BONNETTE & DANIEL, *supra* note 38, at 15. However, the University of Maryland began a competitive cheerleading program in 2003-2004, under the heading of “Competitive Cheer.” The squad is all-female and participates in numerous competitions throughout the year. The University includes these athletes in their numbers to meet the substantial proportionality requirement of OCR’s First Prong. “Competitive Cheer”, Maryland: The Official Site of Terrapin Athletics, *at* <http://umterps.collegesports.com/sports/comp-cheer/spec-rel/050305aah.html> (last accessed Apr. 24, 2005). The OCR has allowed this treatment of the school’s competitive squad under very restrictive conditions.

[B]y consulting with the OCR and then splitting its cheerleading squad into two entities, the Terps were able to circumvent the edict. The school now has two cheerleading teams: One a more traditional group that cheers at basketball and football games; the other a 22-member team that performs only at intercollegiate cheerleading competitions. That’s the group that counts for Title IX. It receives the same benefits that are afforded to any other student-athlete, including scholarships, academic advisors, strength coaches, on-site trainers, locker rooms and media training.

Wayne Drehs, *Athletes Are Cheerleaders, Too*, ESPN.com, *at* <http://sports.espn.go.com/espn/page2/story?page=drehs/040316> (Mar. 16, 2004) (last accessed Apr. 24, 2005). Drehs seems to support having all cheerleading teams that participate in competitions count as sports under both the NCAA and OCR guidelines.

athletic ability, and huge amount of physical exertion.¹³⁰ Furthermore, allowing universities to include these activities in their participation numbers would undeniably reduce existing substantial proportionality disparities. It seems that the OCR has adopted arbitrary and ridiculous criteria to determine when an “athletic opportunity” exists, instead of a more common sense approach to include all activities which would come within the traditional definition of a “sport”.¹³¹ The OCR has offered no clear reason as to why these sports are excluded from its definition of “athletic opportunities”, and the OCR has admitted that competitive cheerleading meets the criteria the OCR has set for determining if an activity constitutes such an “opportunity”.¹³² One author charges that the OCR may feel that “any kind of cheerleading has ‘girlie’ connotations, and perpetuates societal perceptions of women as lesser athletes.”¹³³ Taking this in conjunction with the Policy Interpretation and the Further Clarification, one begins to wonder if the OCR is not just unilaterally imposing its subjective judgment on the high school and intercollegiate athletic programs of America.

Lastly, another problem arising out of the OCR’s interpretation of Title IX’s requirements is that it may conflict with the values underlying Title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, or national origin in all programs or activities that receive Federal financial assistance and which the OCR is also

¹³⁰ See Reich, *supra* note 27, at 557-60 (giving a detailed description of the requirements of competitive cheerleading and a passionate defense of why it should be counted as a “sport”).

¹³¹ See, e.g., “Sport”, WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 1141 (1983) (defining “sport” as a “physical activity engaged in for pleasure” or “a particular activity (as hunting or an athletic game) so engaged in”).

¹³² See, e.g., Letter from Harry A. Orris, Director, Cleveland Office of the United States Department of Education Office of Civil Rights, to Ms. Suzanne M. Martin, Assistant Director, Michigan High School Athletic Association (Oct. 18, 2001), available at <http://www.ed.gov/about/offices/list/ocr/mhsaa-cheer.html> (last accessed Apr. 1, 2005) (refusing to recognize competitive cheerleading as a sport despite stating, in response to a request from the state of Michigan, “[the] material [you submitted] tends to support in several ways the characterization of . . . competitive cheerleading as a Title IX sport in that it specifies the season of sport, identifies the eligibility requirements and standardized judging criteria used by registered officials, notes the availability of some state and conference championships and scholarship monies, and certifies that this activity is recognized as a sport by [Michigan High School Athletic Association] and interscholastic athletics conferences within Michigan.”).

¹³³ Reich, *supra* note 27, at 559-60.

charged with enforcing.¹³⁴ At least one author has argued that the new women's sports programs being added in order to foster Title IX compliance may further racial discrimination in intercollegiate sports programs, since these sports are usually those in which minority women have little experience or interest.¹³⁵ In 1999-2000, African-American women found 81% of their athletic positions in basketball and track.¹³⁶ The addition of sports such as crew, water polo, and synchronized swimming for women may expand opportunities for those women previously exposed to such sports, which tend to be those from upper-middle to wealthy backgrounds, but it does not expand equal opportunities for *all* women. One commentator put it even more bluntly, "True beneficiaries [of Title IX] are middle-class white women from suburban high schools . . . ,"¹³⁷

III. Previously Proposed Solutions

With all of the inequities and problems resulting from the current application of Title IX to intercollegiate athletics, many scholars on both sides of the discussion have sought solutions. This section gives a brief outline of other proposed solutions to the inequitable effects of current Title IX policy, ranging from claims that Title IX should not apply to intercollegiate athletics, to proposals regarding the three-prong test, to more specific propositions involving particular sports or calls to overhaul the existing system of intercollegiate competition.

¹³⁴ Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d et. seq. *See also* 34 C.F.R. Part 100 (regulations relating to Title VI of the Civil Rights Act of 1964).

¹³⁵ *See* GAVORA, *supra* note 3.

¹³⁶ WEILER & ROBERTS, *supra* note 16, at 952.

¹³⁷ Wade Lambert, *Title IX Costs Black Men, Lawyer Says*, WALL ST. J., June 24, 1994, at B7 (statement of Walter B. Connolly, an attorney who represented several universities in Title IX litigation, asserting that the law itself is racially discriminatory). Mr. Connolly went on to add, "African American males are directly hurt in disproportionate numbers by elimination of scholarships in football and basketball." *Id. But see*, Shelton, *supra* note 3, at 259.

Some authors have argued that Title IX should not be applied to intercollegiate athletics.¹³⁸ These critics point to the legislative history of Title IX to support their conclusion that Congress intended a “program-specific” approach rather than the modern “institution-wide” approach to Title IX’s application.¹³⁹ Under the “program-specific” approach, Title IX scrutiny would only apply to the specific programs that receive federal funding, which would exclude athletic departments. As discussed in Part I.C above, the *Grove City College* Court adopted this approach.¹⁴⁰ However, Congress’s subsequent passage of the Civil Rights Restoration Act of 1987¹⁴¹ made it clear that Congress intended Title IX to apply to intercollegiate athletics and directed courts to adopt the “institution-wide” approach to Title IX.¹⁴² Although it may be argued that in so doing Congress erroneously extended the reach of Title IX considering the legislative intent surrounding its original enactment,¹⁴³ this argument is now considered moot by courts, Congress, the OCR, and most commentators. As a policy matter, the argument appeals to common sense—why single out intercollegiate athletics in strictly applying the substantial proportionality requirements of Title IX? Why not dance classes, art classes, or engineering programs, which are often heavily attended by a single gender?¹⁴⁴ However, this common sense reaction may be more aptly directed toward the OCR’s interpretation of what Title IX dictates than the policy underlying the application of the statute to all programs of a university.¹⁴⁵

¹³⁸ See, e.g., Reuscher, *supra* note 24, at 140-43; Paul J. Van de Graaf, *The Program Specific Reach of Title IX*, 83 COLUM. L. REV. 1210 (1983).

¹³⁹ See Van de Graaf, *supra* note 138. See also Part I.A *supra*, especially note 24 *supra*.

¹⁴⁰ 465 U.S. 555 (1984).

¹⁴¹ 20 U.S.C. § 1681, et seq. (1988).

¹⁴² *Id.* The CRRRA of 1987 “explicitly extended Title IX’s coverage to *all* the programs of an educational institution that received *any* federal aid (including grants or loans to its students). . . .” WEILER & ROBERTS, *supra* note 16, at 905.

¹⁴³ See Reuscher, *supra* note 24, at 140-43.

¹⁴⁴ Conversation with Professor Stanton Wheeler, Ford Foundation Professor Emeritus of Law and the Social Sciences and Professional Lecturer in Law, Yale Law School (Feb. 2, 2005).

¹⁴⁵ Title IX has undoubtedly furthered women’s admission to institutions of higher education, professional programs, and other institutional activities, including intercollegiate athletics.

Moreover, it is unreasonable to believe that Congress would eliminate or alter the provisions of the CRRA of 1987 nearly thirty years later, so other solutions seem more plausible.

Another argument is that revenue-producing sports such as football and basketball should not be included for the purposes of calculating institutional compliance with Title IX substantial proportionality requirements. This is what Senator Tower sought to accomplish with his proposal of his 1974 amendment, which was also pressed by the NCAA leadership.¹⁴⁶ The case for exempting these sports from Title IX comes from athletic department budgets—these sports often provide sufficient revenues that they fund other sports teams.¹⁴⁷ Altering their operating guidelines may threaten the viability of the entire athletic department. However, this argument seems untenable considering the fact that Title IX has applied to such programs for thirty years and these sports continue to produce revenue and athletic departments across the country continue to operate.¹⁴⁸ Furthermore, the majority of marquee sports do not actually operate at a profit.¹⁴⁹ Finally, the congressional rejection of the Tower Amendment and its replacement with the Javits Amendment (which directed the HEW to implement the provisions of Title IX, specifically including intercollegiate athletics) may have signaled Congress's desire to have Title IX applied to *all* intercollegiate athletics, albeit with the addendum that the agency should implement “reasonable provisions considering the nature of particular sports.”¹⁵⁰ In light of these considerations, alternative solutions should be explored.

¹⁴⁶ Amend. 1343 to S. 1539, 129 Cong. Rec. 15,322 (1974). *See also* WEILER & ROBERTS, *supra* note 16, at 905; note 26 *supra*.

¹⁴⁷ *See* Rozum, *supra* note 26, at 158-59. *See also* Daniel L. Fulks, Revenues and Expenses of Division I and II Intercollegiate Athletics Programs: Financial Trends and Relationships-2001 (National Collegiate Athletic Association, Nov. 2002).

¹⁴⁸ *See* Fulks, *supra* note 147.

¹⁴⁹ *Id.*

¹⁵⁰ Education Amendments of 1974 (Title VIII), Pub. L. No. 93-380, § 844, 88 Stat. 484 (1974) (codified as amended at 20 U.S.C. § 1681 (2001)). *See* Part I.A *supra*, especially note 27 *supra*. *See also* Rozum, *supra* note 26, at 159; Hudson, *supra* note 26, at 578.

A more ubiquitous argument centers on men's football teams. Some commentators argue that since these teams require such depth, needing players for several different positions and replacements for those players that may be injured throughout the season, the very nature of the sport necessitates a larger roster than other sports.¹⁵¹ Since football accounts for over one-fourth of male participation in intercollegiate athletics¹⁵² and there is no equivalent female team that requires the depth and number of players as this sport,¹⁵³ many non-marquee men's programs suffer the consequences of the OCR's substantial proportionality test, so exempting football makes sense. One author notes that not only would such an exemption be justified under the Javits Amendment, but that it is an appropriate remedy today for three reasons.¹⁵⁴ Originally, amendments seeking to exempt particular sports were directed at preserving the revenue that these sports generated, but the non-revenue producing sports are now the ones threatened by current Title IX application, so that the initial rejections of these amendments would be misplaced today.¹⁵⁵ Secondly, the rejection of the Tower Amendment may have been warranted in the 1970s because "the conditions faced by women in athletics at that time did not warrant any type of exemption for male sports."¹⁵⁶ However, since women have made great progress in intercollegiate athletics over the past thirty years and this progress is unlikely to revert to blatant discrimination and decreased opportunities, a partial exemption for football in order to preserve other men's teams is defensible.¹⁵⁷ Finally, the author argues that since the first prong of the

¹⁵¹ Perhaps this was what Congress had in mind with its language in the Javits Amendment, cautioning the agency implementing Title IX to "consider[] the nature of particular sports." Education Amendments of 1974 (Title VIII), Pub. L. No. 93-380, § 844, 88 Stat. 484 (1974) (codified as amended at 20 U.S.C. § 1681 (2001)). See Part I.A *supra*, especially note 27 *supra*.

¹⁵² NCAA PARTICIPATION REPORT, *supra* note 88.

¹⁵³ WEILER & ROBERTS, *supra* note 16, at 949-50.

¹⁵⁴ Jay Larson, *All Sports Are Not Created Equal: College Football and a Proposal to Amend the Title IX Proportionality Prong*, 88 MINN. L. REV. 1598, 1622-25 (2004).

¹⁵⁵ *Id.* at 1624-25.

¹⁵⁶ *Id.* at 1625-26.

¹⁵⁷ *Id.*

OCR test has become the *only* test applied by courts, the OCR, and the NCAA, the loss of the other two prongs as viable alternatives merits a partial exemption for football. The author does not even suggest exempting the entire roster of the football team for purposes of calculating athletic participation for the substantial proportionality—instead he proposes treating the football team as the same size as the largest women’s team.¹⁵⁸ Although the author may be correct that this proposal will not hinder women’s progress in intercollegiate athletics,¹⁵⁹ it is clearly not the *best* solution for a number of reasons. It directly contradicts feminist and social scholars’ argument that exempting a male sport would send the wrong message about gender equity in athletics.¹⁶⁰ Additionally, other organizations are especially concerned with men’s football programs, suggesting instead that football rosters be capped.¹⁶¹ These very visible and vociferous opponents to any alterations in the application of Title IX would scorn this “compromise” as a step backwards for gender equity, and would probably be more amenable to a solution at least appearing more neutral.

More broadly, some have suggested exempting all non-scholarship, walk-on student athletes on all teams from the calculations of student-athlete participation for Title IX compliance. This position was advocated most publicly by Gerald Reynolds, who until 2003 was President Bush’s Assistant Education Secretary over the Office for Civil Rights.¹⁶² The Commission on Opportunity in Athletics specifically promoted this exemption in its Recommendation Seventeen to the Secretary of Education.

¹⁵⁸ *Id.* at 1626-27.

¹⁵⁹ *Id.* at 1629-30.

¹⁶⁰ *See, e.g.*, Myles Brand, NCAA President, *Title IX Seminar Keynote Address* (Apr. 28, 2003), at http://www.ncaa.org/gender_equity/general_info/20030428speech.html (last accessed Apr. 1, 2005) (“Now is not the time to say, ‘Close enough,’ and watch all the hard work undone.”)

¹⁶¹ The Women’s Sports Foundation, among other organizations, has proposed revising Title IX regulations to impose a hard roster cap on men’s football. WEILER & ROBERTS, *supra* note 16, at 950-51.

¹⁶² WEILER & ROBERTS, *supra* note 16, at 951.

Recommendation 17: For the purpose of calculating proportionality with the male/female ratio of enrollment in both scholarships and participation, these ratios will exclude walk on athletes as defined by the NCAA. Proportionality ratios will be calculated through a comparison of full or partial scholarship recipients and recruited walk-ons. As described in the findings, the Commission feels that the artificial limitations on the number of walk-ons may limit opportunities without any corresponding gain for the underrepresented sex. This recommendation aims at removing those artificial limitations.¹⁶³

However, the Commission noted the reservations expressed by some commissioners, as they believed that such differential treatment for walk-on athletes would not be appropriate, since these athletes receive resources from their institutions just as other athletes.¹⁶⁴ Albeit a practical solution to the manifest problem of capping positions on men's teams, this would only prove to be a partial solution to the larger problem institutions face in meeting substantial proportionality requirements, since football would still comprise a large number of male athletic positions, with the NCAA's 85-football scholarship limit.¹⁶⁵

The arguments focusing on the OCR's Policy Interpretation have either suggested genuine reliance on prongs two and three¹⁶⁶ or the elimination of the proportionality prong altogether. The OCR itself reiterated that schools may also comply with Title IX by meeting the standards set forth in prongs two and three of the test.¹⁶⁷ Although the arguments for eliminating substantial proportionality are numerous and well-founded,¹⁶⁸ at this time the OCR clearly remains committed to the first prong.¹⁶⁹ Furthermore, since the NCAA formally adopts the first prong as a means for testing member institutions' gender equity¹⁷⁰ and the courts similarly seem committed to testing Title IX compliance by relying on substantial proportionality, the OCR's

¹⁶³ DOE 2003 Report, *supra* note 4, at 38.

¹⁶⁴ *Id.*

¹⁶⁵ WEILER & ROBERTS, *supra* note 16, at 951.

¹⁶⁶ *See, e.g.,* C. Peter Goplerud III, *Title IX: Part Three Could Be the Key*, 14 MARQ. SPORTS L. REV. 123 (2003).

¹⁶⁷ Further Clarification, *supra* note 5.

¹⁶⁸ *See, e.g.,* Rozum, *supra* note 26, at 173;

¹⁶⁹ Further Clarification, *supra* note 5.

¹⁷⁰ NCAA Division I Manual, *supra* note 100, at 3 (Article 2.3, "The Principle of Gender Equity") and at 333-340 (Article 19, "Enforcement").

reassurance that the other two prongs of the test are available to institutions rings hollow. As long as substantial proportionality is available to courts, which often take a school's violation of this prong as *prima facie* evidence of discrimination,¹⁷¹ and the judicial trend to follow *Cohen* continues, universities have little real chance to defend suits by relying on prongs two and three. Removing the proportionality requirement as an option would force courts to interpret and apply the remaining two prongs of the test, but these have more nebulous requirements. The second prong calls for an historical inquiry into the school's discriminatory practices and requires proof that the situation is "improving for the underrepresented sex."¹⁷² This would be an easy test for any institution to meet, and thus may overcompensate for the harm done to institutions and male athletics under the present system. Furthermore, this type of inquiry seems anachronistic, considering the impressive progress that female athletic programs have made over the last thirty years. The third prong insists that all needs and interests of the student body must be met¹⁷³—logically, this leads to the conclusion that a plaintiff would almost automatically win any action brought against a school, since this would be evidence that there is a need and it is not being met. Additionally, because the remaining two prongs are ill-defined and have not been generally interpreted by courts, institutions may be forced to expend more resources defending lawsuits.

The viewpoint of most feminist organizations and scholars advocates increasing women's programs without cutting existing men's programs, and apparently this is the favored solution of courts and the NCAA as well. The reality, however, is that institutions have limited financial resources, and there are good reasons to spend any additional resources on academic endeavors as opposed to expanding athletic programs. Trivializing this "economic necessity" defense

¹⁷¹ See, e.g., *Favia v. Indiana University*, 7 F.3d 332 (3d Cir. 1993) (citing that Indiana University's failure to meet the proportionality prong of the OCR test could be taken as *prima facie* evidence of gender discrimination in its athletic programs).

¹⁷² Policy Interpretation, *supra* note 13.

¹⁷³ *Id.*

raised by many institutions¹⁷⁴ fails to acknowledge the practical problems involved with managing college athletic departments. Most universities are faced with a scarcity of resources, and must prioritize budgetary items, so that unlimited funds are not available for athletics, or any other department for that matter. It is true that most collegiate athletic programs do not produce a profit on average,¹⁷⁵ so that no one can credibly argue that the purpose of college athletics is to raise revenue. Several critics point out that men's marquee programs are often the most expensive, so that capping participation in men's football and basketball or limiting these budgets would leave more resources for other teams, including women's teams and other men's teams.¹⁷⁶ What these critics undervalue, aside from the fact that over two-thirds of Division I and II men's football and basketball programs do turn a profit,¹⁷⁷ are the intangible values that are associated with such programs. Scaling back marquee programs may cost more than the direct loss of revenues—it could also result in lower alumni donations (often made in connection with ticket sales to marquee sports), fewer athletic opportunities for some male athletes, and a loss of the intangible connection to the university that faculty, staff, alumni, students, and other members of the community develop, which is often strengthened (and even symbolized) by key sports programs. Most would agree that the central purpose of college athletics is to provide another aspect of the educational experience to students, as participation on athletic teams teaches students discipline, teamwork, and the values of physical fitness, just to name a few. So,

¹⁷⁴ *Hearing on Title IX of the Education Amendments of 1972 Before the Subcomm. On Postsecondary Educ., Training and Life-Long Learning of the House Comm. on Educ. And Educ. Opportunities*, 104th Cong. 10, 12 (1995) (statement of Hon. J. Dennis Hastert, Representative, Illinois) (explaining that it is simply an economic necessity for some schools to eliminate men's non-revenue sports in order to achieve Title IX compliance under the current regime). For a prime example of the trivialization and dismissal of this argument, see Shelton, *supra* note 3, at 260-64.

¹⁷⁵ Fulks, *supra* note 147. See also Shelton, *supra* note 3, at 260.

¹⁷⁶ The Women's Sports Foundation argues that the more appropriate policy for universities to follow is to add women's teams, not subtract men's teams, and fund this expansion by drastically cutting the budget of men's football and basketball. See generally Women's Sports Foundation, at <http://www.womenssportsfoundation.org/cgi-bin/iowa/index.html> (last accessed Apr. 2, 2005). See also WEILER & ROBERTS, *supra* note 16, at 950-51.

¹⁷⁷ Fulks, *supra* note 147. See also WEILER & ROBERTS, *supra* note 16, at 951-52.

if this is the purpose of the athletic program in the first place, does it not make sense to provide these inherently limited educational opportunities to those who desire them most, regardless of whether those students are men or women?

Finally, two authors' suggestions envision more radical changes for intercollegiate athletics. One author suggests adopting an "Olympics" approach to collegiate athletics, having both men and women represent their schools as a unified team.¹⁷⁸ The author argues:

[H]aving the sexes work together conceptually as a 'team' increases the likelihood that they will, among other things: communicate with each other; travel together in the same or same means of transportation; cheer for, support, respect, and commiserate with each other; receive joint support from students and the public and equal coverage from the media; contribute jointly to bringing in revenue; and receive coaching of comparable quality, or even simultaneous coaching.¹⁷⁹

She insists that if schools offer one sport, they should offer it for both sexes, either with separate squads or as a truly mixed squad, and applauds the NCAA's efforts to encourage this.¹⁸⁰ In essence, she asks that Title IX be replaced with a concept of gender equity that embodies the idea that each athlete is an important member of the athletic department and the university as a whole, a position also espoused by some athletic directors.¹⁸¹ The author acknowledges that football would be a problem under this proposal and that this may serve to limit the number of total sports and the variety of sports that schools can offer.¹⁸² So, it seems like an idealistic goal, but, at least for the time being, an impractical reality. One author makes an even more revolutionary (and, thus, probably unrealistic) proposal—the gender desegregation of all intercollegiate sports teams, with the guarantee of equal participation and equal playing time to both sexes.¹⁸³

Acknowledging how extreme this proposal is, the author states, "[t]o the extent that such as

¹⁷⁸ Marcia Federbush, *An "Olympics Approach: A More Equitable Approach to Athletics than Title IX Offers*, 34 U. MICH. J.L. REFORM 265 (2001).

¹⁷⁹ *Id.* at 270.

¹⁸⁰ *Id.* at 271.

¹⁸¹ Interview with Barbara Chesler, *supra* note 120.

¹⁸² *See* Federbush, *supra* note 178, at 273-74.

¹⁸³ George, *supra* note 18.

drastic proposal might change the very nature of [intercollegiate] sports and how they are played, such outcomes may reflect exactly the kind of leadership our schools should be providing.”¹⁸⁴ To most people, this may seem more than idealistic, but actually ludicrous, considering that it would entail a complete restructuring of athletic departments, not to mention threatening a revenue source for many schools. Furthermore, it seems to overcompensate for women’s previous exclusion from intercollegiate athletics and may not provide the psychological and physical benefits accruing to students from participation in varsity athletics. Women want to compete, but they also want the experiences of leadership and victory that may be more difficult to achieve when competing against men, who are often biologically more adaptable to certain sports.¹⁸⁵ Not to mention that “earning your spot” on a sports team is perceived as being based upon merit—the best player should get the spot. Promoting such a meritocracy seems irreconcilable with the goal of having gender desegregated teams.¹⁸⁶

IV. Using a “Measure of Genuine Interest” as a Solution

So it seems that we are left with a problem that no one is willing to solve in an equitable manner. The OCR has been unwilling, until recently, to change any part of its three prong test for Title IX compliance and courts have consistently concluded that a violation of substantial proportionality, the first prong, is enough to hold a school liable. Several reasonable proposals, such as altering the compliance test or exempting football or walk-on athletes from the proportionality calculation, have found no support in the DOE or in the courts. Collegiate athletic departments and administrators, faced with dwindling budgets and a myriad of demands

¹⁸⁴ *Id.* at 1107.

¹⁸⁵ *Id.* at 1148-50.

¹⁸⁶ *Id.* at 1156-58.

from alumni, students, and coaches, have either attempted to “create” women’s programs for which there is questionable interest or cut men’s non-revenue sports.

So why not hearken back to the spirit and purpose of Title IX¹⁸⁷—providing women equal access and equal opportunities, yet allowing women themselves to decide what opportunities they genuinely want? The quota system in place under substantial proportionality seems to violate Title IX’s nondiscrimination mandate and ignore the meritocracy and matching of interests and abilities to opportunities envisioned by other civil rights amendments.¹⁸⁸ An effective remedy, then, appears to be to figure out what women are genuinely interested in and allow schools to provide opportunities accordingly.¹⁸⁹

A. The OCR’s Recent Survey Proposal

On March 17, 2005 the OCR issued yet another “Dear Colleague” Letter clarifying its interpretation of prong three of the three-part test (meeting all interest and abilities) and allowing schools to use surveys to establish their compliance under this prong.¹⁹⁰ Apparently, the OCR issued this statement, which appears revolutionary in the face of Title IX’s history, without much

¹⁸⁷ See Part I.A *supra*. See also Reuscher, *supra* note 24; Rozum, *supra* note 26; Reich, *supra* note 27.

¹⁸⁸ See Kimberly A. Yuracko, *One for You and One for Me: Is Title IX’s Sex-Based Proportionality Requirement for College Varsity Athletic Positions Defensible?*, 97 NW. U. L. REV. 731 (2003). The author acknowledges that Title IX interpretation does not comport with the “careers-open-to-talents” distribution model prescribed by Title VII of the Civil Rights Act of 1964 (42 U.S.C.A. § 2000e et seq.), which prohibits racial discrimination by employers in hiring decisions. *Id.* at 731-34. However, the author goes on to conclude that such a model would be inappropriate in the field of intercollegiate athletics, and that, although much of the language of Title IX mirrors that of Title VII, Congress never intended that they be applied in the same way. *Id.* at 734-37. This author obviously questions Yuracko’s reasoning as it stretches the basic principles of logic—if it looks like x, and Congress did not distinguish it from x, it probably should be interpreted in much the same way as x. See also Rozum, *supra* note 26, at 177 (arguing that substantial proportionality ignores the actual interest levels of both sexes and is undermining the progress of some women’s sports).

¹⁸⁹ See Jeffrey H. Smith, *Wrestling with the Effects of Title IX: Is It Time to Adopt New Measures of Compliance for University Athletic Programs?*, 68 MO. L. REV. 719, 732 (2003). See also, Sara A. Elliott & Daniel S. Mason, *Gender Equity in Intercollegiate Athletics: An Alternative Model to Achieving Title IX Compliance*, 11 J. LEGAL ASPECTS SPORT 1 (2001).

¹⁹⁰ Survey Letter, *supra* note 15, at 1-3.

extra-agency consultation or comment.¹⁹¹ In so doing, the OCR effectively adopted Recommendation 19 from the Commission on Opportunity in Athletics, which states:

*The [OCR] should study the possibility of allowing institutions to demonstrate that they are in compliance with the third part of the three-part test by comparing the ratio of male/female athletic participation at the institution with the demonstrated interests and abilities shown by regional, state or national youth or high school participation rates or national governing bodies, or by the interest levels indicated in surveys of prospective or enrolled students at that institution.*¹⁹²

In clarifying how a school is to comply under part three of the test, the OCR reiterated that substantial proportionality is not required, as long as a school can demonstrate that it is fully and effectively accommodating the interests and abilities of the underrepresented sex.¹⁹³

An institution will be found in compliance with part three unless there exists a sport (s) for the underrepresented sex for which *all* three of the following conditions are met: (1) unmet interest sufficient to sustain a varsity team in the sport(s); (2) sufficient ability to sustain an intercollegiate team in the sport(s); and (3) reasonable expectation of intercollegiate competition for a team in the sport(s) within the school's normal competitive region. Thus, schools are not required to accommodate the interests and abilities of all their students or fulfill every request for the addition or elevation of particular sports, unless all three conditions are present.¹⁹⁴

The letter does provide some additional guidance as to when a university may be considered compliant under part three of the test, but it has yet been subject to the “ultimate” test—in a court of law. Additionally, the letter does not provide guidance as to what level of “unmet interest” would warrant the establishment of a particular sport and when an “ability to sustain interest” in the sport actually exists. These two key concepts are left to OCR or institutional discretion rather than addressed in concrete definitions. However, to its credit, the OCR does emphasize

¹⁹¹ Interview with Barbara Chesler, *supra* note 120.

¹⁹² DOE 2003 Report, *supra* note 4, at 39.

¹⁹³ Policy Interpretation, *supra* note 13.

¹⁹⁴ Survey Letter, *supra* note 15, at 2.

that “all three prongs should be considered safe harbors” and expressed its disfavor for cutting opportunities for the overrepresented sex in order to comply with Title IX.¹⁹⁵

A “User’s Guide to Student Interest Surveys Under Title IX” totaling about 175 pages accompanies this additional clarification letter,¹⁹⁶ which may be an indicator of how complicated the “survey system” may actually be to implement. The majority of the User’s Guide presents an analysis of data taken from selected trial surveys conducted by the National Center for Education Statistics (NCES) and is followed by a technical report compiled by the National Institute of Statistical Sciences (NISS).¹⁹⁷ The entire document culminates in a “Model Survey” developed by the NCES and instructions for its implementation,¹⁹⁸ and it is this instrument that I will focus on in my criticism.

B. Where the OCR Proposal Went Wrong

It is commendable that the OCR has acknowledged that there is a problem with institutional compliance with Title IX, that current methods of compliance evaluation are only causing more complex problems, and that it must forge ahead to find a solution. Therefore, none of these criticisms are meant to imply that the OCR’s proposal is anything other than well-intentioned. And since the proposal is almost completely new to the institutional toolbox for Title IX compliance, its designers may anticipate working out some kinks after a period for experimentation. Additionally, since the courts have been deferential in the past to the OCR’s Policy Interpretation and Further Clarification,¹⁹⁹ one hopes that they will allow this new tool to

¹⁹⁵ *Id.* at 3.

¹⁹⁶ *User’s Guide to Developing Student Interest Surveys Under Title IX*, NAT’L CTR. FOR EDUC. STATISTICS, U.S. DEP’T OF EDUC. (Mar. 2005) [hereinafter *User’s Guide*].

¹⁹⁷ Some of the surveys were conducted in conjunction with OCR compliance reviews of institutions and were uniformly composed and administered by NCES, while other surveys were used by individual institutions and included in the analysis. Additional Clarification on Intercollegiate Athletics Policy: Three Part Test—Part Three, OFFICE OF CIV. RTS., U.S. DEP’T OF EDUC. (Mar. 2005) [hereinafter Additional Clarification].

¹⁹⁸ *User’s Guide*, *supra* note 196, at 15-22.

¹⁹⁹ *See, e.g.*, *Cohen v. Brown Univ.*, 101 F.3d 155 (1st Cir. 1996).

be utilized by institutions to demonstrate compliance during litigation as well, despite past statements to the contrary.²⁰⁰ However, there are three main criticisms that I would direct at the Model Survey in particular, which reflect upon the efficacy of the OCR's Additional Clarification/Policy Interpretation in general: the method suggested for conducting the survey is ineffective, much of the substantive decision-making seems left to institutions (or, possibly, the OCR), and the structure of the survey is at best questionable.

First, the Additional Clarification and suggestions for implementation suggest that the survey be administered via electronic mail.²⁰¹ One need only to have been a student receiving such web-based surveys or be a member of an institution or organization attempting to administer such surveys to know that response will be limited at best. Yale University Senior Associate Director of Athletics, Barbara Chesler, noted the deficiencies of using a web-based survey, “[s]tudents get more than ten of these per day . . . it is ludicrous to believe that they will take the time to fill this one out.”²⁰² Similarly, the University of Alabama’s Associate Athletic Director and Senior Woman’s Administrator, Marie Robbins, voiced her concerns about non-responsiveness to the survey, “[in spite of the newly-announced Additional Clarification,] we already tried the survey route and did not find it helpful [due to the low level of response], so we have hired a Title IX consultant to help us achieve gender equity under substantial proportionality.”²⁰³ The OCR itself recognizes the issue of non-responsiveness to the survey, but seems dismissive of such a problem, “[a]lthough rates of nonresponse may be high with the email procedure, under these conditions, OCR will interpret such nonresponse as a lack of interest.” Clearly, simply because an undergraduate woman decides not to take the time to fill

²⁰⁰ See, e.g., *Neal v. Bd. of Trs. of Cal. State Universities*, 198 F.3d 763, 768-69 (9th Cir. 1999) (discrediting interest surveys as an effective means for determining Title IX compliance).

²⁰¹ Additional Clarification, *supra* note 197, at 5.

²⁰² Interview with Barbara Chesler, *supra* note 120.

²⁰³ Interview with Marie Robbins, *supra* note 7.

out a survey, it may not mean that she is uninterested in athletic opportunities at her school. In addition to the defective way in which the survey is administered, the sample that it produces may be flawed in that the OCR requires only that the “underrepresented sex,” namely, women, participate in the survey.²⁰⁴ However, this approach rejects the proposition that a school should provide opportunities for meeting the athletic interests of *all* of its students, and seems blatantly inadequate considering the mandate of Title IX itself:

*No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefit of, or be subjected to discrimination under any education program or activity receiving federal financial assistance. (Emphasis added).*²⁰⁵

Secondly, the Additional Clarification allows institutions broad discretion in the way in which the survey is administered, how its results are interpreted, and what actions are taken *ex post* as far as incorporating survey results into the athletic program of the institution. For example, the OCR allows the institution to decide how much “interest is sufficient to sustain a varsity team,”²⁰⁶ stating that the athletic directors and coaches of institutions have unique skills in assessing athletic ability, and that the OCR will presume their assessments to be valid. Even when called upon to make such a judgment, the OCR has only announced some general criteria that it will use to make such a determination, always emphasizing its deference to institutional judgments.²⁰⁷ This broad discretion coupled with all but a complete lack of guidance on the part

²⁰⁴ Additional Clarification, *supra* note 197, at 5.

²⁰⁵ 20 U.S.C. § 1681(a). The Act is codified in its entirety in 20 U.S.C. §§ 1681-88 (2002).

²⁰⁶ Additional Clarification, *supra* note 197, at 9-12.

²⁰⁷ *Id.* The criteria enumerated by the OCR are:

- the athletic experience and achievement — in interscholastic, club or intramural competition — of underrepresented students interested in playing the sport;
- participation in other sports, intercollegiate or otherwise, that may demonstrate skills or abilities that are fundamental to the particular sport being considered;
- self-assessment of ability to compete in a particular interscholastic varsity sport;
- if the team has previously competed at the club or intramural level, whether the competitive experience of the team indicates that it has the potential to sustain an intercollegiate team;
- tryouts in the particular sport in which there is an interest;
- other direct observations of participation in the particular sport being considered;

of the OCR or any standardized system to determine what a school should do *ex post* to take the survey results into account when re-structuring its athletic program makes this “new” Policy Interpretation of the OCR appear to hearken back to the era of pre-Title IX enforcement. It will inevitably be ineffective and may lead to some of the negative consequences that critics fear will accompany any change to Title IX policy and interpretation.²⁰⁸

Finally, the structure of the OCR Model Survey is not user-friendly, nor will it produce the necessary data for any meaningful evaluation of student athletic interests at an institution. The survey asks students about their interest, past and current participation, and relative abilities in *all* NCAA-sanctioned sports, regardless of the school’s current facilities or potential for developing such facilities, the region in which the institution is located (which may preclude some schools from offering particular sports), and the prospect for any meaningful and feasible competition in such sports.²⁰⁹ The survey continues, asking for a *self-assessment* of the student’s ability and interest in the sports about which she has chosen to answer questions—a dubious indicator of objective interest and ability.²¹⁰ Furthermore the survey fails to provide some

and

- opinions of coaches, administrators, and athletes at the institution regarding whether interested students have the potential to sustain a varsity team.

Id. at 10.

²⁰⁸ See Part V *infra*.

²⁰⁹ *User’s Guide*, *supra* note 196, at 19. The prospect for meaningful competition is apparently addressed after the surveys have been completed and the data compiled. Additional Clarification, *supra* note 197, at 12. However, in light of the information-overload already apparent in the Model Survey, it may be best to screen out these incompatibilities before administering the survey.

²¹⁰ The American Psychological Association has noted that humans have an irresistible tendency to overestimate their competence in several areas—including athletic ability. See Tori DeAngelis, *Why We Overestimate Our Competence*, 34 MONITOR ON PSYCHOL. 60 (Feb. 2003). DeAngelis highlights some studies by Cornell social psychologist David Dunning, Ph.D.:

Dunning is addressing some of these self-overestimation issues empirically. In a series of studies reported in the December 1999 *Journal of Personality and Social Psychology* (Vol. 77, No. 6), he and co-author Justin Kruger, PhD, then a Cornell graduate student and now an assistant professor at the University of Illinois at Urbana-Champaign, examined the idea that ignorance is at the root of some self-inflation. Cornell students received short tests in humor, grammar and logic, then assessed how well they thought they did both individually and in relation to other Cornell students. In all three areas, students who performed the worst greatly overestimated their performance compared to those who did well.

critical information—such as an explanation of what participation in a club or intramural sport would entail—and only briefly clarifies the commitment expected of a varsity athlete,²¹¹ which is unlikely to deter a student with only a mild interest in a sport, an overestimation of her abilities, and perhaps inflated dreams of the “glory of varsity participation” from overstating her willingness to commit. Lastly, each page of the survey seems loaded with information—disclaimers, statements of purpose, administrative safeguards, etc.—that makes the entire instrument so rambling²¹² and time-consuming²¹³ that any student who did decide to seriously embark on honestly answering the survey could not help but be daunted by the entire process.

C. A Better Solution—Genuinely Measuring Interest

Although the OCR deserves applause for providing schools with another option for Title IX compliance, its method leaves much to be desired. I propose that the Additional Clarification and accompanying survey guidelines could easily be improved by means of a few simple enhancements and clarifications. To help the reader, my suggestions will correspond to the three main categories of criticisms above: the method suggested for conducting the survey, much of the substantive decision-making being left to institutions, and the opportunities for improvements in the structure of the survey. Exploring the consequences that these suggestions, and the survey approach in general, would have on different educational institutions, I will briefly contrast the effects of using such a system in different institutions—specifically, how such a system could (or

Id. at 61-62. In light of the psychological evidence that those of us who perform the *worst* at tasks seem to overestimate our abilities the *most*, any survey used by institutions in compliance with Title IX would need a better objective indicator of interest and ability or at least some objective check *ex post*—prior to any implementation.

²¹¹ This information appears at the bottom of “Screen Four” and appears to be added as an afterthought. *User’s Guide*, *supra* note 196, at 18.

²¹² *Id.* at 15-22.

²¹³ The NISS estimates that the survey should take each respondent less than ten minutes to complete. *Id.* at 15. However, the author, in scrolling through and reading the survey for the purposes of this paper, spent more than 20 minutes simply reading all of the screens in the Model Survey, and definitely would have taken more time to provide honest and accurate answers to such questions, as the survey asks a student to recall and evaluate all of her athletic participation from high school to the present and requires that she earnestly prognosticate about any future participation or interest therein.

should) be utilized in an Ivy League institution, a traditional Division I institution, and a Division II institution or other institution without large marquee programs.

The most important modification to the OCR's Model Survey is revising the method by which it will be conducted. First, it should be completed by *all* members of the student body, so as to more accurately measure *both* male and female interest in participation in athletic opportunities offered by the school. To remedy the non-responsiveness problem, the survey should be mandatory—that is, it could be included in a student's registration materials and students could be informed that they would not be allowed to register for classes until the form is submitted.²¹⁴ Additionally, the data set should be included to survey newly-admitted students, once they have committed to enrollment at the university.²¹⁵ At least one administrator had not considered this as being an option before her institution abandoned its efforts to achieve compliance using surveys under the third prong, but she admitted that, had the school further explored this method, that may have curtailed its current costly efforts to achieve compliance under substantial proportionality.²¹⁶ This could still be administered via a web-based survey, especially considering that many institutions now allow for on-line registration and enrollment. However, the school would need some sort of mechanism to assure that the student has completed the survey prior to having access to registration. Hopefully, these measures would

²¹⁴ The OCR itself makes this suggestion in passing. See Additional Clarification, *supra* note 197, at 7. Two authors also have suggested ways in which to make the survey a requirement, although they also limit the use of the survey to the female undergraduate population. See Elliott & Mason, *supra* note 189, at 17-18.

²¹⁵ See Elliott & Mason, *supra* note 189, at 17-18.

²¹⁶ Interview with Marie Robbins, *supra* note 7. In speaking with Ms. Robbins, the author discussed the University of Alabama's experience with such surveys at length. Her opinion of the usefulness of such surveys was heavily influenced by the inadequate responses that the University received when attempting to implement such a system in 2003. Thus, the University of Alabama has brought in a Title IX consultant to help it achieve gender equity in intercollegiate athletics under the substantial proportionality prong, as it feels that its history of cutting a few women's programs and the inadequacy of the survey system have left it no choice. When asked how the school anticipates implementing its "compliance plan", Ms. Robbins stated that the University will most likely elevate one or more women's club sports to varsity status—specifically women's crew. When asked if there was similar interest among the men's club team participants in being elevated to a varsity sport, Ms. Robbins responded, "Well, of course, I'm sure they would like to be varsity, and have actually expressed more interest than the women, but, well, considering what we are trying to achieve here, that is simply out of the question." *Id.*

increase the response rate to the survey, thereby producing more accurate results, or at least a larger sampling.

The discretion delegated to institutions under the OCR's Additional Clarification is troubling—schools may decide, largely without OCR oversight, what levels of interest among respondents would merit consideration of forming *any* kind of team to meet that interest, what level of interest would be sufficient to sustain a varsity team, what levels of ability would be necessary to sustain a varsity team, how much competition intercollegiate competition would merit the addition of a team or to what extent the school should seek to accommodate a team without competitors or facilities in its immediate geographic region, and, finally and most poignantly, how to implement any results of the survey that it deems conclusive.²¹⁷ Since thus far institutions, in order to achieve Title IX compliance, have been subjected to exacting restrictions and guidelines under the OCR's and court's interpretation of substantial proportionality, it seems ill-advised to allow institutions such a broad latitude in achieving compliance under the third prong. In fact, the lack of direction and guidelines provided by the OCR under this Additional Clarification makes this opportunity for another method of Title IX compliance look like a capitulation of the OCR to Division I schools with large marquee programs unable to meet the substantial proportionality test. The OCR should remedy this defect by providing some sort of general guidance to schools as to how much interest merits the development of an athletic opportunity, be it at the intramural, club, or varsity level. This type of determination will undoubtedly be university-specific, taking into account such factors as geographical location, fiscal resources, current programs, and the like, so that the OCR should oversee these determinations at investigator level. Thus, schools earnestly seeking to comply with Title IX under this prong would need to develop a relationship with the OCR official in

²¹⁷ See Additional Clarification, *supra* note 197, at 9-13.

their region or at their institution. Furthermore, it is inconceivable that such changes could be effected overnight. Any changes to athletic programs would need to be gradual, so that some sort of relatively uniform timeline could be established for “phasing-in” a newly-formed team from intramural, to club, to varsity status.²¹⁸ Repetitions of the survey, either each year, or at least every four years (as determined by the institution working in conjunction with the OCR), would signal that interest in the newly-formed and already-established sports is either increasing or waning, and adjustments to that sport’s status could be made accordingly. Any team elevated to varsity status, since this level of competition involves the investment of the most resources for any institution, would be subject to a sort of heightened scrutiny under the interest determination, to ensure that there is not a problem of high turnover rates, yet at the same time guaranteeing that those athletes already committed to the program will be able to participate for all four years of their eligibility. Thus, perhaps a type of “sunset provision” or a probationary period for new teams would be in order—those that cannot sustain sufficient interest according to benchmarks that are *pre-established* by the institution and OCR would be “phased out” in order to allow for the development of other teams, which may show more promise. These requirements will indeed call for large amounts of flexibility on the part of institutions, coaches, and the OCR during this developmental process, as all aspects of the implementation of a new sport will have to be considered, including recruitment, which should be pursued even for a fledgling team, the provision of facilities and coaches, and the allocation of resources. Hopefully, such deliberate action would only be required during this transitional period in which athletic programs learn how to more effectively and fairly accommodate interests in order to meet gender equity. Practically, any institution seeking to comply under this type of test for the third prong must be willing to rethink its athletic department’s strategy and long-term goals.

²¹⁸ See Elliott & Mason, *supra* note 189, at 19-21.

Finally, the structure of the Model Survey should be reconstituted so as to be more user-friendly and comprehensible. As the OCR has stated that it will not require schools to go to unattainable lengths to meet interests for sports for which the school may not be geographically or topographically well-suited,²¹⁹ the initial list of sports included in the survey should be limited to those for which the school already has existing facilities or could easily provide such facilities. Furthermore, the survey should provide the necessary information in a format generally comprehensible and easily garnered from the appearance and text of the survey. This may entail increasing the number of screens or pages involved in the survey (as the current Model Survey has only eight screens) in order to underscore important information or fill any gaps in such information, but would more likely need to pare down the amount of information included in the survey in general, eliminating unnecessary verbiage. The problem of self-assessment would have to be dealt with *ex post*, when a coach or other administrator could hold try-outs or some similar event to substantiate the claims made by students on the surveys—both as to their relative abilities and levels of interest.

The survey mechanism would be best suited to those institutions willing to be flexible enough to provide for “temporary” teams and those that suffer from the most serious negative effects under the current system of compliance via substantial proportionality. Therefore, the survey system would be more likely to aid a traditional Division I institution than an Ivy League school or other institution, but, for the same reasons should be forced to work closely with the OCR in developing any such compliance system. Ivy League schools already offer far more athletic opportunities at the varsity level and usually have far more resources than other

²¹⁹ “If an institution’s normal competitive region [is within a particular geographic area, or if that institution is in a particular region] . . . OCR will not require the creation of a particular sport if, due to climate or topography, it would not be possible as a practical matter for students at the institution to practice that sport.” Additional Clarification, *supra* note 197, at 12.

institutions do to dedicate to athletic programs.²²⁰ Additionally, because Ivy League schools do not offer traditional athletic scholarships and instead offer only need-based aid packages, they are not required to achieve substantial proportionality in that respect.²²¹ Thus, the survey method seems a viable alternative for those schools that have been forced to cut male non-marquee programs and “create” women’s programs for which there are little interest in order to achieve compliance under substantial proportionality. This characterization mainly applies to Division I-A and Division I-AA athletics’ programs,²²² which have the “problem” of over-participation in men’s marquee sports. This does not usually describe the situation of most Division II and III program, which have actually seen a net increase in the number of men’s sports.²²³ This may be due to the facts that, as opposed to the hefty scholarship packages and adamant recruiting that occurs at their Division I compatriot institutions, there are no athletic scholarships offered at the Division III level²²⁴ and very few offered at the Division II level²²⁵ and walk-on athletes (those who are not recruited by institutions) are more often starters on their teams.²²⁶

V. Criticisms

A. There Will Be a Backslide in Women’s Progress

²²⁰ Interview with Barbara Chesler, *supra* note 120. Ms. Chesler notes that Ivy League schools have had faced far less substantial obstacles in achieving substantial proportionality, as Yale offers seventeen programs for men and the same number for women, with one co-educational team, sailing. Much of this is possible because of specific endowments for women’s athletics. She agrees that Yale’s focus is now not so much on “playing the numbers game,” but on achieving gender equity in the treatment of its student-athletes. *Id.*

²²¹ *Id.* Ms. Chesler notes, however, that this makes attrition a more salient problem in Ivy League schools, as athletes are often recruited and admitted to the school on the understanding that they will participate in their programs for the entire four years, and may subsequently drop out of a team. *Id.*

²²² Daniel R. Marburger & Nancy Hogshead-Makar, *Is Title IX Really to Blame for the Decline in Intercollegiate Men’s Nonrevenue Sports?*, 14 MARQ. SPORTS L. REV. 65, 91 (2003).

²²³ *Id.*

²²⁴ See NCAA, *What’s the Difference Between Divisions I, II, and III?*, at http://www.ncaa.org/about/div_criteria.html (last accessed Apr. 10, 2005).

²²⁵ *Id.*

²²⁶ Symposium, *The Seventh Annual Symposium of Legal Issues in Professional Sports: Panel II: Thirty Years of Title IX*, 14 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 695, 741 (2004) [hereinafter *Title IX Symposium*].

Several staunch defenders of the Title IX status quo contend that *any* alteration of the present compliance system (unless such a change would make prongs two and three of the test harder for an institution to meet) would result in a reversal of women’s progress in the field of intercollegiate athletics during the past thirty years.²²⁷ Prior to the results of the Commission on Opportunities in Athletics were finalized (and largely not implemented by the OCR), one author worried, “[t]he [DOE’s] formation of a Title IX commission to investigate the application of the law to intercollegiate athletic departments could have profound effects in seriously eroding the precarious advancements that have been achieved in the last thirty years”²²⁸ Some commentators go so far as to suggest that substantial proportionality may be the only viable way to ensure that women receive equal athletic opportunities and equal institutional resources.²²⁹

This contention is genuinely ludicrous—the suggestion that over thirty years of progress with an accompanying 500% increase in female participation in intercollegiate athletics could be completely undermined by the administration of a carefully-orchestrated and closely-scrutinized survey program to determine the genuine athletic interests of both sexes is at best an overstatement. It is true that the particular sports programs offered at particular universities may change slightly, and it may also be true that women will lose a trivial number of opportunities on some campuses. However, under my interest survey proposal, women also have the opportunity to gain more teams and spots in athletic programs. Furthermore, this criticism seems misplaced

²²⁷ See, e.g., Eric Bentley, *Title IX: How Title IX Should Be Interpreted to Afford Women the Opportunities They Deserve in Intercollegiate Athletics*, 11 SPORTS LAW J. 89, 118-120 (2004); Suzanne Eckes, *The Thirtieth Anniversary of Title IX: Women Have Not Reached the Finish Line*, 13 S. CAL. REV. L. & WOMEN’S STUD. 3 (2003); Elizabeth A. Hueben, *Revolution, Numbers, IX: The Thirtieth Anniversary of Title IX and the Proportionality Challenge*, 71 UMKC L. REV. 659, 683 (2003); Jocelyn Samuels & Kristen Galles, *In Defense of Title IX: Why Current Policies Are Required To Ensure Equality of Opportunity*, 14 MARQ. SPORTS L. REV. 11 (2003).

²²⁸ Diane Heckman, *The Glass Sneaker Thirty Years of Victories and Defeats Involving Title IX and Sex Discrimination in Athletics*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 551, 612.

²²⁹ Samuels & Galles, *supra* note 227, at 37. *But see* Catherine Pieronek, *Title IX and Intercollegiate Athletics in the Federal Appellate Courts: Myth vs. Reality*, 27 J.C. & U.L. 447, at 512-14. For a spirited debate on both sides of the issue, see generally *Title IX Symposium*, *supra* note 226.

and misguided—the underlying purpose of Title IX, not to mention what most feminist commentators advocate, is the provision of equal *opportunities* for *each* sex and the accommodation of *interests*. That is exactly what such a survey system as a method for compliance under the third prong would strive to achieve. And there is more good news (or at least it should be) for such critics—the enrollment of women has now surpassed men in institutions of higher learning.²³⁰ One would expect the majority of an institution’s student body to face fewer obstacles in voicing their concerns regarding the lack of athletic opportunities for their sex, as opposed to pre-Title IX, when men were over 60% of the undergraduate population.²³¹ Finally, statistics, surveys, and the simple observance of behavioral trends alike suggest that women, while interested in athletic opportunities offered at their institutions, are increasingly *more* interested in pursuing other academic or extracurricular opportunities, such as graduate programs, leadership positions, community service organizations, and the like.²³² In sum, there is little real threat of a monumental backslide in athletic opportunities for women, especially considering the advances that women have made, how these “opportunities” have become the norm both in societal expectations and in the functioning of athletic departments, and the modern political and numerical realities surrounding female participation in institutions of higher learning, including the athletic departments.

B. Interest as a Phenomenon of Social Values

A more difficult criticism for the proponents of changing Title IX compliance to overcome is that which is based on our underlying social value structure. Women’s lower participation in sports, so the argument runs, is a direct result of social stereotypes that women are not, or should

²³⁰ Most sources put women at over 55% of the undergraduate population in two-year and four-year institutions combined and at over 56% of the graduate student population in all institutions. See Yupin Bae, et al., *Trends in Educational Equity for Girls and Women*, U.S. DEP’T OF EDUC., NAT’L CENTER FOR EDUC. STAT., 60 (2000).

²³¹ *Id.*

²³² See generally *id.*

not be, interested in sports and the historical lack of opportunities available to women in the field of intercollegiate athletics. “This argument [that women are not as interested in participating in athletics as men] was unfounded considering the dramatic increase in female athletic participation rates after the passage of Title IX. The increase in participation suggests that it has been a lack of athletic opportunity, instead of a lack of interest [hindering women].”²³³ Therefore, any attempt to measure women’s interest in athletic opportunities would be doomed from the start. Two critics emphasize this point regarding the use of interest surveys:

Fundamentally, the problem with an interest-based test for allocation of participation opportunities lies in the fact that ‘women’s lower rate of participation in athletics reflects women’s historical lack of opportunities to participate in sports’—not a lack of interest, which ‘evolve[s] as a function of opportunity and experience.’²³⁴

Similarly, the courts have been skeptical of any type of interest-based measure to allow schools to comply with Title IX. The *Cohen II* Court stated:

[S]tatistical evidence purporting to reflect women’s interest instead provides only a measure of the very discrimination that is and has been the basis for women’s lack of opportunity to participate in sports To allow a numbers-based lack-of-interest defense to become the instrument of further discrimination against the underrepresented gender would pervert the remedial purpose of Title IX.²³⁵

This criticism is well-founded, but not unshakable, especially as pertains to the policies and legislative intent motivating the enactment of Title IX.

There are several possible responses to this socio-historical-feminist criticism of the interest survey approach, but I will touch on only four. The first would simply be a largely rhetorical question—why single out athletics as the stereotype to negate via a questionable agency

²³³ Eckes, *Another Pin for Women: The National Wrestling Coaches Association’ Title IX Case is Dismissed*, *supra* note 87, at 702.

²³⁴ Martha Burk & Natasha Plumly, *Who Owns Sports? The Politics of Title IX*, 14 MARQ. SPORTS L. REV. 49, 29 (2003) (quoting *Cohen v. Brown Univ.*, 101 F.3d 155, 179 (1st Cir. 1996)).

²³⁵ *Cohen v. Brown Univ.*, 101 F.3d 155, 179-80 (1st Cir. 1996). *See also* *Neal v. Bd. of Trs. of Cal. State Universities*, 198 F.3d 763, 768-69 (9th Cir. 1999) (discrediting interest surveys as an effective means for determining Title IX compliance).

interpretation? Why not legislate (or, more appropriately, have an agency interpret to mandate) equality in engineering programs, where women still receive only 20% of degrees awarded?²³⁶ Why not extend this to dance classes, art classes, or vocational programs? A more historical criticism is that Congress never intended to mandate equal numbers in athletic programs by enacting Title IX, but only to provide women with equal opportunities for participation,²³⁷ which it has done. Belittling the role that interest was originally intended to play came not from congressional intent, but from agency interpretation gone awry, as evidenced by the heated political and public debate surrounding the issue.²³⁸ Third, there will still be a strict proportionality requirement at the elementary, junior high, and high school levels, where most initial interest in sports develops for both men and women.²³⁹ Inevitably, some of this interest will carry through to the college level and will be reflected in interest surveys, thus preserving any preexisting and developing interests that women have in pursuing sports at the

²³⁶ *Education Equality*, Feminist Majority Foundation, at <http://www.feminist.org/education> (last accessed Apr. 2, 2005).

²³⁷ See Part I.A *supra*. See also Reuscher, *supra* note 24; Rozum, *supra* note 26; Reich, *supra* note 27.

²³⁸ See Chico Harlan, *No End in Sight: The Title IX Debate Continues*, College Publisher Network, at <http://www.dailyorange.com/media/paper522/news/2003/02/10/News/No.End.In.Sight.The.Title.Ix.Debate.Continues-364888.shtml> (Feb. 10, 2003) (last accessed Apr. 10, 2005).

²³⁹ As of 2001, female athletes comprised 2.8 million of the approximately 6.6 million high school athletes. NAT'L COALITION FOR WOMEN & GIRLS IN EDUC., *Title IX at 30: Report Card on Gender Equity* 16 (June 2002), available at <http://www.ncwge.org/title9at30-6-11.pdf> (last accessed Apr. 12, 2005). Since there are only about 400,000 athletic opportunities at the collegiate level that are sponsored by the NCAA, and therefore even fewer opportunities that provide all of the “perks” of a free college education, the best coaches, travel, etc., there is an inherent mismatch in demonstrated interest among high school athletes and spots available on college squads. See NCAA, *Miscellaneous Facts and Figures: Fact Sheet*, at http://www.ncaa.org/about/fact_sheet.pdf (last accessed Apr. 4, 2005). Therefore, the criticism that historical patterns of social discrimination and gender role expectations seems overrated—there is demonstrated interest among both sexes at the high school level and the real question is how to distribute the limited resources and opportunities at the college level, which are limited because of scarce resources and other programs with which athletic departments must share funding. It seems proper, then, considering the fact that many high school athletes, both men and women, do not wish to pursue their sports at the more intense college level and instead spend their limited time pursuing other interests and goals, to award these opportunities to those athletes who demonstrate the most commitment and time to their sports. If Title IX's *de facto* quota system is retained, and men usually demonstrate more dedication to sports (as measured by how many male v. female athletes are “walk-ons”, the attrition rates of male v. female athletes on varsity teams, and various sociological and psychological surveys, some conducted independently of the Title IX debate), then the law seems to be “punish[ing] men for the fact that women are not as interested in sports.” GAVORA, *supra* note 3, at 55, 56. See also *id.* at 132-47 (citing several sociological studies supporting the claims made above) and at 68 (discussing the lower incidences of female “walk-ons” to varsity teams). But see Makar, *supra* note 125, at 123-31.

intercollegiate level. Finally, if social stereotypes against female participation in athletics, as illustrated by historical biases against female involvement, are to be ultimately corrected, the transformation is best brought about through a gradual change, which progressively establishes the desired conversion and eventually is more successful than a radical revelation which offends the majority. In this case, strict proportionality has confronted substantial resistance, both politically and in the public eye, so a gradual course of adjustment guaranteed by a continuation of proportionality requirements at the elementary and secondary levels of education coupled with interest surveys at the intercollegiate levels of athletic participation may prove to be the least complicated and most enduring remedy for such past discrimination, particularly in light of the monumental progress that women have made in the struggle for gender equity in intercollegiate athletics over the past thirty years.

C. It's Not Substantial Proportionality's Fault

Most critics of the interest survey proposal are quick to point out that the substantial proportionality requirement is not to blame for the problems arising from institutional compliance with Title IX.²⁴⁰ “The crux of the problem is not, therefore, Title IX itself and the Department of Education’s three-part test. Rather, the problem is the way in which schools choose to comply with those mandates and the fact that schools claim they can not afford to add more women’s sports to do so.”²⁴¹ For some schools this is undeniably true, although some critics would argue that an institution should be free to make this type of decision, whether they inure from budgetary constraints or the school wants to enhance one or more of its athletic programs at the cost of sacrificing others.²⁴² No one would question such a decision made in other contexts. One commentator restates the issue, “Schools have the right to say, ‘I’m going to

²⁴⁰ See generally Part III *supra*.

²⁴¹ Hueben, *supra* note 227, at 681.

²⁴² *Title IX Symposium*, *supra* note 226, at 730

be number one in the country in medicine and law, and I am not going to offer Russian or microbiology.’”²⁴³ However, Title IX does alter institutional behavior because schools, if they choose to make decisions such as those posited above in the context of intercollegiate athletics, they must keep the strictures of Title IX, and especially substantial proportionality, in mind. Blaming university budget mismanagement and athletic department focus on marquee sports,²⁴⁴ however, fails to recognize that Title IX was the catalyst for such change, albeit with the laudable goal of providing more opportunities for women in intercollegiate athletics and even more praiseworthy because it has achieved such great progress in this area. The inescapable fact, though, is that a new problem has appeared—men’s non-revenue sports are now suffering—and, conceding that most institutions do have limited athletic budgets and keeping in mind the objective of maintaining opportunities for *both* sexes at the intercollegiate level, something has got to give. The OCR, in recognizing this, has now allowed for interest surveys to attempt a more equitable distribution of limited athletic department resources among competing interests, and these surveys may be a viable alternative if their defects are remedied and all players—students, institutions, the OCR, and special interest organizations—agree to be flexible.

D. Recruiting for Interest?

Finally, how does a school undertake the practical problem of recruitment under the interest survey system? This seems like a chicken and egg problem, since, as two commentators, expressing their doubts that a survey system would be a viable option for compliance, stated:

[A]ny survey of [the interests] of the student body will be driven by the university’s athletic offerings, recruiting practices, admissions preferences, and athletic scholarships, if available. Particularly at Division I schools that rely on recruiting to select their intercollegiate athletes, the results of a survey of athletic interest in the student body is predetermined by the university’s selection of sports and recruiting practices. For example, if a university recruits twice as many men as women for its

²⁴³ *Id.* at 729.

²⁴⁴ *See* Marburger & Hogshead-Makar, *supra* note 222, at 90-93.

intercollegiate athletic offerings, a survey which finds more men than women who claim to be interested in participating in intercollegiate athletics is not a true measure of relative interest. Similarly, a survey of student applicants to a university will be skewed by that university's existing opportunities. Students who want to participate in a sport not offered at a particular university may not apply there.²⁴⁵

At first glance, this seems to be an insurmountable problem, but, again, flexibility is the key to a solution. Of course, schools should seek to recruit athletes for *all* teams, even those nascent varsity teams in the developmental probationary period discussed above,²⁴⁶ and these athletes should be guaranteed annual support even in the event that their sport is discontinued because of insufficient interest.²⁴⁷ As new teams emerge from the survey process or move up from the club level, recruiting efforts will increase to fill these varsity slots. This is not new—this is how *all* teams, both male and female, have evolved within their institutions. Two of the most celebrated teams in women's intercollegiate sports—the women's basketball teams of the University of Connecticut and Duke University, developed their teams in just this way, and did so prior to the Title IX quota system ever being implemented.²⁴⁸ Undoubtedly, these teams faced inequities and obstacles that should not have hampered their development, but they grew to be great powerhouses just the same. True, it is a gradual process, but lasting and meaningful change in this area may have to come more slowly than most reformers would like. Additionally, when a team genuinely seeks to comply with Title IX under this survey system, it will have to follow

²⁴⁵ Deborah Brake & Elizabeth Catlin, *The Path of Most Resistance: The Long Road Toward Gender Equity in Intercollegiate Athletics*, 3 DUKE J. GENDER L. & POL'Y 51, 79 (1996). See also John C. Weistart, *Can Gender Equity Find a Place in Commercialized College Sport?*, 3 DUKE J. GENDER L. & POL'Y 191, 234 (1996) (asserting that "most schools in Division I and Division II create interest in their programs. They do this by recruiting. Their coaches . . . search out appropriate athletic candidates, who are then cajoled, entreated, and given special considerations solely to induce them to come to school to play sports[']").

²⁴⁶ See Part IV.C *supra*.

²⁴⁷ Of course, the NCAA currently only requires schools to award annual scholarships to student-athletes, so that if the athlete discontinues playing the sport, he or she may lose that financial award. See NCAA Division I Manual, *Article 15: Financial Aid*, *supra* note 100, at 191-215.

²⁴⁸ See *Title IX Symposium*, *supra* note 226, at 710.

OCR guidance in the area of recruiting as well, and will inevitably have to rethink and restructure its recruiting process just as it will the remainder of its athletic program.²⁴⁹

VI. Conclusion

Unquestionably, Title IX has facilitated the unprecedented growth of well-deserved and long-awaited opportunities for women in intercollegiate athletics. However, as the 2003 Commission on Opportunity in Athletics and the passionate debates, among academics, policy-makers, and institutional players alike, have demonstrated, the disputes surrounding Title IX have produced few areas of agreement. In issuing its Additional Clarification in March of this year, the OCR has only expanded the debate into another dimension. The use of surveys as an acceptable method of compliance under the third prong of the OCR's 1979 three-prong test appears to be a workable solution to the negative consequences instigated by substantial proportionality—the loss of men's non-revenue teams, the creation of women's sports with little genuine interest, and Title IX's possible conflicts with the values underlying Title VI of the Civil Rights Act of 1964, prohibiting discrimination on the basis of race, color, or national origin, since most of these “emerging sports” for women tend to have middle to upper-class white athletes on their rosters.

Albeit well-intentioned, the OCR's survey proposal is deficient in at least three respects: the method suggested for conducting the survey is ineffective, much of the substantive decision-making seems left to institutions (or, possibly, the OCR), and the structure of the survey is at best questionable. It is quite possible that these “kinks” will be worked out of the system in due time and as both the OCR and institutions gain more experience with the system. But, in order to make it a more attractive and efficacious alternative, I would propose some revisions to the existing structure, including mandatory surveys for *all* undergraduate students, both currently

²⁴⁹ See Part IV.C *supra*.

enrolled and incoming freshmen, more OCR guidance on when and how a school should implement the results of a survey, and a format more tailored to the regional and fiscal realities of the institution giving the survey, keeping in mind that less clutter will produce more responses and more reliable results. Hopefully, the OCR will continue to refine this new tool as a genuine alternative for institutional compliance with Title IX while at the same time preserving its foremost objective of providing equal opportunities to all current and prospective student-athletes—both female *and* male.