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Unsportsmanlike Conduct: Title IX and Cohen v. Brown University

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Notes and Comments

Unsportsmanlike[1] Conduct: Title IX and *Cohen v. Brown University*

INTRODUCTION

Men are no longer the sole participants on playing fields, basketball courts, ice rinks or even in boxing rings.[2] The popularity of women's sports has grown dramatically in recent years, and American women captured the spotlight during the 1996 Summer Olympic Games in Atlanta.[3] These "centennial games" were a far cry from the first modern Olympics where women were relegated to spectating and to showering winners with affectionate cheers.[4]

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1. Considering the subject matter, perhaps a "gender-neutral" term would be more appropriate. However, nothing else communicates the spirit without a sense of awkwardness.

2. Female boxer Christy Martin has gained recent notoriety in the fight game, performing in what has traditionally been considered the most brutal of all athletic contests. *See* George Diaz, *In Macho Sport Martin Doesn't Hit Like a Girl*, Orlando Sentinel, Nov. 8, 1996, at C1, *available in* 1996 WL 12424450; *see also* Richard Hoffer, *Gritty Woman: Christy Martin is Knocking Down Stereotypes Even as She Refuses to Champion the Cause of Woman in the Ring*, Sports Illustrated, Apr. 15, 1996, at 56, *available in* 1996 WL 8826289.

3. Television coverage of the Olympics was geared toward women viewers and ratings were higher for the women's contests. Christine Brennan, *At Olympics, Women Show New Strength; Female Athletes Grow in Size and Stature*, Wash. Post, July 18, 1996, at A1, *available in* 1996 WL 10721560. Companies also targeted their marketing toward the women athletes. Rich Brown, *NBC Nails Olympics Gold; Network Breaks Ratings & Revenue Records with Coverage*, Broadcasting & Cable, July 29, 1996, at 4, *available in* 1996 WL 82900874. The United States women athletes won 38 medals; their highest level of accomplishment on the U.S. team. Christine Brennan, *US Women Look Good in Gold; As Games End, Future is Now*, Wash. Post, Aug. 5, 1996, at C5, *available in* 1996 WL 10724798. The women's basketball team won the gold. In swimming, women outperformed the men, winning 14 of 26 total medals, and 7 of 13 golds. The women's soccer team won the gold in front of 76,000 fans. *Id.*

4. Donald Mahoney, Comment, *Taking A Shot at The Title: A Critical Review of Judicial and Administrative Interpretations of Title IX as Applied to Intercollegi-*

Title IX of the Education Amendments of 1972 bars gender discrimination in all education programs or activities receiving federal financial assistance,[5] and has garnered the majority of credit for the recent female athletic success.[6] Within four years of Title IX's passage, women's athletics on university campuses experienced unparalleled growth.[7] Universities expanded existing programs and offered new athletic teams to satisfy the newborn interests of women athletes.[8]

However, competition is not confined to the athletic fields. Colleges and universities[9] are operating in difficult economic times. Men's and women's programs across the country have felt the consequences. Budget restrictions have created gender struggles over funding for intercollegiate athletic programs. Invariably, losers of administrative boardroom battles turned to the courts to

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ate Athletic Programs, 27 Conn. L. Rev. 943 (1995). Pierre de Coubertin, the founder of the modern Olympic Games summed up the women's role: "The Olympic Games must be reserved for men . . . . [W]e must continue to try to achieve the following definition: the solemn and periodic exaltation of male athleticism, with internationalism as a base, loyalty as a means, art for its setting, and female applause for its reward." *Id.* at 943 (quoting Women in Sport: Issues and Controversies 169 (Greta L. Cohen ed., 1993)).

5. Education Amendments of 1972, Pub. L. No. 92-318, §§ 901-907, 86 Stat. 235, 373-75 (codified as amended at 20 U.S.C. §§ 1681-1688 (1994)).

6. Cohen v. Brown Univ., 101 F.3d 155, 188 (1st Cir. 1996) ("One need look no further than the impressive performances of our country's women athletes in the 1996 Summer Olympic Games to see that Title IX has had a dramatic and positive impact on the capabilities of our women athletes."); *see also* Nancy Lieberman-Cline, *Atlanta Olympics Show the Impact of Title IX*, Dallas Morning News, Oct. 17, 1996, at 2B, *available in* 1996 WL 10988332 (attributing the success of U.S. women's basketball to Title IX); Donna St. George, *Title IX Opened Doors for Era of Female Athletes*, Sacramento Bee, Aug. 13, 1996, at D1, *available in* 1996 WL 3311277 (crediting Title IX with the first generation of women who had a choice to play sports); Gene Wojciechowski & Andrew Gottesman, *Golden Era for Women: Atlanta Games a Tribute to 24 Year-Old Equity Law*, Chi. Trib., Aug. 4, 1996, Chicagoland Final Edition, News, at 1, *available in* 1996 WL 2696299 (calling the Olympics a 16-day tribute to Title IX).

7. Joannie M. Schrof, *A Sporting Chance?*, U.S. News & World Report, Apr. 11, 1994, at 52, *available in* 1994 WL 11128063.

8. *See, e.g.*, Cohen v. Brown Univ., 809 F. Supp. 978, 980-81 (D.R.I. 1992) (noting that nearly all of Brown's 15 women's teams were created between 1971 and 1977); Roberts v. Colorado State Bd. of Agric., 814 F. Supp. 1507, 1514 (D. Colo. 1993), *aff'd*, 998 F.2d 824, 830 (10th Cir. 1993) (noting that Colorado State University added 11 sports for women in the 1970s).

9. Title IX applies to both colleges and universities receiving federal funds. This Note will refer to universities to represent both types of institutions.

seek justice.[10] The bulk of plaintiffs have been women requesting reinstatement of their eliminated teams, expansion of existing teams or creation of new programs.[11] To date, female plaintiffs have been overwhelmingly successful.[12] Recently, several federal courts have held that universities have violated Title IX by cutting women's teams.[13] Conversely, men have not scored a single legal victory in their reverse discrimination attempts.[14] In addition, men have experienced pain unintended by Title IX's drafters. Universities have attempted to comply with the legislation by eliminating men's teams; since 1982, 99 schools have discontinued men's wrestling and 64 have eliminated swimming.[15] Further,

10. The Supreme Court has held that a private right of action is implicit in Title IX. Cannon v. University of Chicago, 441 U.S. 677 (1979).

11. *Cohen*, 809 F. Supp. 978; *Roberts*, 814 F. Supp. 1507; *see also* Horner v. Kentucky High Sch. Athletic Ass'n, 43 F.3d 265 (6th Cir. 1994) (protesting the state athletic association's decision not to sanction fast-pitch softball); Favia v. Indiana Univ., 812 F. Supp. 578 (W.D. Pa. 1992), *aff'd*, 7 F.3d 332 (3d Cir. 1993) (requesting reinstatement of demoted women's gymnastics and field hockey teams); Cook v. Colgate Univ., 802 F. Supp. 737 (N.D.N.Y. 1992), *vacated*, 992 F.2d 17 (2d Cir. 1993) (seeking upgrade of status for women's ice hockey); Pederson v. Louisiana State Univ., 912 F. Supp. 892 (M.D. La. 1996) (seeking to force the creation of women's fast-pitch softball and soccer teams). *But see* Kelley v. Board of Trustees, 832 F. Supp. 237 (C.D. Ill. 1993), *aff'd*, 35 F.3d 265 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 938 (1995) (protesting the elimination of men's swimming, fencing and diving); Gonyo v. Drake Univ., 879 F. Supp. 1000 (S.D. Iowa 1995) (objecting to the elimination of men's wrestling); Lichten v. State Univ., 646 N.Y.S.2d 402 (App. Div. 1996) (protesting the elimination of men's tennis, swimming and wrestling).

12. *Cohen*, 809 F. Supp. 978; *Roberts*, 998 F.2d 824; *Horner*, 43 F.3d 265; *Favia*, 812 F. Supp. 578; *Cook*, 802 F. Supp. 737; *Pederson*, 912 F. Supp. 892.

13. Courts have consistently relied on a three part test in a policy interpretation promulgated by the Department of Education's Office of Civil Rights. Title IX of the Education Amendments of 1972: A Policy Interpretation: Title IX & Intercollegiate Athletics, 44 Fed. Reg. 71,413 (1979) (codified at 45 C.F.R. pt. 86) [hereinafter Policy Interpretation]; *see infra* text accompanying note 84.

14. *Kelley*, 35 F.3d 265; *Gonyo*, 879 F. Supp. 1000; *Lichten*, 646 N.Y.S.2d 402.

15. San Francisco State University cut football after 64 years; Cornell University's men's fencing team was canceled after 98 years; Colgate University dropped men's baseball after 107 years; Princeton University ended its prestigious 90 year old wrestling tradition despite a 2.3 million dollar endowment pledge from alumni, because even with the funds, they would face litigation due to an inability to satisfy "proportionality;" and UCLA dropped the swimming and diving program that produced 16 Olympic gold medalists. Craig L. Hymowitz, *Losers on the Level Playing Field; How Men's Sports Got Sacked by Quotas, Bureaucrats and Title IX*, Wash. Post, Sept. 24, 1995, at C5, *available in* 1995 WL 9263566; *see also* Jessica Gavora, *College Women Get More Than Their Sporting Chance*, Insight Magazine, Jan. 22, 1996, at 25, *available in* 1996 WL 8310175 (noting that women's progress has coincided with men's regression).

since 1975, 101 men's gymnastics programs have been dropped.[16] While courts have supported this general tactic, these consequences defy the purpose of the well-intentioned legislation.

Courts have gone astray by focusing on strict proportionality between the gender percentages of a student body and athletic program participation. However, Title IX only requires universities to meet the interests and abilities of women to the same degree as they meet the interests of men.[17] Instead of focusing on "strict proportionality," courts should emphasize whether opportunities available to women reflect the proportion of female students willing and able to participate in intercollegiate athletics. This application better serves the intent of Title IX, and more fairly serves the athletic interests of both men and women.

The most developed judicial interpretation of Title IX arose when several female athletes sued Brown University: *Cohen v. Brown University*.[18] This Note examines Title IX within the framework of the *Cohen v. Brown* battle. Part I chronicles the history of Title IX, including the legislation's statutory and regulatory framework. Part II sets forth the facts and holding of *Cohen*. Part III illustrates how the *Cohen* courts' current application of Title IX violates the spirit of both the legislation and the Equal Protection Clause. Finally, Part IV suggests an improved interpretation that implements the intent of Title IX and satisfies the mandates of the Constitution.

I. HISTORY OF TITLE IX AND ITS REGULATORY FRAMEWORK

Title IX prohibits gender discrimination in education programs or activities receiving federal funds.[19] The statute is not exclusively directed at intercollegiate athletics, but rather addresses discrimination throughout educational institutions. The statute

16. Gavora, *supra* note 15, at 25.

17. 34 C.F.R. § 106.41(c)(1) (1996) ("[w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes").

18. Cohen v. Brown Univ., 809 F. Supp. 978 (D.R.I. 1992) (*Cohen I*); Cohen v. Brown Univ., 991 F.2d 888 (1st Cir. 1993) (*Cohen II*); Cohen v. Brown Univ., 879 F. Supp. 185 (D.R.I. 1995) (*Cohen III*); Cohen v. Brown Univ., 101 F.3d 155 (1st Cir. 1996) (*Cohen IV*). Since these cases follow each other and agree on nearly every legal issue, in the text, this Note will refer to them at times collectively as "the courts" or "the *Cohen* courts."

19. 20 U.S.C. § 1681(a) (1994).

provides in relevant part: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ."[20] Congress enacted this section within the larger framework of the Education Amendments of 1972.[21] While the motivation behind the legislation has been traced to a House of Representatives subcommittee hearing on sex discrimination years earlier,[22] the actual passage of the measure left little secondary legislative material.[23] The dearth of secondary materials coupled with Title IX's vague and broad wording, caused "considerable consternation in the academic world."[24] Universities were unsure *what* programs or activities were within the scope of the law, and exactly *how* the government would classify adherence.[25]

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20. *Id.*

21. Education Amendments of 1972, Pub. L. No. 92-318, §§ 901-907, 86 Stat. 235, 373-75 (codified as amended at 20 U.S.C. §§ 1681-1688 (1994)).

22. Jill K. Johnson, Note, *Title IX and Intercollegiate Athletics: Current Judicial Interpretation of the Standards for Compliance*, 74 B.U. L. Rev. 553, 557 n.25 (1994) (citing *Discrimination Against Women: Hearings on H.R. 16098 § 805 Before the Special Subcomm. on Education of the House Comm. on Education and Labor*, 91st Cong. 2 (1970) (quoting testimony of Rep. Edith Green, chair of subcommittee: "It is to be hoped that the enactment of the provisions would be of some help in eliminating the discrimination against women which still permeates our society" and that "our educational institutions have proven to be no bastions of democracy.")).

23. *Cohen II*, 991 F.2d at 893. There was an "absence of secondary legislative materials. Congress included no committee report with the final bill and there were apparently only two mentions of intercollegiate athletics during the congressional debate." *Id.*

24. *Id.*

25. *Id.* In fact, until Congress passed the Civil Rights Restoration Act in 1987, athletic programs were not placed firmly within the grip of Title IX. Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (codified at 20 U.S.C. §§ 1687-1688; 29 U.S.C. §§ 706, 794; 42 U.S.C. §§ 2000d-4a, 6107 (1994)). At issue was the Title IX phrase, "any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a) (1994). While some argued this meant that all programs within institutions receiving federal funds were subject to Title IX's provisions (the "institution-wide" viewpoint), others maintained that Title IX applied only to those "programs or activities" directly receiving the money (the "program-specific" view). Notably, in *Grove City College v. Bell*, 465 U.S. 555 (1984), the Supreme Court supported the "program-specific" view. The Court did hold the entire financial aid office to the burdens of Title IX, however, it also concluded that to assume Title IX applies to other programs that receive larger portions of school money as a result of federal assistance earmarked elsewhere in the institution would be "inconsistent with the program-specific nature of [Title IX]." *Id.* at 572. Because Title IX touched only those programs which received federal

Today, there are three sources of regulatory framework guiding the interpretation of Title IX: (1) the regulations promulgated by the Department of Education (DED) that govern, among other things, intercollegiate athletics;[26] (2) a policy interpretation issued by the same department's Office of Civil Rights (OCR);[27] and (3) an athletics investigator's manual published by the OCR to facilitate Title IX investigations of athletic programs.[28] Each layer of the regulatory framework is designed to assist enforcement and compliance with the statute, but application of the DED's regulations and the OCR's policy directives have only fueled the Title IX debate.

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funds and did "not trigger institutionwide coverage," *id.* at 573, athletic programs were largely immune because few receive federal funds directly. *Cohen II*, 991 F.2d at 894. In response to the Court's reading of Title IX, Congress passed the Civil Rights Restoration Act in 1987 reversing *Grove City*. Civil Rights Restoration Act of 1987, 20 U.S.C. §§ 1687-1688; 29 U.S.C. §§ 706, 794; 42 U.S.C. §§ 2000d-4a, 6107. Thus, institutions, on a whole, are subject to the tenets of Title IX provided any arm of the institution enjoys federal funding. 20 U.S.C. § 1687(2)(A). Although the Act does not mention athletics specifically, the floor debate is replete with comments regarding more opportunities for female athletes. *Cohen II*, 991 F.2d at 894 (describing comments from Senators Byrd, Hatch and Riegle regarding the development of female athletes). For this reason, universities readily admit that Title IX is applicable to their athletic programs. *Id.* ("[Brown] do[es] not challenge the district court's finding that under existing law, [its] athletic department is subject to Title IX."). *Id.*

26. Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance, 34 C.F.R. pt. 106 (1996).

27. Policy Interpretation, *supra* note 13, at 71,413.

28. Valerie Bonnette & Lamar Daniel, Office for Civil Rights of the Department of Education, Title IX Athletics Manual (1990) [hereinafter Investigator's Manual]. The Investigator's Manual was intended to supersede two similar investigator manuals issued by the OCR in 1980 and 1982. *Cohen I*, 809 F. Supp. 978, 984 (D.R.I. 1992).

A. *The Regulations*

Under Congressional direction, the DED[29] was given the task of implementing Title IX.[30] Its Title IX regulations were proposed in 1974, nearly two years after the passage of the statute.[31] Publication was followed by a public comment period where nearly 10,000 comments were received, the lion's share of which regarded athletics.[32] The proposed regulations were also submitted to Congress for a forty-five day review.[33] Congress could reject the regulations if they believed them to be "inconsistent with the act."[34] Congress, however, did not object, and the final regulations became effective in July 1975.[35]

The regulations address Title IX's application to an educational institution's entire operation, however, two sections specifically concern athletics.[36] Section 106.37(c), pertains to financial assistance and requires university grants of athletic scholarships

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29. The regulations were initially promulgated by the Department of Health and Welfare (HEW), with an effective date of July 1975. 40 Fed. Reg. 24,128 (1975). In 1979, Congress split the HEW into the Department of Health and Human Services (HHS) and the DED. *See* 20 U.S.C. §§ 3401-3510 (1994). "In a wonderful example of bureaucratic muddle," the HEW's Title IX regulations remained with the HHS, 45 C.F.R. pt. 86 (1996), while at the same time the DED copied them as part of its own "regulatory armetarium," 34 C.F.R. pt. 106 (1996). *Cohen II*, 991 F.2d at 895. Because the DED is charged with policing the regulations, *see* 20 U.S.C. § 3441(a)(1) (transferring all HEW education functions to the DED); *see also id.* § 3441(a)(3) (transferring education-related OCR work to the DED), and the courts have consistently turned to the DED regulations, this Note refers to the DED.

30. Education Amendments of 1974, Pub. L. No. 93-380, § 844, 88 Stat. 484, 612 (codified at 20 U.S.C. § 1681 (1988)) [hereinafter Javits Amendment] (requiring the HEW to issue regulations implementing Title IX with respect to education programs, including, "with respect to intercollegiate athletic activities, reasonable provisions considering the nature of the particular sports").

31. 39 Fed. Reg. 22,228-40 (1974).

32. *Id.* at 22,240; *see also Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor*, 94th Cong. 436-42 (1975) (testimony of Caspar Weinberger, Secretary of the HEW). Secretary Weinberger testified that "the most important issue in the United States today is intercollegiate athletics, because we have an enormous volume of comments about them." *Id.* at 439.

33. 20 U.S.C. § 1232(d)(1) (1988).

34. *Id.*

35. 34 C.F.R. § 106.1 (1996). Congressional inaction does not, however, necessarily proclaim belief in the regulations' consistency with the legislation's Congressional intent. Such regulations can be challenged as outside the authority granted to the implementing agency. 20 U.S.C. § 1232(d)(1) (1988).

36. 34 C.F.R. §§ 106.37 Financial Assistance, 106.41 Athletics.

to be substantially equal to the proportion of males and females participating in intercollegiate athletics.[37] Section 106.41, entitled, "Athletics,"[38] contains a general provision prohibiting discrimination based on sex,[39] and addresses when a university may operate teams segregated by gender.[40] This section also requires universities to "provide equal athletic opportunity for members of both sexes."[41]

The "equal opportunity" requirement has been the primary source of Title IX litigation and is the "critical issue"[42] in the *Cohen* case. In compelling universities to provide each sex with "equal athletic opportunity,"[43] the subsection lists a "non-exclusive compendium"[44] of factors to determine compliance. The subsection reads in full:

> (c) *Equal Opportunity.* A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:

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37. The regulation provides: "[Institutions] must provide reasonable opportunities for such award [of financial assistance] for members of each sex in proportion to the number of students of each sex participating in . . . intercollegiate athletics." 34 C.F.R. §106.37(c).

38. *Id.* § 106.41.

39. This section is nearly identical to Title IX, with a specific athletics application. The section reads in pertinent part: "No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient . . . ." *Id.* § 106.41(a).

40. The section provides:

> *Separate Teams.* Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where the selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport . . . .

Id. § 106.41(b).

41. *Id.* § 106.41(c).

42. *Cohen I*, 809 F. Supp. 978, 983 (D.R.I. 1992).

43. 34 C.F.R. § 106.41(c).

44. *Cohen II*, 991 F.2d 888, 896 (1st Cir. 1993).

(1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
(2) The provision of equipment and supplies;
(3) Scheduling of games and practice time;
(4) Travel and per diem allowance;
(5) Opportunity to receive coaching and academic tutoring;
(6) Assignment and compensation of coaches and tutors;
(7) Provision of locker rooms, practice and competitive facilities;
(8) Provision of medical and training facilities and services;
(9) Provision of housing and dining facilities and services;
(10) Publicity.[45]

While mandating that institutions provide "equal athletic opportunity" for both genders, the regulation specifically sets forth that failure to spend equal amounts on each gender will not alone constitute non-compliance.[46] Since the department specifically requires "equal opportunity" but not "equal expenditures," it is reasonable to infer that the DED was more interested in providing opportunities rather than mandating equal aggregate expenditures.[47] In fact, Brown University, and most other Title IX transgressors,[48] have been found in violation because they deprive opportunity rather than fail to spread athletic funds equally.[49]

The regulations were designed by the DED to implement and clarify Title IX.[50] However, when confronted with allegations of

45. 34 C.F.R. § 106.41(c)(1)-(10).

46. "Unequal aggregate expenditures for members of each sex . . . will not constitute noncompliance with this section . . . ." *Id.* § 106.41(c).

47. Consulting the corresponding Policy Interpretation bolsters this assertion. While factors two through ten are covered by one policy section, factor one, requiring "equal opportunity" is given its own separate section. The OCR's furnishment of a singular policy section devoted to this factor illustrates its distinction. *See* Policy Interpretation, *supra* note 13, at 71,417-18.

48. *See* Roberts v. Colorado State Bd. of Agric., 814 F. Supp. 1507 (D. Colo. 1993), *aff'd*, 998 F.2d 824 (10th Cir. 1993) (restoring women's softball); Favia v. Indiana Univ., 812 F. Supp. 578 (W.D. Pa. 1992), *aff'd*, 7 F.3d 332 (3d Cir. 1993) (granting a preliminary injunction reinstating women's gymnastics and field hockey); Pederson v. Louisiana State Univ., 912 F. Supp. 892 (M.D. La. 1996) (ordering the immediate accommodation of female athletes).

49. *Cohen II*, 991 F.2d at 896.

50. *See supra* note 29.

discrimination, courts examine the OCR's interpretation of these regulations.[51]

B. *Policy Interpretation*

Despite the issuance of the above regulations, there was still little consensus in university administrative circles on how to comply with Title IX.[52] Hoping to further clarify compliance requirements, encourage self-policing and considerably reduce the number of complaints, the OCR proposed a Policy Interpretation which expanded on the DED's regulations and interpretation of Title IX.[53] The Policy Interpretation solely addresses gender discrimination in intercollegiate athletics.[54]

The eleven page Policy Interpretation is primarily divided into three sections of regulatory compliance: "Athletic Financial Assistance"[55] (scholarships); "Equivalence in Other Athletic Benefits and Opportunities"[56] (equipment and supplies); and "Effective Accommodation of Student Interests and Abilities"[57] (meeting the wants and needs of both sexes). Each of the three policy sections corresponds directly to an athletic provision within the DED's regulations and is designed to clarify obligations under those regulations and Title IX.[58] These eleven pages are at the core of Title IX dis-

51. *Cohen I*, 809 F. Supp. 978 (D.R.I. 1992); *Cohen II*, 991 F.2d 888 (1st Cir. 1993); *Cohen III*, 879 F. Supp. 185 (D.R.I. 1995); *Cohen IV*, 101 F.3d 155 (1st Cir. 1996); *Roberts*, 998 F.2d 824; *Favia*, 812 F. Supp. 578; *Pederson*, 912 F. Supp. 892; Kelley v. Board of Trustees, 832 F. Supp. 237 (C.D. Ill. 1993), *aff'd*, 35 F.3d 265 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 938 (1995); Gonyo v. Drake Univ., 879 F. Supp. 1000 (S.D. Iowa 1995); Lichten v. State Univ., 646 N.Y.S.2d 402 (App. Div. 1996). *But see* Cook v. Colgate Univ., 802 F. Supp. 737 (N.D.N.Y. 1992) (focusing on whether the treatment of women's ice hockey was discriminatory by comparing the benefits distributed to the men's team and women's team).

52. Following promulgation of the regulations, more than 100 complaints, involving over 50 schools, were lodged. *Cohen II*, 991 F.2d at 896.

53. 43 Fed. Reg. 58,070-76 (1978). The proposed Policy Interpretation received over 700 comments and department staff made campus visits to apply the policy in "actual practice." Policy Interpretation, *supra* note 13, at 71,413. Following this period, the final Policy Interpretation representing the department's reading of the "intercollegiate athletic provisions of Title IX" was released in 1979. *Id.*

54. Policy Interpretation, *supra* note 13, at 71,413.

55. *Id.* at 71,415; *see also* 34 C.F.R. § 106.37(c) (1996).

56. Policy Interpretation, *supra* note 13, at 71,415; *see also* 34 C.F.R. § 106.41(c)(2)-(10).

57. Policy Interpretation, *supra* note 13, at 71,417; *see also* 34 C.F.R. § 106.41(c)(1).

58. Policy Interpretation, *supra* note 13, at 71,413.

putes. Generally, when investigating a claim, the OCR will explore all three areas,[59] and only "where unique circumstances justify limiting a particular investigation," will the OCR limit its scrutiny to one area.[60] In addition, courts have ruled that a university violates Title IX solely by failing the policy's third section, viz., ineffectively accommodating student interests and abilities, regardless of performance in the other areas.[61]

The Policy Interpretation's first section corresponds directly with section 106.37(c) of the regulations which requires universities to award scholarships to each gender in proportion to their relative participation rates in intercollegiate athletics.[62] The provision does not measure the proportion of scholarship funds spent on each gender in relation to their percentages of the total student body, but rather requires money be made available in substantial proportion to each gender's participation rate.[63] Compliance with this requirement is determined by dividing amounts of aid awarded to each sex by the numbers of male and female athletes, and then comparing the ratios.[64] For a university to be in compliance with this section, these ratios must be "substantially equal."[65] The Policy Interpretation, however, provides nondiscriminatory factors that may explain uneven scholarship allocation and leave a university in compliance despite a resulting disparity.[66]

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59. Investigator's Manual, *supra* note 28, at 7.

60. *Id.*

61. *Cohen II*, 991 F.2d 888, 897 (1st Cir. 1993).

> [A]n institution can violate Title IX even if it meets the "financial assistance" and "athletic equivalence" standards. In other words, an institution that offers women a smaller number of athletic opportunities than the statute requires may not rectify that violation simply by lavishing more resources on those women or achieving equivalence in other respects.

Id.; *see, e.g.*, *Cohen I*, 809 F. Supp. 978, 989 (D.R.I. 1992); Roberts v. Colorado State Bd. of Agric. 814 F. Supp. 1507, 1510-11 (D. Colo. 1993), *aff'd*, 998 F.2d 824 (10th Cir. 1993); Favia v. Indiana Univ., 812 F. Supp. 578, 584-85 (W.D. Pa. 1992), *aff'd*, 7 F.3d 332 (3d Cir. 1993).

62. 34 C.F.R. § 106.37(c).

63. Policy Interpretation, *supra* note 13, at 71,415.

64. *Id.*

65. *Id.*

66. *Id.* These nondiscriminatory factors are higher cost of tuition to out-of-state students and reasonable decisions regarding program development. For example, in the first factor, the presence of more out-of-state athletes of one gender would skew the ratio because of the increased tuition. The second nondiscriminatory factor would be present in developing a new team. Program development may require fewer scholarships in the first year. A university starting a new team may

Because Brown University, a member of the Ivy League, does not provide athletic scholarships, this section is inapplicable to the *Cohen* case.[67]

The Policy Interpretation's second section applies to athletic equipment, supplies and other benefits, and pertains directly to section 106.41(c)(2)-(10) of the regulations.[68] This section requires that each sex receive "equal athletic opportunity"[69] measured by similar allotments of items such as equipment, training facilities, practice times, tutoring and medical attention.[70] It also provides guidance in considering two additional components: recruitment of student athletes and provision of support services.[71] Compliance with this section is determined by comparing the availability, quality, and kinds of benefits, opportunities and treatment provided to each gender, with results indicating that program components are "equal or equal in effect."[72] So long as the overall effect of any difference is negligible, duplicate or identical equivalency is not required.[73] Similar to the financial assistance segment, universities may still adhere to this section despite unequal results, provided the inequities are attributable to nondiscriminatory factors.[74] Such nondiscriminatory factors include "unique aspects of particular sports,"[75] "legitimately sex-neutral" conditions related to special circumstances of a temporary nature, and unique demands

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not wish to grant all of its scholarships in the first year for, when those students graduate, the team is forced to replenish its top-flight talent with all first year students. However, the policy makes clear that these factors are considered only if they are "legitimate [and] nondiscriminatory." *Id.*

67. *Cohen I*, 809 F. Supp. 978, 989 (D.R.I. 1992). The OCR does not include need-based or merit-based aid awarded to athletes in its analysis unless "there are allegations . . . [that] award[s are given] differently to athletes than the general student body or on the basis of sex." Investigator's Manual, *supra* note 28, at 6. This also is not the subject of the *Cohen* dispute.

68. Policy Interpretation, *supra* note 13, at 71,415.

69. 34 C.F.R. § 106.41(c) (1996).

70. Policy Interpretation, *supra* note 13, at 71,415.

71. *Id.* at 71,417. Recruitment practices will be examined if "equal athletic opportunities are not present for male and female students." *Id.* The practices are examined to ascertain if the provision of equal opportunity will require modification of those practices. Support services inquiries analyze the amount of administrative, clerical and secretarial services provided to each gender's program. *Id.*

72. *Id.* at 71,415.

73. *Id.*

74. *Id.*

75. *Id.* This distinction is directly attributable to the Javits Amendment, *supra* note 30.

directly associated with operating a single-sex sports event.[76] The many nondiscriminatory factors listed by the Policy Interpretation suggest that disparities between men's and women's programs may be explained for legitimate reasons. Thus, this section has not proved fertile battleground in Title IX conflicts, and is of little significance in the *Cohen* dispute.[77]

The Policy Interpretation's third section corresponds exclusively with regulation section 106.41(c)(1) and delineates compliance with the regulation's requirement that universities "effectively accommodate" each gender's athletic interests and abilities.[78] This one component has been labeled the "heartland" of equal opportunity.[79] This section has been interpreted to require examination in two different areas: effective accommodation of skills and interests, and equal offerings of competition levels.[80] Courts, however, have downplayed the "levels of competition"[81] component, and the "effective accommodation test" has been the

76. Policy Interpretation, *supra* note 13, at 71,416. For example, different rules of play, rates of injury, or nature and replacement of equipment are recognized as nondiscriminatory factors. Thus, higher rates of injuries resulting from contact sports played by men cannot account for discriminatory allocations of medical attention. Similarly, recruitment disparities based on annual fluctuations in team needs and increased costs due to event management at football and basketball events, which typically draw large crowds, have been cited as justifying inequality in this section. *Id.*

77. *Cohen I*, 809 F. Supp. 978, 994-97 (D.R.I. 1992); *Cohen III*, 879 F. Supp. 185, 213 (D.R.I. 1995). Both district court opinions conduct cursory analyses of the Policy Interpretation's "Equivalence in Other Athletic Benefits and Opportunities" section. In *Cohen III*, the court uses a single paragraph to find Brown in violation of elements (2), (4), (5), (6) and (8). While a violation of this section was found, it was labeled "additional ground upon which to rest" the Title IX violation, and consumed little of the judicial resources employed in this dispute. *Cohen III*, 879 F. Supp. at 213.

78. Policy Interpretation, *supra* note 13, at 71,417.

79. *Cohen II*, 991 F.2d 888, 897 (1st Cir. 1993); *see also* Kelley v. Board of Trustees, 35 F.3d 265, 268 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 938 (1995) ("Chief among these, and of primary concern . . . is [§ 106.41(c)].").

80. *Cohen I*, 809 F. Supp. at 991 ("Thus, in determining compliance under § 106.41(c)(1), a court must conduct a two step analysis. First, . . . apply the three-part test, and second, . . . apply the two questions on competitive opportunities."); *see also* Policy Interpretation, *supra* note 13, at 71,418.

81. This analysis includes consideration of criteria reflecting scheduling and "competitive regions" to determine whether competitive opportunities are offered equally. Policy Interpretation, *supra* note 13, at 71,418.

centerpiece of nearly every Title IX dispute scrutinized by the courts.[82]

The effective accommodation test consists of a three prong analysis whereby a university must meet at least one of three benchmarks:[83]

> (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
> (2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or
> (3) Where the members of one sex 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 demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.[84]

With an affirmative answer to any of the above questions, a university is in Title IX compliance. Alternatively, a university is in violation if it fails all three prongs.[85]

Under the test as developed by the courts, the plaintiff must prove a disparity between a university's student body gender proportion and that of its student athletes, thereby proving the existence of an "underrepresented gender."[86] This satisfies prong one: lack of substantial proportionality.[87] Then, a plaintiff must satisfy

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82. *Cohen I*, 809 F. Supp. 978; *Cohen II*, 991 F.2d 888; *Cohen III*, 879 F. Supp. 185; *Cohen IV*, 101 F.3d 155 (1st Cir. 1996); *see, e.g.*, Kelley v. Board of Trustees, 832 F. Supp. 237 (C.D. Ill. 1993), *aff'd*, 35 F.3d 265 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 938 (1995); Roberts v. Colorado State Bd. of Agric., 814 F. Supp. 1507 (D. Colo. 1993), *aff'd*, 998 F.2d 824 (10th Cir. 1993); Horner v. Kentucky High Sch. Athletic Ass'n, 43 F.3d 265 (6th Cir. 1994); Favia v. Indiana Univ., 812 F. Supp. 578 (W.D. Pa. 1992), *aff'd*, 7 F.3d 332 (3d Cir. 1993); Pederson v. Louisiana State Univ., 912 F. Supp. 892 (M.D. La. 1996). *But see* Cook v. Colgate Univ., 802 F. Supp. 737 (N.D.N.Y. 1992), *vacated*, 992 F.2d 17 (2d Cir. 1993) (holding the university in violation based on expenditures, facilities, practice times, travel and coaching).

83. *Cohen II*, 991 F.2d at 897.

84. Policy Interpretation, *supra* note 13, at 71,418.

85. *Id.*

86. *Cohen II*, 991 F.2d at 902.

87. *Id.*

prong three by exhibiting an unmet interest and ability of the underrepresented gender: lack of full accommodation.[88] At this point, the burden shifts and the university must demonstrate a continuing program expansion for the underrepresented gender.[89] If the university cannot meet this burden, it has failed prong two: lack of continuing expansion.[90]

Application of the three prong test is the "most hotly contested legal issue"[91] in *Cohen*. As will be discussed in Part III, it is in exercising this test that courts have muddied the intent of the legislation, and converted a nondiscrimination statute into a quota system that violates equal protection. Before examining the *Cohen* application of the three prong test, the third layer of regulatory framework should be mentioned because it provides the OCR's personnel with procedures for conducting investigations.

C. *The Investigator's Manual*

The OCR may start its own investigations of university athletic programs in one of two ways: it can initiate the investigation itself,[92] or it can respond to a written complaint.[93] To assist in department compliance investigations, the OCR provided further guidance by publishing the Athletics Investigator's Manual (Manual) in 1990.[94] For the most part, the Manual traces the three levels of compliance set forth in the regulations and Policy Interpretation: athletic scholarships (§ 106.37), other athletic benefits and opportunities (§ 106.41(c)(2)-(10) and recruitment and support services), and effective accommodation of student interests and abilities (§ 106.41(c)(1)).[95] While investigations typically focus on all three general areas, the OCR will limit its scrutiny "where unique circumstances justify limiting a particular investigation."[96] Thus, the Manual permits an investigator to concentrate exclu-

88. *Id.*
89. *Id.*
90. *Id.*
91. *Cohen III*, 979 F. Supp. 185, 200 (D.R.I. 1995).
92. 45 C.F.R. § 80.7(a) (1996).
93. *Id.* § 80.7(b).
94. Investigator's Manual, *supra* note 28. This 1990 publication of the manual was crafted to supersede earlier versions issued in 1980 and 1982. *Cohen I*, 809 F. Supp. 978, 984 (D.R.I. 1992).
95. Investigator's Manual, *supra* note 28. Each one of the thirteen "program components" is devoted an individual section. *Id.*
96. *Id.* at 7.

sively on the effective accommodation test in measuring compliance.

Here, the Manual mimics the Policy Interpretation's three prong test by providing three consecutive steps for investigators.[97] In fact, investigators are advised to consider subsequent steps only if the prior step has not been met.[98] The Manual supplies investigators with details, thereby expanding on the three prongs. Regarding prong one, the Manual instructs that "no set ratio" constitutes substantial proportionality, but if a university's enrollment is 52% male and 48% female, then "ideally, about 52% of the participants of the athletics program should be male and 48% female."[99] In evaluating compliance with prong two, investigators are directed to inquire if a university has recently added sports, and if so, to discover the "number of participants affected and the percentage of gain to each program."[100] If a university has failed to add teams, a prong three inquiry requires the investigator to gather evidence on "why the attempts were unsuccessful."[101] With the statute, its regulations, the Policy Interpretation and the Investigator's Manual as the lens, we are ready to focus on *Cohen*.

II. *COHEN V. BROWN UNIVERSITY*

A. *Factual Background*

Brown University has been and is still considered to be a national leader in women's intercollegiate athletic opportunity.[102] As a Division I institution within the National Collegiate Athletic Association, Brown competes at the highest level of intercollegiate competition.[103] The development of Brown's women's athletic program began in 1971 when Brown merged with its neighboring wo-

97. Investigator's Manual, *supra* note 28, at 21.

98. *Id.* at 23-24.

99. *Id.* at 24.

100. *Id.*

101. *Id.*

102. In 1991, at the initiation of the suit, Brown offered 15 women's sports in intercollegiate competition. *Cohen I*, 809 F. Supp. 978, 980 (D.R.I. 1992). This array of offerings is nearly double the national average, and the percentage of Brown women playing sports is nearly triple national figures. Gary McCann, *Suit Captures Attention of College Leaders*, Greensboro News & Record, Dec. 18, 1995, at C4, *available in* 1995 WL 9458868.

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

men's counterpart, Pembroke College.[104] Subsequent to the merger, Brown "promptly upgraded Pembroke's rather primitive athletic offerings," and by 1977, the foundation for Brown's women's program was complete.[105] Brown added two additional women's sports, winter track in 1982,[106] and women's skiing in 1994,[107] but the thrust of the women's expansion was in the 1970s.

Brown operates its athletic program within a two-tiered funding system that includes "university-funded" and "donor-funded" varsity teams.[108] Both types of teams compete at, and are recognized as, varsity level. However, while university dollars support the university-funded teams, donor-funded teams must survive through private donations.[109] Brown's extensive varsity athletic menu offers university funding for thirteen women's sports and twelve men's sports.[110] In addition, three women's and four men's teams comprise the donor-funded squads.[111] This brought each gender's athletic offerings to sixteen sports apiece prior to the proposed cuts.

Responding to budget constraints, in May 1991, Brown discontinued university funding for four teams: men's golf, men's water polo, women's gymnastics and women's volleyball.[112] These actions were designed to yield $77,813 per annum.[113] While the budget cuts took substantially more dollars from the women's ath-

104. *Id.* at 981.

105. *Cohen II*, 991 F.2d 888, 892 (1st Cir. 1993).

106. *Cohen I*, 809 F. Supp. at 981.

107. *Cohen III*, 879 F. Supp. 185, 211 (D.R.I. 1995).

108. *Id.* at 189.

109. *Id.* The Policy Interpretation recognizes club teams as intercollegiate varsity "where they regularly participate in varsity competition." Policy Interpretation, *supra* note 13, at 71,413 n.1. Brown also provides club sports which receive funding from the Student Activities organization. *Cohen III*, 879 F. Supp. at 191. Club teams not competing at the varsity level are not included in the analysis. Policy Interpretation, *supra* note 13, at 71,413 n.1.

110. *Cohen III*, 879 F. Supp. at 188-89.

111. *Id.* at 189.

112. *Cohen I*, 809 F. Supp. 978, 981 (D.R.I. 1992). Despite the evaporation of school funding and reduction in status from university-funded to donor-funded, the four teams were still permitted to participate in intercollegiate competition provided they raised their own expenses. *Id.*

113. *Cohen II*, 991 F.2d 888, 892 (1st Cir. 1993).

letic budget, the percentages of women and men playing sports were unaffected.[114]

Led by gymnast Amy Cohen, members of the demoted gymnastics and volleyball teams brought suit under Title IX.[115] In a class action suit,[116] plaintiffs moved for a preliminary injunction asking the court to "(1) reinstat[e] the women's gymnastics and volleyball teams to full varsity status; and (2) prohibi[t] Brown from eliminating or reducing the status of any other . . . women's . . . teams . . ."[117] Specifically, they charged Brown with violating Title IX by deciding "to devalue the two women's programs without first making sufficient reductions in men's activities or, in the alternative, adding other women's teams to compensate for the loss."[118] Plaintiffs' claims rested on the three prong test contained within the OCR's Policy Interpretation.[119] The female athletes argued that what appeared to be evenhanded trimming was, in fact, the continuation of an ill-distributed athletic program prior to Brown's athletic pruning.[120]

The district court granted the plaintiffs injunctive relief. The court required Brown to restore the women's teams to university-funded varsity status, and prohibited Brown from eliminating or reducing the status or funding of any existing women's intercollegiate varsity team pending the outcome of a trial on the merits.[121] Brown appealed the district court's issuance of the injunction, but a First Circuit panel affirmed.[122] Calling this a "watershed

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114. *Id.* Prior to the cuts, women represented 36.7% of athletes and men 63.6%; cutting the teams would leave women with 36.6% of the athletic population and men 63.4%. *Id.*

115. *Id.* The Supreme Court has determined that Title IX is enforceable through an implied private right of action. Cannon v. University of Chicago, 441 U.S. 677, 703 (1979). The Court has also sanctioned damage awards for actions brought under Title IX and impliedly accepted the right to injunctive relief. Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 64-66, 71-73, 76 (1992).

116. Plaintiffs were certified as a class in a separate order prior to filing suit. *Cohen I*, 809 F. Supp. at 980.

117. *Id.*

118. *Cohen II*, 991 F.2d at 893.

119. *See supra* text accompanying note 84.

120. *Cohen III*, 879 F. Supp. 185, 187 (D.R.I. 1995).

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

122. *Cohen II*, 991 F.2d at 891. The First Circuit panel upheld the district court's ruling in all respects but one. The First Circuit held the district court erred in misallocating the burden of proof under prong three of the three part test. The district court had placed the burden on the defendant to prove prong three compli-

case,"[123] the First Circuit acknowledged the paucity of precedent and provided a detailed framework of Title IX analysis, thus becoming the first appellate tribunal to recognize the interpretive gloss placed on Title IX by the implementing agencies.[124]

In the trial on the merits, the district court relied heavily on the First Circuit opinion and its reading of the Policy Interpretation's three prong test presented in the injunction appeal. Failing all three prongs, Brown was found in violation of Title IX.[125] The district court ordered Brown to submit a comprehensive plan for complying with Title IX within 120 days of the judgment.[126] Finding Brown's proposal unpalatable, the district court subsequently rejected the plan and ordered specific relief.[127] Again, Brown appealed to the First Circuit citing errors in evidentiary rulings and an overspill of discretion in rejecting Brown's compliance plan and ordering specific relief in its place.[128] Brown also renewed its statutory and constitutional challenges.[129] Acknowledging confinement within the bounds of their previous holding and unpersuaded by Brown's rationale, the First Circuit again affirmed.[130]

B. *Judicial Interpretation*

Title IX comprises "rugged legal terrain."[131] With respect to athletics, Title IX's broad wording is administered through two DED regulations. Section 106.37(c)[132] pertains to athletic scholarships, and section 106.41 prohibits gender discrimination in intercollegiate athletic programs.[133] Most notably, section 106.41(c) requires universities to provide "equal athletic opportunity" for

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ance. The standard, instead, requires plaintiffs to prove they have interests not being met. *Id.* at 903.

123. *Id.* at 891.

124. *Id.* at 893 n.4.

125. *Cohen III*, 879 F. Supp. at 185-86.

126. *Id.* at 214.

127. *Cohen IV*, 101 F.3d 155, 162 (1st Cir. 1996) (citing Order of August 17, 1995, at 11 (requiring Brown to elevate and maintain at university-funded varsity status four women's teams: gymnastics, fencing, skiing and water polo)).

128. *Id.*

129. *Id.*

130. *Id.* While the First Circuit affirmed Brown's liability, the court reversed the district court's own specific relief proposal and afforded Brown the opportunity to submit another compliance plan. *Id.* at 187-88.

131. *Cohen II*, 991 F.2d 888, 891 (1st Cir. 1993).

132. 34 C.F.R. § 106.37(c) (1996).

133. *Id.* § 106.41.

both sexes,[134] and lists ten factors to consider in determining if this requirement is met.[135] The two regulatory sections are augmented by the OCR's Policy Interpretation[136] which suggests three compliance areas: (1) scholarships, (2) equivalence in athletic equipment and supplies, and (3) meeting the interests and abilities of both genders.[137] In assessing scholarships, the Policy Interpretation specifically cites section 106.37(c).[138] Likewise, the Policy Interpretation section appraising equivalent equipment and supplies refers to section 106.41(c), but only considers nine of the ten listed factors.[139] The remaining factor stands alone as a Title IX compliance indicator and asks whether each gender's athletic interests and abilities are being "effectively accommodate[d]."[140] A university's failure to answer this isolated question affirmatively is sufficient grounds to establish a Title IX violation regardless of its performance in respect to the other compliance factors.[141] To answer this crucial question the Policy Interpretation's third section provides the effective accommodation test.[142] This test provides three prongs which a university may employ to exhibit the effective accommodation of its students' interests and abilities,[143] and the application of the test serves as the impetus for *Cohen's* central issues.[144]

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134. *Id.* § 106.41(c).

135. *Id.* § 106.41(c)(1)-(10).

136. Policy Interpretation, *supra* note 13, at 71,413.

137. *Id.* at 71,414.

138. *Id.* at 71,415.

139. *Id.* (listing 34 C.F.R. § 106.41(c)(2)-(10) as the applicable factors).

140. 34 C.F.R. § 106.41(c)(1).

141. *Cohen II*, 991 F.2d 888, 897 (1st Cir. 1993); *see also Cohen I*, 809 F. Supp. 978, 989 (D.R.I. 1992); *Cohen IV*, 101 F.3d 155, 166 (1st Cir. 1996); Roberts v. Colorado State Bd. of Agric., 814 F. Supp. 1507, 1510-11 (D. Colo. 1993), *aff'd*, 998 F.2d 824 (10th Cir. 1993); Favia v. Indiana Univ., 812 F. Supp. 578, 584-85 (W.D. Pa. 1993), *aff'd*, 7 F.3d 332 (3d Cir. 1993).

142. Policy Interpretation, *supra* note 13, at 71,418.

143. *Id.*; *see also supra* text accompanying note 84.

144. Prior to its application of the appropriate regulatory layers, the court recognized the agency's influential role. The First Circuit granted the DED's regulations substantial deference, basing this level of respect on the *Chevron* test. *See* Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984) (holding where Congress has explicitly delegated responsibility to an agency, the regulation deserves "controlling weight"). Since Congress explicitly delegated that the DED "prescrib[e] standards for athletic programs under Title IX," the standards must be given high deference. *Cohen II*, 991 F.2d 888, 895 (1st Cir. 1993); *see also Cohen III*, 879 F. Supp. 185, 198-99 (D.R.I. 1995). *Cohen III* expands on this point and discards Brown's argument that the agency overran the boundaries of

the Congressional directive. Brown relied on the Javits Amendment which required the agency to promulgate provisions concerning the nature of particular sports. Javits Amendment, *supra* note 30. Brown argued that, to the extent the regulations go beyond that specific authorization, they are "interpretive" rather than "legislative" and entitled to less deference. *Cohen III*, 879 F. Supp. at 198. The court responded: "the directive that those regulations 'include reasonable provisions considering the nature of particular sports' does not limit the scope of the delegation; it merely compels the agency to include such provisions in its broader regulatory framework." *Id.* at 199 (citing Proposed Findings of Fact and Conclusions of Law of Pls. at 28). Similarly, the First Circuit ceded the same amount of deference to the Policy Interpretation because it is the agency's interpretation of the regulation. *Cohen II*, 991 F.2d at 896-97 (citing Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144 (1991)); *see also Cohen IV*, 101 F.3d 155, 173 (1st Cir. 1996) ("[A]n agency's construction of its own regulations is entitled to substantial deference . . . .") (quoting *Martin*, 499 U.S. at 150 (quoting Lyng v. Payne, 476 U.S. 926, 939 (1986))). The policy behind this is to take advantage of agencies' expertise. *Martin*, 499 U.S. at 151 ("Because applying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives, we presume that the power to authoritatively interpret its own regulations is a component of the agency's delegated lawmaking powers.").

While beyond the scope of this Note, arguments that the deference was in error are presentable. First, it cannot be denied that *Chevron* mandates considerable weight to agency regulations promulgated at the behest of Congress. However, even in *Chevron* the Court concedes, "[t]he judiciary authority is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to the clear congressional intent." *Chevron*, 467 U.S. at 843 n.9. Under the *Cohen* courts' interpretation of Title IX, the result is a single prong test centered on statistical balance between student enrollment and athletic participation. Congress would disavow this result because it runs counter to Title IX's subsection (b) prohibition on preferential treatment based on a statistical disparity, and ubiquitous comments in the legislative history on quota aversion. *See infra* note 287 and accompanying text. Second, while the regulations may deserve great deference, the Policy Interpretation is a lower level document not deserving of such respect. Unlike the regulations, Congress did not review, nor did the President approve, the Policy Interpretation. Pederson v. Louisiana State Univ., 912 F. Supp. 892, 911-12 (M.D. La. 1996) ("The Policy Interpretation has not been approved by either the President or Congress, however, and is also susceptible in part, to an interpretation distinctly at odds with the statutory language."). Title IX's section 1682 does authorize agencies to effectuate its provisions by issuing rules, regulations or orders of general applicability. 20 U.S.C. § 1682 (1994). However, "[n]o such rule, regulation or order shall become effective unless and until approved by the President." *Id.* Therefore, it can be argued that absent this Presidential blessing the Policy Interpretation should not be held in the same regard as the regulations which it purports to define. In *Cohen III*, this argument was rejected by the district court because the Policy Interpretation is not a "rule, regulation, or order, but is a guideline." *Cohen III*, 879 F. Supp. at 199. In *Pederson*, these "drawbacks" were both recognized and emphasized, but the court still acknowledged the Policy Interpretation definitely had "a role to play." *Pederson*, 912 F. Supp. at 912.

1. *Prong One: Substantial Proportionality*

The first prong asks "whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments."[145] Thus, the First Circuit held in *Cohen II*, Brown could "stay on the sunny-side of Title IX"[146] by maintaining gender parity between its student enrollment and its athletic program. Courts have expressed a need for a standard rigorous enough to fulfill the statute's purpose, yet flexible enough to excuse the minor fluctuations that may occur from year to year.[147] Despite this objective, the term "substantially proportionate" has never been defined with a firm figure.[148]

Expanding on the First Circuit holding, the district court in *Cohen III* addressed some contested issues related to prong one. First, the court settled the phrase "intercollegiate level participation" in light of Brown's unique two-tiered athletic program.[149] Finding that "donor-funded teams do engage in varsity level competition," the court included both university-funded and donor-funded squads in assessing prong one compliance.[150]

Second, the court defined the term "participation opportunities."[151] Specifically, it held that participation opportunities within a university are measured by counting the actual participants on intercollegiate teams.[152] In doing so, it disposed of Brown's argument that the term "participation" holds a different definitional footing than "participation opportunity." Brown contended not all opportunities were being taken advantage of. It argued that there were slots on squads going unutilized, therefore, athletic participation opportunities should be measured by calcu-

145. Policy Interpretation, *supra* note 13, at 71,418.

146. *Cohen II*, 991 F.2d at 897-98.

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

148. We can, however, glean a standard from a case which found a prong one failure with a 10.5% disparity between university enrollment proportions and athletic participation rates. Roberts v. Colorado State Bd. of Agric., 814 F. Supp. 1507 (D. Colo. 1993), *aff'd*, 998 F.2d 824 (10th Cir. 1993).

149. *Cohen III*, 879 F. Supp. at 200-01.

150. *Id.* at 201.

151. *Id.* at 202. The court notes that in *Cohen II*, the First Circuit did not define this term. It goes on to remark that while the First Circuit did not define the term, it "explicitly adopted" the definition set forth by the district court. *Id.* at 202-03.

152. *Id.*

lating each team's filled and unfilled athletic slots.[153] For example, if the field hockey team has twenty roster spots, but only fifteen are filled, the remaining five spots should count as participation opportunities. The court rejected this reasoning holding that the concept of any measure of available but unfilled athletic slots does not comport with reality.[154]

The primary basis for the court's holding is its determination that Brown "predetermines" the number of athletic positions available to each gender.[155] The court cited the consequential roles of recruiting, admissions practices, coaches' preferences in maintaining team sizes and the selection of sports Brown offers.[156] Brown was found to expect the gender mix of interested athletes on campus because it selects the teams it will field and subsequently recruit, and it admits students based on those projected needs.[157] Therefore, the court concluded that Brown predetermines the gender balance of its athletic program, and therefore, the existence of an available but unfilled slot is imaginary.[158]

Eschewing the predetermination concept, Brown offered a different and independent interpretation of "participation opportunity" in the prong one context.[159] Brown defined a participation opportunity as a chance for interested students to participate in athletics.[160] Brown maintained that students would take advantage of these opportunities in accordance with the relative interest of their respective gender, reflected by their participation rates.[161] Thus, Brown argued that equal participation opportunities are provided if the gender mix within the varsity athletics program is substantially proportionate to the ratio of men and women inter-

153. *Id.* at 203.

154. *Id.* at 203 n.36.

155. *Id.* at 202-03.

156. *Id.* at 202.

157. *Id.*

158. *Id.* The court notes that because some sports, by their nature require more players, the selection of sports offerings predetermines the gender balance. Recruitment and coaching preference are also emphasized: "[m]ost coaches testified that they determine an ideal team size and then recruit the requisite number of athletes to reach that goal. Because recruits constitute the great majority of athletes" Brown should expect the gender mix of athletes on campus. *Id.*

159. *Id.* at 204.

160. *Id.*

161. *Id.*

ested in varsity athletics.[162] Borrowing logic from Title VII employment discrimination cases, Brown sought to equate Title VII's qualified applicant pool with Brown's interested potential varsity athlete pool.[163] For a discrimination analysis, Title VII jurisprudence requires a comparison between an employer's work force demography and the qualified applicant pool, not the general population as a whole.[164] By analogy, Brown sought to limit Title IX's relevant inquiry to a comparison between its athletic program demography and the interested varsity athlete pool, not the entire student enrollment.[165] The court dispensed with this interpretation on two bases: by distinguishing Title IX and Title VII, and by noting the difficulties inherent in measuring individual interests.

First, Brown's likening of Title IX to Title VII was termed "inapposite."[166] The First Circuit, in sustaining the preliminary injunction in *Cohen II*, had already rejected Brown's Title IX analogy to Title VII in a different context.[167] The First Circuit found Title IX broader than Title VII in that the former applies to all aspects of education, whereby the latter only affects employment matters.

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162. The court illustrated the concept as follows:

> Defendants explain their theory with a hypothetical. In this hypothetical there are 1000 men and 1000 women in the student body at a university that has 150 gender-neutral athletic slots available. 500 men and 250 women in the student body (50% of men enrolled and 25% of women enrolled) are interested in filling these spots, and a random lottery is conducted in which students are offered a guaranteed position on the team. Where equal numbers of randomly selected men and women are offered such an opportunity, 50% of the men and 25% of the women will accept. Thus, although equal numbers of men and women are offered a position, 100 men and 50 women, due to the relative interest of their gender, will fill the 150 slots.

Id. at 204 n.40 (referring to testimony of Dr. Finis Welch, Trial Tr. Nov. 22, 1994, at 13-15, 19-24).

163. *Id.* at 205.

164. *Id.*

165. *Id.*

166. *Id.*; *c.f.* Kelley v. Board of Trustees, 35 F.3d 265, 270 (7th Cir. 1994) ("Congress itself recognized that addressing discrimination in athletics presented a unique set of problems not raised in areas such as employment and academics.") (citing *Sex Discrimination Regulations, Hearings Before the Subcomm. on Post Secondary Educ. of the Comm. on Educ. and Labor*, 94th Cong. 46, 54, 125, 129, 152, 177, 299-300 (1975); 118 Cong. Rec. 5807 (1972) (statement of Sen. Bayh); 117 Cong. Rec. 30,407 (1971) (same)).

167. *Cohen III*, 879 F. Supp. at 204 n.42; *see also Cohen II*, 991 F.2d 888, 902 (1st Cir. 1993) (rejecting Title VII comparison for burden of proof on prong three elements).

Contemporaneously, and by contrast, Title IX was also found to be more narrow than Title VII in that the former applies only to schools receiving federal assistance as the latter relates to virtually all employers.[168] The First Circuit also found a distinction in how each statute effectuates its mandates. The court found Title IX "largely aspirational."[169] The statute sets wide guidelines whereby universities have choices in adapting to its parameters.[170] On the other hand, Title VII is labeled "preemptory."[171] Employers subjected to its tenets must adhere to strictly prescribed standards.[172] Thus, Title VII is a tight fit, whereas Title IX is "loosely-laced."[173]

The district court adopted the distinguishing points set forth by the First Circuit in *Cohen II*, and added a few in rejecting Brown's "attempt to superimpose the meaning of discrimination in Title VII upon the plain language of Title IX."[174] The district court discarded Brown's Title VII analogy because unlike Title VII, where gender-neutral job openings are to be filled without gender consideration, Title IX applies to athletics which do have specific gender requirements.[175] Therefore, the Title VII concept of the "qualified pool" was found to have no place in the Title IX athletics analysis because women are not "qualified" to compete for positions on men's teams and vice-versa.[176]

Second, the district court noted the difficulty with, and even the impossibility of assessing the required interests in compiling such a pool.[177] The result would unnecessarily burden student plaintiffs, courts and universities who must monitor compliance.[178] The court noted that burdens on schools wishing to maintain compliance would be especially harsh because of the difficulties in ad-

168. *Cohen II*, 991 F.2d at 902.
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*
174. *Cohen III*, 879 F. Supp. 879, 205 n.42 (D.R.I. 1995).
175. *Id.* at 205.
176. *Cohen IV*, 101 F.3d 155, 177 (1st Cir. 1996).
177. *Cohen III*, 879 F. Supp. at 205 ("Under the defendants' theory, a concerned party must undertake a complicated assessment of 'interested' students before making any comparisons. Any such assessment will be meaningless since it is an impossible task to quantify latent and changing interests.").
178. *Id.* at 205-06.

justing program offerings with the constantly changing interests of male and female students.[179] The court found the difficulties in assessing the relevant interests to be compounded when confronted with the question of *who* to survey in developing the qualified applicant pool.[180] The problems associated with each potential survey group confirmed the court's "initial conclusion" that Brown's Title VII analogy was incorrect.[181] The court shunned any suggestion that its interpretation resulted in quotas requiring uni-

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179. *Id.* at 206 n.44.

180. *Id.* at 206.

181. *Id.* The court discussed and summarily rejected each of the potential survey groups for developing the pool of interested and able athletic participants. First, a survey population based upon students matriculated at Brown was rejected. Since Brown already predetermines who arrives on campus, "to . . . suggest that Brown must only satisfy the relative interests of students present on campus is circular." *Id.* Therefore, the court maintained that any meaningful survey pool must be comprised of a larger group.

A potential survey pool of Brown applicants was also renounced. This group, *too*, was held *not* broad enough because it overlooks those who do not apply because their sport is not offered at Brown. Additionally, "it revisits the conceptual problems inherent in attempting to measure 'interests,' " because a response to one of many questions on Brown's application cannot be considered a reliable indication of which interests will yield action. *Id.*

Finally, the court declared the "most appropriate survey population" would comprise all prospective Brown applicants if Brown offered their favored sport. *Id.* at 207. Because this entails a national search, "the difficulties in identifying all such persons in order to construct a representative survey population may be insurmountable." *Id.* Furthermore, even this sweeping search would fall short of identifying interests in sports like crew, which typically do not develop until after enrollment. *Id.* at 207. Nor would this national survey measure the extent to which additional opportunities drive interests.

Several of the court's "problems" with the potential pools seem misguided. First, the entire purpose of Title IX is for a university to provide "equal athletic opportunity" to *that* university's students. *See* 34 C.F.R. § 106.41(c) (1996). Therefore, not only is the suggestion of matriculating students as a survey group proper, but it is the only plausible group under the dictates of Title IX. Second, the court's suggestion that a national survey would fail to identify interests in sports, like crew, which do not develop until a student is on campus, overexaggerates the potency of such interests. It seems clear that in conducting a nationwide search, potential crew enthusiasts would hardly skew the numbers of men's and women's interests in athletics in general for purposes of developing a "qualified applicant pool." Furthermore, even if it did, it could almost certainly be said that it would have an equal effect on each gender's interests and participation ratios. *See Cohen III*, 879 F. Supp. at 191-92 (listing participation numbers for every sport and noting that women's crew has 50 participants and men's crew has 45). Finally, the court's previous assertion that Brown "predetermines" its athletic makeup is contradictory with its current suggestion that interests can develop after matriculation. *See* discussion *supra* Part II.B.1.

versities to satisfy women's opportunities in excess of their relative interests because aside from prong one's substantially proportionate plank, the court noted the existence of the two separate and remaining compliance prongs.[182] The court stated, "[i]n this way, the Policy Interpretation accommodates the equal opportunity mandate of Title IX without *requiring* strict quotas."[183]

After disposing of these "provocative arguments"[184] and settling these interpretive issues, the court applied its prong one interpretation to the statistical facts of Brown's athletic line-up. The district court found that in 1993-94, Brown provided 479 university-funded varsity slots for men and 312 such slots for women. Brown also furnished an additional 76 donor-funded varsity slots for men and 30 such slots for women.[185] Therefore, as a total, Brown provided 555 (61.87%) intercollegiate athletic opportunities to men and 342 (38.13%) to women. During that same period, Brown's undergraduate enrollment consisted of 5722 students, of which 2796 (48.86%) were men and 2926 (51.14%) were women.[186] Accordingly, the court found a 13.01% disparity between female participation in intercollegiate athletics and female student enrollment.[187] Because these two gender ratios were not substantially proportionate, Brown had violated prong one.

The First Circuit dubs this prong a "safe harbor;"[188] if a university meets the numbers in substantial proportion, it is safe. The concept guarantees that no further inquiry will be conducted, so the manner in which these proportionate numbers are achieved is irrelevant. However, when a university fails this prong a reviewing court must examine the remaining two prongs.[189]

2. *Prong Two: Continuing Expansion*

Even if an institution fails prong one, it can still achieve Title IX compliance provided it can show "a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the members of [the under-

182. *Cohen III*, 879 F. Supp. at 207.
183. *Id.*
184. *Id.* at 188.
185. *Id.* at 211.
186. *Id.*
187. *Id.*
188. *Cohen II*, 991 F.2d 888, 897 (1st Cir. 1993).
189. *Id.*

represented] sex."[190] Specifically, this second prong allows a university to achieve compliance through progressive efforts in meeting the needs of the underrepresented gender.[191] So long as a university is resolute in its commitment to meet the underrepresented gender's increasing interests and abilities, the university will satisfy prong two, and need not obtain complete gender parity in one immediate surge.[192]

Prong two interpretation has set forth two meaningful principles. First, program expansion may not be exhibited by slashing men's programs in order to increase the overall female percentage within the school's athletic scheme.[193] The "ordinary meaning of the word 'expansion' may not be twisted" to find increases when in actuality decreases result.[194] Therefore, prong two requires demonstration of actual program growth.[195] Second, expansion must be linked to the number of opportunities offered.[196] Interestingly, Brown argued for a broad reading of prong two, permitting compliance upon evidence of expansion in other women's program components such as coaches, competition levels and admissions practices, rather than restricting program expansion to numerical participation.[197] Citing the Policy Interpretation's direct link to the number of teams and athletes participating in intercollegiate competition, regardless of whether the quality of the program has improved, the district court applied the more narrow interpretation.[198]

In applying prong two to the facts, the court acknowledged Brown's "impressive history" of growth in the 1970s.[199] Despite this recognition "for supercharging a low-voltage athletic program in one burst rather than powering it up over a longer period," Brown could not be held forever immune via prong two.[200] The court recognized that since 1977, Brown had added only two sports

190. Policy Interpretation, *supra* note 13, at 71,418.
191. *Cohen II*, 991 F.2d at 898.
192. *Id.*
193. *Cohen III*, 879 F. Supp. 185, 207 (D.R.I 1995).
194. *Id.* (citing Roberts v. Colorado State Bd. of Agric., 998 F.2d 824, 830 (10th Cir. 1993)).
195. *Id.*
196. *Cohen I*, 809 F. Supp. 978, 991 (D.R.I. 1992).
197. *Id.*
198. *Id.*
199. *Cohen III*, 879 F. Supp. at 211.
200. *Cohen II*, 991 F.2d 888, 903 (1st Cir. 1993).

to the women's athletic forum: indoor track in 1982 and skiing in 1994.[201] "The very length of this hiatus"[202] coupled with the fact that percentages of female athletic participants at Brown have remained steady since the 1970s, left the court to conclude that Brown had failed prong two.[203]

3. *Prong Three: Full Accommodation*

Even when it has been shown that an institution's intercollegiate athletics program is not substantially proportionate to the gender ratio of its undergraduate enrollment, and the university is unable to display a continuing practice of program expansion, universities will still be considered in compliance with Title IX provided the underrepresented gender fails to show interest not being met by existing programs.[204] The third prong asks whether the interests and abilities of the underrepresented gender have been "fully and effectively accommodated by the present program."[205] This sets a high standard and is not "a sport for the short-winded."[206] The accommodation must be *full* and *effective* and not merely some lower level of serving the interest.[207]

Despite the arduous standard universities face to comply with prong three, the district court made the assessment easy.[208] If the underrepresented gender presents interests not pacified by existing programs, an institution necessarily fails this part of the test.[209] Thus, provided that athletes of the underrepresented gender have both the interest and ability to compete, the university must field a squad.[210] The court added, however, that some female students interested in a sport will not "ipso facto require" the school to provide them a varsity team.[211] Instead, the third prong requires a reasonable expectation of competition within that region

201. *Cohen III*, 879 F. Supp. at 211.
202. *Cohen II*, 991 F.2d at 903.
203. *Cohen III*, 879 F. Supp. at 211.
204. *Id.* at 207-08.
205. Policy Interpretation, *supra* note 13, at 71,418.
206. *Cohen II*, 991 F.2d at 898.
207. *Id.*
208. *Cohen III*, 879 F. Supp. at 208.
209. *Id.*
210. *Id.*
211. *Cohen II*, 991 F.2d at 898.

in order to satiate the underrepresented gender's unmet interest.[212]

Brown argued that the district court's interpretation of prong three is contrary to Title IX. Specifically, Brown contended that schools should be able to meet interests and abilities of each gender in direct proportion to each gender's comparative level of interests.[213]

The First Circuit illustrated and rejected Brown's argument with an example of a hypothetical university, Oooh U.[214] University enrollment was set at 1000 men and 1000 women (a one-to-one ratio), and 500 men and 250 women comprised the number of students interested and able to compete in intercollegiate athletics (a two-to-one ratio).[215] Brown's position was that Oooh U. must provide athletic opportunities in line with the gender ratio of interested and able students.[216] For example, if Oooh U. has 150 athletic opportunities, Brown's view was that 100 would serve men and 50 would serve women.[217]

The First Circuit classified this approach as "myopic," and charged Brown with reading "full" out of its duty to accommodate fully and effectively.[218] The court held that in the absence of prong one or prong two adherence, compliance with prong three requires

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212. *Cohen III*, 879 F. Supp. at 208 (citing Policy Interpretation, *supra* note 13, at 71,418). For example, interested and able women at the University of Florida are unlikely to obtain an alpine ski team.

213. The position that Title IX requires institutions to meet the interests and abilities of women to the same degree as they meet the interests of men has been advanced under different prongs at different stages of the litigation. *Cohen IV*, 101 F.3d 155, 174 n.13 (1st Cir. 1996). The court states:

> We note that Brown presses its relative interests argument under both prong one and prong three. At trial, Brown argued that "in order to succeed on prong one, plaintiffs bear the burden of proving that the percentage of women among varsity athletes is not substantially proportionate to the percentage of women among *students interested in participating in varsity athletics*."

Id. (quoting *Cohen III*, 879 F. Supp. at 205). At the preliminary injunction stage, Brown propounded the same relative interests argument under prong three. *Id.* (citing *Cohen III*, 879 F. Supp. at 205 n.41).

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

215. *Id.*

216. *Id.*

217. *Id.* The court also adds, "[u]nder this view, the interest of 200 women would be unmet—but there would be no Title IX violation." *Id.* Apparently, the fact that 350 men still go unserved under this regime goes unnoticed by the court.

218. *Id.*

that Oooh U. serve all 250 women's interests and abilities, fully accommodating them so long as they remain the underrepresented gender in terms of athletic opportunity.[219] The fact that under this holding 250 men go disappointed while no women are shut out is not a concern of Title IX, according to the court.[220] The court also labeled Brown's position "poor policy," citing formidable problems with quantifying interests and burdens placed on universities monitoring self-compliance.[221] By contrast, the court applauded its "simpler reading" as far more serviceable.[222]

Brown, on the other hand, considered this the very type of discrimination Title IX was designed to squelch. Brown's position was that men generally maintain a higher interest level in athletics than women, and since the court's interpretation did not take into account each gender's relative interests, the court was serving women to a greater degree than men, disadvantaging men as a class based on gender.[223] Brown asserted that if "full and effective accommodation" of student's interests were as the court had re-

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219. *Id.* Thus, the law requires Oooh U., so long as the gender ratio of the student body is 50%-50%, to accommodate all interests of any gender whose athletic makeup is less than 50% until the 50%-50% balance in the athletic department is achieved. The exception to this rule would be prong two, whereby a university could receive a temporary stay of a noncompliance finding by showing a continuing practice of program expansion. In other words, prong two is the equivalent of a lay away plan for those schools who have not expended any expansionist efforts, and who wish to do so on an incremental basis.

220. *Id.* ("The fact that the overrepresented gender is less than fully accommodated will not, in and of itself, excuse a shortfall in the provision of opportunities for the underrepresented gender.").

221. *Id.* at 900.

222. *Id.*; *see also Cohen III*, 879 F. Supp. 185, 209-10 (D.R.I. 1995) ("Because no one measure and no identifiable population adequately establish relative interest, defendants effectively demonstrated how their interpretation of prong three would impose an insurmountable task on Title IX plaintiffs.") (citation ommitted). In response, Brown presented the OCR's explicit advisory of the use of surveys to determine interests and abilities contained in the Investigator's Manual. Investigator's Manual, *supra* note 28, at 27. When presented with this evidence, the court deflected it, distinguishing the manual's suggested use of surveys as a tool to identify which sports to create after a violation has been found: "it would not be used to make a determination in the first instance." *Cohen III*, 879 F. Supp. at 210 n.51. This interpretation of the manual by the court is unquestionably contrary to its previous assertion that the manual was published merely to "provide guidance." *Cohen I*, 809 F. Supp. 978, 984 (D.R.I. 1992).

223. *Cohen II*, 991 F.2d at 900.

solved, then the provision violated the equal protection guarantees of the Fifth Amendment.[224]

The district court read Brown's interpretation to disadvantage women and stunt the remedial purposes of Title IX by confining program expansion for the underrepresented gender "to the status quo level of relative interests."[225] Brown's equal protection argument was disposed of on two grounds. First, the court pointed to the lack of evidence that men are more likely than women to play sports.[226] The First Circuit noted that both Congress and administrative agencies had urged that women, when given the opportunity, will participate in athletics in numbers equal to men. The court then remarked that, absent any proof that men are more interested in athletics than women, its interpretation would not infringe upon the Fifth Amendment.[227] Second, the court noted that, even assuming the scales were tilted in favor of women, it would find no constitutional infirmity because Congress has broad powers under the Fifth Amendment to remedy past discrimination.[228]

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224. *Id.*

225. *Cohen III*, 879 F. Supp. at 209.

226. *Cohen II*, 991 F.2d at 900.

227. *Id.*

228. *Id.* at 901 (citing Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 565-66 (1990) (noting that Congress need not make specific findings of discrimination to grant race-conscious relief); Califano v. Webster, 430 U.S. 313, 317 (1977) (upholding social security wage law that benefited women in part because its purpose was "the permissible one of redressing our society's longstanding disparate treatment of women")). Recognizing the breadth of the arguments regarding the proper standard for Congress to exercise its remedial powers for sports discrimination, this Note confines itself to addressing the three part test, the *Cohen* courts' interpretation of it and the resulting quota program that violates the legislative intent and equal protection precedent. However, the *Cohen* courts' reliance on *Metro Broadcasting* must be addressed. *Metro* has since been overruled in part. Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2113 (1995). The application of the *Adarand* principles in the context of Title IX and intercollegiate athletics could cast considerable doubt on the continued validity of substantial proportionality. *Metro* subjected a race-conscious classification to intermediate scrutiny. *Metro*, 497 U.S. at 564. Under the intermediate scrutiny standard, the Court will uphold a classification if it serves an "important" government interest and has a "substantial relationship" to the achievement of that goal. John E. Nowak & Ronald D. Rotunda, Constitutional Law §14.3, at 603 (5th ed. 1995). Compensating women as a class for past discrimination has been considered such an important interest. *Webster*, 430 U.S. at 317. These remedial measures are considered "benign gender classification." Nowak & Rotunda, *supra*, §14.23, at 782. In *Adarand*, the Court explicitly overruled *Metro* and held "all racial classifications . . . must be analyzed by a reviewing court under strict scrutiny [because] there is no way of determining what classifications are 'benign' or 'remedial.'" *Adarand*, 115 S. Ct. at 2112-13.

Finally, Brown argued that the *Cohen* courts had created a quota scheme by blending prongs one and three, leaving each without distinct meaning.[229] Brown argued that because "strict proportionality" serves as the keystone to both prong one and prong three, the *Cohen* courts had eliminated the "raison d'être" for prong three and in reality created a one prong test.[230] The district court acknowledged that prong three compliance rests upon the arch of prong one's proportionality, but denied that the test left prong three meaningless.[231] The court suggested the possibility of schools, who, unlike Brown, may possess a sparseness of athletic talent among the underrepresented gender and may avail themselves of prong three by pointing to this scarcity and justifying the prong one failure.[232]

Following the discussion of these issues, the district court applied prong three generally to Brown's athletic program. The court found Brown had failed to provide for four women's teams with the interest and ability to compete at Brown's highest varsity level.[233] In assessing compliance, Brown's two-tiered athletic system pro-

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Strict scrutiny, on the other hand, requires the classification to serve a "compelling" government interest and be "narrowly tailored" to promote that interest. Nowak & Rotunda, *supra*, §14.3, at 602. While *Cohen* applies to gender, and *Metro* to race, Chief Judge Torruella states in his *Cohen IV* dissent: "I nevertheless think that *Adarand* compels us to view so-called 'benign' gender-conscious governmental actions under the same lens as any other gender-conscious governmental actions." *Cohen IV*, 101 F.3d 155, 190 (1st Cir. 1996) (Torruella, C.J., dissenting). While the law may be hazy regarding the proper standard of scrutiny to apply, it is clear that the *Cohen* courts have interpreted the three prong test in a way that results in quotas and serves women to a greater degree than men. The *Cohen* courts created a gender classification that must be subject to either strict or intermediate review. In either case, the *Cohen* courts have not referenced any standard. The issue of which standard to apply is left for further study.

229. *Cohen III*, 879 F. Supp. at 210.

230. *Id.* (quoting Trial Tr. Dec. 16, 1994, at 74-75).

231. *Id.* at 210.

232. *Id.* Under this interpretation prong three cannot be considered an independent prong of compliance, but is more reasonably designated as the "impossibility excuse" similar to the theory of impossibility in contract law. Here, the court bases all compliance on strict proportionality, hence, those numbers become the duty under the "contract." If a university has accommodated every interested and able woman, yet, still does not approach proportionality because of a dearth of interested women, then the school is rendered without the resources, through no fault of its own, to reach the contract term of strict proportionality. Despite the court's assertion to the contrary, this can hardly be considered an independent prong.

233. *Id.* at 212.

vided a twist and "a new application of prong three."[234] Brown was found in violation of prong three on two counts.

First, Brown failed to accommodate members of the underrepresented sex fully and effectively by failing to elevate them from below intercollegiate status to intercollegiate status despite a display of interests and abilities.[235] Specifically, the court found Brown had failed to accommodate women fully and effectively by maintaining women's water polo at club status and by demoting women's gymnastics to donor-funded when each had demonstrated the requisite interest and ability to compete as an intercollegiate varsity team.[236] The court further held that absent university funding, neither team could compete at the intercollegiate varsity level.[237] Thus, because the plaintiffs demonstrated the requisite interests and abilities to be viable varsity teams and Brown failed to meet those interests, Brown violated prong three.[238]

Second, Brown failed to accommodate members of the underrepresented gender fully and effectively by failing to maintain and support women's donor-funded teams at Brown's highest level, preventing these athletes from fully developing their competitive abilities and skills.[239] Specifically, the court charged that Brown's failure to operate women's fencing and women's skiing at the uni-

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234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.* Women's water polo was maintained as a club sport, received no university athletic department support and did not "regularly compete in varsity competition." Policy Interpretation, *supra* note 13, at 71,413. For this reason, the court found that women's water polo was not a varsity sport. *Cohen III*, 879 F. Supp. 185, 200-01 (D.R.I. 1995). However, despite the demotion of the women's gymnastics team from university-funded to donor-funded status, it still competed at varsity level competition and could be considered a varsity sport. Policy Interpretation, *supra* note 13, at 71,413 n.1. The court's decision not to include gymnastics for prong three purposes was based on its determination that the women's gymnastics team "will in fact cease to exist, in a few seasons . . . in the absence of university funding." *Cohen III*, 897 F. Supp. at 212.

238. *See Cohen II*, 991 F.2d 888, 906 (1st Cir. 1993). The court states:

> If a school, like Brown, eschews the first two benchmarks of the accommodation test, electing to stray from substantial proportionality and failing to march uninterruptedly in the direction of equal athletic opportunity, it must comply with the third benchmark. To do so, the school must fully and effectively accommodate the underrepresented gender's interests and abilities . . . .

Id.

239. *Cohen III*, 879 F. Supp at 212.

versity-funded level prevented these women from reaching their full athletic potential.[240] In computing participation opportunities for prong one compliance, the court counted these donor-funded slots in compiling participation ratios; whereas for prong three assessment, the court excluded these positions because donor-funded slots possess such "qualitative differences" from university-funded slots that they cannot be considered full and effective accommodation.[241] The court recognized that prong three had never been read in this regard, but contributed this fact to Brown's unique two-tiered program.[242] Upon the above evidence and reasoning, the court found Brown in violation of prong three.

Consequently, Brown was held to be in violation of Title IX.[243] The *Cohen* courts found a prong one failure because Brown's participation opportunities, as measured by actual team participants,

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240. *Id.* The court cited the women's fencing team and ski team as having demonstrated both the interests and abilities to be university-funded varsity rather than donor-funded varsity.

241. *Id.* This is especially troubling. First, the Policy Interpretation specifically makes reference that these donor-funded teams are to be considered intercollegiate varsity so long as they "regularly compete in varsity competition." Policy Interpretation, *supra* note 13, at 71,413 n.1. This has been shown to be the case for these sports. *Cohen III*, 879 F. Supp. at 201. Second, for the purposes of prong one statistics, these donor-funded teams were included, both for *men* and women. This inclusion increased the male-female differential by 46 slots (76 donor-funded varsity slots for men and 30 donor-funded slots for women). *Cohen III*, 879 F. Supp. at 211. However, the court then exempted these opportunities as unmerited under prong three analysis—raising the level for women without reference to the men on donor-funded squads and how these 76 slots are to be considered. Furthermore, if the court felt donor-funded teams did not rise to a varsity-type level and consequently excluded them from the prong one inquiry, Brown's proportionality disparity would then be reduced to 11%. *See, e.g.*, *Cohen III*, 879 F. Supp. at 191 n.16. If available but unfilled slots had been considered as "participation opportunities" in the prong one calculus, *see* discussion *infra* Part IV.A, it is most likely that Brown's proportionality ratio would be below the 10.5% disparity found in *Roberts v. Colorado State Board of Agriculture*, 814 F. Supp. 1507 (D. Colo. 1993), *aff'd*, 998 F.2d 824 (10th Cir. 1993). *See supra* text accompanying note 148. Thus, Brown could conceivably have been able to avail itself of the "safe harbor." *See supra* text accompanying notes 188-89.

242. *Cohen III*, 879 F. Supp. at 212. The court stated:

> Brown's restructured athletic program cannot be used to shield it from liability when in truth and in fact it does not fully and effectively accommodate the women athletes participating on donor-funded teams. It would circumvent the spirit and meaning of the Policy Interpretation if a university could "fully and effectively" accommodate the underrepresented sex by creating a second-class varsity status.

Id. at 213.

243. *Id.*

were not substantially proportionate to the male and female enrollment ratio.[244] Prong two was not a refuge for Brown because the university dramatically expanded programs in the 1970s, but had not continually increased women's programs in recent years.[245] Lastly, the presence of women interested and able to compete on teams where adequate regional competition exists eliminated Brown's ability to comply through prong three.[246] It is upon this foundation that we examine the *Cohen* courts' holding and its failure.

III. A CRITICAL ANALYSIS: *COHEN'S* QUOTA SYSTEM DISCRIMINATES AGAINST MEN

In the murky lineage of Title IX perhaps nothing is more clear than its mandate for equal treatment of the sexes: "No person . . . shall, on the basis of sex, be excluded . . . or be subjected to discrimination . . . ."[247] Equally conspicuous in the act and its history is the treatment of quotas: they are strictly prohibited.[248] Subsection (b) of Title IX reads:

> 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 . . . or other area: *Provided*, That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.[249]

A plain reading of the statutory language conveys that statistical evidence of a disparity in athletic programs may be relevant as evi-

244. *Id.* at 211.
245. *Id.*
246. *Id.* at 211-13.
247. 20 U.S.C. § 1681(a) (1994).
248. *See id.* § 1681(b); *see also infra* note 287 for legislative statements prohibiting quotas.
249. 20 U.S.C. § 1681(b).

dence of discrimination, but the statute does not command affirmative action or quotas based on student body percentages. Rhode Island Senator Claiborne Pell echoed this sentiment during Title IX's passage when he said: "succinctly, we must be sure that this type of amendment is not used to establish quotas for sex."[250]

On first blush, *Cohen* case law appears to adhere to the statute's plain meaning: "[n]o aspect of the Title IX regime at issue in this case—inclusive of the statute, the relevant regulation, and the pertinent agency documents—mandates gender-based preferences or quotas."[251] However, on closer scrutiny, it is apparent the *Cohen* courts' interpretation of this legal framework transforms Title IX into an affirmative action, quota based scheme. A system that requires a certain number of individuals to be given opportunity based on gender, as a sole characteristic without regard to other qualifications, is a quota system; and these attributes are "here in spades."[252]

A. *The Court Blends the Three Prongs: It Is All Proportionality*

In *Cohen IV*, the First Circuit points to the three alternative measures of compliance to support the premise that it has not created a quota scheme.[253] Superficially, the test as articulated by the court appears to offer three separate compliance means, viz., substantial proportionality, continuing expansion, and full and effective accommodation. However, a more careful analysis demonstrates that substantial proportionality is the sole litmus test for satisfying Title IX. This result renders the three prong test a de facto quota scheme: an ironic result for a statute intended to prevent discrimination based on gender.

The prong one analysis developed by the *Cohen* courts requires a straightforward calculus of gender ratios of student body and athletic participants. "[P]rovided that the gender balance of

250. *See* Mahoney, *supra* note 4, at 949 (quoting 118 Cong. Rec. 18,437 (1972)).
251. *Cohen IV*, 101 F.3d 155, 170 (1st Cir. 1996).
252. *Id.* at 195 (Torruella, C.J., dissenting).
253. The court states:

> Only where the plaintiff meets the burden of proof on these elements *and* the institution fails to show as an affirmative defense a history and continuing practice of program expansion responsive to the interests and abilities of the underrepresented gender will liability be established. Surely this is a far cry from a one-step imposition of a gender based quota.

Id. at 175.

its intercollegiate athletic program substantially mirrors the gender balance of its student enrollment," a university will be found in compliance with prong one.[254] The district court's interpretation of "participation opportunities" as varsity team membership results in simple mathematics when applying prong one.[255] Courts merely total each gender's representation in the student body and on the athletic field, and then adhere to the raw numbers. This computation not only provides a "safe harbor,"[256] but becomes the benchmark and sole measure of compliance given the absence of other conformity avenues.

The *Cohen* courts hold that prong two requires continual increases in women's athletic slots until the threshold of substantial proportionality is achieved.[257] This interpretation results in an installment plan toward the gender balance required in prong one rather than an independent means of adherence. The courts concluded that Brown, or any other institution, is unable to avail itself of prong two by eliminating men's programs.[258] Furthermore, the courts reject an argument that equates program expansion with improvements in women's athletic program components such as coaching, schedules and admission requirements.[259] The *Cohen* courts read both terms of "program expansion" strictly. "Expansion" means just that and cannot be achieved by cutbacks.[260] "Program" means the overall participation in the system and not the quality of individual components.[261] Therefore, the whole program must expand by increasing the women participants either by creating new programs or enlarging existing ones.

This reasoning is flawed for two reasons. First, it does not contemplate the economic realities that quell a university's ability to expand athletic opportunities for either sex. Title IX litigation has stemmed from the fact that women's and men's programs have

254. *Cohen III*, 879 F. Supp. 185, 200 (D.R.I. 1995).

255. *See id.* at 202 ("'Participation opportunities' offered by an institution are measured by counting the *actual participants* on intercollegiate teams.").

256. *Cohen II*, 991 F.2d 888, 897 (1st Cir. 1993).

257. *Cohen III*, 879 F. Supp. at 207.

258. *Id.* at 211 ("Because merely reducing program offerings to the over-represented sex does not constitute program 'expansion,' the fact that Brown has eliminated or demoted several men's teams does not amount to a continuing practice of program expansion for women.") (citation ommitted).

259. *Cohen I*, 809 F. Supp. 978, 991 (D.R.I. 1992).

260. *Cohen III*, 879 F. Supp. at 207.

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

been cut. This fact alone makes it virtually impossible to comply with the courts' interpretation of prong two.[262]

Second, the *Cohen* courts' interpretation makes prong two wholly dependent on prong one's statistical balance. Satisfying prong two requires an institution to show it is moving toward substantial proportionality.[263] Prong two can no less be considered an independent prong because it allows a university to move gradually toward rigid gender balances rather than "leap to complete gender parity in a single bound."[264] Since the court is not satisfied with anything less than increasing the number of participants to approach proportionality,[265] the two prongs conflate into one. Regardless of its adjustments for incremental changes, prong two's bedrock principle is prong one's mandate.[266]

Prong three is likewise reduced to a mere assessment of substantial proportionality and cannot be considered an independent means of compliance. Prong three only excuses a university's failure to achieve proportionality due to the ineluctable consequence of insufficient female interest and ability. In the event that a university falls short of substantial proportionality, and members of the underrepresented sex display interests and ability unmet by existing programs, the school has necessarily failed prong three.[267] It follows that a given university, not having athletic participation numbers substantially proportionate to its student body gender makeup, must accommodate all female athletic interest until those proportions are met.[268] Furthermore, this requirement ignores

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262. *Cohen III*, 879 F. Supp. at 211; *see also* Roberts v. Colorado State Bd. of Agric., 998 F.2d 824, 830 (10th Cir. 1993) ("[I]n times of economic hardship, few schools will be able to satisfy Title IX's effective accommodation requirement by continuing to expand their women's athletic programs."); *Cohen IV*, 101 F.3d 155, 193 (1st Cir. 1996) (Torruella, C.J., dissenting) ("Under the district court's interpretation, a school facing budgetary constraints must, in order to comply with prong two, *increase* the opportunities available to the underrepresented gender, even if it cannot afford to do so.").

263. *Cohen II*, 991 F.2d 888, 898 (1st Cir. 1993).

264. *Id.*

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

266. This may also be considered poor policy because it penalizes schools such as Brown who took the early initiative to dramatically expand programs in the 1970s, and rewards schools who neglected women for years and now drag their feet to satisfy Title IX's mandate with meager annual additions.

267. *Cohen II*, 991 F.2d at 898.

268. *Cohen III*, 879 F. Supp. at 210 ("This Court's interpretation of prong three does require that the unmet interests and abilities of the underrepresented sex be

any unmet male interest, even if a greater percentage of males than females go unsatisfied.[269] This analysis displays prong three's interdependence on prong one's gender balancing scheme.

The *Cohen* courts' interpretation of prong three prohibits it from becoming an independent prong. As set forth by the First Circuit, a university is required to serve the interests of every able female student until proportionality is attained.[270] This prong can hardly be considered distinct from prong one because it compels complete accommodation of the underrepresented gender's interested and able members until the requisite ratios are achieved. A university's shortage of female interest excusing it from the directives of prong one cannot be regarded as an independent means of Title IX compliance. In the *Cohen IV* dissent, First Circuit Chief Judge Torruella states, "a quota with an exception for situations in which there are insufficient interested students to allow the school to meet it remains a quota."[271]

By the *Cohen* courts' reading, it is a near certainty that no school could ever comply by using this measure. The district court suggested that other schools without Brown's depth of female athletic talent "may point to the absence of such athletes to justify an athletic program that does not offer substantial proportionality."[272] Despite this proposition, reality indicates the extreme unlikelihood this would ever occur. Considering that two percent of all college students participate in intercollegiate athletics,[273] it is extremely unlikely that there can ever be full and effective accommodation under the *Cohen* courts' interpretation.

For example, take a school of Brown's comparable size: 6000 students. The two percent average participation rate yields 120 athletic slots. Allocating the 120 athletic slots in substantial proportionality to the likely matriculating ratio at a co-educational in-

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accommodated to the fullest extent until the substantial proportionality of prong one is achieved.").

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

270. *Id.* at 898.

271. *Cohen IV*, 101 F.3d 155, 198 (1st Cir. 1996) (Torruella, C.J., dissenting).

272. *Cohen III*, 879 F. Supp. at 210.

273. This percentage is based upon estimates indicating that 290,000 of 12,439,000 undergraduate students compete on college athletic teams. National Collegiate Athletic Ass'n, 1995 NCAA Convention Proceedings 75 (citing the number of athletes); United States Dep't of Commerce, Statistical Abstract of the United States 178 (114th ed. 1994) (citing the number of students).

stitution (50%-50%) affords 60 women athletes. That fewer than 60 of 3000 women students would be interested in intercollegiate athletics, even accounting for a lesser appeal towards athletics than their male counterparts, is extremely doubtful. On average, 1000 of those women students will have the potential interest and ability to participate in college athletics because they were involved in high school sports.[274]

If one were to accept this unlikely possibility, arguendo, combined with the district court's judgment that universities predetermine their athletic lineup, then only a university's discriminatory admissions practices could account for the poverty of women's interest.[275] Thus, a university which admits a student body unable to take the field in substantial proportionality to its enrollment would necessitate a finding of discrimination under the *Cohen* rationale. Therefore, the courts' interpretation of the full and effective test makes it a superfluous tool for compliance.

As prongs two and three reduce to prong one, substantial proportionality becomes the only way for universities to comport with Title IX. In short, there is no question that proportionality must eventually be achieved, the only question is how fast. Contrary to the Act's explicit directive,[276] universities *are* being required to grant preferential treatment to members of one sex on account of an imbalance between the gender composition in the student body and the athletic programs. The court reached this result because it ignored the differences in relative interests rates of each gender and refused to accept the analogy between Title IX and Title VII.

B. *The Equal Protection Problem*

Equal protection is implicated when a classification made by the government or another state actor intentionally subjects an individual to treatment different from similarly situated individuals based on an impermissible characteristic, such as race, national origin or gender.[277] The *Cohen* courts have offended the Constitution by requiring Brown to impose athletic quotas subjecting men

274. *See* Donna St. George, *After Two Decades, Title IX Reaps a Golden Harvest*, Buffalo News, Aug. 7, 1996, at A3, *available in* 1996 WL 5859004 ("Before Title IX was enacted . . . 1 in 27 girls was a high school athlete. Now it's 1 in 3.").

275. *See supra* note 158 and accompanying text.

276. 20 U.S.C. § 1681(b) (1994).

277. Nowak & Rotunda, *supra* note 228, §14.3, at 605-06.

as a class to unequal treatment. This conclusion becomes manifest with a showing that men, generally, bear a greater interest in athletic participation than women.[278] Once established that women are being served at a higher rate, it is difficult to ignore the courts' failure to consider the relevant pool of qualified athletic participants. Consequently, the *Cohen* courts' analysis runs counter to established Supreme Court rulings on equal protection.

1. *Title IX Is Analogous to Title VII*

Title IX's broad prohibition of sex discrimination was modeled after the vanguard of the 1964 Civil Rights Act, Title VI.[279] However, unlike Title VI, Title IX contains a subsection explicitly prohibiting preferential or disparate treatment of members of one sex based on statistical disparities.[280] This instruction is patterned after Title VII, a statute designed to prevent discrimination in employment practices.[281] These similarities prompted Brown to analogize Title IX to the legislative and judicial interpretations of Title VII's prohibition against preferential treatment in the employment context.[282] However, inexplicably, the *Cohen* courts rejected Title VII's qualified pool concept in the Title IX athletics context.[283]

Setting the statutes side by side reveals their likeness in plain language and intent. Title VII's directive against affirmative action reads in relevant part:

> Nothing contained in this subchapter shall be interpreted to require any employer . . . to grant preferential treatment to any individual . . . on account of an imbalance which may exist with respect to the total number or percentage of persons

278. *See infra* note 317 and discussion *infra* Part III.B.3.

279. 42 U.S.C. § 2000d (1988). In fact, the legislative history reveals that Title IX's purpose was to close a gap in Title VI. 118 Cong. Rec. 39,261-62 (comments of Sen. Birch Bayh). Title VI's § 2000d states: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. Title IX's §1681(a) likewise states: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a).

280. 20 U.S.C. § 1681(b).

281. 42 U.S.C. § 2000e-2(j) (1994); *see* 117 Cong. Rec. 39,261-62 (1971).

282. *Cohen III*, 879 F. Supp. 185, 205 (D.R.I. 1995).

283. *Cohen IV*, 101 F.3d 155, 177 (1st Cir. 1996).

> of any race, color, religion, *sex* or national origin employed by any employer . . . in comparison with the total number or percentage of persons of such race, color, religion, *sex* or national origin in any community . . . or other area.[284]

Almost identically, Title IX prohibits preferential treatment as well:

> 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 . . . or other area.[285]

Considering the above, it is difficult to understand how the court would find an analogy between the two an "attempt to *superimpose* the meaning of discrimination in Title VII upon the *plain language* of Title IX;"[286] for their plain language is the same.

In addition to textual similarities, Title VII's legislative history shares another common denominator with Title IX; it admonishes quotas.[287] Senators Clifford Case and Joseph Clark inserted an interpretive memorandum of Title VII into the record during enactment of the measure. In pertinent part it reads:

> There is no requirement in title VII that an employer maintain a racial balance in his workforce. On the contrary, any deliberate attempt to maintain a racial balance, whatever such a balance may be, would involve a violation of title VII because maintaining such a balance would require an employer to hire or refuse to hire on the basis of race. It must be

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284. 42 U.S.C. § 2000e-2(j) (emphasis added).

285. 20 U.S.C. § 1681(b).

286. *Cohen III*, 879 F. Supp. at 205 n.42 (emphasis added).

287. For Title IX legislative passages in regard to quota aversion, see 117 Cong. Rec. 30,407-09 (1971) (statements of Sen. Birch Bayh) (The statute will not require "a 50-50 ratio" of men and women in every educational program. "The basis for determining compliance [considers the] qualifications of the students who have made application . . . . What we are saying is that we are striking down quotas. The thrust of the amendment is to do away with every quota."). *Id.* at 39,262 (1971) (statement of Rep. Edith Green) ("[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.").

> emphasized that discrimination is prohibited as to any individual.[288]

As the two statutes mirror each other in wording and intent it should necessarily follow that judicial interpretations of Title VII's provisions should be borrowed to shed light on its twin counterpart.[289]

2. *The Court Fails to Distinguish Title VII as Inapplicable to Title IX*

Despite the glaring similarity in phrasing and legislative intent, the *Cohen* courts have refused to adopt the Title VII-Title IX parallel and to follow the former's case law. The refusal to accept Title VII case law as a model rests primarily on two unmeritorious distinctions. First, Title VII applies to jobs which are "gender neutral," whereas Title IX applies to athletics which do have gender requirements.[290] Second, the courts reasoned that determining the relevant pool and measuring its interests would be complicated, inviting "thorny questions."[291]

a. *Competition Is Gender Neutral for Athletic Slots*

The *Cohen* courts misfired in their first attempt to shoot down the Title VII-Title IX analogy. The courts concentrated too narrowly on a distinction between employment and athletics, and

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288. Mahoney, *supra* note 4, at 967 (quoting 110 Cong. Rec. 7213 (1964)) (emphasis omitted).

289. *See, e.g.*, Roberts v. Colorado State Bd. of Agric., 998 F.2d 824, 832 (10th Cir. 1993) ("[T]his court has held that Title VII . . . is 'the most appropriate analogue when defining Title IX's substantive standards' . . . .") (quoting Mabry v. State Bd. of Community Colleges & Occupational Educ., 813 F.2d 311, 316 n.6 (10th Cir. 1987)). Several other courts have also applied Title VII standards to Title IX in contexts other than athletics. *See* Lipsett v. University of P.R., 864 F.2d 881, 896-97 (1st Cir. 1988) (holding that where a student-employee claimed dismissal from residency program was due to sexual harassment, disparate treatment standard of Title VII applied to claims under Title IX); Ward v. John Hopkins Univ., 861 F. Supp. 367, 375 (D. Md. 1994) (holding that Title IX claims by a female employee and a student-employee of the University that a male employee sexually harassed them were "appropriately analyzed under the standards applicable to cases brought under Title VII."); Hasting v. Hancock, 842 F. Supp. 1315, 1320 (D. Kan. 1993) (denying summary judgment on grounds that Title VII agency principles may be applied under Title IX to impose liability upon private, unincorporated institutions for alleged sexual harassment of student by employee).

290. *Cohen III*, 879 F. Supp. 185, 205 (D.R.I. 1995).

291. *Cohen II*, 991 F.2d 888, 900 (1st Cir. 1993).

failed to detect the conspicuous similarities between the two contexts. The First Circuit held that "women are not 'qualified' to compete for positions on men's teams"[292] because men's and women's teams are segregated and require separate attributes.[293] Therefore, unlike employment opportunities, which do not have specific gender requirements, athletic opportunities are gender based.[294] Thus, for the courts' purpose the analogy became "inapposite"[295] because the two situations differ in "analytically material ways."[296]

While men and women may not spar directly for a position on a team roster,[297] they do challenge each other for the scarce allocation of athletic offerings. These generic opportunities should be likened to the job opening, rather than a position on a gender specific squad.

The apportionment of a university's athletic opportunities becomes the specimen of examination to determine whether each gender has been effectively accommodated.[298] Therefore, emblematic of a job in an employment context, the athletic slot or opportunity to play becomes the finite, limited item. In deciding how to divide the athletic allotments and opportunities, universities must take into account the interests and abilities of each sex.[299] In com-

292. *Cohen IV*, 101 F.3d 155, 177 (1st Cir. 1996).
293. *Id.* at 176-77.
294. *Cohen III*, 879 F. Supp. at 205.
295. *Id.*
296. *Cohen IV*, 101 F.3d at 177.
297. In some cases, women and men do actually compete for and share spots on teams, including ice hockey. This was even seen at the professional level when goaltender Manon Rheaume became the first woman ever to play in the National Hockey League. *Rheaume Holds Her Own in NHL Debut*, Louisville Courier J., Sept. 24, 1992, at 5E, *available in* 1992 WL 7857102. In fact, Rhode Island has given birth to two top notch female goalies who compete on male teams: Sara DeCosta and Erika Silva. *See* Sherry Skalko, *College Hockey Notes: Ex-Titan DeCosta set for Debut at PC*, Prov. J. Bull., Nov. 14, 1996, at C2, *available in* 1996 WL 14167313 (noting Sara DeCosta, former high school standout in the boys' division, will begin her women's college hockey career at Providence College); Manny Correira, *Silva Ranks with School Hockey's Best*, Prov. J. Bull., Oct. 1, 1996, at C6, *available in* 1996 WL 12466972 (stating that Providence Country Day goalie Erika Silva was the only female selected to the Rhode Island select team—a team comprised of the state's best talent). This tarnishes the *Cohen* courts' notion that women lack the qualifications for men's teams.
298. 34 C.F.R. § 106.41(c)(1) (1996).
299. *Id.* ("Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of *both* sexes.") (emphasis added).

paring the athletic participation opportunities provided for men with those provided for women, it thus becomes essential to measure the relative interest rates of each gender. Consequently, the Title VII analogy becomes indispensable. Each gender's interested and able students become the base ratio for satisfying those students with appropriate teams. One then compares the population of those students, with the population of students whose interests are being served. It is only after this determination is made that these gender-neutral athletic slots are parceled into teams which have gender criteria. The fact that men and women do not compete directly for a specific roster position based on their comparable athletic skill is irrelevant. Any holding to the contrary offends the concept of the qualified pool, and though determining the pool can be a difficult task, the Act and the constitution do not mandate the easiest route.

b. *How Long Has Convenience Been a Civil Rights Principle?*

The *Cohen* courts found Brown in violation of Title IX based solely on whether the school's athletic gender makeup was substantially proportionate to the gender percentage of its student body.[300] By requiring gender proportionality between student body enrollment and athletic participants, the courts mandated the functional equivalent of imposing employment quotas on employers based on aggregate population statistics—a principle that the Supreme Court has expressly rejected.

In applying Title VII's directive prohibiting quotas, the Court has been true to Congressional wishes. In *Sheet Metal Workers v. EEOC*,[301] the provision was held to "expressly state that the statute did not require an employer . . . to adopt quotas or preferences simply because of a racial imbalance."[302] Similarly, the Court has found the legislation "clear . . . [in] impos[ing] no requirement that a work force mirror the general population."[303]

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300. The court maintains it subjected Brown to three distinct prongs, however, the courts' flawed application resulted in a single inquiry based on strict proportionality. *See* discussion *supra* Part III.A.

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

302. *Id.* at 461-63.

303. International Bhd. of Teamsters v. United States, 431 U.S. 324, 339-40 n.20 (1977).

Title VII requires a comparison between the population being served and the population qualified to be served. Thus, qualifications become the defining measure of the relevant pool. In *City of Richmond v. J.A. Croson Co.*,[304] the Court struck down a thirty percent set-aside program for minority businesses, holding that "[w]here special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task."[305] Accordingly, the Court found the minority population at large to "have little probative value."[306]

The Court held similarly in *Hazlewood School District v. United States*,[307] where a teaching applicant attempted to demonstrate discriminatory hiring practices by furnishing statistical disparities between the racial dimensions of the school staff and those of the general population where the applicants lived.[308] The Court dismissed the offering as irrelevant, instead positioning the inquiry upon a comparison between the school district's racial makeup of teachers and the pool of qualified and able teachers in the hiring area.[309] This group is dubbed a "qualified applicant pool."[310]

The relevant pool inquiry requires an appraisal of a student body's relevant interests and abilities in athletics before any comparisons can be made with the athletic program population.[311]

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304. 488 U.S. 469 (1989).

305. *Id.* at 501-02.

306. *Id.* at 501 (quoting Hazlewood Sch. Dist. v. United States, 433 U.S. 299, 308 n.13 (1977)).

307. 433 U.S. 299 (1977).

308. *Id.* at 310.

309. *Id.* at 308.

310. *Id.*; *see also* Regents of Univ. v. Bakke, 438 U.S. 265 (1978). Although a case involving Title VI, the model for Title IX's section 1681(a), its judicial logic is applicable in Title VII relevant pool reasoning. In striking down a special admissions program under which positions were reserved for "disadvantaged" minority students, the Court held that:

> [i]f petitioner's purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial but as facially invalid. Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake.

Id. at 307. By rejecting an admissions program that was not based upon qualification, the Court eschewed the concept of strict proportionality, and instead fixed upon ability as the relevant measure.

311. *Cohen III*, 879 F. Supp. 185, 205 (D.R.I. 1995).

The *Cohen* courts asserted assessment complications in measuring relative interests to support its dismissal of the relevant pool concept.[312] First, the courts found Brown's claim that men are actually interested in sports to a greater degree than women an "unproven assertion."[313] Second, it disputed the ability to measure interests because "it is an impossible task to quantify latent and changing interests."[314] Finally, the uncertainty as to what group to survey in order to comprise the qualified applicant pool became dispositive in rejecting Brown's alternative interpretation.[315] The court chose to evade "thorny questions" of survey population, instead embracing a "simpler reading [as] far more serviceable."[316] Proving discrimination based entirely on a finding of unequal percentages between women athletes and women in the student body is simple; however, ease should not be the controlling principle. While it may be more difficult to appraise the athletic interests and abilities of each gender, evidence exists to guide this task.

3. *Women Are Less Interested in Athletics than Men*

One need look no further than an elementary school playground to determine that boys are more interested in athletics than girls.[317] However, additional empirical evidence exists.[318] Potential intercollegiate athletes nurture and hone their skills at the primary and high school level. Participation levels at these feeder forums reflect disparate interests: young males constitute

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312. *Id.*

313. *Cohen IV*, 101 F.3d 155, 178 (1st Cir. 1996).

314. *Cohen III*, 879 F. Supp. at 205.

315. *Id.* at 207.

316. *Cohen II*, 991 F.2d 888, 900 (1st Cir. 1993).

317. *See generally* Matt Lorenz, *Ideal, Reality and Sports Participation in the NCAA*, St. Petersburg Times, Sept. 5, 1993, at D1, *available in* 1993 WL 4423919 (Little League Baseball, composed of elementary school age children had 2.2 million participants in 1992, almost all of them boys. Little League Softball, encompassing the same classifications, had only 480,000 players, all of them girls.).

318. *Id.*

> Personal experience and empirical data tell us that women watch less, participate less, and are less prone to make sports the focus of their aspirations. The reasons—social programming, dearth or wealth of alternatives, peer pressure or the lack of it, hormones, images conveyed by television—are a matter of debate, but the disparity of interest is a fact of American life. No policy can achieve fairness without acknowledging that.

Id.

61% of the student athletes compared to 39% female involvement.[319] As common sense might dictate, these figures reflect the current composition of intercollegiate athletics, 66% male and 34% female.[320] Other intercollegiate athletic practices also reveal men's greater interests in sports. At Brown, for example, intramural programs, which have no limits on the number of students who can participate, contain eight times more men than women.[321] Men at Brown also outnumber women four to one in club sports which are driven by student interests.[322] At trial, Brown submitted no less than eight data surveys indicating greater athletic interest among men.[323] Given this statistical substantiation, a conclusion that men do not hold greater athletic interests than women is puzzling.

Armed with data on athletic interests between men and women in high school, who apply to Brown, who attend Brown or who attend universities nationally, it seems evident that any survey group will reveal the heightened athletic zeal of men. Despite the district court's exercise in discussing and rejecting each of the po-

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319. National Fed'n of State High Sch. Ass'ns, 1995 Athletic Participation Survey 2, at 2 (1995).

320. *Id.* at 75.

321. Appellant's Brief in Appeal from the District Court at 7, *Cohen IV* (no. 95-2205). National statistics reflect a four to one ratio between men and women for intramural sports. *Id.* at 7 n.10.

322. *Id.* at 7-8. Nationally, women only account for 34.29% of the club athletes. *Id.* at 8 n.11.

323. The court states:

> Among the evidence submitted by Brown are: (i) admissions data showing greater athletic interest among male applicants than female applicants; (ii) college board data showing greater athletic interest and prior participation rates by prospective male applicants than female applicants; (iii) data from the Cooperative Institutional Research Program at UCLA indicating greater athletic interest among men than women; (iv) an independent telephone survey of 500 randomly selected Brown undergraduates that reveals that Brown offers women participation opportunities in excess of their representation in the pool of interested, qualified students; (v) intramural and club participation rates that demonstrate higher participation rates among men than women; (vi) walk-on and try-out numbers that reflect a greater interest among men than women; (vii) high school participation rates that show a much lower rate of participation among females than among males; (viii) the NCAA Gender Equity Committee data showing that women across the country participate in athletics at a lower rate than men.

Cohen IV, 101 F.3d 155, 198 n.30 (1st Cir. 1996) (Torruella, C.J., dissenting).

tential survey pools,[324] it is unequivocal that Title IX applies to educational institutions and *their* students.[325] Therefore, it is most fitting that a university's matriculating student body becomes the survey population to determine the qualified applicant pool. However, the district court rejected the student body as a survey pool.[326] It found campus preferences predetermined by Brown's selection of sports and recruitment practices.[327] Thus, it found the student body survey pool to be too narrow because Brown's practices inhibit students with interests in athletics not offered by Brown from applying, entering and becoming part of the survey pool.[328]

The idea that Brown's athletic offerings and recruitment practices significantly limit the interests of its campus population does not comport with the facts. Prior to the proposed athletic cuts that gave rise to the dispute at hand, Brown provided every sport offered by NCAA Division I schools except for badminton, bowling and equestrian.[329] The absence of these three does not suggest a large body of potential applicants disregarding Brown "due to the limits of [their] program offerings."[330] Consequently, there is no reason the university should go "off-campus" in evaluating student interests. Instead, courts need to re-think their approach to the three part test and how it effects both men and women athletes. This can be accomplished by giving each prong independent significance.

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324. *Cohen III*, 879 F. Supp. 185, 206 (D.R.I. 1995) (examining each of the possible pools and their corresponding "theoretical and practical problems"). Offered and rejected are the pools of matriculated students, actual Brown applicants and academically able potential varsity participants. *Id.* at 206-07; *see supra* note 181.

325. *See, e.g.*, 20 U.S.C. § 1681 (1994); 34 C.F.R. pt. 106 (1996); Policy Interpretation, *supra* note 13, at 71,413; *see also Cohen II*, 991 F.2d 888, 901 (1st Cir. 1993) ("The statute . . . and the regulations, read together, require a Title IX plaintiff to show disparity between the gender composition of the *institution's* student body and *its* athletic program.") (emphasis added).

326. *Cohen III*, 879 F. Supp. at 206.

327. *Id.*

328. *Id.*

329. Appellant's Brief in Appeal from the District Court at 4 n.3, *Cohen IV* (no. 95-2205).

330. *Cohen III*, 879 F. Supp. at 207.

IV. MAKING GENDER EQUITY EQUITABLE: A BETTER APPLICATION

"[T]he [c]ourt is not unsympathetic to the plight of members on the men's . . . team[s] and recognizes that Congress, in enacting Title IX, probably never anticipated that it would yield such draconian results."[331] This statement from the Central District Court of Illinois suggests that an alternative reading of the Policy Interpretation's three part test may render an application more compatible with Congressional intent and Supreme Court equal protection precedent.[332] With interpretive adjustments in place, universities could distribute athletic resources in a nondiscriminatory manner. Both genders would stand on a level playing field and accrue the benefits of athletic opportunity equally.

Creating this level playing field does not require a complete overhaul of the regulatory framework,[333] but rather a re-tailored interpretation of the existing three part test.[334] First, courts should recognize the existence of available athletic opportunities that are not seized, and read prong one not to equate "participation

331. Kelley v. Board of Trustees, 832 F. Supp. 237, 243 (C.D. Ill. 1993).

332. *Id.*

333. Contrary to the popular belief of some Title IX critics, the solution for a more evenhanded method does not lie in exempting football from the calculations. For a discussion of arguments made in favor of exempting football, see Phillip Anderson, *A Football School's Guide to Title IX Compliance*, 2 Sports L.J. 75, 96 (1995); James V. Koch, *Title IX and the NCAA*, 3 W. St. L. Rev. 250, 259 (1976); Walter B. Connolly, Jr. & Jeffrey D. Adelman, *A University's Defense to a Title IX Gender Equity in Athletics Lawsuit: Congress Never Intended Gender Equity Based on Student Body Ratios*, 71 U. Det. Mercy L. Rev. 845, 909 (1994). Football supporters have been suspicious of Title IX, treating the statute as a conspiracy to undermine the unique American game: "I have seen the enemy eyeball to eyeball, and I can tell you they're out to get the game of football." Ken Stephens, *Coaches Fear Title IX Lawsuits May Prove Damaging for Football*, Dallas Morning News, Jan. 10, 1995, at B9, *available in* 1995 WL 7457423 (quoting Grant Teaff, Executive Director of the American Football Coaches Association). Congress, however, rejected efforts to exempt football from Title IX. 120 Cong. Rec. 15,322-23 (May 20, 1974). An amendment sponsored by Texas Senator John Tower would have exempted revenue-producing sports from Title IX's coverage. *Id.* The Tower Amendment was approved by the Senate, but was later defeated in a conference committee. *Id.* Thus, even assuming, arguendo, that a football exemption was a commendable proposal, it cannot be advanced without trespassing on Congressional intent.

334. A revised interpretation of the existing three part test would still satisfy the *Cohen* courts' reliance on *Chevron* and its grant of deference to the regulations and Policy Interpretation. A new read would simply interpret the present wording in a different fashion. *See supra* note 144.

opportunity" with "participation rate."[335] Second, courts should read prong three to require institutions to meet the interests and abilities of each gender to the same degree. These modifications will restore the principle of equality which is Title IX's basis.

A. *Prong One: Participation Opportunity Does Not Mean Participation Rate*

Prong one of the OCR's three part test asks whether a university's athletic participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments.[336] Students make decisions on whether to take advantage of opportunities. Actual participation rates will reflect those decisions. Thus, depending on the interests and abilities within the student body, and the resulting decisions based on those interests, there may be a deficiency or abundance of participation opportunities.[337] In the first instance, coaches must conduct try outs and cut players in order to form the most talented and workable team. In the second scenario, all interested students would make the team, and the insufficient interest would leave remaining roster spots open. To illustrate, consider a women's soccer team with thirty roster spots. If interest and ability is grand and fifty women come out for the team, the coaching staff is forced to pare down the enlisted hopefuls into thirty teammates and twenty unsatisfied athletes. Conversely, if interest and ability is lower and only twenty-two women sign up, the result is eight participation opportunities go unutilized. Thus, the ratio of participation opportunities provided to men and women—the available slots on existing teams—are not necessarily reflected in the relative participation rate.

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335. *Cohen III*, 879 F. Supp. 185, 202 (D.R.I. 1995) ("The 'participation opportunities' offered by an institution are measured by counting the actual participants on intercollegiate teams.").

336. Policy Interpretation, *supra* note 13, at 71,418.

337. Renowned "feminist" Camille Paglia espouses this view and notes that men, more than women, are interested in sports.

> Men's teams are usually oversubscribed. Men will sit on a bench to be on a team. Team identity is more important to men. Opportunities for women must be expanded, but common sense has to apply. There may be an imbalance in this and we have to accept that. If there is no interest on the part of women, it's ridiculous to insist on meeting a quota level.

Carol Innerst, *A Culture, et Cetera*, Wash. Times, Feb. 22, 1996, at A2, *available in* 1996 WL 2947285 (quoting Camille Paglia).

The regulations and reality both support this proposal. First, comparing two Title IX regulatory sections makes it clear that the terms "participation opportunity" and "participation rate" are not interchangeable. Section 106.37(c), regarding athletic scholarships, requires such fiscal awards be provided to each gender "in proportion to the number of students of each sex *participating* in" intercollegiate athletics.[338] Section 106.41(c), however, requires institutions to provide "equal athletic *opportunity* for members of both sexes."[339] Given the general rule of statutory construction that "every word has some operative effect,"[340] reflective analysis requires a conclusion that the two words are distinct in meaning.[341]

Second, even accepting the predetermination principle that Brown controls the participation opportunities through its recruitment practices[342] does not foreclose the possibility of available, but unfilled slots. Even recruited athletes make individual decisions on whether to accept the opportunity or chance to participate. Therefore, to the extent a recruited athlete arrives on campus and is allocated a predetermined slot, but later decides against playing sports, the allocated slot is available, but unfilled. At Brown, where athletic scholarships are not available,[343] a student's freedom of choice is even more apparent. Recruited athletes receiving full scholarships at other schools may be coerced to participate even against their will due to economic pressures. However, a recruited athlete at Brown, once matriculated, may still exercise discretion in deciding whether to take advantage of an opportunity. Furthermore, the predetermination concept assumes that the coach acquires all the pursued players once a coach sets an ideal team size and recruits to meet that goal.[344] Considering recruitment competition and the fact that admission boards will not rubber-stamp all anointed athletes, it cannot follow that each coach

338. 34 C.F.R. § 106.37(c) (1996) (emphasis added).

339. *Id.* §106.41(c) (emphasis added).

340. United States v. Nordic Village, Inc., 503 U.S. 30, 36 (1992).

341. More simply, one need look no further than a dictionary to discover that "opportunity" and "rate" have different meanings.

342. *See supra* note 158 and accompanying text.

343. *See supra* note 67 and accompanying text.

344. *Cohen III*, 879 F. Supp. 185, 202 (D.R.I. 1995) ("Most coaches testified that they determine an ideal team size and then recruit the requisite number of athletes to reach that goal.").

obtains the ideal recruiting class for every season.[345] Thus, even under the notion of predetermination, when the recruiting goal is underachieved, available but unfilled slots are certain to result.

Therefore, courts should welcome the idea of available but unfilled slots as participation opportunities. This approach will incorporate differing levels of interests into the prong one equation. When a roster spot is available, and coaches acknowledge the gap between team capacity (the number of opportunities) and its current line up (participation rate), it is evident that unseized opportunities exist. It is in neglecting to count these offerings that the court erred.

An application of prong one that computes proportionality based on opportunities, and not actual participants, better serves the plain language of the regulations, the policy interpretation and the statute.[346] It also accounts for differing levels of interests, more fairly accommodating men and women in their quest for equal athletic opportunity.

B. *Prong Three: Meet Each Gender's Interests to the Same Degree*

In the absence of proportionality and continuing expansion, the third tier of the OCR's three prong test asks whether a university has fully and effectively accommodated the interests and abilities of the underrepresented gender.[347] According to the *Cohen*

345. Most sought after athletes are pursued by more than one institution, thus every coach will not get his or her wish. Even the most experienced coach who accounts for this problem by over-recruiting cannot be expected to continuously hit the mark. Therefore, when errors occur, a coach is either left with an abundance of players and a shortage of spots, or a deficit of players and available yet unfilled slots.

346. One need not be concerned about financial disparities that may result due to unseized opportunity. For example, take a softball team and a baseball team each with thirty participation opportunities. The softball team only has twenty women on the team, whereas the baseball team is at capacity. Any uneasiness from the thought that unequal expenditures between the two clubs will result, i.e., less money spent on the women's team for uniforms, equipment and supplies, is misplaced. Unequal expenditures alone will not constitute non-compliance. 34 C.F.R. § 106.41(c) (1996). Furthermore, equipment and supplies are not within the scope of the Policy Interpretation's three prong test dealing with interests and abilities. Instead, equipment and supplies are addressed in the Policy Interpretation's section entitled, "Equivalence in Other Athletic Benefits and Opportunities." Policy Interpretation, *supra* note 13, at 71,415.

347. Policy Interpretation, *supra* note 13, at 71,418.

courts, any unmet interest and ability of the underrepresented gender must be met if such interests and abilities are sufficient to sustain a team.[348] But, this standard does not account for the amount of unmet interest and ability of the other gender.[349] To the extent that the rate of interest in athletics differs between the genders, the courts have created a different standard for men and women. Rather than looking only to the raw percentages of each gender's representation in the athletic program and the balance within the student body, courts should examine the rate at which each gender's interested and able members are being accommodated. As long as each gender's relative interest rates are being accommodated to the same degree, a university should be found in compliance with Title IX.

For example, consider a hypothetical university, Aaah U., with 10,000 students: 5000 men and 5000 women. In the matriculated student body, 2000 men and 1200 women are interested and able to compete in intercollegiate athletics. Aaah U. has an athletic program with 500 participation opportunities. All rosters are at maximum capacity, leaving no available, but unfilled slots, and no new teams have been added during the last decade. The athletic program gender breakdown is 300 male participants and 200 female participants.

Under the *Cohen* reading, the university violates Title IX. The athletic program gender composition (60%-40%) does not reflect the enrollment ratio (50%-50%), so prong one is not satisfied. In addition, the presence of 1000 interested and able women with unmet interest, necessitates a failure on prong three. Finally, the stagnant level of opportunities over the last ten years warrants a prong two failure. Thus, the university must achieve strict propor-

348. *Cohen II*, 991 F.2d 888, 898-99 (1st Cir. 1993); *Cohen III*, 879 F. Supp. at 208. Aside from other problems, both practical and constitutional as set forth in Parts III.A.3 and III.C, respectively, this interpretation has another difficulty. *Cohen II* disclaims that Brown is at the whim of female interests. It held that some female interest will not ipso facto require schools to provide a team, but instead the interest must rise to a level sufficient to field a viable team. *Cohen II*, 991 F.2d at 898. This, however, does not account for individual sports. Presumably, a "workable" golf, tennis, fencing or track team could consist of one member. Therefore, according to the *Cohen* courts' interpretation, prong three compels a university which has the presence of an "underrepresented gender" to satisfy any unmet interest of that gender.

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

tionality by cutting 100 male positions, accommodating an additional 100 women or a combination of both.

An improved analysis which compares each gender's interest levels and requires Aaah U. to meet each gender's interests and abilities to the same degree would yield compliance under prong three. A probing of the relative interest rates concludes that Aaah U. is accommodating fifteen percent of the interested males and nearly seventeen percent of all the interested females.[350] Therefore, Title IX would be satisfied because the university satisfies each gender's interests and abilities to a comparable degree. In this way, Aaah U. satisfies the governing principle of the three prong test: that athletic interests and abilities of male and female students be equally and effectively accommodated.[351] Once courts recognize and accept that prong three requires a consideration of both the accommodated and unaccommodated members of each gender, students will receive athletic opportunities on equal footing. A revised interpretation of prong three that requires an institution to meet the interests and abilities of women to the same degree as it meets those of men, is far more consistent with Title IX, Congressional intent and the Supreme Court's equal protection precedent.

CONCLUSION

Title IX has paved the way for the rapid growth in women's interests and participation in athletics. The effects were universally recognized during the 1996 Summer Olympic Games when American women dominated the playing fields and captivated the spirit of a nation. However, recent economic times have forced universities to trim athletic budgets and eliminate programs. Litigation has resulted. In interpreting Title IX and its implementing regulatory framework, the courts have fumbled. They have misread the statute and its regulations, and have misconstrued the policy directives. While endeavoring to enforce a nondiscrimination statute, the courts have forced universities to discriminate against men. This misapplication reached a pinnacle in *Cohen v. Brown University*, where ironically, a school which offers women's

350. Conversely, 85% and 83%, respectively, are going unaccommodated.

351. Policy Interpretation, *supra* note 13, at 71,414.

athletics in numbers triple the national average was found to discriminate against women.

Ostensibly, the courts offer three ways in which to comply with the anti-discrimination mandate. The *Cohen* courts conclude that Title IX requires either a university to have an athletic program gender mix substantially proportionate to its enrollment; or to continually expand athletic programs for women; or to ensure that every interested and able female athlete is accommodated. However, modern realities suggest that substantial proportionality is the only way in which to comply.

In enforcing Title IX, the *Cohen* courts make no attempt to gauge whether Brown is serving each gender's interests to an equal degree. Instead, they demand that the number of actual women participants in varsity sports be proportionate to the number of female students at the university, regardless of their interests in athletic participation. The *Cohen* courts' fixation on the undergraduate population as a whole without regard to those students' interests and abilities for athletic competition is the most significant failure. At this juncture in time, universities inherit student bodies whereby men exhibit a greater interest in athletics than women. The courts' concentration on substantial proportionality without consideration of each gender's interests and abilities ignored an explicit directive in Title IX itself: prohibiting the ordering of preferential treatment to any gender on account of an athletic program's inability to mirror the gender ratio of the student body. This oversight results in the application of a quota system that requires Brown to satisfy women's athletic interests and abilities to a greater degree than men's. This interpretation is fundamentally at odds with the statute, legislative intent and substantial Supreme Court precedent regarding the use of such statistics in equal protection cases. A better approach would consider both the accommodated and unaccommodated members of each gender. This reading will guarantee that each gender will be able to participate in intercollegiate athletics at a rate proportional to its interests and abilities.

Women must be given the equal opportunity to participate in athletics; this is the mandate of Title IX. However, as applied in every stage of this case, men's equal protection rights are being treaded upon by an unconstitutional quota system that requires women's interests and abilities to be met at a higher degree than

those of men. Courts should remember that Title IX does not claim to protect only women from discrimination; it claims to protect everyone.

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