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GENDER EQUITY, COLLEGE SPORTS, TITLE IX AND GROUP RIGHTS: A COACH'S VIEW*

Michael Straubel[†]

INTRODUCTION

Among many of my coaching colleagues the words "gender equity" and "Title IX" have become fighting words.¹ To the coaches of male teams these words raise fears of smaller budgets, team size caps (roster limits) and even the elimination of their sports from college athletic programs.² To the coaches of female teams these words raise hopes of budgets as large as

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¹ In addition to teaching law for the past ten years, I have coached both the men's and women's cross country and track teams at Valparaiso University. Valparaiso University is a Division I member of the NCAA and the Mid-Continent Conference. During those ten years, the issue of gender equity has caused many "interesting" discussions.

² Among the more visible examples are the elimination of the men's swimming team at the University of Illinois, see *Kelley v. Board of Trustees of Univ. of Ill.*, 832 F. Supp. 237 (C.D. Ill. 1993), *aff'd*, 35 F.3d 265 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 938 (1995), the elimination of the wrestling team at Drake University, see *Gonyo v. Drake Univ.*, 837 F. Supp. 989 (S.D. Iowa 1993), and the elimination of the men's track team at Blinn Community College. See USA TODAY, Jan. 30, 1995, at D1. Among the less visible examples are the elimination of the men's cross country team at Cleveland State University (at the time a member of the Mid-Continent Conference) and the cap of twelve team members placed on the men's cross country team at Eastern Illinois University. And just recently a cap was placed on team size at Brown University as part of the plan to comply with the court order arising out of *Cohen v. Brown Univ.*, 879 F. Supp. 185 (D.R.I. 1995), *aff'd*, 101 F.3d 155 (1st Cir. 1996). Then, close to home, the wrestling team at Valparaiso was cut in 1995 partly for reasons of satisfying gender equity concerns.

men's team budgets, larger rosters and even the addition of new women's teams.³ Lately, those fears and hopes have been coming true.

For a long time the fight over these words was small, and the success of women and women's coaches in achieving gender equity was minimal.⁴ However, starting in about 1992, women began to win some important battles, and the level of fear in male athletes, men's coaches and college athletic departments began to increase dramatically. Recently, the battle over gender equity and Title IX has taken some dramatic turns. Congressional hearings have been held,⁵ and it is quite likely that a Title IX case will make its way to the Supreme Court.

During the past ten years, my men's and women's teams have not been significantly affected by the growing battle over gender equity.⁶ However, clouds on the horizon suggest that soon we may be affected. If the precedent set by the recent decision in *Cohen v. Brown University*⁷ is not modified, my

³ The growth of women's teams has been dramatic of late. For example, among many other additions, the University of Cincinnati added women's track in the 1995-96 year, and Northern Illinois University added women's cross country for the 1995-96 year.

⁴ Much of the delay in the successful use of Title IX was due to the holding in *Grove City College v. Bell*, 465 U.S. 555 (1984). The Court in *Grove City* held that Title IX was program specific and applied only to those programs and departments within a university that directly received funds from the federal government. However, Congress overturned *Grove City* with the Civil Rights Restoration Act of 1987, 20 U.S.C. § 1687(2)(A) (1996). For a history of Title IX, see Diane Heckman, *Women and Athletics: A Twenty Year Retrospective on Title IX*, 9 U. MIAMI ENT. & SPORTS L. REV. 1 (1992).

⁵ On May 9, 1995, the House Subcommittee on Postsecondary Education, Training, and Lifelong Learning held a hearing to investigate complaints that the Department of Education's Office of Civil Rights Enforcement was not properly enforcing Title IX. See Ronald D. Mott, *Congress Hears from All Sides on Title IX*, NCAA NEWS, May 10, 1995, at 1. While both supporters and detractors of the existing three-prong test for compliance testified, the most publicized aspect of the hearing was the call for clarification of the second and third prongs. As a result of the hearing, the OCR was requested to issue and has issued a clarification of prongs two and three. See Steve Wiedberg, *House Panel Wants Better Enforcement of Title IX Provisions*, USA TODAY, May 26, 1995, at C8. The OCR presently is reviewing comments on its first draft of clarifications. See *OCR Responds to Title IX Compliance Confusion*, NCAA NEWS, Oct. 2, 1995, at 1. Although much needed, the clarifications do not add much to the understanding of Title IX jurisprudence.

⁶ To the extent that we have been affected, it has been positive. The women's cross country team was created ten years ago, the year I took over the team. During all ten years the men's and women's budgets, both travel and scholarship, have been equal.

⁷ *Cohen v. Brown Univ.*, No. 95-2205, 1996 U.S. App. LEXIS 30192 (1st Cir.

men's team could be negatively affected.⁸ Conversely, if the *Cohen* holding is changed in some of the ways suggested by the detractors of gender equity, my women's athletic team could be negatively affected.⁹

The courtroom battles over Title IX, the legal force behind the push for gender equity, have produced an interpretation of Title IX and its implementing regulations that works much like a blunt instrument, rather than a sharp knife, to go after cancerous discrimination in college athletic programs. The result is a test which creates a conclusive presumption of discrimination upon a showing of disparate impact; affirmative defenses have been eliminated, and the plaintiff no longer bears the ultimate burden of proving discrimination.¹⁰ At a number of schools, the effect is that women and women's teams are not being helped; rather, men and men's teams are being hurt. Consequently, like overly aggressive cancer treatments, healthy tissue is removed along with bad tissue, and the patient receives no overall benefit. Therefore, there is a need for a new and improved test for compliance with Title IX that will leave both men's and women's teams positively affected.

During ten years of coaching both men and women, I have accumulated experiences that call into question some of the assumptions that underlie current approaches to Title IX compliance. Implicitly underlying many of the regulations and court decisions interpreting and enforcing Title IX is the assumption that given the same opportunities and encouragement, females will participate in athletics at the same rate as males.¹¹ However, my experience does not support this assumption. In each

Nov. 21, 1996) [hereinafter *Cohen IV*]; see *infra* pp. 1053-57.

⁸ In the worst case scenario, the men's team would be eliminated in order to balance out the participation numbers between men and women. In a less drastic scenario, the team would be capped at nine or twelve members.

⁹ Reforms in Title IX that would return collegiate athletics to pre-Title IX days could result in budget cuts to, or even the elimination of, the women's team. However, now that a constituency for certain women's teams exists, schools see women's teams as a means of recruiting capable students. That is, smaller, private schools like Valparaiso use nonrevenue sports, with little or no scholarship backing, to recruit new students.

¹⁰ See *infra* p. 1057.

¹¹ See, e.g., *Cohen v. Brown Univ.*, 879 F. Supp. 185 (D.R.I. 1995) [hereinafter *Cohen III*].

of my ten years of coaching, despite coming from a student body that is regularly more female than male (most recently fifty-five percent female), more men consistently have turned out to participate than women.¹² While broader social forces may be at work, the encouragement and support for the women here appears to be equal.¹³ Scholarships, travel budgets and support services are the same for both sexes. Yet more men than women choose to participate in athletics at the college level. This is not an experience limited to my school. It is a national experience.¹⁴

While discrimination at the high school and junior high school levels¹⁵ may be causing this effect at the college level, the result is, nevertheless, that women are not taking advantage of the opportunities to participate in athletics at the same rate as men. A recent survey by the NCAA supports this conclusion.¹⁶ Therefore, the effort to implement Title IX must be adjusted either to take this different level of interest into consideration or to improve the interest level among women. Until the Department of Education's Office of Civil Rights Enforce-

¹² In each of my ten years of coaching, the men's team has had four to ten more team members than the women's team. This year (1996-97), I have thirteen women and twenty-three men on the two teams.

¹³ It is possible that because I am a male, female athletes are deterred from joining the team. However, on the average college women's cross country teams are smaller than men's cross country teams. According to the NCAA, for the 1993-94 academic year the average squad size for men's cross country teams was 13.5, and for women's cross country teams the average size was 11.8. *Participation Numbers Narrowly Miss Record*, NCAA NEWS, July 19, 1996, at 1, 13 [hereinafter *Participation Numbers*].

¹⁴ *Id.*

¹⁵ According to the 1993-94 *Handbook of the National Federation of State High School Associations*, in the 1992-93 school year, nationally 10,504 high schools sponsored boys' cross country and 9741 high schools sponsored girls' cross country. At those high schools, 159,536 boys and 116,221 girls participated. That works out to an average squad size of 15.2 for boys and 11.9 for girls. In Indiana, 386 high schools sponsored boys' cross country, and 339 high schools sponsored girls' cross country. In those Indiana high schools, 5277 boys and 3546 girls participated. That works out to an average team size of 13.7 boys and 10.4 girls. The fewer number of schools that sponsor high school cross country nationally and in Indiana for girls than boys may be contributing to the smaller squad size at the collegiate level. However, the squad size difference that exists at the collegiate level also exists at the high school level, supporting the observation that boys participate at a higher rate. As yet, the reasons for that participation difference remain unanswered. Nevertheless, the difference in sponsorship is cause to press for compliance with Title IX at the high school level.

¹⁶ See *Participation Numbers*, *supra* note 13, at 1.

ment ("OCR") and the courts recognize the group origin aspect of the rights protected by Title IX, enforcement of Title IX will continue to be problematic and uncertain.

The fact that women, by the time they reach college, show a lower relative level of interest in athletics than men is in little doubt. Before the age of twelve, girls and boys participate at about the same rate in athletics. However, between the ages of twelve and fourteen, girls begin to drop out of athletics at a faster rate than boys.¹⁷ Why this happens is hotly debated. Is it something in society and the girl's environment that tells her to get out of sports? Or, is it something in the girl's biological make-up that tells her to get out of sports? This is nothing but the old nature versus nurture debate. The evidence on both sides of the debate leads me to conclude that nature and nurture play symbiotic or complementary roles in driving girls from sports.¹⁸ If this is in fact true, then digging further into

¹⁷ See Donna Lopiano, *Her Say*, CHL TRIB. (Women Section), Dec. 26, 1993 (Donna Lopiano is the Executive Director of the Women's Sports Foundation); *Study Aims to Help Keep Girls Involved in Sports*, VIDETTE-TIMES, Aug. 13, 1995, at B7 (report by Associated Press on study by Elizabeth Fielder and Sharon Shields of Vanderbilt University).

¹⁸ The nature versus nurture debate about differences between men and women cuts across many areas of the law. In the world of sports, particularly in my area of cross country and track, there are many examples on both sides of the debate. On the nature side is the effect that puberty has on girls' running abilities. In many states each year at the high school cross country championships, a new freshman "will come out of nowhere" to "shock" everyone by winning the event. But two years later, when that freshman is a junior, she will be struggling to qualify for the same state championship. The reason is that as a result of puberty she is now twenty pounds heavier and sporting the body of a woman, not the body of a girl. It is euphemistically called the "black hole."

On the side of the argument that nurture drives girls from sports is the stereotype of girls in sports. Girls that make the varsity team are rumored to be at the least unfeminine or even lesbians. The members of the softball team don't get dates; the cheerleaders get the dates.

The debate, interestingly, is not limited to the question of whether nature or nurture drives girls away from athletics, but extends into whether athletics, because they are centered around competition, are destructive for women. In the book *No Contest: The Case Against Competition*, Alfie Kohn argues that women, by nature, prefer interdependence and relationship over competition with its emphasis on winning. To be competitive, Kohn argues, is to deny desirable female qualities and imitate men. Kohn writes: "This is why I call the cheerleaders of competition for women pseudofeminists: they are responding to sexism by appropriating the worst of male values, which represents a serious error in judgment if not a kind of betrayal." ALFIE KOHN, *NO CONTEST: THE CASE AGAINST COMPETITION* 179 (1992).

Nevertheless, whether the cause of girls dropping out of sports is nature,

the debate will not aid the search for a better Title IX test. The test must work both to seek out discrimination in the environment and, at the same time, take into consideration the cause of nature.

Finding or developing a new test and standard for compliance with Title IX requires an understanding of the current regulatory and case law interpretations and the implementation of Title IX. This law must be critiqued in light of the realities of college athletics. Such a critique should suggest a more accurate test for gender equity. In Part I of this Article, the current legal framework is explored. Here the "proportionality" ruling of the *Cohen III* court is closely analyzed. In Part II, the *Cohen III* court's interpretation of Title IX is scrutinized as if it were before the Supreme Court. Finally, Part III offers a new standard for compliance with Title IX that emphasizes the group origin of Title IX athletic rights.

I. SUMMARY OF THE LAW

Many articles have been written about the history and development of Title IX.¹⁹ It would be a waste of time to repeat those authors' work. However, recent developments and the need for an understanding of the relevant background calls for a summary of the statutory, regulatory and case law that embody Title IX. Further, a survey of the law is necessary to address the one question that almost all of the courts and

nurture or both, something quite dramatic is happening to girls in their early teenage years. For a dramatic account of this troubled time, see MARY PIPHER, *REVIVING OPHELIA: SAVING THE SELVES OF ADOLESCENT GIRLS* (1994). After reading Pipher's book, I am even more convinced that girls and young women need sports to help them through their tough times, and therefore the emphasis of Title IX enforcement must be aimed at junior high and high schools.

¹⁹ Among the articles that have tracked the development of Title IX are Walter Connolly, Jr. & Jeffrey 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 (1994); Diane Heckman, *The Explosion of Title IX Legal Activity in Intercollegiate Athletics During 1992-93: Defining the "Equal Opportunity Standard,"* 3 DET. C.L. REV. 953 (1994); Jennifer L. Henderson, *Gender Equity in Intercollegiate Athletics: A Commitment to Fairness*, 5 SETON HALL J. SPORTS L. 133 (1995); Janet Judge et al., *Gender Equity in the 1990's: An Athletic Administrator's Survival Guide to Title IX and Gender Equity Compliance*, 5 SETON HALL J. SPORTS L. 313 (1995); T. Jesse Wilde, *Gender Equity in Athletics: Coming of Age in the 90's*, 4 MARQ. SPORTS L.J. 217 (1994).

writers have neglected: Was Title IX intended to stimulate participation by women, or was it intended to be merely a reactive tool for protecting rights?

A. Statutory and Regulatory Summary

The operative language of Title IX²⁰ can be found in 20 U.S.C. §§ 1681(a) and 1681(b). The relevant portion of Section 1681(a) reads: "No person in the United States shall on the basis of sex, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance"²¹ The relevant portion of Section 1681(b) 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, state, section, or other area²²

The details of implementation and enforcement of Title IX were delegated to the Department of Education²³ ("DOE"), which enacted implementing regulations in 1975.²⁴ Two portions of the regulations specifically speak to athletics.²⁵ Section 106.41 is the most important of the two and, in part, reads:

(a) General. 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

²⁰ 20 U.S.C. §§ 1681-1688 (1996).

²¹ *Id.* § 1681(a).

²² *Id.* § 1681(b).

²³ *Id.* § 1682. In 1972, the agency responsible for promulgating the implementing regulations was the Department of Health, Education and Welfare ("HEW"). In 1979, HEW was reorganized and the Department of Education was created to take on some of HEW's functions, including enforcement of Title IX. From here on, I shall refer to the Department of Education ("DOE") as the appropriate regulatory agency. See *id.* § 3441.

²⁴ 34 C.F.R. § 106 *et seq.* (1996).

²⁵ *Id.* § 106.37, 106.41.

....

(c) Equal opportunity. A recipient which operates or sponsors inter-scholastic, 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:

(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 times;

(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.

Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the Assistant Secretary may consider the failure to provide necessary funds for teams of one sex in assessing equality of opportunity for members of each sex.

In 1979, in order to provide more guidance, the DOE issued a Policy Interpretation.²⁶ The policy statement is divided into three sections dealing with athletic financial assistance, equivalence in other athletic benefits and opportunities, and effective accommodation of student interests and abilities. It is the last section that contains the language that has become the primary test for compliance with Title IX. That section, in pertinent part, reads:

5. Application of the Policy – Levels of Competition.

In effectively accommodating the interests and abilities of male and female athletes, institutions must provide both the opportunity for individuals of each sex to participate in intercollegiate competition and for athletes of each to have competitive team schedules which equally reflect their abilities.

a. Compliance will be assessed in any one of the following ways:

(1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or

²⁶ 44 Fed. Reg. 71,413-71,423 (1979).

(2) Where the members of one sex have been and are under-represented 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 under-represented 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.²⁷

B. Case Law Summary

Armed with the text of Title IX and the above-described regulatory material, four courts have analyzed the dictates of Title IX. Those four cases, *Cook v. Colgate University*, *Roberts v. Colorado State Board Of Agriculture*, *Favia v. Indiana University*, and *Cohen v. Brown University* (*Cohen II*) have been analyzed in many other articles and will only be summarized here.²⁸ However, the fairly recent district court opinion of *Cohen III* broke new ground and therefore will be carefully analyzed here.

1. Pre-*Cohen III* (*Cook*, *Roberts*, *Favia* and *Cohen*)

Before *Cohen III*, with only one unimportant exception, the courts have nominally adopted as a starting point in their analysis the three-prong test for equal opportunity found in the DOE's Policy Interpretation of 1979.²⁹ As drafted by the DOE, the three-prong test allows a school to show compliance with Title IX in any one of the three ways found in Sections

²⁷ *Id.* at 71,418.

²⁸ See *supra* note 19.

²⁹ See *Favia v. Indiana Univ. of Pa.*, 7 F.3d 332 (3d Cir. 1993); *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824 (10th Cir.), *cert. denied*, 510 U.S. 1004 (1993); *Cohen v. Brown Univ.*, 991 F.2d 888 (1st Cir. 1993) [hereinafter *Cohen III*]; *Cook v. Colgate Univ.*, 802 F. Supp. 737 (N.D.N.Y. 1992), *vacated*, 992 F.2d 17 (2d Cir. 1993). *Cook*, the first of these cases, is the exception and has not been followed. The *Cook* court instead adopted the three-step burden shifting process applied in Title VII cases and conducted a sport to sport examination. *Id.* at 743. Both of those approaches have been criticized. See T. Jesse Wilde, *Gender Equity in Athletics: Coming of Age in the 90's*, 4 MARQ. SPORTS L.J. 217 (1994).

5(a)(1), (2), and (3) of the policy interpretation. The courts, however, have turned the tests into a two-step burden shifting proof scheme³⁰ which may have altered the DOE's tests. To prevail, a plaintiff must first show that a substantial difference exists between the percentage of women in the student body and the percentage of women participating in intercollegiate athletics.³¹ In other words, the plaintiff must show that athletic participation does not match the proportion of women in the undergraduate population. Second, the plaintiff must show that unmet interest exists; that the interests and abilities of the underrepresented sex have not been fully and effectively accommodated.³² After these two elements have been established, the burden shifts to the defendant to show "a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of

³⁰ The burden shifting scheme was first used by the district court in *Cohen v. Brown Univ.*, 809 F. Supp. 978, 991 (D.R.I. 1992) [hereinafter *Cohen I*].

³¹ In application, if the percentage of women in the student body is 55% and the number of women that participate in athletics is below 55%, and if the difference is "substantial," then the plaintiff has satisfied the first element. Just what constitutes a substantial difference has not been defined clearly. The *Cohen II* court found a difference of 11.4% to be substantial. *Cohen II*, 991 F.2d at 903 (citing *Cohen I*, 809 F. Supp. at 991). The *Roberts* court found 10.5% to be substantial, *Roberts*, 998 F.2d at 830; and the *Favia* trial court found a difference of 19.1% to be substantial. *Favia v. Indiana Univ. of Pa.*, 812 F. Supp. 578, 584-85 (W.D. Pa. 1993).

While a "bright line" test for substantially proportionate participation has not been established, the *Roberts* and *Cohen II* opinions can be read to create the following test for substantial proportionality: If the change (improvement) in the participation ratio of the underrepresented sex that would result from adding a proposed sport (team) will tip the balance in favor of the underrepresented sex, then substantial proportionality exists. Conversely, if the addition of a sport would not tip the balance, then substantial proportionality does not exist. This reading of *Cohen II* and *Roberts* rests on the courts' heavy reliance on the DOE's statement that an exact match between enrollment and participation is the ideal situation, *Roberts*, 998 F.2d at 829-30; *Cohen II*, 991 F.2d at 897-99, and on the courts' emphasis on the concept of full and effective accommodation of the interests of the underrepresented sex. *Roberts*, 998 F.2d at 828-30; *Cohen II*, 991 F.2d at 897-99.

³² When the plaintiffs represent a team that has been eliminated by the defendant, the courts have said that the plaintiffs very easily satisfy their burden under the second step. See *Roberts*, 998 F.2d at 831; *Cohen II*, 991 F.2d at 904. The courts, however, have not faced the situation where the plaintiffs are asking for the creation of a new team.

the members of the underrepresented gender.³³ This is the second of the DOE's three tests. The *Cohen II* court views the defendant's burden as an affirmative defense,³⁴ if met.

The plaintiff has the burden of going beyond proof of disproportional participation (the first element of the plaintiff's burden) since, according to the First Circuit, statistical evidence alone is not enough to show discrimination. There must be further evidence of discrimination, such as unmet interest among the underrepresented sex.³⁵ Statistical evidence is not enough because, under the three-part test of the DOE's Policy Interpretation, an imbalance between enrollment and participation does not constitute a violation of Title IX if the school has satisfied the interests and abilities of both sexes.³⁶ Within this burden shifting scheme, a plaintiff does not have to prove intent to discriminate,³⁷ and a plaintiff may be awarded monetary damages in addition to equitable relief.³⁸

In evaluating the first element, proportionality, the courts have declined to announce a precise test, instead choosing to look at each case individually. So far, the lowest disparity to fail the test of substantial proportionality has been 10.5%³⁹ Similarly, when facing the third element, fully and effectively accommodating the interests of the underrepresented sex, the courts also have not created a precise test. In all four of the important Title IX cases, the plaintiffs represented women's teams which were dropped from, or club teams denied, varsity status. Under such circumstances, the courts stated that they had little trouble finding unmet interest among the underrepresented sex and thereby the second element of plaintiffs' proofs.⁴⁰

³³ *Cohen II*, 991 F.2d at 902 (quoting *Cook v. Colgate Univ.*, 802 F. Supp. 737, 743 (N.D.N.Y. 1992)).

³⁴ *Id.*

³⁵ *Id.* at 895-96.

³⁶ *Id.*

³⁷ *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824, 832-33 (10th Cir. 1993).

³⁸ *Cannon v. University of Chicago*, 441 U.S. 677 (1979).

³⁹ *Roberts*, 998 F.2d at 830.

⁴⁰ See *supra* note 32.

Although the four cases have left many questions unanswered,⁴¹ the courts rejected several of the defendants' arguments and thereby defined some of what Title IX is not. First, although the *Cook v. Colgate University*⁴² court seemed to adopt the Title VII burden shifting scheme, the other courts have expressly or impliedly rejected the Title VII scheme.⁴³ Most commentators view the *Cook* decision as an aberration.⁴⁴ Second, the courts have rejected the argument that proportionality is satisfied when a school participation ratio approximately matches the ratio of students interested and capable of participating. In other words, they have rejected the argument that if thirty percent of all the students interested in participating are women, then thirty percent of the participation opportunities should be allotted to women.⁴⁵ The courts rejected this argument for two reasons. First, the courts found that satisfying the relative interest of the underrepresented sex would leave some interest among that sex unmet. This would not satisfy the Policy Interpretation's requirement of full accommodation even though interest among the overrepresented sex remained unmet.⁴⁶ Second, the courts found this interpretation to ignore the history of institutional and societal favoritism toward men which has in turn caused greater interest

⁴¹ Among the unanswered questions is whether the unmet interest aspect of the third prong of the DOE's three-prong test (and the second step in the courts' burden shifting scheme) can be satisfied by a simple showing that members of the underrepresented sex have a desire to participate in athletics rather than showing an interest in a specific, but yet unsponsored, sport. This is a critical question in situations where the number of sports sponsored for each sex is equal, but either the nature of one sport (for example, football) or an imbalance in participation (more men go out for cross country than women, for example) creates an imbalance in participation opportunities under the first prong. Must the underrepresented sex show interest in a yet unsponsored sport, or is a general interest enough?

⁴² *Cook v. Colgate Univ.*, 802 F. Supp. 737 (N.D.N.Y. 1992). In *Cook*, the plaintiffs, members of Colgate's Women's Club hockey team, alleged that Colgate's failure to elevate the club to varsity status violated Title IX. Applying a Title VII proof scheme, the court concluded that Colgate discriminated against women by sponsoring a men's hockey team but not a women's hockey team.

⁴³ *Cohen II*, 991 F.2d 888, 901 (1st Cir. 1993).

⁴⁴ See Wilde, *supra* note 19.

⁴⁵ See *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824, 831 (10th Cir. 1993); *Cohen II*, 991 F.2d at 899.

⁴⁶ See *Roberts*, 998 F.2d at 831; *Cohen II*, 991 F.2d at 899.

among men. Given equal opportunity and encouragement, the courts believe, women will show an interest equal to that of men.⁴⁷

Thus, the stage, as set going into the *Cohen III* case, contained the framework of a three-part burden shifting test which was increasingly being read as accepting only proportionality of participation as sufficient compliance with Title IX. The second of the DOE's three tests, a history of expanding opportunities, is at best a temporary answer. The third test, full and effective accommodation of the underrepresented sex even in the absence of proportionality, was on its way to elimination. *Cohen III* has now taken center stage and sent the third test to the dressing room.

2. *Cohen III*

Cohen III has broken new ground because of the innovative arguments made by the defendant, Brown University.⁴⁸ Brown University introduced statistical information and legal arguments that forced a vigorous examination of the previous interpretations of Title IX tests and standards.⁴⁹ At the time of trial, Brown University fielded sixteen men's teams and sixteen women's teams,⁵⁰ had a participation ratio of 38.13%

⁴⁷ *Cohen II*, 991 F.2d at 890.

⁴⁸ In a two to one decision, the First Circuit affirmed *Cohen III*. *Cohen IV*, No. 95-2205, 1996 U.S. App. LEXIS 30192 (1st Cir. 1996). The majority, relying heavily on the Law of the Case doctrine, rejected all of Brown University's attacks on the reasoning of the *Cohen III* and *Cohen II* decisions. The dissent, however, found that several exceptions to the Law of the Case doctrine applied and proceeded to evaluate Brown's arguments. Most notably, the dissent found that contact sports should be removed from participation comparison and that Brown's relative accommodation interpretation of the third prong of the policy interpretation three-part test should be adopted. *Id.* Further, the dissent found that the proportionality test created a quota which created an equal protection violation. *Id.* at 195.

⁴⁹ In addition to extensive evidence and expert testimony, Brown made sophisticated statutory and regulation interpretation arguments. Many of these interpretation arguments were previewed in a law review article. Connolly & Adelman, *supra* note 19.

⁵⁰ Of these sixteen teams, thirteen women's and twelve men's teams were funded by the university, and three women's and four men's teams were "donor-funded." All of the teams, regardless of funding source, were designated as varsity sports. However, the court found that the donor-funded teams did not offer participation opportunities equal to that of the varsity funded teams. See *Cohen III*, 879 F. Supp. 185, 188-89 (D.R.I. 1995).

women and 61.87% men, and had an undergraduate enrollment ratio of 51.14% women and 48.86% men. The named plaintiffs were members of the women's gymnastics and volleyball teams, which had been cut from varsity status along with the men's water polo and golf teams. The plaintiffs represented the class of "all present and future Brown University women students and potential students who participate, and/or are deterred from participating in intercollegiate athletics funded by Brown."⁵¹

The arguments and analysis were limited to the issue of whether Brown effectively accommodated "the interests and abilities of students to the extent necessary to provide equal opportunity in the selection of sports and levels of competition available to members of both sexes."⁵² To show that it had effectively accommodated female athletes, Brown focused its arguments on the first and third prongs of the three-prong test adopted from the DOE's Policy Interpretation. The essence of Brown's argument was that, as currently applied by the courts, the three-prong test does not accurately measure participation opportunities and the relative interests of both sexes.⁵³ At the heart of this argument was the premise that women have not shown the same level of interest in participating in athletics as men.⁵⁴ The court rejected Brown's arguments on all points.

On the first prong, the test of substantial proportionality, Brown first argued that "participation opportunities" should be defined as the maximum number of members that a team could accommodate or at least as many as the comparable men's team size.⁵⁵ The court found these measurements to be predetermined by the defendant and problematic. Instead, it opted for a count of the team rosters at the end of the season as the measure of participation opportunities.⁵⁶

Failing on this point, Brown offered an alternative test for providing proportionate participation opportunities. According to Brown, opportunities must be offered in proportion to the ratio of interest among the student body. Therefore, if forty

⁵¹ *Id.*

⁵² *Id.* at 193 (quoting 44 Fed. Reg. 71,417 (1979)).

⁵³ *Id.* at 200.

⁵⁴ *Id.* at 209-10.

⁵⁵ *Cohen III*, 879 F. Supp. at 203-04.

⁵⁶ *Id.*

percent of the students that show an interest in participation are women, forty percent of the participation opportunities should be available for women. This argument borrowed heavily from Title VII jurisprudence, which tests employment discrimination by comparing the qualified applicant pool with work place demographics.⁵⁷

In rejecting this argument, the court relied heavily on the conclusion that student interest cannot be accurately measured and the observation that, unlike the gender neutral job classification at issue in Title VII cases, Title IX cases involve gender requirements. According to the court, the first problem is finding the appropriate pool to survey. The court rejected a pool consisting of matriculated students, because that group is predetermined by recruiting practices.⁵⁸ Actual applicants to the school will not work for the same reason as matriculated students; they preselect themselves based on the sports offered by Brown. Further, a mere expression of interest does not always grow into participation.⁵⁹ The only pool that the court was willing to accept was "all academically able potential varsity [high school] participants." However, conducting a survey of that pool of high school students is practically impossible.⁶⁰

Besides problems in selecting a pool to survey, the court found that relying on a survey to test compliance will not measure latent and changing interests⁶¹ or take into account how opportunity can drive interest.⁶² Further, on an administrative level schools will find it difficult to survey continually the chosen pool and respond to those changes.⁶³

Brown's next line of defense was to define full and effective accommodation, the third prong, as satisfaction of interest in proportion to the interest among each sex.⁶⁴ According to the argument, a school will fully and effectively accommodate both sexes if it provides participation opportunities in proportion to the interest of both sexes. Or, defined negatively, the

⁵⁷ *Id.* at 205.

⁵⁸ *Id.* at 206.

⁵⁹ *Id.* at 206-07.

⁶⁰ *Cohen III*, 879 F. Supp. at 207.

⁶¹ *Id.* at 205.

⁶² *Id.* at 207.

⁶³ *Id.* at 206.

⁶⁴ *Id.* at 208.

school disappoints each sex in proportion to its demonstrated interest.⁶⁵ Because this argument is similar to and rests upon some of the same presumptions as Brown's argument on proportionality, it was rejected by the court.⁶⁶ In addition to the problems of assessing interest, the court noted that Brown's proposal would work to lock in the status quo, a status quo created by past discrimination.⁶⁷ Any survey of interests would reflect current interests and not promote the development of new interests.⁶⁸ The court interpreted Title IX to be remedial, to correct past discrimination. Brown's test would not stimulate interest because opportunity creates interest.⁶⁹

Thus, the court found that Brown had failed to provide female athletes with equal opportunity to participate in intercollegiate athletics. In rendering its decision, unlike past decisions, the court explicitly and impliedly clarified and refined the test for compliance with Title IX. Until *Cohen III*, the possibility existed that a university could use survey data to show that it was fully and effectively accommodating the interest of the underrepresented sex, satisfying the third prong. Now, however, this avenue has been closed by the court's conclusion that any survey will be flawed, and that the use of such survey data will defeat the remedial intent of Title IX. The practical effect, whether intended or not, is to leave the first prong, proportionality, as the only test for compliance with Title IX. The third prong is now no more than an element of proof in the plaintiff's case: namely, requiring the plaintiff to show unmet interest.

However, one district court has declined to adopt and apply the three-part test found in the Policy Interpretation. In *Pederson v. Louisiana State University*,⁷⁰ the court rejected the proportionality foundation of the three-part test for two reasons. First, the court found that the Policy Interpretation did not have the force of law because it had not been adopted by the President or Congress⁷¹ and was in conflict with the

⁶⁵ *Cohen III*, 879 F. Supp. at 208.

⁶⁶ *Id.* at 210.

⁶⁷ *Id.* at 209.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ 912 F. Supp. 892 (M.D. La. 1996).

⁷¹ *Id.* at 910.

Regulations. Specifically, the court found Section 1681(a) to prohibit an interpretation of Title IX to require preferential or disparate treatment to members of one sex, which the court believed proportionality to do.⁷² Second, the court rejected the *Roberts*, *Cohen* and *Horner* courts' adoption of proportionality as lacking evidentiary support. According to the *Pederson* court, those three courts relied on the assumption that interest to participate in sports is equal between men and women. The *Pederson* court found no evidence in the *Roberts*, *Cohen* or *Horner* opinions to support that assumption.⁷³ Therefore, the *Pederson* court analyzed the accommodation of interest question without the aid of the proportionality starting point.

The questions now become, did the *Cohen III* and *IV* courts stray from what Congress and the DOE intended? And, is the effect of this holding to change Title IX from a measure to prevent discrimination into a means of creating interest and participation, or as some critics have asserted, a requirement of affirmative action?⁷⁴ To answer these questions, it is necessary to analyze Title IX the way that the Supreme Court might.

II. INTERPRETATION OF TITLE IX

Most scholars agree that the Supreme Court has employed or does employ two methods of statutory interpretation: the modern textualist and the intentionalist approaches.⁷⁵ The modern textualist approach appears to be favored by the majority of the current Court.⁷⁶ Generally, the modern textualist approach can be described as a search for how an ordinary person would understand the law as written, without the aid of

⁷² *Id.* at 914.

⁷³ *Id.* at 913.

⁷⁴ See Stephen Chapman, *Unsportsmanlike Conduct: Setting Quotas for Women in College Sports Isn't Fair Play*, CHI. TRIB., Apr. 20, 1995, at 21.

⁷⁵ See T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20 (1988); Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749 (1995). Other terms have also been used to describe what is essentially intentionalism and textualism by some commentators.

⁷⁶ See Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 355 (1994); Pierce, *supra* note 75, at 750.

extratextual sources. On the other hand, the intentionalist approach seeks the underlying purpose or intent of the drafters and will resort to extratextual aids in some circumstances.

A. *A Modern Textualist Interpretation*

Modern textualists, led by Justice Scalia, eschew reference to legislative history, reasoning that legislative history is nothing more than the contrived statements of only a few special interests and therefore not indicative of the prevailing intent of Congress.⁷⁷ Discovery of the prevailing intent of Congress therefore being impossible, modern textualists instead seek the plain meaning of the words chosen by Congress. As Justice Scalia wrote:

The meaning of terms on the statute books ought to be determined, not on the basis of which meaning can be shown to have been understood by a larger handful of the Members of Congress; but rather on the basis of which meaning is . . . most in accord with context and ordinary usage, and thus most likely to have been understood by the whole Congress which voted on the words of the statute

. . . .⁷⁸

Should the language of a statute be ambiguous, the modern textualist will look to contemporaneous and contextual aids to find the ordinary meaning of the words chosen. These aids include dictionaries, other similar statutes and common law usage.⁷⁹

The first step, then, in determining whether proportionality, as the only method of complying with Title IX, is in accord with the language of Title IX is to look for contextual clues. Within the text of Title IX, three provisions facially appear to speak to a test for compliance:

Section 1681(a): 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 . . . ;

⁷⁷ See *Pierce v. Underwood*, 487 U.S. 552 (1988); *Kungys v. United States*, 485 U.S. 759 (1988); *United States v. Fausto*, 484 U.S. 439 (1988); *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365 (1988).

⁷⁸ *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring).

⁷⁹ See *Pierce*, *supra* note 75, at 750.

....

Section 1681(a)(8): This section shall not preclude father-son or mother-daughter activities at an educational institution, but if such activities are provided for students of one sex, opportunities for reasonably comparable activities shall be provided for students of the other sex;

....

Section 1681(b): Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area: *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.⁸³

Now, do the dictates of any of these three provisions show an unambiguous expression of congressional intent? That question is the first step in determining whether an agency's construction of a statute passes muster.⁸¹ If an unambiguous expression of congressional intent is found, the analysis stops there.⁸² Here, it cannot be said that Congress expressly authorized or forbade proportionality. However, it can be said that Congress intended institutions to provide "reasonably comparable opportunities." A close reading of Sections 1681(a) and 1681(a)(8) leads to that conclusion. Section 1681(a)(8) requires that when one sex is provided with an opportunity, the other sex must be provided with a "reasonably comparable opportunity." Section 1681(a)(8)'s requirement thereby puts into effect the command of Section 1681(a) that no person be excluded from participation or be subject to discrimination on the basis of sex.

But there remain two unanswered questions: (1) how do we determine when one sex is being afforded an opportunity that the other sex is not being afforded, and (2) what is a "rea-

⁸⁰ 20 U.S.C. § 1681 (1996).

⁸¹ *Chevron U.S.A. v. Natural Resource Defense Council*, 467 U.S. 837, 842 (1983).

⁸² *Id.* at 842-43.

sonably comparable opportunity." Section 1681(b) helps in answering the first question, but only a little. Section 1681(b) tells us that unequal opportunity does not exist when an imbalance in sex is caused by an imbalance in the sex of the surrounding geographic area. Then it tells us that a statistical imbalance may nevertheless be used to show unequal opportunity in other circumstances. The question of proportionality remains unanswered. We must therefore look elsewhere for guidance.

Textualist practice would suggest that the dictionary definition of terms should be consulted next. *Webster's Ninth New Collegiate Dictionary* defines "reasonable" as "not extreme or excessive; moderate, fair."⁸³ "Comparable" is defined as "capable of or suitable for comparison; equivalent, similar"⁸⁴ Moreover, *Webster's* defines "opportunity" as "a favorable juncture of circumstances; a good chance for advancement or progress"⁸⁵ Read together, *Webster's* definitions of "reasonable," "comparable" and "opportunity" suggest a fair chance for a similar experience. It does not suggest a guarantee, but the option to take advantage of an offer. Proportionality, on the other hand, does involve a guarantee. The number of participants is locked in. Therefore, using *Webster's* definitions as a guide leads to the conclusion that the plain meaning of Title IX does not include proportionality. But, ironically, while *Mellinkoff's Dictionary of American Legal Usage* does not have entries for "comparable" and "opportunity," it states that "reasonable has no precise legal meaning."⁸⁶ Other evidence of the meaning of "reasonably," "comparable," and "opportunity" would certainly help.

Textualists will consult statutes with similar or the same words or phrasing for guidance.⁸⁷ In the case of Title IX, such consultation is particularly appropriate because Title IX was patterned after Title VI of the Civil Rights Act of 1964.⁸⁸ In

⁸³ WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 981 (9th ed. 1993).

⁸⁴ *Id.* at 267.

⁸⁵ *Id.* at 828.

⁸⁶ MELLINKOFF'S DICTIONARY OF AMERICAN LEGAL USAGE 539 (1992).

⁸⁷ See *Pierce v. Underwood*, 487 U.S. 552, 564-65 (1988); *Kungys v. United States*, 485 U.S. 759, 769-70 (1988).

⁸⁸ See *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824, 832 (10th Cir. 1993).

fact, except for the group being protected, the first sections of Title IX and Title VI are identical. Therefore, what Title VI was thought to mean in 1972, when Title IX was enacted, is strong evidence of the plain meaning of the words used in Title IX.

While by 1972 several circuits had accepted disparate impact as evidence of violation of Title VI, the Supreme Court did not pass on the question until 1974.⁸⁹ Until 1974, it was uncertain whether a disparate impact, in the absence of intentional discrimination, violated Title VI. Therefore, the understanding of Title VI as of 1972 does not conclusively include or exclude proportionality, even if proportionality is viewed as akin to proof of discrimination by disparate impact. However, if the reasoning found in Justice White's opinion in *Guardians Association v. Civil Service Commission* is allowed to have a retroactive effect,⁹⁰ Congress can be said to have intended or allowed disparate impact proof of Title IX violations.⁹¹ To reach this conclusion, one must accept the *Guardians* Court's conclusion that Congress permits disparate impact proof when the agency's regulations allow it, and then one must couple the *Guardians* Court's conclusion with the fact that the disparate impact regulations of Title VI existed when Title IX was enacted. This reasoning, however, seems tenuous and is weakened by the limited support that Justice White's reasoning received in *Guardians* and the likelihood that the current Court, led by Justice Scalia, would decline to follow Justice

⁸⁹ The Supreme Court first addressed and allowed disparate impact evidence as proof of a violation of Title VI in *Lau v. Nichols*, 414 U.S. 563 (1974). However, the Court more fully discussed disparate impact proof in *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582 (1983); see IVAN E. BODENSTEINER & ROSALIE BERGER LEVINSON, *STATE AND LOCAL GOVERNMENT CIVIL RIGHTS LIABILITY* § 8:22, at 70 (1996).

⁹⁰ Justice White found that disparate impact proof of a Title VI violation is permitted when applicable agency regulations permit disparate impact proof. *Guardians*, 463 U.S. at 591.

⁹¹ In *Guardians*, the Court faced the question of whether proof in a private Title VI case required a showing of intent to discriminate. The plaintiffs, African-Americans hired after their white coworkers because of discriminatory practices, challenged the defendant's last hired-first fired policy as disproportionately affecting them. Five justices found that disparate impact, without a showing of intent, was sufficient when the applicable implementing regulations employed an effects standard. However, seven of the Justices found that intent was necessary in the absence of "effects" regulations to win a private Title VI claim. *Id.* at 582.

White's reasoning. Further, it is not the Title IX regulations that contain the proportionality requirements; it is the DOE's policy interpretation. A policy statement does not carry the force of law that regulations carry and therefore may fall outside of, or at least weaken, the *Guardians* rule as applied to Title IX. Congress did not review the policy statement as it reviews regulations. Additionally, the three-prong test found in the policy statement does not use the language of disparate impact. It is the courts that have altered the three-prong test. Congress has not yet spoken on the proportionality-only test.

In summary, a textualist interpretation of Title IX would likely lead to the conclusion that proportionality, as defined and applied by the *Cohen III* decision, does not fall within the plain meaning of Title IX. The plain meaning of Title IX is that no person, because of his or her gender, can be denied the opportunity to participate in collegiate athletics. It does not mean that an imbalance in participation in athletics is conclusive proof of discrimination, nor does it mean that interest in participation must be created by universities. It only means that a woman cannot be excluded because she is a woman.

A textualist reading of Title IX is not the only reading that is possible, however. An intentionalist reading may conclude that proportionality is within the intent of Congress or that the intent of Congress is not clear, and resort to the interpretation of the agency charged with implementing Title IX is necessary.⁹² It is equally feasible that the Supreme Court could employ a combined textualist and intentionalist approach to interpreting Title IX.

B. *Intentionalist Interpretation*

A thorough analysis of Title IX and proportionality must include what some label as an intentionalist interpretation. The intentionalist interpretation method seeks the underlying purpose or intent of the legislature in enacting the statute.⁹³ While the majority view of the intentionalist method seeks the

⁹² Under the *Chevron* process, if the intent of Congress is not clear, then any permissible construction of the agency is accepted. See *Chevron U.S.A. v. Natural Resource Defense Council*, 467 U.S. 837 (1983).

⁹³ See Aleinikoff, *supra* note 75, at 23-24.

purpose or intent of Congress as of the date of enactment, some intentionalist interpretations seek the dynamic intent of the legislature.⁹⁴ In finding the dynamic intent of the legislature, courts look for the concerns that the legislature intended to address.⁹⁵

An intentionalist interpretation begins with a review of the text of the statute, but quite readily consults evidence of legislative history to discover the legislative purpose. Among the many sources of legislative history, the Supreme Court primarily uses committee reports, floor debates and hearings in that order.⁹⁶ The appropriateness of using legislative history, even aside from the textualist-intentionalist debate, has been widely debated. Court practice has varied from only consulting legislative history when the statute is found to be ambiguous, to the other extreme of consulting legislative history to confirm an otherwise clear statute.⁹⁷ Here legislative history will be consulted without any preconceived notions as to its use.

The legislative history of Title IX on the subject of college athletics (or athletics in general) is rather limited. No committee reports were issued on Title IX, and athletics were mentioned only twice during the congressional debates.⁹⁸ Further, both times that athletics were discussed, the discussion had little or no bearing on the test for compliance with Title IX.⁹⁹ The only significant legislative history was created when Congress held hearings on the regulations proposed by the Department of Health, Education and Welfare.¹⁰⁰ In response

⁹⁴ See Aleinikoff, *supra* note 75, at 46-48.

⁹⁵ See Aleinikoff, *supra* note 75, at 22-24.

⁹⁶ A survey of Supreme Court references to legislative history in its opinions from 1938 to 1979 revealed that about 50% of the references were to committee reports, about 20% were to floor debates, and about 15% were to hearings. See Jorge L. Carro & Andrew R. Brann, *The U.S. Supreme Court and the Use of Legislative Histories: A Statistical Analysis*, 22 JURIMETRICS J. 294, 304 (1982).

⁹⁷ Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 287-90 (1990).

⁹⁸ *Cohen II*, 991 F.2d 888, 893 (1st Cir. 1993).

⁹⁹ In the first reference to athletics during the congressional debate over Title IX, Senator Bayh spoke to the question of gender-blended football teams. 117 CONG. REC. 30,407 (1971). The second reference, again by Senator Bayh, addressed the matter of privacy in athletic facilities. 118 CONG. REC. 5807 (1972).

¹⁰⁰ The Department of Health, Education and Welfare submitted its regulations

to those proposed regulations, Senator Tower offered an amendment that would have exempted all college athletics from Title IX coverage.¹⁰¹ Although later modified to exempt only revenue producing sports, the Tower Amendment was dropped by the committee and replaced by the Javits Amendment.¹⁰² The reason for the change and the intent of the Javits Amendment are not explained. The Javits Amendment, in its operative part, reads that regulations should be prepared "which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of the particular sports."¹⁰³

An analysis of the legislative history that speaks specifically to athletics reveals only the general intent of Congress. The rejection, at least by implication, of the Tower Amendment demonstrates that Congress intended Title IX to cover all athletics, revenue producing and nonrevenue producing alike. Just how the Javits Amendment refines this general intent is less than certain. The DOE has interpreted the amendment to mean no more than that sports that require more equipment and have higher injury rates may be budgeted relatively more money.¹⁰⁴ Despite the arguments of some schools, the DOE has rejected interpretations that would lead to the exclusion of football.¹⁰⁵

More guidance can be found in the history of Title IX that shows an intent to repeat the workings of Title VI. As the Supreme Court noted in *Cannon v. University of Chicago*, Title

to implement Title IX to Congress for review pursuant to § 431(d)(1) of the General Education Provisions Act. *Sex Discrimination Regulations, 1975: Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor*, 94th Cong., 1st Sess. 21 (1975).

¹⁰¹ After the House Subcommittee on Postsecondary Education failed to disapprove the proposed regulations to implement Title IX, Senator Tower introduced a bill which called for the exemption of all college athletics from the coverage of Title IX. The Senate Subcommittee on Education held hearings on the bill, during which the bill was modified to exempt only revenue producing sports. The bill failed due to lack of action. See Policy Interpretation, 44 Fed. Reg. 71,473 (1979).

¹⁰² See *Sex Discrimination Regulation: Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor*, 94th Cong., 1st Sess. 21 (1975).

¹⁰³ Education Amendments of 1974, Pub. L. No. 93-380, § 844, 88 Stat. 612 (1974).

¹⁰⁴ Policy Interpretation, 44 Fed. Reg. 71,413, 71,415-71,416 (1979).

¹⁰⁵ *Id.* at 71,421.

IX was explicitly patterned after Title VI, and the drafters of Title IX assumed that it would be interpreted and applied as Title VI had been during the preceding eight years.¹⁰⁵ Therefore, what Title VI was in 1972 is what Title IX was intended to be. The tests and standards that existed for Title VI in 1972 are the tests and standards that Congress intended to be applied to Title IX in athletics.

As of 1972, proof of discrimination by a disparate impact method had not been conclusively accepted by the circuit courts and the Supreme Court.¹⁰⁷ There was disagreement between the circuits as to whether Title VI required a showing of intentional discrimination or if a disparate impact showing was sufficient. Therefore, as was discussed in more detail earlier under the textualist interpretation, Congress cannot be said with certainty to have intended a disparate impact showing for proof of a violation of Title XI in 1972.¹⁰⁸ As a result, a static intentionalist interpretation of Title IX would likely reach the same result as a textualist interpretation of Title XI: An absence of proportionality, without a further showing of intent to discriminate, was not intended by Congress to be proof of violation of Title IX. However, a dynamic intentionalist interpretation of Title IX could reach the opposite conclusion.

A dynamic intentionalist interpretation begins with a search for the concerns that Congress intended to address in a particular statute. According to the Supreme Court in *Cannon*, Congress sought to achieve two objectives when it enacted Title VI and, therefore, by implication, Title IX. First, Congress intended to prohibit the use of federal funds to support discriminatory practices. Second, it intended to protect individuals against discriminatory practices.¹⁰⁹ After determining Congress' concerns, a dynamic intentionalist interpretation asks whether the conduct in question furthers, in a reasonable fashion, those concerns.

This question, whether the proportionality test furthers the goals of eviscerating gender based discrimination in the use of federal funds in collegiate athletics, is the core question

¹⁰⁵ *Cannon v. University of Chicago*, 441 U.S. 677, 696 (1979).

¹⁰⁷ See *infra* pp. 1062-63.

¹⁰⁸ See *infra* pp. 1062-63.

¹⁰⁹ *Cannon*, 441 U.S. at 704.

that the courts will ultimately have to answer. So far, the courts have not fully examined this question. Rather, they have deferred to agency interpretations, a procedural analysis, and have not faced the substantive, hard question. To face this question head on, the first necessary step is defining what constitutes discrimination. While the attempt to define discrimination may seem naive, a simple definition will work to determine whether the proportionality test furthers Congress' goals for Title IX.

Discrimination, in one of its simplest definitions, is the denying or awarding of a benefit because the recipient possesses or does not possess a characteristic unrelated to the qualification necessary to receive the benefit. The classic example is a person being denied the right to vote, a right one qualifies for by virtue of citizenship, because of the characteristic of race. In other words, this test for discrimination is a two-step process. First, the accepted criteria for receiving a benefit is determined (i.e., age eighteen and United States citizenship to vote). Second, if additional criteria or requirements exist which are applied to only a portion of the potential recipients, discrimination has occurred.

The proportionality test, as applied by the *Cohen III* court, defines as unacceptable the criteria of gender to participate in college athletics. At that level of definition, the proportionality test furthers the congressional objective of prohibiting the use of federal funds to support discriminatory practices. Further, considering that Congress has had at least one opportunity to reject the proportionality test,¹¹⁰ it can be said that Congress considers the proportionality test to be consistent with the goal of prohibiting the use of federal funds to support sex discrimination in college athletics. Therefore, it is quite likely that a dynamic intentionalist interpretation of Title IX would find that the proportionality test fits within the intent of Congress when it enacted Title IX. However, the same reasoning could result in a finding that the elimination of men's sports in order to achieve proportionality violates Title IX. The elimination of men's sports in some respects adds an impermissible requirement to participate in college athletics: not being male.¹¹¹

¹¹⁰ See *supra* note 5.

¹¹¹ See *Kelley v. Board of Trustees of Univ. Ill.*, 832 F. Supp. 237 (C.D. Ill.

In conclusion, if the Supreme Court sets out to determine whether the *Cohen II* court's proportionality test is an acceptable interpretation of Title IX, the outcome will depend on whether the Court employs a textualist approach, a static intentionalist approach or a dynamic intentionalist approach to statutory construction. Under the textualist and static intentionalist approaches, the likely conclusion is that the proportionality test exceeds the intent of Congress. However, if the dynamic intentionalist approach is used, the conclusion could be that the proportionality test falls within the intent of Congress.

Contradictory outcomes, dictated by the method of interpretation, are hardly a desirable state of affairs. They harm the legitimacy of the conclusion. But the fault for the contradictory conclusion should not be laid at the feet of the method of interpretation used, it should be laid at the feet of the interpretation being offered. An interpretation truer to the intent of Title IX would satisfy all three methods of interpretation. Such an interpretation is the subject of the next section of this Article.

III. NEW STANDARDS

The DOE's three-part test and its interpretation by the courts will continue to cause confusion and some injustice until the test is reformed to recognize the feature of gender equity in athletics that separates it from all other anti discrimination efforts. That feature is the group nature of the "right." Unlike anti discrimination laws such as Title VII where the discrimination is committed against an individual, in Title IX settings the discrimination is committed against either all members of a sex or a distinct grouping of members from one sex: e.g., all women on a campus who desire to play basketball.¹¹²

1993), *aff'd*, 35 F.3d 265 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 938 (1995), for an example of this requirement.

¹¹² These "group rights" occur when the issue is whether a school is equitably sponsoring sports for both sexes. The "group rights" concept does not apply to issues such as whether existing teams are being fairly funded or coaches are being fairly compensated.

To illustrate this point, consider the situation in which women are clearly the underrepresented sex in athletic participation at State University, and one woman comes forward to demand the creation of a crew team. Under the current regulations and case law, not to mention the reality of all athletic programs, State University has no obligation to sponsor a women's crew team unless other women, enough to field a team at State University and to create teams at competitor schools, also step forward.¹¹³ In this way, one woman's interest in a crew team does not create a "right" to a crew team; only a sufficiently large group of women can create a "right" to a crew team.¹¹⁴

The proportionality test, even when coupled with the requirement of showing sufficient interest in a particular sport, fails to reflect and honor the group nature of the right to participate in college athletics. For example, by using the current student body as a baseline for judging how many athletes from each sex should be permitted to compete, the size of the group that creates the right is not considered, and thereby rights that are out of proportion to the group's size are created. The percentages of each sex in the student body do not necessarily reflect the size or inclination of the group that is interested in college athletics. An example of the absurd extreme that proves the point can be created out of college basketball's "March Madness." Assume that the ratio of men to women at State University is forty-five percent to fifty-five percent respectively. Under the current proportionality test, that ratio should result in forty-five percent of the athletes being men. Further, assume that the vast majority of men on State

¹¹³ For example, the Policy Interpretation excuses a school from sponsoring a team when there is no reasonable expectation of competition within the school's normal competitive region. 44 Fed. Reg. 71,413, 71,418 (1979); see *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824, 831 (10th Cir. 1993).

¹¹⁴ During this discussion, it must always be remembered that there is no constitutional right to participate in college athletics. *Gonyo v. Drake Univ.*, 837 F. Supp. 989, 994 (S.D. Iowa 1993). There is no property right or protected expectation of participation. However, once a school decides to offer athletics, it must offer it equitably to both sexes. In this way, participation in athletics is a privilege that an individual earns by meeting minimum academic standards (the NCAA and institutions set the standard) and athletic standards established by the coach. While the group may acquire a "right" when the school offers athletics, the individual must earn the privilege.

University's campus desire to play only basketball, and not other sports. Then assume that the women on State University's campus enjoy a broad selection of sports. In this hypothetical, the forty-five percent figure is not reflective of the group of men on campus who desire to participate in athletics. The men's interest justifies fielding only a basketball team. State University would be unfairly spending money on men to field more than a basketball team.¹¹⁵ And, under the current proportionality test, State University would only have to field a women's basketball team, despite a strong interest in other sports among the female student body.

This line of analysis admittedly rests on the assumption that it is unfair or inequitable to grant one sex more "privileges" than that sex, as a whole, has asked for. Or, to phrase it differently, it is unfair and inequitable to deny a privilege to one sex at a greater relative rate. In quantitative terms, this assumption of equitable disappointment can be demonstrated in the following way. Assume that State University offers one hundred team positions for women and one hundred team positions for men. Then, assume that consistently over the years, 400 women vie for the available one hundred positions and 200 men vie for their available one hundred positions. The result is an inequitable allocation of the available team positions to women relative to the demand among women.

The proportionality test also fails to ensure equitable opportunity to participate in college athletics because it wrongly assumes that the group rights that are protected by Title IX emanate from the group comprised of all men on campus. Actually, the rights that are protected by Title IX emanate from the group defined as all men on campus who have the desire and ability to compete in college athletics¹¹⁶—a subset of all

¹¹⁵ The uniqueness of gender equity in college athletics among "civil rights" issues and the fallacy of using generalization like the proportionality standard can be seen in this example. This example also raises the specter of where athletics in the United States could be headed if the NCAA does not support the "minor" sports.

¹¹⁶ This definition of the protected group is also seen in the third part of the DOE's test. That third part recognizes that participation cannot exceed interest. The test reads:

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 demon-

men on campus. Therefore, the baseline group to measure whether adequate opportunities are being offered by a school should be changed to reflect the true nature of rights involved.

Including within the definition of a baseline group the desire or interest to engage in a particular activity is not a novel idea. In *Equal Employment Opportunity Commission v. Sears, Roebuck & Co.*,¹¹⁷ the Seventh Circuit stated that the analysis of statistical evidence is not complete if circumstantial variables are not included in the analysis. In *Sears*, the EEOC claimed that Sears was systematically denying women the opportunity to fill commission sales positions. As proof of this discrimination, the EEOC introduced statistical evidence which focused on the low number of women in commission sales positions and the high number of women in noncommission sales positions. In responding to this evidence, Sears introduced evidence showing that, despite Sears's efforts to recruit women, women were not interested in commission selling. Among the reasons for this lack of interest was a dislike for the cutthroat competition and increased risk of commission sales compared to non-commission sales. The Seventh Circuit upheld the district court's judgment for Sears, pointing out that the district court reasonably considered the lack of interest among women in commission sales positions when evaluating the plaintiff's statistical evidence.¹¹⁸ In discussing its analysis, the Seventh Circuit quoted the Supreme Court, stating that "[s]tatistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances."¹¹⁹

The proportionality test is the use of statistical evidence without the consideration of surrounding facts and circumstances. The probative weight and assumptions underlying the

strated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

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

¹¹⁷ 839 F.2d 302 (7th Cir. 1988).

¹¹⁸ *Id.* at 314, 327.

¹¹⁹ *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 340 (1977).

statistical evidence of proportionality should be open to challenge just as the statistical evidence in *Sears* was open to challenge.

The current test, based on proportionality, will also continue to create confusion and injustice because it sets a moving target which changes the test from year to year. First, as enrollment changes from year to year, the baseline for determining how many members from each sex must be participating in athletics will change. In a worst case scenario, this would mean that a school would be adding and dropping teams each year as the enrollment changed. But that problem is compounded by the second problem with the current proportionality test. By measuring actual participation, rather than opportunity to participate, the measure of proportionality can be easily changed by changes in team size. Nonscholarship teams particularly (and partial scholarship teams) can change size from year to year by as much as thirty percent for reasons unrelated to conscious efforts by the coach to increase or decrease team size.¹²⁰

The logical conclusion of these observations is that a new test, truer to the goals of Title IX, is needed. Such a new test should have two parts: first, new safe harbors by which schools can judge their compliance; and second, a refinement of the burden shifting scheme for litigation under Title IX. A safe harbor, as used by the courts, is a standard that when met, creates an almost conclusive presumption of compliance. Both of the tests should be centered around a true measure of the group from which the right to participate arises.

However, the tests must also be effective in achieving other necessarily related goals. The tests must be true to forcing a change in the status quo which favors men in spending and opportunities. But the tests must also not swing the pendulum too far in favor of women. That will only lead to a backlash and prolong the battle to find an equitable test for gender equity. The tests must also be flexible enough to accommodate changes in the popularity of particular sports.

¹²⁰ The size of my men's cross country team has changed from one year to the next by as many as twelve. In 1995, the team had twelve members; in 1996, the team was twenty-four strong.

But the most important criteria that the new test must meet is its ability to work in the hardest cases. Too many observers of gender equity problems feel that more money is the answer. While that may be true at the big Division I schools that have the ability to raise more money, it is not as viable a solution for many small schools. At the smaller schools, the pie cannot be significantly increased. The test must therefore work to divide a limited pie equitably.

A. New Safe Harbors

Schools need a bright line standard by which they can test compliance. However, the factually sensitive nature of each school's situation necessitates a menu of safe harbors. Three choices appear to embody the objectives of Title IX and its group rights nature:

(1) The starting positions on varsity teams available to men and women are almost equal;

(2) The opportunity available to each sex matches the national high school participation rates of each sex;

(3) The opportunity available to each sex matches the high school participation rates for each sex in the state in which the school is located.

1. Equal Starting Positions

Equalizing the number of starting positions available to both sexes is the least responsive of the three safe harbors to the concept of a group created right, but it is the method that best serves as a stimulus to increasing interest among women, an objective that some courts have said underlies Title IX. But equalizing starting positions does allow the greater interest of one sex in athletics to be satisfied, to a certain extent, by not capping team size. For example, while both a women's and a men's cross country team would have seven starting positions, each team would be allowed to carry as many team members as university resources permit.

The obvious fear in this measure is that schools will fund men's teams at high levels to cover and encourage more men's participation. This cheating of the safe harbor would be naturally limited by the budget stretching that funding teams with

equal starting positions would demand and the regulations that currently require equitable support services between the sexes.¹²¹

The negative effect of this safe harbor for men's teams is the effect that football will have on nonrevenue teams. Theoretically, football has twenty-four to twenty-six starting positions. Rather than adding two to four teams which create twenty-four starting positions for women, a school may decide to cut two to four men's "minor" sports to create the balance in starting positions. Unfortunately, this is a very real possibility considering the power of football on most campuses.¹²² But this is a possibility caused by the same forces that shape the group rights of women to participate in sports. Men, and society as a whole, choose to participate in and support football at a higher rate than men and society participate in and support tennis and volleyball, however disappointing this result may be. Only the NCAA, by requiring a minimum number of sports, can prevent a menu of sports that includes only football and basketball on the men's side and basketball, volleyball and two other sports on the women's side.

2. High School Participation Rates—Choices (2) & (3)

Virtually every sport at the college level is also played at the high school level. If a sport is not played at the high school level in the geographic area around a school, the sport likely cannot survive. In some situations, club teams may spring up before high schools sponsor teams, as was true of soccer, for example, but the lag time in moving from club to varsity status usually is not long. Therefore, high school participation is a good indicator of the level of interest in society and among the potentially college bound population. It is true that discrimination occurs at the high school level. However, high schools are in a better position to respond to and stimulate interest in athletics. The high school and junior high school years are the formative years in which athletic interests and abilities are

¹²¹ See *supra* note 23 and the accompanying text.

¹²² At the Division 1A football schools, football is either a revenue producer or so strongly supported by alumni that it will withstand most kinds of cutbacks. Even at schools like Valparaiso where football is a very large or the largest part of the athletic department's budget, football has survived many attacks.

most shaped. Once a student arrives on a college campus, he or she has made the basic decision of whether or not to participate in athletics in general and which sport to participate in specifically. In ten years of coaching, I have never had a person, male or female, join the team who did not compete in athletics in high school, and only one male and one female who did not compete in cross country or track in high school. It is very difficult and unrealistic to start a team at the college level that is not widely sponsored by area high schools or an extensive club system.

Using national statistics will be a true measure for schools with a national draw. National statistics may also prevent schools from relying on state statistics that reflect a long lag time in recognizing a growth in interest, either overall or in a particular sport. However, in some cases state statistics may be more telling of interest, particularly when the school draws a large majority of its students from the state or region in which it sits. State or regional statistics will also be the best test for regional trends and developing interests.

While using high school statistics will provide some certainty, perhaps the most beneficial effect will be the focus that will be drawn to discrimination at the high school level. Top-down stimulation of interest and participation in all but the television sports, sports that are easily packaged and hyped like basketball and football, is a losing effort. Teams created at the college level that do not have counterparts at the high school level will be unable to sustain themselves and will not inspire twelve-year olds to take up the sport. Only television, to a lesser extent the print media, and "grass roots" opportunities will get a twelve-year old involved in a sport or sports in general. That is why, for the non-television sports, sponsorship at the high school level is vital to generating the critical mass of interest and participation necessary to sustain college teams. Therefore, the efforts to enforce Title IX at the high school level are the most effective to creating participation.

B. *A New Burden Shifting Scheme*

Even when a school sets anchor in a safe harbor, discrimination can occur. These safe harbors, because they rest on generalizations,¹²³ must only be presumptions of compliance, not conclusions of compliance. School must continually monitor indications of group interest, and plaintiffs must be able to show that their group rights are nevertheless being violated. However, the current burden shifting scheme must be modified to create a true test for discrimination against a group's rights. That scheme must be within the plaintiff's reach to prove while still being true to the requirement that the ultimate burden of proving discrimination rests with the plaintiff.

To establish a *prima facie* case, a plaintiff would have to show that one of the safe harbors is not being met, that he or she is a member of the underrepresented sex, and that sufficient interest exists on campus to field a team. After a *prima facie* case is established, the burden would then shift to the defendant to rebut the *prima facie* case in one of two ways: (1) by showing that it meets one of the other safe harbor tests and that safe harbor is a more accurate indication of compliance than the plaintiff's choice of safe harbors,¹²⁴ or (2) by showing that despite the existence of sufficient interest on campus, insufficient interest exists at potential competitor schools and among the region's high schools or club programs to assemble a schedule and sustain a team. If the defendant can rebut the *prima facie* case, the burden would then shift back to the plaintiff to prove that the defendant intentionally discriminated against the group that the plaintiff represents.

¹²³ While admitting that the safe harbors are based on generalities admits a possible flaw, the generalities of these safe harbors are more indicative of reality than the generality on which the proportionality safe harbor is based.

¹²⁴ Proof that one safe harbor is more telling than another safe harbor must necessarily rest on a showing of undermeasuring interest. The target safe harbor must be shown to underestimate the strength of interest of the group on campus and heading to campus.

CONCLUSION

While Title IX has brought about necessary changes in college athletics, it has work yet to do. However, the current interpretation of Title IX that employs the proportionality test fails to recognize the group origin of Title IX athletic rights and, thereby, is beginning to cause unnecessary harm. The proportionality test rests on the assumption that women are interested in athletics to the same degree as men upon entering college. However, experience does not support this assumption.

If Title IX is to create interest in athletics among women, the battle must be waged in middle and high schools. Those years are the critical period to stimulate interest in athletics for both boys and girls. By enforcing proportionality at the college level, the courts are forcing colleges to turn men away from college athletics and to search for women to compete on college teams. In all ten years of coaching, I have had to plead with women to join the team in order to field a sufficiently large team. I have never had to plead with men. Proportionality, if it is obtainable, cannot be required of colleges until proportionality is a reality in the high schools. College teams require a high school feeder system.

Therefore, a new Title IX test must be developed. The test must use as its baseline high school participation statistics. College sports are a reflection of the wider society and its interests. If girls vote in high school to drop out of sports, they cannot be pulled back, in most instances, into sports in college. Title IX jurisprudence must honor those votes.