

STRUCTURE VERSUS EFFECT: REVEALING THE UNCONSTITUTIONAL OPERATION OF TITLE IX'S ATHLETICS PROVISIONS

Abstract: Title IX of the 1972 Education Amendments prohibits discrimination on the basis of sex in any educational program receiving federal financial assistance, including athletics. Although the statute has brought great improvements in female athletics, such achievements have not come without problems. Title IX's complex regulatory framework, developed by the Department of Education, has led to numerous lawsuits. In early cases, courts interpreted and upheld the framework as consistent with Title IX. This Note argues, however, that the courts' early decisions and interpretation of the framework, coupled with educational institutions' current fiscal constraints, have left institutions with only one option for compliance: cutting men's teams. Such an inflexible framework amounts to a gender-based quota system that, under recent affirmative action caselaw, courts should hold unconstitutional. Only then will the Department of Education have the impetus to reinterpret the regulatory framework so that Title IX can operate in the way in which it was originally intended.

INTRODUCTION

Congress enacted Title IX as part of the Education Amendments of 1972 in response to its finding of pervasive discrimination against women with respect to educational opportunities.¹ Title IX's objectives are to prevent the use of federal funds to support discriminatory practices and to provide individual citizens protection against those practices.² Despite its seemingly clear language, however, application of Title IX has not come without problems.³ Indeed, the complex regulatory framework that the Department of Education (the "DOE")

¹ Education Amendments of 1972, Pub. L. No. 92-318, §§ 901-905, 86 Stat. 235, 373-75 (1972) (codified as amended at 20 U.S.C. § 1681 (2000)); 118 CONG. REC. 5804 (1972) (statement of Sen. Bayh). The House Special Subcommittee on Education held extensive hearings, during which over 1200 pages of testimony were gathered, documenting "massive, persistent patterns of discrimination against women" in colleges and universities. 118 CONG. REC. 5804 (1972).

² *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 (1979).

³ See, e.g., *Miami Univ. Wrestling Club v. Miami Univ.*, 302 F.3d 608, 613-16 (6th Cir. 2002); *Pederson v. La. State Univ.*, 213 F.3d 858, 864, 876-82 (5th Cir. 2000); *Cohen v. Brown Univ.*, 991 F.2d 888, 892-93 (1st Cir. 1993) ("*Cohen I*").

developed in an effort to clarify the statute's athletics provisions has resulted in numerous lawsuits and the subsequent need for judicial interpretation.⁴

In 1993, in *Cohen v. Brown University*, the United States Court of Appeals for the First Circuit heard the first challenge brought by a female under the Title IX athletics provisions.⁵ This case presented the first opportunity for the federal court system to analyze and interpret the complex regulatory framework that governs the enforcement of Title IX.⁶ The court's conclusions were pivotal because virtually every federal circuit court of appeals that has subsequently ruled on a Title IX athletics discrimination case has followed the First Circuit's analysis.⁷

This deference to the *Cohen* court's analysis was justified initially because most challenges under Title IX's athletics provisions were characteristically similar to *Cohen*, in which female athletes were challenging a school action that had an adverse effect on their opportunity to participate.⁸ More recently, however, the characteristic challenge under Title IX's athletics provisions has changed, with the challenge instead coming from male athletes.⁹ These athletes contend that, under the current interpretation of Title IX's regulatory framework, universities faced with mandatory budget cuts are left with only one option for complying with Title IX: cutting men's teams.¹⁰ Because such decisions are based solely on gender, they violate Title IX and the Fourteenth Amendment.¹¹ Thus far, however, the courts have approved these cuts as being consistent with the mandate of Title IX,

⁴ See, e.g., *Miami Univ. Wrestling Club*, 302 F.3d at 613-16; *Pederson*, 213 F.3d at 864, 876-82; *Cohen I*, 991 F.2d at 892-93.

⁵ *Cohen I*, 991 F.2d at 891.

⁶ *Id.*

⁷ See *Miami Univ. Wrestling Club*, 302 F.3d at 615; *Chalenor v. Univ. of N.D.*, 291 F.3d 1042, 1047 (8th Cir. 2002); *Neal v. Bd. of Trs.*, 198 F.3d 763, 767 (9th Cir. 1999); *Boulahanis v. Bd. of Regents*, 198 F.3d 633, 638 (7th Cir. 1999); *Cohen v. Brown Univ.*, 101 F.3d 155, 172-73 (1st Cir. 1996) ("*Cohen II*"); *Horner v. Ky. High Sch. Athletic Ass'n*, 43 F.3d 265, 271, 272-73, 275 (6th Cir. 1994); *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 830 & n.9, 831-32 (10th Cir. 1993); *Williams v. Sch. Dist. of Bethlehem*, 998 F.2d 168, 171 (3rd Cir. 1993).

⁸ See, e.g., *Pederson*, 213 F.3d at 864; *Horner*, 43 F.3d at 268; *Roberts*, 998 F.2d at 826.

⁹ See *Miami Univ. Wrestling Club*, 302 F.3d at 610; *Chalenor*, 291 F.3d at 1043; *Boulahanis*, 198 F.3d at 635; *Kelley v. Bd. of Trs.*, 35 F.3d 265, 267 (7th Cir. 1994); *Nat'l Wrestling Coaches Ass'n v. U.S. Dep't of Educ.*, 263 F. Supp. 2d 82, 85 (D.D.C. 2003), *aff'd*, 366 F.2d 930 (D.C. Cir. 2004), *cert. denied*, 125 S. Ct. 2537 (2005).

¹⁰ See *Miami Univ. Wrestling Club*, 302 F.3d at 610; *Boulahanis*, 198 F.3d at 639; *Kelley*, 35 F.3d at 267.

¹¹ See *Miami Univ. Wrestling Club*, 302 F.3d at 615; *Boulahanis*, 198 F.3d at 639; *Kelley*, 35 F.3d at 267.

and at least one court has determined that these cuts do not offend the Fourteenth Amendment.¹² In reaching this conclusion, the courts have continued to rely on the analysis of the First Circuit in *Cohen*.¹³

This Note argues, however, that such continuing deference to the First Circuit's analysis and reasoning in *Cohen*, in light of the substance of the recent male challenges to Title IX and the fiscal realities in higher education, is improper, and it is time for the circuit courts to alter their analysis of these claims.¹⁴ The courts today are faced with a set of claims—those based on the consequences of the *Cohen* decision in light of the reality of fiscal constraints—that are different from those faced by the *Cohen* court, and, as such, it is proper for the courts to reevaluate the original interpretation the First Circuit gave to Title IX's regulatory framework.¹⁵ Examination of how this original interpretation has operated in practice since the 1993 decision reveals an inherently inflexible structure that has resulted in decision making based solely on gender.¹⁶ This inflexibility, particularly when considered in light of the U.S. Supreme Court's recent 2003 affirmative action rulings in *Grutter v. Bollinger* and *Gratz v. Bollinger*, should encourage the circuit courts to determine that the regulatory framework of Title IX's athletics provisions is unconstitutional.¹⁷

Part I of this Note provides an overview of the legislative history of Title IX and the development of the regulatory framework that governs the enforcement of its athletics provisions.¹⁸ This Part then discusses the first judicial interpretation of Title IX's athletics provisions in *Cohen*, including the First Circuit's important analysis and conclusions regarding the complex regulatory framework.¹⁹ Although virtually every circuit court has followed this analysis, this Part also discusses two district court rulings that offer concerns about the First

¹² *Chalenor*, 291 F.3d at 1043, 1048–49 (approving the elimination of men's wrestling); *Kelley*, 35 F.3d at 269, 272–73 (approving the elimination of diving, fencing, and men's swimming while retaining women's swimming); see *Miami Univ. Wrestling Club*, 302 F.3d at 611, 615–16 (approving the elimination of men's soccer, tennis, and wrestling).

¹³ *E.g.*, *Neal*, 198 F.3d at 771; *Boulahanis*, 198 F.3d at 639; *Horner*, 43 F.3d at 275; *Roberts*, 998 F.2d at 830 & n.9.

¹⁴ See *infra* notes 254–74 and accompanying text.

¹⁵ See *Miami Univ. Wrestling Club*, 302 F.3d at 610, 615; *Boulahanis*, 198 F.3d at 639; *Kelley*, 35 F.3d at 267, 272.

¹⁶ See *Miami Univ. Wrestling Club*, 302 F.3d at 611; *Chalenor*, 291 F.3d at 1043; *Kelley*, 35 F.3d at 269.

¹⁷ See *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003); *Gratz v. Bollinger*, 539 U.S. 244, 271–72 (2003).

¹⁸ See *infra* notes 29–55 and accompanying text.

¹⁹ See *infra* notes 56–91 and accompanying text.

Circuit's approach.²⁰ Part II provides a discussion of the more recent male challenges to Title IX's athletics provisions.²¹ It highlights the realities of fiscal pressures on educational institutions and how the resulting necessity for budget cuts, coupled with the *Cohen* court's interpretation of Title IX's regulatory framework, has forced institutions to cut only men's teams.²² In light of the nature of the male athletes' claims, Part III suggests a correlation between the male Title IX claims and the claims in affirmative action cases, and thus provides an overview of the Supreme Court's current thought on the issue of affirmative action programs in higher education.²³

Finally, Part IV critically analyzes the First Circuit's original interpretation of Title IX's regulatory framework and rejects it as creating a framework that is impermissibly inflexible under the Equal Protection Clause of the Fourteenth Amendment.²⁴ Part IV.A explains the various flaws in the First Circuit's reasoning in *Cohen* and concludes that the court's deference to the DOE's original Policy Interpretation of Title IX was inappropriate, and that its interpretation of prong three of the DOE's three-part test and of the operation of the test as a whole was flawed.²⁵ Part IV.B then reveals that the First Circuit's interpretation has in effect resulted in the elimination of any flexibility the regulatory framework originally possessed.²⁶ Part IV.C argues that this lack of flexibility is directly at odds with the Supreme Court's current affirmative action jurisprudence, which emphasizes the need for flexibility when decisions are made based on an individual's membership in a particular class.²⁷ Part IV.D, finally, summarizes the foregoing analysis and suggests that the circuit courts alter their analyses of Title IX claims and instead hold that the regulatory framework, as currently interpreted, is unconstitutional.²⁸

²⁰ See *infra* notes 92–104 and accompanying text.

²¹ See *infra* notes 111–52 and accompanying text.

²² See *infra* notes 111–20 and accompanying text.

²³ See *infra* notes 153–80 and accompanying text.

²⁴ See *infra* notes 181–274 and accompanying text.

²⁵ See *infra* notes 186–225 and accompanying text.

²⁶ See *infra* notes 226–39 and accompanying text.

²⁷ See *infra* notes 240–53 and accompanying text.

²⁸ See *infra* notes 254–74 and accompanying text.

I. TITLE IX: LEGISLATIVE HISTORY AND JUDICIAL INTERPRETATION

A. Legislative History of Title IX

Before examining the problems with Title IX's regulatory framework, it is first necessary to understand how this complex framework came into being.²⁹ Although the objective of the statute—to prevent the use of federal funds to support discriminatory practices in education—was clear, the language of the statute and the subsequent ambiguity in its application to athletics resulted in the development of a complicated regulatory framework through which the statute is now applied.³⁰ The courts rely on this complex regulatory scheme to guide their interpretation of Title IX's athletics provisions.³¹

1. Statutory and Regulatory Framework

The language of the statute makes clear that Title IX prohibits gender discrimination in educational programs or activities receiving federal financial assistance.³² It provides, in relevant part in § 1681, that no person shall be discriminated against on the basis of sex in any federally funded education program or activity.³³ Also in § 1681, the statute specifically provides that statistical evidence of disparities between genders in education programs and activities cannot alone lead to a finding of discrimination.³⁴

²⁹ See 20 U.S.C. § 1681 (2000); *Cohen I*, 991 F.2d 888, 893 (1st Cir. 1993).

³⁰ See Walter B. Connolly, Jr. & Jeffrey D. Adelman, *A University's Defense to a Title IX Gender Equity in Athletics Lawsuit: Congress Never Intended Gender Equity Based on Student Body Ratios*, 71 U. DET. MERCY L. REV. 845, 850–53 (1994).

³¹ See, e.g., *Kelley v. Bd. of Trs.*, 35 F.3d 265, 267–68, 270–72 (7th Cir. 1994); *Cohen I*, 991 F.2d at 893–900; *Nat'l Wrestling Coaches Ass'n v. U.S. Dep't of Educ.*, 263 F. Supp. 2d 82, 87–93 (D.D.C. 2003), *aff'd*, 366 F.2d 930 (D.C. Cir. 2004), *cert. denied*, 125 S. Ct. 2537 (2005).

³² 20 U.S.C. § 1681(a).

³³ *Id.* The drafters modeled Title IX's general prohibition against sex discrimination after Title VI of the Civil Rights Act of 1964. *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 514 (1982). Title VI provides that "[n]o 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 (2000).

³⁴ 20 U.S.C. § 1681(b). In particular, the statute states that

[n]othing contained in . . . 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 com-

In connection with the passage of Title IX, Congress did not produce any secondary legislative materials; there was no committee report included with the bill.³⁵ This lack of legislative history, along with no specific mention of athletics in the statute itself, rendered ambiguous the application of Title IX to intercollegiate athletics.³⁶ In response to growing confusion over Title IX's application to intercollegiate athletics, Congress directed the DOE, through its Office of Civil Rights ("OCR"), to develop a regulation implementing the provisions of Title IX, including specific provisions for intercollegiate athletics.³⁷ Pursuant to this directive, the DOE promulgated a Final Regulation (the "Regulation") in 1975, which remains in effect.³⁸

The Regulation mirrors Title IX's language by generally prohibiting discrimination of student-athletes based on sex.³⁹ In addition to this general provision, the Regulation addresses federally funded athletics programs and provides that a recipient of federal funds shall provide equal athletic opportunities for members of both sexes.⁴⁰ The Regulation then lists ten factors to be used to assess equivalence between male and female athletic opportunities.⁴¹ Factor one involves a consideration as to whether the selection of sports and levels of com-

parison with the total number or percentage of persons of that sex in any community, State, section, or other area.

Id.

³⁵ *Cohen I*, 991 F.2d at 893; Connolly & Adelman, *supra* note 30, at 850 & n.17.

³⁶ Connolly & Adelman, *supra* note 30, at 850. Congressional records indicate that intercollegiate athletics were only mentioned twice during the congressional debate on the statute. 118 CONG. REC. 5807 (1972) (statement of Sen. Bayh on privacy in athletic facilities); 117 CONG. REC. 30,407 (1971) (statement of Sen. Bayh noting that the proposed Title IX would not require mixed-gender football teams).

³⁷ Education Amendments of 1974, Pub. L. No. 93-380, 88 Stat. 484, 844 (1974). Agency responsibility for the administration of Title IX shifted from the Department of Health, Education, and Welfare ("HEW") to the DOE when HEW was split into two agencies, the DOE and the Department of Health and Human Services. See Pub. L. No. 96-88, 93 Stat. 668 (1979). The regulations and the agency documents discussed in this Note were originally promulgated by HEW, the administering agency at the time, and later adopted by the present administrative agency, the DOE. See *Cohen I*, 991 F.2d at 895. For the sake of simplicity, this Note will treat the DOE as the promulgating agency.

³⁸ 34 C.F.R. § 106.1-71 (2004). The promulgation of the Final Regulation followed a four-month period in which the DOE received and considered over 9700 comments, suggestions, and objections to the proposed regulation. Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance, 40 Fed. Reg. 24,127, 24,128 (June 4, 1975) (codified at 34 C.F.R. § 106.1-71 (2004)) [hereinafter "Nondiscrimination on the Basis of Sex"].

³⁹ 20 U.S.C. § 1681(a); 34 C.F.R. § 106.41(a).

⁴⁰ 34 C.F.R. § 106.41(c).

⁴¹ *Id.*

petition effectively accommodate the interests and abilities of both sexes; factors two through ten consider equivalence in the provision of other services, facilities, and resources.⁴²

2. The DOE's 1979 Policy Interpretation

After the DOE issued the Regulation, however, confusion followed as to how properly to apply the ten factors and otherwise comply with Title IX.⁴³ As a result, the agency in 1979 issued a Policy Interpretation, which contains three separate sections.⁴⁴ Section one clarifies the statute's application with respect to scholarships; section two discusses the use of factors two through ten of the ten-factor test; and the third section sets forth an interpretation of factor one—whether the institution effectively accommodates the interests and abilities of both sexes.⁴⁵

Under this third section, the DOE provides that institutions may use "any non-discriminatory" method to assess students' athletic interests and abilities, and further offers guidance as to appropriate mechanisms for assessing such interest.⁴⁶ This section then sets forth a three-part test to determine if the institution is effectively accommodating the interests and abilities of both male and female athletes: (1) whether

⁴² *Id.* Specifically, factors two through ten were as follows:

- (2) [t]he provision of equipment and supplies; (3) [s]cheduling of games and practice time; (4) [t]ravel and per diem allowance; (5) [o]ppportunity to receive coaching and academic tutoring; (6) [a]ssignment and compensation of coaches and tutors; (7) [p]rovision of locker rooms, practice and competitive facilities; (8) [p]rovision of medical and training facilities and services; (9) [p]rovision of housing and dining facilities and services; (10) [p]ublicity.

Id. The OCR stated that this list was intended to serve as guidance on what factors the DOE considered integral to providing equal athletic opportunities. Nondiscrimination on the Basis of Sex, *supra* note 38, at 24,134. The enumerated items were not intended to be an exhaustive list. *See id.*

⁴³ *See* Title IX of the Education Amendments of 1972; A Policy Interpretation, 44 Fed. Reg. 71,413, 71,413 (Dec. 11, 1979) [hereinafter "Policy Interpretation"]. By November 1978, the DOE had received almost one hundred complaints alleging that more than sixty-two colleges and universities were violating Title IX by not providing women equal opportunities in athletics. 43 Fed. Reg. 58,070, 58,071 (Dec. 11, 1978).

⁴⁴ Policy Interpretation, *supra* note 43, at 71,413–14.

⁴⁵ *Id.* at 71,414.

⁴⁶ *Id.* at 71,417. The Policy Interpretation requires that this nondiscriminatory method take into account the nationally increasing levels of women's interests and abilities, that the method of determining interest not disadvantage the members of the underrepresented sex, that the method of determining ability take into account team performance records, and that the methods used generally be responsive to the expressed interests of students of the underrepresented sex who are capable of participating in intercollegiate competition. *Id.*

participation opportunities are provided in numbers "substantially proportionate to their respective enrollments," (2) "whether the institution can show a history and continuing practice of program expansion," and (3) whether the interests and abilities of the members of the underrepresented sex have been fully and effectively accommodated.⁴⁷ Proper interpretation and application of this three-part test has been the subject of most, if not all, of the Title IX athletics litigation.⁴⁸

3. The DOE's 1996 Policy Clarification

Guided by the Policy Interpretation, universities continued to attempt to comply with Title IX, but these attempts at compliance created a new set of concerns among institutions, athletes, and members of Congress.⁴⁹ In June 1995, after holding a hearing on Title IX and the three-part test outlined above, 142 members of Congress wrote to the DOE expressing concern over the fact that educational institutions were satisfying prong one of the three-part test—substantial proportionality of opportunity—by eliminating men's athletic opportunities.⁵⁰ In response to this request for more guidance about the existing standards governing the enforcement of Title IX, the DOE in 1996 issued a Policy Clarification.⁵¹

The Policy Clarification provides specific factors intended to guide an analysis under each part of the three-part test and includes examples to demonstrate how these factors should be analyzed in practice.⁵² It underscores the fact that the requirement addressed by the three-part test—the effective accommodation of interests and abilities of both sexes—is only one of many factors considered under the Regulation to determine if an institution is in compliance with

⁴⁷ *Id.* at 71,418.

⁴⁸ See, e.g., *Kelley*, 35 F.3d at 267–68, 270–72; *Cohen I*, 991 F.2d at 893–900.

⁴⁹ See *Nat'l Wrestling Coaches Ass'n*, 263 F. Supp. 2d at 92.

⁵⁰ *Id.*

⁵¹ Office for Civil Rights, U.S. Dep't of Educ., Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (Jan. 16, 1996), <http://www.ed.gov/about/offices/list/ocr/docs/clarific.html> [hereinafter "Policy Clarification"]. Prior to issuing this Policy Clarification, the DOE solicited public comment with respect to the narrow question of whether the Policy Clarification provided the appropriate clarity to areas of the three-part test that had generated questions. Dear Colleague Letter from Norma V. Cantú, Assistant Sec'y, Office for Civil Rights, U.S. Dep't of Educ. (Jan. 16, 1996), <http://www.ed.gov/about/offices/list/ocr/docs/clarific.html> [hereinafter "Dear Colleague Letter"]. The DOE received and considered over 200 public comments prior to the issuance of the final Policy Clarification in January 1996. *Id.*

⁵² Policy Clarification, *supra* note 51.

Title IX.⁵³ Further, the letter accompanying the Policy Clarification describes the first prong as a "safe harbor" for establishing compliance with the equal opportunity requirement.⁵⁴ Finally, the Policy Clarification emphasizes that the three-part test provides an institution with three different avenues of compliance, that institutions have flexibility in deciding how to provide nondiscriminatory participation opportunities for their students, and that the OCR does not require quotas.⁵⁵

B. Judicial Interpretation of the Title IX Athletics Provisions

Courts must rely on this complex regulatory framework for guidance when deciding athletes' Title IX challenges against universities.⁵⁶ The common challenge to the athletics provisions of Title IX involves women, as the underrepresented sex, challenging some school action that has an adverse effect on their opportunity to participate.⁵⁷ Typically, the challenged action involves either the downgrading of women's teams from varsity to club status (with its corresponding loss of funding, respect, and ability to attract talented athletes and coaches), the dropping of women's teams altogether, or the refusal to upgrade women's club teams to varsity status.⁵⁸ In the face of such a claim of discrimination under Title IX, institutions typically defend themselves by challenging the validity of the Regulation and the Policy Interpretation—especially the three-part test.⁵⁹ In particular, schools often argue that the Policy Interpretation and its three-part test are inconsistent with Title IX, exceed agency authority, and violate the Equal Protection Clause because they operate to discriminate against men, the overrepresented sex.⁶⁰ Much to the dismay of the institutions, however, Title

⁵³ *Id.* The letter was likely alluding to factors two through ten of the Regulation. *See id.*

⁵⁴ Dear Colleague Letter, *supra* note 51.

⁵⁵ Policy Clarification, *supra* note 51. In arguing that the three-part test does not operate as a quota, the letter emphasizes the flexibility that the test affords, such that if an institution decides to comply with the effective accommodations test by satisfying prong three, it would not be required to achieve substantial proportionality or show a history of continued expansion of opportunities for the underrepresented sex. *Id.*

⁵⁶ *See, e.g.,* Miami Univ. Wrestling Club v. Miami Univ., 302 F.3d 608, 610–13 (6th Cir. 2002); *Kelley*, 35 F.3d at 270; *Cohen I*, 991 F.2d at 893–94.

⁵⁷ *See e.g.,* Pederson v. La. State Univ., 213 F.3d 858, 864 (5th Cir. 2000); Horner v. Ky. High Sch. Athletic Ass'n, 43 F.3d 265, 268 (6th Cir. 1994); Roberts v. Colo. State Bd. of Agric., 998 F.2d 824, 826 (10th Cir. 1993); *Cohen I*, 991 F.2d at 892–93.

⁵⁸ *See Roberts*, 998 F.2d at 826; Cook v. Colgate Univ., 992 F.2d 17, 18 (2d Cir. 1993); *Cohen I*, 991 F.2d at 892; Connolly & Adelman, *supra* note 30, at 868.

⁵⁹ Nat'l Wrestling Coaches Ass'n, 263 F. Supp. 2d at 95.

⁶⁰ *Id.*

IX, its Regulation, and the Policy Interpretation thus far have survived constitutional challenges in the federal circuit courts of appeals.⁶¹ The courts have chosen to give substantial deference to the Regulation and the Policy Interpretation as valid mechanisms for the enforcement of Title IX.⁶²

This consistent and substantial deference to the Regulation and the Policy Interpretation results from the almost universal reliance on the U.S. Court of Appeals for the First Circuit's analysis in the 1993 watershed case, *Cohen v. Brown University*.⁶³ Indeed, virtually every circuit court that has subsequently ruled on a Title IX discrimination in athletics case has followed the First Circuit's analysis of and level of deference to the Regulation and the Policy Interpretation.⁶⁴

1. *Cohen v. Brown University*: The "Watershed" Interpretation

In 1993, the U.S. Court of Appeals for the First Circuit became the first federal court of appeals to rule on a case involving the athletics provisions of Title IX in the case *Cohen v. Brown University* ("*Cohen I*").⁶⁵ In that case, the plaintiffs, representing a class of current and future women athletes, challenged Brown University's decision to drop women's volleyball and gymnastics from intercollegiate varsity status, which Brown had undertaken in an effort to reduce its financial burden.⁶⁶ The plaintiffs alleged that Brown violated Title IX's ban on gender-based discrimination in its provision of athletics.⁶⁷ They further ar-

⁶¹ See *Miami Univ. Wrestling Club*, 302 F.3d at 613-16; *Chalenor v. Univ. of N.D.*, 291 F.3d 1042, 1047-50 (8th Cir. 2002); *Pederson*, 213 F.3d at 878-82; *Neal v. Bd. of Trs.*, 198 F.3d 763, 772-73 (9th Cir. 1999); *Boulahanis v. Bd. of Regents*, 198 F.3d 633, 637-39 (7th Cir. 1999); *Kelley*, 35 F.3d at 271-72; *Cook*, 992 F.2d at 18; *Cohen I*, 991 F.2d at 895-900, 905-06.

⁶² See e.g., *Neal*, 198 F.3d at 771-73; *Kelley*, 35 F.3d at 271; *Roberts*, 998 F.2d at 828; *Cohen I*, 991 F.2d at 899.

⁶³ *Cohen I*, 991 F.2d at 891; see Julia Lamber, *Gender and Intercollegiate Athletics: Data and Myths*, 34 U. MICH. J. L. REFORM 151, 169 (2000).

⁶⁴ See *Miami Univ. Wrestling Club*, 302 F.3d at 615; *Chalenor*, 291 F.3d at 1047; *Neal*, 198 F.3d at 767; *Boulahanis*, 198 F.3d at 638; *Cohen II*, 101 F.3d 155, 172-73 (1st Cir. 1996); *Horne*, 43 F.3d at 271, 272-73, 275; *Roberts*, 998 F.2d at 830 & n.9, 831-32; *Williams v. Sch. Dist. of Bethlehem*, 998 F.2d 168, 171 (3d Cir. 1993); Lamber, *supra* note 63, at 169.

⁶⁵ See *Cohen I*, 991 F.2d at 891, 907. The First Circuit numbers its *Cohen* cases in a different manner from this Note, but because this Note is only discussing two opinions, it refers to the First Circuit's initial opinion as *Cohen I* and the First Circuit's opinion after remand to the district court as *Cohen II*.

⁶⁶ *Id.* at 892. As part of this plan, Brown also dropped men's golf and men's water polo from varsity status. *Id.*

⁶⁷ *Id.* at 893. Although the elimination of these four teams did not significantly impact the overall participation rate of either gender, the existing participation rates did not rep-

gued that Brown's decision to devalue two women's programs without first taking steps to equalize the athletic opportunities, either by reducing men's activities or by adding other women's teams to compensate for the loss, further exacerbated this violation.⁶⁸

After engaging in an overview of the legislative and regulatory history of Title IX, the First Circuit held that the DOE's Title IX Regulation should be accorded appreciable deference.⁶⁹ In reaching this conclusion, the court relied on *Chevron U.S.A. Inc. v. Natural Reserve Defense Council, Inc.*, the U.S. Supreme Court's 1984 decision addressing the issue of judicial deference to administrative agency determinations.⁷⁰ The court granted the Regulation particularly high deference because Congress had explicitly delegated to the agency the responsibility of setting forth Title IX standards for athletic programs.⁷¹ The court then went on to hold that the Policy Interpretation should also be given substantial deference, as it was a reasonable interpretation of the Regulation.⁷²

Having granted deference to the Policy Interpretation, the court then reviewed each of the three sections of the Policy Interpretation—athletic financial assistance, equivalence of other program areas, and effective accommodation of student interests and abilities.⁷³ The court concluded that an institution can violate Title IX even if it complies with the first two sections.⁷⁴ In other words, under this interpretation, an institution must comply with the third section and its three-part test to prevail in a Title IX challenge.⁷⁵

The court reviewed the three-part test and accepted the statement in the Policy Clarification that the first benchmark provides a safe harbor for institutions to achieve compliance.⁷⁶ The court then

resent statistical equality with the student population. *Id.* at 892. Both before and after the cuts, women had approximately 37% of the athletic opportunities and men about 63%, compared to Brown's student body population of approximately 52% men and 48% women. *Id.*

⁶⁸ *Id.* at 893.

⁶⁹ *Id.* at 893–95.

⁷⁰ *Cohen I*, 991 F.2d at 895 (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)).

⁷¹ *Id.* (citing *Chevron*, 467 U.S. at 844 (holding that where Congress has explicitly delegated responsibility to an agency, the agency's regulations deserve "controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute" at issue)).

⁷² *Id.* at 896–97.

⁷³ *Id.* at 897.

⁷⁴ *Id.*

⁷⁵ See *Cohen I*, 991 F.2d at 897.

⁷⁶ *Id.*

went on to describe that the second and third parts of the test provide additional means for achieving compliance; indeed, the court recognized that it was unlikely that athletic establishments at most institutions would reflect the gender balance of their student bodies.⁷⁷ The court cautioned, however, that the third part of the test sets a high standard in that it requires full and effective accommodation, and that if there is sufficient interest and ability among members of the underrepresented sex that existing programs do not satisfy, an institution necessarily fails the third prong of the test.⁷⁸

In reaching its holding on the proper application of the third part of the effective accommodation test, the court rejected Brown's argument that, to the extent that students' interests in athletics are disproportionate by gender, the third part of the test should be read to allow institutions to meet the interests of students incompletely, so long as the school's response is in direct proportion to the comparative levels of interest.⁷⁹ In the court's opinion, Brown's interpretation "read[] the 'full' out of the duty to accommodate 'fully and effectively.'"⁸⁰ Additionally, the court held that Brown's view, which would have required the assessment of relative interests and abilities of the student population, would have made it overly difficult for institutions to assess compliance and would have presented significant and difficult quantification problems.⁸¹ Rather, the court preferred a simpler and easier-to-administer interpretation of prong three, which requires an academic institution to establish a new team or upgrade an existing club team if there is a sufficiently high unmet need in the underrepresented gender.⁸² Thus, the court adopted this high standard primarily based on its ease of administration and not necessarily because of its consistency with agency intent.⁸³

⁷⁷ *Id.* at 897-98.

⁷⁸ *Id.* at 898.

⁷⁹ *Id.* at 899-900. The court provided an example of Brown's reasoning: suppose a university, "Oooh U.", has a student body consisting of 1000 men, 500 of whom are interested and able to compete, and 1000 women, 250 of whom are interested and able to compete. *Id.* at 899. Under Brown's reasoning, Oooh U. would have had to provide athletic opportunities in line with the two-to-one interested athletes ratio—here, 100 slots for men and fifty slots for women. *Id.*

⁸⁰ *Cohen I*, 991 F.2d at 899 (quoting Policy Interpretation, *supra* note 43, at 71,418). Continuing its hypothetical, the court held that to satisfy prong three, Oooh U. would have had to accommodate the interests of all 250 women. *Id.*

⁸¹ *Id.* at 900.

⁸² *Id.*

⁸³ *See id.*

Having reached the above conclusions, the First Circuit remanded the case to the district court for further proceedings on whether Brown had violated Title IX.⁸⁴ On remand, the district court applied the test laid out in *Cohen I* and determined that Brown's athletic programs violated Title IX.⁸⁵ Brown then appealed the decision, challenging on constitutional and statutory grounds the test employed by the district court.⁸⁶

In upholding the district court's findings after remand, the First Circuit, in *Cohen II*, upheld the *Cohen I* analysis and conclusions.⁸⁷ The court also addressed the claim that its *Cohen I* test for compliance with Title IX effectively renders Title IX an "affirmative action statute" that results in preferential treatment for women because it imposes quotas that exceed women's relative interests and abilities in athletics.⁸⁸ In rejecting this claim, the court maintained that Title IX is not an affirmative action statute, but rather an anti-discrimination statute, and that no aspect of the Title IX regime mandates gender-based preferences or quotas.⁸⁹ Indeed, the court pointed out that the substantial proportionality prong of the three-part test is merely a starting point for the analysis, and that it is but one aspect of the inquiry into whether an institution's athletics program complies with Title IX.⁹⁰ In coming to this conclusion, however, the court failed to consider the fact that its interpretation of prong three had effectively left prong one as the only mechanism for a financially strapped institution to achieve compliance.⁹¹

2. District Court Concerns with *Cohen* Deference and Interpretation

Although most courts have followed the analysis and interpretation of the First Circuit in *Cohen I* and *Cohen II*, not all have done so without reservation.⁹² Indeed, several federal district courts have

⁸⁴ *Id.* at 907.

⁸⁵ *Cohen II*, 101 F.3d at 161.

⁸⁶ *Id.* at 162.

⁸⁷ *Id.* at 172-73.

⁸⁸ *Id.* at 169.

⁸⁹ *Id.* at 170.

⁹⁰ *Cohen II*, 101 F.3d at 171.

⁹¹ *See id.* at 170-71. *But see Miami Univ. Wrestling Club*, 302 F.3d at 613 (recognizing that "in the real world of finite resources, [cutting men's teams] may be the only way for an education institution to comply with Title IX").

⁹² *See Neal v. Bd. of Trs.*, No. CV-F-97-5009 REC., 1999 WL 1569047, at *3 (E.D. Cal. 1999) ("*Neal District*"), *rev'd*, 198 F.3d 763 (9th Cir. 1999); *Pederson v. La. State Univ.*, 912 F. Supp. 892, 913-14 (M.D. La. 1996) ("*Pederson District*"), *rev'd*, 213 F.3d 858 (5th Cir.

called into question the substantial deference granted to the Policy Interpretation, as well as the use of proportionality (prong one of the three-part test) as a measure of compliance.⁹³ These concerns represent valid issues with the current interpretation of Title IX and its regulatory framework.⁹⁴

The U.S. District Court for the Middle District of Louisiana articulated the most explicit rejection of the First Circuit's analysis and interpretation in its 1996 decision, *Pederson v. Louisiana State University*.⁹⁵ In that case, the court pointed out that no President has ever approved the Policy Interpretation, and thus it does not have the binding effect that would normally be accorded to such rules and regulations.⁹⁶ Further, and more importantly, the court held that prong one of the three-part test—substantial proportionality—should not be considered a "safe harbor" because stopping the inquiry at the point of numerical equality would not comport with Title IX's mandate.⁹⁷ The court held that although the Policy Interpretation serves as a useful guide, to the extent that it suggests that numerical proportionality between the sexes will suffice, it is contrary to the language of Title IX and should not be followed.⁹⁸

Two additional district courts have expressed reservations about the Policy Interpretation's proportionality test.⁹⁹ In the 1994 case *Kelley v. Board of Trustees*, in which the plaintiffs—male swimmers—sought a preliminary injunction to prevent the university from cutting their program while leaving the female swimming program intact, the U. S. District Court for the Central District of Illinois expressed some con-

2000); *Kelley v. Bd. of Trs.*, 832 F. Supp. 237, 243–44 (C.D. Ill. 1993) ("*Kelley District*"), *rev'd*, 35 F.3d 265 (7th Cir. 1994).

⁹³ See *Neal District*, 1999 WL 1569047, at *3; *Pederson District*, 912 F. Supp. at 910, 913–14; *Kelley District*, 832 F. Supp. at 241–43.

⁹⁴ See *Neal District*, 1999 WL 1569047, at *3; *Pederson District*, 912 F. Supp. at 910, 913–14; *Kelley District*, 832 F. Supp. at 241–43.

⁹⁵ See 912 F. Supp. at 913–14.

⁹⁶ *Id.* at 910.

⁹⁷ *Id.* at 913–14. The court pointed out that the assumption underlying the substantial proportionality test is that the interest and ability to participate in sports is equal between all men and women on all campuses. *Id.* at 913. The court stated, however, that no basis exists for such a pivotal assumption. *Id.* Rather, the court believed it more likely that interests and abilities will vary from campus to campus. *Id.* at 914. The court further pointed out that the *Cohen* court (and others) reached the conclusion that the first prong should be a "safe harbor" solely as a result of administrative deference. *Id.*

⁹⁸ *Id.* at 914. The court went on to hold that because the university had failed to satisfy prongs two and three of the three-part test, it was in violation of Title IX, regardless of the court's holding on the validity of prong one. *Id.* at 915–17.

⁹⁹ See *Neal District*, 1999 WL 1569047, at *3; *Kelley District*, 832 F. Supp. at 241.

cern that the judicial and policy interpretations had essentially "converted Title IX from a statute which prohibits discrimination on the basis of sex . . . into a statute which provides 'equal opportunity for members of both sexes.'"¹⁰⁰ The court also explicitly recognized that the law could have been interpreted differently and that Congress probably did not anticipate that Title IX would produce such "draconian" results whereby men's teams are eliminated to achieve Title IX compliance.¹⁰¹

With a similar line of reasoning, in 1999 in *Neal v. Board of Trustees*, the U.S. District Court for the Eastern District of California granted a preliminary injunction to male wrestlers who asserted Title IX claims.¹⁰² In issuing the preliminary injunction in favor of the male athletes, the court concluded that relying on proportionality to achieve compliance constituted an implementation of a quota based on gender, and that such a gender-based distinction was a violation of Title IX.¹⁰³ Although the Ninth, Fifth, and Seventh Circuit Courts of Appeals rejected each of these expressed district court concerns, such concerns reveal the lack of unanimous support for the *Cohen* court's interpretation of the regulatory framework.¹⁰⁴

3. *Christensen v. Harris County*: A Revised View on Deference Due to Agency Interpretations

In addition to the district courts' concerns with the *Cohen* court's interpretation, a recent U.S. Supreme Court case also calls into question the deference that the *Cohen* court granted to the Policy Interpretation.¹⁰⁵ In holding that the Policy Interpretation should be granted substantial deference, the *Cohen* court relied primarily upon *Chevron*.¹⁰⁶ In 2000, however, the Supreme Court, in *Christensen v. Harris County*, clarified *Chevron*'s applicability to agency interpretations other than regulations.¹⁰⁷ In particular, the Court held that agency interpre-

¹⁰⁰ 832 F. Supp. at 241.

¹⁰¹ *Id.* at 242, 243. Despite these concerns, the court held in favor of the university and upheld the cuts to the men's swimming program, reasoning they were consistent with current judicial and agency interpretation of Title IX. *Id.* at 242, 244.

¹⁰² 1999 WL 1569047, at *1, *3.

¹⁰³ *Id.* at *3.

¹⁰⁴ See *id.*; *Pederson District*, 912 F. Supp. at 913-14; *Kelley District*, 832 F. Supp. at 243-44.

¹⁰⁵ See *Christensen v. Harris County*, 529 U.S. 576, 587 (2000); *Neal District*, 1999 WL 1569047, at *3; *Pederson District*, 912 F. Supp. at 913-14; *Kelley District*, 832 F. Supp. at 243-44.

¹⁰⁶ *Cohen I*, 991 F.2d at 895 (citing *Chevron*, 467 U.S. at 844).

¹⁰⁷ See *Christensen*, 529 U.S. at 587 (citing *Chevron*, 467 U.S. at 844).

tations such as those in policy statements, opinion letters, agency manuals, and enforcement guidelines—all of which do not have the force of law—are not entitled to *Chevron*-style deference.¹⁰⁸ The Court stated that such interpretations are entitled to respect only to the extent that they are persuasive.¹⁰⁹ Because the *Cohen* court acted four years before *Christensen*, the First Circuit lacked *Christensen*'s guidance when it accorded substantial deference to the Policy Interpretation.¹¹⁰

II. RECENT CHALLENGES TO TITLE IX: DISCRIMINATION AGAINST MEN

In contrast to the typical early challenges to Title IX brought by female athletes, currently the more frequent challenges to the statute come from male athletes, who contend that the actions educational institutions undertake in an effort to comply with Title IX in fact violate Title IX and equal protection principles by impermissibly discriminating against men.¹¹¹ Thus, in trying to avoid one type of lawsuit—a claim of a violation of Title IX because of the elimination of women's teams—educational institutions instead are finding themselves in another uncertain legal position: that of defending the elimination of men's teams to achieve compliance.¹¹²

The practice of cutting teams has become prevalent because intercollegiate athletic departments are facing ever-increasing financial pressure to reduce budgets.¹¹³ In making the required cuts, however, institutions run the risk of violating Title IX if such cuts reduce the opportunities for women at an institution that does not maintain substantial proportionality between its female student-athletes and its female student population.¹¹⁴ The *Cohen* court's initial judicial and statutory interpretation has resulted in a situation where an institution that must impose budget cuts by cutting teams must comply with

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ See *Cohen I*, 991 F.2d at 895 (giving the interpretation *Chevron*-style deference). See *infra* notes 189–206 for a discussion of how the Supreme Court's ruling in *Christensen* might have altered the *Cohen* court's analysis.

¹¹¹ See *Miami Univ. Wrestling Club v. Miami Univ.*, 302 F.3d 608, 610 (6th Cir. 2002); *Chalenor v. Univ. of N.D.*, 291 F.3d 1042, 1043 (8th Cir. 2002); *Boulahanis v. Bd. of Regents*, 198 F.3d 633, 635 (7th Cir. 1999); *Kelley v. Bd. of Trs.*, 35 F.2d 265, 267 (7th Cir. 1994); *Nat'l Wrestling Coaches Ass'n v. U.S. Dep't of Educ.*, 263 F. Supp. 2d 82, 85 (D.D.C. 2003), *aff'd*, 366 F.2d 930 (D.C. Cir. 2004), *cert. denied*, 125 S. Ct. 2537 (2005).

¹¹² See *Miami Univ. Wrestling Club*, 302 F.3d at 610; *Chalenor*, 291 F.3d at 1043; *Boulahanis*, 198 F.3d at 635; *Kelley*, 35 F.2d at 267.

¹¹³ See, e.g., *Miami Univ. Wrestling Club*, 302 F.3d at 611; *Neal v. Bd. of Trs.*, 198 F.3d 763, 765 (9th Cir. 1999); *Kelley*, 35 F.2d at 269.

¹¹⁴ See *Kelley*, 35 F.3d at 269–70; *Cohen I*, 991 F.2d 888, 898 (1st Cir. 1993).

prong one or be deemed in violation of Title IX.¹¹⁵ As a result of this difficulty in compliance, female athletes largely have been successful in suing institutions when their programs are cut and getting their respective athletic programs reinstated.¹¹⁶ This trend in case law and Title IX interpretation, coupled with the intense pressures to reduce athletic budgets, has caused institutions to resort to cutting only men's teams in order to remain compliant with Title IX.¹¹⁷

Thus far, the courts have approved these cuts as being consistent with the mandate of Title IX.¹¹⁸ The courts have held that a university may bring itself into compliance with Title IX either by increasing opportunities for the underrepresented gender or by decreasing athletic opportunities for the overrepresented gender.¹¹⁹ In coming to

¹¹⁵ See *Cohen I*, 991 F.2d at 895–900. A school complies with prong two of the three-part test if it “can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of [the underrepresented] sex.” Policy Interpretation, *supra* note 43, at 71,418. Thus, an institution that cuts women's teams will have great difficulty in complying with prong two. See Connolly & Adelman, *supra* note 30, at 874. Similarly, an institution that makes cuts to women's teams will also fail prong three because courts reason that if a women's team has been cut, the interests of those team members are not being met, which means the interests of all female athletes as a whole are not being “fully” met. See *Cohen I*, 991 F.2d at 898–900. Thus, schools faced with necessary budget cuts are forced to comply with prong one, substantial proportionality, or cut only men's teams. See Connolly & Adelman, *supra* note 30, at 846.

¹¹⁶ See *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 830, 835 (10th Cir. 1993); *Cohen I*, 991 F.2d at 895–900, 907.

¹¹⁷ E.g., *Miami Univ. Wrestling Club*, 302 F.3d at 611 (university eliminated men's soccer, tennis, and wrestling teams after concluding it was not in compliance with Title IX and it did not have funds to increase women's opportunities); *Boulahanis*, 198 F.3d at 635 (university eliminated men's soccer and wrestling teams after recognizing it was not in compliance with Title IX and was unable to meet the interests and abilities of females); *Kelley*, 35 F.3d at 269 (university eliminated men's swimming in light of budget constraints and its failure to comply with Title IX).

¹¹⁸ *Chalenor*, 291 F.3d at 1043, 1048 (approving the elimination of men's wrestling); *Kelley*, 35 F.3d at 272–73 (approving the elimination of men's swimming while retaining women's swimming); see *Miami Univ. Wrestling Club*, 302 F.3d at 611, 615–16 (approving the elimination of men's soccer, tennis, and wrestling).

¹¹⁹ *Neal*, 198 F.3d at 771 (“[A]n institution . . . can bring itself into Title IX compliance by reducing sufficiently the number of roster spots available to men.”); *Boulahanis*, 198 F.3d at 638 (“[T]he elimination of men's athletic programs is not a violation of Title IX as long as men's participation in athletics continues to be ‘substantially proportionate’ to their enrollment.”); *Horne v. Ky. High Sch. Athletic Ass'n*, 43 F.3d 265, 275 (6th Cir. 1994) (“An institution need not pour ever-increasing sums into its athletic programs in order to bring itself into compliance, but has the option of reducing opportunities for the overrepresented gender while keeping opportunities for the underrepresented gender stable.”); *Roberts*, 998 F.2d at 830 (“Financially strapped institutions may still comply with Title IX by cutting athletic programs such that men's and women's athletic participation rates become substantially proportionate to their representation in the undergraduate population.”); *Cohen I*, 991 F.2d at 898–99 n.15 (“[A university] can . . . bring itself into

this conclusion, each court again relied upon the analysis of the First Circuit in *Cohen I* and its interpretation of the Regulation and Policy Interpretation.¹²⁰

A. *The First Claim: Cutting Men's Teams Is a Violation of Title IX*

In an attempt to fight the elimination of their respective programs, male athletes first have attempted to claim that the elimination of their teams, motivated by a concern for achieving gender parity under Title IX, is itself a clear example of sex discrimination, which Title IX and its implementing regulations expressly forbid.¹²¹ In particular, male athletes argue that by eliminating their programs because of the sex of the participants, the institutions are discriminating against the male athletes on the basis of their sex, excluding them from participation in educational programs because of their sex, and denying them the benefits of educational programs because of their sex, all in violation of Title IX.¹²² Additionally, male athletes argue that allowing universities to make such cuts on the basis of sex, in an attempt to equalize the rates of participation and allocation of resources, is analogous to implementing a quota system based on sex.¹²³ Such a quota system, they argue, is also contrary to Title IX's purpose of encouraging, rather than reducing, athletic opportunities for all students.¹²⁴

Thus far, these arguments by male athletes have never succeeded in court.¹²⁵ The U.S. Court of Appeals for the Seventh Circuit heard the first of these male athlete challenges to Title IX in 1994 in *Kelley v. Board of Trustees*.¹²⁶ In that case, the University of Illinois chose to drop its men's swimming team in response to budget constraints and in light of the university's failure to comply with Title IX.¹²⁷ In response

compliance [with Title IX] . . . by reducing opportunities for the overrepresented gender while keeping opportunities stable for the underrepresented gender (or reducing them to a much lesser extent).").

¹²⁰ See *Neal*, 198 F.3d at 770-72; *Boulahanis*, 198 F.3d at 639; *Horner*, 43 F.3d at 275; *Roberts*, 998 F.2d at 830 & n.9.

¹²¹ See *Miami Univ. Wrestling Club*, 302 F.3d at 610; *Chalenor*, 291 F.3d at 1043; *Boulahanis*, 198 F.3d at 635.

¹²² See *Miami Univ. Wrestling Club*, 302 F.3d at 610.

¹²³ See *Chalenor*, 291 F.3d at 1043.

¹²⁴ See *id.*

¹²⁵ See *Miami Univ. Wrestling Club*, 302 F.3d at 614-16; *Kelley*, 35 F.3d at 272-73.

¹²⁶ 35 F.3d at 267. The court was presented with an appeal from a district court's granting of summary judgment in favor of the defendants. *Id.*

¹²⁷ *Id.* at 269. In 1982, the DOE's OCR determined that the University of Illinois was not in compliance with Title IX, but it granted the institution time to remedy the situation. *Id.* Ten years later, however, female participation in athletics at the institution was still dis-

to this action, male swimmers at the institution filed a complaint alleging that the school had violated Title IX by choosing to cut the men's swimming program.¹²⁸

In holding that the institution had not violated Title IX by cutting the men's program, the circuit court agreed with the *Cohen* court both that the Regulation and the Policy Interpretation were a reasonable interpretation of the statute and that deference should be accorded to the agency's interpretations.¹²⁹ Thus, the court concluded, the institution did not violate Title IX when it acted in accordance with the Regulation and the Policy Interpretation.¹³⁰ The court also made clear that if the institution had cut women's programs as part of the cost-cutting measure, the action would have violated Title IX.¹³¹ Finally, in response to the argument that the proportionality test operates as an impermissible quota, the court held that the three-part test offered a flexible means for the university to achieve compliance, and thus a school is not forced to meet the substantial proportionality requirement.¹³²

The U.S. Court of Appeals for the Sixth Circuit reached a similar result in 2002 in *Miami University Wrestling Club v. Miami University*.¹³³ In 1994, in light of disparities in program offerings for men and women and the lack of additional funds to increase opportunities for female students, Miami University determined that it had to eliminate some male athletic opportunities to achieve compliance with Title IX.¹³⁴ It thus chose to eliminate the men's soccer, tennis, and wrestling teams.¹³⁵ Male athletes filed suit against Miami University, arguing the decision to cut their teams violated Title IX.¹³⁶

The Sixth Circuit rejected the male athletes' Title IX claims.¹³⁷ The court held that the Policy Interpretation merited substantial def-

proportionate to female enrollment, with 23.4% female athletes versus a 44% female student body. *Id.* Thus, when faced with budget cuts, the institution opted to cut men's teams to protect itself from Title IX litigation. *Id.*

¹²⁸ *Id.* at 267.

¹²⁹ *Id.* at 270.

¹³⁰ *Id.* at 271-72.

¹³¹ See *Kelley*, 35 F.3d at 269-70.

¹³² See *id.* at 271.

¹³³ 302 F.3d at 615-16.

¹³⁴ *Id.* at 611.

¹³⁵ *Id.*

¹³⁶ *Id.* at 609-10.

¹³⁷ *Id.* at 615-16.

erence.¹³⁸ Additionally, the court agreed with the holdings in *Cohen I* and *Neal* that Title IX was intended to protect women—the historically underrepresented gender.¹³⁹

B. *The Second Claim: Cutting Men's Teams Is a Violation of Equal Protection*

In addition to the Title IX claim, the second of the male athletes' key claims is that an institution's action in eliminating men's but not women's teams creates an illegal gender classification that violates the Equal Protection Clause of the Fourteenth Amendment.¹⁴⁰ To violate the Equal Protection Clause, a state actor—such as a public university—must intentionally classify similarly situated individuals for different treatment based on some impermissible characteristic, such as race, national origin, or gender.¹⁴¹ Gender classifications are subject to an "intermediate" standard of scrutiny, which requires any discrimination based on sex to be substantially related to an important government objective.¹⁴² Thus, under this test, the court must determine, first, whether the government's objective is legitimate and important, and, second, whether a direct, substantial relationship exists between the objective and the gender-based means of achieving it.¹⁴³ In limited circumstances, a gender-based classification favoring one sex can be justified, but only if it intentionally and directly assists members of the underrepresented sex.¹⁴⁴ Male athletes frequently argue that the elimination of men's teams because of their gender does not satisfy this intermediate scrutiny standard because such actions are not substantially related to the purported goal of Title IX.¹⁴⁵

The most recent, and thus far the strongest equal protection challenge to Title IX's regulatory framework, came in 2003 when the United States District Court for the District of Columbia heard *Na-*

¹³⁸ See *Miami Univ. Wrestling Club*, 302 F.3d at 615. The court rejected the plaintiff's contention that the Policy Interpretation was controlled by the less deferential *Christensen* standard rather than the *Chevron* standard. See *id.* (citing *Christensen*, 529 U.S. at 587; *Chevron*, 467 U.S. at 844). In particular, the Sixth Circuit thought that the Policy Interpretation was far different from the opinion letter involved in *Christensen*, and that because neither the regulations nor the Policy Interpretation were unreasonable, arbitrary, capricious, or manifestly contrary to Title IX, deference was warranted. See *id.*

¹³⁹ See *id.* at 615 (citing *Neal*, 198 F.3d at 770; *Cohen II*, 101 F.3d 155, 174 (1st Cir. 1996)).

¹⁴⁰ See *id.* at 610; *Boulahanis*, 198 F.3d at 639; *Kelley*, 35 F.3d at 272.

¹⁴¹ Charles P. Beveridge, Note, *Title IX and Intercollegiate Athletics: When Schools Cut Men's Athletic Teams*, 1996 U. ILL. L. REV. 809, 813.

¹⁴² *Craig v. Boren*, 429 U.S. 190, 197 (1976).

¹⁴³ *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982).

¹⁴⁴ See *id.* at 728.

¹⁴⁵ See *Kelley*, 35 F.3d at 272.

tional Wrestling Coaches Ass'n v. U.S. Department of Education.¹⁴⁶ In this case, the plaintiffs sought a declaratory judgment and injunctive relief to prevent the DOE from enforcing Title IX in a manner that discriminates against male athletes.¹⁴⁷ In particular, the plaintiffs directly challenged the Policy Interpretation and Policy Clarification, claiming that these policy statements force schools to eliminate men's teams, artificially limit the size of men's teams, and otherwise discriminate against male athletes based on sex, thereby denying them equal protection under the law.¹⁴⁸

Despite the district court's ultimate holding that the plaintiffs lacked standing, the court did suggest in its opinion that a challenge like this one may have merit.¹⁴⁹ Throughout the court's lengthy discussion of the legislative history and judicial interpretation of Title IX and its regulatory framework, the court acknowledged that the policy statements may not have been universally accepted as reasonable interpretations of the statute and the Regulation.¹⁵⁰ Further, the court emphasized that the holding that these plaintiffs lacked standing did not mean that the DOE actions were beyond the reach of judicial review and that other potential avenues existed by which individuals or institutions could challenge the regulatory framework.¹⁵¹ Thus, de-

¹⁴⁶ 263 F. Supp. 2d at 85. This challenge represented the first direct challenge of the validity of the Policy Interpretation and the Policy Clarification by way of an action brought against the DOE. *Id.* at 97.

¹⁴⁷ *Id.* at 85.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 124–25. The court held that the plaintiffs lacked standing because they failed to meet the burden of pleading causation and redressability. *Id.* at 111. With respect to causation, the court held that the plaintiffs failed to allege that the three-part test represented a "substantial factor" in the institutions' decision making. *Id.* In reaching this conclusion, the court emphasized that flexibility was key to the operation of Title IX and that it could not be shown that the three-part test and the 1996 Clarification so controlled the conduct of the institutions so as to confer standing on the plaintiffs. *Id.* at 114. With respect to redressability, the court held that it could not be shown that any direct action by the DOE in making new rules would force educational institutions to redress the plaintiff's alleged injuries. *Id.* at 115.

¹⁵⁰ *See id.* at 87–97. The court noted that the 1996 Clarification was drafted in response to concerns by members of Congress that schools were cutting men's teams to reach substantial proportionality. *Id.* at 92. Additionally, the court addressed the fact that, prior to issuing the 1996 Clarification, the DOE received comments suggesting that the proposed Clarification and the three-part test it addressed were seriously flawed. *Id.*

¹⁵¹ *See Nat'l Wrestling Coaches Ass'n*, 263 F. Supp. 2d at 125. For example, the court stated that regulated agencies, such as the plaintiff's educational institution members, have standing to challenge the DOE's Regulation and subsequent interpretations. *Id.* Furthermore, an institution denied funding as a result of Title IX violation could challenge the agency's authority, under Title IX, to adopt the policy interpretations at issue here. *Id.* Individual plaintiffs additionally have an implied right of action under Title IX to chal-

spite dismissing the case based on lack of standing, the court not only suggested that a successful direct challenge to Title IX's regulatory framework was possible, but also provided a glimpse into what such a challenge might look like.¹⁵²

III. RELATION TO AFFIRMATIVE ACTION

In this most recent male challenge to Title IX, *National Wrestling Coaches Ass'n v. U.S. Department of Education*, the United States District Court for the District of Columbia suggested that a constitutional challenge would be possible with the right group of plaintiffs and a correctly stated claim.¹⁵³ The basis of such a claim would be that the effect of the Policy Interpretation and Clarification is to cause Title IX to act as an impermissibly inflexible quota system, because there exists, in effect, only one way to comply.¹⁵⁴ Because the crux of the argument is that Title IX is operating as an inflexible quota system, recent affirmative action caselaw provides instruction on the current U.S. Supreme Court sentiment on the use of quotas in education.¹⁵⁵ The major Supreme Court decisions in this area are *Regents of the University of California v. Bakke* and the two recent decisions of *Grutter v. Bollinger* and *Gratz v. Bollinger*.¹⁵⁶

lenge educational institutions' conduct under the Regulation (in cutting men's teams), and they are free to argue in such lawsuits that the statute, its Regulation, the Policy Interpretation, and/or the Policy Clarification are not entitled to deference and should be struck down as unconstitutional. *Id.* In stating this final suggestion, the court clarified that the holding of the Sixth Circuit in *Miami University Wrestling Club* did not preclude this sort of action, but rather it required that plaintiffs directly challenge the Regulation and Policy Interpretation, by way of naming the DOE as a defendant, when they challenge the conduct of the institution taken in conformity with those agency policies. *Id.* (citing *Miami Univ. Wrestling Club*, 302 F.3d at 614).

¹⁵² See *id.* The Court of Appeals for the District of Columbia affirmed this decision that the plaintiffs lacked standing. *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 933 (D.C. Cir. 2004), *cert. denied*, 125 S. Ct. 2537 (2005). In affirming the decision, the court did not elaborate further on the district court's comments about the potential that Title IX had been misinterpreted or misconstrued. See *id.*

¹⁵³ See 263 F. Supp. 2d 82, 125 (D.D.C. 2003), *aff'd*, 366 F.3d 930 (D.C. Cir. 2004), *cert. denied*, 125 S. Ct. 2537 (2005).

¹⁵⁴ See *id.*

¹⁵⁵ See Joseph Z. Fleming, *Title IX From The Red Rose Crew to Grutter: The Law and Literature of Sports*, 14 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 793, 793-94 (2004).

¹⁵⁶ *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003); *Gratz v. Bollinger*, 539 U.S. 244, 270-71 (2003); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 319-20 (1978) (opinion of Powell, J.).

A. Bakke—A Historical Background

In the landmark 1978 case, *Regents of the University of California v. Bakke*, the U.S. Supreme Court addressed the use of race in public higher education admissions.¹⁵⁷ The Medical School of the University of California at Davis (the "Medical School") used a special admissions program to increase the representation of disadvantaged students in each Medical School class, whereby it reserved sixteen out of 100 seats in the class for members of certain minority groups, who were subject to a separate admissions process.¹⁵⁸ The plaintiff, a white male who had applied for admission at the Medical School in both 1973 and 1974, but was denied admission in both years, argued that the special admissions program operated as a racial and ethnic quota in violation of the Equal Protection Clause of the Fourteenth Amendment.¹⁵⁹

The Supreme Court issued six separate opinions in the decision, none of which garnered the support of the majority of the court.¹⁶⁰ Justice Powell's opinion announcing the judgment, however, has served as the basis for constitutional analysis of race-conscious admissions policies.¹⁶¹ In his opinion, Justice Powell concluded that race-based policies such as the Medical School's special admissions process must be subject to strict scrutiny under the Fourteenth Amendment.¹⁶² He then concluded that the attainment of a diverse student body is a constitutionally permissible goal for a higher education institution, but that the Medical School's special admissions program did not constitute a racial classification that was necessary for the attainment of that goal.¹⁶³

In reaching that conclusion, Justice Powell pointed to other higher education institutions that used race as one of a number of factors considered in the admissions process.¹⁶⁴ He viewed the flexibility of such a process as being key to keeping it constitutionally

¹⁵⁷ *Bakke*, 438 U.S. at 274–75 (opinion of Powell, J.).

¹⁵⁸ *Id.* at 272, 274–75. This special admissions process consisted of a separate committee that considered the applications of those who stated they wished to be considered as members of a "minority group." *Id.* at 274. These applications were rated, and the special committee would recommend the special applicants until the faculty-prescribed number of seats for minority students were filled. *Id.* at 275.

¹⁵⁹ *Id.* at 276, 278. In 1973, at the time when the plaintiff was rejected, four special admissions slots remained unfilled, but the plaintiff was not considered for any of them. *Id.* at 276.

¹⁶⁰ *Grutter*, 539 U.S. at 322–23 (discussing the procedural outcome of the *Bakke* decision).

¹⁶¹ *Id.* at 323.

¹⁶² See *Bakke*, 438 U.S. at 299 (opinion of Powell, J.).

¹⁶³ See *id.* at 311–12, 319–20.

¹⁶⁴ *Id.* at 316–18.

valid.¹⁶⁵ Justice Powell concluded that, though race can be considered as a factor in the admissions process, the practice of setting aside a specific percentage of seats in an entering class for minorities—which in effect tells applicants who are not minorities that they are totally excluded from those seats—disregards the applicants' individual rights guaranteed by the Fourteenth Amendment.¹⁶⁶

B. *Grutter and Gratz: Current Supreme Court Thinking*

Twenty-five years passed after the splintered opinion of *Bakke*, during which time courts and institutions struggled to determine whether Justice Powell's opinion was binding.¹⁶⁷ Then, in the 2003 case *Grutter v. Bollinger*, the U.S. Supreme Court upheld as constitutional the University of Michigan Law School (the "Law School") admissions policy, which required admissions officials to look beyond grades and test scores to other "soft" variables that included, among other factors, race and ethnic background.¹⁶⁸ In so doing, the Court expressly endorsed Justice Powell's view in *Bakke*: that diversity in the student population is a compelling state interest that justifies the narrowly tailored use of race classifications in higher education admissions.¹⁶⁹

Key to the Court's determination that the Law School's admissions policy was narrowly tailored and thus constitutional was its flexibility, which meant that race was considered in a non-mechanical way.¹⁷⁰ The Court reiterated that to comply with the equal protection mandate of the Fourteenth Amendment, universities cannot establish quotas for members of certain racial groups or put members of those groups on separate admissions tracks.¹⁷¹ Rather, a higher education institution can consider race or ethnicity only as a "plus" factor, such that the institution's admission program remains flexible enough to ensure race or ethnicity is not the defining feature of students' applications.¹⁷² Thus, as per this recent Supreme Court decision regarding the use of race in higher education admissions, the reigning senti-

¹⁶⁵ See *id.* at 317–18.

¹⁶⁶ *Id.* at 319–20.

¹⁶⁷ *Grutter*, 539 U.S. at 322–26.

¹⁶⁸ *Id.* at 315–16, 343.

¹⁶⁹ *Id.* at 325.

¹⁷⁰ *Id.* at 334.

¹⁷¹ See *id.* The Court defined "quota" as "a program in which a certain fixed number or proportion of opportunities are 'reserved exclusively for certain minority groups.'" *Id.* at 335 (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 496 (1989)).

¹⁷² See *Grutter*, 539 U.S. at 334, 336–37.

ment emphasizes the significance of a flexible approach when using a suspect class under the Fourteenth Amendment as a means of achieving a compelling state interest.¹⁷³

The U.S. Supreme Court again emphasized the requirement of flexibility and individualized consideration in the *Gratz v. Bollinger* decision, which it issued on the same day it issued *Grutter*.¹⁷⁴ In *Gratz*, two white students who had been denied admission to the University of Michigan's undergraduate program sued the institution, alleging that the admissions program violated their equal protection rights under the Fourteenth Amendment.¹⁷⁵ The university's admissions office used a system by which any applicant who was a member of an underrepresented racial or ethnic minority group automatically received twenty points towards the total number needed for admission.¹⁷⁶

In rejecting this admissions program as unconstitutional, the Court emphasized that the program was not narrowly tailored because it did not provide the individualized consideration that the Constitution required and that Justice Powell contemplated in *Bakke*.¹⁷⁷ In particular, the Court emphasized the fact that the admissions process awarded points (and subsequently admission) solely on the basis of race—without considering other factors.¹⁷⁸ This process did not offer applicants the individualized consideration and selection process that the Equal Protection Clause required and that the Supreme Court upheld in *Grutter*.¹⁷⁹ The holdings in these affirmative action cases provide insight into current Supreme Court thinking regarding higher education decision making based on class membership—insights that become relevant in the attempt to dissect the current operation of Title IX's regulatory framework.¹⁸⁰

¹⁷³ See *id.* at 334.

¹⁷⁴ See *Grutter*, 539 U.S. at 306; *Gratz*, 539 U.S. at 268, 271–72.

¹⁷⁵ *Gratz*, 539 U.S. at 251–52.

¹⁷⁶ *Id.* at 255.

¹⁷⁷ *Id.* at 269–70.

¹⁷⁸ *Id.* at 271–72. Indeed, the only factor that determined the distribution of points was whether the individual was a member of an underrepresented minority group. *Id.*

¹⁷⁹ Compare *Gratz*, 539 U.S. at 275 (holding the policy was not sufficiently narrowly tailored to satisfy the Fourteenth Amendment), with *Grutter*, 539 U.S. at 334, 337, 343 (holding that the Law School's consideration of race as a "plus" factor retained sufficient flexibility to satisfy the Fourteenth Amendment).

¹⁸⁰ See *infra* notes 181–253 and accompanying text.

IV. ANALYSIS: TITLE IX IS OPERATING AS AN IMPERMISSIBLY INFLEXIBLE QUOTA SYSTEM THAT COURTS MUST REJECT AS UNCONSTITUTIONAL

The key to unmasking the true problems with Title IX's current regulatory framework is in examining the *effects* of the regulatory framework's interpretation rather than its structure.¹⁸¹ Thus far, the DOE and the courts have justified the current framework, as interpreted, based on its flexibility and its importance as a governmental objective.¹⁸² Proper analysis of this framework, however, should look to how it operates in practice.¹⁸³ Such an analysis would reveal that the framework, in fact, operates as an inflexible quota system that forces education institutions to cut men's teams if they are to remain in compliance with Title IX.¹⁸⁴ Such an inflexible system is of the type that the U.S. Supreme Court expressly rejected in its relevant affirmative action decisions, and as such, courts should reject it here as a violation of the Equal Protection Clause of the Fourteenth Amendment.¹⁸⁵

A. *The Flawed Analysis of Cohen*

The problems with the current Title IX regime stem from the 1993 First Circuit Court of Appeals' initial flawed interpretation in *Cohen I*.¹⁸⁶ This case was the first challenge of an institution's athletic programs under Title IX, and it has served as the key decision: virtually every federal circuit court of appeals subsequently facing a similar Title IX challenge has followed the First Circuit's analysis of the Regulation and Policy Interpretation.¹⁸⁷ The First Circuit's analysis was flawed, however, because (1) it inappropriately granted substantial deference to the Policy Interpretation, (2) it improperly interpreted

¹⁸¹ See *supra* notes 113–17 and accompanying text.

¹⁸² See *Cohen II*, 101 F.3d 155, 170–71 (1st Cir. 1996); *Kelley v. Bd. of Trs.*, 35 F.3d 265, 271 (7th Cir. 1994); *Nat'l Wrestling Coaches Ass'n v. U.S. Dep't of Educ.*, 263 F. Supp. 2d 82, 113 (D.D.C. 2003), *aff'd*, 366 F.2d 930 (D.C. Cir. 2004), *cert. denied*, 125 S. Ct. 2537 (2005); Dear Colleague Letter, *supra* note 51.

¹⁸³ See *supra* notes 113–17; 170–80 and accompanying text.

¹⁸⁴ See *Miami Univ. Wrestling Club v. Miami Univ.*, 302 F.3d 608, 611 (6th Cir. 2002); *Chalenor v. Univ. of N.D.*, 291 F.3d 1042, 1043 (8th Cir. 2002); *Kelley*, 35 F.3d at 269.

¹⁸⁵ See *Gratz v. Bollinger*, 539 U.S. 244, 270–71 (2003); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 319–20 (1978) (opinion of Powell, J.).

¹⁸⁶ See *Cohen I*, 991 F.2d 888, 895–900 (1st Cir. 1993); Connolly & Adelman, *supra* note 30, at 882.

¹⁸⁷ See *Cohen I*, 991 F.2d at 891, 895–900; Lamber, *supra* note 63, at 169.

prong three of the three-part test, and (3) it misinterpreted the proper application of the three-part test as a whole.¹⁸⁸

1. Flaw #1: Improper Deference to the Policy Interpretation

The First Circuit's first error was its decision to grant substantial deference to the Policy Interpretation.¹⁸⁹ In making this decision, the court relied on *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, which stands for the principle that courts give great deference to an agency's interpretation of a statute that the agency is responsible for administering.¹⁹⁰ Under *Chevron*, however, regulations and their interpretations should not be given controlling weight if they are "arbitrary, capricious, or manifestly contrary to the statute."¹⁹¹ Indeed, *Chevron* indicates that courts should give deference to such interpretations only if they reflect an agency's reasonable construction of the statute at issue.¹⁹² In addition to this general caution regarding the granting of deference, the U.S. Supreme Court held more recently in 2000, in *Christensen v. Harris County*, that substantial deference should not be accorded to agency interpretations that do not have the force of law, such as those in opinion letters, policy statements, agency manuals, and enforcement guidelines.¹⁹³ In light of the cautions under *Chevron* and the more recent ruling in *Christensen* (which the Supreme Court issued four years after the *Cohen* court ruled), strong arguments exist for questioning the appreciable deference that the First Circuit—and every subsequent circuit court—granted to the Policy Interpretation and its three-part test.¹⁹⁴

The First Circuit should not have granted substantial deference to the Policy Interpretation primarily because of the Policy Interpretation's inconsistency with Title IX and the Regulation.¹⁹⁵ First, it is unclear why the DOE, in its Policy Interpretation, chose to emphasize the first factor of the ten-factor test over the other nine.¹⁹⁶ Indeed, the agency pulled out the first factor—accommodating the interests and

¹⁸⁸ See *infra* notes 189–225 and accompanying text.

¹⁸⁹ See *Cohen I*, 991 F.2d at 895.

¹⁹⁰ See *id.* (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)).

¹⁹¹ *Chevron*, 467 U.S. at 844.

¹⁹² *Chalenor*, 291 F.3d at 1046.

¹⁹³ See *id.* at 1046 (citing *Christensen v. Harris County*, 529 U.S. 576, 587 (2000)).

¹⁹⁴ See *infra* notes 195–206 and accompanying text.

¹⁹⁵ See *infra* notes 196–206 and accompanying text.

¹⁹⁶ See Policy Interpretation, *supra* note 43, at 71,414.

abilities of male and female students—and then created a separate three-part test to evaluate compliance with that factor.¹⁹⁷ In the Regulation, however, the DOE set forth the list of ten factors to serve as guidance in terms of determining compliance with the statute; nothing in the Regulation indicated that institutions, agencies, or courts should give such substantial weight to the first factor.¹⁹⁸

The Policy Interpretation is also inconsistent with Title IX itself in its use of substantial proportionality as a means of compliance.¹⁹⁹ Prong one of the three-part test states that compliance with this prong can be achieved if an institution provides athletic opportunities for male and female students in proportion to their general respective enrollments in the institution.²⁰⁰ This use of statistical proportions, however, is expressly rejected as a means of finding discrimination under § 1681(b) of the statute.²⁰¹ Furthermore, this use of the general student population for comparison purposes is too simplistic and is inconsistent with other current discrimination analyses.²⁰²

Indeed, several district courts have called into question the deference afforded the Policy Interpretation with respect to the substantial proportionality prong.²⁰³ The U.S. District Court for the Middle District of Louisiana held in its 1996 decision, *Pederson v. Louisiana State University*, that the substantial proportionality prong should not be considered a "safe harbor," because to stop the inquiry at the point of numerical equality would be inconsistent with the mandate of the statute.²⁰⁴ Similarly, the U.S. District Court for the Eastern District of

¹⁹⁷ *Id.* at 71,414, 71,417–18.

¹⁹⁸ See Nondiscrimination on the Basis of Sex, *supra* note 38, at 24,134, 24,143.

¹⁹⁹ See *infra* notes 200–06 and accompanying text.

²⁰⁰ Policy Interpretation, *supra* note 43, at 71,418.

²⁰¹ See *supra* note 34 and accompanying text.

²⁰² See Connolly & Adelman, *supra* note 30, at 862–63. Indeed, it is exactly this sort of comparison to the general population that the Supreme Court has expressly rejected as being irrelevant in Title VII employment discrimination cases. See, e.g., *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 308 (1977). Rather, the Court has held that the appropriate comparison group is that of skilled or qualified applicants in the general population. *Id.* The appropriate comparison group in the Title IX athletics context, then, should be the population of skilled and qualified students in the general population, and the failure of the agency to use this as the proxy group for the first test renders this prong questionable at best. See *Pederson v. La. State Univ.*, 912 F. Supp. 892, 913–14 (M.D. La. 1996) ("*Pederson District*"), *rev'd*, 213 F.3d 858 (5th Cir. 2000).

²⁰³ See *Neal v. Bd. of Trs.*, No. CV-F-97-5009 REC., 1999 WL 1569047, at *3 (E.D. Cal. 1999) ("*Neal District*"), *rev'd*, 213 F.3d 858 (5th Cir. 2000); *Pederson District*, 912 F. Supp. at 913–14; *Kelley v. Bd. of Trs.*, 832 F. Supp. 237, 242, 243–44 (C.D. Ill. 1993), *rev'd*, 35 F.3d 265 (7th Cir. 1994).

²⁰⁴ 912 F. Supp. at 913–14.

California held in its 1999 decision, *Neal v. Board of Trustees*, that relying on proportionality to achieve compliance constituted an implementation of a quota based on gender, which was a violation of Title IX.²⁰⁵ Thus, the fact that courts have expressed concern over the Policy Interpretation, coupled with the inconsistencies between the Policy Interpretation and the intent of the Regulation, calls into question the granting of substantial deference to the Policy Interpretation.²⁰⁶

2. Flaw #2: Improper Interpretation of Prong Three

The granting of deference was not the only error that the *Cohen* court made, however.²⁰⁷ The First Circuit's second error was its interpretation of the third prong of the test—full and effective accommodation of the interests and abilities of both sexes.²⁰⁸ The court rejected Brown University's contention that an institution can comply with the third prong by meeting the comparative or "relative" levels of interest of each sex—that is, by meeting the interests and abilities of both genders in an equal proportion.²⁰⁹ Rather, the court interpreted the standard to require "full and effective accommodation," meaning that if sufficient interest and ability exists among members of the underrepresented gender that existing programs do not satisfy, then an institution necessarily will fail prong three of the test.²¹⁰

The court justified the use of this more demanding standard, in part, because of the perceived difficulty in assessing and quantifying relative interests and abilities.²¹¹ The standard the court adopted required a simple inquiry: whether the unmet need of the underrepresented gender is sufficient to require the creation or upgrading of a team.²¹² Brown's proposed standard, by comparison, would have required inquiry into what would be the appropriate survey population—the university, feeder schools, or the regional community—an inquiry the court thought would overcomplicate this already complex area of the law.²¹³ In coming to this conclusion, however, the court

²⁰⁵ 1999 WL 1569047, at *3.

²⁰⁶ See *supra* notes 196–205 and accompanying text.

²⁰⁷ See Connolly & Adelman, *supra* note 30, at 882–88.

²⁰⁸ See *id.*

²⁰⁹ *Cohen II*, 101 F.3d at 174. Under Brown's reasoning, for example, if a school met 80% of the interests of men on a campus, then it should also meet 80% of the interests of women on campus. See *id.*

²¹⁰ *Id.* (citing *Cohen I*, 991 F.2d at 898–99).

²¹¹ *Cohen I*, 991 F.2d at 900.

²¹² *Id.*

²¹³ *Id.*

failed to recognize that the agency, in its Policy Interpretation, had intended institutions and courts to make this sort of relative interest inquiry.²¹⁴ Indeed, the Policy Interpretation actually provided guidance regarding methods an institution could use to assess the athletic interests and abilities of its students.²¹⁵ Therefore, the First Circuit's interpretation of the third prong, expressly adopted because of its simplicity, seems to contradict the agency's intent as reflected in the Policy Interpretation.²¹⁶

3. Flaw #3: Improper Interpretation of the Three-Part Test

The *Cohen* court's final error was in its interpretation of the three-part test as a whole.²¹⁷ After engaging in an overview of the Title IX Regulation and Policy Interpretation, the court then engaged in a further analysis of how these agency documents should work in practice.²¹⁸ First, with respect to the first prong of the test, the court held that evidence of statistical inequality could be used as evidence of discrimination.²¹⁹ The court reached this conclusion despite explicit language in Title IX stating that it does not mandate statistical equality between the gender ratio in an institution's general population and the ratio in the body of student-athletes.²²⁰ Second, the court went on to hold that even if an institution met the "financial assistance" and "athletic equivalence" standards, it nonetheless could violate Title IX: in other words, failing the controversial three-part test under the effective accommodations area of compliance necessarily would equate to noncompliance with Title IX.²²¹ Not only was this ruling expressly contrary to the language of the Policy Clarification,²²² but it also effectively eliminated factors two through nine of the ten-

²¹⁴ See *id.*; Policy Interpretation, *supra* note 43, at 71,417.

²¹⁵ Policy Interpretation, *supra* note 43, at 71,417. The DOE actually provides an investigator's manual to assist with assessing compliance; this manual also provides methods for ascertaining levels of interest, suggesting the use of surveys and other techniques. See Connolly & Adelman, *supra* note 30, at 865-66.

²¹⁶ See Connolly & Adelman, *supra* note 30, at 864-67.

²¹⁷ See *infra* notes 218-23 and accompanying text.

²¹⁸ See *Cohen I*, 991 F.2d at 895-97.

²¹⁹ *Id.* at 895.

²²⁰ *Id.*; see 20 U.S.C. § 1681(b) (2000).

²²¹ See *Cohen I*, 991 F.2d at 897.

²²² See *supra* note 53 and accompanying text. The Policy Clarification specifically stated that the requirement addressed by the three-part test was but one of many factors considered in determining compliance. Policy Clarification, *supra* note 51.

factor test from consideration during a Title IX compliance inquiry—a result seemingly inconsistent with agency intent.²²³

To summarize, through its “watershed” analysis in *Cohen*, the First Circuit effectively construed Title IX (1) to eliminate factors two through ten from the relevant inquiry, (2) to interpret the third prong of the three-part test—accommodation of the interests of the underrepresented gender—to mean that any unmet interest would result in violation, (3) to affirm the Policy Interpretation’s use of the general population as the relevant comparison group for purposes of determining substantial proportionality under prong one, and (4) to pave the way for substantial deference to a Policy Interpretation filled with inconsistencies with the original Regulation and the statute.²²⁴ This interpretation of the Title IX statute has continued to survive, and it is this interpretation, coupled with the realities of modern fiscal constraints, that has caused Title IX to act as an impermissible gender-based quota system.²²⁵

B. *The Effective Elimination of Title IX's Flexibility*

In response to charges from male athletes that Title IX, as interpreted, acts as an impermissible quota, both the DOE and the courts have highlighted the inherent flexibility built into the statute for institutional compliance.²²⁶ Indeed, in defending the substantial proportionality test, both the First Circuit and the DOE in its 1996 Policy Clarification reiterated that this was but one way to determine whether an institution’s athletics programs comply with Title IX.²²⁷ The proportionality test is considered a starting point, and as the First Circuit pointed out, the second and third parts of the test are provided in recognition of the fact that under certain circumstances, something short of this proportionality is satisfactory for determining gender balance.²²⁸ These arguments in defense of the three-part test, however, miss the point because the inflexibility has resulted not from

²²³ See *Cohen I*, 991 F.2d at 897. In the Policy Interpretation, the agency highlights factors two through ten as factors the DOE should consider in determining whether an institution is providing equal opportunity in intercollegiate athletics. Policy Interpretation, *supra* note 43, at 71,415.

²²⁴ See *supra* notes 186–223 and accompanying text.

²²⁵ See *supra* notes 113–17 and accompanying text.

²²⁶ Nat’l Wrestling Coaches Ass’n, 263 F. Supp. 2d at 113; Dear Colleague Letter, *supra* note 51; see *Cohen II*, 101 F.3d at 170–71; *Kelley*, 35 F.3d at 271.

²²⁷ *Cohen II*, 101 F.3d at 171; Policy Clarification, *supra* note 51.

²²⁸ *Cohen I*, 991 F.2d at 897–98.

the *structure* of the three-part test, but, rather, from the *application* of the test.²²⁹ Indeed, the initial interpretation of the test, coupled with the financial pressures currently confronting educational institutions, has resulted in a highly inflexible test that leaves institutions with no choice but to cut men's teams.²³⁰

Though they espouse the built-in flexibility of the test, the courts also recognize that any effort to cut women's sports teams would leave an institution in danger of noncompliance with Title IX.²³¹ The second prong of the three-part test requires institutions to have a history and continuing practice of increasing athletic opportunities for women.²³² Thus, almost by definition, an institution that cuts women's teams necessarily will fail prong two of the test.²³³ Further, as a result of the *Cohen* court's interpretation of prong three, if an institution cuts women's teams, then, unmet interest in the underrepresented gender is easily demonstrable, and thus the institution will fail prong three of the test.²³⁴ The result is that an institution facing budget constraints is left with only prong one—substantial proportionality—as a means of complying with Title IX.²³⁵ Yet this standard is difficult, if not impossible, to meet.²³⁶ So, institutions then turn back to prongs two or three, which leaves them with only one option for achieving the needed budget cuts while remaining compliant with Title IX: the elimination of men's teams.²³⁷

Thus, this cycle reveals that the structural flexibility of the Title IX statute essentially has been interpreted away, forcing institutions either to meet statistical equality with their general populations or to eliminate only men's teams when faced with budget cuts.²³⁸ This inflexible system means institutions eliminate men's teams solely because of gender and thus operates, in effect, as the type of discrimina-

²²⁹ See *supra* notes 113–17 and accompanying text.

²³⁰ See *supra* notes 113–17 and accompanying text.

²³¹ *Kelley*, 35 F.3d at 269; see *Cohen II*, 101 F.3d at 171, 174–75, 180; *Cohen I*, 991 F.2d at 898–900.

²³² Policy Interpretation, *supra* note 43, at 71,418.

²³³ Connolly & Adelman, *supra* note 30, at 874.

²³⁴ See *Cohen I*, 991 F.2d at 898–900.

²³⁵ See *id.*

²³⁶ See Connolly & Adelman, *supra* note 30, at 862–64.

²³⁷ See *Miami Univ. Wrestling Club*, 302 F.3d at 611; *Chalenor*, 291 F.3d at 1043; *Kelley*, 35 F.3d at 269.

²³⁸ See *Miami Univ. Wrestling Club*, 302 F.3d at 611; *Chalenor*, 291 F.3d at 1043; *Kelley*, 35 F.3d at 269.

tory quota system that the Supreme Court has expressly rejected in its recent affirmative action decisions.²³⁹

C. *An Inflexible Quota Is Unconstitutional Under the
U.S. Supreme Court's Affirmative Action Cases*

The U.S. Supreme Court's recent rulings on affirmative action in higher education admissions provide insight to the Title IX discussion.²⁴⁰ First, in these cases, the Court has held that student body diversity is a compelling state interest and thus that the narrowly tailored use of race to achieve this compelling state interest is justified.²⁴¹ Second, and more importantly, an institution that wishes to use race as a criterion in its decision-making process must do so in a "flexible, non-mechanical" way; only this flexibility allows such a policy to remain narrowly tailored enough to be constitutional.²⁴² Indeed, in upholding the Law School's admission policy in *Grutter v. Bollinger*, the Court emphasized the flexibility of the Law School's approach, in which race and ethnic background were considered a "plus" factor in the admissions process, but each decision remained highly individual.²⁴³ Likewise, the Court emphasized the *non*-flexibility of the schools' approaches when it rejected the admissions policies used in both *Regents of the University of California v. Bakke* and *Gratz v. Bollinger*.²⁴⁴ In *Bakke*, the institution used a racial set-aside program whereby a certain number of seats were reserved for members of minority groups; in *Gratz*, the institution automatically granted extra points that counted toward automatic admission to applicants of particular racial and ethnic backgrounds.²⁴⁵ In both decisions, the Court emphasized that such broad, inflexible standards were not narrowly tailored, and as such the institutions had violated the Equal Protection Clause of the Fourteenth Amendment.²⁴⁶

The Court's analysis in each of these three cases is instructive as to how courts should view the current operation of the Title IX statute.²⁴⁷ Title IX's operation is analogous to that of affirmative action

²³⁹ See *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003); *Gratz*, 539 U.S. at 270–71.

²⁴⁰ See *infra* notes 241–46 and accompanying text.

²⁴¹ *Grutter*, 539 U.S. at 325.

²⁴² See *id.* at 334.

²⁴³ *Id.* at 315–16, 334.

²⁴⁴ See *Gratz*, 539 U.S. at 270–72; *Bakke*, 438 U.S. at 319–20 (opinion of Powell, J.).

²⁴⁵ *Gratz*, 539 U.S. at 270; *Bakke*, 438 U.S. at 274–75 (opinion of Powell, J.).

²⁴⁶ See *Gratz*, 539 U.S. at 270–72; *Bakke*, 438 U.S. at 319–20 (opinion of Powell, J.).

²⁴⁷ See *infra* notes 248–53 and accompanying text.

programs in that, as currently interpreted, it forces universities to make decisions based on an individual's membership in a particular group—gender.²⁴⁸ Thus, it should follow that the key to withstanding constitutional scrutiny of such decisions is to emphasize the flexibility of the system, which can demonstrate that individual rights are not being curtailed.²⁴⁹ As discussed above, however, any flexibility that had been built into the Title IX statute now, in effect, has been interpreted out of it, such that an institution facing budget constraints has no choice but to cut men's teams or be in violation of Title IX.²⁵⁰ Though gender-based decisions are subject to the lesser standard of intermediate scrutiny (as opposed to the strict scrutiny of race-based decisions), it does not follow that the emphasis on flexibility in the process should be correspondingly lessened.²⁵¹ The appropriate degree of flexibility remains to be determined, but the current lack of any flexibility at all is certainly not preferable.²⁵² The decisions being made under Title IX to cut men's teams would not pass constitutional muster if they were based on race, and the current scheme also should not pass constitutional muster when the decisions are based on gender.²⁵³

D. *The Future of Title IX: The Need for Federal Circuit Court Action*

Guided by the U.S. Supreme Court's recent affirmative action holdings in *Grutter* and *Gratz*, informed by the Court's 2000 *Christensen* decision, and enlightened by the substance of the recent male athletic challenges to the Title IX statute, the federal circuit courts of appeals should alter their current analysis of Title IX claims and thereby prevent Title IX from continuing down its discriminatory path.²⁵⁴ Although the First Circuit's 1993 *Cohen I* decision was a noble attempt at defining an appropriate enforcement structure, it was not without flaws—flaws that recent financial struggles in higher education have

²⁴⁸ See *Miami Univ. Wrestling Club*, 302 F.3d at 611; *Chalenor*, 291 F.3d at 1043; *Kelley*, 35 F.3d at 269.

²⁴⁹ See *Grutter*, 539 U.S. at 336–37; *Gratz*, 539 U.S. at 270–72; *Bakke*, 438 U.S. at 319–20 (opinion of Powell, J.).

²⁵⁰ See *Miami Univ. Wrestling Club*, 302 F.3d at 611; *Chalenor*, 291 F.3d at 1043; *Kelley*, 35 F.3d at 269.

²⁵¹ See *Gratz*, 539 U.S. at 270–72; *Bakke*, 438 U.S. at 319–20 (opinion of Powell, J.); *Craig v. Boren*, 429 U.S. 190, 197 (1976).

²⁵² See *supra* notes 226–39 and accompanying text.

²⁵³ See *Gratz*, 539 U.S. at 270–72; *Bakke*, 438 U.S. at 319–20 (opinion of Powell, J.).

²⁵⁴ See *infra* notes 255–74 and accompanying text.

exposed.²⁵⁵ The current legal landscape and fiscal realities in higher education make this a time characterized by new issues that the *Cohen* court did not anticipate when it rendered its decision almost fifteen years ago.²⁵⁶ It is time for the federal circuit courts of appeals to stop according judicial deference to the *Cohen* court's original interpretation and to reevaluate Title IX's regulatory framework.

The circuit courts first must explicitly recognize that the *Cohen* court's interpretation was flawed, particularly in its granting of substantial deference to the Policy Interpretation.²⁵⁷ The legal landscape with respect to deference to agency interpretations has changed since *Cohen I*.²⁵⁸ In particular, the recent *Christensen* decision—a decision the *Cohen* court did not have the luxury to use as guidance—would counsel against the deference that the First Circuit granted.²⁵⁹ The courts should recognize that not only does the Policy Interpretation not have the force of law and thus it is not entitled to substantial deference under *Christensen*, but also that careful analysis of the Policy Interpretation in comparison to the Regulation and the Title IX statute exposes inconsistencies that even the *Chevron* standard recognizes as reasons counseling against deference.²⁶⁰

In addition to acknowledging this improper deference to the Policy Interpretation, the circuit courts also should reevaluate the substance of male athletes' claims under Title IX and recognize that the *Cohen* court's interpretation of the Policy Interpretation's third prong and of the operation of its entire three-part test was flawed and has led to an impermissibly inflexible system.²⁶¹ In engaging in this evaluation, the courts can use reasoning and analysis similar to that used by the U.S. Supreme Court in *Grutter* and *Gratz*.²⁶² In those affirmative action decisions, the Court demanded that decision making based on group classifications (for example, race or gender) be flexible so as to respect the rights of individuals.²⁶³ The circuit courts

²⁵⁵ See *supra* notes 189–225 and accompanying text.

²⁵⁶ See *supra* notes 111–20 and accompanying text.

²⁵⁷ See *supra* notes 189–206 and accompanying text.

²⁵⁸ See *supra* notes 189–94 and accompanying text.

²⁵⁹ See *Chalenor*, 291 F.3d at 1046 (citing *Christensen*, 529 U.S. at 587).

²⁶⁰ See *supra* notes 189–206 and accompanying text.

²⁶¹ See *supra* notes 207–25 and accompanying text.

²⁶² See *supra* notes 240–53 and accompanying text.

²⁶³ See *Grutter*, 539 U.S. at 336–37; *Gratz*, 539 U.S. at 270–72; *Bakke*, 438 U.S. at 319–20 (opinion of Powell, J.).

should recognize this demand when analyzing Title IX claims.²⁶⁴ The current operation of the regulatory framework results in an inflexible system whereby universities are forced to make decisions based solely on gender.²⁶⁵ The U.S. Supreme Court's affirmative action holdings reject such inflexible decision making, and guided by those holdings, circuit courts likewise should reject it here.²⁶⁶

Having discovered the inflexibility of the current regulatory framework, the circuit courts must hold the current framework unconstitutional.²⁶⁷ Then, the courts should advise the DOE to reexamine and reinterpret Title IX and the Regulation so as to provide a policy interpretation and accompanying tests that allow for flexibility and full individual consideration in the decision-making process.²⁶⁸ Potential reformulations of the agency's interpretation of the statute could call for a more balanced inquiry that reinstates examination of the other nine factors originally set forth in the Regulation.²⁶⁹ Additionally, a reexamination and perhaps reinterpretation of prongs one and three of the three-part test also would be advisable.²⁷⁰

It is important to note that the ultimate goal of such a reexamination is not to get rid of Title IX.²⁷¹ Few will deny the positive effects it has had for female athletes over its more than twenty-five years of existence.²⁷² Rather, the DOE must revisit and revise the regulatory framework in place to enforce the statute so that it operates the way it was originally intended to operate.²⁷³ In that way, the DOE can prevent discrimination based on sex in a manner that does not hinder the success of any of this country's student-athletes.²⁷⁴

²⁶⁴ See *Grutter*, 539 U.S. at 336-37; *Gratz*, 539 U.S. at 270-72; *Bakke*, 438 U.S. at 319-20 (opinion of Powell, J.).

²⁶⁵ See *Miami Univ. Wrestling Club*, 302 F.3d at 611; *Chalenor*, 291 F.3d at 1043; *Kelley*, 35 F.3d at 269.

²⁶⁶ See *Gratz*, 539 U.S. at 270-72; *Bakke*, 438 U.S. at 319-20 (opinion of Powell, J.).

²⁶⁷ See *Gratz*, 539 U.S. at 270-72; *Bakke*, 438 U.S. at 319-20 (opinion of Powell, J.).

²⁶⁸ See *Gratz*, 539 U.S. at 270-72; *Bakke*, 438 U.S. at 319-20 (opinion of Powell, J.).

²⁶⁹ See *supra* notes 217-25 and accompanying text.

²⁷⁰ See *supra* notes 199-216 and accompanying text.

²⁷¹ See *supra* notes 268-70 and accompanying text.

²⁷² See, e.g., Brian L. Porto, *Completing the Revolution: Title IX as Catalyst for an Alternative Model of College Sports*, 8 SETON HALL J. SPORT L. 351, 352-54 (1998); Beveridge, *supra* note 141, at 810; Ross A. Jurewitz, Comment, *Playing at Even Strength: Reforming Title IX Enforcement in Intercollegiate Athletics*, 8 AM. U. J. GENDER SOC. POL'Y & L. 283, 284-86 (2000).

²⁷³ See *supra* notes 268-70 and accompanying text.

²⁷⁴ See *supra* notes 238-39 and accompanying text.

CONCLUSION

A close examination of the current operation of the regulatory framework for Title IX's athletics provisions—a framework that has resulted from years of circuit court deference to the DOE's Policy Interpretation and to the First Circuit Court of Appeals's interpretation of that document in *Cohen v. Brown University*—reveals an impermissibly inflexible system with which universities must comply. While the First Circuit's original interpretation of and deference given to the Policy Interpretation may have been appropriate at the time, subsequent caselaw and a change in the nature of the claims under Title IX reveal the flaws in that original analysis and counsel the circuit courts to revisit the First Circuit's decisions. In particular, the First Circuit's holding created a system that operates in an inherently inflexible manner, in which the only means for a financially strapped institution to achieve compliance is to cut men's athletic teams. Such an inflexible system is counter to the U.S. Supreme Court's current thinking regarding the use of classifications in higher education decision making, as seen in the Court's recent affirmative action holdings. With this in mind, it is time for the circuit courts to alter their analyses of the Title IX regulatory framework, recognize its inherent inflexibility as unconstitutional, and force the DOE to reinterpret Title IX and the Regulation so that Title IX can operate the way it was originally intended to operate.

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