CONSTITUTIONAL IMPLICATIONS OF TITLE IX COMPLIANCE IN COLLEGES AND UNIVERSITIES

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INTRODUCTION

In 2007, officials from James Madison University issued a public statement announcing the elimination of ten varsity sports programs.[1] Seven male sports teams and three female sports teams were cut in an effort to comply with Title IX of the Education Amendments of 1972, a piece of legislation intended to create educational equality.[2] Because James Madison had a larger percentage of female students, it cut more male programs to make the percentage of female athletes equal to the percentage of the student body that was female.[3]

In response to the cuts, Jeff Bourne, James Madison's athletics director noted, "A program that sponsors football and has a high female population is going to have a difficult time [complying with Title IX]."[4] Furthermore, in response to an inquiry by Donna Lopiano, a leader in Title IX growth and formulation, into whether the money saved from these cuts would be put towards the men's football and basketball programs, Bourne responded that the cuts were not motivated by financial reasons, but rather, were made for the sole reason of complying with Title IX.[5]

"Nobody is saying Title IX isn't needed," Jennifer Chapman, a senior on James Madison's track and cross-country teams, said in response to the cuts. "[I]t was so needed in the '70s. And it's definitely got girls to where they are now. But it's fighting the interpretation of it. Schools are abusing it."[6] She added, "Times change, and you adapt to those changes. And if more women are going to college

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1 *See* Erik Brady, *James Madison's Hard Cuts Spur Title IX Debate*, USA TODAY, Apr. 19, 2007, http://www.usatoday.com/sports/college/other/2007-04-19-title-ix-jmu-cover_N.htm.

2 *See* Bill Pennington, *At James Madison, Title IX Is Satisfied, But The Students Are Not*, N.Y. TIMES (Oct. 7, 2006), http://www.nytimes.com/2006/10/07/sports/othersports/07madison.html. James Madison University cut men's archery, cross country, gymnastics, indoor track, outdoor track, swimming, and wrestling, as well as women's archery, fencing, and gymnastics. *Id.*

3 *See* Brady, *supra* note 1. James Madison, a public school 100 miles southwest of Washington, D.C. has an undergraduate enrollment that is 61% female and 39% male, and because of these sports cuts, 61% of their student-athletes were female and 39% were males. *See id.*

4 *Id.*

5 *See id.*

6 *Id.*

than men, and males want to participate in sports, why would we say no? That doesn't make sense."[7]

The condition James Madison faced in 2007 is just one of many examples of how Title IX is not operating in an efficient and constitutionally acceptable way in today's society. Its goal of equality in higher education has impacted collegiate sports negatively. Echoing Jennifer Chapman's sentiment, due to the cuts that so many universities have had to make disproportionately affecting men's sports teams, men have been left with fewer opportunities to play collegiate sports. Because of this, Title IX could be declared to be a violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, as applied to the federal government by the Fifth Amendment. Accordingly, Title IX should be changed either by altering the commonly used third prong of the three-prong test for compliance or by using the standards set up in the Civil Rights Act of 1964, a preceding statute that has been met with less criticism in limiting inequality—among race—in the United States.

This Note will address Title IX issues in colleges and universities insofar as they relate to and violate the Equal Protection Clause. Part I discusses the creation of Title IX, as well as a discussion of its rocky legislative history. Part II provides an overview of the three-prong test for compliance with Title IX. Based on this, Part III discusses how various universities and colleges apply the three-prong test, which will demonstrate the many problems schools have faced in their attempts to comply. Lastly, Part IV discusses the implications of Title IX's Equal Protection Clause and ways to reform this system. Currently, Title IX is not accomplishing the objectives it was intended to accomplish. With the proper reforms, however, Title IX can return to its goal of providing equal opportunities in higher education.

I. TITLE IX CREATION AND LEGISLATIVE HISTORY

Title IX's origins are found in the 1965 Executive Order 11246 and the Civil Rights Movement of the mid-twentieth century.[8] Beginning in the 1950s with the Supreme Court's decision in *Brown v. Board of Education*, communities recognized that segregation was an issue, and began to make concessions to fix this.[9] Throughout the following years, African-Americans became the focus of numerous pieces of legislation, culminating with the passage of the 1964 Civil Rights Act.[10] The Civil Rights Act includes Title VII, which prohibits employment discrimination on the basis of race, color, religion, sex, or national origin.[11]

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[7] *Id.*

[8] *See* Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 28, 1965).

[9] *See* Iram Valentin, *Title IX: A Brief History*, EQUITY RESOURCE CENTER, Aug. 1997 at 4 *available at* http://www2.edc.org/WomensEquity/pdffiles/t9digest.pdf.

[10] *See id.*

[11] *See* 42 U.S.C. § 2003e (1965).

Despite the protections afforded by the Civil Rights Act to racial discrimination, Bernice R. Sandler, a doctoral candidate and part-time lecturer at the University of Maryland, has laboriously commented on how it did not sufficiently protect against gender-based discrimination.[12] She was spurred to get involved in eliminating sex discrimination after she was rejected for an opening at the university because she "c[a]me on too strong for a woman."[13] Sandler noted that Title VII of the Civil Rights Act, which included sex among its protections, explicitly "excluded educational institutions in their educational activities", and that Title VI—also of the Civil Rights Act, which prohibited national origin discrimination affecting limited English proficient persons—did not even cover sex among its protections.[14] Furthermore, the Equal Pay Act—which prohibited discrimination based on sex in salaries—exempted professional and administrative employees, including their faculties,[15] and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution[16] had not yet evolved to the point where cases covering sex discrimination were considered to fall under its protections.[17]

Because the previously mentioned statutes did not satisfactorily protect women in education, Sandler looked toward the 1965 Presidential Executive Order 11246 as another option. The Executive Order prohibited federal contractors from discrimination and was amended in 1968 to include discrimination based on sex.[18] In accordance, since most universities and colleges had federal contracts, this Executive Order protected women in education.[19] Once Sandler made this connection, she began working with Vincent Macaluso, who at the time was the Director of the Office for Federal Contract Compliance at the Department of

[12] *See* Bernice Sandler, *Bernice Sandler: Biography*, *available at* http://www.bernicesandler.com/id2.htm.

[13] Bernice Resnick Sandler, Symposium, *Celebrating Thirty-Five Years Of Sport And Title IX: Title Ix: How We Got It And What A Difference It Made*, 55 CLEV. ST. L. REV. 473, 474 (2007). Following this rejection, she had two more similar rejections. *See id.*

[14] *See* Bernice R. Sandler, *"Too Strong for a Woman"—The Five Words That Created Title IX* (1997), *available at* http://www.bernicesandler.com/id44.htm.

[15] *See id.*

[16] ". . . nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, §1.

[17] *See* Sandler, *supra* note 14.

[18] *See* Valentin, *supra* note 9, at 2. Executive Order 11246 was amended by Executive Order 11375. *See id.* The language of this order reads, "The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin." Exec. Order No. 11246, 30 Fed. Reg. 12,319 (Sept. 24, 1965), *available at* http://www.archives.gov/federal-register/codification/executive-order/11246.html.

[19] *See id.* For example, the federal government has been the most important source of funds for academic research since the 1950s. *See* Roger G. Noll & Will P. Rogerson, *The Economics of University Indirect Cost Reimbursement in Federal Research Grants*, *in* CHALLENGES TO RESEARCH UNIVERSITIES 105 (Roger G. Noll ed., 1998).

Labor,[20] to file a complaint against universities and colleges under this Executive Order.[21]

With the backing of the Women's Equity Action League ("WEAL")—a women's rights organization founded during the feminist movement of the 1960s and 1970s that focused on equal opportunities for women in education, economics and, employment—,[22] Sandler and Macaluso spearheaded a national campaign to end sex discrimination in education by filing a class action complaint against all universities and colleges, with specific charges against the University of Maryland after Sandler was denied an opening at the university.[23]

In addition to the suits, Macaluso also advised Sandler and all women who felt that they had been discriminated against to write their congressmen and senators, as well as members of executive committees and departments.[24] The letters that were written resulted in a higher awareness among federal agencies and congressional staffs about sex discrimination.[25] At the same time, Representative Martha Griffiths[26] gave the first speech in Congress on sex discrimination in education,[27] resulting in the first contract compliance investigation at Harvard University under Executive Order 11246.[28]

In 1970, Representative Edith Green[29] took the first steps towards the Title IX legislation by introducing legislation prohibiting sex discrimination, and held the first congressional hearings on women's employment and education opportunities.[30] The hearings took place in June and July of 1970, and the original

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20 *See* Sandler, *supra* note 13, at 475.

21 *See id.*

22 *See id*.

23 *See* Sandler, *supra* note 14. The suit by WEAL charged that there was an industry wide pattern of discrimination against women in academics and asked for an investigation over admission quotas, hiring, salary differentials, and financial assistance. *See id*. Over the next few months, this filing inspired women throughout the academic community to come out of the woodwork, resulting in many more suits under this Executive Order. *See id*. Furthermore, through these suits, the data collected was striking, as women had less representation in higher ranks and administrative positions. *See id*.

24 *See id*.

25 *See id.*

26 Griffiths was a Democrat member of the House of Representatives representing Michigan's seventeenth district from 1955 to 1974. *See* Martha Wright Griffiths, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, http://bioguide.congress.gov/scripts/biodisplay.pl?index=G000471. She was also a member of WEAL's national advisory board. *See* Sandler, *supra* note 14.

27 *See id.*

28 *See id.* Contract compliance investigations occur when there are complaints alleging discrimination in employment by government contractors.

29 Green was a Democrat member of the House of Representatives representing Oregon's third district from 1955 to 1974. *See* Edith Starrett Green, ENCYCLOPEDIA OF WORLD BIOGRAPHY, *available at* http://www.bookrags.com/biography/edith-starrett-green. She was also a member of WEAL's national advisory board. *See* Sandler, *supra* note 14.

30 Valentin, *supra* note 9, at 2. The hearings were held because at the time there was little research or data on the subject, no campus commissions on the status of women, and there were no conferences held to examine the issue. Sandler, *supra* note 14. As Sandler said in her narrative, "The issue of sex discrimination in education was so new that I received many letters from women and men asking me if it

bill introduced by Representative Green proposed to amend Title VII of the Civil Rights Act to cover employees at educational institutions, Title VI to cover discrimination in federally assisted programs, and the Equal Pay Act to remove its exclusion of administrators and professionals.[31] After the hearings were completed, Sandler was asked by Representative Green to compile a written record of the hearing and several thousand copies were printed.[32] The widespread distribution of this record built the ground support for future legislation designed to eliminate sex discrimination in education—specifically, Title IX.[33]

Following these hearings, Senators Birch Bayh[34] and George McGovern[35] managed Representative Green's bill.[36] Colleges and universities did not lobby for or against the bill because they believed that they had addressed what they saw as the major impacts of the bill—admissions and football.[37] Title IX was born in 1972[38] after the House and Senate took several months to settle the differences between their two bills.[39] At the urging of several African American leaders, this law was created as a separate entity from Title VI of the Civil Rights Act, over fear that it would weaken its coverage of race.[40] On July 23, 1972, Congress passed Title IX, and on July 1, 1972, President Richard Nixon signed it into law.[41]

was true that such discrimination existed, and if so, could I send them proof." *Id.* Sandler also believed that because of the widespread interest by women in these hearings, it made sex discrimination in education a legitimate issue. Sandler, *supra* note 13, at 477. During these hearings, Representative Shirley Chisholm, an African American Congresswoman from New York, testified that her gender had been a greater handicap than her skin color. Sandler, *supra* note 14. Representative Chisholm was just one of many female members of Congress to testify in support of the bill. *Id.*

31 *See* Valentin, *supra* note 9, at 2.

32 *See* Sandler, *supra* note 14.

33 *See id.* Sandler said, "The hearings probably did more than anything else to make sex discrimination in education a legitimate issue." *Id.*

34 Bayh is a Democratic United States Senator from Indiana who held office from 1963 to 1981. *See* Birch Evans Bayh, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, *available at* http://bioguide.congress.gov/scripts/biodisplay.pl?index=B000254. Bayh also was a member of WEAL's national advisory board. *See id.*

35 McGovern is a Democratic United States Senator from South Dakota and held office from 1963 to 1981. *See* George Stanley McGovern, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, *available at* http://bioguide.congress.gov/scripts/biodisplay.pl?index=M000452.

36 *See* Valentin, *supra* note 9, at 2.

37 *See* Sandler, *supra* note 14. Prior to the introduction of the bill, there was a small debate on the floor of the United States Senate about whether the bill required educational institutions to allow women to play on football teams, and it was decided that this was not an issue. *See id.* As for admissions, schools such as Harvard, Princeton, Yale and Dartmouth recently admitted females and had a quota. *See id.*

38 *See id.*

39 At the urging of political leaders, Sandler and WEAL did not lobby political leaders. *See id.* The logic behind this was that there was little opposition to this bill and the less people knew about the bill, the more likely the bill was to pass. *See id.*

40 *See id.*

41 *See id.*

II. GENERAL APPLICATION OF TITLE IX TO SPORTS

Title IX of the Education Amendments of 1972[42] is a 37-word United States law that states, "No person in the United States shall, on the basis of gender, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[43] For several years after Title IX passed, the Office of Civil Rights ("OCR"), a sub-agency of the United States Department of Education that primarily focuses on protecting civil rights through federally assisted education programs, struggled to figure out how Title IX applied to colleges and universities.[44] At the same time, the National Collegiate Athletic Association ("NCAA") realized that Title IX would have an enormous impact on athletics, especially since the inequality in collegiate athletics among men and women's sports was substantial.[45] Thus, choosing the wrong criteria for determining equality could have had a long-term negative impact on one or both genders.

From the start, deciding upon criteria to assess whether the men's and women's programs were equitable was highly problematic. Beyond the central idea that if there were male scholarships, there should be female scholarships, there was general confusion as to how Title IX should be brought into effect, especially because males and females historically played different sports. Thus, in 1979, under President Carter's administration, the United States Department of Health, Education and Welfare issued a policy interpretation for Title IX, which has become known as the "three-prong test for compliance."[46] Over the past thirty years, this test has been the measuring stick for compliance.[47] A school must meet one of the following three prongs to achieve compliance:[48]

1. Participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments.

[42] Now known as the Patsy T. Mink Equal Opportunity in Education Act, in honor of its principal author. *See Patsy Mink: Ahead of the Majority*, PBS, http://www.pbs.org/patsymink/ (last visited Oct. 12, 2011).

[43] 20 U.S.C. § 1681 (1972).

[44] *See* Sandler, *supra* note 13, at 480.

[45] *See id.* For example, in the early 1970s, the men's athletics budget at the University of Michigan was $1.1 million, whereas the budget for women's athletics was zero dollars. *See id.* at 480-81. This was an extreme example, but the inequality between the two genders was pervasive, and the NCAA knew Title IX would affect this. Because of this, the NCAA undertook a major lobbying effort against the act. *See id.* at 480. This effort sought to weaken Title IX and exempt athletics from Title IX, especially football. *See id.* All of these efforts failed and Title IX's language remained intact. *See id.*

[46] Michael W. Lynch, *Weapons Modernization – Changes to Title IX* (Mar. 2000), http://findarticles.com/p/articles/ mi_m1568/is_10_31/ai_59580155/.

[47] *See id.*

[48] *See* LINDA JEAN CARPENTER & R. VIVIAN ACOSTA, TITLE IX 76 (2005).

2. The school can show a history and continuing practice of program expansion that is demonstrably responsive to the developing interest and abilities of the members of that sex.
3. The school can demonstrate that the present program fully and effectively accommodates the interests and abilities of the members of that sex.[49]

Since its inception, the three-prong test of Title IX has been highly controversial in its interpretation and enforcement, as there have been many efforts to get around its limitations. Moreover, there are debates as to the best way to analyze its effectiveness in achieving the intended purpose, namely, eliminating gender discrimination. For example, there has been confusion over how to apply both the second and third prong, as a 2000 General Accounting Office evaluation of collegiate athletics and Title IX showed that more than two-thirds of institutions indicated they were pursuing the third prong as their method of compliance.[50]

To fully comprehend how Title IX compliance works, it is important to spend time evaluating each of the three prongs of the test for compliance and why each prong fails to meet its intended objectives.

A. Prong One

Theoretically, all three prongs hold equal weight, but in reality, the first prong's proportionality standard is the long-term goal that colleges and universities work toward.[51] Proportionality provides a clear-cut way to prove compliance and has been declared by the OCR as a legal safe harbor for schools, whereas the ambiguous language of the second and third prongs does not offer such protection.[52] Therefore, schools tend to view the second and third prongs as temporary fixes until proportionality can be met.

In its 2008 Practical Guide for Colleges and Universities, the NCAA clarified some aspects of the three-prong test. In regards to the first prong, a school can demonstrate compliance by showing that the athletic participation rate of the underrepresented sex is substantially proportionate to the school's full-time undergraduate enrollment.[53] However, the OCR has refused to define

[49] *See id.* at 76-77.

[50] *See id.* The 2005 clarification allowed institutions to use only Internet or e-mail surveys to meet the third prong option of the three-prong test for Title IX compliance, but this was rescinded; *see* Michelle Brutlag Hosick, *OCR Rescinds 2005 Title IX Clarification*, NCAA NEWS (Apr. 20, 2010, 3:05 AM), http://www.ncaa.org/wps/portal/ncaahome?WCM_GLOBAL_CONTEXT=/ncaa/ncaa/ncaa+news/ncaa+news+online/2010/association-wide/ocr+rescinds+ 2005+title+ix+clarification_04_20_10_ncaa_news. The return to the 1996 clarification allows universities to use many forms of surveys, interviews and club or intramural participation. *See id.*

[51] *See* Allison Kasic, *A Move Toward Common Sense on Title IX*, MINDING THE CAMPUS (2010), http://www.mindingthecampus.com/originals/2010/04/a_move_toward_common_sense_on.html.

[52] *See id.*

[53] *See* GENDER EQUITY IN INTERCOLLEGIATE ATHLETICS: A PRACTICAL GUIDE FOR COLLEGES

"substantially proportionate," leaving its meaning to be determined on a case-by-case basis at each institution's discretion.[54]

Furthermore, the fact that OCR offices and courts throughout the country have interpreted this prong in different ways only complicates the process and has encouraged universities to seek compliance through the other two prongs.[55] Federal courts have approved settlement agreements in cases with participation variances as great as five percent, but the OCR, following the 1996 Clarification, has taken a more conservative approach, citing the following examples of substantial proportionality, and thus suggesting a more exact standard than the one provided by the courts: (1) exact proportionality; (2) a disparity of one percent caused by an increase in the current year's enrollment after a year of exact proportionality; and (3) an institution's pursuit of proportionality over a five-year period and in the final year—when proportionality would otherwise have been reached—enrollment of the underrepresented sex increased so that there was a two percent disparity.[56] The OCR has recognized that universities should be permitted to determine how to comply with this prong, and as a result, it is common for schools to choose to implement a roster management system[57] or eliminate programs, instead of expanding opportunities to the underrepresented sex.[58] This is one of the most significant critiques of the first prong of the three-prong test.

The first prong's focus on proportionality has led to some unfortunate outcomes for a law intended to promote gender equity. When this prong was created, women were the minority in both athletics and the general student body.[59] These demographics made it easier for universities to add female teams to their athletic department and comply with Title IX with very few costs. However, since the 1990s, universities have had a much harder time meeting the proportionality prong's demand.[60] Currently, women are often a majority on campuses, but interest in sports among males still remains higher.[61] Thus, in order to comply with the proportionality prong, male programs often suffer and are typically cut.[62]

AND UNIVERSITIES 24 (2008), *available at* http://www.eric.ed.gov/PDFS/ED503745.pdf.

[54] *Id.*

[55] *See id.*

[56] *See* Norma Cantu, *Clarification of Intercollegiate Athletics Policy Guidance: The Three Part Test*, U.S. DEP'T OF EDUCATION (Jan. 16, 1996), http://www2.ed.gov/about/offices/list/ocr/docs/clarific.html.

[57] This was one of the issues in the Quinnipiac competitive cheer case, to be discussed later. The federal court in Quinnipiac's case took issue with several roster management techniques they used, including imposing "roster floors," which required coaches to take a minimum number of players for their teams, or capping roster sizes. Annie Youderian, *Cheerleading Isn't a Title IX Sport, Judge Says*, July 21, 2010, http://www.courthousenews.com/2010/07/21/29019.htm.

[58] *See* GENDER EQUITY IN INTERCOLLEGIATE ATHLETICS, *supra* note 53, at 25.

[59] *See* Kasic, *supra* note 51.

[60] *See id.*

[61] *See id.*

[62] "From 1981 to 2005, male athletes per school dropped six percent and men's teams per school fell 17 percent." *Id.* "In that same time period, both female athletes per school and women's teams per

Many universities, when seeking to comply with the proportionality prong, face a dilemma over whether to drop existing men's opportunities or add women's opportunities to their athletic departments. For example, in the fall of 2000, the University of Wisconsin sought to use the proportionality prong to come into compliance with Title IX.[63] Enrollment at the University of Wisconsin was 53 percent female and 47 percent male, and the athletic participation opportunity ratio was 49.8 percent female—425 athletes—to 50.2 percent male—429 athletes.[64] The OCR sent a letter to the University of Wisconsin finding a lack of substantial proportionality because the 3.2 percent difference between university enrollment by females and female athletic participation was insufficiently equivalent.[65] As a result, the school could have either added 59 athletic opportunities for females, thereby increasing the female participation rate to 53 percent and matching female enrollment, or it could have eliminated 48 athletic opportunities for males, thus decreasing the male participation rate to 47 percent.[66] If an athletic department is operating with a substantial deficit, and the athletic director must decide whether to add or drop the level of participation, eliminating male athletic opportunities might be the only feasible choice from a legal and financial perspective.

A question remains as to whether the proportionality prong is the best option for bringing an institution of higher education into compliance with Title IX, simply because its application typically results in male athletic opportunities being cut. Critics have argued that if an institution has persistently, over time, failed to address the participation requirement for women, and has thus been unable to comply with the second or third prongs, it should forfeit the argument that the only way to achieve Title IX compliance would be to cut men's programs due to the poor financial condition of the athletic department. However, generally, both male and female student athletes are slighted—women are denied opportunities to participate in sports despite a proven unmet interest, and existing male opportunities are eliminated.

B. Prong Two

An institution complies with the second prong of Title IX, a "history of and continuing practice of program expansion," by showing historic documentation of net program expansion for the underrepresented sex.[67] Documentation of the

school rose substantially at 34 percent." *Id.* Every male sport except baseball has decreased or remained consistent in participation, with non-revenue sports like wrestling, tennis, and gymnastics dropping the most in participation. *See id.*

63 *See* Eric Bentley, *Title IX: The Technical Knockout for Men's Non-Revenue Sports*, 33 J. L. & EDUC. 139, 145 (2004).

64 *See id.*

65 *See id.*

66 *See id.*

67 GENDER EQUITY IN INTERCOLLEGIATE ATHLETICS, *supra* note 53, at 25.

university's athletic program history should include dates when teams were added or discontinued and reasons for doing so, the effect this had, and whether the expansion was responsive to students' developing interests and abilities.[68] In other words, there must be some causal connection between the opportunities added and the interests of the students at that university.[69] The OCR indicated that it would focus on several different factors when assessing history. Factors include a record of adding intercollegiate teams by sex, a record of upgrading teams to intercollegiate status based on sex, a record of increasing the number of participants of the underrepresented sex, and affirmative responses to requests by students or others to add or increase athletic opportunities.[70] Furthermore, OCR assesses continuing practice by:

> Current implementation of a policy or procedure for requesting the addition of sports that includes the elevation of club or intramural teams; effective communication of that policy or procedure to students; current implementation of a plan or program expansion that is responsive to developing interests and abilities of the under represented sex; demonstrated efforts to monitor interest and abilities.[71]

Additionally, universities must show an increase in overall sports opportunities rather than merely a shift in percentages.[72]

Prong Two does not require an institution to have an extensive history of program expansion.[73] The 1996 Title IX Clarification only requires there be "at least some" proven history of the institution adding women's participation opportunities.[74] Unless an institution has failed to even attempt to comply with the participation aspect of Title IX, most institutions will be able to prove that there has been at least some history of program expansion. For "continuing practice," the

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[68] *See id.* at 26.

[69] *See id.*

[70] *See id.*

[71] *See id.*

[72] *See* GENDER EQUITY IN INTERCOLLEGIATE ATHLETICS, *supra* note 53, at 27. In the 1996 Clarification, examples were given where universities had to show growth typically over a period of ten to fifteen years. For example:

By 1988, Institution B established seven teams for women. Institution B added a women's varsity team in 1991 based on the requests of students and coaches. In 1999, "it added a women's varsity team after an NCAA survey showed a significant increase in girls' high school participation in that sport." In 2001, Institution B "eliminated a viable women's team and a viable men's team in an effort to reduce its athletics budget. It has taken no action relating to the underrepresented sex since" 2001. The OCR would not find Institution B in compliance with part two. "Institution [B] cannot show a continuing practice of program expansion that is responsive to the developing interests and abilities of the under-represented sex because its only action since [1999], with regard to the underrepresented sex, was to eliminate a team for which there was interest, ability and available competition."

Cantu, *supra* note 56.

[73] *See* Bentley, *supra* note 6363, at 148.

[74] *Id.*

OCR's clarification does not provide any timeline by which an institution must actually follow through with its implementation plans.[75]

The decision in *Boucher v. Syracuse University*[76] by the Second Circuit of the United States Court of Appeals rendered Prong Two even more ambiguous. The plaintiffs in this suit, members of Syracuse club sports teams, alleged that Syracuse discriminated against female athletes in its allocation of participation opportunities—which sports to provide and how many scholarships were available to women—and that Syracuse provided unequal benefits to female athletes as compared to male athletes.[77] Since, at the time, relying on the proportionality prong was not feasible,[78] the university advanced a history of upgrading argument, which the Court accepted, despite the fact that Syracuse had not added a single women's team from 1982 to 1995.[79] Even though Syracuse University had not consistently added women's sports, the court affirmed the lower court's dismissal based on the fact that Syracuse had consistently upgraded its support for female athletes by adding scholarships for female athletes, improving their athletic facilities, hiring additional coaches, and had made arrangements to add a women's softball team.[80] *Boucher* provides just one example of the ambiguities involved with interpreting Prong Two, illustrating that the courts have yet to create a clear-cut formula or standard for schools seeking to use this prong to come into compliance with Title IX.

C. Prong Three

If universities cannot show substantial proportionality or a history and continuing practice of expansion, they can comply with Title IX by fully and effectively accommodating the athletic interests and abilities of the underrepresented sex.[81] In regards to Prong Three, a potential Title IX issue exists only if it can be shown both that women are waiting, ready, and able to participate in athletics and that men already occupy a disproportionate number of the existing participation opportunities.[82] If either of those criteria were unmet, a university would be permitted to have disparate numbers and percentages of male and female sports teams, and could even augment male participation opportunities.[83]

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[75] *Id.*

[76] *See* Boucher v. Syracuse Univ., 164 F.3d 113 (2d Cir. 1999).

[77] *See id.* at 115.

[78] The student body was 50 percent female, yet only 32.4 percent of student athletes were female. *See id.* at 115.

[79] *See id.* at 117. However, Syracuse University added two women's teams in 1995, four years prior to *Boucher*. *See id.* at 117-19.

[80] *See* CARPENTER & ACOSTA, *supra* note 48, at 146.

[81] *See* GENDER EQUITY IN INTERCOLLEGIATE ATHLETICS, *supra* note 53, at 28.

[82] *See id.* at 29.

[83] *See id.* at 29.

In determining whether the third prong has been satisfied, OCR will consider whether the following three criteria are present: "(1) unmet interest in a particular sport; (2) sufficient ability to sustain a team in the sport; and (3) a reasonable expectation of competition for the team."[84]

According to the 1996 Clarification, OCR will consider sufficient unmet interest through the following indicators:

- requests by students and admitted students that a particular sport be added;
- requests that an existing club sport be elevated to intercollegiate team status;
- participation in particular club or intramural sports;
- interviews with students, admitted students, coaches, administrators and others regarding interest in particular sports;
- results of questionnaires of students and admitted students regarding interests in particular sports; and
- participation in particular in interscholastic sports by admitted students.[85]

By considering the unmet interests based on students and administrators who are intimately involved in a university's athletic program and its growth, the school can obtain a better estimate of what it will take to meet this prong.

"Second, OCR will determine whether there is sufficient ability among interested students of the underrepresented sex to sustain an intercollegiate team."[86] Among the indicators that OCR will consider are:

- the athletic experience and accomplishments—in interscholastic, club or intramural competition—of students and admitted students interested in playing the sport;
- opinions of coaches, administrators, and athletes at the institution regarding whether interested students and admitted students have the potential to sustain a varsity team; and
- if the team has previously competed at the club or intramural level, whether the competitive experience of the team indicates that it has the potential to sustain an intercollegiate team.[87]

The easiest way for an institution to comply with the third prong is to disprove that there is sufficient ability to sustain a team in the sport after a request has been

84 Cantu, *supra* note 56.

85 *Id.* "In addition, OCR will look at participation rates in sports in high schools, amateur athletic associations, and community sports leagues . . . in areas . . . [that] the institution draws its students in order to ascertain likely interest and ability of its students and admitted students in particular sport(s)." *Id.*

86 *Id.*

87 *Id.*

made.[88] Thus, the institution would not need to add that sport to its athletics program.[89] This would be true even if there was a proven unmet interest in a sport or even if there was a reasonable expectation of competition in that sport.[90]

Lastly, OCR determines whether there is a reasonable expectation of competition for the team and will consider both competitive opportunities offered by other schools against which the institution competes and participation opportunities offered by other universities in the institution's geographic area, including those offered by schools that the institution does not play against.[91] This determination, as well as the conclusion that there is sufficient ability to maintain a team, is important because if a university cannot provide a team that adequately responds to the competitive needs of the student population in comparison to similar universities, an institution cannot comply with Title IX through the third prong.

Although these factors and the prongs, in general, appear rudimentary in theory, in practice there has been much debate over their application to colleges and universities. Throughout the history of this legislation, the courts have had to answer numerous questions on its application in practice, indicating instability and lack of confidence in this legislation on the part of administrators, legislators, and the courts.

III. CASE STUDIES OF TITLE IX IN COLLEGIATE SPORTS

Over the past 39 years, universities have tried numerous approaches in their attempts to comply with Title IX. The following examples illustrate several instances of how the three-prong Title IX test has been applied recently. As the examples will show, of the many universities that have come into compliance with the technical language of the three-prong test, many have used unfair means to do so. Therefore, many of the various approaches that institutions have taken could potentially form the basis for an Equal Protection Clause argument or a call for alternative options to the current three-prong test.

A. Title IX's Application to James Madison University

James Madison eliminated ten sports to comply with Title IX.[92] More shocking is that the university voluntarily slashed sports in the absence of a lawsuit or complaint and that it chose to comply with Title IX using the proportionality prong, thus fully adhering to the *strictest* federal gender-equity standards.[93] The

88 *See* Bentley, *supra* note 63, at 150.
89 *See id.*
90 *See id.* at 149-50.
91 *See id.* at 150.
92 *See* Pennington, *supra* note 2.
93 *See id.*

cuts left the school with twelve women's sports and six men's sports, one of which was football, which provides upwards of 75 scholarships.[94] Additionally, three full time coaches and eight part time coaches lost their jobs, and 144 athletes were released from their athletic scholarships and left without a varsity team of which to be a part.[95]

Although James Madison used the proportionality prong to raise female athletic participation at its university to 61 percent, most schools do not, as most universities struggle to reach the proper ratio of male-to-female athletic participation that matches the university's enrollment.[96] A 2007 James Madison University Press Release stated that the administration and Board of Visitors decided that it "could not/would not satisfactorily meet the second or third test."[97] However, numerous critics argue that two-thirds of universities comply with Title IX through the more lenient third prong,[98] and that it would have been possible for James Madison to comply through the third prong as well.

Critics of James Madison's alleged use of Title IX to make the cuts have claimed that it was simply a business decision. According to the Women's Sports Foundation, James Madison cut teams because it wanted a group of strong teams within five years in the Colonial Athletic Association,[99] which could generate more revenue for the school. Some of the eliminated teams were cut because they competed in less prominent conferences[100] and the resulting extra budget money from the cuts could be poured into other sports to make them more competitive. Additionally, critics of the decision to use Title IX as the reason for the cuts have also claimed that the teams were cut because some of them were more expensive for the school because they did not have conference membership, and therefore had to travel farther to compete.[101]

James Madison's administration used Title IX as an explanation for the cuts even though it appears that the cuts could have been motivated by other reasons. James Madison cut $550,000 off of its $21 million budget,[102] and if the university

94 *See id.*

95 *See id.*

96 *See id.*

97 Media Relations, *Title IX Statement*, JAMES MADISON UNIV. (Feb. 8, 2007), *available at* http://www.jmu.edu/jmuweb/general/ news2/general8145.shtml.

98 *See* James F. Manning, *Additional Clarification of Intercollegiate Athletics Policy: Three-Part Test – Part Three*, THE MAT.COM (Mar. 22, 2005), http://www.themat.com/section.php?section_id =3&page=showarticle& ArticleID=12052.

99 James Madison University and Title IX: Myths vs. Facts, http://66.40.5.5/Content/Articles/ Issues/Equity-Issues/J/James-Madison-University-and-Title-IX-Myths-vs-Facts.aspx (last visited Oct. 11, 2011).

100 *See id.*

101 *See id.*

102 *See* Erik Brady, *James Madison's Team Cuts Spark Title IX Protest*, USA TODAY, Nov. 1, 2006, http://www.usatoday.com/sports/college/2006-11-01-james-madison-titleix-protest_x.htm (last visited Oct. 11, 2011)..

used Title IX as an excuse for the budget cut, its action seems to be an abuse of Title IX, rather than an attempt to satisfy the legislation's purpose.

B. Title IX's Application to the University of Maryland, College Park

The University of Maryland, College Park is one of the rare model schools for Title IX compliance, with Deborah Yow at the forefront of compliance until 2010, when she stepped down as the university's athletic director.[103] Prior to leaving her position at the University of Maryland, Yow served on the federal government commission that reviews Title IX law in college athletics, and was quoted as saying, "We need to figure out how to offer opportunities for women, while also providing appropriate opportunities for men."[104]

Yow told the University of Maryland school lawyers to use the first prong since the other two prongs were too vague and because "[w]e need to be able to tell what the target is without legal degrees."[105] Accordingly, Yow has always held that she would prefer to add women's teams without eliminating men's teams, instead opting to eliminate staff. This is exactly what she did when the University of Maryland added competitive cheer as a varsity sport in 2006.[106] Within competitive cheer, the University of Maryland awarded the equivalent of twelve full scholarships to its thirty-member competitive cheer squad, with a minimal budget.[107] Furthermore, the University maintains a separate co-ed spirit squad to cheer at football and basketball games, in addition to the competitive cheer team, whose main focus is competition.[108]

The University of Maryland's compliance with Title IX's first prong through its addition of competitive cheer has come under fire from critics. Micki King, the University of Kentucky's Assistant Athletic Director and Senior Woman Administrator, who admits to favoring the somewhat vague third prong of compliance, critiqued:

> We need Title IX to ensure that girls have opportunities to activities that historically they've been denied. Historically, women have not been denied opportunities to be cheerleaders. Historically, women have had only the opportunity to be cheerleaders. So to use cheerleading as Title IX

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103 Tim Peeler, *Deborah Yow: Biography*, N.C. STATE UNIV., http://www.gopack.com/genrel/yow_deboraha.01.html (noting that Yow was the University of Maryland Athletic Department Director from 1994 to 2010).

104 *Deborah Yow: Biography*, MARYLAND COMMISSION FOR WOMEN, http://www.msa.md.gov/msa/educ/exhibits/ womenshall/html/yow.html (last visited Oct. 11, 2011).

105 Erik Brady, *Major Changes Debated for Title IX*, USA TODAY (Dec. 17, 2002), http://www.msa.md.gov/megafile/msa/speccol/sc3500/sc3520/014000/014067/html/ustoday17dec2002.html.

106 *See* Paul Steinbach, *Gender Equity - Leading the Crowd?*, ATHLETIC BUSINESS (Jan. 1, 2004), http://athleticbusiness.com/articles/article.aspx?articleid=685&zoneid=3.

107 *See id.*

108 *See id.*

> compliance is very much against the grain of the philosophical intent of the law.[109]

Thus, the question remains whether competitive cheer adds new meaningful participation for women. However, as stated by Dave Haglund, University of Maryland's associate athletic director for varsity sports, "The end result is that we're able to provide kids with scholarships—men and women,"[110] thus providing the rare combination of complying with Title IX without inhibiting and eliminating male participation.[111]

C. Title IX's Application to Quinnipiac University

In its quest for Title IX compliance, Quinnipiac University attempted to eliminate the women's volleyball team for budgetary reasons and replace it with a competitive cheering squad under the first prong.[112] This was similar to the University of Maryland's attempt to comply with the first prong, except that competitive cheer had not been added at the University of Maryland at the expense of a different women's team, and budgetary reasons were not cited.[113] At Quinnipiac, members of the volleyball team responded by filing a lawsuit challenging the elimination of their varsity sport.[114]

District Judge Stefan R. Underhill, a federal judge in Connecticut, ruled that Quinnipiac University had violated Title IX by failing to provide equal opportunities for female student athletic participation, and called for the university to produce within sixty days a detailed plan on how it would come into compliance for the 2010-2011 academic school year.[115] Accordingly, the decision provided that varsity cheerleading could not be considered a varsity sport for purposes of complying with Title IX, as the purpose of the legislation was to create new meaningful opportunities for females in collegiate athletics.[116]

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[109] *Id.* The Senior Woman Administrator is the highest-ranking female in each NCAA athletic department. This designation is intended to encourage and promote the involvement of female administrators in the decision making process, and enhance representation of female experience and perspective in decision making.

[110] *Id.*

[111] However, in July 2011, it was reported that the University of Maryland Athletic Department lost more than $64 million from 2005 to 2010, and as a result, it may have made cuts to the athletic program. *See* Steve Yanda, *Maryland Athletic Department's Revenue Can't Keep Pace With Spending*, THE WASH. POST (July 20, 2011), http://www.washingtonpost.com/sports/a-closer-look-into-the-finances-of-marylands-athletic-department/2011/07/20/gIQAvsHmQI_story.html. This could be due to Deborah Yow's belief that programs and scholarships should be added to comply with Title IX, rather than to eliminate male athletic opportunities.

[112] *See* Biediger v. Quinnipiac Univ., 728 F. Supp. 2d 62, 112 (D. Conn. 2010).

[113] *See id.*

[114] *See id.*

[115] *See id.* at 114.

[116] *See id.*

The court's decision could potentially create a snowball effect among universities complying with Title IX through historically female dominated sports and activities, including the University of Maryland, which had used competitive cheerleading as a means of Title IX compliance.[117] Additionally, because of this decision, the door was closed to women all over the country who intended to compete in this emerging sport, and Quinnipiac intimated that if it could not count the competitive cheer team under Title IX, the sport could be deemed economically unsustainable and cut from the program.[118] Critics of this decision also questioned why the other prongs were not considered. In the long run, Quinnipiac University decided to keep its women's volleyball team and competitive cheer team, and added women's golf and rugby to comply with Title IX.[119]

In addition to the scrutiny Quinnipiac University faced regarding competitive cheer, the university's roster management procedures also came under examination.[120] Quinnipiac University required that women's cross-country runners join the indoor and outdoor track teams so they could be counted three times when the university reported their participation numbers to the Department of Education.[121] Additionally, Quinnipiac University had been padding women's rosters by counting players and then cutting them a few weeks later.[122] These practices are not uncommon, and until there is a drastic change in the means universities can use to come in compliance with Title IX, they will continue to manipulate their participation numbers.[123]

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117 In a statement released after the Fourth Circuit ruling, the University of Maryland said that they did not anticipate having to make changes to the athletic program because the Fourth Circuit is not binding on the University of Maryland. *See* Steve Yanda, *No Immediate Changes for Maryland After Cheerleading Ruling*, THE WASH. POST (July 23, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/07/22/AR2010072205699.html.

118 *See* Dan Fitzgerald, *Competitive Cheering A Varsity Sport? Quinnipiac Title IX Case May Provide Answers*, CONN. SPORTS LAW, July 21, 2010, http://ctsportslaw.com/2010/ 07/21/competitive-cheering-a-varsity-sport-quinnipiac-title-ix-case-may-provide-answers/.

119 *See* Pat Eaton-Robb, *Quinnipiac Adds Women's Rugby Under Title IX Plan*, HUFFINGTON POST (Aug. 11, 2010), http://www.huffingtonpost.com/2010/08/12/quinnipiac-adds-womens-ru_n_679653.html. Competitive cheer was also renamed "stunts and tumbling" in an effort to have it recognized as a varsity sport. *See id*.

120 *See* Katie Thomas, *College Teams Relying on Deception, Undermine Gender Equity*, N.Y. TIMES, Apr. 25, 2011, at A1.

121 *See id.* These numbers are not used in formal investigations, but many colleges manipulate them to avoid bringing about one. *See id.*

122 *See id.*

123 There are many other examples of unfair roster management. For instance, to comply with the first prong, programs often count male players who practice with women's teams as female participants. *See id.* This includes the 2011 NCAA Women's Basketball Champions Texas A&M University who reported thirty-two players in the 2009-10 academic year, although 14 were males. *See* Katie Thomas, *College Teams Relying on Deception, Undermine Gender Equity*, N.Y. TIMES, Apr. 25, 2011, at A1. Additionally, double- and triple-counting women have allowed four-dozen Division One universities to mask that they have fewer female athletes. *See id.* This includes Oklahoma State University, which reported 35 more participants in 2009-10 than in 2003-04, although there were twelve less women competing. *See id.* Another unfair practice was seen at the University of South Florida, where, in an effort to comply with the first prong, the women's cross country team included 71 women in 2009-10,

IV. TITLE IX COULD VIOLATE THE EQUAL PROTECTION CLAUSE

A. Introduction

In *Neal v. Board of Trustees of California State Universities*, the Ninth Circuit held that capping the number of participants on men's teams is a legally acceptable method for manipulating the ratio between men and women to show compliance with the proportionality prong of the three-pronged approach.[124] In *Neal*, California State University of Bakersfield ("CSUB") decided to decrease the amount of male participation, rather than increasing the female participation, in order to come in compliance with Title IX.[125] This is one of the clearest examples of how male collegiate athletic participation has been limited by Title IX.

Similarly, in *Chalenor et al. v. University of North Dakota*, the Eighth Circuit determined that an institution may cut a men's team rather than increase female participation in attempting to comply with the proportionality prong.[126] The University of North Dakota justified cutting its men's wrestling team with budgetary concerns,[127] and the court allowed this.[128] Although the court conceded that eliminating or capping men's sports controverts the spirit of Title IX, it determined that doing so was an acceptable way of coming into compliance with the statute.[129]

Both *Neal* and *Chalenor* are examples of Title IX compliance by universities that destroyed the spirit of Congress's intent in creating this legislation. Therefore, in the future, as a result of lessons learned from these two cases and because male collegiate athletics are so adversely affected, it could offend the Equal Protection Clause.

B. The Equal Protection Clause Generally

The Fifth and Fourteenth[130] Amendments of the United States Constitution guarantee that no person or group will be denied such protection under the law as is enjoyed by similar persons or groups, and persons similarly situated must be treated equally.[131] Until the mid-twentieth century, the requirement of equality was applied minimally, and was generally only applied to some cases of racial

but only twenty-eight competed in a race. *See id.*

124 *See* Neal v. Bd. of Trs. of Cal. State Univs., 198 F.3d 763, 770 (9th Cir. 1999).

125 *See id.* at 765.

126 *See* Chalenor v. Univ. of North Dakota, 291 F.3d 1042 (8th Cir. 2002).

127 *See id.* at 1043.

128 *See id.* at 1045.

129 *See id.* at 1049.

130 The 14th Amendment to the Constitution of the United States prohibits states from denying any person "the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

131 *See id.*; U.S. CONST. amend. V.

discrimination, such as jury selection and the use of literacy tests and grandfather clauses to restrict the voting rights of blacks.[132] However, beginning in the 1960s, the Supreme Court under Chief Justice Earl Warren dramatically expanded the concept. Accordingly, during the tenure of Chief Justices Warren E. Burger and William H. Rehnquist, the Court continued to add to the types of cases that might be adjudicated under Equal Protection, including cases involving sexual discrimination, the status and rights of aliens, abortion rights, and access to the courts. Additionally, although the Fourteenth Amendment provides that, "No *State* shall . . . deny to any person within its jurisdiction the equal protection of the laws,"[133] *Bolling v. Sharpe* established, generally, that the Fifth and Fourteenth Amendment are applied identically, and the same Equal Protection analysis is applied to federal action.[134]

As provided in *Yick Wo v. Hopkins*, facially neutral laws with discriminatory effects that violate the Equal Protection Clause are counterintuitive to the Fourteenth Amendments because these statutes still discriminate arbitrarily.[135] As applied here, Title IX may have neutral and good intentions, but sometimes this is not enough, as the statute may also have discriminatory effects.

In the context of sex-based classifications under the Equal Protection Clause, intermediate scrutiny applies to constitutional challenges of a statute. This standard first arose in *Craig v. Boren*, where the Supreme Court determined that statutory or administrative sex-based classifications were subject to an intermediate standard of judicial review.[136] The Supreme Court has applied this intermediate scrutiny in a way that is much closer to strict scrutiny and, in recent decisions, the Court has preferred the term "exacting scrutiny" when referring to the intermediate level of Equal Protection analysis. For example, the Court applied similar "exacting intermediate scrutiny" when ruling on sex-based classifications in *J.E.B. v. Alabama*.[137] Under this level of scrutiny, gender classification must serve important governmental objectives and must be substantially related to achievement of those objectives for the classification to be constitutional.[138] Thus,

[132] *See, e.g.*, Strauder v. W. Va., 100 U.S. 303 (1880), where a conviction of an African American man for murder in a state court by a jury that did not allow African Americans on the jury was overturned because all citizens should have the right to serve on a jury. However, despite this landmark decision, in *Plessy* v. *Ferguson*, 163 U.S. 537 (1896), the Supreme Court of the United States upheld "separate but equal" facilities for the races, thus sanctioning racial segregation.

[133] U.S. CONST. amend. XIV, § 1 (emphasis added).

[134] *See* Bolling v. Sharpe, 347 U.S. 497, 500 (1954).

[135] *See* Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886).

[136] *See* Craig v. Boren, 429 U.S. 190, 218 (1976).

[137] 511 U.S. 127 (1994). The Supreme Court held that the Batson challenge on racial discrimination also applied to gender. *Id.* at 146. A Batson challenge is when a party claims that a trial should be invalidated on the basis of peremptory challenges having excluded a cognizable group from the jury, such as excluding a racial group or a specific gender. *Id.* at 129.

[138] *See id.* at 137.

in an "as applied" application of Title IX, a university must show that it had important objectives for dropping a men's team.

C. Title IX In the Courts

Title IX violates the Equal Protection Clause as applied to colleges and universities because the elimination of male sports teams and scholarships is antithetical to Title IX's purpose. To understand this argument, a brief history of Title IX in the courts must be provided.

When determining whether Title IX violates the Equal Protection Clause, it must first be determined who and what Title IX applies to and its effect on collegiate athletics. In *North Haven Board of Education v. Bell*,[139] the Supreme Court decided that Title IX applied not only to student athletes but also to employees of educational institutions. The plaintiff, a tenured public school teacher, had been refused her position upon returning from maternity leave.[140] The Department of Health, Education and Welfare ("HEW") initiated investigations against the school district, to which the school responded that Title IX only applied to students.[141] However, the Supreme Court adopted HEW's position and held that Title IX could apply to teachers as well as students.[142] As a result of *North Haven*, student-athletes, coaches, or anyone associated with the specific sport can attempt to challenge the constitutionality of Title IX.

In *Grove City College v. Bell*, the Supreme Court held that "program" only referred to subunits that actually received federal funding—[143]but this was later overturned, so as to now include the entire institution—[144]and that the institution need not receive direct federal assistance to be held under the jurisdiction of Title IX.[145] The first part of the Supreme Court's holding was overturned by Congress through the Civil Rights Restoration Act of 1987 because of its effect on intercollegiate athletics.[146] Because athletic departments typically did not receive federal money, there was no Title IX jurisdiction over them.[147] Therefore, scholarships for female athletes were cancelled, women's sports teams were terminated, and the federal government was powerless in trying to stop this.[148] As

139 456 U.S. 512 (1982).

140 *See id.* at 517.

141 *See id.* at 517-18.

142 *See id.* at 530.

143 Grove City College v. Bell, 465 U.S. 555, 557 (1984).

144 *See* CARPENTER & ACOSTA, *supra* note 48, at 126. In 1988, the Civil Rights Restoration Act of 1987 was passed over presidential veto, and made clear that the term "program" applies to the entire institution, and not merely the subunit that receives federal funding. *Id.* Therefore, if any federal money finds its way onto a campus, the entire campus falls under the jurisdiction of Title IX. *Id.*

145 *See Grove City College*, 465 U.S. at 597.

146 *See* CARPENTER & ACOSTA, *supra* note 48, at 121.

147 *See id.*

148 *See id.* The effects of this decision lasted four years. *See id.*

a result of the after-effects of this legislation, anyone associated with collegiate athletic programs could bring suit and challenge the constitutionality of Title IX. However, it has also resulted in the limiting of male athletic opportunities.

One last case of importance for Equal Protection analysis of Title IX, and one of the more influential decisions on intercollegiate athletics and Title IX, is *Blair v. Washington State University*, in which the Court held that football, other revenue sports, and the rest of the sports squads at a university must be treated equally under Title IX.[149] The logic of decision-makers behind excluding revenue-producing sports, which typically include men's basketball, baseball, and football, from the reach of Title IX is that Title IX calculations would then only include women's sports and men's minor sports, both of which have been underfunded and have similar numbers of scholarships.[150] This is as opposed to football, which typically has over 80 scholarships, a number that cannot be matched by any female sport.[151] However, the Court decided otherwise,[152] and as a result, many major football and men's basketball programs have paid the price.

D. Title IX Equal Protection Analysis

Players, coaches, and other individuals associated with an athletic program dropped or cut by a public university have brought Equal Protection claims against schools in the past, but courts have been reluctant to accept their arguments since a valid equal protection claim against the university demands that "a plaintiff must allege in the pleadings that the government intentionally discriminated against [that person] by classifying him or her for different treatment under the law."[153] The plaintiff also has the burden of proving that the government made the classification "on the basis of an impermissible characteristic, such as race, national origin or gender."[154] Therefore, a successful Equal Protection claim against Title IX would have to prove that the university's decision to cut or eliminate a program was intentionally based on a gender classification.[155]

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149 *See* Blair v. Washington State University, 740 P.2d 1379, 1389 (Wash. 1987).

150 *See* CARPENTER & ACOSTA, *supra* note 48, at 123.

151 Ryan Wood, *Crunching the Numbers: Football Scholarships*, ACTIVE.COM, http://www.active.com/football/Articles/Crunching_the_Numbers__Football_Scholarships.htm.

152 *See* CARPENTER & ACOSTA, *supra* note 48, at 123.

153 Kelley v. Bd. of Trs., 832 F.Supp. 237, 242 (1994).

154 *Id.*

155 In a situation where a men's team was dropped from a public university, the public university has been considered to be a state actor for equal protection purposes. *See* Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179 , 199 (1988). For private institutions, it could be argued that a private university serves a public and is therefore a state actor. *See* Marsh v. Alabama, 326 U.S. 501, 506 (1946). Alternatively, it could be argued that the private university acts under the color of state law by using power "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." United States v. Classic, 313 U.S. 299, 326 (1941). Furthermore, state action is found when an act or conduct or alleged infringement of the Constitution is "fairly attributable to the state." Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 937 (1982).

One of the most prominent examples of a court's rejection of an Equal Protection argument occurred in *Kelley v. Board of Trustees*,[156] where members of the University of Illinois' men's varsity swimming team brought an action alleging that the University violated Title IX and the Fourteenth Amendment after their sport was eliminated as a result of the school's efforts to comply with Title IX.[157] The Seventh Circuit decided that although the university's decision to eliminate men's swimming classified men for different treatment than women on the basis of gender, the school's action was justified because it complied with Title IX.[158] The Court reasoned that remedial action under Title IX served an important state interest—to eradicate historical discrimination of women in athletics—and that the interest was substantial enough to justify disparate treatment of men and women.[159]

Other courts have used similar reasoning to *Kelley* and held that compliance by universities with Title IX is an important governmental objective to which cutting men's programs is substantially related. However, cases like *Kelley* were decided in an era where women's sports were less popular than they are today. Throughout the past decade, women's collegiate sports have grown enough in strength[160] so when men's sports are eliminated, it is a direct attack on the male gender and thus a violation of the Equal Protection Clause.

Since Title IX's creation, the NCAA has dropped 2,276 men's sports, while adding 3,592 women's sports.[161] Accordingly, female college athletic participation has increased by 456 percent.[162] Currently, female athletes receive approximately 43 percent of participation opportunities, but they comprise 57 percent of the college population nationwide.[163] Because this number has grown so quickly, it has been difficult for universities to show compliance under any of the prongs, especially the first prong, and as a result, some male sports and scholarships have been eliminated.

Throughout the history of the Equal Protection Clause, this invaluable provision has adapted to the times. One of the best examples of this is how the Supreme Court adapted the Fourteenth Amendment to the changing race relations of the 1960s. Following *Plessy v. Ferguson*, where the Supreme Court determined that "separate but equal" was constitutionally acceptable,[164] the Court reversed that

156 *See Kelley*, 35 F.3d 265.

157 *See id.* at 267.

158 *See id.* at 270-71.

159 *See id.* at 271-72.

160 Between 1992 to 1993 and 2000 to 2001, a period where Title IX was rigorously enforced, women's participation increased annually by 4.5%. *See* JOHN CHESLICK, Who's Playing Sports? Money, Race and Gender Executive Summary, 2 (Women Sports Foundation, 2008).

161 *See* Athletics – The National Coalition for Women and Girls in Education, *www.ncwge.org/PDF/Athletics.pdf*

162 *See id.*

163 *See id.*

164 Plessy v. Ferguson, 163 U.S. 537, 552 (1896).

decision in *Brown v. Board of Education*,[165] in a reaction to the changing times. This is just one example of many of how the Equal Protection Clause has been redefined by the Court in reaction to changes in society. Furthermore, as provided in *Neal v. Board of Trustees*,[166] "Title IX is a dynamic statute, not a static one. It envisions continuing progress toward the goal of equal opportunity for all athletes . . ."[167] Therefore, the framers of this statute anticipated changing social dynamics, which, in combination with the malleable Equal Protection Clause, may call for a revolutionization of Title IX.

To allow an institution to eliminate a men's team to comply with Title IX today when that institution is dropping that team because of its sex is synonymous with saying that an institution may deny participation in collegiate athletics on the basis of sex. Even though Title IX unambiguously prohibits denying participation on the basis of sex, courts have seemed to support this very action by allowing men's programs to be cut for the benefit of women's teams to comply with Title IX. The courts in cases like *Kelley* fail to acknowledge the tension between avoiding Title IX sanctions and the congressional purpose of increasing participation in athletics, and that by reducing men's opportunities in collegiate athletics, an institution is not complying with the remedial purpose of Title IX, especially in today's day and age where women have been provided a multitude of opportunities in higher education. Thus, because dropping an existing men's opportunity to comply with Title IX completely violates the statute's purpose, the courts and legislature must take a different approach to interpreting Title IX.

E. How Title IX Should Change In Response To Equal Protection Claims

i. Alter The Third Prong's Measurement Technique

Title IX is a "dynamic" statute[168] in that it adapts to the needs of society. At the present time, Title IX can and should be interpreted in a way that takes into account the specific needs of society today. First, the third prong of the three-prong test should be revised to take into account the needs of both males and females instead of just the underrepresented sex. This practice would help to achieve a more accurate view of both genders' sporting interests and needs. Furthermore, it would provide the universities a stronger and more defined means of compliance, as many schools, such as the University of Maryland, avoid this prong because of uncertainty.

In regards to the third prong's accommodation requirement, the Commission on Opportunities in Athletics advised that interest surveys be used to gauge both

165 347 U.S. 483 (1954).
166 198 F.3d 763.
167 *Id.* at 769.
168 *Id.*

genders' interest in playing sports at school.[169] In 2005, OCR clarified this recommendation and specifically outlined a new way in which universities could assess and accommodate student interest in sports, thus complying with Title IX.[170] The new method introduced was the "e-mail survey."[171] This method allowed schools to gauge interest in women's sports by sending out an e-mail to all of the women in the school and the response to this survey would determine the level of interest that the school would need to satisfy.[172]

The Commission on Opportunities in Athletics encouraged the use of this e-mail survey because it offered institutions a flexible and practical, yet strict, means of attaining a proper guide to Title IX compliance.[173] Furthermore, the Commission supported OCR's encouragement of institutions to use this prong because of the high risk of reducing male athletic opportunities when using the first prong.[174] However, use of the model survey could also result in a reduction of male opportunities. Surveys are often unreliable and numerous problems result from them. The biggest problem is non-response, which introduces error into estimates, as young people often ignore optional surveys.[175] Furthermore, anonymous surveys often result in exaggeration or a failure to take the survey seriously. Therefore, the survey outcome could potentially be skewed or inaccurate. Even more problematic is that the survey was only given to females who knew that the survey was being given in order to measure Title IX compliance. Taking into account that college students are generally liberal, they may be more likely to answer that they have interest in the name of equality.

As a result of these problems, the Obama administration rescinded the use of the model survey, against the wishes of the United States Commission on Civil Rights.[176] However, as an alternative, the survey should be given to both the male and female student populations because, without a survey, the students' voices may not be heard. Therefore, universities can properly gauge a comparative interest. Even if there is stronger female interest than expected, it could be anticipated that the male interest would counterbalance it, as males could also be expected to express strong interest in sporting opportunities. Furthermore, even if the female

169 *See* U.S. DEP'T OF EDUC., SEC'Y OF EDUC.'S COMM. ON OPPORTUNITY IN ATHLETICS, "OPEN TO ALL": TITLE IX AT THIRTY 38 (2003) [hereinafter U.S. DEP'T], *available at* http://www.ed.gov/about/bdscomm/list/athletics/title9report.pdf.

170 *See* U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, ADDITIONAL CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY: THREE-PART TEST—PART THREE 1 (Mar. 17, 2005), *available at* http://www2.ed.gov/about/offices/list/ocr/docs/clarific.html.

171 Also known as the "model survey." *Id.*

172 *See id.*

173 *See* U.S. DEP'T, *supra* note 169, at 38.

174 *See id.* at 39.

175 *See Response Problems in Surveys*, http://unstats.un.org/unsd/methods/statorg/Workshops/Yangon/Session4_Surveys_Cornish_Slides.pdf.

176 *See* Erik Brady, *Rescinding of Title IX Model Survey Draws Praise from Critics*, USA TODAY (Apr. 20, 2010), http://www.usatoday.com/sports/college/2010-04-19-title-ix-reaction_N.htm.

student population is higher than the male population, the university could instead meet the interest of the more demanding population.

ii. Apply The Standards of the Equal Pay Act and Civil Rights Act of 1964

Title VI of the Civil Rights Act of 1964 is the model for subsequent statutes that prohibit discrimination in federally funded programs[177] and provides that:

> No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[178]

Just like Title IX, "federal financial assistance" includes more than money, and recipients can include any state, political subdivision, any public or private agency, institution or organization, or any individual who receives direct or indirect federal assistance.[179] Additionally, the federal agency that provides the financial assistance is primarily responsible for monitoring recipients' compliance with Title VI.[180] This effective mode of measuring compliance—allowing federal agencies to measure—could be adopted by Title IX as an alternative to the three-pronged approach, in a situation where Title IX compliance by universities would revert to the statute that greatly influenced it.

First, under the Title VI Coordination Regulations,[181] agencies must obtain assurances of compliance from prospective recipients in order to be eligible for federal financial assistance.[182] Under these assurances, if an applicant refuses to sign the assurance or does not actually follow their assurance, financial assistance can be denied.[183] Thus, the recipient serves as a self-monitoring body, but the agency providing the federal financial assistance serves as a check on that self-monitoring and makes sure that the university—or the entity receiving financial assistance—follows through on its own guarantees. Furthermore, this assurance can be altered during the life of the assistance, thus allowing for adaptation to present day issues.[184] This mode of compliance would be of great benefit to Title IX compliance because of the evolution of gender equality, and could prevent the elimination of male sports. Additionally, interim measures can be agreed upon to

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[177] *See* U.S. DEPARTMENT OF JUSTICE TITLE VI LEGAL MANUAL (2001), *available at* http://www.justice.gov/crt/about/cor/coord/vimanual.php#I.

[178] Title VI of the Civil Rights Act, 42 U.S.C. § 2000d (1964).

[179] *Id.*

[180] *Id.*

[181] The Title VI Coordination Regulations were created to ensure that federal agencies that extend financial assistance properly enforce Title VI of the Civil Rights Act of 1964. *See* 28 C.F.R. §§ 42.401-42.415 (1976).

[182] *Id.*

[183] *Id.*

[184] *Id.*

allow an award of funding to go forward while the recipient addresses discrimination concerns.[185]

If the recipient sees that it cannot comply with Title VI, it can ask for a temporary deferral of the decision whether to grant assistance until the recipient creates remedial procedures to fix the problem.[186] If this framework were applied to Title IX compliance, it would give universities a reasonable period of time, and more flexibility, as agencies under Title VI Guidelines are recommended to take a case-by-case approach and consider the potential non-compliance problem.[187] Thus, less litigation would occur over Title IX compliance, because universities would be given more time and a means to figure out how to come under compliance with Title IX.

It has been recommended under Title VI that agencies implement an internal screening process in which agency officials are notified of potential red flags concerning a potential grant recipient.[188] Such a screening process may give institutions more of a warning as to potential problems and, therefore, more of a chance for compliance. This stands in sharp contrast to Title IX, which provides only the three-prong test for compliance. If a system existed whereby potential recipients of funding under Title IX could receive a form of notice from agency officials as to whether potential compliance issues were present, litigation would decrease because many of the issues in past litigation could be settled in earlier stages, and the recipients of federal financing would be encouraged to experiment with alternative modes of compliance.

Under Title VI, if an agency has evidence at the time of the providing of federal financial assistance that there could be a potential violation by the recipient, the agency may notify the recipient in the grant award letter that the agency has a civil rights concern.[189] This warning serves to place the recipient on notice that there may be a potential problem and that future failure to cooperate could result in a denial of funding. A similar notification system would be of great benefit to universities, and should be set up for institutions seeking to comply with Title IX.

By adopting a more flexible compliance process similar to Title VI of the Civil Rights Act of 1964, federal funding recipients would be provided a step-by-step means to ensure that compliance is sought in the most optimal and effective way possible, as opposed to the rigid three-prong test of Title IX. If federal agencies provided universities with notice, the institutions would be able to see where there are problems within their compliance and work to fix those problems going forward. Additionally, by having the university and the federal agency agree

185 *Id.*

186 *Id.*

187 *See* 28 C.F.R. §§ 42.401-42.415 (1976).

188 *See supra* note 177, *available at* http://www.justice.gov/crt/grants_statutes/legalman.php.

189 *See supra* note 177, *available at* http://www.justice.gov/crt/grants_statutes/legalman.php#X.

to an assurance of compliance, the universities would have a proper understanding of the federal agency's expectations and a roadmap for compliance. Finally, by having temporary deferrals of enforcement, the universities would have a reasonable and proper amount of time to come into compliance and avoid tedious litigation.

CONCLUSION

In 1972, the United States Congress passed Title IX of the Education Amendments, prohibiting the exclusion of any person from participation in any education program or activities receiving federal financial assistance.[190] This brief statute has impacted collegiate athletics for the past four decades, as federally assisted education programs have struggled to figure out how it should apply to educational institutions. Because of the difficulties that universities faced in compliance and bringing Title IX into effect, the United State Department of Health, Education and Welfare issued a policy interpretation of Title IX, which has come to be known as the three-prong test for compliance, and this simple three-pronged approach has caused great debate and a need for clarification in order to prevent potential future Equal Protection Clause violations.

Under the current three-prong test, male collegiate athletics have been overwhelmingly cut to come into compliance with Title IX. These actions go against the spirit of Title IX because, in today's day and age, where female student numbers continue to grow, males are often the ones to bear the brunt of Title IX's effects. Therefore, Title IX could violate the Equal Protection Clause, despite past federal courts holding that cuts to male student athlete participation is substantially related to the governmental objective of creating equality in higher education and is a legitimate means of compliance under Title IX. Even though Title IX unambiguously prohibits denying participation on the basis of sex, courts have seemed to endorse this very action by allowing men's programs to be cut at the expense of women's teams in order to comply with Title IX. Courts have failed to acknowledge the battle between avoiding Title IX sanctions and the Congressional purpose of increasing participation in athletics, and that by reducing men's opportunities in collegiate athletics, the institution is not complying with the remedial purpose of Title IX.

Because of these potential Equal Protection Clause violations, some action must be taken. First, altering the measurement under the third prong of the three-prong assessment to include male interest would help provide an accurate measurement as to interest in collegiate athletics by both genders. Because the first prong is getting difficult to comply with, as college attendance by females is typically higher than male college attendance, whereas male collegiate athletic

190 20 U.S.C. § 1681 (1972).

participation and interest is typically higher, universities rely on the more vague second and third prongs. Thus, to avoid potential legal issues, a clarification should be provided so there could be an accurate measurement of interest in collegiate athletics. Second, the standards of the Civil Rights Act of 1964 is a superior option to ensure compliance by the university, as the universities would be provided flexible means of compliance where they would be held accountable for any transgressions.

As stated in *Neal v. Board of Trustees*, "Title IX is a dynamic statute, not a static one."[191] It envisions continuing progress toward the goal of equal opportunity for all athletes, and as a result, Title IX is an ever continuing, growing, and evolving statute. Because of this, whereas the elimination of male collegiate sports was originally a necessary action to come into compliance with Title IX, we now live in an age where this is unnecessary and alternative options should be sought.

[191] Neal v. Board of Trustees of California State Universities, 198 F.3d 763 at 769.