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Cohen v. Brown: I am Woman, Hear Me Score

Ted Riley Cheesebrough

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Casenotes

COHEN v. BROWN: I AM WOMAN, HEAR ME SCORE

I. INTRODUCTION

Congress enacted Title IX of the Education Amendments of 1972 (Title IX) to protect individuals from gender-based discrimination in colleges and high schools that receive federal financial assistance.1 As the federal law prohibiting discrimination on the basis of sex in education programs, including athletics programs, Title IX provides the principal mechanism for asserting the rights of women in hopes of obtaining equal opportunities in college and high school athletics.2 Though Title IX has prompted enormous growth in women’s athletics since its inception, widespread discrimination still exists.3 Collegiate female athletes continue to lack the same opportunities that their male counterparts enjoy. This is partly due to the financial strain that the high-priced world of college athletics places on institutional attempts to comply with Title IX.4

2. See Deborah Brake & Elizabeth Caitlin, The Path of Most Resistance: The Long Road Toward Gender Equity in Intercollegiate Athletics, 3 DUKE J. GENDER L. & POL’Y 51, 52 (1996) (noting vital role Title IX has played in opening competitive sports to female athletes over last quarter century); see also Janet Judge et al., Gender Equity in the 1990’s: An Athletic Administrator’s Survival Guide to Title IX and Gender Equity Compliance, 5 SETON HALL J. SPORT L. 313, 314-15 (1995) (suggesting that Title IX, formerly considered idealistic and ineffective, has recently flourished and acted as catalyst for universities to review and rearrange their athletic departments in order to comply with Title IX); cf. Charles Spitz, Gender Equity in Intercollegiate Athletics as Mandated by Title IX of the Education Amendments Act of 1972: Fair or Foul?, 21 SETON HALL L. J. 621, 648-49 (1997) (discussing composition of 1996 U.S. Olympic team (42.9% women), having highest female percentage in American history).
3. See Jill K. Johnson, Title IX and Intercollegiate Athletics: Current Judicial Interpretation of the Standards for Compliance, 74 B.U. L. REV. 553, 554 (1994); Julie Crawford & John L. Strope, Gender Equity in College Athletics: How Far Have We Really Come In Twenty Years?, 104 EDUC. L. REP. 553, 553-54 (1995) (suggesting that while there have been efforts to create equal opportunities for women in sports, equality has not been achieved); Joseph P. Williams, Lower Pay for Women’s Coaches: Recruiting Some Common Justifications, 21 J.C. & U.L. 643, 645 (1995) (noting continuing disparities between women’s and men’s athletic programs despite significant efforts to increase female participation in athletics); Renee Forseth et al., Progress in Gender Equity? An Overview of the History and Future of Title IX of the Education Amendments Act of 1972, 2 VILL. SPORTS & ENT. L.F. 51, 51 (1995) (claiming that gender discrimination remains prevalent in college athletics despite presence of Title IX).
Legal challenges brought by athletes against colleges and universities have moved the most formidable battles off of the playing fields, rinks and courts and into a different type of court. In the past five years, several federal court decisions have changed the look of college athletics.\(^5\) Most recently, in *Cohen v. Brown University* (*Cohen IV*),\(^6\) the Court of Appeals for the First Circuit provided female athletes with another victory, and saddled sports administrations with a debilitating defeat.\(^7\)

Part II of this Note discusses the legislative and jurisprudential history leading up to *Cohen IV*.\(^8\) Part III introduces the parties and facts of the case.\(^9\) Part IV sets forth the majority and dissenting opinions of *Cohen IV*.\(^10\) Part V analyzes these opinions, including the court’s interpretation and application of Title IX.\(^11\) Finally, part VI discusses the import and repercussions likely to flow from the decision in *Cohen IV*.\(^12\)

II. Background

A. Legislative Framework

Congress enacted Title IX of the Education Amendments of 1972\(^13\) to prohibit discrimination on the basis of sex in education programs, including athletic programs, by any school receiving federal financial assistance.\(^14\) Due to the statute’s broad language and limited legislative history,\(^15\) academic institutions were left with few

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837, 838 (1994) (discussing economic difficulties facing athletic departments with respect to Title IX).

5. See, e.g., Kelley v. Board of Trustees, 35 F.3d 265 (7th Cir. 1994) (holding that dropping men’s swimming and diving squad is not violation of Title IX); Roberts v. Colorado State Bd. of Agric., 998 F.2d 824 (10th Cir. 1993) (deciding that cutting women’s fast-pitch softball team violates Title IX even though men’s baseball team was also cut); Favia v. Indiana Univ. of Pa., 7 F.3d 332 (3d Cir. 1993) (finding that elimination of women’s field hockey and gymnastics teams violates Title IX).

6. 101 F.3d 155 (1st Cir. 1996) (*Cohen IV*).

7. Id.

8. See infra notes 13-64 and accompanying text.

9. See infra notes 65-78 and accompanying text.

10. See infra notes 79-139 and accompanying text.

11. See infra notes 140-173 and accompanying text.

12. See infra notes 174-185 and accompanying text.


14. See id. § 1681(a). Section 1681 (a) provides, “[n]o Person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .” *Id.*

15. See Cohen v. Brown Univ., 991 F.2d 888, 893 (1st Cir. 1993) (*Cohen II*) (noting that Congress included no committee report with final bill and there were
guidelines to determine how Title IX affected them, especially as it applied to their athletic programs.\textsuperscript{16} Congress attempted to resolve this uncertainty by passing the Javits Amendment.\textsuperscript{17} The Javits Amendment directed the Secretary of the Department of Health, Education and Welfare (HEW) to promulgate regulations for intercollegiate athletics.\textsuperscript{18} In 1975, the HEW prepared these regulations.\textsuperscript{19} However, the regulations failed to clarify how athletic programs could comply with Title IX.\textsuperscript{20}

Finally, in 1979, the Office of Civil Rights (OCR) issued a Policy Interpretation of Title IX.\textsuperscript{21} The purpose of the Policy Interpretation was to assist colleges and universities in understanding and complying with the duties imposed by Title IX.\textsuperscript{22} The OCR’s Policy Interpretation enumerates three areas requiring specific compliance: athletic financial assistance (scholarships), benefits and opportunities (equipment, supplies, practice times) and effective accommodation of student interests and opportunities.\textsuperscript{23} As to the latter area, universities can demonstrate effective accommodation of student interests and opportunities by meeting at least one of three criteria: (1) showing that the number of intercollegiate ath-

\textsuperscript{16} See Darryl C. Wilson, \textit{Parity Bowl IX: Barrier Breakers v. Common Sense Makers? The Serpentine Struggle for Gender Diversity in Collegiate Athletics}, 27 \textit{Cumb. L. Rev.} 397, 415-416 (1997) ("The original Title IX did not specifically reference athletic programs and was very general . . . ."); Susan M. Shook, \textit{The Title IX Tug-of-War and Intercollegiate Athletics in the 1990’s: Nonrevenue Men’s Teams Join Women Athletes in the Scramble for Survival}, 71 \textit{Ind. L.J.} 773, 775 (1996); see also Judge, \textit{supra} note 2, at 315 (remarking that, despite Title IX’s straightforward appearance, compliance is not easily measured).


\textsuperscript{18} See id. The amendment mandates the HEW to issue regulations enforcing Title IX relating to educational institutions, including, "with respect to intercollegiate athletic activities, reasonable provisions considering the nature of the particular sports." \textit{Id.}

\textsuperscript{19} See 34 C.F.R. §§ 106.37(c), 106.41(a)-(c) (1995) (declaring that Title IX applies to intercollegiate athletics).

\textsuperscript{20} See Wilson, \textit{supra} note 16, at 417; see also Walter B. Connolly, Jr. & Jeffrey D. Adelman, \textit{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, 851 (1994); Marshall, \textit{supra} note 4, at 844; Spitz, \textit{supra} note 2, at 629.

\textsuperscript{21} 34 C.F.R. § 106.37(c).

\textsuperscript{22} See id. In addition to setting forth a framework to resolve complaints, the Policy Interpretation provides schools with additional guidance on how to comply with Title IX’s requirements with respect to intercollegiate athletic programs. \textit{See id.}

\textsuperscript{23} See id.
letic opportunities for student-athletes is “substantially proportionate” to the respective enrollments of men and women;\(^{24}\) (2) showing that the institution has a history and continuing practice of expanding programs for the underrepresented sex;\(^{25}\) or (3) showing that the existing athletic programs fully and effectively accommodate the interests and abilities of the underrepresented gender.\(^{26}\)

B. Judicial Decisions

Lack of compliance with the three-prong test of effective accommodation by colleges and universities has been the locus of numerous judicial decisions.\(^{27}\) Prior to 1988, there were few judicial declarations scrutinizing Title IX claims brought by intercollegiate athletes.\(^{28}\) This was attributable to the Supreme Court’s decision in *Grove City College v. Bell*.\(^{29}\) In *Grove City*, the Court adopted a “program-specific” approach to examining Title IX claims, holding that Title IX applies only to the specific programs within an educational institution that receive federal financial aid and are found to be discriminatory.\(^{30}\) Because federal monies received by universities

\(^{24}\) See id. at 71,418. No strict ratio has been established to determine what can be considered “substantially proportionate.” See Spitz, *supra* note 2, at 630. Notably, a ratio with a 10.5% discrepancy between the percentage of female student-athletes and the percentage of females in the student body was found not to be “substantially proportionate.” See Roberts v. Colorado State Bd. of Agric., 998 F.2d 824 (10th Cir. 1993) (*Roberts II*); see also Favia v. Indiana Univ. of Pa., 812 F. Supp. 578 (W.D. Pa. 1993), aff’d 7 F.3d 332 (3rd Cir. 1993) (holding 17.8% discrepancy is not “substantially proportionate”); Cohen v. Brown Univ., 809 F. Supp. 978 (D.R.I. 1992) (*Cohen I*), aff’d 991 F.2d 888 (1st Cir. 1993) (holding 11.6% discrepancy is not “substantially proportionate”), cert. denied, 117 S. Ct. 1469 (1997).

\(^{25}\) See 44 Fed. Reg. 71,418. Though it is easy to show a history of expanding programs for the underrepresented sex, it is much more difficult to prove a continuing practice in court. See *Cohen IV*, 101 F.3d at 171.

\(^{26}\) See 44 Fed. Reg. 71,418. To meet prong three of the test, the OCR will consider whether there is an unmet interest in a particular sport, sufficient ability to sustain a team in that sport and a reasonable expectation of competition for that team. See id. at 71,417.

\(^{27}\) For a discussion of these decisions, see *infra* notes 40-64 and accompanying text.

\(^{28}\) See Rikki Ades, *The Opportunity to Play Ball: Title IX, University Compliance and Equal Pay*, 13 N.Y.L. SCH. J. HUM. RTS. 347, 358. “Although Title IX legislation has recently increased, even by 1996, ‘only a handful of cases have interpreted Title IX.’” Id. at 358 n.60 (quoting Pederson v. Louisiana State Univ., 912 F. Supp. 892, 911 (M.D. La. 1996)).


\(^{30}\) See id. at 574-75. In this case, students receiving federal grant money were enrolled at Grove City College which itself did not receive any direct federal financial assistance. See id. at 559. The Court determined that the only “program or activity” receiving federal financial assistance was the college’s financial aid pro-
are often funneled through financial aid offices or devoted to federal research grants and not received directly by athletic departments, this decision effectively removed athletic departments from the purview of Title IX and created a substantial hurdle for women combating discrimination in intercollegiate athletics.

In response to Grove City, Congress passed the Civil Rights Restoration Act, over a presidential veto, which gave Title IX a considerably broader reading and statutorily overruled Grove City. With revised definitions, the revamped Title IX adopted an “institution-wide” approach, establishing that “an entire institution must comply with Title IX in order to receive federal aid for any program or activity.”

After the Supreme Court held that an implied right of action for private litigants existed under Title IX and that compensatory damages and legal fees can be awarded to a prevailing plaintiff, the playing field was leveled for underrepresented student-athletes (principally women), kicking off a blitz of litigation.

In Favia v. Indiana University of Pennsylvania, the Third Circuit held that the school’s elimination of women’s field hockey and

gram. Id. at 572. In a prophetic dissent foreshadowing eventual Congressional response, Justice Brennan characterized the majority’s decision as absurd:

According to the Court, the ‘financial aid program’ at Grove City College may not discriminate on the basis of sex because it is covered by Title IX, but the college is not prohibited from discriminating in its admissions, its athletic programs, or even its various academic departments. If anything about Title IX were ever certain, it is that discriminatory practices like the one just described were meant to be prohibited by the statute.

Id. at 601-02 (Brennan, J., dissenting).


34. See id. For a discussion of Grove City, see supra text accompanying notes 30-32.

35. See 20 U.S.C. § 1687 (1988). “[P]rogram or activity’ and ‘program’ mean all of the operations of a college, university, or other post-secondary institution, or a public system of higher education, . . . any part of which is extended Federal financial assistance . . . .” Id.


39. See infra notes 40-64 and accompanying text.

40. 7 F.3d 332 (3rd Cir. 1993).
gymnastics teams constituted a violation of Title IX. Applying the three-part test, the district court held that the school did not meet the substantial proportionality prong because a 17.8% discrepancy existed between the percentage of female students and the percentage of female athletes. The university also failed the second prong, which requires a history and continuing practice of program expansion, because the proposed cuts would have decreased the number of women's varsity teams to seven, down from an all-time high of ten in 1992. Finally, the plaintiffs' testimony indicated that interest, competition and player quality existed for the expelled teams. Accordingly, the court determined that there was no full and effective accommodation of women's interests and abilities.

Faced with an analogous situation in Roberts v. Colorado State Board of Agriculture, the Tenth Circuit upheld the district court's finding and application of the three-part test for compliance. In response to economic constraints, Colorado State University (CSU) announced its intent to discontinue its men's baseball and women's fast-pitch softball programs. Members of the women's fast-pitch team opted to play hardball, suing the school for both reinstatement and compensatory damages. Applying the test to CSU's actions, the district court held the following: (1) a 10.5% discrepancy between the percentage of female students to female athletes was

41. See id.
42. See Favia v. Indiana Univ. of Pa., 812 F. Supp. 578, 584-85 (1993). In the 1990-91 academic year, 10,795 undergraduate students were enrolled at Indiana University of Pennsylvania (IUP), 4790 (44.4%) of which were men, 6003 (55.6%) of which were women. See id. The eighteen varsity teams in IUP's athletic program rostered 503 athletes, 313 (62.2%) of which were men, 190 (37.8%) of which were women. See id.
43. See id. at 585. The 1991 cuts decreased the opportunities for women to compete "and the 1991 cuts were not responsive to the needs, interests, and abilities of women students." Id.
44. See id.
45. See id.
46. 998 F.2d 824 (10th Cir. 1993) (Roberts II). At the district court level, Colorado State University was the defendant. The Colorado Board of Agriculture, which operates Colorado State University, took over the appeal and was the named appellant when the case went to the Court of Appeals for the Tenth Circuit. See id. at 825.
48. See Roberts v. Colorado State University, 814 F. Supp. 1507, 1518 (D. Colo. 1993). The decision to cut these sports eliminated 18 varsity participation opportunities for women and 55 such opportunities for men. See id. at 1514.
49. See id. at 1509-10.
not "substantially proportionate";\textsuperscript{50} (2) while the University had added eleven women's sports during the 1970s, it dropped four women's sports between 1980 and 1992 and decreased the total number of participation opportunities for women, clearly demonstrating a failure to expand women's sports;\textsuperscript{51} and (3) since the plaintiffs desired to play softball and had a talented squad prior to the cuts, CSU did not fully and effectively accommodate its women's athletic interests and abilities.\textsuperscript{52}

\textsuperscript{50} See id. at 1512. The court found that, after Colorado State lost its softball team, women comprised 48.2\% of the student body, but only 37.7\% of the varsity athletes. See id.

\textsuperscript{51} See id. at 1514. The district court had little trouble finding that CSU failed to satisfy prong two, given CSU's inability to live up to their own Title IX compliance plan. See id. at 1515. CSU argued that by adding eleven women's teams in the 1970s it complied with the second prong of the test. See id. The Court of Appeals for the Tenth Circuit held that this argument was flawed because it reads the words "continuing practice" out of this prong of the test. \textit{Roberts II}, 998 F.2d at 850. Despite the economic circumstances leading to CSU's quandary, the court failed to excuse the school:

We recognize that in times of economic hardship, few schools will be able to satisfy Title IX's effective accommodation requirement by continuing to expand their women's athletics programs. Nonetheless, the ordinary meaning of the word 'expansion' may not be twisted to find compliance under this prong when schools have increased the relative percentages of women participating in athletics by making cuts in both men's and women's sports programs. Financially strapped institutions may still comply with Title IX by cutting athletic programs such that men's and women's participation rates become substantially proportionate to their representation in the undergraduate population.

\textit{Id.}

See also Cohen v. Brown Univ., 991 F.2d 888, 898-99 n.15 (1st Cir. 1993) (\textit{Cohen II})

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

\textit{Id.}

\textsuperscript{52} See \textit{Roberts I}, 814 F. Supp. at 1517-18. At trial, several members of the team testified to the time and effort they had devoted to the sport and the Rams' softball team. See id. Additionally, they noted CSU's recent success, including a 1992 third place finish in the Western Athletic Conference. See id. Upholding the district court's findings, the Tenth Circuit discussed the simplicity of applying the third prong to such a scenario: "Questions . . . under this third prong will be less vexing when plaintiffs seek the reinstatement of an established team rather than the creation of a new one. Here, plaintiffs were members of a successful varsity softball team that played a competitive schedule as recently as the spring of 1992." \textit{Roberts II}, 998 F.2d at 832 (citations omitted); cf. Cook v. Colgate Univ., 802 F. Supp. 737 (N.D.N.Y. 1992) (\textit{Cook I}), vacated as moot 992 F.2d 17 (2nd Cir. 1993) (\textit{Cook II}) (directing Colgate University to promote women's ice hockey team from club level to varsity level, status which it had not previously occupied). The \textit{Cook II} court vacated the district court's decision as moot, reasoning that all of the named
In *Kelley v. Board of Trustees*, the men's swimming team brought suit against the University of Illinois after the school dropped men's swimming, men's fencing and men's and women's diving. The Court of Appeals for the Seventh Circuit held that the university's decision was not a violation of Title IX because the percentage of male athletes, even after eliminating men's swimming, was considerably greater than the percentage of total male students. The student-athletes challenged the legislative underpinnings of Title IX on several grounds. First, they claimed that Title IX "'has through some alchemy of bureaucratic regulation been transformed from a statute which prohibits discrimination on the basis of sex into a statute that mandates discrimination against males.'" Dismissing this argument, the court held that it must accord "considerable deference" to an agency's interpretation of a

plaintiffs had either graduated, or planned to do so, before Colgate was required to elevate the status of the women's hockey team. See *Cook II*, 992 F.2d at 19. Also, the district court used the antidiscrimination bases of Title VII, not the three-prong test of Title IX, to examine Colgate's actions. See *Cook I*, 802 F. Supp. at 743. *Cook* suggests that if underrepresented athletes can demonstrate adequate interest, quality and competitiveness, their program can command varsity status even if the program never previously enjoyed varsity status. See *Shook, supra* note 16, at 792.

Readdressing *Roberts*, it is notable that, in the course of rejecting CSU's argument that the school had legitimate, nondiscriminatory reasons for cutting baseball and softball, the district court explained that Title IX lacks any intent requirement when evaluating a discriminatory practice: "[A] financial crisis cannot justify gender discrimination." *Roberts I*, 814 F. Supp. at 1518.

53. 35 F.3d 265 (7th Cir. 1994) (*Kelley II*).
54. *See id.*
55. *See id.* at 270. The court noted that if the percentage of athletes of a particular sex is substantially proportionate to that sex's percentage of the student body, the athletic interests of that sex are presumed to be accommodated. *See id.*; *see also Cohen II*, 991 F.2d at 898. History also worked against the plaintiffs in *Kelley*. *See Shook, supra* note 16 at 794. In 1982, the University of Illinois avoided being charged with Title IX violations after representing to the OCR that it would remedy the disparity in female athletic opportunities within a reasonable period of time. *See Kelley II*, 35 F.3d at 270. But when this case came before the court after a decade later, women accounted for 44% of the student body, but only 23.4% of Fighting Illini athletes. *See id.* At the district court level, the male swimmers maintained that the loss of athletic opportunities at the University of Illinois should be shared equally between genders. *See Kelley v. Board of Trustees*, 832 F. Supp. 237, 244 (C.D. Ill. 1993). The Seventh Circuit, however, highlighted the school's prudential decision to keep women's swimming:

If the [u]niversity had terminated the women's swimming program, it would have been vulnerable to a finding that it was in violation of Title IX. Female participation would have continued to be substantially disproportionate to female enrollment, and women with a demonstrated interest in intercollegiate athletic activity and demonstrated ability to compete would be left without an opportunity to participate in their sport.

*Kelley II*, 35 F.3d at 269-70 (citations omitted).
56. *Kelley II*, 35 F.3d at 270 (citations omitted).
statute that the agency is empowered to enforce.57 The student-athletes further argued that the substantial proportionality test of the policy interpretation established a gender-based quota, a result contrary to the propositions of Title IX.58 The court held that the policy interpretation does not mandate any type of statistical balancing or quotas, but instead "creates a presumption that a school is in compliance with Title IX . . . when it achieves such a statistical balance."59

In Pederson v. Louisiana State University,60 a district court threw Title IX jurisprudence a curveball when it rejected the rationales supporting the holdings in Favia, Roberts and Cohen.61 The court refused to accept the emerging, but erroneous, assumption that an institution is not in compliance with Title IX simply because it lacks numerical proportionality between the athletic departments and the student body.62 Noting that other circuits placed inordinate emphasis on the "substantial proportionality" prong of the test, the court held that ceasing a Title IX inquiry at the point of numerical

57. See id. The student-athletes claimed that the applicable regulation, 34 C.F.R. § 106.41, and the policy interpretation, 44 Fed. Reg. 71, 418 (1979), warped the purpose of Title IX. See id. The Seventh Circuit, relying on Supreme Court precedent disagreed, holding that an agency's interpretation of a statute is to be abided by unless that interpretation is manifestly contrary to the statute's objectives. See id.; see also Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984) (mandating that where Congress has expressly delegated to agency power to "elucidate a specific provision of a statute by regulation," resulting regulations should be given "controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute"). The Kelley II court found that the regulation and the policy interpretation were not "manifestly contrary" to the objectives of Title IX, thus enjoying a presumption of validity. Kelley II, 35 F.3d at 271.

58. See Kelley II, 35 F.3d at 271.

59. Id. The court added that if substantial proportionality is lacking, a school can establish Title IX compliance by either of the other two prongs of the test. See id. Thus, it can either demonstrate a history and continuing practice of expansion for the underrepresented sex or show that existing programs effectively accommodate the interest of that sex. See id.

60. 912 F. Supp. 892 (M.D. La. 1996). Though the suit was reassigned to the Western District, the case remained filed with the Middle District of Louisiana. See id.

61. See id. at 913-14.

62. See id. at 913. The court reasoned:

To accept the interpretation in [Roberts and Cohen] and the argument made by the defendants [LSU], one must assume that the interest and ability to participate in sports is equal between all men and women on all campuses. For instance, if a university has 50% female students and 50% male students, the assumption under this argument must follow that the same percentage of its male population as its female population has the ability to participate and the interest or desire to participate in sports at the competitive level.

Id.
proportionality does not comport with the mandate of the statute. Instead, an appropriate reading of the policy interpretation "allows for consideration of all factors listed therein in determining whether the university has provided equal opportunity and levels of competition for males and females." Despite the court's new Title IX logic, the university was found to be in violation of Title IX because it desperately failed to meet either of the other two prongs of the test: the school lacked a history of expansion of opportunities for women and failed to effectively accommodate the interests and abilities of would-be athletes.

III. FACTS

Amy Cohen's decision to bring a Title IX suit against Brown University's athletic department gave the Court of Appeals for the First Circuit its first opportunity to rule on the statute and its applications to college athletics. Brought in 1992, the Cohen case had a five-year history. Although it acted as a starting block for other Ti-

63. Id. at 914. Supporting its finding that too much weight was accorded to numerical proportionality and that substantial disproportionality is only evidence, not proof, of sex discrimination, the Pederson court highlighted a number of regulatory anomalies and oversights contained in the administrative history of Title IX. See id. at 910, 914. For example, the policy interpretation was immediately effective despite not being approved by the President. See id. at 910. The policy interpretation lacks the binding effect of the rules, regulations and orders authorized by 20 U.S.C. § 1682. See id. With these precursors, the court reasoned:

Title IX, § 1682 authorizes the effectuation of the provisions of Title IX by "issuing rules, regulations or orders of general applicability which shall be consistent with the achievements of the objective of the statute authorizing the financial assistance in connection with which the action is taken." Interestingly, § 1682 of Title IX also provides "no such rule, regulation or order shall become effective unless and until approved by the President." The Policy Interpretation effective December 11, 1979 was never submitted to the President for approval . . . .

Id. at 910 n.45.

64. See id. at 915-16. The plaintiffs, a class of female students with the interest and ability to play intercollegiate fast-pitch softball, maintained that interest in fast-pitch softball existed in 1979, when LSU fielded its first team. See id. at 915. Since then, local, regional and national interest and participation had increased markedly. See id. The court also determined that "LSU has demonstrated a practice not to expand women's athletics at the university before it became absolutely necessary to do so" because it had not added a women's sport in fourteen years. Id. at 916. These findings, coupled with a substantial disproportionality between the percentages of female students to female athletes at LSU, caused the court to hold that LSU violated Title IX. See id.

tle IX litigation, this case only recently crossed the finish line. In the interim, the applicable laws have changed in some respects.

Brown University offered an extensive athletic program for its students, funding thirteen intercollegiate sports for women and twelve sports for men. In addition to these squads, Brown recognized, but did not fund, another seven “donor-funded” varsity teams. Four teams were all-male and three teams were all-female. Although the number of varsity sports offered to each sex were equal, due to the selection of sports offered, the number of athletic opportunities was greater for male athletes than it was for female athletes, partly because no female sport has a roster as large as the men’s football roster.

In May 1991, in response to a campus-wide cost-cutting directive, Brown demoted four teams (women’s gymnastics, women’s volleyball, men’s water polo and men’s golf) from university-funded to

66. See Kelley II, 35 F.3d 265 (7th Cir. 1994); Favia, 7 F.3d 332 (3rd Cir. 1993); Roberts II, 998 F.2d 824 (10th Cir. 1993); Pederson, 912 F. Supp. 892 (M.D. La. 1996). Each of these cases allude to the Title IX suit brought by Cohen against Brown; see also Cohen III, 879 F. Supp. 185, 188 (D.R.I. 1995) (“At the time of [Cohen I], there was virtually no case law on point. Since issuance of the First Circuit’s opinion [in Cohen II], a number of other circuits have been faced with Title IX athletic discrimination suits.”) (citations omitted).


68. See United States v. Virginia, 116 S.Ct. 2264 (1996); Adarand Constr. Inc. v. Pena, 115 S. Ct. 2097 (1995). During the five-year span of the Cohen litigation, the Supreme Court handed down two decisions that affected this case. These decisions involved discrimination and equal protection issues, altered the constitutional law in this area and overruled Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990), a case relied on by the Cohen II court. For discussion of these cases, see infra notes 103-06, 121-22 and accompanying text.


70. See id. at 189. Brown requires “donor-funded” teams to raise their own money for things such as uniforms, equipment and facility use. See id. On the other hand, Brown provides financial support for teams that are “university-funded.” See id. Brown also does not guarantee that donor-funded teams will be provided with coaching, equipment, or money for travel or post-season competition, but Brown guarantees each of these amenities to university-funded teams. See id. at 189 n.7. As a result, a number of donor-funded varsities have experienced difficulty trying to field competitive teams. See id. at 189-90.

71. See id. at 189.

72. See id. During the 1993-94 school year, there were 897 athletes at Brown, 555 men (61.9%) and 342 women (38.1%). See id. at 192. The undergraduate enrollment was 5722 students, consisting of 2796 men (48.9%) and 2926 women (51.1%). See id.
donor-funded status. In response to the demotion, female members of the gymnastics and volleyball teams brought suit against the university claiming that the university violated Title IX. The district court stayed the demotion of the two women’s teams until the case was resolved on its merits. The Court of Appeals for the First Circuit affirmed the district court’s decision to grant a preliminary injunction, concluding that an institution violates Title IX if it ineffectively accommodates its students’ interests and abilities. On remand, the district court determined that Brown’s intercollegiate athletic program violated Title IX and its attendant regulations.

In Cohen IV, Brown challenged the lower court’s utilization of the three-prong test on constitutional and statutory grounds; Brown also argued that the Court of Appeals was not bound by the prior panel’s assessment and application of the law in Cohen II. The Court of Appeals disagreed, maintaining that Cohen II acts as controlling authority.

73. See id. at 188. Of the $77,823 Brown expected to save each year as a result of these demotions, more than $62,000 came from the women’s athletic budget while less than $16,000 came from the men’s budget. See id. at 188 n.2.
76. See Cohen III, 879 F. Supp. at 214. Pursuant to an order from the district court, Brown composed a Title IX compliance plan. See Cohen v. Brown Univ., 101 F.3d 155, 162 (1st Cir. 1996) (Cohen IV). The district court rejected this plan and fashioned specific relief to avoid further litigation and to expedite the appeal on the issue of Brown’s liability. See id. In Cohen IV, the First Circuit found that the district court erred in substituting relief in place of Brown’s proposal to comply with Title IX by cutting men’s sports until it achieved substantial proportionality. See id. at 185. The court of appeals opined, “[o]ur respect for academic freedom and reluctance to interject ourselves into the conduct of university affairs counsels that we give universities as much freedom as possible in conducting their operations consonant with constitutional and statutory limits.” Id. at 187-88. Denying the district court’s remedy was the only component of the Cohen III holding that the Cohen IV court overturned. See id.
77. See Cohen IV, 101 F.3d at 162. The Cohen IV court noted that in Cohen II, a panel of the Court of Appeals for the First Circuit “elucidated the applicable legal framework, upholding the substance of the district court’s interpretation and application of the law in granting plaintiffs’ motion for a preliminary injunction, and rejecting essentially the same legal arguments Brown makes here.” Id. (footnote omitted).
78. See id. Asserting that the “law of the case” doctrine applied and thus, that the decisions made by the Cohen II court are binding, the Cohen IV court refused to undertake plenary review of the issues already decided. See id.
IV. NARRATIVE ANALYSIS

The Majority Rules In Favor of Cohen

The Court of Appeals for the First Circuit addressed the issue of whether Brown University’s demotion of the women’s gymnastics and volleyball teams from university-funded status to donor-funded status constituted a lack of effective accommodation of its students’ interests and abilities in athletics under Title IX.79

At the outset of its opinion, the court stressed that in Cohen II, a different panel of the Court of Appeals for the First Circuit rejected Brown’s constitutional and statutory challenges to the Policy Interpretation’s three-part test, thus precluding the Cohen IV court from reviewing those issues.80 Therefore, the rulings of Cohen II governed Cohen IV.81

79. See Cohen IV, 101 F.3d at 161. While addressing this issue, the court noted that Title IX is an anti-discrimination statute and is modeled after Title VI of the Civil Rights Act of 1964. See id. at 167; see also Cannon v. University of Chicago, 441 U.S. 677, 696 (1979) (noting that Title IX’s drafters explicitly assumed that it would be interpreted and applied in the same fashion as Title VI had been applied). Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color or national origin in institutions benefiting from federal funds. See 42 U.S.C. § 2000d (1994). The Cohen IV court pointed out that Title IX and Title VI share the same constitutional underpinnings. See Cohen IV, 101 F.3d at 167. Discussing the goals of Title IX, the court stated, “According to the statute’s sponsor (Senator Bayh), Title IX was intended to provide for the women of America something that is rightfully theirs - an equal chance to attend the schools of their choice, to develop the skills they want, and to apply those skills ...” Id.

80. See Cohen IV, 101 F.3d at 167. This concept, termed “the law of the case doctrine,” mandates, “[a] decision of an appellate court on an issue of law ... governs the issue during all subsequent stages of litigation in the [lower] court and thereafter on any further appeal.” See id. at 167-68 (quoting Commercial Union Ins. Co. v. Walbrook Ins. Co., 41 F.3d 764, 769 (1st Cir. 1994) (citing United States v. Rivera-Martinez, 931 F.2d 148 (1st Cir. 1991))). Though the “law of the case” doctrine can be circumvented, the court held that no exception to the doctrine applied. See id. at 168. The Cohen IV court would only reopen a previously decided issue on appeal if: 1) the evidence in a subsequent trial was substantially different; 2) controlling authority has since made a contrary decision of law applicable to such issues; or 3) the decision was clearly erroneous and would work manifest injustice. See id.

81. See id. at 169. Adhering to the law of the case doctrine, the court conceded that “conclusions and holdings regarding the merits of issues presented on appeal from a grant of preliminary injunction are to be understood as statements as to probable outcomes.” Id. (emphasis added). The court also noted that when asked to rule on the propriety of a district court’s grant of a preliminary injunction, it sometimes must do so without benefit of full argument and a well-developed record. See id. In this case, however, the court rationalized that the record before the Cohen II court was “sufficiently developed and the facts necessary to shape the proper legal matrix [we]re sufficiently clear.” Id. (quoting Cohen II, 991 F.2d at 904). Finally, the court declared that because the precedent established by Cohen II was not clearly erroneous, “it is the law of this case and the law of this circuit.” Id.
After establishing the precedential foundation of the case, the court stressed that the district court's interpretation and application of the three-part test was appropriate and did not metamorphose Title IX into an "affirmative action" statute as Brown suggested.\textsuperscript{82} Rather, Title IX is an anti-discrimination statute, and like other anti-discrimination schemes, it supports an inference that a gender-based statistical disparity indicates discriminatory practices.\textsuperscript{83} The court stressed that merely because a gender-conscious remedy results from a judicial determination of discrimination does not mean that the remedy constitutes affirmative action.\textsuperscript{84}

The First Circuit then undertook a liability analysis and concluded that the law of the case doctrine required it to follow the mandate of \textit{Cohen II}.\textsuperscript{85} Additionally, the court remarked that every circuit that reviewed a Title IX claim since \textit{Cohen II} agreed with its explication of the Title IX regime as it applies to athletics.\textsuperscript{86} In \textit{Cohen IV}, just as in \textit{Cohen II} and \textit{Cohen III}, the court found that the OCR's Policy Interpretation is entitled to substantial deference because it is the enforcing agency's construction of its own regulations.\textsuperscript{87} The \textit{Cohen IV} court then held that the district court did not

\textsuperscript{82} See \textit{id.} at 169-70. The court elaborated, "[t]rue affirmative action cases have historically involved a voluntary undertaking to remedy discrimination (as in a program implemented by a governmental body, or by a private employer or institution), by means of specific group-based preferences or numerical goals, and a specific timetable for achieving those goals." \textit{Id.} at 170. (footnote omitted). Stating that Title IX is, instead, an anti-discrimination statute modeled after Title VI, the court continued, "[n]o aspect of the Title IX regime at issue in this case - inclusive of the statute, the relevant regulation, and the pertinent agency documents - mandates gender-based preferences or quotas, or specific timetables for implementing numerical goals." \textit{Id.}

\textsuperscript{83} See \textit{id.} at 170-71. Supporting this presumption, the court suggested that the substantial proportionality test is not dispositive, but merely a starting point for analysis - and is thus only one component of the inquiry into whether an institution complies with Title IX. \textit{See id.} at 171. Accordingly, the substantial proportionality test should not be applied mechanically, but on a case-by-case basis. \textit{See id.}

\textsuperscript{84} See \textit{Cohen IV}, 101 F.3d at 172. Similarly, the court indicated that gender-conscious remedies are both appropriate and constitutionally permissible under a federal anti-discrimination regime, although such remedial measures are still subject to equal protection review. \textit{See id.}

\textsuperscript{85} See \textit{id.}

\textsuperscript{86} See \textit{id.} In cases with similar fact patterns, the Third, Seventh and Tenth Circuits followed the lead of \textit{Cohen II}, as did a Sixth Circuit case involving high school athletics. \textit{See id.} However, a district court case awaiting review by the Court of Appeals for the Thirteenth Circuit did not follow the rationale of \textit{Cohen II} and its progeny. \textit{See Pederson v. Louisiana State Univ.}, 912 F. Supp. 892 (M.D. La. 1996). For a discussion of this case, see \textit{supra} notes 60-64 and accompanying text.

\textsuperscript{87} See \textit{Cohen IV}, 101 F.3d at 172-73; \textit{see also supra} note 56 and accompanying text (discussing Supreme Court's decision in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., which held that if Congress has expressly given to agency power to promulgate specific provision of statute by regulation, resulting
err in the degree of deference it accorded the regulation and the appropriate agency declarations.\textsuperscript{88}

The court proceeded to renounce Brown’s “relative interest” approach to the three-part test.\textsuperscript{89} Restating the position taken by the First Circuit court in Cohen II, the court concluded that Brown read the term “fully” out of an institution’s duty to “fully and effectively” accommodate its students’ interests and abilities.\textsuperscript{90} Brown further argued that the interpretation of the three-part test in Cohen III requires numerical proportionality, thus imposing a gender-based quota which is in contravention to Title IX.\textsuperscript{91} The court simply responded that the three-part test does not require preferential or disparate treatment for either gender; and that “[n]either the Policy Interpretation’s three-part tests, nor the district court’s interpretation of it mandates statistical balancing.”\textsuperscript{92}

regulations shall be given controlling weight unless they are arbitrary, capricious or contrary to statute).

\textsuperscript{88} See Cohen IV, 101 F.3d at 173.

\textsuperscript{89} See id. at 174. The court characterized Brown’s argument as suggesting that athletic departments satisfy prong three of the three-part test by meeting the interests and abilities of the underrepresented gender to the same extent that those departments meet the interests and abilities of the overrepresented gender. See id.

\textsuperscript{90} See id. (quoting Cohen II, 991 F.2d at 899). Brown asserted that the district court’s interpretation of “fully” in Cohen III “requires universities to favor women’s teams and treat them better than men’s [teams] . . . forces them to eliminate or cap men’s teams . . . [and] forces universities to impose athletic quotas in excess of relative interests and abilities.” Id. at 174. (quoting Appellants’ Brief at 55).

\textsuperscript{91} See id. Brown’s contention, that the three-part test interpreting Title IX establishes a quota, rests on a plain language reading of 20 U.S.C. § 1681(b) which provides:

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


The Cohen IV court discounted this argument by claiming that § 1681(b) was modeled after 703(j) of Title VII, 42 U.S.C. § 2000e-2(j) and “was specifically designed to prohibit quotas in university admissions and hiring, based upon the percentage of individuals of one gender in a geographical community.” See Cohen IV, 101 F.3d at 174-75.

\textsuperscript{92} Cohen IV, 101 F.3d at 175. Furthermore, the court declared that: (1) because a Title IX plaintiff must prove that there is a statistical disparity between the gender composition of the student body and its athletic program and that unmet interest exists and (2) because an institution can demonstrate, as an affirmative defense, a showing of a history and continuing practice of program expansion for the underrepresented gender, that the Title IX liability assessment “is a far cry from a one-step imposition of a gender-based quota.” See id.
The court also refused to accept Brown’s contention that the disparity between the number of male athletes and female athletes at Brown is due to a difference in interest levels in athletics. The court faulted history and society for any such discrepancies and declared that “even if it can be empirically demonstrated that, at a particular time, women have less interest in sports than do men, such evidence standing alone, cannot justify providing fewer athletic opportunities for women than for men.” The First Circuit also noted that the question of whether a school has fully and effectively accommodated the athletic interests and abilities of its student body is easily answered when student-athletes seek to reinstate what were formerly successful university-funded teams.

The court then disposed of Brown’s Fifth Amendment equal protection challenge to Title IX’s statutory scheme. Brown, relying on the Supreme Court’s decision in Adarand Construction Inc. v. Pena, asserted that “[t]he [equal protection] violation arises from the court’s holding that Title IX requires the imposition of quotas, preferential treatment, and disparate treatment in the absence of a compelling state interest and a determination that the remedial measure is ‘narrowly tailored’ to serve that interest.” The Cohen IV court rejected Brown’s argument by noting that the new law established in Adarand was inapplicable to the disposition of the appeal and, thus, the Cohen III court’s application of the law was consistent with the interpretation expounded by the First Circuit in Cohen II.

In rejecting Brown’s equal protection claim, the Cohen II court noted that, under the Fifth Amendment, Congress possesses a broad ability to remedy past discrimination. The Cohen II court

93. See id. at 178-81.
94. See id. at 178-79. The court suggested that interest and ability do not develop in a vacuum but rather, they evolve as a function of opportunity and experience. See id. at 179. The court also highlighted the Policy Interpretation’s recognition that women’s lower rate of participation in athletics is reflective of the historical lack of opportunities for women to participate in sports. See id.
95. Id. at 180.
96. See id. at 180; see also Cohen I, 809 F. Supp. at 992 (“Brown is cutting off varsity opportunities where there is still great interest and talent, and where Brown still has an imbalance between men and women varsity athletes in relation to their undergraduate enrollments.”). Notably, students have demonstrated interest and ability to participate in intercollegiate athletics even when a school has not previously fielded a varsity team in the desired sport. See Shook, supra note 16, at 792.
97. See Cohen IV, 101 F.3d at 181-85.
100. See id.
101. See Cohen II, 991 F.2d at 901.
cited two Supreme Court cases supporting this proposition, including *Metro Broadcasting, Inc. v. FCC*, a case which has since been overruled in part. The *Cohen IV* court stressed that *Adarand*'s partial overruling of *Metro Broadcasting* does not apply to the areas of law at issue in *Cohen IV*, and even if it did, "[f]or the last twenty years, the Supreme Court has applied intermediate scrutiny to all cases requiring equal protection challenges to gender-based classifications."  

Under the intermediate scrutiny test, the court had little trouble finding the district court's remedial order constitutional. It found that "avoid[ing] the use of federal resources to support discriminatory practices" and "provid[ing] individual citizens effective protection against those practices" were important governmental objectives. Additionally, the court held that judicial enforcement of federal anti-discrimination statutes also is an important objective. Under the intermediate scrutiny evaluation, the court found that the means used by the district court to fashion relief for the statutory violation were substantially related to important governmental objectives.

The court completed its constitutional analysis by reiterating that Title IX is distinguished from other anti-discrimination schemes because it is impossible to determine compliance or to de-

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102. 497 U.S. 547 (1990). In *Metro Broadcasting*, the Court held that Congress need not make specific findings of discrimination to grant race-conscious relief. *See id.* at 565-66. *Metro Broadcasting* subjected race conscious classification to intermediate scrutiny. *See id.* at 564. When a court evaluates a classification under an "intermediate scrutiny" standard, the court will uphold the classification if it serves an "important" government interest and has a "substantial relationship" to the achievement of that goal. *See Cohen IV*, 101 F.3d at 183-84; *see also John E. Nowak & Ronald D. Rotunda, Constitutional Law § 15.3, at 603 (5th ed. 1995).* This sort of remedial measure is considered a "benign gender classification." *See id.* at 782.

103. *See Adarand*, 115 S. Ct. at 2111-12. *Adarand* explicitly overruled *Metro Broadcasting* in its holding that "all racial classifications, imposed by whatever federal, state, or local government actor must be analyzed by a reviewing court under strict scrutiny [as] there is no way of determining what classifications are 'benign' or 'remedial.'" *Adarand*, 115 S. Ct. at 2112-13. A less flexible standard than intermediate scrutiny, strict scrutiny requires a classification to serve a "compelling" government interest and be "narrowly tailored" to promote that interest. *See No- wak & Rotunda, supra* note 102, at 602.

104. *See Cohen IV*, 101 F.3d at 182. The court declared that the *Adarand* decision is limited explicitly to race-based classifications. *See id.*

105. *Id.* at 183.

106. *See id.* at 184.

107. *Id.* (quoting *Cannon v. University of Chicago*, 441 U.S. 667 (1979)).

108. *See id.*

vise a remedy without comparing opportunities while specifically considering gender.\textsuperscript{110} Furthermore, gender-conscious remedial schemes are constitutional if they directly protect the interests of the disproportionately burdened gender.\textsuperscript{111} The court employed this rationale in denying Brown’s argument that cutting men’s sports violates prong three, since the interests of male athletes, like the interests of the female athletes, were not fully and effectively accommodated.\textsuperscript{112}

In a separate issue, the court rejected Brown’s assertion that the district court improperly excluded evidence that supported Brown’s relative interests argument.\textsuperscript{113}

Finally, the court discussed the only portion of Cohen III that it overruled: the district court’s substitution of its own specific relief in place of Brown’s proposal to comply with Title IX by cutting men’s teams until substantial proportionality was achieved.\textsuperscript{114} Citing “respect for academic freedom and reluctance to interject ourselves into the conduct of university affairs,” the court granted Brown the opportunity to adjust its operations in any fashion that was within constitutional and statutory bounds.\textsuperscript{115}

B. The Dissent Disputes the Call

In his dissent, Chief Judge Torruella agreed with the majority in recognizing the “law of the case” doctrine as binding precedent.

\textsuperscript{110} See id. The court added that, even if the three-part test favored women, it is appropriate to consider gender in establishing a remedy for a Title IX violation as it “serves the important objective of ‘ensur[ing] that in instances where overall athletic opportunities decrease, the actual opportunities available to the underrepresented gender do not.’” Id. (quoting Kelley v. Board of Trustees, 35 F.3d 265, 272 (7th Cir. 1994)).

\textsuperscript{111} See id.

\textsuperscript{112} See id. The court held that, although a remedy that requires an institution to cut, add or elevate the status of teams may affect genders differently, such a remedy is only necessary if there already exists a gender-based disparity in athletic opportunities. See id. In this case, “it has not been shown that Brown’s men’s students will be disadvantaged by the full and effective accommodation of the athletics interests and abilities of its women students.” Id. at 184-85.

\textsuperscript{113} See id. at 185. Brown was prohibited from introducing the NCAA Gender Equity Study and the results of an undergraduate poll on student interest in athletics. See id. The court reasoned that since Brown’s witnesses relied on facts from these two studies, the evidence was adequately before the trier of fact. See id.

\textsuperscript{114} See Cohen IV, 101 F.3d at 185. In its order, the district court opined, “i[t] is clearly in the best interest of both the male and the female athletes to have an increase in women’s opportunities and a small decrease in men’s opportunities, if necessary, rather than, as under Brown’s plan, no increase in women’s opportunities and a large decrease in men’s opportunities.” Id. at 187 (quoting District Court Order at 11-12).

\textsuperscript{115} Id. at 187-88.
in successive stages of the same litigation. However, Chief Judge Torruella noted that decisions of the Supreme Court, which were rendered between two appeals and are irreconcilable with the decision on the first appeal, must be followed on the second appeal.\textsuperscript{116} The dissent went on to discuss the two Supreme Court cases which have changed the applicable jurisprudence and suggested that \textit{Cohen IV} should have been decided differently.\textsuperscript{117}

The dissent highlighted that the presumption relied on by the \textit{Cohen II} court, that a "regulation slanted in favor of women [or against men] would be permissible," was based on \textit{Metro Broadcasting}, a case which has since been overruled.\textsuperscript{118} The Supreme Court's overruling of \textit{Metro Broadcasting} by \textit{Adarand} was critical because it suggested that all gender-conscious government action should be subjected to strict scrutiny.\textsuperscript{119}

The dissent further argued that the Supreme Court's decision in \textit{United States v. Virginia} toughened the standard required to prevail in a gender-discrimination case.\textsuperscript{120} Now, rather than applying the "substantial relation to an important government interest" test, courts must examine the constitutionality of a statute mandating gender-based government action by determining whether the government demonstrates an "exceedingly persuasive justification for that action."\textsuperscript{121}

Relatedly, the dissent pointed out that these issues were not considered during this litigation since \textit{Cohen II} was an appeal from a preliminary injunction.\textsuperscript{122} As a result, the ruling in \textit{Cohen II} should

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\item \textsuperscript{116} See \textit{id}. at 188 (Torruella, C.J., dissenting).
\item \textsuperscript{117} See \textit{infra} notes 118-21 and accompanying text.
\item \textsuperscript{118} \textit{Cohen IV}, 101 F.3d at 189 (Torruella, C.J., dissenting). In \textit{Adarand}, the Supreme Court held that "all racial classifications \ldots must be analyzed\ldots under strict scrutiny." \textit{Adarand}, 115 S. Ct. at 2113. Although \textit{Metro Broadcasting} and \textit{Adarand} dealt solely with race-conscious, rather than gender-conscious classifications, the standard in \textit{Metro Broadcasting} was applied in \textit{Cohen II}. See \textit{Cohen IV}, 101 F.3d at 189 (Torruella, C.J., dissenting) (citing \textit{Cohen II}, 991 F.2d at 901).
\item \textsuperscript{119} See \textit{Cohen IV}, 101 F.3d at 189-90 (Torruella, C.J., dissenting).
\item \textsuperscript{120} 116 S. Ct. 2264, 2274 (1996).
\item \textsuperscript{121} \textit{Id}.
\item \textsuperscript{122} See \textit{Cohen IV}, 101 F.3d at 191 (Torruella, C.J., dissenting). The dissent discussed the limited influence of \textit{Cohen II}:
The binding authority of \textit{Cohen II}, therefore, is lessened by the fact that it was an appeal from a preliminary injunction. First, we now have a full record before us and a set of well-defined legal questions presented by the appellant. Trial on the merits has served to focus these questions and to provide background that allows us to consider these questions in the proper context and in detail. In its decision in \textit{Cohen II}, this court recognized and indeed, emphasized the fact that its holding was only preliminary.
\item \textit{Id}. (citations omitted) (Torruella, C.J., dissenting).
\end{itemize}
not have been unquestionably promoted into a permanent ruling. Instead, the dissent suggested that the fully developed issues should have been considered with the full complement of available facts.  

The dissent then attacked the district court's construction of the three-prong test.  

The dissent stated that the manner in which the district court counted "athletic opportunities" was skewed because contact sports should have been left out of the calculus. Relying on the legislative text, the dissent noted that schools are permitted to operate single-sex teams in contact sports and, if the athletes competing in such sports are excluded from calculation of participation rates, "the proportion of women participants would increase dramatically and prong one might be satisfied."  

The dissent illustrated two reasons why prong two, showing a history and continuing practice of program expansion for the underrepresented gender, is nearly impossible to meet. First, schools facing budget constraints must constantly increase the opportunities available to the underrepresented gender, even if it cannot afford to do so. Second, to satisfy this prong, schools must

123. See id. (Torruella, C.J., dissenting). It is also worthy to the note that the standard of review has changed. See id. (Torruella, C.J., dissenting). The Cohen II court declared that it was adopting a deferential standard of review, and "[i]f . . . the district court made no clear error of law or fact, we will overturn . . . only for manifest abuse of discretion." Cohen II, 991 F.2d at 902. Because the standard of review has changed, in that the Cohen IV court must review findings of fact under a clearly erroneous standard, it is conceivable that the result of the analysis will change, making review appropriate. See Cohen IV, 101 F.3d at 192 (Torruella, C.J., dissenting).

124. See Cohen IV, 101 F.3d at 192-95 (Torruella, C.J., dissenting).

125. Id. at 192 (Torruella, C.J., dissenting).

126. See id. (Torruella, C.J., dissenting). The regulation provides that an academic institution may operate separate teams for members of each sex in instances "where selection of such teams is . . . a contact sport." 34 C.F.R. § 106.41(b) (1995).

127. Cohen IV, 101 F.3d at 193 (Torruella, C.J., dissenting). Chief Judge Torruella explained that, under the regulation, a university can choose to field a men-only football team. See id. at 192 (Torruella, C.J., dissenting). Since different sports require different-sized rosters, by including in its count a contact sport that requires very large numbers of participants, "the district court skews the number of athletic participants." Id. (Torruella, C.J., dissenting).

128. See id. at 193 (Torruella, C.J., dissenting). The dissent suggested that the Cohen III court erroneously interpreted the purpose of Title IX:

Rather than respecting the school's right to determine the role athletics will play in the future - including reducing the opportunities available to the formerly overrepresented gender to ensure proportionate opportunities - the district court and the majority demand that the absolute number of opportunities provided to the underrepresented gender be increased. Id. (Torruella, C.J., dissenting).
continue to expand their programs and the number of opportunities for women, irrespective of the women's interest.\textsuperscript{129}

Moreover, the dissent showed that prong three is open to several plausible interpretations.\textsuperscript{130} It is unclear whether the "full and effective accommodation" component of prong three means that an institution must meet 100\% of the underrepresented gender's unmet reasonable interest and ability, or whether an institution must meet this interest and ability as fully as it meets those of the overrepresented gender.\textsuperscript{131} Also, the dissent pointed out that the district court's reading of Title IX was troublesome because Title IX "contains language that prohibits the ordering of preferential treatment on the basis of gender due to a failure of a program to substantially mirror the gender ratio of an institution."\textsuperscript{132} Since there is a variety of reasonable interpretations for the regulations and statutes at issue, the \textit{Cohen IV} court owed no deference to the interpretation chosen because the choice was made by a lower court, not the enforcing agency.\textsuperscript{133}

Next the dissent described that, regardless of semantics, the district court and the majority in \textit{Cohen IV} have turned the three-

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\begin{enumerate}
\item[129.] See \textit{id.} at 198 n.26 (Torruella, C.J., dissenting).
\item[130.] See \textit{id.} at 194 (Torruella, C.J., dissenting).
\item[131.] See \textit{id.} (Torruella, C.J., dissenting). The latter proposed definition of "full and effective accommodation," meeting the underrepresented gender's unmet reasonable interest and ability as fully as it meets those of the overrepresented gender, has support in the Policy Interpretation which provides that in assessing compliance under the regulation, "the governing principle in this area is that the athletic interests and abilities of male and female students be equally effectively accommodated." Policy Interpretation, 44. Fed. Reg. 71,413, 71,414.
\item[132.] \textit{Cohen IV}, 101 F.3d at 194 (Torruella, C.J., dissenting). The dissent relied on the language in 20 U.S.C. \textsection 1681(b) which states that, with respect to Title IX's guarantee that no person shall be excluded on the basis of sex from participation in, be denied the benefits of or be subjected to discrimination under any educational program or activity receiving Federal assistance,
\begin{quote}
[n]othing contained [therein] 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 the sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community.
\end{quote}
20 U.S.C. \textsection 1681(b) (1994); see also Judge, \textit{supra} note 2, at 316 (emphasizing that, although Title IX outlaws discrimination, statute does not require strict numerical equality between sexes).
\item[133.] See \textit{Cohen IV}, 101 F.3d at 195 (Torruella, C.J., dissenting). Chief Judge Torruella added, "[t]herefore, like any other cases of statutory interpretation, we should review the district court's reading de novo." \textit{Id.} (Torruella, C.J., dissenting).
\end{enumerate}
\end{footnotesize}
The dissent rejected the majority’s claim that the three-prong test does not constitute a quota merely because it involves multiple prongs. Rather, the dissent suggested that it is the eventual result of a test, not the number of steps a test has, which determines if that test is a quota. The dissent then remarked that since the appellees have not shown an “exceedingly persuasive justification” for the gender-conscious exercise of government authority, the interpretation of the three-prong test by the district court and the majority does not pass constitutional muster.

The dissent then disputed the majority’s exclusion of evidence and inconsistent use of statistics. The dissent questioned why the majority relied on the statistical evaluations concerning participation rates in Cohen I, Cohen II and Cohen III, but subsequently refused to hear statistical evidence concerning Brown’s student body’s interest in athletics. Critical that Brown was not given the opportunity to demonstrate how it meets its students’ interests and abilities, the dissent opined, “[i]f statistical evidence of interest levels is not to be considered by courts, . . . there is no way for schools to determine whether they are in compliance. Any studies or surveys they might conduct in order to assess their own compliance would, in the event of litigation, be deemed irrelevant.”

134. See id. at 195-97. The dissent believed that the district court turned the three-prong test into an affirmative action, quota-based scheme. See id. at 195; see also Mahoney, supra note 65, at 944 (insisting that any system requiring certain number of persons to be given opportunities based solely on one characteristic, without regard for ability or other classifications, is undeniably quota system).

135. See Cohen IV, 101 F.3d at 196 (Torruella, C.J., dissenting). The dissent plainly stated that any test that requires proportionate participation opportunities for both sexes (prong one) unless the other sex is disinterested (prong three) is a quota. See id. (Torruella, C.J., dissenting). The fact that an exception exists for situations in which there is not a sufficient number of interested students does not alter the fact that the test is a quota. See id. Commentators have espoused the view that courts have imposed a de facto quota by applying the three-prong test to an extreme and, as a result, courts have endorsed the very type of discrimination based on sex that Title IX was intended to stifle. See Mahoney, supra note 65, at 967.


137. See Cohen IV, 101 F.3d at 197-98 (Torruella, C.J., dissenting).

138. See id. at 197 (Torruella, C.J., dissenting).

139. Id. at 198 (Torruella, C.J., dissenting).
V. CRITICAL ANALYSIS

In its holding, the court interpreted and applied the statutory language of Title IX in a fashion that lost sight of the original goal of the legislation.\footnote{140}

Before identifying the majority's misapplication of Title IX, however, it must be noted that the court's procedural tack was also imprecise. When the Supreme Court hands down a decision, this new decision becomes the preeminent law of the land.\footnote{141} The new decision alters or affects the law that controls other cases currently on appeal. The Supreme Court's decision in \textit{Adarand} suggested that gender-based government action, like race-based government action, are analyzed under strict scrutiny.\footnote{142} Further, the Supreme Court's decision in \textit{United States v. Virginia} mandated that parties defending gender-based government action demonstrate an "exceedingly persuasive justification" for that action.\footnote{143} Here, neither the female athletes nor the district court exhibited an "exceedingly persuasive" justification for the district court's adoption of an ap-

\begin{itemize}
\item \textbf{140.} See Andrew A. Ingrum, \textit{Civil Rights: Title IX and College Athletics: Is There a Viable Compromise?}, 48 OKLA. L. REV. 755, 773 (1995) (stressing that spirit of Title IX is to enhance expansion of female athletics but not at ultimate expense of collegiate athletics); see also Mahoney, \textit{supra} note 65, at 976 (suggesting that current interpretation of Title IX requires schools to make gender-conscious decisions instead of gender-neutral ones); Roy Whitehead, Jr. et al., \textit{Gender Equity in College Athletics After Brown and Louisiana State: Why the Big Boys Are Crying}, 32 ARK. L. REV. 10, 40 (1997) (stating that purpose of Title IX legislation is to accommodate interests and abilities of students who have ability to participate in collegiate sports, not to establish some mechanical numerical quota based on student population numbers).
\item \textbf{141.} See \textit{Cohen IV}, 101 F.3d at 188 (Torruella, C.J., dissenting).
\item \textbf{142.} See \textit{Adarand Constr. Inc. v. Pena}, 115 S. Ct. 2097, 2113 (1995). Although \textit{Adarand} concerned race-based action, that decision compels courts to examine "benign" gender-conscious government action with the same approach that the court would view any other gender-conscious government action. \textit{See Cohen IV}, 101 F.3d at 190 (Torruella, C.J., dissenting).
\item The \textit{Cohen IV} majority suggested that allusions to the Supreme Court's decision in \textit{Adarand} as it relates to \textit{Cohen IV} are misguided because the \textit{Cohen II} court relied on \textit{Metro Broadcasting} to support its claim that Congress has broad powers to remedy past discrimination. \textit{See Cohen IV}, 101 F.3d at 182 n.19.
\item Nonetheless, the \textit{Cohen II} court used \textit{Metro Broadcasting} to dispatch Brown's equal protection argument. \textit{See id.} at 182. \textit{Metro Broadcasting} held that "benign" government action was subject to a lower standard than non-remedial government action. \textit{Metro Broadcasting}, Inc. v. FCC, 497 U.S. 547, 564 (1990). This view was clearly revoked by \textit{Adarand}. \textit{See Adarand}, 115 S. Ct. at 2112-13 (stressing that \textit{Metro Broadcasting} was "significant departure" from line of equal protection cases which had preceded it because it suggested that "benign" government action be treated less skeptically than other government actions).
\item \textbf{143.} \textit{United States v. Virginia}, 116 S. Ct. 2264, 2274 (1996). The Supreme Court emphasized that the enduring, inherent physical differences between men and women are to be appreciated and respected but should not cause artificial constraints on an individual's opportunity. \textit{See id.}\
\end{itemize}
parent quota scheme, which is clearly a gender-based exercise of government authority. Thus, the Cohen II decision, accepted by and relied on by the majority, is not consistent with the Supreme Court’s decisions. Accordingly, Brown’s equal protection challenge of the three-prong test should have been reconsidered in Cohen IV.

The other procedural anomaly in Cohen IV was the court’s strict adherence to the findings in Cohen II. This self-imposed straitjacket and overzealous reverence for the “law of the case doctrine” was inappropriate and unnecessary because the authority of Cohen II was weakened by the fact that it was an appeal from a preliminary injunction. Specifically, the Cohen II court explicitly admitted that its decision, made at the preliminary injunction stage, enjoys, at best, tenuous authority and was not necessarily controlling throughout the duration of the litigation.

In unnecessarily relying on the findings of Cohen II, the Cohen IV court inherited a flawed application of the three-part test for compliance adopted by the courts in Cohen II and Cohen III. In Cohen III, the district court declared that Brown failed the first prong, substantial proportionality, because there was a 13.01% disparity between female participation in athletics and female enrollment. This finding was potentially erroneous on two levels. First, the district court arbitrarily decided that athletic opportuni-

144. See Cohen IV, 101 F.3d at 197 (Torruella, C.J., dissenting). For discussion of the majority’s implementation of Title IX as a quota, see infra notes 135-37 and accompanying text.

145. See Cohen IV, 101 F.3d at 191 (Torruella, C.J., dissenting).

146. Cohen IV, 101 F.3d at 191 (Torruella, C.J., dissenting). The dissent pointed out that in the instant case, the court now has a fully developed record before it, as well as a complement of appropriately framed legal questions. See id. (Torruella, C.J., dissenting). The trial on the merits (Cohen III) examined these questions against an appropriate background, yet the Cohen IV court refused to fully and properly review these questions due to the court’s adherence to the Cohen II decision. See id. (Torruella, C.J., dissenting).

147. See Cohen II, 991 F.2d at 902 (“[A] party losing the battle on likelihood of success may nonetheless win the war at a succeeding trial.”) (quoting Narragansett Indian Tribe v. Gilbert, 934 F.2d 4 (1st Cir. 1991)).

148. See Cohen IV, 101 F.3d at 172-80 (discussing appropriateness of previous courts’ interpretations of Title IX and discarding Brown’s approach to three-part test as contrary to language of test as well as contrary to statute itself).

149. See Cohen III, 879 F. Supp. at 211; see also Pederson v. Louisiana State Univ., 912 F. Supp. 892, 914 (M.D. La. 1996) (“Ceasing the inquiry at the point of numerical proportionality does not comport with the mandate of the statute.”). Since the female portion of Brown University’s student body was 51.14% (2,926 of 5,722) and the female athletes only constituted 38.13% (342 of 897), the court concluded, without any analysis of Brown’s program or the rationale behind the first prong of the test, that Brown failed prong one. See Cohen III, 879 F. Supp. at 211.
ties will be measured by counting the number of participants on each team, rather than considering how many roster spots were offered to interested students. Second, the Policy Interpretation suggests that the entire student population be entered into the equation for substantial proportionality, regardless of students’ interests in participating in sports. The interpretation precariousness assumes that the percentages of each sex in the student body reflects the size and inclination of the group that is interested in participating in sports. Unfortunately, the Policy Interpretation proffers no statistical test for schools to apply in determining whether they are providing athletic opportunities in substantial proportion to the schools’ relative enrollments, leaving schools to wonder whether they are complying with Title IX. In absence of guidance from the OCR and its Policy Interpretation, as well as from the courts, collegiate athletic departments are left

150. See Cohen III, 879 F. Supp. at 202. The inherent flaw in this approach is best demonstrated by the following example: if a women’s soccer team has the capacity to carry twenty-five players on its roster, but only twenty women come out for the team, the court will find that only twenty opportunities existed, as opposed to the twenty-five opportunities actually offered.


152. See Connolly, supra note 20, at 862-63; see also Charles P. Beveridge, Title IX and Intercollegiate Athletics: When Schools Cut Men’s Athletic Teams, 1996 U. Ill. L. Rev. 809, 834 (1996) (suggesting that forcing colleges to eliminate only men’s sports does not take into consideration male and female students’ differing interests in and abilities to participate in collegiate athletics); George A. Davidson & Carla A. Kerr, Title IX: What Is Gender Equity, 2 VILL. SPORTS & ENT. L.F. 25, 29-30 (noting that proportionality requirement is based on unsupported presumption that percentage of men and women interested in and able to participate in collegiate athletics mirrors percentage of men and women enrolled in institution); B. Glenn George, Who Plays and Who Pays: Defining Equality in Intercollegiate Athletics, 1995 Wis. L. Rev. 647, 655 (1995) (indicating that proportion of female to male students in student body is not necessarily correlated to number of students with adequate interest and skill level to participate in intercollegiate athletics); Michael Straubel, Gender Equity, College Sports, Title IX and Group Rights: A Coach’s View, 62 BROOK. L. Rev. 1039, 1066-67 (1996) (demonstrating absurdity of results when general student body population is used for comparison purposes to determine whether substantial proportionality exists).

153. See Connolly, supra note 20, at 906. Because no court has found a school in compliance with the substantial proportionality prong, it is difficult to ascertain what percentage disparity would be considered in compliance with Title IX. See id. at 872; see also Beveridge, supra note 152, at 824 (noting that OCR and courts have failed to determine what percentages would be considered substantial proportionality); Ted Curtis, Men’s Sports Programs and Title IX Compliance in Intercollegiate Athletics, 69 FLA. B.J. 63, 65 (arguing that judicial trend seems to drive case-by-case analysis of Title IX compliance, thus leaving schools with little direction on how to comply); Mary W. Gray, The Concept of Substantial Proportionality in Title IX Athletic Cases, 3 DUK. J. GENDER L. & POL’Y 165, 168 (1996) (asserting that schools have received little guidance from courts on how to reach safe harbor provisions of Title IX and what constitutes equal treatment of female and male athletes).
to the mercy of judges’ capricious definitions of “substantially proportionate.”

The logic behind the Policy Interpretation is further called into question when considering the district court’s assessment of the second prong in Cohen III, and the decision’s subsequent affirmation by the First Circuit in Cohen IV, is considered. Since the second prong requires Brown to make a showing that it has a history and a continuing practice of expanding athletic programs for the underrepresented gender, Brown’s extraordinary expansion efforts for women’s sports in the 1970s are of absolutely no significance to the district court. Although the district court and the Court of Appeals for the First Circuit lauded Brown’s expansion efforts at earlier stages in this litigation, the school’s failure to add more women’s varsity teams to the already-existing sixteen women’s squads kept it from meeting the second prong.

154. See Jerry R. Parkinson, Grappling With Gender Equity, 5 WM. & MARY BILL RTS. J. 75, 98 (1996) (discussing failure by OCR to provide educational institutions with any tangible intimation on how to meet substantial proportionality requirement).


156. See Cohen III, 879 F. Supp. at 211 (“Brown University has an impressive history of program expansion . . . .”); Cohen II, 991 F.2d at 903 (conceding that Brown had “supercharged” fledgling women’s athletic program).

157. See Cohen III, 879 F. Supp. at 211 (noting that percentage of women participating in athletics at Brown has remained steady, which is unacceptable under second prong); see also Johnson, supra note 3, at 582 (stating second prong is stumbling block due to continuing practice requirement); Thro, supra note 155, at 624 (noting that most schools would fail second prong because they have not added any sports recently, even if sports were added in the 1970s and 1980s).

In his dissent in the instant case, Chief Judge Torruella noted that the Cohen III decision inexorably required that a school facing economic constraints, in order to comply with prong two, must increase the number of athletic opportunities for the underrepresented gender, even if the school cannot afford to do so. See Cohen IV, 101 F.3d at 193 (Torruella, C.J., dissenting). Torruella further suggested that this demand goes well beyond the scope of Title IX. “A school is not required to sponsor an athletic program of any particular size. It is not for the courts, or the
emerging conjecture is that program expansion, like substantial proportionality, seems a poor substitute and perhaps a poorer measurement for legitimate accommodation of students' athletic interests and abilities.\textsuperscript{158}

Similar to the first two components of the test, the third prong, full and effective accommodation of the underrepresented gender's athletic interests and abilities, was not necessarily interpreted or applied correctly during earlier stages of the litigation for various reasons.\textsuperscript{159} First, since there were several ostensible interpretations of prong three, the Cohen \textit{IV} court owed no deference to the interpretation chosen by the lower court, because it was not a choice made by an agency.\textsuperscript{160} Second, the definition chosen by the district court turns the entire three-part test into an affirmative action, quota-based scheme.\textsuperscript{161}

The district court rejected Brown's argument that the school fully and effectively accommodated the athletic interests of its student body by providing participation opportunities in proportion to the interest of each sex.\textsuperscript{162} In fact, the Cohen \textit{II} court concluded that unless Brown can show absolute numerical parity, the school would not be fully and effectively accommodating the interest of its female students.\textsuperscript{163} The Cohen \textit{II} court also declared that evaluating a school under prong three "requires a relatively simple assessment of whether there is unmet need in the underrepresented gen-

\textsuperscript{158} See Parkinson, supra note 155, at 120.

\textsuperscript{159} See generally Cohen \textit{IV}, 101 F.3d at 193-95 (Torruella, C.J., dissenting) (explaining that district court's narrow, isolated interpretation of Title IX in Cohen \textit{III} essentially creates quota-based scheme for compliance).

\textsuperscript{160} See Cohen \textit{IV}, 101 F.3d at 195 (Torruella, C.J., dissenting). As previously discussed, the Cohen \textit{IV} majority unnecessarily bound itself to the "law of the case doctrine." See id. (Torruella, C.J., dissenting). Instead, because there were multiple possible interpretations, the Cohen \textit{IV} court should have reviewed the district court's reading de novo. See id. (Torruella, C.J., dissenting).

\textsuperscript{161} See id. (Torruella, C.J., dissenting); Davidson & Kerr, supra note 152, at 45-46 ("Adding varsity positions for women until the percentage of women varsity athletes equals the percentage of women students is a form of affirmative action."). The dissent in Cohen \textit{IV} stressed that the outcome of the test, not the number of steps involved, illustrates that a quota system exists. See Cohen \textit{IV}, 101 F.3d at 196 (Torruella, C.J., dissenting). "[T]he school can escape the quota under prong three only by offering preferential treatment to the group that has demonstrated less interest in athletics." Id. (Torruella, C.J., dissenting).

\textsuperscript{162} See Cohen \textit{III}, 991 F. Supp. at 208. Because this argument was built on the same foundation as Brown's argument on substantial proportionality, it was rejected by the court. See id. at 210.

\textsuperscript{163} See Cohen \textit{II}, 991 F.2d at 898.
order.” However, at no time throughout the litigation did the court explain how this “relatively simple” assessment could be taken. Astoundingly, the court made no effort to follow its own suggestion as, on remand, the Cohen III court refused to accept any empirical evidence from Brown demonstrating that the school was accommodating the underrepresented gender’s interests. The district court claimed, “[i]t is unclear what population should be surveyed to assess the interest of the ‘qualified applicant pool,’ even if it were possible to do so.” If prong three is to have any substance, some method must be available to assess student interests and abilities.

The practical result of not allowing a school to use survey data is to eviscerate prong three and leave the first prong, substantial proportionality, as the only test for compliance with Title IX.

164. Id. at 900.
165. See Parkinson, supra note 154, at 127.
166. See Jill Mulderink, Par for the Course: Cohen v. Brown University Mandates an Equal Playing Field in Intercollegiate Athletics, 22 J.C. & U.L. 111, 128 (1995) (expressing that district court should have prescribed some test, survey or method to guide schools in their assessment of student’s athletic interests and needs). See also Cohen IV, 101 F.3d at 197 (Torruella, C.J., dissenting) (noting that majority approvingly cited to statistical evaluations when considering women’s participation in athletics in proportion to their enrollment, yet, when interest level of women at Brown is at issue, court adopts much more critical attitude towards statistical evidence).
168. See Parkinson, supra note 154, at 127; Mulderink, supra note 166, at 127 (questioning how institution can measure number of unaccommodated female athletes without asking females whether they are interested in participating in institution’s athletic programs); Whitehead, supra note 140, at 39 (stressing that surveys or studies of interest in and ability to compete in college sports is more “intellectually honest” measure of Title IX compliance than unsubstantiated reliance on numbers); Davidson & Kerr, supra note 152, at 30 (“Without having a basis in students’ interests and abilities, these additions [of women’s sports] and subtractions [of men’s sports] are not only arbitrary, but are in themselves discriminatory and contrary to the intent of Title IX.”).

Commentators have suggested that the concept of “statistical significance,” used in the resolution of Title VII cases, be employed in Title IX cases as it would provide courts and schools with an appropriate instrument to measure “substantial proportionality.” See Gray, supra note 153, at 185.
169. See Straubel, supra note 152, at 1054; Beveridge, supra note 152, at 822 (emphasizing that substantial proportionality is essentially only way to comply with Title IX since second and third prongs are inapplicable); see also Whitehead, supra note 140, at 140 (“There has been sort of an unquestioned acceptance that only the first part of the test is relevant.”); Shook, supra note 16, at 806 (admitting that substantial proportionality prong is only viable option for schools to use to meet Title IX obligations); Mahoney, supra note 65, at 969-70 (demonstrating that, although test provides school three means by which to comply with Title IX, most schools may only comply with Title IX by meeting substantial proportionality prong); Parkinson, supra note 154, at 137 (noting that Cohen courts’ full accommodation theory, applied as court contemplated, leads to proportionality evaluation
Ironically, the Cohen courts' application of the full accommodation theory inevitably coerces schools to comply with proportionality - and the easiest way to achieve proportionality is to cut athletic programs, an approach which is the antithesis of "full accommodation."\(^{170}\)

Finally, there is the argument that the Policy Interpretation should not enjoy controlling weight as a regulation because it is contrary to the statute that established Title IX.\(^{171}\) The statute says that the rules, regulations and orders authorized under 20 U.S.C. § 1682 do not become effective "unless and until approved by the President."\(^{172}\) In this case, since the Policy Interpretation was neither submitted to nor approved by the President, the Policy Interpretation arguably does not have the force of law and should not have been accorded the deference given it by the Cohen III court.\(^{173}\)

### VI. Impact

Due to the court's inflexible application of the poorly crafted three-prong test throughout this litigation, Brown is left with two lamentable options: cut the number of men's teams or eliminate its athletic programs entirely.\(^{174}\) This lesser of two evils dilemma ultimately derives from the OCR's test which, to be meaningful, must drop the disjunctive "or" from its standard so that all three prongs are considered together when reviewing whether a university has and renders prong three virtually useless); Jennifer L. Henderson, Gender Equity in Intercollegiate Athletics: A Commitment to Fairness, 5 SETON HALL J. SPORT L. 133, 142 (1995) (designating substantial proportionality and continuing program expansion prongs as "unlikely . . . to achieve" and "unreasonable."); George, supra note 153, at 654 (indicating that substantial proportionality has become only prong of three-part test which schools can realistically meet).

170. See Parkinson, supra note 154, at 132 (highlighting Cohen courts' use of three-prong test that seemingly contravenes purpose of Title IX).


173. See Pederson, 912 F. Supp. at 910 n.45.

174. See Deidre G. Duncan, Gender Equity in Women's Athletics, 64 U. CIN. L. REV. 1027, 1050-51 (explaining that Cohen decision exemplifies ridiculousness of strict application of proportionality requirement and that men's sports programs will inevitably suffer if such analysis is applied in subsequent cases); see also John Gibeaut, Shooting for Reality on the Playing Fields, A.B.A. J., May 1997, at 41 (stating that UCLA cut men's swimming squad, even though that program has produced twenty-two Olympic medalists); Shook, supra note 16, at 814 (noting that schools seeking compliance with Title IX must eliminate more men's sports in order to support participation ratios that will be acceptable to federal courts).
complied with Title IX.\textsuperscript{175} Considering the three-part test as a whole stands to be a more effective and comprehensive method for courts and schools to judge Title IX compliance.\textsuperscript{176} Currently, universities cannot be expected to match exactly the percentage of female athletes with the percentage of females in the student body from year to year.\textsuperscript{177}

The ultimate effect of courtroom battles concerning Title IX, like the result in \textit{Cohen}, is that men’s teams will simply end up being hurt rather than women’s teams being helped.\textsuperscript{178} Forcing schools to eliminate men’s sports may discriminate against male athletes if the differing interests and abilities of male and female students to compete in intercollegiate athletics are not considered.\textsuperscript{179} Rather than cutting men’s programs in order to avoid expanding women’s

\textsuperscript{175} See Parkinson, supra note 154, at 148-49; see also Pederson, 912 F. Supp. at 914 (claiming that prongs should not be taken separately). If each prong is taken individually, the simplicity of the substantial proportionality prong becomes an easy way out for both courts and institutions; in the meantime, the other two prongs are ignored. \textit{See id.} at 109.

\textsuperscript{176} See Pederson, 912 F. Supp. at 914 (holding that proper reading of Policy Interpretation and proper analysis under effective accommodation allows for consideration of all factors listed therein to determine whether school had provided equal opportunity for males and females); \textit{see also} Davidson & Kerr, supra note 152, at 35 (revealing ludicrousness of how universities may meet one of test’s prongs but still be in gross violation of Title IX).

\textsuperscript{177} See Gray, supra note 153, at 188; \textit{see also} Straubel, \textit{supra} note 153, at 1069 (noting confusion and injustice created by having target number for substantial proportionality which fluctuates yearly); Whitehead, \textit{supra} note 140, at 40 (stressing that strict proportionality approach, though attractive on its face, is counterproductive to athletes who have ability to compete at college level, and is contrary to meaning of Title IX).

\textsuperscript{178} See Straubel, \textit{supra} note 152, at 1040; \textit{see also} Ted Curtis, \textit{Wrestling With Title IX Compliance and Men’s Sports Programs}, 13 \textit{ENT. & SPORTS L.} 1, 14-15 (1995) (reporting that numerous men’s wrestling, swimming, gymnastics and tennis teams are being eliminated from college athletic departments across country in order to comply with Title IX); Evans, \textit{supra} note 36, at 60 (noting that 366 NCAA schools have established women’s soccer teams since 1982 while 99 schools have discontinued men’s wrestling programs, 64 schools have eliminated men’s swimming teams, and NCAA men’s gymnastics programs have been reduced from 133 teams in 1975 to only 80 teams in 1996); David H. Moon, \textit{Gender [In]Equity? An Analysis of Title IX Lawsuits in Intercollegiate Athletics}, 6 \textit{DEPAUL-LCA J. ART & ENT. L.} 87, 101 (suggesting that many male athletes will lose opportunity to participate in college athletics as result of Title IX); Diane Heckman, \textit{The Explosion of Title IX Legal Activity in Intercollegiate Athletics During 1992-93: Defining the Equal Opportunity Standard}, 1994 \textit{DET. C.L. REV.} 953, 995-96 (1994) (highlighting language from \textit{Kelley} decision which pointed out “inherent unfairness” of such decisions which classify and isolate one gender to carry burdens which other gender is not required to bear); Gibeaut, \textit{supra} note 174, at 41 (realizing that schools are taking easiest path to compliance by cutting men’s programs rather than adding women’s programs); George, \textit{supra} note 152, at 652 (discussing schools’ decisions to eliminate men’s sports in order to increase percentage of female athletes and suggesting that increased attention on women’s sports comes at expense of male athletes).

\textsuperscript{179} See Beveridge, \textit{supra} note 152, at 842.
programs, a more workable Title IX approach is to guarantee that each gender will be able to participate in intercollegiate athletics at a rate proportional to its ability and interest. 180 Meanwhile, the push for proportionality should be made at primary and secondary schools, where encouragement and opportunities to participate in sports must be provided to both girls and boys. 181

Despite an appeal from Brown University, the Supreme Court refused to grant certiorari and review this case. 182 As an implicit endorsement of the First Circuit's findings, the Supreme Court is running the clock out against collegiate athletic departments across the country. Instead of reading Title IX as legislation that ensures opportunities for female athletes, the courts have mutated Title IX into a statute that encourages schools to stop making advances for women in sports, so long as the schools eliminate opportunities for men. 183

In Cohen III, the district court made the preposterous suggestion that Brown University seek compliance with Title IX by

180. See id.; see also Mahoney, supra note 65, at 976 (suggesting that it is not discriminatory for schools to respond to interests and abilities of more men than women when there is greater number of interested and able male student-athletes); Straubel, supra note 152, at 1042 (declaring that Title IX implementation efforts must take into account different levels of interest in intercollegiate athletics between women and men); Davidson & Kerr, supra note 152, at 45 (proposing that, in implementing Title IX, relevant pools of individuals to consider should be those student-athletes subject to discrimination, female and male student-athletes who possess interest in and ability to participate in college athletics; and stressing, "[p]roviding opportunities in proportion to the number of athletes of each sex with interest and ability avoids sex discrimination; providing opportunities in proportion to overall enrollment creates discrimination").

181. See id.; Straubel, supra note 152, at 1074 (urging that youngsters be given equal opportunity to participate in sports and suggesting that proportionality cannot be required of colleges until proportionality is found in high schools); Davidson & Kerr, supra note 152, at 29 (noting difficulty for men and women who lack high school varsity experience to develop interest in and ability to play sports in college and suggesting that, without changes in participation rates in secondary school, ratio of men to women with requisite interest and ability to participate at collegiate level will not change); Brian A. Snow & William E. Thro, Still on the Sidelines: Developing the Non-discrimination Paradigm Until Title IX, 3 DUKE J. GENDER L. & POL'Y 1, 45 (theorizing that, if development of athletic skills at elementary, middle and high school levels is emphasized, there will be interest when these students reach the college level).


183. See Parkinson, supra note 154, at 125 ("One reasonably could question whether cutting men's opportunities, or paring both men's and women's opportunities, purely for the sake of symmetry does anything to 'effectively accommodate' student interests and abilities."); see also Spitz, supra note 2, at 656 (highlighting paradoxical result of Title IX's implementation); Forseth, supra note 3, at 95 (remarking that abolishing entire varsity athletic program in order to comply with Title IX harms all athletes, male and female).
“eliminat[ing] its athletic program altogether.” It seems unlikely that the drafters of Title IX, a statute encouraging athletic opportunities, ever intended for it to become a statute that promoted the elimination of intercollegiate athletics.

Ted Riley Cheesebrough

185. See Christopher Raymond, Title IX Litigation in the 1990’s: The Courts Need a Game Plan, 18 Seattle U. L. Rev. 665, 684; see also Spitz, supra note 2, at 655 (“The primary purpose of Title IX was to provide equality for women in intercollegiate athletics . . . . Compliance with Title IX has essentially signaled the death knell for many athletic programs.”).

If courts refuse to consider the practical results of their decisions, the long-term ramifications could be staggering. See Raymond at 655. If subsequent Title IX cases are decided in accord with Cohen, the future of intercollegiate athletics could be imperiled by the very statute which was intended to proliferate them. See id.