

Denver Sports & Entertainment Law Journal

Volume 7
Issue 1 *Fall 2009*

Article 3

2009

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Recommended Citation

Ben Adams, Title IX: The Story of a Provision in Need for Reform, 7 U. Denv. Sports & Ent. L.J. 4 (2009).

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Title IX: The Story of a Provision in Need for Reform

TITLE IX: THE STORY OF A PROVISION IN NEED OF REFORM

Ben Adams

I. INTRODUCTION

Throughout history, there have been times at which a government must act in order to protect those who have been disadvantaged. The American people, over history, have worked to create an atmosphere in which all Americans are able to compete on a more level playing field. Staples of the American Government, as it has been designed, are examples of this. The progressive tax system is an active statute,¹ which hopes to shift the burden of funding our government from those who are not able to gain as much financially to those who are in a more financially secure position.² Another example is the Equal Employment Opportunities legislation, which seeks to create an environment of fair employment for those of all different backgrounds.³ Much like the Equal Employment Opportunities Legislation, Title IX,⁴ of the United States code of education, signed into law in 1972, was created in order to provide and protect opportunities for women.⁵ Title IX has attempted to remove many barriers and discrepancies that once prevented people, on the basis of gender, from participating in educational opportunities and careers of their choice. It states that:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.⁶

Title IX was passed in 1972 as an amendment, and unfortunately, does not have much well documented legislative history. However, the legislative history of Title IX did begin when it was introduced in the Senate by Senator Birch Bayh of Indiana, who explained that its purpose was to combat "the continuation of corrosive and unjustified discrimination against women in the American educational system."⁷

While arguing in behalf of his legislation, Senator Bayh pointed to the fact that economic inequities suffered by women can often be traced to educational inequities, and this new legislation would be a step toward remedying the situation. Senator Bayh argued that there was a link between discrimination in education and subsequent employment opportunities "The field of education is just one of many areas where differential treatment [between men and women] has been documented but because education provides access to jobs and financial security, discrimination here is doubly destructive for women. Therefore, a strong and comprehensive

¹ See 26 U.S.C. § 1.

² Jonah Goldberg, *Political Squabbles Aside, Our Progressive Tax System is Just That*, SALT LAKE TRIB., Nov. 4, 2008, available at http://www.sltrib.com/opinion/ci_10898118.

³ 42 U.S.C. § 21

⁴ 20 U.S.C. § 1681

⁵ *Id.*

⁶ *Id.*

⁷ 118 CONG. REC. 5803 (1972).

measure is needed to provide women with solid legal protection from the persistent, pernicious discrimination which is serving to perpetuate second-class citizenship for American women.”⁸

Through the implementation of Title IX, the numbers of women in sports have greatly increased.⁹ Women collegiate athletes have actually increased more than five times their numbers, from 31,8522 to 170,526, since the implementation of Title IX.¹⁰ However, not all is well and good in the world of Title IX application to collegiate athletics. “[I]t’s been a bust for men’s Olympic sports.”¹¹ Many schools are being forced to cut men’s programs, as compliance with this provision has become incredibly difficult by simply continuing to add women’s programs, as this is very cost prohibitive.¹² One study has estimated that over 2,200 men’s teams have been eliminated since 1981.¹³ There are even those who believe that Title IX may be a cause for the decline in performance of our men’s athletic teams.¹⁴

a. Has Title IX Run its Course?

In reviewing Senator Bayh’s stated reasoning for Title IX, it is quite obvious that the intentions of those who ratified Title IX in 1972 were to rectify the discrepancy in the numbers of post secondary degrees that were conferred upon members of both sexes. At the time of Title IX’s discussion and creation, undergraduates who were female only accounted for 42 percent of all undergraduates.¹⁵ However, by 2003, women received 57.9% of the degrees conferred from postsecondary schools.¹⁶ Since the late 1970s, as seen in the table below,¹⁷ at least half of all part-time students have been female, and since 1985, a majority of full-time students have been female.¹⁸

⁸ *Id.* at 5806-07.

⁹ Press release, Nat’l Women’s Law Ctr., Quick Facts on Title IX and Athletics (June 2007) (on file with author) available at <http://www.nwlc.org/pdf/Quick%20Facts%20on%20Title%20IX.pdf>.

¹⁰ *Id.*; Department of Health, Education, and Welfare, Policy Interpretation, 44 Fed. Reg. 71419 (1979); NAT’L COLLEGIATE ATHLETIC ASS’N (NCAA), 1981-82—2005-06 NCAA SPORTS SPONSORSHIP AND PARTICIPATION RATES REPORT 76 (2006).

¹¹ Mark Heller & Kyle Odegard, *Examining the progress and problems of Title IX*, EAST VALLEY TRIB., May 31, 2008, available at <http://www.eastvalleytribune.com/story/117574>.

¹² Glenn Sacks, *Title IX Lawsuits are Endangering Men's College Sports*, L.A. DAILY NEWS, Sept. 7, 2001, available at http://www.glennsacks.com/title_ix_helps.htm; *James Madison to drop teams for Title IX compliance*, ESPN.COM, Sept. 26, 2006, available at <http://sports.espn.go.com/ncaa/news/story?id=2607807>.

¹³ Press Release, Eric McErlain, The College Sports Council, Study Reveals Alarming Decline in Men's College Athletic Opportunities: CSC Cites Pattern of Discrimination, Cuts Happening Across the Board (Mar. 27, 2009), available at http://www.savingsports.org/newsroom/display_releases.cfm?id=20; College Sports Council, College Sports Council Longitudinal Study of NCAA Participation Data, <http://savingsports.org/presentation/>.

¹⁴ Phyllis Schlafly, *Title IX Tied Our Hands at Olympics*, <http://www.eagleforum.org/column/2008/aug08/08-08-29.html>.

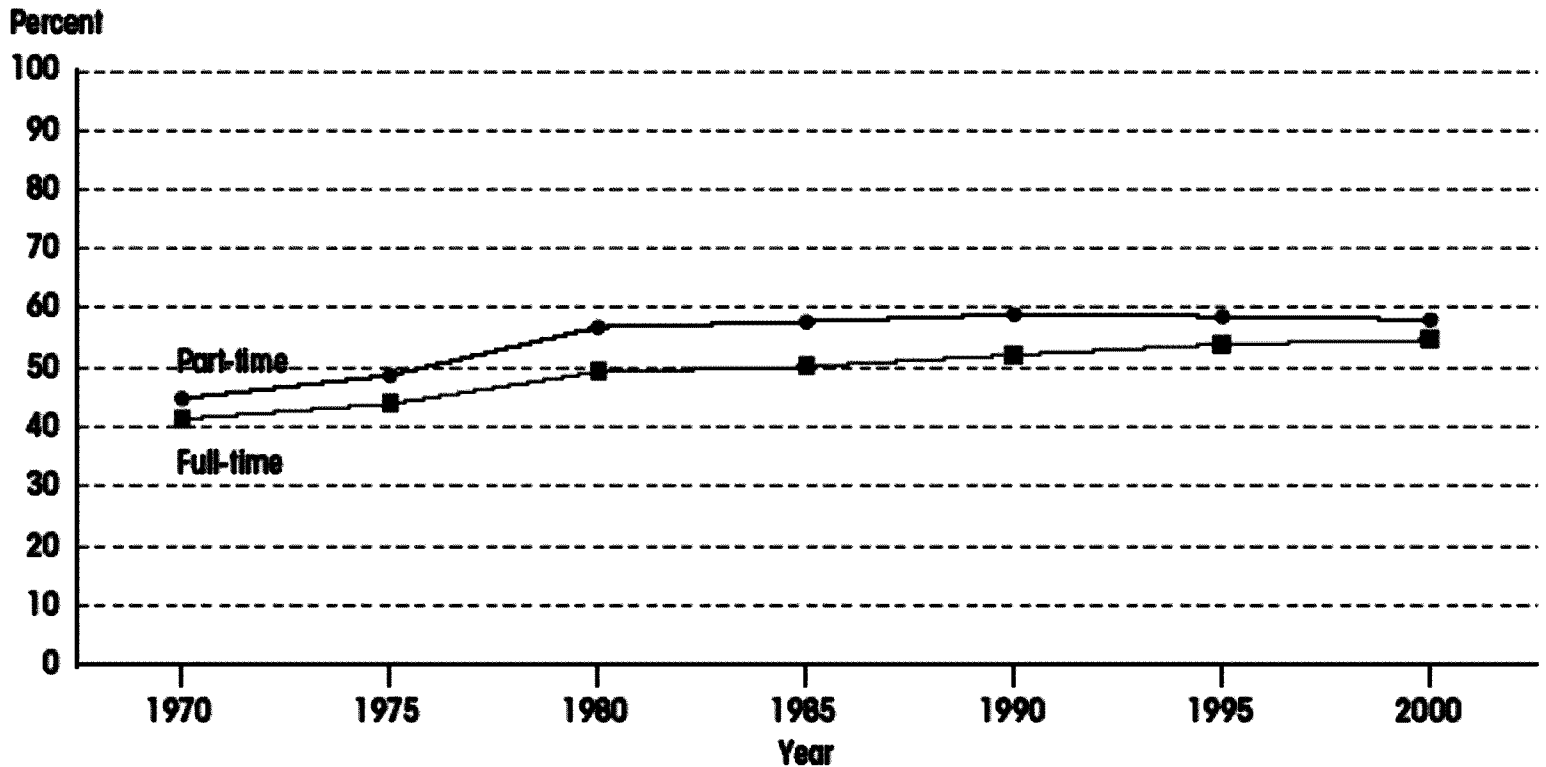
¹⁵ NAT’L CTR. FOR EDUC. STATISTICS, TRENDS IN EDUCATIONAL EQUITY IF GIRLS AND WOMEN: 2004 70 (2005), available at <http://nces.ed.gov/pubs2005/equity/Section8.asp>.

¹⁶ LAURA G. KNAPP, NAT’L CTR. FOR EDUC. STATISTICS, POSTSECONDARY INSTITUTIONS IN THE UNITED STATES: FALL 2003 AND DEGREES AND OTHER AWARDS CONFERRED: 2002-03 14 (2005), available at <http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2005154>.

¹⁷ NATIONAL CTR. FOR EDUCATION STATISTICS, *supra* note 15, at 71.

¹⁸ *Id.*

Percent of undergraduates who were female, by enrollment status: Various years, fall 1970 to fall 2000



NOTE: Includes unclassified undergraduate students.

SOURCE: U.S. Department of Education, National Center for Education Statistics, *Digest of Education Statistics 2002*, based on Higher Education General Information Survey (HEGIS), "Fall Enrollment in Colleges and Universities" surveys; and Integrated Postsecondary Education Data System (IPEDS), "Enrollment" surveys.

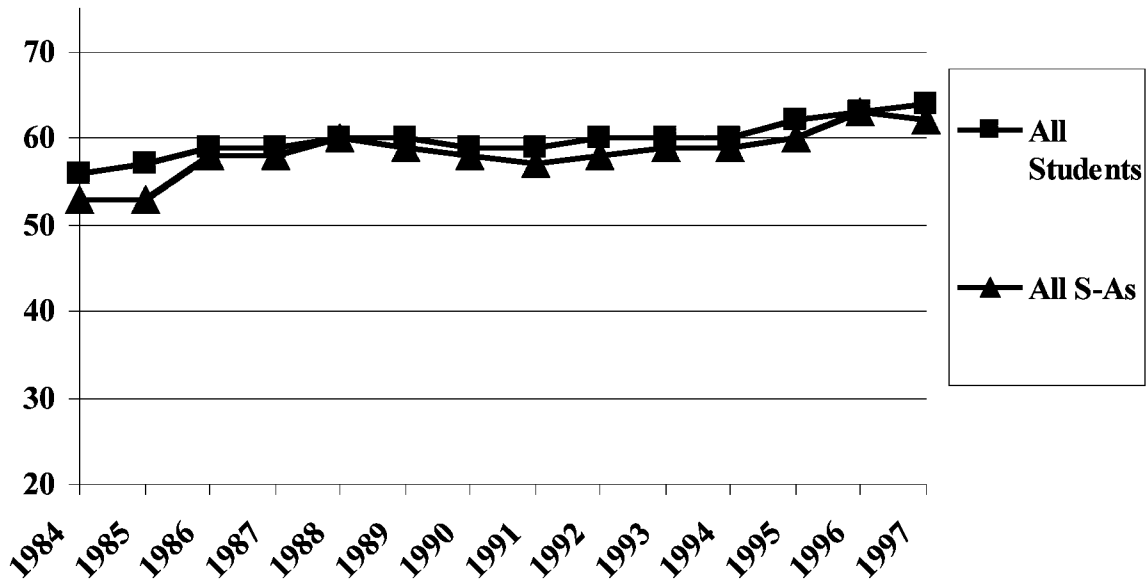
Having seen these statistics, there is reason to see that Title IX has been successful in Senator Bayh's goal of providing educational opportunity for women, so that they may have access to higher employment opportunity. However, not all of Title IX's implications have resulted in such a success. In the arena of Collegiate Athletics, as this comment will attempt to address, Title IX has had a negative effect on male students, and more specifically those who wish to be student athletes.

In general, student athletes have a higher rate of graduation than those students who do not participate in intercollegiate athletics.¹⁹ Sixty-two percent of NCAA student-athletes who entered Division I colleges and universities in 1997 graduated, in comparison to the overall student body, which only graduated sixty percent.²⁰ This is illustrated below:²¹

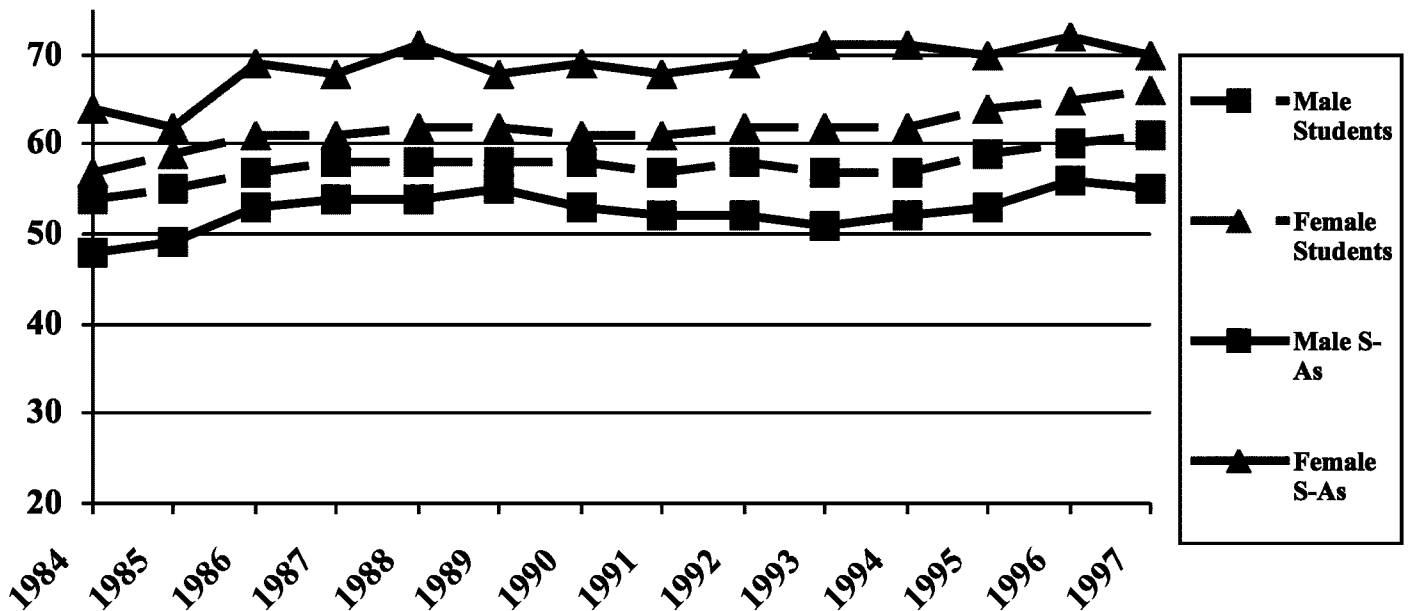
¹⁹ Press Release, Jeff Howard, Nat'l Collegiate Athletic Assoc., NCAA Division I Graduation Rates Continue to Exceed General Student Body (Oct. 25, 2004) (on file with author).

²⁰ *Id.*

²¹ NAT'L COLLEGIATE ATHLETIC ASSOC., NCAA RESEARCH RELATED TO GRADUATION RATES OF DIVISION I STUDENT-ATHLETES 1984-1997 (2003).



However, when digging deeper into the numbers, the data show that the graduation rate for male student-athletes who began college in 2000 is 71.5 percent, compared to women over the same time period, who graduated at 87.3 percent.²² It can be inferred that male student athletes are actually lowering the graduation success rate of both males and athletes in general. This trend is shown in the table below:²³

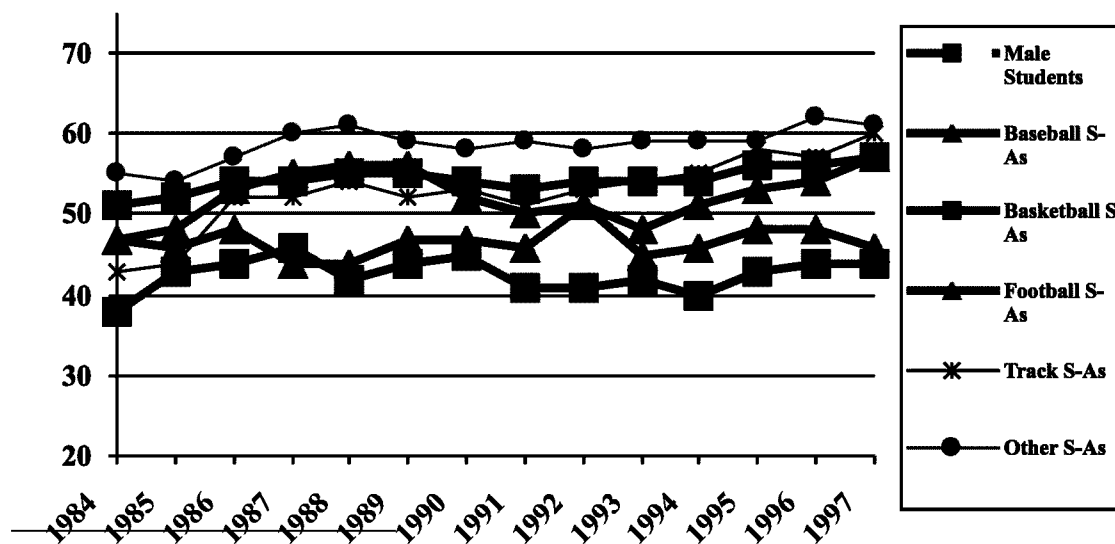


²² Press Release, Bob Williams, Nat'l Collegiate Athletic Assoc., Trend Data Shows Graduation Success Rate Improvement (Oct. 3, 2007) (on file with author).

²³ NAT'L COLLEGIATE ATHLETIC ASSOC., *supra* note 21.

NOTE: The chart above compares male and female students with male and female student athletes (S-As). The dates represent the date upon entrance of an institution of higher learning. Their Graduation Success Rate (GSR), is determined by the rate at which students graduate within five years of entering their institution.

In a large part, this is attributable to the low graduation rate of male athletes from the revenue producing, popular sports. The graduation rate for men's basketball was 63.6 percent for those entering college in 2000, for football, the class entering in the year 2000 only had a 66.6 percent graduation rate in the Bowl Subdivision and 64.7 percent for teams competing in the Championship Subdivision.²⁴ Baseball held a 67.3 percent graduation rate.²⁵ On the other-hand, even further examination shows that other men's sports tend to excel, at least with respect to graduation rates, as well as their women's sport counterparts. Unfortunately, it is just those sports that are being eliminated because schools must attempt to comply with Title IX.²⁶ Even though some of these sports may be cut for reasons other than Title IX, the reason a male sport is cut for budgeting purposes is a direct result of title IX.²⁷ Therefore, it is quite clear from the statistics that the male student athlete graduation rates are hindered by the elimination of certain sports for compliance with Title IX.²⁸ Athletes who would increase the rate at which males graduate are losing their funding for college, in order to retain those athletes who have a much lower rate of graduation. This cannot be a desired effect of the law. The point of collegiate athletics is to enhance student athletes. This effect is illustrated in the table below.²⁹



²⁴ *Id.*

²⁵ *Id.*

²⁶ See generally Ann Coulter, *Title IX Defeats Male Athletes*, USA TODAY, July, 25, 2001, available at <http://www.usatoday.com/news/opinion/2001-07-25-ncguest2.htm>; Katie Thomas, *Women Want to Wrestle; Small Colleges Oblige*, N.Y. TIMES, May 27, 2008 (“Dozens of men’s teams have been eliminated over the past three decades, a phenomenon many coaches attribute to Title IX.”).

²⁷ Tony Dobies, *Title IX Demands Compromises*, THE DAILY ATHENAEUM, Oct. 21, 2008, available at http://www.da.wvu.edu/show_article.php?story_id=40027&archive_date=2008-10-21.

²⁸ As Football, Baseball and Basketball have lower graduation rates than the average, they drag down the graduation rate. In general, student athletes graduate at a higher rate than the general student population. As Football, Baseball, and Basketball players compose a higher percentage of the male student athletes, they push their counterparts, who play other sport, out of opportunities.

²⁹ NAT’L COLLEGIATE ATHLETIC ASSN., *supra* note 21.

NOTE: The chart above compares male students with male student athletes (S-As). The dates represent the date upon entrance of an institution of higher learning. Their Graduation Success Rate (GSR), is determined by the rate at which students graduate within five years of entering their institution. This chart illustrates the graduation rate differences for the major revenue producing sports (Football, Basketball, and Baseball) compared with those of track and other minor sport athletes

These statistics may not convince everyone. With statistics such as these, people can always see what they want within them. Therefore, I cannot solely base my article on these statistics. There are other issues with Title IX, things that both sides of the argument would agree with. Those who are against Title IX believe that the law should be reformed.³⁰ However, others believe that the law is not well enough enforced, to the point that many schools should be severely punished.³¹ The remainder of this comment will focus on these arguments, and how Title IX is in need of reform, in order to accomplish its goals in advancing women, and not inhibiting men.

b. Is this Really Accomplishing Our Goals?

If the above negative influences of Title IX are not enough to convince one that Title IX has run its course and needs and over-haul, Title IX may need to be re-examined as to what compliance really is, and what it really should be.

There are some who believe that Title IX does not even accomplish its goals, and has not yet reached a point at which there is equality.³² This is a compelling argument, if true; however, it may not be completely accurate. One of the problems with compliance, which is identified in an article about how the University of Illinois is not in compliance with Title IX or at least from the view of the author's opinion of Title IX compliance, is that compliance could be, to borrow a phrase from another context, "in the eye of the beholder".³³

As stated by Lester Munson, a Chicago-based lawyer and senior sports columnist for ESPN, "If you accept the effort and see [the underrepresented gender] as equal you'll never have a problem[.]"³⁴ Munson's quote demonstrates a problem with compliance and its potentially subjective nature.³⁵

James Madison University has one of the greatest examples of a Title IX 'battle'.³⁶ Students from the University of Maryland, Rutgers University, Howard University, George Washington University and American University joined those from James Madison in protest of the actions taken in cutting ten sports mainly to comply with Title IX.³⁷ A spokesperson for the College Sports Council, an organization dedicated to reforming Title IX, Jim McCarthy stated, "

³⁰ See generally The College Sports Council, <http://www.savingsports.org/about/> (last visited Jan. 12, 2010).

³¹ See generally Darren Swan & Evan Swan, *At U of I, Title IX is toothless*, MEDILL REPORTS CHICAGO, NW. UNIV., Dec. 11, 2007, available at <http://news.medill.northwestern.edu/chicago/news.aspx?id=73245>.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ Dustin Dopirak, *JMU Students Take Title IX Case To D.C.*, DNRONLINE.COM, Nov. 11, 2002, available at http://www.dnronline.com/sports_details.php?AID=7128&CHID=3.

³⁷ *Id.*

.. the original wording of Title IX is terrific, [however] [w]e believe that no student should be denied the opportunity to play a sport based on gender. But the proportionality quota has led to all of these teams being cut.”

Having such opposed forces can illustrate that there need to be reforms to a given regulation. Both sides of this argument have their valid points, but one thing is clear, both sides are hurt from the law, as is. While this may be a problem engrained in American culture, with the disproportionate amounts of resources needed and produced as there is no female equivalent of men’s collegiate football, something needs to be done. As JMU junior track athlete Mark Rinker said while discussing losing his team to a supposed Title IX cut, “This isn’t going to stop at JMU. This is a trend that started years ago, and it’s going to continue to keep happening. We’re so close to Washington. I just think it’s something that we should do to keep other people from having the same pain we felt the last month.”³⁸

As shown above, Mark Rinker is not the only one who has been harmed by this unfortunate situation. Over 2,200 men’s teams have been eliminated since 1981.³⁹ Many of these teams are men’s wrestling teams, men's gymnastics teams, men’s tennis teams, men’s track and field teams, and men's swimming and diving teams.⁴⁰ Eliminating programs such as this is the “path of least resistance” to Title IX compliance.⁴¹ It is not just struggling programs that are eliminated, either. Many programs of past glory, such as the University of Miami Men’s Swimming and Diving Team, which produced such greats as Greg Louganis, have also been eliminated.⁴² “College administrators have been lazy over the years, axing men's scholarships and programs in order to comply with Title IX. It's the easy way out. Those college administrators have acted first out of fear, intimidation and/or ignorance rather than a well-reasoned examination of Title IX.”⁴³

II. HISTORY OF APPLICATION

a. Passing the bill

Though Title IX was no doubt passed with good intention, it is riddled with vagueness.⁴⁴ The prior mentioned lack of legislative history does little to clarify the cloudiness of the intent,

³⁸ *Id.*

³⁹ Press Release, Eric McErlain, The College Sports Council, Study Reveals Alarming Decline in Men's College Athletic Opportunities: CSC Cites Pattern of Discrimination, Cuts Happening Across the Board (Mar. 27, 2009), available at http://www.savingsports.org/newsroom/display_releases.cfm?id=20; The College Sports Council, College Sports Council Longitudinal Study of NCAA Participation Data, <http://savingsports.org/presentation/>.

⁴⁰ Rebecca Leung, *The Battle Over Title IX; Male Athletes Suing To Change The Law*, 60 MINUTES – CBS NEWS, June 29, 2003, <http://www.cbsnews.com/stories/2003/06/27/60minutes/main560723.shtml>.

⁴¹ Dennis Dodd, *Football Needs to Start Making Title IX Sacrifices*, CBS SPORTSLINE, June 12, 2002, <http://www.cbssports.com/b/page/pressbox/0,1328,5427007,00.html>

⁴² Leung, *supra* note 40.

⁴³ Dodd, *supra* note 41.

⁴⁴ Courtney W. Howland, *Sex Discrimination and Intercollegiate Athletics: Putting Some Muscle on Title IX*, 88 YALE L.J. 1254, 1255 (1979).

and there is even less discussion of its application to athletics, as a matter of fact, sports were only mentioned twice.⁴⁵

Even the architect of Title IX, Senator Bayh, was not very clear on how to enforce his statute. Senator Bayh had to compromise with the minority Republicans, and specifically Representative Quie, of Minnesota. A very clear way in which this could have been accomplished would have been through quotas of some sort, but he did not want this to be the way in which Title IX was enforced. The following quote is an illustration as to why there were no quotas:

As you know, the House attached a floor amendment specifying that the legislation would not require specific quotas. I did not include such a provision as part of the Senate amendment because I believe my amendment already states clearly that no person, male *or* female, shall be subjected to discrimination. The language of my amendment does not require reverse discrimination. It only requires that each individual be judged on merit, without regard to sex.⁴⁶

b. Further Legislative Development

As a matter of fact, sports were never mentioned in the original law, and were added in a 1975 amendment.⁴⁷ Under the regulation, “[a] recipient which operates or sponsors interscholastic, intercollegiate, club, or intramural athletics shall provide equal athletic opportunity for members of both sexes.”⁴⁸ In order to determine compliance with the statute, it prescribes factors for measuring whether there is “equal opportunity for members of both sexes.” These factors are as follows:

- (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
- (2) The provision of equipment and supplies;
- (3) Scheduling of games and practice time;
- (4) Travel and per diem allowance;
- (5) Opportunity to receive coaching and academic tutoring;
- (6) Assignment and compensation of coaches and tutors;
- (7) Provision of locker rooms, practice and competitive facilities;
- (8) Provision of medical and training facilities and services;
- (9) Provision of housing and dining facilities and services;
- (10) Publicity.⁴⁹

⁴⁵ *Id.* Title IX was adopted in conference without formal hearings or a committee report. See S. REP. NO. 798, at 221-22 (1972). See generally Harold H. Bruff & Ernest Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369, 1388-89 (1977); sports were only mentioned twice in the congressional debate. See generally 118 CONG. REC. 5807 (1972) (statement of Sen. Bayh) (personal privacy to be respected in sports facilities); 117 CONG. REC. 30,407 (1971) (statement of Sen. Bayh) (intercollegiate football and men's locker rooms).

⁴⁶ 117 Cong. Rec. 30,406-07; Danielle M. Ganzi, *After the Commission: the Government's Inadequate Responses to Title IX's Negative Effect on Men's Intercollegiate Athletics*, 84 B.U. L. REV. 543, 547 (2004).

⁴⁷ 34 C.F.R. § 106.41(c) (2009).

⁴⁸ *Id.*

⁴⁹ *Id.*

The very first factor, with the “interests and abilities” creates an ambiguous standard, however, according to the regulations, many institutions had only one year within which to comply.⁵⁰ The government did not attempt to clarify its position on athletic programs until December of 1979, as what is now the Office of Civil Rights issued an Intercollegiate Athletics Policy Interpretation.⁵¹ The Office of Civil Rights attempted to address three areas, with the most significant being the compliance with the “interests and abilities”⁵² factor mentioned above.⁵³ The Policy Interpretation was the first mention of the three part test. To comply, a university need only comply with one prong of a three prong test.⁵⁴ The parts are:

- (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
- (2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or
- (3) Where the members of one sex are underrepresented among intercollegiate athletes and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.⁵⁵

c. Application to College Athletics

One might wonder how this legislation, dealing with federal funding, can be applied to either private institutions, or those run by the states. The Supreme Court accomplished this in the landmark case of *Grove City College v. Bell*.⁵⁶ Federal financial assistance may be received directly or indirectly, and the university received it indirectly through the federal financial aid program that was given to veterans.⁵⁷ In reaching its conclusion, the Court considered the congressional intent and legislative history of the statute in question to identify the intended recipient. The Court found that the 1972 Education Amendments, of which Title IX is a part, are "replete with statements evincing Congress' awareness that the student assistance programs established by the Amendments would significantly aid colleges and universities. In fact, one of the stated purposes of the student aid provisions was to ‘provid[e] assistance to institutions of

⁵⁰ 34 C.F.R. § 106.41(d) (2009).

⁵¹ See OCR Policy Interpretation, 44 Fed. Reg. 71,413 (Dec. 11, 1979) (to be codified at 34 C.F.R. pt. 86) (discussing the reasons for issuing the Policy Interpretation); David Aronberg, *Crumbling Foundations: Why Recent Judicial and Legislative Challenges to Title IX May Signal Its Demise*, 47 FLA. L. REV. 741, 754 (1995).

⁵² 34 C.F.R. § 106.41(c).

⁵³ 34 C.F.R. § 106.41(d).

⁵⁴ Aronberg, *supra* note 51, at 757.

⁵⁵ OCR Policy Interpretation, 44 Fed. Reg. at 71,418.

⁵⁶ *Grove City Coll. v. Bell*, 465 U.S. 555 (1984).

⁵⁷ *Id.* at 564.

higher educations.’ Pub. L. 92-318, § 1001(c)(1), 86 Stat. 831, 20 U.S.C. § 1070(a)(5)”.⁵⁸ The court in *Bob Jones Univ.*,⁵⁹ which can be read as a complement to and clarification of *Grove City’s* holding, stated that even if the financial aid to the veterans did not reach the university this would be considered financial assistance to the school since this released the school's funds for other purposes.⁶⁰ Therefore, a university may be deemed to have “received Federal financial assistance” even if that university did not show a “financial gain”.⁶¹

Title IX’s application to collegiate athletics was even further clarified by the Court in 1999.⁶² The Supreme Court in *NCAA v. Smith* followed along with and cited *Grove City* and *Bob Jones University*⁶³, in stating that while dues paid to an entity (NCAA) by colleges and universities, who were recipients of federal financial assistance, “at most ... demonstrates that it [NCAA] indirectly benefits from the federal assistance afforded its afforded members.” But the Court stated, “This showing, without more, is insufficient to trigger Title IX coverage.”⁶⁴ “Entities that receive federal assistance, whether directly or through an intermediary, are recipients within the meaning of Title IX; entities that only benefit economically from federal assistance are not.”⁶⁵

d. How are College Athletic Programs Complying

The statute implies a preference for schools to comply with Title IX on their own, without monitoring.⁶⁶ There are many different tests to determine compliance with Title IX,⁶⁷ listed above, with which schools must comply, however, much of the focus has centered on the three-part test.⁶⁸ In addition, an institution does not have to specify what prong they are attempting to comply with until a complaint is filed against them.⁶⁹

In general, athletic directors believe, and only trust, in their compliance with the proportionality prong.⁷⁰ This is because the proportionality prong is the only fully objective, quantifiable test of the three. Since no clear standards, even through litigation, have been developed for the second two prongs, they are not of meaningful use to many schools, who are interested in avoiding litigation at all costs.⁷¹ The government has therefore effectively led

⁵⁸ *Id.* at 565-66.

⁵⁹ *Bob Jones Univ. v. Johnson*, 396 F. Supp. 597, 603 (D.S.C. 1974).

⁶⁰ *Id.* at 602.

⁶¹ *Id.* at 602-03.

⁶² *See Nat’l Collegiate Athletic Ass’n v. Smith*, 525 U.S. 459 (1999)

⁶³ *Id.* at 470.

⁶⁴ *Id.* at 468.

⁶⁵ *Id.*

⁶⁶ 20 U.S.C. § 1682 (2000) (the statute won’t come into effect until someone reports a non-compliance and then fails to rectify the discrepancy).

⁶⁷ *Supra* Part 2.b.

⁶⁸ OCR Policy Interpretation, 44 Fed. Reg. at 71,418; Aronberg, *supra* note 51, at 757.

⁶⁹ OCR complaints may be filed by individuals or groups, and investigations may also be initiated by the OCR itself. U.S. GEN. ACCOUNTING OFFICE, GENDER EQUITY: MEN’S AND WOMEN’S PARTICIPATION IN HIGHER EDUCATION 7-8 (2000)

⁷⁰ Ted Leland & Karen Peters, *Title IX: Unresolved Public Policy Issues*, 14 MARQ. SPORTS L.J. 1, 4 (2003); SEC’Y OF EDUC. COMM’N ON OPPORTUNITY IN ATHLETICS, “OPEN TO ALL”: TITLE IX AT THIRTY 23-24 (2003).

⁷¹ U.S. GEN. ACCOUNTING OFFICE, *supra* note 69, at 38-40.

schools to infer that “the only surefire way to abide by Title IX was to achieve what's called proportionality.”⁷²

The second prong, which requires a history and continuing practice of program expansion, is more of a temporary device than a permanent solution.⁷³ This prong used to be very easily attained, as most schools had almost no women’s programs and it was very easy to add programs, however, after the tremendous growth of women's sports at the intercollegiate level, it has become difficult to keep adding teams and increasing budgets to have an ongoing history and thus satisfy this prong.⁷⁴

The third prong requires schools to accommodate the interests and abilities of their female student body. In order to satisfy this prong, a court must look at whether female students have a certain interest in a particular sport at a school, and the school does not provide for that interest. Therefore, if viewed in its most strict and literal sense, the language of this prong has created a belief that in order to be in compliance, schools must approve all requests to recognize new women's teams.⁷⁵ Without a clearer definition of the second two prongs, most universities will continue to plan their compliance with Title IX by following the first prong, despite statements that “no one prong is favored.”⁷⁶

e. Complying with the first prong

If an institution wants to comply with the proportionality prong, and as discussed above, this is the most prevalent of the strategies, they may do so in three ways: 1) increase opportunities for women, 2) reduce opportunities for men, or 3) a combination of both.⁷⁷ The goal of Title IX is to add programs for women, however, it is much less expensive to cut a men's team than it is to add a women's. This is directly against the true spirit of Title IX. The Office of Civil Rights, in 1996, noticed that many institutions face increasing budget constraints, but it thought it could work with institutions to find “creative solutions” to ensure equal opportunities in intercollegiate athletics.⁷⁸ The OCR's stated solutions included identifying national and regional interest levels for particular sports and adding women's teams or elevating club teams to varsity status based on these interest levels.⁷⁹ However, this is not the only way in which to comply, and unfortunately, the majority of solutions to this issue, by athletic directors, do not follow the spirit of Title IX.⁸⁰

The Director at the Tucker Center for Research on Girls and Women in Sport at the University of Minnesota, Mary Jo Kane, has been quoted stating, “[t]he issue of whether girls

⁷² Leung, *supra* note 40.

⁷³ Robert C. Farrell, *Title IX or College Football?*, 32 HOUS. L. REV. 993, 1043-44 (1995).

⁷⁴ See, e.g., *Cohen v. Brown Univ.*, 101 F.3d 155, 166 (1st Cir. 1996).

⁷⁵ U.S. GEN. ACCOUNTING OFFICE, *supra* note 69, at 26.

⁷⁶ Letter from Gerald Reynolds, Assistant Sec’y for Civil Rights, Dep’t of Educ. (July 11, 2003), *available at* <http://www.ed.gov/about/offices/list/ocr/title9guidanceFinal.html?exp=0>.

⁷⁷ See Farrell, *supra* note 73, at 1052-53.

⁷⁸ Letter from Norma V. Cantú, Assistant Sec’y for Civil Rights, Dep’t of Educ. (Jan. 16, 1996), *available at* <http://www.ed.gov/print/about/offices/list/ocr/docs/clarific.html>.

⁷⁹ *Id.*

⁸⁰ Kristin Rozum, *Staying Inbounds: Reforming Title IX in Collegiate Athletics*, 18 WIS. WOMEN'S L.J. 155, 168-71 (2003).

should play sports is off the radar screen. It's now moved to 'What sport should that be?'"⁸¹ Some institutions have been attempting to add women's sports that are relatively inexpensive to operate and carry a large number of participants, such as rowing, to help offset the size of a football team.⁸² A ridiculous action by a completely land locked school, Kansas State, has added a rowing team, as they can cheaply add large numbers of female athletes, even though there is a lack of local demand for the sport.⁸³ This does increase opportunities for women to participate in sports, however, there often is not a strong interest in the particular region to field such a team and other sports that do have a strong interest at the high school level are not added simply because the sport does not require a large number of participants to help offset the football team. "For example, although over 100 Minnesota high schools sponsor girls' cross-country ski teams and eighty sponsor girls' alpine skiing (for a total of nearly 3000 female skiing participants in Minnesota high schools alone), the university chose to add rowing and not skiing."⁸⁴ While on average, women's rowing teams carry forty-four participants, women's skiing teams carry only eleven.⁸⁵ Another attempt at compliance is by controlling roster sizes, increasing women's while decreasing men's.⁸⁶ This limits the ability of men's teams to have non-scholarship athletes, while creating such opportunities for women's teams, even though women often are not as interested as men in walking-on.⁸⁷ This has caused coaches to treat female walk-ons unfairly. In determining proportionality figures, the OCR counts the number of student-athletes on a team as of the date of first competition.⁸⁸ Therefore, women's teams keep a number of walk-ons on the roster through the first competition, only to cut them shortly after.⁸⁹

There is no doubt that these attempts at compliance are not within the spirit of Title IX. Title IX was meant to create opportunity for women, not deny it to men, nor to manipulate women.

III. THE GROWING DEMAND FOR ACTION

Challenges have been made in the 1st, 3rd, 5th, 6th, 7th, 8th, 9th, and 10th circuit courts in two different forms.⁹⁰ The first is that, institutions have challenged Title IX regulations as a defense to suits filed by female student-athletes, and in general the courts have repeatedly upheld the

⁸¹ Heller & Odegard, *supra* note 11.

⁸² See generally, Tom Farrey, *Football Grabs Stronger Hold on Purse Strings*, ESPN, Feb. 25, 2003, <http://sports.espn.go.com/espn/print?id=1514457&type=story> (stating that Kansas State University's with proportionality is bolstered by its women's sixty-two-member equestrian team and a seventy-four-member rowing team).

⁸³ Dodd, *supra* note 41.

⁸⁴ NAT'L FED'N OF STATE HIGH SCH. ASS'NS, 2002-03 PARTICIPATION SURVEY 57 (2003), www.nfhs.org/scriptcontent/Va_custom/SurveyResources/2002_03_Participation.pdf.

⁸⁵ NAT'L COLLEGIATE ATHLETIC ASS'N, 1981-82 TO 2001-02 NCAA SPORTS SPONSORSHIP AND PARTICIPATION RATES REPORT 167 (2003) [hereinafter NCAA Sports Sponsorship Report], *available at* http://www.ncaa.org/library/research/participation_rates/19822002/participation.pdf.

⁸⁶ SEC'Y OF EDUC., *supra* note 70, at 30.

⁸⁷ *Id.* at 30-31.

⁸⁸ Cantu, *supra* note 78.

⁸⁹ See Leland & Peters, *supra* note 70, at 5

⁹⁰ Nat'l Wrestling Coaches Ass'n v. U.S. Dep't of Educ., 263 F. Supp. 2d 82, 94-95 (D.D.C. 2003).

regulations.⁹¹ Second, male student-athletes have sued their schools as a result of the elimination of their sport.⁹²

[The] National Wrestling Coaches Association (“NWCA”), Committee to Save Bucknell Wrestling (“CSBW”), Marquette Wrestling Club (“MWC”), Yale Wrestling Association (“YWA”), and College Sports Council (“CSC”) are associations representing male intercollegiate and scholastic athletes, coaches, and alumni. They commenced this action for declaratory judgment and injunctive relief to enjoin the U.S. Department of Education (“DoE”) from enforcing Title IX, which prohibits sex discrimination in education, in a manner they contend results in discrimination against male athletes. Specifically, plaintiffs maintain that the Department's current enforcement policies lead educational institutions to cut men's sports teams, artificially limit the number of participants on men's teams, and otherwise impermissibly discriminate against men based on sex in the provision of athletic opportunities, thereby denying male athletes and other interested parties the equal protection of laws.⁹³

In addition, some have offered the argument that the Title IX regulations force schools to discriminate against males because of their sex, by cutting male sports to comply with Title IX, their schools violate both Title IX and the equal protection component of the Fifth Amendment.⁹⁴ These strategies have been unsuccessful. Since the courts have consistently deferred to the Title IX regulations, any change in Title IX policy likely will have to come through the legislature.

Many of the efforts to reform Title IX in the legislature have focused on football.⁹⁵ College football is different from other sports due to its vast roster size, its vast budgetary necessities, and that in some cases, football programs generate enough revenue to fund the rest of the athletic program.⁹⁶ Based on this third reason, the earliest proposals to reform Title IX attempted to completely exempt all revenue-producing sports, including football, from the Title IX regulations.

IV. POSSIBLE REMEDIES

a. Exemption for Revenue Producing Sports

⁹¹ *Id.* See generally *Cohen*, 101 F.3d 155.

⁹² *Boulahanis v. Bd. of Regents*, 198 F.3d 633, 636 (7th Cir. 1999).

⁹³ *Nat'l Wrestling Coaches Ass'n*, 263 F. Supp. 2d at 84.

⁹⁴ *Boulahanis*, 198 F.3d at 639.

⁹⁵ See *Gender Equity in Intercollegiate Athletics: Hearing Before the Subcomm. on Postsecondary Educ., Training, & Life-Long Learning of the H. Comm. on Econ. & Educ. Opportunities*, 104th Cong. 200, 2003 (1995) (statement of Charles M. Neinas, Exec. Dir., Coll. Football Ass'n), available at 1995 WL 269760; Charles P. Beveridge, *Title IX and Intercollegiate Athletics: When Schools Cut Men's Athletic Teams*, 1996 U. ILL. L. REV. 809, 837-839 (1996).

⁹⁶ See DANIEL L. FULKS, REVENUES AND EXPENSES OF DIVISION I AND II INTERCOLLEGIATE ATHLETICS PROGRAMS: FINANCIAL TRENDS AND RELATIONSHIPS-200116 (2002), available at http://www.ncaa.org/library/research/i_ii_rev_exp/2002/d1_d2_revenues_expenses.pdf.

One way in which to release the constraints of Title IX on college athletics would be to exempt revenue producing sports, which are sports that produce enough money to fund their own activity. Football and basketball are two sports that generally produce enough revenue to support their own operations, as well as having large amounts of excess money that is put back into the budget.⁹⁷ However, currently the rate at which these programs spend is taken into account without regard for the revenues that they produce. Football and basketball consume the majority of men's total athletic budgets in Division I-A schools, 74%.⁹⁸ Logically, it would make sense to eliminate one of these programs; however, 'cash is king' and these sports will never be eliminated due to their large revenue production and alumni support.⁹⁹

This was first proposed in the debate over the Education Amendments of 1974.¹⁰⁰ Senator John Tower proposed an amendment to exempt all revenue-producing sports from Title IX as long as the sport could support itself without university funding.¹⁰¹ Senator Tower's rationale was that because revenue-producing sports often generate enough income to fund themselves as well as the non-revenue-producing sports in the athletic department, regulating the revenue producers would erode the financial base of the entire athletic program, thereby reducing opportunities for both men and women.¹⁰² This amendment, unfortunately, only passed the Senate, not receiving the support it needed from the House of Representatives in order to become law.¹⁰³

In addition, a sport which produced enough revenue to maintain its own operations would not need to take money from students who receive federal aid and therefore could potentially fall outside the reach of Title IX in that they would not receive federal aid, they would simply benefit from their association to an institution that does, which, according to the Court, does not necessarily amount to enough to trigger Title IX.¹⁰⁴

b. Further Define and Reinforce the Second Two Prongs

In response to school administrators' confusion about specific compliance requirements, the OCR should provide "clear, consistent and understandable written guidelines for implementation of Title IX and make every effort to ensure that the guidelines are understood, through a national education effort."¹⁰⁵ The Commission on Opportunity in Athletics described this possibility in its report in 2002.¹⁰⁶ The courts have given the label "safe harbor" to the

⁹⁷ A Look at Big Ten Football Revenues, Expenses, <http://myespn.go.com/blogs/bigten/0-3-14/A-look-at-Big-Ten-football-revenues--expenses.html> (March 3, 2009, 17:08 EST); Iowa FB revenue comparisons with Iowa State, Notre Dame, Big Ten, <http://scottdo.wordpress.com/2009/03/01/iowa-fb-revenue-comparisons-with-iowa-state-notre-dame-big-ten/> (Mar. 1, 2009, 10:10 EST).

⁹⁸ Nat'l Women's Law Ctr., *supra* note 9; NAT'L COLLEGIATE ATHLETIC ASS'N, 2002-03 REVENUES AND EXPENSES OF DIVISIONS I AND II INTERCOLLEGIATE ATHLETICS PROGRAMS REPORT 32 (2005).

⁹⁹ Dodd, *supra* note 41.

¹⁰⁰ 120 CONG. REC. 15,322-23 (1974).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ Nondiscrimination in Federally Assisted Programs, 43 Fed. Reg. 18,772, 18,774 (May 2, 1978) (to be codified at 45 C.F.R. pt. 1110).

¹⁰⁴ Nat'l Collegiate Athletic Ass'n v. Smith, 525 U.S. 459, 468 (1999).

¹⁰⁵ SEC'Y OF EDUC., *supra* note 70, at 33.

¹⁰⁶ *Id.* at 24.

substantial proportionality part, however, the Commission suggested that all three parts of the “interests and abilities” test should be safe harbors.¹⁰⁷ This would assist those schools in complying with Title IX as they would be capable of demonstrating compliance through the second or third parts.¹⁰⁸ Currently, if school officials were attempting to comply with the second or third prong, they do not have a definitive defense and they still may be at risk.¹⁰⁹ The Commission believed that adoption of this recommendation would alleviate concerns that compliance with the second and third parts was insufficient to insulate schools from further complaints.¹¹⁰

c. Surveying

The Commission came forward with another recommendation, in that the university could continuously survey its population.¹¹¹ The Commission suggested that institutions could use such surveys “as a way of (1) demonstrating compliance with the three-part test, (2) allowing schools to accurately predict and reflect men's and women's interest in athletics over time, and (3) stimulating student interest in varsity sports.”¹¹² It would be recommended that the OCR should set out specific guidelines for school to follow when conducting these surveys, so they could be used to demonstrate compliance with the three parts of the “interests and abilities” requirement.¹¹³

It is believed that these surveys may loosen the tight hold that Title IX compliance has placed upon collegiate athletic budgeting offices.¹¹⁴ These surveys have the potential of showing that women’s interest in participating in collegiate athletics is being met, by an amount equal to, if not more than the rate at which men’s interest is met.¹¹⁵

V. CONCLUSION

Title IX has come a long way in its goal to provide opportunity for women. The spirit and goal of the law are still a proper and desirable outcome; however, there must be some evolution to the application of Title IX to collegiate athletics.

There is no doubt that the framers nor even proponents of Title IX, who would like to further advance female opportunities in sports, believe that men’s programs or athletes should be harmed. As Arizona State University associate athletic director Dawn Rogers theorized, “[t]hat’s a shortfall of the law. It’s about providing opportunities, not taking away from one group to keep up with another.”¹¹⁶

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 39.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ SEC’Y OF EDUC., *supra* note 70, at 38, 59.

¹¹² *Id.* at 38.

¹¹³ *Id.*

¹¹⁴ Kathryn Jean Lopez, *Interest Surveys Will Let Secret out on Title IX Women's Sports*, PASADENA STAR NEWS, Mar. 27, 2005.

¹¹⁵ *Id.*

¹¹⁶ Heller & Odegard, *supra* note 11.

The strains on college athletics must be loosened, in order to ensure that Title IX does not amount to the exact opposite of its intention, denying opportunities to some, while creating a 'gender-war'. Title IX implementation has reached a pinnacle moment in its value to society. Alumni of institutions will not allow for the revenue producing sports to be eliminated. Young men are being hurt by the elimination of their sport, and even in the most extreme cases, women are being taken advantage of to simply fill a quota like number for the appearance of compliance. Something must be done, and with the Judiciary's stubbornness to take action, it seems that the legislature or potentially even the Office of Civil rights must take action.