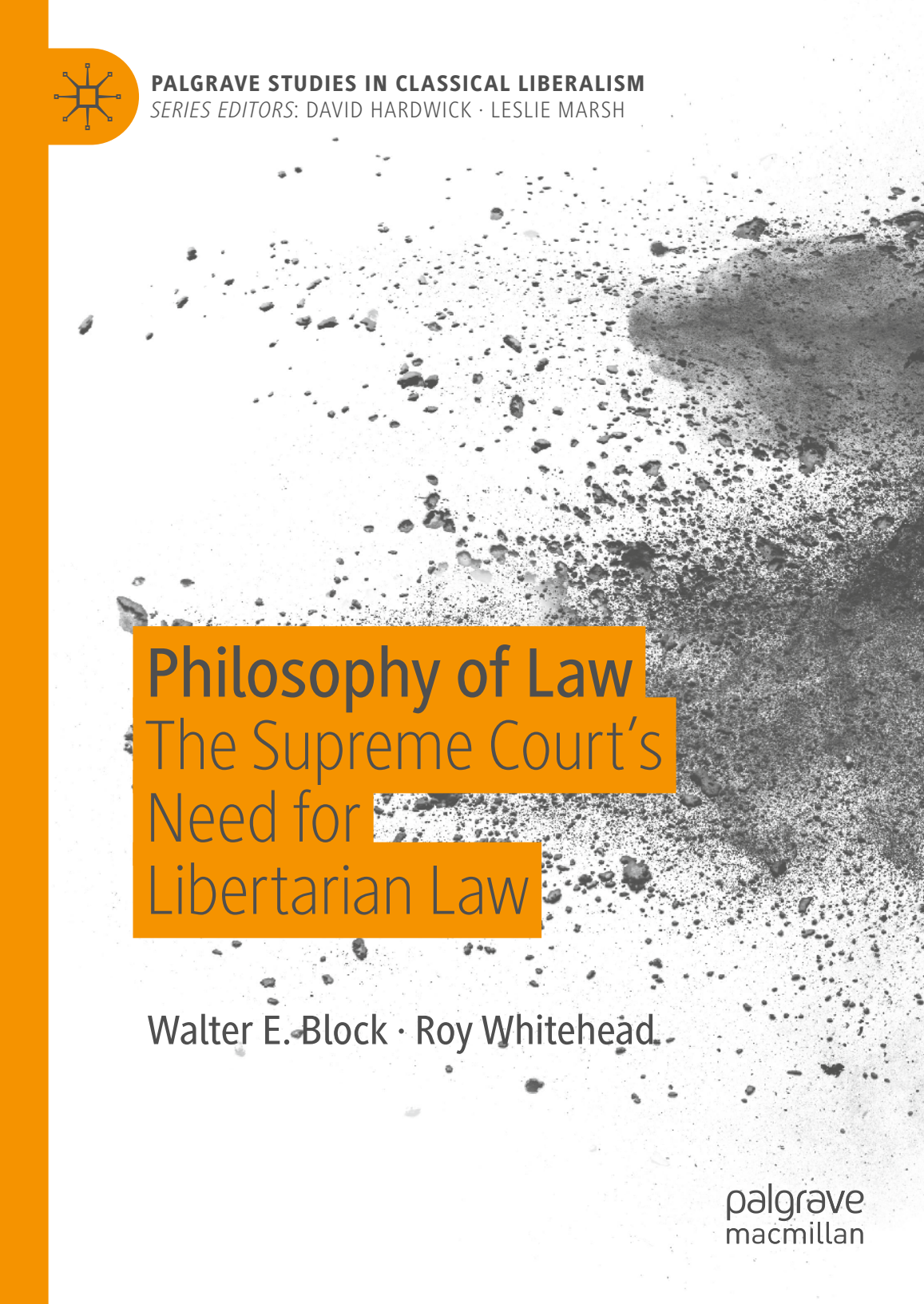

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Philosophy of Law
The Supreme Court's Need for Libertarian Law

Walter E. Block · Roy Whitehead

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Introduction

The libertarian philosophy of law is based on the premise that no one may threaten or initiate violence against other people or their legitimately owned property. The source of licit ownership is broadly based upon Lockean homesteading principles and self-ownership.

As such, libertarianism is not very controversial. Who, after all, advocates murder, rape, or theft, quintessential violations of this code? However, when this perspective is applied to a whole host of legal issues, the fireworks begin. For the mainstream view on these issues is very much in the direction of *violating* these supposedly acceptable to all principles.

This book will lay out the libertarian philosophy in all of its dimensions and apply it to several very fascinating issues, including the following: sexual, religious and racial discrimination, environmentalism, markets in human body parts, drug legalization, the Boy Scouts and anti-gay discrimination, sexual harassment, and criminology.

A person could be forgiven for thinking that this collaboration is one between "strange bedfellows." Block, best described as a New York City Jew, hails from Brooklyn. Whitehead is a "good old boy" from the backwoods of Arkansas.

We both crossed paths while professors at the business school at the University of Central Arkansas (UCA), in Conway, AR. Roy taught business ethics and business law, and Walter was the chair of the economics and finance department.

What was the occasion of our first meeting? It was in 1998, when our business school was faced with the accreditation process from the Association to Advance Collegiate Schools of Business (AACSB). This was very important to us, since without it we would not be accredited and suffer all sorts of grievous penalties. One of the dimensions upon which we would be rated was the quantity and also the quality of the publications authored by the UCA professors. Hard copies of these journal articles (published in the previous five years) were duly collected and perused by the entire professoriate.

It turned out that by far the most voluminous publishers were the two of us. We were head and shoulders above all our colleagues in this regard, pretty much tied with each other at about 40 articles each (our third best colleagues registered only in the low teens). Not unexpectedly, the two of us expressed interest in each other's writings, began to have lunch together, formed a friendship, and then began to collaborate with each other in future publications. The first of these appeared in print in 1999, and appears as Chap. 1 in the present book. Our coauthorships continued for many years (Whitehead has retired from UCA, and Block took up a professoriate with Loyola University New Orleans in 2001), and our last one saw the light of day in 2017, and appears as Chap. 16 below.

We have had some interesting experiences in having these article of ours published, mainly, in law reviews. Typically, Whitehead would write the first half of our essays, and Block the last half. Whitehead, a lawyer, would typically discuss, describe, analyze, and pontificate upon extant law and court decisions. The contribution of Block, an economist and libertarian theoretician, was very different. Instead of looking at the state of law, he would opine about what the law should be, a rather different undertaking.

When academics publish in the field of economics, they are allowed to submit their papers only to one journal at a time. If their first foray was rejected, they would typically try a second scholarly publication, and so on, seriatim. The process for law reviews is quite different. Here, one could submit an essay to dozens, even hundreds of them at a time. Naturally, in the latter case, we would receive dozens of responses for each submission. Many rejected our feeble efforts outright, and, as you can

see, below, some few accepted them (as it happens, every piece we co-authored appeared in a law review; this book compiles them).

The most interesting of these letters fit into neither of these categories, neither accepting our submissions outright nor rejecting them entirely. In this category, editors might say something along the following lines: "The first half of this essay is splendid. It constitutes a sober, measured, information-packed analysis of the xyz subject. But the second part was written by a madman, an ignoramus, a moron, and idiot, someone who should be incarcerated in a mental institution. If you break up this article into two parts, we will gladly publish the first, brilliant, half of it. But the second part should be confined to the dustbin." Very, very rarely, did the opposite occur. Here is a paraphrase of the second type of editorial response: "The first half of this essay is dull, boring, repetitive of other work, and singularly unhelpful. But the second part is magnificent, brilliant, creative. We will accept this otherwise wonderful essay for publication, if you deep-six the opening section." We presume that none of these editors knew which author was primarily responsible (we each helped the other with our contributions) for which section of these papers.

Needless to say, we stuck together through thick and thin. We never broke ranks. We rejected all offers of publication which praised only one section of these papers, some from very prestigious law reviews.

You now have fair warning about the chapters you are about to read. We expect that most people who pick up this book will like it in its entirety. But, there may well be some who are edified by one part of each chapter, and horrified, or bored, by the other. Happy reading.

Walter E. Block
Roy Whitehead

Part I

Discrimination

1

Gender Equity in Athletics

Background

For years intercollegiate athletics has offered interested and able students opportunities to experience the lessons of competition, develop physical and leadership skills, be a part of a team, and perhaps most important, enjoy themselves. Good intercollegiate athletics programs require competitive parity, universal and consistently applied rules, and an opportunity to participate according to one's interest and ability. The majority of National Collegiate Athletic Association (NCAA) members have sought to assure the foregoing conditions, but there is considerable evidence that they have not fully succeeded with regard to women.

Because there was no assurance of equal opportunity in the range of components of education, Congress enacted Title IX of the Educational Amendments of 1972.[1] The federal law stipulates that:

> [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

[1] 20 U.S.C. §1681 *et seq*. (1972).

W. E. Block, R. Whitehead, *Philosophy of Law*, Palgrave Studies in Classical Liberalism,
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> under any education program or activity receiving federal financial assistance.[2]

Interestingly, an often ignored subsection of the statute, often quoted by football coaches, provides:

> [N]othing contained in subsection (a) … 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 that 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…. (20 U.S.C. §1681(b))

In 1991, the NCAA surveyed its member's expenditures for women's and men's athletics programs. The survey revealed that undergraduate enrollment was roughly equally divided by sex, but men constituted 69.5% of the participants in intercollegiate athletics, and their programs received approximately 70% of the athletics scholarship funds, 77% of operating budgets, and 83% of recruiting money.[3]

In response to the study, the NCAA appointed a Gender Equity Task Force that submitted its report during July 1993. The Task Force, in its report, defined gender equity as follows:

> An athletics program can be gender equitable when the participants in both men's and women's sports programs would accept as fair and equitable the overall program of the other gender.[4]

The report defined the ultimate goal of gender equity as:

> The ultimate goal of each institution should be that the numbers of male and female athletes are substantially proportionate to their numbers in the institution's undergraduate population.[5]

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[2] 20 U.S.C. §1681(a) (1972).

[3] Final report of the NCAA Gender-Equity Task Force, page 1, 1993, hereinafter referred to as The Report.

[4] The Report, page 2.

[5] The Report, page 3.

In January 1994, the NCAA members gave a lukewarm endorsement of gender equity by voting to encourage member institutions to follow the "law" concerning gender equity.[6] One purpose of this article is to review the guiding regulations and cases that interpret the "law" for the benefit of those who are interested in effectively accommodating the interest and abilities of women athletes. We are concerned that the Federal court decisions which have dealt specifically with Title IX and "gender equity" have generally failed to focus on the real meaning of Title IX, "fully and effectively accommodating the interests and abilities of women athletes." This is due to a misguided focus almost solely on proportionality in numbers rather than on a real accommodation of athletic abilities.

Another goal of this article is to philosophically and legally examine the underlying principles of gender equity in athletics. To this end, we will criticize this "law" from a perspective based on property rights and economic freedom.

What Are the Requirements?

Part I

The primary sources of gender equity responsibilities are found in Title IX, the implementing regulations,[7] and, perhaps more important, the Title IX Athletics Investigators Manual used by the Department of Education, Office of Civil Rights (OCR).[8] Judges who are involved in Title IX cases frequently cite the Office of Civil Rights Manual as authority. The OCR takes several major factors into account in determining whether intercollegiate athletic programs are gender equitable. The program components are[9]:

1. Accommodation of athletic interests and abilities;
2. Equipment and supplies;
3. Scheduling of games and practice times;

[6] Amendment No. 2-1, Principle of Gender Equity, NCAA Convention, January 1994.

[7] 34 C.F.R. Part 106, effective July 21, 1975, see also 34 C.F.R. §106.41 and §106.37 (1992).

[8] Title IX Athletics Investigators Manual, Office of Civil Rights, Department of Education, 1990, hereinafter referred to as the Manual.

[9] 34 C.F.R. §106.41 and 34 C.F.R. §106.37 (1992).

4. Travel per diem allowance;
5. Opportunity to receive coaching and academic tutoring;
6. Assignment and compensation of coaches and tutors;
7. Locker rooms, practice, and competitive facilities;
8. Medical and training facilities and services;
9. Housing and dining facilities and services;
10. Publicity; and,
11. Athletic scholarships.

Although all the program components are considered important, perhaps the most relevant issue is whether or not the university is providing an effective accommodation of students' interests and abilities. The regulations require institutions that offer athletics programs to accommodate effectively the interests and abilities of students of both genders to the extent necessary to provide equal opportunity in selection of sports and levels of competition. The Office of Civil Rights uses three factors to assess the opportunity for individuals of both genders to compete in intercollegiate programs:

1. Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to the respective enrollments;
2. Where members of one sex have been and are underrepresented among intercollegiate athletics, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities to that sex; and
3. Where members of one sex are underrepresented among intercollegiate athletics, and the institution cannot show a continuing practice of program expansion such as that cited above, where it can show that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.[10]

Unfortunately, very few institutions, especially those with football programs, are able to meet the first test, proportionality. Additionally, a

[10] 34 C.F.R. §106.41(c)(1) (1992).

training session with an author of the OCR Investigators Manual reveals that no institution, to his knowledge, has ever met the second test consisting of a history and practice of program expansion responsive to the interests and abilities of women.[11]

Given that few institutions can meet parts one and two of the test, we must focus on whether the institution is effectively accommodating the interests and abilities of the underrepresented sex.

Recall that the NCAA Gender Equity Task Force defined gender equity as having the same proportion of female and male athletes as in the undergraduate student body. Much to the dismay of some interest groups, OCR has ruled that the third part of the test may be satisfied by the institution showing it has accommodated the interest and abilities of its female students, although there may be a substantial disproportionality of numbers between male and female athletes. According to the OCR, this may be demonstrated by showing that the opportunity to participate in intercollegiate athletics is consistent with the interests of enrolled women undergraduates who have the ability to play college sports, which can be determined by an external survey of the university's recruiting area, including high school and junior college competition, summer league competition, and sanctioned state sports. The university need only accommodate women who have the ability to play at the intercollegiate level.[12]

The Office of Civil Rights does not generally interview undergraduates who cannot play at the intercollegiate skill level. It is clear, however, that if the undergraduate survey, or external survey of the recruiting area, suggests that potential female students who possess the required interest and ability are present, and there is a reasonable availability of competition for a team, they must be accommodated. If the conference, for example, has women's softball, and softball interests and abilities are discovered in the undergraduate population and the recruiting area, the university must accommodate this by inaugurating a woman's softball team.

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[11] Remarks of Lamar Daniel, Office of Civil Rights, Gulf South Conference Meeting, Birmingham, Alabama, January 26, 1994.

[12] The Manual, Effective Accommodation of Students Interests and Abilities, pp. 21–28, see also 34 C.F.R. §106.41(c)(1) (1992).

Secondly, there is perhaps the most misunderstood area of gender equity compliance, athletic financial assistance. OCR regulations provide that:

> [Institutions must provide reasonable opportunities for athletic scholarships awards for members of each sex in proportion to the number of students of each sex participating in … intercollegiate athletics.[13]

OCR will determine compliance with this provision of the regulation primarily by means of a financial comparison. The requirement is that proportionately equal amounts of financial assistance (scholarship aid) are available to men's and women's athletics programs. This rule is often misinterpreted as mandating that the amount of financial assistance to male and female athletes be proportionate to their undergraduate enrollments. For example, if a university has 60% female and 40% male, 60% of the financial assistance would have to go to female athletes. Fortunately, or unfortunately, depending on one's point of view, the foregoing is not the test for compliance.

OCR measures compliance with the athletic financial assistance standard by dividing the amounts of aid available for members of each sex by the numbers of male or female participants in the athletic program and tabulating the results. Institutions may be found in compliance if this comparison results in substantially equal amounts (plus or minus 2 to 4%) or if a resulting disparity can be explained by adjustments that take into account a legitimate, nondiscriminatory factor.[14] Because of this interpretation, the institution described above with an undergraduate enrollment of 60% female and 40% male may be in compliance if it spends equal amounts on each male and female athlete even if there are more male than female athletes. For example, if it has an athletic financial assistance budget of $1 million and spends $700,000 of that on 70 male athletes and $300,000 on 30 female athletes. Note that if 60% of the participants in athletics programs are men, then male athletes should receive about 60% of the available athletic financial assistance even if the

[13] 34 C.F.R. §106.37 (1992).

[14] The Manual, pp. 14–20.

undergraduate female enrollment exceeds the male undergraduate enrollment.

If the financial assistance provided is not substantially equal, the Office of Civil Rights will determine whether there is a legitimate nondiscriminatory factor to explain the difference.[15] For example, the institution can justify the differences in awards by noting the higher costs of tuition for students from out of state that in some years may be unevenly distributed between men's and women's programs. These differences are nondiscriminatory if they are not the result of policies or practices which limit the availability of out of state scholarships to either men or women. Further, an institution may decide the awards most appropriate for program development. Often this may initially require the spreading of scholarships over as much as four years for developing programs. This may result in the award of fewer scholarships in the first few years than would be necessary to create equality between male and female athletes. The OCR Investigators Manual, however, directs investigators to investigate carefully "reasonable professional decisions" when there is a negative effect on the underrepresented sex.

The regulations require "equitable" treatment for female athletes in the provision of equipment and supplies.[16] The OCR defines equipment and supplies as uniforms, other apparel, sports-specific equipment and supplies, instructional devices, and conditioning and weight training equipment. In assessing compliance, the OCR takes a careful look at the quality, amount, suitability, maintenance and replacement, and availability of equipment and supplies to both male and female athletes. If there is a disparity, the university is in violation. The OCR permits nondiscriminatory differences based on the unique aspects of particular sports, and the regulations do not require equal expenditures for each program. For example, the equipment for the (male) football team may be more expensive than the equipment for the women's volleyball team.[17]

[15] The Manual, p. 19.

[16] 34 C.F.R. §106.41(c)(2) (1992).

[17] The Manual, page 29.

The regulations also require equality in the scheduling of games and practice time.[18] OCR assesses five factors in determining compliance. They are[19]:

1. Number of competitive events per sport;
2. Number and length of practice opportunities;
3. Time of day competitive events are scheduled;
4. Time of day practice opportunities are scheduled; and
5. Opportunities to engage in preseason and postseason competition.

Considerable emphasis is placed on practice and game time. It is usual for women's practice to be scheduled immediately before or immediately after men's. As a result, female athletes may have to skip lunch or dinner or eat a very light lunch or dinner to effectively participate. Additionally, it is common to schedule women's games before men's games and start them at about 5:30 p.m. This results in denying female athletes the opportunity to have their parents, friends, and acquaintances present at the event unless they live nearby or can get off work early. To be in compliance, some programs have adopted a rotating schedule for practice and/or games. For example, every other women's game would start at 7:30 rather than 5:30. The men's team would alternate, correspondingly.

The regulations require an assessment to decide whether the athletic program meets the travel and per diem allowances requirement.[20] OCR assesses the following factors to decide compliance[21]:

1. Modes of transportation;
2. Housing furnished during travel;
3. Length of the stay before and after competitive events;
4. Per diem allowance; and
5. Dining arrangements.

[18] 34 C.F.R. §106.41(c)(3) (1992).
[19] The Manual, pp. 35–42.
[20] 34 C.F.R. §106.41(c)(4) (1992).
[21] The Manual, pp. 43–48.

The easy way for an athletic program to ensure compliance is to treat male and female teams alike. If male athletes stay two to a room, they should house female athletes in the same manner. If the male team travels by airplane, the comparable female team should do so also. If they provide the male team a catered meal before the event, this should apply to the female team as well.

The regulations also require equality in the opportunity to receive academic tutoring, and assignment and compensation of tutors.[22] OCR looks for the academic qualifications, training, experience, and compensation of tutors. If there is any disparity in the opportunity to receive academic tutoring and assignment and compensation of tutors, the university is violating Title IX.[23]

The regulations require equality in the opportunity to receive coaching and assignment and compensation of coaches.[24] The OCR looks at three factors in this regard. They are:

1. Relative availability of full-time coaches;
2. Relative availability of part-time and assistant coaches; and
3. Relative availability of graduate assistants.

The OCR lists two factors to be assessed in determining compliance in assignment of coaches:

1. Training, experience, and other professional qualifications; and
2. Professional standing.

The policy interpretation lists seven factors in determining compliance in compensation of coaches. They are:

1. Rate of compensation;
2. Duration of contract;
3. Conditions relating to contract renewal;
4. Experience;

[22] 34 C.F.R. §106.41(c)(5) (1992).

[23] The Manual, pp. 49–54.

[24] 34 C.F.R. §106.41(c)(5) & (6) (1991).

5. Nature of coaching duties performed;
6. Working conditions; and
7. Other terms and conditions of employment.

Whether opportunity to receive coaching assignments and compensation of coaches is "equitable" has been difficult to determine. This is because of the subjectivity involved in assessing the training, experience, and professional qualifications of coaches assigned to men's and women's programs. Although the OCR seems to limit its investigation to the experience and qualifications of the coaches, at least one case seems to suggest that another factor, the size of the crowds and the ability to attract boosters, may be a factor in compensation.[25] The intent of the regulation is that equal athletic opportunity be provided to participants, not coaches. When a coach's compensation is based on seniority or longevity, a recognized method of paying employees, alleging that a female team coach with five years of experience is somehow being discriminated against because he or she receives less than a coach with 15 years of experience is difficult to prove. This brings up an interesting point because it is possible for a male coach of a female team to be protected under this provision because the intent of the Act is to provide effective coaching to females.

Perhaps the most important regulation from the health and safety aspect of athletics is the regulation that requires equal medical and training facilities and services.[26] In the recent past, and perhaps in some institutions today, female athletes only have access to trainers after male athletes or, sometimes, not to anyone but assistant trainers or graduate assistants. It is not too unusual for the head trainer to travel with the men's teams and a graduate assistant or an assistant trainer to travel with the women's teams. One can be assured that the discovery of such information during the compliance review will result in a finding of discrimi-

[25] In the case of *Stanley v. University of Southern California*, 13 F.3d 1313 (9th Cir. 1994), the court found that evidence of the male coach's greater responsibility in raising funds and level of responsibility justified the disparity in salary The court said that the men's team "generated greater attendance, more media interest, and larger donations" and that the men's coach, George Raveling, has fund-raising duties not required of the women's coach. The court found that the university was not responsible for "societal discrimination in preferring to witness men's sports in greater numbers."

[26] 34 C.F.R. §106.41(8) (1992).

nation in violation of Title IX. To assess compliance and provision of medical training facilities, OCR investigates five areas.[27] They are:

1. Availability of medical personnel and assistants;
2. Health, accident, and injury insurance coverage;
3. Availability and quality of weight and training facilities;
4. Availability and quality of conditioning facilities; and
5. Availability and qualification of athletic trainers.

The regulations specifically require gynecological care coverage where such health problems are a result of participation in the athletics program.[28] Schools must either hire a trainer for the women's programs who possesses the same qualifications as the counterpart for the men's programs, or have the travel with the teams on a rotating basis. There can also be other considerations; for example, some women's team coaches prefer a female trainer because she can room with the female players and reduce expenses.

To achieve substantial proportionality in accommodating interests and abilities of both male and female athletes, it is clear that OCR will carefully review the recruitment of student athletes.[29] OCR looks at three factors in assessing compliance. They are:

1. Whether coaches or other professional athletic personnel in the program serving male and female athletes are provided with substantially equal opportunities to recruit;
2. Whether financial and other resources made available for recruitment in male and female athletic programs are equivalently adequate to meet the needs of each program; and
3. Whether differences in benefits, opportunities, and treatment afforded prospective student athletes of each sex have a disproportionately limiting effect on the recruitment of students.

[27] The Manual, pp. 72–80.

[28] 34 C.F.R. §106.39 (1992).

[29] 34 C.F.R. §106.41 (1992) and the Manual, pp. 97–101.

OCR carefully checks the recruitment funds allotted to each team and compares the proportionate recruitment funds with the proportion of male and female athletes in the athletics program. In judging whether or not the resources are equivalently adequate to meet the needs of each program, the OCR determines the availability of recruitment resources to both men's and women's programs, including access to telephones, recruitment brochures, mailing costs, and travel.

They allow nondiscriminatory differences in some cases. For example, the recruiting of budget for a particular team either male, or female, may be increased because of a disproportionate number of student athletes either graduated or dropped out of the program in a particular year, thereby requiring extra effort to replace them.

What Is Compliance?

The federal courts, in at least three instances, have appeared to impose a more stringent accommodation test than the Office of Civil Rights.[30] Recall that the regulations state that an institution is in compliance if it can show that it "fully and effectively accommodates the interests and abilities of female students who have the ability to participate in intercollegiate sports." Most federal court cases stress that the percentage of female athletes accommodated has to be proportionate to the total female undergraduate enrollment rather than relate solely to those women who have the interests and abilities to participate.

For example, in a case involving Colorado State University, the court found that there was a 10.5% disparity in the percentage of women athletes and undergraduate women students. If determined that the female participation in intercollegiate sports was not substantially proportionate to female enrollment and ordered the university to reinstate a woman's softball team, hire a coach, and maintain a competitive schedule.[31]

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[30] *Cohen v. Brown University*, 991 F.2d 888 (1st Cir. 1993) and *Cohen v. Brown University*, 879 F.Supp. 185 (D.RI. 1995); *Roberts v. Colorado State Board of Agriculture*, 998 F.2d 824 (10th Cir. 1993), and *Favia v. Indiana University of Pennsylvania*, 812 F.Supp. 578 (W.D. PA 1993) Aff'd 7 F.3d 322 (3d Cir. 1993).

[31] *Roberts v. Colorado State Board of Agriculture*, 998 F.2d 824 (10th Cir. 1993).

In an ongoing case involving Brown University, the court ordered reinstatement of female teams when there was about a 13% disparity between the percentage of female athletes and the percentage of females in undergraduate enrollment.[32] The Colorado State University case is difficult to square with Title IX because the opinion appears to rely solely on the proportionality test and to de-emphasize the "interest and abilities test." This strong reliance on proportionality is contrary to the OCR regulations that tend to treat the prongs of the three-part test equally.[33]

The statute also prohibits reliance solely on proportionality by providing "Nothing contained in subsection (a) … 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…."[34]

The question posed is whether the strong emphasis on proportionality in the Colorado State and Brown cases is, or should be, the trend in the law. Unfortunately for this determination, the U.S. Supreme Court denied certiorari in both cases.[35] To provide appropriate guidance, the question we must answer is: How will other Circuit Courts of Appeals deal with the regulatory three-prong test and ultimately, what will the U.S. Supreme Court do when they eventually grant certiorari?

To answer the question, the remainder of Part I of this chapter will deal with the decisions on the merits and appeals in the four separate decisions involving *Cohen v. Brown University*,[36] the District Court deci-

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[32] *Cohen v. Brown University*, 809 F.Supp. 978 D.RI. 1992, Aff'd. 991 F.2d 888 (1st Cir. 1993).

[33] 34 C.F.R. §106.41(c)(1) (1992).

[34] 20 U.S.C. §1681(b) (1972).

[35] Roberts v. Colorado State Board of Agriculture, 998 F.20 824 (10th Cir. 1993), cert. denied U.S.___(1994).

[36] Prior to trial on the merits of the Brown cases, the district court granted the plaintiffs a preliminary injunction, ordering the women's volleyball and gymnastics teams be restored from club to university funded status, Cohen v, Brown, 809 F.Supp. 978 (D.RI. 1992) ("Brown I"). The first circuit upheld the district court's decision after reviewing the district court's analysis of Title IX and the implementing regulations. Cohen v. Brown, 991 F.2d 888 (1st Cir. 1993) ("Brown II"). On

sion in *Peterson v. Louisiana State University*,[37] and the recent "Clarification of Intercollegiate Athletics Policy Guidance: the Three Part Test"[38] (The Clarification) distributed by the U.S. Department of Education, Office of Civil Rights.

Brown I and II: The District Court, in Brown I, while assessing this University's compliance with Title IX, specifically addressed whether it accommodated effectively "the interest and abilities of students to the extent necessary to provide equal opportunity in the selection of sports and levels of competition available to members of both sexes."[39] The Court commenced by stating that it may not find a violation solely because there is a disparity between the gender composition of the educational institution and student constituency, on the one hand, and its athletic programs, on the other.[40] The Court, however, stated that Subsection (b) also provides that it "shall not be construed to prevent the consideration in any proceedings … of statistical evidence tending to show that such an imbalance exists with the respect to the participation in, or the receipt of benefits of, any such program or activity by the members of one sex."[41]

The judges concluded that an institution satisfied prong one (proportionality) if the gender balance of its intercollegiate athletic program substantially *mirrors* the gender balance of its student enrollment.[42] Taking the view that the phrase "substantially proportionate" must be a standard stringent enough to effectuate the purposes of the statute,[43] the Court said that Title IX established an illegal presumption that discrimination exists if the university does not provide participation opportunities to

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remand, the district court found that Brown's intercollegiate program violated Title IX and the supporting regulations. Cohen v. Brown 879 F.Supp. 185 (D.RI. 1995) ("Brown III"). Brown appealed and on November 21, 1996, the First Circuit affirmed. Cohn v. Brown, No. 95-2205 (1st Cir. 1996) ("Brown IV").

[37] No. 94-247, Slip. Op. (Md. La. Jan. 22, 1996).

[38] Letter from Norma Cantu, Assistant Secretary for Civil Rights, U.S. Department of Education, to Colleges and Universities (Jan. 16, 1996).

[39] 991 F.2d 888 (1st Cir. 1993).

[40] Id. at 18.

[41] Id. at 19.

[42] Id. at 33.

[43] Id. at 36.

men and women in substantial proportionality to their respective student enrollments.[44] It found that the numerical disparity between male and female athletes in Brown's program, approximately 13%, was not "substantially proportionate" and was certainly not a mirror image of the gender of the respective male and female enrollments.[45] The Court concluded that Brown University did not meet the requirements of prong one of the three-part test.[46]

With regard to prong two, the issue was 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 the underrepresented sex.[47] Prong two illustrates that Title IX does not require the University to leap to complete gender parity in a single bound. It does, however, require an institution to show that it has continued to increase the number of underrepresented athletes participating in intercollegiate athletics.[48] The Court stated that schools may not twist the ordinary meaning of the word "expansion" to find compliance under prong two when schools have increased their relative percentage of women participating in athletics by making cuts in both men's and women's sports.[49] Because Brown had attempted to comply with prong two by reducing both men and women's sports to equalize proportionality, the Court found it had failed the prong two test.

The Court said that prong three (interests and abilities) requires a relatively simple assessment of whether there is unmet need in the underrepresented gender that rises to a level sufficient to form a new team or require the upgrading of an existing one.[50] Thus, if athletes of the underrepresented gender have both the ability and interest to compete at the intercollegiate level, they must be fully and effectively accommodated.[51] Institutions need not upgrade or create a team where the interest and

[44] Id. at 45.
[45] Id. at 47.
[46] Id. at 50.
[47] Id. at 50.
[48] Id. at 51.
[49] Id. at 51.
[50] Id. at 52.
[51] Id. at 52.

ability of the students are not sufficiently developed to field a varsity team.[52]

Brown declared that "to the extent students interests in athletics are disproportionate by gender, colleges should be allowed to meet those interests incompletely as long as the schools response is in direct proportion to the comparative level of interests."[53] In other words, Brown argued that it may accommodate *fewer* than all of the interested and able women if, on a proportionate basis, it accommodates *fewer* than all the interested and able men.

The Court took considerable pains to address why this reading of Title IX was flawed. Brown argued that they could read the third prong, providing for accommodation of interests and abilities, separately from prong one, requiring substantial proportionality. This view was rejected because the policy interpretation, which requires full accommodation of the underrepresented gender, draws its essence from the statute and requires an evaluation of the athletic program as a whole.[54]

Secondly, the Court stated that any argument that prong three somehow countervails the meaning of prong one is wrong. Such a position overlooks the accommodation test's general purpose: to decide whether a student has been "excluded from participation in, or denied the benefits of," an athletic program on the basis of sex. The test is whether or not the athletic program as a "whole" is reasonably constructed to carry out the statute.[55] Brown's proposal would be contrary to the purpose of the statute. It would determine athletic interest and abilities of students in such a way as to take into account the nationally increasing levels of women's interest and abilities as related to their population in the student body. The Court clearly did not agree that full and effective accommodation can satisfy the statute when prong one proportionality is not found.

Brown's reliance on student surveys of interest and abilities was also found at fault. The Athletic Investigators Manual (The Manual) stated that the intent of its provisions was to use surveys of interest and abilities

[52] Id. at 52.
[53] Id. at 53.
[54] Id. at 53.
[55] Id. at 54.

to follow a determination that an institution does not satisfy prong three: they could not use it to make that determination in the first instance.[56] The Court was also concerned that a survey of interests and abilities of the students at Brown would not be a true measure of their interest and abilities because the school's recruiting methods could predetermine such interests and abilities in the first place.[57] The judges noted that the test was full and effective accommodation, in the whole program, not solely an accommodation of interests and abilities at the expense of disregarding proportionality.[58] Prong three would excuse Brown's failure to provide substantial proportionate participation and opportunities only if this University fully and effectively accommodate the underrepresented sex. But Brown did not comply with prong three because it failed to increase the number of intercollegiate participation and opportunities available to the underrepresented sex and also failed to maintain and support women's donor-funded teams at Brown's highest level, thus preventing athletes on those teams from developing fully their competitive abilities and skills.[59]

Finally, the Court found that far more male athletes were being supported at the University-funded varsity level than female athletes, and thus, women receive less benefit from their intercollegiate varsity programs as a whole than do men.[60]

Louisiana State: In *Peterson v. Louisiana State*,[61] the District Court examined prongs one, two, and three, of the three-part test in the context of whether the University had fully and effectively accommodated the interests and abilities of its female students. The plaintiffs argued that Louisiana State University (LSU) failed to accommodate its female athletes by providing greater athletic opportunities to its male students at a time when the sufficient interest and ability existed in its female student population to justify

[56] Id. at 56.
[57] Id. at 56.
[58] Id. at 60.
[59] Id. at 61.
[60] Id. at 65.
[61] No. 94-247(MD. La. Jan. 22, 1996).

increasing women's sports opportunities.[62] The specific complaint concerned a perceived failure to provide a woman's fast pitch softball team.

Relying on *Colorado State* and *Brown*, both plaintiffs and defendants asked the Court to find that, so long as males and females are represented in athletics in the same proportion as found in the general student population and are given numerically proportionate opportunity to participate in advanced competition, the university should be in compliance with Title IX. Further, if numerical proportionality is not found, the university should be deemed in violation of Title IX.[63] The Court rejected this proposition and specifically stated that it disagreed with the rationale of the *Brown* and *Colorado State* opinions. "Title IX does not mandate equal numbers of participants. Rather, it prohibits exclusion based on sex and requires equal opportunity to participate for both sexes."[64] Therefore, ending the inquiry at the point of numerical proportionality does not comport with the mandate of the statute. Title IX specifically does not require preferential disparate treatment based on proportionality. Rather, those percentages should be considered as evidence "tending to show that such an imbalance exists with the respect to the participation in, or receipt of benefits of, any such program or activity by members of one sex." Consequently, the clear language of the statute prohibits the requirement of numerical proportionality and regarded the Brown case as a "safe harbor" for a university. Clearly, the pivotal element of the LSU analysis is the question of effective accommodation of interests and abilities. Given the foregoing, it was imperative that LSU be acquainted with the interests and abilities of its female students.

Because this University had not conducted a survey of its female students, the Court found that there was no creditable evidence to establish their actual interests and abilities. LSU simply had no method, discriminatory or otherwise, by which a determination could be made. This school was, and had been, ignorant of the interests and abilities of its student population for some time.[65]

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[62] Id. at 10.

[63] Id. at 14.

[64] Id. at 15.

[65] Id. at 16.

The trial evidence found that LSU's student population during the relevant period was approximately 51% male and 49% female, and its athletic participation for the same period was about 71% male and 29% female.[66] Throughout the relevant period, LSU fielded a man's baseball team. The Court accepted evidence that women's fast pitch softball was the closest approximation to this sport.[67]

The plaintiffs established that there was sufficient interest and ability at LSU to fill a successful Division I varsity fast pitch softball team since 1979 and that for some unknown reason, in 1983, LSU disbanded that program. The plaintiffs also were able to establish that the interest in fast pitch softball increased since 1979.[68] They presented credible evidence that they themselves had an interest in playing intercollegiate varsity fast pitch softball plus the requisite ability. Finally, and critically, the plaintiffs established that intercollegiate play is provided for male students with similar interests and abilities by way of the varsity baseball team.[69] At the same time, LSU provided absolutely no opportunity for women to compete in fast pitch softball at any level.

By not fielding a women's fast pitch softball team, LSU was not accommodating the interests and abilities of the plaintiffs individually and at least one segment of its total female student population. The Court's findings suggested that sex discrimination accounted for the discrepancy.[70]

The Court then examined the history of expanding opportunities for women athletes at LSU and concluded that the University has demonstrated a practice not to expand women's athletics at the University before it became absolutely necessary to do so.[71] It could find no evidence of a workable plan of action by the University to address the failure to accommodate interests and abilities of women students and concluded that LSU was violation of Title IX. The Court noted that LSU was a national leader in resisting gender equity.[72]

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[66] Id. at 17.
[67] Id. at 17.
[68] Id. at 17.
[69] Id. at 17.
[70] Id. at 17.
[71] Id. at 18.
[72] Id. at 18.