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Shooting to Minimize Gender Discrimination as an Unintended Consequence of Title IX

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Shooting to Minimize Gender Discrimination as an Unintended Consequence of Title IX

Alexa Potts*

ABSTRACT

Title IX is a federal law prohibiting sex-based discrimination in any education program or activity that receives federal funding. Congress initially passed Title IX out of concern for sex-based equality in academia. However, Title IX has had significant impacts on athletics, resulting in increased athletic opportunities for females.

To be Title IX compliant, institutions must provide equality in athletic participation for both sexes. The Office of Civil Rights provided a three-part test to measure equality in athletic participation. Institutions must satisfy at least one of the three prongs to meet Title IX requirements as they pertain to equality in athletic participation. The first prong states that institutions are Title IX compliant when they provide collegiate athletic opportunities to male and female students in numbers substantially proportionate to their respective academic enrollments. The second prong states that institutions are compliant if they show a history and continuing practice of program expansion in response to the interests and abilities of women. The third prong states that institutions are compliant when they demonstrate that the present program effectively accommodates the interests and abilities of women.

This Comment analyzes how institutions can use an NCAA rifle team to achieve Title IX compliance. Applying the three-part test, institutions can maintain a women's rifle team to achieve Title IX compliance. However, rifle is the only coeducational sport in the NCAA. Creating female rifle teams is para-

* J.D. Candidate, Penn State Dickinson Law, 2023. This Comment is dedicated to my dad, who took me kicking and screaming to my first rifle practice, and to my mom, who accompanied me to many competitions. Thank you to the coaches, teammates, and competitors who enriched my time as an athlete and provided me with some of my warmest memories.

doxical: Institutions intentionally segregate the lone NCAA sport that allows both sexes to compete as equals. In this scenario, discrimination against men results from a federal law prohibiting sex-based discrimination. This Comment proposes a fourth prong to the three-part test for equality in athletic participation that would require institutions with coeducational teams to use such teams to achieve substantial proportionality, thereby minimizing gender discrimination as an unintended consequence of Title IX compliance.

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INTRODUCTION

Imagine the following scenario: A male rifle athlete from Mississippi wants to compete on a National Collegiate Athletic Association (NCAA) rifle team.¹ He would like to attend college in Mississippi because in-state tuition is generally cheaper than out-of-state tuition. The athlete is excited to learn that there is an NCAA rifle team at the University of Mississippi.² However, he realizes

1. See Melody Harris, Comment, *Hitting 'Em Where it Hurts: Using Title IX Litigation to Bring Gender Equity to Athletics*, 72 DENV. U. L. REV. 57, 70 (1994) (noting that the NCAA is a "voluntary association of public and private institutions" to form an athletic group).

2. See *2021–22 Rifle Roster*, OLE MISS SPORTS, <https://bit.ly/33jZ1oQ> [<https://perma.cc/DK8C-NSDS>] (last visited Jan. 9, 2022).

that the team is a women's team, and he is not allowed to compete on the team because of his sex.³ This unfortunate sex-based discrimination is an unintended consequence of Title IX, a federal law prohibiting sex-based discrimination in any education program or activity that receives federal funding, including athletics.⁴

According to guidance published by the Office for Civil Rights (“OCR”), a division of the Department of Education (“DED”), Title IX requires equality in three areas of collegiate athletics: athletic participation, scholarship distribution, and enjoyment of other benefits such as equipment and supplies.⁵ This Comment focuses on Title IX's requirement for equality in athletic participation. The OCR provided a three-part test to help determine how an institution can measure equality in athletic participation.⁶ The three-part test provides three ways an institution may demonstrate compliance with Title IX's requirement for equality in athletic participation.⁷ This Comment focuses on an analysis of the test as it relates to one sport—rifle.

First, this Comment provides a historical overview of Title IX and NCAA rifle. Second, this Comment analyzes ways an institution might use a women's rifle team to achieve Title IX compliance under the three-part test. Third, this Comment shows that the use of a women's rifle team to achieve Title IX compliance results in discrimination against male rifle athletes. Discrimination against male athletes in the context of NCAA rifle is problematic and unnecessary because rifle is the only sport in the NCAA that allows for direct competition between men and women.⁸ Fourth, this Comment proposes a solution to the discrimination institutions cause when they use women's rifle teams to achieve Title IX compliance.

I. BACKGROUND

A. *History of Title IX and Its Application to Collegiate Athletics*

Title IX of the Education Amendments of 1972 was adopted on June 23, 1972.⁹ Title IX, a federal law, prohibits sex-based dis-

3. *See id.*

4. *See* 20 U.S.C. § 1681.

5. *See* Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,418 (proposed Dec. 11, 1978) (codified at 45 C.F.R. pt. 86).

6. *See infra* notes 30–33 and accompanying text.

7. *See* Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,418.

8. *See* E-mail from Richard Fletcher, Deputy Dir. of Athletics, Morehead State Univ., to Alexa Potts (Aug. 24, 2021, 04:46 EST) (on file with author).

9. *See* Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 235.

crimination in any education program or activity that receives federal funding.¹⁰ The law states: “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”¹¹ When Title IX was adopted, its impact on athletic departments and student-athletes was not a large consideration; rather, sex-based equality in academia was the primary concern.¹² Any mention of athletics or sports is absent from the language of Title IX.¹³

Historically, females were significantly underrepresented in athletic participation.¹⁴ Female underrepresentation in athletics resulted from several popular beliefs, including that athletic competition was too aggressive for women and engagement in athletic competition caused damage to female reproductive systems.¹⁵ Title IX has had a profound impact on female enrollment in athletics: From 1971 to 1977, women’s participation in collegiate athletics increased 102 percent—from 31,852 women to 64,375 women.¹⁶

While some celebrated the impact of Title IX on female athletics, others worried that Title IX would hurt men’s sports, such as football and basketball, sparking the proposal of a bill known as the Tower Amendment.¹⁷ The Tower Amendment suggested the exclusion of any revenue-generating sports from Title IX, but it was not

10. See 20 U.S.C. § 1681.

11. *Id.*

12. See, e.g., Rachel Schwarz, Comment, *Timeout! Getting Back to What Title IX Intended and Encouraging Courts and the Office of Civil Rights to Re-evaluate the Three-Prong Compliance Test*, 20 WASH. & LEE J. CIV. RTS. & SOC. JUST. 633, 634 (2014).

13. See 20 U.S.C. § 1681.

14. See, e.g., Deborah Brake & Elizabeth Catlin, *The Path of Most Resistance: The Long Road Toward Gender Equity in Intercollegiate Athletics*, 3 DUKE J. GENDER L. & POL’Y 51, 51 (1996).

15. See *id.* at 52.

16. See Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,419 (proposed Dec. 11, 1979) (codified at 45 C.F.R. pt. 86).

17. See S. 2106, 94th Cong. (1974); Paul M. Anderson, *Title IX at Forty: An Introduction and Historical Review of Forty Legal Developments That Shaped Gender Equity Law*, 22 MARO. SPORTS L. REV. 325, 330 (2012) (noting that a number of bills were introduced in an effort to stop Title IX from negatively impacting revenue-producing sports in collegiate athletics); Harris, *supra* note 1, at 58 (noting that in a national survey 7 years after the adoption of Title IX, women constituted only 30 percent of intercollegiate athletics but constituted 48 percent of undergraduate enrollment).

passed.¹⁸ Instead, Congress adopted the Javits Amendment in 1974.¹⁹ The Javits Amendment required the Secretary of Health, Education, and Welfare (“HEW”) to propose regulations implementing the provisions of Title IX as it related to sex discrimination in intercollegiate athletics.²⁰ Congress clarified through its adoption of the Javits Amendment that although sports were not specifically mentioned in Title IX, Title IX was to apply to athletics.²¹

In compliance with the Javits Amendment, HEW issued regulations outlining the application of Title IX to athletics.²² The regulation reads:

No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.²³

The regulation states that teams segregated by sex are permitted for contact sports.²⁴ However, if a separate team is maintained for a non-contact sport, then the sex that was previously limited in athletic opportunities must be permitted to try out for the team.²⁵ The regulation also provides a list of ten factors an athletic director shall consider when determining if equal opportunities exist, and the regulation allows for an adjustment period for compliance.²⁶

18. See Christine I. Hepler, *Symposium: A Bibliography of Title IX of the Education Amendments of 1972*, 35 W. NEW ENG. L. REV. 441, 448–49 (2013).

19. See Education Amendments of 1974, Pub. L. No. 93-380, 88 Stat. 484 (codified as amended at 20 U.S.C. § 821).

20. See *id.*

21. See Hepler, *supra* note 18, at 449.

22. See *Cohen v. Brown Univ.*, 879 F. Supp. 185, 195 (D.R.I. 1995).

23. 34 C.F.R. § 106.41 (2021).

24. See *id.*

25. See *id.*

26. See *id.* The regulation states:

In determining whether equal opportunities are available the Director will consider, among other factors: (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 and housing and dining facilities and services; (10) Publicity.

Initially, Congress charged HEW with oversight of Title IX implementation.²⁷ In 1979, Congress divided HEW into the Department of Health and Human Services (“HHS”) and the DED.²⁸ Presently, the OCR enforces Title IX.²⁹

In 1979, the OCR issued a Policy Interpretation (“Interpretation”) to clarify ongoing confusion about the relationship between Title IX and athletics, focusing specifically on collegiate sports.³⁰ The Interpretation requires equality in three areas: athletic participation, scholarship distribution, and enjoyment of other benefits such as equipment and supplies.³¹ The Interpretation provides a three-part test to measure equality in athletic participation.³² The test states that “compliance will be assessed in any one of the following ways:”

- (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.³³

The first prong, which calls for substantial proportionality between a university’s general enrollment numbers and athletic participation rates by sex, begs the question: What percentage is substantially proportionate? Case law provides guidance as to how a court may answer this question, but a bright-line rule for determining substantial proportionality does not exist.³⁴

27. See *Cohen v. Brown Univ.*, 991 F.2d 888, 895 (1st Cir. 1993).

28. See *id.* (referring to the split of HEW as “a wonderful example of bureaucratic muddle”).

29. See *id.*

30. See Anderson, *supra* note 17, at 336.

31. See Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,418 (proposed Dec. 11, 1978) (codified at 45 C.F.R. pt. 86).

32. See Anderson, *supra* note 17, at 339.

33. Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,418.

34. See Harris, *supra* note 1, at 83.

For example, the U.S. District Court for the District of Rhode Island held that Brown University failed to meet substantial proportionality when females comprised 48.2 percent of the student body enrollment but only 36.6 percent of the students enrolled in athletics, constituting an 11.6 percent disparity.³⁵ Similarly, the U.S. District Court for the District of Colorado held a 10.6 percent difference between female academic enrollment and female athletic participation at Colorado State University did not meet Title IX's substantial proportionality prong.³⁶ The U.S. District Court for the Western District of Pennsylvania found that a 17.84-percent difference between the percentage of females enrolled in the student body and the percentage of female student-athletes failed to meet substantial proportionality.³⁷ On the other hand, the Fourth Circuit found that a one or two-percent gap in substantial proportionality does not violate Title IX.³⁸

The first prong is generally the easiest prong for universities to satisfy to demonstrate effective accommodation; however, this prong is not without criticism.³⁹ Opponents of Title IX argue that the substantial proportionality prong has resulted in the demise of men's teams and opportunities.⁴⁰ For example, instead of adding women's sports to attain substantial proportionality, an institution may cut men's sports that do not generate significant revenue.⁴¹

35. See *Cohen v. Brown Univ.*, 809 F. Supp. 978, 991 (D.R.I. 1992).

36. See *Roberts v. Colo. State Univ.*, 814 F. Supp. 1507, 1513 (D. Colo. 1993).

37. See *Favia v. Ind. Univ. of Pa.*, 812 F. Supp. 578, 584–85 (W.D. Pa. 1993).

38. See, e.g., *Equity in Athletics, Inc. v. Dep't of Educ.*, 639 F.3d 91, 110 (4th Cir. 2011). The court found that the plaintiff provided no support for the argument that a disparity between one or two-percent was substantially disproportionate as a matter of law. *Id.* The court noted that under the first prong, it was to use a case-by-case analysis by considering the institution's specific circumstances and the size of its athletic department in determining whether the percentage was substantially proportionate. *Id.*

39. See Brenda L. Ambrosius, Comment, *Title IX: Creating Unequal Equality Through Application of the Proportionality Standard in Collegiate Athletics*, 46 VAL. U. L. REV. 557, 563–65 (2012) (stating that by complying with the proportionality standard, schools have cut men's athletic teams to maintain proportionality when athletic budgets do not allow for additional teams).

40. See Deborah Brake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 34 U. MICH. J. L. REFORM 13, 21 (2000) (noting that Title IX discriminates against men by assuming that men and women have equal interests in athletics); see also Suzanne Sangree, *Symposium: Title IX: Women, Athletics, and the Law: The Secretary's Commission on Opportunity in Athletics Squandered its Opportunity to Understand Commercial Collegiate Sports: Why They Eliminate Minor Men's Sports and Prevent Title IX from Achieving Full Gender Equality*, 3 U. MD. L.J. RACE RELIG. GENDER & CLASS 257, 275–76 (2003) (stating that schools use Title IX as a scapegoat for the elimination of minor men's sports).

41. See Ambrosius, *supra* note 39, at 557–58 (describing the story of a male hockey player at an NCAA Division III school who was forced to play club hockey

Male athletes subjected to discrimination under Title IX have sued institutions for cutting men's teams to meet Title IX's substantial proportionality requirements; however, courts have held that substantial proportionality can be met either by adding women's teams or by cutting men's teams.⁴² In one such lawsuit, the Seventh Circuit stated: "[T]he elimination of men's athletic programs is not a violation of Title IX as long as men's participation in athletics continues to be 'substantially proportionate' to their enrollment."⁴³ To support its holding, the court cited budgetary concerns as a strong rationale for permitting the elimination of men's teams rather than the addition of women's teams to achieve Title IX's substantial proportionality.⁴⁴

Next, the second prong—the effective accommodation test—allows institutions to demonstrate compliance even if they fail the substantial proportionality test from prong one.⁴⁵ Institutions can demonstrate effective accommodation by showing historical and continued efforts to accommodate female athletes.⁴⁶ The effective accommodation test is difficult for institutions to meet for several reasons.⁴⁷ First, demonstrating historical change can be challenging because Title IX has existed for only five decades.⁴⁸ Second, even if an institution demonstrates historical expansion of accommodations for female athletes, the court may still find that the institution fails the second prong for neglecting to demonstrate a *continuation* of program expansion.⁴⁹ Third, institutions frequently cannot afford to add women's teams due to the overhead expense of creating new teams and the unfortunate reality that most women's teams do not generate enough money to keep athletic departments afloat.⁵⁰

after the university cut the program to meet Title IX's substantial proportionality requirement).

42. *See id.* at 576–77.

43. *Boulahanis v. Bd. of Regents*, 198 F.3d 633, 638 (7th Cir. 1999).

44. *See id.*

45. *See* Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,418 (proposed Dec. 11, 1978) (codified at 45 C.F.R. pt. 86).

46. *See id.*

47. *See Ambrosius, supra* note 39, at 563.

48. *See id.*

49. *See Cohen v. Brown Univ.*, 879 F. Supp. 185, 211 (D.R.I. 1995) (holding that “[a]lthough Brown University [demonstrated] an impressive *history* of program expansion, [the university] failed to demonstrate [a continued] practice of intercollegiate program expansion for women”).

50. *See* J. Brad Reich, *All the [Athletes] are Equal, but Some are More Equal than Others: An Objective Evaluation of Title IX's Past, Present, and Recommendations for its Future*, 108 PENN. ST. L. REV. 525, 537 (2003).

Finally, if an institution is unable to meet the standards provided in the first two prongs, the institution may demonstrate compliance through the third prong.⁵¹ The third prong permits inequality in athletic opportunities by sex if the institution proves that the “interests of the underrepresented sex” are “fully and effectively accommodated.”⁵² For example, a community college may not offer many athletic opportunities because most of its students are nontraditional students with little interest in athletics.⁵³ Even if the community college offers more athletic opportunities for males than for females, the college can assert that the interests of the females are accommodated by the limited offerings the school provides.⁵⁴ An institution asserting compliance under the third prong must present evidence to the court, including surveys that demonstrate athletic interest, lack of athletic interest, or participation in clubs and other extracurriculars by the underrepresented sex.⁵⁵

Thus, while Congress initially adopted Title IX to address concerns regarding sex discrimination in academia, it is often recognized today for its impact on athletics.⁵⁶ As of 2018, 44 percent of NCAA athletes were female, and 54 percent of NCAA teams were women’s teams.⁵⁷ While these numbers demonstrate that Title IX has had positive impacts on female involvement in collegiate athletics, Title IX has resulted in unintended consequences, including the sex-based segregation of a coeducational sport—rifle.

B. *History of Collegiate Rifle*

In response to the threat of World War I, Congress passed the National Defense Act of 1916.⁵⁸ The National Defense Act of 1916 permitted the War Department to provide firearms and ammunition to civilian rifle clubs.⁵⁹ Consequently, rifle teams regulated by

51. See Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,418.

52. See *id.*

53. See Harris, *supra* note 1, at 90.

54. See *id.* (noting that nontraditional female students may not be interested in athletic opportunities because of job or parenting responsibilities).

55. See *id.*

56. See *Ohlensehlen v. Univ. of Iowa*, 509 F. Supp. 3d 1085, 1088 (S.D. Iowa 2020).

57. See *Number of NCAA College Athletes Reaches All-Time High*, NCAA (Oct. 10, 2018), <https://bit.ly/3noSe3p> [<https://perma.cc/HT52-NGRQ>].

58. See W. Burette Carter, *The Age of Innocence: The First 25 Years of the National Collegiate Athletic Association, 1906 to 1931*, 8 VAND. J. ENT. & TECH. L. 211, 246 (2006).

59. See *The Civilian Marksmanship Program*, NRA-ILA (Aug. 3, 2004), <https://bit.ly/3GsHej8> [<https://perma.cc/W288-3Z59>].

the National Rifle Association (NRA) were established on college campuses to provide military training in light of the impending war.⁶⁰ Collegiate rifle teams also evolved through Reserve Officers' Training Corps (ROTC) programs, which provide military training on college campuses to students who commit to serving in the military upon graduation.⁶¹

The NCAA did not officially adopt rifle as a sport until 1980, at which time the NCAA hosted its first collegiate championship for rifle.⁶² Because many institutions already maintained rifle ranges on college campuses, it did not require additional financial resources for the NCAA to adopt rifle as an NCAA sport.⁶³ Schools were able to add one more NCAA team to their numbers simply because the NCAA dubbed rifle an NCAA sport.⁶⁴

Despite coeducational rifle teams existing since 1980, the NCAA still classifies rifle as a men's sport.⁶⁵ The NCAA sets requirements for the classification of an institution as a Division I, Division II, or Division III school.⁶⁶ A Division I institution must maintain either seven teams for men and seven teams for women or six teams for men and eight teams for women.⁶⁷ For purposes of defining whether an institution is Division I, Division II, or Division III, a rifle team counts as a men's sport.⁶⁸ However, NCAA rules for the sport are not the same as Title IX rules because the NCAA is a member-led, self-regulating organization, whereas Title IX is a

60. See Carter, *supra* note 58, at 246.

61. See *A Brief History of Collegiate Shooting Sports in the United States*, NRA SHOOTING SPORTS USA (Nov. 15, 2020), <https://bit.ly/2ZHxmvW> [<https://perma.cc/R9LB-3H2N>]; see also *ROTC Programs*, TODAY'S MIL., <https://bit.ly/3pWi81m> [<https://perma.cc/LD2J-TFFX>] (last visited Nov. 1, 2021).

62. See *Rifle*, NCAA, <https://bit.ly/3GhsSwW> [<https://perma.cc/HKQ3-TBWS>] (last visited Oct. 24, 2021).

63. See Telephone Interview with Lawrence Katz, Founder, The Law Offices of Lawrence S. Katz, P.A., (Sept. 21, 2021).

64. See *id.*

65. See Jason J. Brown, *A Brief History of the NCAA Rifle Championship*, NRA-ILA (Mar. 6, 2017), <https://bit.ly/3bd4YEt> [<https://perma.cc/A8VD-7QSP>].

66. See *Divisional Differences and the History of Multidivision Classification*, NCAA, <https://bit.ly/3BaqHHX> [<https://perma.cc/22LD-U6F7>] (last visited Oct. 24, 2021).

67. See *id.*

68. See Brown, *supra* note 65; see also E-mail from Richard Fletcher, Deputy Dir. of Athletics, Morehead State Univ., to Alexa Potts (Sept. 23, 2021, 06:34 EST) (on file with author).

federal law.⁶⁹ Thus, unlike for NCAA purposes, rifle is not classified as a men's sport under Title IX.⁷⁰

The number of NCAA rifle teams across the country has shrunk in recent years. For example, the University of Nevada, Reno announced in 2019 that it was cutting its rifle program at the end of the 2018–19 season.⁷¹ The decision to cut the team was rooted in several considerations, including financial constraints and a lack of competition from nearby universities.⁷² The University of Nevada, Reno also wanted to strengthen its place in its athletic conference by replacing the rifle team with a men's cross country team.⁷³

As of 2022, only 29 NCAA rifle teams exist in the United States, and 7 of the 29 existing teams are for only women.⁷⁴ The remaining teams are coeducational.⁷⁵ Rifle is the only NCAA sport that allows direct competition between male and female athletes, meaning that female teams compete against coeducational teams.⁷⁶

A 2014 study compared athletic performances between male and female rifle shooters at the NCAA Rifle Championships between 2007 and 2013.⁷⁷ The study found no differences in performance outcomes between males and females, noting that rifle “is distinct from most competitive sports as it requires little physical exertion, so physiological/biomechanical differences between the genders that generally bring about superior performance by males relative to females may have only minimal effect on shooting performance.”⁷⁸ The study took note of the physical factors involved in

69. See *Overview*, NCAA, <https://bit.ly/3b3XS5g> [<https://perma.cc/8X7S-QCGL>] (last visited Oct. 24, 2021); see also *Gender Equity/Title IX Important Facts*, NCAA, <https://bit.ly/3Gb1CzY> [<https://perma.cc/MP8U-63NB>] (last visited Oct. 24, 2021) (explaining Title IX requirements in NCAA athletics).

70. See *id.*

71. See Ryan Freeberg, *Nevada Athletics Disbands Rifle in Favor of Men's Cross Country*, NEV. SAGEBRUSH (Feb. 5, 2019), <https://bit.ly/3E3y093> [<https://perma.cc/M65A-FXA7>].

72. See *id.*

73. See *id.*

74. See generally NCAA DIRECTORY, <https://bit.ly/3jsP91d> [<https://perma.cc/95K4-JPKZ>] (last visited Oct. 24, 2021) (providing a list of sports offered at universities across the United States).

75. See *id.*

76. See E-mail from Richard Fletcher, Deputy Dir. of Athletics, Morehead State Univ., to Alexa Potts (Aug. 24, 2021, 04:46 EST) (on file with author).

77. See Nadav Goldschmied & Jason Kowalczyk, *Gender Performance in the NCAA Rifle Championships: Where is the Gap?*, 74 SEX ROLES J. RSCH. 310, 310 (2016) (arguing that the current Olympic protocol of segregating males and females in Olympic shooting competitions is a “separate and (un)equal policy which should be reconsidered”).

78. *Id.*

shooting, including “aiming, breathing, trigger control, position, and steadiness.”⁷⁹

Physical distinctions between male and female rifle athletes make little difference in performance results; rather, mental toughness separates elite shooters from ordinary shooters.⁸⁰ Jon Hammond, two-time Olympian and Head Coach of the West Virginia University Rifle Team, stated: “The importance of mental toughness in sport shooting cannot be emphasized enough. The difference between winners and losers at the highest levels of shooting is more mental than physical.”⁸¹

Logically, one must question why teams for only women exist in a sport that allows for direct competition between the two sexes at the NCAA level. The answer is simple: Maintenance of a women’s rifle team can help institutions achieve Title IX compliance. Institutions can use women’s rifle teams to try to meet at least one prong of the three-part test used to measure equality in athletic participation.

II. ANALYSIS

A. *So, What’s the Problem?*

While institutions may achieve Title IX compliance by maintaining women’s rifle teams, maintaining women’s teams rather than coeducational teams results in inadvertent discrimination against men. Male athletes have sued for discrimination caused by institutional attempts at Title IX compliance through the elimination of men’s sports.⁸² However, courts have held that Congress has broad powers to address discrimination, and the elimination of men’s teams is not a violation of Title IX so long as substantial proportionality is met.⁸³ Plausibly, if men tried to sue for inadvertent

79. *Id.* at 312.

80. *See id.* at 318; *see also* Jon Hammond, *Forward* to RAYMOND PRIOR, BULLSEYE MIND: MENTAL TOUGHNESS FOR SPORT SHOOTING 5 (2016).

81. PRIOR, *supra* note 80, at 5.

82. *See, e.g.,* Kelley v. Bd. of Trs., 35 F.3d 265, 267 (7th Cir. 1994) (describing lawsuit brought for violation of Title IX by members of the men’s swimming program after the university announced its intent to terminate the program).

83. *See Kelley*, 35 F.3d at 272 (holding that an institution may either add opportunities for women or reduce opportunities for men to reach Title IX compliance); *see also* Boulahanis v. Bd. of Regents, 198 F.3d 633, 638–39 (7th Cir. 1999) (holding that the elimination of men’s soccer and wrestling teams to meet Title IX compliance was permissible); Neal v. Bd. of Trs., 198 F.3d 763, 771 (9th Cir. 1999) (holding that where male athletes are overrepresented, an institution may cut men’s athletic opportunities to achieve Title IX compliance).

discrimination caused by maintaining women's rather than coeducational rifle teams, courts might reach the same holding.

However, such lawsuits in the context of NCAA rifle need not be contemplated if institutions simply maintained coeducational rather than women's rifle teams. The maintenance of a coeducational team could accomplish several goals. First, it would end the unintended sex-based discrimination because both sexes could elect to participate in the recruitment process for the team. Second, it would further the general policy goal of increasing gender inclusivity, which plays a large role in modern society. Third, it would allow athletic departments to recruit individuals to meet substantial proportionality with sex-based enrollment rates. Accordingly, the OCR should add a fourth prong to the test for equality in athletic participation that allows institutions to demonstrate compliance through the maintenance of a coeducational team.

B. Applying Title IX's Three-Part Test to NCAA Rifle

The NRA's guidance for developing a collegiate shooting program discusses the benefits a rifle team brings to student-athletes and institutions.⁸⁴ The NRA notes that “[f]emale students find shooting a challenging sport in which they may equally compete with male students” and “[t]he shooting sports program demonstrates a school's commitment to meeting the needs of its co-ed population. It can help bring an athletic program into compliance with Title IX regulations.”⁸⁵ In the same vein, Leighton Dempster, Head Coach of the Army West Point Rifle team, stated:

I'm happy that we are creating a space for women and girls to be recognized in the sports world. It can be hard for women to find their identity as an athlete and I'm glad that young girls and boys will see that there is a place for everyone in sports. That is what is so cool about rifle. Men and women compete equally and the women show that they are just as good and often better than the guys when given the chance.⁸⁶

While institutions have taken advantage of the opportunity to achieve Title IX compliance through women's rifle teams, they have seemingly overlooked the benefits brought by coeducational teams. Applying the three-part test for equality in athletic participation,

84. See NAT'L RIFLE ASS'N, DEVELOPING A SCHOLASTIC SHOOTING PROGRAM 26 (Nat'l Rifle Ass'n, 3rd ed. 2011).

85. *Id.* at 30–31.

86. Army West Point Rifle (@armywp_rifle), INSTAGRAM, <https://bit.ly/3HIQdxR> [<https://perma.cc/S349-UTTC>] (last visited Feb. 1, 2022).

this Comment analyzes how institutions may seek to achieve Title IX compliance under each prong through the maintenance of a women's rifle team. Then, this Comment addresses the inadvertent discrimination caused by this approach. This Comment suggests a solution that can help institutions reach Title IX compliance while minimizing inadvertent discrimination in the context of coeducational rifle teams.

1. *Application of the First Prong*

As detailed above, the first prong of the three-part test for equality in athletic participation states that compliance may be assessed by considering if “intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments.”⁸⁷ In 1996, the OCR published a clarification letter (“clarification letter”) explaining each prong of the three-part test.⁸⁸ As to the first prong, the clarification letter states that an institution must begin an analysis by considering who qualifies as a participant, because the analysis is contingent on levels of participation opportunities.⁸⁹ According to the OCR, a participant is any individual listed on an athletic team’s roster at the time of the first competitive event of the season.⁹⁰ Members of NCAA rifle teams constitute “participants” for the purpose of evaluation under the first prong.⁹¹

The next part of the first prong analysis considers the substantial proportionality of athletic opportunities.⁹² In its clarification letter, the OCR noted that substantial proportionality rather than exact proportionality is required because it is unreasonable to require exact proportionality between athletic participation and enrollment rates by sex.⁹³ The OCR failed to provide a range of

87. Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,418 (proposed Dec. 11, 1978) (codified at 45 C.F.R. pt. 86).

88. See Norma V. Cantú, *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test*, OFF. FOR CIV. RTS. (Jan. 16, 1996), <https://bit.ly/3xbrd80> [<https://perma.cc/YGF6-GYB3>] [hereinafter *Clarification Letter*].

89. See *id.*

90. See *id.* (noting that athletes are still considered participants even if they do not receive athletic aid, even if they must raise some or all the team’s funds, and even if they practice but do not compete).

91. See, e.g., *2021–22 Rifle Roster*, NAVY SPORTS, <https://bit.ly/3nFgFER> [<https://perma.cc/A545-FCA2>] (last visited Nov. 22, 2021).

92. See *Clarification Letter*, *supra* note 88.

93. See *id.* (noting that it would be unreasonable to expect an institution to achieve exact proportionality due to “natural fluctuations in enrollment and participation rates or because it would be unreasonable to expect an institution to add

percentages that might satisfy substantial proportionality.⁹⁴ The OCR cited the case-and-fact specific nature of Title IX issues as the reason why it declined to provide “strict numerical formulas or ‘cookie cutter’ answers.”⁹⁵ Even without explicit OCR guidance, the smaller the percentage, the greater the likelihood that a court will find that substantial proportionality is met.⁹⁶

Consider the following hypothetical: An institution has an enrollment rate of 55 percent women and 45 percent men, and the institution has an athletic department of 200 athletes. However, 45 percent of the institution’s athletic opportunities are for women, and 55 percent are for men, constituting a 10 percent disparity. The institution lacks athletic opportunities for women, providing only 90 opportunities for athletic participation for women rather than 110 opportunities, which would create exact proportionality. The law requires substantial rather than exact proportionality.⁹⁷ To help close the gap, the institution might add a 15-member women’s rifle team to the athletic roster. Now, the institution has 105 opportunities for athletic participation for women, decreasing the disparity from 10 percent to 2.5 percent. This example demonstrates how an institution can add a women’s rifle team to its athletic roster to help achieve substantial proportionality under the first prong of the three-part test for equality in athletic participation.

2. *Application of the Second Prong*

Next, if an institution cannot meet the substantial proportionality requirement of the first prong, it can achieve Title IX compliance by satisfying the second prong of the three-part test for equality in athletic participation.⁹⁸ This prong states that compliance may be assessed “[w]here the members of one sex have been and are underrepresented among intercollegiate athletes, whether

athletic opportunities in light of the small number of students that would have to be accommodated to achieve exact proportionality”).

94. See *Clarification Letter*, *supra* note 88.

95. See *id.*

96. See *Equity in Athletics, Inc. v. Dep’t of Educ.*, 639 F.3d 91, 110 (4th Cir. 2011) (holding that a one to two-percent disparity satisfied substantial proportionality); see also *Cohen v. Brown Univ.*, 809 F. Supp. 978, 991 (D.R.I. 1992) (holding that an 11.6-percent disparity did not satisfy substantial proportionality); *Roberts v. Colo. State Univ.*, 814 F. Supp. 1507, 1513 (D. Colo. 1993) (holding that a 10.6-percent disparity did not satisfy substantial proportionality); *Favia v. Ind. Univ. of Pa.*, 812 F. Supp. 578, 584–85 (W.D. Pa. 1993) (holding that a 17.8-percent disparity did not satisfy substantial proportionality).

97. See Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,418 (proposed Dec. 11, 1978) (codified at 45 C.F.R. pt. 86).

98. See *id.*

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.”⁹⁹ The clarification letter states that when analyzing whether an institution has achieved Title IX compliance under the second prong, both the past and present efforts of the institution to expand opportunities for the underrepresented sex shall be considered.¹⁰⁰

First, the clarification letter provides a non-exhaustive list of factors to use in considering whether an institution can demonstrate a history of program expansion for the underrepresented sex.¹⁰¹ These factors include:

[A]n institution’s record of adding intercollegiate teams, or upgrading teams to intercollegiate status, for the underrepresented sex; an institution’s record of increasing the numbers of participants in intercollegiate athletics who are members of the underrepresented sex; and an institution’s affirmative responses to requests by students or others for addition or elevation of sports.¹⁰²

An institution might capitalize on the existence of a women’s rifle team on campus to demonstrate historical program expansion for the underrepresented sex, which would satisfy several of the factors listed above.

Second, the clarification letter provides a non-exhaustive list of factors to use in considering whether an institution can demonstrate a continuing practice of program expansion for the underrepresented sex.¹⁰³ These factors include “an institution’s current implementation of a nondiscriminatory policy or procedure for requesting the addition of sports . . . and the effective communication of the policy or procedure to students; and an institution’s current implementation of a plan of program expansion that is responsive to developing interests and abilities.”¹⁰⁴ If an institution responds to female interest in a rifle team by taking steps to establish a women’s rifle team on campus, an institution may be able to show a continuing practice of program expansion for the underrepresented sex.

To achieve compliance through the second prong, an institution must have both a history *and* continuation of program expansion.

99. *Id.*

100. *See Clarification Letter, supra* note 88.

101. *See id.*

102. *Id.*

103. *See id.*

104. *Id.*

sion for the underrepresented sex.¹⁰⁵ An institution will fail to comply with Title IX if it cannot demonstrate past and present expansion of opportunities for women.¹⁰⁶ While an institution will need to show more than just the establishment of a women's rifle team to satisfy the second prong, the creation of a women's rifle team may demonstrate either historical or present expansion of opportunities for women, helping the institution attain Title IX compliance through the second prong of the three-part test.

3. *Application of the Third Prong*

Finally, if an institution cannot meet the substantial proportionality requirement of the first prong nor demonstrate historical and continuing practices of program expansion for women per the second prong, an institution might attain Title IX compliance through the third prong. This prong states that compliance may be assessed:

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.¹⁰⁷

The clarification letter explains that in some instances, disproportionate percentages between athletic participation and general student body enrollment of the underrepresented sex are permissible.¹⁰⁸ Title IX compliance may be achieved under the third prong when the disparity is not rooted in discrimination; rather, the interests and abilities of the underrepresented sex are fully accommodated despite the lower rates of athletic participation.¹⁰⁹ The OCR stated that an institution fails to fully and effectively accommodate the underrepresented sex if there is unmet interest in a particular

105. See Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,418 (proposed Dec. 11, 1978) (codified at 45 C.F.R. pt. 86).

106. See *Cohen v. Brown Univ.*, 101 F.3d 155, 166 (1st Cir. 1996) (affirming the district court's holding that Brown failed to satisfy the second prong of the three-part test because although Brown boasted a robust history of program expansion, it failed to demonstrate "a continuing practice of program expansion for women").

107. Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,418.

108. See *Clarification Letter*, *supra* note 88.

109. See *id.*

sport, sufficient ability to sustain a team in the sport, and a reasonable expectation of competition for the team.¹¹⁰

In determining whether there is unmet interest in a particular sport, the clarification letter provides various factors to consider and gives institutions discretion in choosing methods to evaluate their athletic programs, so long as the chosen methods are not discriminatory.¹¹¹ The OCR also provided factors to use in considering whether there is sufficient ability among interested female students to sustain an intercollegiate team.¹¹² Lastly, the OCR provided factors to use in considering whether there is a reasonable expectation of competition for the team.¹¹³

The third prong is difficult to apply to any single team, including an NCAA rifle team.¹¹⁴ However, one can imagine a scenario in which an institution maintains a women's NCAA rifle team, along with other opportunities for women, and demonstrates that the "interests and abilities of the members of that sex have been fully and

110. *See id.*

111. *See id.* The factors provided by the OCR include the following: [R]equests by students and admitted students that a particular sport be added; requests that an existing club sport be elevated to intercollegiate status; participation in particular club or intramural sports; interviews with students, admitted students, coaches, administrators and others regarding interest in particular sports; results of questionnaires of students or admitted students regarding interests in particular sports; and participation in particular in interscholastic sports by admitted students.

Id.

112. *See id.* The factors provided by the OCR to analyze indications of ability include the following:

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

Id.

113. *See id.* The factors provided by the OCR to analyze whether there is a reasonable expectation of competition for the team include the following: "[C]ompetitive opportunities offered by other schools against which an institution competes; and competitive opportunities offered by other schools in the institution's geographic area, including those offered by schools against which the institution does not now compete." *Id.*

114. *See* David Klinker, Comment, *Why Conforming with Title IX Hurts Men's Collegiate Sports*, 13 SETON HALL J. SPORTS L. 73, 83 (2003) (noting that courts are hesitant to rule on the third prong of the three-part test or offer clarification); *see also* Ambrosius, *supra* note 39, at 596 (stating that the lack of guidance from courts as to the third prong discourages institutions from relying on the third prong).

effectively accommodated by the present program.”¹¹⁵ Indeed, the NRA states that shooting sports welcome both men and women with “enthusiasm” and that women enjoy the opportunity to compete against male athletes.¹¹⁶ A women’s rifle team may be one of several factors that contributes to the full and effective accommodation of the interests of women regarding an institution’s athletic program. Nevertheless, no matter how institutions use women’s rifle teams to achieve Title IX compliance, the result is the same: inadvertent discrimination against men.

C. *Inadvertent Discrimination Caused by Using Women’s Rifle Teams to Reach Title IX Compliance*

As demonstrated above, an institution can feasibly use a women’s rifle team under any one of the three prongs from the three-part test, helping the institution comply with Title IX requirements for equality in athletic participation. However, the use of women’s rifle teams inadvertently discriminates against male rifle athletes. Outcomes for male athletes bringing lawsuits for discrimination, usually due to cutting men’s teams under the first prong, have not been favorable for plaintiffs.¹¹⁷ For example, the Ninth Circuit held that an institution may eliminate athletic opportunities for men to reduce the number of athletic roster spots for the over-represented sex as a remedial action under Title IX.¹¹⁸ Arguably, the courts seem more concerned with remedying past discrimination against women rather than ensuring equality for all athletes, regardless of sex, under Title IX.¹¹⁹

As mentioned earlier in this Comment, only 29 NCAA rifle teams exist in the United States, and 7 of the 29 existing teams are

115. See Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,418 (proposed Dec. 11, 1978) (codified at 45 C.F.R. pt. 86).

116. See NAT’L RIFLE ASS’N, *supra* note 84.

117. See, e.g., *Neal v. Bd. of Trs.*, 198 F.3d 763, 765 (9th Cir. 1999).

118. See *id.* at 765.

119. See *Neal*, 198 F.3d at 773 (holding that Title IX permits cutting spots for male athletes to reduce the number of athletic roster spots for men, the Ninth Circuit stated: “Today we join our sister circuits in holding that Title IX does not bar universities from taking steps to ensure that women are approximately as well represented in sports programs as they are in student bodies.”); *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 830 (10th Cir. 1993) (stating that “[f]inancially strapped institutions may still comply with Title IX by cutting athletic programs such that men’s and women’s athletic participation rates become substantially proportionate to their representation in the undergraduate population”); see also *Equity in Athletics, Inc. v. Dep’t of Educ.*, 675 F. Supp. 2d 660, 670 (W.D. Va. 2009) (agreeing with other courts that institutions may cut men’s teams to reach substantial proportionality); *Ambrosius*, *supra* note 39, at 582.

for only women.¹²⁰ Rifle is the only NCAA sport that allows direct competition between male and female athletes.¹²¹ While it seems undesirable that any type of discrimination results from a law intended to combat sex-based discrimination, it is especially objectionable that such discrimination should occur in the context of a coeducational sport, where both sexes can compete as equals on the so-called “field of play.”

For example, the state of Nebraska maintains one NCAA rifle team, a women’s team.¹²² Federal law states that if a team is maintained for one sex, the opposite sex must be permitted to try out for the team unless it is a contact sport.¹²³ However, the law only applies if opportunities were previously limited for members of that sex, meaning that this law benefits only women.¹²⁴ Thus, if a male athlete from Nebraska wants to shoot collegiately, he must pay out-of-state tuition to attend an institution that offers coeducational rifle, such as The Ohio State University.¹²⁵ Put simply, this male athlete has been excluded from participation in a sport based on his sex.¹²⁶

D. Adding a Fourth Prong: Coeducational Teams Can Help Institutions Achieve Equality in Athletic Participation

Institutions can easily rectify the discrimination against male rifle athletes if they maintain coeducational rather than women’s rifle teams. The maintenance of a coeducational team could accomplish several goals. First, it would diminish the unintended sex-based discrimination because both sexes could elect to participate in the recruitment process for the team. Although federal law caters to female athletes by requiring institutions to allow female athletes to try out for a non-contact sport when an institution maintains a team for only men, the law fails to afford such protection to male athletes.¹²⁷ Consequently, an institution is under no legal obligation to allow a male rifle athlete to try out for a women’s rifle team, rendering the male athlete unable to compete on the women’s rifle

120. See NCAA DIRECTORY, *supra* note 74 (providing a list of sports offered at universities across the United States).

121. See E-mail from Richard Fletcher, Deputy Dir. of Athletics, Morehead State Univ., to Alexa Potts (Aug. 24, 2021, 04:46 EST) (on file with author).

122. See 2021–22 Rifle Roster, HUSKERS, <https://bit.ly/3JQCTDn> [<https://perma.cc/2VJY-UX8X>] (last visited Jan. 9, 2022).

123. See 34 C.F.R. § 106.41 (2004).

124. See *id.*

125. See 2021–22 Rifle Roster, OHIO STATE BUCKEYES, <https://bit.ly/3F9IJfo> [<https://perma.cc/DT9N-99RX>] (last visited Jan. 9, 2022).

126. See 20 U.S.C. § 1681.

127. See 34 C.F.R. § 106.41 (2004).

team because of his sex.¹²⁸ This problem would be obsolete if all rifle teams were coeducational teams, allowing both sexes to participate in the recruitment process and providing for recruitment based on skill rather than sex.

Second, the maintenance of coeducational rifle teams would further the general policy goal of increasing gender inclusivity and acceptance, which plays a large role in modern society. The use of gender-neutral pronouns, such as “they, them, and theirs,” is prevalent in society as nonbinary gender identities “have gone from obscurity to prominence in American public life.”¹²⁹ Consequently, several states permit their nonbinary citizens to change their sex on birth certificates to “X” rather than male or female.¹³⁰ Gender inclusivity and acceptance conflict with sports teams segregated by sex, especially when a transgender woman wants to compete on a team with biological women.¹³¹ In the context of NCAA rifle, these issues will never arise if institutions maintain coeducational teams for all athletes regardless of sex or gender identity.

Lastly, the maintenance of coeducational rifle teams would allow athletic departments to recruit individuals to meet substantial proportionality with sex-based enrollment rates. For example, if an institution lacked opportunities for female athletic participation during a specific academic year, the coach of a coeducational rifle team could recruit fewer males than females to provide more spots on the athletic roster for female athletes. This policy would help the institution reach substantial proportionality while still providing opportunities for male athletes to compete on the team. Rather than barring male athletes from participation entirely, this policy would minimize gender discrimination as an unintended consequence of Title IX.

Accordingly, the OCR should add a fourth prong to the test for equality in athletic participation. The fourth prong should require institutions that have a coeducational team to use the team to help provide opportunities for males and females that are substantially

128. *See id.*

129. *See* Jessica A. Clarke, *They, Them, and Theirs*, 132 *HARV. L. REV.* 894, 896 (2019).

130. *See* Amy Harmon, *Which Box Do You Check? Some States Are Offering a Nonbinary Option*, *N.Y. TIMES* (May 29, 2019), <https://nyti.ms/3HNZ1fz> [<https://perma.cc/8YBC-BJC8>].

131. *See* David W. Chen, *Transgender Athletes Face Bans from Girls' Sports in 10 U.S. States*, *N.Y. TIMES* (Oct. 28, 2021), <https://nyti.ms/3JQN3Ux> [<https://perma.cc/KY5X-VQ9M>] (explaining that nine states have enacted laws that bar or limit transgender females from participating in female sports out of fairness to biological females).

proportionate to their respective academic enrollments. Suppose an institution's general academic enrollment is split evenly between males and females. Then, assume that 45 percent of the institution's athletic opportunities are for women, leaving 55 percent of the athletic opportunities for men. Rather than use a *female rifle team* to achieve substantial proportionality and inadvertently cause discrimination against men, the institution could use a *coeducational rifle team* to achieve substantial proportionality and minimize discrimination against men. The institution could maintain a 20-member coeducational team and offer 5 spots to men and 15 spots to women. This practice would help the institution achieve substantial proportionality by diminishing the disparity between the percentage of females generally enrolled at the institution and the percentage of female athletes participating in athletic opportunities. This practice would also minimize the sex-based discrimination against men, which currently bars male rifle athletes entirely from participation on women's rifle teams.

CONCLUSION

Amidst frequent lawsuits founded on sex-based discrimination, it is prudent to celebrate the lone NCAA sport that allows for direct competition between the two sexes. However, instead of maintaining coeducational rifle teams, some institutions use women's rifle teams to try to meet Title IX requirements.¹³² The OCR guidance on measuring equality in athletic participation, a cornerstone of Title IX as it relates to athletics, makes it easy to cause inadvertent sex-based discrimination in an effort to avoid the same.

Institutions can use the OCR's three-part test for equality in athletic participation to achieve Title IX compliance by creating a women's rifle team. Under the first prong, an institution can use a women's rifle team to create additional intercollegiate level participation opportunities for female athletes that are substantially proportionate to the female student body enrollment.¹³³ Under the second prong, an institution can use a women's rifle team to help establish a history or continuing practice of program expansion for women.¹³⁴ Under the third prong, an institution might assert that

132. See Telephone Interview with Walter Rybka, Former Coach, Morehead State University Rifle Team, (Nov. 3, 2021) (stating that women's rifle teams are needed for the sake of Title IX equity).

133. See Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,418 (proposed Dec. 11, 1978) (codified at 45 C.F.R. pt. 86).

134. See *id.*

the interests and abilities of its female population have been fully and effectively accommodated by the present program, which may include a women's rifle team.¹³⁵

The issue with any one of these three approaches is that it results in sex-based discrimination against male athletes. With 7 of the 29 NCAA rifle teams reserved for only women, male rifle athletes have fewer opportunities to compete collegiately.¹³⁶ The fact that these male athletes cannot compete on certain teams because of their gender suggests the very type of sex-based discrimination that Title IX seeks to remedy.¹³⁷

Rather than segregating coeducational teams into women's teams to help achieve Title IX compliance, these teams could remain coeducational and still help achieve Title IX compliance. The OCR should add a fourth prong to the three-part test for equality in athletic participation. This prong should require institutions that have a coeducational team to use the team to help provide opportunities for males and females that are substantially proportionate to their respective enrollment rates. While still recruiting both sexes, a coach could recruit more females than males during an academic year when more athletic opportunities for females are required to satisfy substantial proportionality. This solution would allow male athletes to compete on the team instead of being barred from participation entirely, while also helping institutions reach Title IX compliance.

Albeit simple, this solution would provide a life-altering opportunity for the hypothetical male rifle athlete from Mississippi who, under the current status of the law, is forbidden from shooting collegiately at the University of Mississippi because of his sex and must leave his home state in hopes of finding another opportunity elsewhere.¹³⁸

135. *See id.*

136. *See generally* NCAA DIRECTORY, *supra* note 74 (providing a list of sports offered at universities across the United States).

137. *See* 20 U.S.C. § 1681.

138. *See* OLE MISS SPORTS, *supra* note 2.
