not have funding or prestige to match that of VMI, so they ordered women's admission to VMI. Does the equal protection clause enable one to choose between these options: creation by the state of a truly outstanding all-women's college versus female admission to a truly exceptional "adversative system" military college that loses its single-sex character? Should Virginia be allowed to claim, "We wish to offer single-sex military colleges in Virginia, but there is not enough female interest to fill a whole college, so we satisfy equal protection by letting women enroll in ROTC at Virginia Tech until more female interest becomes evident"? What, precisely, is the constitutional flaw in this claim?

2. Virginia claims that the VWIL program was based on differences between men and women that are "real" and "not stereotypes." Are not some psychological differences between men and women (on average) both "real" and "stereotypes"?

3. Justice Scalia asserts that when the Court alters what has previously been a consistent tradition of "the people's" constitutional interpretation, the Court is undermining democracy. His approach would seem to allow the government to have continued racial segregation in the 1950s. Other than sheer tradition, or sheer judicial will, is there an alternative standard that can guide the Court when it decides to update a particular constitutional interpretation?

4. Scalia insists, "There is simply no support in our cases for the notion that a sex-based classification is invalid unless it relates to characteristics that hold true in every case." Is this an accurate characterization of, for instance, *Craig v. Boren*?

5. Scalia argues that Virginia should be free to provide alternative educational options, such as, for instance, a post-high-school vocational school. By his logic, should Virginia be free to open a men-only vocational college but no college for women only?

TITLE IX AND EDUCATIONAL EQUALITY

Having voted overwhelmingly in 1972 for the ERA, that same year Congress expanded the coverage of federal civil rights law in a number of ways. For instance, the Title VII ban on employment discrimination was extended to cover employees of state and local governments. Another critical expansion of antidiscrimination law was Title IX of the 1972 Education Amendments to the Civil Rights Act of 1964, commonly known simply as "Title IX" (20 U.S.C. § 1681[a] and § 1682). This set of provisions mandated, "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. . . ."[32] If a recipient of federal funds

were found in violation of this mandate, that recipient was to lose the financial assistance.

In terms of media attention, the spotlight on Title IX first focused on high school and college athletics programs, where its impact was indeed substantial. The number of females participating in intercollegiate sports in the United States went from 16,000 in 1972 to over 150,000 by 1984, and continues to grow.[33] Expansions in athletic programs, however, are only small pieces of the changes wrought by Title IX: high school vocational training programs, once totally sex segregated, had to become nondiscriminatory; co-ed college admission programs (e.g., at Cornell University) that had openly discriminated against females by imposing stiffer admissions standards on them to make more room for males had to stop discriminating. The proportion of women law students nationwide tripled between 1971 and 1974.[34]

Like Title VI of the 1964 Civil Rights Act, Title IX is silent on the question of whether individual victims (of sex discrimination in educational programs that receive federal funds) may sue schools that discriminate against them. But in 1979 the Supreme Court ruled that individual victims may take schools to court for sex discrimination under Title IX[35] (at that point it was not clear whether the suit could ask just for injunctive relief or for damages as well). Then two cases in 1983[36] and 1984[37] established that victims of race discrimination under Title VI could take perpetrators to court, and that monetary damages could be sought under Title VI.

Congress itself followed up by enacting the Civil Rights Remedies Equalization Amendment of 1986,[38] which essentially took away the states' Eleventh Amendment immunity against lawsuits from private citizens when such lawsuits were brought under either Title VI or Title IX (or also the 1973 prohibition on discrimination against the disabled or the 1975 prohibition on age discrimination). (Normally Congress cannot legislate away parts of the Constitution; Congress evidently believes that the Fourteenth Amendment, adopted later than the Eleventh, and which Congress is charged with enforcing, limits the reach of the Eleventh Amendment.) This 1986 act states that under these laws "remedies . . . are available for such a violation to the same extent as . . . are available for such a violation in the suit against any public or private entity other than a State."[39]

Grove City College v. Bell (1984)

The legal force of Title IX was temporarily altered by a Supreme Court decision in February of 1984, *Grove City College v. T.H. Bell, Secretary of Education.*

Prior to that decision, the reference in § 902 to termination of funds for any discriminating recipient in respect to "the particular program, or part thereof, in which noncompliance has been so found" was thought to refer an entire university. That is, it was generally believed that if any part of a university discriminated, the university would lose all of its federal funds. The executive branch had interpreted the law in this way from its passage in 1972, through the district court and court of appeals levels of the *Grove City* case, but by the time the case was argued at the Supreme Court, the Carter administration had become the Reagan administration, and the Department of Education (formerly the Department of Health, Education and Welfare, or HEW) had altered its "own" position in court. At the Supreme Court, the Department of Education argued that the program-specific language of Title IX should be understood as applying to parts of universities, rather than as treating each whole university as an indivisible "program." Thus, a university could take federal aid, say, to construct science buildings but still discriminate in admissions or in sports programs. Six members of the Supreme Court bought this argument. Two (Brennan and Marshall) dissented, and one (Stevens) argued that the Supreme Court did not have jurisdiction to take this case.

This case began when the Department of Education moved in 1977 to declare Grove City College ineligible to receive federal funds in the form of Basic Educational Opportunity Grants (BEOGs) (i.e., need-based scholarships) because the college refused to complete certain obligatory government forms asserting that it refrained from discriminating on the basis of sex (Assurance of Compliance). Grove City was a coed liberal arts college of about 2,200 students, of whom about 140 received BEOGs. The record was clear and undisputed on Grove City's innocence of any racial or sex-based discrimination. But Grove City College as a matter of principle—insisting on its independence from government control—took no money from the government. (The BEOGs went directly to individual students who then used them to pay tuition.) Likewise, on principle, Grove City refused to fill out these bureaucratic forms. The college went to court to block the federal cutoff of funds from its students, arguing that the college was not a recipient of federal funds under the statute and thus should not have to fill out the forms. The Supreme Court was unanimous in rejecting this claim. But six justices stated that Grove City, in order to keep receiving the funds, would have to fill out Assurance of Compliance forms only as to its financial aid program, for it took federal money only for that program. This was the controversial part of the decision because it limited the federal government's ability to utilize financial pressures to gain Title IX compliance across university programs. Justice Brennan insisted that "controlling indicia of Congress's intent" that Title IX applied to

entire institutions, not just specific programs, should override "the latest position adopted by the Government."[40]

A bill aimed at overturning this decision (H.R.5490) passed in the House by a vote of 375–32 on June 26, 1984 and its Senate counterpart (S.2568) had 63 co-sponsors as of August 1984. The bill, dubbed at first the Civil Rights Act of 1984, whose coverage would also have extended to laws prohibiting discrimination against the handicapped and the elderly, became entangled in antiabortion politics and in a number of side issues (e.g., would ranchers whose animals drank water from federal water projects have to hire the handicapped)? The campaign against it was led by conservatives such as Orrin Hatch and Jeremiah Benton, and they succeeded in preventing its enactment. But after the Democrats took control of the Senate, the Civil Rights Restoration Act of 1988 was passed over President Reagan's veto. The *Grove City* precedent was dead. Nonetheless, Grove City College still seeks to maintain its independence; it now refuses to participate in federal financial aid programs.[41]

Title IX and College Sports: *Cohen v. Brown U.* (1996)

The controversy over Title IX's application to athletic programs continued. The statute does not literally mandate absolute equality. It allows institutions to maintain separate teams for men and women. However, if there is only one team in a given sport, students previously excluded because of sex must be allowed to try out—except for contact sports (e.g., football, basketball, ice hockey, boxing, etc.). Even this degree of sex equality was a radical enough departure from long-accepted practice to provoke vehement protest. In 1978, the Department of Education (DED) issued regulations that conformed to Congress's intent. The DED announced a three-part test for determining "whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes."[42] An institution receiving federal funds was in compliance with Title IX if any one of the following questions could be answered in the affirmative: (1) Are intercollegiate level participation opportunities for male and female students provided in numbers substantially proportionate to their respective enrollments? (2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, can the institution show a history and continuing practice of program expansion that is demonstrably responsive to the developing interests 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 as cited above, can it be demonstrated that the interests and

abilities of the members of that sex have been fully and effectively accommodated by the present program?[43] In 1991, Brown University, a private coeducational institution in Providence, Rhode Island, demoted the women's gymnastics and volleyball programs and the men's golf and water polo programs from university-funded to donor-funded status: they could continue only if they raised all their own money. The men's teams, older and more firmly entrenched in the university's culture, had deeper pockets. While the two women's programs needed to raise about $62,000, the men needed about $16,000. Amy Cohen was the named plaintiff in the ensuing class action suit.

Brown University acknowledged that both before and after its budget cuts far more men than women participated in its athletic programs, but the university insisted that a fair standard under Title IX was not numerical equality of participation or percentage equality of participation as percentage of student body, but rather was

> in direct proportion to the comparative levels of interest. . . . Brown . . . argues that an institution satisfactorily accommodates female athletes if it allocates athletic opportunities to women in accordance with the *ratio of interested and able women to interested and able men*, regardless of the number of unserved women or the percentage of the student body that they comprise. (*Cohen II*, 991 F.2d.888, at 899)

In November 1996, a federal appeals court ruled that the demotion of the two women's teams to donor-funded status constituted sex discrimination in violation of Title IX. The panel rejected Brown's "level of interest" argument on the grounds that it was based on stereotypes (*Cohen IV*, 101 F.3rd 155.). The Supreme Court declined Brown's petition to hear the case, and the women's teams were restored to university-funded status.

Other complications for Title IX enforcement are questions about what constitutes a sport and who qualifies as an intercollegiate athlete. In 2009, Quinnipiac University in Hamden, Connecticut cancelled its women's volleyball team in addition to its men's golf and outdoor track and field teams. At the same time it created a new varsity women's cheerleading team. When the volleyball players and the team's coach sued the university for failing to provide female collegiate athletes with equal opportunities to participate in school athletics, the university defended itself by arguing that it had redirected money and resources to the newly created cheerleading team thereby complying with the law. *Biediger v. Quinnipiac University*, 691 F.3d 85 (2 Cir. 2012). In its decision, the appellate court evaluated both the mechanisms by which the university counted male and female athletes and the question of whether or not the members of the cheerleading team

should be counted towards the total number of female athletes at Quinnipiac. Ultimately, the court concluded that the university had engaged in some irregularities when counting male and female athletes resulting in an inflated number of female varsity athlete positions, and it excluded the thirty roster slots on the cheerleading team because they did not qualify as "genuine varsity athletic participation" at this time. The court's reasoning followed that of the district court decision: while Quinnipiac was treating the cheerleading team as a competitive intercollegiate varsity team in many ways, the structures of intercollegiate competition for this sport were not yet well enough developed for it to compare to the other varsity sports at Quinnipiac (Id., at 103–106). Once the cheerleading team was eliminated from consideration, Quinnipiac was shown to be providing 3.6 percentage points fewer athletic participation opportunities than women's percentage of the student body, and was therefore ordered to provide more of them than were currently available (id., at 108).

TITLE IX AND SEXUAL HARASSMENT

Franklin v. Gwinnett County (1992)

Title IX has implications for sexual harassment as well as sexual assault in institutions of elementary, secondary and higher education (See Chapter 7 for a discussion of Title IX with respect to sexual assault and rape on college campuses.). While it is understood that Title IX forbids sex discrimination in institutions of education, it was not clear if individuals who sued under Title IX would be able to pursue monetary damages. Congress's rebuff of the *Wards Cove v. Atonio*, *Martin v. Wilks*, and *Patterson v. McLean Credit Union* decisions by the Civil Rights Act of November 1991 (see Chapter 3) was expressed in no uncertain terms. The Supreme Court evidently got the message. In a case argued only one month later, the Court was faced with a choice between a broad and a narrow reading of plaintiff's rights under Title IX. Apparently the Court knew which choice would avoid Congressional ire, for when it handed down its decision on February 26, 1992, it made that choice (despite the fact that the first Bush administration sent its solicitor general to Court to argue for the contrary outcome). Not only did the Court make the interpretive choice that hit harder against sex discrimination; it made the choice unanimously.

Christine Franklin v. Gwinnett County Schools posed the specific issue of whether money damages were permitted in a suit by a victim of sex discrimination under Title IX. Whether a plaintiff in such a lawsuit could ask just for injunctive relief—i.e., a court order to cease the discrimination—or whether monetary damages