Stopping the "Savage Indian" Myth: Dealing with the Doctrine of Laches in Lanham Act Claims of Disparagement

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INTRODUCTION

Far out on the northern Great Plains, the tension between Euro-American and American Indian culture continues to unfold. In Grand Forks, North Dakota one of the nation's best college hockey teams, the University of North Dakota Fighting Sioux, plays in a newly-constructed hockey palace. Each of the seats in the more than 11,500 person-capacity arena is made of cherry wood and leather, and the concourse floors are made of granite.[1] On the end of every row of seats, emblazoned in gold, is an image of a Sioux Indian with a headdress of feathers and a prominent nose.[2] The same Sioux Indian image is built into the floor of the main entrance.[3] In fact, thousands of such images bombard all hockey fans that fill the seats of Ralph Engelstad Arena.[4]

The relationship between Euro-Americans and American Indians in the United States began as a story about land and bloodshed,[5] but today is about the control of image and jurisdiction.[6] A primary struggle during the last thirty years involves sports

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1. Arena overview, *at* http://www.theralph.com/new2/Arena_Info_Section/Arena_Info_Main.htm (last visited Jan. 3, 2005).

2. Photographs, *at* http://www.zudnic.net/bob/graphics/Univ._of_North_Dakota_CHTGFolder/Leather_Seat.jpg (last visited Jan. 3, 2005).

3. Photographs, *at* http://www.zudnic.net/bob/graphics/Univ._of_North_Dakota_CHTGFolder/Solid_Marble_Sioux.jpg (last visited Jan. 3, 2005).

4. David Dodds, *Ralph Englestad Arena: NCAA minority panel questions arena as tourney site*, GRAND FORKS HERALD, Oct. 16, 2002 *available at*, http://www.grandforks.com/mld/grandforksherald/news/local/4294107.htm (last visited Jan. 3, 2005).

5. *See, e.g.*, ROBERT M. UTLEY, THE INDIAN FRONTIER OF THE AMERICAN WEST 1846–1890, at 84–85 (Ray A. Billington et al. eds., 1984) (explaining the removal of the Navajo Indians to a wasteland known as Bosque Redondo).

6. Thankfully, tragedies such as the massacre at Wounded Knee and the battle of the Little Big Horn are not the types of struggles that are occurring today. Instead, American Indians face the shrinking of tribal court jurisdiction through unfavorable non-tribal court decisions. *See* Nevada v. Hicks, 533 U.S. 353 (2001) (limiting the reach of tribal jurisdiction on Indian Country so as not to reach civil claims against state officials for harms committed on Indian Country); Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980) (extending the tax jurisdiction of the state onto Indian Country to tax sales of goods to non-Indians); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (eliminating tribal

teams that use American Indian nicknames, logos, and mascots (hereinafter "nicknames").[7] The struggle over the use of American Indian nicknames occurs across the entire nation and at every level of athletics. These nicknames perpetuate the image that American Indians live a savage lifestyle; this false image of today's American Indians is known as the "savage Indian" myth.[8] Although some high schools and colleges have made changes,[9] many schools still use American Indian nicknames.[10] None of the six professional sports teams that use such nicknames have changed.[11]

The struggle over image has gradually progressed from one that was primarily conducted through demonstrations and protests,[12] to one that has increasingly looked to legal avenues as a catalyst for change.[13] *Pro-Football, Inc. v. Harjo*,[14] a recent decision by the United States District Court for the District of Columbia, involved a claim brought by Pro-Football, Inc. ("Pro-Football") to overturn a 1999 decision of the Trademark Trial and Appeal Board ("TTAB") canceling six team trademarks that used

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jurisdiction over non-Indian versus non-Indian violent crimes committed on Indian Country). The line of cases concerning shrinking tribal jurisdiction will not be analyzed in this Note, but are of importance insofar as tribal jurisdiction is an area in which American Indians are feeling the negative impact of the "savage Indian" myth described in Part I.

7. *See* American Indian Sport Team Mascots, *at* http://aistm.org/1chronologypage.html (last visited Jan. 3, 2005).

8. *See* H.W. Peterson, *Debunking Those Lingering Myths about American Indians* (mentioning the myth that Indians are "basically a savage and barbaric people"), *at* http://coas.missouri.edu/mas/articles/articledebunking.html (last visited Jan. 3, 2005); Kentucky-Uruguay Cultural Heritage Education Project, *Separating Fact From Fiction: Myths About Kentucky's Native Peoples* (discussing the "savage Indian" myth), *at* http://www.dinacyt.gub.uy/proykent/boone_myths.htm (last visited Jan. 3, 2005).

9. *See* American Indian Sport Team Mascots, *supra* note 7. Among the schools that have changed names are universities such as the Miami University RedHawks (formerly the Redskins), the St. John's University Red Storm (formerly the Redmen), and the Stanford University Cardinal (formerly the Indians). *See id.* As of 1998, nearly one-third of all public schools in the state of Wisconsin that used American Indian nicknames had ceased such use. *Id.*

10. Included among the numerous universities currently using American Indian nicknames are the University of North Dakota Fighting Sioux, the University of Illinois Fighting Illini, and the University of Utah Utes.

11. There are currently six professional sports teams that use American Indian nicknames within the National Football League ("NFL"), National Basketball Association ("NBA"), National Hockey League ("NHL"), and Major League Baseball ("MLB"). They are the Kansas City Chiefs (NFL), the Washington Redskins (NFL), the Golden State Warriors (NBA), the Chicago Blackhawks (NHL), the Atlanta Braves (MLB), and the Cleveland Indians (MLB).

12. *See* Russ Jamieson, *Native Americans plan protests at World Series*, *at* http://www.cnn.com/US/9510/mascot_protest/ (Oct. 21, 1995) (stating that the American Indian Movement ("AIM") conducted protests in 1991 and 1992 against the Atlanta Braves team nickname); Mordecai Specktor, *Still not the REAL Indians*, *at* http://nativenet.uthscsa.edu/archive/nl/9505/0012.html (May 1, 1995) (stating that protests also occurred at the 1992 Super Bowl against teams using American Indian nicknames).

13. *See, e.g.*, American Indian Sport Team Mascots, *supra* note 7; Jamieson, *supra* note 12 (stating that after the 1991 and 1992 protests AIM moved on to file lawsuits in four cities where professional sports teams have American Indian nicknames in hopes of changing the nicknames).

14. 284 F. Supp. 2d 96 (D.D.C. 2003).

some form of the word "redskin."[15] Suzan Shown Harjo, a member of a federally-recognized American Indian tribe, along with six other American Indians, successfully petitioned the TTAB to cancel the trademarks based on § 1052(a) (commonly referred to as, and hereinafter, § 2(a))[16] of the Federal Lanham Act.[17] The TTAB eliminated the federal protection of the six Pro-Football trademarks pursuant to § 2(a) because the trademarks disparaged American Indians.[18] The district court reversed the cancellations because of an insufficient record of disparagement to American Indians, and because laches barred the claim from consideration.[19] Because most professional sports teams have old trademarks pertaining to their American Indian nicknames,[20] the application of laches may provide the most trouble for future litigants challenging the trademarking of American Indian nicknames.[21]

This Note will examine the recent *Pro-Football, Inc. v. Harjo* decision, and will present an argument to refute the use of laches in disparagement claims brought by American Indians. Part I of this Note will discuss the harms that the continued use of American Indian nicknames cause. Part II will provide an overview of the *Pro-Football, Inc. v. Harjo* decision in three steps. First, it will discuss the Lanham Act and its subsections (including § 2(a)). Second, a summary of laches will be presented. Third, this Note will examine the *Pro-Football, Inc. v. Harjo* decision with respect to its analysis of the § 2(a) claim of disparagement and laches. Part III will analyze the public interest exception to the laches doctrine and argue that this exception is the primary avenue available for refuting the application of laches to § 2(a) disparagement

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15. *Id.* at 99.

16. 15 U.S.C. § 1052(a) (2000).

17. *Pro-Football, Inc.*, 284 F. Supp. 2d at 99.

18. *Id.* (citing Harjo v. Pro- Football, Inc., 50 U.S.P.Q.2d 1705, 1749 (T.T.A.B. 1999), 1999 WL 37907).

19. *Id.* at 145.

20. For example, the Kansas City Chiefs have active trademarks with American Indian references dating back to at least 1974 (registration number 0982132), the Washington Redskins have such trademarks dating back to at least 1967 (registration number 0836122), and the Atlanta Braves have such trademarks dating back to at least 1967 as well (registration number 0829309). United States Patent and Trademark Office, *at* http://www.uspto.gov/index.html (last visited Jan. 3, 2005). In comparison, the trademarks of schools tend to be more recently created. For example, the University of Illinois' "Fighting Illini" trademark dates back to only 1999 (registration number 2230527). *Id.* Other schools, such as the University of Utah and the University of North Dakota, do not possess such trademarks. *See id.*

21. Searches conducted through the United States Patent and Trademark Office website show that all six professional sports franchises with American Indian nicknames in the NFL, NBA, NHL, and MLB rely on trademark protection for their nicknames, and a few of the universities with American Indian nicknames also rely on trademark protection. *See id.* Thus, the laches problem is most troublesome in reference to professional sports franchises. Even where trademark protection exists for school nicknames it is less troublesome because pressure from local protests and demonstrations have been at least adequate in changing nicknames at the high school and college levels. *See* PAULA L. WAGONER, THEY TREATED US JUST LIKE INDIANS 23–31, 131–132 (Raymond J. DeMallie & Douglas R. Parks eds., 2002); *see also supra* note 9 and accompanying text. Protest and demonstration pressure has not worked at all to change professional sports team nicknames.

claims[22] (thus avoiding the problem of *Pro-Football, Inc. v. Harjo*).[23] The Note will conclude that § 2(a) disparagement claims seeking to eliminate trademark protection of American Indian nicknames sufficiently implicates the public interest to defeat a laches defense.

I. HARMS CREATED BY AMERICAN INDIAN NICKNAMES FOR SPORTS TEAMS

It is imperative to understand the harm that American Indian nicknames cause in order to appreciate the need to eliminate their use. Furthermore, from a legal standpoint, these harms enhance the American Indians' argument against laches.[24]

A. Creation of the "Savage Indian" Myth and Historical Harms to American Indians

Throughout the history of the United States, American Indians have been marginalized and treated as sub-humans, both at the hands of the United States government and by Euro-American citizens of the United States.[25] The ever-changing American Indian policies of the United States government have contributed to the oppression. At the earliest point, the government's policy was based on separation of American Indians and United States citizens.[26] As Chief Justice Marshall's decision in *Johnson v. M'Intosh*[27] pointed out, the nation preferred to assimilate the American Indians into the majority culture, although at the time it was not yet considered possible.[28] In the 1830s, the United States began to remove American Indians from

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22. This avenue will be applicable to disparagement claims against the trademark protected use of American Indian nicknames by sports teams that are brought before the TTAB and at any further level of litigation or appeal associated with such a claim. This avenue could be immediately applied to the pending appeal of the *Pro-Football* decision. *See infra* note 123.

23. This Note will not analyze the evidentiary problems of the *Pro-Football* case. For a discussion of the evidentiary problems, see Rachel Clark Hughey, *The Impact of* Pro-Football, Inc. v. Harjo *on Trademark Protection of Other Marks*, 14 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 327 (2004).

24. This link of the harms to the public interest and the public interest exception to laches is the main point of this Note and is discussed in detail in Part III.

25. *See, e.g.*, FERGUS M. BORDEWICH, KILLING THE WHITE MAN'S INDIAN: REINVENTING NATIVE AMERICANS AT THE END OF THE TWENTIETH CENTURY 173–74 (1996) (explaining that anthropologists were freely able to rob the graves of American Indians, while robbing the graves of any other racial group would have been a crime); WARD CHURCHILL, *Bringing the Law Home: Application of the Genocide Convention in the United States*, *in* INDIANS ARE US?: CULTURE AND GENOCIDE IN NATIVE NORTH AMERICA 11, 39 (1994) (explaining the 1970s policy of the Bureau of Indian Affairs Health Service to sterilize American Indian women on an involuntary basis); RICHARD DRINNON, FACING WEST: THE METAPHYSICS OF INDIAN-HATING AND EMPIRE-BUILDING 75 (1980) (stating that American Indians were considered to be beastly and degradations of human beings).

26. DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 84–87 (4th ed. 1998).

27. 21 U.S. (8 Wheat.) 543 (1823).

28. *Id.* at 590.

their homelands and relocate them onto reservations[29]—often land with poor soil, water, and vegetation.[30] During this period of American Indian removal, the "Trail of Tears" and other atrocities occurred.[31] The assimilation and allotment policy period, which lasted from 1871–1928, was no kinder to American Indians.[32] The government's primary objective during this period was to assimilate American Indians to Euro-American ways by importing the Euro-American style of property rights into the tribal land holdings.[33] During this time, the reservation lands of the American Indians were diminished in order for Euro-Americans to obtain large portions of the best reservation land for their own development and use.[34]

While Euro-Americans increased in population and wealth, the declining American Indian population held less and less land. It is no coincidence that these two trends were occurring at the same time; the idea of nation building in the United States has always been linked to the destruction of the American Indian.[35] The Founding Fathers, for the most part, did not seek to aid the American Indians, but rather to subordinate their "savage" neighbors. John Adams referred to the Indians as "savages" unfit for democracy and Thomas Jefferson sought to "exterminate[]" the Indians of any tribe that resisted assimilation and dominance.[36] Studies show that by 1900 the population of American Indians was approximately 90% less than it was at the time of Euro-American settlement in North America. The arrival and settlement of Euro-Americans stands as the primary cause of this vast diminishment.[37]

These past harms are largely unrecognized by non-Indian Americans today. Those non-Indian Americans who know this history often choose to accept genocide as proper or inevitable.[38] The non-Indian American public of today can acquiesce to

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29. *See* BORDEWICH, *supra* note 25, at 45 (stating that in 1830 the Indian Removal Act was passed).

30. *See id.* at 47; UTLEY, *supra* note 5.

31. *See* BORDEWICH, *supra* note 25, at 47; *see, e.g.*, UTLEY, *supra* note 5.

32. Indian Land Working Group, *Impact of Allotment on Indian Lands* (stating that this policy period reduced tribal lands and tore apart American Indian culture), *at* http://www.ilwg.net/impact.htm (last visited Jan. 3, 2005).

33. *Id.*

34. *Id.* (stating that statutorily forced sales of American Indian reservation land to Euro-Americans were in direct opposition to established treaties, and that the treaty terms were ignored due to the Euro-American greed for the reservation lands). Similar to the assimilation and allotment period was the termination policy period, which lasted from 1945–1961. *See* GETCHES ET AL., *supra* note 26, at 204. This period saw some American Indian reservations completely eliminated by the Federal government in hopes of creating rapid assimilation of the American Indians to the majority culture. *Id.*

35. *See* DRINNON, *supra* note 25, at 464.

36. *Id.* at 70, 75, 96, 103 (stating that the American Indians were deprived of liberty because the founders of the United States generally perceived the American Indians as savages, just like many other Euro-Americans perceived the American Indians).

37. *See* BORDEWICH, *supra* note 25, at 53 (stating that the population of American Indians in what is now the continental United States stood at merely 250,000 in 1900 as compared to the 2.6 million American Indian inhabitants at the time of Euro-American settlement).

38. *See* WARD CHURCHILL, In the Matter of Julius Streicher*: Applying Nuremburg Precedents in the United States, in* INDIANS ARE US?: CULTURE AND GENOCIDE IN NATIVE NORTH

historical acts of marginalization, maltreatment, and genocide of American Indians due to the current portrayal of American Indians as "savage Indian" relics of the past, rather than as a continuing presence in today's world.[39]

B. Perpetuation of the "Savage Indian" Myth Today

Unfortunately for American Indians, the image of the "savage Indian" did not die with John Adams or with the end of the allotment era. Even today, in the era of tribal self-determination,[40] the "savage Indian" image continues to be propagated through television, movies, and sports team nicknames.[41] By "savage Indian," this Note means an image of American Indians as an uncivilized social group of aggressive and unintelligent persons.[42] This image has been handed down from the time of John Adams and Thomas Jefferson. The American Indian trademarks of sports teams promote this image today. The Cleveland Indians trademark of "Chief Wahoo" depicts a caricature of an American Indian face with a cartoon-like grin and a large nose, an Atlanta Braves trademark shows an American Indian in a "war cry" with a mohawk and feathers, and a Washington Redskins trademark portrays an American Indian head profile with war paint and feathers.[43] These trademarks represent Native Americans as aggressive and unsophisticated.[44]

The "savage Indian" message of the trademarked nicknames is made more harmful due to the removal and reservation policies of the past. These policies have resulted in most non-Indian Americans living far away from the nation's large American Indian reservation populations,[45] and thus, most non-Indian Americans have not had the contact with American Indians needed to break the "savage Indian" myth. Two main reasons cause the minimal contact to persist despite the fact that the majority of

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AMERICA, *supra* note 25, at 73, 79 (1994) (stating that the public acquiesces in the past genocide of American Indians due to the dehumanizing portrayal of American Indians as "strange, perverted, ridiculous, and often very dangerous *things of the past*") (emphasis in original). American civic ideology such as the "manifest destiny" of the United States contributes to this idea of inevitability.

39. *See id.* at 79 (stating that the American Indian has been "consigned to another dimension . . . , drifting as myths through the vast panorama of Americana").

40. *See* GETCHES ET AL., *supra* note 26, at 224 (stating that self-determination is the policy era that has existed since 1961). The self-determination policy's primary goal is to strengthen the autonomy of American Indians and tribes, such that the tribes can decide if they prefer to run certain administrative functions autonomously or if they would rather keep certain functions under the control of the Bureau of Indian Affairs. *Id.* at 227.

41. *See* CHURCHILL, *supra* note 38, at 79–81.

42. *See supra* note 8.

43. *See* United States Patent and Trademark Office, *supra* note 20 (referencing Cleveland Indians trademark registration number 1590703, Atlanta Braves trademark registration number 0829309, and Washington Redskins trademark registration number 0836122).

44. This representation derives from the trademarks, and is further enhanced through actions associated with the trademarks (such as the "tomahawk chop" at Atlanta Braves baseball games).

45. *See* Infoplease, *U.S. Federal and State Indian Reservations*, *at* http://www.infoplease.com/ipa/A0778676.html (last visited Jan. 3, 2005).

American Indians today are "urban Indians" who do not live on reservations.[46] The first is that non-Indian Americans often do not know when they are interacting with urban Indians because the majority population often mistakes urban Indians for Asian or Hispanic Americans.[47] Thus, American Indians often suffer an outward loss of identity from the majority population. This outward loss of identity occurs in part because the urban Indians who work in blue and white collar jobs in the cities of the United States do not fit the stereotypical "savage Indian" profile that is fed to the majority population.[48]

Secondly, the amount of interaction is also minimized due to the small overall population of American Indians in the United States. The American Indian population makes up only 1.5% of the overall United States population,[49] and only eight states have an American Indian population that is at least 3.0% of the state's overall population.[50] This lack of interaction makes the mythical image of the "savage Indian," as depicted by American Indian nicknames of sports teams, even more dangerous to today's American Indians.[51] Without real world interactions non-Indian Americans easily mistake the "savage Indian" myth as reality.

The "savage Indian" myth has hampered the ability of tribal courts to assert jurisdiction. The opinion of the Supreme Court of the United States in *Nevada v. Hicks*[52] continued the modern trend of shrinking tribal jurisdiction and dismantling tribal rights.[53] In *Hicks*, the court was faced with the question of whether a tribal court had jurisdiction over an American Indian's civil claim against a state game warden for the improper execution of a search warrant in Indian Country.[54] The majority found

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46. More than two-thirds of all American Indians live off reservation in urban, large city environments. These American Indians are commonly referred to as "urban Indians." DONALD L. FIXICO, THE URBAN INDIAN EXPERIENCE IN AMERICA 188 (2000).

47. *Id.* at 33.

48. *See id.* at 33, 37 (stating that American Indians that do not fit the savage stereotype are frequently not seen as American Indians at all).

49. Based on the 2000 United States census, American Indians (counting individuals that claimed to be multi-racial including American Indian as one of the raccs) made up only 1.5% of the overall United States population. The American Indian and Alaska Native Population: 2000, at 3 (Feb. 2002) (stating the total American Indian population as slightly more than 4.1 million persons), *at* http://www.census.gov/prod/ 2002pubs/c2kbr01-15.pdf (last visited Jan. 3, 2005).

50. *Id.* at 5. These eight states are Alaska, Arizona, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, and Wyoming. *Id.*

51. United States Commission on Civil Rights, *Statement of the U.S. Commission on Civil Rights on the Use of Native American Images and Symbols as Sports Symbols* (stating that even where such symbols are used for a positive purpose, they create false perceptions which keep individuals from understanding the true American Indian of today), *at* http://aistm.org/2001usccr.htm (Apr. 13, 2001).

52. 533 U.S. 353 (2001).

53. *See* County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 502 U.S. 251 (1992) (deciding that the state can tax any alienable land held by a tribe or a tribal member on Indian Country); Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989) (deciding that states have jurisdiction to tax non-Indians for oil and gas lease activity on Indian Country); *see also supra* note 6.

54. *Hicks*, 533 U.S. at 355–57.

that the tribal court did not have jurisdiction over the law enforcement duties of state officers,[55] because the opposite decision would have allowed the tribe to override the duties of a state officer whenever it desired.[56] Through this decision, the Court suggests that while a state court has authority to override a state officer's execution of duties, it cannot trust a tribal court to fairly do the same[57]—an outsider will not get a fair trial in the "savage" tribal courts.

The "savage Indian" myth has also contributed to the internal loss of identity for American Indians, which leads to a negative stigmatization of American Indians. Some American Indian children have communicated that they are ashamed of being American Indians.[58] Such stigmatization can be very dangerous, as the Supreme Court made clear in *Brown v. Board of Education of Topeka*[59] in reference to the schooling of African-American children. One of the primary factors in the *Brown* decision was the fact that the negative stigmatization of African-American children led to a loss of success in their educational endeavors.[60] Likewise, American Indian children face negative consequences from the stigmatization created by the "savage Indian" myth. As the United States Commission on Civil Rights stated, "[t]he perpctuation of harmful stereotypes may exacerbate [the problem]" of American Indians maintaining "the lowest high school graduation rates in the nation and even lower college attendance and graduation rates."[61]

Thus, the American Indian image that John Adams spoke of beginning in the separation policy era of the United States continues to exist today in the form of the "savage Indian" myth. The "savage Indian" myth is perpetuated in the popular culture of the American majority through the use of, among other things, American Indian nicknames by sports teams, and this image continues to disparage American Indians and cause them many ills, both on a tribal and on a personal level.[62] As the United States Commission on Civil Rights stated, the false portrayals of American Indians through the use of nicknames "prevent[s] non-Native Americans from understanding the true historical and cultural experiences of American Indians. Sadly, [the false

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55. *Id.* at 373.

56. *Id.* at 365 (quoting Anderson v. Creighton, 483 U.S. 635, 638 (1987)).

57. Joseph William Singer, *Canons of Conquest: The Supreme Court's Attack on Tribal Sovereignty*, 37 NEW ENG. L. REV. 641, 645 (2003) (stating that the Supreme Court is treating the tribal courts as "inherently suspect").

58. FIXICO, *supra* note 46, at 35.

59. 347 U.S. 483, 493–94 (1954). The analogy to *Brown* is used to show the consistency in the type of harm (although the harm may be different in scope) suffered by African-Americans during the time of "separate-but-equal" laws and that suffered by American Indians currently. Both result in stigmatization and sub-humanization of the victims by the majority.

60. *Id.* at 494 (stating that the stigmatization of inferiority negatively "affects the motivation of a child to learn").

61. United States Commission on Civil Rights, *supra* note 51.

62. *See* CHURCHILL, *supra* note 38, at 82 ("*Understand* that the treatment of Indians in American popular culture is *not* 'cute' or 'amusing' or some sort of 'good, clean fun.' Know that it causes real pain to real people. *Know* that it threatens our very survival.") (emphasis in original).

portrayals] also encourage biases and prejudices that have a negative effect on contemporary Indian people."[63]

As Part III of this Note will explain, these harms provide the basis for the American Indians' public interest argument against laches.

II. EXAMINING THE LACHES DECISION IN *PRO-FOOTBALL, INC. V. HARJO*

The recent decision in *Pro-Football, Inc. v. Harjo*[64] is the leading case for analyzing the application of laches within the framework of Lanham Act § 2(a) disparagement claims. As previously stated, this Note seeks to develop an argument to counter the application of laches to § 2(a) disparagement claims. Before analyzing the public interest exception used for reaching this ultimate goal (this will be done in Part III) this Note will: (a) discuss the Lanham Act as it applies to disparagement claims against the use of American Indian nicknames, (b) discuss laches as it currently exists, and (c) discuss the manner in which laches was applied in the *Pro-Football* decision.

A. The Lanham Act

The Federal Trademark Act of 1946, more commonly known as the Lanham Act ("Act") is the trademark protection law that serves to protect American Indian nickname trademarks.[65] The principal purpose of the Act is to "secur[e] to the owner [of the trademark] the good will of his business and [to protect] the public against spurious and false marked goods."[66] There are two provisions of the Act that are of importance for removing the trademark protection of American Indian nicknames for sports teams: § 2(a) and § 1052(d) (commonly referred to as, and hereinafter, § 2(d)).

1. Section 2(a)

Section 2(a) of the Act is the key provision for litigants seeking to remove trademark protection from American Indian nicknames used by sports teams.[67] It is important to note that § 2(a) will not bar a team from using the nickname.[68] Rather, this approach assumes that once trademark protection is lost the team will face sufficiently severe economic consequences, thus causing the team to voluntarily stop using the nickname and switch to a non-American Indian nickname that it can trademark.[69]

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63. United States Commission on Civil Rights, *supra* note 51.

64. 284 F. Supp. 2d 96 (D.D.C. 2003).

65. 15 U.S.C. § 1052 (2000 & Supp. 2004).

66. Ann K. Wooster, Annotation, *"Post-Sale Confusion" in Trademark or Trade Dress Infringement Actions Under § 43 of Lanham Trade-Mark Act (15 U.S.C.A. § 1125)*, 145 A.L.R. FED. 407 (1998) (quoting S. Rep. No. 79-1333 (1946)).

67. *See Pro-Football, Inc.*, 284 F. Supp. 2d at 102. The use of § 2(a) is important because there is no statutory time limit on § 2(a) claims. 15 U.S.C. § 1052. The only limitation is the equitable doctrine of laches.

68. *Pro-Football, Inc.*, 284 F. Supp. 2d at 144.

69. The negative economic consequences would likely have to result from competitors using the formerly protected nickname on merchandise and the loss of investments from sponsor companies of the team due to the tenuous nature of the formerly protected nickname. Such

Section 2(a) states, in pertinent part, that no trademark shall be refused protection by its nature unless it "[c]onsists of or comprises immoral, deceptive, or scandalous matter; or *matter which may disparage* or falsely suggest a connection with *persons, living or dead, institutions, beliefs, or national symbols,* or bring them into contempt, or disrepute . . . ."[70] While the language of § 2(a) provides two distinct clauses for trademark cancellation, the significant clause for American Indian litigants, at issue in *Pro-Football*, is the second and in particular its provision discussing disparagement[71] (hereinafter "disparagement provision").[72]

A trademark satisfies the disparagement provision if it meets the two-part test set forth by the TTAB.[73] It must be: (1) "reasonably understood as referring to the plaintiff,"[74] and (2) "considered offensive or objectionable by a reasonable person of ordinary sensibilities."[75] The disparagement test looks only at the class of people that

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negative consequences are possible because the sales of professional sports team apparel is a billion-dollar-per-year industry, and some universities make in excess of a million dollars per year selling similar merchandise. *See* Hughey, *supra* note 23, at 332.

70. 15 U.S.C. § 1052(a) (emphasis added).

71. The TTAB decision, which preceded the *Pro-Football* court's decision, did not find the term "Redskins" to be immoral or scandalous to the public at large, and therefore the first clause of § 2(a) was not analyzed by the *Pro-Football* court. *Pro-Football, Inc.*, 284 F. Supp. 2d at 99–100. Thus, the immoral or scandalous matter clause of § 2(a) will not be examined in this Note.

72. The provision of the second clause discussing "contempt or disrepute" will not be discussed in specific, because the TTAB and the *Pro-Football* court have cast aside this provision of the second clause as being nothing more than duplicative of the disparagement provision of the same clause. *See Pro-Football, Inc.*, 284 F. Supp. 2d at 113–14; Harjo v. Pro-Football, Inc., 50 U.S.P.Q.2d 1705, 1766 (T.T.A.B. 1999), 1999 WL 375907, at *38. Likewise, the provision of the second clause discussing false suggestions will not be discussed in this Note as a means for eliminating the trademark protection of teams, because it was not analyzed by the *Pro-Football* court either. *Pro-Football, Inc.*, 284 F. Supp. 2d at 99–100. The false suggestion provision will be discussed in Part III.A. as a comparison to the disparagement provision.

73. Kristine A. Brown, *Native American Team Names and Mascots: Disparaging and Insensitive or Just a Part of the Game?*, 9 SPORTS LAW. J. 115, 124 (2002) (citing Greyhound Corp. v. Both Worlds, Inc., 6 U.S.P.Q.2d 1635 (T.T.A.B. 1988)).

74. *Id.* The use of the term "plaintiff" here is consistent with a party in the position of the American Indians in *Pro-Football*, even though the American Indians are not the plaintiffs in *Pro-Football*. In the *Pro-Football* case before the District Court, it is Pro-Football that is using laches despite the fact that Pro-Football is the plaintiff. *Pro-Football, Inc.*, 284 F. Supp. 2d at 99. This is able to occur because the Act allows a party who receives an unfavorable decision by the TTAB to bring a civil action to the District Court for the District of Columbia if there is diversity of the parties. 15 U.S.C. § 1071(b)(1), (4) (2004). Thus, the *Pro-Football* case is not an appeal of the TTAB decision, it is a claim based on a cause of action created by § 1071. To avoid confusion, the terms "plaintiff" and "defendant" will not be used at all in reference to *Pro-Football* in this Note. Wherever used in reference to other cases, the term "plaintiff" should be understood to mean a party in the position of the American Indians, while the term "defendant" should be understood to mean a party in the position of Pro-Football.

75. Brown, *supra* note 73, at 124 (citing *Greyhound Corp.*, 6 U.S.P.Q.2d at 1639). The two-part test set forth by the TTAB in *Greyhound Corp.* should be seen as analogous to the two-part test set forth by the TTAB in *Harjo*, 50 U.S.P.Q.2d at 1741, and agreed upon by the district court. *See Pro-Football, Inc.*, 284 F. Supp. 2d at 125–28 (stating that the two-part test looks at the meaning of the word used as the nickname, including its connection to the

the trademark refers to rather than the general public.[76] Thus, courts will not analyze whether non-Indian Americans believe the term "redskins" may disparage American Indians, but rather will analyze whether American Indians believe the term may disparage American Indians. Moreover, the disparagement inquiry is based on the attitudes that existed when the trademark was registered, not on present day attitudes.[77]

2. Section 2(d)

Section 2(d) states in pertinent part that a trademark shall be refused registration if it "so resembles a mark registered in the Patent and Trademark Office . . . as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive . . . ."[78] For the purposes of this Note, § 2(d) is important because it has more developed case law than § 2(a), and therefore this Note will use it by analogy to analyze how a § 2(a) disparagement claim can use the public interest exception to overcome an otherwise successful laches argument.

B. The Doctrine of Laches

Because the problems in *Pro-Football* that concern proving disparagement are largely evidentiary problems that apply solely to that case, the main area of concern in the post-*Pro-Football* legal environment will be the application of laches.[79] Laches is an equitable doctrine that "denies relief to a claimant who has unreasonably delayed . . . in asserting the claim, when that delay . . . has prejudiced the party against whom relief is sought."[80] To analyze laches as it applies to § 2(a) disparagement claims, it is appropriate to look at how the common-law elements of laches apply to trademark infringement cases[81] for two reasons: (1) the infringement cases are easily applied by analogy to § 2(a);[82] and, (2) other than *Pro-Football*, there has been little litigation in the area of § 2(a) disparagement claims, and thus, little direct precedent exists.[83] The common-law approach to laches, used in *Pro-Football*, involves a two-prong test consisting of delay and prejudice.[84]

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referenced group, and looks at whether the word is shown to be disparaging to a "substantial composite" of the referenced group).

76. *See* Brown, *supra* note 73, at 124–25 (citing Jack Achiezer Guggenheim, *Renaming the Redskins (And the Florida State Seminoles?): The Trademark Registration Decision and Alternative Remedies*, 27 FLA. ST. U. L. REV. 287, 297 (1999) (citing *In re* Hines, 31 U.S.P.Q.2d 1685, 1688 (T.T.A.B. 1994))); *see also Pro-Football, Inc.*, 284 F. Supp. 2d at 124–25.

77. *Pro-Football, Inc.*, 284 F. Supp. 2d at 125.

78. 15 U.S.C. § 1052(d) (Supp. 2004).

79. *See infra* Part II.C; *see also* 15 U.S.C. § 1069 (2004) (allowing for laches to be applicable to the Lanham Act).

80. BLACK'S LAW DICTIONARY 396 (2d pocket ed. 2001).

81. *See, e.g.*, Univ. of Pittsburgh v. Champion Prods. Inc., 686 F.2d 1040, 1044 (3d Cir. 1982) (citing Gruca v. United States Steel Corp., 495 F.2d 1252, 1258 (3d Cir. 1974)); Anheuser-Busch v. Du Bois Brewing Co., 175 F.2d 370, 373–74 (3d Cir. 1949), *cert. denied*, 339 U.S. 934 (1950).

82. *Pro-Football, Inc.*, 284 F. Supp. 2d at 136–37.

83. *Id.* at 124.

84. *See, e.g.*, *Univ. of Pittsburgh*, 686 F.2d at 1044 (citing *Gruca*, 495 F.2d at 1258); *Anheuser-Busch*, 175 F.2d at 373–74. In *Pro-Football* the delay prong of the test is broken into

1. The Delay Prong

Laches separates delays into two distinct categories: patently egregious and less egregious.[85] A delay is patently egregious if it extends for 100 years or more.[86] These delays generally result in an overall abandonment of the party's claims.[87] In contrast, a less egregious delay will often result in a bar of past claims, but might leave claims for prospective, injunctive relief alive.[88] Less egregious delays must be broken into reasonable and unreasonable delays.[89] Since the Act is a federal statute that does not set forth any statutory limitations on the time frame for bringing claims, it is customary for the court to look to the most applicable local law and apply its statute of limitations to the Act.[90] If the delay is within the local statute of limitations, then there is a presumption that the delay is not unreasonable, but if the delay is greater than the statute of limitations, then the delay is presumed to be unreasonable.[91] The burden of proof remains with the party using laches, even if the delay is greater than the statute of limitations.[92]

A party can allege several legitimate "excuses" that may persuade a court to deem a less egregious delay not unreasonable. For instance, reasonable time taken to settle a

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two components (substantial delay and notice of the trademarks during the delay), thus giving the basic two-prong test three components for the overall analysis. *See Pro-Football, Inc.*, 284 F. Supp. 2d at 139 (citing Bridgestone/Firestone Research, Inc. v. Auto. Club de L'Ouest de la France, 245 F.3d 1359, 1361 (Fed. Cir. 2001)); *see also infra* note 111 and accompanying text.

85. *Univ. of Pittsburgh*, 686 F.2d at 1044.

86. *Id.* (citing *Anheuser-Busch*, 175 F.2d at 374).

87. *Id.* (citing *Anheuser-Busch*, 175 F.2d at 374).

88. *Id.* (citing *Anheuser-Busch*, 175 F.2d at 373–74); *see also* Hot Wax, Inc. v. Turtle Wax, Inc., 191 F.3d 813, 824 n.3 (7th Cir. 1999) (quoting James Burrough, Ltd. v. Sign of Beefeater, Inc., 572 F.2d 574, 578 (7th Cir. 1978)).

89. *Univ. of Pittsburgh*, 686 F.2d at 1044–45 (citing Menendez v. Holt, 128 U.S. 514, 523-24 (1888)).

90. *Hot Wax, Inc.*, 191 F.3d at 821 (citing Wilson v. Garcia, 471 U.S. 261, 266–67 (1985)); *see also* Santana Prods., Inc. v. Bobrick Washroom Equip., Inc., 249 F. Supp. 2d 463, 497-98 (M.D. Pa. 2003) (quoting *Wilson*, 471 U.S. at 266).

91. Tandy Corp. v. Malone & Hyde, Inc., 769 F.2d 362, 365-66 (6th Cir. 1985), *cert. denied*, 476 U.S. 1158 (1986) (stating that the presumption enables objectivity and clarity of the analysis); *see also* AmBrit, Inc. v. Kraft, Inc., 812 F.2d 1531, 1546 (11th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987).

92. *Bridgestone/Firestone Research, Inc.*, 245 F.3d at 1361 (citing Cornetta v. United States, 851 F.2d 1372, 1380 (Fed. Cir. 1988)); *see also* Analytic Recruiting, Inc. v. Analytic Res., L.L.C., 156 F. Supp. 2d 499, 516 (E.D. Pa. 2001) (citing Pappan Enters., Inc. v. Hardee's Food Sys., Inc., 143 F.3d 800, 804 (3d Cir. 1998)); Fed. Express Corp. v. United States Postal Serv., 75 F. Supp. 2d 807, 814 (W.D. Tenn. 1999). *Contra Univ. of Pittsburgh*, 686 F.2d at 1045 (stating that the burden of proof shifts to the plaintiff if the claim is brought outside of the statute of limitations) (citing *Gruca*, 495 F.2d at 1258-59; Burke v. Gateway Clipper, Inc., 441 F.2d 946, 949 (3d Cir. 1971)). The *Federal Express* court correctly stated that the burden of proof remains with the defendant, but the court mistakenly interpreted the presumption of an unreasonable delay, as explained by the *Tandy* court, as a presumption that laches exists on a per se basis. *Fed. Express Corp.*, 75 F. Supp. 2d at 814. The presumption of an unreasonable delay only applies to the delay prong of the laches test, and the prejudice portion of the analysis still must be proved to exist. *Tandy Corp.*, 769 F.2d at 366–67. Therefore, the presumption of an unreasonable delay is not equivalent to a mandated application of laches.

potential dispute without litigation will not be included in the time calculus of laches.[93] It is also true that a change in circumstances concerning the trademark can bar the application of laches if the harms caused by the infringement have increased due to the change[94] and the change in circumstances was more than normal growth in the defendant's business.[95]

2. The Prejudice Prong

Delay alone cannot support laches;[96] prejudice to the defendant must also be proved. There are two main forms of prejudice: (1) lost witnesses and evidence, and (2) monetary.[97] The primary focus of § 2(a) cases has been on monetary prejudice.[98] In analyzing monetary prejudice, courts do not focus on the total amount of money spent on creating a trademark, but rather on how much money has been spent that would not otherwise have been spent if not for the delay in bringing the claim.[99] Courts further

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93. *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 31 cmt. c (1995). This excuse is not readily applicable to American Indians who are trying to stop the use of American Indian nicknames by sports teams, because the parties involved have not likely been conducting settlement meetings throughout the period of delay.

Trademark law is a subset of unfair competition law, and trademark law has been codified almost in its entirety by the Act. Moseley v. V Secret Catalogue, Inc., 537 U.S. 418, 428 (2003). Thus, it is appropriate to look at the manner in which laches is applied to unfair competition law.

94. *Analytic Recruiting, Inc.*, 156 F. Supp. 2d at 518 (quoting Guardian Life Ins. Co. of Am. v. Am. Guardian Life Assur. Co., 943 F. Supp. 509, 520–21 (E.D. Pa. 1996)) (citing *Univ. of Pittsburgh*, 686 F.2d at 1045)); Parrot Jungle Inc. v. Parrot Jungle Inc., 512 F. Supp. 266, 270 (S.D.N.Y. 1981).

95. *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 31 cmt. c (1995). This excuse does not appear to be a viable option for American Indians trying to stop the use of American Indian nicknames by sports teams either, because the professional and major college sports teams of the United States have already become national in their marketing and largely international as well. Thus, barring the unprecedented expansion of a professional sports team onto a new continent, the likelihood of there being a change into a new market that would not be considered normal growth is very small. The other limitation with this excuse is that a successful use of it would only bar the trademark from being used in that single new market, and would do nothing to stop the use of the trademark within a team's current markets. *Id.*

The excuses listed here and in note 93, *supra*, are mentioned as background and to show that other avenues were contemplated besides the public interest exception for refuting the application of laches. This strengthens the notion that the public interest exception is the best avenue to pursue.

96. *Bridgestone/Firestone Research, Inc.*, 245 F.3d at 1362; *see also Univ. of Pittsburgh*, 686 F.2d at 1045.

97. *Bridgestone/Firestone Research, Inc.*, 245 F.3d at 1362.

98. *See id.* (stating that monetary prejudice is "economic prejudice based on loss of time or money or foregone opportunity").

99. AmBrit, Inc. v. Kraft, 812 F.2d 1531, 1546 n.82 (11th Cir. 1986); *see* Pro-Football, Inc. v. Harjo, 284 F. Supp. 2d 96, 143 (D.D.C. 2003). Although *AmBrit* is a trade dress infringement claim under § 43(a) of the Act (involving similar product wrappers and packaging on two different products), the touchstone of the analysis in such a case is "likelihood of

limit their focus by only considering money spent in relation to the development and promotion of the trademark that would not have been spent but for the delay.[100] Finally, reliance on the delay is not a requirement for showing monetary prejudice, and as the period of delay becomes longer the burden of showing monetary prejudice decreases.[101]

3. The Public Interest Exception

Even if both unreasonable delay and monetary prejudice exist, a showing that the violation of the Act is not in doubt and that the violation sufficiently implicates the public interest can overcome an otherwise successful laches argument. For example, in a § 2(d) likelihood of confusion case, a claimant can defeat a valid laches argument when the public has an interest in avoiding confusion created by trademarks within the market[102] and confusion clearly exists.[103] Thus, the public interest dictates that the equitable nature of laches not be applied strictly in all scenarios.[104]

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confusion." *AmBrit, Inc.*, 812 F.2d at 1535, 1538. Thus, the logic of the *AmBrit* court applies in a consistent manner to § 2(d) likelihood of confusion cases.

100. *AmBrit, Inc.*, 812 F.2d at 1546 n.82. The money spent on the services of the company that would have been spent anyway for the continuing business is not of importance to the prejudice analysis. *Id.*; *see also Pro-Football, Inc.*, 284 F. Supp. 2d at 143 (citing Hot Wax, Inc. v. Turtle Wax, Inc., 191 F.3d 813, 824 (7th Cir. 1999)). An argument that sports teams are not prejudiced because they do not spend money to promote their trademarks is not likely to be successful. As any individual driving on an interstate in a major sports city can see out of a car window on any number of billboards or can see while watching television on any number of commercials, trademarked team nicknames are heavily marketed. The marketing creates sales of merchandise, and sales are bolstered by trademark protection. *See supra* note 69. Thus, this money likely would not be spent, at current levels, to promote the trademarks but for the delay.

101. *Bridgestone/Firestone Research, Inc.*, 245 F.3d at 1363 (citing *Hot Wax, Inc.*, 191 F.3d at 821; A.C. Aukerman Co. v. R.L. Chaides Constr. Co., 960 F.2d 1020, 1042 (Fed. Cir. 1992)); *see, e.g., Pro-Football, Inc.*, 284 F. Supp. 2d at 139.

102. The public's interests are harmed when trademark confusion interferes with consumers' reasons for purchasing specific goods rather than competing goods. Such reasons include the quality of the goods, where the goods were made, who made the goods, and what social values the goods represent. Trademark confusion can cause consumers to purchase goods that they otherwise would not have purchased. This in turn may lead to a decline in consumer confidence and trust in the marketplace. Thus, the ultimate harm to the public interest may be the harm to the economy as a whole. This harm to the public interest has been upheld as showing that a sufficient level of public interest exists to support the public interest exception. *See* Ultra-White Co. v. Johnson Chem. Indus., Inc., 465 F.2d 891, 893-94 (C.C.P.A. 1972).

103. *See id.*

104. *Bridgestone/Firestone Research, Inc.*, 245 F.3d at 1363; Resorts of Pinehurst, Inc. v. Pinehurst Nat. Corp., 148 F.3d 417, 423 (4th Cir. 1998); Kason Indus., Inc. v. Component Hardware Group, Inc., 120 F.3d 1199, 1207 (11th Cir. 1997) (stating that injunctive relief may be given where monetary damages are barred and that intentional infringement cases are not "the only cases where injunctive relief might be appropriate despite a plaintiff's delay"); Harley-Davidson, Inc. v. Estate of O'Connell, 13 F. Supp. 2d 271, 285 (N.D.N.Y. 1998).

C. *The Laches Decision in* Pro-Football, Inc. v. Harjo

The recent *Pro-Football* decision is the leading case for analyzing the application of laches to § 2(a) disparagement claims. The TTAB's decision to cancel Pro-Football's six federal trademarks was based on its conclusion that the marks disparage American Indians.[105] The first of the six trademarks was originally registered in 1967, the next three trademarks were all registered in 1974, the fifth trademark was registered in 1978, and the final trademark was registered in 1990.[106] The TTAB's decision was overturned by the district court on two separate grounds: (1) the record created by the TTAB did not support the conclusion that the marks disparage American Indians,[107] and (2) the petitioners' claims before the TTAB were barred by laches.[108]

Laches applies when there has been an unreasonable delay in beginning an action after the cause of action has accrued.[109] The court applied a test of laches that was analogous to the common-law test used in trademark infringement cases.[110] The court set forth a three-component test which requires: (1) substantial delay in bringing a suit, (2) knowledge of the trademarks during that delay, and (3) continued development of goodwill in the trademarks during that delay.[111] Laches must be applied separately to all four of the relevant dates of registration for the six trademarks.[112] In its application of laches, the *Pro-Football* court concluded that: (1) the American Indians did substantially delay in bringing suit, (2) the American Indians had notice of the marks during that delay, and (3) the interests of Pro-Football were prejudiced by that delay.[113]

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105. *Pro-Football, Inc.*, 284 F. Supp. 2d at 99. The TTAB concluded that the marks were not to be cancelled on scandalous matter grounds. *Id.*

106. *Id.* at 105–07.

107. *Id.* at 145. The court noted that a major problem with this case is the lack of evidence on the record, and the court further noted that the decision should not be understood as a decision on whether the term "redskins" is disparaging to American Indians. *Id.* at 99, 145. This first ground for overturning the TTAB's decision is evidentiary-based and is not the focus of this Note. *See supra* note 23.

108. *Pro-Football, Inc.*, 284 F. Supp. 2d at 145. Laches is not excluded from claims made under § 2(a). *Id.* at 137 (quoting Pro-Football, Inc. v. Harjo, 57 U.S.P.Q.2d (BNA) 1140, 1145 (D.D.C. 2000)). This Note will focus solely on the second ground on which the TTAB's decision was overturned (i.e., laches).

109. *Pro-Football, Inc.*, 284 F. Supp. 2d at 136 (quoting NAACP v. NAACP Legal Def. & Educ. Fund, Inc., 753 F.2d 131, 137 (D.C. Cir. 1985)).

110. *Id.* at 136–37. Infringement is an act that interferes with a trademark owner's rights in reference to the trademark. BLACK'S LAW DICTIONARY 348 (2d pocket ed. 2001). Thus, a likelihood of confusion case is simply a sub-set of the larger category of trademark infringement cases. *Cf.* Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 32 n.5 (2003) (stating that § 43(a) provides trademark infringement relief against any description that is likely to cause confusion as to sponsorship of goods).

111. *Pro-Football, Inc.*, 284 F. Supp. 2d at 137, 139; *see also supra* note 84 (explaining that the basic two-prong laches test is broken into three components by the *Pro-Football* court).

112. *Pro-Football, Inc.*, 284 F. Supp. 2d at 137.

113. *Id.* at 140, 144.

1. The Delay Prong

The court concluded that in reference to the marks registered in 1967, 1974, and 1978, the delay was facially substantial.[114] The delay for the 1990 trademark (i.e., the "Redskinettes" trademark) was deemed substantial "given the context of this case."[115] The name "Redskinettes" has been used since 1962, and this thirty-year timeframe of use of the name, in conjunction with the existence of the other five trademarks and the lack of a challenge of the 1990 trademark until 1992, led the district court to conclude that the delay was substantial.[116]

The American Indians received clear notice of the trademarks in question when each of the six trademarks was published and again when each of the six trademarks was registered.[117] The TTAB has made it clear that the clock for laches begins to run when each trademark is published.[118] Not only did the American Indians have constructive notice, but they also had actual notice of the trademarks during the delay periods because they knew about the Washington Redskins football team.[119] The court concluded that there is no reasonable excuse for the delay created by the American Indians; thus, the delay was deemed unreasonable.[120]

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114. *Id.* at 140. The court stated that "whether a Lanham Act claim has been brought within the analogous state statute of limitations is not the sole indicator of whether laches may be applied in a particular case." *Id.* at 139 (quoting Hot Wax, Inc. v. Turtle Wax, Inc., 191 F.3d 813, 821–22 (7th Cir. 1999)). Thus, the court did not look to the analogous state statute of limitations to decide whether the delay was unreasonable. *See supra* note 90 and accompanying text.

115. *Pro-Football, Inc.*, 284 F. Supp. 2d at 140.

116. *Id.* In analyzing the 1990 "Redskinettes" trademark, the district court broke its own rule that each of the trademarks must be analyzed on its own merits when applying laches. *See supra* text accompanying note 112. The court should not be looking at the overall context of this case when analyzing this single particular trademark. Anything that occurred before the trademark was ever published is inconsequential to the analysis as well. *See infra* text accompanying note 118 (stating that the laches clock begins to run upon publication). This trademark was published on April 24, 1990, United States Patent and Trademark Office, *supra* note 20 (referencing trademark registration number 1606810), and the original claim in this case was filed in September 1992. *Pro-Football, Inc.*, 284 F. Supp. 2d at 96. Thus, not even two-and-one-half years separate the publication date from the claim date. Therefore, an unreasonable delay has not facially occurred and the use of laches in regards to the "Redskinettes" trademark appears to be highly questionable, if not fully erroneous.

117. *Pro-Football, Inc.*, 284 F. Supp. 2d at 140.

118. *Id.* (citing Turner v. Hops Grill & Bar, Inc., 52 U.S.P.Q.2d (BNA) 1310, 1312–13 n.3 (T.T.A.B. 1999)). It is worth noting that the *Pro-Football* court often refers to the registration date, even though the publication date starts the laches clock. *See supra* text accompanying notes 106, 114, 116. This conflation of terms is harmless, because the registration date will always create a shorter laches timeframe when compared to a timeframe beginning with the publication date. Thus, if laches exists based on the registration date, then it will also exist based on the publication date.

119. *Id.* at 141.

120. *Id.* at 142.

2. The Prejudice Prong

Delay in bringing a claim is not enough by itself to invoke laches; Pro-Football also had to show that it suffered a negative consequence or prejudice due to the delay.[121] The court stated that there had clearly been substantial investment and development in the Redskins "brand" throughout the period of delay, based on television contracts and the sale of merchandise and game tickets.[122] The court concluded that case law and common sense both pointed to economic prejudice against Pro-Football due to the long twenty-five-year delay and heavy investment in the trademark.[123] Thus, laches barred the American Indians' claim.[124]

3. The Public Interest Exception

The district court noted that courts have historically found in favor of tardy § 2(d) likelihood of confusion claimants because the Act includes a public interest component.[125] Due to the public interest implicated in likelihood of confusion cases (§ 2(d) cases),[126] courts often apply the public interest exception to laches in these cases.[127] But, the district court concluded that in the context of § 2(a) disparagement cases, the public interest is narrower than in § 2(d) cases, because § 2(a) disparagement cases have a more narrow overall application.[128] The district court stated that it is inaccurate to say that laches is unavailable whenever the public interest is involved.[129] Such a rule would be too broad in application as all actions brought under § 2(a) would be outside of the reach of laches.[130] If the rule were to be boundless in this regard, the policy purposes of trademark protection would be undermined and dilatory behavior

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121. *Id.* (citing Bridgestone/Firestone Research, Inc. v. Auto. Club de L'Ouest de la France, 245 F.3d 1359, 1362 (Fed. Cir. 2001)).

122. *Id.* at 143.

123. *Id.* at 144. It is worth noting that the court neglects to make any citations or references to cases that make up the "case law" that the court states as supporting the conclusion. *Id.*

124. *Id.* Harjo and the other six American Indians have appealed the decision of the District Court. *See* James V. Grimaldi, *Taking a New Team into Court*, WASH. POST, Nov. 3, 2003, at E1. For further information on the pending appeal of this case, see *Pro-Football, Inc. v. Harjo*, No. 03-7162 2004 U.S. App. LEXIS 24616 (D.C. Cir. Nov. 24, 2004) (considering a motion to strike the amicus curiae brief of the National Congress of American Indians).

125. *Pro-Football, Inc.*, 284 F. Supp. 2d at 138 (citing *Bridgestone/Firestone Research, Inc.*, 245 F.3d at 1363). In *Ultra-White*, the United States Court of Customs and Patent Appeals stated that within § 1052 the public interest is a consideratiou, and further stated that the public interest is the dominant consideration in situations where confusion is not only likely to occur, but is not in doubt (in *Ultra-White* § 2(d) of § 1052 was applicable). Ultra-White Co. v. Johnson Chem. Indus., Inc., 465 F.2d 891, 893-94 (C.C.P.A. 1972).

126. *See supra* note 102 and accompanying text.

127. *Pro-Football, Inc.*, 284 F. Supp. 2d at 138.

128. *Id.* The district court did not cite to any precedents for this assumption. *Id.* The district court shows a pattern of making bold assumptions without noting precedent to back up the assumptions. *See supra* notes 116, 123.

129. *Pro-Football, Inc.*, 284 F. Supp. 2d at 137–38.

130. *Id.*

would be rewarded.[131] Through this analysis, the court concluded that laches barred the disparagement claim despite the existing public interest in the claim.[132]

III. USING THE PUBLIC INTEREST EXCEPTION TO OVERCOME LACHES IN A POST-*PRO-FOOTBALL, INC. V. HARJO* WORLD

Laches, as applied in *Pro-Football*, is a major barrier to the use of § 2(a)[133] as a catalyst for changing the American Indian nicknames of sports teams.[134] The first step in a laches analysis is to decide whether the delay has been egregious. None of the sports team trademarks are so old that the delay in bringing the disparagement claim would be deemed "egregious" (i.e., a delay of 100 years).[135] Because the delay is a "less egregious" delay, American Indians have not abandoned their rights under § 2(a).[136] Unfortunately for American Indian litigants, their disparagement claims will face the following two problems in reference to laches: (1) the delay will likely exceed the local statute of limitations for nearly all sports team trademarks, thus creating a presumption of unreasonable delay;[137] and (2) the sports teams have already invested heavily in promoting their trademarks, thus leading to prejudice.[138] Assuming then that trademark owners can establish the two prong test for laches, American Indian litigants looking to avoid laches should turn to the public interest exception.

The *Pro-Football* court argued that the public interest exception to laches used by litigants bringing § 2(d) claims was unavailable to the American Indians' § 2(a) claim. This Note disagrees. Because the public has as much of a stake in the American Indians' disparagement claims as they do in likelihood of confusion cases under § 2(d), the public interest exception should apply in § 2(a) cases as it does in § 2(d) cases.[139] To prove this, this Note will examine two questions: (1) Is the public

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131. *Id.* at 138–39.

132. *Id.* at 138–39, 144.

133. *See supra* Part II.C.

134. A successful § 2(a) claim will have to provide proper evidence backing the disparagement claim as well. *See supra* notes 107–08 and accompanying text.

135. *See supra* note 20 and accompanying text; *see also* Univ. of Pittsburgh v. Champion Prods. Inc., 686 F.2d 1040, 1044 (3d Cir. 1982) (citing Anheuser-Busch v. Du Bois Brewing Co., 175 F.2d 370, 374 (3d Cir. 1949)).

136. *See Univ. of Pittsburgh*, 686 F.2d at 1044 (citing *Anheuser-Busch*, 175 F.2d at 374).

137. *See supra* note 20 and accompanying text; *see also* AmBrit, Inc. v. Kraft, Inc., 812 F.2d 1531, 1546 (11th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987); Tandy Corp. v. Malone & Hyde, Inc., 769 F.2d 362, 365–66 (6th Cir. 1985), *cert. denied*, 476 U.S. 1158 (1986) (stating that the presumption enables objectivity and clarity of the analysis).

138. *See supra* note 100 and accompanying text.

139. Ultra-White Co. v. Johnson Chem. Indus., Inc., 465 F.2d 891, 893–94 (C.C.P.A. 1972). This Note agrees with the *Pro-Football* court that the likelihood of confusion provision of § 2(d) is a proper, and pivotal, point of reference for analyzing the public interest exception's application to the § 2(a) disparagement provision claims of the American Indians. *Pro-Football, Inc.*, 284 F. Supp. 2d at 138. This is proper for the following four reasons: (1) the *Pro-Football* court developed it laches test from infringement cases and § 2(d) is a sub-set of infringement cases, (2) § 2(d) is easily applied by analogy to the § 2(a) disparagement provision because both have privacy interests that may be invoked, (3) § 2(a)'s disparagement provision has little direct

interest exception applicable to § 2(a) disparagement claims at all?[140] (2) Is the public interest within § 2(a) narrower than or equivalent to the level of public interest within § 2(d)?

A. The Public Interest Exception Is Applicable to the § 2(a) Disparagement Provision

The laches test that is applied to the § 2(a) disparagement provision in *Pro-Football* is adapted by analogy, with some changes, from the laches test from common-law infringement cases. This adaptation is appropriate given the procedural posture of the *Pro-Football* case.[141] The test used in common-law infringement cases states that laches is applicable if the following three requirements are met: "(1) a substantial delay . . . prior to filing suit; (2) . . . awareness that the disputed trademark was being infringed; and (3) a reliance interest resulting from . . . continued development of good-will during this period of delay."[142] The *Pro-Football* court's adjusted test for § 2(a) disparagement cases states that laches is applicable if the following three circumstances are met:

> (1) the Native Americans delayed substantially before commencing their challenge to the "redskins" trademarks; (2) the Native Americans were aware of the trademarks during the period of delay; and (3) Pro-Football's ongoing development of goodwill during the period of delay engendered a reliance interest in the preservation of the trademarks.[143]

The adjustments made are because the party opposing the trademark is not itself a trademark owner. Such adjustments do not change the test's underlying structure or logic.

Since the laches test from the infringement line of cases is adjusted and applied by analogy to the § 2(a) disparagement cases, then the exceptions to the test in the infringement line of cases should come with it. The *Pro-Football* court agreed, stating that "even in a disparagement case, a court may be willing to invoke the public interest

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precedent of its own and thus needs to leverage the more highly developed precedents of § 2(d) (especially in regard to the public interest exception), and (4) the privacy interest and harms to the interest are equivalent as between the two provisions. *See supra* notes 81–83 and accompanying text; *see infra* notes 142, 153–54 and accompanying text; *see infra* Part III.B.

140. The court in *Pro-Football* draws an analogy between the public interest involved in § 2(d) likelihood of confusion cases and the public interest involved in § 2(a) disparagement cases. *Pro-Football, Inc.*, 284 F. Supp. 2d at 138. Thus, it is reasonable to draw a further analogy between the public interest exception to laches as applied to § 2(d) likelihood of confusion cases and to § 2(a) disparagement cases. This public interest exception analogy also makes sense because the § 2(a) disparagement provision laches test is derived from the laches test applied to the § 2(d) likelihood of confusion provision. *See id.*

141. *Id.* This adaptation is consistent with the basic underpinnings of the laches test. *See supra* Part II.B.

142. *Pro-Football, Inc.*, 284 F. Supp. 2d at 136 (quoting NAACP v. NAACP Legal Def. & Educ. Fund, Inc., 753 F.2d 131, 137 (D.C. Cir. 1985)). *See also supra* note 110 and accompanying text (stating that § 2(d) likelihood of confusion is a sub-set of infringement).

143. *Id.* at 137.

behind section 2(a)."[144] The *Pro-Football* decision, in harmony with other cases, shows that § 1052 (including both § 2(a) and § 2(d)) involves public interest.[145]

This also makes sense from a policy perspective. The purpose of the public interest exception is to protect the interests of the public from being harmed due to the claimant's dilatory behavior, and it protects the public in lieu of the interests of the trademark owner who also may be harmed by the claimant's dilatory behavior. Thus, where laches is at play, the public interest exception is also at play, assuming a public interest exists for the claim brought.[146]

Even though the *Pro-Football* court stated that cases brought under § 1052 involve public interest,[147] this does not finish the inquiry, as courts have found that some types of cases under the Act involve primarily private interests—including some cases brought under the "false suggestion" clause of § 2(a).[148] The *Bridgestone/Firestone Research* court stated that the false suggestion provision's right of privacy purpose stems from the intent of the drafters and serves to differentiate the provision from the § 2(d) likelihood of confusion provision.[149] The *Bridgestone/Firestone Research* court only implicates the false suggestion provision of § 2(a) and does not implicate the disparagement provision of § 2(a).[150]

The disparagement provision of § 2(a) stands in a different relation to the public interest as compared to the false suggestion provision of § 2(a). Unlike the false suggestion provision, the disparagement provision does not have to be differentiated from the § 2(d) likelihood of confusion provision because the disparagement provision does not implicate the confusion of trademarks, while the false suggestion provision does.[151] Further, unlike the false suggestion provision, the disparagement provision does not have a primary interest of protecting privacy rights,[152] and no case law has shown or stated otherwise. Indeed, even the *Pro-Football* court did not state that the

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144. *Id.* at 138.

145. *See, e.g., id.* (quoting Ultra-White Co. v. Johnson Chem. Indus., Inc., 465 F.2d 891, 893–94 (C.C.P.A. 1972)).

146. *See supra* note 132 and accompanying text (stating that a public interest does exist for the disparagement claim of the American Indians).

147. *Pro-Football, Inc.*, 284 F. Supp. 2d at 138 (quoting *Ultra-White Co.*, 465 F.2d at 893–94).

148. *E.g.*, Bridgestone/Firestone Research, Inc. v. Auto. Club de L'Ouest de la France, 245 F.3d 1359, 1363 (Fed. Cir. 2001).

149. *Id.* at 1363 (citing Univ. of Notre Dame Du Lac v. J.C. Gourmet Food Imps. Co., 703 F.2d 1372, 1376 (Fed. Cir. 1983)). As the *Pro-Football* court explains, the false suggestion provision of § 2(a) has been stated as not implicating the public interest as its principle purpose. *Pro-Football, Inc.*, 284 F. Supp. 2d at 137. Rather the principle purpose of the false suggestion provision is the protection of personal privacy.

150. *See Bridgestone/Firestone, Inc.*, 245 F.3d at 1363. Although the false suggestion provision is part of § 2(a), it is a separate provision and analysis from the disparagement provision of § 2(a). 15 U.S.C. § 1052(a) (2000); *see also supra* note 72.

151. *See* Morehouse Mfg. Corp. v. J. Strickland & Co., 407 F.2d 881, 888–89 (C.C.P.A. 1969).

152. This does not mean that there is no privacy interest involved in the disparagement provision, rather it means only that such a privacy interest is not primarily the purpose of the disparagement provision.

disparagement provision was meant primarily to protect privacy interests;[153] rather, the court admitted that the disparagement provision included a public interest that could be invoked.[154] The problem is that the court found this interest to be too narrow.

B. The Public Interest in the American Indians' § 2(a) Disparagement Claim Is Equivalent to the Public Interest in § 2(d) Likelihood of Confusion Claims

The *Pro-Football* court correctly stated that the existence of the public interest within § 1052 does not mean that all litigants can use the public interest exception to laches.[155] The *Pro-Football* court held that while the public interest involved in § 2(d) is strong enough to encompass the exception to laches, the public interest involved in § 2(a) cases is narrower.[156] It makes this conclusion without citing any precedent and without providing convincing analysis.[157] The court's conclusion is based on the assumption that the § 2(a) disparagement analysis applies to only the American Indians, while the § 2(d) likelihood of confusion analysis applies to a larger portion of the general public.[158] The court's conclusion is misguided.

The public interest involved in the § 2(a) disparagement claims of the American Indians is equivalent to the public interest known to exist in § 2(d) likelihood of confusion claims for the following three reasons: (1) the level of public interest involved in a § 2(d) likelihood of confusion claim stems from the circumstances surrounding the claim not from the text of § 2(d) and thus is not an inherently heightened level of public interest, (2) the narrow scope of the § 2(a) disparagement inquiry is analogous to the narrow scope of the § 2(d) likelihood of confusion inquiry and thus does not create a narrow level of public interest under the disparagement provision, and (3) the harms to the public's interest under both provisions are equivalent because both involve substantial impacts to the economy of the United States. Based on these three reasons, the public interest exception that is clearly applied to § 2(d) likelihood of confusion claims should be applied in an equivalent manner to the § 2(a) disparagement claims of the American Indians. This Note now seeks to explain and further develop these three reasons that lead to this conclusion.

1. Public Interest in the § 2(d) Likelihood of Confusion Provision Is Not a Heightened Level of Public Interest

The language of § 2(d)'s likelihood of confusion provision does not implicate a heightened public interest above that of the language of § 2(a)'s disparagement provision—neither provision expressly states the level of public interest involved.[159]

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153. *See Pro-Football, Inc.*, 284 F. Supp. 2d at 137–38.

154. *See supra* notes 132, 144 and accompanying text.

155. *Pro-Football, Inc.*, 284 F. Supp. 2d at 137 (interpreting the position of the Federal Circuit in *Bridgestone/Firestone Research, Inc.*, 245 F.3d at 1363).

156. *Id.* at 138. Thus, it is clear that the district court recognizes that there is a public interest component in the § 2(a) disparagement cases. *Id.*; *see supra* notes 132, 144, 154 and accompanying text.

157. *Pro-Football, Inc.*, 284 F. Supp. 2d at 138.

158. *Id.*

159. 15 U.S.C. § 1052 (2000 & Supp. 2004).

Still, the *Pro-Football* court found that § 2(d)'s language provided a basis for a higher public interest than § 2(a)'s language. Its analysis of § 2(d) put special emphasis on the phrase discussing the improper purposes that the section combats. Specifically, that a trademark should be cancelled where it "'[c]onsists of or comprises a mark which so resembles a mark registered . . . as to be likely . . . *to cause confusion, or to cause mistake, or to deceive*,'"[160] was noted as providing a basis for the higher level of public interest in § 2(d) as compared to § 2(a).

The *Pro-Football* court, however, puts its emphasis on the wrong terms of § 2(d). The phrase requiring "likeliness" is the key to the public interest issue.[161] To gain the application of the public interest exception under a § 2(d) claim, the purchaser's confusion or mistake must be more than "likely"; it must not be in doubt.[162] The level of puhlic interest involved in a § 2(d) likelihood of confusion case is not enough to support the public interest exception until the confusion or mistake is no longer in doubt.[163]

Thus, the level of public interest needed to support the public interest exception does not exist in all § 2(d) cases where a § 2(d) violation has occurred—the needed level of public interest does not inhere in § 2(d)'s text. Rather, that level of public interest comes from the circumstances surrounding the claim itself.[164] Therefore, the § 2(d) likelihood of confusion provision on its face does not possess a heightened level of public interest above that of § 2(a)'s disparagement provision. Because the level of public interest in § 2(d) is not a heightened level, the next inquiry is to determine whether § 2(a)'s disparagement provision has a narrow level of public interest.

2. The Narrow Scope of the Disparagement Inquiry Does Not Necessarily Create a Narrow Level of Public Interest in § 2(a) Disparagement Claims

The district court in *Pro-Football* concluded that because the disparagement question applied to American Indians rather than a larger portion of the general public, the public interest was narrower for disparagement cases than likelihood of confusion cases.[165] In doing so, the *Pro-Football* court conflated the disparagement inquiry with the public interest inquiry. In answering the question of whether disparagement of American Indians resulted from the use of American Indian nicknames by sports teams, only the opinions of American Indians are of concern.[166] But, the limited scope of this disparagement question is not the same scope that should be applied when inquiring

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160. *Pro-Football, Inc.*, 284 F. Supp. 2d at 138 (quoting 15 U.S.C. § 1052(d)) (alteration in original).

161. The phrase requiring "likeliness" is denoted by the terms "as to be likely" in the statute. 15 U.S.C. § 1052.

162. Ultra-White Co. v. Johnson Chem. Indus., Inc., 465 F.2d 891, 893–94 (C.C.P.A. 1972).

163. *See id.*

164. *Id.* (looking at circumstances such as the identical nature of the parties' marks and goods, as well as the similarity of trade channels, market areas, and advertising media used by each party).

165. *Pro-Football, Inc.*, 284 F. Supp. 2d at 138.

166. *See supra* note 76 and accompanying text.

about the level of public interest involved in a § 2(a) disparagement claim for purposes of the public interest exception.[167]

By analogizing to the analysis of public interest elsewhere in the Act,[168] it becomes clear that the narrow scope of the disparagement inquiry does not necessarily narrow the scope of the public interest inquiry. In the classic § 2(d) likelihood of confusion case between two companies, it is the company that possesses the original trademark (hereinafter "Company A") that suffers the § 2(d) violation by the confusing mark of Company B. The likelihood of confusion analysis looks to compare the two marks and does not require a showing of actual confusion in the marketplace by individuals or the public at large.[169] On the other hand, a showing of an inevitable impact, or a showing of an actual impact, on the public is required to establish the public interest exception, because either of the showings ensures that confusion is not in doubt.[170] Thus, when a § 2(d) likelihood of confusion claim implicates the public interest, the exception dictates that laches should not be applied to a delayed claim by Company A if confusion is found to exist on the circumstances of the case.[171] Importantly, the scope of the likelihood of confusion inquiry, which only needs to look at the marks, is separate from and narrower than the scope of the public interest inquiry, which needs to look at the impact that the marks have as to individuals and the general public.

Similar to the likelihood of confusion cases, the § 2(a) disparagement inquiry is answered by analyzing a narrow context (here, the American Indians).[172] Thus, it should follow by analogy from the likelihood of confusion cases, that the public interest exception in disparagement cases does not necessarily become narrow simply because the disparagement inquiry is narrow. The disparagement provision is analogous to the likelihood of confusion provision in that the party with the rights under the Act and the analysis of that party's claim in no way limits the level of public interest associated with the applicable provision of the Act. This Note next contends that the public's interests are harmed by the disparagement of American Indians, and that this harm is equivalent to the harm to the public interest due to confusing goods under § 2(d). These harms are used as a barometer to ultimately conclude that the level of public interest associated with the two provisions is equivalent as well.

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167. The disparagement analysis exists under the Act, while the public interest is only of importance in conducting the laches analysis.

168. 15 U.S.C. § 1052(d).

169. Ultra-White Co. v. Johnson Chem. Indus., Inc., 465 F.2d 891, 893–94 (C.C.P.A. 1972). Clearly, a showing of actual confusion of individuals in the marketplace would support the likelihood of confusion claim, but such a showing is not required. There is no requirement of showing that the confusion is not in doubt.

170. *Ultra-White Co.*, 465 F.2d at 893–94 (stating that a showing of inevitable confusion supports the application of the public interest exception). Clearly, a showing of concrete instances of confusion presented by witness testimony would also support the application of the public interest exception. *See also supra* text accompanying note 162.

171. *See supra* notes 102–03 and accompanying text.

172. *See supra* note 76 and accompanying text.

3. The Harm to the Public's Interests Due to Disparagement of American Indians Is Equivalent to the Harm to the Public's Interests Due to Confusing Goods

Since it has already been established that § 2(d) does not possess a heightened level of public interest and that the narrow scope of the § 2(a) disparagement inquiry does not necessarily narrow the level of public interest associated with the § 2(a) disparagement provision, it is now important to directly compare the public interest of the claims under both provisions to ensure that the public interest in § 2(a) disparagement claims, brought against trademarked American Indian nicknames, provides a sufficient basis for the public interest exception.[173]

The public interest in the § 2(a) disparagement claim is implicated in two manners. First, disparagement caused by the use of American Indian nicknames results in the non-American Indian public being continually fed the "savage Indian" myth, which robs them of the opportunity to understand American Indians.[174] Non-American Indians have little contact with American Indians in today's society, making the "savage Indian" nicknames even more harmful because the relic images of American Indians are taken as reality.[175]

Second, the public interest is even more significantly implicated by the use of American Indian nicknames based on the impact that such nicknames have on the current experience of American Indian children in schools across the United States.[176] American Indian children have among the lowest high school graduation rates in the nation, and a link has been identified between these low graduation rates and the perpetuation of harmful American Indian stereotypes such as the "savage Indian" myth.[177] Low graduation rates in turn lead to a loss of economic productivity from these drop-out students.[178] As the Supreme Court of the United States clearly stated, "education provides the basic tools by which individuals might lead economically productive lives *to the benefit of us all*."[179] Thus, the public has an interest in ensuring that these stigmatizing American Indian nicknames are not given protection and legitimacy from the government through the trademark process. As was noted in *Brown*

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173. The public interest in § 2(d) likelihood of confusion cases has already been shown to be at a sufficient level for supporting the public interest exception. *See supra* note 102 and accompanying text.

174. *See supra* notes 51, 63 and accompanying text.

175. *See supra* notes 45–51 and accompanying text.

176. *See supra* notes 58–61 and accompanying text.

177. *See supra* note 61 and accompanying text.

178. *See* Albert Cortez et al., *Dropping Out of School in Arizona: IDRA Conducts New Study*, IDRA NEWSLETTER ("Intercultural Development Research Association"), Sept. 2002, *available at* http://www.idra.org/Newsltr/2002/Sep/Albert.htm (last visited Jan. 3, 2005); Richard St. Germaine, *Drop-Out Rates Among American Indian and Alaska Native Students: Beyond Cultural Discontinuity*, *at* http://offchemmath.roshd.ir/ael01/eric/digests/edorc961.htm (last visited Jan. 3, 2005).

179. Plyler v. Doe, 457 U.S. 202, 221 (1982) (emphasis added) (stating that because public education is for the benefit of the nation as a whole it cannot be denied to any children in the United States); *see also* Robert Holland, The Heartland Institute *High School Crisis: 3 in 10 Drop Out*, SCHOOL REFORM NEWS, Jan. 1, 2003 (stating that becoming a drop-out lessens the chances of becoming a productive citizen of the United States), *available at* http://www.heartland.org/Article.cfm?artId=11280 (last visited Jan. 3, 2005).

v. Board of Education of Topeka where the stigmatization of school children was involved, the negative effects of stigmatization are greater when sanctioned by the law.[180] Like African-American school children that were stigmatized due to the "separate-but-equal" regime, American Indian children are shown that they are thought of as overly-aggressive and unsophisticated by the majority culture when American Indian nicknames used by sports teams are given protection under federal law.[181] Thus, a significant level of public interest exists based on the disparagement claims of the American Indians.

Clearly the public interest outlined for the § 2(d) likelihood of confusion context is more closely related to the Act's stated purpose of protecting the public from spurious goods,[182] than the public interest outlined for the § 2(a) disparagement context. This fact should not be surprising and should not be determinative of whether the public interests of these two provisions exist at an equivalent level. The very structure of these two provisions dictates that this difference would exist; the likelihood of confusion claim belongs solely to a trademark owner, while the disparagement claim may be brought by any disparaged party without requiring the party to own a trademark protected by the Act. The expectation is that the public interest will take a different form in the disparagement provision because of this, and indeed that is the case. The public interest in the likelihood of confusion provision involves a single mechanism, the marketplace. On the other hand, the public interest in the disparagement provision involves a more diffuse set of mechanisms, which include social interactions and public education. The common thread is that harming the public interest through either provision ultimately has a negative effect on our nation's economy,[183] and it cannot be said that one's impact on the economy is larger than the other.[184] Our nation's history of social justice and focus on public education should not be ignored or minimized as to their impact on our economy.[185] Social justice and public education together establish a vital and substantial public interest that is at stake within § 2(a) disparagement claims brought to end the use of American Indian nicknames.

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180. 347 U.S. 483, 494 (1954).

181. This effect is likely multiplied due to schoolchildren being exposed to high school and college American Indian nicknames while they are themselves in school.

182. *See* Wooster, *supra* note 66 and accompanying text; *see also supra* note 102.

183. *See supra* notes 102, 178–79 and accompanying text.

184. The only other way to try to establish the public interest of § 2(d) as being larger than the public interest of § 2(a) disparagement claims is to claim that the number of people actually impacted by confusing trademarks is larger than the number of people actually impacted by disparaging trademarks. Clearly, this cannot be true, because the actual impact under both provisions will depend on the individual circumstances at play. For instance, confusing trademarks may only affect a small number of consumers if the trademarked good is not heavily consumed. Thus, there is no assurance that the number of consumers in the public impacted by the confusing trademark will be higher than the number of persons impacted by an act of disparagement due to a trademark.

185. *See Plyler*, 457 U.S. at 221 (stating that Americans "have always regarded education and [the] acquisition of knowledge as matter[s] of supreme importance") (quoting Meyer v. Nebraska, 262 U.S. 390, 400 (1923)); *supra* notes 178–79 and accompanying text. The Supreme Court further states that public schools and the education of children are "the primary vehicle[s] for transmitting 'the values on which our society rests.'" *Plyler*, 457 U.S. at 221 (quoting Ambach v. Norwiek, 441 U.S. 68, 76 (1979)).

Thus, the public interest in disparagement cases involving American Indian nicknames used by sports teams exists at an equivalent level as compared to the public interest in likelihood of confusion cases (although in a different form). The public interest has been harmed due to the disparagement of American Indians through the "savage Indian" myth, and it is this harm to the public interest that should be upheld as sufficient to set aside laches through the public interest exception whenever the disparagement of American Indians is not in doubt.[186]

CONCLUSION

The use of American Indian nicknames by sports teams is a horrible tradition within the popular culture of the United States and is a tradition that should no longer be tolerated. The social avenues of demonstrations and pressure through grass roots public opinion have helped to change the American Indian nicknames of many high schools and universities, but have done nothing to change these same nicknames of professional sports teams. The approach of removing the trademark protection of these still unchanged sports team nicknames through the use of the Lanham Act will hopefully result in lost revenues to these teams, and will force the teams to change to a non-American Indian nickname in order to regain trademark protection and lost revenue levels. The recent application of laches to Lanham Act § 2(a) disparagement litigation aimed at eliminating trademark protection for American Indian nicknames is a large roadblock in removing this protection, but this roadblock can be overcome.

This Note has demonstrated that one way to overcome laches is through the public interest exception. The harms that are created by American Indian nicknames through the "savage Indian" myth have been around for too long and are still harms that American Indians face today. Recognizing the true magnitude of these harms from the perspective of the American Indian, assuming that these harms can be proven to exist, will shed light on the significant level of public interest that is interwoven into these nicknames, and should ultimately allow for the otherwise valid defense of laches to be overcome by the public interest exception. The eventual demise of the use of American Indian nicknames by sports teams will assist our nation to see the American Indian not as a mythical image of the past, but as a fellow American citizen of the present. And although the nonexistence of American Indian nicknames in sports likely will not end the "savage Indian" myth altogether, it will surely be one large step in the right direction.

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186. It is highly probable that not all disparagement cases (i.e., cases other than American Indian nickname trademark cases) would have the large public interest that exists here, and thus, not all disparagement cases would be able to take advantage of this ability to bar laches due to the harm to the public interest. Thus, the analysis presented here in Part III likely would not create a per se rule for all disparagement cases.

Forced to Punt: How the Bowl Championship Series and the Intercollegiate Arms Race Negatively Impact the Policy Objectives of Title IX

KEVIN J. RAPP*

INTRODUCTION

In a time when most Division I-A women's sports fail to breakeven financially,[1] the locker room of the Lady Razorbacks women's basketball team at the University of Arkansas at Fayetteville reflects anything but a struggling program.[2] The oversized, black leather sofas and bubbling hot tub[3] represent an athletics program that exemplifies the intent of Title IX to provide equal athletic opportunities—including the provision of equipment, supplies, and competitive facilities—to members of both sexes.[4] Down the road, however, Arkansas State University in Jonesboro has been unable to adequately support women's sports and was forced to add a women's soccer team in 2000 after being cited by the National College Athletics Association ("NCAA") for failing to provide equality of athletic opportunity as required by Title IX: the proportion of female athletes at the university (33%) was substantially smaller than the proportion of female undergraduates (56%).[5] The difference between these two Division I institutions: as a member of the Southeastern Conference ("SEC"), Arkansas benefits from an arrangement that ensures that every year the SEC football champion is guaranteed one of the eight slots in the lucrative Bowl Championship Series ("BCS"). Meanwhile, Arkansas State's football team, a member of the Sun Belt Conference—which is not guaranteed a berth in the BCS—loses millions of dollars annually.[6]

For the University of Arkansas at Fayetteville, supporting women's athletics is not a problem.[7] The SEC's guaranteed spot in the BCS ensures that Arkansas will benefit

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1. *See generally* Daniel L. Fulks, *Revenues and Expenses, Profits and Losses of Division I-A Intercollegiate Athletic Programs Aggregated by Conference—2003 Fiscal Year*, at 29 tbl.3.1, *at* http://www.ncaa.org/library/research/i_ii_rev_exp/2003/2003D1aConfReport.pdf (highlighting net losses for women's athletic programs in every Division I-A conference) (last visited Feb. 4, 2005).

2. Welch Suggs, *Uneven Progress for Women's Sports*, CHRON. OF HIGHER EDUC., April 7, 2000, at A52.

3. *Id.*

4. *See* MARK G. YUDOF ET AL., EDUCATIONAL POLICY AND THE LAW 586 (4th ed. 2002).

5. Suggs, *supra* note 2, at A52.

6. *See id.*

7. *Id.*

from the nearly $18 million yearly payout[8] to the dozen SEC schools. Meanwhile, the Sun Belt is guaranteed a payout of only $720,000[9] to be spread among its nine member schools. All told, this lucrative BCS is scheduled to pay out over $93 million to the member schools in 2004–05, with the overwhelming share going to conferences that are guaranteed to participate in one of the four BCS Bowl Games ("BCS Bowl guaranteed").[10]

Since women's intercollegiate athletic programs "depend to a large extent on football revenues for their support,"[11] any discrepancy in amount of revenues collected carries over to women's sports. Evidence shows that Division I-A football programs that are members of BCS Bowl guaranteed conferences have money to distribute to women's athletic programs.[12] Furthermore, schools that are part of a BCS Bowl guaranteed conference have substantial means to build athletic facilities, hire coaches, and recruit athletes for both their men's and women's programs. However, institutions without the increased BCS funds have a much more difficult time meeting their Title IX obligations. In most cases, schools in conferences that are not guaranteed a position in one of the BCS bowl games ("BCS non-guaranteed") lose an average of $1 million on their football programs on a yearly basis.[13] The end result is that schools without these advantages are much more likely to fail the "effective accommodation test" of Title IX set forth in Title IX's 1979 Policy Interpretation.[14]

Unfortunately, this problem does not lend itself easily to a legal solution. For one, the BCS does not currently violate any provision of Title IX or its subsequent interpretations. As previously mentioned, the only policy implication is that the distinction between BCS Bowl guaranteed and non-guaranteed conferences makes it harder for BCS non-guaranteed conferences to meet their Title IX obligations. This Note concedes that ensuring athletic opportunity for female athletes between BCS bowl guaranteed and non-guaranteed conferences is beyond the rule of law.

However, that does not mean that this argument is without its merits. Currently, there is an ongoing and active debate about the escalating "arms race" in intercollegiate athletics and the increasing difficulty of maintaining a top-notch athletics program in the face of spiraling athletics costs. The BCS series, for one, has been greatly scrutinized.[15] However, curiously absent from this debate is the effect that such an arms

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8. Bowl Championship Series, *2005 BCS Revenue Distribution*, *at* http://www.bcsfootball.org/index.cfm?page=revenue (last visited Jan. 10, 2005).

9. *Id.*

10. *Id.*

11. *On the Issue of Fundamental Fairness and the Bowl Championship Series (BCS): Hearing before the House Judiciary Committee*, 108th Cong. 29 (2003) (statement of Steve Young, former college and professional football player) [hereinafter Young].

12. *See infra* Part II.B.

13. *See* Young, *supra* note 11.

14. Title IX of the Education Amendments of 1972: A Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,413, 71,415 (Dec. 11, 1979) (codified at 34 C.F.R. § 106.37(c) (1993)).

15. *See, e.g.*, John Sandbrook, *Divison I-A Postseason Football History and Status: Executive Summary*, The Knight Foundation (June 2004), *available at* http://www.knightfdn.org/default.asp?story=athletics/reports/2004_sandbrook/execsummary.html (last visited Jan. 17, 2005).

race has on the implicit policy goals of Title IX. Therefore, this Note seeks to encourage further debate on this topic. Specifically, this Note argues that the current BCS, as an inseparable part of the arms race, is directly at odds with the spirit of Title IX of the Education Amendments of 1972 to provide equal athletic opportunities in educational programs receiving federal funding.[16] Due to the lucrative payouts it guarantees to certain conferences, the BCS creates discrepancies in football revenue that cause Title IX compliance issues for many non-guaranteed institutions. While there have been efforts in the past to remedy the vast discrepancies in funding between college football "have" and "have-nots," none have considered the negative impact that such funding has on female athletes. This Note proposes solutions to this problem within the larger context of college athletics spending reform.

In order to understand the context of this argument, an overview of Title IX legislation, BCS history, and the debate over the college arms race is necessary. Part I describes relevant Title IX legislation, from its genesis in Congress to subsequent revisions and updates put forth in the 1979 Policy Interpretation, and briefly interprets Title IX's policy objective. Part II provides helpful background information on the BCS, detailing its evolution from bowl reform efforts in the 1990s to its current structure and revenue discrepancies, and gives a description of the current intercollegiate arms race. Part III details how the BCS and its prominence in the intercollegiate arms race is directly at odds with the "spirit" of Title IX. Finally, Part IV recommends measures for how to better distribute college football revenue and shows how such goals are consistent with the policy objectives of Title IX.

I. HISTORY OF RELEVANT TITLE IX LEGISLATION

At Division I-A schools, football is without a doubt the "engine that drives all intercollegiate sports," including women's sports.[17] As such, it is easy to see how gross discrepancies in football revenue among schools could lead to the failure of the lower revenue-producing schools to meet their Title IX obligations by having less to distribute to their women's athletics program. However, before putting forth such an argument, a brief background of relevant Title IX legislative history and interpretation is necessary. This section details the two major phases of Title IX development: its legislative history and enactment in 1972, and the 1979 Policy Interpretation.

A. History and Enactment of Title IX

Title IX of the Education Amendments of 1972 was signed into law on June 23, 1972.[18] Title IX provides that: "[n]o person . . . 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."[19] Although there is little legislative history surrounding the enactment of Title IX,[20] Title IX's

16. 20 U.S.C. § 1681 (2000).

17. Young, *supra* note 11.

18. 20 U.S.C. § 1681(a).

19. *Id.*

20. *See generally* Diane Heckman, *Women & Athletics: A Twenty Year Retrospective on Title IX*, 9 U. MIAMI ENT. & SPORTS L. REV. 1, 9 n.30 (1992) (detailing the sparse legislative

general prohibition against gender-based discrimination in education is based on Title VI of the Civil Rights Act of 1964, which prevented racial discrimination in federally funded programs.[21]

Intercollegiate athletics were never mentioned in the original statutory language of Title IX, leaving its "specific application to intercollegiate athletics ambiguous."[22] However, Congress made it clear that Title IX did apply to intercollegiate athletics with the passage of the "Javits Amendment" in 1974.[23] This amendment required the then existing Department of Health, Education and Welfare ("HEW") to develop regulations for Title IX implementation including, "with respect to intercollegiate athletic activities[,] reasonable provisions considering the nature of particular sports."[24] These regulations, after being authorized by President Ford and reviewed by Congress, became effective on July 21, 1975.[25] The new regulations listed ten factors to be considered when determining whether equal opportunities are available for members of both genders, including the effective accommodation of both genders' interests and abilities and the equal provision of equipment, supplies, as well as practice and competitive facilities.[26]

Included in the regulations was a three-year transition period for schools of higher education to comply with the regulations.[27] When this period ended in 1978 and the HEW's Office for Civil Rights ("OCR") began to investigate Title IX complaints, it determined that further clarification of how Title IX applied to intercollegiate athletics was needed.[28] To accomplish this, the OCR "consulted with interested parties from around the country, visited eight universities, and entertained 700 public comments."[29]

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history of Title IX). What little relative legislative history that does exist is discussed in greater detail at Part I.C, *infra*.

21. 42 U.S.C. § 2000(d) (2000). As it relates to Title IX: "The early version of [Title IX] legislation proposed the addition of the word 'sex' to Title VI of the Civil Rights Act of 1964 . . . ." Heckman, *supra* note 20, at 9 n.30 (citing H.R. 16098, 91st Cong., 2d Sess. § 805 (1970); H.R. 916, 92d Cong., 1st Sess., (1971)). *See also* Cannon v. Univ. of Chi., 441 U.S. 677, 696 (1979) ("The drafters of Title IX explicitly assumed it would be interpreted and applied as Title VI had been during the preceding eight years.")

22. Walter B. Connolly, Jr. & Jeffrey D. Adelman, *A University's Defense to a Title IX Gender Equity in Athletics Lawsuit: Congress Never Intended Gender Equity Based on Student Body Ratios*, 71 U. DET. MERCY L. REV 845, 850 (1994). However, intercollegiate athletics were touched upon briefly by Sen. Birch Bayh during congressional hearings. *Id.* at 850 n.18.

23. Heckman, *supra* note 20, at 12.

24. Education Amendments of 1974, Pub. L. No. 93-380, § 844, 88 Stat. 484, 612 (1974).

25. 40 Fed. Reg. 24,128 (June 4, 1975) (codified at 34 C.F.R. § 106.41 (July 21, 1975)); *see also* Heckman, *supra* note 20, at 12-13.

26. 34 C.F.R. § 106.41.

27. 45 C.F.R. § 86.41(d) (codified at 34 C.F.R. § 106.41(d) (1991)).

28. Julia Lamber, *Gender and Intercollegiate Athletics: Data and Myths*, 34 U. MICH. J.L. REFORM, 151, 155 (2000–2001). This policy clarification was made in part to ease schools' fears of losing their federal funding due to Title IX violations. *See* Heckman, *supra* note 20, at 13.

29. Ellen J. Staurowsky, *Title IX and College Sport: The Long Painful Path to Compliance and Reform*, 14 MARQ. SPORTS L.J. 95, 102 (2003).

This resulted in HEW's publication of a Policy Interpretation in December 1979.[30] The Policy Interpretation is not a "regulation" within the meaning of the Title IX statute and "does not have the force of law, but it is entitled to substantial deference" by the courts.[31]

B. The 1979 Policy Interpretation

The Policy Interpretation is divided into three sections: athletic financial assistance (scholarships),[32] equivalence in other athletic benefits and opportunities,[33] and effective accommodation of student interests and abilities.[34] Part one of the code dictates that athletic scholarships "should be given to men and women in proportion to the number of men and women participants in the institution's athletic program."[35] It requires universities to award scholarships to "members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics."[36] Thus, if women make up 60% of the intercollegiate athletes at a school, they should be entitled to 60% of athletic scholarships.

Part two of the test is used to determine "compliance in program components, such as recruitment, equipment, travel or practice times" by comparing the "availability, quality, and types of benefits, opportunities, and treatment afforded male and female athletes."[37] The Policy Interpretation does not require identical program components for each sex, but rather that any differences result from "nondiscriminatory factors, such as rules of play, rate of injury resulting from participation, or the nature of the facilities required for competition."[38] Therefore, while there might be differences in funding for football due to high injury rates or equipment needs that favor men, "[p]rovided the institution meets the sports specific needs of both men and women, 'differences in particular program components will be found to be justifiable.'"[39]

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30. Lamber, *supra* note 28, at 155 (citing Title IX of the Educational Amendments of 1972; A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413 (Dec. 11, 1979)).

31. *Id.* at 155 n.17. Generally speaking, courts have given deference to the 1979 Policy Interpretation consistent with the Supreme Court's decision in *Chevron, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under *Chevron*, regulations promulgated by a government agency should be "given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844. Several circuit courts have concluded that the policy interpretation is consistent with Title IX. *See* Chalenor v. Univ. of N.D., 291 F.3d 1042, 1045–47 (8th Cir. 2002); Boulahanis v. Bd. of Regents, 198 F.3d 633, 637–38 (7th Cir. 1999); Neal v. Bd. of Trs. of the Cal. State Univs., 198 F.3d 763, 769–72 (9th Cir. 1999); Cohen v. Brown Univ., 101 F.3d 155, 172–73 (1st Cir. 1996); Horner v. Ky. High Sch. Athletic Ass'n, 43 F.3d 265, 272–75 (6th Cir. 1994).

32. 44 Fed. Reg. 71,413, 71,415 (Dec. 11, 1979) (codified at 34 C.F.R. § 106.37(c) (1993)).

33. *Id.* at 74,415–17 (codified at 34 C.F.R. § 106.41(c)(2)–(10) (1993)).

34. *Id.* at 74,417–18 (codified at 34 C.F.R. § 106.41(c)(1) (1993)).

35. Lamber, *supra* note 28, at 156.

36. 34 C.F.R. § 106.37(c).

37. Lamber, *supra* note 28, at 156.

38. *Id.* at 157 (citing 44 Fed. Reg. at 71,415–16).

39. *Id.* (quoting 44 Fed. Reg. at 71,416).

Part three, the most controversial aspect of the Policy Interpretation, has been called "the effective accommodation test"[40] by some commentators. It consists of a three-part test which is "used to determine whether an institution has effectively accommodated student interest and ability."41 A school is considered to be in compliance with Title IX if it satisfies any part of the three-part test: "(1) achieving substantial proportionality between the male-female student ratio and the male-female student-athlete ratio; (2) demonstrating a history of continuing program expansion; or (3) satisfying the interests and abilities of the under-represented gender."[42] In 1996, under pressure from academic institutions, coaches of minor men's sports, and Congress, the OCR issued a Policy Clarification, which reiterated its position that an institution must meet only one part of the test.[43]

This test was also clarified with the issuance of an investigator's manual. This manual "provides detailed tests and procedures for OCR's investigators to determine compliance with Title IX's intercollegiate athletic provisions."[44] Generally, the manual encourages investigators to use an "overall approach" that incorporates all three of the major areas of the 1979 Policy Interpretation, but this investigation may be narrowed to fewer than the three areas "'where unique circumstances justify limiting a particular investigation to one or two of these major areas.'"[45]

C. The "Spirit" of Title IX: Policy Interpretation

On its face, the relevant portion of Title IX simply reads: "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."[46] In other words, the explicit policy goal of Title IX can be interpreted as "eliminat[ing] discrimination on the basis of gender in

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40. Connolly, Jr. & Adelman, *supra* note 22, at 861.

41 Lamber, *supra* note 28, at 158. Under the Policy Interpretation, an educational institution must "accommodate effectively the interests and ahilities 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." 44 Fed. Reg. at 71,417.

42 Catherine Pieronek, *Title IX and Intercollegiate Athletics in the Federal Appellate Courts: Myth vs. Reality*, 27 J.C. & U.L. 447, 455 (2000) (summarizing the actual, more detailed description of the three-part test of the 1979 Policy Interpretation, 44 Fed. Reg. at 71,418).

43 OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY GUIDANCE: THE THREE PART TEST 2 (1996). The Policy Clarification came after football coaches, men's minor sports groups, and two universities in violation of Title IX testified before Congress about Title IX and the way it was enforced by the courts. *See* Lamher, *supra* note 28, at 168 n.98 (citing *Hearings on Title IX of the Educational Amendments of 1972: Hearings Before the Subcomm. on Postsecondary Educ., Training and Life-Long Learning of the H.R. Comm. on Econ. and Educ. Opportunities*, 104th Cong., at 78, 101 (1995)). While the hearings did not result in any amendments to Title IX, "some congressmen wrote to OCR to ask that it clarify its three-part test." *Id.*

44. Connolly, Jr. & Adelman, *supra* note 22, at 852.

45. Pieronek, *supra* note 42, at 456 (quoting VALERIE BONNETTE & LAMAR DANIEL, U.S. DEP'T OF EDUC., TITLE IX ATHLETICS INVESTIGATOR'S MANUAL 7 (1990)).

46. 20 U.S.C. § 1681(a) (2000).

educational institutions."[47] When applied to athletics, "[t]he plain meaning of Title IX is that no person . . . can be denied the opportunity to participate in collegiate athletics" due to his or her gender.[48]

However, a broader approach that looks to the 1964 Civil Rights Act, Supreme Court precedent, and the legislative history of Title IX leads to the conclusion that it is meant not only to directly prevent the denial of opportunity to participate in athletics based on gender, but also that it is intended to eliminate all types of discriminatory practices in athletics and to provide equal athletic opportunity for both sexes.[49]

In order to determine the intent of Title IX, an examination of its legislative history must begin with Title IX's connection to Title VI of the 1964 Civil Rights Act.[50] Indeed, the Supreme Court itself, noting this connection between Title VI and Title IX, has interpreted the meaning of Title IX well beyond the plain language of the statute. In *Cannon v. University of Chicago*, the Supreme Court concluded "Title IX, like its model Title VI, sought to accomplish two related . . . objectives. First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices."[51] The Court reached this conclusion by examining the legislative history surrounding the passage of Title IX by Congress, directly citing the testimony of Representative Patsy Mink:

> "Any college or university which has [a] . . . policy which discriminates against women applicants . . . is free to do so under [Title IX] hut such institutions should not be asking the taxpayers of this country to pay for this type of discrimination. Millions of women pay taxes into the Federal Treasury and we collectively resent that these funds should be used for the support of institutions to which we are denied equal access . . . ."[52]

A further assertion of Title IX's intention is the unequivocal statement by one of Title IX's framers, former Senator Birch Bayh, that the goal of Title IX when it was drafted was "equal opportunity for young women and for girls in the educational

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47. Amy Bauer, *If You Build It, They Will Come: Establishing Title IX Compliance in Interscholastic Sports as a Foundation for Achieving Gender Equity*, 7 WM. & MARY J. WOMEN & L. 983, 990 (2001).

48. Michael Straubel, *Gender Equity, College Sports, Title IX and Group Rights: A Coach's View*, 62 BROOK. L. REV. 1039, 1060 (1996).

49. 34 C.F.R. § 106.41 (1993).

50. *See generally* 118 Cong. Rec. 5807 (daily ed. Feh. 28, 1972) (statement of Sen. Birch Bayh) ("Central to my amendment [Title IX] are sections 1001–1005, which would prohibit discrimination on the basis of sex in federally funded education programs. Discrimination against the beneficiaries of federally assisted programs and activities is already prohibited hy Title VI of the 1964 Civil Rights Act, but unfortunately the prohibition does not apply to discrimination on the basis of sex. In order to close this loopholc, my amendment sets forth prohibition and enforcement provisions which generally parallel the provisions of Title VI.").

51. 441 U.S. 677, 704 n.36 (1979).

52. *Id.* (citing 117 Cong. Rec. 39252 (daily ed. Nov. 4, 1971)).

system of the United States of America. Equality of opportunity. Equality."[53] This implicit "spirit" of Title IX is continually upheld, most recently during President George W. Bush's second year in office. Responding to both a campaign promise to develop a "reasonable approach to Title IX"[54] and a lawsuit by the National Wrestling Coaches Association,[55] the White House formed the Commission on Opportunity in Athletics to study Title IX and its enforcement. Similar to the process used when the Policy Clarification was issued in the late 1970s, the Commission "listened to the testimony of over fifty witnesses, received public comment from hundreds of individuals, and accessed thousands of pages of material."[56] Despite a highly controversial set of recommendations, in the end the OCR, which had overseen the Commission, affirmed the existing Title IX regulations and policy.[57] Thus, the incorporation of such dynamic legislative history into Title IX policy clearly demonstrates that the federal government intended and still intends for Title IX to provide gender equality in intercollegiate athletics.

II. THE BCS SYSTEM

While college football bowl games have been a part of the American sports scene for over a hundred years,[58] they have rarely pitted the two top-ranked teams in the nation against each other,[59] a situation unique to Division I-A football as the only NCAA championship that is not decided exclusively on the playing field.[60] Attempts to

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53. Senator Birch Bayh, Address at the Secretary's Commission on Opportunity in Athletics 24 (Aug. 27, 2002), *at* http://www.ed.gov/about/bdscomm/list/athletics/transcript-082702.pdf.

54. Straurowsky, *supra* note 29, at 106. The response was made by President Bush to support his view that the three-part effective accommodation test was "a system of quotas or strict proportionality that pits one group against another." *See id.* (quoting Press Release, Jacqueline Woods, AAUW, Bush Administration Fumbles on Title IX Support (May 30, 2002), *at* www.aahperd.org/nagws/title9/pdf/aauwtitleIXrelease.pdf).

55. *See generally* Nat'l Wrestling Coaches Ass'n v. United States Dep't of Educ., 263 F. Supp. 2d 82 (D.D.C. 2003) (arguing that the three-part effective accommodation test was the product of a flawed process of promulgation).

56. Straurowsky, *supra* note 29, at 107–08.

57. *Id.* at 109.

58. *See generally* ROBIN OURS, COLLEGE FOOTBALL ENCYCLOPEDIA: THE AUTHORITATIVE GUIDE TO 124 YEARS OF COLLEGE FOOTBALL (1994) (providing a comprehensive history of college football in the United States).

59. *Antitrust Implications of the College Bowl Alliance: Hearing before Subcomm. on Antitrust, Bus. Rights, and Competition of the S. Comm. on the Judiciary*, 105th Cong. 32 (1997) (statement of Roy F. Kramer, Commissioner, Southeastern Conference) [hereinafter *Antitrust Implications*]. In the history of the traditional bowl system, before the birth of bowl reform efforts, the two top teams played against each other only nine times. *Id.* at 32.

60. "The NCAA has conducted championships in various sports since 1921. Currently, the NCAA conducts national championships in over seventy men's and women's sports" in divisions I, II, and III, and also in division I-AA for football. K. Todd Wallace, *Elite Domination of College Football: An Analysis of the Antitrust Implications of the Bowl Alliance*, 6 SPORTS LAW. J. 57, 59 (1999).

create a Division I-A football playoff have failed,[61] but there have been a number of efforts by the conferences and bowl game organizers to produce a better system for matching the top two teams in a true National Championship, culminating with the formation of the BCS in 1998. This Part of the Note details bowl reform agreements that gave rise to the BCS, the determination of participation in BCS bowl games, and some of the recent critiques of the BCS.

A. College Football: Who's Number One?

The first proposal to match the top teams in the country was the formation of the Bowl Coalition in 1992. Four of the major New Year's Day bowl games—the Orange, Sugar, Cotton, and Fiesta Bowls—came together to form the Coalition with several conferences including the Atlantic Coast ("ACC"), Big East, Big Eight, Southeastern ("SEC") and Southwest as well as independent Notre Dame.[62] The goal of the coalition was to match the highest-rated teams available—including a number one versus number two match-up whenever possible—"while keeping traditional regional and conference bowl ties in place."[63]

After this first attempt failed, a second attempt resulted in the formation of the Bowl Alliance after the 1995 season.[64] The Bowl Alliance consisted of the Orange, Fiesta, and Sugar Bowls joined by the ACC, Big East, Big Eight, Big Ten, Pacific-10 ("Pac-

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61. In hopes of putting the top Division I-A football teams in direct competition with each other, various efforts at establishing a championship playoff system similar to other NCAA sports have been proposed over the years. Most of these efforts have had little or no success. At the 1976 NCAA Convention, a Special Committee proposal to establish a Division I-A football championship was withdrawn with no discussion. *Antitrust Implications*, *supra* note 59, at 44 (prepared statement of Cedric Dempsey, Executive Director, NCAA). A 1988 convention resolution that "would have attempted to measure the interest of Division I-A members in a national football championship" was defeated by a vote of ninety-eight to thirteen with one abstention. *Id.* A 1994 NCAA Special Committee formed to study a Division I-A football championship concluded that "while there was merit to the concept of a playoff, it could not at that time recommend specific legislation to the NCAA President's Commission." *Id.* Most recently, a 1997 study undertaken by the Division I Board of Directors found a large majority of schools opposed to any type of movement towards a football championship. *Id.* at 46.

62. *See id.* at 34 (statement of Roy F. Kramer, Commissioner, SEC).

63. *See* Richard Billingsley, *The road to the BCS has been a long one* (Oct. 21, 2001), *at* http://espn.go.com/ncf/s/historybcs.html (on file with author). Over time, certain conferences had developed contractual relationships with certain bowl games. *See Antitrust Implications*, *supra* note 59, at 33–34 (statement of Roy F. Kramer, Commissioner, SEC). For instance, the Big Eight conference was affiliated with the Orange Bowl and the SEC with the Sugar Bowl. *Id.* at 34. However, the coalition could not guarantee a national championship game every year. For instance, if a team from the Big Eight finished the season ranked number one and a team from the SEC finished ranked number two, their respective conference affiliations with the Orange and Sugar bowls would prevent them from playing one another. *Id.* Therefore, a match up between any top ranked teams from these conferences with another Bowl Coalition member school was impossible.

64. *Antitrust Implications*, *supra* note 59, at 35 (statement of Roy F. Kramer, Commissioner, SEC).

10"), and SEC conferences and independent Notre Dame.[65] The bowls agreed to rotate a national championship game among themselves so that each bowl was guaranteed the championship once every three years.[66] This game would match the number one and number two ranked teams, unless either of those teams were the champions of the Pac-10 or Big Ten who were still contractually obligated to the Rose Bowl, which was not a part of to the Bowl Alliance.[67] Thus, a match-up between any top-ranked team from these conferences with another Bowl Coalition member school was impossible.

Finally, in 1996 the American Broadcasting Company ("ABC"), which owned the television rights to the Rose Bowl, entered into discussions to integrate the Rose Bowl into a new "super alliance," a plan which became a reality following the 1998 season.[68] Under this new alliance, which became the present-day BCS, the champions of the ACC, Big East, Big Ten, Big XII,[69] Pac-10 and the SEC are guaranteed participation in a BCS bowl game, with the championship game rotating among the Rose, Orange, Fiesta, and Sugar Bowls, allowing each bowl to host the national championship game once every four years.[70]

To best determine the top two teams that would play in this national championship game the BCS ranking system was created. For the 2004–05 football season, the formula consisted of three components: The Associated Press ("AP") media poll, the USA Today/ESPN coaches poll, and a computer poll average.[71] Each component counts as one-third of a team's overall BCS score in the BCS standings.[72] The two

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65. *See id.* The Big Ten and Pac-10 champions were still prevented from playing in a Bowl Alliance game due to their Rose Bowl contract. However, their membership in the Alliance allowed other bowl eligible teams from either conference to be selected by one of the Alliance bowls. *Id.* at 36.

66. *See id.*

67. *Id.*

68. *Id.*

69. In 1996, the Big Eight merged with four members of the now-defunct Southwest Conference to become the Big XII. *See* big12sports.com, *About The Big 12*, *at* http://big12sports.collegesports.com/aboutbig12/big12-aboutbig12.html (last visited Feb. 5, 2005).

70. *See Antitrust Implications*, *supra* note 59, at 106–07 (statement of James Delany, Chairman, Big Ten Conference). Under the new arrangement, the Rose Bowl would still host the Big Ten and Pac-10 champions, unless either of those teams was ranked among the top two teams in the nation, in which case that team would be permitted to play in the national championship game regardless of venue. *Id.* at 36-37.

71. BCSFootball.org, *BCS Standings*, *at* http://www.bcsfootball.org/index.cfm?page=standings (last visited Jan. 13, 2005) [hereinafter *BCS Standings*]. However, as of December 21, 2004, the AP has insisted that the BCS no longer use its poll in compiling the BCS standings, citing harm to the reputation of the AP brand name and violations with AP poll voters. *College Football Notebook: BCS not going away*, SEATTLE POST-INTELLIGENCER, Dec. 23, 2004, http://seattlepi.nwsource.com/cfootball/204997_fbc23.html (last visited Feb. 5, 2005). Nevertheless, the BCS appears to be ready to proceed without the AP poll, hoping to unveil a new formula by April 2005. *Id.*

72. *BCS Standings*, *supra* note 71.

teams with the top overall BCS score will then meet in the BCS championship game.[73] The remaining six teams are then selected from the conference champions of the Big East, ACC, Big XII, Big Ten, SEC, and Pac-10 that are not playing in the BCS championship game.[74] The bowls may then select from any other team that has won at least nine games and is ranked in the top twelve of the final BCS standings; however should any team from a BCS non-guaranteed conference—which includes the Sun Belt Conference, Mid-American Conference, Mountain West Conference, Conference USA, and the Western Athletic Conference ("WAC")—finish sixth or higher in the final BCS standings, the team shall be awarded a BCS game.[75] Since the formation of the BCS in 1998, the University of Utah is the only team from a BCS non-guaranteed conference to qualify for a BCS bowl, and that was not until after the new BCS qualifications were implemented in March of 2004.[76]

Prior to 2004, however, Utah and other schools from the aforementioned BCS non-guaranteed conferences were not even members of the BCS and therefore had never been invited to play in a BCS game. In order to address the fact that no BCS non-guaranteed conference teams were being admitted into the BCS games, a group of presidents from the BCS non-guaranteed conferences formed the Presidential Commission for Athletic Reform.[77] Led by Scott Cowan, president of Tulane University, the commission sought four changes: greater access to major bowls, an end to "the stigma of being labeled 'non-BCS' schools," a reduction in the financial disparity of football's "haves" and "have-nots," and a voice in the governance of post-season play.[78] In airing its concerns, the commission considered filing an antitrust suit and succeeded in getting Congress to hear its grievances.[79] In the fall of 2003, both the House and the Senate held hearings to discuss the ramifications of the BCS on intercollegiate athletics.[80] Among the issues put before Congress were allegations that the BCS hinders funding, athletics facility construction, and recruiting at non-BCS schools, leading to a negative effect on women's intercollegiate athletic programs.[81] After several months of standoffs with little progress and facing the very real possibility of congressional interference and a multimillion dollar lawsuit, the BCS

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73. *See* BCSFootball.org, *BCS Bowl Eligibility*, *at* http://www.bcsfootball.org/index.cfm?page=eligibility (last visited Jan. 13, 2005) [hereinafter *BCS Eligibility*].

74. *Id.*

75. *Id.*

76. *See* Liz Clarke, *Finally, A Mid-Major Breakthrough: Utah Overcame Odds, Favoritism to Claim a Spot in the BCS*, WASH. POST, Jan. 1, 2005, at D01.

77. *See generally* Tulane University, *Presidential Coalition for Athletics Reform*, *at* http://coalition.tulane.edu (containing general background information and press releases about the coalition) (last visited Jan. 13, 2005).

78. Liz Clarke, *Future of BCS Still Faces Major, Mid-Major Issues*, WASH. POST, Feb. 28, 2004, at D4.

79. *Id.*

80. *See generally BCS or Bust: Competitive and Economic Effects of the Bowl Championship Series On and Off the Field: Hearings before the Senate Comm. on the Judiciary*, 108th Cong. (2003), http://judiciary.senate.gov/print_member_statement cfm?id&wit_id=2628 (detailing the hearings in the senate) [hereinafter *BCS or Bust*]; Young, *supra* note 11 (detailing the house hearings).

81. *See BCS or Bust*, *supra* note 80 (statement of Sen. Orrin Hateh).

Presidential Oversight Committee was close to dissolving the current BCS system and heading back to the old bowl setup where neither the courts nor Congress would be able to touch the major conferences.[82]

However, on March 1, 2004, NCAA president Myles Brand stepped in and created a compromise position: the creation of a fifth BCS bowl game beginning in the 2006 season.[83] Under the new plan, the BCS non-guaranteed conferences will increase their BCS revenues by 50%—from 5% percent of the BCS payout to 7.5%.[84] In addition, the BCS non-guaranteed schools possibly stand to receive an additional 7.5% of the BCS payout if one of the schools qualifies to play in a BCS game.[85] While this is obviously a positive step toward equity of football revenue distribution among BCS and former non-BCS schools, a large gap still remains. The BCS bowl guaranteed schools will receive far greater payouts, which can then be converted into much-needed funds for their women's programs.

B. The "Have and Have-Nots": Discrepancies in BCS Revenue Distribution

The primary argument against the current BCS system is that it creates a series of "haves" and "have-nots" in Division I-A college football. As previously stated, BCS non-guaranteed conference schools will likely only qualify for a slot in a BCS game if they win their conference and finish ranked in the top six of the final BCS standings.[86] The likely exclusion of these conferences from the BCS games creates a problem because of the drastic discrepancy in payouts between these games—and their associated lucrative television contracts—and other bowl games.

Funding for the BCS comes from two sources: ABC Sports and the host bowls.[87] According to the BCS website, total revenue from the 2004–05 season is expected to be slightly more than $93 million.[88] Of this figure, nearly $86.5 million was initially to be divided among the six BCS Bowl guaranteed conferences, with the remaining five Division I-A conferences splitting about $5 million, and $1.5 million going to Division I-AA football conferences that have averaged sixty full scholarship grants over the last four years.[89] Furthermore, between the 1998–99 and 2002–03 seasons these payouts have totaled nearly $450 million, with the sixty-three schools in BCS Bowl guaranteed conferences splitting the lion's share—$433 million—of that total, while the remaining

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82. Dennis Dodd, *Middleman Brand proves to be savior* (Mar. 11, 2004), *at* http://cbs.sportsline.com/collegefootball/story/7164165 (last visited Jan. 13, 2005).

83. *See id.*; *see also* Tim Layden, *Pleading the fifth: BCS powers don't go far enough in latest reform* (Mar. 5, 2004), *at* http://sportsillustrated.cnn.com/2004/writers/tim_layden/03/05/bcs .fifthbowl/index.html (last visited Jan. 13, 2005).

84. Stefan Fatsis, *College-Football Deal to Give Nonelite Schools More Money*, WALL ST. J., Mar. 2, 2004, at B11.

85. *Id.*

86. *See BCS Standings*, *supra* note 71.

87. BCSFootball.org, *Revenue Distribution*, *at* http://BCSFootball.org/revenue/shtml (last visited Jan. 13, 2005) [hereinafter *Revenue Distribution*].

88. *Id.*

89. *See id.* The figures are rounded to the nearest half million. While these figures represent the projected BCS payout for the 2004–05 football season, the final payouts had not yet been released at the time this Note was written.

fifty-four schools shared just $17 million.[90] To further illustrate this point, consider that if the approximately $4.5 million projected payout to BCS non-guaranteed conferences for the 2003–04 season is added to the $17 million total BCS non-guaranteed conference payout from the previous years, for a combined total of slightly more than $21.5 million, this figure roughly equals the 2003–04 payout to the Big XII conference *alone*–the Big XII had two teams selected to play in BCS bowl games.[91]

Indeed, even the inclusion of the former non-BCS schools into the BCS and the addition of a fifth bowl game do little to help the BCS non-guaranteed conferences. For instance, under the five-game plan, the six BCS Bowl guaranteed conferences keep their automatic bids and the payouts for their conference champions. The BCS non-guaranteed schools are still not granted an automatic bid, and the exact financial arrangements are under discussion.[92] The *Wall Street Journal* reported that had this new plan been in place in 2003-04, the five BCS non-guaranteed conferences would have split about $8.85 million.[93] While this is a greater payout than the $4.5 million these conferences received in years past under the old plan,[94] divided among five conferences this results in a total of around $900,000 per BCS non-guaranteed conference, still vastly inferior to what each BCS Bowl guaranteed conference currently receives. Thus, while the deal is an improvement for the fifty-four BCS non-guaranteed schools, it still offers nothing close to an equal share of the payouts and therefore does little to remedy the financial disparities that cause Title IX discrepancies between schools in BCS Bowl guaranteed and BCS non-guaranteed conferences.

C. The Intercollegiate Arms Race

In the modern world of college athletics, there exists an unwritten mantra of spend or be left behind. As one scholar put it:

> [T]he school that spends the most wins the most, and the school that wins the most has the most to spend. If a competitor builds a lavish state-of-the-art weight room and hires an array of strength coaches, the home team is instantaneously at a disadvantage. It has lost an edge in its ability to recruit the most exquisite talent, the talent that will ensure lucrative television contracts and ample post-season receipts.[95]

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90. *BCS or Bust*, *supra* note 80 (statement of Dr. Scott Cowen, President, Tulane University).

91. *See* NCAA, *2003-04 Distribution of BCS Revenue*, *at* http://www.ncaa.org/financial/postseason_football/2003-04/2003BcsRevenue.html (last visited Feb. 5, 2005) [herinafter NCAA Figures].

92. *See* Carol Slezak, *Bigger BCS, Smaller Chance for Reform*, CHI. SUN TIMES, Mar. 2, 2004, *available at* http://www.suntimes.com/output/slezak/cst-spt-carol02.html (quoting Fiesta Bowl executive director John Junker on payments: "So much is unknown. I just don't know enough yet. It sounds like it's going to be a very broad set of discussion terms.").

93. *See* Fastis, *supra* note 84, at B11.

94. *See* NCAA Figures, *supra* note 91.

95. John Weistart, *Title IX and Intercollegiate Sports: Equal Opportunity*, 16 BROOKINGS REV. 39, 41 (1998)).

Such competition to be the best is openly referred to by both the media and college football commentators as the athletics "arms race." Nowhere is this more evident than in Division I-A college football, where schools and conferences engage in a constant game of one-upmanship to guarantee themselves lucrative television contracts and a chance at BCS Bowl money. If left unchecked, the result is bound to be the same as the version of an arms race played out during the Cold War: only the most financially fit will be left standing. An unnamed university president noted in a survey conducted by the Football Study Oversight Committee in 2001[96] that "[i]f there is a threat hanging over football, it is the multi-million dollar stadium, locker rooms and the $2 million paid for a football coach. Only a handful of schools in this country can afford this madness."[97]

Despite the fact that everyone involved seems to recognize the danger, no one seems willing to opt out for fear of losing a competitive advantage on the playing field, so the race continues unabated. For instance, in 2003 the ACC invited the University of Miami (Fla.), Virginia Tech, and Boston College of the Big East Conference to join the ACC.[98] It was clear that this move was an effort to become the dominant conference on the East Coast and to increase its member schools' revenues by adding these three traditionally powerful football programs that would presumably give the ACC a greater chance of qualifying more teams to the BCS. In fact, U.S. Senator George Allen of Virginia has openly admitted that the primary reason for the ACC expansion was monetary gain.[99]

Such a ripple effect was not limited merely to the Big East and ACC. Indeed, even as the Big East presidents filed a lawsuit against the ACC to keep Miami, Virginia Tech, and Boston College in the Big East, they in fact were in the process of snatching five schools from Conference USA.[100] All told, conference realignments affected seventeen schools and half of the conferences, or 15% of all Division I-A conference memberships.[101] While not all these realignments will result in BCS bowl game berths, some undoubtedly will, and with them the huge payouts. For everyone else, the realigning process is merely an attempt to get into a better conference, and thereby increase the chance for a bid to any bowl game, since 74% of the forty-six non-BCS bowl game slots are reserved for members of the original BCS alliance.[102]

As one commentator has indicated, "these realignments have a direct impact on all aspects of NCAA governance."[103] It is evident that such practices cannot continue

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96. NCAA News, *The Will to Act Project: College Football and Ma Bell* (Sept. 16, 2002), *at* http://www.ncaa.org/news/2002/20020916/active/3919n12.html.

97. *Id.*

98. Welch Suggs, *Conference Soap Opera is Driven by Cash, but Cachet Matters, Too*, CHRON. HIGHER EDUC., May 30, 2003, at A37.

99. Mike Fish, *Option play: QB-turned-senator Allen playing tough with ACC* (June 19, 2003), *at* http://sportsillustrated.cnn.com/inside_game/mike_fish/news/2003/06/19/fish_va_tech/.

100. Douglas Lederman, *College presidents learn it's hard to keep sports pure*, USA TODAY, Jan. 15, 2004, *available at* http://www.usatoday.com/sports/college/other/2004-01-14-ceos_x.htm.

101. *See* Sandbrook, *supra* note 15.

102. *Id.*

103. *Id.*

unmonitored or the gap between the "haves" and the "have-nots" will widen and equality of opportunity for both genders in intercollegiate athletics will be further threatened.

III. HOW THE BCS AND THE ARMS RACE INTERFERE WITH THE POLICY OBJECTIVES OF TITLE IX

Because the BCS is not a federally-funded educational program and because there is not a per se violation of one of the three major areas set forth in the 1979 Policy Interpretation, typical Title IX enforcement mechanisms cannot be used.[104] Therefore, rather than attack the BCS on legal grounds, this Part of the Note argues that the BCS has a significant negative effect on the policy objectives of Title IX as interpreted from its legislative history and the statute itself, specifically: to promote gender equality in activities—including intercollegiate athletics—supported by federally funded institutions.

Under a plain meaning interpretation of the language of the statute, Title IX seeks to prevent individuals from being denied participation in athletics on the basis of their gender. From this standpoint, the BCS is not in direct violation of the aforementioned policy objective, because the BCS does nothing to prohibit males or females from participating in intercollegiate athletics and as such does not discriminate against women athletes. However, when one accounts for the intentions of Title IX as determined from its legislative history, the BCS does contradict the implicit goal of providing gender equality in athletics. The following Part of this Note further substantiates this argument by showing that the BCS creates a large discrepancy in the availability of funds, making it much more difficult for women in BCS non-guaranteed conferences to be protected from the discriminatory practice of not receiving the same athletic opportunities as women in BCS conferences.

A. Empirical Evidence against the BCS

Membership in a BCS Bowl guaranteed conference, with its large bowl payouts, ensures that most member schools have a much larger pool of funds from football to spread to non-revenue sports. Since women's sports depend largely on football revenues for their support,[105] schools that are part of a BCS conference are given "a substantial competitive advantage in building facilities, hiring coaches and recruiting athletes to bolster all other sports . . . including those for female athletes" compared with their BCS non-guaranteed conference competitors.[106] Specifically, these BCS non-guaranteed schools have a much more difficult time providing the resources necessary to satisfy the requirements of the substantial proportionality prong of the effective accommodation test detailed in the 1979 Policy Interpretation.

A study in *The Chronicle of Higher Education* found that schools in the BCS Bowl guaranteed conferences had on average a "gap of only 8.6 percentage points between

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104. Title IX of the Education Amendments of 1972; A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,413, 71,415 (Dec. 11, 1979) (codified at 34 C.F.R. § 106.37(c) (1993)).

105. *See* Young, *supra* note 11.

106. *Id.*

the proportions of women in their sports programs (42 percent) and in their student bodies (slightly over 50 percent)" while schools outside these conferences "had far fewer female athletes—39 percent—than those in the [BCS Bowl guaranteed] conferences, and the disparity between female athletes and female undergraduates was 12 percentage points."[107]

Another analysis, conducted by faculty at the University of Arizona and Cornell University, reached similar results. Using a regression analysis, the study showed a 6.5% proportionality gap at BCS Bowl guaranteed schools, versus a gap of 10.4% at other Division I-A institutions in 2001–02.[108] BCS Bowl guaranteed schools also showed some of the greatest improvement in compliance rates when compared to a similar study conducted in 1995–96,[109] leading the researchers to opine that "our results may reflect the importance of revenue producing men's sports as a subsidy for women's sports in Division I-A.".[110]

Finally, a statistical analysis conducted in 2000 and published in the *Journal of Sport Management* revealed that "[f]ootball profits were a significant influence on achieving gender equity in financial aid" and that "[c]ompliance in meeting gender equity . . . increased by 0.4 percentage points for each million dollars of football profit."[111] All told, an average Division I-A football program "earn[ed] 43% of all total sports revenues and incur[ed] 26% of total sports costs."[112] Similarly, a study by Professor Julia Lamber found that "on average, football revenues have the potential to cover 70% of the women's sports expenses."[113] The same study also found that "25 out of 80 schools could cover their women's sports expenses from their net football revenue alone."[114]

These numbers imply that a majority of Division I-A football teams are able to provide funding for women's athletic programs. Upon closer examination, however, almost all schools with available revenues for women's sports are in BCS Bowl guaranteed conferences, with BCS non-guaranteed schools "los[ing] an average of $1 Million [sic] dollars in their football programs."[115] For instance, the aforementioned *Journal of Sport Management* study found that, with the exception of the Big West Conference, all of the conference leaders in Title IX compliance were members of the "football bowl coalition or the Rose Bowl agreement."[116] The study implies that

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107. Suggs, *supra* note 2, at A52.

108. Deborah J. Anderson et al., Gender Equity in Intercollegiate Athletics: Determinants of Title IX Compliance 29 (Feb. 9, 2004) (unpublished manuscript, on file with author).

109. At BCS schools, the noncompliance rate fell from 11.2% to 6.5%. *Id.*

110. *Id.* at 13.

111. Donald E. Agthe & R. Bruce Billings, *The Role of Football Profits in Meeting Title IX Gender Equity Regulations and Policy*, 14 J. OF SPORT MGMT. 28, 36 (2000).

112. *Id.* at 30. Men's basketball consistently produces revenues above costs, with 16.1% of average total sports revenues and 7.5% of average total costs. *Id.* at 40 n.1.

113. Lamber, *supra* note 28, at 225.

114. *Id.* The study does not detail whether or not the twenty-five schools were members of BCS conferences.

115. Young, *supra* note 11.

116. Agthe & Billings, *supra* note 111, at 37. As previously discussed, the Bowl Coalition/Bowl Alliance and Rose Bowl participants have since combined to form the BCS. *See supra* Part II.A.

"members of these conferences have better ability to carry out more programs to meet Title IX" than their BCS non-guaranteed conference brethren due to the considerably larger and more certain payouts that the BCS bowls provide.[117]

In conclusion, a number of studies have shown that schools that are not a part of the BCS guarantee are much more likely to have a greater gap in the percentage of male and female athletes in relationship to their student bodies and do not benefit from the distribution of much-needed funds that could be applied toward providing equal availability of sports programs and facilities for members of both sexes.

B. The Intercollegiate Arms Race, the BCS, and Title IX

While not directly addressed by any reports, the impact of the arms race on the policy objectives of Title IX cannot be overstated. How, for instance, will a school such as Louisiana Tech, a traditional women's basketball power, be able to compete when its football team is relegated to playing in the WAC, which has never qualified a team for a BCS bowl despite the fact that conference member Boise State has compiled a 24–1 record over the last two seasons—including a perfect 11–0 mark in 2003–04? Moreover, if the arms race is left untouched to reach its logical conclusion, it is impossible to see how anyone, save perhaps titans such as Michigan, Texas, and Ohio State, can survive. In the meantime, it is likely that multiple schools' athletic programs will collapse under the weight of trying to keep up with the few power programs, resulting in both a narrowing of competition for NCAA championships to schools in the power conferences, and perhaps inevitably, a reduction in the number of athletic programs for women in order to meet budget demands. Such a result is clearly at odds with the policy objectives of Title IX.

However, such a doomsday scenario is not likely to appear. Indeed, many university presidents and faculty senates, awakened not only by the dangers of the college arms race, but also by numerous other problems in college sports ranging from graduation rates to scandals, have increasingly been motivated to address these problems. One group in particular, the Coalition on Intercollegiate Athletics ("COIA"), has tentatively adopted a framework for comprehensive athletics reform that could be beneficial in ensuring that the policy objectives of Title IX are met; this framework is thus analyzed next in the context of the BCS.

IV. SOLUTIONS TO THE TITLE IX PROBLEMS CAUSED BY THE BCS

The above section clearly demonstrates that schools in BCS non-guaranteed conferences have a more difficult time embodying the "spirit" of Title IX, primarily due to their exclusion from the rich BCS bowl game payouts. Evidence indicates that this discrepancy in revenue will only worsen as a result of the intercollegiate arms race.[118]

Without the threat of legal action, the BCS and the BCS Bowl guaranteed conferences have no compelling reason to change their current practices, which contribute to an uneven playing field for Title IX compliance through unequal

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117. Agthe & Billings, *supra* note 111, at 37.

118. *See supra* Part III.A.

distribution of bowl revenues. As previously stated, Title IX applies to educational programs and activities receiving federal funds,[119] and since the BCS is neither of these, most of the traditional remedies for Title IX non-compliance are unavailable.[120] The schools that are members of BCS Bowl guaranteed conferences are not directly violating Title IX, so the authorized remedy for assuring compliance "by the termination of or refusal to grant or to continue assistance . . . to any recipient as to whom there has been an express finding . . . of a failure to comply with such requirement"[121] is not available.

Therefore, it appears that there are no discernible remedies available under current law to reduce the negative effects of the BCS on the policy objectives of Title IX. Nor are measures that would facilitate such reforms likely from Congress anytime soon. Since Steve Young's testimony in the fall of 2003, there have been no congressional hearings on the subject.[122]

Indeed, for reform to be truly effective, it must come from all schools and conferences, especially the BCS Bowl guaranteed conferences. While such a remedy at first blush may appear unlikely, the current debate about the role the BCS plays in the escalating "arms race" in intercollegiate athletics has energized many university presidents to assume a more active voice in the debate over the role of intercollegiate athletics in the academic setting.[123] Indeed, many proposals that are currently circulating seek to control the arms race before it spirals towards a result where college sports are reduced to a small oligopoly of elite schools that can afford to participate.[124] While not specifically mentioning Title IX by name, these initiatives would by their very nature embrace the policy goals of Title IX by ensuring that revenues are distributed more fairly across the spectrum of Division I-A schools.

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119. 20 U.S.C. § 1681 (2000).

120. Generally, Title IX is enforced in three ways: "(1) through OCR audits; (2) through law suits brought by the federal government; or (3) through law suits brought by private individuals." Connolly, Jr. & Adelman, *supra* note 22, at 853. The OCR, utilizing the *Title IX Athletics Investigator's Manual*, looks for violations in three or fewer of "the major areas set out in the 1979 policy interpretation . . . ." Pieronek, *supra* note 42, at 456. If a Title IX violation is discovered, the OCR will "work with the institution to reach compliance." Connolly, Jr. & Adelman, *supra* note 22, at 854. Failure to comply can result in loss of federal funding or judicial proceedings by the Department of Justice. *Id.* (citing OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., TITLE IX ATHLETICS INVESTIGATOR'S MANUAL (1990)). Similarly, "[a]n individual can obtain injunctive relief, such as forcing a university to add a team, or money damages and attorney fees . . . ." *Id.* (citing Cohen v. Brown Univ., 991 F.2d 888 (1st Cir. 1993)).

121. 20 U.S.C. § 1682.

122. Sandbrook, *supra* note 15.

123. Report of the Knight Foundation Commission on Intercollegiate Athletics, *A Call to Action: Reconnecting College Sports and Higher Education* (June 2001) (providing a letter of transmittal to W. Gerald Austen, M.D.), *available at* http://www.knightfdn.org/default.asp?story=athletics/reports/2001_report/index.html (last visited Jan. 16, 2004) [hereinafter *Call to Action*].

124. *See id.*; *see also* The Coalition on Intercollegiate Athletics, *A Framework for Comprehensive Athletics Reform* (bold and underline type omitted), *at* http://www.math.umd.edu/%7Ejmc/COIA/Framework-Text.html (last visited Jan. 17, 2005) [hereinafter *Framework*].

The first is a series of initiatives affecting Division I-A football proposed by the Knight Commission on Intercollegiate Athletics. Founded in 1989 as a response to more than a decade of highly visible college sports scandals, the John S. and James L. Knight Foundation's stated goal is to "recommend a reform agenda that emphasize[s] academic values in an arena where commercialization of college sports often overshadow[s] the underlying goals of higher education."[125] It is generally comprised of current and former NCAA presidents that are concerned about the influence of college sports in the university setting.[126] In the past, the Knight Commission has been successful in putting pressure on both the NCAA and colleges and universities. For example, its 2001 report, *A Call to Action: Reconnecting College Sports and Higher Education*, was one of the first reports to mention the dangers of the arms race and to propose solutions.[127]

In 2004, the Knight Commission published a working paper entitled *Division I-A Postseason Football History and Status* in an attempt to understand the current Division I-A postseason football structure and its interplay within the BCS structure. While not explicitly proposing any direct changes to the current structure, the report did note three critical areas of concern: governance, access and revenue distribution.[128]

First, with respect to governance, the report noted an alarming lack of NCAA oversight over Division I-A postseason football.[129] As a result of this lack of oversight, the BCS organization will continue to link "the more 'successful' football conferences with four major revenue-producing bowls and a single television company."[130] Such a result, the authors contend, actually weakens the overall economic strength of the bowl system.[131] On the other hand, a single governing authority could "coordinate all television and sponsorship agreements to maximize revenues."[132]

Second, the report briefly noted that access to the BCS bowls continues to be a major concern for the aforementioned BCS non-guaranteed schools, questioning whether or not increasing the number of BCS bowl games would actually increase participation in BCS games by BCS non-guaranteed schools.[133] Finally, the report addressed what the authors considered to be the "foremost concern": revenue distribution.[134] Here the report discussed how the absence of a governing authority allowed nearly 99% of the revenues from bowl games to flow directly to Division I-A

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125. Press Release, *Knight Commission on Intercollegiate Athletics Calls for Clearer Model of Division I-A Football Governance: Notre Dame Football Coach Tyrone Willingham and Former Texas A&M Coach R.C. Slocum Offer their Testimony* (May 24, 2004), *available at* http://www.knightfdn.org/default.asp?story=/news%5Fat%5Fknight/releases/2004/2004%5F05%5F24%5Fkcia.html.

126. *Id.*

127. *See Call to Action*, *supra* note 123. Interestingly enough, this report suggested basing revenue distribution plans "not on winning and losing but on improving academic performance, enhancing athletes' collegiate experienee," and, most notably, "achieving gender equity." *See* Press Release, *supra* note 125.

128. Sandbrook, *supra* note 15.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

conferences.[135] Since these revenues in large part flow to the BCS Bowl guaranteed conferences, such a distribution makes it increasingly difficult for the non-guaranteed conferences to keep pace in athletic expenditures.

As a proposed solution, the authors analogized the current BCS system to the differences in revenue generation between the so-called "big market" and "small market" Major League Baseball and National Football League franchises.[136] Such leagues, the authors contend, have benefited from greater economic success by implementing a revenue distribution plan.[137]

Such an outcome is not too far-fetched and in fact currently exists within the NCAA structure. Each year the NCAA distributes roughly 58% of the income generated by the Division I-A basketball championships to its Division I-A members.[138] Such a revenue plan could be adopted for the Division I-A football championships. Using recent BCS payout figures, the distribution would amount to roughly $750,000 per school,[139] a significant improvement for BCS non-guaranteed schools over what they have been receiving under the current system.

However, such redistribution would result in BCS Bowl guaranteed conference schools having fewer resources to distribute among themselves, making it unlikely that these schools would choose to voluntarily adopt such a system. Yet it appears that, faced with the mounting costs of maintaining their place in the arms race, many schools—including members of the BCS Bowl guaranteed conferences—are in fact open to any proposal, including revenue sharing that could limit this trend.[140]

One such proposal has recently been put forth by the COIA. COIA is a group of Division I-A faculty senates that works with the American Association of University Professors, the Association of Governing Boards (a national organization representing college and university trustees), and the NCAA, among other groups, to promote serious and comprehensive reform of intercollegiate sports.[141] As of January 17, 2005, thirty-one of COIA's forty-five members were schools in BCS Bowl guaranteed conferences.[142]

COIA's mission is "to preserve and enhance the contributions athletics can make to academic life by addressing longstanding problems in college sports that undermine those contributions."[143] In keeping with this goal, COIA's steering committee released

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135. *See id.*

136 *Id.*

137 *See id.*

138. *Id.*

139. *BCS or Bust*, *supra* note 80 (statement of Harvey S. Perlman, Chancellor, University of Nebraska-Lincoln).

140. The Coalition on Intercollegiate Athletics, *A National Coalition of Faculty Governance Leaders*, *at* http://www.math.umd.edu/~jmc/COIA/Members.html (last visited Dec. 17, 2004).

141. The Coalition on Intercollegiate Athletics, *About the Coalition*, *at* http://www.math.umd.edu/~jmc/COIA/COIA-Home.html (last visited Jan. 17, 2005) [hereinafter *About the Coalition*].

142. *See* The Coalition on Intercollegiate Athletics, *Schools whose faculty senates have voted to join the Coalition*, *at* http://www.math.umd.edu/~jmc/COIA/Members.html (last visited Jan 17, 2005).

143. *About the Coalition*, *supra* note 141.

A Framework for Comprehensive Athletics Reform in the fall of 2003, which cited five areas of comprehensive reform in college athletics: "(1) academic integrity, (2) athlete welfare, (3) governance of athletics at the school and conference level, (4) finances, and (5) over-commercialization."[144]

Noting the rising costs of maintaining a top-notch athletics program at a time of budget scarcity, the coalition openly embraced "increased revenue-sharing (beyond the participants in events) to minimize revenue-driven incentives for winning."[145] Furthermore, the report emphasized that, to the degree allowable under federal anti-trust laws, "conferences should . . . seek to control expenses . . . to create as level a playing field as possible."[146] Finally, the report concluded by acknowledging that such a plan would disadvantage programs that are currently most successful and by noting the importance of developing a plan that could buffer these effects during the period of reform.[147]

While it is currently unclear which, if any, of the proposals offered by either the Knight Commission or the COIA will become a reality, it is nevertheless critical that such a debate, ignited by the arms race, has begun in the first place. As it stands, any type of increased revenue-sharing system would be beneficial to the policy goals of Title IX, which are in no small part hampered by the gross inequities of revenue distribution currently promulgated by the BCS.

CONCLUSION

It is apparent that the BCS in its current form does not sufficiently support the provision of equal opportunity for women athletes under the goals of Title IX. Originally designed to match the two top-ranked teams in a national championship game, the BCS has morphed into what critics have stated is a two-tiered system of college football "haves" and "have-nots."[148] Partially by repeatedly rejecting proposals that exempt revenue-producing sports from Title IX, Congress has established that the goal of intercollegiate athletics is not to make money but to enhance the overall educational experience for both males and females.[149] Since the scope of Title IX does not extend to organizations such as the BCS, and since Congress is loathe to act, no legal remedies are currently in place to reign in the excesses of the BCS. Therefore, it is apparent that the current proposals by the Knight Commission and the COIA should be implemented to ensure that the policy objectives of Title IX are maintained.

144. *Framework*, *supra* note 124.
145 *Id.*
146 *Id.*
147 *Id.*
148. *See* NCAA News, *supra* note 96.
149. *See* Heckman, *supra* note 20, at 12.