

CAN GENDER EQUITY FIND A PLACE IN COMMERCIALIZED COLLEGE SPORTS?

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The premise of Title IX should be uncontroversial: no person may be excluded from the benefits of an educational program on the basis of gender.¹ There is a sense in which Title IX, at the time of its adoption more than twenty years ago, simply captured what was an independent societal norm of considerable force. Women were participating in higher education, including graduate and professional education, in increasing numbers and were properly claiming a right to equal opportunities. Sexual harassment was, and is, a persistent problem and some disciplines have changed only slowly.² The prevailing

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Christopher McLaughlin of the Class of 1996 at Duke began working with this project in its earliest stages and contributed many hours of very valuable research assistance. The later work of Amy Kunstling, Brian Beck and Jessica Carey, all of the Class of 1996, was of a similar high quality.

1. "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." Education Amendments of 1972, 20 U.S.C. § 1681(a) (1994).

2. Although the number of female professors has increased significantly in recent years, faculties have significantly fewer women than men. Denise K. Magner, *The New Generation: Study Shows Proportions of Female and Minority Professors Are Growing*, CHRON. HIGHER EDUC., Feb. 2, 1996, at A17. Furthermore, women are more likely than men to occupy non-tenure track instructional positions. *Id.*; see also Ben Gose, *Women's Place in Medicine*, CHRON. HIGHER EDUC., Nov. 3, 1995, at A49 (regarding Stanford's medical school faculty). Similarly, the number of female students in graduate and professional programs is higher than in previous years, but women in these programs still report disparate treatment. Magner, *supra*, at A49 (increasing numbers of women attending medical school, but discrimination still reported); Judith A. Turner, *More Women Are Earning Doctorates in Mathematics, But Few Are Being Hired by Top Universities*, CHRON. HIGHER EDUC., Dec. 6, 1989, at A13 (increasing numbers of women enrolled in mathematics, engineering, and science programs, but slow progress in hiring).

Women students still face many biases and barriers at the nation's law schools, according to a recent American Bar Association report. Women students are occasionally called "sweetie" or "baby" by professors, and women are still underrepresented in law school enrollments. *ABA Report Finds Bias Against Women*, L.A. TIMES, Feb. 3, 1996, at A4.

Some of the most enduring obstacles to gender equity in higher education are found in all-male military colleges. Even today, the Citadel in South Carolina and the Virginia Military Institute continue to fight highly-publicized court battles to prevent the admission of female cadets. See, e.g. *Faulkner v. Jones*, 858 F. Supp. 552 (D.S.C. 1994), *aff'd and remanded as modified*, 51 F.3d 440 (4th Cir.), *aff'd and remanded*, 44 F.3d 1229 (4th Cir.), *reh'g denied*, 52 F.3d 90 (4th Cir.), *cert. granted*, 116 S. Ct.

perception, however, was that universities were, with varying degrees of willingness, reexamining their past practices and moving away from their prior model of male preferences.

On the landscape of gender equity in higher education, athletics stands out as a notoriously troubled area. Participation by women in college sports has increased, but their programs are a persistent source of discouraging statistics. A majority of the students at Division I schools are women.³ Nonetheless, women athletes receive only 35 percent of the athletic scholarship money that is distributed.⁴ By common consensus there are no more than a handful of schools at which the percentage of women participating in athletics matches the percentage of women in the student body,⁵ which at present is the most commonly used standard for judging compliance with Title IX.⁶ Expenditures for support of women's programs, such as those for recruiting, promotion, and training, are similarly small, often only a fraction of the comparable expenses for

281 (1995).

3. Debra E. Blum, *Slow Progress on Equity: Survey of Division I Colleges Shows Little Has Changed for Female Athletes*, CHRON. HIGHER EDUC., Oct. 26, 1994, A45.

4. *Id.*

5. *Id.* at A51. A recent survey of student-athlete participation rates revealed some stark examples of underrepresentation of women:

1993-94 ATHLETICS PARTICIPATION

SCHOOL	% OF WOMEN IN STUDENT BODY	% OF ATHLETES WHO ARE WOMEN
Miami University	53%	28%
University of Pittsburgh	49%	22%
University of Mississippi	50%	24%
University of Georgia	53%	34%
UNLV	51%	28%

Id.

6. The "substantial proportionality" standard is one of three tests employed by the Department of Education to determine if a school has satisfied the interests and abilities of its student-athletes as required by the Department's Title IX regulations. Policy Interpretation: Title IX and Intercollegiate Athletics, 34 C.F.R. § 106.41(c) (1994); see also *infra* notes 102-07 and accompanying text. For critiques of the substantial proportionality test, see Deborah Brake & Elizabeth Catlin, *The Path of Most Resistance: The Long Road Toward Gender Equity in Intercollegiate Athletics*, 3 DUKE J. GENDER L. & POL'Y 51 (1996); B. Glenn George, *Who Plays and Who Pays: Defining Equality in Intercollegiate Athletics*, 1995 WIS. L. REV. 647, 653-59; Mary W. Gray, *The Concept of "Substantial Proportionality" in Title IX Athletics Cases*, 3 DUKE J. GENDER L. & POL'Y 161 (1996); Brian A. Snow & William E. Thro, *Still on the Sidelines: Developing the Nondiscrimination Paradigm Under Title IX*, 3 DUKE J. GENDER L. & POL'Y 1 (1996).

men's sports.⁷ It is not uncommon for a school to spend twice as much on its football team that it spends for all women's sports.⁸

Perhaps more notable, though, is the fact that women's claims for greater participation in college sports have generated open and, in some cases, vicious criticism from defenders of men's sports. While the efforts of women to participate in other areas of the academy have encountered resistance, public discourse has been increasingly accepting, and at times even encouraging. The language used to attack Title IX in the sports area is often unrestrained, however. Even though the gains for women's sports under Title IX have been modest, the head of the American Football Coaches Association apparently experiences the women's claims as conspiratorial: "I have seen the enemy eyeball to eyeball, and I can tell you that they're out to get the game of football."⁹ A commentator in California is no less sanguine: "Unless this law is amended, it will eventually cause the demise of all male-based non-revenue sports in both college and high school."¹⁰ And a fan writing to his local newspaper is certain about what is afoot in the implementation of Title IX. The prospect that booster donations to support women's sports is, in his view, nothing short of a "political correctness tax," which allows women's teams to train and travel in luxury, while the "athletes who generate the profits and donations live in poverty."¹¹

These comments, of course, represent the extreme on a spectrum of opinion about Title IX. Fortunately, most deliberations of Title IX issues take place in a more reasonable environment, even where the disagreements are sharp. The boldness of the anti-Title IX comments are rather odd nonetheless. One does not hear the same types of open-attack on the mandate for equal pay and equal opportunity for women in employment, whatever the realities of private discourse. In public, the appropriateness of the equal treatment of men and

7. See *Cohen v. Brown Univ.*, 809 F. Supp. 978, 997 (D.R.I. 1992), *aff'd*, 991 F.2d 888 (1st Cir. 1993) (men's teams received more than three times the recruiting funds for women's teams); TITLE IX COMPLIANCE REVIEW COMM., UNIV. OF MISS.-OXFORD, REPORT OF THE TITLE IX COMPLIANCE REVIEW COMMITTEE 24 (1994) [hereinafter UNIV. OF MISS.-OXFORD REPORT] (60 percent more was spent on recruiting for men's teams as compared to women's teams in the same sports); Mark Alesia, *Recruiting: The Sky's The Limit*, L.A. DAILY NEWS, Sept. 28, 1992, at 51 (football recruiting budget at UCLA greater than the total budget for the school's national champion women's volleyball team); Doug Bedell, *Title IX: Female Athletes Still Struggle for Equality*, HOUSTON CHRON., Sept. 15, 1991, at 51 (Temple University's advertising budget for men's sports was 500 times that of women's sports); Joan O'Brien, *Gender Inequity: Women at University Still Get Short End of the Stick*, SALT LAKE TRIB., Dec. 23, 1994, at C1 (food allowance per diem for female athletes at University of Utah is one-half that of male athletes).

8. In 1993, eighty-five Division I-A schools spent an average of \$4 million on men's football alone. Those same schools spent an average of \$1.8 million on all women's sports. DANIEL L. FULKS, REVENUES AND EXPENSES OF INTERCOLLEGIATE ATHLETIC PROGRAMS 15 (1994).

9. Ken Stephens, *Coaches Fear Title IX Lawsuits May Prove Damaging for Football*, DALLAS MORNING NEWS, Jan. 10, 1995, at 9B (quoting Grant Teaff, Executive Director of the American Football Coaches Association).

10. Bob Rohwer, *An Even Field? Are Boys' and Girls' Athletic Programs Treated Equally at the High School Level?*, L.A. TIMES, Nov. 1, 1994, at V1 (quoting Arlyn F. Obert, Huntington Beach, CA).

11. Letter to the Sports Editor, NEWS AND OBSERVER (Raleigh), May 14, 1995, at 2C.

women is accepted, and the debate that continues is typically restrained. Sports, again, seems to be different.

The rough edge to the Title IX debate can be explained in part by the structure of the statute as it has been applied to sports. Under its accepted interpretation, Title IX is not an antidiscrimination statute. Rather, it does something that is quite antithetical to accepted notions of providing equal opportunity. The statute tolerates open and notorious discrimination.¹² It is acceptable for a school to recruit only men for its football team or other designated "men's" teams, a practice that would not be tolerated if we were considering the employment of lawyers, the staffing of offices, or the enrollment of students in a Ph.D. program. A basic notion of "separate but equal" is embraced.

In the area of athletics, the goal of Title IX is to provide equality in the form of alternative experiences. While the preference of the statute may be understandable,¹³ the choice fuels the sharpness of the debate about Title IX. A

12. The Title IX regulations permit schools to sponsor separate teams for each sex "where selection for such teams is based upon competitive skill or the activity involved is a contact sport." Females may be barred even from trying out for an all-male team if the sport is considered a contact sport, such as football, ice hockey, basketball, or any other sport "the purpose or major activity of which involves body contact." 34 C.F.R. § 106.41(b) (1995). As a result, Title IX "dictates a course of separate but equal athletic teams for women college athletes modeled after men's competitive athletics. The separate but equal approach ignores that men and women are not similarly situated in their relationships to athletics as a social institution." Wendy Olson, *Beyond Title IX: Toward an Agenda for Women and Sports in the 1990's*, 3 YALE J. L. & FEMINISM 105, 108 (1991).

13. The debate over the appropriateness of gender separation in athletics continues at a lively pace. A number of scholars continue to question whether such differentiation is rational. See, e.g., Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex From Gender*, 144 U. PA. L. REV. 1, 37-38 (1995). A significant factor fueling the continuing appraisal of the feasibility of gender-neutral sports is the significant reduction in running times for female marathon runners. It is reported that the most advanced women reduced their times by more than one and a half hours over a twenty year period, while men's time decreased only slightly. See ANNE FAUSTO-STERLING, MYTHS OF GENDER: BIOLOGICAL THEORIES ABOUT WOMEN AND MEN 218-19 (1989); see also MARIAH B. NELSON, THE STRONGER WOMEN GET, THE MORE MEN LOVE FOOTBALL 52-59 (1994).

Although the Title IX regulations permit all-male sports teams, there are examples of women qualifying for positions on men's college teams, even in contact sports such as football. In 1995, female place kickers at Duke University and the University of Louisville became the first two women to join major college football teams. It is estimated that 100 girls play high school football across the country. Andy Miller, *Narrowing the Gender Gap*, ATLANTA J. & CONST., Aug. 22, 1995, at F6. The gender barrier in men's college baseball was shattered in 1989, when a woman played first base for St. Mary's College in Maryland. Olson, *supra* note 12, at 151 n.196.

Female high school athletes have relied on equal protection claims to prevail in lawsuits against school districts that refused to allow women to try out for men's sports in which no women's team existed. Most courts have ruled that women must be permitted an opportunity to attempt to qualify for men's teams, unless the sport is a contact sport and there is ample opportunity for women to compete on their own. Glenn M. Wong & Richard J. Ensor, *Sex Discrimination in Athletics: A Review of Two Decades of Accomplishments and Defeats*, 21 GONZ. L. REV. 345, 373-437 (1985-86); see also Clinton v. Nagy, 411 F. Supp. 1396 (N.D. Ohio 1974) (permitting a woman to try out for a high school football team); Brenden v. Independent Sch. Dist. 742, 342 F. Supp. 1224 (D. Minn. 1972), *aff'd*, 477 F.2d 1292 (8th Cir. 1973) (striking down a rule which prohibited mixed-gender high school tennis and cross country ski competitions).

"we/they," "men v. women," dichotomy is created.¹⁴ The resources for funding athletes are limited and thus a gender-based debate over the allocation of those funds is inevitable.¹⁵ And since men's sports have been around longer and are

14. Catherine MacKinnon, in an early essay, provides an interesting perspective on gender issues in sports. She observes that the conventional view of gender discrimination is that there are real differences between men and women, but the significance of these have been distorted by irrational sexual stereotyping. Under this view, the goal is to accept the difference but to remove improper discrimination. Professor MacKinnon rejects this perspective and finds a much more troubling explanation for discrimination. In her view, the determinative factor is one of hierarchy, in particular a male hierarchy that seeks to define the experiences of women in athletics and elsewhere. See CATHERINE A. MACKINNON, *FEMINISM UNMODIFIED* 117 (1987).

The present emphasis on separate athletic experiences for women might seem to offer the opportunity for women to develop their own definitions of sport and the rewards of sports participation and thus reduce the influence of the male hierarchy. For the foreseeable future, however, such independence is not likely. Precisely because of the dominance of male interests, funding for women's sports has been limited. See *infra* notes 74-87 and accompanying text. Moreover, the notion of equality that is being applied seems to assume that women's sports should develop much like men's offerings have. In this respect, the process of defining the sports experience has many of the characteristics that Professor MacKinnon is concerned about. A later portion of this article argues, however, that special efforts should be made to encourage women's sports to develop in ways different from prevailing male conventions. See *infra* notes 175-78 and accompanying text.

15. A significant issue in recent years has been the decline in the number of teams in certain men's sports and the reasons offered by schools to justify the reduced support for these sports. In 1976, there were men's gymnastic programs at 138 NCAA schools. Twenty years later that number had declined to thirty-one. See Bonnie DeSimone, *Issue of Balance Threatens Gymnasts*, *PLAIN DEALER* (Cleveland), Jan. 8, 1995, at 1D. In a period of ten years, men's wrestling lost 120 programs. Paul Kenyon, *The Buck Stops Here: Budgetary Decisions Hinge on Title IX*, *PROVIDENCE J.-BULL.*, Feb. 28, 1995, at 2F. Moreover, sixty-five men's swimming teams have been eliminated since 1985.

There has been great controversy over the extent to which the reduction in the sponsorships of these sports is due to the efforts of schools to shift money over to women's sports, rather than other gender-neutral reasons. Many advocates for men's non-revenue sports believe strongly that Title IX has been the cause. See *supra* text at notes 9-10. The President of the National Wrestling Coaches Association, T. J. Kerr, explains that the Title IX debate has "gotten to the point where there's a lot of anger, a lot of emotion, which is not surprising when people have had jobs taken away." Kenyon, *supra*. When UCLA decided to cut both men's swimming and gymnastics while adding women's soccer and water polo in 1994, a male gymnast complained that the new women's teams "are almost recreational sports . . . [.] they're never gonna produce any Olympians from those teams, and they just drop the men's swimming and gymnastics, who have produced" The President of the National Association of Collegiate Gymnastics, Roy Johnson, advocates a "protected status" amendment to Title IX, which would preclude institutions from capping men's team sizes or eliminating men's teams altogether. Ronald D. Mott, *OCR Title IX Clarification Receives Mixed Reviews*, *NCAA NEWS*, Oct. 9, 1995, at 1, 8.

On the other hand, Dr. Christine H.B. Grant, Director of Women's Athletics at the University of Iowa, rather convincingly illustrates that much of the decline in the number of teams in men's gymnastics and wrestling occurred quite apart from Title IX developments. Dr. Grant observes that participation in these sports declined even in the period following *Grove City College v. Bell*, 465 U.S. 555 (1984), when Title IX enforcement was virtually non-existent. For example, there were roughly 370 collegiate wrestling programs in 1982, and less than 265 in 1993. See Reid Hanley, *Wrestling's Future Shaky; Scholarship Opportunities Scarce for Sport's Best*, *CHICAGO TRIB.*, Feb. 18, 1994 (Sports), at 16. The rate of decline was relatively even over that period. See Dr. Christine H. B. Grant, *Address to the NSCWAA, Title IX and Gender Equity* (Sept. 25, 1995) (on file with *Duke J. Gender L. & Pol'y*) (also available at <http://www.arcade.uiowa.edu/proj/ge/present.html>).

A report of the Board of Trustees of Princeton University indicates that gender equity concerns were only one of several factors that led to a recommendation to eliminate wrestling as a

wealthier and more established, it appears that women's sports are "taking money from" men's sports.¹⁶ Thus, the legal arrangement encourages a highly defensive posture in those associated with traditional men's sports.¹⁷ Under the segregation model of Title IX as applied to athletics, differences in treatment are accentuated and a deep running debate about fairness is inflamed.

It is the strength and persistence of the resistance to full implementation of Title IX that prompts the inquiry made in this article. The analysis that immediately follows examines the structure of decision-making in college sports. This inquiry identifies two significant biases. One is an historical bias in favor of men's sports that is quite enduring, in part because present law, unlike other equal opportunity measures, treats the separation of men's and women's sports as legal and legitimate. A more pernicious bias is found in the budgetary structures used to fund athletics. In those arrangements, there is an inherent favoritism of some men's sports, in particular football and basketball. Moreover, many of the forces that skew budgetary decisions away from women's sports are external and thus not easily controlled. Program enhancements by competitors in the two men's revenue sports put strong pressure on a school to match the expenditures if it wants to preserve its chance to earn a portion of the significant television and other revenues available to successful teams. The effects are unmistakable. Without outside oversight and prompting, women's sports will not be elevated to a level of "equality."

The question thus naturally arises as to how gender equity in sports programs will be achieved in the face of strong negative incentives. The middle section of this article considers the issue of the appropriate legal standard for judging a school's progress in this regard. Particular attention is given to the

varsity sport at Princeton. According to the report,

[t]he considerations that led to the specific identification of wrestling as the sport to be discontinued included: the magnitude of savings that could be achieved (i.e., eliminating smaller programs would produce insufficient savings, and eliminating larger programs would result in more savings than required); the impact of such a decision on gender equity; growing difficulties in adequately supporting the sport through the admissions process; Princeton's relatively weak current competitive status; and the relatively low level of spectator interest in the sport. The conclusion that wrestling was the varsity sport to discontinue was a function of the cumulative effect of all the factors considered rather than because of any particular one.

PRINCETON UNIV. COMM. ON STUDENT LIFE, HEALTH AND ATHLETICS, REPORT ON PRINCETON ATHLETICS 24 (1995) [hereinafter REPORT ON PRINCETON ATHLETICS].

16. At least some participants in the debate about Title IX fail to take account of the fact that the statute was never intended to be a vehicle for increasing the amount of money spent on athletics. For example, advocates who perceived that men's non-revenue sports were being dropped to make way for new women's sports argued, in effect, that the statute should be read to mean that men's sports could not be dropped to achieve gender equity. See *supra* note 15. Presumably these advocates also would not want to see a radical reduction in the funding for their preferred men's sports. Thus, their position is, in effect, a call for greater overall funding. But in an era of relatively stagnate university budgets, such a result would require that money be diverted from academic programs to fund new athletic ventures for women. Not only would such an approach represent a doubtful public policy choice, it seems not to have been intended by the statute. Nothing in the statute or regulations requires that a school operate an athletic program or maintain an existing program at prior levels.

17. See, e.g., *supra* notes 9, 10, 15 and accompanying text.

highly controversial requirement, implemented through federal regulation and judicial interpretation, of "substantial proportionality" between the percentage of women in the student body and the percentage on sports teams. Despite the strong rhetorical disapproval of the standard in public statements by some advocates for men's sports, the conclusion reached here is that this standard, and its companion qualifications, is a reasonable accommodation of a very difficult set of competing interests.

Because of the significant competitive deterrents to a school's giving fair weight to women's interests, an alternative to the present budgetary approach is necessary. The concluding portion of this article offers the suggestion that if schools truly wish to remove themselves from the external scrutiny that Title IX invites, then some type of collective action to control spending on football and men's basketball will be necessary. The article concludes with an optimistic appraisal of the likely legality of any such collective effort.

I. THE STRUCTURE OF ATHLETIC DECISION-MAKING

As we begin to examine the decision-making process in college sports, a strong caveat is in order. College sports do not fit a single pattern. Some differences are quite stark. Many "Big Time" schools — a phrase that is used here to connote the schools that sponsor the thirty to forty most successful football and men's basketball programs — have athletic budgets in excess of \$20 million.¹⁸ Other smaller schools get by on \$1 to \$2 million.¹⁹ For the former, football or men's basketball, or both, may be a source of considerable revenue, while the latter may generate few revenues and rely instead on university funds to support their programs. Participation rates may also vary so widely as to suggest that the purposes of the programs are fundamentally different. At a major state university, typically only 1 to 2 percent of the student body participates in athletics.²⁰ At other schools the participation rates may be as high as

18. Professors Arthur Padilla and David Baumer of North Carolina State University report that the average athletic budget of Big Time schools is now between \$15 and \$20 million. Arthur Padilla & David Baumer, *Big Time College Sports: Management and Economic Issues*, J. SPORT & SOC. ISSUES, May 1994, at 123, 124.

Other information seems to confirm Padilla and Baumer's data. In 1994-95, Ohio State University's athletic budget reached the \$30 million mark, while the University of Nebraska's athletic expenditures grew to \$26 million. Lee Barfknecht, *NU Athletics Removes Red From Budget*, OMAHA WORLD HERALD, Oct. 8, 1995, at 1C; Malcolm Mason, *Ohio State Success Lined with Dollars and Sense*, N.Y. TIMES, Oct. 6, 1995 at B20. Auburn University has budgeted nearly \$22 million for its athletic department in 1995-96. The University of Alabama will spend just over \$20 million on athletics for the same time period. Jon Robisoff & Dave Parks, *College Athletics' Big Spenders*, BIRMINGHAM NEWS, Sept. 3, 1995, at 1A. UCLA's 1991-92 athletic budget was over \$20 million, while the University of Tennessee and the University of Michigan both budgeted about \$22 million for athletics. Mitch Vingle, *Marshall University Is Right to Explore Possibilities*, CHARLESTON GAZETTE, Feb. 8, 1995, at 3B.

19. The text at note 47 *infra* sets out the athletic budget of a typical regional state university. In that budget, football expenses are \$1.2 million. Also, of the 164 Division III schools who responded to the most recent NCAA profitability study, the largest athletic budget reported was \$2.01 million. FULKS, *supra* note 8, at 80, 93.

20. At Division I public universities, 2 percent of the aggregate undergraduate student body participates in athletics. See NCAA, 1995 NCAA DIVISION I GRADUATION-RATES REPORT 625 (1995) [hereinafter GRADUATION-RATES REPORT]. At particular schools, the level of participation may be

15 to 20 percent, a phenomenon that is usually coupled with modest overall support by the school and relatively low public visibility.²¹ Moreover, many Big Time schools offer very few sports, often only the minimum fourteen required by the NCAA.²² Other universities have extensive athletic programs, with over thirty varsity intercollegiate offerings.²³ Another significant difference among schools is the percentage of women in the student body. Even at the same level of athletic competition, the numbers may vary. At the University of North Carolina-Chapel Hill, for example, 60 percent of the undergraduate students are women.²⁴ At Georgia Tech, on the other hand, women comprise only 23 percent of the student body.²⁵

Because of the wide differences among programs, any generalization must be guarded. A characterization, for example, as to a sport's dependency on television revenues, that fits one school may have very little relevance for another. And on a particular issue, such as the role of the athletic department on the campus, the appropriate answer may be highly particularized to the size, history, location, and past or present leadership of the school.

The following paragraphs will make observations about the development and structure of college sports. While most observations would need to be qualified if we were looking closely at certain specific programs, such an approach is exceedingly cumbersome and often introduces a quality of relativity that eventually belies more common and enduring elements. Shared characteristics among programs will be emphasized here, but this is done with a recognition that more space and more time would lead to greater qualification.

A question that looms not too far on the horizon is whether the law developed under Title IX allows for enough differentiation to accommodate these essential differences among programs. The shrillness of the rhetoric of the critics of Title IX might suggest that it does not. A later portion of the paper specifically examines this question.²⁶ Particular attention is given to that part of present law that requires a showing that the percentage of athletes who are women approximate the percentage of women in the student body, a standard that treats large and small, rich and poor programs alike. In the end, this measure is found to be appropriate despite its seeming inflexibility. The proportionality standard is preferable to its likely alternatives.

even less. At Ohio State, for example, approximately 1.1 percent of the undergraduate student body participates in athletics. *Id.* at 385.

21. At Princeton University, approximately 18 percent of the class of 1997 participates in varsity athletics. REPORT ON PRINCETON ATHLETICS, *supra* note 15, at 5 n.2 (1995).

22. This fourteen sport minimum requirement may be satisfied by an even number of male and female teams or by six men's teams and eight women's teams. NCAA, 1994-95 NCAA MANUAL Art. 20.9.3 (1994) [hereinafter 1994-95 NCAA MANUAL].

23. In 1990-91, Brown University sponsored thirty-one varsity sports. *Cohen*, 809 F. Supp. at 980. In 1995, Princeton University sponsored thirty-three sports. See REPORT ON PRINCETON ATHLETICS, *supra* note 15, at 5.

24. Blum, *supra* note 3, at A50.

25. *Id.*

26. See *infra* notes 170-72 and accompanying text.

A. The Historical Preference for Men's Sports

As with many programs in higher education, athletics began with a strong and, in most cases, exclusive emphasis on men's participation. At Brown University, for example, football, baseball and men's track had a 100-year head start on women's sports.²⁷ Indeed, at many universities there were no significant expenditures for women's sports until the 1970's, and then only because of the adoption of Title IX and an initial flurry of enforcement activity.²⁸ Major state universities, because they are newer, typically do not have a 100-year history of men's sports, but it is not uncommon for such schools to have claimed four or five decades of a highly visible, well-established tradition in men's sports, with women's athletics appearing only with the advent of Title IX.²⁹ Moreover, the beginning of television coverage in the 1950's and 1960's meant that the image of college sports presented to the viewing public was an image of men's sports

27. See *Cohen*, 809 F. Supp. at 981. Brown was started in 1764 as a men's school. The court in *Cohen* summarized the history of athletics at Brown as follows:

[V]irtually all of the women's varsity teams were created between 1971 and 1977. The only women's varsity team created after this period was winter track in 1982. Before 1971, all women's sports were operated out of a separate athletic program at Pembroke College, a sub-unit of Brown University until its merger with Brown College during that year. Before the merger, the women's athletic program at Pembroke bore no resemblance to the program which Brown provided to its male varsity athletes. While Pembroke did have a few intercollegiate teams (e.g., field hockey, basketball, tennis), the women's program received very little financial or institutional support from the university.

Id.

28. There was a general disapproval of competitive athletics for collegiate women in the first half of this century. National organizations such as the Committee on Women's Athletics and the Athletic Conference of American College Women supported general physical education programs and some intramural sports for women, but refused to sanction intercollegiate competitions. These organizations went so far as to oppose collegiate women's involvement in the 1932 Olympics. Women's intercollegiate athletic programs were not recognized by a national governing body until 1957, when the Division for Girls' and Women's Sports gave formal approval of such programs as long as they were outgrowths of intramural programs and emphasized recreation over competition. Six years later, this organization approved competitive intercollegiate athletics for women. The 1969 gymnastics, golf, and track and field national championships were the first national championships held in any women's collegiate sports. RUTH M. SPARHAWK ET AL., *AMERICAN WOMEN IN SPORT, 1887-1987: A 100-YEAR CHRONOLOGY* xv, 55 (1989). As one commentator has observed:

The myth governing women athletes for most of the twentieth century was that women were simply too fragile to engage in strenuous physical contests. . . . Women outside the college system were responsible for demonstrating the fallacy of the "fragile female" myth. . . . [1932 Olympic track and field champion and professional golfer Babe] Didrickson, like the African-American women track stars of the 1960's, was not a product of the collegiate system.

Olson, *supra* note 12, at 109, 110 n.25.

29. The University of Illinois, for example, began sponsoring varsity men's swim teams in 1911. A women's swim team was not added until 1982. *Kelley v. Board of Trustees*, 832 F. Supp. 237, 239 (C.D. Ill. 1993). Louisiana State University created its intercollegiate athletic program in 1893 with the inception of men's baseball and football teams. The school did not sponsor a single sport for women until 1977. See *Pederson v. Louisiana State Univ.*, 912 F. Supp. 892, 901 (M.D. La. 1996).

only.³⁰ In fact, only in the last few years has there been any systematic television coverage of women's intercollegiate sports.³¹

Not surprisingly, this historical preference for men's sports has produced a structure for athletic decision-making that has a decidedly male orientation.³² At the 302 Division I schools, for example, there are only fifteen female athletic directors.³³ A survey of the management structures of 800 athletic departments of NCAA schools at all levels of competition revealed that only 11 percent of athletic departments with directors who oversee both women's and men's sports had a woman as athletic director.³⁴

The individuals who are chosen as athletic directors and their assistants historically have a background in sports, a choice that is understandable for the expertise it provides. As benign as this arrangement is for other issues, it is likely to have a dampening effect on the movement toward gender equity. Most

30. The early history of NCAA football television broadcasts is discussed in *NCAA v. Board of Regents*, 468 U.S. 85, 89-92 (1984).

31. Recently, the national television cable networks announced "unprecedented" television coverage of women's intercollegiate basketball for the 1995-96 season. ESPN and ESPN2 broadcasted a total of sixty-four regular season and tournament games, while Prime Sports televised ten additional games. *Women's Basketball Gains TV Exposure*, NCAA NEWS, Sept. 25, 1995, at 9. The growing popularity of women's athletics is demonstrated by the record number of women participating in NCAA sports in 1993-94. A total of 105,190 women took part in NCAA competition. *Participation Numbers Narrowly Miss Record*, NCAA NEWS, Feb. 15, 1995, at 1, 13. This compares with 90,927 participants for 1991-92. NCAA, THE SPORTS AND RECREATIONAL PROGRAMS OF THE NATION'S UNIVERSITIES AND COLLEGES 19 (1994).

The increased popularity of women's athletics has also made an impact on athletic apparel manufacturers. Both Nike and Reebok recently created advertising campaigns aimed solely at female athletes. Carolyn Susman, *Nike Kicks in Support for Women's Sports*, PALM BEACH POST, Oct. 5, 1995, at 1D.

32. The predominance of a male perspective on athletics offers some support for a more general concern that has been raised by feminist scholars. Catherine MacKinnon, for example, sees a pervasive problem of male dominance in a hierarchical relationship between men and women in an array of activities. Among other things, this relationship has allowed men's preferences to control the definition of experiences for women. Professor MacKinnon finds this hierarchical relationship to have particular force in athletics. See MACKINNON, *supra* note 14, at 117. The analysis developed in the text suggests that the decision-making structure in college athletics may offer a particularly stark example of a male controlled hierarchy. The presence of this largely single-gender structure has meant that the definition of sports experiences for both men and women has not been neutral.

33. Telephone Interview with Shirley Combs, NCAA Member Services Dept. (Oct. 24, 1995).

34. This data comes from a 1993 study by researchers Dorothy J. Lovett of the University of Texas and Carla Lowry of Southwestern University (Texas). Their survey found that in schools with separate athletic directors for men's and women's athletic programs, 33 percent of the directors of the women's programs were female. These researchers believe that the structural bias present in most universities hinders progress towards Title IX's objectives:

Contrary to some who believe that the greatest single obstacle to gender equity in intercollegiate athletics is shrinking financial resources and increasing operating costs, there are those who believe that the greatest single obstacle is that the persons who are in decision-making positions are not as committed to gender equity as they are committed to maintaining the status quo.

Dorothy J. Lovett & Carla Lowry, *Expect Traditional NCAA Bias Against Women to Continue*, WOMEN IN HIGHER EDUC., Dec. 1995, at 11.

athletic administrators have been affiliated with men's sports and most come from a tradition in which men's sports have defined the mission of the athletic department.³⁵ Potentially more significant is that most administrators come from a background that accepts a hierarchy in which football and men's basketball require special nurturing and consistently claim the lion's share of athletic department resources. Indeed, the relationship between career advancement and the acceptance of the football-basketball paradigm appears to be immutable at the schools that operate the largest, most successful programs.³⁶ The primacy of these two revenue sports is unavoidable in the financial structure in which college sports presently operate. Thus, one who does not favor these two sports need not apply. Acceptance of this male hierarchy is a *de facto* qualification for the job.

The historical preference for men's sports has had an impact on the structure of athletic decision-making in other ways as well. One of the most signifi-

35. A number of recent reports seem to confirm the preference for athletic directors with a background in men's sports. See, e.g., Kelvin C. Bias, *Hancock Director New AD at North Texas*, DALLAS MORNING NEWS, Jan. 5, 1994, at 6B (North Texas' new athletic director was formerly the executive director of the John Hancock Bowl); Mike DeCourey & Phil Stukenborg, *Temple AD Makes Visit to Memphis*, COMMERCIAL APPEAL (Memphis, Tenn.), Dec. 29, 1995, at 1D (reporting that University of Memphis President wants to hire an athletic director "with a football background"); Greg Garber, *U. Conn. Athletic Director Perkins Is Confident, Controversial*, HARTFORD COURANT, Feb. 23, 1992, at A1 (Perkins played college basketball); Lynn Henning, *McPherson Gets Norvell as New AD for MSU*, DETROIT NEWS, May 25, 1995, at G1 (Michigan State's new athletic director played football for Wisconsin); Allen Lessels, *Chapman Doubles Up*, BOSTON GLOBE, Mar. 25, 1992, at 49 (University of New Hampshire athletic director, who has extensive background coaching basketball, will serve also as head men's basketball coach); Gary Swan, *USF Names New Athletic Director*, S.F. CHRON., Mar. 5, 1991, at D3 (new USF athletic director coached basketball).

A somewhat different trend has manifested itself in the last few years. Increasingly there is discussion of the need for athletic directors with a background in business and an expertise in marketing. See, e.g., Joe Gergen, *Classy Man Ends Career*, NEWSDAY, July 2, 1995, at 15 (quoting St. John's former athletic director, Jack Kaiser, explaining that "[a] business and marketing background is paramount now" for athletic directors); Bobby Hall, *Rebs' Choice Made Easy, Boone Fits Into New Era in College Athletics*, COMMERCIAL APPEAL (Memphis), Sept. 5, 1994, at 3C (quoting Ole Miss chancellor R. Gerald Turner as saying new athletic director, James T. "Pete" Boone, with a banking and finance background "should fit nicely into . . . the 'new breed' of modern athletic directors whose backgrounds are more about business than athletics"). This approach is not likely to change the secondary status given to women's sports. In the short term, women's sports, except perhaps for basketball, are not likely to be seen as readily marketable. In addition, the shift toward a concern for marketability is undoubtedly motivated by a desire for further revenue-maximization in the two preferred men's sports.

36. In at least one judicial proceeding, the male bias of the athletic department's administration was incorporated into the court's findings. In *Pederson* the court found that

LSU has clearly been one of those universities which has been extremely reluctant to change in light of Title IX, one which has shown no enthusiasm, whatsoever, to embrace changes—enthusiastically or otherwise—for the purposes of bringing an end to sex discrimination in its athletics program. LSU's athletic department was established in 1897 as a male domain. Throughout the 100 years since its inception, LSU has provided greater athletic opportunities for its male than female students. . . . LSU's approach suggests ignorance of the changed social fabric in this country. LSU's outmoded approach to athletics includes antiquated assumptions about women's athletic interests and abilities. . . .

912 F. Supp. at 919.

cant consequences of the long history of men's sports is the extensive infrastructure of supporters and advocates that has been created. This can be seen at both Big Time schools and at schools with programs that are more oriented toward broad participation. In the former, the constituency that supports pre-existing male programs is often quite formidable.³⁷ This is likely to include alumni who have invested a great deal, both literally and figuratively, in such programs. The donor who has given generously to the football program is not likely to give a warm and immediate embrace to the competing budgetary demands of women's sports.

Often the "advocates" for men's sports have an even more immediate role in decision-making. It is not uncommon for members of a school's board of trustees to be drawn from the strong advocates for men's sports teams.³⁸ While this is especially true of football and basketball, even non-revenue sports may gain a special place in the eye of the influential alum who played that sport.³⁹ There is thus a constituency, often of venerable standing, to urge continued and expanded support for men's programs. This process of "developing advocates" presumably will be open to women's sports, but the much longer tradition of men's sports, and the imbalance toward men on university boards, give the men's programs a more permanent voice at the present time.

37. MURRAY SPERBER, *COLLEGE SPORTS INC.: THE ATHLETIC DEPARTMENT VS. THE UNIVERSITY* 74-81 (1990) (discussing the donations of alumni and booster clubs and the degree to which they influence college athletic programs at several Big Time schools); DAVID WHITFORD, *A PAYROLL TO MEET: A STORY OF GREED, CORRUPTION, AND FOOTBALL AT SMU* 44-46 (1989) (discussing illegal payments made by various alumni to members of the men's football team at Southern Methodist University). According to Digger Phelps, ex-head coach of the Notre Dame men's basketball team, "in a lot of situations, the [alumni] booster clubs have had the college presidents fired." *Fair Game!* (PBS television broadcast, Jan. 18, 1987) (transcript on file with *Duke J. Gender L. & Pol'y*).

38. There are many examples of Board of Trustees members who became advocates for men's sports. One of the most sobering involves trustees at Southern Methodist University who were aware that improper payments were systematically given to SMU but deliberately misled investigators from the NCAA when inquiries were made. In addition, members of the board secretly approved the continuation of the payments even after the NCAA imposed sanctions. Among the trustees involved was William P. Clements, Jr., the governor of the State of Texas. See WHITFORD, *supra* note 37, at 136-53.

Another significant episode involved Clemson University. In the early 1980's, the NCAA found evidence of numerous recruiting violations and placed Clemson's football program on probation. A drug scandal involving athletes and coaches developed in 1985. William Atchley, Clemson's President, asked the University's Trustees to support a full investigation into the problems plaguing the athletic department. The Trustees refused and demanded Atchley's resignation when he attempted to bring the athletic department under his control. "I found myself up against the good ol' boy system," said Atchley. "It was something I wasn't supposed to mess with." Mark Ivey, *How Educators Are Fighting Big-Money Madness in Athletics*, BUS. WEEK, Oct. 27, 1986, at 136.

39. Examples of such alumni support are the Friends groups at Princeton University and the Sports Foundation at Brown University. These programs encourage alumni to donate money to a specific sport sponsored by the university. Although many alumni prefer to support the traditional men's sports, non-revenue sports and even non-varsity club sports receive financing from these sources. At Brown, parents of some women's volleyball team members volunteered to pay the coach's salary through donations to the Sports Foundation. *Cohen v. Brown Univ.*, 809 F. Supp. 978, 996 (D.R.I. 1992), *aff'd*, 991 F.2d 888 (1st Cir. 1993). At Princeton, the Friends of Wrestling have financed an intercollegiate club wrestling team after the school discontinued its varsity wrestling team. REPORT ON PRINCETON ATHLETICS, *supra* note 15, at 22, 24.

For Big Time programs, the entrenched pool of advocates for men's sports is likely to be even broader and include a significant sampling of a state's voters and taxpayers. Many football and basketball teams at large state universities are no longer merely "college teams." Rather, they have become the "state's team" and have attracted a following of millions of people with no direct connection to the university. This public constituency can have a significant impact on decision-making with respect to sports programs at "their" schools, ranging from issues of legislative support for financial subsidies to public controversies about the need to replace a coach.⁴⁰ This widespread public involvement mainly focuses on the two high visibility men's sports. Women's sports are seldom given a prominent role in public discourse.

The historical preference for men's sports might not appear to fully explain the dynamics of the conflict between men's and women's sports. After all, a similar historical preference for maleness existed in the areas of enrollment and faculty hiring in universities.⁴¹ In public perception at least, this historical preference did not control the progress made in these other areas.⁴² Thus, the much more limited success in both the reality and the perception of gender integration in sports requires a more differentiated explanation. That explanation is probably found in two particular aspects of athletic decision-making. One is the budgeting process in athletic departments, which seems to accept that two men's

40. In North Carolina, the state legislature pledged \$22 million toward a new basketball arena for North Carolina State University that originally was to cost \$66 million. Local governments are expected to contribute a similar amount, with N.C. State boosters paying the balance. Design changes and other delays are adding \$360,000 per month to the arena's estimated cost. Laurie Willis, *Delays Push Up Projected Tab for NCSU Arena*, NEWS & OBSERVER (Raleigh), Nov. 16, 1995, at B1. Officials now estimate that the arena's total budget will be at least \$85 million. The state legislature has been asked to contribute additional tax dollars towards these cost overruns. *Let's Slam the Door on Wolf Dome Spending*, NEWS & RECORD (Greensboro), Dec. 20, 1995, at A12. Where the additional funding will come from is the subject of considerable debate. Other taxpayer monies are used to support the nearby Dean E. Smith Center, home of the University of North Carolina-Chapel Hill men's basketball team. The facility needed a state subsidy of about \$500,000 to balance its budget in 1994. Burke Noonce, *Arena Operating Costs Will Fall on Wake Taxpayers*, TRIANGLE BUS. J. (Raleigh), June 16, 1995, at 1. Since 1992, the state legislature has appropriated over \$57 million for the construction of athletic facilities at four North Carolina universities. *Students Shouldn't Pay for Fancy Sports Arenas*, NEWS & RECORD (Greensboro), Feb. 8, 1995, at A10.

The North Carolina legislature's interest in college sports is not limited to building bigger and better athletic facilities. Some state legislators have shown a keen interest in the football schedules of the state's major public universities. Bills introduced in 1995 would have required the University of North Carolina-Chapel Hill and North Carolina State University to play cross-state rival Eastern Carolina University in football each year. Although the bills did not become law, both UNC and NCSU later placed ECU on their future football schedules. See John Bare, *Legislature Out of Bounds*, CHAPEL HILL HERALD, Apr. 17, 1995, at 4; Harry Minium, *With ECU's Fortunes Rising, the Buzzards Have Stopped Circling*, VIRGINIAN-PILOT (Norfolk), Oct. 4, 1995, at C1.

41. See, e.g., Deborah J. Merritt, *The Status of Women on Law School Faculties: Recent Trends in Hiring*, 1995 U. ILL. L. REV. 93, 93-94; Martha S. West, *Gender Bias in Academic Robes: The Law's Failure to Protect Women Faculty*, 67 TEMPLE L. Q. 67, 68-69 (1994); see also *supra* note 2.

42. In practice, the preference for maleness has had a dramatic impact on some controversies involving gender integration in higher education. A particular sharp debate has emerged over the efforts of the Virginia Military Institute and the Citadel to exclude women applicants. See *supra* note 2.

sports, football and basketball, will receive preferential funding. In this environment, movement toward gender integration will be slow since the preferred sports typically consume most new revenues in order to stay competitive. A secondary, subservient status for new women's sports seems to be assured. The issues that arise from the present budgetary structure are examined in some detail in the next section.

The second feature of athletic decision-making that has had a marked tendency to perpetuate the historic preference for men's sports involves the particular notion of "equality" that has been adopted with respect to sports. As previously noted, one consequence of defining parity as "separate but equal" opportunities is that men's teams and women's teams become direct competitors for what is, of necessity, a limited pool of resources.⁴³ And since there is a statutory goal to increase and support women's teams, men's teams will likely be the direct losers if the statute is vigorously enforced.

This situation is different from that which has existed for gender integration in other areas of higher education. While men received fewer enrollment and faculty-position opportunities when these areas were opened up to women, these opportunities were not "lost" in the way that sports positions are. Few male faculty members were fired, for example, and enrollment changes were prospective.⁴⁴ In the athletics area, it is much harder to both preserve existing positions and ease into gender-neutral decisions for the future. The budgetary choices are more difficult and more adversarial. Schools must make room in their budgets for new activities that are distinctly women's. A very real prospect exists that male jobs — those of coaches — will be terminated. In the same vein, an activity — the favored team — that has been the focus of years of nurturing and advocacy by male alums may be brought to an end, or at best relegated to a lesser role. That the sport may have "merit" is not necessarily controlling.

Disappointment is inevitable. The prospect of loss, coupled with an opposing constituency that is both different and readily identifiable, almost certainly means that public controversies will be sharp. In this setting, the fact that men's sports have deep running constituencies and that the vast majority of athletic department decision-makers are men with a background in men's sports also means that progress will be slow. Curtailing an otherwise inoffensive activity supported by an active constituency is hardly attractive to administrators.

43. See *supra* note 16.

44. Some universities did offer early retirement to male professors in order to diversify the faculty ranks. West, *supra* note 41, at 172; see also Jennifer Skordas, *Women: Utah's Universities, Colleges Still Have Gender Gap*, SALT LAKE TRIB., Nov. 1, 1995, at A1 ("You can't just go in and fire half of the professors so you can replace them with women.").

B. Budgetary Structure and Gender Equity

1. *Budgetary Structures in Major Programs.* At the heart of the debate about gender equity in athletics are important differences of opinion about how limited athletic resources ought to be divided between men's and women's sports. A review of actual budgetary structures should give a clearer picture of the decision-makers' existing preferences and should provide a foundation for evaluating the extent to which a reallocation of funds is possible. The work of an enterprising newspaper reporter, Mark Alesia, is particularly helpful in this regard. Mr. Alesia undertook an extensive investigation of the UCLA athletic department. His final report covered a variety of topics and included figures for the 1991-92 UCLA athletic budget.⁴⁵ We will use that budget as the focus of our inquiry into budgetary patterns. Other available information suggests that the UCLA budget is typical for the large state universities that field football and men's basketball teams at the highest levels of competition.⁴⁶ A later portion of this article compares the budgetary structure utilized by regional state universities that choose to participate at the next lower level of competition.⁴⁷

UCLA '91-92 ATHLETIC BUDGET

INCOME

Category	Total
Football	\$7,615,595
Basketball	3,800,547
TV/radio	3,171,365
Other men's sports	71,979
Women's sports	27,166
Corporate sponsors/merchandising	935,917
Boosters	3,065,948
Student fees	2,163,842
Other events*	388,851
Total Income	\$21,241,210

45. Mark Alesia, *UCLA Sports Inc.: A Look at the Books*, L.A. DAILY NEWS, Sept. 27, 1992, at S1.

46. See *supra* note 18 and accompanying text.

47. See text at notes 89-90 *infra*.

EXPENSES

Administration/support	\$6,601,645
Football	5,228,850
Basketball	1,610,874
Other men's sports	1,324,169
Women's sports	1,277,475
Scholarships	3,146,069
Other events*	382,440
Capital campaign	650,000
Capital costs	40,582
Debt service	89,178
Housing loans	76,450
<hr/>	
Total Expenses	\$20,427,732

*—NCAA women's volleyball tournament, basketball Final Four, etc.

In order to determine how much is spent on particular sports, especially football and basketball, some adjustment in the above numbers is necessary. For example, the largest expense item — administration/support — is not allocated among sports. It is likely though that a few sports, in particular football and men's and women's basketball, claim a disproportionate share of this item. Non-revenue sports are not expensive to administer, and most efforts that an athletic department devote to fund-raising, ticket sales, advertising, and promotion will be directed to the three potential revenue producing sports. Similarly, the amount spent on scholarships is not differentiated between sports in the above budget. However, it is well known that three sports consume most of the typical scholarship budget. Football alone typically accounts for eighty-five scholarships, with men's and women's basketball claiming an additional twenty-six or so grants.⁴⁸

To get a rough estimate of the cost of the two predominant men's sports, the following assumptions have been made: (1) most of the general administrative/support expense has been allocated to football and men's and women's basketball in proportion to their general level of expense; and (2) scholarship costs have been allocated on the basis of the number of scholarships commanded by various sports. The resulting figures are only approximations. They are, howev-

48. These figures represent the maximum number of scholarships permitted in each sport for Division I schools. 1994-95 NCAA MANUAL, *supra* note 23, Art. 15.5.4-15.5.5. Due to walk-ons, the total number of athletes participating in each sport is often much higher. North Carolina State University, for example, had 127 male athletes participating in its 1994-95 football program. Steve Politi, *Tight Money Puts Squeeze on Men's Sport*, NEWS & OBSERVER (Raleigh), May 7, 1995, at 6C. The University of Nebraska took a squad of 141 players to the Fiesta Bowl in 1996. Tim Layden, *Headed for a Fall?* SPORTS ILLUS., Jan. 15, 1996, at 66. See also *infra* notes 51, 78 and accompanying text.

er, useful for our purposes since they give a sense of the relative proportion of expenditures between men's and women's sports.

With the reallocation suggested above, it appears that out of a total budget of \$20 million, roughly \$13 million is spent on two men's sports. By contrast, all women's sports receive approximately \$2.2 million.⁴⁹ Football alone appears to command about \$10 million.

The expenditures for football and basketball are quite high by almost any measure. The \$10 million that is spent on football in this budget is in significant contrast to the \$1 million or so that is needed to field a team at a regional state university, a level of competition that is examined below.⁵⁰ One would expect that the greater travel involved in a national program and the need for more sophisticated coaching and training would increase expenses. However, the necessity of a ten-fold difference in expense is less easily explained given the essential similarity of the two activities.

The disproportionate expenditures on football and basketball are accentuated when the costs of the program are translated into a "per student" sum. Even using the most conservative calculation — averaging costs over all players on the team and not just the 50 to 60 percent who are core players⁵¹ — the results are notable. Basketball at UCLA involves expenditures of roughly \$200,000 per player per year and football \$100,000 per player. By contrast, most women's sports other than basketball can be offered at a very competitive level for a cost of \$200,000-250,000 per year for the entire team.⁵² As we will see, at a lower level of competition, entire teams can be supported for \$50,000-100,000.⁵³

At first glance, it may not be obvious what the "problem" is with the UCLA numbers. After all, while football and men's basketball programs spend a large amount of money, they also generate substantial revenues and seem to pay their own way. There are, though, only a small number of schools in which these expensive sports are not subsidized.⁵⁴ Thus, a requirement of equal

49. These figures appear to be consistent with the athletic budgets at other Big Time schools. See *supra* note 18 and accompanying text.

50. See text at notes 89-90 *infra*.

51. College football teams typically have over 100 players, sometimes as many as 140. By comparison NFL squads are limited to 45 players. See *infra* note 78 and accompanying text.

52. For example, the Intercollegiate Women's Lacrosse Coaches Association estimates that it costs approximately \$80,000, exclusive of scholarships, to support a varsity women's lacrosse team. Steve Politi, *UNC Adds a Sport With a Title*, (IX), NEWS & OBSERVER (Raleigh), June 19, 1994, at 1B, 14B. The figures in the UCLA budget similarly suggest that the estimate of \$200,000-250,000 for women's sports other than basketball is reasonable.

53. See *infra* notes 89-95 and accompanying text, for a discussion of the athletic budget for a typical regional state university that competes in the second tier of Division I schools. This sample budget indicates that a smaller school can fund most of its women's teams for less than \$100,000 each.

An earlier version of the administrative Policy Interpretation under Title IX required that a school spend "substantially equal per-capita amounts" for men and women on such expenses as scholarships, equipment, and so on. See Ann V. Thomas & Jan Sheldon-Wildgen, *Women in Athletics: Winning the Game But Losing the Support*, 8 J.C. & U.L. 295, 296 n.4 (1982). Under such a standard, the type of calculation suggested in the text would have potential legal significance.

54. The likelihood that a football program is profitable is related to the level at which it is played. In 1993, for example, 91 percent of the Division III schools and 84 percent of the Division

subsidies between men's and women's sports would require massive redistribution of funds towards women's sports at most schools. Moreover, as will be explained below, when all costs are considered, including allocated costs of stadia, very few Big Time programs actually make money. Finally, cross-subsidization between functions within a university is common and there is no *a priori* sense in which these particular university funds — sports revenues — should not be available to support programs other than those that generated the revenue. A closer analysis of the economics of college athletics is required.

One might look at these numbers and conclude that gender equity can be achieved by the relatively simple device of shifting money from the two predominant sports to a more generous funding of women's sports. If the proportion of spending on men's sports portrayed here is typical of Big Time programs generally, and it is typical, one might conclude that the controversy over Title IX has been exaggerated and that real movement toward compliance is foreseeable. Or, stated another way, in light of the amounts of money available, why has the Title IX debate been so sharp and relatively unpleasant?

Further analysis reveals other aspects of the budgetary structure of college sports that may explain why the commitment to funding revenue sports has been relatively inflexible and hence why budgetary reallocation has been so difficult to achieve. Two features, in particular, warrant attention. One is the assumption, common to most Big Time programs, that the athletic program must pay for itself. The other is that much of the decision-making regarding funding revenue sports is driven by external factors, in particular the decisions of competitors to spend more to enhance their teams' competitiveness. If an athletic program is to be largely self-sustaining and if relative levels of expenditure for the two preferred men's sports are substantially controlled by outside competitive forces, choices for reallocating funds to encourage women's sports will be limited, and often quite limited.

In some cases, college sports are made self-funding by statute.⁵⁵ In other cases, the arrangement is the product of a choice that is made to keep peace with legislators, taxpayers, or, in the case of private universities, groups that make competing claims on the school's budget. Whatever the level of compulsion, the rationale for this approach is that athletics is something of a luxury and taxpayer money should not be used to support such an endeavor.

This policy of self-sufficiency works imperfectly in practice. The policy does in fact impose a limit, for there is typically no general, ongoing claim against the public fisc. Primary responsibility for generating money to meet the program enhancements of competitors rests with the revenue-generating potential of a few sports, typically football and men's basketball. There are, though, few, if any sports programs at state schools that do not receive significant taxpayer subsidies. For example, stadium construction, a high cost at any

II schools responding to an NCAA survey reported that their football programs operated at a deficit. By contrast, only 33 percent of the Division I-A schools reported a deficit. Yet, among the somewhat smaller Division I schools, those in Division I-AA, 95 percent reported deficits. FULKS, *supra* note 8, at 20, 34, 61, 86.

55. Padilla & Baumer, *supra* note 18, at 127.

institution, frequently has a significant level of taxpayer support.⁵⁶ In addition, coaches, trainers, and other support personnel are often carried on the university payroll, which is funded by the state.⁵⁷ And, of course, taxpayers typically pay most of the actual cost of the athlete's education, an arrangement that creates a significant tax subsidy.⁵⁸ While substantial, these subsidies are generally fixed and are not subject to year-to-year adjustments that enable the program to respond to short-term operating needs. Program revenues, which typically arise from football and men's basketball, are the main source of budgetary flexibility.

One tends to think of higher education as involved in only a very mild form of competition among the academic programs of various schools. Education offerings must be well-staffed and up-to-date or they will lose their usefulness, but remaining competitive in this sense only requires a general level of attentiveness to larger trends in education. The operation of an athletic department often stands in sharp contrast to this relaxed approach, especially if the department seeks to be successful at the highest and most lucrative levels of competition. Indeed, the pressures of competition are constant for an athletic department, and success or failure in meeting these demands can be measured on a season-to-season basis. Recruiting athletes for the revenue-generating teams is a prime example. If a program has one or two off-years in its efforts to attract the most talented recruits, its on-the-field success, and hence its revenues, may suffer.⁵⁹ Conversely, landing a football or basketball "superstar" can mean additional millions for a program as the team will find its games in greater demand on television and more likely candidates for tournament and bowl game money.⁶⁰

56. See *supra* note 40.

57. See SPERBER, *supra* note 37, at 174-77; see also Dave Parks, *Playing in the Red: Sports Programs at State's Smaller Universities Running Up Big Deficits*, BIRMINGHAM NEWS, Oct. 8, 1995, at 3D.

58. Public colleges and universities receive nearly twice as much revenue from state government appropriations as from student tuition and fees. *Revenues and Expenditures of Colleges and Universities*, 1992-93, CHRON. HIGHER EDUC. ALMANAC, Sept. 1, 1995, at 25.

59. See Mark Alesia, *Athletic Department Says It Must Spend to Stay Competitive*, L.A. DAILY NEWS, Sept. 27, 1992, at 1 (discussing the pressure to outspend rival college athletic programs in order to attract top recruits).

The failure to sign a blue-chip recruit can have an immediate impact on ticket sales and athletic booster donations. Vanderbilt University estimates that its failure to sign high school basketball star Ron Mercer in 1995 cost the school \$1.3 million in revenues. These losses were evident before Vanderbilt's basketball team even began the 1995-96 season. S.L. Price, *What's Hot, What's Not*, SPORTS ILLUS., Nov. 27, 1995 at 48, 50.

60. The *Los Angeles Daily News* estimates that men's basketball star Ed O'Bannon was worth \$420,000 to UCLA during the 1993-94 season. Mark Alesia, *Pay for Play*, L.A. DAILY NEWS, Nov. 13, 1994, at 51, 53. O'Bannon's value to UCLA presumably rose even higher after he led the Bruins to the 1995 national championship. UCLA's earnings since the championship in April 1995, include \$2 million in basketball related sales at the campus bookstore, \$500,000 in additional booster donations to the athletic department, and \$210,000 from increased television exposure. In addition, all of UCLA's home games have sold out for the first time in 20 years, notwithstanding a 17 percent increase in ticket prices. J. C. Clemons, *Title's a Windfall for UCLA & Co.*, ATLANTA J. & CONST., Nov. 12, 1995, at E12. Patrick Ewing, a star on the Georgetown University basketball team in the 1980's, is estimated to have been worth \$14.4 million to his school. *Id.*

The potential for increased athletics spending is enormous. If competing programs are paying their coaches \$1 million a year,⁶¹ and if the salaries of assistant coaches are double that of classics professors, then other institutions that wish to remain competitive also must increase their expenditures in these areas.⁶² Similarly, a comfortable, up-to-date weight room and training area is an advantage in recruiting. Thus, a school that wants to be in the running for the best players must be "competitive," which means that it must be prepared to offer comparable or better facilities.⁶³

61. Florida State University has offered its head football coach, Bobby Bowden, a five-year contract that includes an annual salary of more than \$1 million. Ed Price, *Bowden and FSU Nearing Deal for Five-Year Contract*, PALM BEACH POST, Oct. 31, 1995, at 5C. At other schools, coaches receive money from a number of activities, many of which are subsidized by the university. A successful coach can expect a total income of over \$1 million. See John Weistart, *How Colleges Can Cash in on Their Coaches*, WALL ST. J., Sept. 11, 1992, at A18, col. 4.

62. The need to "meet the competition" is seen not merely in salaries for head coaches and assistants, but also in bonuses given to assistant coaches when the school's team appears in a post-season event. In 1993, the University of Colorado's football team played in the Fiesta Bowl. A group of CU assistant coaches "were angered" when they learned that the assistants employed by their opponent, Syracuse University, had received post-season bonuses as high as \$8,000. It was reported that "in the wake of that morale-eroding trip, a group of CU boosters discussed establishing a 'coaches aid' fund." Thereafter, CU instituted a formal bonus program that gives assistants an additional month's salary for a bowl game appearance, plus a per diem reimbursement for expenses incurred by members of their families. B. G. Brooks, *CU Bonus Plan More Generous Now*, ROCKY MTN. NEWS (Denver), Jan. 1, 1996, at 13B.

Ohio State University, believing that its football team could not be competitive on the field if its coaches' salaries were not competitive, raised the average assistant coach's salary from 1993 to 1995. The football team proceeded to improve from a .500 winning percentage to national championship contenders. Malcolm Moran, *Ohio State Success: Lined with Dollars and Sense*, N.Y. TIMES, Oct. 6, 1995, at B20.

Arthur Padilla and David Baumer's study revealed that the amount spent on football coaches' salaries did not always have a significant impact on the profitability of a school's football program. Padilla and Baumer suggest that the returns on expenditures for the most successful coaches can be high, but that there is much variability in those results. Padilla & Baumer, *supra* note 18, at 136.

63. A recurring problem for the NCAA has been the control of athletic dorms, facilities which primarily housed athletes and which had rooms that were typically more spacious and better appointed than a standard dormitory room. In 1983, the NCAA adopted a rule that required that athletic dorms be comparable to other student housing. That rule has been "virtually ignored." Drake Witham, *An End to Athletic Dorms*, CHRON. HIGHER EDUC., Oct. 13, 1995, at A39, A40. The reason was that "[a]s was the case with stadiums and weight rooms, the competition to build bigger and better athletic dormitories turned into an 'arms race.'" *Id.* (quoting Thomas C. Hanson, Commissioner of the Pacific-10 Conference). The NCAA eventually imposed a more severe restriction, one that prohibited dormitories in which the concentration of athletes exceeded 49 percent. That regulation is now being implemented. *Id.* The regulation does not affect other player amenities, such as training rooms and locker rooms.

In explaining why the University of North Carolina-Chapel Hill needed expanded seating and additional training space in its stadia, Mayer Smith, the president of the school's booster club, identified recruiting as a significant concern:

If a kid, a student—in this case, a football player—comes and looks at our facility and he goes and looks at Florida State's, and Georgia Tech's, and [N.C.] State's, and sees that theirs is better, he's going to think about that . . . and the other schools know; they point that out quite vividly. They say, "Look at what we've done, and look at what they haven't done. We've made a commitment, and they haven't."

Martha Quillin, *The Home Improvement Game*, NEWS & OBSERVER (Raleigh), Oct. 12, 1995, at 1C.

While the externalization of decision-making resulting from competition is not new to college sports, its budgetary implications have been greatly intensified in the last fifteen to twenty years. In that period, the rewards of success have increased dramatically due to intensified demand for sports contests on television. A million dollar bowl game used to be a rarity. In 1994, however, twelve bowl games had payouts of at least \$1 million per team.⁶⁴ The total payout for the most elaborate bowl, the Fiesta Bowl, is now a remarkable \$26 million.⁶⁵ Similarly, in men's basketball, the NCAA Final Four Tournament was sold to broadcasters for \$14 million in 1982. Just thirteen years later, the broadcast rights fee was \$152 million, an increase of over 1,000 percent.⁶⁶ While conference distribution plans tend to equalize payments among conference members, the unmistakable lesson is still that a school must be willing to meet competitors' levels of expenditures if it expects to remain in the running for these substantial monetary rewards.

Berkeley sociologist Harry Edwards describes this intense economic competition among college sports programs as the "Athletics Arms Race."⁶⁷ A high-revenue football or basketball program is under persistent pressure to increase revenues, since often the team that spends the most wins the most, and the team that wins the most has the most to spend. This resonance between spending and winning creates an upward spiral and is not readily amenable to modulation by unilateral action.⁶⁸

Professor Edwards's characterization is not only intuitively correct, it is also consistent with available data on recent trends in athletic department financing. Two economists at North Carolina State University, Arthur Padilla and David Baumer, have produced one of the few systematic reviews of the effects of increased athletics spending.⁶⁹ They found that general athletic expenditures have increased at the extraordinary rate of 20 percent per year over a recent several year period.⁷⁰ This rate of growth is several times greater than the general rate of inflation.⁷¹ Almost certainly this huge increase in athletic

64. *College Bowl Payouts*, CHARLESTON GAZETTE, Nov. 30, 1984, at 2B.

65. *Daily Briefing: Colleges*, DENV. POST, Aug. 10, 1995, at 2D.

66. Padilla & Baumer, *supra* note 18, at 125; Debra E. Blum, *All Part of the Game*, CHRON. HIGHER EDUC., Feb. 24, 1995, at A39.

67. See Harry Edwards, *The Collegiate Arms Race: Origins and Implications of the "Rule 48" Controversy*, 8 J. SPORT & SOC. ISSUES 4, 7 (1984); see also Harry Edwards, Remarks at the PBS Television Broadcast Station (Jan. 18, 1987) (transcript of "Fair Game!" on file with the *Duke Journal of Gender Law & Policy*).

68. For example, when the NCAA created a Cost Reduction Committee in 1989 to study the phenomenon of ever-increasing athletic budgets, Eugene Corrigan, who chaired the committee, stated that a collaborative effort among NCAA members was required to maintain a level playing field because unilateral cost reductions were not feasible. See *Law v. NCAA*, 902 F. Supp. 1394, 1399 (D. Kan. 1995).

69. Padilla & Baumer, *supra* note 18, at 123.

70. *Id.* at 124. Other reports support Padilla and Baumer's appraisal. The University of Nebraska's athletic budget increased from \$18 million in 1993 to \$26 million in a growth of nearly 45 percent. Lee Barfknecht, *NU Removes Red From Athletic Budget*, OMAHA WORLD-HERALD, Oct. 8, 1995, at 1C.

71. The rate of inflation for both 1992 and 1993 was 3.0 percent. U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 492 (1995) (measuring inflation as the yearly per cent

spending is a response to the increased revenues that broadcasting has brought to the college sports industry. "Investments" made in basketball and football programs were found to have a positive economic return. In addition, each additional victory by a team has a significant financial payoff — up to \$300,000 per victory in football and approximately \$45,000 in basketball.⁷² Thus, the rewards of increased spending by broadcasters are distributed to the teams that are willing to spend additional sums to remain competitive. Increased earnings have relatively little significance for non-revenue sports. Most new money — perhaps as much as 95 percent — is reinvested in football and men's basketball, presumably to maintain their competitiveness with rival programs.⁷³ Most importantly, as is probably intuitively evident, spending on non-revenue sports has no correlation to success in the Arms Race. Instead, support for such sports is probably a negative influence on revenue enhancement.

2. *The Implications of Present Budgetary Arrangements of Major Athletic Programs.* The budgetary structure of major athletic programs has rather ominous implications for women's sports. Indeed, the interaction of the policy of rough self-sufficiency and the pressures to meet competitors' expenditures may go a long way in explaining why progress toward gender equity has been so slow. It may also explain the intensity of the anger towards women's sports, especially that expressed by football partisans. The traditional budgetary arrangement inevitably relegates non-revenue sports to a secondary, contingent position. The position of these sports is secondary in the sense that the needs of football and basketball will come first. Indeed, the explanation for the primacy of these sports is nearly tautological: football and basketball must be preferred ahead of other sports because if they are not preferred there might not be any other sports. A weakening of the commitment to keep football and basketball competitive would affect the income stream upon which other sports depend and thus threaten their very existence.⁷⁴ Thus, the revenue sports must be supported and they are supported at a level at which they are "competitive," a condition that is largely defined by many factors not within the immediate control of the school's budget makers.⁷⁵

change in the Consumer Price Index).

72. Padilla & Baumer, *supra* note 18, at 141.

73. *Id.*

74. Again, available anecdotal evidence confirms the dependent position of non-revenue sports. Max Ulrich, Iowa State's athletic director, has observed, "For us to just redistribute dollars from those sports to other [non-revenue] sports and reduce the income potential of those sports—that would be one of the most foolish things we could. We'd be looking at watering down [the] opportunities for everybody that way." Bedell, *supra* note 7.

Lou Tepper, the University of Illinois-Champaign head football coach, described the relationship between revenue and non-revenue sports with this analogy: "If [a farmer] has a couple of cash crops and a lot of other crops that aren't bringing in any cash, he's not going to fertilize them 50-50." Lou Tepper, *Opinions: Title IX*, NCAA NEWS, May 17, 1995, at 4. Brown University's chief counsel Beverly Ledbetter also believes that Title IX regulations should respect football's revenue potential, stating "when a football team brings in 90 percent of the budget, to say it shouldn't be given any deference doesn't make any sense to me." Ken Stephens, *Coaches Fear Title IX Lawsuits May Prove Damaging for Football*, DALLAS MORNING NEWS, Jan. 10, 1995, at 9B.

75. See, e.g., *supra* notes 61, 62, 63 and accompanying text.

The Padilla-Baumer study confirms these observations. Major athletic programs spend large amounts of money and receive significant financial returns. Only a small portion of that money is used to fund non-revenue sports, however. The authors' analysis suggests that "for every additional \$1 spent on athletic programs, between three and seven cents were spent on nonrevenue sports."⁷⁶ Thus, if an additional \$1 million becomes available because the revenue sports win on the field, only about \$50,000 of this will be spent on non-revenue sports.

This disparity explains why coaches and athletic directors can say, presumably with a straight face, that women's sports are expensive. Two hundred thousand dollars spent to establish a new women's team at a Big Time school does not look like much compared to the \$10 million spent on football. On the other hand, in the perspective of the athletic director, if an increased expenditure of \$50,000 is regarded as "appropriate," then the prospect of spending \$200,000 for a new women's sport is likely to be viewed as extraordinary. Stated another way, if one has been trained to think of non-revenue sports as nonessential and secondary, then any request beyond some very low minimum may seem like an unreasonable demand, even though in the larger perspective of the budget, it is quite modest.

Implicit in the budgetary structure is the further assumption that the claims of non-revenue sports will necessarily be contingent.⁷⁷ They will be fully and generously funded only if the fortunes of the revenue sports prove bountiful. If revenues are not what was expected, then other sports should expect less. And in the event of a true crisis in one of the revenue sports, non-revenue sports should expect severe consequences. Their existence, after all, is derivative, and if truly significant adjustments have to be made, the contingency that underlies non-revenue sports will have to be realized — in the form of severe budgetary cuts.

This secondary, contingent status that is described here extends to all non-revenue sports, men's and women's. It should be clear, though, that in the present environment, women's sports are going to be more severely affected than

76. Padilla & Baumer, *supra* note 18, at 139.

77. The secondary status of non-revenue sports is underscored by the fact that athletes in those sports are often given training, travel and sleeping arrangements that are inferior, if not demeaning, when compared to those furnished to football and basketball players. An investigation at Temple University revealed that while the men's teams were flown to out-of-town games, women traveled by vans, even to the same locations. While male athletes were assigned single beds in out-of-town hotels, women slept two-to-a-bed, four-to-a-room. Members of the football team had no monetary limit on meals while traveling, while women were given an \$11 per-day limit. Bedell, *supra* note 7; see also Snow & Thro, *supra* note 6.

The University of Mississippi Title IX Compliance Review Committee made a number of findings that similarly suggest that the school's non-revenue sports had been relegated to a secondary status. For away games, pre-game meals were provided for men's football, men's basketball, and women's basketball teams. All other teams, with one limited exception, arranged for meals to be paid from a modest per diem. No doctor traveled with any women's team, whereas a doctor accompanied the men's basketball and football teams. Only football and baseball have laundry equipment in their immediate facilities. Men's and women's basketball and volleyball have laundry facilities in a different building. In the other sports, players or coaches do the laundry on their own. See UNIV. OF MISS.-OXFORD REPORT, *supra* note 7, at 10, 12.

men's. Men's non-revenue sports are already established and presumably have assumed a place that presents no threat to the existing balance that clearly prefers the two expensive men's sports. The claims of equality for women's sports represent a new and potentially quite damaging demand.⁷⁸ The money that would go to women's sports is a new expenditure and one that is potentially quite large if women's sports were funded at the levels of parity that Title IX demands. A school that unilaterally decided to divert significant sums of money to women's sports would be laying the seeds of its rather immediate self-destruction in the race for broadcast and attendance revenues.⁷⁹ Thus, the incentives to step up and be the first to establish a well-supported women's program are few. Indeed, a path of quiet collective resistance to a full-scale implementation of Title IX will do the most to preserve the existing balance of power among major schools and seems to explain why progress under Title IX has been so limited.

There is a good deal of anecdotal evidence that confirms both the existence of a hierarchical structure among a school's various sports and the fact that women's sports do not fare particularly well in this structure. Consider the following from a news report on the effects of the dwindling athletic fortunes of the Iowa State football team:

Iowa State is feeling the pain of empty seats in the football stadium. Later this month the school may drop as many as five sports—baseball, men's swimming and golf and women's gymnastics and tennis—because of budget problems

78. Football interests have identified Title IX as a significant threat to their sport. As noted earlier, some proponents of Big Time football characterize the movement toward greater Title IX enforcement as one in which people are "out to get" football. See *supra* note 9 and accompanying text. There have been decidedly fewer dire predictions from supporters of men's basketball, for example. There are a number of reasons why football perceives a particular threat. One is the fact that its budgets are so large relative to other sports. Football's disproportional claim on resources makes it a natural object of potential cuts. In addition, college football's squad sizes seem unusually large and, some may feel, unnecessarily large and thus appropriately reduced. As previously noted, a typical Division I football team has over 100 members. Some are even larger. The University of Nebraska dressed 141 players for its appearance in the 1996 Fiesta Bowl. See *supra* note 51 and accompanying text. At all levels of competition above and below the college level, squad sizes are much lower. The NFL, for example, limits teams to forty-five players. NFL COLLECTIVE BARGAINING AGREEMENT 1993-2000 Art. XXXIII (1993). High school squads vary in size, but a roster larger than seventy would be unusual. An obvious question, then, is whether present levels of financial support, especially scholarship support, for college football are necessary. Jim Hart, athletic director at Southern Illinois University, believes that fans would not notice any difference on the field if college teams were limited to sixty-five players. *Opinions*, NCAA NEWS, Aug. 2, 1995, at 4 (quoting *Dallas Morning News* article in which Nancy Lieberman-Cline was characterizing Jim Hart). Others have specifically identified reductions in football squad size as an area of significant potential savings. Donna Lopiano, former Athletic Director at the University of Texas and now Executive Director of the Women's Sports Foundation, states: "The fact of the matter is, what universities are saying is that the 150th member of the football team — that tackling dummy, that scout-team kid who will never play — is more important than providing a first-team soccer opportunity for a woman." *Bedell*, *supra* note 7.

79. See *supra* note 68 and accompanying text. Walter Byers, then the NCAA Executive Director, commented shortly after the passage of Title IX that this new law could mean "the possible doom of [men's] intercollegiate sports." George, *supra* note 6, at 660. Presumably he had in mind the concern that costs in high-dollar sports could not otherwise be controlled.

created mostly by poor football attendance. Women's soccer, planned for competition this year, is on hold.⁸⁰

Similar experiences have been reported at other schools.⁸¹ One lesson is unmistakable in these events: those who manage athletic departments apparently do not perceive that women's sports are entitled to independent, singular monetary commitment. Revenue sports come first and must be protected in the event of a financial shortfall. And this will be true even though the school has never been in compliance with Title IX, and even though women's sports have never had an opportunity to establish a supportive constituency.

It should be apparent that this arrangement for funding embraces a rather glaring non sequitur. The experience at the University of Oklahoma underscores this point. For many years Oklahoma fielded a football team that was highly successful, at least athletically. The substantial revenues that the team generated provided the main support for other sports programs, including the first blossoming of women's teams. Over time, however, the Oklahoma football program found itself embroiled in increasing controversy. This included rumors of improper payments to athletes and a string of incidents involving allegations of assaults, rape, and robbery by football players.⁸² One of the more memorable events was an incident in which a football player settled a dormitory dispute by shooting a fellow student. Improprieties in the program were eventually revealed, and the Oklahoma football program was put on probation. The department immediately faced the prospect of losing up to \$1 million in annual revenues.⁸³ Adjustments were necessary. The university announced that it was canceling women's basketball. The flaw in this planning sequence is obvious: football players receive improper payments; football players are involved in gun play; therefore, women's basketball is canceled. This appears to be the antithesis of a fair and neutral commitment to providing athletic opportunities for women. While public pressure eventually prompted the school to reverse its decision, the school's initial choice was a strong statement of its internal priorities.

Some might argue that Title IX was intended to accept the traditional mechanisms for athletic funding and thus also accept that the advancement of non-revenue sports is dependent upon the availability of sufficient receipts from

80. Blair Kerkhoff, *Iowa State Ponders Cuts*, KANSAS CITY STAR, Jan. 11, 1995, at D3.

81. In March 1991, the University of Wisconsin-Madison announced that it was eliminating five non-revenue sports in an attempt to reduce the athletic department's \$2.1 million deficit. The school's financial difficulties began when its football program, traditionally a "cash cow," experienced successive losing seasons. Andy Baggot, *A Total Turnaround: UW Athletic Department Takes a Big Step Up?*, WIS. STATE J., Oct. 8, 1995, at 1D.

In the view of some observers, the subpar performance of the University of Miami's football team could cost the school over \$6 million in revenues in 1995-96. This would represent nearly a third of the school's entire athletic budget. Randall Mell, *Losing's Bad on UM's Morale — And Rotten for Business*, SUN-SENTINEL (Ft. Lauderdale), Oct. 12, 1995, at 1C.

82. See Paul Attner, *Switzer Loses Control: Oklahoma's Football Monster Finally Forces Resignation of Coach*, SPORTING NEWS, July 3, 1989, at 42; Rick Telander & Robert Sullivan, *You Reap What You Sow*, SPORTS ILLUS., Feb. 27, 1989, at 20.

83. Sally Jenkins, *Sooners Call 3-Year Penalty Harsh*, WASH. POST, Dec. 20, 1988, at E1. Because the Big Eight Conference splits the bowl and television revenues earned by its schools, all conference members suffered financially as a result of Oklahoma's sanctions. *Id.*

revenue sports. Under this view, the speed of the movement toward gender equity would accelerate or slow down depending on the flow of money from the on-the-field successes of football and men's basketball. After all, there is no evidence that Title IX was intended to mandate that schools spend more money on athletics, a policy choice that is highly dubious because of its potential drain on academic programs.⁸⁴

The suggestion that the hierarchial structure of athletic spending was intended to be approved by Title IX is refuted by both the statute and its legislative history. The language of the statute mandates gender-blind equal opportunity. No qualification is made based on the availability of funding. Thus, any suggestion that funds from a particular source were understood as a prerequisite to compliance finds no hint of plausibility in the text. The correctness of this conclusion would appear to be fully confirmed by Congress's refusal to adopt the Tower Amendment, a measure that would have exempted revenue sports from the coverage of the statute.⁸⁵ One of the arguments made for exempting revenue sports was that they needed special protection because they were the source of funding for other sports.⁸⁶ Rejection of the Tower Amendment rather strongly implies that Congress did not embrace the notion that women's sports were entitled to *only* a contingent status.⁸⁷ With the proposed amendment defeated, the statutory commitment to equal opportunity remained unqualified.

3. *Budgetary Arrangements in Other Competitive Programs.* Jeff Orleans, Commissioner of the Ivy League, has made a significant contribution to the discussion of Title IX by his careful efforts to quantify the financial and policy issues that are raised when an athletic department seeks to add women's sports.

84. See *supra* note 16.

85. The Tower Amendment provided that "[Title IX] shall not apply to an intercollegiate athletic activity to the extent that such activity does or may provide gross receipts or donations to the institution necessary to support that activity." 120 CONG. REC. 15,322 (1974). The Tower Amendment failed to pass in the House of Representatives, however, and Congress passed the Javits Amendment instead, which required the Department of Health, Education, and Welfare to promulgate regulations implementing the provisions of Title IX relating to sex discrimination in intercollegiate athletics. Diana Heckman, *Women & Athletics: A Twenty Year Retrospective on Title IX*, 9 U. MIAMI ENT. & SPORTS L. REV. 1, 12 nn. 39-40 (1992).

86. When Senator Tower introduced his amendment in the Senate, he argued that an exemption for revenue sports was necessary because "impairment of the financial base of the revenue-producing activity threatens not only the continued viability of that activity, but the viability of the entire athletic program." 120 CONG. REC. 15,323 (1974). Senator Tower contended that by "preserv[ing] the revenue base of intercollegiate activities . . . [the Tower Amendment] will provide the resources for expanding women's activities in intercollegiate sports." *Id.* at 15,323.

87. The Tower Amendment's possible marginalization of women's sports was explicitly referred to in the Senate debates. Senator Williams expressed his determination to "steadfastly oppose" any weakening in the "equality of opportunity for men and women in the educational process." 121 CONG. REC. 29,791 (1975). Additionally, the Senate heard testimony about the adverse impact the Tower Amendment would have on women's sports. *Id.* at 29,791-95. Although the Senate ultimately passed the Tower Amendment, the House of Representatives' rejection of the amendment implies that the House recognized the concerns raised in the Senate and decided that the Tower Amendment would detrimentally impact women's sports.

He has assembled a composite budget for a typical regional state university that competes in the second tier of Division I schools. Another article in this symposium gives Mr. Orleans's thoughtful analysis of the significant issues that arise when such a school seeks to comply with Title IX.⁸⁸ The sample budget prepared by Mr. Orleans, which was scrutinized and ultimately approved by several knowledgeable commentators,⁸⁹ is quite useful for our present purposes. Selected expense and revenue items from Mr. Orleans's analysis are reproduced below. The information is presented in a form different from that used for the UCLA budget. For example, expenditures for specific sports are separately listed. Nonetheless, a number of useful comparisons can be made, particularly with adjustments that are explained more fully below.

Figure 2. Costs and Revenues for a Typical Division I-AA School

SPORT	# OF PARTICIPANTS	EXPENSES (including scholarships)	REVENUES
<hr/>			
MEN			
Baseball	32	\$ 164,000	—
Basketball	13	389,300	\$ 255,300
Football	82	1,050,500	416,300
Soccer	24	116,700	—
Tennis	9	47,300	—
Wrestling	18	104,600	—
Cross Country	11	33,200	—
<hr/>			
TOTAL	189	\$1,905,600	\$690,600*
<hr/>			
*Includes \$19,000 income from other women's sports.			
<hr/>			
WOMEN			
Basketball	15	\$ 294,300	\$ 18,300
Fencing	9	31,200	—
Soccer	18	97,600	—
Softball	18	96,700	—
Tennis	11	55,400	—

88. Jeffrey H. Orleans, *An End to the Odyssey: Equal Athletic Opportunities for Women*, 3 DUKE J. GENDER L. & POL'Y 129 (1996).

89. This sample budget was discussed extensively at the *Duke Journal of Gender Law & Policy* Conference entitled *Gender and Sports: Setting a Course for College Athletics*, held on Feb. 17-18, 1995.

Volleyball	13	138,800	—
Cross Country	8	42,300	—
<hr/>			
TOTAL	92	\$756,300	\$36,000**

**Includes \$17,700 income from other women's sports.

The gross operational deficit in the above budget is \$1,935,300. In the example that is used, this deficit is reduced by student fees and other miscellaneous revenue.⁹⁰ With these adjustments, the net deficit is \$1,440,300.

In Mr. Orleans's original presentation, the \$1.4 million deficit included \$281,000 in unallocated administrative expenses, an amount that represented the athletic director's salary, the cost of academic assistance to athletes, and other items. In order to facilitate comparisons with the per-sport costs extrapolated from the UCLA budget, these administrative expenses should be allocated among the various sports. If this is done on the basis of the proportionate cost of each sport, the adjusted costs would roughly be as follows: football — \$1,200,000; men's basketball — \$430,000; and women's basketball — \$325,000. The cost of the less expensive men's and women's non-revenue sports would increase only modestly. Women's tennis, for example, would increase from \$55,400 to roughly \$61,000.

Mr. Orleans's data supports a number of inferences. One is that women's sports, again, are relatively inexpensive. At this secondary level of competition, many women's sports can be offered for a cost of only \$100,000 per year or less. Emphasis of this fact is important to correct the implication in many public comments on Title IX that women's sports represent unusual or unmanageable costs.⁹¹ Moreover, given the low cost of offering tennis, fencing, and cross coun

90. Many, if not most, schools assess students some form of "activities fee" which is allocated to the athletic department. Nearly 60 percent of Division I-A and I-AA schools that responded to a recent NCAA profitability study indicated that their athletic departments rely on student fees. FULKS, *supra* note 8, at 108. The fees can be significant. At James Madison University, each student pays \$800 annually to support the school's athletic department. Katharine S. Mangan, *Paying for Athletics: NCAA Division I and II Colleges Rely on Student Fees to Fill Holes in Sports Budgets*, CHRON. HIGHER EDUC., Sept. 21, 1994, at A43, A44. The fact that students are forced to subsidize schools' athletic departments adds further legitimacy to demands by female athletes for equal participation opportunities.

91. The cost of women's sports is often the reason given by schools for explaining why their progress toward gender equity has been slow. Seldom is there a recognition of how modest those costs are relative to other items in the school's athletic budget. See Eric Olson, *Financing Equity Hardest Part*, OMAHA WORLD HERALD, Apr. 30, 1995, at 7C (quoting Creighton Athletic Director Bruce Rasmussen as saying "we need more money from private resources" to achieve gender equity); Bob Bennet, *Gender Equity Not Equitable for All*, NCAA NEWS, Feb. 1, 1995, at 4 (letter to the editor) (saying "more money is needed" for gender equity); Bob Hunter, *Gender Equity Confounds Colleges*, COLUMBUS DISPATCH, May 23, 1993, at 1E (quoting Indiana Athletic Director Clarence Doninger as saying "'I'm in favor of gender equity, but I think one thing you can't ignore is how we're going to pay for all this.'"). For a court case in which lack of gender

try track — each costs less than \$65,000 — the absence of these sports from a school's program warrants particular scrutiny. A lack of student interest or the absence of available competition may explain the absence of these sports, but cost factors are not a persuasive justification.

A further implication of the composite budget is that football still occupies a position of primacy, even at this much more modest level of competition. Expenditures for football are greater by a long measure than the entire budget for women's sports. Indeed, even within the sphere of men's sports, football consumes more than 50 percent of the budgetary expenses. Football does generate more revenues than any other sport, but its separate deficit is still quite substantial. In fact, the football deficit is greater than the total cost of all women's sports excluding basketball.

The revenue-generating potential of football reinforces its ability to command first attention in budgetary decisions. The revenues from football are both very welcome and somewhat fickle. A scaled-down version of the Arms Race will occur, for the question will be constantly presented whether hiring a better, but more expensive, coach or improving the locker room or spending more on recruiting will significantly improve the revenue picture. Similarly, on-the-field reversals — losing too many games — hold a real prospect for upsetting budget projections, an event which will ensure that the football program receives careful attention.

What is said about football is also true to a lesser extent for men's basketball. The revenues from basketball are attractive and are thus likely to be nurtured. Women's basketball is also a significant expense item, a fact that will ensure that it receives due attention in departmental decision-making. While it does not generate significant revenues in the budget presented here, there has been a rapid ascendancy in the popularity of women's basketball generally, and the dynamic forces that influence decision-making for the preferred men's sports may soon be seen in this women's counterpart.

The point of the above analysis is to underscore again that the predominant positions of football and basketball are likely to sway decision-making within the department, even in less competitive leagues. The numbers here serve to confirm that these sports command a level of attention that is not equaled by most women's sports. And in the face of the deficits already present, it is unlikely that not-yet-offered women's sports will command a high priority. The reality of this budget is that no sport pays for itself, and some sports, especially football, represent a significant budgetary risk. In this environment, there is no strong internal incentive to add additional sports. Absent such an incentive, a firm external control is necessary if gender equity is to be achieved.

A third perspective on athletic spending can be drawn from the factual record in *Cohen v. Brown University*.⁹² The case has produced selected data about

equity was attributed by the university to the high costs of women's sports, see *Cook v. Colgate Univ.*, 802 F. Supp. 737, 749-50 (N.D.N.Y. 1992) (noting that Colgate refused to elevate women's ice hockey to varsity status because "it is too expensive" and ordering that the sport become a varsity team), *vacated as moot*, 992 F.2d 17 (2d Cir. 1993).

92. 809 F. Supp. 978 (D.R.I. 1992), *aff'd*, 991 F.2d 888 (1st Cir. 1993).

the relative cost of sports at that school. The information is useful for the view that it gives of the treatment of athletics at an elite private school that offers a wide array of sports and makes no pretense of pursuing commercial returns. Although Brown does recruit athletes, it offers no athletic scholarships. Its sports programs attract a much wider degree of participation from its students than would be found at a major state university. Even in this relatively low-key athletic environment, the pattern of a preference for men's sports is still readily seen. As with the budgets examined above, football occupies such a central budgetary position at Brown that it is likely to receive first attention in athletic decision-making. In 1990-91, Brown sponsored an impressive thirty-one NCAA varsity sports, sixteen for men and fifteen for women.⁹³ The total amount spent on varsity sports was \$4,740,268. Of this amount, three men's sports — football, basketball and hockey — received 42 percent of the available funds. Football alone received \$1,280,659.⁹⁴

When unrelated events prompted a trimming of the overall athletic budget, the department chose to eliminate two men's sports and two women's sports. This decision was made at a time when women were underrepresented among the school's athletes.⁹⁵ The amount the University saved by eliminating the two women's sports was only \$62,000.⁹⁶ There is no evidence of a significant redirection in the more than \$1.9 million allocated to the three expensive men's sports.

The explanation for why such a disproportionate share of the budget at Brown goes to these three sports is probably similar to that given for imbalances reflected in Mr. Orleans's sample budget. Not only do these sports have a long tradition at the school, they also have greater public appeal than other offerings. While the revenue potential of these sports is not enough to cover their costs, the fact that money can be generated at all by these endeavors is thought to warrant their special treatment.

II. THE STANDARD FOR REVIEWING ATHLETIC DEPARTMENT DECISION-MAKING

The prior discussion described the rather formidable hurdles that will confront a claim for greater participation by women in the athletic life of the university. The environment in which that claim is made is more *commerce* than *athletics*, and in this context, the two revenue-producing sports dominate the budgetary discussions. There is little to suggest that a movement toward gender equity will be achieved without outside prodding. Hence, a question naturally arises as to the form of the regulatory measure that will be used to correct the strong imbalance in favor of the commercially competitive, revenue-generating sports. This investigation is undertaken here. Following a brief statement of the existing standards, a proposed model for judging the effectiveness of such controls is discussed. The existing control measures are then evaluated against these criteria.

93. 809 F. Supp. at 980.

94. *Id.* at 995.

95. *Cohen v. Brown Univ.*, 879 F. Supp. 185, 187 n.2 (D.R.I. 1995).

96. *Id.*

Title IX itself provides relatively little guidance as to the standard to be used to measure athletic department compliance. The legislation requires only that there be no exclusion or denial of benefits or other discrimination based on gender.⁹⁷ A more specific standard, one useful in the athletics setting, was left for clarification by the Department of Education.⁹⁸

There are a number of different measures that might have been selected. For example, it might have been decreed that equality means equal dollars, so that a school had to spend roughly comparable amounts on men's and women's sports.⁹⁹ Indeed, one might read the budgetary analysis in the prior section as implicitly suggesting that the "problem" in college sports is disparate funding between men's and women's sports, and therefore the appropriate solution is equalization in money spent. At least for the short-term, such a solution would have been highly problematic. Not only is there uncertainty about the relative level of demand for women's sports, but an abrupt, radical shift away from support for men's revenue sports would likely be self-defeating since a significant source of departmental revenues would be disrupted. At least initially, a milder standard seems to be appropriate.

A different approach might have chosen to allow revenue sports to keep all of the money they generate and to mandate equality only for expenditures on other sports.¹⁰⁰ As mentioned, however, claims by proponents of revenue sports that revenues are "their money" are hardly persuasive, both because considerable taxpayer support is involved and because a school-wide asset — the general good will of the university — is the source of much of the teams' support.¹⁰¹ Another approach would have tried to provide the same number of teams for each gender. Because of wide variance in squad size, however, this approach achieves only a superficial equality, and because of the inordinately large size of football squads, conveniently continues the historic preference for selected men's sports.

97. For text of statute, see *supra* note 1.

98. A useful history of the early efforts to devise regulations to implement Title IX is found in John Gaal, Louis P. Dilorenzo & Thomas S. Evans, *HEW's Final "Policy Interpretation" of Title IX and Intercollegiate Athletics*, 6 J.C. & U.L. 345 (1980), and Ann Victoria Thomas & Jan Sheldon-Wildgen, *Women in Athletics: Winning the Game but Losing the Support*, 8 J.C. & U.L. 295 (1981).

99. See Loretta M. Lamar, *To Be an Equitist or Not: A View of Title IX*, 1 SPORTS L. J. 237, 240 (1994) (noting that in 1978 HEW proposed a policy interpretation that would have required equal per capita expenditures for men and women); Jill Cousins, *Examples of Absolute Equality*, ORLANDO SENTINEL, Aug. 3, 1993, at D5 (noting that two Florida community colleges spend equal amounts on men's and women's sports to reach gender equality).

100. Under one version of this theory, the non-scholarship budgets for any revenue-producing or self-funding sports would not be included in a Title IX financial analysis. Title IX compliance would then be determined by analyzing the non-revenue sports opportunities provided to each gender by the university. See Catherine Pieronek, Note, *Clash of Titans: College Football v. Title IX*, 20 J.C. & U.L. 351, 376 (1994).

101. Taxpayers provide significant support for construction of stadium and training facilities, even for athletic departments which are self-funding. See *supra* note 40 and accompanying text. In addition, student fees often provide a significant portion of a school's athletic budget. See *supra* note 90.

The test actually devised by the Department of Education, is different. The critical question under the Department's regulations, administered by its Office of Civil Rights ("OCR"), is whether a school is "effectively accommodat[ing] the interests and abilities of members of both sexes."¹⁰² In determining whether there is an effective accommodation, a departmental interpretation provides that a three-part test is to be used.¹⁰³ Part I is a safe harbor. If it is satisfied, the school is adequately accommodating women's interests, and if there is no significant discrimination in coaches' salaries and the like, the school is in compliance with Title IX. This safe harbor is the substantial proportionality test. In rough terms, this test deems a school to be in compliance if the percentage of female athletes approximates the percentage of women in the student body.¹⁰⁴

Even if a school has not achieved substantial proportionality, it will be found to be in compliance if it meets the second test: whether the institution has engaged in effective and systematic planning to expand its women's sports programs.¹⁰⁵ Thus, a school that it is not fully up to speed in offering women's programs will not be found to be in violation if it has given serious attention to the issue of compliance and has mapped out a course for expanding its offerings.

If neither of the above conditions is present, a school will still be found to be in compliance if it can show that it is operating a program that effectively meets the level of interest its women students have manifested.¹⁰⁶ In other words, a program in which the percentage of women athletes is less than the

102. 34 C.F.R. § 106.41(c)(1) (1995).

103. 44 Fed. Reg. 71,413, 71,418 (1979). Although the three-part test is not included in Title IX or the related regulations, most judges have indicated that the Policy Interpretation is entitled to respect:

I also recognize that the Policy Interpretation . . . do[es] not carry the force of law or establish controlling standards for this Court. Nevertheless, I believe the Policy Interpretation . . . [is an] important guid[e] in unraveling the requirements of the athletic regulation. Moreover, considerable weight should be given to an agency's interpretation of its own regulation.

Cohen, 809 F. Supp. at 988. The Tenth Circuit agrees: "We defer substantially to an agency's interpretation of its own regulations." *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824, 828 (10th Cir.), *cert. denied*, 114 S. Ct. 580 (1993). Judicial acceptance of the Policy Interpretation has not been unanimous, however. A federal judge in Louisiana recently refused to apply the substantial proportionality test included in the Policy Interpretation:

The Policy Interpretation has not been approved by either the President or Congress, however, and is also susceptible, in part, to an interpretation distinctly at odds with the statutory language . . . to the extent that the Policy Interpretation suggests . . . that a mere reliance upon substantial numerical proportionality between the sexes suffices, it is contrary to the explicit language in 20 U.S.C. Section 1681(b) and will not be followed herein.

Pederson, 912 F. Supp. at 911, 914.

104. 44 Fed. Reg. 71,413, 71,418.

105. The institution must demonstrate a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the members of the underrepresented sex in order to satisfy the second test. *Id.*

106. A university can satisfy Title IX by demonstrating "that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present [athletic] program." *Id.*

percentage of women in the student body may nonetheless be in compliance. Under this third test, the school must show that the actual interest of its women students in athletics is less than is suggested by their proportion in the student body. Even when there is an effective accommodation of interest under one of these three tests, it is also necessary for a school to show that it is fairly distributing financial support for the teams that are offered.¹⁰⁷

A. The Demands of the Present Sports Context

We will eventually turn to the issue of whether this three-part test is appropriate for the task of securing compliance with Title IX. Before addressing that question, we must examine more closely the particular realities that any compliance measure will face in the modern sports context. A successful compliance standard must be sensitive to these. Three elements warrant particular attention. One is the apparent bias in favor of men's sports that is embedded in the present decision-making structure. A second is the reality that there can be no absolutes in predicting the extent of women's eventual interest in sports and in judging the relative appeal of men's and women's sports in the future. A particular effort must be made to avoid building new biases into the statute, whether in favor of particular sports or in the form of assumptions about the degree of women's interests. Third, any set of rules used in the present context should be seen as transitional. A major goal for such rules will be to guide the massive transition between a prior state of affairs that was almost exclusively male to a future in which the only certainty is uncertainty. Thus, a delicate balance must be achieved between firm prompting — necessary to achieve

107. The Title IX regulations state that the "equal athletic opportunity" determination includes a review of the support offered to male and female sports teams. Such support includes provision of equipment and supplies, travel and per diem allowance, assignment and composition of coaches and tutors, provision of locker rooms and practice facilities, and publicity. Despite these regulations, gross discrepancies in spending on male and female athletics exist at many universities. See *supra* note 77 and accompanying text.

Title IX's mandate for equitable funding has not been interpreted to require dollar-for-dollar equality. In 1993, Marion Stanley, the women's basketball coach at the University of Southern California, filed suit under Title IX and the Federal Equal Pay Act when the school refused to offer her the same salary as the men's head basketball coach. The court held that the men's coach experienced greater pressure to win games, was expected to perform more public relations duties, and possessed a greater market value. Stanley's lower salary was justified by the "quantitative dissimilarity in responsibilities" found by the court. *Stanley v. University of So. Cal.*, 13 F.3d 1313, 1321 (9th Cir. 1994).

Stanley's situation is not unique. A recent survey revealed that Division I women's basketball coaches average less than 60 percent of the base salary for men's coaches. Some of the more prominent women's coaches have achieved salary equity, however. Pat Summitt, the women's coach at the University of Tennessee, earns more in base salary than either the men's basketball or football coaches. Nine Division I schools now pay their women's coach at least as much as their men's coach. Fifteen women's coaches earn over \$90,000 per year in base salary. Scott M. Reid, *What Price Fairness? What Price Fair: Women's Coaching Salaries*, ATLANTA J. & CONST., Mar. 13, 1994, at E6. In some instances, threatened Title IX litigation motivated schools to raise the salaries of women's coaches to the level of their male counterparts. The University of Georgia nearly doubled the salaries of its women's basketball and gymnastics coaches after the coaches retained an attorney and threatened a Title IX lawsuit in 1994. Scott M. Reid, *Georgia's Salary Dispute Resolved*, ATLANTA J. & CONST., Mar. 19, 1994, at C6.

movement — and flexibility, which is necessary to deal with the uncertainty inherent in the future development of men's and women's sports.

1. *Responding to the Structural Bias of Athletic Decision-Making.* The first section of this paper discussing the structure of athletic decision-making supports a conclusion that has very important implications for Title IX enforcement.¹⁰⁸ The conclusion to be reached is that the commercial realities of college sports create a very strong bias against women's sports. Because of the financing arrangement that has been selected, revenue sports, particularly football and men's basketball, are strongly favored in budgetary allocations. Indeed, not to favor them would be to opt out of the most financially lucrative opportunities that are available, a choice that few schools are prepared to make.

This financial environment creates a strong incentive to give women's sports a very low priority in budgetary decision-making. Those sports are a net drain on the budget and, in the near term, hold a limited prospect of new revenues. In short, the demand for new women's sports creates a direct challenge to the primacy of the preferred men's sports. The nurturing of these latter sports requires flexibility. Adding women's sports has the potential of severely limiting a school's capacity to meet enhancements by competitors that may yield an athletic advantage.

The implication of this budgetary structure for Title IX is apparent: Title IX is not self-enforcing; a strong external mandate is needed to achieve the statute's goal.¹⁰⁹ The task confronted by any regulation in this area will be to overcome

108. See *supra* notes 19-44 and accompanying text.

109. The need for thorough external review when structural imperfections exist has been discussed in the areas of constitutional and administrative law. Under his structural due process theory, Professor Laurence Tribe calls for a new definition of due process "in which we are as concerned with the *development of policy over time* as with a snap shot of policy at any given point, and in which we are as interested in the *process of decision itself* as with the outcomes produced." Tribe believes that courts must be more willing to inquire into the actual objectives being pursued by decision-makers rather than accepting any hypothetical objective or justification that a court might propose itself. Laurence H. Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269, 290 (1975). If this theory were applied to Title IX controversies, the OCR would take into account a school's bias in favor of traditional men's revenue sports when reviewing the school's budget decisions.

Some administrative law scholars believe that a strong external mandate is necessary to assure that agencies and institutions comply with legislative mandates. According to the "hard look" review theory,

agencies do not function well in the absence of external discipline that forces them to consider policy issues seriously through a rational decision-making process Agencies often fail to understand the area in which they are acting and adopt policies that are poorly reasoned They also take actions based on improper motives — either decisional factors prohibited by statute or the desire to assist some individual or group for political reasons.

RICHARD J. PIERCE, JR. ET AL., *ADMINISTRATIVE LAW AND PROCESS* 361 (2d ed. 1992); see also William H. Rodgers, *A Hard Look at Vermont Yankee: Environmental Law Under Close Scrutiny*, 67 GEO. L.J. 699 (1979). It is an accepted tenet of administrative law that the scope of review employed by a supervising authority is related to the impartiality, thoroughness, and reasonableness of the decision-maker. "Its supervisory function calls on the court to intervene . . . if the court becomes aware, especially from a combination of danger signals, that the agency has not really taken a 'hard look' at the salient problems, and has not genuinely engaged in reasoned decision-making." Greater

the weak to non-existent internal incentives that a department has to expand women's offerings. This lack of internal incentives suggests that wide deference to internal decision-making is inappropriate. Rather, the emphasis of any regulation should be on clarity and directness. Phrasing that invites softened enforcement will be readily embraced and, thus, opportunities for avoidance should be carefully circumscribed.

The perspective developed here may provide some insight into the strong and vitriolic attacks on Title IX that have come from football partisans. When they suggest that Title IX represents a direct assault on football,¹¹⁰ there is a sense in which they are correct. The athletic financial pie is limited, and thus there cannot be both new expenditures for women's sports and a continuing commitment to match competitors' spending. Implementation of the former has undeniable implications for the latter. But the statute, and especially the rejection of the Tower Amendment, answers the question of which is to have priority. Title IX's commitment to women's sports is not qualified, by competitive needs or otherwise. It does not follow, however, that a full embrace of Title IX necessarily makes college football significantly less competitive or less attractive. To the extent that is the critics' fear, it is misdirected. There are mechanisms for accommodation of both interests, but these involve financing arrangements different from those now used by schools. A profitable alternative outlet for the energy of the critics of Title IX is to begin working on financial structures that permit effective and durable limits on program expenditures. A later section examines that question more fully.¹¹¹

2. *Challenging What We Think We Know About Women's Sports.* The public discussion of Title IX reveals a surprising tendency toward firm statements about what women do and do not want in sports, and what they will and will not achieve. For example, one fan interviewed by the *Los Angeles Times* confidently surmised that "[i]t is unrealistic to believe that under any circumstance the number of women interested in participating in a sports program in high school or college will ever approach the percentage of males that are doing so."¹¹² This comment was specifically intended as a refutation of the wisdom of a legal standard that requires substantial proportionality between women athletes and women in the student body. A columnist in the *Chicago Tribune* was certain that the court in the *Brown University* case was wrong in approving the substantial proportionality test. In his view, the real reason why women

Boston Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970). Under this principle, the structural bias present in most athletic departments would require the OCR or some other supervising agency to assume an active regulatory role.

110. See, e.g., *supra* notes 9-11 and accompanying text. Lamar Daniel, a Title IX consultant, warns that "[i]t's time for fans of college football to get together," before the "monster [of] proportionality" that is Title IX destroys college football. Ronald D. Mott, *CFA Advocates Maintaining System of One Institution/One Vote in I-A*, NCAA NEWS, June 7, 1995, at 1, 20.

111. See text at notes 184-234 *infra*.

112. Bob Rohwer, *An Even Field?*, L.A. TIMES, Nov. 1, 1994, at V1 (quoting Arlyn F. Obert).

were underrepresented in athletics at Brown was clear: "[f]or better or worse, young women are generally less interested in sports than young men."¹¹³

Another set of "inherent truths" concerns the continuing primacy of football and men's basketball. Some people believe that these two sports will always be the most popular sports at the college level because they have professional counterparts.¹¹⁴ Or because men play sports better than women play theirs.¹¹⁵ Or just because these men's sports are more interesting.¹¹⁶

A careful look at the developing landscape reveals why such assertions are much more confident than they should be. For example, in recent years, the women's basketball teams at Stanford University and the University of Colorado have outdrawn their men's counterparts in attendance.¹¹⁷ In addition, the 1995-

113. Stephen Chapman, *Opinions: Title IX Debate Is a Matter of Interest*, NCAA NEWS, May 10, 1995, at 4.

114. One editorial relied upon the popularity of professional football to rebut the idea that female athletic participation rates could ever equal or surpass male participation, stating, "Anyone who has ever been to a Super Bowl party knows what's wrong with that logic." The editorial concluded that since far more men than women follow professional sports, it's unreasonable to expect that the popularity of women's athletics will ever rival that of men's athletics at the college level. *Opinions: Title IX*, NCAA NEWS, May 24, 1995, at 4 (quoting an editorial from the *Chicago Tribune*). Another commentator questioned whether a women's program can ever "attract significant national attention or generate revenues in the absence of professional leagues for women to help create a high level of interest in the college 'farm teams'." Pieronek, *supra* note 105, at 368. An NCAA official suggested that male student athletes might place more emphasis on athletics because of the opportunity to play professionally:

The rewards for some in athletics on the male side so far outweigh those on the women's side—the promise of the pro's, the promise of big bucks—and there are an awful lot of males who aspire to that. Women know from the beginning it's not there for them and that they must do something else to be successful.

Steve Wieberg, *NCAA Graduation-Rate Study: Women First, Female Athletes Lead Males 69%-43%*, USA TODAY, June 30, 1995, at 3C.

115. A Charleston, South Carolina newspaper editor, had these comments on women's basketball:

The fact of the matter is that this is intramural stuff . . . [W]atching two women post up in the paint is too closely akin to tavern mud wrestling than most of us would like to admit. Why women themselves ever thought this was a good sport for them to play is puzzling to me . . . [W]hat I've said is the truth, and behind closed doors, every athletic director in the country agrees with me.

Ken Burger, *Opinions: Women's Basketball*, NCAA NEWS, Dec. 11, 1995, at 4.

116. The traditional sports of football and basketball are, of course, the prime revenue-producers for Big Time athletic departments. See *supra* notes 47-54 for a discussion of UCLA budget. This may change, however, as women's sports continue to grow in popularity. As women's basketball has attracted more fans, the sport has drawn the attention of big-name advertisers and sponsors. According to one marketing analyst, "A lot of other sports opportunities are at the point of saturation. There are plenty of people who have more anticipation for the women's [national basketball] team than the men's team this year." Stefan Fatsis, *Women's Olympic Hoops Team Shows Marketing Mettle*, WALL ST. J., Nov. 3, 1995, at B4. There is another sign that women's basketball has reached the big time: a manufacturer has announced that the U.S. national women's basketball team will be the subject of the first set of trading cards devoted exclusively to a woman's team. *Id.*

117. See, e.g., Tyler Green, *Big Eight Pay Gap; Women Wage Difficult Battle Over Salaries*, ST. LOUIS POST-DISPATCH, Nov. 2, 1994, at D1 (reporting that during the 1993-94 season, the Colorado women's basketball team drew 5,167 fans per home game, compared to 3,165 for the men's team); Earl Gustkey, *Women's Basketball; Stanford's Folk Again Flying High*, L.A. TIMES, Feb. 20, 1995, at C8 (reporting that the average attendance of Stanford women's basketball games not only outpaced the

96 basketball season saw a surge in the televised coverage of women's games, a decent gauge of whether fan interest is evolving.¹¹⁸ Moreover, the raw numbers on women's participation in sports can hardly leave one confident that we already know all that we can know. In 1971, before there was any significant activity under Title IX, approximately 290,000 girls were participating in high school sports. In just six years, the number rose to more than 2 million.¹¹⁹ Participation rates have been greatly affected by budgetary changes and shifts in total enrollment, but the number today is still 2.1 million.¹²⁰ The obvious unanswered question is what this number would be after a couple of decades of adequate funding and vigorous enforcement of Title IX. Sobering implications can be found in the experience of one independent school in the Southeast. Several years ago it made a commitment to fund, and to find appropriate competition for, any group of students interested in forming any interscholastic team. For the last several years, 80 percent of the girls, as well as a similar percentage of the boys, have chosen to participate in interscholastic sports.¹²¹

Those who contend that there never will be enough interest among women make another fatal analytical error as far as college athletics is concerned. The standard of substantial proportionality does not require, for example, that 50 percent of an evenly balanced student body actually participate in athletics. The number of women athletes needed to meet this standard is quite small at most schools. To take one example, at the University of Illinois, a school with a student body of 25,000, only 325 women athletes would be needed to meet the proportionality standard.¹²² And since the assumption at schools such as the University of Illinois is that athletes will be recruited, and not drawn from students who have independently decided to attend the school, women athletes will in fact be drawn from a pool that is much larger than 25,000. Hence, with an appropriate commitment from the school administration to encourage recruiting and to support women's teams, a sufficient number of athletes most likely can be found.¹²³

Stanford men's program, but also placed ahead of two other PAC-10 men's programs).

118. ESPN plans to televise sixty-four women's basketball games during the 1995-96 season. See *supra* note 32.

119. NATIONAL FED'N OF STATE HIGH SCH. ASS'N, 1993-94 SPORTS PARTICIPATION SURVEY (1995).

120. *Id.* The percentage of high school athletes who are female has increased from 7 percent in 1971 to 38 percent in 1994.

121. Interview with Donald North, Headmaster of Durham Academy in Durham, N.C. (Mar. 16, 1995).

122. The undergraduate population of the University of Illinois at Urbana-Champaign was 44 percent women in 1991-92. The school sponsored 413 male athletes that year. If the school supported 325 female athletes, the percentage of athletes who were women would have been 44 percent as well. Because the school already sponsored 137 female athletes, only 188 additional women athletes were needed to meet the statutory standard. See *Kelley v. Board of Trustees*, 832 F. Supp. 237, 240 (C.D. Ill.), *aff'd*, 35 F.3d 265 (7th Cir. 1994).

123. See *infra* notes 151-65 and accompanying text for a discussion of the significance of recruiting in gauging women's interests in athletics. In the Brown University Title IX litigation, a federal district judge concluded that a university can

predetermine the gender balance of its athletic program through the selection of sports it offers (some sports by nature require more players), the size of the teams it maintains (as dictated by each coach's preference), the quality and number of coaches

Another common assumption is that we already know what sports interest women and how relatively popular they will be. Again, however, recent history has taught us that we ought not to embrace any conventional wisdom. A few years ago, only a couple of thousand fans attended the women's Final Four basketball tournament. Last year the event sold out at over 18,000 fans.¹²⁴ Fourteen cities vied to host the event in 1999 and 2000.¹²⁵ Similar errors in judging popularity have been made with respect to sports other than basketball. For many years, it was assumed that soccer was mainly a men's sport. Indeed, in 1972 only about 300 women played collegiate soccer.¹²⁶ But in 1992, there were over 8,000 participants in soccer at the three levels of NCAA competition.¹²⁷

A further reason for reserving judgment about the long-term future of women's sports is the potential for major changes in the Big Time football and basketball markets. At their highest level of competition, these sports are heavily commercialized. Many, if not most, of the successful programs operate at a significant distance from the notions of amateurism and academic primacy that were their origins.¹²⁸ For example, graduation rates at many schools continue to be low, despite much publicized "reforms" promulgated by the NCAA. In recent years, the basketball programs at Kentucky, Arizona, Syracuse, and Oklahoma State had graduation rates of 20 percent, 20 percent, 21 percent, and 17 percent, respectively.¹²⁹ For African-American basketball players at Kansas, Massachusetts, and Missouri, the graduation rates were 17 percent, 0 percent, and 0 percent.¹³⁰ Results are not significantly more encouraging for Big Time football programs.¹³¹ A national publication recently proposed that the University of Miami should shut down its highly successful football program because

it hires, and the recruiting and admissions practices it implements.

Cohen, 879 F. Supp. at 202. Since the court found that a school's actions determine the number and gender of athletes who matriculate, the court rejected Brown's argument that the school need only satisfy the interest in its present student body. *Id.* at 204-07.

124. Jim Kleinpeter, *Women's Final Four*, TIMES-PICAYUNE (New Orleans), Apr. 3, 1993, at D3 (providing 1982 figures); Ted Lewis, *Opinions: Women's Basketball*, NCAA NEWS, May 10, 1995, at 4; Ted Lewis, *Women's Final Four a Hit, Increasing Attendance Gives Tourney Bright Future*, TIMES-PICAYUNE (New Orleans), Apr. 9, 1995, at C14 (providing 1995 figures).

125. Darryl Richards, *SMU, Dallas Seek to Host Final Four*, DALLAS MORNING NEWS, Jan. 4, 1995, at 9B.

126. See NCAA, THE SPORTS AND RECREATIONAL PROGRAMS OF THE NATION'S UNIVERSITIES AND COLLEGES, 1957-1992, REPORT NO. 8, at 25 (1992).

127. *Id.* at 19.

128. One indicator of this lack of amateurism and academic primacy is that in October 1995, twenty-eight institutions faced NCAA sanctions for violations ranging from allowing academically ineligible players to compete to providing improper payments and inducements to players. 28 *Institutions on NCAA Probation*, CHRON. HIGHER EDUC., Oct. 27, 1995, at A42.

129. GRADUATION-RATES REPORT, *supra* note 20, at 24, 244, 390, 504; see also Mike Rubin, *Real Life Top 20*, VILLAGE VOICE (New York), Mar. 21, 1995, at 126.

130. GRADUATION-RATES REPORT, *supra* note 20, at 100, 222, 314.

131. The President of Rutgers University, Francis L. Lawrence, has indicated that he is committed to improving the success of the school's football team. He is apparently willing to reduce academic standards for football players in order to achieve that result. He has discussed "the possibility of adding a 'general studies' curriculum to help the eligibility of players of lesser academic standing." Jere Longman, *Rutgers President Fires Graber*, N.Y. TIMES, Nov. 28, 1995, at B13.

of a long series of academic, NCAA, and civil infractions.¹³² The athletic products of the top programs are extremely popular on television, and the flow of large broadcast dollars is not necessarily dependent on these sports having a university affiliation. Although there is no purely commercial alternative on the immediate horizon, it is not inconceivable that market forces will coalesce to give rise to new versions of pre-professional sports that are delinked from the present requirements for a four-year degree.¹³³ Part-time enrollment of athletes or a loose or non-existent affiliation with colleges may eventually be seen as creating a larger labor pool and a more interesting product.

Such a development would be something of a mixed blessing for women's sports. A major source of funding would be adversely affected. On the other hand, a lessening of the role of Big Time sports would allow for a reorientation of college sports toward less commercialized versions.¹³⁴ The notion that the only good sports are those that have a professional counterpart may lose its present hold and permit a new emphasis on broader scale participation, albeit at less glamorous levels. In this environment, the relative acceptance of women's sports would likely increase, perhaps significantly so.

The basic point again is that any legal standard should accept the dynamic nature of women's sports at the college level. Our knowledge of women's sports at present is roughly at the level that our understanding of men's sports was in 1920. It clearly would have been a mistake to have frozen our assumptions about men's offerings at that point in time. We would probably still have

132. The article in *Sports Illustrated* maintained that Miami's football successes have come at an "incalculable cost to the university's reputation and integrity." The allegations of impropriety included drug abuse, recruiting violations, credit card fraud, academic cheating, and the reported degradation of women in the football dorm. Recently, a former athletic department official was convicted of dispersing more than \$128,000 in fraudulent Pell grants to over fifty Miami football players. Approximately one out of every seven scholarship players on Miami's 1994 football team had been arrested at least once while enrolled at the school. Alexander Wolff, *Broken Beyond Repair*, SPORTS ILLUS., June 12, 1995, at 20. After a lengthy investigation, the NCAA found numerous violations and sanctioned the university in late 1995. Miami is prohibited from appearing in a bowl game in 1995-96 and will lose twenty-four football scholarships over the next two years. *Miami Loses Bowl Bid*, *Scholarships*, NEWS & OBSERVER (Raleigh), Dec. 2, 1995, at C1, C3.

133. It is frequently observed that the two most popular sports — basketball and football — are the only two that do not provide an alternative to college for gifted athletes seeking further training and preparation. Other sports, particularly baseball, hockey, tennis and golf, offer non-collegiate avenues through which an athlete's skills can be refined. See John Weistart, *College Sports Reform: Where Are the Faculty?*, 73 ACADEME 12 June-Aug. 1987; John Weistart, *The Unnatural Athletic-Academic Link*, N.Y. TIMES, Aug. 5, 1984, § 5, at 2. The expansion of channels on cable and direct television has opened up opportunities for new versions of sports. A plausible candidate for further expansion is a basketball or football league made up of players who decide either that they are not interested in a traditional four-year college education or who would prefer to focus solely on their athletic development.

134. Some commentators argue that because most universities focus primarily on the financial aspects of sports, they fail to recognize the true value of athletics:

Profit from intercollegiate athletics should be measured not in dollars but in the degree of benefit to the lives of the participants. If the athletic/commercial complex could change its guiding principles to those more appropriate for an academic/athletic complex, women's teams and men's minor sports would be considered very profitable.

Linda-Jean Carpenter & R. Vivian Acosta, *Back to the Future: Reform with a Women's Voice*, in SPORT IN CONTEMPORARY SOCIETY 338, 393 (D. Stanley Eitzen ed., 1993).

college boxing programs and a curiously awkward version of basketball.¹³⁵ Independent forces, including the desire to protect the preferred men's sports, create pressures to keep women's sports at their current levels. One function of the standard for legal review, therefore, should be to both allow for and encourage further development of women's sports. Sensitivity to this goal will accept that judges and administrative agencies will have to make decisions in the face of a good deal of uncertainty.¹³⁶ Thus, remedies to expand women's opportunities should not be judged against a standard of scientific certainty as to future viability. A more suitable measure is one that asks whether there are plausible grounds to support an expansion that would further the broad goals of Title IX.

3. *The Special Pressures of a Transitional Rule.* As suggested, any legal standard used to judge compliance with Title IX in college sports should be sensitive to the fact that is an area of endeavor that is very much in transition. Whatever the legal standard, it should not be defined by firm assumptions about what women's sports will look like in forty or fifty years. Indeed, a strong case can be made that whatever test for compliance we have now should not be the rule that applies several decades from now.¹³⁷ The base of knowledge about the progress

135. Boxing was an NCAA tournament sport from 1932 through 1960. Seventy-four men representing thirty-three colleges participated in the first national championship tournament held at Penn State University in 1932. The sport reached its height of popularity in the 1940's when fifty-five schools sponsored boxing teams. By 1959, fewer than fifteen schools entered the national championship tournament and two years later the NCAA eliminated the tournament due to a lack of participation. E. C. WALLENFELDT, *THE SIX MINUTE FRATERNITY: THE RISE AND FALL OF NCAA TOURNAMENT BOXING, 1932-60* at 20, 250-51, 373 (1994).

In the 1920's, college basketball was still played with rules that included double-dribbling and traveling as personal fouls which resulted in free throws for the opposing team. After every basket a jumpball occurred at center court. The one-handed shot was not introduced until 1937. See MODERN ENCYCLOPEDIA OF BASKETBALL (Zander Hollander ed., 1973). Early versions of women's basketball were far removed from today's high-scoring, fast-paced games. Originally men's basketball was considered too rough for female participation. In 1892, a physical education teacher at Smith College modified the rules to create a segmented court restricting players' movement and limiting players to three bounces. JANET WOOLUM, *OUTSTANDING WOMEN ATHLETES* 7 (1992). A similarly modified version of basketball, in which teams have three offensive players and three defensive players, each of whom are restricted to one half of the court, was played by high school girls in Iowa until recently. See Kevin Cook, *The Iowa Girl Stands Tall*, *SPORTS ILLUS.*, Feb. 13, 1989, at 76.

136. Courts have rejected arguments by Title IX defendants to the effect that the women who are requesting a new sport lack the ability necessary for a successful varsity-level program. In a case involving a proposed women's ice hockey team, the court refused to weigh the newness of the sport as a reason for not recognizing its merit:

[The proposed team] is not a varsity team. It has not been funded or recruited as a varsity team. It has not had any of the advantages of a varsity team. To expect those women to have varsity team abilities in the face of these difficulties which have been against them . . . would not be realistic . . . It takes a few years after a sport reaches varsity status before the team can be considered competitive. A university should look for the foundation upon which to build a varsity program.

Cook v. Colgate Univ., 802 F. Supp. 737, 748 (N.D. N.Y. 1992), *vacated and remanded*, 992 F.2d 17 (2d Cir. 1993).

137. There are aspects of the court's opinion in *Pederson v. Louisiana State Univ.*, 912 F.

of women's sports will most likely be quite different at that future point. Perhaps we can eventually embrace a rule that assumes that athletic administrators will make neutral budgetary allocations. As previously suggested, however, there is presently little reason to be confident on that score. For now, our legal standard must deal with the known of the departmental resistance to the expansion of women's sports and the unknown of what women's sports will look like in the future.

A transitional rule should accept the fact that the historical context of college sports has been very male oriented. Clearly the adoption of Title IX was intended to change this. An effective transitional rule should have a significant element of urging and prompting built into it, as excessive deference to existing methods of decision-making is not likely to yield meaningful results. Given the continuing pervasive effects of the historical bias, a firm and clear method of judging progress may be necessary.

On the other hand, a transitional rule should avoid any specific direction as to the type of sports to be offered or the levels of funding to be provided. In a very concrete sense, the most useful rule for the present will be one that accepts a level of experimentation in women's athletics.¹³⁸ New sports should not be rejected because they have no track record or an unproven one, nor should they be rejected because they might eventually fail. While universities should not be required to spend money foolishly, by the same token, schools cannot demand that new women's sports irrefutably prove their viability. Because women's sports are in transition, there cannot be exquisite certainty that all choices made now will become permanent. In short, transitional rules should embrace a procedure for change and resist any effort to codify a particular model for women's sports.

B. Evaluating the Present Standards

1. *What Do They Mean?* As previously discussed, the Department of Education presently uses a three-part test to determine whether schools are meeting their basic obligations to "effectively accommodate" the interests of men and

Supp. 892 (M.D. La. 1996), that suggest the consequences that will flow if a court is not mindful of the transitional quality of the present era of Title IX jurisprudence. The court rejects the test of substantial proportionality because the test assumes that the degree of interest that women have in sports will be reflected by the percentage of women in the student body. The court thinks that is not likely. Rather, in the court's view, a claim of a violation of the statute would require proof by actual women plaintiffs of a "desire to participate, the ability to participate, and the level of competition involved." *Id.* at 914. It would appear that the court means to say that the only successful plaintiffs will be those with demonstrated Division I potential who are already enrolled at the university. Such a test provides little incentive for a department to take the lead in developing new sports and does little to address the reality that when a team is started, its players will almost certainly be recruited for that team and not merely selected from the student body. *See infra* notes 159-74. Moreover, the court's test gives no recognition to the significance of the imbalances in budgetary allocations that have served to promote — and generate interest in — men's sports. A reasonable reading of Title IX and its regulations is that the statute was intended to encourage change and promote more fair budgetary allocations.

138. *See infra* notes 177-78 for a discussion on the contrasts between the male and female models of athletics.

women in athletics. The Department's official interpretation offers a school a safe harbor if the gender division of participation opportunities is substantially proportionate to the gender division of the student body (Part One).¹³⁹ But a school will be found to be in compliance even in the absence of substantial proportionality if it can show a history and continuing practice of program expansion designed to accommodate the interests of the underrepresented gender (Part Two).¹⁴⁰ Finally, it is open to a school to show that there is a reduced level of interest in women's sports on its campus and that it is fully accommodating whatever interest is manifested (Part Three).¹⁴¹ It is appropriate to ask whether these tests respond to the policy concerns previously raised involving the appropriate structure of a compliance rule

There is, however, another more preliminary matter to be considered. What exactly do these three parts mean? A number of questions concerning meaning have been raised. There is one in particular that warrants examination. The rhetoric of the Title IX debate is rather shrill in general, but the legal criteria used to enforce the statute are given a particularly scathing characterization. A common theme is that under the Department's interpretation, Title IX is a "quota statute."¹⁴² Not very well veiled in this criticism is the suggestion that Title IX has become an affirmative action measure that mandates proportionality for women's sports at all costs and with little regard to interest in and the appropriateness of women's sports.¹⁴³ The defenders of the traditional primacy of football are particularly vocal in raising this complaint. A version of it was raised by Brown University in its recent litigation.¹⁴⁴

139. OCR Policy Interpretation, 44 Fed. Reg. 71,413, 71,414-15 (1979).

140. *Id.* at 71,418.

141. *Id.*

142. Critics of the OCR regulations claim that the current policy ignores the second and third tests of Title IX compliance in favor of the gender quota required by the substantial proportionality test. An attorney working with a coalition of men's non-revenue sports coaches claims that "OCR's proportionality rule is nothing but a gender quota." Dale Anderson, *NCAA NEWS*, May 24, 1995, at 4 (editorial).

A national publication described the Brown University Title IX litigation as "[o]ne small example of why quotas are under heavy attack in this country." The article claimed that a "quota-minded judge" ignored Brown's alleged history of gender equality. *Reductio Ad Absurdum*, *FORBES*, July 31, 1995, at 24. Vartan Gregorian, the President of Brown University, charges that the recent OCR clarifications to its Title IX policy "result in the explicit, rather than tacit, establishment of a quota system." Douglas Lederman, *Murky Clarification*, *CHRON. HIGHER EDUC.*, Nov. 3, 1995, at A51.

143. The descriptions of the prevailing interpretation of Title IX as creating a "quota statute" or promoting "affirmative action" are interesting rhetorical ploys. In other settings these terms mean that there is some benefit given when there is no proof of present active discrimination. Those who oppose quotas often say that they, of course, would never tolerate actual discrimination. In the Title IX context, however, the real issue is one of present, active discrimination. Substantial resources are devoted to sports activities, and men's interests are widely favored. The function of Title IX is to correct this on-going "discrimination." To suggest that women who win under Title IX are the beneficiary of "affirmative action" or a "quota" treats the basic claim of discrimination as somehow unjust or unfair. As typically used in the sports context, such a phrase is largely a veiled argument for continuing the historic status quo of substantial male preferences.

144. The district judge described one of the defendant's arguments by stating that Brown also believes that the plaintiff's proportionality claim is inconsistent with the athletic regulation's emphasis on accommodating the interests and abilities of both

While the complaint about quotas is long on rhetoric and short on any clear statement of the details of the argument, the basic concern appears to be that substantial proportionality (Part One) is effectively the only test that is used and that Part Two (history and continuing practice of expansion) and Part Three (effectively meeting a lower level of interest) largely collapse into Part One, which in the critics' eyes now looks like a quota.¹⁴⁵ The concern that Part Two may not have any independent significance is raised when one asks toward what goal must the history and continuing practice of expansion be directed. If the objective of expansion is substantial proportionality, then Part Two is not really an alternative to Part One, but only a temporary way station. Under this view, any school that wants to avoid long-term legal difficulties should plan for substantial proportionality, since that will be what is ultimately required.

Part Three (less than proportionate interest) might seem to provide an alternative avenue for compliance with Title IX. Presumably a school could show that in its case all reasonable interest in sports among women had been satisfied. But schools have found that courts are skeptical when the institution attempts to introduce surveys to show that there is not sufficient interest among its women for additional sports offerings.¹⁴⁶ Schools and their advocates then reason that if there is no real way to show a less than proportionate level of interest, Part Three, like Part Two, collapses into the Part One requirement of proportionality. As expressed by one frustrated football advocate: "From the word 'go' it was proportionality, proportionality, proportionality."¹⁴⁷ The

sexes. They argue that it is the interests and abilities of students, not the relative proportion of the sexes, that determines what "participation opportunities" must be followed.

Brown claimed that under the plaintiff's interpretation, Title IX would become an "affirmative action statute." *Cohen*, 809 F. Supp. at 987.

145. See 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. DETROIT. MERCY L. REV. 845, 862-63, 870 (1994).

146. Brown University argued that the OCR Investigator's Manual authorizes the use of surveys to judge the relative accommodation of interests and abilities. The court rejected this argument, concluding that the OCR's policy was to recommend interest surveys after a school has been found in violation of Title IX. Such surveys would help the school to identify the most appropriate sports which could be added to the school's athletic program to achieve compliance. The court found "inherent difficulties" with requiring an interest and ability survey as evidence of compliance with Part Three. *Cohen*, 879 F. Supp. at 210 n.51. The court's rejection of student surveys flows logically from its earlier finding that Brown recruiting and funding decisions predetermine the composition and characteristics of its student population. The OCR's position regarding the use of surveys may have been altered by the agency's clarification to its Title IX regulations. Issued in January 1996, this document states:

[a]n institution may evaluate its athletic program to assess the athletic interest of its students of the underrepresented sex using nondiscriminatory methods of its choosing. . . . Those assessments may use straightforward and inexpensive techniques, such as a student questionnaire or an open forum, to identify students' interests and abilities. OCR often recommends surveys because they are usually the simplest method for assessing interest.

OFFICE OF CIVIL RIGHTS, U.S. DEPT. OF EDUC., CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY GUIDANCE: THE THREE PART TEST 7, 8 (1996) [hereinafter THE THREE PART TEST].

147. Ronald D. Mott, *Title IX Discussion Intensifies on Several Fronts*, NCAA NEWS, Jan. 25, 1995, at 1, 6 (quoting Grant Teaff, Executive Director of the American Football Coaches Association).

position statement of the American Football Coaches Association echoes this sentiment:

Government regulators have sought to force schools to do whatever must be done to ensure that the percentage of athletes who are women equals the percentage of women in the student body, regardless of students' actual interests and abilities Title IX is not an affirmative action statute and should not be used to establish arbitrary and capricious quotas.¹⁴⁸

Many schools at the higher levels of NCAA competition may be correct in the observation that Part Three of the test provides them with relatively little relief. A close appraisal of the underlying facts reveals, however, that the discomfort experienced by these schools is largely self-inflicted. The essential question concerns how a school might show that the level of interest by women athletes at its institution is below proportionality. While defendant schools would like to argue that a survey device or other statistical appraisal is appropriate, such an approach ignores the fact that most schools in Division I and Division II *create* interest in their programs. They do this by recruiting. Their coaches watch lower levels of competition and search out appropriate athletic candidates, who are then cajoled, entreated, and given special considerations solely to induce them to come to school to play sports.¹⁴⁹ The coaches and recruiters do not wait until the student body is formed under normal admissions criteria and then sift through the matriculated students to see who has athletic skills. The latter technique would not likely produce very competitive teams, at least according to contemporary standards.¹⁵⁰

148. See *id.* (quoting position paper of American Football Coaches Association).

149. See generally SPERBER, *supra* note 37, at 247-55. See also Charles P. Pierce, *The Shadow*, SPORTS ILLUS., Dec. 16, 1991, at 92; Alexander Wolff, *High School Confidential*, SPORTS ILLUS., Jan. 8, 1990, at 20. For specific examples, see Mark Kiszla, *What Price Can Be Put on Billups*, DENV. POST, Mar. 27, 1994, at B2 (describing inducements used by college basketball programs to recruit high school junior Chauncey Billups); Craig Neff, *Scorecard: A Grand Slam*, SPORTS ILLUS., Jan. 16, 1989 (discussing revelations by student Hart Lee Dykes regarding improper inducements he received from several college football programs). See also Alesia, *supra* note 7 at 51 (discussing UCLA's football recruiting).

150. When the Board of Trustees at Princeton University studied that school's athletic program in 1995, it found that the internal culture of organized sports had changed such that athletes drawn directly from the general student body no longer had the requisite levels of skills to sustain a competitive program. Thus, the school found it necessary to recruit most of its athletes.

Heightened levels of competition and of specialized skills have greatly affected the composition, size, and objectives of college and university varsity athletics programs. Until recent decades, most intercollegiate teams included a substantial number of "walk-on" participants—that is, students admitted without special regard to their ability in a particular sport, not recruited specifically to play a sport, but with sufficient natural ability, experience, or devotion and dedication to be contributing members of a varsity team after their arrival at the institution.

Today, because national levels of performance in athletics have become increasingly heightened, students usually must concentrate on a single sport and must devote themselves with single-minded intensity to the enhancement of their skills and strengths in that sport, often from an early age, if they expect to play at the Division I intercollegiate level. As a result, the "walk-on" student who is not an identified athlete prior to admission can no longer be a major factor in making up the rosters of most Division I (including Ivy League) varsity sports. . . . Princeton, like the

In 1996, the Office of Civil Rights, in response to considerable pressure from individual members of Congress and others, issued a document that sought to clarify the meaning of the three-part test. One aspect of this document is likely to generate considerable confusion. The OCR staff takes the position that in determining whether an institution is accommodating the interests of women athletes, the school need only consider the interests of existing and accepted students. In the staff's view, the 1979 Policy Interpretation "does not require an institution to accommodate the interests and abilities of potential students."¹⁵¹ This language might suggest that the school's ability to find qualified athletes through recruiting is irrelevant to the issue of its compliance with Title IX. However, a footnote comment casts doubt on any such interpretation: "[W]here an institution recruits potential student athletes for its men's teams, it must ensure that women's teams are provided with 'substantially equal opportunities to recruit potential student athletes.'"¹⁵²

One might try to reconcile these statements by suggesting that the decision of *whether* to have a particular women's team is to be determined, at least in part, by looking only to the interests of the current women students, while the quality of the team, once it is established, will be determined by recruiting. Thus, a low interest among presently enrolled female students could prevent the formation of a team even though other evidence suggests that a successful team could be easily recruited. But as this interpretation is subjected to critical examination in coming years, what likely will be shown is that the OCR is seriously out of touch with how teams are formed and sustained at the college level, especially within Big Time programs and at other schools that purport to offer "competitive" programs.

There is rather pervasive evidence to confirm that recruiting produces patterns of team composition that are different, often fundamentally so, from the profile of the general student body. In some cases, interest in a particular sport seems to have been created out of whole cloth. To offer an example that will surely be controversial, it can be noted that Nevada has never been thought of as a "natural" basketball state. The state has no particular history of producing a steady stream of native-born basketball stars.¹⁵³ Indeed, in the entire NBA, there is only one player that identifies Nevada as his home.¹⁵⁴ Moreover, Nevada is not a geographical location noted for intense basketball competition.

universities against which it competes athletically, must actively recruit students who have demonstrated very high levels of athletic ability in each of the required specialized skills of Princeton's varsity sports. (And it should be noted that it is not sufficient to identify excellent overall players; in each team sport, specialized skills for particular positions must be found—there must be adequate numbers of offensive specialists, defensive specialists, and goalies, etc.).

REPORT ON PRINCETON ATHLETICS, *supra* note 15, at 6-7, 10.

The report points out that this emphasis on attracting "competitive athletes" has lowered the academic standards for incoming athletes.

151. THE THREE PART TEST, *supra* note 146, at 7.

152. *Id.* at 10.

153. Nevada ranks only 44th in total high school sports participation. NAT'L FED'N OF STATE HIGH SCH. ASS'N, 1993-94 SUMMARY OF SPORTS PARTICIPATION TOTALS BY STATE (1995).

154. See *Mapping the '94-'95 Rosters*, USA TODAY, June 30, 1995, at 13C.

There are no significant long-standing rivalries and no particular sense of basketball tradition. Nonetheless, the University of Nevada at Las Vegas was able to establish a men's basketball program that was quite successful, at least on the court.¹⁵⁵ How was this done? Of course, most of the talent was imported, sometimes from thousands of miles away.¹⁵⁶ The commercial success of the program was possible, not because of the particular demographics of the UNLV student body, but because there were lucrative commercial markets to be exploited.

The same point — that athletic interest does not simply emerge unaided from the general student body — is reinforced by the increasing use of foreign players in collegiate competition.¹⁵⁷ Some universities engage in extensive efforts to attract foreign athletes. Often standing between the university and the athlete in his native country is a middleman or broker who seeks to profit by "placing" the athlete and steering him toward a professional career.¹⁵⁸ That the school's in

155. UNLV, under the guidance of head coach Jerry Tarkanian, won the national championship in 1989-90 and appeared in the 1990-91 Final Four. After an investigation following allegations that several UNLV players had associated with a gambler previously convicted of sports bribery, the NCAA suspended UNLV from postseason play after the 1990-91 season for numerous violations. Negative publicity forced Tarkanian to retire one year later. Michael J. Goodman, *Throwing in the Towel*, L.A. TIMES, Feb. 16, 1992 (Magazine), at 18. Tarkanian is back coaching, though, in 1995-96 at Fresno State University.

156. The roster of the 1989-90 NCAA champion UNLV men's basketball squad illustrates the extent to which UNLV imported talent:

89-90 UNLV MEN'S BASKETBALL TEAM

PLAYER	HOMETOWN
Larry Johnson	Dallas, TX
Anderson Hunt	Detroit, MI
David Butler	Washington, DC
Stacey Augmon	Pasadena, CA
Greg Anthony	Las Vegas, NV
Moses Scurry	Brooklyn, NY
Travis Bice	Simi Valley, CA
Barry Young	Ellicott, MD
James Jones	Cincinnati, OH
Stacey Cvjnovich	Oxnard, CA

It will be noted that of the ten regular players on the roster, only one lists Nevada as his home state. Telephone Interview with Chris Johnson, University of Nevada-Las Vegas Athletic Information Office (Nov. 14, 1995).

157. American universities have traditionally recruited foreign student-athletes primarily for non-reserve sports such as track and field, soccer, and tennis. For example, thirty-three of the sixty-four entrants in the 1994 NCAA men's tennis tournament were foreigners. Richard Hoffer, *Foreign Legions*, SPORTS ILLUS., June 6, 1994, at 46. In the past few years, however, American universities have begun searching for basketball talent around the globe. The U.S. collegiate game offers the best path into a professional career with the NBA, and foreign basketball stars know that "if you want to play the game, [the U.S.] is the place," as one ex-college coach put it. *Foreign Giants*, ECONOMIST, Jan. 28, 1995, at 86. "Coaches are always searching for new recruiting venues, and I'm not intimidated by crossing six hours of water to find them," said Wake Forest men's basketball coach Dave Odom. Chip Alexander, *The College Game Goes Global*, NEWS & OBSERVER (Raleigh), Dec. 10, 1995 at 1C, 9C. See generally JOHN BALE, *THE BROWN DRAIN* (1991) (discussing the role of foreign student-athletes in American universities).

158. See, e.g., Bill Brubaker, *For Foreign Basketball Talent, He's the Man to See*, WASH. POST, July 8, 1995, at A1 (discussing middleman Rob Meurs, a Dutch basketball recruiter). The Wake Forest

volvement with foreign athletes is often purely athletic is underscored by those cases in which the athlete leaves the country, and his or her academic work, once the season is over.¹⁵⁹ The athlete thus bears little relationship to the typical student. Indeed, at many universities that rely on the recruitment of foreign athletes, there is no significant history of the school recruiting, much less giving scholarships to, foreign students who are not athletes. A vigorous program to attract international students generally would be quite laudable. When the students sought out, however, are only those with extraordinary athletic talents, we have rather convincing evidence that the general student population is not the relevant cohort for determining interest in athletics.

A final point underscores the fundamental importance of recruiting in staffing university athletic teams. At most top programs, admissions standards for athletes are quite different from — that is, much lower than — normal admissions criteria. At Wake Forest University, for example, one recent entering class of basketball players had an average SAT score that was a full 450 points below the mean for the student body on a 1600 point scale.¹⁶⁰ Mark Alesia, the Chicago journalist who developed the profile of UCLA athletics, points out that 41 percent of athletes at UCLA are admitted under special admissions criteria.¹⁶¹ This figure compares with 3 percent for the general student body. Moreover, the special admits are not limited to basketball and football. The following is a sampling of non-revenue sports and the percentage of participants who were admitted to UCLA under lower admissions criteria:¹⁶²

Men's Swimming	46%
Women's Volleyball	48%
Men's Soccer	45%
Men's Track	44%
Women's Softball	40%

University basketball team was placed on probation for one year in 1994 for becoming entangled with a middleman. An interpreter, who was helping Wake Forest translate communications between Sengalese forward Makhtar Ndiaye and Coach Dave Odom, overstepped NCAA rules by providing transportation, lodging, and meals for Ndiaye, thus leading to NCAA censure. Ed Hardin, *Deacons Placed on Probation*, NEWS & REC. (Greensboro), June 22, 1994, at C1.

159. A somewhat extreme, but nevertheless telling example of this type of recruiting is UCLA's use of Tanya Harding in winning the 1995 women's softball College World Series. UCLA recruited Harding from Queensland, Australia midway through the 1995 season. After leading the Lady Bruins to victory, Harding returned to Australia without taking final exams or earning even a single college credit. Although UCLA did not break any formal rules by recruiting Harding, the incident generated heated criticism that some foreign athletes may be little more than hired-guns. Mark Starr, *No Credit For UCLA*, NEWSWEEK, June 12, 1995, at 58; see also Leigh Montville, *Ringer From Down Under*, SPORTS ILLUS., June 12, 1995, at 76 (discussing UCLA and Harding, and comparing a similar incident at Seton Hall involving the departure of Australian basketball player Andrew Gaze a mere three days after Seton Hall lost in the NCAA Final Four).

160. Compare GRADUATION-RATES REPORT, *supra* note 20, at 575, with EDWARD T. CUSTARD, THE PRINCETON REVIEW BIG BOOK OF COLLEGES 1098 (1996).

161. Mark Alesia, *Standards Cut for 41% of Recruits*, L.A. Daily News, Sept. 29, at S1.

162. *Id.*

It is not merely the Big Time schools that define their athletic programs through recruiting. The practice is common for all sports at Brown University, a school that operates an expanded, highly participatory program. In fact, in the *Brown University* litigation, there was a specific finding that the two women's sports terminated by Brown — gymnastics and volleyball — would suffer significantly if they were reduced to club status,¹⁶³ in part because recruiting for such lower status sports was found to be much more difficult than for those that had varsity status.¹⁶⁴

The reality of college sports at both Big Time schools and their "competitive" counterparts is that much of the student participation in sports is the product of very careful administrative design.¹⁶⁵ The implication in the OCR clarification that the choice of level of athletic activity is a response to wellsprings within the student body itself is simply long outdated. There may be some schools at the lowest levels of competition that follow such a model, but the model is not one that controls the direction of athletes at most schools that have found themselves in Title IX controversies.

Moreover, the OCR interpretation suggests outcomes that seem quite clearly to contradict the intent of the statute and original regulations. Could a school with a student body evenly balanced between men and women be in compliance with the statute by offering ten men's sports, heavily subsidized and comprised solely of recruited athletes who were given special admissions exemptions and only a couple of women's teams? Surely not. The notion of equality of opportunity embodied in the statute presumably requires that the question be asked whether a wider array of women's sports could be sustained if there were adequate funding, ample recruiting support, and flexibility in admissions decisions. Without this look to the future, the statute and regulations would operate to enforce a double standard for support of men's and women's sports, an outcome directly contrary to their essential goal.

The question remains as to whether Part Three (less than proportionate interest in women's sports) has any independent meaning as a legal standard for ascertaining compliance with Title IX. Despite the protestation of some schools, the answer is not much in doubt. Part Three does have independent validity and can be used by a school that is truly faced with a situation in which it cannot sustain interest in a wide array of women's sports. Note that the real issue goes to how a lower level of interest can be established. As has been shown, resort to surveys of the normal admissions pool is not a satisfactory response for a school that relies on recruiting to staff its teams.¹⁶⁶ However, for other institutions that depend on spontaneous staffing of teams, surveys can

163. "The bottom line is that Brown knows full well that the two women's teams will not be able to effectively compete at an intercollegiate level without varsity status, recruitment assistance, and some type of guaranteed funding arrangement by the university." *Cohen.*, 809 F. Supp. at 993. Princeton University similarly reports that virtually all of its athletes are recruited. *See supra* note 160, at 10.

164. The then-athletic director at Brown admitted that a club team cannot attract players with the talent or ability to compete at the level of recruited varsity players. 809 F. Supp. at 992.

165. *See generally* George, *supra* note 6, at 655-56.

166. *See supra* notes 151-64 and accompanying text.

have validity in establishing the level of interest that women students have in athletics.

For all schools — those that recruit heavily and those that recruit little or not at all — there is another approach that gives true vitality to Part Three. If a school has given women's sports adequate funding and recruiting support and then later finds that some sports cannot be sustained for an extended period of time, it should be relieved from having to establish substantial proportionality. In other words in cases in which a school has actually tried to meet a proportionate interest and its reasonable efforts have failed, a court can appropriately conclude that the "interests and abilities of the members of the underrepresented sex have been fully and effectively accommodated."¹⁶⁷

A legal standard that encourages a school to find the limit of women's interests by funding a venturesome expansion of women's sports is quite consistent with the intent of the statute. The statute and regulations seek to encourage participation opportunities for women, and Title IX was adopted in a context in which the possibilities for women's sports were quite hopeful though not well defined. Experimentation and exploration are perfect vehicles for moving women's sports forward in a setting where the long-term outcome is not susceptible to current definition. In the face of the long history of disproportionate funding of men's sports, it seems appropriate, and probably necessary, that a modest level of risk be accepted in the support of new women's sports if gender equity is to be achieved.

The question remains as to whether Part Three can ever be satisfied by anything short of an actual finding that programs that were otherwise adequately supported had failed. Again, courts should generally be skeptical of efforts to show a low proportionate interest by survey devices. As previously mentioned, there is a good chance that the pool surveyed will be too narrow. Even when an expanded pool is used, there is reason for doubt. The point of any survey must be qualified by the reality that typically only a small number of athletes are needed to satisfy the statute's mandate. Even if a statistical measure shows that the proportion of women interested in a particular sport at a designated school is less than the proportion of women in the student body, that is hardly evidence that the particular sport will not have sufficient support to sustain itself. The school, after all, is not attempting to provide athletic opportunities for all of its women students, and it needs only a relatively few team positions to satisfy the substantial proportionality test. Imagine that an adequate sampling device could be devised — a doubtful proposition at most schools. Assume that it showed that out of a pool of 10,000 women who could be attracted to the school in a given year, only 37 percent show a significant interest in and ability for the level of competition that is being proposed. Assume further that the student body is 50 percent women. Under these assumptions, the school has not made a case for a Part Three exception. The school may need only 100-200 new female athletes a year to satisfy the requirement of Part One. Thirty-seven percent of a large pool will be more than sufficient to provide the small number of athletes that will establish substantial

167. Policy Interpretation, 44 Fed. Reg. 71,413, 71,418.

proportionality.¹⁶⁸ Careful recruiting will allow a school to identify the women athletes it needs to attract.

While surveys are an uncertain way to establish a Part Three exception, proving the exception by means other than the school's actual experience is a possibility. Presumably a university in Miami does not have to fund a ski team to establish that this is not a suitable women's sport for its school. In the same vein, the actual experience of other schools in the same geographical competitive area is relevant.¹⁶⁹ A court considering such measures should still be somewhat reserved in weighing data of this sort. The evolutionary quality of women's sports should be taken seriously. It is proper that we leave ourselves open to be informed on these questions.

The prior analysis, in addition to establishing the separate viability of Part Three, should also serve to show that Part Two does not collapse into Part One. Recall that the policy question raised is whether the "history and continuing practice" of program expansion under Part Two had to have as its goal the substantial proportionality required by Part One. The clear implication of the immediate prior discussion is that program expansion might indeed have an alternative goal — the lower-than-proportionate accommodation allowed under Part Three in the prior analysis, where a lower level of interest has been reliably shown. Substantial proportionality should be the normal measure, but where the prior experience of the subject school or of similarly situated institutions clearly establishes the futility of that measure, then it need not be mindlessly pursued. Geographic isolation or an extraordinary emphasis on having many

168. An example of the confusion that results from excessive emphasis on the size of a particular student body rather than the much smaller number of women athletes needed for compliance can be found in *Pederson v. Louisiana State Univ.*, 912 F. Supp. 892 (M.D. La. 1996). Although finding LSU in violation of the statute, the court rejected the substantial proportionality test devised by the Department of Education and approved in *Cohen* and other cases. See *Cohen v. Brown Univ.*, 809 F. Supp. 978, 997 (D.R.I. 1992) *aff'd*, 991 F. 2d (1st Cir. 1993); *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824 (10th Cir.), *cert. denied*, 114 S. Ct. 580 (1993); *Horner v. Kentucky High Sch. Athletic Ass'n*, 43 F.3d 265 (6th Cir. 1994). In explaining why it refuses to follow these authorities, the court states:

To accept the [substantial proportionality test], one must assume that interest and ability to participate in sports is equal as between men and women. For instance, if a university has 50% female students and 50% male students, the assumption, under this argument[,] must follow that the same percentage of its male population as its female population has the ability to participate and the interest or desire to participate in sports at the same competitive level.

912 F. Supp. at 913. The court states that it has seen no evidence, either in the case before it or in other decisions, to prove or disprove this assumption.

The fallacy of this analysis is that it assumes that there will be some reasonable effort to accommodate the actual interest that exists. But, of course, that is not the case, and certainly not at a university the size of LSU. In fact, only a very small number of athletes, men and women, will be offered intercollegiate opportunities. The reference point of gender distribution is being used, not to identify potential participants, but rather to influence resource allocation.

169. A Part Three exception must be available if the OCR finds that there is no "reasonable expectation of intercollegiate competition for a particular sport in the institution's normal competitive region." If a school cannot locate "competitive opportunities in the geographical area in which the institution's athletes normally compete," then the OCR will not find a violation under Part Three for that particular sport. THE THREE PART TEST, *supra* note 146.

students vocationally engaged might be enough to establish under Part Two that a school's systematic planning can have a numerical goal less than substantial proportionality.

The bottom line is that the complaint by some that the three-part test is merely a disguised quota statute loses its force when removed from the highly rhetorical forums where it is typically raised. The test of substantial proportionality has received the most attention of the three measures. Some of the reasons why that might be true are explored in the next section. The measure of proportionality has been the standard used to expose the rather consistent lack of compliance in major programs, thus inviting the attacks that have been launched against it. Further, as noted, many schools have removed themselves from the protection of Part Three by their decision to rely heavily on recruiting to secure athletes. Yet none of these developments disproves the independent significance of each of the three parts. Once there are more sincere efforts at planning for compliance with the statute, and once there is more experience with robust efforts to support women's sports, the separateness of the three tests will become more significant.

2. *Judging the Appropriateness of the Three Legal Tests.* A prior section of this article makes the case that the enforcement standard selected to implement Title IX should be sensitive to the historical and structural biases that favor men's sports, should accept that the future configuration of women's sports is uncertain, and should be sensitive to the transitional nature of the regulatory effort that is to be undertaken. The three-part test, when evaluated against these criteria, emerges as an appropriate response to the problems it addresses. A particular virtue — one for which the regulations are seldom given credit — is that they define equal opportunity without attempting to give a fixed definition of the continuing role of the preferred men's sports of football and basketball. While the uncertainty resulting from this flexibility has become a source of strong criticism, the regulatory approach nonetheless seems sound. Adjustments in the status quo must occur if opportunities for women are to increase within present budget limits. The form that those adjustments take is not appropriately dictated by courts and regulators. Some features of the rules warrant clarification. More can be done to define an acceptable planning process, for example. These corrections, though, do not require a fundamental reorientation.

The feature of the three-part test that has received the most criticism may in fact be one of its greatest strengths. The use of the standard of substantial proportionality as the primary measure for judging statutory compliance has a number of attractions. One is the answer it gives to the extremely delicate question of how much deference will be paid to the discretionary judgments of a school's athletic department budget-makers. As noted at length already, there is considerable evidence to support the view that men's sports, especially basketball and football, will be favored in the discretion that is to be exercised. This preference has historically been the case, without question.¹⁷⁰ Moreover, be-

170. See *supra* notes 80-87 and accompanying text for a discussion of decisions by Iowa State and Oklahoma.

cause of the Athletics Arms Race and the persistent pressure to match the program-enhancements of competitors, the budgetary needs of football and men's basketball will be given a first preference. Despite the twenty-year presence of Title IX, the recent pattern of athletic department decision-making confirms that there are still many instances in which women's sports are treated as secondary and contingent. Schools not even remotely in compliance with Title IX have chosen to respond to budgetary problems by terminating women's sports.¹⁷¹ The consistent pattern is that the preferred men's sports are disrupted as little as possible, while the underdeveloped women's program is treated as fair game for dismemberment.

In this environment, it would be inappropriate to have a legal rule that wholly deferred to departmental decisions. Thus, a standard that attempted to judge the reasonableness or good faith of internal departmental decisions would not be desirable. The essential defect in that governance structure has already been revealed. On the other hand, effective compliance is going to require adjustments and compromises that are difficult, if not impossible, to dictate through regulation. For example, there will always be a question as to where the money will come from to support expanded women's sports. And there will be controversial questions about how much of the budget can be claimed by football. Not only are those questions not answerable in the abstract, any effort at regulation would require a degree of governmental micro-management that will almost certainly have the dual defects of intrusiveness and inappropriateness. So, discretion to implement the new regime of expanded women's sports is properly left at the school. Yet a firm directive as to the intended end point is needed.

The test of substantial proportionality is a reasonable effort to strike this balance. Absent other evidence of the sort invited by Parts Two and Three, the percentage of women athletes should approximate that of the proportionate representation of women in the student body. How a school gets to that point, and in particular how the school weighs the numerous trade-offs that will be confronted, is left to the individual school. There is no mandated protection for football and basketball, but there is no ordered contraction either. It may well be that football will be less bountifully supported. To the credit of the regulations, however, they afford each department maximum flexibility to choose the adjustments that will be made.

It is unclear what critics of the substantial proportionality standard would want as an alternative. There seems to be a call that athletic departments should be given more freedom to find an accommodation between men's and women's sports. Given the substantial reasons for doubting that such discretion could be evenly administered, this alternative is potentially much more intrusive than the present standard. Every budgetary decision would be subject to governmental second-guessing, and when sufficient progress toward equality was not forthcoming, the degree of governmental intrusion would increase. By contrast, the present approach is actually much more of a deregulation model. The goal

171. See *supra* notes 82-83 and accompanying text for discussion of decision by Oklahoma to terminate women's basketball in order to cope with budgetary problems.

of decision-making is not discretionary, but how a department gets there and how it resolves the inevitable competing demands is its choice.

A related virtue of the substantial proportionality test is the ease with which it can be administered. This feature produces two very substantial benefits. One is that the test can be administered with relatively low transaction costs. Compared to a purely discretionary standard, substantial proportionality need not require direct and extensive governmental review of departmental decision-making. The school itself can judge whether it is in compliance.¹⁷²

A second attraction is that substantial proportionality promotes public accountability. A number of constituencies have an interest in whether women's sports are being adequately promoted. These include women students, parents, taxpayers, and legislators. Given the historical and structural biases of athletic departments, internally produced appraisals of the progress of women's sports are likely to be self-serving. Substantial proportionality as defined in the regulation is more easily judged. Moreover, the results are expressed in a form that invites ready comparison among schools, thus enhancing consumer and parental choice. As evidenced by the useful surveys published by the *Chronicle of Higher Education*, progress toward gender equity in athletics, both generally and by individual schools, can be treated in four- or five-page compilations.¹⁷³ The alternative of a highly discretionary, internally generated statement of progress offers limited opportunity for cross-comparison and provides no certain measure of achievement.

The existing test seems quite capable of accommodating the "unknown" quality of the future of women's sports. No pre-existing notion of the number or types of sports to be offered is imposed. While critics attempt to paint the statutory tests as rigid and unyielding, they in fact admit of great flexibility in how they are met. For example, women's basketball seems to be the most likely candidate for a highly visible, potentially commercially viable offering.¹⁷⁴ There is, however, no effort to canonize women's basketball or ensure through the statute that it will receive a disproportionate level of funding. Nor is there an effort to mandate female counterparts to existing men's sports. A school with a baseball team need not necessarily have a women's softball team.

One significant caution needs to be added on this topic, however. In discussion of Title IX and in some litigation under the statute, there has been an

172. The University of Mississippi, in its Title IX self-study, was able to make a clearly stated appraisal of the extent to which its then-present practices deviated from the standard of substantial proportionality. See UNIV. OF MISS.-OXFORD REPORT, *supra* note 7, at 6.

173. See *supra* Blum, note 3, at A47; see also *The Numbers Behind Title IX*, NEWS & OBSERVER (Raleigh), June 19, 1994, at 1B (a graphical comparison of the participation statistics for Duke University, the University of North Carolina-Chapel Hill, and North Carolina State University).

174. Basketball appears to be the most popular women's sport both in terms of spectators and teams: Women's collegiate basketball attracted 3.6 million fans in 1994-95 which is more than triple the attendance of 1985. See *supra* notes 124-25 and accompanying text for a discussion of increased popularity of women's basketball. Over 850 colleges offer women's basketball, making it the sport with the most teams at the college level. *Participation Numbers Narrowly Miss Record*, NCAA NEWS, Feb. 15, 1995, at 1, 13. At the high school level, girls basketball is played by more athletes, over 400,000, and offered by more schools, over 16,000, than any other sport. 1993-94 *High School Sports Participation*, NCAA NEWS, Feb. 1, 1995, at 2.

unmistakable effort to impose the men's model of collegiate sports on women's offerings. The attraction of the male model as a benchmark is understandable. If one is seeking to answer the question "what is an appropriate level of support for women's soccer?" for example, the support provided the men's version of this sport is surely relevant. It is this reasoning that has led coaches of women's teams — who may be, and often are, men — to demand pay that equals that of the coach of the comparable men's sport.¹⁷⁵ However, rigid adherence to a sport-by-sport equation should not be added to the statute by judicial or administrative interpretation. To do so would fossilize collegiate sports according to the men's model which has failed in some spectacular respects. In some sports, especially revenue-producing sports, this model has created significant downward pressure on academic standards. Despite many years of supposed-academic reforms, for example, the NCAA basketball tournament regularly includes teams with graduation rates of less than 25 percent. This and other ills of the male model are discussed elsewhere.¹⁷⁶ It is appropriate that women's sports be given the opportunity to develop in ways that avoid these problems.

Lest the point here be missed, it should be recognized that judicial and administrative review will actually be more difficult if an effort is made to maximize the flexibility afforded the future development of women's sports. The male model is an easy test for compliance. It is a model that provides quick answers for questions such as what is an adequate level of support and what is an appropriate structure for competition. But the easy answer may not be the best answer. To take just one example, the male model, as presently practiced, assumes that a school will have only one intercollegiate team in each sport. That

175. See, e.g., Lorraine Kee, *Vols' Summitt Puts New Spin on Pay Debate*, ST. LOUIS POST-DISPATCH, June 10, 1995, at 7C.

176. See *infra* notes 199-05 and accompanying text. A widely quoted commentary argues that the "male model" of athletics has been forced upon female athletes since the NCAA effectively destroyed the Association of Intercollegiate Athletics for Women by establishing championships in some women's sports in 1980. The male model of athletics includes: emphasizing those sports that are revenue producers; distancing college athletics from academic control; placing more importance on the athlete portion of the term *student-athlete*; and focusing more on the development of the student as an athlete rather than as a contributing member of society. The female model, as developed by the AIAW, emphasized greater cooperation between the academic and athletic aspects of the college experience. See Carpenter & Acosta, *supra* note 134, at 338, 391. Another critic agrees, concluding that over the past two decades universities have "abandoned the definition of sport to men's athletics." See Olson, *supra* note 12, at 118. Women coaches and administrators recognize that the male model's emphasis on financial profits is influencing the development of women's sports. Chris Voelz, the women's athletic director at the University of Minnesota, Twin Cities, remarks:

[W]e are being told [women's sports] must be an economic driven model. That's not unlike the rest of this university. . . . It's about, "Can we make a profit?" We used to think [women's sports] had the corner on the purist amateur. There's a need for us to go with the mainstream, and the mainstream expectations of us are to generate gate receipts and donations.

Chris Voelz, *Opinions: Women's Athletics*, NCAA NEWS, Dec. 4, 1995, at 4. The softball coach at Arizona State University comments, "What happened was, women became molded into the male model I thought the whole model would have to change, that [men's sports] couldn't keep being big revenue, big money, big deal. I lost that optimism a long time ago." Linda Wells, *Opinions: Women's Athletics*, NCAA NEWS, Dec. 4, 1995, at 4.

is not inevitable, of course. If there is unusual interest in some sports and less interest in others, the goal of increasing opportunities for women might be better accommodated by having two team offerings. Judging whether there has been sufficient support for women's sports may well be more difficult where the issue is to be resolved in a general way, rather than sport-by-sport. The question will not be whether women have received as much as men, but rather, whether the level of support was sufficient to provide robust and challenging competition.¹⁷⁷

Despite this greater administrative challenge, the potential long-run benefits are quite substantial. The future of women's sports offers many exciting possibilities. The path that lies ahead is not well-marked, but there is little reason to believe that the joys and rewards that women receive from inter-scholastic competition will be exactly the same as for men.¹⁷⁸ It is appropriate then that women's sports be permitted to define their own frontiers. The basic substantial proportionality test has a strong non-directive quality to it which is a further virtue of this approach.

Much of the criticism of Title IX assumes that there must be an immediate and specific answer to the question of how many women's sports a school must offer. The solution to the underrepresentation of women is largely seen as mechanical: add a few more women's sports and everything will be okay.¹⁷⁹ This impatience fails to give proper weight to the objective of the statute — providing equal opportunity for women — and fails to see the appropriateness of the slow, transitional quality of the changes that are appropriate. A realistic view of the development of women's sports over the last twenty years confirms

177. The tension between comparable funding and equitable funding is recognized in existing commentaries on Title IX:

[A]t the root of this debate exists the question of whether gender equity means equality. Title IX specifically "mandates equity, not equality," but what does this mean? One way to view equity is as a state of similarity, where no one gets more than another, but is given fair opportunity, whereas equality is more akin to being identical. In looking at this new push for gender equity, institutions and athletic conferences should be aware of their goals and objectives, as well as their word choice. Equity may be relatively easy to achieve, but equality may only create more problems.

Lamar, *supra* note 99, at 275-76.

178. One commentator has suggested that:

[W]omen's integration into sports will produce a process-oriented, cooperative, competition model of sport rather than merely perpetuate the current model. [A 1984 survey] showed that women participate in sports for different reasons than men do. Fifty-four percent of the women in the survey cited improved health as their reason for participation in sport; fourteen percent cited stress reduction; eight percent cited friendship and sociability; eight percent cited competitions; and only one percent cited winning.

Olson, *supra* note 12, at 145.

179. See George, *supra* note 6, at 653-54. Title IX litigation has demonstrated that many women's athletics programs stopped expanding after the 1970's. Brown University created fourteen women's teams between 1971 and 1977, and then only added one more in the next fifteen years. *Cohen*, 809 F. Supp. at 981. In the Colorado State University case, the Tenth Circuit stated, "[T]he facts as found by the district court (and largely undisputed by defendant) can logically support no other conclusion than that, since adding women's golf in 1977, CSU has not maintained a program of expansion in women's athletics, and indeed has since dropped three women's sports." *Roberts*, 998 F.2d at 830.

that we are only in the beginning of what will be a long process of defining a new societal role for women and athletics.

Whether intended or not, the present regulatory standards show considerable deference to the evolving quality of the women's sports enterprise. As already noted, the regulations avoid mapping out a specific course for the development of specific sports. And there is no effort to forecast which women's sports are to be favored. In addition, all gender-casting of traditional sports is avoided. While including a statement of a preferred goal of substantial proportionality and a recognition of exceptions, the present standard is very much non-regulatory. The details of the movement toward parity are to be provided by the schools themselves. This general approach is well suited to the task of guiding women's athletics through the present period of transition.

A further attraction of the present approach is one that is usually ignored by critics. The regulations are intended to encourage planning. There is no rule mandating that compliance must be immediate. Rather, the opposite is true: under Part Two, a school is in compliance if it can show "a history and continuing practice of program expansion" that is responsive to women's interests.¹⁸⁰ In a neutral environment, such an exception to substantial proportionality seems quite reasonable. The law will defer to departments that are making a steady, conscious effort to reorient their sports program to provide equal opportunities for women athletes. In much of the Title IX discussion, however, this invitation to compliance through planning has largely been ignored. The reason, of course, is that the debate about the statute has occurred in a context that is anything but neutral. Few schools have attempted the systematic transition that Part Two invites, and many schools are seeking to justify overly generous support for the preferred men's sports. Hence, in looking for a defense for this lack of progress, the potential immunity afforded through planning is dismissed as an option. Having not planned well, and wanting to protect the preferred men's sports, schools do not treat this alternative seriously.

Despite this somewhat dismal past, planning and experimentation can still be an effective tool for Title IX compliance in the future. This encouragement of planning will work, of course, only if the OCR shows it proper deference. A definite area for improvement in the overall regulatory scheme is the reception that the agency gives to planned transitions. Much more can be done by the agency to provide guidance on the time frame and rate of progress that will be acceptable.¹⁸¹ But, again, the regulations are to be credited for keeping the tran

180. See *supra* notes 145-46 and accompanying text.

181. In January 1996, the OCR released a clarification of its Title IX regulations which appears to place greater emphasis on a school's long-term athletic policy planning. According to this document, a school would satisfy Part Two's requirement of a "continuing practice of program expansion" if the school demonstrates "the current implementation of a plan of program expansion that is responsive to developing interests and abilities." This plan of program expansion should include efforts to assess developing interests and abilities of the underrepresented sex and timely action in response to these assessments. *THE THREE PART TEST*, *supra* note 146, at 5. Some critics were upset that the OCR might place too much emphasis on planning and not enough on actual expansion. The clarification included an OCR evaluation of four hypothetical athletic departments.

sitional nature of the rule at hand clearly in focus. The opportunity is afforded for a school to both bring itself in compliance with the statute and to avoid any abrupt internal financial disruption.

Another area of potential improvement in the regulation involves a clarification of how Part Three (establishing less than proportionate interest) might be satisfied. As already discussed, it is understandable that proposals to survey student interest in athletics are met with skepticism. Strong football and men's basketball programs typically did not spontaneously leap from within the student body. The excitement they generate is the product of careful manipulation, including the recruiting of athletes who, but for athletic talent, would likely not be part of the student body.¹⁸² A helpful addition to the regulations would be more specific guidance on how relative degrees of interest might be gauged. A promising alternative is one that specifically approves venturesome experimentation by schools. For example, a period of active experimentation in sports programs should be treated the same as systematic planning. As long as a vigorous experimentation model is in effect and sincerely supported, the sponsoring school should be found in compliance. The experimentation that should be welcomed is that which offers less-than-traditional intercollegiate competition in several women's sports for a multi-year period, backed by a promise that the most successful of the experiments will be fully funded for the future.¹⁸³ Such an approach reduces the dilemma that schools presently face in

Women's sports advocates criticized these examples for accepting minimal expansion in women's athletics under the Part Two test. One of the hypotheticals described a school which created seven women's teams in the mid-1970s, added another sport in 1984, elevated another to varsity status in 1990, and plans to add one more women's sport in 1996. The clarification concludes that the OCR would find this school in compliance with Part Two. After reviewing a draft of this clarification, one critic complained, "I think a six-year gap is too long. There are almost six generations [of women students] that have been cheated out of opportunities. I didn't think that example was very good." Mott, *supra* note 15, at 9 (quoting Cary Groth, Athletics Director at Northern Illinois University and immediate past President of the National Association of Collegiate Women Athletic Administrators).

182. See *supra* text accompanying notes 151-65.

183. An appraisal of future prospects for new forms of sports competition best begins with an appreciation of the inherent rigidity in the present conference-based arrangements. At the highest levels of college sports competition, for example, it is assumed that a school will field only one team in each sport, that the primary competition will be against other conference members, and that the appropriate contest is a single game scheduled separately from other contests. Among other things, this approach limits competitive opportunities for participants. At a particular school, there might be an unusual interest in basketball, for example. Under the present model, only a single team is likely to be found. In a different environment, however, it is quite conceivable that a school would have multiple teams in a sport.

Note also that the conference model often requires that teams travel long distances to meet the required level of competition. For non-revenue sports, this can be extremely expensive. It is worth asking how the geographical area of conferences gets defined. In recent years, the answer has little to do with the opportunities for good competition for non-revenue sports. Rather, the primary determinant is often the availability of an attractive television market for one or both of the expensive revenue sports. See, e.g., Rory Glynn, *Xavier's Ticket Sales Improved*, CIN. ENQUIRER, Nov. 2, 1995, at D6 (noting that Xavier's basketball ticket sales increased after changing conferences); Brian Landman, *Same Name, But Different League*, ST. PETERSBURG TIMES, Jan. 17, 1995, at 1C (quoting University of South Florida athletic director Paul Griffin as saying the school's conference change will result in a "substantially larger [economic] pie" . . . this was 'economically and athletically the

having to commit significant resources to a full-blown intercollegiate competition while knowing relatively little about its ultimate prospects for success. Such an approach has the added virtue of shaping the new women's sports frontier in response to what women students want. In selecting which among several competing experimental sports offerings will be made permanent, the degree of student body support presumably will be given considerable weight.

III. BEYOND THE ATHLETICS ARMS RACE: CORRECTING THE "REAL" IMPEDIMENT TO GENDER EQUITY

A careful review of the economics of college sports confirms that Title IX has caused a problem for the preferred men's sports (football and basketball), but it is not the problem that football coaches rail against, and it is not a problem for which women should be blamed. It is appropriate that there be a solution, but since the injury is largely the product of choices made in the operation of revenue sports, the resolution should also come from within these sports, not at the expense of increased opportunities for women. The essence of the argument made by football coaches and advocates is that since there are finite athletic resources, Title IX will take money away from football and thus reduce its quality.¹⁸⁴ In the paradigm in which most football advocates think, Title IX represents a direct dollar-for-dollar threat to the money that goes to football. Left unaddressed are the issues of whether football actually needs as much money as it receives and whether there would be any significant reduction in the overall quality of collegiate football if budgets for the sport were uniformly reduced.

The insight that is missing from the highly vocal attacks on Title IX by football advocates is any recognition that the high consumption financial appetites of football programs come from the pressures of unrestrained economic competition rather than from any serious concern about the quality or safety of the game. In an environment in which the team that spends the most

most . . . beneficial choice . . ."). For a general overview of the reconfigured college athletics conferences, see Gene Collier, *In College Athletics, 10 Doesn't Necessarily Have to Follow Nine*, PITTSBURGH POST-GAZETTE, Feb. 11, 1996, at D6. A healthy encouragement of experimentation would accept that the geographical areas for competition might not be the same for each sport.

Any number of other possibilities suggest themselves. The size of the on-the-field squad might be larger, or smaller, than presently-assumed models. Again, such an arrangement allows for the accommodation of unusual levels of interest. See Sam H. Verhovek, *With 6 Boys and a Football, Tiny Texas Towns Stay Alive*, N.Y. TIMES, Nov. 14, 1995, at A1. In a similar vein, the high cost of single-contest events could be reduced by the simultaneous scheduling of multiple contests, a variation of the approach taken in track.

An obvious concern is that the present bias in favor of the two preferred men's sports might mean that emerging women's sports were systematically relegated to less attractive forms of competition. Without outside oversight, this prospect is quite real. Indeed, the history of Title IX shows that the statute is not self-enforcing and the good-faith of athletic decision-makers cannot be presumed. Thus, any move toward experimentation would have to be accompanied by both neutral external review and evidence of a school's sincere commitment to expanding women's athletic alternatives. At present, it would be important for a school to be able to show that its total financial support for women's sports was appropriate given its budget for men's offerings. That the women's sports took non-traditional forms should be less of a concern, however.

184. See *supra* text accompanying notes 74-75.

wins the most, a school cannot unilaterally reduce its spending to any significant extent if it wishes to remain competitive.¹⁸⁵ If a school caps its own spending, then its competitors will surge ahead. Free spending competitors will win more, and as a result, they will have still more to spend.

It is true that Title IX may upset the competitive relationship between schools. If a school takes seriously its obligations under the statute, it will consume funds that may have otherwise been needed by football to stay competitive in the ever-rising spiral of expenditures. Thus, in the eyes of many football coaches, women's sports are to blame for the disadvantages, real and imagined, seen on the horizon. But a more discerning perspective will see that the real cause of discomfort is the fact that men's revenue-producing sports have set themselves on a course in which there is no foreseeable relief from the pressure for increased spending. As long as competitors can gain an economic advantage by spending more, an institution's budgetary decision-makers will feel drawn to follow suit. Thus, it may be that the solution to the distress that revenue sports feel with Title IX is mutual disarmament, a general capping of expenses at a level that ensures adequate quality but avoids excesses.

We will explore whether an institutionalized cap on football spending would seriously affect quality and whether such a restriction is legally enforceable. On both scores, there is reason for optimism. Before examining these questions, though, it is worth noting how this new assessment of the "real" problem with football would affect the Title IX debate. A couple of examples will be sufficient. The number of men's programs in wrestling and gymnastics have declined in the recent period of expanding women's opportunities.¹⁸⁶ Coaches in these sports have pointedly blamed women's sports and denigrated Title IX as a "quota" or affirmative action statute. If the thesis developed here is correct, then the advocates for declining men's sports have the wrong villain. The real culprit may be the high-dollar men's sports that operate with unrestrained budgets. Rather than castigating Title IX and its seemingly innocuous goal of introducing the athletic department to reforms that occurred fifteen to twenty years ago in academic departments, the disappointed coaches should assail the Athletic Arms Race and the regulatory choices that have allowed it to flourish.

185. A curious aspect of the public debate on the issue of shifting "football" money to Title IX compliance is the lack of recognition that the alleged "problem" in this area could be avoided by an NCAA-wide control. The notion is hardly a new one. For more than ten years, courts in college sports cases have recognized that the pressure to keep up with competition may justify a collective rule that requires uniformity:

[T]he integrity of [college football] cannot be preserved except by mutual agreement; if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed. Thus, the NCAA plays a vital role in enabling college [sports] to preserve [their] character, and as a result enables a product to be marketed which might otherwise be unavailable.

National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85, 102 (1984). This principle was followed in a 1995 district court case in Kansas in which the court concluded that "cost-cutting measures are needed, [and] that amateurism and competitive equity should be maintained" in college athletics. *Law v. National Collegiate Athletic Ass'n*, 902 F. Supp. 1394, 1410 (D. Kan. 1995).

186. See *supra* note 15 and accompanying text.

In the same vein, the present analysis explains why relatively inexpensive women's sports are seen as such a serious threat to men's revenue sports. Recall the numbers from the UCLA budget: \$13 million spent on football and men's basketball and only \$2.2 million spent on all women's sports. Two or three women's sports could be added for \$500,000. This amount, which is modest in comparison to, say, football, is seen as a serious concern. The reason, of course, is that in the present highly competitive environment, amounts that are spent at the margin become quite important. Additional money spent on a coach can move a school's team up a notch athletically. Or it may be that just a little more is needed to have the best weight room, training table, or traveling accommodations. Thus, amounts that are modest in relative terms may be seen as critical in a program's effort to gain a marginal advantage over competitors.

Finally, the thesis developed here explains, in part, why progress toward gender equity has been slow in athletic departments but more noticeable in most other university departments.¹⁸⁷ Unlike competition among academic departments, where success is measured by the ability to attract students and faculty, competition among sports teams depends on an ability to satisfy a public that demands winning teams. This difference doubtlessly explains why there is little internal incentive for a school to step forward and correct its gender imbalance in athletics. Such a step leaves the school vulnerable to its competitors' seizing the moment to move their programs ahead. Moreover, if a school is threatened with litigation or administrative action, resistance to settlement is often attractive. Funds that might be needed to maintain the competitiveness with other schools' football and men's basketball teams will not lightly be "diverted" to women's sports. In short, the theme of the first part of this article is confirmed: even when administrators' intentions are benign, athletic department decision-making is structured so as to carry a significant bias against women's sports. This bias, however, is most appropriately seen as the product of a choice about how revenue sports will compete against one another.

A. An Alternative Model of Economic Competition Among College Sports Programs

An important question raised by any cap on football and basketball expenses is whether the restriction would significantly reduce the quality of the athletic product. The assumption made here is that revenue from commercially successful sports is properly used to achieve meaningful gender equity. This can only happen if the quality of the commercially popular teams is maintained at a high enough level so that an attractive revenue stream is preserved. The issue of the effect on quality is not one that can be finally resolved in these pages, for an intensive factual inquiry is required. There is a significant array of practices in men's basketball and football that appear extravagant and that have only a highly debatable connection to on-the-field quality.¹⁸⁸ Further inquiry is

187. *But see* note 2 and accompanying text.

188. Curtailing some present practices offers the prospect of either significant savings or new revenue, or both. For example, it has never been quite clear why coaches should be allowed to claim the monies paid by athletic shoe companies when a team agrees to wear a particular brand

needed to judge whether a defunding of these practices would have a significant adverse impact.¹⁸⁹

On their face, however, the present economics of revenue sports give reason for doubt as to the inevitability of the present arrangement, especially with respect to Big Time men's basketball and football. As already noted, the

of shoe. Some of these contracts pay upwards of \$400,000 per year. See Darrel Golder, *Hoop Schemes: Coaches Prosper from Shoe Deals*, BOSTON GLOBE, Mar. 26, 1995 (National/Foreign), at 1. It is probably true that schools consent to allowing the coach to keep this money as disguised compensation. However, with appropriate collective action, these sums could be reclaimed by the schools themselves. See Weistart *supra*, note 61, at A18.

Bonus arrangements for assistant coaches also warrant re-examination. The model of incentive pay is highly unusual on college campuses and, with an appropriate collective restraint, seems unnecessary to achieve the needed levels of effort and dedication. See *supra* note 62 and accompanying text.

Another doubtful practice is the phenomenon of a school purchasing three round trip airplane tickets to bring a single recruiting prospect to campus. One ticket is used to send the coach or an assistant to the distant city to accompany the prospect back to campus. Another is used for the prospect himself or herself, and the third is used by the chaperon on the return trip. See Anne Goodman James, *Many Men's Sports Unfairly Imperiled*, NCAA NEWS, Oct. 3, 1994, 4, 5.

One of the more curious customs is that of many Big Time programs that house their football teams at a local hotel before each home game. See John Henderson, *Title IX Battle Rage on, Football Bosses Go on Offensive*, DENVER POST, Jan. 22, 1995, B1 (describing the criticisms of how football money is spent). Such arrangements often involve purchasing meals and lodging for 100-140 people. The justifications for this ritual are varied and somewhat vague. Some contend that isolation from campus will allow the athletes to sleep better. This theory was placed in some doubt when George Welsh, the University of Virginia football coach, offered the view that the important night for sleep before a Saturday game was Thursday night, not Friday. A. J. Carr, *Not Easy to Catch Seminoles*, NEWS & OBSERVER (Raleigh), Sept. 13, 1995, at 5C. Modern sleep research seems to confirm Welsh's view that performance is seldom impaired by fitful sleep the night before. See WILLIAM C. DEMENT, *SOME MUST WATCH WHILE SOME MUST SLEEP* 5-13 (1976). It is quite possible that the expensive "night together" approach of modern college teams is ritualistic behavior that has little on-the-field significance.

189. Many commentators similarly believe that the budgets for revenue sports include unnecessary expenditures which do not affect the quality of play. Nancy Lieberman-Cline offered this advice to athletic officials: "Reduce expenses that don't directly affect the student-athlete The time is gone when schools can spend \$25,000 to recruit a single basketball player. Reduce the standard of living of men's sports by trimming the fat. For instance: why must football teams stay in hotels the night before home games?" Nancy Lieberman-Cline, *Opinions: Gender Equity*, NCAA NEWS, Aug. 2, 1995, at 4. Anne Goodman James, the President of the College Swimming Coaches Association, agrees: "These options for 'trimming the fat' from existing budgets will vary from one institution to another There is no single answer or simple list of cuts that will work everywhere, but the way we currently operate needs to be reviewed." Anne G. James, *Many Men's Sports Unfairly Imperiled*, NCAA NEWS, Oct. 3, 1994, at 4, 5. Commentators from different sides of the Title IX debate agree that uniform cost control measures are needed. Christine Grant, women's athletic director at the University of Iowa, and T. J. Kerr, President of the National Wrestling Coaches Association, support the creation of a national cost-containment committee to be formed to reduce expenses in football and men's basketball. The savings would be used for other sports. Ronald D. Mott, *Interested Parties Play Wait-and-See Following Title IX Hearing*, NCAA NEWS, May 17, 1995, at 1, 24. Football advocates, however, maintain that any reductions in their budgets will have a detrimental impact. Bill Carr, the athletic director at the University of Houston, states, "[T]here has been excess in college football, financially and in other ways, but I think it has been trimmed as far as it can go to still put an attractive product on the field." Bill Carr, *Opinions*, NCAA NEWS, Apr. 12, 1995, at 4.

football program at UCLA costs at least \$10 million per year.¹⁹⁰ Football at a lower, but nonetheless respectable, level of competition costs roughly \$1 million per year.¹⁹¹ While UCLA football offers a higher level of training and performance, it is difficult to explain the ten-fold difference in cost. Similarly, Big Time basketball costs over \$200,000 per player per year.¹⁹² Other schools offer a serious and respectable regional competition for \$30,000 per player per year.¹⁹³ That there is a higher cost associated with the top rungs of competition is understandable. That the difference would be of such a magnitude is less readily explained. Rather than the high cost being a necessity, it is plausibly explained as an excess that makes only an uncertain contribution to overall quality.¹⁹⁴

While much more factual work must be done to clarify the correlation between expense and quality in the college athletics context, there are other experiences in the sports industry that suggest that the relationship is far from direct. One particularly important point can be drawn from the recent history of professional sports. The crucial lesson is that interesting athletic competition does not depend upon a commitment to unlimited expenditures. Professional sports have a long history of imposing devices to control costs and share revenues. Their model is one of cooperation and restraint. The most obvious example in recent years is the equal sharing of television revenues. The NFL has the most complete version of revenue-sharing. Unlike college sports, where the best teams make the most money, the worst NFL team — one with little television appeal — receives exactly the same amount of money as the best, most commercially attractive team. Moreover, stadium revenues are shared on a sixty-forty basis between the home team and the visiting team. This arrangement recognizes that a "game" is in essence a jointly produced product from which each team that plays should profit.

Revenue-sharing is a way to control run-away spending. The best teams cannot keep all of the revenues that might be attributable to their efforts and, thus, have, comparatively speaking, less money to spend. Conversely, weaker opponents are given the opportunity to be rejuvenated by the ample distribution of money from television contracts and other sources. The by-word of most professional leagues is parity.

This same rejection of the free market model can be seen in the rules that control players' salaries. In the last decade, the trend in professional sports has been toward salary caps.¹⁹⁵ There is no doubt that the intent of these measures

190. See *supra* text accompanying notes 47-50.

191. See *supra* text accompanying note 50.

192. See *supra* text accompanying note 52-53.

193. See sample budget for a Division I-AA School and discussion of this budget *supra* at text accompanying notes 89-91.

194. Increases in the budgets of revenue sports may be driven more by the availability of additional revenues than by legitimate program needs. Arthur Padilla and David Baumer's study of Big Time athletic departments concluded that "additional dollars generated by the revenue sports tend to be recycled largely within those sports . . ." Padilla & Baumer, *supra* note 18, at 141.

195. Professional basketball and football leagues already rely on salary caps to retain some control over player salaries. The recent labor negotiations between major league baseball owners and players have included discussions about a proposed salary cap. See Jerry Crasnick, *Humbled*

is to limit total expenditures. Player salaries are the largest item in the professional team's budget, and the caps serve to avoid overspending by wealthier clubs. In prior periods, other devices were used to control costs — reserve clauses, tight restrictions on bidding for players, and rights of first refusal. Much has been written about the effects of leagues moving through these various stages of restraint,¹⁹⁶ but there is very little, indeed almost no, commentary suggesting that the quality of the on-the-field competition suffered significantly as a result of these cost controls.

One might wonder how this could be. After all, is not the essence of the free market model that competition, as opposed to artificial restraints like salary caps and shared revenues, will produce the optimal level of expenditure? In truth, unlimited spending by teams does not ensure the best athletic competition. What makes athletic contests interesting is uncertainty of outcome between skilled and well-prepared teams.¹⁹⁷ Such closeness of competition is not assured with free market spending and indeed is probably inhibited. The balance that engages one's attention is more easily achieved when the preparation for competition includes a substantial element of equalization. This is a lesson that professional sports leagues have understood for most of their history.

The point of the prior analysis is not simply that a cap on expenditures will not diminish on-the-field competition in college sports. Such a cap almost inevitably will *improve* the athletic product that is offered. At present only a few schools can compete at the highest level of competition. The reason, of course, is that it is extremely expensive to remain competitive in the present environment. Few schools can afford the \$10 million that UCLA spends to field its football team. An effective, uniform cap on expenses that is set at a modest level will mean that more teams, potentially many more teams, will be able to participate on an equal footing. Thus, rather than ten or fifteen teams with the ability to vie for the top position in a particular season, the number that are truly competitive could easily expand to several dozen.

Negotiators Head Back to Table, DENV. POST, Nov. 12, 1995, at C14; Alice Lipowicz, *Lobby Tries to Evoke Sympathy for Millionaires: Companies Sports Teams Decry Capping Tax Break at \$1M in Pay*, CRAIN'S N.Y. BUS., Nov. 13, 1995, at 4; Mark Znidar, *Brown: Free Agency Makes New Stadium a Necessity; Bengals President Points to Skyrocketing Costs*, COLUMBUS DISPATCH, Nov. 24, 1995, at 3E.

196. For an overview of player restraints in professional sports, see JOHN WEISTART & CYM H. LOWELL, *THE LAW OF SPORTS* § 5.03 (1979 & Supp. 1985). For an extensive list of case decisions, legal publications, and congressional materials dealing with professional baseball's antitrust exemption and the player reserve clause, see *id.* at 480, n.17. See also JAMES B. DWORKIN, *OWNERS VERSUS PLAYERS: BASEBALL AND COLLECTIVE BARGAINING* (1981) (detailing the failures and successes of the unionization efforts by major league baseball players); JAMES QUIRK & RODNEY D. FORT, *PAY DIRT: THE BUSINESS OF PROFESSIONAL TEAM SPORTS* 179-208 (1992) (tracing the history of the reserve clause and the player reservation system from the late 19th century to the present); Roger G. Noll, *Alternatives in Sports Policy*, in *GOVERNMENT AND THE SPORTS BUSINESS* 411, 415-17 (Roger G. Noll ed., 1974) (discussing alternatives to player reservation clauses); James G. Scoville, *Labor Relations in Sports*, in *GOVERNMENT AND THE SPORTS BUSINESS*, in *id.* at 185-219 (providing an economic analysis of the market for players).

197. Not surprisingly, comparisons of attendance figures reveal that fan interest is highest between evenly matched teams. Contests that are predictably lopsided attract considerably fewer fans on a relative basis. See WEISTART & LOWELL, *supra* note 196, at 595-96.

Some care must be taken in stating the precise lesson to be drawn from the experience of the professional leagues. It is not being proposed here that colleges should reorganize themselves according to the professional model. In fact, the redirection proposed here assumes a much more pervasive control of expenses than is imposed in professional sports. The most desirable change for colleges would go further and control all costs, including costs for coaches, travel, and facilities. The most effective device would be one that imposed an overall budget limit. The measure would specify that total expenditures for football could not exceed a designated amount. Schools would then be encouraged to use their skills in management and administration to produce the best athletic results within these financial parameters. Some schools might spend more on coaches' incomes; others might prefer to emphasize training facilities and related support.

There is an interesting article to be written by someone explaining how and why colleges got drawn into the Athletics Arms Race, especially considering that they had the available evidence from professional sports that strongly suggests that ever-escalating costs have a potentially negative effect on both profitability and overall athletic quality.¹⁹⁸ For our present purposes, it is sufficient to note that the popular discussion on Title IX which characterizes the central issue as good football (or good basketball) versus gender equity is largely misdirected. Because the present state of ever-escalating competition is the product of choice, it can be changed. In any process of reevaluation, there are important lessons to be learned from the limits of the correlation between costs and quality in athletic ventures.

Ending the present pressure for ever-expanding economic competition would have important consequences for women's sports. A uniform cap on expenses for revenue sports offers the attractive prospect of freeing up considerable funds for women's sports while still preserving the high levels of athletic performance that are manifested in the present version of men's revenue sports. There are, however, other, non-financial reasons for defusing the relatively unrestrained competition of the present, reasons that may have legal significance, as will be seen in a later section.¹⁹⁹ The pressures created by the present practices are, in many important respects, incompatible with the educational goals of the sponsoring institutions. In the present environment, there are persistent and formidable internal pressures to maximize athletic revenues. Inevitably this pursuit of an economic advantage comes into conflict with the

198. On the question of why college sports has developed with relatively little sensitivity to the cost controls inherent in the professional model, the following factors seem relevant. Colleges started out with a pre-existing economic separateness between schools; most pro teams come into being solely to contribute to a league-based sports competition. The regulatory body in college sports — the NCAA — was only belatedly visited with the task of economic regulation. By contrast, pro leagues were formed with that function in mind. Finally, in a real sense, the potential for earning high profits was serendipitously visited on college sports, while pro sports leagues have a long history of sensitivity to their profit potential.

199. A uniform budget cap can be expected to attract antitrust scrutiny. An appropriate defense is that the restraint serves to enhance the educational, non-commercial underpinnings of college sports and hence help define it as a distinctive product. See *infra* note 233 and accompanying text.

academic endeavors of the participating athletes. Coaches seek to gain a competitive advantage on the field and are under pressure to pursue the steps that, in their minds at least, will increase the chances of winning. Time spent by athletes studying or in labs or in collateral reading are a threat to the revenue-maximizing steps that the present level of economic competition demands.

Compensation arrangements for coaches reflect this rather singular focus on revenues. If the coach wins, he or she gets paid more. Moreover, the rewards for financial success are often explicit. Many coaches operate under contracts that pay them a bonus for success in bowl games and year-end tournaments.²⁰⁰ Rarely is there a reward for the academic success of players. Athletes in Big Time programs rather consistently report that they feel they lack sufficient time to perform well academically.²⁰¹

Based on the above analysis, one would expect to see significant differences in the academic performance of athletes in revenue and non-revenue sports. In fact, this is the case. Rather consistently, non-revenue athletes often have higher graduation rates.²⁰² Moreover, it is common to find women's sports in which the participants academically outperform the general student body,²⁰³ a rare event in men's revenue sports.²⁰⁴ The persistent anecdotal evidence of em

200. The University of Massachusetts has agreed to give its basketball coach, John Calipari, 35 percent of all postseason tournament revenue. Rubin, *supra* note 129, at 126. The University of Cincinnati has agreed that its basketball coach, Bob Huggins, will earn up to a quarter of a million dollars if his team wins the NCAA championship. *Arena: Sports Briefing*, ROCKY MTN. NEWS (Denver), July 18, 1995, at 12B. As previously noted, bonus arrangements are commonly extended to assistant coaches. See *supra* note 62.

201. See Peter Adler & Patricia A. Adler, *From Idealism to Pragmatic Detachment: The Academic Performance of College Athletes*, in *SPORT SOCIOLOGY: CONTEMPORARY THEMES* 471, 474 (Andrew Yiannakis et al. eds., 4th ed. 1993) ("[f]atigue and restricted time for studying caused many athletes to give up and cease caring about their academic work."); see also Edwards, *The Collegiate Arms Race*, *supra* note 68 (detailing the hours spent each week by student-athlete in sports-related activities).

In a 1994 survey of over 1100 Division I basketball players, 70 percent of the respondents believed that their college grades would improve if they were not on the basketball team. More than half of these student-athletes indicated that they are required to spend more time than they expected on sports-related activities. LIZ CLARK, NCAA BASKETBALL—THE PLAYERS SPEAK: FINAL RESULTS 3, 4 (1994) (results of a survey conducted by the *Charlotte Observer*). In another study, a college basketball player described the physical demands of his sport:

It was all you could do to drag yourself back to the dorm each day. By the time you ate and got back to your room, it was 8:30, and all you could think about was getting your weary bones in bed and getting some sleep. Who had time to study?

Murray Sperber, *College Sports Inc: The Athletic Department vs. the University*, in *SPORT SOCIOLOGY: CONTEMPORARY THEMES* 162, 164 (Andrew Yiannakis et al. eds., 4th ed. 1993).

202. For example, according to the most recent NCAA survey of Division I graduation rates, 58 percent of all scholarship athletes entering college in 1988 graduated within six years. The graduation rate for male basketball players was 42 percent. Debra E. Blum, *Athletes' Graduation Rates*, *CHRON. HIGHER EDUC.*, July 7, 1995, at A34.

203. A recent NCAA study revealed that both black and white female basketball players graduated at a rate more than 10 percentage points higher than black and white females in the general student body. Black females in the student body graduated at a rate of 41 percent while black female basketball players graduated at a rate of 54 percent. The graduation rates for white females and white female basketball players were 61 percent and 72 percent respectively. *Id.*

204. The graduation rates for revenue sports at many Big Time schools is often well below the 58 percent graduation for all scholarship athletes. See *supra* note 203 and accompanying text. Examples of Big Time schools with extremely low graduation rates for male basketball players

barrassing graduation rates of student athletes almost always comes from men's revenue programs. A fair reading of why this is so must recognize that it is not merely the time demands of winning that produce the disparate results. Among other things, the athletes recruited for such programs are often less academically inclined.²⁰⁵ And there is little doubt that the pressures to win detract significantly from the revenue-sport athlete's academic pursuits.

A comprehensive measure to cap and equalize costs in revenue sports will not, of course, eliminate all pressures to win. There will still be rewards for winning and some of them will continue to be financial. There will, however, be a significant tempering of singular focus on winning and hence of its educationally-detrimental consequences. The money race — the race to fund winning — will be eliminated. Meeting budgetary goals will be assured in many programs and relatively easily attainable in others. While athletics will continue to present the risk of tempting students away from classrooms, the diversion will be lessened in degree, if not in kind. A school that supports measures to end the present levels of intense economic competition in sports can honestly report that it is seeking to bring its athletes closer to its academic core.

B. The Legality of Uniform Budgetary Controls

The central legal question raised by any effort to cap football and basketball expenditures is whether such controls would violate federal antitrust laws. The premise of these laws is that economic activity in this country must operate according to a free market, or competitive, model.²⁰⁶ Firms are to compete against one another, generally free of artificial restraints, in an effort to satisfy consumer preferences. Thus, the price at which goods are sold, the characteristics of products, and the quantities that are available are determined by producers' efforts to satisfy consumers. Particularly to be avoided are private arrangements between firms to limit the terms of competition. Price-fixing is condemned, even if the fixed price is arguably reasonable.²⁰⁷ In the same vein, jointly imposed limits on quantities, availability of product, and quality are generally rejected.²⁰⁸ Consumer preference is to determine the mix of goods and the price at which they are sold.

include: Kentucky, 21 percent; Arizona, 20 percent; Syracuse, 20 percent; and Oklahoma State, 11 percent. See GRADUATION-RATES REPORT, *supra* note 21, at 24, 244, 390, 504.

205. See *supra* text accompanying notes 160-62.

206. The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress

Northern Pac. R.R. v. United States, 356 U.S. 1, 4 (1958); see also National Soc'y of Prof. Eng'rs v. United States, 435 U.S. 679, 689 (1978).

207. See United States v. Addyston Pipe & Steel Co., 85 F.2d 271, 282-83 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899); see also National Soc'y of Prof. Eng'rs, 435 U.S. at 689 (1978) (discussing *Addyston Pipe*).

208. See, e.g., Broadcast Music, Inc. v. CBS, 441 U.S. 1 (1979); United States v. Topco Assocs., 405 U.S. 596 (1972); Klor's, Inc. v. Broadway-Hale Stores, 359 U.S. 207 (1959); Fashion Originators' Guild of Am. v. FTC, 312 U.S. 457 (1941); Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918).

The objection will be raised that a general budgetary cap in college sports represents a direct interference with market forces and thus strongly implicates antitrust concerns. No longer would schools be able to seek the economic advantages that might come from spending more on coaches, stadia, promotion, or training facilities. Moreover, individuals who benefit from the present regime of selectively open spending would likely have fewer economic opportunities. In a world with budgetary controls, coaches, trainers, and sellers of weight-room equipment may well find that the markets for their services and goods are diminished.

It would be a bit odd, though, if the law completely prohibited cooperatively imposed controls in college sports. For one thing, to bar such action would make it extremely difficult for schools to achieve a proper balance between athletics and academics. By every measure, athletics is to be ancillary and subordinate to a school's educational function.²⁰⁹ A model of free and open economic competition would fundamentally challenge this ordering and leave individual schools subject to constant pressure to expand the role and funding of athletics. Because resources are limited, diminution of academic programs would be the most likely adjustment. To avoid such a misalignment of priorities, some amelioration from the pure competition model seems warranted.

Presently, college sports function with little resemblance to a true free market model. The bulk of the NCAA's 500-page operating manual is devoted to restraining competition. Under its rules, players cannot be paid.²¹⁰ Only a specified number of scholarships can be awarded.²¹¹ The number of contests that can be played is limited.²¹² The prominence of commercial logos, and hence their market value, is restricted.²¹³ The rules limiting the competitive opportunities of teams literally number several hundred.

While the antitrust implications of NCAA regulation have received attention in only a few cases, the jurisprudence in this area was greatly advanced in 1984 when the United States Supreme Court decided *National College Athletics Association v. Board of Regents of the University of Oklahoma*.²¹⁴ There, the Court made a rather careful effort to craft the analytical framework in which cooperative sports regulations are to be evaluated. The Court's decision ultimately offers strong encouragement for the proposal that increased compliance with Title IX can be achieved by imposing a general budgetary limit on football and basketball expenditures and using the freed-up resources to fund women's sports. The decision generally approves collective actions that promote

209. See, e.g., *NCAA*, 468 U.S. at 101-02; 121-22 (White, J. & Rehnquist, J., dissenting); see also WEISTART & LOWELL, *supra* note 196, at 178-83.

210. 1995 NCAA MANUAL, *supra* note 22, Art. 12.1.1.

211. *Id.* at Art. 15.5.

212. The NCAA has a different maximum number of contests for each sport and each division. Baseball, for example, is limited to fifty-six contests in Divisions I & II, while field hockey is limited to twenty-five dates of competition for all divisions. *Id.* at Arts. 17.2.5.3, 17.6.5.

213. *Id.* at Art. 14.5.4.

214. 468 U.S. 85 (1984).

the distinctiveness of the college version of sports and preserve its historical embrace of educational goals.²¹⁵

1. *The Court's Opinion.* The specific issue in *NCAA* was whether the NCAA had violated the antitrust laws when it imposed rules that severely restricted the number of college football games that could appear on television.²¹⁶ The decision ultimately found these rules to be improper because they lacked a coherent economic and educational justification. The Court, however, used its opinion to indicate the circumstances under which collective action in the sports area would be upheld. The opinion began by settling a point that previously had been much in doubt. The Court very explicitly accepted that the sports industry is different from more common commercial activity because high levels of cooperation among participants is required. In the Court's language, "what is critical is that this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all."²¹⁷ Further, the NCAA's efforts to govern and promote college sports "would be completely ineffective if there were not rules on which the competitors agreed to create and define the [athletic] competition to be marketed."²¹⁸ Thus, in the Court's view, rules dealing with playing area, squad size, and scoring require joint control and

215. The NCAA's attorney, then Professor Frank H. Easterbrook, declared the Supreme Court opinion to be a "substantial victory" for the NCAA. Easterbrook concluded that the justices had held unanimously that the NCAA plays a legal and beneficial role as a nonprofit, self-regulatory association. William H. Hickman, *The NCAA and Televised College Football: Does Economic Efficiency Score Points?*, 11 OKLA. CITY U. L. REV. 323, 352 (1986). As one commentator explained, "the Court noted that many of the NCAA's rules were aimed at defining the particular product—college or amateur athletics . . . ; the Court appeared willing to assume the legitimacy of most NCAA regulations because they help to define and make possible the product." Barry Wertheimer, Note, *Rethinking the Rule of Reason: From Professional Engineers to NCAA*, 1984 DUKE L.J. 1297, 1319-20, 1323. Most of the NCAA regulatory controls would survive antitrust scrutiny because they preserve the "unique" nature of amateur sports and protect the traditions of intercollegiate athletics. Wendy T. Kirby & T. Clark Weymouth, *Antitrust and Amateur Sports: The Role of Noneconomic Values*, 61 IND. L.J. 31, 48 (1985).

216. In 1981, the NCAA entered into four-year agreements which granted the ABC and CBS television networks the exclusive rights to broadcast college football games. The intent of this plan was to "reduce, insofar as possible, the adverse effects of live television on football game attendance" and to spread television exposure among as many colleges as practicable. The plan limited any one school to six television appearances every two years and required the networks to schedule appearances for at best eighty-two different schools over a two-year period. The rules of the agreement permitted the networks to submit exclusive bids for games at essentially fixed prices, severely restricting the schools' bargaining powers. *NCAA*, 468 U.S. at 91-94.

217. *Id.* at 101. This aspect of the Court's analysis represents an important clarification of prior law. In a previous decision, *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), the Court had indicated that any defense of an industry practice that argued, in effect, that competition was undesirable in the particular setting could not be entertained by antitrust courts. Such contentions were, in effect, a request for an exemption from the Sherman Act and would have to be taken to Congress. See 435 U.S. at 689-90. Such a perspective had potentially devastating consequences for the sports industry since many rules and practices were justified on the basis that collective behavior had to be mandated and individualistic impulses restrained. The *NCAA* case made clear that the sports industry was entitled to a special form of analysis under the antitrust laws that accepted the economic interdependence of the various clubs in a league or association. See WEISTART & LOWELL, *supra* note 196, at 109-13.

218. 468 U.S. at 101.

should not be summarily condemned. This characterization of the sports industry contrasts with that which applies to most other areas of commerce. For example, joint control of participant behavior does not appear to be generally necessary in the automobile industry. In that industry any widespread effort at standardization would likely impede innovation and run directly contrary to the goal of relying on consumer preference to set price and output.²¹⁹

Accepting that the sports industry is different, however, does not answer the question of what types of collective restraints will be found acceptable. NCAA confirmed that the ultimate test is whether a particular restraint ultimately enhances competition.²²⁰ As earlier cases had recognized, certain actions that deviate from the free market model may nonetheless enhance competition. A classic example is a joint agreement among traders to accept orders only during regular business hours. While some traders will be disadvantaged — for example, because they cannot immediately take advantage of information gained late at night — the overall efficiency of the market will be enhanced if orders are handled in a concentrated, orderly fashion that requires significantly fewer resources than an unlimited market.²²¹ Restrictions on competitive activity that are short-term or otherwise limited are acceptable if there are ultimate gains that enhance overall competition.²²²

As NCAA made clear, the crux of an antitrust inquiry in the sports area is the justifications put forth in support of a collective restriction. The Court examined the various explanations offered for the NCAA's restrictive television plans and ultimately found them wanting. The proffered justifications either lacked factual support or did not satisfy the requirement of ultimately enhancing competition. It is the Court's discussion of the permissible and impermissible justifications that offers the greatest encouragement for the legality of the proposed budgetary controls.

Two concepts that the Court approved in NCAA are particularly relevant in evaluating the legality of the proposed budgetary cap. One is the Court's recognition that restrictions which serve to define the distinctiveness of a product may be competition enhancing. The other is the Court's acceptance that rules which promote competitive balance on the field can pass muster under the antitrust laws.

The former point was strongly underscored by the Court. A basic theme of the NCAA case is that the general commercial market for sports is enlivened by the presence of multiple products.²²³ Overall competition is enhanced if con-

219. For a further discussion of the characteristics of the sports industry that entitled it to different treatment under the antitrust laws, see WEISTART & LOWELL, *supra* note 196, at 592-97.

220. 468 U.S. at 104.

221. See *Chicago Bd. of Trade*, 246 U.S. at 240. This opinion "recognizes that competing firms may also meet the self-interests of consumers by entering the joint agreements or undertaking joint ventures which will more efficiently allocate resources than could be accomplished separately by each firm." Hickman, *supra* note 215, at 327.

222. The Court has specifically approved a limited covenant not to compete by a seller of a business on the grounds that the negative competitive effects of such a provision are outweighed by the incentive that is created for the seller to devote resources to the business in the first place. *National Soc'y of Prof. Eng'rs*, 435 U.S. at 688-89.

223. NCAA, 468 U.S. at 102.

sumers have clearly differentiated products from which to choose. A wider range of preferences is thereby accommodated. In addition, because consumers have other sports options available, individual producers have a strong incentive to change and refine their particular product to enhance its appeal. In explaining why cooperative behavior among college teams is desirable, the Court observed that

The NCAA seeks to market a particular brand of football— college football. The identification of this “product” with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be compared, such as, for example, minor league baseball.²²⁴

The opinion noted that cooperation among schools is essential in achieving the distinctiveness of their product. In the words of Justice Stevens, “if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might be destroyed.”²²⁵

The Court left no doubt that most restraints imposed by the NCAA are consistent with the goals of the antitrust laws:

[T]he NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable. In performing this role, its actions widen consumer choice — not only the choice available to sports fans but also those available to athletes — and hence can be viewed as procompetitive.²²⁶

Even though the Court found that the restrictions on television appearances by college teams violated the antitrust laws, it stated that “[i]t is reasonable to assume that most regulatory controls of the NCAA are . . . procompetitive because they enhance public interest in intercollegiate athletics.”²²⁷

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.* at 117. The Seventh Circuit applied this principle to uphold the NCAA’s “no-draft” and “no-agent” rules when challenged on antitrust grounds by a college football player who was denied his final year of NCAA eligibility after applying for the NFL draft and employing an agent. The court stated that these rules “promote fair competition, encourage the educational pursuits of student-athletes and prevent commercialism. . . . The no-agent and no-draft rules are vital and must work in conjunction with other eligibility requirements to preserve the amateur status of college athletics” The court held that the plaintiff did not and could not allege any anticompetitive effects of the rules in question. *Banks v. NCAA*, 977 F.2d 1081, 1089-91 (7th Cir. 1992); see also *Law v. NCAA*, 902 F. Supp. 1394, 1399 (D. Kan. 1995) (citing *NCAA* to demonstrate that certain NCAA regulations that may restrain economic competition are crucial to the continued success of amateur athletic competition).

Other commentators believe that the NCAA’s efforts to preserve the unique nature of college athletics resemble the behavior of a classic cartel. Judge Easterbrook has written:

Many scholars understand the NCAA as a cartel, having power in the market for athletes The NCAA depresses athletes’ income—restricting payments to the value of tuition, room, and board, while receiving services of substantially greater worth. The NCAA treats this as desirable preservation of amateur sports; a more jaundiced eye would see it as the use of monopsony power to obtain athletes’ services for less than the competitive market price.

United States v. Walters, 997 F.2d 1219, 1224-25 (7th Cir. 1993).

The Court gave separate treatment to the issue of whether rules that promote competitive balance among teams will be upheld under the antitrust laws. The NCAA attempted to justify its television plan as a way to equalize competition: "Petitioner argues that the interest in maintaining a competitive balance among amateur athletic teams is legitimate and important and that it justifies the regulations challenged in this case."²²⁸ The Court's response to this argument is important for our inquiry about the antitrust status of a uniform budgetary cap. The Court agreed with the NCAA's assertion that promoting competitive balance is a "legitimate and important" interest.²²⁹ It went on to conclude, however, that the particular restraints before it did not further that interest.

The suggestion that the NCAA's restriction on television revenues served to equalize competition and promote competitive balance was found by the Court to be implausible in light of other facts about how college sports were funded. As the Court observed, the television plan "does not regulate the amount of money that any college may spend on its football program."²³⁰ Monies received from other sources were not affected by the television plan, and hence schools with access to large gate receipts or alumnae donations could outspend their less well endowed rivals. A clear implication of the Court's analysis is that a set of restraints that was more carefully focused on a defined group of competition — such as all teams within a division — and one that was more precisely crafted to control general expenditure would be more acceptable for antitrust purposes.²³¹ The Court clearly accepted "competitive balance" as a pro-competitive goal. In that conclusion, it aligned itself with a strong trend among lower court decisions involving professional sports.²³²

2. *Implication of NCAA for a Uniform Control on Sports Expenditures.* The Court's approval of financial measures that effectively limit individual team expenditures offers direct support for the legality of the type of general budget cap on revenue sports expenses that is proposed here. Indeed, the question considered in NCAA is precisely the one that would be raised if an expense ceiling were adopted. The type of cap that would effectively free up money to support women's sports presumably would respond directly to the defect that the Court found in the television plan. The Court found no real restraint on overall expenditures. But an effective control of this sort would be essential in any plan to increase significantly the monies available for new women's offerings. Assuming that the funds-shifting plan were carefully devised, the char-

228. 468 U.S. at 117.

229. *Id.*

230. *Id.* at 119.

231. The Court stated that a collective restriction could be justifiable if it "is intended to equalize competition within any one league." *Id.* at 117-18.

232. See, e.g., *North Am. Soccer League v. National Football League*, 670 F.2d 1249 (2d Cir. 1982); *Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976); *Mid-South Grizzlies v. National Football League*, 550 F. Supp. 558 (E.D. Pa. 1982), *aff'd*, 720 F.2d 772 (3d Cir. 1983); *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462, 504 (E.D. Pa. 1972); see also *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 726 F.2d 1381 (9th Cir. 1984), *aff'g*, 519 F. Supp. 581 (C.D. Cal. 1981).

acteristics that caused the Court to reject the television plan can be eliminated and a uniform budgetary control imposed. Again, the Court has gone a long way to indicate the acceptability of such a measure.

It should be noted, however, that the NCAA case offers a second, largely independent justification for controlling the costs of intercollegiate revenue sports and shifting the savings to the enhancement of women's teams. The Court's acceptance of effective product-defining rules provides an antitrust justification that offers colleges and their governmental organ — the NCAA — considerable leeway in devising rules to shift money to women's sports. A rule that restrained expenditures on football and men's basketball — and women's basketball where necessary — would further sharpen the distinction between the economic product of college sports and other versions of athletics and hence solidify — and in important respects, reaffirm — its unique market position.

The unusual feature of college sports is its deep running historical connection with higher education. While not compelled by market forces, numerous steps are presently taken, as the Court observed, to ensure that this version of sports operates consistently with the basic collegiate values. For example, only students can participate, and they must be enrolled on a full-time basis. In addition, sports are to be secondary to educational goals. Athletes are not to be paid and restrictions are placed on their commercial affiliations. The advent of Big Time, broadcast-driven sports represents a significant threat to the distinctiveness of the college sports product, and much of this threat stems from the unrestrained spending that occurs. Increasingly, the most refined versions of Big Time sports look like their professional counterparts. Product endorsements and commercial affiliations are emphasized. Press relations and player promotion occupy a central place, and "getting on television" is an important end game. The emphasis that is placed on winning "at all costs" denigrates the educational endeavor of the participants and diminishes the academic qualities that are supposed to define the endeavor.²³³ In addition, unrestrained spending encourages a commercial quality that distances the athletic department from other departments of the university. Among other things, the historical ordering of academics first and athletics second is obliterated. As suggested above, a restraint on spending will reduce the pressures that have encouraged athletic departments to operate as detached entities.

Another aspect of product enhancement touches directly on Title IX concerns. While college sports have gained their distinctiveness because of an intimate connection with universities, the nature of the university is changing, particularly with respect to gender issues. Women are increasingly prominent on most campuses, both as students and faculty members. If college sports are to maintain the distinctiveness that they draw from their university attachment, then they too should be expected to move toward greater gender integration. The prevailing budgetary model that favors men's sports is clearly impeding this move toward a totally integrated program. Thus, an adjustment such as a

233. See, e.g., Adler & Adler, *supra* note 201; Sperber, *supra* note 201; Weistart, *College Sports Reform*, *supra* note 134; John Weistart, *Serious Reform of College Sports Must Go Beyond Fine Tuning*, CHRON. HIGHER EDUC., Jan. 10, 1990, at A52.

general budgetary control is an appropriate way to enhance the integrative character of college sports and reinforce the distinctiveness of this product.

There is, of course, more that could be said about both the legality of uniform budgetary controls and how such a cap might be defined. There are a few lower court decisions involving antitrust issues in NCAA regulation that should be examined.²³⁴ Moreover, there are significant potential difficulties in drafting a rule that deals with such issues as when money can be spent on stadium expansion and whether the salaries of coaches and trainers carried on teaching budgets should be treated as athletic expenses. It is not the purpose of this article to resolve all of these questions. The main point of the discussion of the NCAA case is to forestall any suggestion that an effort to devise a truly effective arrangement for funding women's sports would run afoul of the antitrust laws. The Supreme Court only defines the general parameters to be followed to avoid antitrust liability. However, its guidelines are surprisingly responsive to the type of budgetary adjustment that is needed to provide a more substantial and reliable source of funding for women's sports. Indeed, it appears that the question of legality is not the central one. The more pressing issue is one of resolve. Effective external enforcement of the present Title IX interpretations is likely to have a remarkable effect in helping colleges find that resolve.

IV. CONCLUSION

In a very real sense, the present state of affairs of gender integration in college sports is not satisfactory. Supporters of expanded women's sports can properly claim that progress toward gender equity has been slow. Indeed, the fact that the equalization of sports programs lags well behind advances in other aspects of higher education understandably raises suspicions about the sincerity of the efforts that have been made to date. On the other hand, advocates for men's sports feel deeply wronged. After several instances in which schools have dropped men's non-revenue sports and explained their actions on the basis of the need to shift money to women's sports, questions have been raised about the fairness of an interpretation of Title IX that advances the interest of one group by denying opportunities to another. Adding to the debate are the proponents of men's revenue sports, especially football, who believe that Title IX requires the dismantling of their commercially successful ventures. Indeed, what may be most remarkable about the present Title IX debate is the absence of any voice that suggests that the existing trends are acceptable.

A number of different futures for Title IX and college sports can be foreseen. It is quite possible that the recent history of acrimony and slow progress will continue for some time. The present course is particularly subject to the

234. See, e.g., *Banks v. NCAA*, 977 F.2d 1081 (7th Cir. 1992); *Hennessey v. NCAA*, 564 F.2d 1136 (5th Cir. 1977); *Law v. NCAA*, 902 F. Supp. 1394 (D. Kan. 1995); *Gaines v. NCAA*, 746 F. Supp. 738 (M.D. Tenn. 1990); *Justice v. NCAA*, 577 F. Supp. 356 (D. Ariz. 1983); *Association for Intercollegiate Athletics for Women v. NCAA*, 558 F. Supp. 487 (D.D.C. 1983); *Jones v. NCAA*, 392 F. Supp. 295 (D. Mass. 1975); *Kupiec v. Atlantic Coast Conference*, 399 F. Supp. 1377 (M.D.N.C. 1975); *College Athletic Placement Serv. v. NCAA*, 1975 Trade Cas. ¶60,117 (D.N.J. 1974), *aff'd mem.*, 506 F.2d 1050 (3d Cir. 1974).

uncertainties of outside forces. Changes in the political trends in the federal government will speed or retard forward movement as the then-current perception of ideological advantage dictates. By the same token, as long as women's sports are kept in a secondary, contingent relationship with men's revenue sports, a variety of other, seemingly distant events will move the fortunes of women's teams forward or backwards. These include changes in television viewing habits with respect to football and basketball, the development of new forms of non-sports entertainment products, and the revelation of evermore dismaying scandals in Big Time sports.

To the extent that colleges continue to use a model of economic competition to dictate funding levels in men's revenue sports, the present atmosphere of suspicion and political maneuvering will be encouraged. Moreover, there will be a continuing need for strong external enforcement of Title IX. The economic competition model creates a selfishness in men's revenue sports and offers negative incentives for gender integration. Firm outside regulation is thus necessary to correct the distortions that are created.

While the present state of gender integration is not satisfactory, it is important to note that it is not inevitable either. Just as the existing tensions between genders in sports are the product of choice, they can be unchosen. There is an obvious decision that lies ahead and that is whether the economic engine that drives revenue sports will be restrained. The reasons for doing so are immensely attractive. A long-standing source of budgetary distress will be tempered, if not quieted. The attractiveness and variety of sports opportunities will be increased, with relatively little change in the versions that are presently popular. The intensity of external oversight will be reduced. And most importantly, a source of long simmering distrust will be removed. It may even be that universities are able to fulfill their educational function in a more effective way.