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TITLE IX AND COLLEGE SPORT: THE LONG PAINFUL PATH TO COMPLIANCE AND REFORM

ELLEN J. STAUROWSKY¹

In a country devoted to democratic principles of fairness, tolerance, equality, freedom, and justice, the fulfillment of the legal mandate and societal imperative embodied in Title IX of the Education Amendments of 1972 would seem, on the surface, to be imminently within reach. After all, the provision that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance,” resonates with those ideals most Americans hold dear.²

They comprise, in fact, the basis of what President George W. Bush and our nation’s leaders in post-September 11th America frequently remind us and the world is the “American way of life.”³ As Birch Bayh, the former United States Senator and one of the drafters of the Title IX legislation has stated,

What we were really looking for was . . . equal opportunity for young women and for girls in the educational system of the United States of America. Equality of opportunity. Equality. That shouldn’t really be a controversial subject in a nation [that] now for 200 years has prided itself in equal justice.⁴

The challenges and imperfections associated with any democracy emerge when citizens confront the task of living up to and upholding the very ideals they believe central to their identity as a people and the country they call home. Thus, although fundamental principles of equality ought not to inspire controversy, nevertheless, in the “land of the free,” debates about the meaning of equality ebb and flow, sometimes as nothing more than a discernible undercurrent, at other times, in the form of full-blown debates and disputes

1. Professor, Department of Sport Management & Media, Ithaca College.

2. 20 U.S.C. §§ 1681-1688 (2000).

3. Press Release, The White House, President Says Terrorists Won’t Change American Way of Life: Remarks by the President in Photo Opportunity with Members of Congress (Oct. 23, 2001), available at <http://www.whitehouse.gov/news/releases/2001/10/20011023-33.html>.

4. Senator Birch Bayh, Address at The Secretary’s Commission on Opportunity in Athletics 24 (Aug. 27, 2002) (transcript available at the Department of Education’s website –ED.GOV), available at <http://www.ed.gov/about/bdscomm/list/athletics/transcript-082702.pdf>.

that take place in the media, in the courts, in schools, and in our institutions of government.

Perhaps it is not surprising then that the history of Title IX is a history of the conflicts that occur when a society committed to the ideals of equality, struggles with the all-too-human resistance that impedes progress toward attainment of that ideal due to prejudices that marginalize and oppress girls and women. Undertaken with the broad purpose of uplifting ourselves and our society, the airing of opposing perspectives about Title IX over time has been important in clarifying for Americans the benefits to be realized for girls and women who participate in sport and, ultimately, encouraging mass societal acceptance of female athletes. We are no longer a society content, as we were just a short time ago, to routinely prevent girls and women from participating in sport because it is not ladylike, or because of a paternalistic sense of protectionism, or because of sexist presumptions about the fundamental nature of female inferiority.⁵ As sport sociologist, Dr. Mary Jo Kane points out, "The question is no longer, 'Can women play?' The critical question is 'At what level?' That's the 21st century question."⁶

Despite that realization, we remain, thirty-one years after the passage of Title IX, a society in which Title IX enforcement inspires controversy and is subject to persistent public scrutiny. At the time of this writing, the most recent cycle of national debate regarding Title IX as it applies to school athletic programs has just abated. A much criticized, twelve-month study of Title IX conducted by the Commission on Opportunity in Athletics appointed by U.S. Secretary of Education Roderick Paige in June of 2002, in response to a lawsuit brought against the department by the National Wrestling Coaches Association and other men's minor sport groups, came to a quiet end with the publication and distribution of a letter reaffirming established Title IX enforcement guidelines on July 11, 2003.⁷

In the aftermath of the Commission's hearings and subsequent decision on the part of the Department of Education to preserve the existing Title IX policy interpretation, advocates from organizations like the National Coalition for Women and Girls in Education, the National Women's Law Center, and

5. There are several extensive histories of women in sport that examine this issue. See SUSAN K. CAHN, *COMING ON STRONG: GENDER AND SEXUALITY IN TWENTIETH-CENTURY WOMEN'S SPORT* (1994); MARY JO FESTLE, *PLAYING NICE: POLITICS AND APOLOGIES IN WOMEN'S SPORTS* (1996); ALLEN L. SACK & ELLEN J. STAUROWSKY, *COLLEGE ATHLETES FOR HIRE: THE EVOLUTION AND LEGACY OF THE NCAA'S AMATEUR MYTH* (1998).

6. Jere Longman & Ian Zack, *She Got Game*, N.Y. TIMES UPFRONT, May 9, 2003, at 12, 15.

7. Michael Dobie, *Title IX Report Skews the Facts*, NEWSDAY, Feb. 21, 2003, at A81; Ellen J. Staurowsky, *The Title IX Commission's Flawed Lineup*, CHRON. HIGHER EDUC., Feb. 14, 2003, at B20.

the Women's Sports Foundation, declared victory and celebrated a successful defense to an attack they believed had the potential to reverse gains made for girls and women under Title IX.⁸ Alternatively, representatives from groups like the National Wrestling Coaches Association, the College Sports Council, and the Independent Women's Forum pledged to continue pursuit of avenues to reform Title IX because of the alleged cause and effect relationship between Title IX compliance and the cutting of men's minor sports.⁹

Given the polarization surrounding the debate over Title IX, it is not unexpected that a victory/defeat framework would be adopted to characterize and interpret the outcome of the Commission on Opportunity in Athletics. However, if one rejects the assumption that victory can be declared merely because one side's argument carried the moment and contemplates whether any side has truly prevailed, perspectives worth considering are revealed. For instance, the citizenry as a whole most assuredly cannot declare victory when a \$700,000.00, taxpayer-funded, government inquiry, which fueled Title IX passions around the country, politicized the education of children, and slowed enforcement resulted only in a restatement of policy well-established for over twenty-five years and upheld in eight federal appellate courts.¹⁰ Whereas women advocates did win this round of arguments, there is little cause for victory in the reality that they were called upon once again to quell an attack on the rights of female students. And what of the men's minor sport advocates? Even if they had succeeded in vacating Title IX policy, the public debate about Title IX was not going to restore their lost programs or guarantee that those programs would not be cut in the future.¹¹ Thus, even if they had

8. Michael Dobie, "Slam Dunk Victor:" *Bush Administration Gives Sweeping Support to Title IX*, NEWSDAY, July 12, 2003, at A07; Press Release, Marcia Greenberger, National Women's Law Center, A Huge Win for American Girls to Women (July 11, 2003), at <http://www.nwlc.org/details.cfm?id=1582§ion=newsroom>; Press Release, American Association of University Women (AAUW), AAUW Pleased to Celebrate Another 31 Years of Title IX (July 11, 2003), at http://www.aauw.org/about/newsroom/press_releases/030711.cfm.

9. Press Release, Independent Women's Forum, Title IX and Fear of Feminists (July 11, 2003), at <http://www.iwf.org/news/030716.shtml>; Welch Suggs, *Education Department Clarifies, but Does Not Change, Title IX Compliance Guidelines*, CHRON. HIGHER EDUC. (July 14, 2003), available at <http://chronicle.com/daily/2003/07/2003071401n.htm>. (Jim McCarthy, speaking for the group Saving College Sports, described the affirmation of existing Title IX regulations as "sacrificing Rudy on the altar of radical feminism.")

10. Ellen J. Staurowsky, *Don't 'Clarify' Title IX, Live Up To It*, STREET & SMITH'S SPORTSBUS. J., July 28-Aug. 3, 2003, at 26.

11. Discussions regarding wrestling and men's minor sports during the United States Department of Education's Commission on Opportunity in Athletics did not yield any specific recommendations or directives to reinstate programs that had been cut or to add these sports in the future. See *Transcripts from The Secretary's Commission on Opportunity in Athletics*, ED.GOV, at <http://www.ed.gov/about/bdscomm/list/athletics/transcripts.html> (last visited Oct. 4, 2003).

won, what would they have gained?

Thus, at this juncture in the Nation's discussions regarding Title IX, several questions should be raised. First, as critical as debate surely is on these issues, when is enough, enough? When does it become counterproductive and harmful to everyone involved to entertain questions that are found to be baseless and unsupported by factual information? Second, as can happen in any long-standing argument, when does the act of arguing itself overtake the central issues? And has this moment come in the history of Title IX? Third, if in fact winning the argument has become more important than the substance of the argument, what critical issues are being neglected?

This article addresses the relationship between Title IX and the much larger and more problematic area of intercollegiate athletics in higher education. Ultimately, I will argue that the calls for reform are wrongly directed toward Title IX by men's minor sport advocates, who should more rightly be directing their admonitions regarding reform to higher education decision makers, who have been unsuccessful in controlling the college sport corporation. I will further argue that rather than being a hindrance to college sport by insisting on a reordering of priorities within athletic programs, Title IX has presented the best hope for college sport reform, but to date it has largely been ignored. I will offer some suggestions on how Title IX provides the bridge back to the amateur, educational ideal of college sport increasingly disappearing from the American higher education landscape. Finally, I will address some of the impediments that stand in the way of progress on these related issues.

To that end, Section I provides an overview of the history of Title IX, culminating in the most recent action taken by the United States Department of Education. Section II contrasts the conceptualization of college sport as an amateur, educational activity from a Title IX perspective with the conceptualization of college sport as a professional, corporate entity. By understanding this distinction, it is to Title IX that college sport reformers should look in reigning in an enterprise that many believe represents a disconnect between the mission of academic institutions and the commercial/professional interests of a multi-billion dollar industry. Section III considers the dual complications of advocating for equity in an inherently inequitable system while doing so within a climate of distrust.

I. BRIEF OVERVIEW OF TITLE IX HISTORY

Enacted by the United States Congress in 1972, Title IX of the Education Amendments is the law barring discrimination on the basis of sex in school

programs receiving federal financial assistance.¹² The law's prohibition against sex discrimination is both comprehensive and inclusive, "apply[ing] to every aspect of a Federally funded education program or activity (including athletics) and extends to elementary and high schools, colleges, and universities."¹³ About the intent of the legislation, the principal sponsor in the United States Senate, Birch Bayh explained, Title IX was to be a "strong and comprehensive measure [that would] provide women with solid legal protection from the persistent, pernicious discrimination" that rendered women second-class citizens.¹⁴

As a result of Title IX, girls and women gained access to educational opportunities once preserved primarily or exclusively for boys and men.¹⁵ Comparative data of women's experiences in higher education reflect the impact Title IX has had on society overall.¹⁶ In 1972, women earned forty-four percent of all bachelor's degrees.¹⁷ By the year 1998, that figure had risen to fifty-seven percent. During that same period of time, women earning professional degrees rose from six to forty-three percent.¹⁸

In the area of athletics, the effect has been so profound that "it is difficult to believe that our nation's high schools and colleges have not always provided athletic opportunities to their female students."¹⁹ In the time since the passage of Title IX, there has been a dramatic increase in opportunities available for girls and women to compete on varsity athletic teams. At the high school level, 294,015 girls participated in school sports in 1971 compared to over 2.8 million in the year 2002, representing an 847 percent rise in participation.²⁰ Between the academic years 1981-82 and 1998-99, women enrolled in four-year colleges and universities participating in intercollegiate sport rose from 90,000 to 163,000.²¹

12. Diane Heckman, *Scoreboard: A Concise Chronological Twenty-Five Year History of Title IX Involving Interscholastic and Intercollegiate Athletics*, 7 SETON HALL J. SPORT L. 391, 391 (1997).

13. Nancy Hogshead-Makar, *The Ongoing Battle Over Title IX*, USA TODAY, July 2003, at 64.

14. 118 CONG. REC. 5804 (1972).

15. *Title IX Athletics Policies: Issues and Data for Education Decision Makers* (Nat'l Coalition for Women & Girls in Educ (NCWGE), Wash., D.C.), 2002.

16. See generally *Title IX at Thirty: Report Card on Gender Equity* (NCWGE, Wash., D.C.), June, 2002, at 10, available at <http://www.ncwge.org/title9at30-6-11.pdf> [hereinafter *Title IX Report Card*].

17. *Id.* at 2.

18. *Id.* at 10.

19. 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, 52 (1996).

20. *Title IX Report Card*, *supra* note 16, at 2.

21. U.S. GEN. ACCT. OFF., NO. 01-297, INTERCOLLEGIATE ATHLETICS: FOUR-YEAR COLLEGES' EXPERIENCES ADDING AND DISCONTINUING TEAMS 4 (2001); Nat'l Fed'n State High School Ass'ns

A. The Enactment of Title IX and Legislative History

The decade of the 1960s and early 1970s marked a time of significant social change in the United States as the effects of the civil rights, women's rights, and peace movements reverberated throughout the nation.²² A wave of landmark civil rights laws were passed during this time period. Title IX of the Education Amendments was one of those laws.²³

Inquiries leading to the development of Title IX began in the summer of 1970 when Representative Edith Green chaired a set of hearings conducted by the Special House Subcommittee on Education where witnesses testified to significant sex discrimination occurring in educational institutions.²⁴ About the testimony she heard, Representative Green commented, "our educational institutions have proven to be no bastions of democracy."²⁵ The language of Title IX reflects that of the prohibitions against race and national origin discrimination found in Title VI of the Civil Rights Act of 1964²⁶ while also demonstrating the mid-course adjustment that occurred in the development of the legislation. Due to the pervasive levels of sex discrimination in education, an original plan to amend Title VI to include the word "sex" was abandoned in favor of a "more narrowly tailored bill" aimed directly at educational programs.²⁷

Title IX and its application to college sport programs quickly emerged as a point of concern for the then all-male National Collegiate Athletic Association ("NCAA").²⁸ The NCAA's first level of attack, carried forward by Senator John Tower (R-Tex.) in May of 1974, sought to remove intercollegiate athletics entirely from the jurisdictional scope of the legislation itself. Failing that, but remaining fearful that Title IX threatened the existence

(NFHS), *2001-2002 High School Participation Survey*, NFHS.ORG, available at <http://www.nfhs.org/Participation/2002data/Participation01-02.htm> (last visited Nov. 25, 2003).

22. Sue M. Durrant, *Title IX- Its Power and Its Limitations*, J. HEALTH, PHYS. EDUC., REC. & DANCE 60 (1992).

23. *Id.*; KAREN TOKARZ, *WOMEN, SPORTS, AND THE LAW: A COMPREHENSIVE RESEARCH GUIDE TO SEX DISCRIMINATION IN SPORTS I* (1986).

24. *Discrimination Against Women Hearings on Section 805 of H.R. 16,098 Before the Special Subcomm. of the House Comm. on Educ. & Labor*, 91st Cong. (1970).

25. *Id.* As reported in Brake & Catlin, *supra* note 19, at 54 (Senator Bayh, in referring to the hearings, noted "over 1,200 pages of testimony document the massive, persistent patterns of discrimination in the academic world."). See also 118 CONG. REC. 5804 (1972).

26. 42 U.S.C. § 2000d (1994) ("No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.")

27. Brake & Catlin, *supra* note 19, at 53.

28. WALTER BYERS & CHARLES HAMMER, *UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES* 240 (1995).

of men's sports, a modified Tower Amendment attempted to gain an exemption for revenue-producing sports.²⁹ Although the Tower Amendment was approved in the Senate, it was eventually deleted when it reached the conference committee on the Education Amendments Act of 1974. Among a number of other amendments put forward to limit the applicability of Title IX to athletics, an amendment sponsored by Jacob Javits (R-NY) was approved by Congress in 1974 and remains controlling to this day.³⁰ It instructed the Secretary of Health, Education and Welfare (HEW) to prepare regulations for implementing Title IX that "shall include with respect to intercollegiate athletics . . . reasonable provisions considering the nature of particular sports."³¹

This palpable resistance to Title IX is reflected in the process of public comment that occurred following the issuance of the proposed Title IX regulations in June of 1974, which resulted in 10,000 responses being forwarded to HEW, ninety percent of which concerned athletics.³² Bemused by the intensity of the reaction generated when the regulations were circulated, "Caspar Weinberger, then Secretary of HEW, testified only somewhat in jest that he [had] not realize[d] athletics was the most important sex discrimination issue in the country, while issues such as employment at educational institutions were under consideration."³³ Many of the suggestions made during the public comment period were incorporated into the final regulations issued by HEW in the summer of 1975. The forty-five day window of time afforded Congress to disapprove the final regulations by concurrent resolution produced a number of bills reflecting the desire on the part of the NCAA to prevent the application of Title IX to athletics, and failing that, to limit it.³⁴ Some sense of the magnitude of resistance the NCAA marshaled against Title IX and its application to athletics is reflected in correspondence between NCAA officials and then President of the United States, Gerald R. Ford.³⁵ In March of 1975, John Fuzak, president of the NCAA, wrote to President Ford,

29. 120 CONG. REC. 15,322-23 (1974) (statements by Senator John Tower).

30. Hogshead-Makar, *supra* note 13, at 64 (About attempts to amend the legislation, she writes, "When Congress passed the current regulations in 1975, no fewer than nine amendments were introduced that would have weakened the law.")

31. S. Conf. Rec. No. 1026, 93d Cong., 2d Sess. 421 (1974); ELLEN J. VARGYAS, *BREAKING DOWN BARRIERS: A LEGAL GUIDE TO TITLE IX* 7 n.13 (1994).

32. VALERIE BONNETTE & MARY VON EULER, *COMMISSION ON OPPORTUNITY IN ATHLETICS TITLE IX, ATHLETICS BRIEFING BOOK 2* (2003).

33. *Id.*; *H.E.W. Head Says Title IX Won't 'Bankrupt' Schools*, N.Y. TIMES, June 27, 1975, at 16; see also VARGYAS, *supra* note 31, at 7 n.17.

34. VARGYAS, *supra* note 31, at 8.

35. SACK & STAUROWSKY, *supra* note 5, at 121.

who coincidentally was the recipient of the NCAA Theodore R. Roosevelt Award that year, saying, “the HEW concepts of Title IX as expressed could seriously damage if not destroy the major men’s intercollegiate athletic programs.”³⁶ In turn, President Ford communicated a similar concern to Harrison A. Williams, chair of the Senate Committee on Labor and Public Welfare. In the end, none of those bills were adopted and the regulations went into effect in July of 1975.³⁷

Once in effect, there was an expectation that educational institutions would immediately move to comply. In recognition of the massive disparities existing in athletics programs, a three-year transition period was provided for those programs.³⁸ In July of 1978, at the end of that transition period, over 100 athletics complaints had been filed with HEW’s Office for Civil Rights (OCR) but no internal guidelines had been developed for investigating athletics programs.³⁹ While drafting a policy document that would address the vagueness of the regulations, OCR staff consulted with interested parties from around the country, visited eight universities, and entertained 700 public comments before issuing the *Intercollegiate Athletics Policy Interpretation* in December of 1978.⁴⁰ The Policy Interpretation sets out the criteria and tests used to determine “a university’s compliance with the three major areas of intercollegiate athletics governed by the regulations: financial assistance (in the form of athletic scholarships), ‘other program areas’ ([defined] as “treatment, benefits and opportunities”), and equal opportunity (equally effective accommodation of the interests and abilities of male and female athletes).”⁴¹ The operative analysis used to determine compliance in the area

36. *Id.* Reference to the “Teddy” Award was found on a list of recipients at the NCAA website. This is the highest honor that can be bestowed on someone by the NCAA. “The Theodore Roosevelt Award shall be presented annually to a distinguished citizen of national reputation and outstanding accomplishment” Nat’l Collegiate Athletic Ass’n, *NCAA Honors Program: Theodore Roosevelt Award*, NCAA.ORG, at http://www.ncaa.org/awards/honors_program/theodore_roosevelt/ (last visited Oct. 3, 2003).

37. SACK & STAUROWSKY, *supra* note 4, at 121-23. This background becomes important to understanding how the NCAA achieved its goal of derailing Title IX’s applicability to athletic programs through *Grove City* in 1984. *Grove City Coll. v. Bell*, 465 U.S. 555 (1984).

38. BONNETTE & VON EULER, *supra* note 32, at 3. Note: In Linda Carpenter, *Letters Home: My Life With Title IX*, in GRETA L. COHEN, *WOMEN IN SPORT: ISSUES AND CONTROVERSIES* 133, 138 (2001); the NCAA’s effort to undermine the 1975 regulations is documented. In 1976, the NCAA was unsuccessful suing the Department of Health, Education, and Welfare challenging the validity of the regulations.

39. BONNETTE & VON EULER, *supra* note 32, at 3.

40. *Id.*

41. Jill Johnson, *Title IX and Intercollegiate Athletics: Current Judicial Interpretation of the Standards for Compliance*, 74 B.U. L. REV. 553, 558 (1994).

of equal opportunity is the three-part test.⁴²

The logical construction of the three-part test affords three independent means of addressing Title IX's mandate of equal opportunity. Schools may satisfy the first part of the test, substantial proportionality, by providing athletic opportunities to male and female students at a level that reflects the percentage of males and females in the student population. Absent meeting this standard, institutions can demonstrate a history and continuing practice of expanding opportunities for the underrepresented sex (in the vast majority of cases this refers to female students) or the institution can provide information supporting a claim that female students at their school are fully and effectively accommodated and that their interests are met. Although the "Policy [Statement] does not have the force of law, it is the clearest statement of the enforcing agency's interpretation of the regulatory criteria for statutory compliance and, therefore, is accorded substantial deference by the courts."⁴³

As the 1970s came to a close, the OCR was positioned to enforce Title IX in earnest but for the repeated challenges that yet awaited. The question regarding Title IX's applicability to athletic departments persisted into the decade of the 1980s.⁴⁴ Lacking support in Congress, the question would be pursued in the courts early in the 1980s yielding decisions divided over whether Title IX applied only to programs that received direct federal funding within institutions or programs that existed within institutions that received federal funding.⁴⁵ At issue in these cases was the vulnerability of athletic programs to Title IX.⁴⁶ Narrowly interpreted, if athletic departments were not direct recipients of federal funding, then they would not be subject to the requirements of Title IX.⁴⁷

In February 1984, the Supreme Court's decision in *Grove City College v. Bell* achieved that result.⁴⁸ What the NCAA had attempted to achieve through lobbying efforts in Congress came to fruition here. This case is illustrative of the persistence of the NCAA in pursuing this issue. During the

42. *Id.*

43. Brake & Catlin, *supra* note 19, at 57.

44. *Id.* at 58. As the authors noted, "*compare* Rice v. Harvard College, 663 F.2d 336, 338-39 (1st Cir. 1981) (refusing to apply Title IX without a claim that sex discrimination occurred in program receiving federal funds) and Univ. of Richmond v. Bell, 543 F. Supp. 321 (E.D. Va. 1982) (holding that an athletic department which receives no federal funds is not covered by Title IX) *with* Haffer, 688 F.2d 14, 16 (holding that an athletic department is subject to Title IX when university as a whole received federal funds)." *Id.* at 58 n.43.

45. Brake & Catlin, *supra* note 19, at 58.

46. *See generally id.*

47. *See generally id.*

48. 465 U.S. 555 (1984).

time the regulations and policy interpretations were being developed, NCAA officials were actively searching for a college that would litigate this question. They were interested in institutions that were not associated with the highly visible football interests that had driven the discussions leading to the Tower and Javits Amendments.⁴⁹ In August of 1977, administrators at the NCAA had a lead on an ideal candidate, Columbia Bible College, a private, co-ed, and Fundamental institution with an enrollment of 664 students. "The NCAA's interest in Columbia Bible College is evidenced in a memo to Walter Byers from Assistant Executive Director Tom Hansen, who wrote, '[n]ot a member. Can we recruit?'"⁵⁰ It is difficult to know if anything further might have happened with Columbia Bible College. By 1978, Grove City College had appeared on the scene and the NCAA provided support through the services of its legal counsel, Squire, Sanders, and Dempsey.⁵¹

The impact of *Grove City* was immediate on two fronts. Enforcement effectively ceased. "OCR immediately dropped or narrowed almost forty pending Title IX athletics investigations" and "suspension cases where discrimination had been found [to exist]."⁵² At the same time, members of Congress in both political parties introduced bills to broaden coverage of Title IX to include programs that existed in Federally funded educational institutions.⁵³ The road back to Title IX applicability to athletic programs was paved with the passage of the Civil Rights Restoration Act in 1988.⁵⁴

The renewed impetus for Title IX enforcement was further fueled by the 1992 Supreme Court decision in *Franklin v. Gwinnett*,⁵⁵ which established the right of plaintiffs to monetary damages in circumstances where an intentional violation of Title IX occurred.⁵⁶ Heralded as a wake up call for athletics administrators and institutions that had previously faced virtually no meaningful penalties for not complying with the law, *Franklin*, happening twenty years after the passage of Title IX, conveyed a message that a failure to attend to Title IX business was now a costly proposition.⁵⁷

By the late 1980s and early 1990s, increasing institutional awareness of the need to comply with Title IX coincided with an era of downsizing and

49. SACK & STAUROWSKY, *supra* note 5, at 122.

50. *Id.*

51. *Id.* at 122-123.

52. Brake & Catlin, *supra* note 19, at 58.

53. Brake & Catlin, *supra* note 19, at 59.

54. 20 U.S.C. § 1687 (1988) (as discussed in VARGYAS, *supra* note 31, at 10.)

55. *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 76 (1992).

56. *Id.* at 76.

57. Brake & Catlin, *supra* note 19, at 61.

tight budgets. Whereas *Franklin* represented a significant advance in the enforcement of Title IX, the elimination of women's teams due to budget shortfalls led to a surge in Title IX litigation in the 1990s.⁵⁸ In Title IX cases involving access to participation opportunities, federal courts in the First, Third, Sixth, and Tenth Circuits ruled favorably on behalf of female students.⁵⁹ In summary, these courts concluded, upon applying the three-part test, that the challenged schools violated Title IX by failing to provide adequate athletic opportunities for their female students.⁶⁰

These cases also signaled the start of an era of dispute over the three-part test of Title IX compliance, led primarily by those representing major college football interests and men's non-revenue or minor sports. With the Title IX topic dujour now focused on what standards institutions needed to meet in order to comply, discussions arose again in Congress to contest those standards. Having received a sympathetic hearing from legislators like Illinois Congressman Dennis Hastert, a former wrestling coach and president of the Illinois Wrestling Coaches Association, and increasing attention in the press attributing cuts in men's sports to Title IX, the House Subcommittee on Postsecondary Education conducted a hearing on Title IX in May of 1995.⁶¹ As a result of the hearing, OCR was instructed to clarify the three-part test. In the drafting process, OCR distributed the draft clarification to 4,500 educational administrators and others before issuing its *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test*.⁶²

At the time of the subcommittee hearing on Title IX, Congressman Hastert expressed a view that was gaining increasing veracity around the country: the enforcement of Title IX constituted a quota system that jeopardized the future of men's minor sport programs in the country.⁶³ This perspective was also raised in several cases alleging reverse discrimination cases; cases in which male plaintiffs from minor sports like wrestling and swimming routinely failed to establish that the proportionality standard of the

58. *Id.*

59. *Id.*

60. *Id.* at 62; see *Homer v. Ky. High Sch. Athletic Ass'n*, 43 F.3d 265 (6th Cir. 1994); *Favia v. Ind. Univ.*, 7 F.3d 332 (3d Cir. 1993); *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824 (10th Cir. 1993); *Cohen v. Brown Univ.*, 991 F.2d 888 (1st Cir. 1993).

61. BONNETTE & VON EULER, *supra* note 32, at 4 (Congressman Hastert is now Speaker of the House of Representatives.).

62. Letter from the U.S. Department of Education, Office of Civil Rights, *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test* (Jan 16, 1996) [hereinafter 1996 Clarification Letter].

63. BONNETTE & VON EULER, *supra* note 32, at 4.

three-part test was an illegal quota.⁶⁴

B. The Commission on Opportunity in Athletics

Described by several scholars as a backlash against the enforcement of Title IX,⁶⁵ the allegation that Title IX harmed male athletes and was being implemented as a quota system eventually gained enough capital to be included in the 2000 Republican Party Platform.⁶⁶ While rhetorically expressing support for Title IX, President Bush made it clear during the campaign leading up to his assuming office that, in contradiction to the seven federal courts that had determined the three-part test was not a quota system, he supported what he described as a “reasonable approach to Title IX” and not “a system of quotas or strict proportionality that pits one group against another.”⁶⁷ Opposite all fact to the contrary, the inference was that a system of quotas existed.

It was during President Bush’s second year in office that a novel twist in the resistance to Title IX occurred. In January of 2002, the National Wrestling Coaches Association and representatives of other men’s minor sport interests sued the United States Department of Education seeking to have the 1996 Clarification Letter and the three-part test vacated on grounds that they were the product of a flawed process of promulgation.⁶⁸ The plaintiffs also argued that the regulations and the three-part test were “arbitrary” and “capricious.”⁶⁹ While the U.S. Department of Justice requested that the case be dismissed, the White House urged the creation of a commission by the Department of Education to study Title IX and its enforcement. Known as the Commission on Opportunity in Athletics, there was a close similarity between the questions raised for the Commission to address and the issues outlined in

64. See, e.g., *Miami Univ. Wrestling Club v. Miami Univ.*, 302 F.3d 608, 609-10 (6th Cir. 2002); *Chalenor v. Univ. of N.D.*, 291 F.3d 1042, 1043 (8th Cir. 2002); *Boulahanis v. Bd. of Regents*, 198 F.3d 633, 634-36 (7th Cir. 1999); *Neal v. Bd. of Trs.*, 198 F.3d 763, 765 (9th Cir. 1999); *Kelley v. Bd. of Trs.*, 35 F.3d 265, 267, 270 (7th Cir. 1994); *Williams v. Sch. Dist. of Bethlehem*, 998 F.2d 168, 170 (7th Cir. 1994).

65. Brake & Catlin, *supra* note 19, at 55. See also Nicole Stern, *Preserving and Protecting Title IX: An Analysis and History of Advocacy and Backlash*, 10 SPORTS LAW. J. 155, 157 (2003).

66. Republican Nat’l Comm., *A Responsibility Era: Education and Opportunity: Leave No American Behind*, at <http://www.mc.org/GOPInfo/Platform/2000platform3.htm> (last visited Oct. 4, 2003).

67. Press Release, Jacqueline Woods, AAUW, Bush Administration Fumbles on Title IX Support (May 30, 2002), at www.aahperd.org/nagws/title9/pdf/aauwtitleIXrelease.pdf.

68. *Nat’l Wrestling Coaches Ass’n v. Dep’t. of Educ.*, 263 F. Supp. 2d 82, 85 (D.D.C. 2003).

69. *Id.* at 98.

National Wrestling Coaches Ass'n.⁷⁰

In effect, to many observers, the Commission “was established to eviscerate the law’s interpretive regulations via an end run around the courts, the Congress, and the will of the people.”⁷¹ Described as “yet another chapter in an old debate,”

[The Commission] heard from the same groups (and in some cases the same individuals) who have repeatedly lost in the courts and who have found no relief from Congress Having lost in the judicial and legislative branches of our government, they have now turned to the executive branch and the political appointees in the Office for Civil Rights.⁷²

The Commission was widely criticized for several reasons. First, and most obviously, the selection of appointees reflected a studious avoidance of individuals who had express expertise in the area of civil rights. Significantly, “the Commissioners [were] denied the opportunity to ask questions of career civil rights professionals at OCR specializing in Title IX athletics.”⁷³ Some members of the Commission “repeatedly asked for expert assistance on current legal standards, but were ignored by the Department [of Education staffers present at their meetings].”⁷⁴ Second, the composition of the Commission was skewed in favor of the major power brokers in intercollegiate athletics and barely acknowledged the interests of the vast majority of institutions that are expected to comply with Title IX. Of the fifteen appointees to the commission, ten were associated with NCAA Division I-A institutions, the division with the fewest institutions and the greatest interest in obtaining exemptions for revenue-producing sports.⁷⁵ Third, the Commission’s deliberations revealed a significant knowledge gap in terms of basic Title IX principles even after the Commission had been together for eight months, listened to the testimony of over fifty witnesses, received public comment from hundreds of individuals, and accessed to thousands of pages of

70. Press Release, Secretary’s Commission on Opportunity In Athletics: Questions & Answers (June 27, 2002), at <http://www.ed.gov/news/pressreleases/2002/06106272002f-8a.html>.

71. Hogshead-Makar, *supra* note 13, at 64.

72. BONNETTE & VON EULER, *supra* note 32, at 21; see also Sharyn Tejani, *Title IX: The Deregulation Ploy*, MS. (Magazine), available at <http://www.ms magazine.com/june03/tejani2.asp> (last visited Dec. 4, 2003) (“Unable to cut down Title IX through the courts or legislation – though not for lack of trying over the past three decades – conservatives have again turned their attention toward weakening the law’s regulations.”).

73. BONNETTE & VON EULER, *supra* note 32, at 26.

74. Hogshead-Makar, *supra* note 13, at 65.

75. Ellen J. Staurowsky, *Title IX in Its Third Decade: How Will This Ground Hog Day Story Turn Out?*, ENT. L.J. (forthcoming Fall 2003); Stern, *supra* note 65, at 177.

material.⁷⁶

Fourth, keeping in mind that the Commission featured representatives of the higher education community who held advanced degrees, the quality of the Commission's deliberations did not conform to the most rudimentary elements of good research practice and investigation. Information introduced to the Commission was not assessed for accuracy or integrity. Critical analysis of the impact of possible courses of action did not occur. In point of fact, one of the chairs instructed the commissioners to limit the depth of their inquiry because they were not there to "unravel conflicting sets of data and statistics" nor to "assemble a lengthy research document."⁷⁷

The final report of the Commission exemplified the flawed process that existed. So profound were the disagreements among the Commissioners about the final report entitled "*Open to All*": *Title IX at Thirty*, two withdrew their support and authored a minority report.⁷⁸ Former Senator Bayh described the proposals put forth by the Commission as "undemocratic" and "unlawful."⁷⁹ Michael Dobie, a writer for *Newsday*, considered the report

biased from start to finish – in the way it presents history, in the way it selects certain statistics and ignores others, in the way it reflects the tenor of debate among the commissioners, in the way it makes assumptions that have no basis in fact, in the way it seems written to support views held by the Bush administration before the Secretary's Commission on Opportunity in Athletics was ever convened.⁸⁰

In the intervening months between the submission of the report and Secretary Paige's final determination of what he was going to do with the recommendations delivered to him in the report, resolutions were drafted in the House of Representatives and in the Senate cautioning that "if the Department of Education changes Title IX athletics policies, Congress should restore the intent of Title IX through policies that preserve the right to equal

76. Staurowsky, *supra* note 75.

77. *Id.*

78. The Secretary of Education's Commission on Opportunity in Athletics, "*Open to All*," *Title IX at Thirty* (Feb. 28, 2003) [hereinafter *Open to All*]; Donna de Varona & Julie Foudy, *Minority Views on the Report of the Commission on Opportunity in Athletics*, Feb. 2003, at 19 [hereinafter *Minority Report*]. The complete text of both *Open to All* and *Minority Report* are included within this publication. The authors were disenfranchised members of the Commission who expressed concerns that minority viewpoints were not adequately accommodated in *Open to All*, necessitating the expression of those views in a minority report. When Secretary Paige refused to accept the *Minority Report*, Senator Hillary Clinton (D-NY) moved to have the report published in the *Congressional Record*. See 32 CONG. REC. s2892 (daily ed. Feb. 27, 2003). For a fuller exploration of the events leading up to and following the Commission's creation and hearings, see Staurowsky, *supra* note 75.

79. Birch Bayh, *Don't Tamper With Title IX*, BALT. SUN, Feb 3, 2003, at 15A.

80. Dobie, *supra* note 6, at A81.

opportunities in athletics.”⁸¹

The resolution of the National Wrestling Coaches Association suit was published several weeks before the Department of Education announced what it was going to do with the recommendations from the Commission. On June 11, 2003, the case was dismissed. U.S. District Court Judge Emmet E. Sullivan concluded,

Before entertaining claims which contemplate taking the dramatic step of striking down a landmark civil rights statute’s regulatory enforcement scheme, the Court must take pains to ensure that the parties and allegations before it are such that the issues will be fully and fairly litigated. This is particularly true where the challenged enforcement scheme is one which has benefited from more than twenty years of study, critical examination, and judicial review, and for which a demonstrated need continues to be recognized by the nation’s legislators.⁸²

One month later, the Department of Education issued a letter under the signature of Assistant Secretary Office for Civil Rights, Gerald Reynolds, affirming the existing Title IX regulations and policy.⁸³ And with that, another challenge to Title IX had ended, at least for the time being.

II. TITLE IX REFORM V. COLLEGE SPORT REFORM

Prophetically, scholar Susan Greendorfer wrote in the late 1990s that Title IX was on a collision course with mainstream cultural values in America.⁸⁴ Given the events that occurred around the time of Title IX’s thirtieth anniversary, there was not only a collision but a multiple car pile up. About the cultural values operating in college sport, legal scholar John Weistart observed that “[f]or virtually all the history of college sports, all the seats at the table have been occupied by men – and not a particularly broad cross section at that.”⁸⁵ He notes that the changes fostered by Title IX have done little to change the seating arrangement of those at the table. Those

81. H.R. Res. 137, 108th Cong. (2003); S. Res. 153, 108th Cong. (2003).

82. *Nat’l Wrestling Coaches Ass’n*, 263 F. Supp. 2d at 129.

83. Letter from the Gerald Reynolds, Assistant Secretary for Civil Rights, *Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance* (July 11, 2003) [hereinafter 2003 Clarification Letter]. The complete text of the 2003 Clarification Letter is included within this publication.

84. Susan L. Greendorfer, *Title IX Gender Equity, Backlash and Ideology*, WOMEN IN SPORT & PHYS. ACTIVITY J. 69 (1998).

85. John Weistart, *Equal Opportunity? Title IX and Intercollegiate Sport*, 16 BROOKINGS REV. 39 (1998).

changes preference selected male sports and direct a disproportionate amount of the budget to those sports. He continues, “[w]hile this reality of football and basketball as the defining influence is most apt for the 40 or so largest programs in each sport, it is also relevant for smaller programs.”⁸⁶

The interlocking nature of the arguments that get brought to bear on discussions regarding Title IX compliance and intercollegiate sport are revealed here. Because primacy is afforded to the revenue-generators, and the revenue-generators are overwhelmingly male, the strictures of Title IX are tolerated but not embraced. Those who subscribe to the “controlling norm” of male sports, particularly revenue-generating sports, are the ones at the table making the decisions.⁸⁷ They are also the ones orchestrating wave upon wave of resistance. This construction gives rise to a mindset where women are technically regulated, rather than integrated, into the college sport system.

The salience of this understanding provides a different reading to the assessment of the proportionality prong as a quota. The quota argument makes sense within the framework of a college sport system that exhibits a tendency to, as recent past president of the NCAA Cedric Dempsey described, violate the spirit of rules as frequently as rules are made. This tendency on the part of the college sport system to distort the regulatory process ought not to be confused or construed as the desired application of the three-part test. As the courts have determined, the proportionality prong was designed as a starting point in the discussion regarding compliance, not the final determining factor. To choose the option of achieving technical gender equality, rather than attempting to achieve a fully integrated athletic program that has examined and discarded the logics that sustained exclusion, distorts the intent and purpose of the three-part test. This is not the fault of the designers of the test nor the Office for Civil Rights as the enforcement agency. Gender equality can be achieved by technicality or by reasoned and careful planning. If the proportionality prong has been used as if it were a quota by college administrators, this is a reflection of the mode of operating within college sport, and more broadly higher education, not a rationale to alter the three-part test.

Commenting about the tendency of Title IX reformers to blame the legislation for the elimination of men’s teams, Jeff Orleans, Executive

86. *Id.*

87. *Id.* The “controlling norm” mentioned here references Weistart’s work. The overall analysis of the gendered dynamic at work in the decision making process is also strongly advised by legal scholar Deborah Brake’s thoughtful considerations of legal and social theories that converge around Title IX, particularly her thoughts on limitations of formal equality and the need for a more critical analysis of sex difference. See Deborah Brake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 34 U. MICH. J.L. REFORM 13 (2001).

Director of the Council of Ivy Group, likened it to “blaming the IRS for having to pay taxes.”⁸⁸ Locating the responsibility for establishing priorities in athletics programs with administrators on individual campuses, he observed, “There is not enough leadership, not enough good will, not enough courage in enforcing the standard that we have.”⁸⁹

Despite such strong positions, which mirror what the courts have affirmed and the regulations already provide, the resiliency of the arguments that seek to fix the college sport problem by fixing Title IX wind their way through law journal articles and public discourse.⁹⁰ Representative of these ruminations is a model for resolving the “crisis threatening the future of college sports,” a crisis prompted by the “solution to the gender equity problem confronting higher education.”⁹¹ This model for Title IX reform starts from the premise that not all college sports are educational in nature, that some have no educational value whatsoever, and that not all constitute a bona fide business. Following from that premise, a recommendation is made that the problem with Title IX would be solved if those programs qualifying under the business model were given an exemption and excluded from Title IX analysis.⁹² Despite laudatory efforts to distinguish this proposed “business model” exemption from the revenue-producing exemption found in the defeated Tower Amendment, the “business model” exemption is essentially indiscernible from those earlier attempts and vulnerable at several levels.⁹³

88. David Rochelson, *Panelists Debate Effectiveness of Title IX Law*, HARV. CRIMSON (May 12, 2003), available at <http://www.thecrimson.com/article.aspx?ref=348092>.

89. *Id.*

90. Selected law review articles that touch upon this topic include: Robert C. Farrell, *Title IX or College Football?*, 32 HOUS. L. REV. 993 (1995); Ross A. Jurewitz, *Playing At Even Strength: Reforming Title IX Enforcement in Intercollegiate Athletics*, 8 AM. U. J. GENDER SOC. POL'Y & L. 283 (1999); Christopher P. Reuscher, *Giving the Bat Back to Casey: Suggestions to Reform Title IX's Inequitable Application to Intercollegiate Athletics*, 35 AKRON L. REV. 117 (2001). On national television, the special status of football is often discussed on such shows as, *60 Minutes* (CBS Television broadcast, June 29, 2003). The pervasive concerns about how the enforcement of Title IX and its relationship to major programs is also reflected in the inclusion of the question “How do revenue producing and large-roster teams affect the provision of equal opportunities?” contained in the charge to the Commission on Opportunity in Athletics. See also Lee Sigelman & Paul J. Wahlbeck, *Gender Proportionality in Intercollegiate Athletics: The Mathematics of Title IX Compliance*, SOC. SCI. Q. 518 (Sept. 1999). They note, “The reallocation strategy appears to present the most inviting avenue to compliance, although the only scenarios in which most football schools come close to compliance would involve exempting football from Title IX coverage or placing a fifty-player cap on football rosters.” *Id.* The authors note that neither is likely to happen. The point, however, is these ideas continue to circulate in the discourse to impede progress.

91. Matthew L. Daniel, *Title IX and Gender Equity in College Athletics: How Honesty Might Avert A Crisis*, 1995 ANN. SURV. AM. L. 255, 255 (1995).

92. *Id.* at 306-313.

93. *Id.* at 310. Note: The ideas discussed have considerable value to the advancement of

First, it assumes that there is only one direction to move in fixing the problem, and that is to limit opportunities available for girls and women, thus, maintaining the gender order as it is with regard to Weistart's notion of who is at the table making decisions.⁹⁴ In essence, women who are attempting to participate in educational sport programs are harmed because of the normalized nature of the business of big time (read male) college sport. At the same time, it shifts the form of potential sex discrimination from educational sport opportunity to professional sport opportunity. Birch Bayh's analysis at the time the Tower Amendment was first proposed, resonates here.⁹⁵ The focus of the discussion is no longer on the civil rights of the underrepresented, but on the business interests of the college sport enterprise. Theoretically, and some would argue in actuality, the operating values within the system protect the mass spectacle at any price, not the educational interests of females denied access to opportunity. Additionally, if women, by virtue of being systemically rendered economic dependents to male wage-earners (i.e., football pays for women's sports), are excluded from the opportunity to become wage earners themselves because of the gendered economic priorities of the institution, distorted as these may be, then sex discrimination has not been eradicated, merely given a new façade.⁹⁶

Second, the premise upon which proposals advocating for revenue-sports to be exempt from Title IX is grounded in a belief that the saving grace for this business enterprise is its educational purpose in providing funds to sponsor lower level men's and women's sports and enhanced name recognition for institutions. The enduring resiliency of this line of reasoning is baffling given the ever-growing body of information regarding the state of college sport programs. In one of the 2001 State of the Association addresses, former president of the NCAA, Cedric Dempsey, reported that rising revenues generated from intercollegiate athletics were being "overwhelmed by even higher costs."⁹⁷ As an association, the more than 970 members of the NCAA

discussions regarding college sport reform. I would disagree that the ideas presented here should be discussed as a resolution to the Title IX problem. The practices of college sport are the problem, not the civil rights of female students previously excluded from opportunities. The author suggests that this is a "gender-neutral" approach because the focus is on those teams that run as "businesses." However, the NCAA Division I Philosophy Statement ensures that the most profit-centered sports sponsored will be "the traditional spectator-oriented, income-producing sports of football and basketball." See 1998-1999 NCAA MANUAL, ART. 20.8, DIVISION I MEMBERSHIP REQUIREMENTS, DIVISION I PHILOSOPHY STATEMENT 342.

94. Weistart, *supra* note 85, at 39.

95. Brake & Catlin, *supra* note 19, at 54.

96. Ellen J. Staurowsky, *Examining the Roots of a Gendered Division of Labor in Intercollegiate Athletics: Insights into the Gender Equity Debate*, J. SPORT & SOC. ISSUES 28 (1995).

97. KNIGHT FOUND. COMM'N ON INTERCOLLEGIATE ATHLETICS, A CALL TO ACTION:

were bringing in just over \$4 billion a year while spending \$5.1 billion.⁹⁸ In that same year, the Knight Foundation Commission on Intercollegiate Athletics identified the “athletics arms race,” along with academic transgressions and commercialization, as “evidence of [a] widening chasm between higher education’s ideals and big-time college sports.”⁹⁹ The Commission further described that, “a frantic, money-oriented modus operandi that defies responsibility dominates the structure of big-time football and basketball.”¹⁰⁰ Former commissioner of a major conference, John Gerdy has written, “We can no longer deny that college sports, particularly big-time college sports, are in direct conflict with virtually every value an academic institution should stand for.”¹⁰¹

The point of curiosity here is the readiness with which those who favor exemptions for revenue-producers assume that the money is being used for an educational purpose and, therefore, make the defense of revenue producers justifiable. Arguably, there is nothing in the financial practices of big-time intercollegiate athletics programs from which to infer that the “athletic arms race” encourages revenue-generators to be willing revenue-sharers with the less fortunate.¹⁰² This would make them benevolent philanthropists rather than pragmatic providers. And big-time college sport is not in the business of gift-giving.

Witness the corporate raid by the Atlantic Coast Conference (ACC) of

RECONNECTING COLLEGE SPORTS AND HIGHER EDUCATION 17 (June 2001), *available at* http://www.knightfdn.org/publications/knightcommission/KCfinal_06-2001.pdf. Note: Cedric Dempsey, *The Funding Dilemma*, (June 17, 2002), *at* <http://www.ncaa.org/eprise/main/ceo/dempsey-messages/Funding-dilemma.html>. Mr. Dempsey reported: The soon-to-be released Revenues and Expenses report compiled from data submitted by member schools will show that the number of programs in Division I-A that have revenues remaining after expenses (and excluding institutional support) has fallen from forty-eight to forty in the last two years. Adding to the elite status of those forty programs where revenues exceed expenses is the fact that the average margin has increased from \$3.8 million two years ago to \$5 million today. And the average deficit for the others has increased from \$3.3 million to \$3.8 million. Divisions II and III aren’t exempt from the spending spree. After a decade of modest increases in Division II deficits, the average in 1999 jumped 21% for the 1997-99 reporting period and rose above the million-dollar mark for the first time. And while revenue figures are not kept for Division III, expenses for that division jumped 30% from 1997 to 1999 –by far the highest single reporting-period increase since the NCAA has been tracking the numbers. *Id.*

98. Dempsey, *supra* note 97.

99. KNIGHT FOUND. COMM’N ON INTERCOLLEGIATE ATHLETICS, *supra* note 97, at 4.

100. *Id.* at 17.

101. John R. Gerdy, *Athletic Victories, Educational Defeats*, ACADEME 33, 33-34 (2002).

102. Note: I am using literary license here because I know, technically, schools participate in revenue-sharing agreements with the NCAA and conferences. At the same time, Walter Byers and others have referred to this arrangement as a money-laundering scheme; thus, the distinction I draw above.

the Big East during the summer of 2003.¹⁰³ Consistent with a shift from “bus leagues,” composed of regional rivals grouped together for proximity as well as prowess to “business leagues,” conference liaisons formed to maximize market position and enhance brand image, the ACC bid to draw schools away from the Big East was a move to become the dominant conference on the east coast.¹⁰⁴ This was a case of one prime time media property, with broadcast relationships with six networks, exhibiting the familiar Darwinian survival of the fittest strategies that have so popularized another prime time television show, *Survivor*.¹⁰⁵ The economics of the entertainment industry, distinct from education, drive the priorities:

In football and basketball. . .the school that spends the most wins the most, and the school that wins the most has the most to spend. If a competitor builds a lavish state-of-the-art weight room and hires an array of strength coaches, the home team is instantaneously at a disadvantage. It has lost an edge in its ability to recruit the most exquisite talent, the talent that will ensure lucrative television contracts and ample post-season receipts.¹⁰⁶

Evidence that spending is the name of the game is seen in the doubling of average athletics budgets at schools in the six major conferences that participate in the Bowl Championship Series.¹⁰⁷ During the five-year time period between 1996-1997 and 2001-2002, budgets rose from \$14 million to \$34 million.¹⁰⁸

When examined through the lens of the regulations that the NCAA adopts in the name of amateurism and for the purpose of regulating and controlling its means of production, otherwise known as athletes or more appropriately workers, the point becomes even clearer.¹⁰⁹ If administrators at NCAA member institutions cannot bring themselves to “voluntarily give up some of these revenues” to compensate athletes in the so-called revenue-producing sports as recognition of their market value, they are less likely to be

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

104. *Id.*

105. The Official Website of the Atlantic Coast Conference, at <http://www.acc.com> (At the bottom of the ACC's webpage are the logos of the ACC's relationships with ABC, CBS, ESPN, FoxSportsNet, The Sunshine Network, & Comcast Sports Net.).

106. Weistart, *supra* note 85, at 41.

107. CNN, *Analysis Finds Gap in College Sports Spending* (July 22, 2003), at <http://www.cnn.com/2003/EDUCATION/07/22/title.ix.costs.ap>.

108. *Id.*

109. SACK & STAUROWSKY, *supra* note 5; ANDREW S. ZIMBALIST, UNPAID PROFESSIONALS: COMMERCIALISM AND CONFLICT IN BIG-TIME COLLEGE SPORTS (1999).

persuaded to share with the non-revenue producers.¹¹⁰ “The college athletics arms race continues to escalate right into the presidential suites despite the presidents’ protests to the contrary.”¹¹¹

And what would be the implications if revenue-producers were awarded an exemption? Given the excessive spending and lack of fiscal accountability that have become the hallmarks of major college sports programs, how would exempting revenue-producers from the reach of Title IX improve college sport?¹¹² About the purpose of the NCAA’s principle of amateurism, the now retired, first-full time, executive director of the NCAA, Walter Byers wrote, “Collegiate amateurism is not a moral issue. It is an economic camouflage for monopoly practice.”¹¹³ An argument can be made that the thin veneer of amateurism that envelops the college sport entertainment complex is secured by the uncorrupted educational interests that serve as the basis for Title IX’s application in the programmatic area of athletics.¹¹⁴

Contrary to misperceptions that the NCAA is the single authoritative voice in defining college sport as an educational, amateur activity, and the rulings of judges who accept the NCAA on its word alone when the NCAA cites the manual that it wrote,¹¹⁵ it is Title IX that offers the sounder ideological

110. Richard Just, *Outside Shot: Can the Next NCAA President Reform College Sports?*, AM. PROSPECT 15, 16 (2002).

111. Len Elmore, *ACC Realignment Puts Knight Report in the Dustbin*, STREET & SMITH SPORTSBUS. J. 25 (2003).

112. For some insight into the creative financial accounting used in college sport, see Michael Sokolove, *Football is a Sucker’s Game*, N.Y. TIMES, Dec. 22, 2002, at 36.

None of this – the salaries, the utility costs, the \$8,000 a year just in laundry detergent – is charged against football. Nor is there any attempt to break out football’s share of such costs as sports medicine, academic tutoring, strength and conditioning, insurance, field upkeep or the rest of its share of the more than \$5 million in general expenses of the athletic department not assigned to a specific sport.

Id. at 40.

113. Steve Rushin, *Inside the Moat*, SPORTS ILLUSTRATED, Mar. 3, 1997, at 68.

114. *Georgia In My Wallet*, THE ECONOMIST, Mar. 15, 2003. This veneer of amateurism is sometimes referred to as the headline suggests.

115. *Bloom v. Nat’l Collegiate Athletic Ass’n*, No. 02-CV-1249 (20th Dist. Ct. Colo. Aug. 15, 2002). In the opinion written by Judge Daniel C. Hale, significant deference is accorded to the NCAA’s published principles of amateurism. For a discussion regarding the strength of the NCAA’s amateurism principles, see Kristin Muenzen, Comment, *Weakening Its Own Defense? The NCAA’s Version of Amateurism*, 13 MARQ. SPORTS L.REV. 257 (2003), which reads, “Courts have consistently approved of the NCAA’s mission and preservation of amateurism in intercollegiate athletics because of the uniqueness of college sports, as compared to professional sports.” *Id.* at 274. The very fact that it is the “collegian image” that provided the edge for college sport programs to succeed against their competitors, professional sport franchises, is indicative of the sophistry at work here. For further elaboration on this, see MURRAY SPERBER, BEER & CIRCUS: HOW BIG TIME COLLEGE SPORT IS CRIPPLING UNDERGRADUATE EDUCATION (2000).

foundation for college sport to legitimately be conceptualized as having educational value.¹¹⁶ Even the NCAA's Division III, "often portrayed as an idyllic bastion of pure amateurism," is now struggling with the erosion of amateur, educational ideals.¹¹⁷ In a survey of the Division III membership, 120 institutions representing roughly a third of those responding "expressed some support for a splintering of Division III."¹¹⁸ Citing the effects of a preoccupation with competition and winning over participation, those supporting the split identified a need for more restrictive rules on length of seasons, recruiting, eligibility, and protracted off-season practices.¹¹⁹

The reason the revenue-producing capability of certain sports is irrelevant to Title IX analyses is the educational interests of students do not reside in the Bowl Championship Series or the NCAA's \$6 billion television contract with CBS, or the myriad of marketing and merchandising opportunities associated with the product and production of college sport. Revenue-production marks the intersection between college sport and commerce. Title IX marks the intersection between college sport and higher education. So long as institutions of higher education are willing to promote a select number of teams as televised sport spectacle (those teams in the vast majority of cases being men's basketball and football), the system remains inherently unequal. Thus, not only does the notion that adopting a business model approach "defeat[] the purpose and spirit of Title IX,"¹²⁰ the business model already adopted in athletics is defeating the purpose and spirit of college sport itself.

When understood from that perspective, men's minor sports will not find the relief they seek in Title IX reforms because their concerns lie outside of the realm of Title IX. As Hogshead-Makar explains:

The purpose of Title IX is to make discrimination based on gender in

116. The history of women's college sports have paralleled the calls for college sport reform for over 100 years. Scholars have documented the concerns female physical educators and athletic leaders expressed from the early 1900s to the present about the corrosive effect of commercial, entertainment influences on the educational foundation of college sport. The model for educational/amateur athletics has consistently been a "women's model" of college sport. See SACK & STAUROWSKY, *supra* note 5, at 51-76.

117. Bill Pennington, *Playing for Victory, Or Simply to Play? Colleges Are Split*, N.Y. TIMES, May 25, 2003, at 1.1. NCAA Division III has been examining a number of issues regarding the principle of amateurism as a way of maintaining consistency with amateur, educational principles of participation. See Kay Hawes, *Division III Management Council Plots Legislative Course for Future*, NCAA NEWS, (Aug. 4, 2003) available at <http://www.ncaa.org/news/2003/20030804/active/4016n01.html>.

118. Pennington, *supra* note 117, at 1.1.

119. *Id.*

120. Sudha Setty, *Leveling the Playing Field: Reforming the Office for Civil Rights to Achieve Better Title IX Enforcement*, 32 COLUM. J.L. & SOC. PROBS. 331, 353 (1999).

education and athletics unlawful. It is not designed to protect sports or any particular men's or women's sport or team. Title IX does not prevent schools from abandoning the educational mission of athletics, and it cannot stop schools from deciding to drop a men's team, or, indeed, it's entire athletic department. It does not give pretext to schools that make indefensible decisions. The law is limited to providing boys and girls, men and women, with educational experiences equitably.¹²¹

Clear as the parameters are regarding the educational interests of students under Title IX, those interests are much less clear in other issues involving college sport. In a contemporary sense, nothing exemplifies this more than the case of *Bloom v. NCAA*. A two-sport athlete who is in the unique position of being a world-class moguls skier and scholarship football player, Jeremy Bloom sought an exemption from NCAA prohibitions restricting earnings based on athletics ability so that he could continue to receive remuneration from endorsement contracts and acting/modeling opportunities generated from his career as a moguls skier.¹²²

Arguing that he was like any other college student who had skills, talents, and interests beyond his involvement in NCAA sports, and like any other college student, he

wished to pursue those outside interests and be compensated accordingly, the NCAA denied his request. Its denial was based on the rationale that his acceptance of compensation earned from opportunities arising from his ski career, demonstrated as they were on mountain slopes and not in a football stadium, would violate the NCAA principles of amateurism. In August of 2003, Mr. Bloom wrote in a *New York Times* editorial, "What [I have discovered] is that the benefits of being a student become clouded when you add the word 'athlete'."¹²³ The cloud to which Mr. Bloom refers may, in fact, become a shroud in which the NCAA may wrap itself in one day. Writing about the need for the major college sport powers to radically change their mode of operation, former University of Michigan president, James Duderstadt, has suggested that the future of college sport holds two possible outcomes—reform or extinction.¹²⁴

121. Hogshead-Makar, *supra* note 13, at 66.

122. *Bloom*, No. 02-CV-1249 (The Honorable Daniel C. Hale Presiding), *appeal filed*, No. 02-CA-2302 (Appeal from the Denial of a Preliminary Injunction by the District Court for Boulder County, Division 2).

123. Jeremy Bloom, *Show Us the Money*, N.Y. TIMES, Aug. 1, 2003, at A23.

124. JAMES J. DUDERSTADT, INTERCOLLEGIATE ATHLETICS AND THE AMERICAN UNIVERSITY: A UNIVERSITY PRESIDENT'S PERSPECTIVE 305-18 (2000).

III. COLLEGE SPORT IN THE 21ST CENTURY – REFORM OR EXTINCTION?

In March 1925, an editorial appeared in *The Sportswoman*, a publication owned and edited by the incomparable director of physical education at Bryn Mawr College, Constance Applebee.¹²⁵ The early signs of the madness that would take over college sport and higher education had already been detected, as seen in the opinion piece she wrote:

The very words intercollegiate competition are unpleasant, and we do not wonder that the idea is repugnant to many. It sounds as though the main idea was to set out to win something, for the college, in the name of the college and something that a college doesn't exist for. It is perfectly true that this is what in many cases men's intercollegiates have degenerated into and it is quite possible that in some cases women's might also.¹²⁶

Like women physical educators of her day, and those who would follow for several decades well into the 1970s, they struggled to create an alternative model for college sport built around the highest intellectual principles of the academy, knowing full well the trappings of what the men's college sport model presented.¹²⁷ As the authors of a sport for women philosophy that emphasized fair play, fiscal accountability, avoidance of commercial interests, inclusion rather than elitism, moderation in competition, and the primacy of student education above all else, one wonders what Miss Applebee and her colleagues would think of the goings on in the early part of the 21st Century.

In light of present day calls for college sport reform and in the wake of a summer filled with a buffet of college sport scandals and traumas –from Mike Price to Rick Neuheisel to Maurice Clarett to Jeremy Bloom to the ACC/Big East scuffle to Title IX– there is cause to wonder if this is what a college exists for.¹²⁸ Beyond the college sport dramas so enthusiastically covered in the

125. Constance Applebee, *Editorial*, SPORTSWOMAN, Mar. 1, 1925, at 1. Known as “the Apple,” Miss Applebee brought field hockey from Great Britain to the United States in 1901, introducing the sport during a physical education seminar at Harvard in 1901.

126. *Id.*

127. SACK & STAUROWSKY, *supra* note 5, at 63-76. There is an extensive history that is well worth reading on women physical educators' philosophy of college sport, a philosophy that was embodied in the Association for Intercollegiate Athletics for Women (AIAW). In some respects, the takeover of the AIAW by the NCAA reflects a similar mindset that led to the ACC-Big East confrontation in the summer of 2003.

128. Bill Finley, *Commissioner Addresses Future of the Big East*, N.Y. TIMES, July 24, 2003, at D1; Mike Freeman, *When Values Collide: Bill Threatens Student-Athletes' Eligibility* (July 23, 2003), at <http://www.collegesports.com/sports/m-footbl/stories/072303aam.html>; *Price Still Doesn't Know Why He Was Fired*, SEATTLE TIMES, July 21, 2003, at D5; *Neuheisel's Firing Upsets Washington QB*, OMAHA WORLD-HERALD, July 31, 2003, at 8C. Mike Price was fired as head football coach at

press, which one must concede are also part of the commodification of college sport and the university, there is the very real problem of whether ruminations on Title IX will have been for naught because the system destroyed itself. Perhaps all of this will someday be rendered moot.

The increasing disparities between rich and poor, between the proverbial economic haves and have-nots, grows ever wider. Alarmed in the aftermath of the ACC acquisition of two teams from the Big East, sportswriter Mike Lopresti wrote:

“What should be alarming is how obsessive college sport has become about football, and football money. It colors every issue. It slants every decision. It intimidates, it frightens, it hurries, it clouds, and at times it causes folly from people who know better.”¹²⁹

However, the college sport system is built on a myriad of inequities, not merely economic ones. The failure on the part of those in higher education to challenge the institutional power and status structures that sustain the college sport corporation promote multiple inequities (between males and females, faculties and administrations, students and athletes, male athletes among themselves, minority athletes and white athletes), inequities that affect and shape the experience of every constituency that has a role in higher education. As the inequities in all of these areas become more pronounced, so too do the fractures in higher education.

Optimists such as Brian Porto envision that college sport salvation can be attained by returning to the kind of participation model advocated by women physical educators and others in years past.¹³⁰ They suggest that a concerted effort to return to the ideals of amateurism and education that reconcile college sport to higher education already have a foundation in Division III, the Ivy League, and the Patriot League.¹³¹ Emerging coalitions of faculty, motivated by the corrosive effect of college sport on the academic integrity of the academy, such as the Drake Group and Rutgers 1000, have advanced reform positions that attempt to hold colleges and universities accountable for the compromises made to the academic interests of students to accommodate the competing interests of athletics.¹³² Athletes as well have

the University of Alabama for questionable conduct. Rick Neuheisel was fired for violating NCAA gambling rules. Questions have been raised about a grade Maurice Clarett, a football player at Ohio State, received. The other issues mentioned have already been discussed.

129. Michael Lopresti, *ACC's Dance for College Football Dollars is in Step with Times*, USA TODAY, June 26, 2003, at C3.

130. See generally BRIAN L. PORTO, *A NEW SEASON: USING TITLE IX TO REFORM COLLEGE SPORTS* (2003).

131. *Id.*

132. Carol Simpson Stern, *The Faculty Role in the Reform of Intercollegiate Athletics*,

come forward to challenge the system.¹³³

Whereas there is little doubt as to the need for reform, the question of whether the athletic culture can be reformed is another matter. At the NCAA Title IX Seminar held in San Diego in April 2003, one of the sessions featured athletes speaking about their experiences on college campuses dealing with their own athletic departments about Title IX.¹³⁴ Their advice to athletic directors dealing with these issues was to be honest. What does it say about the culture of the intercollegiate athletic community when athletes feel compelled to advise college administrators to be honest? What does this say about the compromises made in higher education, when the institution that is supposed to serve as the moral antennae of the society, conveys falsehoods to the very students they are charged to protect?¹³⁵

And thus, we arrive at the very impediment to Title IX compliance and college reform. The sacred trust the academy has been charged to uphold in service to the education of students, the Nation's hope of the future is routinely violated by the practices and demands of college athletics. The culture of the athletic community does not, by itself, encourage an adherence to a strict code of honesty. In a commentary about the problems in intercollegiate athletics, Cedric Dempsey wrote:

Many of the problems we face seem nearly insurmountable because we are so divided on the proper solution. We have resorted to a "bible" of rules and regulations that in truth is probably 10 percent sound policy and 90 percent closing loopholes. At times it appears that our efforts at creating new borders for our behavior are exceeded only by our violation of the spirit in which those borders were established.¹³⁶

Dempsey's insight explains a great deal as to why the path to Title IX compliance has been such a difficult one. It also reveals that the higher

ACADEME, Feb. 2003, at 64.

133. Bloom, *supra* note 123.

134. Denise O'Grady, *How to Educate Your Student Athletes on Title IX*, WOMEN HIGHER EDUC., June 2003, at 7; Note: I attended the NCAA Title IX Seminar in San Diego in April of 2003. According to my notes taken at that meeting, O'Grady downplays the significance of the appeals made by the students for administrators to be honest.

135. PARKER J. PALMER, *THE COURAGE TO TEACH: EXPLORING THE INNER LANDSCAPE OF A TEACHER'S LIFE* (1998). There are other places to turn with regard to the code of ethics that sustain academic life. See the AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS STATEMENT OF PROFESSIONAL ETHICS 75 (1990), which read, in part, that professors are "to seek and state the truth as they see it . . ." *Id.*

136. Cedric Dempsey, *The Will of the Membership* (July 15, 2002), at http://www.nceaa.org/eprise/main/ceo/dempsey_messages/20020715will.of.membership/.

education community, as a community, must step in to reform college sport. The same forces that have resisted college sport reform have fueled resistance to Title IX compliance. The path to Title IX compliance will be a long and painful one unless major reforms to college sport occur.

